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Securities and Exchange Commission
Plaintiff, : Civil Case #2:21-cv-4845
v.
Joseph Cammarata
Defendant.

MOTION FOR RELIEF FROM STAY FOR THE LIMITED PURPOSE OF HEARING A MOTION FOR SUMMARY JUDGMENT UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 56

I, Joseph Cammarata, come before this court to enter a pro se motion in the above captioned civil complaint No. 2:21-cv-04845, (the "Complaint"). This court is aware of my incarceration and limited resources, but bring a legitimate motion in good faith and legal basis. I respectfully request the court to temporarily lift the stay for a Summary Judgment hearing in ~~acc~~ accordance with F.R.C.P. Rule 56.

My previously denied 12(b)(6) motion was a request for judgment on the pleadings alone, to avoid any self incrimination on the then pending criminal trial, U.S. v. Cammarata, No. 21-cr-427 (E.D. Pa), ("Criminal case"). This motion will challenge the Security and Exchange Commission's ("SEC") specific claim deficiencies under Rule 56, among other statutes. The court's denial of the previous 12(b)(6) motion (ECF. No 162) was thoughtful, logical and easy to understand the valid reasons in the footnote, and I thank you. I hope this court considers the effort and research I have put into this motion and is able to evaluate the legal elements to grant summary judgement.

BACKGROUND:

On November 3rd, 2021, the SEC filed a civil complaint in a coordinated effort with the Department of Justice and Federal Bureau of Investigation. The same day the Complaint was filed, and I was the only detained defendant, the FBI took every file, evidence, and operating computer servers from the AlphaPlus office. The AlphaPlus business was already shut down and stopped all business in about December of 2020. The SEC also filed a Temporary Restraining Order to freeze every asset, for the alleged purpose of preventing any future alleged securities violations. The court is aware of my position on that particular injunction, that it never did (and still does not), meet the legal and minimum requirements of

15 U.S.C. 78u(d)(1), to prevent future harm (of alleged securities violations) only, and not punish past transgressions. While my motion to dissolve the injunction under FRCP Rule 65 was denied by this court on October 27th, 2022 (the day after the Criminal case had a verdict), it will not be part of this motion.

In the interest of the court's time and efficiency, I will ask the court to recall all relevant facts, case law, and legal interpretations from the 12(b)(6) motion (ECF No. 162) that was also denied, on October 12th, 2022. I am having to hand write all of this without access to a copier (for previously filed motions), printer, word processor, or even typewriter (which I was denied because the one that the FDC Philadelphia had broke a few years ago). Without having to rewrite all of the statutes, I ask the court and SEC to be able to reference them if used.

ARGUMENTS:

The SEC's Complaint contains only two (2) claims for relief. The SEC alleges the defendants ~~from~~ violating Section 10(b) of the Exchange Act (15 U.S.C. 78(b)) and Rule 10b-5 (17 C.F.R. 240.10b-5). The first Claim for relief is wrongly interpreted and misunderstood allegations of 10(b) and 10b-5 that will be demonstrated within this motion.

The Second claim for relief is merely a dependant claim of aiding and abetting. This motion for summary judgment is only sought on claim one of the Complaint, or the "First Claim for Relief", or ("Claim one").

I. Under Rule 56 for Summary Judgment I will start with Rule 56(c) to establish the failure of the First Claim to support any evidence to support a genuine dispute.

If we refer back to 10(b) and 10b-5 we know that any alleged violation must be "in connection with the purchase or sale of any security". It was well established by my 12(b)(6) motion that the filing of a settlement claim on a clients trade from years ago could not be considered "in connection with, coinciding with, or touching" a security transaction at issue. The statutes themselves, the district courts' opinions, and the Supreme Court decisions were overwelmingly clear that filing claims on behalf of clients trades that occured years earlier were not in connection with a security violation.

In this court's footnote in the 12(b)(6) motion (ECF No. 142), the court may have conceded that point, but rightfully denied the motion because there was an alterative accusation of securities fraud. The court was fair and accurate that an administrator may have liquidated a money market fund (security) and "for that reason alone..., the Complaint clearly contains "enough facts to state a claim to relief that is plausible on its face".

II. While there is not any legal basis for considering AlphaPlus' client claim filings to be securities, it is a fact that a Money Market Fund may be a security. However, under FRCP Rule 56(e) and other rules and statutes, I will prove once again that the SEC's Complaint fails to support an assertation of fact.

In the Complaint this alleged securities violation is only vaguely mentioned in two (2) paragraphs under the "FACTS" heading of the Complaint. There is no denying that the Complaint has many allegations of fraud, there is not a single reference or example as to how any of the alleged fraudulent acts are actually "Securities Fraud" as defined by 10(b) + 10b-5. Not only would that have been pertinent to a 10(b) and 10b-5 claim, it is actually required by the Federal Rules of Civil Procedure, which will be proven in section III of this motion.

Let us look at the only two paragraphs

of the Complaint that even mention (or vaguely suggest) that there may be a thread of securities fraud allegations.

Paragraph #31 states, "The settlement documents, stipulations, distribution plans, and/or orders, which are generally publically available, often provide that the funds to be distributed may be held in securities. Accordingly, while distribution fund administrators evaluate victim-claims and documentation, which can take time, they often hold the funds in escrow in a money market fund or other type of security. The money market fund is later liquidated in order to fund distributions."

Paragraph #65 states "Distribution fund administrators liquidated money market funds (or other sources), in whole or in part, to pay approved distributions, including distributions paid to AlphaPlus by check for the benefit of the sham clients, which were premised on Defendants' false claims."

These two (2) paragraphs (#31 + 65) both have some factual elements, but appear to be purely hypothetical, ~~[illegible]~~ mischaracterized, and fail to assert how misrepresented claim filings (from months earlier) was a cause or impacted the decision of the fund administrator to liquidate a security (or Money

Market fund). We should start with a very liberal and broad interpetation of the SEC's liquidation of a money market as a security argument and then I will begin to narrow the funnel as we go through this motion, the case law and many district and Supreme Court interpretations and rulings.

I ask this Court to consider why the rather important ~~argument~~ (perhaps sole) argument of 10(b) + 10b-5 securities violations were not even pointed to in the Complaint. It may have been suggested in paragraphs 31+65, but in paragraphs 1 through 167 there is not a single example cited. One would think that if some unnamed fund administrator actually did hold settlement funds in a money market account (or other security) that it would be provided or explained, which is required when alleging fraud.

Again, starting at the top of the money market liquidation argument proffered by the SEC, lets start at the top and wide part of the funnel. Is there any fund administator that actually held ~~funds~~ settlement distribution funds in a security, which was paid by check to AlphaPlus for the benefit of alleged Sham Clients? Lets assume there are such examples, they should have been stated in the Complaint, as this Court knows that the SEC would never bring a frivolous Complaint or injunction without severe liability and sanctions. By virtue of the Complaint and Claim One failing to properly support an assertation as required by Rule56(c) alone, the Court should grant summary judgment on Claim One.

If we continue to assume that there were some admins, or even one, that did hold the alleged Sham Clients funds in a security and distributed (had to liquidate the security), were the funds of all claimants all held in one omnibus account? If there was any interest accrued on the funds, how are they treated and distributed? Did these supposed fund administrators have a separate checking account to draw the checks or were the checks drawn from the fund's money market or securities account?

The 10b + 10b-5 violations that the SEC ~~claims~~ alleges still do not hold water whether a claim filed is a security or a fund liquidating a security can be "in connection" with any alleged fraud for "securities fraud". If the assumption that there was an actual administrator that held the settlement funds in a security and then later distributed it to Alpha Plus by check for the benefit of the alleged Sham Clients, there are several factors required to meet the well defined standard of "in connection" with any security. From the 3rd Circuit, "It is axiomatic that before a plaintiff can invoke the protections of the anti-fraud provisions of of the federal securities laws, a plaintiff must show that the alleged misconduct involves a purchase or sale of securities. See Steinhardt Grp. Inc. V. Citigroup, 126 F.3d 144, 150 (3d Cir. 1997); Scattergood v. Perelman, 945 F.2d 618, 622 (3d Cir. 1991) (fraud under the Exchange Act and Rule 10b-5 must concern the purchase or sale of a "security"). "Indeed, in order to state a claim for securities fraud under Section 10(b) and 10b-5, a plaintiff must allege that defendants: (1) made a misstatement or an omission of material fact; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) upon which the plaintiff reasonably relied; and (5) plaintiff's reliance was the proximate cause of his injury." In Westinghouse Secs. Litig., 90 F.3d 696, 710 (3d Cir. 1996).

In the SEC's complaint and in reality there were two distinct acts that were not connected and did not coincide. There are 167 paragraphs of alleged misrepresentations and a separate (independant) and unrelated act of liquidating or selling a security, many months later. If any administrator did deposit funds ~~into~~ into a money market account, that would be the purchase of said security. That purchase would have likely occurred when the admin accepted the settlement fund, several months (or even years) before there would be a sale or distribution to claimants. Certainly it would be well before AlphaPlus or its alleged Sham Clients could have known or influenced any purchase decision. It was then likely months before any alleged Sham Clients could have filed any alleged false claims. We can thereby establish that any false claims could not have been in connection or influenced any desision to purchase the money market security.

Looking at the 5 elements required to state a claim for securities fraud, lets start at #1, "made a misstatement or an omission of material fact". While there is strong evidence that shows the misstatements in the alleged false claims were not material for the administrators to validate the trade data, but even if we assume they were material for the admins to approve, they are in no way material or even related to the months later liquidation (sale) of the fund's security. The Supreme Court holds out, "Mindful of the ends of both SLUSA and Rule 10b-5, the Court's precedents interpret the key phrase in both laws to mean that a "misrepresentation or omission of a material fact" is made "in connection with the purchase or sale" of a security when the "fraud <u>coincided</u> with the sales [or purchases] <u>themselves</u>." Zanford, 535 U.S. @ 820, 122 S. Ct. 1899, 153 Ed. 2d 1. Notice the words "coincided" and "themselves", this language is in plain text and could not be anymore clear. The alleged mistatements were not material, at least to the liquidation (sale) of the security.

Element #2, "with scienter"; as it relates to the purchase or sale of a security (the liquidation of the money market fund), scienter is impossible. The defendants could not have acted with scienter as they did not and could not know that any administrators held the funds in any security. In fact more than a year later and there is still no example or explaination of any money market or security that was liquidated by the (any) admin. Even with an actual security sale, there is no way to deny the defendants' scienter in connection with the security transactions "themselves". Also from the Supreme Court we have, "Plaintiffs bear the burden of proving that the defendant's misrepresentations "caused the loss for which the plaintiff seeks to recover." Dura Pharms., 544 U.S. @ 345-46 (quoting § 78u-4(b)(4). In determining whether a "strong inference" of scienter has been sufficiently alleged, this Court must not only draw "inferences urged by the plaintiff" but also engage in a "comparative evaluation," thus examining and considering "competing inferences [<u>in defendants'</u> <u>favor</u>] drawn from the facts alleged." Tellabs, 551 U.S. @ 314. Hence, scienter must not only be <u>plausible</u> or reasonable," it must also be "cogent and at least as compelling as any opposing inference of nonfraudulent intent." Id @ 324.

In element #3 that is required to claim securties fraud is, "in connection with the purchase or sale of a security". Again, the plain text is very precise to mean that any alleged fraud and the other 4 elements, at a minimum, must be in connection with the purchase or sale of a security. This is the primary reason that filing a claim on years old trade data was not in connection with the purchase or sale of the security. However, in regards to the SEC's allegations that some admin may have liquidated a money market or security, the possible sale occurred months or years after the security may have been purchased and the security would have been sold or liquidated whether or not there were any alleged sham clients of AlphaPlus. AlphaPlus had zero impact on any alleged administrator's possible liquidation of a security to pay the class of claimants and is even further removed from being "in connection" with any security transaction, that we still do not even know existed. The Supreme Court's interpretation in Zanford is worth repeating and relevant for this 3rd element as well, "a misrepresentation or omission of a material fact is made in connection with the purchase or sale of a security when the fraud coincided with the sales [or purchases] themselves." The interpretation of the already clear text should be undisputable at this point, but there is much more than just the "in connection" argument.

The 4th ~~required~~ element required to allege a securities fraud claim is that the plaintiff reasonably relied on the misstatements alleged. I refer back to the Supreme Court's guidance in ~~[illegible]~~ Basic, Inc v. Levinson, 485 U.S. 224, 231-32, 108 S. Ct 978, 99 L. Ed. 2d 194 (1988), "An omitted fact is material under federal securities laws where there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available". The allegation that AlphaPlus misrepresented or omitted facts in claim filings had no impact or relevance to the admins decision to liquidate the money market or security. For further clarity, "A plaintiff's burden of alleging reliance varies depending on the nature of the fraud under section 10(b). Feinman v. Dean Witter Reynolds, Inc 1995 US Dist Lexis 13757 @ 3. "Where plaintiffs allege an affirmative misrepresentation, they must 'demonstrate that [they] relied on the misrepresentation when entering the transaction." Burke v Jacoby, 981 F. 2d 1372, 1378 (2d Cir. 1992).

Reliance, also known as transaction causation, is an essential element of a claim brought under Section 10(b) of the 1934 Act. In re Time Warner, Inc. Sec Litig, 9 F. 3d @ 264. Because Section

10(b) applies only to fraudulent acts related to the purchase or sale of securities," see Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737-38, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975), plaintiffs must assert that they relied on the omission in choosing to purchase the securities in question, that is, that the fraudulent conduct alleged "induced [them] to enter into the transaction" Citibank, N.A. v. K-H Corp., 968 F.2d 1489, 1495 (2d Cir (1992).

The 5th element required to allege securities fraud is that the, "plaintiff's reliance was the proximate cause of his injury", is also the easiest to prove, the continued failure to allege any securities fraud claim. While the SEC alleges that some admin, may have, held distribution funds in a money market or security and that because of AlphaPlus' alleged misrepresentations on claims filings, caused the plaintiff (or the admin) to liquidate or was harmed is also untrue. the facts in the complaint are not clear as to ~~[illegible]~~ how the admin's liquidation was "premised on defendant's false claims". The (possibly held) money market fund had all of the claimants' (the ~~class~~ class) funds for distribution and after the prorations were established and the claimant checks were to be sent, the admin liquidated the security. This security would have been liquidated regardless of any AlphaPlus claims and the funds were also held in only one account (a single money market or security account). That "securities" account would then have to be liquidated to the administrators checking account, since it would be a actual securities violation if the admins, drafted checks or wires to a 3rd party benefiary from a securities account. Even if the court looks past this important distinction, the ultimate truth is that the admin or plaintiff suffered no injury from the possible liquidation of a security. The reason there was no loss, is because the net amount being distributed from the money market funds would have been the same. If not for AlphaPlus' alleged false claims the distribution amount would have been the same, but the claimant prorations may have changed microscopically (the fund amount in the security in question, would have remained constant). In other words, the supposed administrator that may have held the distribution funds in a money market would have distributed the same exact amount of funds and would not have had any "proximate cause of (any) his injury". Not only was there no reliance on AlphaPlus' claims to liquidate the alleged security, even if the admin somehow did, and the reliance was somehow in connection with the securities transaction, it did not in anyway change the amount that was liquidated and the ~~t~~ admin did not suffer any injury. Even if the SEC would argue that the administrators did not suffer injury, but maybe a claimant might have been paid ~~a~~ a tiny proration higher, the argument is further then removed ~~the~~ from "in connection with" the security transaction and proven by the fact that all of the checks or wires came from the admin's checking account and not ~~directly~~ directly from the securities account. Again, Section 10(b) applies only to fraudulent acts related to the purchase or sale of securities.

Even taking a liberal and unbaised interpretation of the case law and opinion from the Supreme Court and Third Circuit, the SEC may be able to satisfy one of the required elements to make a securities fraud claim, but certainly fail at satisfying all five (5) of the required elements, regardless of any of the arguments put forth. This is also all under the assumption that there really was even a single admin that held the funds in a security, which appears to be the prevailing argument. In closing this section of required elements, I will add, "Reliance is often equated with 'transaction causation'." Dura Pharmaceuticals, Inc V. Broudo, 544 U.S. 336, 341, 342, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005). "Transaction causation in, turn, is often defined as requiring an allegation that but for the deceptive act, the plaintiff would not have entered into the securities transaction." See Lentell v. Merrill Lynch + Co., 396 F.3d 161, 172 (2005).

III. In addition to factual and legal evidence for summary judgement of Claim one of the SEC's Complaint, I would like to introduce the Complaint's failure to comply with Rule 9(b) of the FRCP. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or Mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.", See FRCP Rule 9(b).

While the Complaint did have detailed allegations that if true, may be construed as general fraud and would suffice, the allegations against defendants are specific to 10(b) + 10b-5, Securities Fraud. In the 167 paragraphs of fraud allegations not one specifically (or with any particularity) describes how it is securities fraud or in violation of 10(b) + 10b-5. Even the SEC's purported security claim in ~~sections~~ paragraphs 31 + 65 fail to name a possible administrator and zero particularity of the alleged securities fraud. Under Rule 9(b) of FRCP, "a plaintiff must state the circumstances of the alleged fraud ~~to~~ with sufficient particularity to place the defendant on notice of the precise misconduct with which [it is] charged." Frederico V. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007).

From the Third Circuit, "9(b)'s particularity requirement is comparable to and effectively subsumed by the requirements of [§ 78u-4(b)(1)] of the PSLRA"; 6Institutional Inv'rs Group v Avaya, Inc, 564 F.3d 242, 253 (3d Cir. 2009). The Complaint has failed to state not only with particularity, but at all, any details of how the alleged misstatements are in connection with securities fraud (10b-10b-5). The SEC may choose to amend their Complaint, but currently fails to comply with 9(b) and for this reason alone, this Court should grant a summary judgment on Claim one.

IV. This final section of this motion may render all of the arguments moot. In the opening sentence of the SEC's complaint it states, "Starting in approximately 2014, Defendants orchestrated a scheme to steal money from distribution funds established for the benefit of securities fraud victims." The SEC alleged the scheme and referenced "the scheme" throughout the Complaint. In section 6 of the Complaint, they say, "Defendants committed many deceptive acts in furtherance of their scheme..." This Claim for relief, Claim one has alleged the acts as securities fraud in singular scheme that started in 2014. It is for these reasons that Claim one has violated 28 U.S.C. 2462, which for securities actions is a five year statute of limitations.

"Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when it first acrued.:." 28 U.S.C. § 2462. "A claim "first accrue[s]" when it has "come into existance as an enforceable claim or right." William A. Graham Co v. Haughey, 646 F.3d (3d Cir. 2011). The alleged "securities fraud", the scheme is what the Complaint continuosly called it. If it was not a singular, unified, and continuing violation, the specific "securities violations" would have been (and required by FRCP Rule 9(b)) to list each securities violation with specificity, which was not done. Since the alleged scheme was, started (and first accrued) in 2014, the claim is time-barred.

Citing Haughey, 646 F.3d @ 146, "[A] claim accrues when all of the elements of the cause of action have objectively come into existance." In

SEC enforcement actions for civil penalties, 'the five-year clock in §2462 begins to tick when the fraud occurs, not when it is discovered." Gabelli v. SEC 568 @ 448, 133 S. Ct. 1216, 185 L. Ed 2d 297 (2013) again from the Supreme Court, States, "that the most natural reading of the statute is that a 'Claim based on fraud accrues - and the five-year clock begins to tick when a defendant's allegedly fraudulent conduct occurs." "The Supreme Court recently held that the five-year statute of limitations in Section 2462 applies to disgorgement in SEC enforcement actions." Kokesh, 137 S. Ct 1642. They also in Kokesh, 884 F.3d @ 983, instructed that, "when ... misconduct constitutes one "Continuing violation" of securities laws that commenced prior to the statute of limitations, the action is time-barred."

CLOSING:

In looking at the facts, evidence, case law interpetations and failing to meet the requirements of securities violations in Claim One of the Complaint it should be very clear that almost all of the elements are missing. This has been in front of this Court for over one year and while I have tried to have the Complaint and injunction dismissed, I hope the Court finds this motion more compelling as inartful as they all are. The SEC has alleged a fraudulent scheme and if most of the allegations are even true, it may appear to be general fraud (without evidence or discovery), but it can no longer be plausible on its face to be securities fraud. Claim one of the Complaint has failed to meet the required elements and failed to support an assertation of any violations of 10(b) and 10b-5 specifically.

The Complaint, and even just Claim One, alone, has not met the heightened burden of the PSLRA and Rule 9(b) requirements to allege any 10(b) + 10b-5 claims for securities fraud. It has further failed to show in anyway, nevermind particularity, how AlphaPlus' class action filings from client trades of years earlier could have been "in connection" with a security transaction based on the overwhelming evidence. Even the obscure allegation that a selling of a money market fund for distribution to the class claimants failed on all five of the Third Circuit's own requirements to claim ~~a~~ securities fraud under Section 10(b) and 10b-5. That was not even ~~[illegible]~~ possible to consider as viable since that allegation also had no particularity or even named one example of an admin that did hold the funds in a security.

Then if the claim could have somehow be beleived to have overcome those truly insurmountable hurdles, the distribution was not caused by AlphaPlus and the liquidated amount would have been the same. This therefore also proves no harm to plaintiff as a result of the security transaction. Again, after all of that this argument will still fail to meet the FRCP Rule 9(b) requirement to allege fraud, nevertheless securities fraud. Finally, if all of that is ignored, the Claim of the Complaint for the "scheme" is time-barred. However, if the SEC wants to now claim that each filing was an ~~independe~~ independent act, they must amend the Complaint to include the particularities of each act, of which would time bar most of the Claim anyway. In fact ~~three (3) out~~ four (4) out of the five (5) examples of "securities fraud" listed in the Complaint are time-barred under 28 USC 2462. The fifth (5^{th}) example was never paid to AlphaPlus and was likely not held in a money market fund.

It should be very clear to this court by now that the First Claim of the Complaint cannot beyond a reasonable doubt be considered a violation of 10(b) and 10b-5, securities fraud.

"Painting lines on the side of a horse and calling it a zebra, does not make it a zebra", United States v. Vasquez-Rivera, 135 F.3d 172, 177 (1^{st} Cir. 1998).

This horse should finally be put to pasture.

I thank this court again for its time and continued patience with my pro se motions and inartful form. In the interest of this court's efficiency and justice, I respectfully submit this motion for the court's consideration for summary judgment on the First Claim for Relief in the Complaint.

Respectfully,

Joseph Cammarata
Pro Se Inmate #02555-506

J. Cammarata
02555-506
P.O. Box 562
Philadelphia, PA 19105

PHILADELPHIA PA 190
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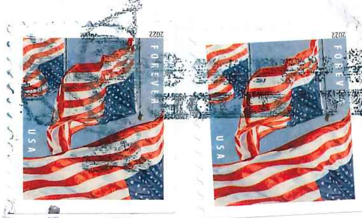

U.S.M.S
X-RA

U.S. District Court
Attn: Clerk of Court
601 Market Street
Philadelphia, PA 19106

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