UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO.: 8:20-cv-00394-MSS-SPF

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

KINETIC INVESTMENT GROUP, LLC et al.,

Defendants and Relief Defendants.
_______________________________________/

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant MICHAEL SCOTT WILLIAMS ("Defendant"), pursuant to Federal Rules of Civil Procedure 12(c) and 12(h)(2)(B) and Middle District Local Rule 3.01, moves for judgment on the pleadings and states as follows:

INTRODUCTION

Plaintiff's Complaint [D.E.1] presents an unwieldy amalgam of cross-refencing allegations and claims that, at best, are difficult to digest. The end result, however, is that Plaintiff "would not be entitled to relief under any set of facts that could be proved consistent with the allegations," thereby supporting judgment on the pleadings and dismissal of Plaintiff's claims. *Szabo v. Federal Ins. Co.*, 2011 WL 3875421, at *2 (M.D. Fla. Aug. 31, 2011).

Plaintiff alleges Defendant and/or co-Defendant Kinetic Investment Group, LLC ("Kinetic Group") made misrepresentations and omissions to investors in Kinetic Funds I, LLC ("Kinetic Funds") and diverted the funds away from Kinetic Funds. Based on these allegations, Plaintiff attempts to assert 14 causes of action against Defendant arising under three similar but different statutory regimes: (1) the Securities Act of 1933; (2) the Securities Exchange Act of 1934; and (3) the Investment Advisers Act of 1940.

Crucially, however, Plaintiff has failed to plead the requisite elements of the claims it is attempting to assert, much less satisfied the heightened pleading standard that applies to securities fraud claims. As a result, Plaintiff has failed to state a claim against Defendant upon which relief can be granted. Accordingly, Defendant is entitled to judgment on the pleadings, and Plaintiff's claims should be dismissed.

Further, because Plaintiff was aware of the August 10, 2020 deadline for the parties to amend their pleadings (set forth in the Scheduling Order [D.E. 88]) — and elected not to amend its Complaint before the deadline — the Court has no authority to allow Plaintiff to amend its Complaint now, and Plaintiff's claims should be dismissed with prejudice.

PROCEDURAL HISTORY

On February 20, 2020, Plaintiff filed its Complaint. [D.E. 1]. On April 27, 2020, Defendant filed his Answer. [D.E. 56]. On May 29, 2020, the Court

issued a Case Management and Scheduling Order ("Scheduling Order"). [D.E. 88]. Pursuant the Scheduling Order, the deadline to amend pleadings was August 10, 2020, and the trial term begins on August 30, 2021. [D.E. 88].[1]

MOTION

Plaintiff has failed to satisfy the pleading requirements of Rule 8(a)(2) — or even plead the requisite elements of the claims it is attempting to assert — much less satisfy Rule 9(b)'s heightened pleading standard, which applies to securities fraud claims.

Plaintiff's Complaint begins with 41 paragraphs of general allegations [D.E. at ¶¶ 1-41] followed by 14 Counts against Defendant. [D.E. 1 at ¶¶ 42-85]. Each of the Counts adopts by reference all of the general allegations, formally recites the formulaic and threadbare elements of the claim being asserted (without any elaboration or detail), and conclusorily asserts that Defendant violated (or aided and abetted the violation of) the statute at issue. [D.E. 1 at ¶¶ 42-85]. A table summarizing Plaintiff's purported claims against Defendant is attached hereto as **Exhibit A**.[2]

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[1] Defendant's undersigned counsel made their appearances in this case on May 27, 2020. [D.E. 84]. Plaintiff's counsel has represented Plaintiff since the Complaint was filed (and for approximately one year before it was filed while Plaintiff investigated the facts alleged therein — collecting 900,000+ pages of documents, compiling 1,500+ pages of interview transcripts, and coordinating and sharing information with other regulators and agencies).

[2] Plaintiff's claims shall be referred to by the Roman numeral assigned to them in the Complaint (*e.g.*, Count I, Count II, etc.).

In its Complaint, Plaintiff attempts to allege that Defendant made six misrepresentations, four omissions, and twelve misappropriations. Tables summarizing these alleged misrepresentations, omissions, and misappropriations are attached hereto as **Exhibits B, C, and D**, respectively.[3]

As alleged, however, *none* of the statements identified as misrepresentations are in fact misrepresentations because the specifically alleged explanations as to why they are false do not establish falsity:

> Misrepresentation No. 1: Plaintiff alleges: (1) Defendants[4] represented that the "assets" of *Kinetic Funds Yield* ("KFYield") would be invested in U.S.-listed financial products and hedged with options; and (2) this was false because "capital" of KFYield's *investors* was transferred to Lendacy. [D.E. at ¶¶ 2-3]. Plaintiff, however, is comparing apples to oranges because "investor capital" is different from "KFYield assets" — and therefore how "investor capital" is deployed cannot contradict statements regarding how "KFYield assets" would be used. Even if "investor capital" and "KFYield assets" were the same thing (they are not), the mere fact that investor capital was transferred to Lendacy, absent more,

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[3] The misrepresentations, omissions, and misappropriations shall be referred to by the number assigned to them in attached tables. The Complaint is unclear whether Misrepresentation No. 1 is a restatement of Misrepresentation Nos. 2, 3, and 5, *see* **Exhibit B**, and whether Misappropriation Nos. 1, 2, 3, 4, 5, 10, 11, and 12 are restatements of Misappropriation Nos. 6, 7, 8, and 9. *See* **Exhibit D**. Accordingly, Defendant shall treat each as a separate misrepresentation and misappropriation. That said, Plaintiff *nowhere alleges* the transfers or uses of funds referenced in Misappropriation Nos. 1, 2, 3, 4, 5, 10, 11, and 12 are "misappropriations" (or even improper) — unlike Misappropriations Nos. 6, 7, 8, and 9, which are expressly alleged to be misappropriations. [D.E. 1 at ¶ 32]. Thus, Misappropriations 6, 7, 8, and 9 are the *only* alleged misappropriations.

[4] Plaintiff fails to allege *which* Defendant made any of the alleged misrepresentations or omissions — which is a form of shotgun pleading and grounds for dismissal. *See Rosado-Cabrera v. Pfizer, Inc.*, 2021 WL 662220, at *3 (M.D. Fla. Feb. 19, 2021) ("Many of the allegations are directed simply to the 'Defendants' without differentiation. Plaintiffs' response that the failure to distinguish the acts of the various corporate Defendants is harmless because they are 'effectively the same company' only exacerbates the problem. Corporations are generally considered separate legal entities, and one corporation is not charged with liability for the conduct of the other unless a basis for doing so is pled and proven.").

does not mean that the investor capital was not invested in U.S.-listed financial products and hedged with options *at Lendacy*.

Misrepresentation No. 2: Plaintiff alleges: (1) Defendants represented that investors' money would be invested in U.S.-listed financial products; and (2) this was false because Defendants invested a "portion" of investors' capital in Lendacy, which is not a U.S.-listed financial product. [D.E. 1 at ¶¶ 28(a), 29(a)]. Plaintiff, however, does not allege Defendants represented that *all* of the investors' capital would be invested in U.S.-listed financial products. If a portion of their funds — even a substantial portion — were invested in Lendacy, that would not render the alleged representation untrue. Indeed, Plaintiff's allegation that a portion of investors' capital was invested in Lendacy necessarily implies that a portion was *not*.

Misrepresentation No. 3: Plaintiff alleges: (1) Defendants represented that KFYield's portfolio "would be hedged with listed options"; and (2) this was false because, between 2015 and 2019, assets representing 23% of KFYield's holdings were diverted to Lendacy, which could not be hedged. [D.E. 1 at ¶¶ 28(b), 29(b)]. Plaintiff, however, does not allege that Defendants represented a specific percentage of the portfolio would be hedged. If 23% were unhedged, that would not render the alleged representation untrue. Plaintiff separately alleges "written marketing materials" represented 90% of the portfolio "is" hedged, but Plaintiff does not allege *Defendants* wrote or published those materials. Nor does Plaintiff allege *when* they were published (if it was before 2015 or after 2019, then statements about the portfolio being presently hedged would be true even if funds were diverted during 2015-2019). Finally, if KFYield's holdings were diverted to Lendacy, that does not mean those holdings were not hedged *at Lendacy* (regardless of whether Lendacy itself could be hedged).

Misrepresentation No. 4: Plaintiff alleges: (1) Defendants represented that Lendacy has a separate source of funding to finance it loans; and (2) this was false because Lendacy's loans were financed by KFYield assets. [D.E. 1 at ¶¶ 28(c), 29(c)]. Crucially, however, Plaintiff expressly alleges that KFYield is a separate and distinct entity from Lendacy [D.E. at ¶¶ 2, 9-10] — therefore, by definition, Lendacy *did* have a separate funding source when *KFYield's* assets were used to fund *Lendacy's* loans.[5]

[5] *See Pinto v. Collier County*, 2020 WL 2219185, at *5 (M.D. Fla. May 7, 2020) (holding complaint containing contradictory allegations failed to state a claim).

> Misrepresentation No. 5: Plaintiff alleges: (1) Defendants "touted the liquidity of KFYield's assets";[6] and (2) this was false because KFYield's investment in Lendacy limited its ability to honor redemption requests equitably. [D.E. 1 at ¶¶ 28(d), 29(d)]. Plaintiff separately alleges "written brochures" represented investors' money is always available, but Plaintiff does not allege *Defendants* wrote or published those brochures. In any case, whether KFYield could honor redemptions "equitably," has no bearing on the liquidity of its assets or whether investors' money is always available. If redemptions were requested and some requests to be paid by wire were honored while others were not and instead were paid by check (*i.e.*, the redemptions were not honored "equitably"), that would have no bearing on the liquidity of KFYield's assets or whether money was available to be redeemed.
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> Misrepresentation No. 6: Plaintiff alleges: (1) Defendants provided "false" account statements regarding *investors'* "holdings" in Kinetic Funds; and (2) the statements were false because *Kinetic Funds'* "assets" are less than the aggregate amount reflected on investor account statements. [D.E. 1 at ¶ 30]. "Investors' holdings," however, are different from "Kinetic Fund's assets." As such, the amount of "Kinetic Fund's assets" reflected in an account statement has no bearing on whether the amount of an "investor's holdings" reflected in that statement is accurate.

See **Exhibit B**.

Even if the alleged statements are actual misrepresentations, *none* of the misrepresentations have been properly plead because — for each misrepresentation — Plaintiff has not alleged: (1) whether it was in writing or oral;[7] (2) if it was in writing, in which document it was made; (3) *which* of the Defendants

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[6] Absent additional facts (which have not been plead), this allegation is nothing more than inactionable puffery. *See MAZ Partners LP v. First Choice Healthcare Sols, Inc.*, 2019 WL 5394011, at *14 (M.D. Fla. Oct. 16, 2019).

[7] Plaintiff does not allege *how* Misrepresentation No. 1 was made. [D.E. 1 at ¶ 2]; and while Plaintiff alleges generally that Misrepresentations Nos. 2-5 were made "both orally and in writing," Plaintiff does not allege how each of the subsequently itemized alleged misrepresentations was specifically made. [D.E. 1 at ¶¶ 28, 31]. Nor does Plaintiff allege whether the false statements about investors' accounts referenced in Misrepresentation No. 6 were communicated in writing or orally. [D.E. 1 at ¶ 30].

made it; (4) to which investors or prospective investors it was made; (5) when it was made; and (6) where it was made. [D.E. ¶¶ 2-3, 28-30].

Similarly, *none* of the alleged omissions that are the basis of Plaintiff's claims have been properly plead because — for each omission — Plaintiff has not alleged: (1) whether it was made in a written or oral statement; (2) if it was in a written statement, in which document it was made; (3) *which* of the Defendants made it; (4) to which investors or prospective investors it was made; (5) when it was made; (6) where it was made; and (7) how it was misleading. [D.E. ¶¶ 29, 39-40].

In light of the forgoing — and for the reasons below — Plaintiff has failed to state a claim against Defendant upon which relief can be granted:

1. Counts II, V, and XI-XII — and Counts I, III-IV, VI-X, and XIII-XIV (to the extent they are based on a misrepresentation or omission) — fail to state a claim because Plaintiff has failed to plead the predicate misrepresentations and omissions upon which they are based sufficiently to satisfy Rules 8(a) and 9(b).

2. Counts II, V, and XI-XII — and Counts I, III-IV, VI-X, and XIII-XIV (to the extent they are based on a misrepresentation or omission) — fail to state a claim because Plaintiff has failed to allege that the misrepresentations and omissions were made "in connection" with an offer, purchase, or sale of a security.[8]

3. Counts I, III-IV, VI-X, and XIII-XIV fail to state a claim because they are predicated on wrongdoing other than a misrepresentation or omission — but the only other alleged wrongdoings are

[8] Because Plaintiff has failed to allege *when* the misrepresentations and omissions occurred, it is impossible to know whether they occurred before (and, if so, how long before) or — like the misappropriations, *see infra* n.9 — *after* the investors had already completed the purchases of their investments.

Misappropriation Nos. 6, 7, 8, and 9, which Plaintiff has failed to allege occurred "in connection with" an offer, purchase, or sale of securities.[9]

4. Count II fails to state a claim because Plaintiff has failed to allege that any of the purported misrepresentations and omissions were made "to obtain money or property."

5. Counts I, III-IV, VI-X, and XIII-XIV fail to state a claim because Plaintiff has failed to allege that Defendant engaged in a "device, scheme, or artifice to defraud" or employed an "act, transaction, practice, or course of business that operates as a fraud."[10]

6. Counts VII, VIII, IX, and X fail to state a claim because Plaintiff has failed to allege Defendant (for Counts VII and IX) or Kinetic Group (for Counts VIII and X) employed a device, scheme, or artifice to defraud *a client* or engaged in an act, practice, or course of business which operates as fraud or deceit *upon a client*.[11]

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[9] [D.E. 1 at ¶¶ 32-37]; *see supra* n.3; *IBEW Local 5959 Pension & Money Purchase Pension Plans v. ADT Corp.*, 660 Fed. App'x 850, 858 (11th Cir. 2016) ("Misleading statements and omissions only create scheme liability in conjunction with conduct beyond those misrepresentations or omissions."). Plaintiff expressly alleges Misappropriation Nos. 6, 7, 8, and 9 occurred *"once investors invested in KFYield."* [D.E. 1 at ¶ 32]. If the investors had already completed purchasing their investments in KFYield *before* the misappropriations occurred, however, then — as a matter of logic — the misappropriations could ***not*** have occurred "in connection with" the offer, purchase or sale of those securities. *See Pinto*, 2020 WL 2219185 at *5.

[10] Plaintiff conclusorily alleges — without any detail or elaboration — that "Defendants" (Plaintiff does not allege which one) engaged in a "device, scheme, or artifice to defraud" or employed an "act, transaction, practice, or course of business that operates as a fraud" [D.E. 1 at ¶¶ 43, 49, 52, 58, 62, 68, 81]; however, Plaintiff nowhere identifies the specific device, scheme, or artifice to defraud or act, transaction, practice, or course of business that operates as a fraud in which it alleges Defendant engaged. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[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.").

[11] Plaintiff alleges Defendants made misrepresentations, etc., to Kinetic Funds' investors and misappropriated funds that investors invested in Kinetic and allocated to KFYield. Crucially, however, Plaintiff also alleges that Defendants managed and advised Kinetic Funds. [D.E. 1 at ¶¶ 2, 7-9, 61] As a matter of law, a fund manager's client is *the fund* — not the fund's investors. *See SEC v. Lauer*, 478 Fed. App'x 550, 557 (11th Cir. 2012) (stating general rule that fund manager's client is fund). Thus, Kinetic Funds (***not*** its investors) was Defendants'

7. Counts VIII-XIV fail to state a claim because Plaintiff has failed to allege that Defendants were investment advisers.

8. Counts XI-XIV fail to state a claim because Plaintiff has failed to allege that: (1) Defendants were investment advisers *to pooled investment vehicles* and (2) the misrepresentations and omissions were made to — and the act, practice, or course of business was fraudulent with respect to — an investor or prospective investor *in the pooled investment vehicle* advised by Defendant. [12]

9. Counts I, IV-VIII, X, XII, and XIV fail to state a claim because Plaintiff has failed to allege Defendants acted with scienter.[13]

10. Count II-III, IX, XI, and XIII — and X, XII, and XIV (with regard to the primary violation) — fail to state a claim because Plaintiff has failed to allege Defendants acted negligently.[14]

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client. Plaintiff has not alleged that Defendant employed in any scheme, etc., to defraud — or engaged in any act, etc., that would operate as a fraud upon — *Kinetic Funds*.

[12] Plaintiff alleges — without elaboration — that Kinetic Funds was a "private pooled investment fund" [D.E. 1 at ¶ 9] but not that it was a "pooled investment vehicle," which is a defined term. *See* 17 C.F.R. § 275.206(4)-8(b). In Count XI, Plaintiff alleges that the *investments* offered by Kinetic Funds were "pooled investment vehicles" [D.E. 1 at ¶ 74] but not that *Kinetic Funds* was a pooled investment vehicle. Even if these allegations were sufficient to establish that Kinetic Funds was a pooled investment vehicle, Plaintiff has failed to allege that Defendant advised Kinetic Funds (or any other pooled investment vehicle).

[13] The word "scienter" appears nowhere in the Complaint; and while Plaintiff conclusorily alleges "Defendants" (Plaintiff does not allege which one) acted "knowingly" or "recklessly" (without further explanation or detail) [D.E. 1 at ¶¶ 43, 52, 55, 58, 62, 66, 72, 79, 85], Plaintiff fails to allege facts supporting a strong inference of 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." *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 791 (11th Cir. 2010) (quoting *McDonald v. Alan Busch Brokerage Co.*, 863 F.2d 809, 814 (11th Cir. 1989)).

[14] Plaintiff conclusorily alleges "Defendants" (Plaintiff does not allege which one) acted "negligently" (without any further explanation or detail) [D.E. 1 at ¶¶ 46, 49, 68, 75, 81]; however, Plaintiff "fails to allege sufficient facts to support [its] conclusory allegation of negligence." *In re AINEO Corp.*, 2020 WL 2857208 at *2 (M.D. Fla. May 13, 2020) (granting motion to dismiss). As discussed above, none of the alleged misrepresentations are, in fact, misrepresentations. Even if they were, Plaintiff has not alleged that Defendant knew or should have known they were false. Nor has Plaintiff alleged that Defendant knew or should have known he was required to disclose the alleged omissions, nor that he knew or should have known they had not been disclosed. Nor has Plaintiff alleged any facts to support an inference that

11. Counts I-XIV fail to state a claim because Plaintiff has failed to allege that any of the alleged misrepresentations, omissions, or misappropriations were made by use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange.[15]

12. Counts VIII, X and XIV fail to state a claim because they are predicated on Defendant aiding and abetting a primary violation by Kinetic Group other than a misrepresentation or omission — but the only other alleged primary violations are the four misappropriations Plaintiff has expressly alleged were committed *by Defendant*.[16]

13. Counts VIII, X, XII, and XIV (the aiding-and-abetting claims) fail to state a claim because Plaintiff has expressly incorporated into each of them all of the paragraphs of the preceding Count [D.E. 1 at ¶¶ 65, 71, 78, 84] — which is the definition of an impermissible shotgun pleading.[17] Even if such a pleading were permitted (it is not), for all of the reasons above, Plaintiff has failed to plead the elements of the primary violation. Plaintiff has also failed to plead that Defendant knew of the primary violation, knowingly and substantially assisted it, and acted with scienter.[18]

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any alleged transfers of funds (*i.e.*, misappropriations) were done negligently. Plaintiff has not even alleged any of the relevant the standards of ordinary care.

[15] Parroting the securities statutes, Plaintiff conclusorily alleges — without any explanation or detail — that Defendants (Plaintiff does not allege which one) "made use of the means or instrumentalities of interstate commerce, the means and instruments of transportation or communication in interstate commerce, or the mails." [D.E. 1 at ¶¶ 17, 43, 46, 49, 52, 55, 58, 62, 68]. However, Plaintiff does not specifically allege *which* means of interstate commerce Defendants used — *e.g.*, U.S. mail, email, telephone, etc. — nor *how* or *when* Defendants used them. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). This omission is a direct result of Plaintiff's failure to allege how the misrepresentations, etc., were made.

[16] [D.E. 1 at ¶¶ 32-37]; *see supra* n.3; *IBEW*, 660 Fed. App'x at 858.

[17] *See Farrukh v. University of S. Fla. Bd. of Trustees*, 2021 WL 734586, *2 (M.D. Fla. Feb. 25, 2021) (dismissing shotgun pleading where Counts III, IV, and VI incorporated Counts I, II, and V, respectively); *SEC v. Kingdom Legacy Gen. Partner, LLC*, 2017 WL 417093, at *7 (M.D. Fla. Jan. 31, 2017) ("While a party may incorporate factual allegations into the claims of a complaint, it may not incorporate explicit elemental allegations from one claim to another without running afoul of the court's disapproval for shotgun pleadings.").

[18] The Complaint contains no allegations regarding Plaintiff's knowledge of the primary violations. Further, while Plaintiff conclusorily alleges Defendant "knowingly or recklessly

Accordingly, Defendant is entitled to judgment on the pleadings, and Plaintiff's claims should be dismissed for failure to state a claim upon which relief can be granted. Further, because the deadline to amend pleadings has passed, Plaintiff's claims should be dismissed with prejudice.

MEMORANDUM OF LAW

I. Judgment on the Pleadings Are Governed by the Same Standard as Motions to Dismiss

"After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). "Failure to state a claim upon which relief can be granted . . . or to state a legal defense to a claim may be raised . . . by a motion under Rule 12(c)." FED. R. CIV. P. 12(h)(2)(B).

"A motion for judgment on the pleadings is governed by the same standard as a motion to dismiss under Rule 12(b)(6)." *Carbone v. Cable New Network, Inc.*, 910 F.3d 1345,1350 (11th Cir. 2018). "Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Powers v. Secretary, U.S. Homeland Sec.*, 2021 WL 446011, at *2 (11th Cir. Feb. 9, 2021) (quoting *Perez v. Wells*

provided substantial assistance" [D.E. 1 at ¶¶ 66, 72, 79, 86], Plaintiff fails to allege any specific facts to support its conclusory allegation. Indeed, the only specific facts that are alleged are those that purportedly evidence the primary violation — *e.g.*, the misrepresentations, omissions, and misappropriations — *not* that Defendant knowingly and substantially assisted it.

Fargo N.A., 774 F.3d 1329, 1335 (11th Cir. 2014)). "The ultimate question on a motion for judgment on the pleadings . . . is the same as on a motion to dismiss under Rule 12(b)(6) — whether the complaint states a claim for relief." *Id.*

II. A Complaint Must Plead Facts Sufficient to Give the Defendant Fair Notice and State a Claim That Is Plausible on Its Face

"Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting FED. R. CIV. P. 8(a)(2)). "The plaintiff's allegations must be sufficient to 'give the defendant fair notice' of the nature of the . . . claim 'and the grounds upon which it rests.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 679 (quoting *Twombly*, 550 U.S. at 570). "A claim is plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Powers*, 2021 WL 446011 at *2 (quoting *Iqbal*, 556 U.S. at 679).

"Although courts are generally required to accept as true the factual allegations in a complaint for purposes of a motion to dismiss, courts need not accept as true internally inconsistent factual claims." *Wyndham Vacation Ownership v. Reed Hein & Assocs., LLC*, 2020 WL 3266038, at *5 (M.D. Fla.

Jan. 6. 2020).[19] Likewise, "[a]lthough courts 'must make reasonable inferences in Plaintiffs' favor' at the pleadings stage, [they] are not required to draw every inference that the plaintiff suggests." *Id.* (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005)). Further, "[l]egal conclusions without adequate factual support are entitled to no assumption of truth." *Mamani v. Berzain*, 653 F.3d 1148,1153 (11th Cir. 2011). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

III. Securities Fraud Claims Are Governed by Rule 9(b)'s Heightened Pleading Standards

"Allegations of security fraud are subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b)." *SEC v. BIH Corp.*, 2011 WL 3862530, at *4 (M.D. Fla. Aug. 31, 2011). Rule 9(b) requires that a party alleging fraud "must state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b).

> Rule 9(b) is satisfied if the complaint sets forth "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner

[19] *See Battle v. Central State Hosp.*, 898 F.2d 126, 130 n.3 (11th Cir. 1990) ("[A]llegations that are contradicted by other allegations in the complaint may also constitute grounds for dismissal."); *Pinto*, 2020 WL 2219185 at *5.

in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud."

Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001). This standard applies with equal force to securities claims.[20]

"[F]ailure to satisfy Rule 9(b) is a ground for dismissal of a complaint." *FindWhat Inv. Group v. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011).

IV. The Elements of Plaintiff's Securities Claims

Plaintiff has attempted to assert 14 claims against Defendant for violating and/or aiding and abetting a violation of: (1) Sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act (Counts I-III); (2) Section 10(b) and Rules 10b-5(a), 10b-5(b), and 10b-5(c), of the Exchange Act (Counts IV-VI); and (3) Sections 206(1), 206(2), and 206(4) and Rules 206(4)-8(a)(1) and 206(4)-8(a)(2) of the Advisers Act (Counts VII-XIV). [D.E. 1 at ¶¶ 42-85]; *see* **Exhibit A**.

Although the Securities Act, the Exchange Act, and the Advisers Act are separate statutory regimes, they are modeled on one another, they employ

[20] *See Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1318 (11th Cir. 2019) ("Rule 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake" — which in the securities-fraud context . . . requires a plaintiff to allege specifically (1) which statements or omissions were made in which documents or oral representations; (2) when, where, and by whom the statements were made (or, in the case of omissions, not made); (3) the content of the statements or omissions and how they were misleading; and (4) what the defendant received as a result of the fraud."); *see SEC v. Roanoke Tech. Corp.*, 2006 WL 3813755, at *3 (M.D. Fla. Dec. 26, 2006) ("The particularity requirement applies to securities fraud claims brought by the SEC . . . .").

similar (often identical) language, and, as a result, they require similar and overlapping elements of proof:[21]

1. To establish a violation of Section 17(a)(1) — Count I — Plaintiff must prove: (1) a device, scheme, or artifice to defraud; and that it was employed (2) in connection with the offer or sale of securities; (3) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mail; and (4) with scienter;[22]

2. To establish a violation of Section 17(a)(2) — Count II — Plaintiff must prove: (1) a misrepresentation or omission; (2) that it was material; and that it was made (3) in connection with the offer or sale of securities; (4) to obtain money or property; (4) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mail; and (5) with negligence;[23]

3. To establish a violation of Section 17(a)(3) — Count III — Plaintiff must prove: (1) a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser of securities; and that it was engaged in (2) in connection with the offer or sale of securities; (3) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mail; and (4) with negligence;[24]

4. To establish a violation of Section 10(b) and Rule 10b-5(a) — Count IV — Plaintiff must prove: (1) a device, scheme, or artifice to defraud; and that it was employed (2) in connection with the purchase

[21] For the same reason, courts construe and apply these statutes in similar fashion notwithstanding their superficial differences. *See*, *e.g.*, *SEC v. Radius Cap. Corp.*, 653 Fed. App'x 744, 749 (11th Cir. 2016) ("Proving a violation of § 17(a)(1) requires substantially similar proof [as proving a violation of Rule 10b-5] . . . ."); *Kingdom*, 2017 WL 417093 at *7, 8 ("A plain reading of [Section 17(a)] reveals that it largely mirrors that of Rule 10b–5."; "Turning to the elements of a Section 206 claim, it is established law that sections (1) and (2) are analogues for Section 17(a)(1) and (3) of the Securities Act."); *SEC v. Wealth Strategy Partners, LC*, 2015 WL 3603621, at *2 (M.D. Fla. June 5, 2015) ("The elements of a Section 10(b) and Rule 10b–5 violation are "substantially similar" to a Section 17(a)(1) claim . . . .").

[22] *See* 15 U.S.C. § 77q(a)(1); *Radius*, 653 Fed. App'x at 749; *Wealth*, 2015 WL 3603621 at *2.

[23] *See* 15 U.S.C. § 77q(a)(2); *Radius*, 653 Fed. App'x at 749; *Wealth*, 2015 WL 3603621 at *2.

[24] *See* 15 U.S.C. § 77q(a)(3); *Radius*, 653 Fed. App'x at 749; *Wealth*, 2015 WL 3603621 at *2.

or sale of a security; (3) by the use of any means or instrumentality of interstate commerce or of the mails or any facility of any national securities exchange; and (4) with scienter;[25]

5. To establish a violation of Section 10(b) and Rule 10b-5(b) — Count V — Plaintiff must prove: (1) a misrepresentation or omission; (2) that it was material; and that it was made (3) in connection with the purchase or sale of a security; (4) by the use of any means or instrumentality of interstate commerce or of the mails or any facility of any national securities exchange; and (5) made with scienter;[26]

6. To establish a violation of Section 10(b) and Rule 10b-5(c) — Count VI — Plaintiff must prove: (1) an act, practice, or course of business which operates or would operate as a fraud or deceit upon any person; and that it was engaged in (2) in connection with the purchase or sale of a security; (3) by the use of any means or instrumentality of interstate commerce or of the mails or any facility of any national securities exchange; and (4) with scienter;[27]

7. To establish a violation of Section 206(1) — Count VII — Plaintiff must prove: (1) a device, scheme, or artifice to defraud; and that it was employed (2) by an investment adviser; (3) to defraud a client or prospective client; (4) by use of the mails or any means or instrumentality of interstate commerce; and (5) with scienter;[28]

8. To establish aiding and abetting a violation of Section 206(1) — Count VIII — Plaintiff must prove: (1) a violation of Section 206(1) by another party (which requires Plaintiff prove all the elements of a violation of Section 206(1)); and that the aider and abettor (2) had knowledge of the violation; (3) knowingly and substantially assisted the violation; and (4) acted with scienter;[29]

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[25] *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(a); *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1244 (11th Cir. 2012); *Kingdom*, 2017 WL 417093 at *5.

[26] *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b); *Morgan Keegan*, 678 F.3d at 1244; *Kingdom, LLC*, 2017 WL 417093 at *5.

[27] *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(c); *Morgan Keegan*, 678 F.3d at 1244; *Kingdom, LLC*, 2017 WL 417093 at *5.

[28] *See* 15 U.S.C.§ 80b-6(1); *ZPR Inv. Mgmt. Inc. v. SEC*, 861 F.3d 1239, 1247 (11th Cir. 2017); *Kingdom*, 2017 WL 417093 at *8.

[29] *See* 15 U.S.C. § 80b-9(f); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975); *Wealth*, 2015 WL 3603621 at *3; *SEC v. K.W. Brown and Co.*, 555 F. Supp.2d 1275, 1306-07

9. To establish a violation of Section 206(2) — Count IX — Plaintiff must prove: (1) a transaction, practice, or course of business which operates as a fraud or deceit; (2) that it operates as a fraud or deceit upon a client or prospective client; and that it was engaged in (3) by an investment adviser; (3) by use of the mails or any means or instrumentality of interstate commerce; and (4) with negligence;[30]

10. To establish aiding and abetting a violation of Section 206(2) — Count X — Plaintiff must prove: (1) a violation of Section 206(2) by another party (which requires Plaintiff prove all the elements of a violation of Section 206(1)); and that the aider and abettor (2) had knowledge of the violation; (3) knowingly and substantially assisted the violation; and (4) acted with scienter;[31]

11. To establish a violation of Section 206(4) and Rule 206(4)-8(a)(1) — Count XI — Plaintiff must prove: (1) a misrepresentation or omission; (2) that it was material; and that it was made (3) by an investment adviser to a pooled investment vehicle; (4) to an investor or prospective investor in that same pooled investment vehicle; (5) by use of the mails or any means or instrumentality of interstate commerce; and (6) with negligence;[32]

12. To establish aiding and abetting a violation of Section 206(4) and Rule 206(4)-8(a)(1) — Count XII — Plaintiff must prove: (1) a violation of Section 206(4) and Rule 206(4)-8(a)(1) by another party (which requires Plaintiff prove all the elements of a violation of Section 206(4) and Rule 206(4)-8(a)(1)); and that the aider and abettor (2) had knowledge of the violation; (3) knowingly and substantially assisted the violation; and (4) acted with scienter;[33]

(S.D. Fla. 2007). In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), the court adopted as binding precedent decisions of the former Fifth Circuit Court of Appeals decided on or before September 30, 1981.

[30] *See* 15 U.S.C.§ 80b-6(2); *ZPR Inv.*, 861 F.3d at 1247; *Kingdom*, 2017 WL 417093 at *8.

[31] *See* 15 U.S.C. § 80b-9(f); *Woodward*, 522 F.2d at 97; *Wealth*, 2015 WL 3603621 at *3; *K.W. Brown*, 555 F. Supp.2d at 1306-07.

[32] *See* 15 U.S.C.§ 80b-6(4); 17 C.F.R. § 275.206(4)-8(a)(1); *ZPR Inv.*, 861 F.3d 1239 at 1247; *Kingdom*, 2017 WL 417093 at *8.

[33] *See* 15 U.S.C. § 80b-9(f); *Woodward*, 522 F.2d at 97; *Wealth*, 2015 WL 3603621 at *3; *K.W. Brown*, 555 F. Supp.2d at 1306-07.

13. To establish a violation of Section 206(4) and Rule 206(4)-8(a)(2) — Count XIII — Plaintiff must prove: (1) an act, practice, or course of business that is fraudulent, deceptive, or manipulative; and that it was engaged in (2) with respect to an investor or prospective investor in a pooled investment vehicle; (3) by an investment adviser to that same pooled investment vehicle; (4) by use of the mails or any means or instrumentality of interstate commerce; and (5) with negligence;[34]

14. To establish aiding and abetting a violation of Section 206(4) and Rule 206(4)-8(a)(2) — Count XIV — Plaintiff must prove: (1) a violation of Section 206(4) and Rule 206(4)-8(a)(2) by another party (which requires Plaintiff prove all the elements of a violation of Section 206(4) and Rule 206(4)-8(a)(2)); and that the aider and abettor (2) had knowledge of the violation; (3) knowingly and substantially assisted the violation; and (4) acted with scienter.[35]

See **Exhibit A**.

Sections 17(a)(1) and 17(a)(3), Section 10(b) and Rules 10b-5(a) and 10b-5(c), Sections 206(1), 206(2), 206(4) and Rule 206(4)-8(a)(2) — Counts I, III-X, and XII and IV — are predicated on "scheme liability," which occurs when a defendant employs "any device, scheme, or artifice to defraud" or "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." *See IBEW*, 660 Fed. App'x at 858. "A scheme liability claim is different and separate from a [misrepresentation or omission] claim." *Id.*

> Misleading statements and omissions only create scheme liability *in conjunction with conduct beyond those misrepresentations or omissions*.

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[34] *See* 15 U.S.C.§ 80b-6(4); 17 C.F.R. § 275.206(4)-8(a)(2); *ZPR Inv.*, 861 F.3d 1239 at 1247; *Kingdom*, 2017 WL 417093 at *8.

[35] *See* 15 U.S.C. § 80b-9(f); *Woodward*, 522 F.2d at 97; *Wealth*, 2015 WL 3603621 at *3; *K.W. Brown*, 555 F. Supp.2d at 1306-07.

Id. (emphasis added). "To plead scheme liability, a plaintiff must allege "intentional or willful conduct *designed to deceive or defraud investors . . . .*" *In re Tupperware Brands Corp. Secs. Litig.*, 2021 WL 247870, at *5 (M.D. Fla. Jan.25, 2021) (emphasis in original).

For purposes of Section 17(a)(1), Section 10(b) and Rules 10b-5(a), 10b-5(b), and 10b-5(c), Section 206(1), and aiding-and-abetting claims — Counts I, IV-VIII, X, XII, and XIV — scienter is defined as ""intent to defraud or severe recklessness on the part of the defendant." *Carvelli*, 934 F.3d at 1318; *see Wealth*, 2015 WL 3603621 at *2 (stating scienter can be proven by a "showing of knowing misconduct or severe recklessness." (quoting *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982))).

> Severe recklessness is limited to 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.

Edward J. Goodman, 594 F.3d at 791 (quoting *McDonald*, 863 F.2d at 814). "[A] plaintiff must plead 'facts supporting a strong inference of scienter for each defendant with respect for each violation.'" *Lockwood v. Oliver*, 2021 WL 75123, at *4 (M.D. Fla. Jan. 8, 2021) (quoting *Mizzaro v. Home Depot*, 544 F.3d 1230, 1238 (11th Cir. 2008)).

For purposes of Sections 206(1) and 206(2) — Counts VII-X — an investment fund adviser's client is the fund itself, *not* the investors in the fund. *See*

Lauer, 478 Fed. App'x at 557 (11th Cir. 2012) (stating fund manager's client is usually only the fund and does not include the fund's investor unless the manager gave direct investment advice to the investor); *SEC v. Mannion, 2013 WL 5999657, at *4 (N.D. Ga. Nov.12, 2013)* ("[T]he general rule . . . [is] that the client of a hedge fund manager is only the hedge fund itself . . . .").[36]

For purposes of Sections 206(1), 206(2), and 206(4) and Rules 206(4)-8(a)(1) and 206(4)-8(a)(2) — Counts VII-XIV — an investment adviser is defined as "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 . . . ." 15 U.S.C. § 80b-2(a)(11).

For purposes of Section 206(4) and Rules 206(4)-8(a)(1) and 206(4)-8(a)(2) — Counts XI-XIV — a pooled investment vehicle is defined as "an investment company as defined in section 3(a) of the Investment Company Act of 1940." 17 C.F.R. § 275.206(4)-8(b). An investment company, in turn, is defined as "any issuer which is or holds itself out as being engaged primarily, or

[36] *See also SEC v. Conrad*, 354 F.Supp.3d 1330, 1350 (N.D. Ga. 2019) ("Because individual investors were not Defendants' 'clients' within the meaning of this statute, these Counts apply only to Plaintiff's allegations that Defendants committed fraud on the funds, not on investors."); *SEC v. Mannion*, 789 F.Supp.2d 1321, 1337-38 (N.D. Ga. 2011) ("[T]he Court concludes that to support a claim under Section 206(1), the SEC must plausibly allege that Defendants [who were investment advisers to an investment fun] employed a 'device, scheme, or artifice to defraud' the Fund itself, rather than the Fund's investors.").

proposes to engage primarily, in the business of investing, reinvesting, or trading in securities . . . ." 15 U.S.C. § 80a-3(a)(1)(A).

V. Plaintiff Has Failed to Plead a Claim for Relief

Based on the pleading standards and deficiencies discussed above, Plaintiff has failed to state a claim upon which relief can be granted:

1. As to Count I, Plaintiff has failed to plead: (1) a device, scheme, or artifice to defraud; and that it was employed (2) in connection with the offer or sale of securities; (3) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mail; and (4) with scienter;

2. As to Count II, Plaintiff has failed to plead: (1) a misrepresentation or omission; and that it was made (2) in connection with the offer or sale of securities; (3) to obtain money or property; (4) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mail; and (5) with negligence;

3. As to Count III, Plaintiff has failed to plead: (1) a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser of securities; and that it was engaged in (2) in connection with the offer or sale of securities; (3) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mail; and (4) with negligence;

4. As to Count IV, Plaintiff has failed to plead: (1) a device, scheme, or artifice to defraud; and that it was employed (2) in connection with the purchase or sale of a security; (3) by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange; and (4) with scienter;

5. As to Count V, Plaintiff has failed to plead: (1) a misrepresentation or omission; and that it was made (2) in connection with the purchase or sale of a security; (3) by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange; and (4) with scienter;

6. As to Count VI, Plaintiff has failed to plead: (1) an act, practice, or course of business which operates or would operate as a fraud or deceit upon any person; and that it was engaged in (2) in connection

with the purchase or sale of a security; (3) by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange; and (4) with scienter;

7. As to Count VII, Plaintiff has failed to plead: (1) a device, scheme, or artifice to defraud; and that it was employed (2) to defraud a client or prospective client; (3) by an investment adviser; (4) by use of the mails or any means or instrumentality of interstate commerce; and (5) with scienter;

8. As to Count VIII, Plaintiff has failed to plead: (1) all of the elements of a violation of Section 206(1) by another party (*see* Count VII); and that the aider and abettor (2) had knowledge of the violation; (3) knowingly and substantially assisted the violation; and (4) acted with scienter;

9. As to Count IX, Plaintiff has failed to plead: (1) a transaction, practice, or course of business which operates as a fraud or deceit; (2) that it operates as a fraud or deceit upon a client or prospective client; and that it was engaged in (3) by an investment adviser; (3) by use of the mails or any means or instrumentality of interstate commerce; and (4) with negligence;

10. As to Count X, Plaintiff has failed to plead: (1) all of the elements of a violation of Section 206(2) (*see* Count IX); and that the aider and abettor (2) had knowledge of the violation; (3) knowingly and substantially assisted the violation; and (4) acted with scienter;

11. As to Count XI, Plaintiff has failed to plead: (1) a misrepresentation or omission; and that it was made (2) by an investment adviser to a pooled investment vehicle; (3) to an investor or prospective investor in that same pooled investment vehicle; (4) by use of the mails or any means or instrumentality of interstate commerce; and (5) with negligence;

12. As to Count XII, Plaintiff has failed to plead: (1) all of the elements of a violation of Section 206(4) and Rule 206(4)-8(a)(1) (*see* Count XI); and that the aider and abettor (2) had knowledge of the violation; (3) knowingly and substantially assisted the violation; and (4) acted with scienter;

13. As to Count XIII, Plaintiff has failed to plead: (1) an act, practice, or course of business that is fraudulent, deceptive, or manipulative; and that it was engaged in (2) with respect to an investor or prospective investor in that same pooled investment vehicle; (3) by an investment adviser to a pooled investment vehicle; (4) by use of the

mails or any means or instrumentality of interstate commerce; and (5) with negligence; and

14. As to Count XIV, Plaintiff has failed to plead: (1) all of the elements of a violation of Section 206(4) and Rule 206(4)-8(a)(2) (*see* Count XIII); and that the the aider and abettor (2) had knowledge of the violation; (3) knowingly and substantially assisted the violation; and (4) acted with scienter.

See **Exhibit A**.

VI. Plaintiff's Claims Must Be Dismissed with Prejudice

"[W]here . . . a party seeks to amend after the deadline set in the Court's scheduling order, the party must establish 'good cause.'" *Club Exploria, LLC v. Aaronson, Austin, P.A.*, 2020 WL 686010, at *2 (M.D. Fla. Feb. 11, 2020; *see* FED. R. CIV. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent.").

"Defendant must first satisfy Rule 16(b)(4)'s 'good cause' standard for modifying a scheduling order before the Court can decide whether to freely give leave to amend under Rule 15(a)(2)." *Whittington v. Whittington*, 2020 WL 8224604, at *2 (M.D. Fla. Oct. 23, 2020).

"The 'good cause' standard is a rigorous one, focusing not on the good faith of or the potential prejudice to any party, but rather on [the] diligence [of the party seeking to amend] in complying with the Court's scheduling order." *Id.* "This good cause standard precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension." *Club Exploria*, 2020 WL 686010 at *2 (quoting *Sosa v. Airprint Sys., Inc.*, 133 F.3d

1417, 1418 (11th Cir. 1998)). "'[I]f [a] party was not diligent, the [good cause] inquiry should end.'" *Freedom Mortg. Corp. v. Daniel*, 2020 WL 4041080, at *2 (M.D. Fla. July 17, 2020) (quoting *Sosa*, 133 F.3d at 1418). "[A] party lacks diligence when it 'has full knowledge of the information' upon which it seeks to rely before the deadline passes but fails to act on it." *Id.*

Here, Plaintiff filed its Complaint on February 20, 2020. [D.E. 1]. On May 29, 2020, the Court issued the Scheduling Order in this case and set August 10, 2020 as the final deadline for the parties to amend their pleadings. [D.E. 88]. Defendant made clear to Plaintiff that he was investigating — and intended to dispute — the elements of Plaintiff's claims as plead in the Complaint. [D.E. 183; D.E. 184; D.E. 185; D.E.191]. In his response to Plaintiff's Motion for Protective Order and to Quash, Defendant expressly disputed that the Complaint satisfied Rule 8(a). [D.E. 191 at 13].

Plaintiff has been represented by the same counsel since it filed its Complaint. As such, Plaintiff had full knowledge of the allegations and claims in its Complaint — and of the deadline to amend those allegations and claims — yet Plaintiff elected not to amend its Complaint before the August 10, 2020 deadline, nor did Plaintiff request leave to amend its Complaint any time after the August 10 deadline through the date of this Motion.

As a matter of law, Plaintiff lacked diligence and cannot now establish "good cause" to permit the Court to entertain whether it should modify the

Scheduling Order. Accordingly, if any of Plaintiff's claims are dismissed (in whole or in part), they should be dismissed with prejudice.

WHEREFORE, Defendant respectfully requests an Order be entered granting judgment on the pleadings as to the Complaint and dismissing with prejudice all of Plaintiff's claims against Defendant for failure to state a claim upon which relief can be granted.[37]

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 12, 2021, the foregoing document was filed with the Clerk of the Court using the CM/ECF system and served on all counsel of record.

By: /s/ Timothy W. Schulz

By: /s/ Jon A. Jacobson

[37] In the event one or more of Plaintiff's claims are found to be sufficiently plead, then the deficient claims — including those portions of any otherwise sufficient claims that are predicated on alleged wrongdoing that has not been properly plead (*e.g.*, misrepresentations that are not misrepresentations, etc.) — should be dismissed.

PLAINTIFF'S CLAIMS

✓ = Element of Claim
~~✓~~ = Not Properly Plead

COUNT	CLAIM	ELEMENTS													
		Misrep/ Omission	Material	To Obtain Money or Property	Device, Scheme, or Artifice to Defraud	Act, Practice, or Course of Business Operates as a Fraud or Deceit	Upon/To Purchaser, Investor, or Client	In Connection w/ Offer, Purchase, or Sale of Securities	Scienter	Negligence	Investment Adviser or Investment Advisor to a Pooled Investment	Primary Violation	Knowledge of Primary Violation	Knowing/ Substantial Assistance	Mail, Interstate Commerce, or National Securities Exchange
I	Violation of Section 17(a)(1) of the Securities Act				~~✓~~			~~✓~~	~~✓~~						~~✓~~
II	Violation of Section 17(a)(2) of the Securities Act	~~✓~~	✓	~~✓~~				~~✓~~		~~✓~~					~~✓~~
III	Violation of Section 17(a)(3) of the Securities Act					~~✓~~		~~✓~~		~~✓~~					~~✓~~
IV	Violation of Section 10(b) and Rule 10b-5(a) of the Exchange Act				~~✓~~			~~✓~~	~~✓~~						~~✓~~

COUNT	CLAIM	ELEMENTS													
		Misrep/ Omission	Material	To Obtain Money or Property	Device, Scheme, or Artifice to Defraud	Act, Practice, or Course of Business Operates as a Fraud or Deceit	Upon/To Purchaser, Investor, or Client	In Connection w/ Offer, Purchase, or Sale of Securities	Scienter	Negligence	Investment Adviser or Investment Advisor to a Pooled Investment	Primary Violation	Knowledge of Primary Violation	Knowing/ Substantial Assistance	Mail, Interstate Commerce, or National Securities Exchange
V	Violation of Section 10(b) and Rule 10b-5(b) of the Exchange Act	✓	✓					✓	✓						✓
VI	Violation of Section 10(b) and Rule 10b-5(c) of the Exchange Act					✓		✓	✓						✓
VII	Violation of Section 206(1) of the Advisers Act				✓		✓		✓		✓				
VIII	Aiding and Abetting Violations of Section 206(1) of the Advisers Act				✓				✓		✓	✓	✓	✓	✓

COUNT	CLAIM	ELEMENTS													
		Misrep/ Omission	Material	To Obtain Money or Property	Device, Scheme, or Artifice to Defraud	Act, Practice, or Course of Business Operates as a Fraud or Deceit	Upon/To Purchaser, Investor, or Client	In Connection w/ Offer, Purchase, or Sale of Securities	Scienter	Negligence	Investment Adviser or Investment Advisor to a Pooled Investment	Primary Violation	Knowledge of Primary Violation	Knowing/ Substantial Assistance	Mail, Interstate Commerce, or National Securities Exchange
IX	Violation of Section 206(2) of the Advisers Act					✓	✓			✓	✓				✓
X	Aiding and Abetting Violations of Section 206(2) of the Advisers Act					✓	✓		✓	✓	✓	✓	✓	✓	✓
XI	Violation of Section 206(4) and Rule 206(4)-8(a)(1) of the Advisers Act	✓	✓				✓			✓	✓				✓

COUNT	CLAIM	ELEMENTS													
		Misrep/ Omission	Material	To Obtain Money or Property	Device, Scheme, or Artifice to Defraud	Act, Practice, or Course of Business Operates as a Fraud or Deceit	Upon/To Purchaser, Investor, or Client	In Connection w/ Offer, Purchase, or Sale of Securities	Scienter	Negligence	Investment Adviser or Investment Advisor to a Pooled Investment	Primary Violation	Knowledge of Primary Violation	Knowing/ Substantial Assistance	Mail, Interstate Commerce, or National Securities Exchange
XII	Aiding and Abetting Violations of Section 206(4) and Rule 206(4)-8(a)(1) of the Advisers Act	✓	✓				✓		✓	✓	✓	✓	✓	✓	✓
XIII	Violation of Section 206(4) and Rule 206(4)-8(a)(2) of the Advisers Act					✓	✓			✓	✓				✓
XIV	Aiding and Abetting Violations of Section 206(4) and Rule 206(4)-8(a)(2) of the Advisers Act					✓	✓		✓	✓	✓	✓	✓	✓	✓

MISREPRESENTATIONS ALLEGED BY PLAINTIFF

	Misrepresentation	Why It Is False
1	"Defendants represented to investors that the largest sub-fund, Kinetic Funds Yield ("KFYield"), invested all of its assets in income-producing U.S. listed financial products hedged by listed options. Defendants also touted KFYield as a liquid investment." [D.E. 1 at ¶ 2]	"In reality, Defendants diverted a substantial portion of KFYield investor capital to KCL Services, LLC d/b/a Lendacy ("Lendacy"), a private, start-up company owned by Williams. Lendacy was neither listed on a U.S. exchange nor capable of being hedged with listed options. Williams then directed Lendacy to make loans using KFYield assets to himself, entities controlled by him, and others." [D.E. 1 at ¶ 3]
2	"Defendants told investors that their money would be invested in income-producing U.S. listed financial products. Exhibits B-1 and C-1 to the Operating Agreement likewise state that Kinetic Funds "will trade derivatives, but may also be invested in individual stocks, components of the indices, cash, and other exchange listed products . . . ." [D.E. 1 at ¶ 28(a)]	"Defendants did not invest all investor funds in U.S. listed financial products. Since at least 2013, Defendants invested a substantial portion of investor capital in Lendacy, Williams' entity. Lendacy is not a U.S. listed financial product." [D.E. 1 at ¶ 29(a)]
3	"Defendants advised investors that their principal would be secure because the KFYield portfolio would be hedged with listed options. Written marketing materials state that Kinetic Funds will 'maintain 90% principle [sic] protection' and that '90% [of KFYield's] portfolio [is] hedged using listed options against market volatility risk.'" [D.E. 1 at ¶ 28(b)]	"Defendants did not hedge at least 90% of KFYield's portfolio using listed options. KFYield assets diverted to Lendacy accounted for more than 23% of KFYield's holdings between January 2015 and September 2019. And, Lendacy could not be hedged using listed options." [D.E. 1 at ¶ 29(b)]

	Misrepresentation	Why It Is False
4	"With respect to the Lendacy credit line product, Defendants led prospective investors to believe Lendacy had a separate funding source that would finance the loan from Lendacy to the investor, and that their entire capital would be invested in KFYield. They gave investors marketing materials stating: '[y]ou keep 100% of your capital working, generating dividends and interest with the opportunity for continued appreciation.'" [D.E. 1 at ¶ 28(c)]	"Defendants used KFYield assets, not a separate funding source, to fund Lendacy and its undisclosed loans. Most investors were not told KFYield assets were used to fund their or others' Lendacy loans." [D.E. 1 at ¶ 29(c)]
5	"Defendants touted the liquidity of KFYield assets. Written brochures claim: 'Your money is always available . . . The fund's positions are hedged out to 90 days, so with a 30 day written notice prior to the quarter end, the fund can redeem 100% principal without penalties.'" [D.E. 1 at ¶ 28(d)]	"KFYield's investment in Lendacy, the assets of which were unsecured loans primarily to Williams, significantly limits its ability to honor redemption requests to all investors equitably. Moreover, any redemptions made would further concentrate KFYield's assets in its illiquid investment in Lendacy." [D.E. 1 at ¶ 28(d)]
6	"[D]efendants provided false account statements to investors regarding their holdings in Kinetic Funds." [D.E. 1 at ¶ 30]	Kinetic Funds' known assets are less than the aggregate amount reflected on investor account statements. [D.E. 1 at ¶ 30]

OMISSIONS ALLEGED BY PLAINTIFF

	Omissions
1	"Most investors were not told KFYield assets were used to fund their or others' Lendacy loans." [D.E. 1 at ¶ 29(c)]
2	"[Defendants failed to disclose that] Defendants transferred investor capital amounting to at least $9.1 million net to Lendacy, an entity owned by Williams." [D.E. 1 at ¶¶ 39(a), 40]
3	"[Defendants failed to disclose that] Williams and two of his entities took unsecured, purported loans amounting to at least $6.8 million funded with KFYield assets." [D.E. 1 at ¶¶ 39(b), 40]
4	"[Defendants failed to disclose that] Defendants used $30,872.44 of investor funds to pay Silexx Financial Systems, LLC ("Silexx"), another company that Williams partially owned and/or had a financial interest in." [D.E. 1 at ¶¶ 39(b), 40]

MISAPPROPRIATIONS ALLEGED BY PLAINTIFF

	Misappropriations
1	"Lendacy received at least $11 million of investor assets and approximately $9.1 million has not been returned. Defendants then used the investor funds diverted to Lendacy to fund purported loans to Williams, his business entities, and others, and at least $6.8 million remains outstanding from Williams and his entities." [D.E. 1 at ¶ 10]
2	"Scipio used at least $2,755,000 of investor assets routed through Lendacy to purchase a historic bank building in San Juan, Puerto Rico." [D.E. 1 at ¶ 11]
3	"El Morro received at least $565,000 of investor assets, routed through Lendacy, to fund general operating expenses for Williams' various entities and to partially fund a multi-day launch event for KIH." [D.E. 1 at ¶ 12]
4	"KIH used at least $1,380,000 of investor assets to fund its start-up costs." [D.E. 1 at ¶ 13]
5	"LF42 executed a credit agreement with Lendacy reflecting a loan for $2,550,000, of which a substantial portion was used by El Morro and KIH and at least $100,000 was retained by LF42." [D.E. 1 at ¶ 14]
6	"In April 2015, Williams used $37,000 of KFYield funds, routed to Lendacy, to pay off the mortgage on his relative's house. On April 29, 2015, Williams executed a Lendacy "Credit Facility Agreement" reflecting a purported loan for $40,000. Williams' relative did not grant Lendacy a mortgage or provide any other consideration to Lendacy, and the Credit Facility Agreement was unsecured." [D.E. 1 at ¶ 33]
7	"In March 2017, Williams purchased for $1,512,575.50 three luxury apartments and two parking spaces for himself in San Juan, Puerto Rico. Williams used KFYield funds, diverted to Lendacy, to pay for the properties. Williams titled these properties in his name." [D.E. 1 at ¶ 34] "Certain employees subsequently raised concerns to Williams about his use of KFYield funds to pay for the San Juan properties. Williams responded by stating that he was expecting a future payout from the sale of an unrelated company and would pay the fund back at that time. After employees pressed the issue, Williams executed a Lendacy "Credit Facility Agreement" for a $1,517,000 loan. Williams did not grant Lendacy a mortgage on the properties, and the Credit Facility Agreement is unsecured." [D.E. 1 at ¶ 35]

	Misappropriations
8	"In May 2018, Williams used at least $2,755,000 of KFYield funds, routed to Lendacy in the form of a Lendacy loan, to purchase a historic bank building in Old San Juan, Puerto Rico. Williams titled the building in the name of his entity, Scipio, and executed a Lendacy "Credit Facility Agreement" on Scipio's behalf. Scipio did not grant Lendacy a mortgage on the property, and Williams did not guarantee repayment of the purported loan, which is unsecured." [D.E. 1 at ¶ 36]
9	"In April 2019, Williams used $2,050,000 of additional KFYield funds in the form of two Lendacy loans to provide financial support to his outside business ventures. These expenses included, among others, paying for the development of KIH, an international financial entity in Puerto Rico, the development of an international exchange in Puerto Rico, and paying more than $600,000 for a multi-day event held to highlight and introduce KIH to the public at a luxury hotel in Puerto Rico. Williams executed on behalf of his entity, LF42, two "Credit Facility Agreements" reflecting a total loan in the amount of $2,550,000. Williams did not guarantee repayment of the purported loan, which is unsecured." [D.E. 1 at ¶ 37]
10	"Defendants transferred investor capital amounting to at least $9.1 million net to Lendacy, an entity owned by Williams." [D.E. 1 at ¶ 39(a)]
11	"Williams and two of his entities took unsecured, purported loans amounting to at least $6.8 million funded with KFYield assets." [D.E. 1 at ¶ 39(b)]
12	"Defendants used $30,872.44 of investor funds to pay Silexx Financial Systems, LLC ("Silexx"), another company that Williams partially owned and/or had a financial interest in." [D.E. 1 at ¶ 39(c)]