UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AURELIEN BERANGER, et al, Plaintiffs, v. CLIFFORD "T.I." JOSEPH HARRIS, JR., et al, Defendants.	CIVIL ACTION NO. 1:18-CV-05054-CAP

ORDER

This matter is before the court on the defendant, Clifford "T.I." Joseph Harris, Jr.'s, motion to dismiss the plaintiffs' amended complaint pursuant to Federal Rule of Civil Procedure 12(b) for failure to state a claim upon which this court may grant relief [Doc. No. 36]. The plaintiffs have filed a response in opposition [Doc. No. 38], and Harris has filed a reply brief [Doc. No. 45].

I. Background

The thirty-five plaintiffs in this action are citizens of twelve different countries spread all around the world: France, South Africa, the Netherlands, Russia, the United Kingdom, the Czech Republic, South Korea, the Slovak Republic, Germany, Greece, the United States, and Thailand [Doc. No. 30 at 4-8, Amend. Compl. ¶¶ 6-40]. They are suing the defendants Harris, Ryan

Felton, and Kevin Hart for violations of Georgia's Uniform Securities Act ("GUSA"), negligent representation, and unjust enrichment.[1] The plaintiffs claim that they collectively lost over $2,000,000 after they purchased FLiK tokens, a type of cryptocurrency, from FLiK, an online distribution platform for entertainment projects that they maintain was owned and controlled by Felton and Harris. To raise money to launch the company and its online platform, FLiK conducted an initial coin offering ("ICO") from August 20, 2017, to September 20, 2017. In an ICO, a company offers purchasers a unique digital asset, often called a "coin" or "token," in exchange for consideration. FLiK's ICO involved the sale of a limited number of FLiK tokens, which were then available for sale on the secondary market.

On August 12, 2017, before initiating the ICO, FLiK published a "whitepaper" describing the company and the tokens that would be sold during the ICO. Holders of FLiK tokens would be able to use the tokens for content on the company's website, and they would have access to other activities such as in-person FLiK events. However, the defendants also touted the tokens' investment potential. The tokens were valued at $0.06 per token at the beginning of the ICO. From August to October 2017, FLiK made

[1] The plaintiffs also seek punitive damages.

several announcements promoting the tokens, including social media posts describing high-value purchases, celebrity endorsements and investments, and upcoming projects. The plaintiffs allege that Felton generally posted the company's announcements, and that other alleged promotions about FLiK were published via Felton's or Harris's individual social media accounts. By October 17, 2017, the market value of the tokens had increased from $0.06 to $0.30 per token. The next day, Felton advertised that the tokens would be redeemable for $14.99 per token in fifteen months. However, sometime in 2017, the tokens began to rapidly decrease in value, and FLiK's social media campaign disappeared. By February 15, 2018, the tokens' value dropped to about $0.18 per token.

In April 2018, FLiK announced that it had missed the launch date for its internet platform, and no further announcements about its progress were made. Ultimately, FLiK never launched, and the company no longer exists. As of August 3, 2018, the FLiK tokens' value was about $0.008 per token. Between that and the failure of FLiK and its online platform, the tokens are now essentially worthless. The plaintiffs suffered a total loss on their investments.

The plaintiffs allege that the defendants solicited and sold the securities as part of a "pump and dump" scheme—a type of fraud scheme in

which company owners artificially inflate the price of a security (the "pump") to then sell it at a higher price to duped investors (the "dump"). Specifically, the plaintiffs have brought claims against Harris for materially aiding the sale of unregistered securities in violation of GUSA, O.C.G.A. § 10-5-20 (Count I), negligent misrepresentation in violation of O.C.G.A. § 10-5-50 (Count III), unjust enrichment (Count IV), and punitive damages (Count V). Harris has moved to dismiss all the claims against him under Federal Rule of Civil Procedure ("Rule") 12(b)(6).

II. Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Conversely, Rule 12(b)(6) allows for dismissal of a case when the complaint "fail[s] to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). When evaluating a Rule 12(b)(6) motion, the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321–22 (11th Cir. 2012). To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has

facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully," and when the "complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement of relief." *Id.* (citing *Twombly*, 550 U.S. at 557). The complaint thus must contain more than mere "labels and conclusions, and a formulaic recitation of a cause of action's elements." *Twombly*, 550 U.S. at 555. The plaintiff must allege facts that "raise the right to relief above the speculative level." *Id.*

III. Discussion

Harris has presented several arguments for dismissal. First, he argues that GUSA does not apply because the plaintiffs have not shown a nexus between Georgia and the acts of the defendants [Doc. No. 36-1 at 9-16]. He alternatively contends that the plaintiffs fail to show that he is a controlling shareholder in FLiK [*Id.* at 16-18], and that in fact, they don't plead enough facts to support their contention that he materially aided the sale of FLiK tokens [*Id.* at 18-20]. As for the plaintiffs' claim for negligent misrepresentation, Harris maintains they have not pleaded that claim with

the level of specificity required by Federal Rules of Civil Procedure 8 and 9(b) [*Id*. at 20-24]. Harris then asserts that Counts IV and V (unjust enrichment and punitive damages) are both impermissible shotgun pleading style counts and do not stand independently from the other claims against him [*Id*. at 24-25].

A. Count I – Application of Georgia's Uniform Securities Act

GUSA makes it "unlawful for a person to offer or sell a security in this state unless (1) the security is a federal covered security; (2) the security, transaction, or offer is exempted from registration under Code Sections 10-5-10 through 10-5-12; or (3) the security is registered under this chapter." O.C.G.A. § 10-5-20. An "[o]ffer to sell includes every attempt or offer to dispose of or solicitation of an offer to purchase a security or interest in a security for value." O.C.G.A. § 10-5-2(29). Under O.C.G.A. § 10-5-58, the purchaser of an unregistered security may maintain a private right of action against a person who violates § 10-5-20, a person who controls the primary violator, and a person who materially aids in the violation. The statute of limitations for such an action is "within two years after the violation occurred." O.C.G.A. § 10-5-58(j).

Count I of the amended complaint alleges that Harris violated § 10-5-20 because he materially aided the sale of unregistered securities and had control over FLiK and "other persons liable for the violations of O.C.G.A. § 10-5-20." [Doc. No. 30 at 29, Amend. Compl. ¶ 120, 122]. Harris argues that § 10-5-20 does not apply because the plaintiffs have failed to plead facts showing a nexus between the defendants' actions and the state of Georgia. He asserts that "Plaintiffs allege no facts regarding how, when or where they purchased the FLiK tokens to show that the Georgia Securities Act applies. Since they do not allege a Georgia transaction, Georgia law does not apply" [Doc. No. 36-1 at 14]. Harris argues that the plaintiffs have failed to plead facts showing that the offer of FLiK Tokens came from Georgia or that any of the plaintiffs were directed to Georgia or received anything at a location in Georgia [*Id*. at 12]. Further, he claims that although the amended complaint contains announcements that were made by all of the defendants, there is nothing in the amended complaint to show that the announcements came from within the state of Georgia [*Id*. at 14]. The only tie to Georgia in this case, he maintains, is that several of the defendants are Georgia residents [*Id*. at 12]. The plaintiffs counter that there is "more than a reasonable inference that the ICO for FLiK tokens was sent from the same state in which FLiK's two owners and cryptocurrency business advisor reside, *i.e.*

Georgia" [Doc. No. 38 at 5]. The plaintiffs also aver that Harris can present evidence at the summary judgment stage that demonstrates the offer came from somewhere other than Georgia [*Id*. at 6]. Harris argues that "[i]nferences do not substitute for unpled facts" and that "Plaintiffs' failure to plead the facts necessary to state each of their individual claims leave fatal gaps that cannot be filled by inferences" (internal quotation omitted) [Doc. No. 45 at 4].

i. Scope of Georgia's Uniform Securities Act

GUSA is an example of a "blue sky"[2] law that states across the nation have implemented to protect their citizens from fraud and deceitful practices in the sale and purchase of securities. *See Oil Resources v. State of Fla., Dept. of Banking,* 583 F.Supp. 1027, 1030 (S.D.Fla. 1984); *Upton v. Trinidad Petroleum Corp.,* 468 F.Supp. 330, 335 (N.D.Ala. 1979); *Underhill Assocs. Inc. v. Bradshaw*, 674 F.2d 293, 295 (4th Cir. 1982); *Baron v. Strassner*, 7 F. Supp. 2d 871, 875 (S.D. Tex. 1998); *Simms Inv. Co. v. E.F. Hutton & Co.*, 699 F. Supp. 543, 545 (M.D. N.C. 1988), reconsidering 688 F. Supp. 193 (M.D. N.C. 1988); *Lintz v. Carey Manor Ltd.*, 613 F. Supp. 543, 551 (W.D. Va. 1985);

[2] The term "blue sky" was popularized after it was used by Supreme Court Justice McKenna in *Hall v. Geiger-Jones Co.*, to describe the subject of such laws, which he cited as "speculative schemes which have no more basis than so many feet of 'blue sky'." 242 U.S. 539, 550 (1917).

Oil Resources, Inc. v. State, 583 F. Supp. 1027, 1030 (S.D. Fla. 1984), aff'd 746 F.2d 814 (11th Cir. 1984); *Newsome v. Diamond Oil Producers, Inc.*, CCH Blue Sky L. Rep. ¶ 71, 869 (Okla. Dist. 1983); *Banking Comm'n v. Holdings of U.S. Gov't Sec., Inc.*, CCH Blue Sky L. Rep. ¶ 71, 524 (Conn. Banking Comm'r 1979); *cf. Mon-Shore Management, Inc. v. Family Media, Inc.*, 584 F. Supp. 186, 192-93 (S.D. N.Y. 1984), reh'g denied, 2 Bus. Franchise Guide (CCH) ¶ 8230 (S.D. N.Y. Sept. 5, 1984). While such laws are intended to protect the citizens of a state, a non-resident may allege claims pursuant to a state's blue sky law. *McInnis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 706 F. Supp. 1355, 1358 (M.D. Tenn. 1989). *See also Lintz,* 613 F.Supp. at 550 (W.D. Va. 1985). In addition to protecting its citizens, "[t]he state likewise has a legitimate interest in regulating and controlling securities activities deemed to have taken place at least partially within the borders of the state." *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512, 1533 (M.D. Fla. 1989). *See also North Star Int'l v. Arizona Corp. Comm'n,* 720 F.2d 578, 582-83 (9th Cir. 1983). However, the transaction must have some nexus to that state in order for that state's blue sky law to apply. *Barneby* at 1534. ("If upon application of the facts a transaction is found to be covered by the statutory scheme developed by those states, then the penalties can be applied."). *See also Garland v. Advanced Medical Fund, L.P. II*, 86 F.

Supp.2d 1195, 1204 (N.D. Ga. 2000) (holding that "the pertinent question . . . is whether there was a sufficient territorial nexus between the state at issue and the transaction.") However, "a local act will not attach merely because the seller of securities happens to be a local resident who leaves the state and conducts negotiation and sale of a security in another state with a resident of that state." JOSEPH C. LONG, BLUE SKY LAW § 4:3 (Dec. 2019 Update).

GUSA contains a specific scope on its application. It explicitly states that § 10-5-20 does "not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this state or the offer to purchase or the purchase is made and accepted in this state." O.C.G.A. § 10-5-79(a). Under Georgia law, it is not necessary for either the offeror or the offeree to reside in Georgia, however, there must be some factual nexus with the state. GUSA proceeds to clarify the conditions under which an offer is deemed to have been made in Georgia: (1) if the offer originated from within Georgia or (2) if the person or entity making the offer directs the offer to a place in Georgia and then the offer is received at that place in Georgia. O.C.G.A. § 10-5-79(c). Similarly, the statute clarifies the conditions under which an offer is deemed to be accepted in Georgia: (1) the acceptance is communicated in Georgia to the person or entity originating the offer "and the offeree reasonably believes the offeror to be present in this state [Georgia] and the

acceptance is received at the place in this state [Georgia] to which it is directed." O.C.G.A. § 10-5-79(d). The GUSA even clarifies the conditions under which an electronic communication is deemed to have originated in Georgia:

> A radio or television program or other electronic communication is considered as having originated in this state if either the broadcast studio or the originating source of transmission is located in this state, unless:
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> (1) The program or communication is syndicated and distributed from outside this state for redistribution to the general public in this state;
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> (2) The program or communication is supplied by a radio, television, or other electronic network with the electronic signal originating from outside this state for redistribution to the general public in this state;
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> (3) The program or communication is an electronic communication that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television, or other electronic system; or
>
> (4) The program or communication consists of an electronic communication that originates in this state but is not intended for distribution to the general public in this state.

O.C.G.A. § 10-5-79(e).

The court must look to basic principles in determining if the sale of a security occurred in Georgia for purposes of applying Georgia's security law. *Allen v. Smith & Medford, Inc.*, 199 S.E.2d 876, 880 (Ga. Ct. App. 1973). In

Allen, the court found that the security sale had occurred in Georgia because the sale agreement was entered into in Atlanta, Georgia, the plaintiff resided in Georgia, executed the contract in Georgia, and received the stock in Georgia. *Id*. at 542. Likewise, the court in *Eldon Industries, Inc. v. Paradies & Co.* found that Georgia law applied where the underlying contract was executed in Georgia, the merchandise listed in the contract was delivered to the defendant in Georgia and then stored in a warehouse in Georgia. 397 F.Supp. 535, 539-40 (1975). In *Seale v. Miller*, 698 F.Supp 883, 897 (N.D. Ga 1988), the court deemed the sale to have occurred in Georgia where the purchaser was a Georgia resident, the sales contract was finalized during a telephone call between the Georgia purchaser and the Texas seller, and the purchaser transferred funds from a Georgia bank account to pay for the security. However, in *Rasmussen v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc.*, 1979, 608 F.2d 175, 177, the court found that the sale did not take place in Georgia where the plaintiff, a Georgia resident, and the defendant, a Tennessee resident, had telephonic communication concerning an arrangement in which the defendant's companies would be the plaintiff's investment advisors, and the defendant mailed to the plaintiff two letters establishing the contract terms, and plaintiff signed and returned the letters.

Other states have used tests predicated on (1) place of contract, (2) place of performance, or (3) place of solicitation. LOUIS LOSS, BLUE SKY LAW, Ch. 5, p. 180 *et seq*. (1958). In one interpretive opinion, the California Commissioner of Corporations determined that a transaction was not subject to California law where a California resident was the sole shareholder of a California corporation, travelled to New York to negotiate the sale of all the stock in his corporation to a New York corporation, reached final agreement of the sale in New York, and received payment for the sale in New York. Cal. Corp. Comm'n Int. Op. No. 70/115, 2 Cal. Corp. Comm'n Official Op., 1970 Cal. Sec. LEXIS 70 (Sept. 10, 1970). The California Commissioner also did not apply that state's statute to a group of California residents who travelled to Delaware to form a corporation and then had the original issue of corporate stock physically delivered to them. The Commissioner held that California law did not attach since only very limited planning had taken place in California. JOSEPH C. LONG, BLUE SKY LAW § 4:3 (Dec. 2019 Update). The court in *Miles v. Lawrence* ruled that the Texas Securities Act did not apply where "Plaintiffs merely ask the Court to assume that, because [the company offering the securities] is based in Texas, [its managing broker-dealer] must have engaged in some activity in the state." Nos. 10-CV-34, 10-CV-104, 10-CV-120, 2011 WL 13086566, at *27 (D. Wyo. April 15, 2011).

Likewise, in *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), the Delaware court ruled that a company was not subject to that state's security law merely because it was incorporated in that state. In order for the state law to apply, the court found that there must be more facts than just that to tie the transaction to the state.

ii. The plaintiffs' factual allegations

The plaintiffs ask the court to infer that because Harris and Felton are citizens of Georgia,[3] the offer to purchase must have originated in Georgia [Doc. No. 38 at 5]. However, the plaintiffs must allege enough facts to allow for plausible inferences of liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint should contain well-pleaded facts that permit the court "to infer more than the mere possibility . . . 'that the pleader is entitled to relief.'" *Id.*, *quoting* F.R.Civ.P. 8(a)(2). The Supreme Court explained:

> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a

[3] As is FLiK's "advisor" Tony Gallippi [Doc. No. 30 at 8, Amend. Compl. ¶ 47]. Gallippi is not a defendant in this action and the plaintiffs do not allege that he performed any specific actions related to the offer and sale of FLiK tokens. Co-defendant Kevin Hart is a citizen of California. [Doc. No. 30 at 9, Amend. Compl. ¶ 50].

> court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

"State securities laws . . . specifically define key elements such as buy, sell, offer and acceptance and thereby direct determinations of whether a securities transaction took place within the state. This helps ensure that a satisfactory nexus exists with the state whose law is sought to be invoked." *Barneby v. E.F. Hutton & Co.*, 715 F.Supp. 1512, 1535 (M.D. Fla. 1989) (citing *Klawans, et al. v. E.F. Hutton & Co., Inc., et al.,* No. IP 83-680-C (S.D. Ind. 1987). "If upon application of the facts a transaction is found to be covered by the statutory scheme developed by those states, then the penalties imposed by those statutes can be applied." *Lintz v. Carey Manor Ltd.*, 613 F.Supp. 543, 551 (W.D. Va. 1985).

Harris relies on *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), *supra*, which the plaintiffs believe is inapposite here because "in

Singer, the plaintiffs asked the court to infer that an offer or acceptance of a pre-merger buyout of minority stakeholders occurred within Delaware merely because the corporation was incorporated in that State and the merger vote was taken in Delaware" [Doc. No. 38 at 5]. They then expound that "[u]nlike the facts in *Singer*, in this case all major players . . . reside in Georgia" [*Id.*]. They assert that they "are entitled to the benefit of any reasonable inference that can be drawn from the factual averments, including that the FLiK token offer originated in the state where all owners and the cryptocurrency advisor resided." [*Id.* at 6]. The court does not see the distinction here between the instant case and cases such as *Singer* and *Miles v. Lawrence*, 2011 WL 13086566 (D. Wyo. April 15, 2011), *supra*. In those cases, the plaintiffs asked the court to infer that simply because a company was located or incorporated in the state that it must have engaged in activity in the state. In the instant action, the connection to the state of Georgia is even less tenuous. The plaintiffs have offered no case law to support their proposition, and the court is persuaded by the case law cited above.

A review of the facts show the following activity regarding the sale of FLiK tokens. The plaintiffs allege that "[a]t some time in mid-

2017, Felton created FLiKIO, an offshore entity whose actual name and location are unknown and have been maintained under strict secrecy by Felton" [Doc. No. 30 at 16, Amend. Compl. ¶ 73]. Clearly then, the company is not physically located within the boundaries of the state of Georgia. None of the plaintiffs reside in Georgia or allege that they have travelled to Georgia, therefore the acceptances were executed outside of Georgia. The plaintiffs allege that all of the communications they viewed regarding the FLiK tokens were online. Most of this internet communication was via Facebook, Twitter, and Instagram. Even if these Facebook, Twitter, and Instagram messages were posted from Georgia, under GUSA they are not considered as having originated in Georgia. O.C.G.A. § 10-5-79(d)(2). The plaintiffs have provided no allegations concerning the state in which www.theflik.io, the website that published the whitepaper, is registered. There are no allegations that the offer to purchase the tokens was made telephonically or via mail by way of the state of Georgia. The plaintiffs have not alleged that any funds were sent to or from any financial institutions or accounts located in Georgia. Further, they have not alleged that any of the electronic communication they include in the amended complaint originated in the state of Georgia. Nor have they

alleged that any online advertisement soliciting the purchase of FLiK tokens was published in Georgia or seen by any of the plaintiffs while he or she was in Georgia. They ask the court to infer that the offer came from Georgia, however, although Harris may be a resident of Georgia, he is a musician and actor who tours across the nation and works for extensive periods of time in locations outside of Georgia. In fact, the plaintiffs in this case experienced difficulty serving him because he had "been residing in South Africa filming a movie" [Doc. No. 23 at 1].[4] The court also notes that one of the co-defendants is a citizen of California. Based on the statute and case law cited above, it is clear to the court that the facts alleged by the plaintiffs are insufficient to support their contention that Harris violated O.C.G.A. § 10-5-20. *See State v. Lundberg*, 445 P.3d 1113, 1120 (Kan. 2019) (holding that the Kansas Uniform Securities Act did not apply where the defendants employed intermediaries residing in California to make sales presentations in California and sell securities from California to

[4] The plaintiffs then sought leave of court to serve Harris by alternative methods, and the court granted them leave to serve him by publication [Doc. 29]. "A court may take judicial notice of its own records and the records of inferior courts." *United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987).

individuals who were not residents of Kansas "only because the entity purportedly benefiting from the security issuance was organized under Kansas law and has a place of business in Kansas when no act in connection with the sale or offer occurred in Kansas").

For the reasons stated above, Count I against Harris is dismissed.

B. Count III – Negligent Misrepresentation

The plaintiffs allege that Harris has violated O.C.G.A. § 10-5-50 by breaching his "legal duty to provide accurate information to each Plaintiff as prospective purchasers of investments in FLiK by omitting material facts, and such material facts were necessary to make the statements made, in light of the circumstances under which they were made, not misleading" [Doc. No. 30 at 33, Amend. Compl. ¶ 131]. This statute makes it "unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

> (1) To employ a device, scheme, or artifice to defraud;
>
> (2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or
>
> (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

O.C.G.A. § 10-5-50. This statute "requires a showing of intent to defraud." *Sims v. Natural Products of Georgia, LLC*, 785 S.E.2d 659, 663 (Ga. Ct. App. 2016). *See also Branan v. State,* 647 S.E.2d 610 (Ga. Ct. App. 2007) (decided under previous code section).

"The elements of common law fraud and negligent misrepresentation under Georgia law are essentially the same as the elements of a 10b-5 claim, except for the level of scienter required to prove negligent misrepresentation." *Damian v. Montgomery County Bankshares, Inc.*, 255 F.Supp.3d 1265, 1284 (N.D.Ga. 2015). In order to prevail on a cause of action under § 10(b) or Rule 10b-5,[5] a plaintiff must "prove (1) a misstatement or omission (2) of a material fact (3) made with scienter (4) upon which the plaintiff relied (5) that proximately caused the plaintiff's' loss." *Gochnauer v. A.G. Edwards & Sons, Inc.,* 810 F.2d 1042, 1046 (11th Cir. 1987).[6] The reliance must be

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[5] Under § 10(b) of the Securities Exchange Act of 1934, it is unlawful to "use or employ, in connection with the purchase or sale of any security" a "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5 provides a scope for this statute, using language almost identical to the language in O.C.G.A. § 10-5-50.

[6] The language in O.C.G.A. § 10-5-50 is almost identical to that of the analogous Florida security law, § 517.301 of the Florida Securities and Investor Protection Act (in all three versions of the Act). The Eleventh Circuit has found that the elements of the cause of action under this Florida law are the same as those in Rule 10b-5, with the exception that the Florida law allows for the element of scienter to be satisfied by a showing of mere

reasonable and such that the plaintiff could not have uncovered the truth behind the misrepresentation by exercising reasonable diligence. *Id*. at 1047. "Justified reliance is an essential element of any fraud claim." *Keogler v. Krasnoff*, 601 S.E. 2d 788, 792 (Ga. Ct. App. 2004) (quoting *William Goldberg & Co., Inc. v. Cohen*, 466 S.E.2d 872, 881 (Ga. Ct. App. 1995)). "The plaintiff must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on the misrepresentations." *Holmes v. Grubman*, 691 S.E.2d 196, 199 (Ga. Ct. App. 2010) (internal quotations omitted). "Such distinction reinforces the reliance requirement by separating plaintiffs who actually and justifiably relied upon the misrepresentations from the general investing public, who, though they did not so rely, suffered the loss due to the decline in share value. This distinction also separates common law fraud claims, which must prove actual reliance, from federal securities fraud claims, which may rely upon the fraud-on-the-market theory." *Id*. Because the plaintiffs have failed to plead reasonable reliance, Count III must be dismissed. *Tri-State Consumer Ins. Co., Inc. v. LexisNexis Risk Solutions Inc.*, 823 F.Supp.2d

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negligence. *Grippo v. Perazzo*, 357 F.3d 1218, 1222 (11th Cir. 2004). The Georgia Court of Appeals has found that "scienter is required to sustain an action for securities fraud." *Keogler v. Krasnoff*, 601 S.E. 2d 788, 791-92 (Ga. Ct. App. 2004).

1306, 1320 (N.D. Ga. 2011); *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, 479 S.E.2d 727, 729 (Ga. 1997).

Further, in *Holmes*, the Georgia Supreme Court stated that a negligent misrepresentation claim is viable only when a plaintiff can allege and prove direct communication with a defendant and specific reliance on that defendant's communication. 691 S.E.2d at 200. Here, the plaintiffs do not allege any direct communication with any defendant. The plaintiffs have also failed to plead that any of them relied on the statements in paragraphs 76-104 of the Amended Complaint. As the defendant notes, they fail to even allege specifically that they saw them [Doc. No. 36-1 at 8-9].

Harris also argues that the plaintiffs do not plead this claim with the specificity required by Federal Rule of Civil Procedure 9 [Doc. No. 36-1 at 20-24]. This rule requires that "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "[T]o survive a motion to dismiss, allegations of securities fraud must satisfy the requirements of" this rule. *In re World Access, Inc. Sec. Litig.*, 119 F.Supp.2d 1348, 1353 (N.D. Ga. 2000). "To provide a sufficient level of factual support for a claim of securities fraud, a plaintiff must plead the circumstances of fraud in detail, including "[t]he who, what, when, where, and how." *Id*. This is true also for claims of negligent misrepresentation. *Smith v. Ocwen*

Financial, 488 F. App'x 426, 428 (11th Cir. 2012). "Allegations that are wholly conclusory in nature will not suffice in a securities action." *Currie v. Cayman Res. Corp.*, 595 F. Supp. 1364, 1371 (N.D. Ga. 1984).

The plaintiffs respond that they did plead the claim with specificity, referring the court to paragraphs 76-104 of the Amended Complaint [Doc. No. 38 at 14-15]. However, only two of these paragraphs concern Harris:

> 90. On August 30, 2017, T.I. encouraged his more than 8 million followers on Twitter to "Check out my new #ICO @TheFLiKIO it's about to change #Hollywood!!! #Crowdsale #Blockchain."
> [Doc. No. 30 at 21, Amend. Compl. ¶ 90].
>
> 93. October 15, 2017, T.I. posted a picture of him via Twitter meeting with Mark Cuban.
> [Id. at 22, Amend. Compl. ¶ 93].

The other paragraphs concern the actions of FLiK, Felton, or Hart. The plaintiffs argue that since Harris was a co-owner of FLiK, "it is reasonable to infer that he was aware of the representations made about FLiK, particularly on FLiK's own Facebook page and Twitter feed and even more particularly with respect to those misrepresentations that referenced him specifically." [Doc. No. 38 at 16]. However, "when a plaintiff claims fraud by several defendants, the complaint should contain specific allegations with respect to each defendant; generalized allegations lumping multiple defendants together are insufficient." *Space Coast Credit Union v. Merrill Lynch, Pierce,*

Fenner & Smith Inc., 295 F.R.D. 540, 544 (S.D. Fla. 2013)) (internal quotation marks omitted).

When the fraud alleged concerns securities transaction, the plaintiff is required under Rule 9 to include the "time, place, and content of the misrepresentations, the facts misrepresented, and the nature of the detrimental reliance." *Currie*, 595 F. Supp. at 1371 (quoting *Elster v. Alexander*, 75 F.R.D. 458, 461 (N.D.Ga. 1977)). There is no presumption of reliance available to the plaintiffs, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 722 (11th Cir. 1987) (holding that the "presumption of reliance does not apply" to §10(b) Rule 10b-5), and as noted above, the plaintiffs have not alleged any reliance. The plaintiffs have merely alleged that Harris encouraged his Twitter followers to visit the website for the FLiK ICO. They have not provided any statements from Harris about the value of the FLiK tokens. The facts as pleaded do not rise to the level of particularity required by Rule 9. *See Curry v. Ameritrade, Inc.*, 2015 WL 11251449, at *22 (N.D. Ga. 2015) (finding that the plaintiffs' 98-page complaint did not plead facts as to the underlying securities violation with the specificity required by Rule 9 because the plaintiffs failed to "provide sufficient details regarding the securities transactions which were allegedly fraudulent").

For the reasons stated above, Count III against Harris is dismissed.

C. Count IV – Unjust Enrichment

The plaintiffs have also asserted a claim for unjust enrichment, alleging that Harris "received fees and commissions from the sale of investments to Plaintiffs" [Doc. No. 30 at 35, Amend. Compl. ¶ 138]. Harris argues that the plaintiffs cannot allege unjust enrichment because they have not alleged a contract claim [Doc. No. 36-1 at 24]. "Although a plaintiff may allege a breach of contract and unjust enrichment claim in the alternative, there is no requirement that it do so, as it can only recover under one of those theories. An unjust enrichment claim is improper only where the existence of a valid contract between the parties is undisputed." *Delta Air Lines, Inc. v. Wunder*, No. 1:13-CV-3388-MHC, 2015 WL 11347586, at *16 (N.D.Ga. Dec. 28, 2015). While unjust enrichment is often pleaded as an alternative theory if a contract claim fails, it can also be pleaded as here, when no contract claim is pleaded. In fact, when a contract exists, a plaintiff cannot recover under unjust enrichment. *Davidson v. Maraj*, 609 F.App'x 994, 997 (11th Cir. 2015). "Unjust enrichment applies when as a matter of fact there is no legal contract, but when the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for." *Engram v. Engram*, 463 S.E.2d 12, 15 (Ga. 1995) (citations and punctuation omitted).

"The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received." *Reidling v. Holcomb*, 483 S.E.2d 624, 626 (Ga. Ct. App. 1997). Under Georgia law, a plaintiff must assert several factors in order to successfully state a claim for unjust enrichment. Specifically, the plaintiff "must assert that (1) the defendant induced or encouraged the plaintiff to provide something of value to the defendant; (2) the plaintiff provided a benefit to the defendant with the expectation that the defendant would be responsible for the cost thereof; and, (3) the defendant knew of the benefit being bestowed upon it by the plaintiff and either affirmatively chose to accept the benefit or failed to reject it." *Crystal Steel Fabricators, Inc. v. AMEC Foster Wheeler Programs, Inc.*, 349 F. Supp. 3d 1364, 1376 (N.D. Ga. 2017). "A district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of the securities laws." *Hays v. Adams*, 512 F.Supp.2d 1330, 1342. *See also SEC v. First Pacific Bancorp,* 142 F.3d 1186, 1191–92 (9th Cir. 1998); *SEC v. Fischbach Corp.,* 133 F.3d 170, 175 (2d Cir. 1997). "Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *First Pacific,* 142 F.3d at 1191.

The plaintiffs' claim for unjust enrichment is directly related to their other claims, including the claim for negligent misrepresentation. Accordingly, it too must satisfy Rule 9(b). *United States ex rel. Citizens United to Reduce & Block Fed. Fraud, Inc. v. Metro. Med. Ctr.,* No. 89–0592–CIV, 1990 WL 10519617, at *3 (S.D. Fla. Jan. 11, 1990) (holding that unjust-enrichment claim based on "fraudulent taking of money . . . must satisfy Rule 9(b)"). *See also Space Coast Credit Union v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 295 F.R.D. 540, at *545 (S.D. Fla. March 18, 2013) ("All of the claims for relief—even those that do not require proof of fraudulent intent—are based on alleged fraudulent representations and omissions . . . Therefore, Rule 9(b) and the policies supporting it require [plaintiff] to plead these claimed fraudulent acts with particularity."); *United States v. Gericare Med. Supply Inc.*, 2000 WL 33156443, at *10 (S.D. Ala. Dec. 11, 2000) ("It appears to be the rule that a claim for unjust enrichment is subject to Rule 9(b) only if it is 'premised on fraud.'").

The plaintiffs have not pleaded their claim for unjust enrichment with particularity. They merely "repeat and reallege the allegations contained in Paragraphs 1 through 118 of the Complaint" [Doc. No. 30 at 35, Amend. Compl. ¶ 137], and the court has already found that those paragraphs do not meet the particularity requirements of Rule 9(b). Further, the court having

dismissed the underlying securities law violation and negligent misrepresentation claims, it must also dismiss the plaintiffs' claim for unjust enrichment. Because the plaintiffs have not alleged facts to support their contention that Harris violated GUSA or engaged in negligent misrepresentations, they have also not alleged facts sufficient to support their claim that he obtained ill-gotten gains as a result of a securities law violation. "[E]quitable relief is improper if the complainant has a remedy at law which is 'adequate,' i.e., 'as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.'" *Sherrer v. Hale,* 285 S.E.2d 714, 718 (Ga. 1982). The unjust enrichment claim seeks recovery for the exact same conduct as in the plaintiffs' other claims. "[A]lthough Plaintiff may be entitled to plead in the alternative, that is not what Plaintiff has done in this case. Plaintiff's unjust enrichment claim relies on the factual predicate common to all its claims." *Weaver v. Mateer & Harbert, P.A.,* No. 5:09–cv–514–Oc–34TBS, 2012 WL 3065362 at *11 (M.D.Fla. July 27, 2012). *See also Guerrero v. Target Corp*., 889 F.Supp.2d 1348, 1356 (S.D. Fla. 2012) (holding that the plaintiff's claim for unjust enrichment must be dismissed where the plaintiff could not prevail on her Florida Deceptive and Unfair Trade Practices Act claim).

For the reasons stated above, Count IV against Harris is dismissed.

D. Count V – Punitive Damages

The plaintiffs seek punitive damages because "the conduct of Defendants . . . showed willful misconduct, malice, fraud, wantonness, oppression or entire want of care which would raise the presumption of conscious indifference to consequences" [Doc. No. 30 at 36, Amend. Compl. ¶ 141]. Harris argues that this claim does not stand independently from the other claims in the case [Doc. No. 36-1 at 25]. The plaintiffs do not disagree [Doc. No. 38 at 19]. It is the law in Georgia that "[a] claim for punitive damages cannot stand alone." *Thysis, Inc. v. Chemron Corp*., No. 1:08-cv-03879-SCJ, 2011 WL 13162410, at *5 (N.D. Ga. August 25, 2011). The court having dismissed the plaintiffs' other claims, it must also therefore dismiss their punitive damages claim. *See Curry v. TD Ameritrade, Inc.*, No. 1:14-cv-1361-LMM, 2015 WL 11251449, at *15 (N.D. Ga. June 30, 2015).

For the reasons stated above, Count V against Harris is dismissed.

IV. Leave to Amend the Complaint

The plaintiffs have requested leave to amend their complaint [Doc. No. 38 at 19, note 3]. Courts are instructed to "freely give leave [to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2); *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014). Granting such leave is purely within the court's discretion, however, "[i]n the absence of any apparent or

declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment . . . leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The court notes that it has already granted the plaintiffs such leave before, following adjudication of co-defendant Felton's motion to dismiss the original complaint [Doc. No. 19]. That amended complaint added plaintiffs, an additional defendant, and additional counts. Harris opposes any further amendments [Doc. No. 45 at 15]. In his motion to dismiss, Harris characterizes Counts IV and V of the plaintiffs' amended complaint as "shotgun-style" counts [Doc. No. 36-1 at 24, 25]. The court does not agree with this assessment. The Eleventh Circuit has described four categories of shotgun pleadings: (1) "a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint," (2) "a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any

particular cause of action," (3) "one that commits the sin of not separating into a different count each cause of action or claim for relief," and (4) "the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Weiland v. Palm Beach County Sheriff's* Office, 792 F.3d 1313, 1321-23 (11th Cir. 2015) (citing cases). However, the Eleventh Circuit in *Weiland* specifically found that a complaint was not a shotgun pleading when it re-alleged only a specific range of certain paragraphs at the beginning of each count and did not roll the allegations of each count into each successive count. *Id.* at 1324. The plaintiffs' amended complaint likewise re-alleges only the allegations in Paragraphs 1-118 at the beginning of each count. As the court in *Weiland* stated, "this is not a situation where a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Id.* at 1324.

However, the court must also consider factors such as "undue delay, undue prejudice to the defendants, and futility of the amendment" in determining whether or not to grant the plaintiffs leave to amend. *Carruthers v. BSA Advertising, Inc.*, 357 F.3d 1213, 1218 (11th Cir. 2004) (citation and internal punctuation omitted). The case was filed in November

2018. The co-defendants have filed their respective answers to the amended complaint and the eight-month discovery period is already well underway. The court finds that allowing the plaintiffs a second chance to amend their complaint at this late stage of the proceedings would cause undue delay. Therefore, the plaintiffs' request for leave to amend the complaint for a second time is DENIED.

V. Conclusion

For the reasons stated above, the court GRANTS Harris's motion to dismiss [Doc. No. 36]. The clerk is DIRECTED to terminate Harris as a defendant in this action. The remaining parties are DIRECTED to continue with discovery.

SO ORDERED this 28th day of February, 2020.

/s/CHARLES A. PANNELL, JR.
CHARLES A. PANNELL, JR.
United States District Judge