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 MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

COMES NOW Defendant Burton Douglas Morriss ("Mr. Morriss"), pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), and respectfully moves this Court for an Order dismissing the Complaint in its entirety, or, in the alternative, for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). As discussed in more detail in the Memorandum of Law in Support of Defendant Burton Douglas Morriss's Motion To Dismiss the Complaint or, in the Alternative, Motion for a More Definite Statement, Mr. Morriss is entitled to dismissal because the Complaint fails to state a claim upon which relief can be granted and to plead fraud with sufficient particularity all of the circumstances constituting fraud.

Respectfully submitted this 28th day of February, 2012.

ASHCROFT HANAWAY, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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Defendants, and	)	
	)	
MORRISS HOLDINGS, LLC,	)	
	)	
Relief Defendant.	)	
	)	

ORDER GRANTING MOTION TO DISMISS

This matter is before the Court on the Motion to Dismiss or, in the Alternative, for a More Definite Statement filed by Defendant Burton Douglas Morriss ("Mr. Morriss"). Upon consideration of the motion and finding it to be supported by good cause, it is hereby

ORDERED and **ADJUDGED** that the motion is **GRANTED**, and it is further

ORDERED and **ADJUDGED** that this action is **DISMISSED WITH PREJUDICE** as to all counts against Mr. Morriss for failure to state a claim upon which relief can be granted.

Dated this ____ day of _____, 2012, at St. Louis, Missouri.

_____
HON. CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
Copies to: Counsel of Record

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MORRISS HOLDINGS, LLC,	)	
	)	
Relief Defendant.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BURTON DOUGLAS MORRISS'S 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 support of his Motion to Dismiss the Complaint filed by Plaintiff Securities and Exchange Commission (the "SEC") pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) because it fails to state a claim upon which relief can be granted or, in the alternative, fails to plead fraud with the particularity required by Rule 9(b) and is so vague and ambiguous that Mr. Morriss cannot prepare a proper response.

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I. INTRODUCTION

The SEC's Complaint contains a jumble of allegations and a laundry list of causes of action, but what it utterly fails to do is link its scatter-shot allegations to its causes of action. The federal pleading standards governing complaints generally, and fraud claims in particular, are not empty recitations or aspirational targets. There is no litigant coming to this Court with more power or a larger reservoir of resources than the federal government. When the government is the plaintiff, as it is here, and it is using the immense resources entrusted to it by the people against an individual, the government should not be allowed to be slack in the manner in which it sets forth its causes of action. The Federal Rules of Civil Procedure require the SEC to set forth its allegations with sufficient particularity so that this Court and the Defendants understand exactly what the SEC is suggesting it can prove. Without that, the Defendants are pushed into a prolix guessing game. The rules do not allow a plaintiff to hide the ball and to put a defendant in a posture where the defendant must conjecture at which allegations the plaintiff will later suggest match its standard list of causes of action.

The Complaint suffers from a number of structural deficiencies, including its "formulaic recitation" of the elements of the claims it asserts, its failure to connect any of the factual allegations to any particular cause of action and required elements thereof, the "lumping together" of all defendants, and the failure to specify the role of each Defendant. The SEC has chosen to engage in "shotgun" pleading – spraying allegations without applying sufficient care to match its allegations to the elements it must plead in order to support its causes of action, and without bothering to delineate between the multiple defendants it has named. This lack of attention to what is crucial detail creates immense and unfair challenges for the Defendants who are deprived of the fair notice to which they are entitled.

The Plaintiff's "shotgun" pleading makes it extremely difficult for any of the Defendants to respond to the Complaint's allegations, and is especially inappropriate in a complaint subject to the heightened pleading standards applicable to a case of securities fraud. Rule 9(b) requires that allegations involving fraud be pleaded with "particularity," by specifying the who, what, where, and when of the alleged fraud. To defend against an allegation of fraud, courts have recognized that a defendant is entitled to certain basic information: the time, the place, and the content of the alleged misrepresentation, who allegedly made such a misrepresentation, and what was obtained as a result of the misrepresentation. The SEC's Complaint is vague at best on all of these points. The law does not force parties to defend complaints that nonchalantly dispense with any type of precision fraud allegations, even if it is the federal government making the claims. Each and every count of the Complaint should be dismissed based on these overall deficiencies.

In addition to these global defects, the Complaint's specific causes of action – to the extent Mr. Morriss can speculate what allegations match the various causes of action – are all additionally deficient in that one or more of the requisite elements are missing from each count. For instance, all of the securities fraud claims (Counts I through IV) require that the alleged fraud be in connection with the offer, sale or purchase of a security. The Plaintiff's failure to plead specifics makes this element impossible to glean from the Complaint – indeed, there is not a single specific factual allegation regarding any sale or purchase of a security. There is only the Plaintiff's sweeping statement that over an eight-year period (2003 through 2011), 97 unnamed investors invested money in the Investment Entity Defendants. Doc. # 1 ¶ 15. There is nothing in the Complaint connecting those investments to any alleged fraudulent conduct; indeed, there is

no allegation of any misconduct until at least 2005, at least two years after the Complaint alleges that investments were first made.

Likewise, the Complaint does not adequately allege scienter, which is a required element for most of the Plaintiff's claims. (Scienter is a required element of claims in Counts I, III, V, and the corresponding aiding and abetting counts.) The SEC's unwillingness to plead any intent to defraud is, perhaps, calculated. To state its fraud allegations with any sort of precision would further expose the grave contradictions in the SEC's Complaint. On the one hand, the SEC vaguely alleges that Mr. Morriss intended to defraud but, on the other, characterizes the disbursements made to him as loans. It even concedes that these loans were backed up by promissory notes. Thus, the SEC has several counts where even if the conduct alleged were sufficiently pleaded, the Complaint would still be deficient for failing to allege scienter.

The Complaint, however, does not sufficiently plead the conduct which supposedly constituted the fraud. (Since the individual causes of action do not relate to any specific conduct, but rather incorporate all of the conduct alleged, this affects each and every count of the Complaint.) For example, the Complaint fails to plead the materiality of the alleged misrepresentations and omissions, much less the existence of a duty to disclose with respect to the claimed omissions. Indeed, all of the allegations involving allegedly fraudulent conduct lack specificity as to who was involved (which defendants, and what investors), when the conduct took place vis-à-vis any investments, and how the conduct operated as a fraud upon any investors. The SEC makes bold, categorical allegations of fraud and misrepresentation, relying on conclusory allegations and formulaic recitations of the elements of a fraud claim to try to shoehorn Mr. Morriss into its assertions of corporate malfeasance and fraud. The SEC has not pled with particularity whether any alleged materially false or misleading statements, omissions,

or deceptive conduct on the part of any of the Defendants, including Mr. Morriss, were made in connection with the sale of any security.

An additional defect in the Investment Advisers Act (the "Advisers Act") claims (Counts V through VIII) is the SEC's failure to allege any facts indicating that Mr. Morriss is in fact an "investment adviser" subject to the statute. Moreover, Counts V and VII allege fraud upon "clients," but in the context of the Advisers Act, the "clients" are the private equity funds at issue, rather than individual investors in those funds. Finally, the SEC fails to sufficiently allege, as it must to sustain aiding and abetting claims (Counts IV, VI and VIII), that Mr. Morriss substantially assisted any of the alleged primary violations by the other Defendants. Indeed, the SEC fails in its Complaint to distinguish among the alleged actions of the five named Defendants and the Relief Defendant

The SEC's claims against Mr. Morriss should be dismissed or, in the alternative, pleaded with the degree of specificity required under the Federal Rules of Civil Procedure.

II. FACTUAL BACKGROUND

The Complaint itself underscores the complexity of the investments involved here. These were investments by sophisticated, accredited investors in response to private offerings. There was no public solicitation involved. These sophisticated investors were offered opportunities to invest in start-up technology and finance companies – in other words, companies without track records operating in high-risk, high-reward industries. The investments were structured as membership interests in private equity funds, Defendants MIC VII, LLC ("MIC") and Acartha Technology Partners, LP ("ATP"), which in turn invested in the start-up portfolio companies, as well as membership interests in Defendants Acartha Group, LLC ("Acartha") and Gryphon Investments III, LLC ("G III"), which companies managed the equity funds.

The Complaint alleges that Mr. Morriss, who was Chairman and CEO of Acartha as well as the manager of G III, "misappropriated" investor funds over a six-year period. Doc. # 1 ¶ 1. However, *by the SEC's own account*, disbursements to Mr. Morriss were memorialized in loan documents. Doc. # 1 ¶ 22. The SEC also alleges that Mr. Morriss lent money to the various Investment Entities. Doc. # 1 ¶ 21. Thus, the monies that the SEC alleges were "misappropriated" from investors were accounted for in loan documents in which Mr. Morriss had created a contractual obligation to repay. The SEC attempts to portray Mr. Morriss's actions to secure financing for the continued successful operations of the Investment Entities as deceptive conduct. The SEC, however, fails to explain the obvious inconsistency between the bare allegations of "misappropriation," on the one hand, and the plain evidence of loan documentation, on the other.

III. ARGUMENT

A. Summary of Legal Standards

Defendants are entitled to challenge the legal sufficiency of a complaint under Fed. R. Civ. P. 12(b)(6). If a complaint fails to state a claim, it must be dismissed. In ruling on a motion to dismiss, a court will consider only those facts that are well-pleaded; the court "need not credit a complaint's 'bald assertions' or legal conclusions." *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996). To survive a motion to dismiss for failure to state a claim, a complaint must comply with Rule 8, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 12(b)(6), 8(a)(2); *see generally Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). Indeed, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions,

and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007).

When the claims involve fraud, as in this case, the complaint must also satisfy Rule 9(b), which requires that "a party must state with particularity the circumstances constituting fraud[.]" Fed. R. Civ. P. 9(b). As this Court has noted, "[t]he particularity requirement of Rule 9(b) 'has been strictly applied in the context of securities fraud litigation as a means of deterring frivolous suits.'" *Jakobe v. Rawlings Sporting Goods Co.*, 943 F. Supp. 1143, 1152 (E.D. Mo. 1996) (quoting *Weisburgh v. St. Jude Medical, Inc.*, 158 F.R.D. 638, 642 (D. Minn. 1994), *aff'd*, 62 F.3d 1422 (8th Cir. 1995)). Also, "where, as here, 'multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his [or her] alleged participation in the fraud.'" *In re Parmalat Securities Litigation*, 479 F. Supp. 2d 332, 340 (S.D.N.Y. 2007) (citation omitted). *See also, e.g., Lillard v. Stockton*, 267 F. Supp. 2d 1081, 1094 (N.D. Okla. 2003) ("[W]here fraud is alleged against multiple defendants, blanket allegations of fraud couched in language such as 'by the defendants' are insufficient. Instead, the specifics of the alleged fraudulent activity of each defendant must be set forth.").

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court expressly "retired" the 50-year old statement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." As stated by the Supreme Court, "after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."

Twombly, 127 S. Ct. at 1969. Instead, "Rule 8(a)(2) . . . requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 1965 n.3. "Rule 8(a) 'contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented' and does not authorize a pleader's 'bare averment that he wants relief and is entitled to it.'" *Id.* at 1965 n.3 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, at 94, 95 (3d ed. 2004)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level," and "'the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.'" *Id.* at 1965 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 235-36).

"Labels and conclusions" or "a formulaic recitation of the elements of a cause of action" are insufficient to withstand a motion to dismiss." *Twombly*, 127 S. Ct. at 1964-65. When reviewing a complaint under Rule 12(b)(6), the Court must "construe the complaint in the light most favorable to the nonmoving party." *Carton v. Gen. Motors Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010); *see also Broadcast Music, Inc. v. MWS, LLC*, 2012 WL 368736, at **1-2 (E.D. Mo. Feb. 3, 2012). "Although the pleading standard is liberal, the plaintiff must allege facts – not mere legal conclusions – that, if true, would support the existence of the claimed torts." *Moses.com Securities v. Comprehensive Software Systems, Inc.*, 406 F.3d. 1052,

1062 (8th Cir. 2005) (citing *Schaller Tel. Co. v. Golden Sky Systems*, 298 F.3d. 736, 740 (8th Cir. 2002)); *see also Benton v. Merrill Lynch & Co., Inc.*, 524 F.3d 866, 870 (8th Cir. 2008) ("[w]here the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate") (citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997)).

Further, on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986). In deciding whether a claim for relief is supported, a court must consider only the facts that are alleged, and not un-alleged facts that a plaintiff might later prove. *Assoc. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526, 103 S. Ct. 897, 902 (1983). As the Eighth Circuit recently explained, "to survive a motion to dismiss, the factual allegations in a complaint, assumed true, must suffice 'to state a claim to relief that is plausible on its face.'" *See Northern Valley Communications, LLC v. Qwest Communications Co., LLC*, 2012 WL 523683, at *2 (D.S.D. Feb. 16, 2012) (unpublished) (quoting *Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 716 (8th Cir. 2011) (in turn quoting *Northstar Indus., Inc. v. Merrill Lynch & Co.*, 576 F.3d 827, 832 (8th Cir. 2009))).

B. Plaintiff's Complaint Overall Fails to State any Claim Upon Which Relief May Be Granted because Plaintiff Employs an Impermissible Style of Pleading

The SEC's Complaint inappropriately engages in "shotgun" and/or "puzzle" pleading and should be dismissed as a whole. "Shotgun" pleadings are those that "incorporate all or nearly all antecedent allegation by reference to each subsequent claim for relief or affirmative defense," leaving the court and defendants to parse which allegations support which claims. *See S.E.C. v. Fraser*, 2010 WL 5776401, at *14 (D. Ariz. Jan. 28, 2010) (unpublished) (internal quotations and citations omitted) (dismissing certain SEC claims for relief where the complaint engages in

shotgun pleading). "Puzzle" pleadings require the court and the defendant to match alleged statements with the reason they are false or misleading. *S.E.C. v. Fraser*, 2009 WL 2450508, at *14 (D. Ariz. Aug. 11, 2009) (unpublished) (citation omitted). Courts have stated that a complaint relying on shotgun or puzzle pleading fails to meet the particularity requirements of Rule 9(b). *Id*. (quoting *Teamsters Local 617 Pension and Welfare Funds v. Apollo Group, Inc.*, 617 F. Supp. 2d 763, 784 (D. Ariz. 2009), *vacated on other grounds*, 690 F. Supp. 2d 959 (D. Ariz. 2009)); *see also Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006) (noting that the complaint at issue was a shotgun pleading "incorporating every antecedent allegation by reference into each subsequent claim for relief"); *In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1279 (E.D. Wash. 2007).

In *Wagner*, the court concluded that the central problem was that the factual particularity of the previously stated allegations was "not connected to the otherwise generally pled claim in any meaningful way." *Wagner*, 464 F.3d at 1279. The problem, the court stated, "was not that Plaintiffs did not allege enough facts, or failed to recite magic words; the problem lay in the fact that while Plaintiffs introduced a great deal of factual allegations, the amended complaint did not clearly link any of those facts to its causes of action." *Id*. at 1280. In similar fashion, the SEC's Complaint in this case jumbles together a host of allegations with little organization and varying specificity to Mr. Morriss. At times, the SEC cites to specific language in the offering memoranda or operating agreements of the various Investment Entities as evidence that the Defendants engaged in fraudulent conduct, never specifying whether Mr. Morriss participated in the drafting of the documents alleged as containing a misrepresentation or omission. *See, e.g.*, Doc. # 1 ¶ 30. Further, the SEC routinely refers to "Defendants" generically, rather than alleging specific facts regarding how Mr. Morriss in particular misled or defrauded investors. *See, e.g.*,

Doc. # 1 ¶ 31 ("As a result, he and the Investment Entities misled investors as to how the Defendants would use their funds").

The SEC's style of pleading unfortunately forces Mr. Morriss and the Court to comb through the Complaint, determine which fraud or deceit was perpetrated by Mr. Morriss or the other Defendants, determine which misrepresentations or omissions were made by which Defendant(s), and then evaluate the adequacy of that factual support as to the various claims against the Defendants. No list or chart is provided that would identify for each claim which Defendant(s) committed the fraud or deceit or which Defendant(s) made which misstatement or omission and, further, to which investor at which time, much less the facts that would establish scienter concerning the alleged misconduct. The SEC's parroting of the language of various securities statutes leaves Defendants and this Court with the task of parsing the Complaint and inferring what specific conduct the SEC might believe to be a violation of securities law. *See Fraser*, 2009 WL 2450508, at *14. Indeed, this Court is tasked with "untangling which (if any) act(s) engaged in by which (if any) defendant(s) applies to which (if any) claim(s)." *Id*. at *13.

According to the SEC's own tally, the Defendants raised at least $88 million since 2003 through 2011 from approximately 97 sophisticated individuals. Doc. # 1 ¶ 15. Although this case is obviously complex – the SEC charges Mr. Morriss with eight counts of securities fraud in connection with these capital raises – the Complaint provides none of the basic facts that one would expect to see in a fraud complaint. First, the SEC fails to describe the alleged fraud with the requisite facts, leaving a host of questions as to (i) the names of the investors who were defrauded; (ii) the dates they were defrauded; (iii) the amounts they were each defrauded; (iv) the specific documents that were used to defraud them; or (v) where they were defrauded. Second, with respect to the allegations concerning misrepresentations and omissions in investor

disclosures, neither this Court nor any of the Defendants are told of: (i) the specific nature of the supposed fraudulent misrepresentations; (ii) the specific nature of the supposed omissions; (iii) whether the omissions were material; (iv) when the supposed fraudulent misrepresentations and/or omissions took place; (v) where they took place; (vi) whether Mr. Morriss or the other Defendants may properly be said to have owed investors a duty to disclose any omissions; (vii) whether investors reasonably relied on supposed fraudulent misrepresentations and/or omissions; or (viii) whether Mr. Morriss may properly be said to have made or participated in the drafting of documents containing misrepresentations and/or omissions.

The *Fraser* court rejected the SEC'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 SEC's 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." *Fraser,* 2009 WL 2450508, at *8. The instant SEC Complaint contains far *less* information than the *Fraser* court had the benefit of considering. In this case, 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. 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. Incorporating into the claims sections of the Complaint all preceding factual allegations, the SEC

instead leaves this Court – and the Defendants – to search the Complaint and match up alleged facts to each claimed act of wrongdoing. *Fraser*, 2009 WL 2450508, at **13-14.

The style of pleading used by the SEC is clearly inappropriate for a complaint alleging securities fraud. For this reason alone, the Complaint should be dismissed. Indeed, one court recently noted that district courts are encouraged to dismiss "shotgun" complaints as they impermissibly burden the trial court:

> "The typical shotgun complaint contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e. all but the first) contain irrelevant factual allegations and legal conclusions." *Strategic Income Fund v. Spear, Leeds & Kellogg*, 305 F.3d 1293, 1295 n. 9 (11th Cir. 2002). Shotgun complaints impose a heavy burden on the trial court because it must sift through each and every count to determine which allegations are relevant to the cause of action purportedly stated. *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1354 (11th Cir. 2006). District courts are encouraged to dismiss such complaints, as permitting such pleadings results in much more judicial labor in the long run. *Johnson Ent. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1333 (11th Cir. 1998) . . . .

Andela v. University of Miami, 692 F. Supp. 2d 1356, 1370 (S.D. Fla. 2010), *aff'd in part, dismissed in part on other grounds*, --- Fed. Appx. ----, 2012 WL 45441 (11th Cir. Jan. 10, 2012). *See also S.E.C. v. Mercury Interactive*, 2008 WL 4544443, at *8 (N.D. Cal. Sept. 30, 2008) (explaining that shotgun pleading makes it "difficult to discern which filings form the bases for each claim"); *S.E.C. v. Patel*, 2009 WL 2015794, at **1-2 (D.N.H. July 7, 2009) (criticizing this pleading style because "to reasonably determine that any particular claim should not be dismissed would require the court to first comb the complaint in search of factual support for each element of the multiple claims pled as to each defendant, and then evaluate the adequacy of that factual support," which "is, of course, plaintiff's job in the first instance, not the court's").

While the SEC finds it sufficient to simply cross-reference the same 45 paragraphs of its disorganized Complaint under each of the eight Counts charged against Mr. Morriss, its failure to

plead with particularity concerning the factual allegations as they relate to the specific causes of action cited in the Complaint reveals a yet greater failing of the Complaint: a general inability to plead with the particularity required in order to enable this Court to conclude that Mr. Morriss did indeed commit fraud actionable under Federal securities law.

C. Plaintiff's Complaint Additionally Fails to State a Claim By Failing to Sufficiently Plead Several Requisite Elements of the Stated Causes of Action

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

To state a claim for securities fraud under Section 17(a), the Complaint must allege that there was fraud "in the offer or sale" of securities. 15 U.S.C.A. § 77q(a). To state a claim for securities fraud under Section 10(b) of the Exchange Act, the Complaint must allege that there was fraud "in connection with the purchase or sale" of securities. 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5. Both statutes require that the alleged misstatement occur in connection with the purchase, offering or sale of a security.[1] The U.S. 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.

[1] The securities fraud counts (Counts I through IV) require that the conduct complained of be performed "in the offer or sale of any securities" (Securities Act, Sec. 17(a); 15 U.S.C.A. § 77q(a)) or "in connection with the purchase or sale of any security" (Exchange Act, Sec. 10(b); 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5). Although courts often treat these two standards similarly, the Securities Act language clearly requires a more direct nexus to the actual offer or sale of securities than the Exchange Act's broader "in connection with" language. *See S.E.C. v. Evolution Capital Advisors, LLC*, CIV.A. H-11-2945, 2011 WL 6754070, *1 (S.D. Tex. Dec. 22, 2011) ("The Securities Act applies to the 'offer or sale' of securities and the Exchange Act applies more broadly 'in connection with the purchase or sale' of securities."). Regardless of any differences between the two standards, the allegations in the Complaint do not satisfy either standard.

A fraud is "in connection with" a purchase or sale of securities when there are "deceptive practices touching [upon the purchase or] sale of securities." *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12–13, 92 S. Ct. 165, 169 (1971). The activity must be prior to or contemporaneous with and not subsequent to the purchase or sale. *See, e.g.*, *MathStar, Inc. v. Tiberius Capital II, LLC*, 712 F. Supp. 2d 870, 881 (D. Minn. 2010) ("As a matter of law, 'conduct actionable under Rule 10b–5 must occur before investors purchase the securities.'") (quoting *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1487 (9th Cir. 1991)); *Seattle-First Nat. Bank v. Carlstedt*, 678 F. Supp. 1543, 1547 (W.D. Okla. 1987) ("Activities that occur after a plaintiff's purchase of a security cannot form the basis for liability under Rule 10b–5.") (citing cases).

The Complaint states, in conclusory terms, that there were transfers of funds from certain investment entities to Mr. Morriss or Morriss Holdings over a several year period. *See* Doc. # 1 ¶ 26 (transfers between March 2008 and June 2009), ¶ 28 (transfers between December 31, 2009 and at least September 30, 2011). The Complaint alleges that fraud occurred because investors were misled as to the manner in which their funds were used. *See* ¶ 32 (2008 ATP Agreement), ¶ 33 (2008 G III Agreement), ¶ 34 (2005 MIC VII Agreement), ¶ 35 (2007 Acartha Private Placement Memorandum). However, the Complaint fails to allege any factual support to satisfy the essential element that the alleged fraud was *in connection with the purchase or sale of any security*. The *only* allegation in the Complaint of the purchase or sale of any security is that "from 2003 until 2011, Morriss and the Investment Entities raised at least $88 million from approximately 97 investors." Doc. # 1 ¶ 15. Under even the broadest reading of the phrase "in connection with the purchase or sale of any security," it cannot seriously be argued that this imprecise pleading is sufficient to establish the requisite connection. Although the SEC has

consistently urged a broad reading of the phrase "in connection with the purchase or sale of any security," the Supreme Court has cautioned that not every allegation that happens to involve securities is sufficient to implicate the securities fraud laws. *See generally S.E.C. v. Zandford*, 535 U.S. 813, 820, 122 S. Ct. 1899, 1903 (2002) ("the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)"). The Complaint's only allegation of any purchase or sale of any security is that there was an eight-year period where approximately 100 investors made an investment.

This is patently insufficient to establish any connection between the purchase or sale of securities and any alleged fraud. First, none of the relevant particulars are provided in even the sketchiest of details – who invested, what did they invest in, when did they invest, what was their understanding, etc. Second, it is clear that any alleged misrepresentations or omissions could not, by virtue of Plaintiff's pleading, relate to any investment decisions in 2003, 2004 or perhaps even 2005. *See* Doc. # 1 ¶¶ 32-35 (alleged representations and omissions occurred beginning in 2005). The Complaint provides no information whatsoever regarding the securities transactions with these unnamed investors, such that Mr. Morriss or this Court could determine whether any the alleged fraud coincided with any investor's decision to invest in one of these entities. To the extent the transfer of funds was subsequent to the completion of the securities transactions, the allegations are too tenuous to form the basis for a claim under the federal securities laws. *See 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).

To allege securities fraud, the SEC must allege that Mr. Morriss made misrepresentations to the investors *at the time the securities were sold and the money was raised*, not at a later time.

"As a threshold matter, the Court notes that only those of plaintiffs' securities purchases that occurred subsequent to the alleged fraudulent acts by [defendant] can be 'in connection' with such fraud." *Goldman v. McMahan, Brafman, Morgan & Co.*, No. 85 Civ. 2236 (PKL), 1987 WL 12820, at *8 (S.D.N.Y. June 18, 1987). Examining a claim by plaintiffs who bought limited partnership interests in a New York limited partnership, the *Goldman* court found that defendants could not be held liable for securities fraud where the allegation concerned fraudulent acts occurring *after* plaintiffs made their purchase. *Id.*; *see also First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon*, 629 F. Supp. 427, 439 (S.D.N.Y. 1986); *Freschi v. Grand Coal Venture*, 551 F. Supp. 1220, 1227 (S.D.N.Y. 1982). By virtue of the information missing from the Complaint, this Court is presently unable to apply the 'in connection with' test to determine whether the allegations against Mr. Morriss amount to Federal securities fraud. The same weakness attaches to the assertion that the disclosures to Investment Entity investors amounted to a fraudulent inducement to purchase. Indeed, save a singular sentence concerning the time period in which Mr. Morriss and the Investment Entities allegedly raised funds, the Complaint is entirely devoid of factual allegations concerning the circumstances surrounding the investments made in the Investment Entities. Doc. # 1 ¶ 15 ("From 2003 until 2011, Morriss and the Investment Entities raised at least $88 million from approximately 97 investors"). At the very least, however, the SEC's pleading suggests that investments made in 2003 and 2004, or perhaps even 2005 could not have constituted fraud in connection with the sale of securities, being as they predated the allegedly fraudulent loans made by Mr. Morriss beginning in 2005. Doc. # 1 ¶ 21.

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

Scienter is a requisite element of most of the Plaintiff's claims. The U.S. Supreme Court has held that scienter – "an intent on the part of the defendant to deceive, manipulate, or defraud" – is required for a cause of action under Section 17(a)(1) of the Securities Act (alleged in Count I), as well as under Rule 10b-5 and Section 10(b) of the Exchange Act (alleged in Counts III and IV). *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 686, 701-02, 100 S. Ct. 1945, 1950, 1958 (1980). Scienter has also been required for claims under Section 206(1) of the Investment Advisers Act (alleged in Counts V and VI of the Complaint). *See S.E.C. v. Steadman*, 967 F.2d 636, 641 n.3 (D.C. Cir. 1992) ("Although the Supreme Court has not held that scienter is required under § 206(1) of the Investment Advisers Act, the language of § 206(1) is identical in all important respects to the language of § 17(a)(1) of the Securities Act, which was central to the Court's holding in *Aaron* that § 17(a)(1) did require scienter. *See* 446 U.S. at 695-97, 100 S. Ct. at 1954-56. We therefore believe that *Aaron* obliges us to interpret § 206(1) the same way and agree with the Fifth Circuit that scienter is required under that section as well. *See Steadman v. S.E.C.*, 603 F.2d 1126, 1134 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91, 101 S. Ct. 999, 67 L.Ed.2d 69 (1981).").

The Eighth Circuit has recently explained the scienter element in this 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's factual allegations do not support their "formulaic recitation" of the element of scienter required for many of the claims asserted against Mr. Morriss. The "intent . . . to deceive, manipulate, or defraud" is belied by the SEC's concession that the loans – which the SEC characterizes, with no support, as "misappropriations" – were backed up by promissory notes. These facts indicate not an intent to misappropriate funds, but to the contrary an intent to repay those funds.

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

As already noted, Plaintiff's eight counts merely parrot the language of the statutes allegedly violated. The counts contain no identification whatsoever of the conduct which allegedly violated these statutory provisions, other than to incorporate by reference the entire Complaint. The counts simply recite the statutory language, complaining of unspecified "devices, schemes or artifices to defraud" (Counts I, III, V), "untrue statements" and "omissions" (Counts II and III), or "acts, practices and courses of business" which were fraudulent (Counts II, III, V, VII). The defendants are left to scour through the Complaint's vague factual narrative to guess what conduct supposedly comprised these fraudulent devices or practices.

a. Plaintiff Fails to Sufficiently Allege that Any Purported Conduct was Fraudulent, False or Misleading

Moreover, the factual allegations themselves are simply not pled with the particularity required in a securities fraud complaint. The Plaintiff complains generally of "misappropriation" of investor funds and related misrepresentations or omissions regarding the use of investor funds. There are also a handful of allegations regarding misrepresentations as to what entity managed ATP, and a fraudulent scheme to circumvent the unanimous consent requirement for investors into MIC VII. Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). In the context of securities fraud, this particularity requirement "ensures that a defendant is given sufficient notice of the allegations against him to permit the preparation of an effective defense." *Parnes v. Gateway 2000, Inc*., 122 F.3d 539, 549 (8th Cir. 1997). The Eighth Circuit has applied Rule 9(b) strictly in securities fraud cases, requiring details as to any alleged misrepresentations:

> This Court has explained that, for Rule 9(b), "'[c]ircumstances' include such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby.... [C]onclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule." *Commercial Property Invs., Inc. v. Quality Inns Int'l, Inc*., 61 F.3d 639, 644 (8th Cir. 1995) (quotations and citations omitted); *see also DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) ("[T]he circumstances [constituting fraud] must be pleaded in detail. This means the who, what, when, where, and how: the first paragraph of any newspaper story. None of this appears in the complaint, although the flood of information released about Continental Bank since 1984 offers ample fodder if there is indeed a tale to tell." (quotations omitted)); . . . *In re Lifecore Biomedical, Inc. Sec. Litig*., 159 F.R.D. 513, 516 (D.Minn.1993) (Rule 9(b) requires that "the complaint must allege the time, place, speaker and sometimes even the content of the alleged misrepresentation."). Where "allegations of fraud are explicitly or, as in this case, implicitly, based only on information and belief, the complaint must set forth the source of the information and the reasons for the belief." *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 878 (1st Cir. 1991).

Id. at 549-50 (some citations omitted) In *Parnes*, the court dismissed the plaintiffs' securities fraud claims under Rule 9(b). *Id.* at 550 ("The Plaintiffs provide the barest clue as to when the alleged fraud took place, and the Defendants are left to guess which controlling shareholders were responsible for this alleged fraud. Neither this nor the Plaintiffs' other allegations of fraud meet Rule 9(b)'s particularity requirements, and the district court properly struck them."). These strict pleading requirements apply equally to omissions. *See Stewart v. Fry*, 575 F. Supp. 753, 756 (E.D. Mo. 1983) ("In a complaint under § 10(b) 'there *must* be a specific identification of what statements were made in what reports and in what respects they were false, misleading or inaccurate or what omissions were made and why the statements made are believed to be misleading.'") (citation omitted) (emphasis added by court).

In this case, the Complaint fails to satisfy the Eighth Circuit's stringent pleading standards for securities fraud. The Plaintiff fails to identify the "circumstances" of the alleged fraud – the "time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Parnes*, 122 F.3d at 549. For example, the Complaint states that "Morriss and Gryphon Investments represented to investors that it was the fund manager for ATP[.]" Doc. # 1 ¶ 13; *see also* Doc. # 1 ¶ 42 (same). There is no information as to the time(s) or place of these alleged representations.

b. Plaintiff Fails to Sufficiently Allege that Any Purported Misrepresentations or Omissions were "Material"

Misrepresentations and omissions can serve as the basis of a fraud claim only if they are "material." The Eighth Circuit recently explained that "[a] misrepresentation or omission is material if there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" *In re AMDOCS Ltd. Securities Litigation*, 390 F.3d 542, 548 (8th

Cir. 2004) (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 232, 108 S. Ct. 978 (1988)).[2] *See also Jakobe v. Rawlings Sporting Goods Co.*, 943 F. Supp. 1143, 1152 (E.D. Mo. 1996) ("The definition of materiality is the same whether misrepresentations or omissions are involved.").

The Complaint does contain several allegations of untrue statements or omissions, but nowhere does it allege that such statements or omissions involved "material" facts. For example, the Complaint alleges that the Defendants failed to disclose that investor funds would or could be transferred to Morriss or Morriss Holdings. *See, e.g.*, Doc. # 1 ¶ 30. However, the Plaintiff points to certain "vague" contractual language which permitted such transfers in the "sole" or "broad discretion" of management. Complaint ¶¶ 34, 35.[3] In addition, the Complaint states that "Morriss and Gryphon Investments represented to investors that it was the fund manager for ATP, however, it outsourced ATP's management operations to Acartha Group." Doc. # 1 ¶ 13.

The Complaint does not, and cannot, explain how such an omission would be "material" to investors, much less to the sophisticated investors in these private equity funds. *See In re Hutchinson Technology, Inc. Securities Litigation*, 536 F.3d 952, 960-61 (8th Cir. 2008) ("The

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[2] As the Eighth Circuit further explained in this case:

> Alleged misrepresentations can be immaterial as a matter of law if they: 1) are of such common knowledge that a reasonable investor can be presumed to understand them; 2) present or conceal such insignificant data that, in the total mix of information, it simply would not matter; 3) are so vague and of such obvious hyperbole that no reasonable investor would rely upon them; or 4) are accompanied by sufficient cautionary statements. Cautionary language which relates directly to that which the Plaintiffs claim to have been misled, if sufficient, renders the alleged misrepresentation or omissions immaterial as a matter of law.

Id. (citations omitted).

[3] The Complaint points to other governing contracts that purportedly prohibited such transfers; it would seem clear that any challenge to transfers in violation of these provisions is for breach of those provisions, rather than securities fraud. *See, e.g., Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 692 (9th Cir. 2011) ("contract breach is not a sufficient predicate for securities fraud"); *Wortley v. Camplin*, 333 F.3d 284, 294 (1st Cir. 2003) ("[M]ere breach of a promise is not itself enough to establish fraudulent intent for a federal securities law violation. The remedy in such a situation is an action for breach of contract.") (citation omitted).

role of the materiality requirement is not to attribute to investors a childlike simplicity[.]") (citation omitted); *Delta Holdings, Inc. v. National Distillers and Chemical Corp.*, 945 F.2d 1226, 1242-43 & n.4 (2d Cir. 1991) (considering sophistication of investors in determining materiality of information); *Sable v. Southmark/Envicon Capital Corp.*, 819 F. Supp. 324, 335 (S.D.N.Y. 1993) (same); *cf. Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1028-29 (4th Cir. 1997) ("A sophisticated investor requires less information to call a '[mis]representation into question' than would an unsophisticated investor. Likewise, when material information is omitted, a sophisticated investor is more likely to 'know[] enough so that the ... omission still leaves him cognizant of the risk.'") (citations omitted).

c. Plaintiff Fails to Allege Any Duty to Disclose

Moreover, the Plaintiff fails to allege any duty to disclose in support of its claims based on omissions. When there is an allegation of fraud, and it is based on a nondisclosure, there can be no finding of fraud absent a duty to disclose information. *See, e.g., Jakobe v. Rawlings Sporting Goods Co.*, 943 F. Supp. 1143, 1156 (E.D. Mo. 1996); *S.E.C. v. Rogers*, 790 F.2d 1450, 1459 (9th Cir. 1986), *disagreed with on other grounds by Pinter v. Dahl*, 108 S. Ct. 2063 (1988). As the statutory and Rule 10b-5 language make clear, there is no duty to disclose unless silence would make other statements misleading. *See generally In re K-tel Intern., Inc. Securities Litigation*, 300 F.3d 881, 898 (8th Cir. 2002) ("'Materiality alone is not sufficient to place a company under a duty of disclosure.' In fact, '[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5.' 'A duty arises, however, if there have been inaccurate, incomplete or misleading disclosures.'") (citations omitted).

As discussed above, the Complaint generally alleges there is a violation "by reason of the foregoing," without any meaningful detail or factual support concerning the purported fraud. The impermissibly vague allegations are compounded by Plaintiff's failure to assert any duty to

disclose information relating to the transfer of investor funds to Mr. Morriss or Morriss Holdings. For example, the Plaintiff claims that "[n]either Morriss, MIC VII, nor Acartha Group disclosed to investors Morriss's receipt of the $2.5 million [from the proceeds of a sale of stock] at the time of the transfer." Doc. # 1 ¶ 38. However, Plaintiff does not allege how this failure to disclose rendered any other statements made misleading. *See* Doc. # 1 ¶¶ 37-38. Thus, not only do the non-particularized allegations ignore the basic fraud pleading rule, which make it impossible for Mr. Morriss to defend this case, the claims should be dismissed because they fail to satisfy an essential element of a securities fraud claim.

Arguably, without any allegations that the omissions were "in connection with" the offer or sale of securities, or that there was a duty to disclose the transfer of funds, Plaintiff is attempting to litigate matters that are not actionable under federal securities laws. *S.E.C. v. Zandford*, 535 U.S. 813, 820, 122 S. Ct. 1899, 1903 (2002) (the Securities Exchange Act "must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)"); *see also In re Morgan Stanley Tech. Fund Sec. Litig.*, 643 F. Supp. 2d 366, 377 (S.D.N.Y. 2009) ("firms have no duty to accuse themselves of unproven, allegedly illegal policies") (citing *In re Am. Express Shareholder Litig.*, 840 F. Supp. 260, 269 (S.D.N.Y.1993) and *In re Axis Capital Holdings Ltd. Sec. Litig.*, 456 F. Supp. 2d 576, 587 (S.D.N.Y. 2006)), *aff'd sub nom. In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347 (2d Cir. 2010).

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

These counts fail for many of the same reasons already discussed, including the failure to plead fraud with particularity and the failure to sufficiently allege scienter. Moreover, the Plaintiff fails to allege any facts to support the claim that Mr. Morriss is an "investment adviser" as defined in the Advisers Act. *See* 15 U.S.C.A. § 80b-2(a)(11) ("'Investment adviser' means

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities[.]").

Counts V and VI fail for an additional reason. These counts allege violations of Sections 206(1) and 206(2) of the Advisers Act, which 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."). 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.

5. The Aiding and Abetting Claims (Counts IV, VI and VIII) Must Fail

"To establish . . . liability under an 'aiding and abetting theory,' the SEC must establish: (1) a primary or independent securities violation committed by another party; (2) awareness or knowledge by the alleged aider and abettor that his role was part of an overall activity that was improper; and (3) the alleged aider and abetter knowingly and substantially assisted the conduct that constitutes the primary violation." *See generally S.E.C. v. Bolla*, 401 F. Supp. 2d 43, 58 (D.D.C. 2005) (citations omitted), *aff'd in part and remanded*, 475 F.3d 392 (D.C. Cir. 2007)

(Investment Advisers Act); *S.E.C. v. Pentagon Capital Mgmt. PLC*, 612 F. Supp. 2d 241, 266 (S.D.N.Y. 2009) (Exchange Act).

Here, the claims of "aiding and abetting" (Counts IV, VI and VIII) are derivative of the substantive claims in Counts III, V and VII. The Plaintiff asserts that Mr. Morriss is both the principal violator and assisted in the principal violation of the Exchange Act (Sec. 10(b)) and Advisers Act. Mr. Morriss has demonstrated that the Plaintiff failed to allege all of the necessary elements of the underlying misrepresentation, omissions and/or fraudulent scheme, and the facts alleged did not meet the particularity standards in order to survive the pleading stage.

The problems stem initially from Plaintiff's "formulaic recitation" of the claims and the "puzzle" style pleading. The problems continue where, among other things, the Complaint identifies certain operating agreements as the basis for the violations, but fails to elaborate on (1) whether the Defendants used the documents in relation to the purchase or sale of securities (without which it is unclear whether any fraud coincided with any investment), (2) if so, how the Defendants used the documents to deceive, manipulate or defraud investors (without which there is no intent), and (3) whether the ability to transfer and/or loan funds would have been significant to any of the unidentified investors (without which it is unclear whether the information was material). Equally troubling is that the Plaintiff also asserts claims under the Advisers Act without establishing even the slightest legal foundation; in particular, whether Mr. Morriss is an investment adviser and whether a *client or prospective client* was involved. *See S.E.C. v. Tambone*, 417 F. Supp. 2d 127, 133 (D. Mass. 2006) (citing *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) ("[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist."), and *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999) ("bald assertions...and the like need not be credited") (quoting

Correa–Martinez v. Arrillaga–Belendez, 903 F.2d 49, 52 (1st Cir. 1990))). Thus, the claims of "aiding and abetting," being derivative of the substantive (failing) claims, also fail.

IV. 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 28th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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