UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Plaintiff,	)	
v.	)	**CASE NO. 4:12-CV-00080-CEJ**
	)	
BURTON DOUGLAS MORRISS,	)	
ACARTHA GROUP, LLC,	)	
MIC VII, LLC,	)	
ACARTHA TECHNOLOGY PARTNERS, LP, and	)	
GRYPHON INVESTMENTS III, LLC	)	
	)	
Defendants, and	)	
	)	
MORRISS HOLDINGS, LLC,	)	
	)	
Relief Defendant.	)	
	)	

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

Defendant Burton Douglas Morriss ("Mr. Morriss") respectfully submits this Memorandum of Law in reply to the Plaintiff Securities and Exchange Commission's ("SEC") opposition (Doc. # 104) to Morriss's Motion to Dismiss the Complaint (Doc. # 86, # 87).

I. INTRODUCTION

Plaintiff's Complaint suffers from several fundamental flaws, including the fact that it lumps together all of the Defendants in this case. As further evidence of the Plaintiff's failure to sufficiently differentiate between the Defendants, the Plaintiff's Response purports to respond to both Defendant's and Relief Defendant Morriss Holdings' motions to dismiss in a single

opposition. Defendant has undertaken to go through Plaintiff's brief in an effort to discern what arguments are made against him specifically, and which pertain only to Morriss Holdings, but Plaintiff's use of a single opposition to two separate motions by two separate defendants is inappropriate. This is especially true because Plaintiff makes statements regarding Mr. Morriss's motion and arguments which are not accurate. For example, Plaintiff alleges that "[i]n their motions, Morriss and Morriss Holdings apply the heightened pleading standard set forth in the Private Securities Litigation Reform Act of 1995 ('PSLRA')." Doc. # 104 at 12. However, Mr. Morriss's brief does not cite to or discuss the PSLRA's applicability to this case.

In any case, Plaintiff's Response does not show how its vague and generalized allegations satisfy federal pleading standards, especially in a case involving securities fraud which must be pleaded with particularity. There are no specifics as to the alleged wrongful conduct, the timing of events, the parties involved, or the connection between any conduct and the purchase or sale of any securities. The Plaintiff's overall pleading style, as well as specific failings as to particular elements of its causes of action, require that the Complaint be dismissed or, at a minimum, that Plaintiff provide a more definite statement of its claims.

II. ARGUMENT

A. Summary of Legal Standards

The Plaintiff, noting Mr. Morriss's cite of the Supreme Court's most recent evaluation of the requisite pleading standards for a Rule 12(b)(6) motion to dismiss, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), claims that *Twombly* "did not change the pleading landscape as much as Morriss would have the Court believe." Doc. # 104 at 7. Furthermore, Plaintiff hastily concludes that "the facts alleged in the Commission's Complaint are more than enough to give defendants fair notice." Doc. # 104 at 8. It is, of course, up to this Court to determine whether

the facts as currently alleged by the Plaintiff amount to the fair notice standard required by the Supreme Court.

On a motion to dismiss, the complaint's allegations are taken as true and all reasonable inferences are drawn in the plaintiff's favor. *Rivell v. Private Health Care Systems, Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008) (citing *Hoffman–Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002)). However, *Twombly* made clear that while Rule 8(a) requires only a short and plain statement that gives notice to the defendant, it also requires that the factual allegations "be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 235-36 (3d ed. 2004)). In applying such general standard, the Court held that complaints must contain enough factual matter to establish "plausible grounds" for relief. *Id.* at 556.

While federal courts generally require only notice pleading, Fed. R. Civ. P. 8(a)(2), there must still be "enough factual matter (taken as true) to suggest the required element." *Rivell*, 520 F.3d at 1309 (citations and internal quotations omitted). Mere labels, conclusions, and formulaic recitations of the elements are, as always, insufficient. *Twombly*, 550 U.S. at 555; *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (internal quotations omitted). When ruling on a defendant's Motion to Dismiss, a judge must rule "on the assumption that all the allegations in the complaint are true," and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.'" *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). The complaint, however, must still "include sufficient factual allegations to provide the grounds on which the claim rests." *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009).

As the Supreme Court subsequently explained, two working principles underlie *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 555). Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 1950 (citing *Twombly*, 550 U.S. at 556) (internal quotations omitted). Determining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

At this stage, then, this Court is to determine whether the challenged pleadings "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555). The proper test is whether the complaint "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Financial Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007) (citation and internal quotations omitted) (explaining that "factual allegations in a complaint must possess enough heft to set forth a plausible entitlement to relief") (citation omitted). While ordinary pleading rules are not meant to impose a great burden upon a plaintiff, courts decisions in respect of proper pleading standards reinforce the notion that the "still exceedingly low" pleading standard noted by Plaintiffs is still that – a test that the Plaintiff has the burden of clearing. Doc. # 104 at 8; *see also Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005), citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513-515, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002).

In the instant action, then, Plaintiff has the burden of pleading facts that would indicate that Mr. Morriss's intra-company loans amounted to a violation of federal securities laws and, to satisfy *Twombly*, cite in its complaint grounds for relief that are *plausible*, not only *possible*, to survive a 12(b)(6) motion to dismiss. The Plaintiff's threadbare Complaint provides little more than conclusory allegations and formulaic recitations of the elements of a fraud claim. For instance, the only link the Plaintiff cites as between Mr. Morriss and the creation of the allegedly fraudulently misrepresentations and omissions in investor materials is that Mr. Morriss "deliberately requested that the Investment Entities utilize vague and broad language" therein. Doc. #1 ¶ 31. The Complaint likewise provides scarce detail as to when the fraud occurred, except to allege that Mr. Morriss "solicited investments through emails, telephone calls, and meetings with potential investors" from "approximately 2005 through 2011". Doc. #1 ¶¶ 1 and 13. Taken together and viewed in the light most favorable to the Plaintiff, these assertions nevertheless simply fail to provide fair notice for Mr. Morriss or any of the other named Defendants to construct a proper defense thereof. *Twombly*, 550 U.S. at 570.

B. Plaintiff Has Not Alleged Fraud With Sufficient Particularity

Plaintiff's reply erroneously states that Mr. Morriss cites "additional elements and heightened legal standards that apply to private securities litigation, not a Commission enforcement action." Doc. # 104 at 9. Mr. Morris has not done so.[1] In arguing against what Mr. Morriss did not claim, the Plaintiff distracts this Court from what criticisms Mr. Morriss does properly lodge against Plaintiff: that the Complaint provides scant assertions to support the eight

[1] The Response mischaracterizes Mr. Morriss to have averred applicability of the PSLRA to this instant enforcement action. Doc. # 104 at 12. Mr. Morriss has, instead, repeatedly and consistently cited to Rule 9(b), which pleading standard, as Plaintiff agrees, "plainly requires more specific facts than in nonfraud cases." Doc. # 104 at 11.

distinct counts against Mr. Morriss, which shortcomings amount to an improperly plead complaint failing to meet even minimal fair notice requirements, much less the heightened Rule 9(b) standard applicable to a case of securities fraud.

1. Elements Of The Violations Alleged

Contrary to Plaintiff's contention, Mr. Morriss does not seek to impose additional elements – reasonable reliance and investor loss – that are not required in this action. *See* Doc. # 104 at 10. Mr. Morriss does point out that these are among the many factual allegations missing from the Complaint, but does not argue that the Plaintiff here must establish reasonable reliance or loss by particular investors. However, reliance is relevant in an SEC enforcement action in the sense that "[t]he 'in connection with' requirement is satisfied when someone uses a device 'that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities.'" *S.E.C. v. Merrill Scott & Associates, Ltd.*, 505 F. Supp. 2d 1193, 1213 (D. Utah 2007) (citation omitted). Reliance is also relevant in the context of materiality, another requisite element of Plaintiff's claims. *See, e.g., Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Allscripts-Misys*, 778 F. Supp. 2d 858, 872 (N.D. Ill. 2011) ("'The crux of materiality is whether, in context, an investor would reasonably rely on the defendant's statement as one reflecting a consequential fact about the company.'") (citation omitted). The Plaintiff's Complaint lacks any specificity as to these elements.

2. Pleading Fraud With Particularity Under Rule 9(b)

Under the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Rule 9(b), however, requires that fraud be alleged with particularity. The Eighth Circuit Court has described Rule 9(b)'s particularity requirement as follows:

> Under Rule 9(b), the circumstances constituting fraud . . . shall be stated with particularity. 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 damaging allegations. To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result. Put another way, the complaint must identify the "who, what, where, when and how" of the alleged fraud.

United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006) (internal citations omitted); *see also Costner v. URS Consultants, Inc.*, 317 F.3d 883, 888 (8th Cir. 2003) (citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997).[2]

Rule 9[b] "is a special pleading requirement and [is] contrary to the general approach of simplified pleading adopted by the federal rules." See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1297, at 405 (3d ed. 2004). Rule 9[b] serves two important purposes. First, it assures the defendant of "'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Denny v. Barber*, 576 F.2d 465, 469 (2d Cir.1978) (citing *Segal v. Gordon*, 467 F.2d 602, 607 (2 Cir. 1972), which in turn quotes *Shemtob v. Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2 Cir. 1971)). Secondly, the specificity requirement grows out of "the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing." *Segal*, 467 F.2d at 607; *see also Ross v. Bolton*, 904 F.2d

[2] Plaintiff takes care to distinguish *Parnes* from the instant action, stating that Mr. Morriss misapplies the case as the *Parnes* complainant failed to provide "*any* details" in furtherance of Rule 9(b) requirements. Doc. # 104 at 15. The case simply stands for the notion, as Plaintiff states in its Response, that Rule 9(b) mandates that a complaint allege the time, place, and contents of false representations. *See Parnes*, 122 F.3d at 549-550. *Doc.* # 104 at 12.

819, 823 (2d Cir. 1990) (recognizing and rigorously enforcing the "salutary purposes" of Rule 9(b)).

As many courts have discussed, there is an inherent tension between the arguably less stringent pleading standard set forth in Rule 8 and the "particularity" demanded by Rule 9(b). *See, e.g., Ross v. A.H. Robins Co.*, 607 F.2d 545, 557-58 (2d Cir. 1979) (noting that a defendant is "entitled to a reasonable opportunity to answer the complaint and must be given adequate information to frame a response"); *Ziemba v. Cascade Intern., Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001). Rule 9(b) does not abrogate Rule 8 but, rather, must be read in light of Rule 8's requirement that allegations be simple, concise, and direct, and short and plain statements of each claim. *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1386 (D.C. Cir. 1981); *see also S.E.C. v. Physicians Guardian Unit Inv. Trust*, 72 F. Supp. 2d 1342, 1352 (M.D. Fla. 1999). Nevertheless, as the Eighth Circuit has opined, 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 damaging allegations." *Mayer v. Countrywide Home Loans*, 647 F.3d 789, 790 (8th Cir. 2011) (citations omitted); *see also Ross v. Bolton*, 904 F.2d at 823 (stating that the time, place, and nature of the misrepresentations must be set forth so that the defendant's "intent to defraud, to employ any scheme or artifice to defraud, to make any untrue statement of a material fact, or to engage in any act or course of business that would operate as a fraud under the securities laws is revealed").

The Plaintiff states that a "complaint pleads fraud with sufficient particularity if it alleges the substance of the fraudulent acts, who engaged in the fraud and when the fraud occurred – *i.e.* 'the first paragraph of any newspaper story.'" *Ritchie Capital Mgmt., LLC v. Jeffries*, 653 F.3d 775, 764 (8th Cir. 2011) (internal quotation and citations omitted); *see also Summerhill v.*

Terminix, Inc., 637 F.3d 877, 880 (8th Cir. 2011); *S.E.C. v. Tiffany Indus., Inc.*, 535 F. Supp. 1160, 1167 (E.D. Mo. 1982). Doc # 104 at 12. Mr. Morriss agrees, and submits to this Court, as detailed below, that the Complaint fails Rule 9(b) strictures to identify the what, who, when, where and how of both (i) the fraudulent misstatements and omissions made by Mr. Morriss and (ii) the schemes he allegedly carried out to defraud investors. Indeed, while courts have held that the Plaintiff is not required to plead detailed evidence concerning each and every fraudulent act alleged, it does need to provide sufficient detail in order to mount a proper defense against the very serious allegations contained in the Complaint. *See S.E.C. v. Levin*, 232 F.R.D. 619, 624 (C.D. Cal. 2005) (denying a motion to dismiss, noting the "great detail" contained in the SEC's complaint concerning the when, how and who of allegedly fraudulent transactions). As of this writing, the Plaintiff has failed to provide a reasonable delineation of the underlying acts and transactions allegedly constituting the fraud. *See Anderson v. Transglobe Energy Corp.*, 35 F. Supp. 2d 1363, 1369-70 (M.D. Fla. 1999), citing *Brooks v. Blue Cross and Blue Shield of Florida*, 116 F.3d 1364, 1371 (11th Cir. 1997) (a fraud claim satisfies Rule 9(b) if it "sets forth precisely what statements or omissions were made in what documents or oral presentations, who made the statements, the time and place of the statements, the contents of the statements or manner in which they misled the [p]laintiff, and what the defendants gained as a consequence.")

3. Plaintiff's Pleadings Lack the Requisite Who, What, When and Where and How

As previously discussed in Mr. Morriss's Motion to Dismiss, the Plaintiff's Complaint leaves this Court with a host of questions as to (i) the specific nature of the supposed fraudulent misrepresentations or omissions; (ii) whether the misrepresentations or omissions were material; (iii) when the supposed fraudulent misrepresentations and/or omissions took place; (iv) whether

Mr. Morriss or the other Defendants may properly be said to have owed investors a duty to disclose any omissions; or (v) whether Mr. Morriss may properly be said to have made or participated in the drafting of documents containing misrepresentations and/or omissions.

Plaintiff purports to meet the *what* and the *where* prongs of the particularity test by pointing to a list of standard corporate documents, including a limited partnership agreement, two limited liability company operating agreements and a private placement memorandum.[3] Doc. # 104 at 13-14. In an apparent attempt to bolster its pleading, the Plaintiff cites *S.E.C. v. Medical Capital Holdings, Inc.*, SACV 09-0818 DOC, 2010 WL 809406, at *2 (C.D. Cal. Feb. 24, 2010), for the proposition that listing documentation such as Plaintiff has, on its own, meets the requirements of Rule 9(b). While the *Medical Capital* court did opine that the complainant fulfilled its pleading obligations by referencing certain private placement memoranda, it was careful to note that the amended complaint specifically set forth statements made in those documents that were false *at the time that they were made* and how the documents were

[3] The four alleged misrepresentations include:

- Section 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 the Agreement. (Doc. # 1 ¶ 32).
- Gryphon Investments' 2008 Limited Liability Company Operating Agreement, which provides that Gryphon Investments' management can make loans or advances to other person excluding to members, managers and affiliates of members and managers. (*Id.* ¶ 33).
- MIC VII's 2005 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." (*Id.* ¶ 34).
- Acartha Group's 2007 PPM, 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." (*Id.* ¶ 32-35).

misleading through a failure to disclose certain information. *Medical Capital Holdings, Inc.*, 2010 WL 809406, at *2 (emphasis added).

In this regard, the Plaintiff fails to explain why the standard corporate language cited constitutes, in and of itself, a fraudulent misrepresentation by Mr. Morriss, nor does the Plaintiff state whether the documents contained misrepresentations or omissions at the time they were made. To use the Plaintiff's terminology, the "broad" managerial powers contained in the documents *allow* the sort of loan activity which Plaintiff cites as evidence of fraud by Mr. Morriss. Doc. #1 ¶ 31. Indeed, the Complaint lacks sufficient context to determine how these statements were fraudulent or false to satisfy Rule 9(b)'s specificity requirements. *See Lagermeier v. Boston Scientific Corp.*, 2011 WL 4549175, at **6-7 (D.Minn. Sept. 29, 2011). These allegations may concern a breach of Mr. Morriss's 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).

With respect to the *when* of the Complaint, Plaintiff repeats that Mr. Morriss has converted investor funds through supposed activity which cannot be pinpointed with greater accuracy than a six-year period (Doc. #1 ¶¶ 1, 17, 21, 32-35, 43), and then fails utterly to explain to this Court who was defrauded nor, critically, why Mr. Morriss's loan activity, documented in writing – through the enabling power of the corporate documents and in the netting agreements and promissory notes referenced in the Complaint – as it was, amounts to securities fraud. Doc. # 104 at 18; s*ee also, e.g.*, Doc. #1 ¶¶ 21-22 and 27. This summary sentence lacks any specifics concerning when the misrepresentations or omissions took place during this six-year period, and the cited references provide no additional detail. Moreover, whereas the Complaint details the

respective year each of the four corporate documents was executed, it fails to inform the Defendants or this Court when the alleged misstatements or omissions were made to any prospective investors.

Rule 9(b) demands greater detail describing the time the alleged statement or misconduct occurred. *See S.E.C. v. Shanahan*, 2008 WL 5211978 at *3 (E.D. Mo. Dec. 12, 2008), quoting *S.E.C. v. Thielbar*, 2007 WL 2903948, at *4 (D.S.D. Sep. 28, 2007) (to successfully state a claim for fraud, including securities fraud, the complaint must set forth the time of the false representation). Timing is, of course, particularly critical to any determination as to the alleged fraudulent nature of Defendants' activity – they must have been done "in connection with" the sale or offer of a security to bring Plaintiff's 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 S.E.C. v. Zandford*, 535 U.S. 813, 820, 122 S. Ct. 1899, 1904 (2002) (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)").

As to the *who* alleged by the Plaintiff, the Complaint is entirely silent as to Mr. Morriss's exact activity concerning the production of the allegedly fraudulent investor disclosures. Doc. # 1 ¶¶ 1-45. In an enforcement action by the SEC, the *Fraser* court rejected the agency's claims of primary Section 17(a), Section 10(b), and Rule 10b–5 liability against a former chief financial officer who was alleged to have, among other things, reviewed the company's Form 10-Ks and signed sub-certifications, due diligence certifications and management representation letters relating to financial statements deemed fraudulent. In considering the complaint, the court stated that the SEC offered nothing "beyond the mere assertion that he was present and somehow

involved" because the complaint "contain[ed] no allegation that Fraser had any role in the actual drafting or editing of the Forms 10-K, much less the *significant* role in drafting and editing that is required." *S.E.C. v. Fraser*, 2009 WL 2450508, at *8 (D. Ariz. Aug. 11, 2009) (unpublished).

The instant Complaint contains far *less* information than the *Fraser* court had the benefit of considering. This Court has not been informed as to whether Mr. Morriss attended meetings or drafted or edited private placement memoranda, operating agreements or limited partnership agreements, much less whether such involvement, if any, was of a significant nature. Instead, Plaintiff alleges, without more, that Mr. Morriss "used the offering documents to solicit investors … and that he solicited investors using email, telephone calls, and face-to-face meetings." Doc # 104 at 14, n.4. With specific reference to the allegedly fraudulent misrepresentations and omissions contained in the corporate documents, all that the Plaintiff avers is that Mr. Morriss "deliberately requested" that the documents contain vague and broad language. Doc #1 ¶ 31. The Complaint fails to mention how the statements were made and who made them, both of which are critical elements of a proper Rule 9(b) pleading of fraud. *See, e.g.*, *Shanahan*, 2008 WL 5211978, at *3 (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 S.E.C. v. Patel*, 2009 WL 2015794, at **1-2 (D.N.H. July 7, 2009) (where multiple defendants are involved, each defendant's role in the fraud must be particularized).

Finally, the Plaintiff cites the flow of money among the Defendants as proof of the fraudulent misrepresentations contained in the investor disclosures – the *how* of the pleading test. Doc # 104 at 14. Instead, they merely illustrate the interrelated nature of the operations of the management companies and the equity funds under management. As previously noted, the language cited by Plaintiff as being purposely "vague" is, instead, language of the sort found in

organizational and offering documents of many companies simply granting an entity's management broad corporate authority to, among other things, borrow funds, make advances and carry out all necessary affairs of the company – all of which can and does occur in boardrooms and executive offices across America without any required knowledge or consent of investors. Doc. #1 ¶ 31. Plaintiff has yet to explain how the existence of not one, but multiple loan documents setting to writing this activity negate its claims of securities fraud as against Mr. Morriss. While Plaintiff responds to the *how* question with a recitation of money transfers taking place throughout a six-year period, Mr. Morriss is left to wonder how Plaintiff believes representations were communicated to investors: what was said to whom, and when did these communications occur? The Complaint is entirely silent on these points except to mention the six-year timeframe and that Mr. Morriss interacted with potential investors through the telephone, by email and in person. *Id.* ¶ 13.

4. Insufficiency of Plaintiff's Complaint: Alleged Schemes To Defraud

The Plaintiff misreads Mr. Morriss's Motion to Dismiss when it contends that Mr. Morriss does not contest the sufficiency of the allegations of two schemes to defraud in Counts I, III and IV – VIII of the Complaint. However, the Plaintiff is correct to conclude "nor could" they, although not for the reason it assumes. Doc. # 104 at 16. Bereft of detail necessary in order for Mr. Morriss to respond to the assertions concerning alleged violations of § 17(a)(1) of the Securities Act and§ 10(b) of the Exchange Act; § 206(1), (2) and (4) of the Advisers Act and respective Rules 10b-5 and 206(4)-8(a)(2) thereunder, the Complaint likewise fails to properly allege schemes to defraud under these same statutes.[4] Nevertheless, as Mr. Morriss's discussion

[4] 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. *See S.E.C. v. Czarnik*, 2010 WL 4860678, at *3 (S.D.N.Y. Nov. 29, 2010).

of the alleged schemes in his Memorandum of Law supporting his Motion to Dismiss were missed by the Plaintiff, certain text appearing in that document are reproduced here. Doc. # 87 at 13, 18-19 and 24.

The Complaint does not specifically set forth the elements and allegations to describe the alleged scheme to misappropriate nearly $9 million in investor funds, 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. In both Counts I and III, the Plaintiff 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.

Further, the Supreme Court has held that to allege securities fraud, the scheme to defraud must coincide with the sale of securities. *S.E.C. v. Zandford*, 535 U.S. 813, 822, 122 S. Ct. 1899, 1904 (2002); *see also Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S. Ct. 1220, 1223 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud"). The Complaint fails to offer factual assertions to that end. Plaintiff's weak attempt to cure the defective Complaint by reorganizing its scattered factual assertions in its Response are of no help. There, the Plaintiff states that Mr. Morriss concealed loans from investors "by providing false, broad, and vague offering and operating materials to investors and ... classifying the transfers to Morriss and Morriss holdings as loans…" Doc. #104 at 16.

With respect to the alleged scheme to defraud MIC VII investors, the Complaint rests on even more tenuous ground. To begin, the alleged scheme demands that Mr. Morriss be found to have fraudulently diluted the investments of MIC VII members by not obtaining their unanimous consent before admitting new investors, all for the ostensible purpose of quietly satisfying a $2.5

million loan from Wachovia. Doc. # 104 at 16-17. As Plaintiff is plainly aware, a failure to follow the voting requirements of an operating agreement does not, in and of itself, sound in fraud. Plaintiff therefore cites violations of Sections 206(1) and 206(2) of the Advisers Act respecting this activity, which statutes prohibit investment advisers from "employ[ing] any device, scheme, or artifice to defraud *any client or prospective client*," or "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon *any client or prospective client*[.]" 15 U.S.C.A. § 80b-6(1, 2) (emphasis added). In the context of private equity funds, as here, the "client" of an investment adviser is the fund itself, not the investors in the fund. *See Goldstein v. S.E.C.*, 451 F.3d 873 (D.C. Cir. 2006). *See also S.E.C. v. Mannion*, 789 F. Supp. 2d 1321, 1338 (N.D. Ga. 2011) ("[T]o support a claim under Section 206(1), the SEC must plausibly allege that Defendants employed a 'device, scheme, or artifice to defraud' the Fund itself, rather than the Fund's investors."). Most notably, nowhere in the Complaint does the Plaintiff allege that the private equity funds themselves were defrauded by Mr. Morriss. Indeed, the funds are named as defendants in this lawsuit.

As with the first alleged scheme, the Plaintiff fails to provide detail in support of its sweeping allegations. As discussed in the preceding section, the Complaint lacks particularity concerning the *who, what, when, where*, and *how* of both the fraudulent statements and the fraudulent schemes 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. Though the Response boasts of the detail provided for the "complex transactions" Mr. Morriss and other named defendants undertook in furtherance of the alleged scheme to defraud MIC VII investors, the Complaint language cited by the Plaintiff, a single paragraph running the length of three sentences as it does, is entirely and deficiently

silent on the granularity required in order to support the scheme claimed. Doc. #104 at 17. *See also* Doc. # 1 ¶ 40.

C. Plaintiff's Complaint Engages in "Shotgun" or "Puzzle" Pleading

Plaintiff summarily dismisses both Mr. Morriss's and Relief Defendant Morriss Holdings's legitimate concerns with the cryptic nature of the Complaint by stating that "catch phrases" such as "shotgun" or "puzzle" pleading[5] "are of no help in analyzing whether a particular complaint meets the applicable pleading requirements." Doc # 104 at 17. However, courts examining complaints for sufficiency under Rule 9(b) have repeatedly discussed, "often at great length and always with great dismay," pleadings which rely on shotgun or puzzle pleading. *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002). *See also Byrne v. Nezhat*, 261 F.3d 1075, 1128-34 (11th Cir. 2001) ("Shotgun pleadings ... impede[ ] the due administration of justice and, in a very real sense, amount[ ] to obstruction of justice.") (internal citation omitted); *Magluta v. Samples*, 256 F.3d 1282, 1284-85 (11th Cir. 2001) (per curiam) (refusing to address and decide serious constitutional issues on the basis of a "quintessential 'shotgun' pleading of the kind [this court has] condemned repeatedly … because "[i]t is in no sense the 'short and plain statement of the claim' required by Rule 8.")

Plaintiff misunderstands the criticism leveled against Plaintiff's Complaint when it cites *Mellette v. Branch*, 07-cv-02065-WDM-KMT, 2008 WL 4001044, at *9 (D. Colo. Aug. 26, 2008), in support of its position. Doc # 104 at 17-18. Indeed, the Complaint's repetition of general and specific allegations in succeeding claims does not, in and of itself, make the

[5] "Group" pleadings are those which lump together all defendants and plead the same allegations against them collectively rather than individually, failing to set forth which defendant took what action. "Shotgun" pleadings are those that incorporating every antecedent allegation into each subsequent claim for relief or affirmative defense. "Puzzle" pleadings are those that require the court and the defendant to match factual statements to misconduct. *See S.E.C. v. Fraser*, 2009 WL 2450508, at *14.

complaint defective; rather, the fatal flaw in the Complaint is that its loose organization, across 21 pages and 74 paragraphs and encompassing six distinct defendants, makes an end run around required Rule 9(b) particularity. As the *Mellette* court made clear, "[a] complaint-so long as it is minimally sufficient to put a defendant on notice of the claims against him-will not fail for mere surplusage." *Mellette*, 2008 WL 4001044, at *9, citing *United States ex rel Garst v. Lockheed–Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003) ("[s]urplusage can and should be ignored. Instead of insisting that the parties perfect their pleadings, a judge should bypass the dross and get on with the case."). The problem with the Plaintiff's Complaint is that it does not meet even the minimal notice standard – there is literally nothing to review and defend against once Mr. Morriss bypasses the dross and repetition. While the amended complaint reviewed by the *Mellette* court contained allegations corresponding to specific claims, Plaintiff's Complaint fails to present factual allegations in a way which specifically tie back to the eight distinct causes of action, leaving this Court to parse through 45 paragraphs to determine which allegations support which counts. *Mellette*, 2008 WL 4001044, at *9.

Further, even allowing for the contention that the claims for relief encompassed in Counts I-VIII have overlapping elements, Plaintiff's incorporation by reference of the identical 45 paragraphs, followed by a recitation of statutory language and a declaration of Mr. Morriss's guilt, forms the insufficient shotgun pleading style frowned upon by the courts.[6] *See S.E.C. v. Fraser*, 2009 WL 2450508 (D. Ariz. Aug. 11, 2009) (unpublished); *S.E.C. v. Mercury*

[6] Ironically, Plaintiff's Response criticizes the motions to dismiss of both Mr. Morriss and Relief Defendant Morriss Holdings for attacking the cause of action in the Complaint "wholesale" and without differentiation as between Counts I-VIII, surmising that Mr. Morriss implicitly recognizes that all the allegations form the basis of each count. Doc # 104 at 18. As courts examining faulty pleadings have recognized, Mr. Morriss is forced to address the Complaint in this fashion because each count of the Complaint incorporates 45 paragraphs, spanning 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.

Interactive, 2008 WL 4544443, at *8 (N.D. Cal. Sept. 20, 2008) (shotgun pleading makes it "difficult to discern which filings form the bases for each claim"); *Patel*, 2009 WL 2015794, at **1-2 ("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 S.E.C. v. Solow*, 2007 WL 917269, at *3 (S.D.Fla. Mar. 23, 2007) (noting "no effort by the Plaintiff to state with particularity which specific allegations apply to which specific count, thereby impeding [d]efendant's ability to discern the exact nature of the complaint"); *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006).[7]

D. Plaintiff Has Not Properly Alleged the Elements of Securities Fraud

1. Plaintiff Fails to Sufficiently Allege Conduct "In Connection With" Sale or Purchase of a Security (Required in Counts I, II, III and IV)

The Plaintiff claims that it has properly alleged the "in connection with" requirement, under the U.S. Supreme Court's decision in *S.E.C. v. Zandford*. Doc. # 104 at 23.[8] However, in *Zandford*, the Court stressed that the defendant's "fraud coincide[] with the [securities] sales themselves." 535 U.S. 813, 820, 122 S. Ct. 1899, 1904 (2002). In *Zandford*, unlike in this case, the Complaint pleaded a direct link between the defendant's fraudulent conduct and the sale of securities – the defendant broker in that case would sell shares in his clients' mutual fund

[7] Plaintiff's attempt to distinguish *Fraser*, *Mercury Initiative* and *Wagner* on the basis of the fraud and nonfraud claims contained therein falls short of its goal. In particular, the *Wagner* court notes that shotgun pleadings "divert already stretched judicial resources into disputes that are not structurally prepared to use those resources efficiently." *Wagner*, 464 F.3d 1273 at 1279. That the Plaintiff does not present as egregious a complaint as did the *Wagner* complainant hardly cures the defect of the impermissible shotgun pleading used by Plaintiff.

[8] Plaintiff expends several pages of its brief arguing that the investments sold by Defendants were securities. Doc. # 104 at 20-23. However, Defendant did not contest in his Motion to Dismiss that the investments at issue are securities. Rather, Mr. Morriss argued only that the Complaint does not sufficiently allege that any misstatements or omissions were "in connection with" the sale or purchase of securities.

account, "initiat[ing] these transactions by writing a check to himself from that account, knowing that redeeming the check would require the sale of securities," and pocket the proceeds while concealing his intent to do so from his clients. *Id.* at 820-21, 122 S. Ct. at 1904. Thus, as the Court explained, there was a direct connection between the defendant's deceptive practices and his sale of securities. The Court stressed that not every breach of fiduciary duty is transformed into a federal securities violation: "If, for example, a broker embezzles cash from a client's account . . . then the fraud would not include the requisite connection to a purchase or sale of securities." *Id.* at 825 n.4, 822 S. Ct. 1906 n.4. The Plaintiff's argument that the facts of *Zandford* are "nearly identical" to those pleaded in the Complaint against Morriss is simply not persuasive. In its opposition, the Plaintiff claims that the Complaint establishes a connection between statements contained in offering and operating agreements and the offer, sale and purchase of securities. Doc. # 104 at 24. However, the Complaint does not contain any specific allegations detailing when these agreements were provided, or to whom, or how the admittedly "vague" statements in some of these standard corporate documents were misleading.

The Plaintiff attempts to distinguish one of the cases cited by Morriss by noting that it was decided prior to *Zandford*. Doc. # 104 at 23, n.8 (citing *Levine v. Diamonthuset, Inc.*, 950 F.2d 1478 (9th Cir. 1991)). However, Mr. Morriss cited that case only because it was cited in *2010* by a sister district court in the Eighth Circuit for the proposition that "[a]s a matter of law, 'conduct actionable under Rule 10b–5 must occur before investors purchase the securities.'" *MathStar, Inc. v. Tiberius Capital II, LLC*, 712 F. Supp. 2d 870, 881 (D. Minn. 2010) (citing *Levine*, 950 F.2d at 1487). Contrary to the Plaintiff's suggestion, securities fraud must still coincide with the purchase or sale of securities – even in cases brought by the SEC. *See, e.g., S.E.C. v. Woolf*, --- F. Supp. 2d ----, 2011 WL 6326092, *6 (E.D. Va. Dec. 13, 2011) ("The 'in

connection with' element is met whenever 'fraudulent activity ... "touches" or "coincides" with a securities transaction.'") (citations omitted); *S.E.C. v. Mannion*, 789 F. Supp. 2d 1321, 1332 (N.D. Ga. 2011) ("The rule urged by the SEC—that showing that alleged misrepresentations were reasonably calculated to influence the investing public satisfies the "in connection with" requirement—does not apply in this case. The Complaint does not allege that the allegedly inflated Side Pocket valuations were publicly disseminated or that there was a public market for limited partnership stakes in the Fund. Nor is this a case where substantial trading activity occurred during the alleged misrepresentations, which might support the reasonable inference that the misrepresentations affected the purchase or sale of interests in the Fund.").

Moreover, despite Plaintiff's suggestion to the contrary, the SEC must allege and prove the "in connection with" element even if it need not prove (as private plaintiffs must) that any particular investor actually relied on the defendant's conduct. *See* Doc. # 104 at 23, n.8. Reliance is relevant in an SEC enforcement action in the sense that "[t]he 'in connection with' requirement is satisfied when someone uses a device 'that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities.'" *Merrill Scott & Associates, Ltd.*, 505 F. Supp. 2d at 1213 (citation omitted).[9] Thus, for example, the public dissemination of a prospectus or similar document could be sufficient to establish the "in connection with" element of securities fraud. *See, e.g.*, *S.E.C. v. Pirate Investor LLC*, 580 F.3d 233, 249 (4th Cir. 2009) ("Where the fraud alleged involves public dissemination in a document such as a press release, annual report, investment

[9] Reliance is also relevant in the context of materiality. *See, e.g., Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Allscripts-Misys*, 778 F. Supp. 2d at 872 ("'The crux of materiality is whether, in context, an investor would reasonably rely on the defendant's statement as one reflecting a consequential fact about the company.'") (citation omitted).

prospectus or other such document on which an investor would presumably rely, the 'in connection with' requirement is generally met by proof of the means of dissemination and the materiality of the misrepresentation or omission.'") (citation omitted), *cert. denied*, 130 S. Ct. 3506 (2010). *Compare Allard v. Arthur Andersen & Co. (USA)*, 924 F. Supp. 488, 496-97 (S.D.N.Y. 1996) (seller not defrauded "in connection with" the securities transaction where proceeds were to be used for research and development, but were embezzled instead); *Mezzonen, S.A. v. Wright*, 1999 WL 1037866, *4 (S.D.N.Y. Nov. 16, 1999) ("[T]he post-investment looting and the concealment of that looting … were not in connection with Mezzonen's initial investment in the Direct–Invest Corporations."); 3 Law Sec. Reg. § 12.5 (6th ed.) ("The fraud must nevertheless relate to the securities involved rather than to something tangential to the securities. Thus, for example, misappropriation of assets after the securities transaction has been completed has been held not to have been in connection with the purchase or sale of a security.") (citing *Mezzonen* and *Allard*). In contrast, the Complaint in this case contains no allegations connecting any of the allegations of misconduct to the sale or purchase of any securities.

2. Requisite Scienter is Not Sufficiently Pleaded (Required in Counts I, III, IV, V, and VI)

Although the Plaintiff chastises Mr. Morriss and Morriss Holdings for supposedly relying on PSLRA case law in their briefs, the Plaintiff itself cites the rule for establishing scienter in a PSLRA case. Doc. # 104 at 26 (citing *Detroit Gen. Retirement Sys. v. Medtronic, Inc.*, 621 F.3d 800, 808 (8th Cir. 2010), which notes that in PSLRA cases scienter may be established from, *inter alia*, allegations of motive and opportunity). In this case, however, the relevant rule was recently stated by the Eighth Circuit as follows:

> The element of scienter requires proof of "intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12, 96 S. Ct. 1375,

> 47 L.Ed.2d 668 (1976). [W]e are among the circuits holding that a finding of scienter may be based upon "severe recklessness," that is:
>
> > those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.
>
> *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 654 (8th Cir. 2001) (quotation omitted). This definition of recklessness is "the functional equivalent for intent," requiring proof of "something more egregious than even 'white heart/empty head' good faith." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir.), *cert. denied*, 434 U.S. 875, 98 S. Ct. 224, 225, 54 L.Ed.2d 155 (1977). It is insufficient to show that a defendant should have known that a material statement or omission was false or misleading. "That is a viable claim of negligence, but not of fraud." *In re Ceridian Corp. Secs. Litig.*, 542 F.3d 240, 249 (8th Cir. 2008).

S.E.C. v. Shanahan, 646 F.3d 536, 543-44 (8th Cir. 2011). The Complaint contains only a formulaic recitation of the "scienter" element, unsupported by any detailed facts. For example, the Plaintiff claims that Mr. Morriss knew that statements contained in corporate operating documents were false – some of which prohibited Mr. Morriss from taking loans, while others permitted it by using "vague and broad language." Doc. # 1 ¶¶ 31-35. Clearly, Mr. Morriss could not have "intended" both of these "statements" to be false. Similarly, Plaintiff makes the unsupported assertion that Mr. Morriss had no intention of repaying loans. Yet Plaintiff itself notes that there were promissory notes and netting agreements (Doc. # 104 at 5), which indicates precisely the contrary – that these were indeed loans which were intended to be repaid.

3. Fraudulent Conduct Complained of Is Not Sufficiently Pleaded (all Counts)

The Plaintiff does not respond to Defendant's contention that the alleged fraudulent schemes are not pleaded with sufficient particularity. *See* Doc. # 87 at 18-20. Plaintiff responds only to Mr. Morriss's arguments regarding materiality and the duty to disclose. As to

materiality, Plaintiff cites, *inter alia*, a 1972 Supreme Court decision which held that "information is material if 'a reasonable investor *might* have considered [it] important in the making of [the investment] decision.'" Doc. # 104 at 29 (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972)) (emphasis added). However, the Supreme Court has since rejected this lax standard and now requires more. *See, e.g., Press v. Chemical Inv. Services Corp.*, 988 F. Supp. 375, 384 n.12 (S.D.N.Y. 1997) ("Although *Affiliated Ute* required only that an investor 'might' have considered the omitted information to be important, the Court in *TSC Indus., Inc. v. Northway, Inc*., 426 U.S. 438, [449,] 96 S. Ct. 2126, [2132,] 48 L.Ed.2d 757 (1976), made clear that the test for determining materiality is whether an investor "would" find the information important.").

The Plaintiff focuses its discussion of materiality on its allegations of "misappropriation," arguing that even sophisticated investors would view the misappropriation of funds as material. Of course, it is difficult to disagree with such an oversimplified proposition. But the Plaintiff neglects to address the materiality of Defendants' alleged statements and omissions, such as the alleged omission to disclose that ATP's management operations were outsourced to Acartha Group. Doc. # 87 at 21. Moreover, the Plaintiff claims that fraudulent conduct creates an independent duty to disclose, but this ignores the rule that a party is not under a duty to disclose its own alleged wrongdoing. *See, e.g., S.E.C. v. Fraser*, 2010 WL 5776401, *9 (D. Ariz. Jan. 28, 2010). The Plaintiff cites to *In re Initial Public Offering Sec. Litig*. (and two other cases following it) for the proposition that silence that conceals illegal activity always implicates a duty to disclose. However, the *Initial Public Offering* case arose in a specific factual setting (involving market manipulation) and has been limited to that context. *See Galati v. Commerce Bancorp, Inc*., 2005 WL 3797764, *8 (D.N.J. Nov. 7, 2005) ("Plaintiffs' argument that the

failure to reveal criminal conduct is per se misleading is also without merit. Plaintiffs cite *In re Initial Public Offering Sec. Litig*., 241 F. Supp. 2d 281, 381-82 (S.D.N.Y. 2003), for the proposition that concealing illegal activity is inherently misleading. However, *In re Initial Public Offering* addressed market manipulation, holding only that '[w]here a defendant has engaged in conduct that amounts to "market manipulation" under Rule 10b-5(a) or (c), that misconduct creates an independent duty to disclose.' *Id*."), *aff'd*, 220 Fed. Appx. 97 (3d Cir. Mar 29, 2007).

4. The Investment Advisers Act Claims (Counts V-VIII)

These counts fail for some of the reasons discussed above, including the failure to plead fraud with particularity and the failure to sufficiently allege scienter.[10] As to Counts V and VI,[11] Plaintiff claims that the defrauded "clients" are the ATP and MIC VII funds it named as defendants in the securities fraud counts. The majority of the Complaint's factual allegations – which are nowhere tied to specific counts of the complaint – involve conduct directed to individual investors. *See* Doc. # 1 ¶¶ 30-32 (misrepresentations to investors), 37-41 (defrauding MIC VII investors), and 42-45 (defrauding Gryphon Investments investors). Plaintiff contends that Mr. Morriss violated his fiduciary duty to ATP and MIC VII by misappropriating investor funds. Doc. # 104 at 34. However, the only specific allegations involving these two funds are that Mr. Morriss "borrowed" money from them and "owed" money to them (Doc. # 1 ¶ 24), and

[10] The Plaintiff argues that the Complaint sufficiently alleges Mr. Morriss acted as an "investment advisor" to the Defendants ATP and MIC VII in part because he received "compensation" in the form of allegedly misappropriated client funds. Plaintiff cites no case law for this proposition. (The SEC Release in the *Stein* matter cites a U.S. Supreme Court case, but only for the holding that the Investment Advisers Act should be construed flexibly. *See In the Matter of Alexander v. Stein*, 1995 WL 358127 at *2 & n.13 (S.E.C. Release No. June 8, 1995).)

[11] Contrary to Plaintiff's claim, Morriss's Motion to Dismiss does attack Counts VII and VIII, in that they fail to plead fraud with the requisite particularity and fail to sufficiently allege Morriss was an investment advisor. *See* Doc. # 87 at 23-24.

that he "took" a portion of ATP investor funds which was evidenced by a receivable note (*id*. ¶¶ 26-27). Plaintiff points to no support for its naming of these funds as wrongdoers in the securities fraud counts, and then claiming they are victims of the very same conduct in their investment advisor act counts.

III. CONCLUSION

For the reasons set forth above, Mr. Morriss respectfully requests that this Court dismiss all of the claims asserted against Mr. Morriss in the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, require Plaintiff to state its cause of action with the particularity required by Fed. R. Civ. P. 9(b).

Respectfully submitted this 5th day of April, 2012.

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CERTIFICATE OF SERVICE

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