

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 WILLIAMS' MOTION FOR SUMMARY JUDGMENT

Defendant MICHAEL SCOTT WILLIAMS (“Defendant”), pursuant to Federal Rule of Civil Procedure 56 and Middle District Local Rule 3.01, moves for summary judgment and states as follows:

MOTION

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 has asserted 14 causes of action against Defendant arising under three related statutory regimes that are modeled on one another, employ similar (often identical) language, and require

similar and overlapping elements of proof: (1) the Securities Act of 1933 (“Securities Act”); (2) the Securities Exchange Act of 1934 (“Exchange Act”); and (3) the Investment Advisers Act of 1940 (“Advisers Act”). [D.E. 1 at ¶¶ 42-85]; *see* 15 U.S.C. §§ 77q(a)(1)-(3), 78j(b), 80b-6(1)-(2),(4); 17 C.F.R. §§ 240.10b-5(a)-(c), 275.206(4)-8(a)(1).

Plaintiff’s claims can be organized into three related groups — (1) Counts I, IV, III, and VI-VIII (predicated on a device, scheme, or artifice to defraud); (2) Counts II, V, and XI-XII (predicated on a misrepresentation or omission); and (3) Counts III, VI, IX-X, and XIII-XIV (predicated on an act, practice, or course of business which operates) — with each group requiring nearly identical elements of proof.

Defendant moves for summary judgment on: (1) Counts I, III-IV, VI-X, and XIII-XIV on the grounds they are predicated on misappropriations that are *not* to be “in connection with” an offer, purchase, or sale of securities; (2) Counts I, III-IV, VI-X, and XIII-XIV on the grounds they are predicated on the misappropriation of funds that were *not* misappropriated; (3) Counts VII, IX, XI, and XIII on the grounds that Defendant was *not* an “investment adviser” during the relevant time period; (4) Counts VIII, X, and XIV on the grounds that they are predicated on Defendant aiding and abetting *his own* misappropriations; and (5) Counts I-XIV to the extent they are predicated on *oral* misrepresentations or omissions that did not happen.

UNDISPUTED MATERIAL FACTS

There is no genuine dispute or issue for trial regarding the following material facts:

1. Paragraph 32 of the Complaint [D.E. 1] states: “Once investors invested in KFYield, Williams then misappropriated KFYield funds for the benefit of himself and other business ventures.” [D.E. 1 at ¶ 32].

2. While the Complaint contains allegations that “Defendants” “used” funds diverted to Lendacy [D.E. 1 at ¶¶ 10, 39(c)] and “transferred” funds to Lendacy [D.E. 1 at ¶ 39(a)], there is no allegation in the Complaint these uses or transfers of funds are “misappropriations” or that Kinetic Group “misappropriated” any funds or property. [D.E. 1].

3. None of the funds transferred by Kinetic Funds to Lendacy belonged to Kinetic Funds, KFYield, Kinetic Funds’ investor, or KFYield’s investors. *See* Affidavit of Michael Scott Williams (hereinafter “Williams affidavit”) at ¶¶ 16-18, attached hereto as **Exhibit A**.

4. Defendant did not advise Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds’ investors, or KFYield’s investors as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. *See id.* at ¶ 19.

5. Defendant did not engage in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. *See id.* at ¶ 20.

6. Defendant did not any compensation advising Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds' investors, or KFYield's investors as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. *See id.* at ¶ 21.

7. Defendant did not receive any compensation advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. *See id.* at ¶ 22.

8. Defendant did not receive any compensation from Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds' investors, or KFYield's investors. *See id.* at ¶ 23.

9. Defendant did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield. *See id.* at ¶ 24.

10. Defendant did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security. *See id.* at ¶ 25.

11. Defendant did not omit to state orally a material fact necessary in order to make any statements made — in the light of the circumstances under which they were made — not misleading in connection with the offer, purchase or sale of any security. *See id.* at ¶ 25.

12. Defendant did not omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield. *See id.* at ¶ 26.

13. Defendant did not omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield. *See id.* at ¶ 27.

14. Defendant did not omit to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield. *See id.* at ¶ 28.

15. Defendant did not omit to state a material fact necessary in order to make any statements made orally — in the light of the circumstances under

which they were made — not misleading in connection with the offer, purchase or sale of any security. *See id.* at ¶ 29.

16. Kinetic Group did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield. *See id.* at ¶ 30.

17. Kinetic Group did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security. *See id.* at ¶ 31.

18. Kinetic Group did not omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield. *See id.* at ¶ 32.

19. Kinetic Group did not omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security. *See id.* at ¶ 33.

20. Kinetic Group did not omit to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer,

purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield. *See id.* at ¶ 34.

21. Kinetic Group did not omit to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security. *See id.* at ¶ 35.

MEMORANDUM OF LAW

I. Counts I, III-IV, VI-X, and XIII-XIV Are Predicated on Misappropriations That Are Not “in Connection with” the Offer, Purchase, or Sale of Securities

Plaintiff has asserted claims against Defendant for violating — and aiding abetting a violation of — Sections 17(a)(1) and 17(a)(3) of the Securities Act; Section 10(b) and Rules 10b-5(a) and 10b-5(c) of the Exchange Act; and Sections 206(1), 206(2), and 206(4) and Rule 206(4)-8(a)(2) of the Advisers Act. [D.E. 1 at Counts I, III-IV, VI-X, XIII-XIV].

A fundamental element common to all of these claims is that Plaintiff must prove that Defendant (or, in the case of the aiding and abetting claims, Kinetic Group) either: (1) employed a device, scheme, or artifice to defraud; or (2) engaged in an act, practice, or course of business which operates or would

operate as a fraud or deceit. *See* 15 U.S.C. §§ 77q(a)(1),(3); 78j(b); 80b-6(1)-(2),(4); 17 C.F.R. §§ 240.10b-5(a),(c), 275.206(4)-8(a)(2).¹

This element is referred to as “scheme liability.” Importantly, “[a] scheme liability claim is different and separate from a [misrepresentation or omission] claim.” *IBEW Local 5959 Pension & Money Purchase Pension Plans v. ADT Corp.*, 660 Fed. App’x 850, 858 (11th Cir. 2016). As a result, the “device, scheme, or artifice to defraud” and the “act, practice, or course of business which operates or would operate as a fraud or deceit” that is a predicate for Counts I, III-IV, VI-X, and XIII-XIV must be something other than a misrepresentation or omission.

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

Id. (emphasis added).

Another fundamental element common to all of these claims is that Plaintiff must also prove that the device, scheme, or artifice to defraud and the act, practice, or course of business which operates or would operate as a fraud or deceit occurred “*in connection with*” the offer, purchase, or sale of a security. *See* 15 U.S.C. §§ 77q(a)(1),(3); 78j(b); 80b-6(1)-(2),(4); 17 C.F.R. §§ 240.10b-5(a),(c), 275.206(4)-8(a)(2).

¹ A table summarizing the elements of Plaintiff’s claims is attached hereto as **Exhibit B**.

The only wrongdoings alleged in the Complaint that are *not* misrepresentations or omissions — and therefore could be a predicate for Counts I, III-IV, VI-X, and XIII-XIV — are the alleged misappropriations.

In its Complaint, Plaintiff arguably alleges twelve misappropriations as the basis of its claims. [D.E. 1 at ¶¶ 10-14, 32-37, 39].² However, while Misappropriation Nos. 1, 2, 3, 4, 5, 10, 11, and 12 allege funds were “transferred” or “used” [D.E. 1 at ¶¶ 10-14, 39]; the Complaint contains *no* allegations that any of those transfers or uses of funds were, in fact, “misappropriations” or that they were even improper — unlike Misappropriations Nos. 6, 7, 8, and 9, which Plaintiff expressly alleges are misappropriations. [D.E. 1 at ¶¶ 32-37], *see Exhibit C*.

Accordingly, based on the allegations in the Complaint and the undisputed facts, Misappropriations Nos. 6, 7, 8, and 9 are the *only* misappropriations that are the basis of Plaintiff’s claims.

Plaintiff expressly alleges that Misappropriations 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

² A table summarizing the misappropriations is attached hereto as **Exhibit C**. The misappropriations shall be referred to by the number assigned to them in Table A. It is unclear from the Complaint is unclear whether Misappropriation Nos. 1, 2, 3, 4, 5, 10, 11, and 12 are merely restatements of Misappropriation Nos. 6, 7, 8, and 9. *See id.* Accordingly, Defendant shall treat each as a separate misappropriation.

alleged misappropriations occurred, however, then — as a matter of law and logic — the misappropriations could *not* have occurred “in connection with” the offer, purchase, or sale of those securities.

Accordingly, even if Plaintiff were able to prove all of its allegations, it would still not prevail on Counts I, III-IV, VI-X, and XIII-XIV because one of the allegations that Plaintiff will have proved is that the predicate misappropriations for those claims occurred *after* — and therefore *not* “in connection with” — the investors’ purchases of their investments. As such, Defendant is entitled to summary judgment on Counts I, III-IV, VI-X, and XIII-XIV.

II. Counts I, III-IV, VI-X, and XIII-XIV Are Predicated on Misappropriations of Funds That Were Not Misappropriated

Plaintiff has asserted claims against Defendant for violating — and aiding abetting a violation of — Sections 17(a)(1) and 17(a)(3) of the Securities Act; Section 10(b) and Rules 10b-5(a) and 10b-5(c) of the Exchange Act; and Sections 206(1), 206(2), and 206(4) and Rule 206(4)-8(a)(2) of the Advisers Act. [D.E. 1 at Counts I, III-IV, VI-X, XIII-XIV].

As discussed above, to prevail on these claims, Plaintiff must prove that Defendant (or, in the case of the aiding and abetting claims, Kinetic Group) either: (1) employed a device, scheme, or artifice to defraud; or (2) engaged in an act, practice, or course of business which operates or would operate as a fraud or deceit. *See* 15 U.S.C. § 80b-6(1)-(2),(4); 17 C.F.R. § 275.206(4)-8(a)(2).

As discussed above, Sections 17(a)(1) and 17(a)(3) of the Advisers Act; Section 10(b) and Rules 10b-5(a) and 10b-5(c) of the Exchange Act; and Sections 206(1), 206(2), and 206(4) and Rule 206(4)-8(a)(2) are predicated on “scheme liability.” *See IBEW*, 660 Fed. App’x at 858. As such, the “device, scheme, or artifice to defraud” and the “act, practice, or course of business which operates or would operate as a fraud or deceit” that is a predicate for Counts I, III-IV, VI-X, and XIII-XIV must be something other than a misrepresentation or omission.

As discussed above, the only wrongdoings alleged in the Complaint that are *not* misrepresentations or omissions — and therefore could be a predicate for Counts I, III-IV, VI-X, and XIII-XIV — are Misappropriations Nos. 6, 7, 8, and 9. [D.E. 1 at ¶¶ 32-37]; *see Exhibit C*.

Plaintiff expressly alleges that Misappropriations Nos. 6, 7, 8, and 9 involve the misappropriation of *KFYield funds*. [D.E. 1 at ¶ 32]. More specifically, Plaintiff alleges that Defendant “routed” KFYield funds to KCL Services, LLC d/b/a Lendacy (“Lendacy”) and then Defendant borrowed those funds from Lendacy to use for his own purposes. [D.E. 1 at ¶¶ 33-37].

It is undisputed, however, that *none* of the funds transferred by Kinetic Funds to Lendacy belonged to Kinetic Funds, KFYield, Kinetic Funds’ investor, or KFYield’s investors. *See Williams* affidavit at ¶¶ 16-18. To the contrary, the only funds that were transferred from Kinetic Funds to Lendacy were funds

that *belonged to Interactive Brokers, LLC* (“IB”). *See id.* Plaintiff has nowhere alleged in its complaint that transferring IB’s funds to Lendacy was a predicate misappropriation for any of its claims — or that such transfers to IB were even improper. [D.E. 1].

Accordingly, Plaintiff will not be able to prove the diversion of KFYield funds to Lendacy upon which Counts I, III-IV, VI-X, and XIII-XIV are predicated because the only funds that were transferred to Lendacy were funds that *belonged to IB*. As such, Defendant is entitled to summary judgment on Counts I, III-IV, VI-X, and XIII-XIV.

III. Plaintiff Cannot Prove Defendant Was an “Investment Advisor” — Which is an Element of Counts VII, IX, XI, and XIII

Plaintiff has asserted claims against Defendant for violating 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. [D.E. 1 at Counts VII, IX, XI, XIII].

A fundamental element common to all of these claims is that Plaintiff must prove wrongdoing was done by an “investment adviser.”³ *See* 15 U.S.C. § 80b-6(1),(2),(4); 17 C.F.R. § 275.206(4)-8(a)(1),(2). An investment adviser, in turn, is defined as “any person who, for compensation, engages in the business

³ Plaintiff must also prove that the wrongdoing was done to: (1) the investment adviser’s client or prospective client or (2) an investor prospective investor in the pooled investment vehicle advised by the investment adviser). *See* 15 U.S.C. § 80b-6(1),(2),(4); 17 C.F.R. § 275.206(4)-8(a)(1),(2).

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).

It is undisputed, however, that Defendant did not engage in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities; nor did Defendant receive any compensation advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. *See* Williams affidavit at ¶¶ 19-23. As such, Defendant was not an “investment adviser” as that term is defined for purposes of Sections 206(1), 206(2), and 206(4) and Rules 206(4)-8(a)(1) and 206(4)-8(a)(2).

Because Defendant was not an investment adviser, Plaintiff cannot prove an essential element of Counts VII, IX, XI, and XII. Accordingly, Plaintiff is entitled to summary judgment as to Counts VII, IX, XI, and XII.

IV. Counts VIII, X, and XIV Are Predicated on Defendant Aiding and Abetting His Own Misappropriations

Plaintiff has asserted claims against Defendant for aiding and abetting Kinetic Group’s violations of Sections 206(1), 206(2), and 206(4) and Rule 206(4)-8(a)(2) of the Advisers Act. [D.E. 1 at Counts VIII, X, XIV].

As discussed above, to prevail on these claims, Plaintiff must prove that Kinetic Group violated Sections 206(1), 206(2), and 206(4) and Rules 206(4)-

8(a)(1) and 206(4)-8(a)(2) (*i.e.*, the primary violation that Defendant is alleged to have aided and abetted). *See* 15 U.S.C. § 80b-9(f); *Woodward*, 522 F.2d 97; *Wealth Strategy*, 2015 WL 3603621 at *3; *SEC v. K.W. Brown*, 555 F. Supp.2d at 1306-07.

As discussed above, to prevail on these claims, Plaintiff must prove that Kinetic Group either: (1) employed a device, scheme, or artifice to defraud; or (2) engaged in an act, practice, or course of business which operates or would operate as a fraud or deceit. *See* 15 U.S.C. § 80b-6(1)-(2),(4); 17 C.F.R. § 275.206(4)-8(a)(2).

As discussed above, Sections 206(1) and 206(4) and Rule 206(4)-8(a)(2) of the Advisers Act are predicated on “scheme liability.” *See IBEW*, 660 Fed. App’x at 858. As such, the “device, scheme, or artifice to defraud” and the “act, practice, or course of business which operates or would operate as a fraud or deceit” that is a predicate for Counts VIII, X, and XIV must be something other than a misrepresentation or omission.

As discussed above, the only wrongdoings alleged in the Complaint that are *not* misrepresentations or omissions — and therefore could be a predicate for Counts VIII, X, XIV — are Misappropriations Nos. 6, 7, 8, and 9. [D.E. 1 at ¶¶ 32-37]; *see Exhibit C*.

Plaintiff expressly alleges that Misappropriations Nos. 6, 7, 8, and 9 were done by *Defendant* — not Kinetic Group. [D.E. 1 at ¶¶ 32-37]. As a matter of

law and common sense, an individual cannot aid and abet his own commission of a wrongdoing. *See Woodward*, 522 F.2d at 97 (“[B]efore someone can be caught within the net of aiding and abetting liability under Rule 10b-5, *another party* must have violated the securities laws . . . ” (emphasis added)).

Accordingly, even if Plaintiff were able to prove all of its allegations, it would still not prevail on Counts VIII, X, and XIV because one of the allegations that Plaintiff will have proved is that Defendant — *not* Kinetic Group — committed predicate securities violation that Defendant is alleged to have aided and abetted. As such, Defendant is entitled to summary judgment on Counts VIII, X, and XIV.

V. Defendant Did Not Make Any Oral Misrepresentations or Omissions Upon which Counts I-XIV Could Be Based

Plaintiff has asserted claims against Defendant for violating — and aiding abetting a violation of — Sections 17(a)(1), 17a(2), and 17(a)(3) of the Securities Act; Section 10(b) and Rules 10b-5(a), 10b-5(b), and 10b-5(c) of the Exchange Act; and Sections 206(1), 206(2), and 206(4) and Rules 206(4)-8(a)(2) and 206(4)-8(a)(2) of the Advisers Act. [D.E. 1 at Counts I-XIV].

A fundamental element common to Counts II, V, and XI-XII, is that Plaintiff must prove that — in connection with the offer, purchase, or sale of a security — Defendant (or, in the case of the aiding and abetting claims, Kinetic Group) either: (1) made an untrue statement of a material fact; or (2) omitted

to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. *See* 15 U.S.C. §§ 77q(a)(2); 78j(b); 80b-6(4); 17 C.F.R. §§ 240.10b-5(b), 275.206(4)-8(a)(1).

As discussed above, Counts I, III-IV, VI-X, and XIII-XIV are predicated on “scheme liability” and require proof of either: (1) a device, scheme, or artifice to defraud; or (2) an act, practice, or course of business which operates or would operate as a fraud or deceit. *See* 15 U.S.C. §§ 77q(a)(1),(3); 78j(b); 80b-6(1)-(2),(4); 17 C.F.R. §§ 240.10b-5(a),(c), 275.206(4)-8(a)(2); *IBEW*, 660 Fed. App’x at 858. To prevail on these claims, it is not sufficient for Plaintiff to prove only a misrepresentation or omission. *See IBEW*, 660 Fed. App’x at 858. However, a misrepresentation or omission can be a component of a scheme liability claim if conduct beyond the misrepresentation or omission is also proven. *See id.*

It is undisputed that Defendant and Kinetic Group did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security; nor did they omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security; nor did they omit to state a material fact necessary in order to make any statements made orally, in the light of the

circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security. *See* Williams affidavit at ¶¶ 24-35.

Accordingly, because Defendant and Kinetic Group did *not* make any oral misrepresentations or omissions, Plaintiff is entitled to summary judgment on Counts I-XIV to the extent they are predicated (in whole or in part) on an oral misrepresentation or omission by Defendant or Kinetic Group.

WHEREFORE, Defendant moves for an Order granting summary judgment in Defendant's favor on Counts I, III, IV, VI-XI, and XIII-XIV in their entirety and on Counts I-XIV to the extent they are predicated (in whole or in part) on oral misrepresentations or omissions by Defendant or Kinetic Group.

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

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO.: 8:20-cv-394

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

KINETIC INVESTMENT GROUP, LLC, and
MICHAEL SCOTT WILLIAMS,

Defendants, and

KINETIC FUNDS I, LLC,
KCL SERVICES, LLC d/b/a LENDACY,
SCIPIO LLC,
LF42, LLC,
EL MORRO FINANCIAL GROUP, LLC,
and KIH, INC. f/k/a KINETIC INTERNATIONAL, LLC,

Relief Defendants.

_____ /

DECLARATION OF MICHAEL SCOTT WILLIAMS

I, Michael Scott Williams, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is Michael Scott Williams. I am over eighteen years of age, and I suffer from no mental or legal disability. All statements contained in this declaration are based upon my personal knowledge.

2. I am a named Defendant in the above-styled action.

The Kinetic Entities

3. I formed Kinetic Investment Group, LLC (“Kinetic Group”) with the aid of — and in reliance on the advice, guidance, and expertise of — my attorneys, accounts, and other professional advisers. Kinetic Group was owned by Kinetic Partners LLC (“Kinetic Partners”). LF42, LLC (“LF42”) was the majority owner of Kinetic Partners. I owned 100% of LF42, which meant that I was the majority owner of Kinetic Partners and Kinetic Group.

4. I formed KCL Services, LLC d/b/a Lendacy (“Lendacy”) with the aid of — and in reliance on the advice, guidance, and expertise of — my attorneys, accounts, and other professional advisers. LF42 was the majority owner of Lendacy.

5. From 2013 through 2019, Kinetic Group was the managing manager of Kinetic Funds I, LLC (“Kinetic Funds”).

6. Kinetic Funds’ investors allocated the money they invested in Kinetic Funds to one or more of Kinetic Funds’ “sub-funds,” each of which was designed to pursue a different investment objective (*e.g.*, capital growth, income, etc.).

7. Kinetic Funds Yield (“KFYield”) was one of the sub-funds offered to Kinetic Funds’ investors. As such, KFYield was not an actual entity. Rather,

it was more like a bookkeeping entry to keep track of which of the funds invested in Kinetic Funds were allocated to KFYield.

Kinetic Fund's Operation

8. In my capacity as the majority owner of Kinetic Group, I was kept informed of the investment strategies, trades, and financial transactions employed by Kinetic Group and Kinetic Funds.

9. Each investor in Kinetic Funds was deemed a member of Kinetic Funds I, LLC.

10. For accounting purposes, each Kinetic Funds investor was assigned a capital account which reflected that investor's investment in Kinetic Funds as well as any income and capital appreciation (or depreciation) attributable to his investment minus any funds he withdrew.

11. Kinetic Funds maintained its investments in U.S.-listed financial products at Interactive Brokers, LLC ("IB").

12. Kinetic Funds employed a hedging strategy at IB to protect the value of the investments it held at IB so that those investments could never lose more than 10% of their value.

13. Kinetic Funds also employed portfolio margin at IB to increase its ability to pursue various investment strategies and to buy various investments and assets.

14. Through the use of portfolio margin, Kinetic Funds could borrow from IB up to 90% of the value of the investments it held at IB.

15. Thus, to use an over-simplified example, if Kinetic Funds had only one investor and that investor invested \$100,000 in Kinetic Funds, then Kinetic Funds could use that \$100,000 to borrow another \$70,000 from IB. In that case, Kinetic Fund's records would reflect that Kinetic Funds held a total of \$170,000 and that it owed \$70,000 to IB; the investor's capital account would reflect that the investor owned \$100,000 of Kinetic Fund's \$170,000. If Kinetic Funds were shut down at that point, \$70,000 would be returned to IB and \$100,000 would be returned to the investor. Stated another way, while Kinetic Fund's records reflected that Kinetic Funds held \$170,000, not all of that money belonged to Kinetic Funds or its investors.

16. All of the funds that were transferred by Kinetic Funds to Lendacy were borrowed by Kinetic Funds from IB through the use of portfolio margin.

17. Stated another way, the only funds that were transferred by Kinetic Funds to Lendacy were funds that were borrowed by Kinetic Funds from IB through the use of portfolio margin.

18. Stated still another way, none of the funds transferred by Kinetic Funds to Lendacy belonged to Kinetic Funds, KFYield, Kinetic Funds' investor, or KFYield's investors — they belonged to IB and were simply on loan.

I Have Never Provided Investment Advice

19. I did not advise Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds' investors, or KFYield's investors as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

20. I have never engaged in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

21. I did not receive any compensation advising Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds' investors, or KFYield's investors as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

22. I have never received any compensation advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

23. I did not receive any compensation from Kinetic Group, Kinetic Funds, KFYield, Kinetic Funds' investors, or KFYield's investors.

**I Have Never Made
Any Oral Misrepresentations or Omissions**

24. I did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield.

25. I did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security.

26. I did not omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield.

27. I did not omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security.

28. I did not omit to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield.

29. I did not omit to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security.

**Kinetic Group Has Never Made
Any Oral Misrepresentations or Omissions**

30. Kinetic Group did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield.

31. Kinetic Group did not make any untrue oral statements of material fact in connection with the offer, purchase, or sale of any security.

32. Kinetic Group did not omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield.

33. Kinetic Group did not omit to state orally a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security.

34. Kinetic Group did not omit to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security relating, directly or indirectly, to Kinetic Group, Kinetic Funds, or KFYield.

35. Kinetic Group did not omit to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of any security.

FURTHER DECLARANT SAYETH NAUGHT.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 3/12/2021



Michael Scott Williams

PLAINTIFF'S CLAIMS

- ✓ = Element of Claim
- ✗ = Not Properly Plead

<u>COUNT</u>	<u>CLAIM</u>	<u>ELEMENTS</u>													
		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					✓	✓		✓	✓	✓	✓	✓	✓	✓

MISAPPROPRIATIONS ALLEGED BY PLAINTIFF

<u>Misappropriations</u>	
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	<p>“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]</p> <p>“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]</p>

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)]