

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

COMMODITY FUTURES TRADING
COMMISSION,

CASE NO.: 8:19-cv-886-T-33SPF

Plaintiff,

vs.

OASIS INTERNATIONAL GROUP,
LIMITED; OASIS MANAGEMENT, LLC;
SATELLITE HOLDINGS COMPANY;
MICHAEL J. DACORTA; JOSEPH S.
ANILE, II.; RAYMOND P. MONTIE, III;
FRANCISCO "FRANK" L. DURAN; and
JOHN J. HAAS,

Defendants;

and

MAINSTREAM FUND SERVICES, INC.;
BOWLING GREEN CAPITAL Management
LLC; LAGOON INVESTMENTS, INC.;
ROAR OF THE LION FITNESS, LLC; 444
GULF OF MEXICO DRIVE, LLC; 4064
FOUNDERS CLUB DRIVE, LLC; 6922
LACANTERA CIRCLE, LLC; 13318 LOST
KEY PLACE, LLC; and 40AKS LLC;

Relief Defendants

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**DEFENDANT, RAYMOND P MONTIE, III'S
MOTION TO DISMISS AND MEMORANDUM OF LAW**

The Defendant, RAYMOND P. MONTIE, III, by and through his undersigned attorneys, moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss all Counts of the complaint on the ground that fraud has not been pled with the particularity required by

Federal Rule of Civil Procedure 9(b), and that the non-fraud counts have not stated plausible causes of action as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

STATEMENT OF FACTS

On April 15, 2019, plaintiff filed its complaint attempting to allege fraud in forex transactions (Count One) and fraud by commodity pool operators (CPOs) and associated persons (APs) of CPOs (Count Two) (Doc. 1). Additionally, Counts Three, Four, and Five, which purport to allege violations of statutes and regulations, incorporate and rely upon the allegations of paragraphs 1-86 of the complaint, including those which attempt to allege fraud (Doc. 1 ¶¶ 113, 133, 141).

The complaint makes the following allegations relating to fraud:

Summary Section (Doc. 1 ¶¶ 1-7)

The named defendants, including Mr. Montie, "have engaged in a fraudulent scheme to solicit and misappropriate money from over 700 U.S. residents for pooled investments in retail foreign currency contracts ("forex")" (Doc. 1, p. 2, ¶ 1).

"Defendants have fraudulently solicited hundreds of members of the public ("pool participants") to invest approximately \$75 million in two commodity pools..." (Doc. 1, p. 2, ¶ 1).

"Defendants ... issued false account statements to pool participants to conceal their trading losses and misappropriation." (Doc. 1, p. 1, ¶ 1).

"Defendants made material misrepresentations to pool participants, including

that: (1) all pool funds would be used to trade forex; (2) pool participants would receive a minimum 12% guaranteed annual return from this forex trading; (3) the Oasis Pools were profitable and returned 22% in 2017 and 21% in 2018; (4) the Oasis Pools had never had a losing month; (5) money being returned to pool participants was from profitable trading; (6) there was no risk of loss with the Oasis Pools; and (7) pool participants earned extra returns by referring other pool participants to the Oasis Pools."

(Doc 1, p. 1-2, ¶ 2).

"Defendants also omitted to tell pool participants, among other things, that DaCorta-the CEO of OIG and the Oasis Pools' head trader-had been permanently banned from registering with the Commission in 2010 and was prohibited from soliciting U.S. residents to trade forex and from trading forex for U.S. residents in any capacity." (Doc 1, p. 2, ¶ 2).

"Defendants' representations were false." (Doc 1, p. 2, ¶ 3).

Paragraph 3 also explains how some of the representations were false: "defendants" deposited into the forex trading accounts only \$21 million of the \$75 million they received from pool participants, and misappropriated the rest in various ways. (Doc 1, p. 2, ¶ 3).

"Defendants created and issued false account statements to pool participants that inflated and misrepresented the value of the pool participants' investments in the Oasis Pools and the Oasis Pools' trading returns." (Doc 1, p. 2, ¶ 4).

Facts Section (Doc. 1 ¶¶ 10-86)

The complaint identified Mr. Montie as a member of defendant Oasis International Group, Limited (OIG), and a member of its Board of Directors (Doc 1 p. 4 ¶ 11; p. 6 ¶ 16), who acted as an associated person (AP) of OIG (Doc 1 p. 4 ¶ 16). The business defendants together operate under the name "Oasis," and Oasis seems to operate a common website (Doc. 1 p. 11 ¶¶

29, 30).

It alleged that the business defendants, including OIG, acting through individual defendants, including Mr. Montie, "fraudulently solicited and obtained" the money at issue (Doc. 1 p. 14 ¶ 41).

"Defendants" made material misrepresentations and omissions to pool participants and prospective pool participants via the Oasis website, phone calls, in-person meetings, and in promissory notes (Doc. 1 p. 14 ¶ 41).

Paragraph 41 identifies seven specific statements, alleged to be fraudulent solicitations, but states that these were "Defendants' fraudulent solicitations," made to "pool participants and prospective pool participants" (Doc. 1 p. 14-15 ¶ 41). It does not attribute any statement to any identified defendant, nor does it identify the recipient of any statement.

Paragraph 43 purports to allege the fraud committed by Mr. Montie:

In January 2019, Defendant Montie represented on a conference call with a prospective pool participant's investment advisor that Oasis was a privately held company in the Cayman Islands that invested in forex. Montie said that Oasis divided the returns it earned trading forex with pool participants who loaned Oasis money, and that interest was deposited into pool participants' accounts on a daily basis. Montie said that any pool participant who brought other pool participants into Oasis would receive a portion of the interest their referral earned from the Oasis Pools. Montie said that Oasis had never had a down day trading forex. Montie said there was no income or net worth requirements for investing in Oasis.

(Doc. 1 p. 15-16, ¶ 43). This paragraph does not identify which statements, if any, are false, nor does it explain how they are false. It does not identify the investment advisor to whom the statements were made, nor does it identify prospective pool participant to whom the information

would (presumably) be conveyed. This paragraph also does not assert that Mr. Montie knew the statements were false, had reason to know that they were false, or was reckless or willfully blind as to whether they were false.

Paragraph 44 alleged that a meeting took place in "late January 2019" between "a couple" and "Prospective Pool Participant #1." It alleges that this unidentified couple "shared their experiences" with Oasis. The paragraph alleges specific representations made by Mr. Montie to the couple. It does not allege that Mr. Montie was present at this meeting or made the representations to Prospective Pool Participant #1; so far as the allegations of this paragraph are concerned, the representations may well have been made to Prospective Pool Participant #1 by the couple alone, and any misstatement they made to Prospective Pool Participant #1 may have been their own misstatements, whether intentional or mistaken. (Doc. 1 p. 16 ¶ 44). As with paragraph 41, paragraph 44 does not identify which statements, if any, are false, explain how they are false, or identify either "the couple" or Prospective Pool Participant #1.

Paragraph 45 alleges that one day after the meeting that occurred on paragraph 44's unspecified date in late January 2019, Mr. Monte had a telephone call with Prospective Pool Participant #1. Here, it is alleged that Mr. Monte made specifically identified statements directly to Prospective Pool Participant #1, but it does not identify this person, identify which statements are false, or explain how they are false. This paragraph also does not assert that Mr. Montie knew the statements were false, had reason to know that they were false, or was reckless or willfully blind as to whether they were false.

Paragraph 85 alleges that Mr. Montie was a controlling person of OIG, that he solicits

prospective pool participants and introduces them to OIG and to co-defendant Michael J. DaCorta, and that he "acted in bad faith or knowingly induced OIG's fraudulent acts" (Doc. 1 p. 28 ¶ 85). No allegation describes why Mr. Montie's actions were done in bad faith or that when he knowingly assisted OIG that Mr. Montie knew OIG was a fraud.

Paragraphs 1-86 are incorporated by reference into each count of the complaint (Doc. 1 p. 28 ¶ 87; p. 31 ¶ 97; p. 35 ¶ 113; p. 39 ¶ 133; p. 40 ¶ 141).

Specifically alleged in Count One is that in connection with retail forex transactions, the business defendants, acting through the individual defendants, including Mr. Montie, have "knowingly or recklessly: (1) cheated or defrauded or attempted to cheat or defraud pool participants; (2) made or caused to be made false account statements; or (3) deceived or attempted to deceive pool participants by any means" (Doc. 1 p. 30 ¶ 92). Count One also alleges that the individual defendants, including Mr. Montie, control the business defendants "and did not act in good faith or knowingly induced, directly or indirectly, OIG's, OM's, and Satellite Holdings's conduct alleged in this Count" (Doc. 1 p. 31 ¶ 95). Other than these allegations, paragraphs 88 through 91 allege the provisions of the statute and regulations, and paragraphs 92 through 95 allege the legal conclusions that the defendants have violated the statutes and regulations, and that the individual defendants, including Mr. Montie, are liable for the conduct of the business defendants.

Count Two alleges that the defendants, including Mr. Montie, "(1) knowingly or recklessly employed devices, schemes or artifices to defraud pool participants and prospective pool participants, or (2) engaged in transactions, practices, or courses of business which operated

as a fraud or deceit upon pool participants or prospective pool participants" (Doc. 1 p. 34 ¶ 108). Like Count One, paragraphs 98 through 100, 103, 104, and 107 allege the provisions of the statutes and regulations, while paragraphs 101, 105, 108, and 109 allege legal conclusions.

Count Three alleges the provisions of the statutes and regulations in paragraphs 114 through 120, while paragraphs 121, 128, and 130 allege legal conclusions.

Count Four alleges in paragraphs 134 through 136 the provisions of the regulations while paragraph 137 through 139 allege legal conclusions.

Count Five alleges provisions of the regulation in paragraphs 142 and 143, and allege legal conclusions in paragraphs 145 and 146.

MEMORANDUM OF LAW

The foundation cases on which all motions to dismiss in civil cases are to be judged are *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (*Twombly*) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (*Iqbal*). Additionally, Rule 9(b), requires a party to "state with particularity the circumstances constituting fraud or mistake."

Twombly said under Rule 8(a)(2) a complaint attacked by motion to dismiss does not need detailed factual allegations, but the obligation to provide the grounds of relief does require more than mere labels and conclusions. A formulaic recitation of the elements of a cause of action is insufficient, and factual allegations have to be sufficient to raise the right to relief above the speculative level.

The Court quoted *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999): "[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be

sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, ... but a court is not required to accept such terms as a sufficient basis for a complaint).¹ Footnote 5 of *Twombly* notes that the issue in *DM Research* was the line between the conclusory and the factual, while in *Twombly* it lay between the factually neutral and the factually suggestive. 550 U.S. at 557, n. 5.

Thus, a complaint must allege facts rather than conclusions, and the facts alleged must be suggestive, rather than neutral, before liability becomes plausible. If liability is not plausible, the complaint should be dismissed. 550 U.S. at 555, 556, 557 n. 5.

Iqbal interpreted and expanded upon *Twombly*, identifying the working principles that underlie *Twombly*. These are:

First, the tenet that a court must accept as true all allegations of a complaint applies to factual allegations and not to legal conclusions. Therefore, threadbare recitals of the elements of a cause of action supported only by conclusory statements are insufficient. The court is not bound to accept as true a legal conclusion couched as a factual allegation. Although Rule 8 relieves a plaintiff of the onus of hypertechnical common law pleading, it does not unlock the doors of discovery for a plaintiff who has only conclusions.

Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Where the well-pleaded facts do not allow the court to infer more than the mere

¹It should be noted that the term "fraud," like "conspiracy" or "agreement" is also a border-line term. *See Thompson v. Bank of New York*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003). ("Because of litigants' proclivity to loosely sling the term 'fraud' into pleadings, the law requires that fraud be described with precision.")

possibility of misconduct, the complaint has not shown that the pleader is entitled to relief.

Iqbal also established the proper, two-pronged approach the court must take on motion to dismiss:

1. Begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. Conclusions can provide the framework of a complaint, but the conclusions must be supported by well-pleaded facts.

2. If there are well-pleaded factual allegations, the court assumes they are true, then determines whether they plausibly give rise to an entitlement to relief. A pleading that relies on naked assertions devoid of factual enhancement is insufficient to withstand a motion to dismiss. *Iqbal*, 556 U.S. at 678.

In addition, Counts One and Two of this complaint attempt to allege fraud and are therefore subject to the heightened pleading standard of Rule 9(b): they must be pled "with particularity."

Taken together, these principles mean that a claim for fraud must set out the details that constitute the fraud. The plaintiff must plead facts as to time, place and substance of the defendant's alleged fraud, specifically the details of the defendant's allegedly fraudulent acts, when they occurred, and who engaged in them. *United States v. McInteer*, 470 F.3d 1350, 1357 (11th Cir. 2006). The Eleventh Circuit, this Court, and indeed, this division of this Court, have repeatedly held that to survive a motion to dismiss, a fraud complaint must contain what amounts to the first paragraph of a news story: it must allege facts that identify the who, what, when, where, and how of the fraud. *Garfield v. NDC Health Corp*, 466 F.3d 1255 (11th Cir. 2006);

Transatlantic, LLC v. Humana, Inc., No. 8:13-cv-1925-T-17TBM, 2016 WL 7319711 (M.D. Fla. Mar. 4, 2016); *Agbottah v. Orange Lake Country Club*, No. 6:12-cv-1046-Orl-37KRS, 2012 WL 3612425 (M.D. Fla. Aug. 21, 2012); *Medina v. Wright*, No. 8:10-cv-2134-T-35AEP, 2012 WL 12915429 (M.D. Fla. Jan. 10, 2012); *Miller v. Ethex Corp.*, No.: 8:09-cv-1520-T-23TBM, 2010 WL 11508263 (M.D. Fla. Feb. 22, 2010). The complaint must identify specific recipients of fraudulent communications. See *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1242 (11th Cir. 2008) (among other deficiencies, the amended complaint does not identify who received the communication); *Securities Exchange Commission v. Spinosa*, 31 F. Supp. 3d 1371, 1376 (S.D. Fla. 2014) (a complaint must identify the recipients of statements to put the defendant on notice of the exact statements upon which the claims are based). That is, a complaint may not allege that the defendants, as a whole, made misrepresentations to the victims, as a whole. It must allege the identity of a defendant who made a specific statement to an identified victim. See *Daniels v. Bursey*, 313 F. Supp. 2d 790 (N.D. Ill. 2004) (plaintiff may not lump the defendants together in a group; he must specify each defendant's participation in the alleged fraud).

The summary section of plaintiff's complaint, paragraphs 1 through 7, consists almost entirely of broadly stated conclusions rather than facts. One omission specifically identified, that DaCorta had been permanently banned from registering with the Commission, was prohibited from soliciting U.S. residents to trade forex, and was prohibited from trading forex for U.S. residents in any capacity, was not attributed to Mr. Monte, but only to defendants, generally, and is therefore not pled with particularity (Doc. 1 p. 2 ¶ 2). Similarly, the misrepresentations specifically identified are alleged to have been made by "defendants" to "pool participants" (Doc.

1 p. 2 ¶ 2).

The fact section is similarly vague. "False statements," "material misrepresentations," and "omissions" are alleged to have been made by "defendants" to "pool participants" and to "prospective pool participants." Paragraphs 44 and 45 do identify specific statements alleged to have been made by Mr. Montie, but do not identify any person to whom he allegedly made the statements. The time when the statements were made is not pled with particularity. Paragraph 43 identifies the time frame of Mr. Montie's statements to an unidentified investment advisor as "January, 2019." Paragraph 45 identifies the time frame of Mr. Montie's telephone call with unidentified Prospective Pool Participant #1 as occurring in "late January 2019." Paragraph 44 also identifies a time frame of "late January 2019" but does not allege that Mr. Montie made the statements within that time frame; rather, it alleges that at an unidentified time, Mr. Montie made statements to an unidentified couple who then, in late January 2019, repeated those statements to an unidentified prospective pool participant.

The plaintiff's claims for fraud against Mr. Montie have not been pled with particularity as required by Rule 9(b). Absent the pejorative use of overbroad terms such as "fraud," "misrepresent," "cheat" and the like, the facts alleged show only that Mr. Monte was associated with some of the other defendants in their business dealings. They are insufficient to raise plaintiff's right to relief from Mr. Monte above the level of speculation as required by *Twombly*.

Furthermore, nowhere in this complaint does the plaintiff allege that Mr. Monte knew that any statements he made were false. Although scienter, unlike fraud, does not have to be pled with particularity, Rule 9(b), it does have to be pled. *Iqbal* 556 U.S. at 686-67 (Rule 9 excuses

a party from pleading intent under an elevated pleading standard but does not give license to evade Rule 8's pleading requirements.). The plaintiff's failure to plead any facts tending to show, beyond speculation, that Mr. Montie knew or should have known that, or acted in reckless disregard of whether, his statements, or any of them, were false, requires dismissal.

Counts Three, Four, and Five attempt to allege violations of statutes and regulations. However, they incorporate by reference and rely upon at least 11 paragraphs from the general allegations which broadly state that fraud has been committed, but which fail to allege the fraud with the particularity required by Rule 9(b). The purpose of the heightened pleading requirement for fraud claims is not only to give the defendant fair notice of the claims brought against it, but also to protect the defendant from harm to its reputation, and to prevent plaintiffs from filing baseless claims and then attempting to discover unknown wrongs. *See Zarrella v. Pacific Life Ins. Co.*, 809 F. Supp. 2d 1357 (S.D. Fla. 2011). By relying on fraud alleged in such broad and imprecise terms, Counts Three, Four, and Five work precisely those wrongs on Mr. Montie, and thus should be required to meet the heightened pleading standards of Rule 9(b). Even without relying on Rule 9(b), these counts allege little more than legal conclusions, and therefore fail to meet the requirements of *Twombly* and *Iqbal*. Counts Three, Four, and Five should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim on which relief can be granted.

In the alternative, if the court determines that Counts Three, Four, and Five should not be dismissed in their entirety, Mr. Montie moves to strike the following paragraphs, which allege fraud without particularity, from Counts Three, Four, and Five: ¶ 1, ¶ 2, ¶ 3, ¶ 4, ¶ 16, ¶ 29, ¶ 30, ¶ 41, ¶ 43, ¶ 44, ¶ 85.

WHEREFORE, Defendant, Raymond P. Montie III, requests the Court dismiss all counts of the complaint. As to Counts Three, Four, and Five, if the Court denies the Motion to Dismiss, then Mr. Montie requests that those paragraphs that allege fraud without particularity be stricken from Counts Three, Four, and Five.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2019, I filed a copy of the foregoing with the Clerk of the Court via the CM/ECF system, which served all parties of record who are equipped to receive service of documents via the CM/ECF system, via electronic mail to Gerard Marrone, Law Office of Gerard Marrone P.C., 66-85 73rd Place, Second Floor, Middle Village, NY 11379

at gmarronelaw@gmail.com and to unrepresented parties Michael J. DaCorta, mdacorta@oasisig.com and Francisco “Frank” L. Duran fduran@oasisig.com .

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