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 AND MEMORANDUM OF LAW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Raymond Montie, III, moves to dismiss the complaint. The 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., et al.

(CFTC Suit, Doc. 7). The plaintiff filed the complaint in this case on April 14, 2020, but has failed to serve Mr. Montie and has not requested counsel for Mr. Montie to accept service of the complaint. If plaintiff had made such a request, Mr. Montie, through counsel would have accepted service.

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 1, ¶¶ 93, 100.

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.”).[1]

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,

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[1]It should be noted that 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. Dist. Ct. App. 2003) (“Because of litigants' proclivity to loosely sling the term 'fraud' into pleadings, the law requires that fraud be described with precision.”).

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.

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 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." 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[2] 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* ***[sic]****. v. Worrell*, 421 F. Supp. 3d 1321, 1334

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

(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.).

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) (a 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); *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), 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).

C. THE INSTANT 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 defendants in their business dealings. The complaint 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 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 one or more other persons) specifically identified false statements which are material, and which were made to identified victims, requires dismissal under Rule 9(b).

The complaint contains few allegations attributing specific conduct to Mr. Montie. It contains few, if any, 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); *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.[3] 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 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 complaint contains a specific allegation identifying payments made to Mr. Montie. Exhibit A to the plaintiff's 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

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[3]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*.

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 that was deposited. 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.

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 26, 30, 32, 34, 35, 37, 38, 40, and 47.

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 36, 40, and 43.

The plaintiff lumps all of the business entities together, in paragraphs 27, 37, 41, 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 26, 27, 32, 35, 39, 42, 43, 44, and 47.

The plaintiff lumps multiple payments together as “transfers” or “distributions” without identifying any particular transfer, in paragraphs 27, 35, 37, 41, 44; 45, 69, and 71.

The plaintiff alleges general dates of all alleged wrongs rather than specific dates of specific actions, in paragraphs 34, 51, and 52.

The plaintiff alleges facts “on information and belief,” in paragraph 35.

The plaintiff alleges misrepresentations generally, in paragraph 35 and 36.

The plaintiff alleges statements relating to future performance in a manner as to suggest that these were fraudulent misrepresentations, in paragraph 35.

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, specifically in paragraphs 27, 37, 38, 39, 40, 41, 42, 44, 46, 47, 69, 70, 71, 72, 73, 74, 75, 77, and 80.

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

Twombly/Iqbal failures:

1. Conclusions not entitled to the assumption of truth:

Page	¶	Allegation
9-10	26	Mr. Montie and others defrauded investors.
9-10	26	All purported trading gains were fabricated and fictitious.
10	27	Investors who received transfers in excess of their investment got false profits.
10	27	Payments to investors were funded with money stolen from others.
10	28	Mr. Montie received false profits.
10	28	Mr. Montie can't satisfy the statutory good faith defense.
10	28	Mr. Montie must disgorge under an unjust enrichment theory.
12	35	Mr. Montie and others guaranteed the investors would earn substantial income and could not lose money.
14	37	Anile and DaCorta transferred money to a company through which fraudulent trading occurred.
21	56	the statements alleged in ¶ 55 to have been made by Mr. Montie are ridiculous statements that no legitimate financial professional would make.
21-22	57	Mr. Montie failed to disclose that DaCorta filed bankruptcy in 2010 to avoid liabilities to customers.
21-22	57	Mr. Montie failed to disclose items of public information that he either knew or willfully ignored.
21-22	57	Mr. Montie was obligated to know or at least to inquire about and investigate the veracity of these statements.

23	60	Mr. Montie did not investigate questions asked by a prospective investor because he either already knew of the fraud or completely abdicated his fiduciary duties.
24	62	The scheme constituted a massive distribution of unregistered securities.
24	62	The offering violated section 5 of the Securities Act and similar provisions of most state Blue Sky laws.
25	64	Failure to disclose matters alleged in ¶ 63 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

27	70	The insiders conduct alleged in this complaint amounted to embezzlement, breach of fiduciary duty, breach of contract, fraud, and/or other violations of law.
28	76	Mr. Montie cannot satisfy the statutory good faith defense of § 726.105(1)(a).

Allegations specific to Count II

29	82	The circumstances alleged in this complaint render Mr. Montie's retention of benefit inequitable and unjust.
29	83	Mr. Montie was unjustly enriched.

Allegations specific to Count III

30	87	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

31	98	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). For example:

Page	¶	Allegation	Reason
8	21	DaCorta co-founded OIG with Anile and Montie.	The allegations of ¶¶ 21 and 22 taken together, do not give rise to an entitlement to relief because of other allegations made in the same paragraphs. ¶ 21 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.
8	22	Anile co-founded OIG with DaCorta and Montie.	¶ 22 alleges Anile was OIG's president as well as a principal shareholder and director, and controlled OIG's bank accounts. Anile opened trading accounts 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.
10	27	Some investors received transfers from the Oasis Entities in an amount that exceeded the amount they invested.	Mere receipt of transfers does not give rise, alone, to an inference that fraud occurred.

10	28	Mr. Montie received hundreds of thousands of dollars, and approximately $1.7 million in total transfers.	Without the added allegation that the "hundreds of thousands" constitutes "false profits," which allegation is conclusory and unsupported by adequately pled facts. The receiver does not set forth Mr. Montie's payments into DaCorta's fraudulent scheme. Also, these allegations are neutral rather than suggestive.
12	33	OIG, Oasis Management, and Satellite Holdings had no policies, procedures, or financial controls, did not keep regular or accurate books, did not prepare accurate financial or pool performance statements.	The alleged failures on the part of the business entities does not give rise to a claim against Montie absent well-pleaded facts to support a conclusion that Mr. Montie was responsible to see that these actions were taken. The complaint contains allegations that Mr. Montie was one of three founders of OIG, was one of three persons who owned shares and served as a director of OIG but contains no allegations that it was his duty to undertake the actions ¶ 33 alleges were not undertaken or that he knew such actions were taken.

26	67	Mr. Montie received the transfers identified in Exhibit A.	First, this is a neutral rather than a suggestive fact. Any investor expects 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. Second, Ex. A does not support the "fact" the plaintiff alleges. It identifies bank transactions by date, bank ID and account name, and states the amount of incoming and outgoing transfers. No recipient of funds is identified, no depositor is identified. Ex. A supports a conclusion that Mr. Montie made all transfers into these accounts and all outgoing transfers were paid to someone else as readily as it supports the "fact" the plaintiff asserts in paragraph 67.

Rule 9(b) failures:

Page	¶	Allegation	Explanation
9	26	Montie, the insiders, and the other CFTC defendants defrauded investors.	Lumps Mr. Montie in with many others, without differentiating what he did that might constitute fraud.

11	30	"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 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 the allegation unacceptably vague as to Mr. Montie. It implies that Montie exercised control, without clearly stating this as fact.
11	31	Investors were able to use the website to view their purported account balances.	Lumps investors together, without (presuming the "purported" balances were falsely reported) identifying any false statement to any individually identified investor.
12	32	The website had a banner asserting that OIG's services and products were not being offered in the U.S.	Does not allege that Mr. Montie had any responsibility for the content of the website. Further, use of the term "website" is a way of lumping together all persons, both individuals and witnesses, who were associated with any business identity without identifying Mr. Montie as a person responsible for this statement or knew that it was false.
12	32	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.

12	35	Montie, insiders, and others told investors and potential investors that their money would be used in specific ways.	1. Lumps Mr. Montie together with DaCorta, Anile, and other unidentified persons. 2. Lumps all investors and potential investors together. 3. Alleges a statement about intended future performance rather than a misrepresentation of past or current fact.
12	35	Montie, the insiders, and others guaranteed investors that the Oasis Pools would earn substantial income, that they could not lose money.	1. Lumps Mr. Montie together with DaCorta, Anile, and other unidentified persons. 2. Lumps all investors and potential investors together. 3. Alleges a statement about intended future performance rather than a misrepresentation of past or current fact.
13	35	"On information and belief, investors transferred money to the Oasis Entities based on those representations."	A fraud complaint cannot allege facts on information and belief. Investors are unidentified. No amount of money transferred to the Oasis Entities is identified.

Beginning at page 19, the complaint alleges some acts specifically attributed to Mr. Montie. These allegations do not cure the foregoing defects. For example, paragraph 54C 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 54D, 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 55, 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 plaintiff's complaint. Nowhere is it alleged that Mr. Montie knew the money he received was from anything other than successful trading by DaCorta. The plaintiff alleges, in paragraph 55, 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 rather than investing it. Nor is it reasonable to suggest that any investor believed that to be true, and invested money because DaCorta was printing 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. DaCorta's conduct was typical of a master fraudster. Mr. Montie and countless others were duped by DaCorta.

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 57 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. 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 complaint does not allege, here or elsewhere, that Mr. Montie's duties 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 contrary, paragraph 20 alleges that the information, or almost all of it, was available to Mr. Montie because it was available to the public.

Section A of the complaint, paragraphs 29 through 33, bears the header "Montie and the Insiders Operated The Oasis Entities As A Common Enterprise," but as to Mr. Montie, alleges nothing more than his ownership of OIG, and the fact that he solicited investors.

Paragraph 7 alleges that the term "false profits" means the amount a defendant receives that exceed his principal investment. The complaint, however, does not allege any facts from which the Court can calculate the amount of the alleged false profits. This is probably because the plaintiff is not seeking false profits, but asks this court to turn over to him the entire $1.7 million that Mr. Montie allegedly received (Doc. 1 ¶ 28; 76). Yet he repeatedly alleges that Mr. Montie received false profits--an unacceptably vague and conclusory allegation, absent allegations of fact which would define the amount of those false profits.

E. THE INDIVIDUAL COUNTS

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

Paragraph 69 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 complaint are the circumstances supposedly constituting fraud, alleged in paragraphs 1-67 and incorporated into Count I by paragraph 68. The allegations of paragraphs 1 through 67 are not pled with particularity, therefore dismissal of Count One under Rule 9(b) is required.

Also, paragraphs 69 through 77 do not allege additional facts, they allege conclusions drawn from the allegations of paragraphs 1 through 67. Most significantly for this count, the 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, so the 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 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 fails to state a claim on which relief can be granted.

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. Fiduciary duty exists where influence has been acquired, 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 67 of the complaint, rendering this count subject to Rule 9(b). The 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 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 claim on which relief can be granted and for failure to plead fraud with particularity.

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 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 complaint attempts to allege

is the fraud, pleaded without the particularity required by Rule 9(b). Further, the complaint does not adequately 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 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. The complaint 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 complaint to allege element 4, it must allege that Mr. Montie knew of the fraud. Even if the court considers that element 4 is adequately pled, however, element 3 is not. Therefore, Count IV must be dismissed for failure to state a claim on which relief can be granted.

F. THE COMPLAINT SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND

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); *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097 (9th Cir. 2003) (When an entire complaint is grounded in fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss); *Suez Equity*

Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87 (2d Cir. 2001) (conclusory allegations are insufficient as a matter of law); *see also Thompson v. Bank of New York*, 862 So. 2d 768 (Fla. Dist. Ct. App. 2003).

There is no legitimate reason why the instant complaint should be so vague. The plaintiff was, or should have been, aware that his 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. These are the same flaws that the plaintiff has duplicated in his 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. Nor can it be seriously suggested that the plaintiff did not have access to information 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 spent the pool of funds available to repay victims of more than

$930,000 for pay the plaintiff's fees, and fees for the attorney and experts the plaintiff has hired. Docs. 114, 203, 234, and 272.[1] In in the CFTC Suit, the plaintiff has failed to identify any accounts associated with Oasis that Mr. Montie had signature authority over.

Finally, although the plaintiff has not seen fit to serve this complaint on Mr. Montie, so that Mr. Montie can participate in discovery and begin to prepare his defense, the plaintiff has seen fit to e-mail this 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.

III. CONCLUSION

All counts of this 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. 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

[1] 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 plaintiff in this case.

specifically identified in the CFTC complaint. Instead, the plaintiff has chosen not only to duplicate those deficiencies, but to use the vague complaint as a weapon to damage Mr. Montie.

Respectfully submitted on June 16, 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 CERTIFY that on June 16, 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