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RICHARD FORMICA, MARILYNN FORMICA, AMI MARIE FORMICA, MATTHEW FRANCIS FORMICA, AND KEVIN FRANCIS FORMICA, Plaintiffs, v. DONALD H. ROWE, THE WALL STREET DIGEST INC., a Delaware corporation, and CARNEGIE ASSET MANAGEMENT, INC., a Delaware corporation, Defendants.	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CIVIL ACTION NO. 2:10-CV-00921(PGS)(ES) Civil Action

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR: (1) LACK OF PERSONAL JURISDICTION PURSUANT TO FED. R. CIV. P. 12(B)(2); (2) FAILURE TO PLEAD FRAUD WITH PARTICULARITY PURSUANT TO FED. R. CIV. P. 9; (3) FAILURE TO STATE A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, AND UNJUST ENRICHMENT; (4) FAILURE TO COMPLY WITH FED. R. CIV. P. 17; AND/OR (5) IMPROPER VENUE PURSUANT TO FED. R. CIV. P. 12(B)(3)OR IN THE ALTERNATIVE TO: (1) TRANSFER VENUE TO THE MIDDLE DISTRICT OF FLORIDA; OR (2) STAY THIS ACTION PENDING RESOLUTION OF RELATED ACTIONS PENDING IN THE MIDDLE DISTRICT OF FLORIDA

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PRELIMINARY STATEMENT

This action against Defendants, Donald H. Rowe ("Mr. Rowe"), The Wall Street Digest, Inc., ("WSD"), and Carnegie Asset Management, Inc., ("CAM") (collectively, "defendants") arises out of losses allegedly experienced by plaintiffs, Richard Formica, Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, and Kevin Francis Formica, as a result of plaintiffs having made various investments during a period of time that ended with one of the most catastrophic global financial meltdowns in modern history.

The amended complaint seeks relief in seven counts: (1) violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5, (2) common law fraud, (3) negligent misrepresentation, (4) negligence, (5) breach of fiduciary duty, (6) breach of contract, and (7) unjust enrichment. These claims are asserted against Mr. Rowe, WSD, and CAM. WSD is the publisher of an investment newsletter. CAM is an investment management company. Mr. Rowe is the founder and president of both WSD and CAM.

The amended complaint specifies that each claim is brought by all plaintiffs against all defendants. Plaintiffs do not make any factual allegations regarding what CAM did or did not do that would justify any claim against CAM, much less the exercise of jurisdiction over it, relying instead on the doctrine of *respondent superior*. Plaintiffs do not allege that any of the investments were made in the defendant entities[1]; rather, plaintiffs allege that they invested in certain so-called Recommended Funds as a result of recommendations by Mr. Rowe.

Some of plaintiffs' investments were in the Nadel Funds, which were run by Arthur Nadel, who is currently the subject of an SEC action alleging that Nadel secretly ran his funds as

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[1] While the names are similar, plaintiffs claim that they invested in entities named The Wall Street Digest Fund, LP and The Carnegie Fund, LP. They do not allege that they invested in the defendant entities, Wall Street Digest, Inc. or Carnegie Asset Management, Inc.

a Ponzi scheme. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "A.") The SEC and the receiver have taken the position that Nadel ran this scheme in secret, and that even Nadel's colleagues and co-workers were unaware that his funds were being run as a Ponzi scheme. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibits "B" and "C.") While the receiver has sued some of these defendants in an effort to claw back funds paid to defendants as investment returns, principal, and fees, the receiver's complaint does not allege that these defendants were knowing participants in Nadel's scheme. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "D.") The receiver has also initiated a multitude of other actions in the Middle District of Florida in an effort to marshal assets for the benefit of investors. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "E," listing actions pending in the Middle District of Florida where the receiver is a party.)

In short, the damages suffered by plaintiffs are the result of the actions and inactions of others, or, on information and belief, they are the result of one of the greatest and most unprecedented global economic crises of modern history. Plaintiffs' damages were not the result of anything these defendants did or did not do. All that plaintiffs allege is that certain statements were made by one or all of defendants to Plaintiff Richard Formica regarding the so-called Recommended Hedge Funds and that Richard Formica relayed information regarding the Recommended Hedge Funds to the other plaintiffs. Plaintiffs allege that they subsequently lost money.

The amended complaint against the defendants should be dismissed in accordance with the Federal Rules of Civil Procedure. First, the amended complaint should be dismissed pursuant to Rule 12(b)(2) as this court lacks personal jurisdiction over Mr. Rowe, WSD, and CAM. Each of the three defendants in this action has insufficient contacts with New Jersey to

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assert jurisdiction in a manner consistent with the due process protections provided by the United States Constitution.

Second, Count II should be dismissed pursuant to Rule 9(b) for failure to plead fraud with the particularity required for such claims.

Third, Counts V, VI, and VII should be dismissed pursuant to Rule 12(b)(6) for failure to state causes of action entitling the plaintiffs to relief.

Fourth, the amended complaint should be dismissed pursuant to Rule 12(b)(3) for improper venue. The proper venue for this action is the United States District Court for the Middle District of Florida, where each of the three defendants resides, where multiple closely related cases are currently pending, where the cause of actions, if any, against these defendants accrued, and where the majority of the witnesses and documents relevant to plaintiffs' claims will be found. For that reason, even if this Court finds that it has personal jurisdiction, it should nonetheless dismiss or transfer this action pursuant to 28 U.S.C. § 1406 or, in the alternative, 28 U.S.C. § 1404.

Fifth, the amended complaint should be dismissed for failure to comply with Rule 17.

Alternatively, if this case is not dismissed or transferred, then the defendants move to stay this action. A multitude of closely related actions are currently pending in the United States District Court for the Middle District of Florida, and the Honorable Richard Lazzara, United States District Judge, Middle District of Florida, has entered an order which on its face restricts or prohibits the prosecution of this action. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "F".)

STATEMENT OF FACTS

For the sake of brevity, Mr. Rowe, WSD, and CAM rely upon the accompanying certification of Donald Rowe for a recitation of the facts relevant to this motion. (See Certification of Donald H. Rowe.)

LEGAL ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE EACH DEFENDANT LACKS MINIMUM CONTACTS SUFFICIENT TO CONSTITUTIONALLY EXERCISE PERSONAL JURISDICTION OVER THEM IN THE STATE OF NEW JERSEY.

Pursuant to Rule 12(b)(2), the amended complaint should be dismissed as to all defendants for lack of personal jurisdiction. When a defendant raises the defense of lack of personal jurisdiction, "the burden falls upon the plaintiff to come forward with sufficient facts to establish that jurisdiction is proper." Mellon Bank (East) PSFS, Nat. Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992); Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992); Weber v. Jolly Hotels, 977 F. Supp. 327, 331 (D.N.J. 1997) (noting that the plaintiff must establish these facts "by a preponderance of the evidence"). Plaintiffs must meet their burden by "establishing with reasonable particularity sufficient contacts between the defendant and the forum state." Mellon Bank, 960 F.2d at 1223 (citing Provident Nat'l Bank v. Calif. Fed. Sav. & Loan Ass'n, 819 F.2d 434 (3d Cir. 1987)). The court "must look beyond the pleadings," and plaintiffs must sustain their burden of proof in establishing jurisdictional facts through affidavits or other competent evidence, and they may not merely rely on the bare pleadings alone. Id. (citing Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 67 n.9 (3d Cir. 1984)).

If plaintiffs are able to meet this burden, then defendants must be permitted to show "the unreasonableness of an otherwise constitutional assertion of jurisdiction . . . ." Weber, 977 F. Supp. at 331 (citing Mellon Bank, 960 F.2d at 1223). Several factors are evaluated in determining reasonableness, "including: the burden on the defendant, the forum state's interest in litigation, the plaintiff's interest in pursuing its claims in the state, and the interstate judicial

system's interest in the efficient resolution of claims." Id. (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)).

The jurisdictional analysis begins with Rule 4(e) of the Federal Rules of Civil Procedure, which "authorizes personal jurisdiction over non-resident defendants to the extent permissible under the law of the state where the district court sits." Mellon Bank, 960 F.2d at 1221. A federal court sitting in diversity will look to the forum state's long-arm statute to determine whether a non-resident defendant is subject to the court's personal jurisdiction. Gitomer v. Rosefielde, 726 F. Supp. 109, 110 (D.N.J. 1989). New Jersey's long-arm statute, N.J. Ct. R. 4:4-4, "permits personal jurisdiction over a non-resident defendant to the extent allowed by the Due Process Clause of the Fourteenth Amendment." Id.

The analysis of whether the exercise of jurisdiction is permitted by the Due Process Clause is dependent on whether the court seeks to exercise general or specific personal jurisdiction. "To assert 'general' jurisdiction, a plaintiff must establish that defendant's contacts with the forum state are so 'continuous and substantial' with the forum state that the defendant should expect to be haled into court on any cause of action." Weber, 977 F. Supp. at 330 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-416 & 414 n.9 (1984)). If the court has general jurisdiction over a defendant, then the defendant may be called into court on any type of action regardless of whether the action arises from the defendant's contacts with the forum state. In contrast, where the court's personal jurisdiction is specific, the nonresident defendant can only be haled into the forum state's courts "when the claim is related to or arises out of the defendant's contacts with the forum." Carteret Sav. Bank, 954 F.2d at 149.

A. Defendants are Not Subject to General Jurisdiction in New Jersey.

This Court lacks general jurisdiction over Mr. Rowe, WSD, and CAM because each of them lacks the requisite continuous, systematic, and substantial contacts with New Jersey. The amended complaint does not allege any basis for general jurisdiction over any defendant. Indeed, the amended complaint's jurisdictional allegations are summarized in paragraph 11 of the amended complaint as follows: "Defendants, directly and indirectly, used the means and instrumentalities of interstate commerce, including the United States mails and interstate telephone communications." Use of the means and instrumentalities of interstate commerce does not give rise to general jurisdiction. Additionally, plaintiffs assert that personal jurisdiction is proper "since: (a) service was proper, as Defendants agreed to waive service, and authorized nationwide service under Section 27 of the Exchange Act; and (b) Defendants reside and conduct business in the United States." See amend. compl., para. 8. However, pursuant to Rule 4(d)(5), "[w]aiving service of a summons does not waive any objection to personal jurisdiction or to venue." Fed. R. Civ. P. 4(d)(5). Residing and conducting business in the United States, generally, is also insufficient to subject a defendant to personal jurisdiction in the District of New Jersey for the reasons stated below. This is particularly true where Mr. Rowe, WSD, and CAM are not residents of the State of New Jersey and did not maintain an office in the state during the relevant period. Accordingly, this Court should find that it lacks general jurisdiction over Mr. Rowe, WSD, and CAM.

B. Defendants are Not Subject to Specific Jurisdiction in New Jersey.

This Court also lacks specific jurisdiction over Mr. Rowe, WSD, and CAM because none of these defendants has sufficient minimum contacts with the State of New Jersey to support the exercise of jurisdiction consistent with due process. Int'l Shoe Co. v. Washington, 326 U.S. 310,

316 (1945). In the absence of general jurisdiction, the Due Process Clause of the Fourteenth Amendment allows for jurisdiction over a non-resident defendant only where that defendant has sufficient "minimum contacts" with the forum state. Burger King Corp., 471 U.S. at 474. "These contacts must be of the nature such that the individual non-resident defendant 'should reasonably anticipate being haled into court there.'" Weber, 977 F. Supp. at 330 (citing Burger King Corp., 471 U.S. at 474).

1. Plaintiffs Cannot Demonstrate that Defendants Have Adequate Minimum Contacts with New Jersey.

A finding of sufficient minimum contacts requires that "there be some act or acts by virtue of which defendant has purposefully availed himself of the benefits and protections of the laws of the forum state." Burger King Corp., 471 U.S. at 474-76. The purposeful availment requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" Id. at 475 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1983); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980); Helicopteros Nacionales de Colombia, 466 U.S. at 417). Whether certain contacts with the forum state are sufficient to establish jurisdiction depends upon "their nature and quality and the circumstances of their commission." Burger King Corp., 471 U.S. at 475, n.18. If the nature and quality of the contacts suggest only an "attenuated" affiliation with the forum, or indicate that the contacts resulted from the unilateral activity of another party, then the exercise of jurisdiction is improper. Id.

a. Each Defendant's Contacts Must be Analyzed Separately.

The due process standard for personal jurisdiction "must be applied to each defendant" individually, and where there are multiple defendants the court should not aggregate contacts.

Carteret, 954 F.2d at 145, n.6. There is no specific formula that the court will follow, and "[e]ach case must be judged on its particular facts." Mellon Bank, 960 F.2d at 1224.

In this case, the amended complaint contains no allegations of contact between WSD and New Jersey, or CAM and New Jersey. While the due process standard for personal jurisdiction "must be applied to each defendant" individually, plaintiffs in this case have attempted to circumvent this requirement by making the bald assertion that any contacts between Mr. Rowe and the State of New Jersey are attributable to WSD and CAM under a *respondeat superior* theory.

As a matter of law, asserting jurisdiction over one defendant based on the acts of another defendant is improper and unconstitutional. See Rush v. Savchuk, 444 U.S. 320, 331-32 (1980) (noting that the assertion of jurisdiction over one defendant based on the actions of another is "plainly unconstitutional" and while "[n]aturally, the parties' relationships with each other may be significant in evaluating their ties to the forum", "[t]he requirements of International Shoe . . . must be met as to each defendant" over whom the court exercises jurisdiction). Even if Mr. Rowe's contacts with the State of New Jersey properly could be charged to WSD and CAM, Mr. Rowe's contacts were not sufficient to establish minimum contacts. For the reasons stated below, Plaintiffs' allegations that Mr. Rowe made verbal statements on the telephone to plaintiff Richard Formica and sent correspondence to them are insufficient to give rise to personal jurisdiction.

b. Alleged Verbal Communications Insufficient.

There is no verbal communication whatsoever alleged between any defendant and plaintiffs Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, or Kevin Francis Formica. Any verbal contact between plaintiff Richard Formica and Mr. Rowe was via telephone calls unilaterally initiated by Richard Formica and cannot represent the type of

"minimum contacts" necessary to support the exercise of personal jurisdiction over Mr. Rowe. Mr. Rowe did not travel to New Jersey to meet with plaintiffs in person at any time, and plaintiffs have not alleged—and indeed could not truthfully allege—any in person meeting with him in New Jersey. Mr. Rowe is aware of only one telephone call with plaintiff Richard Formica, and that call was initiated by Mr. Formica. Specifically, Mr. Formica called Mr. Rowe, and Mr. Rowe answered or responded to the call. Telephone conversations, particularly when initiated by the resident plaintiff, do not give rise to general jurisdiction. See Burger King Corp., 471 U.S. at 474-76 (unilateral activity of forum resident insufficient to establish minimum contacts). In fact, "[t]he Third Circuit has held that 'telephone communications or mail sent by a defendant [do] not trigger personal jurisdiction if they 'do not show purposeful availment.'" Machulsky v. Hall, 210 F. Supp. 2d 531, 539 (D.N.J. 2002) (quoting Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 724 (E.D. Pa. 1999) (quoting Mellon Bank, 983 F.2d at 556). Mr. Rowe cannot be said to have purposefully availed himself by answering Mr. Formica's telephone call, or returning a telephone call from Mr. Formica.

A plaintiff cannot show purposeful availment where the alleged "minimum contacts" are based on telephone calls made by the plaintiff to the non-resident defendant, and the non-resident defendant merely answered or responded to those calls. Compare Carteret, 954 F.2d at 149 (discussing Lebel v. Everglades Marina, Inc., 115 N.J. 317 (1989), where non-resident defendant boat seller initiated approximately 20 calls to New Jersey buyer) with Stefansky v. Lagamba, No. L-378-03, 2005 WL 3211425, at *5 (Sup. Ct. N.J. Dec. 1, 2005) (clarifying that Lebel represents the 'outermost limit' of personal jurisdiction, holding that the interstate communications at issue were insufficient to establish jurisdiction and noting that unlike the Lebel defendant, it was unclear in Stefansky which party even initiated contract).

Moreover, a single telephone conversation between one plaintiff and one defendant is not sufficient to establish jurisdiction over all other defendants relative to claims by all other plaintiffs. Here, Mr. Rowe's declaration states that "[t]he only verbal communication [he] can recall with any plaintiff in this action was one telephone call **from** plaintiff Richard Formica. Mr. Formica initiated that telephone call." (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "G", para. 12.) Plaintiffs have attempted to counteract Mr. Rowe's certification by amending their complaint to include an allegation that plaintiff Richard Formica and Mr. Rowe frequently spoke over the telephone and that the calls were initiated by both parties, and further alleging that Mr. Rowe frequently called plaintiff Richard Formica. However, plaintiffs still have not alleged that Mr. Rowe did anything other than return plaintiff Richard Formica's phone call or calls. In any event, the Court "must look beyond the pleadings" and plaintiffs must sustain their burden of proof in establishing jurisdictional facts through affidavits or other competent evidence, and they may not merely rely on the bare pleadings alone. Mellon Bank, 960 F.2d at 1223.

c. Alleged Written Communications Insufficient.

The written communications allegedly received by plaintiffs from Mr. Rowe are similarly insufficient to give rise to the exercise of personal jurisdiction over Mr. Rowe or any of the defendants. On information and belief, the written communications were generalized investment newsletters from WSD.

The amended complaint clarifies that only one of the plaintiffs, Richard Formica, subscribed to WSD. These newsletters were not directed at plaintiffs and were not personalized to them. The newsletters were only sent to subscribers after subscribers requested a subscription. They were not directed at or personalized to individuals such as plaintiffs Marilynn Formica,

Ami Marie Formica, Matthew Francis Formica, and Kevin Francis Formica, who were not subscribers.

As the Third Circuit has observed, written communications mailed into the state of New Jersey, without something more, do not give rise to general jurisdiction. See Carteret, 954 F.2d at 149 ("minimal correspondence alone will not satisfy minimum contacts"). An individual who uses the mails to send information to investors does not purposefully avail himself of the benefits of the forum state's laws such that he would have a reasonable expectation of being haled into court in that forum state. Gitomer, 726 F. Supp. at 111 ("merely using the mails to send information to investors in New Jersey without any other New Jersey contact would hardly constitute the purposeful availing of the benefits of a forum state's law which would lead to a reasonable expectation of being haled into court in that forum state"). Similarly, advertisements seeking business in the forum state do not, without more, constitute the type of "continuous and substantial" business activity required for the exercise of general jurisdiction. Reliance Steel Prods. Co. v. Watson, Ess, Marshall, & Enggas, 675 F.2d 587, 589 (3d Cir. 1982).

Plaintiffs may argue that this Court has specific jurisdiction over WSD because WSD is the publisher of an investment newsletter to which plaintiffs allegedly subscribed. However, publishing a generalized investment newsletter is not sufficient to give rise to specific jurisdiction. This is particularly true in the case of WSD, which at all relevant times had a relatively small circulation. On the date of its final publication, WSD had 2,606 subscribers, less than 3.5% of whom were residents of New Jersey. The law of the Third Circuit is clear that even the distribution of a much larger national publication does not constitute "continuous and substantial contacts" with the forum state. See Barrett, 44 F. Supp. 2d at 724 ("the Third Circuit has consistently held that national publications do not constitute 'continuous and substantial

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contacts' with the forum state" such that general jurisdiction can be found on that action alone); see also Buckley v. The New York Times Co., et al., 338 F.2d 470, 474 (5th Cir. 1964) ("[t]he law is well settled that the mere circulation of a periodical through the mails to subscribers and independent distributors constitutes neither doing business nor engaging in a business activity"); see also Time, Inc. v. Frank Manning, 366 F.2d 690, 695 (5th Cir. 1966) (periodical with between five and 1,800 subscribers had "hardly a wide circulation").

While the amended complaint nowhere explicitly states that plaintiffs received any recommendations from any defendant via a website, because plaintiffs have attached what appears to be a print off from CAM's web page, it should be noted that no defendant maintains a website that is sufficient to qualify under the "minimum contacts" standard for due process.

Generally speaking, "a mere presence on the World Wide Web does not establish the minimum contacts necessary to subject a corporation to personal jurisdiction on a worldwide basis." See S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc., 79 F. Supp. 2d 537, 539 (E.D. Pa. 1999) (citing and noting numerous cases in support of same proposition). Maintenance of a web site has been analogized to national publications, with at least one court noting that "[i]f anything, the Third Circuit has consistently held that national publications do not constitute 'continuous and substantial contacts' with the forum state" such that general jurisdiction can be found on that action alone. Barrett, 44 F. Supp. 2d at 724. To determine if a website gives rise to specific jurisdiction, the court will look at the website in question and evaluate the site's level of interactivity. "The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Penn. 1997).

"Internet sites have been categorized in three ways, according to interactivity levels: (1) interactive sites used to conduct business over the Web; (2) semi-interactive sites allowing the exchange of information with a host computer; and (3) passive sites allowing access to information but not enabling the exchange of information with a host computer." Machulsky, 210 F. Supp. 2d at 538-39. Under this framework, "[w]hen a defendant merely posts information or advertisements on a Web site, personal jurisdiction over such defendant is not proper." Id. at 539. However, if a user of the site can "exchange[] information with a host computer, the court must examine the level of interactivity and commercial nature of the exchange in order to determine the propriety of exercising personal jurisdiction." Id.

Any internet sites maintained by WSD or CAM are minimally interactive and insufficient to establish minimum contacts. They are maintained outside of the state of New Jersey and contain generalized content available to anyone who visits the site, as well as a more restricted content viewed only by persons with a log-in and password. A visitor to the site may contact WSD and CAM via an email link or a telephone number, but would not be able to trade stocks, transfer funds, or make purchases through the sites.

Where a nonresident defendant maintains an otherwise passive website from a location outside the forum state, the fact that the website permits internet users who may be located in the forum state to email representatives of the company should not lead the court to conclude that the nonresident defendant was engaging in business within the forum state. See, e.g., Miller v. Berman, 289 F. Supp. 2d 1327, 1334 (M.D. Fla. 2003) (nonresident defendant maintained a passive website that permitted internet users to email representatives of the company, and court declined to exercise jurisdiction because such use of the internet did not constitute "engag[ing] in activity within the state of Florida"). If a resident of the forum state comes across the

nonresident defendant's website on the Internet and contacts the nonresident defendant through that site, the resident plaintiff cannot subsequently be heard to complain that the nonresident "solicited" his business in the forum state. See id. at 1332-33 (noting that nonresident defendant did not solicit plaintiff's business in the state; rather, it was plaintiff who contacted the nonresident defendant via email after plaintiff came across the nonresident defendant's website on the Internet). Whether the nonresident sold subscriptions to his website to "an unknown, relatively small number" of residents of the forum state should not alter the analysis. See e.g., Alternate Energy Corp. v. Redstone, 328 F. Supp. 2d 1379 (S.D. Fla. 2004) (declining to exercise specific jurisdiction over a nonresident defendant who operated from Michigan a passive website, and rejecting the plaintiff's argument that the defendant's sale of subscriptions to the website to Florida residents constituted sufficient minimum contacts to satisfy the Fourteenth Amendment requirement). Where a web site is maintained outside of the forum state, the fact that a resident of the forum state can access the site, contact the nonresident defendant through the site, and ultimately cause the nonresident defendant to receive a commission or referral fee from a third-party does not mean that the nonresident defendant was "carrying on business" or soliciting business in the forum state. See e.g., Miller, 289 F. Supp. 2d at 1332-33. Similarly, minimally interactive features such as the ability to print an application, the ability to order and pay for a promotional video, the ability to complete a form by which a user can request additional information, and a link by which a user can email the company directly are "not interactive enough to justify the exercise of personal jurisdiction." S. Morantz, 79 F. Supp. 2d at 541; see also id. ("The presence of an e-mail link or a form for placing orders on a web site does not create the kind of minimum contacts required to establish personal jurisdiction.").

Accordingly, even if plaintiffs were to argue that the maintenance of a website should be considered in a minimum contacts analysis for WSD or CAM, it is clear that the websites for CAM and WSD would be insufficient to sustain the exercise of personal jurisdiction.

C. Fair Play and Substantial Justice Also Require That This Court Decline to Exercise Jurisdiction.

Even if this Court were to somehow conclude that Mr. Rowe, WSD, and CAM had sufficient minimum contacts, it should decline to exercise personal jurisdiction because the assertion of jurisdiction would not comport with fair play and substantial justice. See Gitomer, 726 F. Supp. at 1222 (quoting Burger King Corp., 471 U.S. at 476) (If a court believes that there are sufficient minimum contacts to exercise specific jurisdiction, it next inquires "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'")).

In evaluating whether the assertion of jurisdiction comports with fair play and substantial justice, the Court should consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of the controversies, and the shared interest of the several States in furthering fundamental substantive social policies." Id. (citing Burger King, 271 U.S. at 477 (quoting World Wide Volkswagen, 444 U.S. at 292)).

Here, the due process considerations weigh heavily in favor of the defendants. As noted in plaintiffs' amended complaint, Mr. Rowe resides in Sarasota, Florida and both WSD and CAM maintain their principal offices in Sarasota, Florida. The amended complaint does not, and indeed could not truthfully, allege facts disputing that in the relevant time period: (1) none of the defendants reside in New Jersey; (2) none of the defendants is incorporated in New Jersey; (3) none of the defendants maintain an office in New Jersey; (4) none of the defendants have assets

or own property in New Jersey; (5) none of the defendants have officers, agents, or employees in New Jersey; (6) none of the defendants have an agent for service of process in New Jersey; (7) none of the defendants have a telephone listing in New Jersey; (8) none of the defendants traveled to New Jersey to meet with any of the plaintiffs; (9) none of the defendants sends reporters or writers into New Jersey; (10) none of the defendants have advertising personnel in New Jersey; (11) in light of the total number of subscribers, the number of subscribers in New Jersey to any newsletter published or website maintained by these defendants is very small; (12) the newsletter published by WSD is edited, published, printed, and principally circulated outside of New Jersey; (13) any copies of the newsletter published by WSD that are circulated in New Jersey are not circulated by distributors in New Jersey, as copies are sent directly by mail under subscription orders sent to and processed in Florida; (14) there are no verbal communications alleged between Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, or Kevin Francis Formica and any defendant; (15) any verbal communications between Mr. Rowe and plaintiff Richard Formica would have been via telephone conversations initiated by Mr. Formica; and (16) the physical burden on Mr. Rowe would be great if this case were to proceed in New Jersey, in light of his age and health concerns.

In light of these facts, the burden on these defendants if this case proceeds in New Jersey will be great. Furthermore, to the extent that the state of New Jersey may have some interest in adjudicating the disputes of its residents, here plaintiffs not only have an avenue of relief through the receiver's action for certain of their claims, but also by the same token will likely not be permitted by the receiver or Judge Lazzara to recover against Mr. Rowe and/or CAM to the exclusion of other investors. To that end, the instant action will not provide plaintiffs with effective relief, as the receiver likely would attempt to claw back any payment by Mr. Rowe or

CAM to satisfy a judgment or to otherwise resolve this claim. Additionally, it is in the interstate judicial systems best interest to resolve these claims in the same district where multiple related cases currently are pending.

For these reasons, the exercise of personal jurisdiction over these defendants does not comport with notions of fair play and substantial justice and defendants' motion to dismiss should be granted.

II. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE AMENDED COMPLAINT FAILS TO PLEAD FRAUD WITH PARTICULARITY.

The amended complaint should be dismissed for failure to plead fraud with particularity. Rule 9, Federal Rules of Civil Procedure, requires that the amended complaint state with particularity the circumstances constituting fraud. Here, the amended complaint does not indicate the most basic factual basis for a fraud claim. There is no indication to whom the alleged misrepresentations were made, which defendant made them, on or about what date they were made, and in what form they were made. The only thing the amended complaint makes clear about the alleged representations is that none were made by any defendant to Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, or Kevin Francis Formica.

The requirements of Rule 9 are applied "rigorously" in securities fraud cases. See California Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 144 (3d Cir. 2004) (noting that plaintiffs who assert securities fraud claims "must specify 'the who, what, when, where, and how: the first paragraph of any newspaper story'"). And while Rule 9(b) does not require "every material detail such as date, location, and time, plaintiffs must use 'alternative means of injecting precision and some measure of substantiation into their allegations of fraud.'" Id.; see also In Re: Alpharma Inc. Sec. Litig, 372 F.3d 137, 147 (3d Cir. 2004) (noting the requirements for stating a claim pursuant to Rule 10b-5 and recognizing that the Private Securities Litigation

Reform Act "requires plaintiffs to '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 amended complaint shall state with particularity all facts on which that belief is formed'"). Several paragraphs of the amended complaint make allegations upon information and belief without stating with particularity the facts on which the plaintiffs' beliefs were formed. See e.g., amend. compl., paras. 55, 56, 59, 65, 66, 70, 80, and 84. Here, where plaintiffs fail to make even the most basic factual allegations with respect to fraud, the amended complaint clearly fails to comply with these requirements.

III. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, OR UNJUST ENRICHMENT.

The basic test on a motion to dismiss is whether the complaint, with all the well-pleaded material facts taken as true and construed in the light most favorable to the plaintiff, sets forth facts sufficient to state a legal claim. See Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997). "[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss. Id.

A. Count V Fails to State a Cause of Action for Breach of Fiduciary Duty.

Plaintiffs' amended complaint fails to state a cause of action for breach of fiduciary duty against the defendants. "The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." F.G. v. MacDonell, 150 N.J. 550, 563 (N.J. 1997) (citing In re Stroming's Will, 79 A.2d 492 (N.J. App. Div. 1951) ("stating essentials of confidential relationship 'are a reposed confidence and the dominant and controlling position of the beneficiary of the transaction'"); Blake v. Brennan, 61 A.2d 916 (Ch. Div.

1948)("describing 'the test [as] whether the relationship between the parties were of such a character of trust and confidence as to render it reasonably certain that the one party occupied a dominant position over the other'")).

A fiduciary relationship "exists when the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed." In re Stroming's Will, 79 A.2d at 495. In other words, for such a relationship to exist there must be unequal terms, a powerful decision-maker on one side, and a justifiable weakness or reliance on the other. Id.; see also Salt Lake Tribune Pub. Co. v. MediaNews Grp., Inc., 2007 WL 2156612, *3 (D. Utah 2007) (finding no fiduciary relationship where the plaintiff pointed "to no evidence indicating that it expressly reposed trust and confidence in Management Planning"). "Only a poor business owner would say that its customers did not have confidence in it or trust it, but that hardly converts every business into a fiduciary for its customers." Salt Lake Tribune, 2007 WL 2156612, *3.

"A fiduciary relationship arises when one has reposed trust or confidence in the integrity or fidelity on another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another." Fraternity Fund, Ltd. v. Beacon Hill Asset Mgmt., LLC, 376 F. Supp. 2d 385, 413-414 (S.D. N.Y. 2005). Whether a relationship is fiduciary in nature must be determined on the basis of the services agreed to by the parties. Id.

The amended complaint fails to state a cause of action for breach of fiduciary duty because it fails to provide any indication that any defendant owed any plaintiff a fiduciary duty. The amended complaint alleges that Mr. Formica subscribed to a newsletter and spoke on the phone to Mr. Rowe. Mr. Formica, much less his non-subscribing family members, cannot unilaterally impose a fiduciary duty upon the defendants in this action where they did not agree

to occupy a position of trust and confidence over the plaintiffs. These defendants did not assume any control or responsibility over any plaintiff, nor does the amended complaint allege that any defendant was retained as, or agreed to serve as, any plaintiff's fiduciary. Even if all of the facts alleged in the amended complaint were true, they do not amount to any defendant occupying a position of dominance over Mr. Formica or any of his family members such that they enjoyed an overmastering influence over plaintiffs. Certainly, any alleged dependence by the plaintiffs was not justifiable and nor was it alleged to be.

Even if somehow Mr. Formica could establish that Mr. Rowe or any other defendant wrested control of Mr. Formica's finances and asserted dominance over them by virtue of Mr. Formica's subscription to WSD—which he cannot—none of the other plaintiffs have alleged grounds for a fiduciary relationship between themselves and any defendant. In fact, there is no relationship whatsoever alleged between any of the remaining plaintiffs and any defendant. Paragraph 13 of the amended complaint states that Richard "Formica is the individual family member who primarily dealt with Defendant Rowe." The amended complaint does not allege ***any relationship*** whatsoever between Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, or Kevin Francis Formica and ***any*** of the defendants. Furthermore, paragraph 23 of the amended complaint states that Richard Formica, and only Richard Formica, subscribed to Mr. Rowe's investment newsletter. The amended complaint alleges telephone communication between Mr. Rowe and only ***one*** of the plaintiffs, Richard Formica.

While the amended complaint alleges that the plaintiffs "frequently received from Defendant Rowe, his employees and/or Defendants personally addressed correspondence" relating to their investments, Exhibit "A" attached in support of this statement contradicts their claim. See amend. compl., para. 23. Exhibit "A" is a letter to plaintiff, Ami Marie Formica, from

the Chief Operations Officer of Carnegie Management Group. Carnegie Management Group is not a defendant to this action. These allegations in the amended complaint do nothing but negate the validity of the plaintiffs' claim that there was any relationship—much less a fiduciary one—between any defendant and plaintiffs Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, or Kevin Francis Formica. See Hollis-Arrington v. PHH Mortg. Corp., 2005 WL 3077853, *8 (D.N.J. 2005) (stating that if a plaintiff's own allegations preclude a finding of one of the elements of their claim, the claim must be dismissed).

Where the amended complaint fails to allege any relationship between the defendants and Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, or Kevin Francis Formica, it correspondingly fails to allege that any defendant was in a dominant position over them such that they were justifiably weak and reliant upon any defendant. With respect to plaintiff Richard Formica, even if some kind of relationship has been alleged, a publisher of a generalized newsletter is not in a dominant or superior position in relation to its subscribers. Richard Formica's act of subscribing to the newsletter did not render him dependent and needy of Mr. Rowe. Rather, he was free to accept or reject WSD's recommendations, to do his own independent research, and to ultimately make the decision whether or not to invest his money. The defendants' role was only to provide information that Richard Formica might consider when making his investments. A fiduciary relationship is what gives rise to a party's fiduciary duty. Absent such a fiduciary relationship, there could be no breach giving rise to the cause of action. Accordingly, defendants' motion to dismiss Count V should be granted.

B. Count VI Fails to State a Cause of Action for Breach of Contract.

"In order to state a claim for breach of contract, Plaintiff must allege: (1) a contract between the parties; (2) breach of that contract; (3) damages flowing therefrom; and (4) that the

party performed its own contractual obligations." MK Strategies, LLC v. Ann Taylor Stores, Corp., 567 F.Supp.2d 729, 735 (D.N.J. 2008); Frederico v. Home Depot, 2006 WL 624901, *3 (D.N.J. 2006). To allege the existence of an express contract, the plaintiffs must set forth the elements of offer, acceptance, and mutual consideration. *Id.* (citing Gardiner v. V.I. Water & Power Auth., 145 F.3d 635, 644 (3d Cir. 1998)).

The amended complaint does not allege any of the elements necessary for a valid contract. The amended complaint does not allege that any defendants made or accepted any offer to enter into an agreement, or that there was a mutual exchange of obligations required to satisfy the consideration element of a valid contract. See Stentor Electric Mfg. Co. v. Klaxon Co., 115 F.2d 268 (3d Cir. 1940), judgment rev'd on other grounds, 313 U.S. 487 (1941) (stating that a "contract" is a promise or a set of promises). With respect to the formation of a contract, the amended complaint only alleges that "Defendants obligated themselves to certain contractual duties, including to timely and accurately report to its readers, customers and subscribers information that they could rely upon." See amend. compl., para. 140. Such a vague, conclusory statement is insufficient to state a cause of action, where there is no allegation of what was offered and by whom, what was accepted and by whom, and what consideration was provided.

Here, the amended complaint states that only plaintiff Richard Formica was a subscriber, and only plaintiff Richard Formica communicated verbally with Mr. Rowe. The amended complaint is devoid of any factual assertions supportive of the legal conclusion that any defendant obligated himself or itself in the manner suggested by the amended complaint. Further, even if these elements had been alleged, the amended complaint states that the defendants were "obligated" only to "its **readers, customers and subscribers**." Even if the plaintiffs assertions were accurate, which they are not, the only plaintiff that falls into one of

those categories is Richard Formica. The amended complaint does not allege that Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, or Kevin Francis Formica were readers, customers, or subscribers of the defendants' newsletter.

Here, the amended complaint fails to state a claim for breach of contract. It is impossible to determine what the alleged contract is, who are the alleged parties to it, and how it was breached. This Court should not credit the plaintiffs' "bald assertions" or "legal conclusions" that contractual duties exist. Moreover, the allegations of the amended complaint are such that it appears beyond doubt that Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, and Kevin Francis Formica cannot prove any set of facts in support of their claim that a contract existed between them and any defendant. As such, defendants' motion to dismiss Count VI should be granted.

C. Count VII Fails to State a Cause of Action for Unjust Enrichment.

In order to state a claim for unjust enrichment, plaintiffs must show: (1) they conferred a benefit on the defendants, and (2) the defendants' retention of that benefit without payment would be unjust. In re Mercedes-Bens Tele Aid Contract Litigation, 457 F.R.D. 46, 72 (D.N.J. 2009) (citing VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 641 A.2d 519, 526 (1994); Restatement (First) of Restitution § 1 (1937)). Under New Jersey law, the unjust enrichment doctrine requires that plaintiffs show they expected remuneration from defendants at the time they performed or conferred a benefit on the defendants and that the failure of remuneration unjustly enriched the defendants beyond their contractual rights. VRG Corp., 641 A.2d at 526. In other words, the plaintiffs must show that they got something less than they paid for, and that the defendant should be required as a matter of equity to make them whole. In re Mercedes-Benz, 457 F.R.D. at 72.

The amended complaint fails to allege that each plaintiff conferred a benefit upon each so-called defendant. The amended complaint alleges that certain third parties—the Recommended Hedge Funds—paid sums that the defendants allegedly received and did not disclose. See, e.g. amend. compl., paras. 18, 151. However, that is not a benefit that the plaintiffs conferred upon the defendants; rather, the plaintiffs allege that defendants earned those fees directly from third parties. In order to state a claim for unjust enrichment, there must be some alleged benefit conferred by each plaintiff on each defendant, and that retention of such benefit would be unjust.[2]

Accordingly, the defendants' motion to dismiss Count VII should be granted because Count VII fails to allege facts sufficient to support a claim for unjust enrichment against any of the defendants.

IV. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH RULE 17, AS PLAINTIFFS ARE NOT THE PROPER PARTY TO BRING ACTIONS ON BEHALF OF LOSSES TO AN INDIVIDUAL RETIREMENT ACCOUNT.

Pursuant to Rule 17, Fed. R. Civ. P., "[a]n action must be prosecuted in the name of the real party in interest." In this suit, individual plaintiffs attempt to bring causes of action for losses allegedly suffered by Individual Retirement Accounts ("IRAs"). The real party in interest

[2] The amended complaint does allege that the "Defendants did not earn the fees it charged Plaintiffs." See amend. compl., para. 149. It is not clear from the language of the amended complaint what fees the plaintiffs claim they were charged; however, this may be a reference to a subscription fee paid by plaintiff Richard Formica for the newsletter to which he allegedly subscribed. In light of the fact that he claims to have relied upon its contents, he appears to have received the newsletter. As such, these allegations would not support a claim for unjust enrichment. In any event, Mr. Formica is the only plaintiff alleged to have been a subscriber and the other plaintiffs would have no claim for unjust enrichment where they did not pay a subscription fee.

is the IRA, not the individual, and the individual lacks standing to pursue any cause of action on behalf of the IRA.

V. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE DISTRICT OF NEW JERSEY IS NOT THE PROPER VENUE FOR THIS ACTION.

The proper venue for this case is the Middle District of Florida, where each of the three defendants either resides or has its principal office. See amend. compl., para. 18-20 ("Defendants are residents of Sarasota County, Florida."). Determination of the proper venue for a federal action begins with 28 U.S.C. § 1391. Under section 1391, if the court's jurisdiction over the claim is based on diversity, then the claim may be brought only in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State,
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or
>
> (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391.

According to paragraphs 18-20 of the amended complaint, "Defendants are residents of Sarasota County, Florida." Defendants do not dispute this allegation regarding their residences. Because all defendants reside in the Middle District of Florida, the Middle District of Florida is clearly the appropriate venue pursuant to 28 U.S.C. § 1391(a)(1).

Venue in the Middle District of Florida also is proper under § 1391(a)(2), because a substantial part of the events giving rise to the claim are alleged to have occurred there.

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Specifically, Mr. Rowe resided in Sarasota;[3] WSD maintains its principal offices in Sarasota; CAM maintains its principal offices in Sarasota; the SEC action against Arthur Nadel of the Nadel-Moody Funds was filed in the Middle District of Florida (see amend. compl., para. 44), and the receiver appointed in that action has commenced suits for the benefit of investors in the Middle District of Florida; any funds invested by plaintiffs in the Nadel-Moody Funds were sent to Nadel-Moody in Sarasota, Florida; any funds invested by plaintiffs in High Street Capital Management, LLC were sent to High Street in Tampa, Florida; any statements by Mr. Rowe, WSD, and CAM would have been made in Sarasota, Florida; and, according to the allegations of the amended complaint, "the managers of the Nadel Funds, the High Street Funds, the Carnegie Fund, and the Wall Street Digest Fund were conveniently located in or near Defendant Rowe's hometown of Sarasota, Florida." See amend. compl., para. 95. Indeed, the only connection with the District of New Jersey that is apparent from the amended complaint is that plaintiffs were in New Jersey when the alleged representations were made to them.

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." The following facts weigh in favor of a dismissal or venue transfer.

First, the burden of and inconvenience to the defendants would be great if they were forced to litigate this matter in the District of New Jersey. All three defendants presently reside in Sarasota, Florida. Some of these defendants are presently defending a related action with substantially similar allegations filed in the Middle District of Florida by the receiver appointed

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[3] Sarasota, Florida is located within Sarasota County, which falls within the Tampa, Florida division of the United States District Court for the Middle District of Florida. See 28 U.S.C. § 89(b); Middle District of Florida Local Rule 1.02(b)(4).

in Securities and Exchange Commission v. Arthur Nadel, et al., 8:09-cv-87-RAL-TBM (Middle District of Florida). The receiver's action is styled Wiand v. Rowe, et al., Case No.: 8:10-cv-245-T-17MAP. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "D.") Defendants are also presently defending an action containing substantially the same or similar allegations as those in this case, which was filed by a separate group of investors in the Nadel-Moody funds in Sarasota County, Florida state court on March 23, 2009.

Second, various witnesses who defendants may wish to call at trial are located outside the subpoena power of the District of New Jersey and would not be expected to appear voluntarily. These witnesses include, but are not limited to, Neil Moody (Sarasota County, Florida); Chris Moody (Sarasota County, Florida); Burton W. Wiand (Pinellas County, Florida); Michael Corcione (Sarasota County, Florida); and John Bartoletta (Hillsborough County, Florida).

Third, the relevant documents are located in and around Sarasota County, Florida. See amend. compl., para. 95. Specifically, any documents related to the Nadel-Moody funds are in the possession of the receiver, whose offices are located in Tampa, Florida.

Fourth, the physical burden on Mr. Rowe would be great if this case proceeds in the District of New Jersey. Mr. Rowe is 75 years of age. In 2009, he suffered a stroke that has impaired his mobility. Travel back and forth from Sarasota, Florida to New Jersey would represent a significant physical, not to mention financial, hardship.

Fifth, defendants submit that, particularly in light of the minimal connection between the forum state and the controversy, it would be inequitable and wasteful to the citizens of New Jersey who may be called to serve as jurors in light of the fact that Judge Lazzara's order likely renders any judgment uncollectible until the actions filed by the receiver have been concluded. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "F.")

Alternatively, if this Court does not dismiss or transfer based on section 1406, defendants request that the case be transferred pursuant to section 1404(a). The court may consider "all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (citing Wright, Miller & Cooper § 3847). Such factors may include, but are not limited to: (1) the defendants' forum preference; (2) whether the claim arose elsewhere; (3) the convenience of the parties as indicated by their relative physical and financial condition; (4) convenience of witnesses to the extent that the witnesses may actually be unavailable for trial in one of the fora; (5) the location of books and records to the extent that they could not be produced in the alternative forum; (6) the enforceability of the judgment; (7) practical considerations that could make the trial easy, expeditious, or inexpensive; (8) relative administrative difficulty in the two fora resulting from court congestion; and (9) the local interest in deciding local controversies at home. Id. at 879-880.

In evaluating these factors, the Court in this case should also consider Mr. Rowe's advanced age and health concerns; the inconvenience to the defendants; the burden of litigation of the same or similar issues in multiple fora; the receiver's efforts to recover on behalf of all investors, a group that includes these plaintiffs, in the Middle District of Florida; the convenience of witnesses who will be already called in and who reside in the Middle District of Florida; the location of records, particularly those in the possession of the receiver for the Nadel-Moody entities; the fact that under an order from the Middle District of Florida (see Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "F"), Mr. Rowe and CAM are likely unable to satisfy any judgment without risk of being held in contempt of court by Judge Lazarra, or being subject to expansion of the Receivership; the fact that plaintiffs' claims arose in the Middle District of

Florida, which was the situs from which the alleged representations forming the bases of plaintiffs' claims were made; practical considerations in light of the fact that the Middle District of Florida is currently the forum best situated and most familiar with suits relating to the Nadel-Moody scheme; and the local interest in the Middle District of Florida in deciding the controversy in light of the pendency of related actions filed by the receiver and other investors, because permitting "a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1959). Further, the Court should also consider that the issues in the instant suit are only one piece in a much broader dispute related to the Nadel-Moody funds. See Chrysler Capital Corp. v. Woehling, 663 F. Supp. 478, 483 (D. Del. 1987) (granting a motion to transfer pursuant to § 1404(a) and noting that "[t]he issue in this case is only one piece of a much broader dispute, most of which is before the New Jersey court"). By transferring to a venue where related actions are pending, the Court assists the parties with realizing the benefits of more efficient pretrial discovery, the savings of time and money for witnesses, eliminating added expense to the parties and the public by avoiding duplicated litigation, and avoidance of inconsistent results. See id. at 484.

VI. THE CASE SHOULD BE STAYED PENDING RESOLUTION OF RELATED ACTIONS PENDING IN THE MIDDLE DISTRICT OF FLORIDA.

If it is not dismissed or transferred to the Middle District of Florida, then this case should be stayed pending resolution of related actions pending in the Middle District of Florida. Specifically, the Securities Exchange Commission sought and obtained appointment of a receiver in SEC v. Nadel, 8:09-cv-87-RAL-TBM (Middle District of Florida), and, in appointing the receiver, the Hon. Richard Lazzara, United States District Judge for the Middle District of

Florida, enjoined "all persons" from "prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Defendants or Relief Defendants," and prohibited "any person or entity" from exercising "any form of self-help whatsoever." (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "F.") Furthermore, Judge Lazzara prohibited any investor from transferring funds to other persons or entities. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "F.") If an investor transfers funds that may belong to the receivership, then the Order appears to permit the receiver to take possession of those funds and seek expansion of the receivership over those investors. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "F.")

All of the parties to this case face the potential of being held in contempt of court, having the funds seized from plaintiffs, or having the receivership expanded over defendants and plaintiffs if defendants were to attempt to resolve payment of plaintiffs' claims here, or if they attempted to satisfy any judgment rendered by this court.

The receiver appointed in SEC v. Nadel has filed a separate action against Mr. Rowe and CAM, seeking to claw back or avoid transfers of funds to them. (See Certification of Anne-Leigh Gaylord Moe, Esq., Exhibit "D.") The receiver has taken the position that monies paid by the so-called "Nadel funds" to Mr. Rowe and CAM represented either "false profits" or "fraudulent transfers" that the receivership entities should be permitted to avoid. The receiver also recently stated in an April 26, 2010 informational meeting for investors that he considers any action by an investor against Mr. Rowe to be an action seeking the same money that the receivership seeks in its clawback action. Accordingly, if this case is not dismissed or transferred, then a stay is necessary to ensure compliance with Judge Lazzara's Order.

CONCLUSION

Because plaintiffs cannot establish that this Court has jurisdiction over defendants, defendants respectfully submit that the Court should grant their motion to dismiss. Even if it had jurisdiction, the Court should grant the motion to dismiss because plaintiffs fail to plead fraud with particularity, and violate Rule 17. Additionally, the motion to dismiss should be granted as to Counts V, VI, and VII because plaintiffs failed to state a claim upon which relief can be granted for breach of fiduciary duty, breach of contract, and unjust enrichment. Alternatively, the case should be transferred to the Middle district of Florida or stayed pending resolution of the multiple related case in the Middle District of Florida. Accordingly, defendants respectfully request that their motion be granted.

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DATED: July 14, 2010

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