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**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**SHELDON PITTLEMAN, Individually  
and on Behalf of All Others Similarly  
Situating,**

**Plaintiff,**

**v.**

**IMPAC MORTGAGE HOLDINGS,  
INC., et al.,**

**Defendants.**

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**CASE NO. SACV 07-0970AG(MLGx)**

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS THE SECOND AMENDED  
CLASS ACTION COMPLAINT**

Defendants Impac Mortgage Holdings, Inc., Joseph R. Tomkinson, William S. Ashmore, and Gretchen D. Verdugo (“Defendants”) brought a Motion to Dismiss the Second Amended Class Action Complaint (the “Motion”). After considering the parties’ arguments, the Court GRANTS the Motion, with leave to amend. If plaintiff Sheldon Pittleman (“Plaintiff”) wishes to file an amended complaint, he must do so within 21 days from today.

**BACKGROUND**

Plaintiff claims that Impac’s stock price was artificially inflated during the class period. (Mot. 4:17-19.) Impac is a publicly-traded mortgage lender. (Mot. 4:20-21.) During the class

1 period, Tomkinson was CEO and Chairman of the Board, Ashmore was Executive Vice  
2 President and Chief Operating Officer, and Verdugo was CFO. (Mot. 25-28.) Impac specializes  
3 in “Alt-A” loans, which are more stable than sub-prime loans but are not eligible for sale to  
4 prime lenders. (Mot. 5:13-16.) Plaintiff is an investor who lost money investing in Impac.  
5 (Mot. 2:15-16.)

## 6 7 **LEGAL STANDARD**

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9 Private federal securities fraud actions are based on Section 10(b) of the Securities  
10 Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Securities and Exchange Commission Rule 10b-  
11 5 (17 C.F.R. § 240.10b-5). Section 10(b) forbids (1) the “use or employ[ment] . . . of any . . .  
12 deceptive device,” (2) “in connection with the purchase or sale of any security,” and (3) “in  
13 contravention of” Securities and Exchange Commission “rules and regulations.” SEC Rule 10b-  
14 5 forbids making any “untrue statement of a material fact” or the omission of any material fact  
15 “necessary in order to make the statements made . . . not misleading.” 17 C.F.R. § 240.10b-5.  
16 To state a claim under § 10(b), a plaintiff must plead six basic elements: (1) a strong inference of  
17 scienter, (2) a material misrepresentation or omission, (3) a connection with the purchase or sale  
18 of a security, (4) reliance, (5) economic loss, and (6) loss causation. *Dura Pharmaceuticals, Inc.*  
19 *v. Broudo*, 544 U.S. 336, 341-42 (2005).

20 When a plaintiff alleges fraud, a heightened pleading standard is applied and the plaintiff  
21 “must aver with particularity the circumstances constituting the fraud.” FED. R. CIV. P. 9(b).  
22 The particularity requirement is designed “to give defendants notice of the particular conduct  
23 which is alleged to constitute the fraud so they can defend against the charge and not just deny  
24 that they have done anything wrong.” *Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d  
25 1086, 1094 (C.D. Cal. 1999) (quoting *Neubronner v. Milken*, 6 F.3d 666 (9th Cir. 1993)). To  
26 provide this notice, “the complaint must specify such facts as the times, dates, places, and  
27 benefits received, and other details of the fraudulent activity.” *Id.*

28 This is especially true in the context of private federal securities fraud actions. The

1 Private Securities Litigation Reform Act of 1995 (“PSLRA”) imposes stringent pleading  
2 requirements on securities plaintiffs and evidences a desire to “provide a filter at the earliest  
3 stage (the pleading stage) to screen out lawsuits that have no factual basis.” *In re NAHC, Inc.*  
4 *Sec. Litig.*, 306 F.3d 1314, 1332-33 (3d Cir. 2002). The PSLRA is designed “generally to  
5 eliminate abusive securities litigation and particularly to put an end to the practice of pleading  
6 ‘fraud by hindsight.’” *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1084-85 (9th Cir. 2002).

## 7 8 **DISCUSSION**

9  
10 Defendants argue that Plaintiff has not properly alleged the first and second elements of a  
11 private securities fraud claim: scienter and material misrepresentation. (Mot. 4:6-14.)

12 Defendants also argue that Plaintiff may not use group pleading. (Mot. 29:14-32:20.)

### 13 14 **1. SCIENTER**

15  
16 Scienter – a wrongful state of mind – requires a showing of fraudulent intent or  
17 “deliberate or conscious recklessness.” *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 979  
18 (9th Cir. 1999). Under the PSLRA, a plaintiff must “state with particularity facts giving rise to a  
19 strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-  
20 4(b)(2). The Supreme Court has construed this language to mean that, to state a claim under §  
21 10(b), an inference of scienter must “be more than merely plausible or reasonable – it must be  
22 cogent and at least as compelling as any opposing inference of nonfraudulent intent.” *Tellabs,*  
23 *Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2504-05 (2007).

24 Plaintiff fails to plead a strong inference of scienter. Plaintiff packs the Complaint with  
25 30 pages of supposed misstatements and culpable acts, but none of them shows fraudulent intent  
26 or deliberate or conscious recklessness. The former employees’ (“FEs”) statements provide no  
27 specific facts that contradict Impac’s disclosures. In fact, many of the FE statements are  
28 completely benign – for example, that Ashmore did not explain his actions to his employees, that

1 Impac had a strained relationship with KPMG, and that the company’s goal was to approve  
2 loans. Others are so vague as to be meaningless – that overstating borrowers’ income “made  
3 everyone happy,” that the work environment was “crazy.” The most compelling statements are  
4 that Ashmore “knowingly purchased bad loan pools” and that Defendants “were well aware that  
5 the loans [Impac] was buying were either bad or fraudulent.” But these are nothing more than  
6 vague, blanket allegations. The statements made by anonymous bloggers are even less  
7 compelling and seem to be nothing more than idle Internet speculation.

8 Two of the FEs make vague accusations about “spreadsheets” and “Loss Estimate”  
9 reports. These assertions are too generic to satisfy the scienter requirement. *See, e.g., Dura*  
10 *Pharm., Inc. Sec. Litig.*, 548 F. Supp. 2d at 1132 (“[N]egative characterizations of reports relied  
11 on by insiders, without specific reference to the contents of those reports, are insufficient to meet  
12 the heightened pleading requirements of the PLSRA.”).

13 Plaintiff also argues for scienter because Verdugo and Tomkinson signed the Sarbanes-  
14 Oxley (“SOX”) certificates that accompanied Impac’s SEC filings. But signing a SOX  
15 certificate is not adequate to establish scienter. *See, e.g., In re Hansen Natural Corp. Sec. Litig.*,  
16 527 F. Supp. 2d 1142, 1159 (C.D. Cal. 2007) (“[[I]f SOX certificates were enough to show  
17 scienter, then] scienter would be established in every case where there was an accounting error  
18 or auditing mistake made by a publicly traded company, thereby eviscerating the pleading  
19 requirements for scienter set forth in the PSLRA.”) (citing *Central Laborers’ Pension Fund v.*  
20 *Integrated Elec. Servs., Inc.*, 497 F.2d 546, 555 (5th Cir. 2007)).

21 Plaintiff’s statements do not provide any specifics, and they do not show fraudulent intent  
22 or conscious recklessness. The PLSRA was intended to guard against exactly these sorts of  
23 vague, conclusory allegations. Thus, the Complaint fails to plead a strong inference of scienter.

## 25 2. MISREPRESENTATION

26  
27 The PSLRA governs pleading requirements in private federal securities fraud actions. 15  
28 U.S.C. § 78u-4(b). Under the PSLRA, the complaint must: (1) specify each statement or

1 omission alleged to have been misleading, (2) state when and where the statement or omission  
2 was made, (3) identify the speaker and what the person obtained thereby, and (4) state the  
3 reason or reasons why the statement is misleading. 15 U.S.C. § 78u-4(b)(1). If an allegation  
4 regarding the statement or omission is made on information and belief, the complaint must state  
5 with particularity all facts on which that belief is formed. *Id.*

6 Plaintiff spends about 30 pages arguing that Defendants committed material  
7 misrepresentations regarding a wide range of subject areas, including Alt-A versus sub-prime  
8 loans (Mot. 14:24); underwriting for Alt-A loans (Mot. 16:23); delinquencies, repurchases,  
9 secondary market conditions, or margin calls (Mot. 20:11-12); loan loss reserves and write  
10 downs (Mot. 21:4); and optimism or future prospects (Mot. 24:9) . The Court need not address  
11 this issue. The Court has already determined that Plaintiff has not pled a strong inference of  
12 scienter, so even if Plaintiff successfully pleads material misrepresentations, Plaintiff still fails to  
13 plead a securities fraud action.

### 14 15 **3. GROUP PLEADING**

16  
17 In the Ninth Circuit, it has long been “reasonable to presume” that false or misleading  
18 information conveyed in “prospectuses, registration statements, annual reports, press releases, or  
19 other group-published information . . . are the collective action of the corporate officers.” *Wool*  
20 *v. Tandem Computers, Inc.*, 818 F.2d 1433, 1441-42 (9th Cir. 1987). The enactment of the  
21 Private Securities Litigation Reform Act of 1995 (“PSLRA”) called into question this long-  
22 standing principle. The Ninth Circuit has not considered the PSLRA’s effect on group pleading,  
23 but two other circuits have, and both found that the group pleading exception is no longer viable.  
24 *See Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.* 365 F.3d 353, 363 (5th Cir. 2004);  
25 *Makor Issues & Rights, Ltd. V. Tellabs, Inc.*, 437 F.3d 588, 601 (7th Cir. 2006), *vacated on other*  
26 *grounds*, 127 S. Ct. 2499 (2007). Other courts in the Central District have overwhelmingly  
27 rejected the group pleading exception in the wake of the PSLRA. *See, e.g., In re Lockheed*  
28 *Martin Corp. Sec. Litig.*, 272 F. Supp. 2d 928, 936 (C.D. Cal. 2002) (holding that the “group

1 published information doctrine is inconsistent with the PSLRA”); *In re Syncor Int’l Corp.*, 327  
2 F. Supp. 2d 1149, 1172 (C.D. Cal. 2004) (“[T]he individual defendants cannot be liable for the  
3 false statements found in the complaint on a group-pleading theory”); *In re DDi Corp. Sec.*  
4 *Litig.*, No. 03-7063, 2005 U.S. Dist. LEXIS 1056, at \*77 (C.D. Cal. July 20, 2005 (“[Group  
5 pleading is] wholly inconsistent with the PSLRA and its particularity requirement.”)).

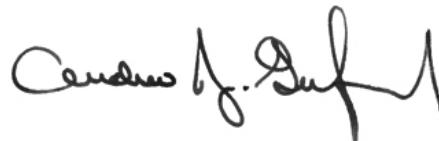
6 Plaintiff argues that the Court should permit group pleading. Defendants argue that the  
7 court should not permit it. The Court has already determined that Plaintiff fails to plead a strong  
8 inference of scienter. Thus, the Court need not determine whether to permit group pleading.

9  
10 **DISPOSITION**

11  
12 The Court GRANTS the Motion, with leave to amend. If Plaintiff wishes to file an  
13 amended complaint, he must do so no more than 21 days from today.

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15 IT IS SO ORDERED.

16 DATED: October 6, 2008

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20 Andrew J. Guilford  
21 United States District Judge  
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