IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK J. DALICANDRO Plaintiff, v. LEGALGARD, INC., et al Defendant.	: : : : : : : :	CIVIL ACTION NO. 99-3778

MEMORANDUM AND ORDER

YOHN, J. January_______, 2003

On January 17, 2002, plaintiff, Frank J. Dalicandro, filed a second amended complaint against multiple corporate and individual defendants, alleging violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 (Counts I and II), common law fraud (Count III), breach of fiduciary duty (Count IV), violation of §1-501 of the Pennsylvania Securities Act of 1976 (Count V), breach of contract (Count VI), and unjust enrichment (Count VII).

Now pending before the court is defendant Howard Steinberg's motion to dismiss plaintiff's complaint as it relates to him, pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Currently, plaintiff names Steinberg as a defendant in Counts I, II, III, and V.[1] Because 1) the statute of limitations has expired on both the federal and Pennsylvania securities claims, and 2) plaintiff has failed to allege certain elements of fraud, defendant's

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[1] Initially, plaintiff also asserted Count IV against defendant. Since then, however, plaintiff has withdrawn this claim. Pl. Br. at p. 27.

motion to dismiss will be granted**.**

Factual Background

From 1987 until 1998, plaintiff, Frank Dalicandro ("Dalicandro"), was a founder, shareholder, and employee of Legalgard, Inc. ("Legalgard"), a corporation that "offers independent analysis and consulting related to legal services performed for insurance companies by outside counsel." Sec. Amd. Compl. ¶12. In 1996, another company, Reliance Insurance Co., Inc. ("Reliance"), "acquired an 80% majority interest in Legalgard by purchasing or acquiring an option to purchase all shares held by outside shareholders." *Id.* at ¶15. This action resulted in Reliance taking control of the company. *Id.* at ¶16.

Following Reliance's acquisition of the control of Legalgard, Dalicandro signed a Shareholders' Agreement on December 10, 1996, which "provided for the purchase of shares held by the employee shareholders who terminated employment with the Company within the first two years of the Agreement,[2] as follows: a) If terminated for cause, the lower of $0.70 or adjusted book value per share; b) If terminated without cause, the higher of $0.70 or adjusted book value per share; c) If employment terminated voluntarily, the higher of $0.70 or adjusted book value per share." *Id.* at ¶21.

This agreement also contained a clause stating that "neither the Corporation, its shareholders nor its directors and officers has any duty or obligation to disclose to the Executive

[2] In October 1998, Dalicandro and other employee shareholders requested that this agreement be altered to reflect a recent commitment by Reliance to invest additional funds into the company, thereby altering the book value. Sec. Amd. Compl. ¶25-26. Specifically, they wanted the buy-out value changed to $1.36 per share. *Id*. Additionally, they wanted the terms extended through year 2000. *Id*. On October 16, 1998, Reliance, through Steinberg, agreed to extend the terms through year 2000, but the board of directors of Legalgard rejected the proposal to alter the buy-out figure. *Id.* ¶27-28.

any material information regarding the business of the Corporation or affecting the value of the capital stock of the Corporation before or at the time of a termination of the employment of the Executive, including, without limitation, any information concerning plans for the Corporation to make a public offering of its securities or to be acquired by or merged with or into another firm or entity." Def. Mot. to Dismiss, Exh. B at 9-10.[3]

During the course of 1998, Legalgard and Reliance negotiated with two other companies – Examen, Inc. ("Examen") and Policy Management System, Inc. ("Policy Management") – for the sale of Legalgard. Defendant Howard Steinberg, who allegedly was the general counsel to Reliance and a director on the Legalgard board, participated in these negotiations. Sec. Amd. Compl. ¶¶23-24, 30-31, 36, 40, 44, 46, 51, 74. As a result of these negotiations, on March 31, 1999, Policy Management purchased the assets of Legalgard for "approximately $23 million, which represented a price of approximately $4.00 per each Legalgard share." *Id.* at ¶95.

During this same time, Dalicandro alleges that Reliance and its representatives, including defendant Steinberg, were engaged in a scheme "to push Dalicandro into resigning from

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[3] Ordinarily, where a defendant attaches extrinsic evidence to a Rule 12(b)(6) motion, the court must convert that motion into one for summary judgment under Rule 56 to give the plaintiff an opportunity to respond. *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir. 1970).

Where, however, an attached document is integral to the plaintiff's claims and its authenticity is not disputed, the plaintiff "obviously is on notice of the contents of the document and the need for a chance to refute evidence is greatly diminished." *Pension Ben. Guar. Corp. v. White Consol. Industries, Inc.*, 998 F.2d 1192, 1196-1197 (3d Cir. 1993); *see also Pryor v. National Collegiate Athletic Ass'n.*, 288 F.3d 548, 560 (3d Cir. 2002) ("Documents that the defendant attaches to the motion to dismiss *are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the claim*; as such, they may be considered by the court.").

In this case, plaintiff makes numerous references to sections of the contract in his complaint, and it is clearly integral to each of his claims. Hence, this court is free to consider the contract without converting this motion to one for summary judgment.

Legalgard and selling his shares for amounts much less than they were worth . . . in order to increase the amount of money paid to Reliance. . ..." *Id.* at ¶97-98. As part of this scheme, none of the defendants informed Dalicandro about the negotiations with the companies interested in acquiring Legalgard. Furthermore, in November 1998, Reliance representatives insisted that Dalicandro sign an amendment to the Shareholders' Agreement. The amendment would have altered the terms such that "the price of the shares [would] be reduced to the <u>lower</u> of book value or $0.70 per share in the event of voluntary termination or in the event of termination without cause through June 10, 2000." *Id.* at ¶77. Unless Dalicandro signed this amended agreement, "Reliance [would] refuse[] to invest the additional funds" promised to Legalgard. *Id.* at ¶78. According to Dalicandro, defendant Steinberg, in furtherance of the scheme, specifically told Dalicandro that Reliance wanted him to continue his employment with Legalgard, thereby "affirmatively misrepresenting Reliance's interest in concealing the Examen and Policy Management transactions in order to induce Dalicandro to leave." *Id.* at ¶89.[4]

As result of these actions, and in an effort to avoid signing the amendment to the Shareholders' Agreement, which would have disappointed other Legalgard executives who wanted Reliance to invest additional funds, Dalicandro resigned on December 11, 1998. *Id.* at ¶82. Pursuant to the Shareholders' Agreement, on February 16, 1999, Legalgard exercised its right to buy back his shares at $0.70 per share as that was the greater figure as compared to the book value of $0.10 per share.

Dalicandro claims that he would not have left his job had he known about the

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[4] Plaintiff does not articulate and the court has difficulty discerning how this statement furthered the alleged scheme.

negotiations to sell Legalgard. *Id.* at ¶105. Furthermore, he asserts that he would have purchased additional shares of the company. *Id.* at ¶106. As a result of this alleged fraud, he claims to have lost $731,475 in stock value, $875,000 in salary over a five-year period (less those severance payments made to him), bonuses, and royalties.

Procedural Background

Plaintiff filed his initial complaint on July 26, 1999, alleging claims against only Legalgard and Reliance. *See* Doc. #1. On September 24, 1999, plaintiff amended his complaint to include a breach of contract claim. *See* Doc. #7. On January 24, 2001, plaintiff moved to amend his complaint a second time in order to include claims against the current defendants, who are individual employees, executives, and officers of Legalgard and Reliance. *See* Doc. #32; Sec. Amd. Compl. ¶¶14, 17-19. The court denied plaintiff's motion to amend. Ord. (Yohn, J., Feb. 15, 2001)(Doc. #34). On February 27, 2001, plaintiff filed a motion requesting the court to reconsider its decision. *See* Doc. #35. The court granted plaintiff's motion, vacated its previous decision, and proceeded to evaluate the merits of plaintiff's motion to amend his complaint for a second time. Ord. (Yohn, J., Mar. 15, 2001)(Doc. #37). Plaintiff's motion to amend was granted "only to the extent that it adds claims against four new parties and a claim of unjust enrichment against Legalgard." Ord. (Yohn, J., Jan. 11, 2002) (Doc. #48). On January 17, 2002, plaintiff filed his second amended complaint. *See* Doc. #49. Thereafter, defendant Steinberg filed the pending motion to dismiss. *See* Doc. #59.

Standard of Review

In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court must accept as true all well-pleaded allegations of fact, and any reasonable

inferences that may be drawn therefrom, in the plaintiff's complaint and must determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted); *Colburn v. Upper Darby Township*, 838 F.2d 663, 665-66 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (citations omitted). Although the court must construe the complaint in the light most favorable to the plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Claims should be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Id.*

Discussion

I. Plaintiff's Federal Claims

A. The Statute of Limitations

Plaintiff alleges that, through his acts and omissions, defendant has violated §§10(b) and 20(a) of the Securities Exchange Act. These claims against this defendant, however, are time barred pursuant to the statute of limitations[5] as plaintiff did not bring his claim against

[5] The rules governing the statute of limitations for §10(b) claims also govern plaintiff's §20(a) claim. That section states that:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C.A. §78t(a).

While the Third Circuit has yet to delineate the appropriate statute of limitations which this court should apply to §20(a) claims, that court has held that these claims are predicated on establishing liability under other sections of the Securities Exchange Act. *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 279 (3rd Cir. 1992). Applying the same reasoning, several

defendant within one year of the filing of the first amended complaint, at which time plaintiff had inquiry notice of defendant's role in the alleged fraudulent scheme.

The Supreme Court has stated that "where . . . the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991). Despite the fact that §10(b) of the 1934 Securities Exchange Act does not contain a statute of limitations, the Court held that the "1-year period after discovery combined with a 3-year period of repose" contained within §13 of the 1933 Securities Act, and mentioned in other sections of the 1934 Act, should apply to these claims. *Id.* at 360.

Since that decision, the Third Circuit has clarified that the statute of limitations for federal securities claims is triggered when a plaintiff has "inquiry notice" of the fraud. In *In re NAHC*, the court adopted this standard of notice, stating that "the one-year period begins to run when the plaintiffs 'discovered or in the exercise of reasonable diligence should have discovered the basis of their claim' against the defendant." 306 F.3d 1314, 1325 (3d Cir. 2002) (citations omitted). The court explained that whether parties should have known about the fraud depends

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district courts within this circuit and at least one other court of appeals have held that the statute of limitations governing §10(b) claims also governs §20(a) claims. *See Tracinda Corp. v. Daimlerchrysler AG*, 197 F. Supp. 2d 42, 55 n.5 (D. Del. 2002) (citing *Hill v. Equitable Trust Company*, 562 F. Supp. 1324, 1340 (D. Del.1983) for the proposition "that because 'controlling person claims are predicated upon another person's violation of different provisions of the securities laws, the statute of limitations period governing these claims is the same as the limitations period governing the claims against the controlled person'"); *Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 350 n.2 (2d Cir. 1993)(same). Similarly, this court holds that the statute of limitations for claims brought pursuant to §10(b) applies with equal force to claims brought pursuant to §20(a) of that statute.

on "whether they had 'sufficient information of possible wrongdoing to place them on inquiry notice or to excite storm warnings of culpable activity.'" *Id.* (citations omitted).

The Third Circuit has further stated that the "test for storm warnings is an objective one," and that "[p]laintiffs need not know all of the details or narrow aspects of the alleged fraud to trigger the limitations period; instead, the period begins to run from the time at which plaintiff [sic] should have discovered the general fraudulent scheme." *Id.* at 1326 (citations and internal quotations omitted). Consistent with this standard, when pleading securities fraud against a defendant, "it remains sufficient for plaintiffs to plead scienter by alleging facts establishing a motive and an opportunity to commit fraud, or by setting forth facts that constitute circumstantial evidence of either reckless or conscious behavior." *In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 534-535 (3d Cir. 1999) (citations and internal quotations omitted).

In this case, plaintiff's claim must be dismissed against Steinberg because plaintiff has pled "facts that show that his suit is time-barred or otherwise without merit." *Tregenza v. Great American Communications, Co.*, 12 F.3d 717, 718 (7th Cir. 1993) (stating that, in such instances, the plaintiff "has pleaded himself out of court"). The Third Circuit has held that "[w]hile the language of Fed. R. Civ. P. 8(c) indicates that a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) motion to dismiss, an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 n.1 (3d Cir. 1994). That court has also stated that when evaluating statute of limitations defenses in the context of a motion to dismiss, a court "may also consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the

case." *Id.* at 1385 n.2.

Here, giving plaintiff every benefit of the doubt, he had storm warnings of defendant's role in the alleged fraudulent scheme at least by September 24, 1999, when he filed his first amended complaint against the corporate defendants. In that complaint, plaintiff identifies Steinberg as the general counsel of defendant Reliance. First Amd. Compl., p. 6, ¶ 30. He alleges that Steinberg "knew that Policy Management was interested in purchasing Legalgard," and that he "knew that Reliance had no interest in [plaintiff] continuing to work for Legalgard." *Id.* at p. 6, ¶¶ 32, 35. Moreover, he alleges that the corporate defendants, "through the misrepresentations and concealments of Steinberg and Costello, intentionally and recklessly concealed the negotiations with Policy Management so as to push Dalicandro into resigning from Legalgard and selling his shares for an amount much less than they were worth." *Id.* at ¶39. And plaintiff certainly knew that Steinberg told him directly that Reliance wanted him to stay. Yet, plaintiff did not name Steinberg as a defendant in the first amended complaint.

While plaintiff alleges that the letter of November 20, 1998, which he received in November 2000, was the "smoking gun" evidence of fraud that he had been waiting for, the letter is an employment agreement between Legalgard and Howard Lawson & Co., a financial advisor, with reference to the proposed sale to Policy Management. Thus, the letter only confirms that there were negotiations between Legalgard and Policy Management prior to plaintiff's leaving his job on December 11, 1998, facts which plaintiff already knew well prior to November 2000 and, more importantly, facts which plaintiff had already pled against the corporate defendants in his first amended complaint on September 24, 1999. If the information available to plaintiff in 1999 was enough to plead with particularity that the companies were negotiating, that same

evidence would be enough to support this element of a claim against Steinberg in 1999. Moreover, defendant was not mentioned at all in the letter and plaintiff assets no relationship of the defendant to the letter. Hence, the letter does not provide a new basis for claims which could have been asserted against defendant previously.

In sum, plaintiff certainly had at least inquiry notice by the time he filed his first amended complaint on September 24, 1999, and he never sought to sue Steinberg until he filed his motion to amend the first amended complaint on January 27, 2001, a period well in excess of one year. Thus, giving plaintiff every benefit of the doubt, it appears on the face of the complaints that the statute of limitations has expired on plaintiff's federal securities claims against Steinberg.

B. Relation Back

Plaintiff's claims against defendant do not relate back to the first amended complaint because plaintiff did not make any factual mistakes as to defendant's identity. Rather, he simply chose not to bring a claim against him, which cannot be the basis for relation back.

Federal Rule of Civil Procedure 15(c)(3) governs the relation back of amendments to a complaint which, either by addition or substitution, changes the parties. Pursuant to that section, an amended complaint relates back if 1) the claim arose out of the same "conduct, transaction, or occurrence set forth" in the original pleading and 2) within 120 days of the filing of the original complaint, A) the party to be added received notice of the litigation, and B) that party "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against [him]." Fed. R. Civ. P. 15(c)(3). Defendant concedes that plaintiff's second amended complaint meets all of the rule's requirements, except that of mistake

delineated by subsection 2(B).[6]

As district courts within this circuit have made plain, "Rule 15(c)(3) was not intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party, nor to permit a plaintiff to engage in piecemeal litigation." *Schach v. Ford Motor Co.*, 2002 WL 31319454 at *5 (M.D. Pa. Oct. 3, 2002) (citing *Shirsat v. Mutual Pharmaceutical Co., Inc.*, 1996 WL 273674 at *1 (E.D. Pa. May 15, 1996)); *see also Mathai v. Catholic Health Initiative, Inc.*, 2000 WL 1716747 at *3 (E.D. Pa. Nov. 16, 2000) (citing same). The purpose of the rule is to allow plaintiffs who erroneously name the wrong defendant – either because of a mistake in law or fact – to correct their mistake. *See* Rule 15 Advisory Committee Notes 1996 Amendment (stating that "[t]he problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States," and explaining that often times plaintiffs would sue the wrong entity when pursuing appeals from social security denials only to realize their error, seek to correct it, and then be foreclosed from so doing because the statute of limitations had expired).

Unlike those cases in which courts have allowed a plaintiff's addition of new defendants to relate back, plaintiff in this case, by not naming any of the individual participants as defendants, appeared to elect not to sue them and, rather, to simply pursue the employer companies. Plaintiff in this case knew of the negotiations to sell Legalgard when he filed the initial complaint. He also knew of defendant's role in Reliance and Legalgard. Additionally,

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[6] *See* Def. Amended Memo. of Law in Support of Motion to Dismiss, p. 15 ("For purposes of the present motion, Mr. Steinberg will not contest that the claims asserted against him in the [Second Amended Complaint] arise out of the occurrences set forth in the original complaint, or that he received constructive notice of this lawsuit on or before November 23, 1999.").

plaintiff would not need discovery in order to recall any of his conversations with defendant – he presumably could remember them all on his own.

While plaintiff cites *Advanced Power Systems, Inc. v. Hi-Tech Systems*, 801 F. Supp. 1450 (E.D. Pa. 1992) as supporting his relation-back theory in this case, the court is not convinced that it would be appropriate to apply that court's holding to this case. In *Hi-Tech*, the defendant corporation counterclaimed against the corporate plaintiff and, over the course of the litigation, amended its counterclaim four times, the last of which sought to include the president and another principal of the corporate plaintiff as counterclaim defendants. The court held that this amended counterclaim related back to the initial timely complaint, stating that "courts have typically resisted a narrow reading of the mistake element and allowed the addition of responsible individual defendants when plaintiff simply made an error in legal judgment or form in suing only the corporation." *Id.* at 1457.

In reaching that conclusion, however, the court never articulated the reasons for the party's failure to initially bring suit against the newly added defendants. The cases on which that court relied in reaching its holding are readily distinguishable from the current case before this court. The first case cited, *Kinnally v. Bell of Pennsylvania*, 748 F. Supp. 1136 (E.D. Pa. 1990), was a Title VII case. *Id.* at 1138. In those types of cases, "jurisdictional requirements . . . should be liberally construed." *Id.* at 1139. Furthermore, the plaintiff in that case initially brought suit *pro se*. *Id.* at 1140. As the *Kinnally* court correctly stated, "[i]n such circumstances, courts not only consider the parties formally listed as respondents, but look to the plaintiff's 'factual statement' as 'the crucial element' in determining whether the requirements of the pleading have been met." *Id.* (citations omitted).

More importantly, in *Kinnally*, the court more clearly explained its understanding of the mistake element of relation back. It wrote that "[a] mistake . . . includes errors in legal form, for example: where a plaintiff has full knowledge of all relevant actors but lists the technically incorrect party in her complaint." *Id.* at 1142 (citing Notes of Advisory Committee on Rules (1966 Amendment) (discussing hypothetical case in which plaintiff filing suit for social security benefits mistakenly lists the United States, rather than the Secretary of Health, Education and Welfare, as defendant)). This concurs with my understanding of the mistake component of the relation back doctrine.

In the second case cited, *Itel Captial Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253 (11th Cir. 1983), which involved claims of corporate fraud, the defendant added was the *97% owner of the company* alleged to have committed the fraud. *Id.* at 1258. Moreover, in *Powers v. Graff*, 148 F.3d 1223 (11th Cir. 1998), the Eleventh Circuit subsequently clarified its holding in *Itel*. In *Powers*, a class of shareholders brought suit against a penny stock brokerage company, alleging stock manipulation on an institutional scale in violation of federal securities Rule 10(b)(5). *Id.* at 1225. In their fourth amended complaint, the plaintiffs added a number of individual defendants, each of whom was a control person over the corporate defendant. The court of appeals affirmed the lower court's holding that the amended complaint did not relate back. With regard to *Itel*, the court stated that it "established no general rules about suits originally filed against a corporation where the plaintiff later attempts to add corporate control persons or owners as individual defendants." *Id.* at 1226 (citations omitted).

In short, because this is not a case in which plaintiff did not know the name or identity of the individual defendant, and no error of law comparable to those mentioned in the Advisory

Committee Notes occurred, relation back is not justified.

II. Plaintiff's Pennsylvania Claims

A. Securities Claim

Plaintiff similarly alleges that defendant's conduct violates §1-501 of Pennsylvania's Securities Act of 1972. Like his federal claims, however, the statute of limitations has expired on this state law claim.

Section 1-504(a) of the Pennsylvania Securities Act of 1972 articulates the statute of limitations for claims brought pursuant to §1-501, and states that

> [n]o action shall be maintained to enforce any liability created under section 501 . . . unless brought before the expiration of three years after the act or transaction constituting the violation or the expiration of one year after the plaintiff receives actual notice or *upon the exercise of reasonable diligence should have known* of the facts constituting the violation, *whichever shall first expire*.

70 Pa.C.S.A. §1-504(a)(emphasis added).

As this language parallels that of the federal statute of limitations, and as there is no Pennsylvania Supreme or Superior Court decision to the contrary, this court holds that the statute's language requires claims to be brought within one year of either actual or inquiry notice of the fraud. As detailed in the prior section, plaintiff was certainly on inquiry notice of defendant's alleged fraud when he filed his first amended complaint in September 1999, wherein he frequently referenced defendant. While plaintiff argues that the court should apply the doctrine of equitable tolling[7] to this case, the court does not share his opinion. First, neither the Third Circuit nor the appellate Pennsylvania courts have held that this doctrine applies to this

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[7] The doctrine of equitable tolling maintains that a statute of limitations should toll for the time during which "the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part." *Lampf*, 501 U.S. at 363 (citing *Bailey v. Glover*, 21 Wall. 342, 22 L.Ed. 636 (1875)).

type of claim. Second, a recent United State Supreme Court decision, examining the parallel federal one- and three-year statute of limitation, held that "[b]ecause the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." *Lampf*, 501 U.S. at 363. Finally, and most importantly, as discussed previously, the November 18, 1998 letter, discovered by plaintiff in November 2000, provides no new evidence against defendant and its belated discovery is not a basis for equitable tolling. Thus, even if the equitable tolling doctrine is applicable to Pennsylvania securities claims generally, it is not relevant in this case.

In sum, as with his federal securities claims, the statute of limitations has expired on plaintiff's Pennsylvania securities claim, and, hence, it will be dismissed.

B. Common Law Fraud Claim[8]

Plaintiff finally alleges that defendant committed common law fraud by 1) misrepresenting to plaintiff that Reliance wanted him to remain at his job, and 2) failed to disclose to plaintiff any information about Legalgard's negotiations with Examen and Policy Management.[9] Because plaintiff has not alleged that he relied on defendant's verbal misrepresentation that Reliance wanted him to remain at this job in deciding to terminate his employment, and defendant was under no obligation to disclose the company's negotiations to

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[8] While plaintiff argues that defendant has not moved to dismiss this claim, defendant clearly raised the issue of common law fraud in his motion to dismiss. *See* Pl. Br. at p. 27; Def. Mot. to Dismiss at ¶¶3 & 4, Def. Br. at p. 19-25. In spite of this, plaintiff did not brief the issue on its merits.

[9] Plaintiff does not allege that defendant Steinberg made misrepresentations to plaintiff regarding these negotiations. Rather, defendant Steinberg is alleged only to have failed to disclose information about the negotiations to plaintiff.

plaintiff, plaintiff's common law fraud claim with be dismissed.

Plaintiff alleges that, despite defendant's knowledge to the contrary, defendant misrepresented to plaintiff that Reliance wanted plaintiff to remain at his job. Sec. Amd. Compl. ¶89. The Supreme Court of Pennsylvania has held that "[t]he elements of intentional misrepresentation are as follows: 1) A representation 2) which is material to the transaction at hand, 3) made falsely, 4) with the intent of misleading another into relying on it, 5) justifiable reliance on the misrepresentation, and 6) the resulting injury was proximately caused by the reliance." *Bortz v. Noon*, 729 A.2d 555, 560 (Pa. 1999). Here, plaintiff has failed to allege that he left his job, thereby damaging himself, as a result of defendant's telling him to stay. In other words, plaintiff has failed to properly plead that he justifiably relied on defendant's misrepresentation. Hence, he has not stated a claim for fraud on this basis.

Plaintiff, however, further argues that defendant defrauded him by failing to disclose Reliance's negotiations with Examen and Policy Management regarding the potential acquisition of Legalgard.[10] The Pennsylvania Supreme Court has stated that "[t]he tort of intentional non-disclosure has the same elements as intentional misrepresentation . . .." *Id.* Furthermore, although "concealment may constitute fraud, . . . mere silence is not sufficient in the absence of a duty to speak." *Wilson v. Donegal Mutual Ins. Co.*, 598 A.2d 1310, 1316 (Pa. Super. Ct. 1991) (citing *Smith v. Renaut*, 564 A.2d 188, 192 (Pa. Super. Ct. 1989)). A duty to disclose can be

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[10] In his complaint, plaintiff also alleges that another individual provided him with a memorandum authored by Steinberg that explained that the Examen negotiations had terminated in February 1998. Sec. Amd. Compl. ¶¶33 & 34. In April or May 1998, however, those negotiations resumed. *Id.* at ¶35. Because Steinberg is not alleged to have made or known about this disclosure to plaintiff, he was not under any duty to then inform plaintiff when the negotiations resumed with Examen.

imposed either by virtue of the parties' relationship or by statute.

In this case, neither the 1996 Shareholders' Agreement, which governed defendant's fiduciary relationship with plaintiff, nor federal and state securities laws required defendant to share information concerning negotiations with Examen or Policy Management with plaintiff absent a duty to make a public disclosure to all shareholders. First, the Shareholders' Agreement specifically stated that "neither the Corporation, its shareholders nor its directors and officers has any duty or obligation to disclose to the Executive any material information regarding the business of the Corporation or affecting the value of the capital stock of the Corporation before or at the time of a termination of the employment of the Executive, including, without limitation, any information concerning plans for the Corporation to make a public offering of its securities or to be acquired by or merged with or into another firm or entity." Def. Mot. to Dismiss, Exh. B at 9-10. Absent any allegation that plaintiff was coerced, defrauded, or forced into signing this agreement, there is no basis for not concluding that this provision specifically eliminates any duty defendant might have had simply as a consequence of his fiduciary relationship with plaintiff.

Second, the federal and Pennsylvania securities laws impose a duty on companies to *publicly* disclose *material* information regarding their financial well-being, or lack thereof. Pursuant to both §10(b) of the federal law and §401 of Pennsylvania law, information becomes "material" when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also Basic v. Levinson*, 485 U.S. 224, 232 (1988) (applying the *Northway* rule in the §10(b) context); *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 214 (3rd Cir. 2001) (citing *Rosen*

v. Communication Serv. Group, Inc., 155 F. Supp. 2d 310, 321 n.14 (E.D. Pa. 2001) for the proposition that "Section 401 of the Pennsylvania Securities Act is modeled after Rule 10b-5 of the federal securities laws, and requires virtually the same elements of proof").

Plaintiff, however, has not alleged that the negotiations had become material to all shareholders – thereby imposing a duty of public disclosure on the defendant corporations – prior to plaintiff's resignation. Absent such allegations, the securities laws not impose such a duty.

In short, because plaintiff has failed to plead several elements of common law fraud, this claim against defendant will be dismissed. If plaintiff can amend his complaint to meet these deficiencies, within the confines of Rule 11, I will give him an opportunity to do so.

Conclusion

Because 1) the statute of limitations has expired on plaintiff's federal and state securities claims, and 2) he has failed to plead the necessary elements of fraud, defendant's motion to dismiss will be granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK J. DALICANDRO Plaintiff, v. LEGALGARD, INC., et al. Defendant.	: : : : : : : :	CIVIL ACTION NO. 99-3778

Order

And now on this _____ day of January, 2003, upon consideration of defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (Docs. # 59, 61); plaintiff's opposition thereto; defendant's reply thereto; it is hereby ORDERED that defendant's motion is GRANTED, as follows:

1) Count IV is dismissed as to defendant Steinberg by agreement of counsel;

2) Counts I, II, and V are dismissed as to defendant Steinberg with prejudice; and

3) Count III is dismissed as to defendant Steinberg without prejudice to the right of the plaintiff to file a Third Amended Complaint, amending Count III and the factual allegations supporting Count III only that is consistent with this memorandum, if he can do so within the strictures of Rule 11, within 10 days of the date hereof.

William H. Yohn, Jr., Judge