UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. BURTON DOUGLAS MORRISS, *et al.*, Defendants, And MORRISS HOLDINGS, LLC, Relief Defendant.	)	Case No.: 4:12-cv-00080-CEJ

RELIEF DEFENDANT MORRISS HOLDINGS' REPLY TO PLAINTIFF'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MORRISS AND RELIEF DEFENDANT MORRISS HOLDINGS' MOTIONS TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, MOTIONS FOR A MORE DEFINITE STATEMENT

I. INTRODUCTION

The issue before this Court is whether the Plaintiff Securities and Exchange Commission ("the Commission") has pled sufficient facts with the particularity required by Fed. R. Civ. Pro. 9 (b) to support its claims of securities fraud against Morriss Holdings and the other defendants in this action.[1] In its Response, the Commission fails to show how the Complaint's bare

[1] The Commission states in Footnote 1 of its Response that Morriss Holdings is only a relief defendant and is not alleged to have violated Section 17 (a) of the Securities Act and Section 10 (b) and Rule 10b-5 of the Exchange Act (Doc. #104 p. 9). Regardless what Morriss Holdings is called, it is lumped with the other defendants and is described throughout the Complaint as a party that participated in the wrongdoing alleged. In fact, the Commission's joint response to Morriss Holdings' Motion to Dismiss and to Defendant Burton Douglas Morriss' separate Motion to Dismiss reflects its lumping of Morriss Holdings with the other defendants. The Complaint contains no allegations that Morriss Holdings holds the subject of this litigation in a possessory capacity or that it is merely the recipient of

assertions of alleged misrepresentations or fraudulent conduct contain sufficient particularity to permit it to proceed. As the Commission and Morriss Holdings both note, Rule 9(b) requires that allegations of fraud be pled with particularity, and that the "when, what, where, who and how" of the fraud is described.

Instead, the Complaint alleges general, conclusory acts of fraud against all defendants that are not supported by allegations of particular fact describing the time, place and contents of these misrepresentations, nor does it identify specifically which defendants, other than Defendant Burton Douglas Morriss ("Defendant Morriss") made any misrepresentations or omissions. The Commission's decision to combine its Response to Morriss Holdings' and Defendant Morriss' separate motions to dismiss reflects its lumping of all defendants together without identifying which defendant made what alleged misrepresentation or omission to whom. In particular, the Commission continues to rely on its vague and conclusory claims that the alleged misstatements in its corporate organizational documents were fraudulent but leaves out any detail describing when these statements were made to any investor in connection with any sale or offering.

As it stands, the Complaint is indecipherable as to its cause of action against Morriss Holdings or any of the other defendants, and does not meet Rules 8(a) and 9(b)'s purpose to notify the defendants of the claims against them so that they may prepare an effective defense. While it would be easy for Morriss Holdings to merely request that the Commission clarify its allegations against Morriss Holdings, this Defendant is compelled to speak on behalf of all of the other corporate defendants, Acartha Group, LLC, MIC VII, LLC, Acartha Technology Partners, LP, and Gryphon Investments, LLC ("the Receivership Defendants" or "the Investment Entities"). The Receiver's recent agreement to enter a consent judgment with the Commission,

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ill-gotten funds and does not have a legitimate claim to those funds --- the traditional role of the relief defendant. See *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005).

without a clear picture of what her clients supposedly did and to whom, clearly indicates a decision not to vigorously defend the Receivership Defendants. See Consent Judgment dated March 6, 2012 (Doc. #95, pp. 1 - 12.). Given the complexity of the underlying financial transactions and numerous defendant entities, clarification of the separate causes of action against each individual defendant is imperative. Yet the Commission continues its wholesale lumping of all allegations against all defendants, even going so far as to respond to Morriss Holdings and Doug Morriss' Motion to Dismiss in one pleading.

II. ARGUMENT

A. Rule 9(b) Requires that All Fraud Claims, Including Security Fraud Claims, Be Pled with Particularity.

Plaintiff misreads Morriss Holdings' Memorandum in Support of its Motion to Dismiss, or in the Alternative, Motion to Make More Definite ("Morriss Holdings' Memorandum"), when it states that Morriss Holdings relies on pleading standards found in securities lawsuits brought under the Private Securities Litigation Reform Act ("PSLRA").[2] This is not the case. Morriss Holdings noted in its Memorandum the same pleading standard that the Commission also cites, which is Rule 9 (b)'s heightened pleading requirements for the circumstances constituting fraud in securities litigation. See Morriss Holdings' Memorandum (Doc. #84, pp. 6, 7, 8 and 14); *See also Mayer v. Countrywide Home Loans*, 647 F.3d 789, 790 (8th Cir. 2011) (Rule 9(b)'s "particularity requirement demands a higher degree of notice than that required for other claims," and "is intended to enable the defendant to respond specifically and quickly to the potentially

[2] Although Rule 9(b) requires specific pleading in certain types of cases, including those alleging fraud, inconsistent application and interpretation of Rule 9 (b) and other abuses in securities cases prompted Congress to enact the PSLRA as a check against abusive litigation by private parties. The PSLRA sets forth "*exacting* pleadings requirements for alleged securities violations." *In re BearingPoint, Inc. Securities Litigation*, 525 F. Supp. 2d 759, 766 (E.D. Va. 2007) (emphasis added).

damaging allegations.") (citations omitted); *SEC v. Shanahan*, 2008 U.S. Dist. LEXIS 100641, *12 (E.D. Mo. Dec. 12, 2008).

In ruling on a motion to dismiss, the Court must view the allegations in the complaint in the light most favorable to the plaintiff, accepting all allegations as true and drawing all reasonable inferences in favor of the non-moving party. *Shanahan*, 2008 U.S. Dist. LEXIS 100641, *8, citing *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005). But the Court must grant a motion to dismiss if the Complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007).

As the Commission correctly notes, and Morriss Holdings agrees, the test is not a "probability requirement," but the plaintiff still must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly,* 550 U.S. at 555. A plaintiff must do more than provide labels and conclusions, however, and a formulaic recitation of the elements of a cause of action, such as the Commission has done in the Complaint, does not suffice. *Twombly,* 550 U.S. at 570.

The portions of Morriss Holdings' Memorandum the Commission incorrectly contends that support a different standard of review than found in Rules 8(a) and 9(b) refer instead to Morriss Holdings' discussion of the Commission's improper pleading strategy of "group" pleading, "shotgun" pleading and "puzzle" pleading.[3] Courts have repeatedly criticized or rejected these pleading styles in *both* SEC enforcement actions and private securities actions and have held that by using these pleading styles, the complaints by nature lack sufficient specificity

[3] "Group" pleading consists of lumping together all defendants and pleading the same allegations against them collectively rather than individually, failing to set forth which defendant took what action. "Shotgun" pleading consists of incorporating every antecedent allegation into each subsequent claim for relief. "Puzzle" pleading refers to complaints that contain wholesale incorporation of allegations in each count and require the court and the defendant to match factual statements to misconduct. *See SEC v. Fraser*, 2009 U.S. Dist. LEXIS 70198, *14 (D. Ariz. Aug. 11, 2009).

under Rule 9(b). *SEC v. Fraser*, 2009 U.S. Dist. LEXIS 70198, at *14 (D. Ariz. Aug. 11, 2009) (unpublished); *SEC v. Mercury Interactive*, 2008 U.S. Dist. LEXIS 107706 (N.D. Cal. Sept. 30, 2008) (shotgun pleading makes it "difficult to discern which filings form the bases for each claim"); *SEC v. Patel*, 2009 U.S. Dist. LEXIS 64394 (D. N.H. July 7, 2009) ("to reasonably determine that any particular claim should not be dismissed would require the court to firmly comb the complaint in search of factual support for each element of the multiple claims pled as to each defendant"); *see also Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006); *Lagermeier v. Boston Scientific Corp.*, 2011 U.S. Dist. LEXIS 78525, at *14-15 (securities fraud count dismissed because Rule 9(b) "does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant").[4]

B. The Complaint Fails to Plead with Particularity the "When," "What" and "Where" of the Alleged Securities Fraud

To meet the pleading requirements of Rule 9 (b), the Complaint must set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof. *Shanahan*, 2008 U.S. Dist. LEXIS 100641, at *11-12 (citations omitted.); *Frank v. Dana Corp.*, 547 F.3d 564, 570 (6th Cir. 2008). That is, the Complaint must allege the "who, what, when, where, and how" of the securities fraud --- "the first paragraph of any newspaper story." *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011). The Complaint fails to do this for the reasons explained below.

[4] Plaintiff notes that Morriss Holdings' motion to dismiss attacks the cause of action in the Complaint wholesale and does not differentiate between counts I-VIII, surmising that Morriss Holdings implicitly recognizes that all the allegations form the basis of each count. (Doc. 104, p. 18.) Morriss Holdings addresses the Complaint "wholesale" because each count of the Complaint incorporates all twelve and a half pages of allegations against all or multiple defendants rather than identifying and explaining which factual allegation supports which cause of action.

***When* Did the Alleged Misstatements or Omissions Occur?**

To support its contention that the Complaint contains sufficient particularity concerning when the misstatements and omissions occurred, the Commission only states that they "took place: between 2005 and 2011" and refers to the Complaint's ¶¶ 1, 17, 21, 32-35, and 43. See the Commission's Memorandum (Doc. # 104, p. 13.) This summary sentence lacks any specifics concerning when the misrepresentation were made during this six-year period, and the cited references provide no additional detail. Paragraph 1 through 18 of the Complaint fall under the headings of "Introduction" and "Background." Paragraph 1 of the Complaint contains a broad, conclusory overview of the alleged fraud but lacks any specifics as to the events it summarizes. (Doc. #1, ¶ 1.) Paragraph 17 alleges when Defendant MIC VII, LLC and Acartha Technology Partners, LP were formed. (Doc. #1, ¶ 17.) Paragraph 21 describes Defendant Morriss' alleged misappropriation of funds but does not identify any misstatements or omissions. (Doc. #1, ¶ 21.) Paragraphs 32 through 35 reference the various corporate documents the Commission argues constitute the alleged misstatements. (Doc. #1, ¶¶ 32-35.)

To successfully state a claim for fraud, including securities fraud, the complaint must set forth the time of the false representation. *Shanahan*, 2008 U.S. Dist. LEXIS 100641, *12, quoting *SEC v. Thielbar*, 2007 U.S. Dist. LEXIS 72986, *10 (D.S.D. Sep. 28, 2007). The Commission's Complaint alleges the *year* the corporate agreements were executed but fails to state when the alleged misstatements or omissions were made to any prospective investors. Rule 9(b) requires particularity in describing the time the alleged statement or misconduct occurred.

The timing of when these alleged fraudulent acts took place also is important in determining if they were done "in connection with" the sale or offer of a security to bring this

action within the scope of federal securities law. See § 17 (a), which provides that: "it shall be unlawful for any person *in the offer or sale of any securities.*" 15 U.S.C. Section 77q (a) (emphasis added). *See also SEC v. Zandford*, 535 U.S. 813, 820 (federal securities laws "should not be construed so broadly as to convert every common-law fraud that happens to involved securities into a violation of Section 10(b)").

***What* Were the Misstatements or Omissions?**

The Commission contends that the "Complaint provides even more particularity in its factual allegations describing the *what* and the *where* – i.e. the fraudulent misstatements and omissions and where they were made." (Doc. #104, p. 13.) The Complaint identifies excerpts from various corporate documents, namely, limited partner and limited liability company operating agreements, which contain broad corporate language setting forth when a partner or member may borrow funds or make advances and authorizing the managing member "to carry out any and all of the purposes of the Company."[5] This customary corporate language found in most limited liability company and partnership formation documents is not in and of itself a fraudulent misrepresentation, and the Complaint contains no explanation of why it is. Further,

[5] The four alleged misrepresentations include:

- § 7.7 of ATP's 2008 Agreement of Limited Partnership, which provides in part that the general partner "may not borrow or withdraw any funds or securities from the Partnership except as expressly permitted by this Agreement." (¶ 32.)
- Gryphon Investments' 2008 Limited Liability Company Operating Agreement, which provides that Gryphon Investments' management could make loans or advances to other person but excluded members, managers and affiliates of members and managers. (¶ 33.)
- The 2005 MIC VII Amended and Restated Limited Liability Company Operating Agreement, which provides that the "Managing Member is authorized and empowered on behalf of and in the name of the Company to carry out any and all of the purposes of the Company and to perform all acts and enter into and perform all contracts and undertakings that it may, in its sole discretion, deem necessary, advisable and incidental thereto." (¶ 34.)
- Acartha Group's 2007 Private Placement Memorandum, which provides that "net proceeds of this offering after payment of expenses are anticipated to be used to repay existing obligations of the Company and for working capital purposes. Management will have broad discretion with respect to the application of these funds." (Doc. 1, pp. 9-10, ¶¶ 32-35.)

the Complaint lacks sufficient context to determine how these statements were fraudulent or false to satisfy Rule 9(b)'s specificity requirements. *See Lagermeier*, 2011 U.S. Dist. LEXIS, at **14-15. These allegations may concern a breach of Defendant Morriss' fiduciary duties but certainly do not constitute securities fraud. *See Adropolis v. Red Robin Gourmet Burgers, Inc.*, 505 F. Supp. 2d 662, 682 (D. Colo. 2007) (plaintiff may not "bootstrap" a claim for internal corporate mismanagement or breach of fiduciary duty into a claim for securities fraud).

***Where* Were the Alleged Misstatements or Omissions Made?**

The Commission appears to answer the question "where" by pointing to which documents contain the alleged misstatements, not the location where the alleged misrepresentations or omissions were made. To satisfy Rule 8 (a) and 9(b)'s requirements, the Complaint should describe where, that is, where was the speaker when these alleged misstatements were made and where did the alleged fraud occur. *See Shanahan*, 2008 U. S. Dist. LEXIS, at **11-12 ("simply stated, a complaint must set forth the time, place and content of the false representation").

***Who* Made the Alleged Misrepresentations or Omissions?**

Nor does the Complaint describe with any particularity *who* made the alleged misstatements and omissions. Again, the Complaint contains several allegations concerning Defendant Morriss' statements (including a reference to the broad overview contained in Paragraph 1 of the Complaint). Concerning the Receivership Defendants, however, the Complaint only contains excerpts of certain of their corporate documents but fails to describe how the statements were made or who made them.[6]

[6] This highlights the most troubling aspect of the Receiver's conduct in this case. The Receiver has agreed to a wholesale settling of this matter with the Commission at a very early stage in this litigation. She has agreed to a consent judgment which allows for a "disgorgement" of monies and payment of a civil fine. Morriss Holdings potentially has an interest in each of the Receivership Defendants, which it may wish to pursue on behalf of its sole

The Commission then asserts as a fact in its Memorandum that Defendant Morriss solicited investments through emails, telephone calls and meetings with potential investors but fails to allege this with any specificity in its Complaint. (Doc. # 114, p. 15.) In response to Morriss Holdings' claim that the Complaint does not state that the offering documents were distributed to any investors, the Commission again points to the broad summaries found in Paragraph 1 and 13 of the Complaint. (Doc. #104, p. 14, footnote 4.) Paragraph 1, which contains a conclusory overview of the allegations, by nature, lacks the specificity demanded by Rule 9 (b). Likewise, Plaintiff's citation to the Complaint's Paragraph 13's background allegations summarily references that Defendant Morriss "solicited investments through emails, telephone calls, and meetings with potential investors" but lacks any detail beyond this single statement. This alleged dissemination is a key component of describing *where* the alleged misrepresentation occurred, and the Complaint contains no description as to whom Defendant Morriss allegedly contacted, when he contacted them, where they were and what was said, nor does it state whether Morriss Holdings or any of the Receivership Defendants had any involvement.

Again, the Complaint's generalized allegations fail to separate the defendants to identify which defendant allegedly represented what misstatement. Rule 9 (b) requires more. *See Shanahan*, 2008 U.S. Dist. LEXIS 100641, at *12, ("complaint must set forth the time, place and content of the false representation, and the identity of the party making the false statements); *see also SEC v. Patel,* 2009 U.S. Dist. LEXIS 90558,*814 (where multiple defendants are involved, each defendant's role in the fraud must be particularized).

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member (not Defendant Morriss). It is in the best interests of the Receivership Defendants and Morriss Holdings that these entities be properly managed rather than merely liquidated at a "fire sale."

C. The Complaint Fails to Allege with Particularity a Scheme to Defraud.

Plaintiff misconstrues Morriss Holdings' Motion to Dismiss when it contends that Morriss Holdings does not contest the sufficiency of the allegations of a scheme to defraud in Counts I and III of the Complaint. The Complaint fails to properly allege a scheme to defraud under § 17 (a) (1) of the Securities Act and § 10(b) of the Exchange Act for the same reasons it has failed to state a claim for violations under § 17 (a)'s other provisions.[7] The Complaint does not specifically set forth the elements and allegations to describe a scheme to defraud, but appears to rest this claim on the same conclusory misrepresentations and omissions that form the basis of its claims under §§ 17 (a) (2) and (3) of the Exchange Act in Count II.[8] In both Counts I and III, the Commission merely provides excerpts of the securities acts and does not delineate the elements of any scheme, and the wholesale incorporation of the previous allegations do not contain sufficient detail to support when the fraudulent scheme occurred and what that scheme was.

In its Response, the Commission argues that all the defendants misappropriated nearly $9 million in investor funds for Defendant Morriss' use and concealed it from investors "by providing false, broad, and vague offering and operating materials to investors and … classifying the transfers the transfers to Morriss and Morriss holdings as loans..." (Doc. #104, p. 16.) Again, the Complaint lacks particularity concerning the *who, what and where* of both the fraudulent statements and the fraudulent scheme in which those statements were allegedly made, what the allegedly deceptive offering materials consisted of, when these materials were distributed and to whom they were distributed, and which defendants did so.

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[7] The elements of a securities fraud claim under Section 17 (a) (1) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 are essentially the same. *Shanahan*, 2008 U.S. Dist. LEXIS at *15 (citations omitted).

[8] The Complaint is so general in these claims that it is unclear if the Commission's attempt to describe this case as a scheme to defraud investors is at its core a false-statement case.

D. The Complaint Fails to Properly Allege the Elements of Security Fraud.

In its Response, the Commission still has not demonstrated how it has properly alleged the following elements that are essential to any securities fraud claim, that is, that: (1) the fraud was "in connection with" the offer, sale or purchase of securities; (2) the defendants, including Morriss Holdings, had the requisite *scienter* in committing the fraud; and (3) the defendants' alleged false and misleading statements to investors were material.

1. The Complaint Fails to Allege Facts to Show How the Alleged Misconduct Was "In Connection With" the Sale or Offer of a Security.

The Commission asserts in its Response that the offering and operating agreements containing the alleged fraudulent misstatements were provided to investors. (Doc. #104, p. 24.) In support of this statement, the Commission points to the Complaint's ¶¶ 1 and 31-35. As previously noted, Paragraph 1 of the Complaint contains an overview and summary of the claims against all defendants and, by nature, is devoid of any detail concerning when the documents were disseminated, when the omissions occurred, the identity of the prospective or actual investors, and when the alleged misappropriations specifically occurred. Paragraphs 31 through 35 contain the alleged misstatements found in the Receivership Defendants' corporate organizational documents but do not identify any specific investors or give the dates or circumstances of any offerings.

Although courts broadly interpret the "in connection with" requirement of § 17 (b), Plaintiff has not alleged any facts tying the alleged fraud with the sale or offer of a security. Plaintiff discusses *SEC v. Zandford,* 535 U.S. 813, 820 (2002), but even in that case, the Supreme Court noted the difference between an instance where the sale of the security was not independent of the fraudulent practices and a case in which there was a lawful transaction later followed by a misappropriation of proceeds. *Zandford*, 535 U.S. at 820 ("[t]his is not a case in

which, after a lawful transaction had been consummated, a broker decided to steal the proceeds and did so").

Here, the Complaint merely alleges that "from 2003 until 2011, Morriss and the Investment Entities raised at least $88 million from approximately 97 investors." (Doc. #1, Para. 15.) Later, the Complaint alleges that Defendant Morriss took funds from certain of those entities. However, the Complaint fails to allege specific facts showing that these were connected events. Accordingly, the Complaint fails to state a claim for securities fraud because it does not allege sufficient particular facts demonstrating that the fraud alleged was in connection with the sale of a security.

2. **The Complaint Fails to Allege any Underlying Facts About Morriss Holdings', Much Less any other Defendants', Actions to Support its General Allegation that that Morriss Holdings or any of the Corporate Defendants Acted with the Requisite Scienter.**

To successfully state a securities fraud claim under Section 17 (a) (1) and Rule 10b-5, the Commission must allege that the misstatements or omissions were made with *scienter*, that is, with the intent to deceive, manipulate or defraud. *Shanahan*, 646 F.3d at 541, citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, n. 12 (1976). Again, Plaintiff misreads Morriss Holdings' Memorandum to claim that the PLSRA applies to actions brought by the Commission. As Morriss Holdings noted on Page 13 of its Memorandum (Doc. #84, p. 13), although Rule 9 (b) does permit *scienter* to be alleged generally, courts often will look to underlying allegations to see if they support such a general statement. For instance, in *SEC v. Shanahan*, 2008 U.S. Dist. LEXIS at *16, the court noted that *scienter* could be alleged generally but nonetheless reviewed the complaint in ruling on a motion to dismiss to determine that it contained particularized allegations of fraud to support plaintiff's allegation of *scienter*. Here, the Complaint fails to allege underlying facts or identify circumstances to support its general

allegation that Morriss Holdings or any of the defendants acted with the requisite *scienter*.

In its Response, the Commission asserts that the "Complaint sufficiently alleges Morriss, *and in turn*, the Investment Entities, acted with *scienter*." (Doc. #104, p. 27.) (emphasis added). The Commission then broadly summarizes what Defendant Morriss allegedly knew, referencing again the overview contained in Paragraph 1 of the Complaint and the summary statements contained in Paragraphs 21, 23, 25, 29 and the corporate statements found in Paragraphs 30 to 35. What the Complaint fails to allege, however, is whether Morriss Holdings or any of the corporate defendants had any such knowledge, that is, whether they knew the statements were not accurate when made. The Commission does assert in its Response that the scienter of corporate officers is imputed to the firm for liability purposes, but again the Complaint contains no allegations that such knowledge was imputed to Morriss Holdings or any of the other corporate defendants for purposes of liability under the securities laws.

3. <u>The Question Whether the Alleged Misrepresentations or Omissions were Material May be Decided as a Question of Law in Appropriate Cases</u>.

As the Commission notes in its Response, the materiality of a misrepresentation or omission is a mixed question of fact and law that the Court may determine. (Doc. #104, p. 29.) The applicable legal standard is whether a reasonable shareholder would draw from a given set of facts and the inferences from those facts, the question of material may be decided as a matter of law in an appropriate case upon a showing that "a reasonable investor could not have been swayed by an alleged misrepresentation" or omission. *Guenthner*, 395 F. Supp. 2d 835, 847 (D. Nebr. 2005).

In this case, the alleged misrepresentations consisted of standard corporate provisions found in the operating agreements, such as the managing member's authority "to carry out any and all of the purposes of the Company" (Doc. 1, ¶ 34.), or that "net proceeds of this offering

after payment of expenses are anticipated to be used to repay existing obligations of the Company and for working capital purposes." (Doc. 1, ¶ 35.) The Complaint does not allege must less explain how these statements were material. In some instances, the Commission even calls the alleged statement "vague," which further indicates that no reasonable investor would give weight to such a statement.

4. Morriss Holdings Does Not Have a Duty to Disclose Any Alleged Wrongful Conduct, and the Complaint Fails to Allege that Any Such Duty Exists.

The Commission asserts in its Response that once Morriss and the Investment Entities made certain representations to investors about the use of investor funds, the certain federal securities laws imposed a duty on them not to mislead investors.[9] (Doc. #104, p. 31.) In fact, a defendant does not have a duty to disclose alleged wrongful conduct that he is accused of. *See Fraser,* 2010 U.S. Dist. LEXIS, at *28 (D. Ariz. Jan. 28, 2010) (court disputed SEC's duty to disclose theory and stated it was unaware of any cases imposing primary liability based on defendant's mere silence when he knew of company's fraudulent scheme); *Iron Workers Local 16 Pension Fund v. Hilb Rogal & Hobbs Co.*, 432 F. Supp. 2d 571, 588 (D. Va. 2006) ("federal securities laws do not require a company to accuse itself of wrongdoing") (quoting *In re Citigroup*, 330 F. Supp. 2d at 377.) *See also Weill v. Dominion Resources, Inc.,* 875 F. Supp. 331 (D. Va. 1994) (securities laws do not obligate defendants to reveal the culpability of their activities or their impure motives). Even if such a duty exists, which Morriss Holdings does not suggest, the Complaint contains no allegations of any duty, what the duty consists of and who owes such a duty.

[9] Again, without identifying the representations as to whom they were made.

Conclusion

For the reasons explained, the Commission has failed to state a claim for relief, therefore Morriss Holdings respectfully requests this Court to dismiss Counts I, II and III of the Complaint pursuant to Fed. R. Civ. Pro. 12(b) (6), or, in the alternative, to require the Commission to state its cause of action in these counts with the particularity required by Fed. R. Civ. Pro. 9(b).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing on April 2, 2012 with the Clerk of the Court using the CM/ECF system, which will send notification to the following:

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