

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

Case No. 8:19-cv-886-T-33SPF

OASIS INTERNATIONAL GROUP,
LIMITED, ET AL.,

Defendants,

and

MAINSTREAM FUND SERVICES,
INC., ET AL.,

Relief Defendants.

**DEFENDANT RAYMOND P. MONTIE, III'S RESPONSE
IN OPPOSITION TO THE RECEIVER'S FIFTH INTERIM MOTION
FOR ORDER AWARDING FEES, COSTS, AND REIMBURSEMENT OF COSTS
TO THE RECIEVER AND PROFESSIONALS, AND MEMORANDUM OF LAW**

Raymond P. Montie, III, a named defendant in this action and victim of the Ponzi scheme outlined in the First Amended Complaint, by and through his undersigned attorney, files this memorandum in opposition to the receiver's fifth interim motion for fees. Doc. 311 (hereinafter "motion").¹ Specifically, Mr. Montie opposes the funds held in the estate being

¹ The fifth motion for fees contains a 3.01(g) certification that may lead the reader to believe an attorney sought out the position of the undersigned. However, an administrative assistant sent an email to the undersigned seeking Mr. Montie's position. M.D. Fla. L.R. 3.01(g) requires a moving party "to confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." No such attempt was made, and the certification 3.01(g) requires was not included in the fifth motion for fees.

used to pay two law firms a total of \$44,538.61 for legal work that resulted in a woefully deficient complaints being filed in the receiver's lawsuit against Mr. Montie in case number 8:20-cv-863-T-60SPF. Doc. 311, Sections II and III (pages 10 and 11).

A. RELEVANT PROCEDURAL HISTORY

1. On April 15, 2019, the Commodity Futures Trading Commission ("plaintiff") filed its complaint attempting to allege several claims, including fraud in forex transactions. Doc. 1. The complaint named multiple defendants, including Mr. Montie. On May 22, 2019, Mr. Montie filed his motion to dismiss, asserting that fraud has not been pled with sufficient particularity to satisfy Rule 9(b) and that the non-fraud counts did not state plausible causes of action. Doc. 58. This Court did not rule on Mr. Montie's motion; rather, on June 12, 2019, the plaintiff filed an amended complaint. Doc. 110. This action has been stayed since July 12, 2019, but the receiver has been permitted to work to fulfill his mandate. Docs. 179, 228 & 290.

2. Before April 14, 2020, counsel for the receiver and the undersigned discussed whether filing the lawsuit against Mr. Montie (ultimately case number 8:20-cv-863-T-60SPF and hereafter referred to the "receiver's lawsuit") would be necessary. Ultimately, the receiver refused to produce information to Mr. Montie from government agencies in the receiver's possession. Further, the receiver refused to permit Mr. Montie access to the discovery the receiver obtained while fulfilling his mandates in this case. Therefore, Mr. Montie declined to waive the applicable statute of limitations. Accordingly, the receiver's lawsuit against Mr. Montie was filed on April 14, 2020. Receiver's lawsuit doc. 1.

3. To prosecute the receiver's lawsuit, the receiver is using two law firms. Doc.

258. In total, six lawyers, including one board certified in appellate law,² with a combined 47 years of experience,³ represent the receiver in the receiver's lawsuit. Receiver's lawsuit docs. 1, 3 through 6.

4. Despite having one year to investigate the claims alleged in the receiver's lawsuit, the original complaint was woefully deficient. Receiver's lawsuit doc. 9.

5. On June 6, 2020, Mr. Montie filed a motion to dismiss the receiver's lawsuit, even though he had not yet been served. Nor had Mr. Montie's attorneys been asked to accept service of the receiver's lawsuit. Receiver's lawsuit docs. 9 & 17.

6. The receiver did not file a response to Mr. Montie's motion to dismiss or otherwise justify the deficiencies in the complaint. Receiver's lawsuit doc. 12.

7. On July 7, 2020, the receiver filed an amended complaint. Receiver's lawsuit doc. 16.

8. On July 27, 2020, Mr. Montie moved to dismiss the amended complaint, because it contained the same deficiencies found in the original complaint. Receiver's lawsuit doc. 24. Mr. Montie's motion to dismiss the amended complaint remains pending in the receiver's lawsuit.

² According to the Florida Bar's appellate law certification page, "[a]ppellate practice deals with recognition and preservation of error committed by lower tribunals, and the presentation of argument concerning the presence or absence of such error to state or federal appellate courts through brief writing, writ and motion practice and oral argument." <https://www.floridabar.org/about/cert/cert-applications-and-requirements/cert-ap/> (last visited September 9, 2020).

³ This was calculated using the date of admission to the Florida Bar, according to the Florida Bar records. While the receiver has also been a licensed lawyer in Florida since 1984, his years of practice were not included in the calculation.

9. In the receiver's fifth motion for fees, he seek compensation from the estate intended to benefit victims to pay for the inadequate legal work done in the receiver's lawsuit against Mr. Montie. That same legal work the receiver did not attempt to defend against a motion to dismiss the improper pleading contained within the original complaint.

B. MEMORANDUM OF LAW

The Court has extremely broad powers to supervise a receivership and to determine the appropriate actions to be taken in the administration of the receivership. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The Court should not give the receiver a blank check to determine what is reasonable for the preservation of assets of the estate, especially when seeking compensation for inadequate legal work. The receiver's motion pending before the Court is no more than a request for another blank check for legal work that the receiver could not defend, resulting in an amended complaint being filed. Further, the amended complaint contains the same deficiencies.

The complaint and amended complaint are replete with failures to adequately plead the claims for relief, particularly the failure to plead with the particularity required by Rule 9(b). The receiver's vague pleading makes several false implications, including the suggestion that Mr. Montie bilked investors out of some \$50 million. Receiver's lawsuit docs. 1, 93 & 100. To determine whether the receiver and his professionals seek unjust compensation, the Court must examine the grounds to dismiss the complaints in the receiver's lawsuit.

1. Rule 8(a)(2)

The foundation cases by 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*). Should the Court conclude the amended complaint should be dismissed pursuant to *Twombly* and *Iqbal*, the Court should not compensate the receiver's counsel for the work performed in manufacturing the amended complaint. Given the receiver made no attempt to justify the original complaint, no compensation should be forwarded to the receiver and his professionals for that work. *Twombly* said that 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 must be sufficient to raise the right to relief above the speculative level.

In *Twombly*, 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

¹ Like “conspiracy” or “agreement,” the term “fraud” is 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.”).

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, 557 n. 5.

Iqbal interpreted and expanded upon *Twombly*, identifying the working principles that underlie *Twombly*. First, the tenet that a court must accept as true all allegations of a complaint applies to factual allegations and not to legal conclusions. The court is not bound to accept as true a legal conclusion couched as a factual allegation. 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 possibility of misconduct, the complaint has not shown that the pleader is entitled to relief.

Thus, when evaluating a complaint on motion to dismiss, the court must take a two-pronged approach. It begins by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. Although conclusions can provide the framework of a complaint, the conclusions must be supported by well-pleaded facts. Next, once it identifies well-pleaded factual allegations, the court 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.

2. Rule 9(b)

If a complaint alleges fraud or mistake, Rule 9(b), requires a party to “state with particularity the circumstances constituting fraud or mistake.” All counts of the amended complaint attempt to allege fraud and are therefore subject to the heightened pleading standard of Rule 9(b); they must be pled “with particularity.” A claim for fraud must set out the details that constitute the fraud. A plaintiff satisfies the particularity rule if the complaint includes (1) precisely what statements were made in what documents² or what omissions were made; (2) the time and place of each such statement and the person responsible for making, or, in the case of omissions, not making, each statement; (3) the content of such statements and the manner in which they misled the plaintiff; and (4) what the defendants obtained as a consequence of the fraud. *Crawford's Auto Center, Inc. v. State Farm Mut. Auto. Ins. Co.*, 945 F.3d 1150 (11th Cir. 2019). 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. *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008); *Omnipol, a.S. v. Worrell*, 421 F. Supp. 3d 1321, 1334 (M.D. Fla. 2019) (Covington, J.); *Agbottah v. Orange Lake Country Club*, No. 6:12-cv-1046-Orl-37KRS, 2012 WL 3612425 (M.D. Fla. Aug. 21, 2012) (Dalton, J.); *Miller v. Ethex Corp.*, No.: 8:09-cv-1520-T-23TBM, 2010 WL 11508263 (M.D. Fla. Feb. 22, 2010) (Merryday, J.).

² And, as applied to this case, precisely what oral statements were made in what meetings.

The complaint must identify specific recipients of fraudulent communications. *See Mizzaro, supra; SEC v. Spinosa*, 31 F. Supp. 3d 1371, 1376 (S.D. Fla. 2014) (complaint must identify the recipients of statements). The complaint must also allege the identity of a specific defendant who made a specific statement to an identified victim. *Ambrosia Coal & Const. Co. v. Pages Morales*, 482 F.3d 1309, 1317 (11th Cir. 2007) (*Ambrosia*); *United States ex rel. Silva v. VICI Marketing, LLC*, 361 F. Supp. 3d 1245 (M.D. Fla. 2019) (*Silva*). Rule 9(b) does not permit a plaintiff to allege that the defendants, as a whole, made misrepresentations to the victims, as a whole. Yet that is exactly what the receiver did in the complaints filed in the receiver's lawsuit.

Finally, a plaintiff cannot satisfy the particularity requirement of Rule 9(b) with a complaint that is filed on information and belief. *United States ex rel Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1310 (11th Cir. 2002), citing *United States ex rel. Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1052 (S.D. Ga. 1990).

3. The Amended Complaint in the Receiver's Lawsuit

The receiver'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," "stolen," and the like, the facts alleged only that Mr. Montie was associated with some of the other defendants in their business dealings. The amended complaint also fails to allege facts sufficient to raise the receiver's right to relief from Mr. Montie above the level of speculation as required by *Twombly*.

Nowhere in the amended complaint does the receiver allege that Mr. Montie knew that any statements he made were false. Although scienter, unlike fraud, does not have to be pled with particularity, 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 receiver's failure to plead any facts tending to show, beyond speculation, that Mr. Montie knew any of his statements were false, requires dismissal under Rule 8(a)(2). The failure to plead the alleged fraud in adequate detail, ascribing to Mr. Montie (rather than to Mr. Montie and other persons) specifically identified false statements which are material, and which were made to identified victims, requires dismissal under Rule 9(b).

The amended complaint contains few allegations attributing specific conduct to Mr. Montie, and no allegations identifying any specific victim. Where the pertinent allegations of fraud lump all defendants together without specific assertions about a defendant's conduct, Rule 9(b) requires dismissal of that defendant. *Ambrosia*, 482 F.3d at 1317; *Silva*, 361 F. Supp. 3d 1245.

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 defendants against spurious charges of immoral and fraudulent behavior. *Ziamba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001). It is "to protect the defendant from harm to its reputation, and to prevent plaintiffs from filing baseless claims and then attempting to discover unknown wrongs." *Zarrella v. Pacific Life Ins. Co.*, 809 F. Supp. 2d 1357, 1366 (S.D. Fla. 2011); see *Thompson v. Bank of New York*, 862 So. 2d 768, 770 (Fla. 2003)

(“Because of litigants’ proclivity to loosely sling the term ‘fraud’ into pleadings, the law requires that fraud be described with precision”). By relying on fraud alleged in such broad and imprecise terms, the plaintiff works precisely those wrongs on Mr. Montie. 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*.

The vague pleading contains several false implications, in particular, the suggestion that Mr. Montie bilked the investors out of some \$50 million. No part of the amended complaint contains a specific allegation identifying payments made to Mr. Montie. Exhibit A to the amended complaint does not identify any payments made to Mr. Montie. Although the plaintiff labeled the document “Raymond Montie Transactions,” Exhibit A lists only the amount of incoming and outgoing transfers, the date of the transfers and the name of the account from which or to which the transfers were made. Not one entry identifies either the person or entity transferring money into these accounts or the person or entity who received a transfer out of the account. In particular, not one entry identifies Mr. Montie or Oasis International Group, Limited (“OIG”) as the recipient of any transfer. For example, Exhibit A shows that on December 16, 2011, an Oasis Management account received \$38,900. It does not show what person or entity provided the \$38,900. Similarly, Exhibit A shows that on February 3, 2012, \$3,583.10 was transferred out of the Oasis Management account, but it does not identify the person or entity who received this money. As far as Exhibit A demonstrates, Mr. Montie could have made all the transfers into the bank accounts (none of which is an OIG account) and received none of the transfers out of the accounts.

The full failures of the amended complaint are recited with particularity in Mr.

Montie's motion to dismiss the amended complaint. Receiver's lawsuit doc. 24, pages 8 through 21.

C. CONCLUSION

The receiver's motion pending before the Court is no more than a request for another blank check for legal work that the receiver could not defend, resulting in an amended complaint being filed. Further, the amended complaint contains the same deficiencies.

Wherefore, Mr. Montie requests this Court to deny the receiver's motion to pay two law firms a total of \$44,538.61 for legal work that resulted in a woefully deficient complaint being filed in the receiver's lawsuit. Doc. 311, Sections II and III (pages 10 and 11).

Respectfully submitted on September 10, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to:

A. Brian Phillips, brian.phillips@phillips-law-firm.com
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I HEREBY FURTHER CERTIFY that on September 10, 2020, I provided the following non-CM/ECF participants with a true and correct copy of the foregoing by electronic mail to:

Gerard Marrone, gmarronelaw@gmail.com
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s/ Vincent A. Citro
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