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8 **UNITED STATES BANKRUPTCY COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 **In re**

11 **MORTGAGES LTD.**

12 **EIN: 86-0196199**

Debtor.

13 **VICTIMS RECOVERY, LLC, an Arizona**
14 **limited liability company,**

Plaintiff,

15 **v.**

16 **GREENBERG TRAUIG, LLP, a New York**
17 **limited liability partnership; MAYER**
18 **HOFFMAN McCANN, P.C. a Missouri**
19 **professional corporation; CBIZ, INC. (fka**
20 **Century Business Services, Inc.), a Delaware**
21 **corporation; CBIZ MHM, LLC (fka CBIZ**
22 **Accounting, Tax & Advisory Services, LLC),**
23 **a Delaware limited liability company;**
24 **ROBERT S. KANT and ELLEN P. KANT,**
25 **husband and wife, individually and as Trustees**
26 **of the Kant Revocable Trust; JEFFREY H.**
27 **VERBIN and JAQUELINE R. VERBIN,**
husband and wife; CHARLES A. McLANE
AND EILEEN M. McLANE, husband and wife;
JOEL B. KRAMER and DONNA L.
KRAMER, husband and wife; MICHAEL M.
DENNING and DONNA J. DENNING,
husband and wife; CHRISTOPHER J. OLSON
and RACHEL L. SCHWARTZ-OLSON,
husband and wife; JEFFREY A. NEWMAN
and KATHLEEN N. NEWMAN, husband and
wife,

Defendants.

Chapter 11

Case No. 2:08-bk-07465-RJH

Adversary No. 2:10-ap-01214-RJH

MICHAEL M. DENNING AND
DONNA J. DENNINGS' MOTION
TO DISMISS

1 Defendants Michael M. Denning and Donna J. Denning ("Denning") file their
2 Motion to Dismiss, which is supported by the following Memorandum of Points and
3 Authorities.

4 MEMORANDUM OF POINTS AND AUTHORITIES

5 INTRODUCTION

6
7 Fed.R.Civ.P. 9(b)'s pleading requirements are unambiguous: "In all averments of
8 fraud or mistake, the circumstances constituting fraud or mistake shall be stated with
9 particularity." Count One of Plaintiff's Complaint consists of common law and statutory
10 fraud claims. Count Six is a civil conspiracy claim grounded in fraud. Plaintiff must
11 satisfy Fed.R.Civ.P. 9(b) and it has failed to do so. Dismissal is appropriate because
12 Plaintiff: (A) has failed to state a claim for common law and statutory fraud, and the
13 statutory fraud claims are inapplicable or barred; and (B) has failed to state a claim for civil
14 conspiracy. Counts One and Six should be dismissed.

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16
17 Plaintiff's claim for negligent misrepresentation (Count Two) also should be
18 dismissed for failure to state a claim. Inherent in any claim for negligent misrepresentation
19 is the requirement that a defendant supply false information. Plaintiff fails to identify any
20 specific false representation or information made by Mr. Denning to any member of
21 Plaintiff in connection with a commercial transaction. All required elements have not been
22 adequately alleged.

23
24 Plaintiff's aiding and abetting claims—Counts Three through Five—also contain
25 pleading deficiencies. The Complaint does not adequately allege the required knowledge
26 or substantial assistance elements. Therefore, Plaintiff's aiding and abetting claims should
27

1 be dismissed under Fed.R.Civ.P. 12(b)(6). Mr. and Mrs. Denning's arguments in support
2 of dismissal are discussed below.

3 **ARGUMENT**

4 **1. Plaintiff Fails to Plead Fraud Claims with Specificity.**

5 Plaintiff must distinguish among those it sues and "enlighten each defendant as to
6 his or her part in the alleged fraud."¹ Plaintiff cannot merely offer conclusory allegations
7 that a defendant's conduct is fraudulent.² Instead, Rule 9(b) will only be satisfied when the
8 Plaintiff's Complaint, "state[s] the time, place, and nature of the misleading statements,
9 misrepresentations and specific acts of fraud."³ All "[a]verments of fraud must be
10 accompanied by 'the who, what, when, where, and how' of the misconduct charged."⁴

11 Plaintiff has failed to enlighten Mr. Denning regarding his part in the alleged fraud.
12 Mr. Denning repeatedly is lumped together with various other Defendants in purported
13 schemes of fraud and conspiracy.⁵ Plaintiff's Complaint fails in such a way that a reader
14 cannot determine: (a) who, specifically, made a false statement or representation; (b) when
15 the purportedly false statements were made; (c) where the statements were made; (d) to
16 what individual or entity were alleged misstatements made; or, (e) the circumstances
17 surrounding material omissions.

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24 ¹ *Bruns v. Ledbetter*, 583 F.Supp. 1050, 1052 (S.D.Cal. 1984).

25 ² *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

26 ³ *In re Gupta Corp. Sec. Litig.*, 900 F.Supp. 1217, 1228 (N.D.Cal. 1994).

27 ⁴ *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)(quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).

⁵ *Id.*

1 A complaint is deficient for the purposes of Rule 9(b) when it relies on “shotgun” or
2 “puzzle” pleading.⁶ “Shotgun pleadings are those that incorporate every antecedent
3 allegation by reference into each subsequent claim for relief or affirmative defense.”⁷
4 Similarly, “puzzle pleadings are those that require the defendant and the court to ‘match the
5 statements up with the reasons they are false or misleading.’”⁸ District courts have
6 frowned on this pleading strategy.⁹

7
8 Plaintiff’s Complaint is 40 pages and is comprised of 135 paragraphs. Counts One
9 and Six incorporate by reference all “preceding paragraphs,” and then summarily and
10 respectively declare Mr. Denning has committed fraud or civil conspiracy.¹⁰ Mr. Denning

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13 ⁶ *In re Metropolitan Sec. Litig.*, 532 F.Supp.2d 1260, 1279 (E.D.Wash. 2007)(citing *In re*
14 *GlenFed*, 42 F.3d 1541, 1554 (9th Cir. 1994)(*en banc*)(superseded on other grounds)).

15 ⁷ *See Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279-80 (11th Cir. 2006); *see*
16 *also SEC v. Solow*, No. 06-81041CIV, 2007 WL 917269 at *3 (S.D.Fl. Mar. 23,
17 2007)(noting “[t]here was no effort by Plaintiff to state with particularity which specific
18 allegations apply to which specific count, thereby impeding Defendant’s ability to discern
19 the exact nature of the complaint against him.”).

20 ⁸ *In re Autodesk, Inc. Sec. Litig.*, 132 F.Supp.2d 833, 842 (N.D.Cal. 2000)(dismissing
21 complaint in part because of puzzle pleading); *see also Wagner*, 464 F.3d at 1280 (holding
22 a complaint failed to satisfy 9(b) because “the factual particularity of the first 175
23 paragraphs is not connected to the otherwise generally pled claim in any meaningful
24 way.”); *In re PetSmart, Inc. Sec. Litig.*, 61 F.Supp.2d 982, 991 (D.Ariz. 1999)(“The court
25 should not have to play connect-the-dots in order to identify the facts and trends upon
26 which plaintiffs base their claim.”).

27 ⁹ *SEC v. Mercury Interactive*, No. C07-2822JF, 2008 WL 454443 at *8 (N.D.Cal. Sept. 30,
2008)(granting motion to dismiss and noting this pleading style makes it “difficult to
discern which filings form the bases for each claim”); *see also Teamsters Local 617*
Pension & Welfare Funds v. Apollo Group, Inc., 633 F.Supp.2d 763, 783-84 (indicating a
complaint the relies on shotgun or puzzle pleading does not meet Rule 9(b)’s particularity
requirement); *Defazio v. Hollister, Inc.*, 2008 WL 958185 at *3 n. 3 (E.D.Cal. Apr. 8,
2008)(citing cases); *Chan v. Orthologic Corp.*, No. Civ 96-1514 PHX, 1998 WL 1018624,
at *14 n. 11 (D.Ariz. Feb. 5, 1998).

¹⁰ Complaint at pp. 33-34, and 39-40.

1 is being forced to guess which of the first 99 paragraphs supports each element of the
2 claims asserted against him. Further, Mr. Denning is forced to guess what conduct alleged
3 in the first 99 paragraphs *Plaintiff* may use as the basis of each claim against him. Plaintiff
4 has not complied with Rule 9(b); Counts One and Six should be dismissed under Rule
5 12(b)(6).
6

7 Courts also have recognized the utility of Fed.R.Civ.P. 12(e). In *Wagner*¹¹ the
8 Eleventh Circuit upheld the district court's "proper conclusions that the complaint was a
9 shotgun pleading and that plaintiffs' failed to connect their causes of action to the facts
10 alleged," and determined the proper remedy was to order repleading under Fed.R.Civ.P.
11 12(e) to clarify fraud based claims and obtain the required degree of factual particularity.¹²
12 A defendant faced with a complaint like Plaintiff's Complaint is not expected to frame a
13 responsive pleading, rather the defendant "is expected to move the court, pursuant to Rule
14 12(e), to require the plaintiff to file a more definite statement."¹³
15
16

17 **A. Plaintiff Fails to State a Claim for Common Law Fraud and the**
18 **Statutory Fraud Claims are Inapplicable or Barred.**

19 Plaintiff contends Mr. Denning committed common law fraud. Under Arizona law,
20 Plaintiff must allege and ultimately establish the following elements: (1) a representation;
21 (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of
22 its truth; (5) the speaker's intent that the representation be acted upon by the person and in
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25 ¹¹ *Wagner*, 464 F.3d at 1280,

26 ¹² *See also Cates v. Int'l Tel. & Tel. Corp.*, 756 F.2d 1161, 1180 (5th Cir. 1985).

27 ¹³ *See Anderson v. District Board of Trustees of Central Florida Community College*, 77
F.3d 364, 366 (11th Cir. 1996).

1 a manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's
2 reliance on its truth; (8) a right to rely thereon; and (9) consequent and proximate injury
3 and damages.¹⁴

4 There is no specific allegation in the Complaint that Mr. Denning ever offered or
5 sold any member of Plaintiff any form of investment. Plaintiff never specifically alleges
6 Mr. Denning, as a speaker of a purported false representation, intended a representation be
7 acted upon by Plaintiff in a manner reasonably contemplated or that any statement by
8 Mr. Denning was material. Plaintiff has failed to state a claim for common law fraud.
9

10 Plaintiff also contends Mr. Denning committed statutory consumer fraud in
11 violation of A.R.S. §§ 44-1521 and 44-1522. The elements for a private cause of action
12 under the Arizona Consumer Fraud Act are a false promise or misrepresentation made in
13 connection with the sale or advertisement of merchandise, and the hearer's consequent and
14 proximate injury, regardless of the reasonableness of the consumer's reliance on the
15 misrepresentation.¹⁵ Mr. Denning is not specifically alleged to have ever made a promise
16 or representation to any of Plaintiff's individual members. Plaintiff does not allege it has
17 been injured by a promise or representation spoken by Mr. Denning in connection with the
18 sale or advertisement of merchandise.
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26 ¹⁴ *Wagner v. Casteel*, 136 Ariz. 29, 31 (App. 1983).

27 ¹⁵ *Holeman v. Neils*, 803 F.Supp. 237 (D.Ariz. 1992).

Claims under the Arizona Consumer Fraud Act are subject to a one-year statute of limitation.¹⁶ Plaintiff fails to allege the date(s) any of its members invested. But Plaintiff does allege: (1) “[b]y mid-2007 MLtd [Mortgages Limited] stopped writing new loans; and (2) none of the VR Investors accepted the alleged mid-2007 offer to transfer their RevOp investments into other loan programs.¹⁷ Even assuming Plaintiff’s members made investments in mid-2007, the deadline to file a claim under the Arizona Consumer Fraud Act would have expired in mid-2008. Plaintiff did not commence this litigation until June 1, 2010. Thus, the claim is barred.¹⁸

B. Plaintiff Fails to State a Claim for Civil Conspiracy.

“For a civil conspiracy to occur two or more people must agree to accomplish an unlawful purpose or to accomplish a lawful object by unlawful means, causing damages.”¹⁹ A claim for civil conspiracy “must include an actual agreement,” and be proven by clear and convincing evidence.²⁰ A mere agreement to do wrong is not enough. Liability

¹⁶ *Murry v. Western American Mortg. Co.*, 124 Ariz. 387, 390, 604 P.2d 651, 654 (App. 1979)(noting that since the Consumer Fraud Act creates a cause of action separate from common law fraud, an action commenced thereunder must be brought within one year as required by A.R.S. § 12-541(3)).

¹⁷ Complaint at pp. 13-14.

¹⁸ A.R.S. § 12-2310 is a criminal statute, not a civil statute. Plaintiff cannot rely on A.R.S. § 12-2310 as basis to recover damages for statutory fraud.

¹⁹ *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 498-99, 38 P.3d 12, 36-37 (2002)(quoting *Baker Rowland v. Union Hills Country Club*, 197 Ariz. 535, 542, 5 P.3d 249, 256 (App. 2000)(additional citations omitted).

²⁰ *Id.*

1 requires that two or more individuals agree and thereupon accomplish an underlying tort
2 which the alleged conspirators agreed to commit.²¹

3 Mr. Denning is alleged to be part of a civil conspiracy to commit fraud. However,
4 Plaintiff: (1) fails to specifically identify which individual(s) Mr. Denning conspired with;
5 (2) does not specifically identify the unlawful purpose of any such agreement; and (3)
6 never alleges Mr. Denning engaged in specific acts to accomplish the underlying and
7 unidentified tort with the unidentified co-conspirators. Plaintiff fails to state a civil
8 conspiracy claim.
9

10
11 **2. Plaintiff Fails to State a Claim for Negligent Misrepresentation.**

12 Plaintiff alleges a negligent misrepresentation in Count Two of the Complaint.²²

13 Under Arizona law, a person is liable for negligent misrepresentation where he:

14 In the course of his business, profession or employment, or in any
15 other transaction in which he has a pecuniary interest, *supplies false*
16 *information for the guidance of others in their business*
17 *transactions*, is subject to liability for pecuniary loss caused to them
18 by their justifiable reliance upon the information, *if he fails to*
19 *exercise reasonable care or competence in obtaining or*
20 *communicating the information.*²³

21 ²¹ *Id.*; see also *Baker v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, 542, 5 P.3d
24 249, 256 (App. 2000).

25 ²² Complaint at pp. 34-37.

26 ²³ *Mur-Ray Mgmt. Corp. v. Founders Title Co.*, 169 Ariz. 417, 422-23, 819 P.2d 1003,
27 1008-09 (App. 1991) (quoting Restatement (Second) of Torts § 552(1)). (Emphasis
supplied.)

1 “Liability for negligent misrepresentation is limited to information supplied in
2 connection with commercial transactions.”²⁴ Further, the provider of information only
3 owes a duty to exercise reasonable care when he is “aware of the intended use of the
4 information and then only if he intended to supply it for that purpose.”²⁵

5
6 A negligent misrepresentation claim requires the defendant supply false
7 information. Here, Plaintiff fails to identify any allegedly false information provided by
8 Mr. Denning to any of its members at any time. Similarly, Plaintiff fails to identify any
9 allegedly false information conveyed by Mr. Denning to Mr. Coles, Mortgages Limited,
10 Mortgages Limited Securities, with knowledge and intent that Plaintiff would receive and
11 rely on such information. Plaintiff has failed to state a claim for negligent
12 misrepresentation.
13

14 **3. Plaintiff Fails to State a Claim for Aiding and Abetting.**

15 Plaintiff alleges aiding and abetting claims in Counts Three, Four and Five.²⁶
16
17 Counts Three and Four allege Mr. Denning aided and abetted Mr. Coles’ and Mortgages
18 Limited’s breaches of contract and Mortgages Limited’s bad faith. With respect to the
19 aiding and abetting bad faith claim, Plaintiff alleges “MLtd breached its implied covenants
20 of fair dealing and good faith to the VR and LLJ Investors.”²⁷ Under Arizona law, the
21 breach of implied covenants of good faith and fair dealing are claims that arise out of
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25 ²⁴ *Id.* (citing *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 312-13,
742 P.2d 808, 813-14 (1987); Restatement § 552, cmt. a.

26 ²⁵ *Mur-Ray*, 169 Ariz. at 422-23, 819 P.2d at 1008-09.

27 ²⁶ Complaint at pp. 37-39.

²⁷ *Id.* at ¶ 124.

1 contract, not tort.²⁸ Count Five alleges Mr. Denning aided and abetted Mortgages
2 Limited's breaches of fiduciary duties.

3 **A. Counts Three and Four Do Not State a Claim for Relief.**

4 Counts Three and Four - aiding and abetting breach of contract and MLtd's breach
5 of the implied covenant of good faith and fair dealing - fail to state a claim for relief
6 because there is no viable cause of action for aiding and abetting a breach of contract.²⁹
7 Instead, as set forth below, aiding and abetting claims are limited to aiding and abetting
8 another's tortious acts.³⁰ These claims, therefore, must be dismissed.³¹

10 **B. The Complaint Does Not Contain All Required Elements for Aiding and**
11 **Abetting.**

12 Nonetheless, all of Plaintiff's aiding and abetting claims are subject to dismissal
13 because Plaintiff has not alleged Mr. Denning acted with the requisite scienter or that he
14 substantially assisted or encouraged the defendants to breach their duties.³² Arizona

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18 ²⁸ See, e.g., *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986) (Arizona
19 "law implies a covenant of good faith and fair dealing in every contract"); *Bike Fashion*
20 *Corp. v. Kramer*, 202 Ariz. 420, 423, ¶ 13, 46 P.3d 431, 434 (App. 2002) (same).

21 ²⁹ See *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 413 n.6 (7th Cir. 2000) (noting
22 court could not find, and was not provided with, any authority recognizing a cause of
23 action for aiding and abetting a breach of contract).

24 ³⁰ *Id.* (citing Restatement (Second) of Torts § 876, which sets forth a cause of action for
25 providing substantial assistance or encouragement to another's tortious acts; "Because
26 breach of contract is not a tortious act, § 876 does not support class counsel's aiding and
27 abetting claim.").

³¹ Cf. *JP Morgan Trust Co. Nat. Ass'n v. Mid-Am. Pipeline Co.*, 413 F. Supp. 2d 1244,
1268-69 (D. Kan. 2006) (dismissing civil conspiracy claim predicated on breach of
contract).

³² For purposes of this Motion only, Mr. Denning assumes that if an aiding and abetting
breach of contract cause of action exists, the elements of such a claim would be similar to
those for aiding and abetting tortious acts.

1 recognizes that a person who aids and abets a tortfeasor may be liable for the resulting
2 harm to a third party.³³ Claims of aiding and abetting require proof of the following
3 elements: (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff;
4 (2) the defendant must know that the primary tortfeasor's conduct constitutes a tort or
5 breach of duty; and (3) the defendant must substantially assist or encourage the primary
6 tortfeasor in the achievement of breach.³⁴ Mr. Denning does not concede the first element,
7 but Plaintiff irrefutably has failed to allege the second and third elements.
8

9 Aiding and abetting liability is based on proof of scienter.³⁵ The defendant must
10 know the conduct he or she is aiding and abetting is a tort.³⁶ While knowledge may be
11 inferred, such an inference "will not be made lightly."³⁷ Plaintiff alleges in conclusory
12 fashion that "GT, MHM and MLtd/MLS Defendants" intentionally "facilitated, enabled or
13 aided and abetted" Mortgages Limited's torts.³⁸ But there are no specific allegations
14 Mr. Denning knew the conduct he was aiding and abetting was a tort or breach of alleged
15 duty. Plaintiff also provides no allegations regarding how Mr. Denning substantially
16 assisted or encouraged Mortgages Limited in its alleged achievement of the tort or breach
17 of duty. The claims are deficient.
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24 ³³ *Wells Fargo*, 201 Ariz. at 485, 38 P.3d at 23; see also Restatement § 876(b).

25 ³⁴ *Id.*; see also *Frederico v. Maric*, 224 Ariz. 34, 226 P.3d 403 (App. 2010).

26 ³⁵ *Frederico*, 226 P.3d at 406.

27 ³⁶ *Id.*

³⁷ *Id.*

³⁸ Complaint at pp. 37-39.

1 **CONCLUSION**

2 Plaintiff seeks \$52,381,921.53 in damages. Rule 9(b) commands that Mr. Denning
3 be specifically advised of fraud-based allegations against him. Plaintiff has not done so.
4 Instead, Plaintiff engages in shotgun and puzzle-pleading. It lumps Mr. Denning with other
5 defendants in conclusory allegations of fraud. Plaintiff fails to state a claim for common
6 law fraud and statutory fraud, or for civil conspiracy. Therefore Plaintiff's Complaint fails
7 to satisfy Rule 9(b)'s pleading requirements and Counts One and Six should be dismissed
8 under Rule 12(b)(6). In the alternative, Mr. Denning moves this Court pursuant to Rule
9 12(e) for a more definite statement of the fraud-based claims against him.
10

11 Plaintiff also failed to plead all required elements of its negligent misrepresentation
12 and aiding and abetting claims. Counts Two, Three, Four, and Five are therefore subject to
13 dismissal under Rule 12(b)(6).
14

15 RESPECTFULLY SUBMITTED this 19th day of August, 2010.
16

17 ROSHKA DeWULF & PATTEN, PLC
18

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