UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON W. WIAND, not individually but solely in his capacity as Receiver for OASIS INTERNATIONAL GROUP, LIMITED, *et al.*, Plaintiff, v. ATC BROKERS, LTD., DAVID MANOUKIAN, and SPOTEX LLC, Defendants.	CASE NO. 8:21-cv-01317-MSS-AAS

DEFENDANT, SPOTEX, LLC'S, MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE

Spotex LLC ("**Spotex**"), by its undersigned counsel, hereby files its *Motion to Dismiss Amended Complaint With Prejudice* pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and states in support thereof as follows:

PRELIMINARY STATEMENT

In this action, Burton W. Wiand (the "**Receiver**") presses forward with claims against Spotex for aiding and abetting fraud (Count 1, ¶¶ 132-138), aiding and abetting breaches of fiduciary duties (Count II, ¶¶ 139-149), gross negligence (Count 6, ¶¶ 167-180), and simple negligence (Count 7, ¶¶ 181-192). The crux of his allegations are that the CFTC Defendants perpetrated a Ponzi scheme through the Receivership Entities, caused substantial losses to duped investors, and that Spotex should be held liable for those losses because it provided an electronic trading platform to the exchange firm for the forex trading at the center of the Ponzi scheme. The Receiver does not allege (nor could he) that Spotex was a perpetrator

of the Ponzi scheme, that it had a contractual relationship with the Receivership Entities, or that it received any funds or other transfers from the Receivership Entities.

Despite Spotex's initiation of substantial meet-and-confer conferences with the Receiver prior to, and through, the filing of its motion to dismiss the original complaint, the Receiver filed an Amended Complaint on September 24, 2021 (Doc. 36). Unfortunately, however, the Amended Complaint suffers from the same fatal deficiencies that permeated the Receiver's original complaint, and resulted in the Receiver's decision to scrap that pleading and file a new one. First, the Receiver lacks standing to bring aiding and abetting claims against Spotex because the receivership orders limit his authority to the marshalling and repatriation of the Receivership Entities'[1] assets and his allegations establish that the Receivership Entities' fraudulent acts are imputed to him for purposes of his tort claims under Florida law. Second, the Receiver fails to allege any facts which would tend to plausibly establish that Spotex aided and abetted the Ponzi scheme or was negligent in connection therewith. Third, Spotex is a passive interactive computer service and is immunized from the Receiver's claims pursuant to the Communication Decency Act (CDA). For these reasons, the Receiver's claims against Spotex should be dismissed with prejudice.

[1] Unless otherwise defined in this Motion, capitalized terms used herein shall have the meanings ascribed to such terms in the Amended Complaint (Doc. 36).

STATEMENT OF FACTS

1. Original Complaint

On May 28, the Receiver filed a Complaint against ATC, David Manoukian ("**Manoukian**"), and Spotex asserting the following claims: (1) aiding and abetting fraud against all defendants; (2) aiding and abetting breaches of fiduciary duties against all defendants; (3-5) fraudulent transfers against ATC; (6) gross negligence against all defendants; and (7) simple negligence against all defendants. The claims are predicated on the CFTC Defendants' use of the Receivership Entities to perpetrate a Ponzi scheme. *See, e.g.*, Complaint, Doc. 1, at ¶¶ 1, 2, 4-7, 12, 40-47, 56 and 61. Specifically, the Receiver alleged that Oasis International Group, Limited ("**OIG**") was formed by Anile, DaCorta, and Montie and that they owned, controlled, and operated OIG. *Id.* at ¶ 14. The Receiver also alleged that "the CFTC Defendants operated the Oasis Entities [inclusive of the Receivership Entities] as a Ponzi scheme with OIG as the principal entity used to perpetrate the Ponzi scheme." *Id.* at ¶ 40. Finally, the Receiver alleged that DaCorta and Anile were the sole signatories on, and sole authorized traders of, the subject Oasis trading accounts. *Id.* at ¶¶ 88 and 92.

On July 29, 2021, Spotex initiated meet-and-confer communications with the Receiver concerning its contemplated motion to dismiss pursuant to M.D. Fla., Local Rule 3.01(g)(1) and urged the Receiver to voluntarily dismiss it as a party to this action with prejudice based on the legal issues outlined herein ("**Spotex Letter**"). (Declaration of Matthew S. Adams, dated August 20, 2021, ("**Adams Decl.**") at Exhibit ("**Ex.**") 1, Doc. 32-1). At a minimum, Spotex suggested that the Receiver

should file an Amended Complaint correcting the deficiencies noted in the Spotex Letter in order to avoid the time and expense associated with Spotex's Motion to Dismiss. *Id*. In response to Spotex's good faith efforts to resolve this matter without the need for court intervention, counsel for the Receiver stated that Spotex should proceed with its contemplated Motion to Dismiss. (Adams Decl., at Ex. 2, Doc. 32-2). Unfortunately, the Receiver failed to engage in a meaningful dialogue concerning the serious deficiencies in the original Complaint as outlined in the Spotex Letter, thereby necessitating motion practice. On August 20, 2021, Spotex filed its Motion to Dismiss the Complaint. *See* Doc. 32.

2. Amended Complaint

In response to Spotex's Motion to Dismiss, the Receiver ultimately filed an Amended Complaint, despite being afforded the opportunity to correct blatant deficiencies in his original Complaint. *See* Doc. 36. Significantly, the Receiver continues to allege that the Receivership Entities were dominated and controlled by DaCorta, Anile, and Montie (persons who he alleges engaged in and benefitted from the Ponzi scheme) and that the Receivership Entities lacked any innocent officers or directors. *Id*. at ¶ 14.

The Receiver has now sprinkled additional factual allegations into the Amended Complaint in an effort to correct the deficiencies in his original Complaint. For example, the Receiver alleged that "Spotex also monitored DaCorta's trading activities on the back-office and would notify DaCorta" when "there were margin calls, margin warnings, excessive exposure, excessive credit usage, or trading losses."

Amended Complaint, at ¶ 113. The Receiver further alleges that "Spotex also generated reports of trading activities at the CFTC's Defendants' request, which were delivered to ATC and Manoukian, as they were copied on the correspondences." *Id.* at ¶ 116. The Receiver then alleges that because "Spotex generated one representative set of reports for trading period January 2017 through February 2018 in an email string involving all Defendants," and based on that document, Spotex allegedly "knew about DaCorta's trading losses of third-party monies and large adjustments of the loss amounts." *Id* at ¶ 117. The Receiver asserts that Spotex "actively assisted, participated, supervised and ensured automating or programming the necessary adjustments on the back-end of the investor online portal to allow CFTC Defendants to carry out the ruse of false investor account records." *Id* at ¶ 120. The Receiver also, without any substantive support, asserts that the "Defendants' relationship with Oasis was not passive" because "Spotex consciously continued accepting forex orders for the Oasis Entities[.]" *Id.* at ¶ 131. Finally, the Receiver asserts that because "Spotex never inquired into the background of DaCorta," Spotex was "negligent." *Id.* at ¶ 188.

The Receiver's allegations concerning the extent of Spotex's knowledge of the Ponzi scheme remain contradictory throughout the Amended Complaint. *Cf.* Doc. 36 at ¶¶ 174, 175 (Defendants "knew or were reckless in not knowing") with Doc. 36 at ¶¶ 184, 189, 190, 191 ("Defendants knew, or should have known") with Doc 36 at ¶112 (Defendants "actually knew").

Despite the Receiver's efforts to correct the deficiencies in the original Complaint, the Amended Complaint still suffers from the same fatal defects and

should be dismissed with prejudice, as any further amendment would simply be futile.

STANDARD OF REVIEW

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A complaint will not survive a motion to dismiss pursuant to Rule 12(b)(6) if "it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557).

The Court has a "duty to accept the facts in the complaint as true," but that "does not require [it] to ignore specific factual details of the pleading in favor of general or conclusory allegations." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205–06 (11th Cir. 2007). If a complaint "is wholly devoid of factual allegations suggesting" a defendant's "purposeful involvement in the allegedly fraudulent" conduct, the complaint fails to state a claim for fraud. *See Cisneros v. Petland, Inc.*, 972 F.3d 1204, 1213 (11th Cir. 2020). Because the "threshold question in any claim of negligence is the existence of a duty of care owed by the defendant to the plaintiff," if a complaint fails to allege facts sufficient to demonstrate the existence of such a duty, the complaint fails to state a claim for negligence. *See In re Palm Beach Fin. Partners, L.P.*, 517 B.R. 310, 325 (Bankr. S.D. Fla. 2013).

LEGAL ARGUMENT

The Receiver's Amended Complaint must be dismissed with prejudice because: (1) the Receiver lacks standing to assert aiding and abetting claims against Spotex because his own allegations establish that the Receivership Entities[2] were controlled exclusively by the CFTC Defendants engaging in and benefitting from the Ponzi scheme, and the Receivership Entities were not injured by that scheme; (2) the Amended Complaint fails to state aiding and abetting claims on which relief can be granted; (3) the Amended Complaint fails to state negligence claims on which relief can be granted; and (4) the CDA establishes immunity as to Spotex because Spotex is a passive interactive computer service. The Receiver's minor changes in his Amended Complaint have not cured these severe deficiencies, and his inability to correct these fatal deficiencies through amendment now warrants dismissal with prejudice.

1. The Receiver Lacks Standing to Bring Aiding and Abetting Claims against Spotex

The Eleventh Circuit Court of Appeals' decision in *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296 (11th Cir. 2020) is on all fours with the matter *sub judice*. There, a receiver asserted claims against a bank for aiding and abetting the Ponzi schemers' breach of fiduciary duties, conversion, and fraud. *Id*. at 1301. The receiver alleged that the bank "failed to follow sound banking practices and willfully ignored suspicious banking activity, and thus knowingly encouraged the Ponzi schemers'

[2] Unless otherwise defined in this Motion, capitalized terms used herein shall have the meanings ascribed to such terms in the Complaint (Doc. 1).

tortious conduct *by providing a platform for them to carry out their illicit scheme*." *Id*. (Emphasis added). After the district court granted the bank's motion to dismiss the receiver's aiding and abetting claims with prejudice, the receiver appealed the decision to the Eleventh Circuit Court of Appeals. At oral argument, the Eleventh Circuit "raised the additional concern that because [the] receiver of the [r]eceivership [e]ntities, stands in the shoes of those [e]ntities, and because the [e]ntities are in turn tarred by the fraudulent acts of the Ponzi schemers, [the receiver] could not bring tort claims against [the bank] for aiding and abetting the [r]eceivership [e]ntities' own torts." *Id*. at 1305. In light of this concern, the Eleventh Circuit ordered the parties to provide supplemental briefing of the issue of "whether the fraudulent acts of the [r]eceivership [e]ntities, as the principals of the Ponzi scheme, are imputed to [the receiver] for purposes of his tort claims under Florida law. *Id*.

After analyzing the orders appointing the receiver and empowering him to take certain actions, the Eleventh Circuit concluded that the receiver's powers were limited to marshalling and repatriating the receivership entities' assets including through the prosecution of fraudulent transfer claims. The Eleventh Circuit concluded that a receiver may seek the return of receivership entities' assets that were diverted for unauthorized purposes, e.g., to perpetrate a Ponzi scheme." *Id*. at 1306. Citing *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. Dist. Ct. App. 2003) and *Wiand v. Lee*, 753 F.3d 1194, 1202 (11th Cir. 2014).

These authorized asset recovery actions are, however, distinguishable from common law tort claims against third parties to recover damages for the fraud

perpetrated by the corporation's own insiders. *Isaiah,* supra at 1306. In order to determine whether the receiver had standing to assert these common law tort claims, the Eleventh Circuit analyzed the receiver's complaint. *Id*. at 1307-1308. Since the receiver had alleged that the Ponzi schemers dominated and controlled the receivership entities and used the entities as their "robotic tools", the Eleventh Circuit held as follows:

> At least on the basis of this complaint, the Ponzi schemers' torts cannot properly be separated from the Receivership Entities, and the Receivership Entities cannot be said to have suffered any injury from the Ponzi scheme that the Entities themselves perpetrated. As in *Freeman*, any claims for aiding and abetting the torts of the Receivership Entities' corporate insiders belong to the investors who suffered losses from this Ponzi scheme, not the Receivership Entities. The Receivership Entities thus cannot assert tort claims against third parties like JPMC for aiding and abetting the Ponzi scheme. Because Isaiah, as receiver, stands in the shoes of the Receivership Entities, he too lacks standing to bring these aiding and abetting claims against JPMC. In sum, we hold that Isaiah lacks standing to assert, on behalf of the Receivership Entities, claims against JPMC for allegedly aiding and abetting the Ponzi schemers' breach of fiduciary duties, conversion, and fraud. Like in *Freeman*, Isaiah's ability to pursue these claims is barred not by the doctrine of *in pari delicto*, but by the fact that the Receivership Entities were controlled exclusively by persons engaging in and benefitting from the Ponzi scheme, and so the Receivership Entities were not injured by that scheme. 865 So. 2d at 550–51. ***In the absence of any allegation in the complaint that the Receivership Entities had at least one innocent officer or director and were thus honest corporations injured by the actions of a few corrupt employees, the Receivership Entities—and in turn, Isaiah—lack standing to pursue claims against JPMC for aiding and abetting the Ponzi scheme***.

Id. (Emphasis added).

The Receiver's action against Spotex is indistinguishable from *Isaiah*. Here, the orders appointing the Receiver and empowering him to take certain actions,

establish that his powers are limited to marshalling and repatriating the Receivership Entities' assets including through the prosecution of fraudulent transfer claims. *See* CFTC Action, Doc. Nos. 7 and 177. As set forth above, the Receiver also repeatedly alleges that DaCorta, Anile and Montie dominated and controlled the Receivership Entities to such an extent that the entities were their "robotic tools." *See, e.g.,* Doc. 36, Amended Complaint, at ¶¶ 5, 6, 14, 50, 99, 103, 129 and 141. The Receiver has also sued Montie for conduct in relation to running a Ponzi scheme. *See Wiand v. Montie*, No. 8:20-cv-00863-TPB-SPF (M.D. Fla. Apr. 14, 2020). Accordingly, all three persons who "owned and controlled OIG" are not innocent and are named in the CFTC Complaint underlying this action for perpetrating a Ponzi scheme. *See CFTC v. Oasis International Group, Ltd.*, Case No. 8:19-cv-00886-VMC-SPF (M.D. Fla). Finally, the Receiver fails to allege that the Receiver Entities "had at least one innocent officer or director and were thus honest corporations injured by the actions of a few corrupt employees". Isaiah supra, 960 F.3d at 1306. Instead, the Receiver merely alleges the existence of innocent and honest shareholders and lenders. Doc 36. at ¶¶ 53, 56, 57, and n. 4.

In *Isaiah*, the Eleventh Circuit referred to innocent officers and directors and for good reason. This is because, unlike an officer or director of a company, a shareholder or lender would typically not have the ability to influence or control the company. Accordingly, the Receiver's allegations concerning "innocent and honest" shareholders and lenders are insufficient to grant him standing to bring aiding and abetting claims against Spotex and those claims should be dismissed with prejudice.

The Receivership Entities—and the Receiver who stands in their shoes---lacks standing to pursue such tort claims because the corporations, "whose primary existence was as perpetrators of the Ponzi scheme, cannot be said to have suffered injury from the scheme they perpetrated." *Isaiah*, supra 960 F.3d at 1306.

2. The Amended Complaint Fails to State Aiding and Abetting Claims on Which Relief can be Granted

To assert a claim for aiding and abetting, the Amended Complaint must sufficiently allege: (1) an underlying wrongdoing (fraud, breach of fiduciary duty); (2) actual knowledge by the defendant; and (3) substantial assistance. *See ZP No. 54 Ltd. P'ship v. Fid. & Deposit Co. of Md.*, 917 So. 2d 368, 372 (Fla. 5th DCA 2005) (noting the elements of aiding and abetting fraud); *see also In re Caribbean K Line, Ltd.*, 288 B.R. 908, 919 (S.D. Fla. 2002) (noting the elements of aiding and abetting breach of fiduciary duty). To state claims for aiding and abetting, the Amended Complaint must allege that *each of the defendants*: (1) committed an underlying violation; (2) had actual knowledge of the illegal conduct; and (3) provided substantial assistance to the scheme. The aiding and abetting fraud cause of action is subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b). *See Groom v. Bank of America*, No. 8:08-cv-2567, 2012 WL 50250 at *8 (M.D. Fla. Jan. 9, 2012) (Whittemore, J.).

In *Wiand v. Wells Fargo*, it was alleged that a man, Nadel, orchestrated a massive Ponzi scheme for ten years and that his management companies, Scoop Management, Inc. and Scoop Capital, LLC, raised in excess of $350 million from unwitting investors, purporting to deposit the money in a set of hedge funds. Burton Wiand, the

same court-appointed Receiver as in this case, alleged that Wells Fargo Bank gained actual knowledge of Nadel's fraud and substantially assisted Nadel in stealing money from investors. The initial complaint was dismissed in part for failing to state a claim. Specifically, the Receiver's claims for aiding and abetting common law fraud (Count I), aiding and abetting breach of fiduciary duty (Count II), and aiding and abetting conversion (Count III) were dismissed without prejudice. The claims for fraudulent transfer against Wells Fargo and Best (Count V) and unjust enrichment against Wells Fargo only (Count VI) were upheld and the Receiver was granted leave to file an amended complaint. The Receiver then filed a 76–page, 282–paragraph First Amended Complaint, which was stricken *sua sponte* as a shotgun pleading. The Receiver was granted leave to file a second amended complaint and warned that failure to plead in a manner contemplated by Rule 8 could result in dismissal with prejudice. The Receiver filed his Second Amended Complaint and the defendants again moved to dismiss all of the claims and to strike certain allegations. *See Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1242 (M.D. Fla. 2013).

The Court in *Wiand v. Wells Fargo Bank, N.A.* ultimately held that the Second Amended Complaint did not provide a plausible factual basis to conclude that the bank knew that an actual misappropriation was intended or was in progress. *Id*. at 1249. The Court further held that because the Receiver had failed to allege *actual knowledge* on the part of the bank, the Receiver's claims for (1) aiding and abetting common law fraud, (2) aiding and abetting breach of fiduciary duty, (3) aiding and abetting conversion and (4) common law negligence must all be dismissed. *Id*. at 1247.

As noted previously, the Receiver's allegations here concerning the extent of Spotex's knowledge of the Ponzi scheme are contradictory throughout the Amended Complaint. *Cf.* Doc. 36 at at ¶¶ 174, 175 (Defendants "knew or were reckless in not knowing") with Doc. 36 at ¶¶ 184, 189, 190, 191 ("Defendants knew, or should have known") with Doc 36. at ¶112 (Defendants "actually knew"). For this reason alone, the Receiver's aiding and abetting claims should be dismissed.

Additionally, the aiding and abetting causes of action fail to state claims on which relief can be granted because the Receiver fails to plead facts sufficient to establish, beyond mere speculation, that Spotex had actual knowledge of the CFTC Defendants' fraud or breach of fiduciary duty. The Receiver simply alleges in the Amended Complaint that because Spotex "generated reports" that included "adjustments," Defendants "knew about, assisted, participated, supervised, enabled, and ensured the successful completion of automating the back-end/back-office 'adjustments' to conceal the trading losses from investors and populate false/fictitious profits to them." Doc. 36 at ¶¶ 117 and 127. These allegations are conclusory and insufficient. Simply because Spotex knew adjustments could be uploaded into the back-office does not mean that Spotex could have possibly had actual knowledge that the back-office adjustments *were being used to conceal trading losses from investors*. *See Platinum Ests., Inc. v. TD Bank, N.A.*, No. 11-60670-CIV, 2012 WL 760791, at *3 (S.D. Fla. Mar. 8, 2012) (conclusory statements that a defendant "actually knew" is insufficient to support an aiding and abetting claim where the facts in the complaint only suggest that the defendant "should have known that something was amiss."); *See*

also Wiand v. Wells Fargo Bank, N.A., 938 F. Supp. 2d 1238, 1242 (M.D. Fla. 2013) (the complaint did not provide a plausible factual basis to conclude that the bank knew that an actual misappropriation was intended or was in progress and thus because the receiver failed to allege actual knowledge on the part of the bank, the receiver's negligence and aiding & abetting claims were all due to be dismissed). *See, e.g., Lawrence v. Bank of America,* N.A., No. 8:09-cv-2162, 2010 WL 3467501, at *3-5 (M.D. Fla. Aug. 30, 2010) (Covington, J.), aff'd, 455 F. App'x 904 (11th Cir. 2012) (dismissing plaintiff's aiding and abetting breach of fiduciary duty and conversion claims in the context of Ponzi scheme because the plaintiff failed to adequately allege that defendant affirmatively assisted, concealed, or knowingly rendered substantial assistance to perpetrators in alleged commission of fraud, conversion, or breach of fiduciary duty). That Spotex "assisted" in automating reports, although factually inaccurate but accepted as true, as pled by the Receiver, for purposes of this motion to dismiss under the operative legal standard, does not demonstrate that Spotex could have, should have, or did know that the back-office adjustments were being used to conceal trading losses from investors.

The Receiver's allegations regarding Spotex's "affiliation" with ATC are also insufficient to adequately plead Spotex's actual knowledge under governing law. That Spotex had "a referral relationship with ATC regarding their clients" and "was a firm that provided the technology for these services to clients such as Anile, DaCorta and other Oasis representatives" does not demonstrate actual knowledge. *See* Doc. 36, at ¶ 76. Further the alleged "derivative nature of Spotex's relationship with ATC" does not

mean "ATC's clients were also Spotex's clients." *Id.* ATC was Spotex's client. ATC's clients were certainly not Spotex's clients, as the OIG operators and directors have never even alleged that Spotex had any knowledge of any wrongdoing or participated in any illegal conduct, let alone had a client relationship. (*See* Adams Decl., at Ex. 3 and 4, Doc. 32-3 and Doc. 32-4).

The Amended Complaint also fails to plead facts sufficient to establish, beyond mere speculation, that Spotex knowingly rendered substantial assistance in the CFTC Defendant's commission of wrongdoing or that Spotex knowingly rendered substantial assistance in the commission of the wrongdoing. Significantly, the Receiver's allegations concerning Spotex's "failure to act," cannot constitute "substantial assistance" as a matter of law. *See Richter v. Wells Fargo Bank, N.A.*, No. 2:11-cv-695, 2015 WL 163086, at *3 (M.D. Fla. Jan. 13, 2015) (Steele, J.) (citing *Hines v. FiServ, Inc., No. 08-cv-2569, 2010 WL 1249838, at *4 (M.D. Fla. Mar. 25, 2010)*) and *Groom*, supra at *4.

A defendant does not provide substantial assistance unless his action, or inaction, was a "substantial factor in causing the [underlying violation]." *Richter*, supra at *3 (citing *In re Palm Beach Fin. Partners, L.P., 517 B.R. 310, 348 (Bankr. S.D. Fla. 2013)).* Thus, substantial assistance will not be found where "[t]he amount of assistance alleged is minor in comparison to the massive scope of [the] overall fraudulent scheme." *Id.* Even assuming that the Receiver's allegations and theory concerning the July 2018 e-mail communications set forth at paragraphs 122 through

124 of the Amended Complaint are true, Spotex cannot be said to be a "substantial factor in causing the" fraud or breaches of fiduciary duty that allegedly occurred over a four year period between March 2015 and April 2019. Accordingly, the Amended Complaint fails to state aiding and abetting claims on which relief can be granted and should be dismissed with prejudice.

3. The Amended Complaint Fails to State Negligence Claims on Which Relief Can be Granted

To maintain an action for negligence, a plaintiff must establish that the defendant owed a duty, that the defendant breached that duty, and that this breach caused the plaintiff damages. *See Wiand*, supra at 1247 (citing *Fla. Dep't of Corrs. v. Abril*, 969 So.2d 201, 204 (Fla. 2007)). "Florida law recognizes four sources of duties of care: statutes and regulations, judicial interpretations of legislation, judicial decisions, and duties arising from the facts of a particular case. *See Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316, 1321 (M.D. Fla. 2015) (citing *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1227-28 (Fla. 2010)).

Just as the Court determined the Receiver's allegations in *Wells Fargo* were insufficient (e.g., Wells Fargo allegedly had a duty to meet the standard of care in the banking industry and duty to investigate suspicious transactions made by customers), the Court should likewise find the Receiver's allegations in this case to be insufficient to state negligence claims against Spotex on which relief can be granted (e.g., Defendants allegedly owed "duties of care to administer the ATC accounts for the Oasis Pools in accordance with, as opposed to in violation of, minimum industry

standards for forex exchanges participants"). *Wiand*, supra at 1324 and Doc. 36 at ¶¶ 171 and 187.

Just as a bank does not owe a duty to a non-customer, Spotex does not owe a duty to non-customers and the Receiver has not contended to the contrary. The Amended Complaint makes clear that the Receivership Entities' "customers" were ATC's clients, not Spotex's clients. "Spotex provided a 'white label' software suite that would support ATC's clients and generate online account records with various back-office tasks for such clients. Spotex, through their affiliation with ATC, was a firm that provided the technology for these services to **ATC's clients**, such as Anile, DaCorta and other Oasis representatives." Doc. 36 at ¶ 106 (emphasis added). Adding in a cryptic and conclusory sentence stating that "Given the derivative nature of Spotex's relationship with ATC, ATC's clients were also Spotex's clients," does not make it so. *Id*. at 76. Spotex had a contract with ATC only, and ATC was Spotex's customer. Spotex's only duty was to ATC, not ATC's customers. Spotex never owed any duties to the CFTC Defendants or the Oasis Entities. The Receiver's failure to cite any statute, regulation, judicial interpretation of legislation, judicial decision, or duty arising from the facts of this case is fatal to his allegations that Spotex owed a duty to the CFTC Defendants or the Receivership Entities. Accordingly, Spotex does not have the required duty for the Receiver to maintain a negligence cause of action against it in this matter.

Although the Receiver has alleged that Manoukian was "*an* owner of Defendant Spotex" (Doc. 36, ¶ 24), he has not alleged the existence of an agency relationship

between them. Accordingly, Manoukian's alleged wrongdoing, which Spotex also disputes, cannot be imputed to Spotex even if the claims were true. Spotex is a Delaware limited liability company. Like other jurisdictions, Delaware law considers the corporate business form, including a limited liability company, as an independent legal entity separate and distinct from its members. *See Wood v. U.S. Bank Nat'l Ass'n*, 246 A.3d 141, 148 (Del. Ch. 2021); (Del. C. § 18-201(b)). While courts have "acknowledged that under certain circumstances liability may be imputed to parties who did not actively participate in the alleged wrongdoing," it is generally held that "those circumstances are limited to partnerships or agency relationships and do not extend to limited liability companies or corporations." *In re Manke*, No. 9:15-BK-005370-FMD, 2018 WL 11206119, at *4 (Bankr. M.D. Fla. June 4, 2018), aff'd, No. 2:18-CV-477-FTM-99, 2018 WL 6629957 (M.D. Fla. Dec. 19, 2018). To establish an agency relationship, a plaintiff must show: (1) acknowledgement by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the agent's actions. *See* Restatement (Second) of Agency § 1 (1957).

In *Ct. Appointed Receiver of Lancer Offshore, Inc. v. Citco Grp. Ltd.*, a receiver asserted claims for breach of fiduciary duty and negligence against three defendants. The court held that while the complaint contained sufficient individualized allegations against two of three defendants, the court could not see how the third defendant, CFS-USA, was "properly brought into the fold." *Ct. Appointed Receiver of Lancer Offshore, Inc. v. Citco Grp. Ltd.,* No. 05-60080CIV, 2008 WL 926512, at *5 (S.D. Fla. Mar. 31, 2008).

The Receiver alleged that CFS-USA maintained a sophisticated software system that was used by the other defendants. The Receiver also alleged that William Keunen, the director of another defendant, was also a named officer of CFS-USA. However, the Receiver did not allege that Keunen took any actions on behalf of CFS-USA. The court held that having Keunen, as a named officer, in and of itself, was not enough to suggest direct participation in the scheme by CFS-USA. *See Id*.

Because Spotex and its members are separate legal entities, for Spotex to be liable for Manoukian's actions, the Receiver must demonstrate that Manoukian had an agency relationship with Spotex and acted on behalf of Spotex. Here, the Amended Complaint is completely devoid of allegations that Manoukian, a passive shareholder, was an agent of Spotex who had the authority to act on behalf of Spotex.

4. The Communication Decency Act Establishes Immunity as to Spotex Because Spotex is a Passive Interactive Computer Service

All claims against Spotex are also barred by the immunity provisions of the CDA, 47 U.S.C. § 230(c), because Spotex is a passive "interactive computer service." Congress enacted the statute to protect interactive computer service providers, like Spotex, from liability for their users' content and conduct. Here, the Receiver has failed to sufficiently allege that Spotex acted as an "information content provider" rather than an "interactive computer service." *In re BitConnect Sec. Litig.*, No. 18-CV-80086, 2019 WL 9104318, at *12 (S.D. Fla. Aug. 23, 2019).

The CDA states, in relevant part, that:

> No provider or user of an interactive computer service shall be held liable on account of--

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).
> The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.
> The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service.

47 U.S.C.A. § 230(c).

If a service provider is in part responsible for the creation or development of content, "then it is an information content provider as to that content—and is not immune from claims predicated on it." *In re BitConnect Sec. Litig.*, No. 18-CV-80086, 2019 WL 9104318, at *12 (S.D. Fla. Aug. 23, 2019) (citing *Am. Income Life Ins. Co. v. Google, Inc.*, No. 2:11-CV-4126-SLB, 2014 WL 4452679, at *7 (N.D. Ala. Sept. 8, 2014)). To survive a motion to dismiss, a complaint must therefore allege that the defendant acted as an "information content provider." *Id.* "Federal courts have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

In *In re BitConnect Sec. Litig*, the complaint detailed the degree to which the defendants used YouTube to solicit investments for a Ponzi scheme. *In re BitConnect Sec. Litig.*, No. 18-CV-80086, 2019 WL 9104318 (S.D. Fla. Aug. 23, 2019). YouTube's platform did indeed provide the defendants with an extraordinary reach to solicit investors. *Id.* at *12. Several of the defendants were even alleged to have been designated as "Partners" through the "YouTube Partner Program." *Id.* The Court, however, held that while participation in the "YouTube Partner Program" may have helped direct traffic to the defendants' videos, the traffic alone is not sufficient to preclude § 230 immunity. Because YouTube was not "responsible, in whole or in part, for the creation or development" of the defendants' videos, YouTube was not an "information content provider" and thus YouTube could not be held liable as a participant in the Ponzi scheme. *Id.* The Court clearly stated that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred*." Id.* (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). Further, the Court held that while "YouTube may have had a moral or ethical responsibility to protect its users from the defendants' allegedly fraudulent schemes, ***the plaintiffs' claim that it had a legal duty to do so is preempted by the CDA***." *Id.* at *13. (Emphasis added).

In *Doe v Kik Interactive Inc.*, the plaintiff, a minor who used a mobile messaging service, brought an action against the owners and operators of the service under the

Trafficking Victims Protection Act (TVPA), alleging that the owners and operators knew that sexual predators used its service to contact and solicit sexual activity with minors. *See Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1249 (S.D. Fla. 2020). The plaintiff alleged that the defendants failed to provide any warnings or enact policies to protect minors. The mobile messaging service filed a motion to dismiss based on immunity and failure to state a claim pursuant to the CDA. The plaintiff argued that the mobile messaging service knew or should have known that the minor was being trafficked. The court held that the plaintiff's claims against the defendants were barred by the immunity provisions of the CDA, 47 U.S.C. § 230, and dismissed the complaint. *Id.* at 1251. The court further held that Congress "enacted a statute protecting interactive computer service providers from liability for their users' content and conduct." *Id*. at 1250.

In *Mezey v. Twitter, Inc.,* a plaintiff sued Twitter for allegedly unlawfully suspending his Twitter account. *Mezey v. Twitter, Inc.*, No. 1:18-CV-21069-KMM, 2018 WL 5306769, at *1 (S.D. Fla. July 19, 2018). Twitter moved to dismiss the complaint and argued that the CDA barred the plaintiff's claims. In dismissing the complaint, the court found that "Twitter—as a platform that transmits, receives, displays, organizes, and hosts content—is an interactive computer service [and] Plaintiff is the information content provider as he created the relevant content associated with his Twitter account." *Id*. at *1.

Similarly, in *Kimzey v. Yelp! Inc.,* a business brought claims against an operator of a website that hosted online reviews and allowed users to rate businesses using its

"star" ranking system, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), the Washington Unfair Practices and Unfair Competition Act, and also alleging malicious libel and libel per se. In dismissing the complaint, the court held that it failed "to see how Yelp's rating system, which is based on rating inputs from third parties and which reduces this information into a single, aggregate metric is anything other than user-generated data. Indeed, the star-rating system is best characterized as the kind of 'neutral tool[ ]' operating on 'voluntary inputs' that we determined did not amount to content development or creation" *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016).

Finally, in *e360Insight, LLC v. Comcast Corp.*, an e-mail marketer brought an action against an internet service provider (ISP), alleging violations of the Computer Fraud and Abuse Act (CFAA), infringement of free speech, tortious interference with prospective economic advantage, and deceptive or unfair practices barred by the Illinois Consumer Fraud Act (ICFA) because the ISP used filters to control the volume of its e-mail and to block e-mails. The court granted judgment on the pleadings with respect to the complaint as a whole on the grounds that § 230(c) precluded proceeding on any of the claims against the ISP. *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008).

Spotex, as a service provider, cannot be held liable for information originating with third-party users of the service including the Receivership Entities. The Receiver alleges in the Amended Complaint that "Spotex also monitored DaCorta's trading activities on the back-office and would notify DaCorta when there were margin calls,

margin warnings, excessive exposure, excessive credit usage, or trading losses." Doc. 36 at ¶ 113. In addition, that Spotex "generated reports of trading activities at the CFTC's Defendants' request." *Id* at ¶ 113. Although, the Amended Complaint alleges that "Spotex was an information content provider and not merely a passive computer service," it fails to provide any factual support for such a conclusory assertion. *Id*. at 110. Spotex was not responsible for the ***creation or development*** of content, Spotex simply provided a neutral software tool that would support ATC's clients and generate various back-office tasks through. Given the opportunity to substantiate its claims already once through the amendment process, with full, detailed knowledge of Spotex's legal position under the CDA, the Receiver simply could not plead anything to avoid the CDA's well-settled safe harbor.

Spotex used "algorithms to monitor forex trading, including, but not limited to, fill ratios and execution speeds." *Id* at ¶ 118. Indeed, the Receiver's own allegations establish that it was the fraudsters and criminals who improperly used its software and created the deceitful content-not Spotex. The Receiver has not alleged that Spotex was responsible, in whole or in part, for the creation or development of the information provided on its software platform and, for this reason, his claims against Spotex are barred by the CDA and should be dismissed.

CONCLUSION

Spotex respectfully requests the Court enter an Order granting this Motion and dismissing the Amended Complaint ***with prejudice***.

Dated: October 22, 2021

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RULE 3.01(g) CERTIFICATION

The undersigned certifies that he conferred with Plaintiff's counsel, who will oppose the requested relief.

By:/s/ Matthew S. Adams
Matthew S. Adams, Esq.

CERTIFICATE OF SERVICE

I certify that on October 22, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronicfiling to counsel of record.

By:/s/ Matthew S. Adams
Matthew S. Adams, Esq.