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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES FABIAN, individually; and on behalf of All Others Similarly Situated;

Plaintiff,

v.

NANO f/k/a RAIBLOCKS f/k/a HIEUSYS, LLC; COLIN LEMAHIEU; MICA BUSCH; ZACH SHAPIRO; TROY RETZER; BG SERVICES, S.R.L. f/k/a BITGRAIL S.R.L. f/k/a WEBCOIN SOLUTIONS; AND FRANCESCO "THE BOMBER" FIRANO,

Defendants.

Case Number: 4:19-cv-54-YGR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' HIEUSYS, LLC, COLIN LEMAHIEU, MICA BUSCH, ZACK SHAPIRO, AND TROY RETZER MOTION TO DISMISS THE COMPLAINT

DATE: June 4, 2019
TIME: 2:00 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Plaintiff, James Fabian, has brought this action against Colin LeMahieu, Mica Busch, Zack Shapiro, and Troy Retzer – the developers of the Nano cryptocurrency ("Nano Coins") – and an entity named Hieusys, LLC, (collectively, the "Defendants")[1] for alleged damages arising from a data breach on an Italian cryptocurrency exchange in 2018. The only federal claim asserted in the putative class-action complaint (the "Complaint") is that the Defendants issued an unregistered security (Nano Coins) in violation of Section 5 of the Securities Act of 1933 (the "Act"). That claim, brought under Section 12(a)(1) of the Act, is untimely. Section 12(a)(1) has a strict one-year statute of limitations, which is not subject to equitable tolling. Mr. Fabian alleges that his final purchase of Nano Coins was on December 12, 2017, and he did not file this action until January 3, 2019. Accordingly, the Section 12(a)(1) claim should be dismissed with prejudice because it is time barred.

The Section 12(a)(1) claim should be dismissed for additional reasons as well. To begin with, Mr. Fabian fails to adequately plead that Nano Coins are securities. His contention that they are securities is at odds with the now widely understood distinction between cryptocurrencies, such as Bitcoin, that are not securities, and initial coin offering ("ICO") tokens, which are securities. Although blockchain technology underlies both cryptocurrencies and ICO tokens, as the Chairman of the U.S. Securities and Exchange Commission (the "SEC") has recognized, the former are not securities because they are circulated for free and serve as a replacement for fiat currency. ICO tokens, on the other hand, are issued in exchange for a payment and buyers are led to expect to profit based on some business connected to the tokens. As explained in detail below, Nano Coins are a cryptocurrency distributed for free and their value is derived from their utility as a currency, rather than from the success of any business operated by their developers – and no such business is alleged in the Complaint.

Moreover, were Mr. Fabian to have adequately pled that Nano Coins are securities, his Securities Act claim would still fail because he has not adequately pled that any of the Defendants were "statutory sellers" for the purposes of Section 12(a)(1). Utterly missing from the Complaint are

[1] For purposes of this motion, the term "Defendants" does not include the defendants, BG Services, S.R.L. or Francesco Firano.

any non-conclusory allegations that Mr. Fabian received his Nano Coins from the Defendants or that the Defendants solicited his purchase of the coins. On the contrary, Mr. Fabian is clear that he purchased his Nano Coins from third parties on a currency exchange, and he makes no allegations – nor could he in good faith – that the Defendants had any connection to these transactions.

Finally, even in cases involving actual securities, the Securities Act does not apply to purely foreign transactions like those alleged in the Complaint. One need only skim *Morrison v. National Australia Bank* to know that the U.S. securities laws would not apply to the two purchases of Nano Coins on an Italian currency exchange alleged in the Complaint.

Mr. Fabian also throws eight state law causes of action against the proverbial wall in the hopes that something will stick. None of these claims are supported by sufficient factual allegations, and all of the claims must be dismissed. Indeed, for some of them, like fraud, Mr. Fabian has not even managed to recite the basic elements of the claim.

At bottom, Mr. Fabian has not pled that the Defendants are connected to him, to his transactions with third parties on an independent foreign exchange, or to the hack of that exchange. Accordingly, the Court should dismiss the Complaint in its entirety with prejudice.

FACTS

The Complaint totals 185 paragraphs comprised primarily of attorney argument, musings on blockchain technology, legal boilerplate, and speculation about the Defendants' thought processes. This section draws from the few specific, non-conclusory assertions that can be parsed out from the other content in the Complaint. The section also draws from the Nano website and a "Press Kit" and article by Mr. LeMahieu hyper-linked thereto, which are incorporated by reference in the Complaint[2] and may be properly considered at this stage.[3]

In 2014, Defendant Colin LeMahieu, a software developer at a large technology company, set out, in his spare time, to develop a new cryptocurrency that would improve on the flaws in the

[2] *See, e.g.*, Complaint (Dkt. No. 1) ("Compl.") ¶¶ 16, 17, 136.

[3] *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) ("On a motion to dismiss, we may consider materials incorporated into the complaint or matters of public record.").

(Footnote continued)

prevailing cryptocurrency at the time – Bitcoin.[4] Bitcoin was designed in a way that requires high amounts of computational power (termed "proof of work") to add transactions to the Bitcoin blockchain (a process known as "mining").[5] In exchange for performing this work a reward in Bitcoin is paid. Over time, as the Bitcoin network grew, the electricity required to mine Bitcoin transactions grew exponentially, as more and more miners, utilizing high-performance computers, were competing against each other for the reward. Bitcoin transactions are batched by miners into a "block" of transactions and a new block is added to the Bitcoin blockchain at roughly 10-minute intervals, the time it takes to perform the work of mining. Mining is costly due to high equipment and energy prices, thus requiring a substantial fee to be charged by miners to those wishing to have their Bitcoin transactions processed.

Against this background, Mr. LeMahieu sought to create a new cryptocurrency that used less electricity to validate transactions, dispensed with the need for transaction fees, and settled transactions quickly and securely.[6] In December 2014, Mr. LeMahieu published a whitepaper describing his concept for a cryptocurrency called "RaiBlocks" [7] (the currency was later renamed "Nano"[8]). Nano Coins were designed such that each account has its own blockchain rather than using one blockchain for the entire currency.[9] Utilizing Mr. LeMahieu's novel design, the currency achieves near instantaneous transaction speeds with minimal energy use and, thus, close to zero fees, over a secure network,[10] making it extremely efficient compared to Bitcoin.

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[4] *See* Nano, *Press Kit 2018* 4 (2018), https://nano.org/media/Nano%20Press%20Kit%204.0.pdf.

[5] The following discussion of Bitcoin is for context only and the facts presented are subject to judicial notice because they are "generally known within the trial court's territorial jurisdiction." *See* Fed. R. Evid. 201(b)(1).

[6] *See* Website: FAQ , https://nano.org/en/faq (last visited Mar. 28, 2019) ("What are the advantages of Nano?"), *see also* Compl ¶ 54.

[7] *See* Colin LeMahiue, *Nano: A Feeless Distributed Cryptocurrency Network* 1 (Nov. 2017), https://nano.org/en/whitepaper.

[8] Compl. ¶ 53.

[9] Website: FAQ, https://nano.org/en/faq (last visited Mar. 28, 2019) ("How does Nano work?").

[10] Website: FAQ, https://nano.org/en/faq (last visited Mar. 28, 2019) ("What are the advantages of Nano?").

(Footnote continued)

In 2015, Mr. LeMahieu released the Nano protocol (computer code)[11] by providing the public with a link to a "faucet"[12] and all of the software he had written related to the currency. The Nano Coins were released to the public *for free*,[13] via a "Captcha-based faucet distribution system."[14] Mr. Fabian concedes that no recipient of Nano Coins from the faucet paid any consideration, whether monetary or otherwise, in exchange for receiving the currency.[15] In October 2017, two years later, Mr. LeMahieu ended the faucet, reserved seven million Nano Coins for the establishment of a developer fund, and destroyed the remaining supply of undistributed currency.[16]

After the Nano Coins were released, third parties established exchanges where users could trade other cryptocurrencies for Nano Coins and vice versa.[17] One of the early exchanges to list Nano Coins was the BitGrail exchange, which was owned and operated in Italy by an Italian national, the defendant, Franceso Firano.[18] The Complaint does not contain any allegation that Mr. LeMahieu or any of the other Defendants had any business relationship with Mr. Firano. Rather, the Complaint alludes to the *possibility* of a relationship, but does not identify a contractual, joint venture, agent-principal, equity ownership, or other type of legally cognizable relationship. The interactions alleged in the Complaint amount to nothing more than sporadic instances of the Defendants talking to Mr. Firano about the Nano protocol and technical issues.[19] The Plaintiff also cites statements that the Defendants allegedly made about BitGrail, and vice versa, but none of those statements identify a

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[11] *See* Website: About Nano, https://nano.org/en/about/ (last visited Mar. 28, 2019).

[12] *See* Compl. ¶ 70

[13] *Id.* ¶¶ 70-71.

[14] *Id.* ¶ 72, *see also* Website: FAQ, https://nano.org/en/faq (last visited Mar. 28, 2019) ("Can I mine Nano?").

[15] *See* Compl. ¶¶ 70-71.

[16] *Id.* ¶¶ 76, 79.

[17] *See id.* ¶¶ 87-88.

[18] *Id.* ¶ 22.

[19] *See, e.g., id.* ¶ 92 (asserting that the Defendants provided Mr. Firano with technical advice to make BitGrail compatible with Nano). Note that the allegations about the Defendants working to "integrate" the Nano code into BitGrail lack a date, place, and any detail about how the purported "integration" was achieved. *Cf., e.g, id* at ¶ 100 (alleging a statement by Mr. Firano to the effect that Mr. LeMahieu had access to BitGrail servers for a limited time).

(Footnote continued)

business or contractual relationship. In fact, the Plaintiff concedes that the Defendants made clear that no such relationship exists.[20]

Mr. Fabian alleges that in September and December 2017, he sent a total of $6,070 in Bitcoin to BitGrail to purchase Nano Coins.[21] Mr. Fabian does not allege that he sent any money to the Defendants, that the Defendants were counter-parties to any of these transactions, that the Defendants' urged him to enter into those transactions, or that he has ever had any interaction whatsoever with them.

In early January 2018, BitGrail traders began to experience problems with their accounts and some were unable to withdraw funds.[22] Eventually, in early February 2018, Mr. Firano admitted that BitGrail had been hacked and a quantity of Nano Coins, apparently in BitGrail's custody and at the time worth approximately $170 million, had been stolen.[23] BitGrail froze all accounts and users were unable to withdraw any funds.[24] Mr. Fabian later filed this action.

ARGUMENT

I. THE LEGAL STANDARD GOVERNING THIS MOTION

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief,"[25] and a complaint that fails to do so is subject to dismissal pursuant to Rule 12(b)(6). "A complaint may be dismissed as a matter of law for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim."[26] The Court should not credit "mere conclusory statements or threadbare recitals of the elements of a cause of action."[27]

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[20] *See, e.g., id.* ¶ 5 ("BitGrail is an independent business and Nano is not responsible for the way Firano or BitGrail conduct their business.").

[21] *Id.* ¶¶ 129-135.

[22] *Id.* ¶ 110.

[23] *Id.* ¶ 113.

[24] *Id.* ¶ 117.

[25] Fed. R. Civ. P. 8(a)(2).

[26] *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

[27] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

(Footnote continued)

"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.'"[28] A claim is facially 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."[29] The plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully."[30]

II. PLAINTIFF'S SECURITIES CLAIM MUST BE DISMISSED

A. The Section 12(a)(1) Claim is Time-Barred

Putting aside that Mr. Fabian has not pled either a security under the *Howey* test or that the Defendants are "statutory sellers" under *Pinter v. Dahl*, the Section 12(a)(1) claim should be dismissed because it was filed beyond both the statute of limitations and statute of repose. Section 12(a)(1) of the Act provides a private right of action to enforce the registration requirements of Section 5 by providing that a seller of an unregistered security will be liable to the buyer for rescission.[31] The relevant statute of limitations states that a Section 12(a)(1) claim cannot be maintained "unless brought within one year after the violation upon which it is based."[32] The statute of limitations is not subject to equitable tolling,[33] and runs from the date on which the last offer or sale was made resulting in the plaintiff's purchase.[34]

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[28] *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).

[29] *Id.* (citing *Twombly*, 550 U.S. at 556).

[30] *Id.*

[31] 15 U.S.C. § 77l(a)(1).

[32] 15 U.S.C. § 77m.

[33] *See Nolfi v. Ohio Kentucky Oil Corp.*, 675 F.3d 538, 553 (6th Cir. 2012) (collecting cases); *see also, In re Rexplore, Inc. Sec. Litig.*, 671 F. Supp. 679, 687 (N.D. Cal. 1987) ("The statute specifically provides for accrual upon discovery for section 12(2) claims, but does not include similar language as to section 12(1) claims. A reasonable construction of this language is that Congress intended the one year limitations period of section 12(1) claims to be absolute. Additionally, since the registration, or lack thereof, of securities is a public record and easily discovered, it is inappropriate to apply the equitable tolling doctrine to a claim brought for failure to register securities. On the face of the Complaint, plaintiffs' claim under section 12(1) is time-barred."); *Koehler v. Pulvers*, 614 F. Supp. 829, 841 (S.D. Cal. 1985) ("It was determined that the one year statute of limitations is absolute, and not subject to equitable tolling. This conclusion stands reaffirmed.").

[34] *Eshelman v. Orthoclear Holdings, Inc.*, No. 07-CV-1429, 2009 U.S. Dist. LEXIS 19293, at *33 n.2 (N.D. Cal. Feb. 27, 2009) ("The one-year statute of limitations runs from the date of his personal purchase."); *Meadows v. Pac. Inland Sec. Corp.*, 36 F. Supp. 2d 1240, 1244 (S.D. Cal. 1999) ("Giving

(Footnote continued)

Here, the last purchase of Nano Coins alleged in the Complaint was dated December 12, 2017.[35] The Complaint was filed on January 3, 2019, 387 days after Mr. Fabian's alleged final purchase. Accordingly, it is clear from the face of the Complaint that the Section 12(a)(1) claim – even if viable – would be barred by the one-year statute of limitations.

Section 12(a)(1) claims are also subject to the Act's three-year statute of repose, which provides: "[i]n no event shall any [] action be brought to enforce a liability created under Section [12(a)(1)] of this title more than three years after the security was bona fide offered to the public."[36] For a Section 12(a)(1) claim, the time when a "security" is "bona fide" offered to the public is the date when it is first offered for sale rather than when the offer to sell ends.[37] Like the statute of limitations, the three-year statute of repose is not subject to equitable tolling.[38]

Thus, the claim would also be barred by the Act's statute of repose. The Complaint is vague about the date upon which the Nano faucet opened to distribute Nano Coins. Mr. Fabian alleges that Mr. LeMahieu "launched" Nano "in or about December 2014,"[39] but also asserts that the faucet was not opened until "early 2016."[40] Material incorporated by reference in the Complaint,[41] however,

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broad effect to the language in the 1933 Act, as is required, an unregistered security is 'sold' for purposes of § 12(1) liability when the last integral act of sale is completed, including payment for and delivery of the securities."); *W. Park Assoc. v. Butterfield Sav. & Loan Ass'n*, No. 85-CV-2011, 1989 U.S. Dist. LEXIS 14637, at *2 (D. Or. Nov. 28, 1989) ("When a plaintiff bases a section 12(1) claim on an unlawful offer or sale, as opposed to an unlawful delivery, of unregistered securities, 'the date of payment properly commences the running of the limitations period.'"); *cf. Pinter v. Dahl*, 486 U.S. 622, 644, (1988) ("The purchase requirement clearly confines § 12 liability to those situations in which a sale has taken place. Thus, a prospective buyer has no recourse against a person who touts unregistered securities to him if he does not purchase the securities.").

[35] Compl. ¶ 135.

[36] 15 U.S.C. § 77m.

[37] *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 106 (2d Cir. 2004); *cf. Booth v. Strategic Realty Trust, Inc.*, No. 13-CV-04921, 2014 U.S. Dist. LEXIS 104184, at *21 (N.D. Cal. July 19, 2014) ("Most courts recognize that a security is 'bona fide offered to the public' on the date on which the registration statement for the security is declared effective by the SEC.").

[38] *CalPERS v. ANZ Sec. Inc.*, 137 S. Ct. 2042, 2051 (2017).

[39] *Id.* at ¶ 52.

[40] Compl. ¶ 75.

[41] *See* supra note 2 and accompanying text.

(Footnote continued)

shows that the faucet was open in 2015.[42] As such, the date that Nano Coins were first available to the public was more than three years before Mr. Fabian filed the Complaint. Thus, the Court should dismiss the Section 12(a)(1) claim as time barred.

B. Nano Coins are Not Securities Under the *Howey* Test

The foregoing would only be relevant to this case had Mr. Fabian adequately pled that Nano Coins are securities. He has failed to do so.

Liability under Section 12(a)(1) of the Act is, of course, limited to persons who offer or sell "securities."[43] Under the Act, a "security" is defined as, "unless context otherwise requires":

> [A]ny note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.[44]

Congress's somewhat unusual mixture of the specific with the general has stood out almost since the Act's enactment. In one of the first cases requiring interpretation of the provision, Justice Jackson observed that:

> [T]he term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized, and the name alone carries well settled meaning. Others are of more variable character, and were necessarily designated by

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[42] Website: About Nano, https://nano.org/en/about/ (last visited Mar. 28, 2019) ("Launched in 2015 by Colin LeMahieu as RaiBlocks, Nano is a low-latency payment platform that requires minimal resources").

[43] *See* 15 U.S.C. § 77l(a)(1).

[44] 15 U.S.C. § 77b(a)(1).

(Footnote continued)

> more descriptive terms, such as "transferable share," "investment contract," and "in general any interest or instrument commonly known as a security."[45]

Over the years, the Supreme Court has developed slightly different approaches to determine whether an instrument or interest is a security, depending on which part of the statutory definition is invoked. Where the instrument at issue is called a "stock," the courts will inquire whether it, in fact, has the characteristics traditionally associated with common stock.[46] Where the instrument is a "note," the courts will apply what has come to be known as the "family resemblance" test.[47] And, where the instrument or interest at issue appears to be one of those deemed by Justice Jackson to be of a "more variable character" – an "investment contract" or an "instrument commonly known as a security" – the courts will use the so-called *Howey* test.[48]

The *Howey* test derives from *SEC v. W.J. Howey Co.*,[49] a case in which the Supreme Court determined that a promoter's offer of tracks of citrus groves, with an option to also enter into a service contract for the harvest and marketing of the produce, was an invitation to enter into an "investment contract" notwithstanding part of the package's resemblance to a real estate offer.[50] "The test," according to the Court, was "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[51] Because of the likelihood that investors would pick up the option for the service contract, and thereby mutually depend on the

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[45] *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 433, 351 (1943); *see also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 (1985) (endorsing the characterization of the definition found in *Joiner*); *Steinhardt Group Inc. v. Citicorp*, 126 F.3d 144, 150 (3rd Cir. 1997) ("Included in this definition are several catch-all categories which were designed to cover other securities interests not specifically enumerated in the statute.").

[46] *See Landreth*, 471 U.S. at 688-692.

[47] *See Reves v. Ernst & Young*, 494 U.S. 56, 64-67 (1990).

[48] *See United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975) ("We perceive no distinction, for present purposes, between an 'investment contract' and an 'instrument commonly known as a 'security.' In either case, the basic test for distinguishing the transaction from other commercial dealings is [the *Howey* test].")

[49] 328 U.S. 293 (1946)

[50] *See id.*

[51] *Id.* at 301.

(Footnote continued)

promoter to manage their properties, the test was met.[52] These three elements – (1) an investment of money; (2) in a common enterprise; (3) with an expectation of profits to come solely from the efforts of others – have been refined over the years but continue to comprise the standard by which the existence of an investment contract is determined.

Mr. Fabian alleges that the Nano Coins are investment contracts and dutifully recites the *Howey* elements.[53] He fails, however, to include in the Complaint a single non-conclusory factual allegation that, if proved, would help to establish any of these elements. This complete absence of well pled facts on the issue is not surprising given that Mr. Fabian's own allegations and documents integral to the Complaint clearly show that Nano Coins do not reflect investment contracts or otherwise meet the Act's definition of a security.

To begin with, conspicuously absent from the Complaint is any allegation that Mr. Fabian, *or anyone else*, invested anything of value in the distribution of Nano Coins. To be sure, *Howey's* first element – the investment of money – can be met without a literal exchange of cash between the promoter and security purchaser.[54] But in all cases, the purchaser must tender "some tangible and definable consideration" if his interest is to be considered as security.[55] Even the so-called "free stock" SEC enforcement actions of the late 1990s, to which the more-inclusive *Landreth*, stock test applied,[56] involved the receipt of valuable services.[57]

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[52] *See id.* at 300.

[53] *See* Compl. ¶ 122.

[54] *See, e.g., Uselton v. Commercial Lovelace Motor Freight*, 940 F.2d 564, 575-76 (10th Cir. 1991) (holding that employee contributions to an employee stock ownership plan constitute an investment for the purposes of the *Howey* test, even though the contributions were withheld and remitted by the employer); *SEC v. Shavers*, No. 13-CV-416, 2014 U.S. Dist. LEXIS 194382, at *13-15 (E.D. Tex. Aug. 26, 2014) (holding that exchange of Bitcoin for an instrument satisfies the investment prong of the *Howey* test).

[55] *Int'l Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers v. Daniel*, 439 U.S. 551, 560 (1979).

[56] *See supra* note 46 and accompanying text.

[57] Press Release 99-83, SEC, SEC Brings First Actions To Halt Unregistered Online Offerings of So-Called "Free Stock" (July 22, 1999), *available at* https://www.sec.gov/news/press/pressarchive/1999/99-8 3.txt; *cf. SEC v. Sierra Brokerage Servs Inc.*, 608 F. Supp. 2d 923, 940-43 (S.D. Ohio 2009), *aff'd* 712 F.3d 321 (6th Cir. 2013) (holding that the cashless transfer of a shell company's stock amounted to a "sale" because widespread distribution of the securities was needed to make the company attractive for a reverse merger, thereby benefiting the

(Footnote continued)

Here, Mr. Fabian admits that Nano Coins were released by the Defendants free of charge.[58] Outside of the labor required to complete the CAPTCHA test – which was of no value to anyone associated with the development or release of Nano Coins – the recipients of Nano Coins contributed nothing in return for their Nano Coins.

That free Nano Coins proved useful as a medium of exchange, and so acquired value after their distribution, is irrelevant. And, thus, so too is Mr. Fabian's claim[59] that he paid $6,070 for Nano Coins on a third-party foreign cryptocurrency exchange. As the Supreme Court has recognized "[t]he focus of [the Securities and Securities Exchange Act of 1934 ("the Exchange Act")] is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes . . . ."[60] The "investment" at issue in the *Howey* test, therefore, must be made with the *promoters* of the alleged security. Nothing less is sufficiently related to capital formation.

So axiomatic is this principle that there does not appear to be a single reported case in which a plaintiff has so much as argued that an instrument or interest truly issued for free constitutes a security. It also explains why the Chairman of the SEC, Jay Clayton, has repeatedly affirmed that Bitcoin, which, like Nano Coins, is distributed without charge, is not a security. Speaking to CNBC in June 2018, Mr. Clayton stated, "Cryptocurrencies: These are replacements for sovereign currencies, replace the dollar, the euro, the yen with bitcoin. That type of currency is *not* a security."[61]

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promoter); *SEC v. Harwyn Indus. Corp.*, 326 F. Supp. 943, 952-54 (S.D.N.Y. 1971) (holding cashless distribution of a subsidiary's stock to the parent-company shareholders was a "sale" because creation of an active trading market in the stock facilitated future financing of the subsidiary).

[58] Compl. ¶ 70. Tellingly, the Complaint goes on for 16 more paragraphs straining to create the appearance that Mr. Fabian transferred value to the Defendants. *See id* at ¶¶ 71-86. But even 16 paragraphs of counsel's opinions on cryptocurrency economics cannot hide the fact that nobody paid for a Nano Coin in the distribution faucet, which is the relevant inquiry in the *Howey* test. Nor is counsel's opinion and legal argument a substitute for factual allegations under *Iqbal* and *Twombly*.

[59] *See* Compl. ¶¶ 133-135.

[60] *Forman*, 421 U.S. at 849.

[61] Kate Rooney, *SEC Chief Says Agency Won't Change Securities Laws to Cater to Cryptocurrencies*, CNBC (June 6, 2018, 10:45 AM), https://www.cnbc.com/2018/06/06/sec-chairman-clayton-says-agency-wont-change-definition-of-a-security.html (emphasis added); *see also* Neeraj Agrawal, *SEC Chairman Clayton: Bitcoin is Not a Security*, Coin Center (Apr. 26, 2018), https://coincenter.org/link/sec-chairman-clayton-bitcoin-is-not-a-security ("A pure medium of exchange, the one that's most often cited, is Bitcoin. As a replacement for currency, that has been determined by most people to not be a security.")

(Footnote continued)

The point becomes even more salient when recent enforcement investigations and actions involving ICOs are considered. In *United States v. Zaslavskiy*, for example, the Government is currently moving forward with an indictment against a promoter whom it accuses of staging an ICO of cryptocurrency "tokens" or "coins" supposedly backed by real estate assets and diamonds.[62] The Government alleges that over a thousand investors used credit cards, wire services, and online exchanges to send cash and cryptocurrency to the promoter's companies in return for promises to deliver the coins.[63] If true, clearly this is an investment of money. On similar facts, the SEC recently issued a cease and desist order to a promoter and his company who offered digital tokens, convertible to equity, in an attempt to raise $5 million for supposed oil and gas exploration.[64] Although the respondents were ultimately unable to raise any cash through the ICO, they did exchange approximately 80,000 tokens in exchange for online promotional and marketing services.[65] The barter of these valuable services for the tokens constituted an investment for *Howey* purposes.[66] And, as another example, in July 2017, the SEC released a report of its investigation of an ICO by an unincorporated organization known as The DAO, which issued certain equity-like digital tokens in exchange for cryptocurrency.[67] The SEC concluded that payment of cryptocurrency to The DAO for the tokens was an investment.[68] By contrast to these cases involving securities, there is no allegation in the Complaint – nor could one be made in good faith – that any goods or services passed to the developers of Nano Coins in connection with their distribution.

Mr. Fabian also fails to sufficiently plead the existence of a common enterprise, the second *Howey* element. Indeed, in the absence of any investment in Nano Coins, "commonality" – as the

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[62] *See* No. 17-CR-647, 2018 U.S. Dist. LEXIS 156574, at *3-6 (E.D.N.Y. Sept. 11, 2018)

[63] *Id.* at *4.

[64] *In re Tomahawk Exploration LLC*, Securities Act Release No. 10530, Exchange Act Release No. 83839, slip op. ¶ 1 (Aug. 14, 2018), https://www.sec.gov/litigation/admin/2018/33-10530.pdf.

[65] *Id.* ¶¶ 1,22.

[66] *Id.* ¶ 2.

[67] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017), https://www.sec.gov/litigation/investreport/34-81207.pdf.

[68] *See id.* at 11.

(Footnote continued)

defining characteristic of this element is known – between Nano-Coin holders and the Defendants is impossible. In the Ninth Circuit, courts recognize both traditional "horizontal commonality" and what is sometimes referred to as "strict vertical commonality."[69] The Ninth Circuit has rejected the application of "broad vertical commonality,"[70] which, at least, the pre-split Fifth Circuit had accepted.[71] Here, Mr. Fabian fails to adequately plead horizontal *or* strict vertical commonality.

The lead case on commonality, and its various species, is *Revak v. SEC Realty*[72] from the Second Circuit. In *Revak*, the court described horizontal commonality as "the tying of each individual investor's fortunes to the fortunes of other investors by the pooling of assets, usually combined with the pro-rate distribution of profits."[73] Investment in the interest or instrument alleged to be a security is a prerequisite for establishing horizontal commonality; and, as discussed above, Mr. Fabian has failed to adequately plead an investment by anyone in Nano Coins. Put simply, to pool assets, multiple people must first *invest* those assets. Since the participants in the release of Nano Coins contributed no capital – monetary or otherwise – there are no assets for the Defendants to pool or that could generate profits for distribution.

But what should be made of Mr. Fabian's allegation in Paragraph 124 of the Complaint that "the cryptocurrency and fiat currency were pooled under the control of the Defendants?" This allegation is conclusory, and completely unconnected to the rest of the pleadings. Questions about the assertion abound, such as: What currency? How was it obtained? From whom? In exchange for what? Nothing in the Complaint even hints at answers to these questions.

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[69] *See SEC v. R.G. Reynolds Enters.*, 952 F.2d 1125, 1131 (9th Cir. 1991); *see also N. Am. Wellness Ctr. Holdings, LLC v. Temecula Valley Real Estate Inc.*, No. 16-CV-2010, 2017 U.S. Dist. LEXIS 162915 at *****27-*28 (C.D. Cal. Sept. 29, 2017) (concluding that vertical commonality was not adequately pled); *SEC v. Janus Spectrum LLC*, No. 15-CV-609, 2017 U.S. Dist. LEXIS 126231 at *19-20 (D. Ariz. Aug. 8, 2017) (concluding that the record established horizontal commonality).

[70] *See Brodt v. Bache & Co.*, 595 F.2d 459, 461-62 (9th Cir. 1978).

[71] *See SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 478 (5th 1974) (espousing a theory of broad vertical commonality, in which "the critical factor is . . . the uniformity of impact of the promoter's efforts").

[72] 18 F.3d 81 (2d Cir. 1994).

[73] *Id.* at 87; *see also Wals v. Fox Hills Development Corp.*, 24 F.3d 1016, 1019 (7th Cir. 1994) (Posner J.) (arguing that the Securities Act's disclosure requirement "makes sense only if the investors are obtaining the same thing, namely an undivided share in the same pool of assets and profits").

(Footnote continued)

Strict vertical commonality also requires an investment – or, at a minimum, some type of business or commercial nexus. Otherwise, there is no relationship to connect the fortunes of the "investor" with those of the "promoter." Here, nothing in the Complaint links the Defendants to Mr. Fabian in any material way. There are no non-conclusory allegations that Mr. Fabian – or anyone else – purchased anything from the Defendants, or that he otherwise traded with them or commissioned services from them. Indeed, it must be remembered that Mr. Fabian alleges that the Nano Coins reflect "investment contracts."[74] A contract requires more than one party.

Finally, even if the other *Howey* elements were adequately pled, Mr. Fabian still fails to sufficiently allege that he, or anyone else, had a reasonable expectation of profits from the receipt of Nano Coins. The Supreme Court has stated that its use of the term "profits" in the *Howey* test "has always meant either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of investors' funds."[75] Put more simply, the principle "is only that the expected profits must, in conformity with ordinary usage, be in the form of financial return on the investment, not in the form of consumption."[76] "[W]hen a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply."[77] Where motives are mixed, courts will look to the holder's "primary" motive.[78] This has meant, for example, that fixed lease payments in sale and leaseback arrangements are "profits,"[79] but the right to lease an apartment conferred through ownership of shares in a housing cooperative are not.[80]

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[74] *See* Compl. ¶¶ 8, 122, 125, 183.

[75] *Forman*, 421 U.S. at 852.

[76] *SEC v. Life Partners, Inc.*, 87 F.3d 536, 543 (D.C. Cir. 1996)

[77] *Forman*, 421 U.S. at 852-53.

[78] *See, e.g.*, *Rice v. Branigar Org. Inc.*, 922 F.2d 788, 790-91 (11th Cir. 1991) ("We hold that the lots are not securities under the 1934 Act. We believe that people buy houses and lots in a beach-club development primarily to use them, not to derive profits from the entrepreneurial efforts of the developers."); *Grenader v. Spitz*, 537 F.2d 612, 618 (2d Cir. 1976) ("[T]he documentary evidence . . . would indicate that the profit motive [in purchasing shares in a housing cooperative], if any, was purely incidental.").

[79] *See SEC v. Edwards*, 540 U.S. 389 (2004).

[80] *See Forman*, 421 U.S. at 858; *Grenader*, 537 F.2d at 618-19.

(Footnote continued)

The only reasonable inference that can be drawn from the Complaint, and the website on which it relies, is that Nano holders obtain Nano to use – or "consume" – it. Under the heading "The Allure of XRB," Mr. Fabian alleges that "XRB transactions are purportedly instant, carry no fees, and have no limit to their scalability."[81] "By comparison to payments via credit or debit card," he continues, "XRB purports to offer nearly instantaneous settlement of transactions with no transaction fees."[82] Mr. Fabian's comparison of Nano to other payment methods is a clear admission that Nano is a medium of exchange used for payments. To be sure, Mr. Fabian alleges that he hoped his purchase of the Nano Coins on BitGrail would lead to "lucrative returns."[83] But why? Nowhere in the Complaint does Mr. Fabian explain how the Nano coins are connected to any profit-making activity.

Speculating in currency does not turn the currency into a security. While it's true that people may trade, or hold for future trading, one currency for another – sometimes for a profit – the primary reason for holding money is to use as a medium of exchange. This is clearly the case with respect to Nano Coins, which the website reveals are described exclusively on the basis of their functionality.[84] Thus, Nano Coins are not a "security."

C. The Defendants are Not Section 12 "Statutory Sellers"

Even if Nano were "securities" under the Securities Act, Mr. Fabian's Section 12 claim would fail because the Defendants are not "statutory sellers." Under Section 12, a plaintiff can only recover against a narrow category of defendants who either: (1) passed title to a security directly to the plaintiff, or (2) "solicited" the purchase of a security by the plaintiff for their own financial gain.[85]

Here, Mr. Fabian does not allege that he took title to Nano Coins from any of the Defendants. Quite to the contrary, Mr. Fabian alleges that in September and December 2017, he was at his home and logged onto BitGrail's website to make a purchase of Nano Coins.[86] It is unclear from the

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[81] Compl. ¶ 54.

[82] *Id.*

[83] Compl. ¶ 123.

[84] *See* Website, https://nano.org/en (last visited Mar. 28, 2018) ("Use cases for Nano")

[85] *Pinter v. Dahl*, 486 U.S. 622, 642-643, 647 (1988).

[86] Compl. ¶¶ 1, 11, 67, 68.

Complaint whether Mr. Fabian believes the counterparty to these transactions was BitGrail itself or another trader, but, regardless, he fails to allege – nor could he – that he bought Nano Coins from any of the Defendants.

Nor does Mr. Fabian allege with requisite specificity that any of the Defendants "solicited" him to purchase Nano Coins. Solicitation under Section 12 is recognized only in limited circumstances. In the absence of an actual sale to the plaintiff, the Supreme Court has been cautious to impose liability on actors who are peripheral to the transaction. The level of contact between the parties needs to be both substantial and of a specific nature to constitute solicitation. In *Pinter v. Dahl*, the Court explained that where a broker is acting as an agent for a principal and successfully solicits a purchase for the principal, the broker is also liable as a statutory seller under Section 12, despite not passing title.[87] But the Court cautioned that Section 12 should not be applied to remotely involved actors who could only be said to be a "proximate cause" of the transaction.[88] "Congress did not intend that the section impose liability on participants collateral to the offer or sale or even those whose conduct constituted substantial participation in the sales transaction."[89] Moreover, "[t]he person who gratuitously urges another to make a particular investment decision is not, in any meaningful sense, requesting value in exchange for his suggestion or seeking the value the titleholder will obtain in exchange for the ultimate sale."[90] The Supreme Court held that liability will extend "only to the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner."[91]

Consistent with the Supreme Court's prohibition against liability for remote actors, "[i]n the Ninth Circuit, *Pinter* has been read to require that a defendant be 'directly involved in the actual

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[87] *Pinter*, 486 U.S. at 646.

[88] *Id.* at 651.

[89] *Id.* at 650-51.

[90] *Id.* at 647.

[91] *Id.*

(Footnote continued)

solicitation of a securities purchase."[92] Thus, courts have rejected numerous types of conduct as not constituting "solicitation" under Section 12. For example, in *Moore v. Kayport Package Express*,[93] the Ninth Circuit affirmed the district court's dismissal of Section 12(a)(2) claims[94] against accountants and lawyers who were alleged to have drafted financial documents and prospectuses used in selling unregistered securities, and even directed the issuance of the securities.[95] Although the plaintiffs in *Moore* also alleged that the defendant lawyers allowed their names and tax opinions to be used in the sale of the securities, these activities – even combined – did not amount to solicitation.[96] And, in *In re Vocera Communications Securities Litigation*,[97] allegations that certain defendants participated in the underwriting syndicate that sold the securities were, by themselves, inadequate to establish a viable Section 12 claim.[98] Only allegations that the securities at issue were purchased in response to solicitation by the specific named defendants, rather than the syndicate as a whole, would have sufficed.[99]

In the same vein, courts in this Circuit have scrupulously required that the financial-interest component of *Pinter* be satisfied. And so, for example, in *Bridges v. Geringer*,[100] the court dismissed a Section 12(a)(2) claim against a bank, whose vice president was alleged to have personally urged the purchase of shares in a sham-investment fund that was a major depositor. Notwithstanding allegations

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[92] *In re Tezos Secs. Litig.*, No. 17-CV-06779, 2018 U.S. Dist. LEXIS 157247, at *26 (N.D. Cal. Aug. 7, 2018) (quoting *In re Daou Systems, Inc.*, 411 F.3d 1006, 1029 (9th Cir. 2005)).

[93] 885 F.2d 531 (9th Cir. 1989).

[94] Although *Pinter* addressed a Section 12(a)(1) claim, like that at issue here, courts, including the Ninth Circuit, have held that its statutory seller analysis is equally applicable to Section 12(a)(2) claims. *See, e.g.*, *Moore*, 885 F.2d at 538 ("Accordingly, we hold that *Pinter* provides the standard for determining liability as a 'seller' under section 12(2) as well as under section 12(1) of the Securities Act of 1933.").

[95] *See Moore*, 885 F.2d 536-37.

[96] *See id.*

[97] No. 13-CV-3567, 2015 U.S. Dist. LEXIS 20516 (N.D. Cal. Feb. 11, 2015).

[98] *See id.* at *7.

[99] *See id.*

[100] No. 13-CV-01290, 2015 U.S. Dist. LEXIS 66695 (N.D. Cal. May 21, 2015).

(Footnote continued)

of the vice president's direct appeals to investors, the plaintiffs' failure allege that the bank stood to profit financially doomed the complaint.[101]

Mr. Fabian does not identify even one specific statement that induced his purchase of Nano Coins on BitGrail, any person that made such a statement, the date of any statement he may have heard, or the location where a statement was made. Mr. Fabian does not allege that he communicated with any of the Defendants prior to or at the time of his purchase. He does not allege facts showing an agency or broker relationship between any of the Defendants and BitGrail, nor does he allege how, if at all, the Defendants stood to gain financially from his transactions on BitGrail.

Indeed, Mr. Fabian struggles to even identify statements relevant to BitGrail generally.[102] For example, he alleges that on January 12, 2018, one of the Defendants said: "Yes you can [trust him]. I talk to Bomber every day and he's a good guy. We'll get it all sorted next week. Just hang in there."[103] That statement was allegedly made about one month *after* Mr. Fabian allegedly made his final purchase and does not include any language urging Mr. Fabian or others to buy Nano Coins. Accordingly, that statement cannot support a conclusion that the Defendants "solicited" any of Mr. Fabian's purchases. Mr. Fabian alleges another statement by a Defendant that was made on the same day: "Funds are safe on BitGrail. It's an issue with the node which we're working hard to fix. Again. Funds are safe."[104] That statement does not encourage anyone to buy Nano Coins. Other statements cited in the Complaint simply mention that Nano was being traded on BitGrail: "[Nano] is being traded on bitgrail.com."[105]

The remainder of the statutory seller allegations that can be discerned in the Complaint are nothing more than labels and legal conclusions. For example, Mr. Fabian repeatedly alleges with no

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[101] *See id.* at *17-*18.

[102] Notably, the only statements about which Mr. Fabian *does* make allegations are all about BitGrail's safety, rather than the wisdom of buying Nano Coins. *See* Compl. ¶ 136 ("In deciding to invest in XRB and open an account at BitGrail, Plaintiff Fabian reviewed and relied upon Defendants' promotions on social media channels and/or statements made on Nano's own website representing that BitGrail is a safe and reliable exchange on which to purchase and stake XRB.").

[103] Compl. ¶ 98.

[104] *Id.* ¶ 95.

[105] *Id.* ¶ 94.

(Footnote continued)

elaboration that the Defendants "solicited," "promoted" or made "specific instructions" and "representations" to him.[106] Such allegations are no more than "naked assertions devoid of further factual enhancement,"[107] and Mr. Fabian fails to identify the timeframe for most of those alleged "solicitations." The closest Mr. Fabian gets to alleging a pre-purchase statement is the following: "[the Defendants] used social media channels, such as Twitter, Medium, and Reddit – to recruit unsuspecting investors . . . ."[108] Conspicuously absent are any allegations about the content of the statements, who made the statements, or when they were made. *Iqbal* and *Twombly* require more than that. The Complaint contains only allegations that, at best, give rise to a "sheer possibility"[109] that the Defendants solicited Mr. Fabian's purchase.

Finally, even if Mr. Fabian were to have adequately pled that "Nano" was a statutory seller, he still fails to allege that the individual Defendants – Messrs. LeMahieu, Busch, Retzer, and Shapiro – were statutory sellers in their own right. In *In re Tezos Securities. Litigation*, the court dismissed claims against an individual defendant because the plaintiffs did not allege that they had any knowledge of the defendant prior to their purchase of the securities, much less contact with him.[110] Here, Mr. Fabian fails to allege any contact with the individual Defendants, or even knowledge of their existence, before his purchases of Nano Coins. He does not reference any involvement in the Nano project by Mr. Retzer or Mr. Shapiro predating his purchase of coins in December 2017.[111] And Mr. Fabian does not identify a single statement made by Mr. LeMahieu or claim that he knew of Mr. LeMahieu's involvement in the development of the Nano Coins he ultimately bought. While Mr. Fabian alludes to involvement by Mr. Busch in the Nano project predating his purchase, [112] he

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[106] *Id.* ¶¶ 1-3, 7, 176.

[107] *Iqbal*, 556 U.S. at 678 (internal citations and quotes omitted).

[108] Compl. ¶ 181.

[109] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556)

[110] *In re Tezos Secs. Litig.*, No. 17-CV-06779, 2018 U.S. Dist. LEXIS 157247, at *27 (N.D. Cal. Aug. 7, 2018) ("Without averments that he was cognizant of, or influenced by, Draper's involvement in the Tezos project, Anvari's statutory seller claim against Draper is not plausible.").

[111] *Cf.* Compl. ¶¶ 56-58; 65 (identifying statements by Retzer with no date or allegedly made in 2018); *id.* ¶¶ 61, 98 (identifying alleged statements by Shapiro either with no date or allegedly made in 2018).

[112] *Id.* ¶¶ 81-82.

similarly does not allege that he knew of that involvement or relied on it in making a purchase decision. Mr. Busch's alleged statements quoted in the Complaint do not mention BitGrail or suggest that anyone should or should not buy Nano Coins. Accordingly, Mr. Fabian has failed to sufficiently allege that the Defendants, individually or together, are "statutory sellers."

D. U.S. Securities Laws Do Not Apply to a Transaction in Italy

i. *Morrison* Prohibits Extraterritorial Application of U.S. Securities Laws

In *Morrison v. National Australia Bank*, the Supreme Court held that the federal securities laws apply only to (1) transactions on U.S. securities exchanges, and (2) "domestic transactions in other securities."[113] The Court noted the presumption against extraterritorial application of U.S. laws, stating that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[114] Because the Exchange Act contains no indication that Section 10(b) applies abroad, the Supreme Court held that Section 10(b) has no extraterritorial application.[115]

In *Morrison*, the Supreme Court repudiated earlier case law that had applied U.S. securities laws to foreign securities transactions that were accompanied by some level of "conduct" or "effects" in the United States.[116] Holding that Section 10(b) prohibits not the making of deceptive statements in the United States, but only the making of deceptive statements in connection with securities transactions that take place in the United States,[117] the Supreme Court announced a clear "transactional test" – "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange."[118] Since *Morrison*, that rationale has been extended without opposition to claims under the Securities Act.[119]

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[113] 561 U.S. 247, 267 (2010).

[114] *Id.* at 255.

[115] *See id.* at 265.

[116] *See id.* at 255-59.

[117] *Id.* at 266.

[118] *Id.* at 269-70.

[119] *See Takiguchi v. MRI Int'l, Inc.*, 47 F. Supp. 3d 1100, 1109 (D. Nev. 2014) (citing *In re Smart Techs., Inc.*, 295 F.R.D. 50, 55-56 (S.D.N.Y. 2013) (collecting cases)); *see also Stoyas v. Toshiba*, 896

(Footnote continued)

ii. What is a "Domestic" Transaction?

With the advent of widespread Internet access, counterparties to a securities transaction may be anywhere in the world and may transact through intermediaries who also may be anywhere in the world. To address that geographic dispersion, the Ninth Circuit determines whether the securities at issue were bought and sold in a domestic transaction by the location where "irrevocable liability" was incurred.[120] This determination requires courts look "to where purchasers incurred the liability to take and pay for securities, and where sellers incurred liability to deliver securities."[121] As part of this inquiry, courts must consider a wide array of information, including, among other things, the "contract formation, placement of purchase orders, passing of title, or the exchange of money."[122]

The Second Circuit originated the irrevocable liability test,[123] and its courts have the most experience applying it.[124] From these cases it is clear that no single fact controls the outcome of whether a transaction is domestic. For example, a transaction is not domestic, without more, just because one of the following facts is established: the issuer is based in the United States; the investor is a U.S. resident; the investor placed a purchase order in the United States; the dealer is in the United States; the security is issued and registered in the United States; or the investor wired funds to the United State.[125] Indeed, since *Morrison*, courts have made clear that "the mere placement of a buy order in the United States for the purchase of foreign securities on a foreign exchange, without more," is insufficient to "allege that a purchaser incurred irrevocable liability in the United States."[126]

F.3d 933, 948 (9th Cir. 2018) (citing a passage in *Morrison*, "indicating that the Exchange Act extraterritoriality analysis applies to the Securities Act").

[120] *See Stoyas*, 896 F.3d at 949.

[121] *Id.*

[122] *See id.*

[123] *Id.* at 648.

[124] *See id.* at 648 & n.19 (discussing *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012) and various cases applying its holding).

[125] *See Loginovskaya v. Batratchenko*, 764 F.3d 266, 274-75 (2d Cir. 2014); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 181-82 & n.33 (2d Cir. 2014).

[126] *City of Pontiac*, 752 F.3d at 181 & n.33; *see also In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 473-74 (S.D.N.Y. 2013); *Pope Invs. II, LLC v. Deheng Law Firm*, No. 10-CV-6608,

(Footnote continued)

Similarly, a party's residence is irrelevant to the location of a transaction: "While it may be more likely for domestic transactions to involve parties residing in the United States, '[a] purchaser's citizenship or residency does not affect where a transaction occurs; a foreign resident can make a purchase within the United States, and a United States resident can make a purchase outside the United States.'"[127]

Decisions in the Ninth Circuit are consistent with this overall approach. Thus, allegations that an ICO token – purportedly issued by a Swiss foundation – was sold to U.S. residents, through an interactive website based on a server in Arizona and administered by someone in California have been held sufficient to plead a domestic transaction.[128] But a failure to allege the location of defendants in a case where an equity subscription agreement required their acceptance to become binding has led to dismissal of Exchange Act claims under *Morrison*.[129]

iii. Mr. Fabian Purchased Nano in Italy

The Complaint includes very little detail regarding Mr. Fabian's purchase of Nano on the BitGrail exchange. The only detailed factual allegations are that he accessed BitGrail's website from his home in California, transmitted Bitcoin to BitGrail, and held and traded his Nano on the BitGrail exchange.[130] It is reasonable to infer from these facts that, due to Mr. Fabian's location, the money he initially used to buy Bitcoin was in the United States as well. But, based on BitGrail's location in Florence, Italy, any trades on BitGrail must have occurred in Italy. Mr. Fabian also alleges that he held his Nano Coins in a BitGrail account.[131] This too must have been maintained in Italy. And Mr. Fabian alleges that Francesco Firano, the "sole proprietor" of BitGrail, is domiciled in Italy.[132] The

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2012 U.S. Dist. LEXIS 115282, at *17-24 (S.D.N.Y. Aug. 15, 2012); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 532-33 (S.D.N.Y. 2011), *aff'd* 838 F.3d 223 (2d Cir. 2016)..

[127] *Absolute Activist*, 677 F.3d at 69 (quoting *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010)).

[128] *See In re Tezos Secs. Litig.*, 2018 U.S. Dist. LEXIS 157247, at *25.

[129] *See MVP Asset Mgmt. v. Vestbirk*, No. 10-CV-2438, 2013 U.S. Dist. LEXIS 40715, at *19-*20 (E.D. Cal. Mar. 21, 2013).

[130] Compl. ¶¶ 129-135.

[131] *Id.* at ¶ 9.

[132] *Id.* at ¶ 22.

only reasonable inference to be drawn from these allegations is that Mr. Fabian's purchase of Nano was transacted on BitGrail's computers located in Florence, Italy. Mr. Fabian pleads no facts showing BitGrail's accounts and servers to be in a physical location other than Italy.

As discussed above, the case law makes clear that merely placing a buy or sell order in the United States is not sufficient to bring the transaction within the ambit of Section 12. Since the Complaint does not contain any allegation sufficient to rebut the presumption, established by Mr. Fabian himself, that BitGrail's operations – electronic, financial, or otherwise – are located in Italy, the Court can only infer that Mr. Fabian's alleged purchase of Nano occurred in Italy. Accordingly, the Section 12(a)(1) claims should be dismissed for failure to allege a transaction in the United States. In light of the foregoing, the Section 12(a)(1) claim fails for multiple reasons.

III. PLAINTIFF'S STATE LAW CLAIMS MUST BE DISMISSED

Mr. Fabian has raised no less than eight state law claims that he asserts provide a legal remedy for the alleged wrongs committed by the Defendants. He does not allege that the law of any particular state applies to these claims. For the purposes of this motion, the Defendants assume that Mr. Fabian's state-law claims are governed by California law because Mr. Fabian is a resident of California.

The choice of law is largely irrelevant, however, because Mr. Fabian fails to connect any of the specific facts alleged in the body of the Complaint to the – sometimes partial – recitation of the elements he makes in the state law counts. Thus, regardless of what state's law is deemed to control Mr. Fabian's claims, he comes nowhere near meeting the minimum level of specificity and plausibility required by Rules 8 and 9 of the Federal Rules of Civil Procedure.

A. Breach of Implied Contract

Mr. Fabian's claim for breach of an implied contract fails as a matter of law because Mr. Fabian fails to allege any facts supporting even a single element of a contract claim. To state a claim for breach of contract under California law the plaintiff must allege: "(1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and

(4) the resulting damage to the plaintiff."[133] For both an express and implied contract, "the vital elements of a cause of action . . . are mutual assent (usually accomplished through the medium of an offer and acceptance) and consideration."[134] "Implicit in the element of damage is that the defendant's breach *caused* the plaintiff's damage."[135]

In Count III, Mr. Fabian fails to even recite in conclusory fashion the bare elements of claim for breach of contract, let alone identify any specific factual allegations that would support any of these elements. Rather, Mr. Fabian simply asserts that BitGrail breached a contract with him by failing to "safeguard" funds and by freezing user accounts.[136] Mr. Fabian makes no pretense at alleging an offer, acceptance, consideration, or mutual assent between him and a single one of the Defendants – to say nothing about *all* of them. Indeed, as discussed above at length, Mr. Fabian does not allege any contact whatsoever between himself and any of the Defendants. Instead, the Complaint attempts to gloss over the issue with the following allegation: "by virtue of the Nano Defendants' control over BitGrail's actions relating to XRP [sic], they were also parties to these same implied contracts."[137] Leaving aside that the Complaint is devoid of any well-pled allegations of a contract between Mr. Fabian and BitGrail, this conclusory allegation of control is no substitute for well-pled allegations of offer, acceptance, and consideration. Given Mr. Fabian's tacit concession that he did not contract with any of the Defendants prior to this lawsuit, the Court should dismiss Count III with prejudice.

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[133] *Gulaid v. CH2M Hill, Inc.*, No. 15-CV-4824, 2016 U.S. Dist. LEXIS 137227, at *32 (N.D. Cal. Oct. 3, 2016) (quoting *Richman v. Hartley*, 224 Cal. App. 4th 1182, 1186 (Cal. Ct. App. 2014)).

[134] *Div. of Labor Law Enforcement v. Transpacific Transp. Co.*, 69 Cal. App. 3d 268, 275 (Cal. Ct. App. 1977).

[135] *Neman Fin., L.P. v. Citigroup Glob. Mkts., Inc.*, No. 14-CV-2499, 2018 U.S. Dist. LEXIS 151280, at *18 (C.D. Cal. Sep. 5, 2018) (quoting *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1352, (Cal. Ct. App. 2014)).

[136] Compl. ¶ 149.

[137] *Id.*

(Footnote continued)

B. Breach of Fiduciary Duty

Mr. Fabian's claim for breach of fiduciary duty also fails as a matter of law because Mr. Fabian does not allege facts that if proved would establish the existence of such a duty. "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach."[138] "Whether a fiduciary duty exists is generally a question of law."[139] "Before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law."[140]

A relationship imposing a fiduciary duty as a matter of law "ordinarily arises where a confidence is reposed by one person in the integrity of another."[141] "Traditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal."[142]

Mr. Fabian fails to allege, let alone identify for the purposes of Count IV, any facts that support a fiduciary duty running from the Defendants to himself. Instead, Mr. Fabian asserts – again in utterly conclusory fashion – that *BitGrail* "unquestionably" had a fiduciary duty to him based on having an account on the BitGrail exchange.[143] But, regardless of whether that is the case,[144] the only allegation

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[138] *Kapu Gems v. Diamond Imps., Inc.*, No. 15-CV-3531, 2016 U.S. Dist. LEXIS 107091, at *29 (N.D. Cal. Aug. 12, 2016) (quoting *Gutierrez v. Girardi*, 194 Cal. App. 4th 925, 932 (Cal. Ct. App. 2011)).

[139] *Id.* (quoting *Marzec v. CalPERS*, 236 Cal. App. 4th 889, 915 (Cal. Ct. App. 2015)).

[140] *Id.* (quoting C*ity of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386 (Cal. Ct. App. 2008)).

[141] *Evenfe v. Esalen Inst.*, No. 15-CV-05457, 2016 U.S. Dist. LEXIS 96843, at *19-20 (N.D. Cal. July 24, 2016) (quoting *Wolf v. Superior Court*, 107 Cal. App. 4th 25 (Cal. Ct. App. 2003)).

[142] *Id.*

[143] Compl. ¶ 152.

[144] There is substantial reason to believe that it is not. Not only are Mr. Fabian's allegations about the BitGrail's supposed duties entirely conclusory, but it is doubtful that a currency exchange owes any such duties. After all, it is generally understood that "[t]he relationship between a bank and its depositor is not fiduciary in character." *Namer v. Bank of Am., N.A.*, No.16-CV-3024, 2017 U.S. Dist. LEXIS 48120, at *16 (S.D. Cal. Mar. 30, 2017) (quoting *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 537 (Cal. Ct. App. 1998)). Rather, "the relationship of bank and depositor is founded on contract, which is ordinarily memorialized by a [contract] that the depositor signs upon opening the account. This contractual relationship does not involve any implied duty to supervise account activity or to

(Footnote continued)

related to *the Defendants* is an unintelligible run-on sentence: "the Nano Defendants, by virtue of their unbounded control over the XRB protocol and partnership with BitGrail for coding and running the website's XRB-related programing [sic], security and exchange place, Defendants, also had a special fiduciary relationship with Plaintiff and the Class and is liable for breaching that duty."[145] There are no specific factual allegations elsewhere in the Complaint that support these conclusory assertions. First, Mr. Fabian alleges nothing more about the Defendants' purported "control" over BitGrail apart from that BitGrail's proprietor has claimed that Mr. LeMahieu had "access" to BitGrail's servers "for a while" in 2018.[146] Even if true, this connection is far short of what would be required to establish a "partnership" whereby the Defendants "ran" BitGrail's programming and security.

Moreover, even if there were sufficient allegations to establish the Defendants' involvement with technical aspects of BitGrail's operations, the case law on this issue requires much more than that to establish a fiduciary relationship with a plaintiff. A defendant must have a direct relationship with the party invoking the fiduciary duty. At a bare minimum, in the absence of a traditionally recognized fiduciary relationship – such as that between a trustee and trust's beneficiary – California law requires facts showing that the defendant "knowingly undert[ook] to act on behalf and for the benefit of another."[147] Of course, Mr. Fabian does not allege that the Defendants knowingly acted on his behalf since he fails to allege any contact with them at all.[148]

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inquire into the purpose for which the funds are being used."). *Id.* This rationale is equally applicable to currency exchanges.

[145] Compl. ¶ 153.

[146] *Id.* at ¶ 100.

[147] C*ity of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386 (Cal. Ct. App. 2008).

[148] Mr. Fabian also fails state a claim for aiding and abetting this tort, as raised in Count V. *See Siegal v. Gamble*, No. 13-CV-3570, 2016 U.S. Dist. LEXIS 36346, at *26-27 (N.D. Cal. Mar. 21, 2016) (applying California law to require allegations that the defendant gave "substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person" or "knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act."). Mr. Fabian falls far short of alleging facts showing that the Defendants assisted BitGrail in achieving a tortious result or knew that BitGrail was breaching any duty. Again, attorney argument and conclusory assertions are no substitute for well-pled factual allegations.

(Footnote continued)

C. Fraud

Mr. Fabian's fraud claim fails to satisfy the minimum standard of specificity required under Rule 8 of the Federal Rules of Civil Procedure, let alone the heightened pleading standards applicable under Rule 9(b). "The elements of a cause of action for fraud in California are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.'"[149] "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule."[150] "It is well-settled that the Federal Rules of Civil Procedure apply in federal court, 'irrespective of the source of the subject matter jurisdiction, and irrespective of whether the substantive law at issue is state or federal."[151]

Rule 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud . . . ."[152] Averments of fraud must be accompanied by "the who, what, when, where, and how of the misconduct charged.'"[153] "Rule 9(b) serves three purposes: (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints as a pretext for the discovery of unknown wrongs; (2) to protect those whose reputation would be harmed as a result of being subject to fraud charges; and (3) to prohibit [ ] plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."[154]

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[149] *Dimas v. JPMorgan Chase Bank, N.A.*, No. 17-CV-5205, 2018 U.S. Dist. LEXIS 21929, at *26 (N.D. Cal. Feb. 9, 2018) (quoting *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009); *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951 (Cal. Ct. App. 1997)).

[150] *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003)).

[151] *Id.*

[152] *Id.* at 1124

[153] *Id.* (internal quotation marks and citation omitted).

[154] *Id.* (internal quotation marks and citation omitted).

(Footnote continued)

Here, in Count VI, Mr. Fabian makes two vague allegations that the Defendants had "actual knowledge that BitGrail lacked the safeguards necessary to manage Plaintiff's and the Class's investment assets" and that "the Individual Defendants knew or were grossly negligent in not knowing that BitGrail should not be entrusted with the Class's investments."[155] Earlier in the Complaint, Mr. Fabian also alleges that the "Defendants continued to endorse and promote the use of BitGrail as a safe, secure, and valid exchange, notwithstanding having direct insider information of specific issues likely to jeopardize accountholders XRB investments months prior to the February 8, 2018 announcement."[156]

Putting aside that Mr. Fabian does not bother to provide even a conclusory recitation of the intent or reliance elements of fraud, the allegations he does make with respect to the falsity and scienter elements fall woefully short of the specificity required by Rule 9(b). Indeed, they would not suffice even under the more lenient Rule 8 standard. Mr. Fabian does not identify which specific statements by the Defendants allegedly "endorsed" or "promoted" BitGrail,[157] nor does he provide any detail about how or why these supposed statements were false. Mr. Fabian never identifies the purported "direct insider information of specific issues likely to jeopardize accountholders XRB investments." Similarly, Mr. Fabian fails to explain what "safeguards" were "necessary to manage" his assets. Nor, for that matter, does he hint at how BitGrail "managed" his assets. Moreover, as for scienter, fraud is an intentional tort and cannot be proved by "grossly negligent" conduct.[158]

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[155] Compl. ¶ 159.

[156] *Id.* ¶ 7.

[157] Mr. Fabian does identify two statements allegedly made by Mr. Shapiro about the "safety" of BitGrail and Nano's awareness of the issues at BitGrail with frozen accounts that he alleges were false. Compl. ¶¶ 98-99. But both statements were made in 2018, long after Mr. Fabian took any action in purchasing Nano Coins on BitGrail. Mr. Fabian obviously could not have relied on those 2018 statements in 2017, when he allegedly made his purchases.

[158] *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 482 (Cal. Ct. App. 1998) ("What distinguishes actionable fraudulent deceit is the element of knowing intent to induce someone's action to his or her detriment with false representations of fact. Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other.").

(Footnote continued)

Rule 9(b) requires that allegations of fraud "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong."[159] The lack of specificity on fraud in the Complaint – to the point of entirely missing vital elements of the claim – leaves the Defendants unable to even guess at Mr. Fabian's theory of liability. Unanswered questions about the claim abound: Which specific alleged statements promoted the use of BitGrail? If these statements were false, how were they false? When did Mr. Fabian hear these alleged statements and did he rely on them? And, crucially, what motive did the Defendants have to make false statements about BitGrail? The Complaint is entirely silent on these essential elements of the fraud claim.[160]

D. Negligent Misrepresentation

Mr. Fabian's negligent misrepresentation claim fails because he has again failed to make the specific factual allegations required by Rule 8, to say nothing of Rule 9(b). The elements of negligent misrepresentation are "(1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage."[161] "The Ninth Circuit has not yet determined whether Rule 9(b)'s heightened pleading standard applies to a claim for negligent misrepresentation under California law, but the majority view among district courts in California appears to be that it does."[162]

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[159] *Kearns*, 567 F.3d at1125.

[160] In Count VIII, for constructive fraud, Mr. Fabian also fails to comply with Rule 9(b)'s heightened pleading standard. Indeed, he once again fails to even recite all of the requisite elements of the claim under California law – omitting any allegation of reliance. *Cf. Sacramento E.D.M., Inc. v. Hynes Aviation Indus.*, 965 F. Supp. 2d 1141, 1152 (E.D. Cal. 2013) ("To state a claim for constructive fraud under California law, a plaintiff must allege: (1) a fiduciary or confidential relationship; (2) an act, omission or concealment involving a breach of that duty; (3) reliance; and (4) resulting damage." (quoting Cal. Civ. Code § 1573 and *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183 (C.D. Cal. 2006))). Additionally, as explained above, Mr. Fabian has failed to sufficiently allege the existence of a fiduciary relationship between himself and the defendants, or any specific statements that he alleges were false. Accordingly, the Court should also dismiss the constructive fraud count for failure to state a claim.

[161] *Ragland v. U.S. Bank Nat. Assn.*, 209 Cal. App. 4th 182, 196 (Cal. Ct. App. 2012).

[162] *Jackson v. Fischer*, No. 11-CV-2753, 2013 U.S. Dist. LEXIS 179233, at *53 (N.D. Cal. Dec. 20, 2013).

(Footnote continued)

Here, Mr. Fabian actually manages to recite the required elements of the claim, but these allegations are rote boilerplate. To begin with, he never identifies any specific allegedly false statements by any specific speaker or the date on which they were supposedly made. Rather, he identifies four generic categories of alleged statements.[163] The Complaint contains allegations about a number of specific statements supposedly made by the Defendants,[164] but none of them fall within the four categories of statements Mr. Fabian asserts are the basis for his negligent misrepresentation claim. Indeed, the closest Mr. Fabian comes to identifying a specific statement that conforms with his negligent-misrepresentation allegations is the following statement, allegedly made by Mr. Shapiro: "Yes you can [trust Firano]. I talk to [Firano] every day and he's a good guy . . . ."[165] But that statement was allegedly made on January 11, 2018, one month *after* Mr. Fabian had made his last purchase on BitGrail.

Given its timing, Mr. Fabian could not have relied on this statement, and there are no well-pled allegations that he relied on any other statements. Nor are there any sufficiently specific allegations about the Defendants' intent to induce reliance.[166]

E. Unjust Enrichment

Mr. Fabian's claim for unjust enrichment fails as a matter of law because Mr. Fabian does not allege any enrichment flowing from him to the Defendants and so does not comply with Rules 8 or 9(b). California does not recognize unjust enrichment as a standalone cause of action; rather, it is a theory of recovery demanding restitution for a benefit unjustly conferred.[167] Accordingly, it is

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[163] *See* Compl. ¶ 162.

[164] *Id.* ¶¶ 5, 52, 56-61, 65, 67, 77, 79, 81-82, 94-95. 98-99.

[165] *Id.* ¶ 98.

[166] Regarding the negligence cause of action, Mr. Fabian has not pled a duty.

[167] *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) ("As the district court correctly noted, in California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution.' . . . Rather, they describe the theory underlying a claim that a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request. The return of that benefit is the remedy typically sought in a quasi-contract cause of action." (internal quotation marks omitted)).

(Footnote continued)

correctly construed as a "as a quasi-contract claim seeking restitution."[168] Where the unjust enrichment claim sounds in fraud and is based on the same allegedly misleading or fraudulent statements as a plaintiff's fraud claim, the unjust enrichment claim is subject to Rule 9(b)'s heightened pleading requirements.[169]

Here, like the remainder of the state law counts, the factual basis for the Plaintiff's unjust enrichment claim is not identified. It may be based on the fraud claim, or the negligent misrepresentation claim, [170] the breach of contract claim, or on its own for quasi-contract; it is impossible to tell. But whatever its source, Mr. Fabian has not explained why the damages available under these other causes of action would not make him whole, and regardless the unjust enrichment claim must fail for the same reasons its underlying cause of action fails: Mr. Fabian has made no effort to allege the "what, when, where, and how" of his theory of liability. Far from including specific factual allegations about the "substantial" monetary benefits flowing to the Defendants, Mr. Fabian fails to allege how the Defendants profited from his transactions at all.

F. Civil Conspiracy

Mr. Fabian's civil conspiracy claim fails as a matter of law because Mr. Fabian has not properly pled the claim under California law. Under California law civil conspiracy is not a separate and distinct cause of action.[171] Rather, civil conspiracy is a legal doctrine that imposes liability on persons who, though not actually committing a tort themselves, share with the immediate tortfeasors a

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[168] *Id.* ("When a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution." (internal quotations omitted)).

[169] *In re Arris Cable Modem Consumer Litig.*, No. 17-CV-1834, 2018 U.S. Dist. LEXIS 1817, at *29 (N.D. Cal. Jan. 4, 2018) ("[B]ecause the unjust enrichment/quasi-contract claim is based on the same allegedly misleading advertisements upon which Plaintiffs' UCL, FAL, and CLRA claims are based, the unjust enrichment/quasi-contract claim also sounds in fraud and is subject to Rule 9(b)'s heightened pleading requirements.").

[170] *See* Compl. ¶¶ 171-72 ("Defendants have reaped the benefits from inducing Plaintiff and the Class to invest in XRB-filled accounts at BitGrail . . . . It would be unconscionable for Defendants to retain the substantial monetary benefits they have received as a result of their misconduct.").

[171] *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1228 (9th Cir. 1997).

(Footnote continued)

common plan or design in its perpetration.[172] Thus, it makes no sense to assert the "claim" against "All Defendants," as Mr. Fabian does in Count XI.

To extend liability on a theory of civil conspiracy, the following elements must be pled: "(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct."[173] The first element can be broken down into "three sub-elements: (i) knowledge of wrongful activity, (ii) agreement to join in the wrongful activity, and (iii) intent to aid in the wrongful activity."[174] The "wrongful conduct" must satisfy all the elements of a cause of action for some other tort.[175] "*Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it.* They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it."[176]

Mr. Fabian's civil conspiracy claim is unintelligible. Paragraphs 175-185 of the Complaint are a repetitive mish-mash of unsupported legal conclusions and brand-new conclusory assertions.[177] Yet, despite the flood of jargon, Mr. Fabian still fails allege the basic elements of a conspiracy. Paragraph 175 begins by stating that the "Defendants conspired with one another" without even attempting to allege specific facts showing an agreement between or among the Defendants. And Mr. Fabian does not identify a specific cause of action upon which the conspiracy claim would be based, or set out which one of the defendants named in this action could be liable on it.[178] Instead, Mr. Fabian

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[172] *Verigy US, Inc. v. Mayder*, No. 07-CV-4330, 2008 U.S. Dist. LEXIS 89271, at *17 (N.D. Cal. Nov. 3, 2008).

[173] *Craigslist Inc. v. 3Taps Inc.*, 942 F. Supp. 2d 962, 981 (N.D. Cal. 2013).

[174] *Shubin v. Farinelli Fine Antiques Corp.*, No. 15-CV-1401, 2015 U.S. Dist. LEXIS 70637, at *7 (N.D. Cal. May 29, 2015).

[175] *Wallack v. Idexx Labs., Inc.*, No. 11-CV-2996, 2014 U.S. Dist. LEXIS 51493, at *22-23 (S.D. Cal. Apr. 14, 2014).

[176] *Verigy US, Inc.*, 2008 U.S. Dist. LEXIS 89271, at *18 (emphasis added) (quoting *Choate v. County of Orange*, 86 Cal. App. 4th 312, 333, 103 Cal. Rptr. 2d 339 (2000)).

[177] For example, for the first time, and without any basis in the rest of the Complaint, Mr. Fabian alleges that the Defendants "solicited and/or accepted from Plaintiff and the Class large sums of funds . . .." Compl. ¶176

[178] *See Entm't Research Group, Inc.*, 122 F.3d at 1228.

(Footnote continued)

sprinkles in aspects of various other causes of action without clearly identifying any that the Defendants allegedly agreed to commit.[179] Mr. Fabian is not a pro se litigant entitled to the liberal construction that might be afforded the pleadings in such a case. Accordingly, the Complaint fails to state a claim for civil conspiracy.

CONCLUSION

In light of the foregoing, the Defendants respectfully request that the Court dismiss the Complaint, with prejudice, in its entirety, against them.

Date: March 29, 2019

Respectfully submitted,

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[179] *See, e.g.*, Compl. ¶ 175 (alluding to "misrepresentations"); *id.* at ¶ 183 (alluding to the Section 12(a)(1) claim).