IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TARA SCOTT and WILSON CARTER, INDIVIDUALLY AND AS TRUSTEE OF THE BAILEY MIDDLETON CARTER 2009 TRUST, THE MARY WILSON CARTER 2009 TRUST, and THE WILSON M. CARTER 1988 TRUST,	)	
Plaintiffs,	)	C.A. No.17-448-MPT
v.	)	
VANTAGE CORPORATION, VANTAGE ADVISORY MANAGEMENT, LLC, VF(X) LP, TRADELOGIX, LLC, BRIAN ASKEW, and GERALD FINEGOLD,	)	
Defendants.	)	

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS THE COMPLAINT

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Dated: June 23, 2017

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Defendants Vantage Corporation ("Vantage") Vantage Advisory Management, LLC, VF(X) LP, Tradelogix, LLC, Brian Askew ("Askew"), and Gerald Finegold ("Finegold") (collectively "Defendants") respectfully submit this opening brief in support of their motion to dismiss the Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

Vantage is a technology and investment company that specializes in proprietary trading technology. In January 2016, Plaintiffs Tara Scott ("Scott") and Wilson Carter ("Carter") purchased Class A shares in Vantage, each in the amount of one million dollars. Compl. ¶¶ 16, 19. Plaintiffs allege that "[a]t the time the stock was offered for sale and sold to Plaintiffs, the stock was not subject to an effective registration statement." *Id.* ¶ 26. Plaintiffs further allege that "Askew was not registered as a securities salesperson or an investment advisor with the Georgia Commissioner of Securities as required by § 10-5-1." *Id.* ¶ 27. Finally, Plaintiffs allege that they "purchased [the Stock] as a result of direct misrepresentations and omissions made to them by Askew." *Id.* ¶ 21. These alleged "misrepresentations" include, according to Plaintiffs' Complaint: (1) an assurance by Askew "that 70% of [Plaintiffs'] investment was to be placed in a segregated account for the benefit of each investor;" (2) "that Vantage Corporation was raising funds for a general partnership structure" and that Plaintiffs would become "general partners of a Vantage-related entity" through their purchase of the Stock; and (3) "that Vantage Corporation's systems and strategies had reached a level of maturity and stability to invest significantly large amounts of trading capital" and "that Vantage Corporation had ownership of software, systems, and intellectual property needed for the trading activity of the proposed business model." *Id.* ¶¶ 28, 32-33, 37, 65.

Scott and Carter, individually and as trustee of The Bailey Middleton Carter 2009 Trust, The Mary Wilson Carter 2009 Trust, and the Wilson M. Carter 1988 Trust, filed their Complaint in this action on April 20, 2017. In it, they allege Defendants violated the federal Securities Act of 1933 ("the 1933 Act" or "the Act") and the Georgia Uniform Securities Act of 2008 ("the Georgia Securities Act") in connection with their purchase of Class A shares in Vantage Corporation ("the Stock") from Plaintiffs in January 2016. Compl. ¶¶ 16, 19, 45-50, 52-56, 58-62, 64-69. Plaintiffs also assert common law claims for breach of fiduciary duty, negligence, and a purported claim for accounting against Defendants arising from Plaintiffs' purchase of the Stock. *Id.* ¶¶ 70-75, 77-82.

For the reasons discussed herein, Plaintiffs' action lacks both factual and legal merit and should be dismissed in its entirety with prejudice.

ARGUMENT

Federal Rule of Civil Procedure 12(b)(6) allows the Court to dismiss a complaint, or portions of a complaint, for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When reviewing a Rule 12(b)(6) motion to dismiss, the Court must accept the complaint's well-pleaded factual allegations as true and construe such allegations in a light most favorable to the plaintiff. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009)). The Court is not, however, required to accept the plaintiff's legal conclusions. *Id.*

The Court may dismiss a complaint if the facts alleged are insufficient "to show that the plaintiff has a 'plausible claim for relief.'" *Id.* (quoting ***Ashcroft v. Iqbal***, 556 U.S. 662, 679 (2009)). In *Bell Atlantic Corp. v. Twombly*, the Supreme Court observed that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. 544, 555 (2007). For claims required to meet the notice

pleading standard under Federal law, factual allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* Moreover, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The well-pleaded allegations of the complaint must move the claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

For claims involving or "sounding in" fraud, Federal Rule of Civil Procedure 9(b) imposes a heightened pleading standard, requiring plaintiffs to "state with particularity the circumstances constituting the fraud or mistake." This particularity requirement has been rigorously applied in securities fraud cases. *California Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 144 (3d Cir. 2004). As such, plaintiffs asserting securities fraud claims must specify "'the who, what, when, where, and how: the first paragraph of any newspaper story.'" *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir.1999) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990)).

I. PLAINTIFFS' FEDERAL SECURITY CLAIMS SHOULD BE DISMISSED.

In Count One of their Complaint, Plaintiffs allege that "Askew and Vantage Corporation violated section 12(a)(1) of the 1933 Act . . . and are liable to Plaintiffs because Askew offered and sold stock of Vantage Corporation to Plaintiffs when that stock was neither subject to an effective registration statement pursuant to section 5 of the 1933 Act . . . nor exempt from registration." Compl. ¶ 47. Plaintiffs further allege that "Vantage Corporation is liable to Plaintiffs because it was the issuer of the shares and for the acts of Askew because it participated in these acts . . . or because it was a control person with respect to Askew." Compl. ¶ 48.

Finally, with respect to "Vantage Corporation's Subsidiaries and Gerald Finegold," Plaintiffs argue that these Defendants "are liable to Plaintiffs for the acts of Askew because they participated in these acts, because of the doctrine of respondeat superior, or because each was a control person with respect to Askew." Compl. § 49.

In Count Four of their Complaint, Plaintiffs allege that Askew violated section 12(a)(2) of the 1933 Act because he made certain alleged misrepresentations to Plaintiffs in connection with their purchase of the Stock. Compl. ¶¶ 64-65. Plaintiffs further allege that Vantage, Vantage Corporation's Subsidiaries, and Finegold are liable under section 12(a)(2) "because [they] participated in these acts, because of the doctrine of respondeat superior, or because each was a control person with respect to Askew." *Id.* ¶¶ 67-68.

A. Plaintiffs' Federal Security Claims are Barred by the Statute of Limitations.

Both Counts One and Four should be dismissed against all Defendants because they are time-barred by the statute of limitations.

1. Claims Under Section 12(a)(1) of the 1933 Act Must Be Brought Within One Year.

Section 12(a)(1) of the 1933 Act prohibits the offer or sale of unregistered securities that are not otherwise subject to an exemption from registration. 15 U.S.C. §77l(a)(1). Pursuant to 15 U.S.C. § 77e, all issuers of "non-exempt" securities must file a registration statement with the Securities and Exchange Commission ("the SEC") prior to the issuer offering the security for sale. 15 U.S.C. § 77e(c). Actions claiming liability for the sale of unregistered securities are limited by a one-year statute of limitations. 15 U.S.C. § 77m. Furthermore, the discovery rule does not apply to section 12(a)(1) claims. *Pell v. Weinstein*, 759 F. Supp. 1107, 1111 (M.D. Pa. 1991), *aff'd without opinion*, 961 F.2d 1568 (3d Cir. 1992) ("[N]either the discovery rule nor equitable tolling are applicable to the one-year limitation period governing nonregistration

claims because the language of the statute militates against such an application . . . ."); *see also Blatt v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 916 F. Supp. 1343, 1353 (D.N.J. 1996) ("This Court agrees with *Pell* and the majority rule that the one year limitations period applicable to claims brought under section 12(1) is absolute.").

Thus, Plaintiffs can only maintain claims for the sale of unregistered securities that occurred within one year prior to April 20, 2017, the date Plaintiffs filed this action. Plaintiffs' Complaint alleges that the investments at issue were purchased on January 27, 2016 and January 28, 2016. Compl. ¶¶ 16, 19. As such, the latest date Plaintiffs could sustain a cause of action under section 12(a)(1) with respect to these investments would have been January 28, 2017. Because Plaintiffs filed this action nearly three months beyond that date, Plaintiffs' claims under section 12(a)(1) should be dismissed as time-barred.

2. Claims Under Section 12(a)(2) of the 1933 Act Must Be Brought Within One Year.

An action brought under section 12(a)(2) must be "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. Furthermore, to properly allege a claim under section 12(a)(2), "the complaint must set forth the time and circumstances of the discovery of the fraudulent statements, the reasons why discovery was not made earlier if more than one year has elapsed since the fraudulent conduct occurred, and the diligent efforts which plaintiff undertook in making or seeking such discovery." *Hill v. Der*, 521 F. Supp. 1370, 1389 (D. Del. 1981). The reasonable diligence standard requires a plaintiff to file suit when the possibility of fraud should have been apparent. *Id.* at 1388 (citing *Ingenito v. Bermec Corp.*, 441 F.Supp. 525, 554 (S.D.N.Y.1977)).

Here, Plaintiffs allege only that the alleged misrepresentations were made "[b]efore Plaintiffs purchased Vantage Corporation stock" in January 2016. Compl. ¶¶ 16, 19, 28, 33, 37. Not only do Plaintiffs fail to describe the circumstances surrounding their *discovery* of the alleged fraudulent statements, they wholly fail to provide any facts regarding the alleged fraudulent statements themselves—i.e., the "who," "what," "when," "where," and "how"—other than to generally state such statements were made.

Furthermore, even if the proper factual basis was provided, Plaintiffs' Complaint still fails to plead any reasonable diligence to trigger the discovery rule. The Complaint is devoid of any discussion regarding the circumstances surrounding Plaintiffs' discovery of Defendants' purported fraudulent conduct and fails to provide any explanation as to why Plaintiffs' claims were not brought earlier than April 20, 2017, well over a year after the alleged misrepresentations were made. Commencement of the statutory time period cannot await the plaintiff's "leisurely discovery of the full details of the alleged scheme." *Hill*, 521 F. Supp. at 1388, quoting *Klein v. Bower*, 421 F.2d 338, 343 (C.A.2, 1970). Because Plaintiffs have failed to meet the applicable statute of limitations, their section 12(a)(2) claims should be dismissed as time-barred.

B. Plaintiffs Failed to Allege the Use of Interstate Commerce.

To state a claim under section 12(a)(1) and (2), the plaintiff must allege that the defendant's alleged misconduct involved some instrument of interstate commerce. 15 U.S.C. 77l(a); *Lawler v. Gilliam*, 569 F.2d 1283, 1285 (4th Cir. 1978) ("In order to recover on his s 12(1) claim, Lawler must show that Cocke and Gilliam violated s 5 by utilizing some instrument of interstate commerce to offer or sell to Mower a security for which no registration statement was in effect."). Plaintiffs, however, fail to make this basic allegation. Instead, Plaintiffs go out of their way to make clear that all the solicitations and investments at issue took place in

Georgia, where Askew resides. *See* Compl. ¶ 15 (stating that all "solicitations and investments were made in Georgia" as to Plaintiff Carter); ¶ 18 (stating that all "solicitations and investments were made in Georgia" as to Plaintiff Scott). Plaintiffs' section 12(a) claims should be dismissed for this reason alone.

C. Plaintiffs' Claims Under Section 12(a)(2) Fail Because the Investments at Issue are Exempt from Registration Requirements.

Even if Plaintiffs' Section 12(a)(1) claim was timely and alleged the use of interstate commerce, it should still be dismissed because the sale of Vantage Stock to Plaintiffs is exempt under Regulation D of the 1933 Act. The 1933 Act prohibits the offering or sale of a security unless it is registered with the SEC or exempt from registration requirements. 15 U.S.C. § 77e(a)(1). Under section 4(a)(2) of the Act, "transactions by an issuer not involving any public offering" are exempt from registration. 15 U.S.C. § 77d(a)(2). This exemption is applicable to the circumstances here.

Regulation D contains the rules prescribing the qualifications needed to fall within the private offering exemption of section (4)(a)(2). 17 C.F.R. § 230.501 *et seq*. Rule 506 of Regulation D provides a safe harbor for private sales to "accredited investors" and up to thirty-five unaccredited purchasers under certain conditions. 17 C.F.R. § 230.506(b).[1]

Here, the offerings at issue were available only to accredited investors, as set forth in the Term Sheet provided to Plaintiffs prior to purchase attached hereto as Exhibit A.[2] The Term

[1] An "accredited investor" includes (1) any individual with a net worth of at least $200,000 (or, if married, $300,000); and (2) a trust with total assets in excess of $5,000,000. 17 C.F.R. § 230.501(a)(6)-(7).

[2] Consistent with Rule 12(b)(6), at the motion to dismiss stage, the Court may take consideration of relevant documents outside of the Complaint, and referred to in Plaintiff's Complaint, that go to the heart of Plaintiff's claims. *See Davis v. Wells Fargo*, 824 F.3d 333, 341 (3d Cir. 2016) (citing *Mayer v. Belichick*, 605 F.3d 233, 230 (3d Cir. 2010) (allowing reference to "undisputedly authentic documents if the complainant's claims are based upon these documents").

Sheet states: "The Shares are being offered only to accredited investors as defined under the Securities and Exchange Commission's Regulation D." Additionally, the Stock Subscription Agreement, attached hereto as Exhibit B, makes clear that Defendants never intended the sales of the Stock to Plaintiffs to implicate the registration requirements of the 1933 Act:

> The undersigned is aware that the Shares have not been registered under the Securities Act of 1933 . . . or any applicable state securities laws. The undersigned understands that the Company is relying upon certain exemptions from the registration requirements of the Securities Act and any applicable state securities laws and that such reliance is predicated in part upon the truth and accuracy of the statements made by the undersigned in this Stock Subscription Agreement.

In light of this representation, Plaintiffs unsurprisingly do not, and cannot, allege any facts to suggest they were non-accredited investors or that the Stock was otherwise not exempt from registration. In fact, Plaintiffs' section 12(a)(1) allegations consist of one sentence premised "upon information and belief" that falls plainly short of the federal notice pleading standard. *See* Compl. ¶ 13. Although courts have allowed pleadings based upon "information and belief" allegations to survive dismissal in limited circumstances, there must be "a proper factual basis asserted to support the beliefs pled." *Brinkmeier v. Graco Children's Prod. Inc.*, 767 F. Supp. 2d 488, 496 (D. Del. 2011). Where "these averments are merely a formulaic recitation of the elements of a cause of action . . . [r]eliance by [Plaintiffs] on information and belief cannot transform legal conclusions into plausible factual allegations." *Essex Ins. Co. v. Miles*, Civ. A. 10–3598, 2010 WL 5069871, at *3 (E.D. Pa. Dec. 3, 2010) (internal quotation marks and citation omitted). Here, Plaintiffs have failed to plead *any* factual basis to support their alleged "belief" that "Askew, on behalf of Vantage Corporation, made general solicitations to obtain investor funding, including . . . soliciting and/or selling to unaccredited investors." Compl. ¶ 13. As a result of this deficiency, and because Defendants' sales of the Stock do not

implicate section 12(a)(1) and the registration requirements of the 1933 Act, Plaintiffs' claims asserting violations of section 12(a)(1) should be dismissed as to all Defendants.

D. Plaintiffs' Claims Under Section 12(a)(2) Fail Because There Was No Public Offering.

As with their claim under section 12(a)(1), even if Plaintiffs' section 12(a)(2) claim was timely and alleged the use of interstate commerce, it should still be dismissed for failure to state a claim. Section 12(a)(2) of the Securities Act prohibits the offer or sale of a public security "by means of a prospectus or oral communication" that includes a misstatement or omission of material fact. 15 U.S.C. § 77l(a)(2). To bring a claim under section 12(a)(2), a plaintiff must show that the misrepresentation was made with respect to a public offering, not a private sale. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 1070, 131 L. Ed. 2d 1 (1995) (holding that the terms "prospectus" and "communication" relate only to "public offerings by issuers and their controlling shareholders"). Because Plaintiffs do not, and cannot, allege that the investments at issue here were part of a public offering, they fail to state a claim under section 12(a)(2) and therefore the claim should be dismissed.

E. Plaintiffs Failed to State a Claim for Control Person Liability or Respondeat Superior Under the 1933 Act.

Plaintiffs' section 12(a)(1) and (2) claims further allege that Vantage, Vantage Corporation's Subsidiaries, and Finegold are liable to Plaintiffs for the acts of Askew "because of the doctrine of respondeat superior, or because each was a control person with respect to Askew." Compl. ¶¶ 48-49, 66-67. As there is no viable underlying section 12(a) claim, there is no claim for secondary liability. *See* 15 U.S.C. § 77o (stating that any person who controls another person liable under section 77l "shall also be liable jointly and severally with and to the same extent as such controlled person."). Even if Plaintiffs had stated a claim under Section

12(a), which they did not, their claims regarding respondeat superior or control person liability should still be dismissed.

As an initial matter, the Third Circuit has rejected the applicability of common law principles of agency to federal securities law claims. *Rochez Bros. v. Rhoades*, 527 F.2d 880, 886 (3d Cir. 1975) ("[A]gency principles—respondeat superior—are not applicable to determine secondary liability in a securities violation case."); *see also Brug v. Enstar Grp., Inc.*, 755 F. Supp. 1247, 1256 (D. Del. 1991) (assessing secondary liability based on the "control person" provision of the securities laws); *Hill v. Equitable Bank*, 655 F. Supp. 631, 648 (D. Del. 1987), *aff'd sub nom. Hill v. Equitable Trust Co.*, 851 F.2d 691 (3d Cir. 1988) (same). Accordingly, to the extent Plaintiffs' section 12(a) claims are based on the common law theory of respondeat superior, such claims should be dismissed.

Furthermore, any claim based on a "control person" theory of liability also fails. To properly state a "control person" theory of liability, a complaint must allege that the defendant possessed "the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 240.12(b)-2(f); *see also Harriman v. E. I. DuPont De Nemours & Co.*, 372 F. Supp. 101, 105 (D. Del. 1974). Regarding Vantage Advisory Management, LLC, VF(X) LP, and Tradelogix, LLC, Plaintiff's Complaint baldly states that "Vantage Corporation's Subsidiaries . . . are liable to Plaintiffs for the acts of Askew because they participated in these acts, because of the doctrine of respondeat superior, or because each was a control person with respect to Askew." Compl. ¶55. Plaintiffs have not pled any facts or provided any basis at all for their allegation of control person liability; namely, that these entities had any power to direct or control Askew.

With respect to Finegold, Plaintiffs fail to plead any facts that suggest Finegold was a control person with respect to Askew. Plaintiffs present no facts that suggest Finegold exercised actual power or control over Askew, that he knew or had reasonable grounds to believe Askew was allegedly acting in violation of section 12(a), let alone any factual basis to conclude that Askew allegedly violated 12(a), or that Finegold otherwise participated in any way in the alleged misconduct.

Accordingly, Plaintiffs' claims for secondary liability against Vantage, Vantage Corporation's Subsidiaries, and Finegold for alleged violations of the 1933 Act should be dismissed.

F. If the Court Dismisses the Federal Securities Claims, It Should Decline Supplemental Jurisdiction over the State Law Claims.

Plaintiffs allege that the Court's jurisdiction in this action is based solely on the federal securities law claims. *See* Compl. at ¶ 10 (citing 28 U.S.C. §§ 1331 and 1367). Absent those claims, there is no basis for federal jurisdiction because Plaintiff Carter and Defendant Askew are both residents of Georgia. *See id.* at ¶¶ 2, 9. "When the court dismisses the federal claims that are the bases of subject matter jurisdiction . . . the court is left with a discretionary choice as to whether it will retain supplemental jurisdiction over the complaint's various state law claims." *United States v. Medco Health Solutions, Inc.*, C.A. No. 11–684–RGA, 2017 WL 63006, at *13 (D. Del. Jan. 5, 2017); *see also* 28 USCA § 1367(c).

Moreover, "where the claim over which the district court has original jurisdiction is dismissed before trial, the district court *must* decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000) (quoting *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) (emphasis

added); *see also Carnegie–Mellon University v. Cohill*, 484 U.S. 343, 351, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (when the federal claims are eliminated early in a case, "the District Court ha[s] a powerful reason to choose not to continue to exercise jurisdiction").

Here, this case is in its infancy, no answer has been filed, no schedule has been entered and discovery has not started. Thus, there is no reason for the Court to exercise supplemental jurisdiction over the remaining state law claims. Therefore, if the Court dismisses the federal securities law claims, it should also dismiss all of Plaintiffs' remaining state law claims.

II. Plaintiffs Fail to State a Claim for Relief Against Defendants for Violation of Georgia' Securities Laws.

In addition to their federal securities law claims, Plaintiffs allege that Defendants unlawfully offered and sold securities in the state of Georgia in violation of the Georgia Securities Act. Compl. ¶ 52. The Georgia law claims suffer from the same infirmities as the federal claims and should be dismissed for similar reasons.

A. Plaintiffs Failed to State a Claim Under O.C.G.A. § 10-5-20.

Section 10-5-20 of the Georgia Securities Act provides that "[i]t is unlawful for a person to offer or sell a security" in Georgia unless: "(1) the security is a federal covered security; (2) [t]he security, transaction, or offer is exempted from registration . . . ; or (3) the security is registered under [the Georgia Securities Act]." O.C.G.A. § 10-5-20. Therefore, to state a claim against Defendants under section 10-5-20, Plaintiffs *must state facts* that would allow the Court to reasonably infer that the Stock does not fall into one of the three categories set forth in the statute. Here, as previously discussed, category number two applies—the Stock is "exempted from registration"—and Plaintiffs have failed to plead any facts to suggest otherwise. In the "Factual Allegations" section of their Complaint, Plaintiffs baldly claim:

> At the time the stock was offered for sale and sold to Plaintiffs, the stock was not subject to an effective registration statement pursuant to the Georgia Securities

> Act . . . or exempt from registration . . . . At the time the stock was offered for sale and sold to Plaintiffs, the stock was not subject to an effective registration statement pursuant to section 5 of the 1933 Act . . . or exempt from registration.

Compl. ¶ 26.

Despite Plaintiffs' labeling them otherwise, these statements are legal conclusions, not factual allegations. It is well-settled law that "'threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Fowler*, 578 F.3d at 210 (quoting *Iqbal*, 556 U.S. 662 at 978). "To prevent dismissal, all civil complaints must . . . set out 'sufficient factual matter' to show that the claim is facially plausible." *Id.* Accusations that "'the-defendant-unlawfully-harmed-me'" are not enough to survive a motion to dismiss; the court must be able to "'infer more than the mere possibility of misconduct.'" *Id.* at 210-11; *see also Moreno-Gomez v. Ponce-Romay*, No. C.A. 16-163-GMS, 2016 WL 6871230, at *2 (D. Del. Nov. 21, 2016).

Plaintiffs simply fail to set forth any facts to substantiate their claims that the Stock is not exempt from registration and instead generally assert wrongful action by Defendants. As a result of this failure, the Court cannot reasonably draw an inference that Plaintiffs are entitled to relief under § 10-5-20. Because Plaintiffs plainly fail to meet the pleading requirements, Plaintiffs' claims under O.C.G.A. §§ 10-5-20 and 10-5-58 should be dismissed.

B. Plaintiffs Failed to State a Claim Under O.C.G.A. § 10-5-31.

Count Three of Plaintiffs' Complaint alleges that Defendants violated O.C.G.A. § 10-5-31. Compl. ¶¶ 57-62. In relevant part, § 10-5-31 states that "(a) It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is exempt from registration as an agent under subsection (b) of this Code section." Like the rest of Plaintiffs' claims, Count Three fails to state a claim upon which relief can be granted.

As the statute makes clear, § 10-5-31 applies only to "*an individual*" acting as a broker-dealer or agent, not a corporate entity. As such, Plaintiffs' cannot sustain claims for primary liability against Vantage, Vantage Advisory Management, LLC, VF(x) LP, and Tradelogix, LLC.

Similarly, Plaintiffs have failed to assert a claim against Askew. Plaintiffs have made no factual allegation whatsoever supporting any claim that Askew violated § 10-5-31. As previously discussed herein, notice pleading demands more than conclusory statements or mere hypotheticals. *See, e.g., Warhanek v. Bidzos*, No. C.A. 12-263-RGA-SRF, 2013 WL 5273112, at *5 (D. Del. Sept. 18, 2013). What is clear is Plaintiffs wish to make bald claims in the hopes that this Court will allow the claims and require further undue burden and expense on behalf of the Defendants to defend against them. The law does not support Plaintiffs' effort here to conjure up a claim, provide no factual support in the Complaint, and move past a Motion to Dismiss. Plaintiffs' claim under O.C.G.A. §§ 10-5-31 and 10-5-58(d) should be dismissed.

C. Plaintiffs Failed to State a Claim for Control Person Liability or Respondeat Superior Under the Georgia Securities Act.

As with their federal securities claim, Plaintiffs attempt to impose secondary liability against Vantage, Vantage Corporation's Subsidiaries, and Finegold under theories of control person liability and respondeat superior. Compl. ¶¶ 55, 51. Like their federal securities law claims, these claims are inherently deficient and should be dismissed.

First, because Plaintiffs failed to cite a violation of the Georgia Securities Act, their secondary claims of liability must be dismissed, regardless of the theory upon which such claims are premised. Furthermore, even if Plaintiffs had properly alleged an underlying violation, there is no law that backs Plaintiffs' attempt to impose secondary liability for an alleged violation of the Georgia Securities Act on a theory of respondeat superior, or any agency theory for that

matter. This "throw enough mud at the wall and hope something will stick" approach not only lacks legal support but also flies in the face of notice pleading requirements.

Lastly, Plaintiffs also fail to allege a claim for control person liability under the Georgia Securities Act. As an initial matter, Count Two alleges that Defendants "are jointly and severally liable to Plaintiffs under O.C.G.A. § 10-5-58(d)." Compl. ¶ 56. However, contrary to Plaintiffs' assertion, O.C.G.A. § 10-5-58(d) has nothing to do with joint and several liability related to Plaintiffs' Georgia securities law claims. O.C.G.A. § 10-5-58(d) authorizes a private cause of action against "a person acting as a broker-dealer or agent that sells or buys a security . . . in violation of Section 10-5-31."

In the event, however, Plaintiffs intended to cite O.C.G.A. § 10-5-58(g), this claim fails. Section 10-5-58(g) imposes joint and several liability "with and to the same extent as persons liable" for violations of the Georgia Securities Act. Such secondary liability may attach to a "person that directly or indirectly controls" a liable person or to an "individual who is a managing partner, executive officer, or director" of such person. O.C.G.A. § 10-5-58(g)(1)-(2). Although there is no reported case that sets forth a test for control person liability under the Georgia Securities Act, it has been recognized that the Georgia Securities Act "control liability provisions are nearly identical to the federal statute." *Curry v. TD Ameritrade, Inc.*, 662 F. App'x 769, 772 n. 5 (11th Cir. 2016). Thus, Plaintiffs' claims under the Georgia Securities Act fail for the same reasons as previously discussed with respect to Plaintiffs' federal securities law claims. In particular, Plaintiffs fail to set forth any allegations that remotely touch upon Vantage, Vantage Corporation's Subsidiaries, and/or Finegold's ability to control Askew. There are simply no factual allegations that tend to show Defendants controlled the actions of Askew, much less directed him to make any alleged misrepresentations or otherwise act improperly in

connection with the sale of the Stock. The absence of these allegations renders Plaintiffs' claim for control person liability insufficient and therefore this claim should be dismissed. *See id.* at 772 ("Nothing Appellants allege even remotely approaches the level of control necessary to state a claim.").

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY.

Plaintiffs' breach of fiduciary duty claim should also be dismissed because none of the Defendants owed Plaintiffs a fiduciary duty and, in any event, Plaintiffs failed to state a claim that any purported duty was breached.

A. Plaintiffs' Breach of Fiduciary Duty Claim Fails To Meet the Pleading Requirements of Rule 9(b).

At the heart of Plaintiffs' breach of fiduciary duty claim is their allegation that "Plaintiffs made these investments and purchased Vantage Corporation stock as a result of direct misrepresentations and omissions made to them by Askew." Compl. ¶ 21. A fiduciary duty claim rooted in alleged fraud falls within the ambit of Rule 9(b). *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 198 (D. Del. 2000) (applying Rule 9(b) to claims involving "circumstances of fraud" and noting that a complaint must provide "means of injecting precision and some measure of substantiation into [plaintiffs'] allegations of fraud.")

Here, Plaintiffs have not even scratched the surface of satisfying the heightened pleading requirement of Rule 9(b) with respect to each Defendant. Plaintiffs have not alleged any facts showing the "what, where, when and how" related to Plaintiffs' statement(s) that forms the basis of their Complaint. Nor have Plaintiffs pled how Vantage, its Subsidiaries or Finegold "participated in" the alleged fraud, or any related specific injury. Plaintiffs' breach of fiduciary duty claim should be dismissed for this reason alone.

B. Defendants Did Not Owe Plaintiff any Fiduciary Duties.

A fiduciary relationship arises only "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost faith, such as the relationship between partners, principal and agent, etc." O.C.G.A. § 23-2-58. "Under Delaware law, 'a breach of fiduciary duty claim must be based on an actual, existing fiduciary duty relationship between the plaintiff and the defendants *at the time of the alleged breach*.'" *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1166 (Del. Ch. 2002) (emphasis added).

Here, Plaintiffs' breach of fiduciary duty claim is premised on alleged conduct by Askew that took place before they became stockholders. Plaintiffs have presented no argument nor is there any legal support for their claim that any fiduciary duty was owed by Askew to Plaintiffs at the time the alleged representations in the Complaint were made. Accordingly Plaintiffs cannot establish breach of fiduciary duty as a matter of law and therefore this claim should be dismissed. Furthermore, Plaintiffs have set forth no facts with respect to Finegold that indicate Finegold owed them a duty, much less breached that duty. For these reasons, Plaintiffs' breach of fiduciary duty claim should be dismissed.

Not only have Plaintiffs failed to plead breach of fiduciary duty as set forth above, they cannot sustain this claim as to Vantage and its Subsidiaries because corporations do not owe a "fiduciary duty" to a stockholder as a matter of law let alone individuals where were not even stockholders at the time the alleged statements were made as claimed in the Complaint. *See A.W. Fin Servs. S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1127 n. 36 (Del. 2009); *Arnold v. Society for Sav. Bancorp, Inc.*, No. 12883 1995 WL 376919, at *8 (Del. Ch. Jun. 15, 1995); *In re Wayport, Inc. Litigation, Cons.*, No. 4167-VCL (Del. Ch. May 1, 2003). Accordingly, this claim as to all such Defendants should be dismissed.

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR NEGLIGENCE.

Count Six of Plaintiffs' Complaint is substantively identical to their breach of fiduciary duty claim, but instead alleges that Defendants breached their duty of care to Plaintiffs as stockholders. Because Plaintiffs failed to allege the requisite elements of a negligence claim, Count Six should be dismissed as to all Defendants.

To allege negligence under Delaware law, Plaintiffs' Complaint must allege "a duty, the breaching party, the breaching act, and the injured party." *White v. APP Pharm., LLC*, No. 10C-04-061 CLS, 2011 WL 2176151, at *2 (Del. Super. Apr. 7, 2011). Plaintiffs' negligence claim wholly fails to meet these requirements. Instead, Plaintiffs generally set forth the elements of a negligence claim and leave the Court and Defendants to speculate as to how such elements apply to the circumstances at bar. Plaintiffs' Complaint contains no explanation regarding the specific duties alleged to be owed or breached by Vantage, Askew, or Finegold, no reference to the specific acts allegedly done by each, and no description of the damages suffered by Plaintiffs as a result of any alleged negligence. Accordingly, Plaintiffs have failed to meet the basic pleading standards and, as a result, their negligence claim fails and should be dismissed.

V. ACCOUNTING IS AN EQUITABLE REMEDY, NOT A SEPARATE CAUSE OF ACTION.

Finally, Count Seven of Plaintiffs' Complaint alleges that "Vantage Corporation has refused to provide Plaintiffs access to the company's books and records, including information on where and how their investments have been utilized" and that an "accounting is required to determine the amount of money owed to Plaintiffs." Compl. ¶¶ 86, 88. Although Plaintiffs have pled "accounting" as a separate "count" in their Complaint, an accounting is an equitable form of relief, not a separate cause of action. *See Empire Financial Services, Inc. v. Bank of New York, et al.*, No. 99C-01-207 SCD, 2003 WL 22701442 (Del. Sup. Ct. Nov. 13, 2003). In other words,

an accounting "reflects a request for a particular type of remedy, rather than an equitable claim in and of itself." *Stevanov v. O'Connor*, No. 3820–VCP, 2009 WL 1059640, at *15 (Del. Ch. Apr. 21, 2009). As such, an accounting is "dependent on the viability and outcome of the underlying causes of action." *Addy v. Piedmonte*, No. 3571–VCP, 2009 WL 707641, at *23 (Del. Ch. Mar. 18, 2009); *see also Rhodes v. Silkroad Equity, LLC*, Civ. No. 2133–VCN, 2007 WL 2058736, at *11 (Del.Ch. July 11, 2007) ("An accounting is not so much a cause of action as it is a form of relief. Here, the demand for accounting is inherently dependent on the Court's decision on the fiduciary duty claims."); *Garza v. Citigroup Inc.*, 192 F. Supp. 3d 508, 512 (D. Del. 2016), *reconsideration denied sub nom. Lopez Garza v. Citigroup Inc.*, No. C.A. 15-537-SLR, 2016 WL 7197364 (D. Del. Dec. 9, 2016) ("[Plaintiff's] failure to plead any underlying substantive cause of action or fiduciary relationship renders its claim for an accounting legally invalid on its face under Delaware law."). Because the law does not provide for a cause of action for accounting, this purported claim fails and should be dismissed. Defendants note that, even if Plaintiffs proceeded further in this case, it would still have no right for an accounting for a number of reasons including, but not limited to, the fact that Plaintiffs have failed to state a viable cause of action for breach of fiduciary duty, which is a pre-requisite for any effort to seek an accounting.

CONCLUSION

For the reasons stated herein, the Court should dismiss Plaintiffs' Complaint in its entirety as to all Defendants.

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Dated: June 23, 2017
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