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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

GIL A. MILLER, in his capacity as the Trustee of the Randall Victims Private Actions Trust, Plaintiff, v. **UNION CENTRAL LIFE INSURANCE COMPANY, AMERITAS LIFE INSURANCE CORP., AMERITAS LIFE INSURANCE CORP. OF NEW YORK, and ACACIA LIFE INSURANCE COMPANY**, Defendants.	Case No. 2:14-cv-00575 BCW **Oral Argument Requested.** Filed Electronically.

DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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The lead defendant in this case, The Union Central Life Insurance Company ("Union Central"), together with three related entities, defendants Ameritas Life Insurance Corp., Ameritas Life Insurance Corp. of New York, and Acacia Life Insurance Company, by and through their undersigned counsel and pursuant to Rules 8(a), 9(b), 12(b)(6), and 17(a)(1) of the Federal Rules of Civil Procedure (the "Rules"), hereby move to dismiss the complaint in this case and respectfully state as follows:

I. INTRODUCTION

In *Robbins* v. *Oklahoma*, 519 F.3d 1242 (10th Cir. 2008), the Tenth Circuit Court of Appeals discussed the pleading requirement of plausibility set forth by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007):

> [The] requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them. . . . The *Twombly* Court was particularly critical of complaints that "mentioned no specific time, place, or person involved in the alleged conspiracies." Given such a complaint, "a defendant seeking to respond to plaintiffs' conclusory allegations . . . would have little idea where to begin."

Robbins, 519 F.3d at 1247-48 (citations and footnotes omitted) (emphases added).

Plaintiff Gil Miller's complaint fails to state a plausible claim because it suffers the same defect identified in *Robbins*. Miller does not allege to have claims of his own against Union Central, so he is not proceeding as the representative of a class. Rather, he professes to assert the claims of other people who, he alleges, have assigned their claims to him. But he does not identify those other people by name, and he does not inform Union Central of the "actual grounds" of their purported claims. Instead, he attempts to state their claims with his own general allegations instead of their

specific ones. Consequently, every one of his allegations is vague and conclusory, wholly lacking the necessary details about the "specific time, place, or person involved." Absent class certification (which he is not seeking), Miller must specify such details for each of the claims that those other people allegedly have. He would have to do this if he were asserting only two or three assigned claims; the fact that he purports to assert "hundreds" does not relieve him of this basic pleading requirement.

* * *

Gil Miller is the trustee of the bankruptcy estates of Dee Randall and several of Randall's failed businesses. Miller alleges in his complaint that Randall (acting in concert with an untold number of "agent" and "sub-agent" accomplices) defrauded hundreds of people, including many members of Randall's own church, by selling them "Ponzi-scheme" investment notes. But Miller has not named Randall as a defendant, and Miller has not identified any of Randall's accomplices by name. And while Miller alleges that Randall defrauded many people, his complaint does not tell even one of their stories.

Miller's target in this lawsuit is not Randall; it is Union Central. Union Central is the target because it allegedly sold insurance policies in Utah to some of the unnamed people who also bought Randall's investment notes. However, Miller does not allege that Union Central had any contractual connection to Randall's notes or investment schemes. Nor does he successfully allege that Union Central had any contractual relationship with Randall at all. Miller attempts to allege that Randall was Union Central's general agent and employee, but the very document he relies on clearly shows (as explained below) that Union Central's general agent in Utah was Horizon Financial & Insurance ("Horizon Insurance"), which Randall owed, but which operated as Union Central's independent

contractor with no authority to do anything other than solicit applications for insurance policies, which Union Central could accept or reject. Miller does not even allege that Randall personally solicited applications for Union Central's policies; indeed, Miller acknowledges that Randall did not hold a license for that. And Miller does not allege otherwise that Union Central and Randall were even in privity. In short, based solely on his own conclusory allegations, Miller has not and cannot plausibly allege *any* actionable connection between Randall and Union Central.

Nor has Miller plausibly alleged any connection between Randall's investment notes and Union Central's insurance policies (beyond the sheer coincidence that some people may have purchased both). Miller does allege, in entirely conclusory terms, that some insurance policies and some investment notes may have been sold, "bundled together." But that is not plausible under *Twombly* and *Robbins* because Miller has not alleged who made those sales, what specific instruments were "bundled," to whom these "bundles" were sold, or when. Miller simply neglects his obligation to allege the "specific times, places, and people" involved. Miller's complaint does not identify a single person who bought investment notes from Randall, or who bought insurance policies from Union Central, or who bought both. He tells none of their stories, when in fact he must tell them all.

Ultimately, Miller seeks to hold Union Central and three related entities liable on five counts: securities fraud, unjust enrichment, negligent hiring, negligent retention, and negligent supervision. He seeks to do so solely with his own conclusory allegations about the claims that he alleges that other people may have, but without any of their specific allegations regarding the "times, places, or persons involved." Unquestionably, Miller has not even *begun* to inform Union Central of the

"actual grounds" of the claims against it, and so Union Central has "little idea where to begin" to respond.

* * *

Miller's complaint has other substantial flaws as well: (i) Miller is not a legitimate assignee of whatever claims others may have, (ii) Miller's failure to join or adequately plead primary liability securities fraud claims against Randall and Randall's accomplices is fatal to his derivative liability securities fraud claims, (iii) Miller has no authority to bring unjust enrichment claims on behalf of any claimant who did not purchase insurance policies or who purchased insurance policies that are "active policies," (iv) Miller's negligent employment claims must be dismissed because he has incorrectly alleged that Randall was Union Central's employee, (v) Miller has stated no claims against Union Central's three related entities, (vi) Miller's securities fraud claims are time-barred, and (vii) the statutes of limitation applicable to Miller's negligent employment and unjust enrichment claims cannot be equitably tolled.

Under controlling Tenth Circuit law, Miller's complaint fails to state a claim upon which relief can be granted. Consequently, pursuant to Rule 12(b)(6), his complaint must be dismissed.

II. ARGUMENT

A. The Legal Standard.

A "court will grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) if the complaint fails to state a claim upon which relief can be granted, assuming all well-pleaded factual allegations are true. 'The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.' Further, a court should consider

only the well-pleaded allegations, and not allow conclusory assertions to satisfy the plaintiffs burden." *Moss v. Kopp*, 505 F. Supp. 2d 1120, 1123 (D. Utah 2007) (citations omitted).

B. Miller is Not a Proper Plaintiff.

1. Miller is not asserting any claims of his own.

Miller does not allege that Union Central caused him any injury in fact; nor does Miller allege that he represents any class of plaintiffs under Rule 23. And he has no authority to prosecute this action in his own name on behalf of Randall's creditors as bankruptcy trustee. *Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271 (10th Cir. 2008) (when debtor was culpable, bankruptcy trustee was barred by doctrine of *in pari delicto* from pursuing the same claims against third parties). The sole basis for Miller's allegation that he is the proper party in interest lies in the alleged assignment to him of the unspecified claims of "hundreds" of unnamed people. *See* Rule 17(a) ("An action must be prosecuted in the name of the real party in interest."). But Miller has not alleged specific facts to show that he is the legitimate assignee of any claims against Union Central.

2. Miller is not the assignee of any claims against Union Central.

Miller asserts that he is the assignee of claims against Union Central under the "Chapter 11 Trustee's Liquidating Plan of Reorganization" (the "Plan"). The Plan, (which Miller prepared and proposed to the bankruptcy court in his capacity as Randall's chapter 11 trustee), established the Private Actions Trust (the "PAT") and installed Miller as trustee of the PAT. (*See* Case No. 10-37546 (Bankr. D. Utah Oct. 28, 2013) (docket # 1364), attached hereto as Exhibit A.)[1] Miller asserts "'the absolute right to pursue, settle and compromise . . . any and all Victim Causes of Action' in favor of the Victims PAT." (Miller's complaint ("Compl.") ¶ 22.) The Plan's definition of "Victim

[1] Given Miller's references to certain documents in his complaint, this Court may consider those documents on a motion to dismiss. *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002).

Causes of Action," however, simply does not include causes of action against insurance companies such as Union Central.

The Plan defines "Victim Causes of Action" as follows:

> "Victim Causes of Action" shall mean Causes of Action of a Victim against any Facilitators, including Debtors' Agents, or any other Facilitator that, prior to the Randall Petition Date, acted as an attorney, accountant, auditor, financial advisor for Debtors; such Causes of Action shall include those arising out of: (i) the offering, solicitation, promotion, servicing, or repayment of a Policy or an Investment by a Facilitator, Debtors or any Debtors' Agent; (ii) the issuance, repayment, cancellation, extension, conversion, exchange, or modification of Notes by a Facilitator, Debtors or any Debtors' Agent; (iii) the provision of investment or financial advice or services by a Facilitator, Debtors or any Debtors' Agent; (iv) other actions of any Debtors' Agent; and (v) any Terminated Policy; provided, however, "Victim Causes of Action" shall not include any right or obligation of any Policyholder under any Active Policy.

Plan, Ex. A at p. 13, Article I. Definitions (emphasis added). Miller has not alleged that Union Central is, or any of the defendants in this action are, "an attorney, accountant, auditor, financial advisor for Debtors." Rather, Miller acknowledges that the defendants are insurance companies. (Compl. ¶¶ 23-24.) Yet, significantly, it was Miller who proposed the Plan that was approved by the court. Had the plan intended "Victims Causes of Action" to include all possible claims against all possible "Facilitators," the Plan would have said just that. But it does not.

In an attempt to avoid this deficiency in the purported assignment, Miller refers to the definition of "Facilitator" in a superseded version of the Disclosure Statement to the Plan (the "Disclosure Statement"), which definition actually referenced Union Central. (Compl. ¶ 21 n. 1.) But the Disclosure Statement was modified prior to bankruptcy court approval and solicitation to the assignors and all references to Union Central were removed.

In any event, the Plan, not the Disclosure Statement is the operative document.[2] The definition of "Victim Causes of Action" in the Plan narrows the assignment to causes of action against Facilitators "that, prior to the Randall Petition Date, acted as an attorney, accountant, auditor, financial advisor for Debtors." Union Central is not within that definition, so Miller is not the assignee of any purported claims against it.

C. Miller Has Not Pled his Assignors' Claims Against Union Central Plausibly as Required by Rule 8.

Even if Miller were the legitimate assignee of claims against Union Central, his allegations fail to satisfy Rule 8. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) ("the pleading standard Rule 8 announces . . . demands more than an unadorned, the-defendant-unlawfully-harmed-[somebody] accusation"). In *Robbins*, the Tenth Circuit analyzed Rule 8's requirement of plausibility set forth in *Iqbal*'s predecessor, *Twombly*:

> Thus, "plausible" cannot mean "likely to be true." Rather, "plausibility" in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide

[2] The PAT Trust Agreement, which does not define the "Victim Causes of Action" assigned to it, provides as follows:

> Capitalized terms used in this Private Actions Trust Agreement and not otherwise defined herein shall have the meanings ascribed to them in the Plan.

PAT Trust Agreement Preface, (Case No. 10-37546 (Bankr. D. Utah Oct. 28, 2013) (docket # 1365), attached hereto as Exhibit B)). Further, the PAT Trust Agreement does not reference the Disclosure Statement at all, but rather provides that the terms of the Plan control:

> The Plan and the Confirmation Order are each hereby incorporated into this Private Actions Trust Agreement and made a part hereof by this reference; provided however, if there is conflict on matters arising from or related to the Private Actions Trust between the provisions of this Private Actions Trust Agreement, the provisions of the Plan, or the Confirmation Order, each such document shall have controlling effect in the following rank order: (1) the Confirmation Order; (2) this Private Actions Trust Agreement; and (3) the Plan.

PAT Trust Agreement, Ex. B hereto, § 1.5. The Plan also does not rely on the Disclosure Statement; rather, the Plan itself provides that the terms of the Plan control:

> In the event of any inconsistency between the Plan and the Disclosure Statement, or any other instrument or document created or executed pursuant to the Plan, the terms of the Plan shall govern.

Plan, Ex. A hereto, § 11.16.

> swath of conduct, much of it innocent, then the plaintiffs "have not nudged their claims across the line from conceivable to plausible." The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.
>
> This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them. The *Twombly* Court was particularly critical of complaints that "mentioned no specific time, place, or person involved in the alleged conspiracies." Given such a complaint, "a defendant seeking to respond to plaintiffs' conclusory allegations . . . would have little idea where to begin."

Robbins, 519 F.3d at 1247-48 (citations and footnotes omitted) (emphases added). Miller's complaint suffers *all* the defects identified by the Tenth Circuit.

First, Miller's allegations against Union Central are "so general that they encompass a wide swath of conduct, much of it innocent." For example, Miller's specific allegation that Union Central put Randall's picture in its annual report is barely innuendo, which is insufficient to satisfy Rule 8. *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). Likewise, Miller's persistent allegations that Union Central "willfully ignored" the "red flags" of Randall's fraud are merely conclusory statements, equally probative of actual ignorance as of guilt.[3] *See id*. at 554 ("The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."). And Miller's accusation that Randall did not hold an active insurance license is actually probative of the fact that Randall did not sell any Union Central insurance policies and thus did not "bundle" any insurance policies and investment notes.

[3] Miller is forced to allege, uncomfortably, that his hundreds of Utah assignors could not possibly have known *anything* about Randall's activities, but Union Central, in Cincinnati, Ohio, was on to him from the very beginning.

Most important, Miller's general overriding allegation – *that Union Central is liable to all people who bought investment notes from Randall, even if they did not buy insurance policies from Union Central* (*see* Compl. ¶ 95) – is beyond implausible. That, and all of Miller's other conclusory allegations, will remain implausible – and Miller cannot possibly "nudge" his assignor's claims "across the line from conceivable to plausible" – *Twombly*, 550 U.S. at 560 – until Miller identifies who the real claimants are and the details of their individual claims, if any, against Union Central. *See Berry v. Indianapolis Life Ins. Co.*, 600 F. Supp. 2d 805, 816 (N.D. Tex. 2009) (citing *Twombly*; because conspiracy claims against insurers failed to identify particulars, "Plaintiffs ha[d] not pled the factual specificity to push their claim above the speculative level from conceivable to plausible.")

Second, under *Twombly*, "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphases in original). Miller – who purports to assert claims on behalf of unidentified people without mentioning any "specific times, places, or people involved" – has entirely failed to clear that hurdle.

Third, the purpose of *Twombly* is not just to ensure compliance with pleading rules, but to guard against the use of "anemic" claims as leverage to compel quick settlements, *Twombly*, 550 U.S. at 560, and to prevent expensive discovery on unmeritorious claims. *See id.* at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management[.]'").

Finally, because Miller has not alleged *his assignors'* individual circumstances or individual grievances against Union Central, he has not, as *Twombly* requires, "informed the defendants of the

actual grounds of the [assignors'] claims against them" by specifying the "time, place, or person involved." So Union Central has "little idea where to begin" to answer those claims and present its defenses intelligently. *Twombly*, 550 U.S. at 559 n. 10.

Miller's complaint must be dismissed for failure to satisfy Rule 8.

D. Miller Has Not Stated a Securities Fraud Cause of Action on his Assignors' Behalf Against Union Central.

1. Miller has not named any of the alleged primary violators as defendants, so he cannot maintain a "control person" claim against Union Central.

Miller claims that Union Central is liable, as a control person under Utah state law, for Randall's and his accomplices' securities fraud. In his complaint, however, Miller does little to allege that Union Central could control Randall or his unnamed accomplices in any respect; he alleges *nothing* with respect to Union Central's ability to control them selling securities.[4]

Control person liability is codified under Section 61-1-22(4) of the Utah Uniform Securities Act (the "Utah Act"). Section 61-1-22(4)(a) of the Utah Act states:

> Every person who directly or indirectly controls a seller or buyer liable under Subsection (1) [i.e. Randall and his accomplices], . . . are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

Utah Code Ann. § 61-1-22(4)(a).

The plain language of the Utah Act requires a finding of primary liability *before* there can be derivative control person liability. "Section 61-1-22(4)(a) makes a person liable only if buyers or

[4] Miller alleges that Randall's accomplices may include Horizon Financial & Insurance, HMI, Horizon Auto, Independent Commercial Lending, LLC, Fruit Heights, Strategic Commercial Lending, Castle Holding and Operating, LLC, HFC, Marine Credit Systems, LLC, and an untold number of unnamed "agents" and "sub-agents."

sellers under his or her control are liable under section 61-1-22(1)(a)." *Levitz v. Warrington*, 877 P.2d 1245, 1246 n.2 (Utah Ct. App. 1994). The primary liability of Randall and his accomplices must be adjudicated before control person liability can be found; it is a prerequisite.

Federal securities case law is helpful in terms of understanding why there can be no control person liability without joinder of the primary violators.[5] The Tenth Circuit has held that to state a *prima facie* case of control person liability, "the plaintiff must establish (1) *a primary violation of the securities laws* and (2) 'control' over the primary violator by the alleged controlling person." *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1305 (10th Cir. 1998) (emphasis added). "The plain language of the control-person statute dictates that, absent a primary violation, a claim for control-person liability must fail." *Lustgraff v. Behrens*, 619 F.3d 867, 874 (8th Cir.2010). "[A] controlling person's liability . . . is derived from the acts of its controlled person." *Laperriere v. Vesta Ins. Group, Inc*., 526 F.3d 715, 722 (11th Cir. 2008). "A 'controlling person' shares the liability for violations of securities laws with the primary violator it controlled." *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 485 (6th Cir. 1992).[6]

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[5] "The anti-fraud provisions of the Utah Act mirror the language of § 10(b)." *Precision Vascular Systems, Inc. v. Sarcos, L.C.*, 199 F. Supp. 2d 1181, 1190 (D. Utah 2002). Although substantially similar, there are, however, important differences in comparing the language of the Utah Act to Section 20 of the Exchange Act. First, Section 20 of the Exchange Act imposes control person liability on "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter . . ." 15 U.S.C. § 78t(a)(emphasis added). Section 61-1-22(4) of the Utah Act, on the other hand, limits liability to "[e]very person who directly or indirectly controls a seller or buyer liable . . ." Utah Code Ann. § 61-1-22(4)(a)(emphasis added). The Utah Act is more limiting than the federal statute by focusing on control over a "seller" as opposed to control over "any person" who may have violated the securities laws. For purposes of who is a "seller" under the Utah Act, the Utah federal district courts have held that "[t]he issue of whether a party is considered a 'seller' under the Utah Act is governed by the same standard as that which applies to claims of primary liability under § 12(2) if the Federal Securities Act of 1933." *Wenneman*, 49 F. Supp.2d at 1290 (citing *FSLIC v. Provo Excelsior Ltd.*, 664 F. Supp. 1405 (D.Utah 1987)). Section 12(2) "defines a 'seller' as one who actually passes title to the stock or who actively solicits the purchase motivated by a desire to serve his own financial interests or those of the securities owner." *Id.* Thus, control person liability claims involving primary violators who did not sell securities are not actionable under Utah state law.

[6] "The text of section 20(a) unambiguously imposes derivative liability on persons that control primary violators of the Act." *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008). "[A]ny claim for 'control person'

Randall and his unnamed accomplices should all be parties to Miller's control person claim because their alleged underlying primary liability cannot fairly be adjudicated in their absence, but they have not been named as defendants. Under Rule 12(b)(6), Miller's derivative control person securities fraud claim must therefore be dismissed.

2. Miller has failed to state a primary liability claim against Randall and his accomplices, so he cannot maintain a "control person" claim against Union Central.

Even if this Court could fairly adjudicate the primary liability of Randall and his unnamed accomplices in their absence, Miller has failed to state a claim against them with the required specificity.

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Rule 9(b). Miller's attempt to plead a claim for control person liability under Sections 61-1-1 and 61-1-22 of the Utah Act depends entirely on Miller's underlying securities fraud claim, which he has not pled with sufficient particularity. "Rule 9(b) not only applies generally in securities fraud cases, but courts strictly enforce it under the securities laws, requiring 'detailed statements' of the specific, fraudulent conduct." *Oppenheimer v. Novell, Inc.*, 851 F. Supp. 412, 414-15 (D. Utah 1994). *See also Coroles v. Sabey*, 79 P.3d 974, 982 (Utah App. 2003) (holding that securities fraud claims must be pled with particularity); *Arena Land & Investment Co., Inc. v. Petty*, 906 F. Supp. 1470, 1479 (D.Utah 1994) (analyzing the federal counterpart to Section 61-1-1 and

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liability under § 20(a) must be predicated on a primary violation of securities law." *Hutchins v. NBTY, Inc*., Fed. Sec. L. Rep. P. 96,791, 2012 WL 1078823, *5 (E.D.N.Y. March 30, 2012). "Plaintiffs must demonstrate primary liability under Section 10(b) and Rule 10b-5 before they can prove control-person liability." *Ironworkers Local 580 v. Linn Energy, LLC*, 2014 WL 3345028, *23 (S.D.N.Y. July 8, 2014). "[T]he plaintiff must also establish that the controlled person violated the securities laws." *Brown v. Enstar Group, Inc*., 84 F.3d 393, 396-97 (11th Cir. 1996). "In the absence of a primary violation, a plaintiff cannot state a claim for controlling person liability under § 20(a) of the Securities Exchange Act." *Rich v. Maidstone Financial, Inc*., Fed. Sec. L. Rep. P 91,357, 2001 WL 286757, *8 (S.D.N.Y. March 23, 2001).

holding that claims "for violations of 10(b) and rule 10b-5 are subject to the particularity requirements of Rule 9(b).").

Rule 9(b) "requires a plaintiff to identify the time, place, and content of each allegedly fraudulent representation or omission, to identify the particular defendant responsible for it, and to identify the consequences thereof." *Karacand v. Edwards*, 53 F. Supp. 2d 1236, 1241 (D. Utah 1999) ("Plaintiffs have not set forth in specific terms the time, place, content, and manner of each defendant's alleged matteral misrepresentations or otherwise fraudulent conduct.") The facts alleged in the complaint must "include 'the who, what, when, where and how: the first paragraph of any newspaper story.'" *Colores*, 79 P.3d at 981, fn. 15 (*quoting DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726-27 (10th Cir. 2006) (same).

Specifically, to plead fraud, Miller must allege with particularity, for Randall and each of his alleged accomplices, and with respect to each of his supposed assignors, the following elements:

> *(1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false: (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.*

Pace v. Parrish, 122 Utah 141, 145, 247 P.2d 273, 274-75 (Utah 1952) (citations omitted); *accord Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357, 366 n.9 (Utah App. 1998).

Miller, however, has alleged none of those things, not even the identities of those who were allegedly defrauded (which is only the starting point of what he must allege). Nor has he alleged that each primary violator made each misrepresentation to each individual investor with scienter, which is

required by Section 61-1-1(1). *Fibro Trust, Inc. v. Brahman Financial, Inc.*, 974 P.2d 288, 294 (Utah 1999). With respect to Randall's unnamed accomplices, of course, it is impossible for Miller to plead that they acted with scienter when he has not even identified who they are.

When underlying claims for primary liability are dismissed (indeed, as in this case, not even pled), the control person liability claims must be also dismissed. *See Philadelphia v. Fleming Companies, Inc.*, 264 F.3d 124, 1270-715 (10th Cir. 2001); *Melnyk v. Consonus, Inc.*, 2005 WL 2263950 (D. Utah Sept. 12, 2005) ("Defendants correctly assert that there can be no control person liability once the underlying securities claims are dismissed.").[7] It is "axiomatic" that "it is impossible to state a claim for secondary liability under Section 20 without first stating a claim for some primary violation of the security laws on the part of the controlled party." *Brown v. Hutton Group*, 795 F. Supp. 1317, 1324 (S.D.N.Y. 1992). Where a plaintiff has "not stated a claim for any primary violation . . . , the claim for controlling person liability must also fail." *Id*. at 1325.

Because Miller has failed to state any claims for underlying primary liability against Randall and his unnamed accomplices sufficient to satisfy Rule 9(b), there can be no vicarious control person liability. Accordingly, under Rule 12(b)(6), Miller's securities fraud claims against Union Central must be dismissed.

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[7] *See also Precision Vascular Systems, Inc. v. Sarcos, L.C.*, 199 F. Supp. 2d 1181, 1190 (D. Utah 2002)("Here, Plaintiffs have failed to state a claim under its § 10(b) claim. Thus, there is no primary violation of the securities laws, and the complaint fails to state a § 20(a) claim."); *Karacand*, 53 F. Supp 2d at 1253 ("Plaintiffs' claims under Section 20(a) and Section 20A fail because they require a primary violation and, as set forth above, the Complaint fails to state such a claim."). *Hinerfeld v. United Auto Group*, 1998 WL 397852, Fed. Sec. L. Rep. P 90,264 (S.D.N.Y. 1998)("Because the causes of action under Sections 11 and 12(a)(2) . . . are dismissed, there can be no control person liability under Section 15. Therefore, the third cause of action is also dismissed."); *Komanoff v. Mabon, Nugent & Co*., 884 F. Supp. 848, n.16 (S.D.N.Y. 1995)("In addition, we dismiss Charles Komanoff's Section 20(a) claims because he has failed to state any primary violations under the security laws."); *Salinger v. Projectavision, Inc*., 972 F. Supp. 222, 235 n.9 (S.D.N.Y. 1997) ("Because the plaintiff's § 20(a) claim is dismissed based on the fact: that the plaintiffs' 10(b) and Rule 10b-5 claim fails, it is not necessary to reach the defendants' arguments that the plaintiffs have failed to plead controlling person liability with sufficient particularity.").

E. Miller Has Not Pled his Assignors' Claims Against Union Central with Particularity as Required by Rule 9(b).

As a general matter, Miller's causes of action against Union Central for unjust enrichment and negligent hiring, supervision and retention are also predicated on Randall's underlying fraud, but Miller has not alleged Randall's alleged fraud with particularity. More specifically, with respect to Miller's allegations that Randall and his accomplices somehow "tied," "bundled," or otherwise connected the sale of Randall's notes to the purchase of Union Central's policies, all those allegations sound in fraud. (Compl. ¶¶ 87-96.) But Miller has not *begun* to plead these allegations with particularity. He has not identified a single purchaser in any such "bundled" sale by name, much less made any effort to describe – if, in fact, anyone was ever duped into purchasing notes and policies together – *how*, by *whom*, *when* and *where* they were purportedly defrauded. *See Berry v. Indianapolis Life Ins. Co.*, 600 F. Supp. 2d 805, 816-20 (N.D. Tex. 2009) (dismissing complaint alleging insurance scheme under Rule 9(b) for failure to identify who, what, when, where and how allegedly fraudulent statements were made). Because Miller has not revealed *who* his assignors are, or *when*, *how*, *from whom* or *why* they purchased investment notes and/or insurance policies, he has by definition *not* pled their claims with the requisite particularity. All of his claims that rely on allegations of fraud (that is, all of his claims) must be dismissed for failure to satisfy Rule 9(b).

F. Miller Has Not Stated an Unjust Enrichment Claim on his Assignors' Behalf Against Union Central.

1. Miller has not stated an unjust enrichment claim on behalf of assignors who did not purchase insurance policies.

Miller's complaint cannot possibly state an unjust enrichment claim against people who purchased investment notes from Randall, but who did not purchase insurance policies from Union Central. Those people could not have unjustly enriched Union Central because they made no

premium payments to Union Central and had no other contractual connection to Union Central. Moreover, since Union Central had no alleged involvement in Randall's sales of investment notes, it could not have been "enriched" by those transactions. Miller does not even attempt to allege facts that could support a plausible claim that Union Central was "enriched" by investment transactions to which it was not a party and from which it received no money.

2. Miller has not stated an unjust enrichment claim on behalf of assignors who purchased insurance policies that are "Active Policies."

Miller's complaint repeatedly alleges that Union Central benefitted from the sale of "unsuitable" insurance policies.[8] But the Plan deprives Miller of standing to make such allegations in connection with any policies that are still in effect.

Under the Plan, "Victim Causes of Action shall not include any right or obligation of any Policyholder under any Active Policy." Plan, Ex. A hereto at p. 13, Art. I Definitions (emphasis added). The Plan defines an "Active Policy" as "a Policy held at any time by a Policyholder that is still in force and/or has not been terminated, and any Policy on which a death benefit has previously been paid or is due and payable as of the Effective Date." Plan, Ex. A hereto at p. 2, Art. I Definitions.

The insured's obligation under an insurance policy is to pay premiums. Miller's complaint repeatedly alleges with conclusory language that Randall and his accomplices duped their customers into purchasing too-expensive policies and paying too-high premiums. But Miller has not been assigned any right to sue Union Central on the obligation of the insured to pay premiums under "Active Policies," so he has no standing to assert that Union Central's policyholders were duped into buying too-expensive policies.

[8] *See* Compl., ¶¶ 7, 10, 13, 50, 88-94, 149, 155-157, 164, 166.

Because Miller has failed to identify his assignors and their individual circumstances, Union Central cannot know the extent to which he is seeking improperly to allege claims based on "Active Policies." To the extent he seeks to allege such claims, they must be dismissed.

G. Miller Has Not Stated a Negligent Employment Claim on his Assignors' Behalf Against Union Central.

Miller asserts claims of negligent hiring, negligent retention, and negligent supervision against Union Central (together, the "negligent employment claims"). Each of Miller's negligent employment claims must be dismissed under Rule 12(b)(6) because Miller has not accurately alleged that Union Central was Randall's employer.

In appropriate circumstances, negligent employment claims may be brought against an employer (on account of an employee's acts) because

> a duty may arise when an employer could reasonably be expected, consistent with the practical realities of an employer-employee relationship, to appreciate the threat to a plaintiff of its employee's actions and to act to minimize or protect against that threat.

Simmons v. Harman-Kim, Inc., No. 2:06CV834, 2008 WL 2575649, *6 (D. Utah June 26, 2008) (citation omitted). Utah law is clear that such claims are founded in the employee-employer or master-servant relationship. *Retherford v. AT&T Communications*, 844 P.2d 949, 972-973 (Utah 1992) (collecting cases).

Here, however, Miller makes the truly disingenuous allegation that an employment relationship between Randall and Union Central arose from the "GA Contract." (Compl. ¶ 35.) That agreement is attached hereto as Exhibit C. Significantly, this contract is between *Horizon Insurance* and Union Central, not between *Randall* and Union Central as Miller alleges. That

contract also establishes that Horizon Insurance was Union Central's general agent in Utah, not Randall as Miller alleges. In any event, the GA Contract expressly states, among other things:

> You [Horizon Insurance] agree . . . to solicit applications for our [Union Central's] policies.
>
> We are not your employer, nor are you our employee. You are an independent contractor using your own judgment in performing your duties. We may prescribe rules governing the conduct of your solicitation activities which do not interfere with you exercising said judgment.
>
> You are not authorized to . . . act on our behalf in any manner other than as stated in this Agreement.[9]
>
> We reserve the right to . . . reject applications.

GA Contract, Ex C, at 1, 4 (emphasis added). The GA Contract is the only basis Miller alleges to establish an employer-employee relationship between Union Central and Randall. Yet the GA Contract does not support Miller's allegation that Union Central was Randall's "employer." Instead, it clearly provides that there was only an independent contractor relationship between Horizon Insurance and Union Central. In fact, it expressly disavows *any* employer-employee relationship.

Of course, when an independent contractor relationship is present, the "employer" is *not* vicariously liable for the acts and omissions of the independent contractor simply by reason of that contractual relationship. *Berrett v. Albertsons, Inc.*, 2012 UT App 371, ¶ 16, 293 P.3d 1108. This rule "recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety

[9] Plainly, under the terms of the GA Contract, neither Horizon Financial & Insurance nor Randall was authorized to sell investment notes or other securities. Horizon Financial & Insurance was authorized *only* to solicit applications for insurance policies which Union Central had the right to accept or reject.

of the manner or method of performance implemented." *Id*. at ¶ 29 (*citing Thompson*, 1999 UT 22, ¶ 13).

Miller has not alleged facts supporting his allegation that Union Central employed Randall. Under Rule 12(b)(6), therefore, each of his negligent employment claims must be dismissed.

H. Miller Has Not Stated Any Claims on his Assignors' Behalf Against Union Central's Related Entities.

For the same reasons described in Section E, *supra*, the securities fraud control person liability claims alleged against Union Central's related entities, Ameritas Life Insurance Corp., Ameritas Life Insurance Corp of New York, and Acacia Life Insurance Company, also must be dismissed. There are no allegations whatsoever in Miller's complaint that these entities controlled Randall or his accomplices in connection with their sales of securities. Nor are there any cognizable alter ego allegations. "Under ordinary circumstances, a parent corporation is not liable for the acts and obligations of its subsidiaries. . . . To pierce the corporate veil requires 'strong and robust evidence' that the parent has 'that degree of control over the subsidiary as to render the latter a mere shell for the former." *Lopez v. Shearson American Exp., Inc*., 684 F. Supp. 1144, 1147 (D. Puerto Rico 1988) (citations omitted). There are no allegations in Miller's complaint that Union Central's affiliates controlled it to *any* degree, much less to the degree of control that would render Union Central a "mere shell." Miller's securities fraud cause of action against these related entities, therefore, must be dismissed.

Similarly, there are no allegations whatsoever in Miller's complaint that any of Union Central's affiliates *employed* Randall or were *unjustly enriched* by his alleged fraud, so those claims against the related entities must be dismissed as well.

I. Miller's Assignors' Claims Are Wholly or Partially Time-Barred.

Under Utah law:

- Securities fraud claims must be brought within two years of "discovery by the plaintiff of the facts constituting the violation," but in no event longer than five years "after the act or transaction constituting the violation." Utah Code Ann. § 61-1-22(7)(a).
- Claims for negligent employment and unjust enrichment must be brought within four years. Utah Code Ann. § 78B-2-307. *Russell/Packard Dev., Inc. v. Carson*, 2003 UT App. 316, ¶ 11, 78 P.3d 616.

By the parties' agreement, the statutes of limitation were tolled as of October 30, 2013. (Compl. ¶ 142.) Consequently, Miller's claims for securities fraud are time-barred if they relate to securities sales that occurred before October 30, 2008 (five years prior to the tolling agreement), or were discovered before October 30, 2011 (two years prior). And Miller's claims for negligent hiring and unjust enrichment are barred if they accrued before October 30, 2009 (four years prior) unless the statutes of limitation can be equitably tolled, which, as explained below, they cannot.

1. Miller's securities fraud claims are time-barred.

Certainly, all claims for securities purchased prior to October 30, 2008 (five years prior to the tolling agreement) are time-barred. *See Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶¶ 21, 24, 108 P.3d 741 (holding that equitable tolling does not apply where a statutory scheme sets forth a more specific discovery rule.) These claims (even though Miller has not specified the dates on which any sales of securities supposedly occurred) must be dismissed under Rule 12(b)(6).

Further, *all* claims for securities fraud are time-barred because there is no question that Miller knew or should have known of Randall's fraud and Union Central's alleged relationship with Randall on or before October 30, 2011. More than three months earlier, on July 18, 2011, the United States Trustee's attorney assigned to Randall's chapter 11 cases filed a motion to appoint a trustee in

which she alleged, among other things, that Randall and his entities were running a Ponzi scheme. (*See* United States Trustee's Memorandum of Points and Authorities in Support of the Motion for the Appointment of a Chapter 11 Trustee, Case No. 10-37546 (Bankr. D. Utah July 18, 2011), attached as Exhibit D hereto). That was more than two years before the tolling agreement was signed. Specifically, the U.S. Trustee alleged—

> To the extent Mr. Randall is the one seeking out new investors for his Horizon entities by giving seminars which his wife organizes, or through referrals from his insurance agents once they learn of the existence of a sizeable IRA available for investing, Mr. Randall, post-petition, has participated in actual fraud, dishonesty and criminal conduct.

Id. at 14 (emphases added). The bankruptcy court granted the motion, and Gil Miller, the plaintiff in this action, was appointed trustee of Randall's chapter 11 estate on September 28, 2011, which was also more than two years before the tolling agreement was signed. (Notice of Appointment of Chapter 11 Trustee, Case No. 10-37546 (Bankr. D. Utah Sept. 28, 2011), attached as Exhibit E hereto). Then, on October 5, 2011, Miller's own firm, RMA, applied for bankruptcy court approval to act as Miller's accountants and financial advisor, promoting its qualifications as including expertise in "Ponzi-schemes." (*See* Case No. 10-37546 (Bankr. D. Utah Oct. 5, 2011) (docket # 260), attached hereto as Exhibit F.) That was also more than two years before the tolling agreement.

Clearly, Miller cannot argue credibly that he was not on notice of potential claims against Randall, his alleged accomplices, and Union Central, more than two years prior to the expiration of the statute of limitations. Consequently, his claims for securities fraud are all time-barred and must be dismissed under Rule 12(b)(6).

2. Miller's complaint is insufficient to allege tolling, as to his negligent employment and unjust enrichment claims, under the fraudulent concealment exception.

Miller, aware that the applicable statutes of limitation bar most of his assignors' purported claims, attempts to invoke the "fraudulent concealment exception" to toll the statute of limitations as to the negligent employment and unjust enrichment claims.

Miller's tolling allegations fail as a matter of law and pleading for three reasons. First, the fraudulent concealment exception, as its name implies, requires Miller to all plead the underlying fraud with particularity as required by Rule 9(b). Mere conclusory allegations are insufficient. "At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud." *Sikkenga*, 472 F.3d att 726-27 (citations and internal quotation marks omitted). Further, the complaint "must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Id*. (citations and internal quotation marks omitted).

Second, the allegations fail under Utah law because "fraud committed by a third party in concealing a cause of action against another defendant will *not* toll the statute of limitations as to that defendant." *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 338 (Utah Ct. App. 1997) (emphasis added); *see also Bean v. U.S.*, No. 1:06-cv-105, 2009 WL 2168737, at *3 (D. Utah July 17, 2009) ("[T]he concealment version does not apply when someone other than the defendant is the source of the concealment."). Although there is an exception to this rule – where "there is an agency or privity relationship between the third party committing the fraud and the defendant" – *Jensen,* 944 P.2d.at 338 – Miller has failed to allege that Randall was Union Central's agent under the terms of the GA Contract for *any* purpose, much less for purposes of concealment. All the GA Contract provides is

that Horizon Insurance was an independent contractor with *no authority* to do anything other than solicit applications for policies that Union Central could accept or reject. (GA Contract, pp. 1, 4) Miller must, at a minimum, allege facts that, if true, would make it plausible that Randall was acting *within* the course and scope of authority granted by Union Central when he engaged in activities *outside* the course and scope of Union Central's insurance business.

Third, the allegations of Miller's complaint, if true, prove that the statute of limitations had run and could not have been tolled prior to the Miller filing his complaint because Randall's investors were on inquiry notice and yet failed to conduct the required reasonable investigation. The Tenth Circuit has held that inquiry notice is triggered by "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions." *Sterlin v. Biomune Sys.*, Inc., 154 F.3d 1191, 1196 (10th Cir. 1998) (internal quotation marks omitted).

Miller's complaint alleges that, at some point in time, but long before he filed his complaint, his assignors began to question Randall as to why they were not receiving payments on their investments. (Compl. ¶ 134.) Evidently, not only were Randall's investors on inquiry notice, some of them *actually made inquiries*. Miller's complaint also avers that Randall gave Miller's assignors assurances that they would be paid in full and promised them big returns if they would maintain their investments with Horizon. (Compl. ¶¶ 135-36.) Reliance on such assurances is not, as a matter of established law, a "reasonable investigation." Any of Randall's investors who had reason to make such an inquiry could not rely on re-assurances by Randall that "all was well." *Sterlin v. Biomune Sys., Inc.*, 114 F. Supp. 2d 1163, 1173 (D. Utah 2000). The District Court in *Sterlin* quoted the Tenth Circuit's earlier opinion in that same case:

> Once the storm clouds had gathered, the "[d]ear shareholder" letters . . . refuting the claims [of trouble with their investments in an article] could not dissipate them.' *Sterlin*, 154 F.3d at 1204. A reasonably diligent investor would have been wary of assurances made by [the issuer], particularly after the article was published, and should have become even more suspicious when the very man warned about – Jack Solomon – assured [the investors] that [the company's product] was efficacious and suggested to plaintiff that he should buy more stock."

Id. (*quoting Sterlin*, 154 F.3d at 1173.) Miller has alleged the existence of storm clouds sufficient to trigger inquiry notice, and yet he also has alleged that Randall's investors relied on some of those same storm clouds, including Randall's re-assurances, to decide to do nothing. That, as a matter of law, does not toll the statute. *Id*.

Miller's complaint should be dismissed to the extent it seeks to assert negligent employment and unjust enrichment claims accruing before October 30, 2009 because (i) Miller has failed to plead fraudulent concealment adequately, and (ii) his own complaint establishes that his assignors do not qualify for tolling under the fraudulent concealment exception.

III. CONCLUSION

The defendants in this action respectfully request an order of this Court dismissing the plaintiff Gil Miller's complaint in its entirety.

DATED this 6th day of October, 2014.

PARSONS BEHLE & LATIMER
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/s/ J. Thomas Beckett

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2014, I filed the foregoing **DEFENDANTS' MOTION TO DISMISS** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means:

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