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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KENNETH MACIORA,

11 Plaintiff,

12 v.

13 PMB HELIN DONOVAN LLP, *et al.*,

14 Defendants.
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Case No. C16-295-RSM

ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT AND
GRANTING DEFENDANTS' MOTION TO
DISMISS PURSUANT TO RULE 12(c)

16 **I. INTRODUCTION**

17 This matter comes before the Court on Defendants PMB Helin Donovan, LLP, Christie
18 Cardwell and Donald McPhee's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c), Dkt. #12,
19 and Plaintiff Kenneth Maciora's Motion for Leave to File Second Amended Complaint, Dkt.
20 #13. Defendants argue that Mr. Maciora's claims are frivolous and legally barred. Mr.
21 Maciora opposes Defendants' Motion to Dismiss and moves to Amend his Complaint to add
22 additional claims. Defendants oppose this Motion, arguing that these new claims are futile.
23 For the reasons set forth below, the Court agrees with Defendants, DENIES Plaintiff's Motion
24 to Amend, and GRANTS Defendants' Motion to Dismiss.
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ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT AND GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO
RULE 12(c) - 1

II. BACKGROUND¹

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2 Plaintiff Kenneth Maciora brings this action against Defendants PMB Helin Donovan,
3 LLP (“PMB”), Christie Cardwell and Donald McPhee under several causes of action related to
4 securities fraud. Dkt. #2 at 19-26.

5 Defendant PMB was retained to audit the financial statements of a company called
6 MyECheck prior to the filing of “Form 10” reports and financial statements as required by the
7 Securities Exchange Act of 1934. *Id.* at ¶¶ 1, 12, 13, 15, 16. PMB partner Chris Cardwell was
8 primarily responsible for MyECheck’s audit. *Id.* at ¶ 8. PMB performed its audit and
9 MyECheck caused the Form 10 and financial statements to be filed with the Securities and
10 Exchange Commission (“SEC”). *Id.*

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12 According to the Amended Complaint, in August 2015 a “former board member” for
13 MyECheck informed PMB about alleged accounting errors contained within MyECheck’s
14 Form 10 and/or financial statements, including that the amount of outstanding shares reflected
15 on the Form 10 was “understated by hundreds of millions of shares.” *Id.* at ¶¶ 16, 22, 23, 33,
16 34.

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18 Mr. Maciora alleges that he purchased 66,666,666 common stock share of MyECheck
19 from Rod Zalunardo, a former employee of MyECheck. *Id.* at ¶ 28. The date of this purchase
20 is not alleged. Since October 2015, Mr. Maciora has “repeatedly asked the transfer agent of
21 MyECheck to print his stock certificate and include him on the Shareholder Registrar.” *Id.* In
22 October 2015 and November 2015, Mr. Maciora contacted the Defendants and requested that
23 they cause the Form 10 that was filed with the SEC to be amended to reflect Zalunardo’s
24 ownership of MyECheck shares. *Id.* at ¶ 27.

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28 ¹ The following background facts are taken from Plaintiffs’ First Amended Complaint, Dkt. #2, and accepted as true for purposes of ruling on these Motions.

1 Mr. Maciora filed his first Complaint in this Court on February 25, 2016. Dkt. # 1. He
2 filed his First Amended Complaint on March 17, 2016. Dkt. # 2. The First Amended
3 Complaint lists the following claims: Violations of Section 17(a) of the Securities Act of 1933
4 and Section 10(b) and Rule 10b-5 of the Exchange Act of 1934; Aiding and Abetting
5 MyECheck's Violations of Section 10(b) and Rule 10b-5 of the Exchange Act of 1934;
6 Violation of Section 10A of the Exchange Act of 1934; Aiding and Abetting Violations of
7 Section 13(a) of the Exchange Act and Exchange Act Rules 13a-1, 13a-13, and 12b-20; Aiding
8 and Abetting Violations of Section 13(b) of the Exchange Act of 1934 and Securities Act Rule
9 13b2-1; and Negligence. Dkt. #2 at 19-26.
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11 III. DISCUSSION

12 A. Legal Standard

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14 "After the pleadings are closed – but within such time as not to delay the trial – any
15 party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Analysis under Rule
16 12(c) is 'substantially identical' to analysis under Rule 12(b)(6) because, under both rules, a
17 court must determine whether the facts alleged in the complaint, taken as true, entitle the
18 plaintiff to a legal remedy." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012)
19 (citations and internal quotation marks omitted); *see also United States ex rel. Cafasso v. Gen.*
20 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1053 (9th Cir. 2011). In making a Rule 12(b)(6)
21 assessment, the court accepts all facts alleged in the complaint as true, and makes all inferences
22 in the light most favorable to the non-moving party. *Baker v. Riverside County Office of*
23 *Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted). However, the court is not
24 required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v.*
25 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
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1 (2007)). The complaint “must contain sufficient factual matter, accepted as true, to state a
2 claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met when the
3 plaintiff “pleads factual content that allows the court to draw the reasonable inference that the
4 defendant is liable for the misconduct alleged.” *Id.* The complaint need not include detailed
5 allegations, but it must have “more than labels and conclusions, and a formulaic recitation of
6 the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Absent facial
7 plausibility, a plaintiff’s claims must be dismissed. *Id.* at 570.

9 Pursuant to Fed. R. Civ. P. 15(a)(2), a “court should freely give leave [to amend] when
10 justice so requires,” Fed. R. Civ. P. 15(a)(2). Courts apply this policy with “extreme
11 liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). Five
12 factors are commonly used to assess the propriety of granting leave to amend: (1) bad faith, (2)
13 undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether
14 plaintiff has previously amended the complaint. *Allen v. City of Beverly Hills*, 911 F.2d 367,
15 373 (9th Cir. 1990); *Foman v. Davis*, 371 U.S. 178, 182 (1962). In conducting this five-factor
16 analysis, the court must grant all inferences in favor of allowing amendment. *Griggs v. Pace*
17 *Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). In addition, the court must be mindful of
18 the fact that, for each of these factors, the party opposing amendment has the burden of
19 showing that amendment is not warranted. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,
20 187 (9th Cir. 1987); *see also Richardson v. United States*, 841 F.2d 993, 999 (9th Cir. 1988).

24 **B. Motion to Dismiss Pursuant to Rule 12(c)**

25 **1. Whether there is a Private Cause of Action for Certain Statutory Claims**

26 Defendants argue that “there is no private right of action for: violation (sic) Section
27 17(a) of the Securities Act; violation of Section 10A of the Exchange Act; aiding and abetting
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1 securities fraud; and/or violation of SEC reporting requirements,” because “[o]nly the SEC can
2 bring such claims.” Dkt. #12 at 2. Defendants argue that Mr. Maciora’s second, third, fourth,
3 and fifth claims, as well as part of his first claim, are thus precluded as a matter of law. *Id.*
4 Defendants support this argument by citing, *inter alia*, *In re Washington Pub. Power Supply*
5 *Sys. Sec. Litig.*, 823 F.2d 1349, 1358 (9th Cir. 1987) (overruling prior cases and concluding “no
6 private right of action lies under section 17(a)”); *Central Bank of Denver, N.A. v. First*
7 *Interstate Bank of Denver, NA.*, 511 U.S. 164, 191 (1994) (no private cause of action for aiding
8 and abetting securities fraud under Section 10(b) or Rule 10b-5); *In re Penn Central Securities*
9 *Litigation*, 494 F.2d 528, 540 (3rd Cir. 1974) (no direct or implied private cause of action for
10 aiding and abetting violations of SEC mandatory reporting requirements set forth in Section
11 13(a) of the Exchange Act and/or related Rules 13a-1, 13a-13 and 12b-20); *Lewis v. Sporck*,
12 612 F.Supp. 1316, 1332-33 (N.D.Cal. 1985) (no private cause of action for violations of
13 Section 13(b) of the Exchange Act or Rule 13b2-1). *Id.* at 8-9. Defendants argue that:
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16 ...Section 10A of the Exchange Act, 15 U.S.C. § 78j-1, provides
17 that certain reporting requirements may be triggered to inform the
18 company and, in certain situations, the SEC, if an auditor becomes
19 aware of an “illegal act” during the course of an audit. There is no
20 private cause of action arising under 15 U.S.C. § 78j-1. *See* 15
21 U.S.C. § 78j-1(c); Pub. L. No. 104-67, § 203, 109 Stat. 737, 762
22 (1995) (“Nothing in this Act or the amendments made by this Act
shall be deemed to create or ratify any implied private right of
action...”). Enforcement for failure to “blow the whistle” lies
exclusively with the SEC. *Id.*

23 *Id.* at 10.

24 With regard to Section 17(a), Mr. Maciora responds by arguing that “the Ninth Circuit
25 has held on multiple occasions that a private cause of action exists under §17(a),” and that it is
26 “telling that the United States Supreme Court has declined to confront the issue inferring that
27 the decision is much closer to a debate than the Defendants would like this court to believe.”
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1 Dkt. #24 at 11-12. Mr. Maciora cites to *Mosher v. Kane*, 784 F.2d 1385 (9th Cir.1986) and
2 *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808 (9th Cir.1981), as well as several out-of-
3 circuit cases. *Id.* at 12. With regard to aiding and abetting securities fraud under Section 10(b)
4 and Rule 10b-5, Mr. Maciora argues that finding no private cause of action for aiding and
5 abetting Section 10(b) and Rule 10b-5 “makes no sense if the Defendants are found to be a
6 primary violator of Section 10(b) and Rule 10b-5,” and then appears to argue that because
7 Defendants allegedly aided and abetted MyECheck in violating Section 10(b) and Rule 10b-5
8 they were themselves primary violators of these laws, and that “[i]t is important to note that
9 courts including the Supreme Court have never ruled that a person can’t be an aider and abettor
10 of Section 10(b) and Rule 10b-5 of the Exchange Act if they also a primary violator.” *Id.* at 12-
11 13 (referring without proper citation to *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*,
12 552 U.S. 148 (2008)). With regard to Section 10A of the Exchange Act, Plaintiff asks the
13 Court to find a private cause of action exists under this section as a matter of first impression,
14 referring to the *Cort v. Ash* four-part test to determine whether a federal statute creates a private
15 cause of action. *Id.* at 15 (referring without proper citation to *Cort v. Ash*, 422 U.S. 66, 95 S.
16 Ct. 2080, 2087, 45 L.Ed.2d 26 (1975)).

17 On Reply, Defendants argue that Mr. Maciora cites to bad law in support of his Section
18 17(a) claim because *Washington Pub. Power Supply* overruled *Mosher* and *Stephenson*, and
19 because the out-of-circuit cases cited by Mr. Maciora were later overruled. Dkt. #25 at 8
20 (citing, *inter alia*, *Washington Pub. Power Supply*, 823 F.2d at 1358; *Finkel v. Stratton Corp.*,
21 962 F.2d 169, 175 (2nd Cir. 1992); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 942 (7th Cir.
22 1989)). Defendants reiterate that the Supreme Court has held that there is no private cause of
23 action for aiding and abetting alleged violations of Section 10(b) or Rule 10b-5, and that “Mr.
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1 Maciora fails to identify any law to the contrary.” *Id.* at 8-9 (again citing *Central Bank of*
2 *Denver, N.A., supra*). Defendants walk through the *Cort v. Ash* four-part test and argue that the
3 Court should not create a private cause of action under Section 10A. *Id.* at 9-10. Defendants
4 point out that Mr. Maciora failed to address their arguments to dismiss claims for aiding and
5 abetting violations of Section 13(a), Section 13(b), and related rules 17 C.F.R. § 240.13a-1;
6 13a-13; 12b-20 and 13b2-1, and “thus concedes the point.” *Id.* at 12.
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8 The Court agrees with Defendants as to these claims. The case law is clear in the Ninth
9 Circuit, and this Court will not deviate from controlling precedent. The Court finds that there is
10 no private cause of action under Section 17(a) of the Securities Act. *See Washington Pub.*
11 *Power Supply, supra*. The cases cited by Mr. Maciora for the opposite were subsequently
12 overruled. The Court finds that there is no private cause of action for aiding and abetting
13 violations of Section 10b or Rule 10b-5. *See Central Bank of Denver, N.A., supra; Stoneridge*
14 *Inv. Partners*, 552 U.S. at 162 (“[a]iding and abetting liability is [now] authorized in actions
15 brought by the SEC but not by private parties.”). The Court declines to create a private cause
16 of action under Section 10A as contemplated by Mr. Maciora, agreeing with Defendants that
17 the plain language of the statute indicates a clear intent to preclude a private cause of action.
18 The Court finds that Mr. Maciora concedes that there is no private cause of action for aiding
19 and abetting violations of Section 13a, Section 13b, and related rules 17 C.F.R. § 240.13a-1;
20 13a-13; 12b-20 and 13b2-1. Accordingly, Mr. Maciora’s second, third, fourth, and fifth claims,
21 as well as the part of his first claim alleging violations of Section 17(a), are precluded as a
22 matter of law and will be dismissed.
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26 **2. Fraud Claims under Section 10(b) and Rule 10b-5 of the Exchange Act**

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1 Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), makes it unlawful “for
2 any person... to use or employ, in connection with the purchase or sale of any security... any
3 manipulative or deceptive device or contrivance in contravention of such rules and regulations
4 as the Commission may prescribe[.]” SEC Rule 10b-5, promulgated under the authority of
5 section 10(b), in turn, provides:

6 It shall be unlawful for any person...

7 (a) To employ any device, scheme, or artifice to defraud,

8 (b) To make any untrue statement of a material fact or to omit to
9 state a material fact necessary in order to make the statements
10 made, in light of the circumstances under which they were made,
11 not misleading, or

12 (c) To engage in any act, practice, or course of business which
13 operates or would operate as a fraud or deceit upon any person, in
14 connection with the purchase or sale of any security.

15 17 C.F.R. § 240.10b-5.

16 Defendants argue that Mr. Maciora’s claims for “understating the number of
17 outstanding shares, misstating stockholder equity, and understating compensation expenses” all
18 arise from PMB’s alleged failure to amend the SEC filings to reflect Zalunardo’s interest. Dkt.
19 #12 at 6 (citing Dkt. #2 at ¶¶ 16-18, 22, 24, 26, 29, 32). Defendants argue that Mr. Maciora’s
20 security fraud claims—violations of Section 10b and Rule 10b-5 of the Exchange Act—fail to
21 meet the heightened pleading requirements of the Private Securities Litigation Reform Act
22 (“PSLRA”) and Rule 9(b) by failing to plead with particularity facts that demonstrate PMB
23 made any “materially false” statement with the “intent to defraud” and that Mr. Maciora
24 “relied” on any such statement, resulting in damage. *Id.* at 2. Defendants cite to *In re Daou*
25 *Sys., Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005) for the following five-part test: “(1) a material
26 misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of
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1 a security, (4) transaction and loss causation, and (5) economic loss.” *Id.* at 10. Defendants
2 argue that the Amended Complaint indicates that Mr. Maciora bought the shares at issue prior
3 to confronting PMB and demanding that the SEC filings be amended, and that “Mr. Maciora
4 acquired his alleged shares in spite of, rather than because of, the alleged misrepresentations by
5 PMB.” *Id.* at 11. Defendants argue that “Mr. Maciora has not pled facts specifying how he
6 was misled by the Form 10s and/or financial statements and/or why PMB would have
7 attempted to mislead him.” *Id.* at 12. Defendants argue that Mr. Maciora has not pled scienter
8 facts with particularity. *Id.* at 12-13. Defendants argue that there are no facts in the Amended
9 Complaint indicating that Mr. Maciora relied on PMB’s audits in connection with his purchase
10 of the shares or that PMB’s audits are connected to Mr. Maciora’s damages. *Id.* at 14-15.
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13 In Response, Mr. Maciora argues that he “has more than met the pleading requirements
14 of the PSLRA,” and that the “apparently strict requirements” of Rule 9(b) should be relaxed in
15 securities cases like this one “when factual information is peculiarly within the Defendants’
16 knowledge or control,” citing a case from the Third Circuit. Dkt. #24 at 7. Mr. Maciora argues
17 that there is ample evidence of deception by the Defendants in this matter, referring (without
18 citation to the Amended Complaint) to “several million dollars of real estate that is owned by
19 MyECheck but is not on the balance sheet,” sham revenue transactions that were created by
20 fake contracts,” and “hundreds of millions of shares representing millions in expenses that were
21 never on the books.” *Id.* at 8-9. With regard to materiality, Mr. Maciora argues that:
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24 Over \$500,000 in wire transactions to real estate companies that
25 were never properly accounted for or ignored more than easily
26 meets the requirements for the second element. Add well over
27 \$1,000,000 in real estate owned by MyECheck’s wholly owned
28 subsidiary that is not on the balance sheet and the element of
materiality is well satisfied. It is ludicrous that the Defendants
argue that these issues are not material to support the underlying
claims.

1 *Id.* at 9 (emphasis omitted). Mr. Maciora argues that “the element for the connection to sale of
2 purchase of securities is met by the Plaintiffs purchase of the securities owned by Rod
3 Zalunardo.” *Id.* at 9. Mr. Maciora argues that the pleadings sufficiently establish scienter
4 because “[w]ith all of these material omissions, the Defendants were reckless in their opinion
5 or there is a very strong inference of scienter,” however “the court shouldn’t expect the Plaintiff
6 to meet the almost unsurmountable (sic) task of getting the Defendants to conclude, ‘OK, you
7 got me.’” *Id.* at 10. Mr. Maciora argues that “[r]eliance is satisfied by the fact that the Plaintiff
8 relied on the Defendants to enforce accounting based on general accepted accounting
9 principles” and that “[t]hose principles would have required that the Defendants insist on the
10 proper accounting entries which would not only have created an accounting entry for
11 Zalunardo’s stock but would also have insisted that a note to the financial statements reflected
12 the issuance of the stock to Zalunardo and other management team members.” *Id.*

15 On Reply, Defendants argue that Mr. Maciora fails to identify any “material”
16 misrepresentation by PMB and fails to plead facts with particularity showing intent to defraud.
17 Dkt. #24 at 2-4. Defendants argue that “[i]t is undisputed that Mr. Maciora acquired his alleged
18 interest in [MyECheck] knowing that neither [MyECheck]’s form 10, nor any of the other
19 publically available financial statements indicated that Mr. Zalunardo had any shares to sell,”
20 and that therefore “it cannot be said that Mr. Maciora relied on PMB’s allegedly false
21 information when deciding to purchase the shares.” *Id.* at 4.

24 The Court finds that Mr. Maciora has not properly pled facts to support his fraud
25 claims. There are two problems with the Amended Complaint as drafted—first, the facts lack
26 sufficient particularity as required by the PSLRA and Rule 9(b). Although Mr. Maciora pleads
27 very specific allegations of fraudulent activity, he does not plead with particularity a *material*
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1 misrepresentation or omission of fact communicated to him by Defendants in connection with
2 the purchase of shares. He also does not plead scienter, causation, or economic loss with
3 sufficient particularity. These problems could potentially be resolved by amendment.
4 However, even if Mr. Maciora amended his pleadings to add this additional factual support for
5 his fraud claims, there is a second, more fundamental problem—the facts as alleged show that
6 Mr. Maciora bought shares in spite of, rather than because of, the alleged misrepresentations of
7 Defendants. Mr. Maciora does not allege that PMB represented that Mr. Zalunardo had shares
8 to sell, and that Mr. Maciora relied on this false representation causing damages. Instead, Mr.
9 Maciora alleges that he bought Mr. Zalunardo’s shares without any representations by PMB,
10 and only after purchasing these shares contacted PMB to demand that his newly purchased
11 shares be recognized. These facts, accepted as true, do not state a claim to relief that is
12 “plausible on its face,” nor can the Court draw the “reasonable inference” that these Defendants
13 are liable for the alleged harm under fraud. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S.
14 at 555). The Court finds that the lack of a material misrepresentation or omission and lack of
15 causation cannot be remedied by amendment without directly contradicting the existing
16 pleadings, and that therefore these claims must be dismissed with prejudice.
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20 **3. Negligence Claim**

21 Mr. Maciora alleges that “[t]he Defendant’s (sic) negligence harmed the Plaintiff by
22 aiding and abetting the company in filing false financial statements with the [SEC] which
23 created an atmosphere in which the public company failed to print stock certificates
24 representing hundreds of millions of shares. In fact, 66,666,666 of these shares were shares that
25 the Plaintiff purchased.” Dkt. #2 at 26.
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1 Defendants argue that the Court should apply Washington state law for Mr. Maciora's
2 negligence claim, and that because Mr. Maciora was not PMB's client, there was no duty of
3 care. Dkt. #12 at 17-20. Defendants point out that Mr. Maciora "purchased the shares knowing
4 (or turning a blind eye to the fact) that PMB had allegedly incorrectly audited the Form 10 and
5 financial statements." *Id.* at 19. Defendants argue there are no pled facts to establish causation
6 or the claimed damages. *Id.*

8 Mr. Maciora's Response argues that Section 552 of the Restatement (Second) of Torts
9 should apply to this case, and that he is alleging third party negligence. Dkt. #24 at 16. Mr.
10 Maciora argues that the Court should apply Texas state law. *Id.* at 17-18.

12 On Reply, Defendants argue that even if Texas law applied this claim would be
13 precluded as a matter of law because of a lack of duty to Mr. Maciora. Dkt. #25 at 11.
14 Defendants also point out the causation problem mentioned previously, arguing that "[i]f only
15 Mr. Maciora had relied on the information audited by PMB he may not have acquired shares
16 that Mr. Zalunardo did not have to sell." *Id.* Defendants go on to summarize this case thusly:

18 Mr. Maciora expressly concedes that, rather than rely on PMB's
19 audit, he was "relying on an accurate Form 10 because he told
20 them and asked them to list Rod Zalunardo's stock and the
21 Plaintiff told the Defendants that in multiple communications."
22 Dkt. #24 at 18. In other words, he bought Mr. Zalunardo's shares
23 knowing the SEC filings did not identify them, and hoped to strong
24 arm PMB, either through threatening communications or the
25 present litigation, into amending the Form 10 (which it cannot do)
26 to reflect Mr. Zalunardo's shares (which do not exist).

27 *Id.* at 12.

28 The Court agrees with Defendants that the problem with Mr. Maciora's negligence
claim is a fundamental one that would arise regardless of which state's law is applied. Section
552 of the Restatement (Second) of Torts contemplates liability for pecuniary loss caused by

1 “justifiable reliance upon the information.” Under Washington or Texas law, regardless of
2 whether a duty was owed to Mr. Maciora, the facts of this case simply do not support the claim
3 that any negligent action by Defendants caused Mr. Maciora to purchase the shares from Mr.
4 Zalunardo—the facts as pled can only support the conclusion that Mr. Maciora bought the
5 shares without knowledge of or in spite of Defendants’ audit of the Form 10 and financial
6 statements. These facts, accepted as true, do not state a claim to relief that is “plausible on its
7 face,” nor can the Court draw the “reasonable inference” that the Defendants are liable for the
8 alleged harm under a theory of negligence. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S.
9 at 555). Accordingly, this claim must be dismissed.
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11 **C. Motion to Amend Complaint**

12 Pursuant to Rule 15(a)(2), a “court should freely give leave [to amend] when justice so
13 requires.” Fed. R. Civ. P. 15(a)(2). Five factors are commonly assessed before granting leave
14 to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of
15 amendment, and (5) whether the party has previously amended the pleading. *See Allen v. City*
16 *of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). In conducting this five-factor analysis, the
17 court must grant all inferences in favor of allowing amendment. *Griggs v. Pace Am. Group,*
18 *Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). In addition, the court must be mindful of the fact that,
19 for each of these factors, the party opposing amendment has the burden of showing that
20 amendment is not warranted. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir.
21 1987); *see also Richardson v. United States*, 841 F.2d 993, 999 (9th Cir. 1988). Futility alone
22 can justify a court’s refusal to grant leave to amend. *Novak v. United States*, 795 F.3d 1012,
23 1020, (9th Cir. 2015) (citing *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)).
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1 Mr. Maciora moves for leave to amend his Complaint a second time, acknowledging
2 that this Motion was brought in the shadow of the Motion to Dismiss and alleging that this
3 amendment “should resolve any doubt as to whether dismissal may be warranted.” Dkt. #13 at
4 2. Mr. Maciora argues that this amendment is not made in bad faith and does not cause undue
5 delay or prejudice to Defendants. *Id.* at 3. Mr. Maciora fails to set forth the changes being
6 made in this proposed amendment. Upon review of the attached Proposed Second Amended
7 Complaint, the Court concludes that it contains the claims dismissed above for lack of a private
8 cause of action. *See* Dkt. #13-2 at 17-29.² The portion of Mr. Maciora’s first cause of action
9 for violation of Section 10(b) and Rule 10b-5 of the Exchange Act of 1934 is identical to that in
10 the previous Amended Complaint, *see* Dkt. #2 at 18-19; Dkt. #13-2 at 17-18, and the proposed
11 cause of action for negligence is also identical, *see* Dkt. #2 at 24-26; Dkt. #13-2 at 21-22. The
12 Proposed Second Amended Complaint adds causes of action seven through eleven for “aiding
13 and abetting money laundering,” “aiding and abetting wire fraud,” “aiding and abetting breach
14 of fiduciary responsibility,” “aiding and abetting fraud,” and for “violations of Title 3, Section
15 10A of the Securities Litigation Reform Act of 1995.” Dkt. #13-2 at 22-29.

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19 In Response, Defendants argue that the proposed Second Amended Complaint “asserts
20 new futile claims, fails to support his previously asserted frivolous claims, and... was clearly
21 filed for no other purpose than to counteract [Defendants’] pending Motion to Dismiss.” Dkt.
22 #17 at 5. First, Defendants argue that the Court should “deny leave to amend to add claims for
23 which there is no private cause of action,” specifically “aiding and abetting securities fraud,
24 aiding and abetting SEC reporting requirements, violation of Section 17(a) of the Securities

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28 ² The Court notes that although Mr. Maciora has attached a copy of the proposed Second Amended Complaint to his Motion, he has not indicated in the attachment how it differs from the prior pleading “by bracketing or striking through the text to be deleted and underlining or highlighting the text to be added” as required by Local Rule 15. However, the Court has been able to review the proposed pleading and will not require further action to correct this mistake from Mr. Maciora.

1 Act, or violation of Section 10A of the Exchange Act.” *Id.* at 6. Defendants argue that the
2 proposed amendment fails to support a claim for securities fraud because it fails to identify any
3 material misrepresentation by Defendants or that Mr. Maciora relied upon Defendants’ audit
4 when deciding to acquire the alleged shares, i.e. “[t]here are no facts demonstrating a ‘causal
5 connection between the fraud and the securities transaction in question.”” *Id.* at 7 (citing *In re*
6 *Daou Sys., Inc.*, 411 F.3d at 1025). The Defendants next address the new claims. Defendants
7 argue that there is no private cause of action for wire fraud. *Id.* at 9 (citing *Wisdom v. First*
8 *Midwest Bank of Poplar Bluff*, 167 F.3d 402, 408 (8th Cir. 1999); *Ateser v. Bopp*, 29 F.3d 630
9 (9th Cir. 1994)). Defendants argue that there is no private cause of action for money
10 laundering. *Id.* (citing, *inter alia*, 18 U.S.C. §1956; *El Camino Resources, LTD v. Huntington*
11 *Nat. Bank*, 722 F.Supp.2d 875 (W.D. Mich. 2010)). Defendants acknowledge that there may be
12 a cause of action for aiding and abetting breach of fiduciary duty or fraud under Washington
13 law. *Id.* at 11 (citing *In re Consol. Meridian Funds*, 485 B.R. 604, 616 (Bankr. W.D. Wash.
14 2013); *Brashkis v. Hyperion Capital Grp., LLC*, No. 3:11-cv-05635 RBL, 2011 WL 6130787 at
15 *3 (W.D. Wash. Dec. 8, 2011)). Defendants argue that Mr. Maciora has nonetheless failed to
16 allege facts suggesting that Defendants knew of the alleged breach of fiduciary duty or fraud, or
17 pled the fraud facts with particularity. *Id.* Defendants argue that Mr. Maciora fails to identify
18 any “agreement and concerted action among [Defendants and MyECheck] to commit any
19 alleged fraud.” *Id.* at 12 (citing *Brashkis*, 2011 WL 6130787 at * 3). Defendants argue that
20 “[o]ther than merely stating in conclusory terms that [Defendants] ‘knew’ or ‘had to know’ that
21 the transactions were inappropriate, Mr. Maciora fails to plead any facts suggesting that
22 [Defendants] was aware that the transactions were illicit and/or how [Defendants] aided or
23 assisted in making the transactions.” *Id.* Defendants argue that if the alleged breaches of
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1 fiduciary duty and fraud took place, according to the Complaint they took place more than a
2 year before Defendants were engaged to perform an audit and more than a year before Mr.
3 Maciora allegedly purchased the shares at issue, and thus Mr. Maciora's conclusory allegations
4 of aiding and abetting and causation of harm are insufficient, *i.e.* "there is no basis for any
5 claim that [Mr. Maciora] was somehow damaged by [MyECheck's] alleged illicit transactions
6 and/or [Defendants'] alleged failure to identify them." *Id.* Defendants fail to directly address
7 Mr. Maciora's eleventh cause of action for "violations of Title 3, Section 10A of the Securities
8 Litigation Reform Act of 1995."

9
10 On Reply, Mr. Maciora repeats the same arguments he made in opposition to the
11 Motion to Dismiss to argue that the amendment is not futile.³ With regard to the materiality
12 requirement of his claims of securities fraud under Section 10b and Rule 10b(5) of the
13 Exchange Act, Mr. Maciora argues:

14
15 Over \$500,000 in wire transactions to real estate companies that
16 were never properly accounted for or ignored more than easily
17 meets the requirements for the second element. Add well over
18 \$1,000,000 in real estate owned by MyECheck's wholly owned
19 subsidiary that is not on the balance sheet and the element of
20 materiality is well satisfied. It is ludicrous that the Defendants
21 argue that these issues are not material to support the underlying
22 claims.

23 Dkt. #20 at 4 (emphasis omitted). This exact language has been addressed previously in
24 this Order. Mr. Maciora argues that "[t]he element for the connection to sale of purchase of
25 securities is met by the Plaintiffs purchase of the securities owned by Rod Zalunardo." *Id.*
26 Again, this is identical to Mr. Maciora's argument in opposition to the Motion to Dismiss and

27 ³ The Court notes that Mr. Maciora's Reply is 16 pages long, well in excess of the 6-page limit allowed for a Reply
28 to a Motion of this kind. *See* LCR 7(e)(4). Mr. Maciora did not request leave from the Court to file this grossly
over-length brief. Defendants properly filed a Surreply notifying the Court of this issue and of the fact that Mr.
Maciora raises a new claim in his Reply that was not part of the proposed Second Amended Complaint. *See* Dkt.
22, 23. The Court finds that Mr. Maciora has failed to comply with the local rule on page limits and improperly
raises a new claim. Accordingly, the Court will only consider the first six pages of Mr. Maciora's Reply and will
disregard the new claim.

1 has been addressed previously. Mr. Maciora proceeds to repeat verbatim arguments found in
2 Mr. Maciora's Opposition to the Motion to Dismiss in support of his other claims, including his
3 claim for negligence. *See, e.g., id.* at 6.

4 The Court finds that there is no undue delay or prejudice in the filing of this Amended
5 Complaint. While the Court finds the timing and lack of analysis in Plaintiff's Motion
6 indicative of a procedural (rather than substantive) opposition to Defendants' Motion to
7 Dismiss, this does not rise to the level of bad faith in the Court's opinion. The Court notes that
8 this is not Mr. Maciora's first attempt at amending his Complaint. However, the Court
9 concludes that the key question before it is one of futility, and will address Mr. Maciora's
10 causes of action in turn.
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12 First, the Court has already concluded that there is no private cause of action for aiding
13 and abetting securities fraud, aiding and abetting SEC reporting requirements, violation of
14 Section 17(a) of the Securities Act, or violation of Section 10A of the Exchange Act. Mr.
15 Maciora's amendment of these claims is thus futile.
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17 Second, the Court agrees with Defendants that the Proposed Second Amended
18 Complaint fails to include any new factual allegations that could show material
19 misrepresentation by Defendants or that Mr. Maciora relied upon Defendants audit when
20 deciding to acquire the alleged shares. The new proposed cause of action for violation of
21 Section 10(b) and Rule 10b-5 of the Exchange Act of 1934 is identical to the previous cause of
22 action, and again fails to state with particularity what misrepresentations were made and how
23 they caused Mr. Maciora injury. It is not enough to simply allege new misrepresentations and
24 repeat that Mr. Maciora purchased the shares at issue, Mr. Maciora must actually connect the
25 dots and state a claim to relief that is "plausible on its face," allowing the Court to draw the
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1 “reasonable inference” that the Defendants are liable for the alleged fraud. *See Iqbal*, 556 U.S.
2 at 678 (quoting *Twombly*, 550 U.S. at 555). The Court thus concludes that the proposed
3 amendment of this claim is futile.

4 Third, the Court finds that the new proposed cause of action for negligence is identical
5 to that in the Amended Complaint. Although Mr. Maciora sets forth additional facts in his
6 Proposed Second Amended Complaint, he fails to connect these facts to his claim, which is
7 essentially identical. As such, the Court concludes that this amendment is futile.

9 Finally, the Court will address the newly added claims. The Court agrees with
10 Defendants that there is no private cause of action for wire fraud or money laundering. *See*
11 *Wisdom*, 167 F.3d at 408; 18 U.S.C. §1956. Even if there were, the Proposed Second Amended
12 Complaint fails to allege how the alleged wire fraud or money laundering harmed Mr. Maciora.
13 *See* Dkt. #13-2 at 22-25. To the extent that a private cause of action exists for aiding and
14 abetting breach of fiduciary duty or fraud, Mr. Maciora’s conclusory claims fail for lack of
15 particularity and for the irreparable causation issues identified by Defendants, *e.g.* the factual
16 events giving rise to Mr. Maciora’s claims of aiding and abetting breach of fiduciary duty or
17 fraud are alleged to have taken place well before Mr. Maciora allegedly purchased the shares at
18 issue. The Court concludes that these claims are not plausible on their face and are thus futile.

21 Mr. Maciora’s final claim is for “violations of Title 3, Section 10A of the Securities
22 Litigation Reform Act of 1995.” The Court has been unable to find any instance where Title III
23 of the PSLRA has given rise to a private cause of action. This title requires auditors to
24 investigate potential illegal activity and to “inform the appropriate level of the management of
25 the issuer and assure that the audit committee of the issuer, or the board of directors of the
26 issuer in the absence of such a committee, is adequately informed with respect to illegal acts
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1 that have been detected or have otherwise come to the attention of such accountant in the
2 course of the audit, unless the illegal act is clearly inconsequential.” Section 10A (b)(1)(B),
3 109 Stat. 737, 763. If there is a failure to take remedial action, Section 10A requires auditors to
4 “directly reports its conclusions to the board of directors.” Section 10A goes on to limit
5 liability in a private action and provide for civil penalties to be imposed by the SEC. Section
6 10A (c)-(e), 109 Stat. 737, 764. On its face, this statute does not appear to allow for a private
7 cause of action. Indeed, Title III of the PSLRA amends Section 10A of the Exchange Act, 15
8 U.S.C. § 78j-1, which the Court has already found does not give rise to a cause of action. Even
9 if there was a private cause of action, Mr. Maciora fails to allege how Defendants’ alleged
10 violation caused him harm, and the Court finds that amendment to add this claim is futile for
11 the same lack of causation as previously identified.
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14 IV. CONCLUSION

15 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
16 and the remainder of the record, the Court hereby finds and ORDERS:
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- 18 1) Defendants PMB Helin Donovan, LLP, Christie Cardwell and Donald McPhee’s
19 Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c), (Dkt. #12), is GRANTED.
20 Plaintiff Kenneth Maciora’s claims are dismissed in their entirety with prejudice.
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- 22 2) Plaintiff Kenneth Maciora’s Motion for Leave to File Second Amended Complaint,
23 (Dkt. #13), is DENIED.

24 DATED this 20th day of July 2016.

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27 RICARDO S. MARTINEZ
28 CHIEF UNITED STATES DISTRICT JUDGE