UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON W. WIAND, as Receiver for
OASIS INTERNATIONAL GROUP, LTD.;
OASIS MANAGEMENT LLC; AND
SATELLITE HOLDINGS COMPANY,

Plaintiff,

v. Case No.: 8:20-cv-863-T-60SPF

RAYMOND P. MONTIE, III,

Defendant.
_______________________________________/

DEFENDANT, RAYMOND P MONTIE, III'S MOTION TO DISMISS THE AMENDED COMPLAINT AND MEMORANDUM OF LAW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Raymond Montie, III, moves to dismiss the amended complaint. The amended complaint fails to contain a short, plain statement of the claim showing the pleader is entitled to relief, as required by Rule 8(a)(2). Interpreting Rule 8, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) *(Twombly*) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) *(Iqbal*) held that a pleader must state a plausible claim for relief, based upon facts rather than mere labels and conclusions, and upon facts that are suggestive rather than neutral. Mr. Montie also moves to dismiss for failure to comply with Rule 9(b), which requires allegations of fraud to be stated with particularity.

I. INTRODUCTION

The court appointed the plaintiff as Receiver for Oasis International Group, LTD, Oasis Management LLC, and Satellite Holdings Company in case number 8:19-cv-886-T-33SPF,

Commodity Future Trading Commission v. Oasis International Group, Ltd. (CFTC Suit, Doc. 7).

Mr. Montie moved to dismiss the plaintiff's original complaint on June 16, 2020 (Doc. 9). On July 7, 2020, plaintiff filed an amended complaint (Doc. 16). The amended complaint corrects few, if any, of the flaws demonstrated by Doc. 9.

II. MEMORANDUM OF LAW

This motion is premised on numerous failures to adequately plead the claims for relief, particularly the failure to plead with the particularity required by Rule 9(b). The plaintiff's vague pleading makes several false implications, including the suggestion that Mr. Montie bilked investors out of some $50 million (Doc 16, ¶¶ 97, 104).

A. Rule 8(a)(2)

The foundation cases by which all motions to dismiss in civil cases are to be judged are *Twombly, supra*, and *Iqbal, supra*. *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 have to 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.").[2]

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 allegations 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

[2]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.")

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.

B. 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 documents[3] or what omissions were made; (2) the time and place of each such statement and the person responsible for making, or 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, the Middle District of Florida, and indeed, this division of the Middle District of Florida, 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. *E.g., 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-

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

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.).

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.

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).

C. The Instant Amended Complaint

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

Nowhere in the amended complaint does the plaintiff 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 plaintiff'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. *Ziemba 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). By relying on fraud alleged in such broad and imprecise terms, the plaintiff works precisely those

wrongs on Mr. Montie.[4] 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 amended complaint should be dismissed not only for failure to plead fraud with particularity, as required by Rule 9(b), but also for failure to state a claim on which relief can be granted, as required by Rules 8(a)(2) and 12(b)(6) and by *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 do so. Although the plaintiff labeled the document "Raymond Montie Transactions," Exhibit A lists only the amounts and dates and the name of the account from which or to which the transfers were made. Not one entry identifies either Mr. Montie or OIG as a person or entity involved in the transfers. 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 that was deposited. Similarly, Exhibit A shows that on February 3, 2012, $3,583.10 was transferred out of the same 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

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[4]And worse, by serving the complaint via e-mail to Mr. Montie's friends, business associates, and to victims of DaCorta's fraud, see request for dismissal with prejudice, *infra*.

the bank accounts (none of which is an OIG account) and received none of the transfers out of the accounts.

D. Allegations That Fail To Meet The Requirements Of Rule 8(A)(2) And Of Rule 9(B)

The inadequate, vague, or misleading allegations identified below are simply representative samples. A complete list would require a memorandum far in excess of the 25-page limit of Local Rule 3.01(a).

Although Mr. Montie is the only defendant here, the plaintiff alleges various faults and wrongdoing allegedly committed by several defendants in the CFTC Suit. Briefly, Joseph Anile, Michael DaCorta, and Mr. Montie are alleged to be members and directors of OIG. OIG is alleged to be one of three companies collectively referred to as the Oasis Entities, and the Oasis Entities are alleged to be part of one or both commodity pools referred to as the Oasis Pools.

The plaintiff directly lumps Mr. Montie together with other CFTC defendants, attributing certain actions to all of them, in paragraphs 29, 33, 35, 37, 38, 40, 41, 43, and 50.

The plaintiff indirectly lumps Mr. Montie together with others by alleging that actions "were" taken or representations "were" made, without identifying who took the actions or made the representations, in paragraphs 39, 43, and 46.

The plaintiff lumps some or all investors together, and sometimes lumps Mr. Montie together with investors rather than other CFTC defendants, without identifying what representations any identified investor relied upon or identifying specifics relating to transfers to investors, in paragraphs 29, 30, 35, 38, 42, 45, 46, 47, and 50.

The plaintiff lumps multiple payments together as "transfers" or "distributions" without identifying any particular transfer, in paragraphs 30, 38, 40, 44, 47; 48, 73, and 75.

The plaintiff alleges facts "on information and belief," in paragraphs 11 and 56.

The plaintiff alleges statements relating to future performance in a manner as to suggest that these were fraudulent misrepresentations, in paragraph 38.

Although the plaintiff, in paragraph 5, defines "insiders" as Anile and DaCorta, the plaintiff alleges that "insiders" performed certain actions in such a way as to imply that Mr. Montie participated in these actions, in paragraphs 30, 40, 41, 42, 43, 44, 45, 47, 49, 50, 73, 74, 75, 76, 77, 78, 79, 81, and 84.

The following charts provide a more in-depth examination of representative samples of the plaintiff's failure to plead adequately.

<u>*Twombly/Iqbal* failures</u>:

1. Conclusions not entitled to the assumption of truth:

Page	¶	allegation
12	30	investors who received transfers in excess of their investment got <u>false profits</u>
12	30	payments to investors were funded with money <u>stolen</u> from others
12	31	Mr. Montie received <u>false profits</u>
12	31	Mr. Montie <u>can't satisfy the statutory good faith defense</u>
23	59	the statements alleged in ¶ 58 to have been made by Mr. Montie are <u>ridiculous statements that no legitimate financial professional would make.</u>
24	60	contemporaneous communications tell a <u>different story</u>. *Plaintiff quotes an e-mail in which DaCorta thanks Montie for encouraging him after his struggles "that 2008 created," and concludes that this letter demonstrates that Montie knew about the details of those struggles, including DaCorta's permanent banishment from registering with the CFTC.*

24-25	61	Mr. Montie failed to disclose that DaCorta filed bankruptcy in 2010 to avoid liabilities to customers.
24-25	61	Mr. Montie failed to disclose items of public information that he either knew or willfully ignored.
24-25	61	Mr. Montie was obligated to know or at least to inquire about and investigate the veracity of these statements
27	64	Mr. Montie did not investigate questions asked by a prospective investor because he either already knew of the fraud or completely abdicated his fiduciary dutirs.
27	66	The scheme constituted a massive distribution of unregistered securities.
27	66	The offering violated section 5 of the Securities Act and similar provisions of most state Blue Sky laws.
29	68	Failure to disclose matters alleged in ¶ 67 is prohibited by section 17 of the Securities Act and Section 10 of the Securities Exchange Act and the Blue Sky laws of various states.

Allegations specific to Count I

30	74	The insiders conduct alleged in this complaint amounted to embezzlement, breach of fiduciary duty, breach of contract, fraud, and/or other violations of law
31	80	Mr. Montie cannot satisfy the statutory good faith defense of § 726.105(1)(a)

Allegations specific to Count II

32	86	The circumstances alleged in this complaint render Mr. Montie's retention of benefit inequitable and unjust

Allegations specific to Count III

33	91	Mr. Montie's fiduciary duties to OIG extended to the other Oasis Entities and to the Oasis Pools because they all operated as a single, continous Ponzi scheme

Allegations specific to Count IV

35	102	Mr. Montie knew of or was willfully blind to the acts of Anile & DaCorta

2. Identify well-pleaded factual allegations that do not plausibly give rise to an entitlement to relief. This is difficult to do, primarily because the plaintiff combines what might otherwise be considered well-pleaded facts with legal and factual conclusions (as noted above) and with both facts and factual conclusions that are inadequately pled under Rule 9(b):

Page	¶	Allegation	Reason
10	23 24	DaCorta co-founded OIG with Anile and Montie. Anile co-founded OIG with DaCorta and Montie	The allegations of ¶¶ 23 and 24 taken together, do not give rise to an entitlement to relief because of other allegations made in the same paragraphs. ¶ 23 Alleges Da Corta, in addition to being a principal shareholder and director, was the CEO and chief investment officer of OIG and the sole signatory on Oasis Management's bank accounts. ¶ 24 alleges Anile was OIG's president as well as a principal shareholder and director, and controlled OIG's bank accounts. Anile opened trading accocunts for the Oasis Pools. Anile helped buy real estate with Pool funds, and made non-forex investments with pool funds. Neither paragraph alleges that Mr. Montie had any authority with respect to bank accounts or financial transactions

12	30	Some investors received transfers from the Oasis Entities in an amount that exceeded the amount they invested	The fact that investors get back more than they put in doesn't support a conclusion that they have committed fraud. It is the typical result as to people who are induced to become investors early in the fraud. Montie, as an early investor, according to Exhibit A, invested $ 1,088,882 and got a profit of $620,805. An allegation that one invested in a Ponzi scheme is not sufficient to support a conclusion that the investor participated in the fraud.
26	67	Mr. Montie received the transfers identified in Exhibit A.	All investors expect to receive a return on investment. Mere receipt of funds that happen to have been generated by an alleged Ponzi scheme does not suggest that the recipient participated in the scheme. Mere receipt of promised returns, even if fraudulent, does not support a conclusion that the recipient participated in the fraud.

Rule 9(b) failures:

Page	¶	Allegation	Explanation
13	33	"DaCorta and/or Anile owned and controlled OIG (with Montie)," and DaCorta and/or Anile also owned and controlled Oasis Management and the Oasis pools.	First, the allegation confuses ownership with control. It does not, here or elsewhere in the amended complaint, allege what Mr. Montie did to control OIG, or what authority he had to control OIG. Second, the parenthetical itself is vague. This paragraph clearly alleges that DaCorta and Anile owned and controlled OIG, but use of the parenthetical makes

[cont]			the allegation unacceptably vague as to Mr. Montie. It implies that Montie exercised control, without clearly alleging this as fact.
14	35	Montie, the Insiders [i.e., DaCorta and Anile], and the other CFTC defendants "solicited hundreds (if not thousands)" of people to invest in the pools, and accepted money from at least 700 of them.	Lumps Mr. Montie together with all the CFTC defendants, and lumps together hundreds of investors, without identifying any individual investor that Mr. Montie solicited or from whom Montie accepted money.

Beginning at page 22, the amended complaint alleges some acts specifically attributed to Mr. Montie. These allegations do not cure the foregoing defects. For example, paragraph 57C alleges that a person identified only by his initials said that his parents went to a meeting at Mr. Montie's house, to listen to DaCorta's presentation. It does not allege that any misrepresentations were made at this meeting, or that Mr. Montie made any representations or knew of any false representations. In paragraph 57D, another person identified by initials reported that she invested $10,000 directly through Mr. Montie, but does not allege that she did so as a result of any representation by Mr. Montie, and does not indicate what "directly through" means.

According to paragraph 58, Mr. Montie had meetings and held conference calls with potential investors. The statements Mr. Montie is alleged to have made are statements that DaCorta is his partner and dear friend, that DaCorta has years of experience in the investment business, and that DaCorta has traded in the past with great success for Mr. Montie personally. Nowhere is it alleged that DaCorta was not Mr. Montie's partner and friend; to the contrary, this is the entire thrust of the amended complaint. Nowhere is it alleged that Mr. Montie knew

the money he received was from anything other than successful trading by DaCorta. Plaintiff does allege in paragraph 59 on page 24 that Mr Montie knew "his statements" were false because he knew that DaCorta had lost virtually everything "when his previous forex trading venture collapsed during the 2008 financial crisis." [Emphasis added]. However, paragraph 58 alleges that the only statement Mr. Montie made to investors relating to DaCorta's actual financial performance related to Monte's experience with DaCorta from 2011 onward: "[I]n June, 2017, Montie participated in a conference call ... and made the following statements: ... 'Almost six year [sic] later, I've never had a down month with Mike. We've never lost money. We've only made money.' " [Emphasis added]. It is well known that many businesses failed in 2008, due to the general economic collapse and not necessarily because of any wrongdoing by the businessmen. Therefore, knowing about DaCorta's financial problems in 2008 does not support a conclusion that Mr. Montie must have known in 2013, when OIG was formed, that DaCorta was a Ponzi schemer.

This single example is an important illustration of the critical need for compliance with Rules 8(a) and 9(b) in pleading a fraud claim. The plaintiff, through imprecise statements of fact and reliance on innuendo and implication, has falsely, blatantly, alleged that Mr. Montie lied to investors about events that occurred three years or more before the time period his statements relate to. Plaintiff, relying on paragraphs 58 and 59 makes this same false allegation in paragraph 22 on page 10.

Paragraph 58 also alleges that during a conference call, Mr. Montie said "Mike explained to me how he's got a printing press for money." It is nowhere alleged that "Mike," i.e., DaCorta, did not make such a statement to Mr. Montie. The reference to the printing press

is, of course, hyperbole; it is not alleged that Mr. Montie was trying to convince investors that DaCorta had a printing press and was counterfeiting money. Mr. Montie is also alleged to have told people in these conference calls that "I trust the guy with my life," and "I just can't say enough good things about him." Again, the plaintiff does not allege that Mr. Montie did not trust Mr. DaCorta or believe good things of him.[5]

The plaintiff next alleges several things that Mr. Montie failed to disclose, such as that DaCorta's previous firm failed and caused massive investor losses. The plaintiff does not allege in paragraph 61 or elsewhere that Mr. Montie knew these things, nor does it allege facts which, if proved, would make it incumbent upon Mr. Montie to know them. Paragraph 60 does quote an e-mail DaCorta sent Mr. Montie, thanking him for support after his problems in 2008. No part of this allegation supports a conclusion that Mr. Montie knew anything other than that DaCorta, like so many businessmen, suffered serious financial reversals from the 2008 economic collapse.

It is alleged that Mr. Montie was a co-founder, co-director, and part owner of OIG. It is not alleged (except by innuendo) that Mr. Montie was active in any way other than spreading the word to others. The amended complaint does not allege that Mr. Montie's duties actually involved anything other than sales. It does not allege that Mr. Montie had special access, as a result of his position, to any of the information it alleges he should have disclosed. To the

[5]Discounting the obviously false allegation of paragraphs 85 and 59 that Montie lied about what happened in 2011 and later because he knew about business reversals DaCorta suffered in 2008.

contrary, paragraph 20 alleges that the information, or almost all of it, was available to Mr. Montie because it was available to the public at large.

Additionally, the plaintiff has alleged in paragraph 25 that as a member, officer and director of OIG, Mr. Montie had the duty, authority, and opportunity to access, review, and monitor OIG's bank and trading accounts, as well as the duty, authority, and opportunity to be a signatory on the accounts. It alleges that at best, Mr. Montie abdicated those duties to Anile. However, having the ability to do such things is not the same as having the duty to do them. Every human endeavor involving more than one person also involves division of labor. That owners in general may have the authority to perform duties, does not necessarily imply that each owner must perform every duty. Also, that the things Mr Montie said to investors were false in fact doesn't mean that statements Montie thought were true at the time he made them magically became lies because he didn't perform another member's duties.

The plaintiff makes a similar allegation in paragraph 35, which is invalid for the same reasons stated above. Additionally, paragraph 35 alleges that Montie knew the website was fraudulent and his activities unlawful because he personally solicited American investors. That is a non sequitur. Nowhere does the Amended Complaint allege that Mr. Montie actually knew what the website said, it only alleges that he could have known--an allegation equally applicable to every American investor who invested despite the statement on the website that OIG's services and products are not being offered within the United States or to United States persons.

E. The Individual Counts

1. Count I, Violation of the Florida Uniform Fraudulent Transfer Act

Paragraph 73 alleges that the Oasis Entities have a right to recover transfers made to Mr. Montie because Anile and DaCorta wrongfully made those transfers "under the circumstances alleged in this complaint...." The only circumstances alleged in the amended complaint are the circumstances supposedly constituting fraud, alleged in paragraphs 1-71 and incorporated into Count I by paragraph 72. The allegations of paragraphs 1 through 71 are not pled with particularity, therefore dismissal of Count One under Rule 9(b) is required.

Also, paragraphs 73 through 81 do not allege additional facts, they allege conclusions drawn from the allegations of paragraphs 1 through 71. Most significantly for this count, the amended complaint alleges the legal conclusion that "Montie cannot satisfy the statutory good faith affirmative defense to claims under Florida Statutes § 726.105(1)(a)..." *Twombly* and *Iqbal* hold that conclusions cannot be accepted as fact on a motion to dismiss. The amended complaint fails to state a claim on which relief can be granted and must be dismissed under Rule 8(a)(2).

2. Count II, Unjust Enrichment

Unjust enrichment occurs when the plaintiff has conferred a benefit on the defendant, the defendant knows about the benefit, and the defendant accepts or retains that benefit under circumstances that make it inequitable for the defendant to retain the benefit. *Fla. Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1242 (Fla. 2004); *Am. Safety Ins. Co. v. Griggs*, 959 So. 2d 322, 331 (Fla. Dist. Ct. App. 2007). Because the amended complaint fails to allege fraud with particularity, because it fails to allege with particularity that Mr. Montie committed any

fraudulent act, and because the inadequately pled fraud is the only inequitable circumstance alleged, Count II violates Rules 8(a) and 9(b).

3. Count III, Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, breach of that duty, and damages proximately caused by the breach. *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002).

Quinn v. Phipps, 113 So. 419 (Fla. 1927) is the seminal case on common law fiduciary duty in Florida. Fiduciary duty exists where influence has been acquired and where confidence has been reposed, including informal relations where one person trusts in and relies upon another. *Quinn*, 113 So. at 420-21, as quoted in *McCoy v. Durden*, 155 So. 3d 399 (Fla. Dist. Ct. App. 2014). The relationship between a corporation and its directors and officers involves a quasi-fiduciary relation to the corporation, whereby officers and directors are required to act in the utmost good faith. They undertake to give the corporation the benefit of their best care and judgment, and to exercise the powers the corporation confers on them solely in the interest of the corporation. *Orlando Orange Groves Co. v. Hale*, 144 So. 674 (Fla. 1932), as quoted in *McCoy*, 155 So. 3d at 403. Officers and directors owe both a duty of loyalty and a duty of care to the corporation they serve. *McCoy*, 155 So. 3d at 403.

The breach of fiduciary duty is alleged to have been the fraud described in paragraphs 1 through 71 of the amended complaint, rendering this count subject to Rule 9(b). The amended complaint generally alleges the conclusion that Mr. Montie owed fiduciary duties, including the duty of care and loyalty, to OIG, but as to any breach of those duties, the only acts particularly alleged to have been performed by Mr. Montie consist of speaking to investors and

potential investors about his history with DaCorta. None of the statements particularly alleged to have been made by Mr. Montie are alleged to have been either false or material, or known to be false by Montie. The damages alleged to have been caused consist exclusively of the investors' loss of their investments, and the potential liability of numerous business entities to those investors. All those alleged damages are attributable to the inadequately pled fraud. The allegations of the amended complaint are much too vague to show how OIG's potential liability to investors was proximately caused by Mr. Montie's words and actions, and rest on conclusory statements.

Count III should be dismissed for failure to state a plausible claim and for failure to plead fraud with particularity., Rules 8(a) and 9(b)

4. Count IV, Aiding and Abetting Breaches of Fiduciary Duty

Turnberry Village North Tower Condominium Assoc, Inc. v. Turnberry Village South Tower Condominium Assoc, Inc., 224 So. 3d 266, 277, n. 1 (Fla. Dist. Ct. App. 2017) states that aiding and abetting a breach of fiduciary duty is recognized in Florida, and the elements are (1) a fiduciary duty on the part of a primary wrongdoer; (2) a breach of that fiduciary duty; (3) knowledge of the breach by the alleged aider and abettor; and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. The amended complaint generally alleges that as owners, directors, and officers, Anile and DaCorta owed fiduciary duties to OIG and the other Oasis Entities. The breach of those duties the amended complaint attempts to allege is the fraud, pleaded without the particularity required by Rule 9(b). Further, the amended complaint does not allege that Mr. Montie knew that Anile and DaCorta were committing fraud in violation of their fiduciary duties, or that Mr. Montie encouraged them to

do so. The amended complaint does allege innocent actions by Mr. Montie, which might have substantially assisted Anile and DaCorta to breach their duty to OIG and the other Oasis Entities, but it contains no allegation that Mr. Montie knew his actions would substantially assist wrongdoing. Considering that the wrongdoing alleged is fraud, Mr. Montie contends that for the amended complaint to allege elements 3 and 4, it must allege that Mr. Montie actually knew of the fraud.

Count IV must also be dismissed for violation of Rules 8(a) and 9(b).

5. Applicable to All Counts

There is one final, glaring error that the amended complaint fails to correct: it does not allege the identities of any of the alleged victims. Plaintiff continues to use initials, and on page 22 adds a footnote stating that he does so to protect the investors' privacy. This is improper. Undersigned counsel has not located any case considering whether a plaintiff can assert the privacy interests of a third party, but the cases dealing with the use of pseudonyms by parties all rest their holdings on one of two considerations: whether the party has shown demonstrable risk if his identity becomes known, or whether the cases involves some kind of intimate, personal information. *E.g. In re Chiquita Brands International, Inc.*, No. 19-11494 (11th Cir. July 16, 2020) (fear of murder in retaliation)*; Doe v. Evans*, 202 F.R.D. 173 (E.D.Pa. 2001) (rape victim permitted to sue anonymously); *Doe v. Stegall*, 653 F.2d 180 (5th Cir. Aug. 10, 1981),[6] (threat to batter plaintiffs, based on religion). That a plaintiff might suffer personal

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[6]Cases decided before October 1, 1981 are precedential in the 11th Circuit, Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)]

embarrassment, standing alone, is not enough, *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992).

The procedure is also wrong. In the cases cited above and others, the plaintiff, after filing a complaint captioned "Doe v. [name]" had to request the permission of the court to proceed anonymously, and prove to the court "a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings," *Chiquita* at *10-11 and cases cited therein. Mr. Montie asserts that this same procedure must be required when a plaintiff wishes to make allegations concerning third parties.

F. <u>The Amended Complaint Should Be Dismissed Without Leave To Amend</u>

Where allegations are conclusory in content and lacking in any real allegations of ultimate facts to show fraud, the pleading is insufficient as a matter of law, and a trial court does not err by denying a motion to amend. *See, e.g., Swartz v. KPMG LLP*, 476 F.3d 756 (9th Cir. 2007) (where complaint contains general allegations that the defendants engaged in fraudulent conduct but attributes specific misconduct only to two of the defendants, then alleged the conclusion that the other defendants knew of this specific misconduct and were therefore acting in concert with them without alleging a factual basis for these conclusions was insufficient as a matter of law).

There is no legitimate reason why the instant amended complaint should be so vague. The plaintiff was, or should have been, aware that his amended complaint is too vague to meet the particularity requirement of Rule 9(b). First, he was appointed Receiver by the court in the CFTC suit on April 15, 2019. Doc. 7. On May 22, 2019, Mr. Montie filed a motion to dismiss the CFTC's complaint, on the ground that it failed to plead fraud with particularity, as required

by Rule 9(b) (CFTC Suit, Doc. 58). The motion to dismiss the CFTC complaint demonstrated that, among its many flaws, the CFTC complaint alleged that the defendants as a group committed vaguely described acts or made generally described statements to others, as a group, without attributing specific statements to a specific defendant or identifying specific recipients of those statements--the same flaws that the plaintiff has duplicated in both the complaint and the amended complaint. As Receiver, the plaintiff has actively participated in the CFTC Suit, he had full opportunity to review Mr. Montie's motion to dismiss in that suit and identify allegations that needed to be stated more particularly.

Second, it cannot be seriously suggested that the plaintiff did not have access to information or time sufficient to permit him to correct these errors. In his second request for fees, the plaintiff billed the pool of funds available to victims for work he and his team did reviewing and analyzing Mr. Montie's opposition to the injunction the CFTC originally sought. To date, the plaintiff and his attorneys and experts have billed this pool of funds for more than $930,000. (CFTC Suit Docs. 114, 203, 234, and 272.)[7, 8]

The original complaint in this suit (Doc 1) repeated the government's errors in the CFTC complaint, and Mr. Montie moved to dismiss on substantially the same grounds (Doc. 9). In the amended complaint, plaintiff has made no more than a token effort to amend the multifarious inadequacies of the original complaint, despite Mr. Montie's specific

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[7]This number does not include sums billed after March 31, 2020, and does not include charges for the six lawyers, from two different law firms, representing the plaintiffs in this case.

[8].I.e., in less than a year, plaintiff billed the entities he's supposed to be protecting half again as much as he claims, through Exhibit A, Mr. Montie obtained in more than seven years.

identification of these inadequacies in the previous motion to dismiss. This failure is particularly egregious for two reasons: plaintiff had almost a year to study Mr. Montie's motion to dismiss in the CFTC case before he filed the original complaint in this suit, and although he did make some inadequate effort to correct a fraction of the errors Mr. Montie identified in Doc. 9, other faulty paragraphs identified in Doc 9 were copied verbatim into this amended complaint. For example paragraph 30 of the amended complaint is identical to paragraph 27 of Doc. 1, as are paragraphs 33 and 30, 37 and 34, 38 and 35, 39 and 36, to name only a few.

This indicates that plaintiff is incapable of alleging facts sufficient to satisfy the particularity requirement of Rule 9(b) and the plausibility requirement of Rule 8(a)(2), *Twombly*, and *Iqbal*.

Also, the example discussed above regarding the oblique misrepresentations set forth in paragraphs 58 and 59 demonstrates that plaintiff is trying, through manipulation of the facts, to accomplish by innuendo that which he cannot plead straightforwardly.

Finally, although the plaintiff did not see fit to serve Mr. Montie, he saw fit to e-mail the vague and, frankly, defamatory complaint to Mr. Montie's friends, his business associates, and to victims of the Ponzi scheme, making the damage Rule 9(b) is intended to avoid, *Ziemba*, 256 F.3d at 1202; *Zarrella*, 809 F. Supp. 2d at 1366, even more harmful.

Accordingly, the amended complaint should be dismissed with prejudice.

III. CONCLUSION

All counts of the amended complaint are based in fraud. Fraud is not pled with the particularity required by Federal Rule of Civil Procedure 9(b). Further, the allegations relating to Mr. Montie rely on labels and conclusions, even innuendo rather than clear statements of

alleged fact. The allegations do not allow this court to infer more than the mere possibility of misconduct; they do not allege a plausible claim for relief. It therefore fails to meet the requirements of Federal Rule of Civil Procedure 8(a)(a)(2) and those *of Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The court should grant this motion to dismiss.

WHEREFORE, Mr. Montie requests that the court dismiss this suit with prejudice. The plaintiff, as Receiver in the CFTC Suit, had full opportunity to review Mr. Montie's motion to dismiss the CFTC Suit and correct in the instant pleading the deficiencies specifically identified in the CFTC complaint. Instead, the plaintiff has chosen to duplicate those deficiencies.

Respectfully submitted on July 27, 2020.

LAW OFFICES OF
HORWITZ & CITRO, P.A.

By: *s/ Mark L. Horwitz*
Mark L. Horwitz
Florida Bar Number 0147442
Mark@horwitzcitrolaw.com

s/ Vincent A. Citro
Vincent A. Citro
Florida Bar Number 0468657
vince@horwitzcitrolaw.com

17 East Pine Street
Orlando, Florida 32801
Telephone: (407) 843-7733
Facsimile: (407) 849-1321

CERTIFICATE OF SERVICE

I HEREBY CERTIF Y that on July 27, 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 Jared J. Perez (jperez@wiandlaw.com), Lawrence Dougherty (ldougherty@wiandlaw.com), John W. Waechter (jwaechter@efleagl.com), Courtney Fernald (cfernald@eflegal.com), Beatriz McConnell (bmcconnell@eflegal.com), and Alicia Gangi (agangi@eflegal.com).

s/ Vincent A. Citro
Vincent A. Citro
Florida Bar Number 0468657