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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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No. 68130-3-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

**FUTURESELECT PORTFOLIO MANAGEMENT, INC.,
FUTURESELECT PRIME ADVISOR II LLC, THE MERRIWELL
FUND, L.P. and TELESIS IIW, LLC**

Plaintiffs/Appellants,

v.

**TREMONT GROUP HOLDING, INC., TREMONT PARTNERS,
INC., OPPENHEIMER ACQUISITION CORPORATION,
MASSACHUSETTS MUTUAL LIFE INSURANCE CO., and ERNST
& YOUNG LLP**

Defendants/Respondents.

**RESPONDENTS MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY AND OPPENHEIMER
ACQUISITION CORP.'S JOINT RAP 10.8
STATEMENT OF ADDITIONAL AUTHORITIES**

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*Attorneys for Oppenheimer
Acquisition Corp.*

Respondents Massachusetts Mutual Life Insurance Company (“MassMutual”) and Oppenheimer Acquisition Corp. (“OAC”) hereby submit this Joint Statement of Additional Authorities pursuant to Rule 10.8 of the Washington Rules of Appellate Procedure to advise this Court of the June 8, 2012 decisions in *Agile Safety Variable Fund, L.P., et al. v. Tremont Group Holdings, Inc., et al.*, Case No. 10-2904 (Colo. St. Ct., Boulder Cty.) (the “Agile Opinions”), attached hereto as Exhibits A and B.

The Agile Opinions relate to MassMutual’s and OAC’s arguments that Appellants’ allegations fail to state a control person claim under the Washington statute. *See* Br. of Respondent MassMutual at 30-38; Br. of Respondent OAC at 31-38. The *Agile* plaintiffs asserted state control person claims against MassMutual and OAC under Colorado state securities law. The *Agile* court found that the *Agile* plaintiffs’ allegations failed to state a control person claim against MassMutual or OAC under Colorado securities law, and dismissed the Colorado state control person claims against MassMutual and OAC. *See* Ex. A at 8, Ex. B at 6.

RESPECTFULLY SUBMITTED this 29th day of June, 2012.

**SCHWABE, WILLIAMSON &
WYATT, P.C.**

By: Chris H. Howard

*per telephone
authorization*
Of Counsel: *6/29/2012*

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CERTIFICATE OF SERVICE

SHERRI WYATT certifies and states: On June 29, 2012, I caused to be served a true and correct copy of the following document on the following counsel of record at their address as stated by the method of service indicated.

RESPONDENTS MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY AND OPPENHEIMER ACQUISITION CORP.'S JOINT RAP 10.8 STATEMENT OF ADDITIONAL AUTHORITIES

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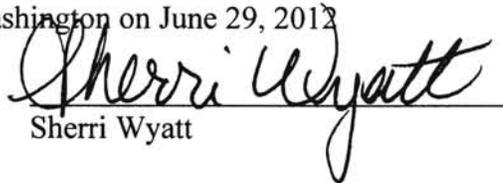
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**Attorneys for Defendants Tremont Group
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I declare under penalty of perjury under the laws of the United
States of America and of the State of Washington that the foregoing is true
and correct.

EXECUTED at Seattle, Washington on June 29, 2012



Sherri Wyatt

EXHIBIT

A

DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO 1777 6 th Street Boulder, CO 80302	FILED Document CO Boulder County District Court 20th JD Filing Date: Jun 11 2012 1:52PM MDT Filing ID: 44740479 Review Clerk: N/A
Plaintiffs: AGILE SAFETY VARIABLE FUND, L.P., et al. v. Defendants: TREMONT GROUP HOLDINGS, INC., et al.	COURT USE ONLY Case No.: 10 CV 2904 Division: 3
RULING AND ORDER	

THIS MATTER comes before the Court on Defendants Massachusetts Mutual Life Insurance Company and MassMutual Holding LLC's Motion to Dismiss Agile Safety Variable Fund, L.P., et al's claims for Nondisclosure or Concealment, Aiding and Abetting Breach of Fiduciary Duty, Aiding and Abetting Fraud, and Violation of the Colorado Securities Act, C.R.S. §11-51-101, pursuant to C.R.C.P. 12(b)(5) and C.R.C.P. 9(b). ("Defendant MassMutual's Motion to Dismiss," filed July 28, 2011). Having reviewed the pleadings and the applicable law, the Court enters the following ruling and order:

I. FACTS

Under C.R.C.P. 12(b)(5) the court must take the facts of the case in the light most favorable to the Plaintiffs, Agile Safety Variable Fund, L.P., et al. ("Agile"). Accordingly, the following is a summary of the facts alleged in Agile's Complaint and Jury Demand ("Complaint"). Agile is comprised of hedge funds that owned limited partnership interests in Defendant Rye Select Broad Market Fund, L.P. and Defendant Rye Select Broad Market Prime Fund, L.P. ("Rye Funds"). All the Rye Funds have the same general partner: Defendant

Tremont Partners, Inc. Defendant Tremont Group Holdings, Inc. is the corporate parent of Tremont Partners.

Defendant Massachusetts Mutual Life Insurance Company owns co-defendant MassMutual Holding, LLC. Together they will be referred to as “MassMutual.” Defendant Oppenheimer Acquisition Corp. (“OAC”) is a subsidiary of MassMutual Holding. Tremont Group is a wholly-owned subsidiary of OAC. In its Complaint, Agile alleges that MassMutual and OAC “were involved in and had oversight of the solicitation, sale, operation and management of the Rye Funds, through Tremont Partners and Tremont Group.” Consequently, Plaintiffs refer to MassMutual, MassMutual Holding, and Oppenheimer collectively in the Complaint as “the Controlling Defendants.”

Agile invested millions of dollars through Tremont and the Rye funds with Bernard L. Madoff (“Madoff”) and his affiliated companies with the understanding that Madoff would be using a “split-strike conversion strategy.” A “split-strike conversion strategy” is a conservative way of investing that limits risk but also limits rewards. Instead, Madoff was engaged in a now infamous Ponzi scheme and Agile lost tens of millions of dollars.

Agile is barred from recovering directly from Madoff, or his investment company, Bernard L. Madoff Investment Securities LLC (“BMIS”), because pursuant to the Securities Investor Protection Act of 1970 (“SIPA”), hedge funds that invested in Madoff through feeder funds, like Tremont, are not eligible to recover on an individual basis. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 285, 302 – 7 (Bankr. S.D.N.Y 2011). As a broker-dealer registered with the Securities and Exchange Commission (“SEC”), BMIS is a member of the Securities Investor Protection Corporation (“SIPC”), a corporation to which most registered

brokers and dealers are required to belong. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 401 B.R. 629, 632 (Bankr. S.D.N.Y. 2009).

Congress created the SIPC in conjunction with SIPA to provide a way for claimants who qualify as “customers” to recover financial losses in the event of their broker’s insolvency. *Investor Prot. Corp.*, 401 B.R. 629 at 633-4. However, the definition of “customers” has been narrowly construed by the courts and applies to investors in privity with the insolvent brokers, rather than hedge funds that have invested with a specific broker through feeder funds. *Id.*, *Sec. Investor Prot. Corp.* 454 B.R. 285 at 302-7. Because Agile did not have a contract directly with BMIS, but rather invested its funds through Tremont, Agile is not a “customer” under SIPA and therefore cannot recover directly from BMIS.

Agile states that it relied on Tremont’s due diligence and other contractual duties enumerated in the Rye Funds’ limited partnership agreements (“the LPAs”) and the Rye Funds’ private placement memoranda (“the PPMs”) to safeguard Agile’s investments. Agile believed that Tremont would be supervising the investments and monitoring Madoff’s actions.

According to the SEC Office of Investigations’ “Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme,” there were numerous “red flags” that led other investment professionals to avoid investing with Madoff and that were instrumental in the SEC’s investigation and ultimate discovery of Madoff’s fraud. Agile alleges that Tremont either disregarded those “red flags” or intentionally participated in the fraud, causing Agile to lose its investment.

Agile filed a complaint seeking relief against MassMutual on four counts: Count I: Violation of the Colorado Securities Act, C.R.S. §11-51-101 to 11-51-908; Count VI:

Nondisclosure or Concealment; Count X: Aiding and Abetting Breach of Fiduciary Duty; Count XII: Aiding and Abetting Fraud.

Subsequently, MassMutual filed a motion to dismiss all of Agile's claims against it pursuant to C.R.C.P. 12(b)(5). Agile responded to all motions to dismiss jointly in its Combined Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Opposition Memo"). MassMutual then filed a reply.

II. STANDARD OF REVIEW

MassMutual argues that Agile fails to state a claim upon which relief can be granted. The purpose of a Rule 12(b)(5) motion is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). When reviewing a motion to dismiss, the Court must accept all averments of material fact as true in the light most favorable to the plaintiff. *Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999). Motions to dismiss for failure to state a claim upon which relief can be granted, under Rule 12(b)(5) are viewed with disfavor and should not be granted unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

III. MERITS

This Court has dispensed with several of Agile's claims against MassMutual in its previous order regarding Tremont's Motion to Dismiss, filed April 25, 2012. The same legal analysis described in the order on Tremont's Motion to Dismiss applies here. Instead of restating its analysis with respect to issues of Colorado's economic loss rule and Plaintiffs' standing, the Court hereby incorporates the applicable sections of its April 25, 2012 order. Therefore, Agile's claims against MassMutual for Nondisclosure or Concealment, Aiding and Abetting Breach of

Fiduciary Duty, and Aiding and Abetting Fraud are hereby dismissed. For an explanation regarding the Court's ruling on these counts, the parties may refer to the Court's April 25th Order on Tremont's Motion to Dismiss. The only remaining claim against MassMutual is liability for Tremont's alleged violation of §11-51-501, C.R.S. under §11-51-604(5), C.R.S.

1. Violation of the Colorado Securities Act, § 11-51-501, C.R.S.

a. Colorado law applies

Agile states in its Complaint that the units it purchased from Tremont are securities as defined by § 11-51-201(17), C.R.S., and that Tremont offered the sales of the units to Agile in Colorado. Tremont does not dispute these facts. As the sales were offered in Colorado, Agile asserts that Tremont violated § 11-51-101, C.R.S. On the basis of these stipulated facts, the Court concludes that Colorado law applies.

b. Agile does not properly allege that MassMutual controlled Tremont or the Rye Funds as defined in §11-51-604(5), C.R.S.

Agile alleges that Tremont violated § 11-51-501, C.R.S. Fraud and Other Prohibited Conduct. Section 11-51-501, C.R.S. states:

- (1) It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:
 - (a) To employ any device, scheme, or artifice to defraud;
 - (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
 - (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Pursuant to § 11-51-604(5)(a), C.R.S., secondary liability may attach to a person *controlling* another person who violates §11-51-501, C.R.S. Similarly, under § 11-51-604(5)(c), C.R.S., joint and several liability may extend to “[a]ny person who knows that another person ... is

engaged in conduct which constitutes a violation of § 11-51-501 and who gives substantial assistance to such conduct...”

In order to establish a prima facie case of “controlling person” liability, a plaintiff must establish both the existence of a primary violation of the securities laws and “control” by the alleged controlling person. *First Interstate Bank of Denver, N.A. v. Pring*, 969 F.2d 891, 895-98 (10th Cir. 1992) (Interpreting § 20(a) of the Securities Exchange Act of 1934, the model for § 11-51-604(5), C.R.S.). “Control” may be established by showing defendant had “some indirect means of discipline or influence” over the primary violator. *Id.* at 896.

Agile claims that it has asserted facts, in addition to ultimate corporate ownership, that establish and raise inferences regarding MassMutual’s control over Tremont. First, Agile makes a general allegation that MassMutual was involved in and had oversight of the “solicitation, sale, operation and management” of the Rye Funds, through Tremont. (Compl. ¶ 18). Agile also relies on the fact that MassMutual represented to the SEC that MassMutual and OAC were “control persons” on its Uniform Application for Investment Advisors Registration (“ADV” Form) (Compl. ¶56). Further indicia of control, Agile argues, is the overlap of directors between MassMutual and Tremont (Compl. ¶¶ 48 – 51, 55). Specifically, Agile points out that MassMutual had two of its executive officers serving on the Tremont Group Holding board of directors when Oppenheimer acquired Tremont Group Holding in 2001.

In its Motion to Dismiss, MassMutual argues that Agile’s claims are conclusory and boilerplate and fail to properly allege facts sufficient to show that MassMutual exerted control over either Tremont’s day-to-day operations or over the alleged violations. Mass Mutual emphasizes that it is an upstream corporate parent, several corporate entities removed from Tremont and the Rye Funds. MassMutual argues that Agile has failed to make any specific

allegations that could support an inference that MassMutual had the power to control or actually exercised control over Tremont's decision to invest with Madoff. Instead, MassMutual argues that Agile's allegations merely describe a corporate structure that involves MassMutual as a corporate parent. Therefore, MassMutual requests that the Court dismiss Agile's claims under § 11-51-604(5), C.R.S.

This Court concludes that Agile has failed to state a claim for violation of C.R.S. § 11-51-604(5)(b) and (c). When reviewing a 12(b)(5) motion to dismiss, the court must accept all averments of material fact as true in the light most favorable to the plaintiff. *Coors Brewing Co.*, 978 P.2d 663. Although the control person determination is not "ordinarily subject to resolution on a motion to dismiss," this Court finds that Plaintiffs have failed to allege facts from which it can reasonably be inferred that MassMutual was a "control person" for purposes of secondary liability under § 11-51-604. *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1305 (10th Cir. 1998).

Plaintiffs concede that the mere existence of a parent/subsidiary relationship between MassMutual and Defendant Tremont is insufficient to plead control. (Pl.'s Resp. at 36-37). The Court is similarly unpersuaded by Plaintiff's argument that there is overlap on Tremont and MassMutual's board of directors. An allegation that someone from MassMutual was a member of Tremont's board of directors is insufficient, "without a specific allegation demonstrating control or influence over the wrongdoing or over the day-to-day business of the company." *Grubka v. WebAccess Inter., Inc.*, 445 F.Supp.2d 1259 (D.Colo. 2006).

Finally, the Court agrees with MassMutual that Tremont's statement on the ADV form regarding MassMutual's status as a controlling person is not dispositive. MassMutual was listed as an indirect owner in Tremont Partner's filing based on its ownership of 25% or more of a class

of voting securities of a direct owner. The case cited by Plaintiffs in support of their argument can be distinguished on its facts. In that case, the statement on the ADV form was one of several allegations the Court considered, including plaintiffs' allegation that the defendant exercised "day-to-day" control over the primary offender. *Belmont v. MB Inv. Partners, Inc.*, No. 0904951, 2010 WL 2348703, at *10 (E.D. Pa. June 10, 2010). In the present case, Plaintiffs have made no such claim.

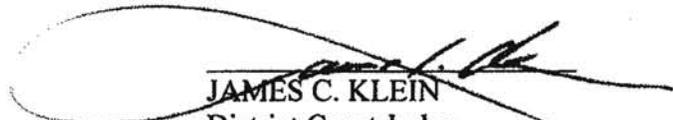
The Court concludes that Plaintiffs' allegations fail to demonstrate that MassMutual exercised the requisite degree of control over Tremont as to sustain a control person claim pursuant to § 11-51-604.

IV. CONCLUSION

For the foregoing reasons, MassMutual's Motion to Dismiss is GRANTED.

Done this 8th day of June, 2012.

BY THE COURT:


JAMES C. KLEIN
District Court Judge

EXHIBIT

B

DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO 1777 6 th Street Boulder, CO 80302	EFILED Document CO Boulder County District Court 20th JD
Plaintiffs: AGILE SAFETY VARIABLE FUND, L.P., et al.	Filing Date: Jun 11 2012 1:52PM MDT Filing ID: 44740479 Review Clerk: N/A
v.	COURT USE ONLY
Defendants: TREMONT GROUP HOLDINGS, INC., et al.	Case No.: 10 CV 2904 Division: 3
RULING AND ORDER	

THIS MATTER comes before the Court on Defendant Oppenheimer Acquisition Corp.'s Motion to Dismiss Agile Safety Variable Fund, L.P., et al's claims for Nondisclosure or Concealment, Aiding and Abetting Breach of Fiduciary Duty, Aiding and Abetting Fraud, and Violation of the Colorado Securities Act, C.R.S. §11-51-101, pursuant to C.R.C.P. 12(b)(5) and C.R.C.P. 9(b). ("OAC's Motion to Dismiss," filed July 28, 2011). Having reviewed the pleadings and the applicable law, the Court enters the following ruling and order:

I. FACTS

Under C.R.C.P. 12(b)(5) the court must take the facts of the case in the light most favorable to the Plaintiffs, Agile Safety Variable Fund, L.P., et al. ("Agile"). Accordingly, the following is a summary of relevant facts recited in Agile's Complaint and Jury Demand ("Complaint"). Agile is comprised of hedge funds that owned limited partnership interests in Defendant Rye Select Broad Market Fund, L.P. and Defendant Rye Select Broad Market Prime Fund, L.P. ("Rye Funds"). All the Rye Funds have the same general partner: Defendant Tremont Partners, Inc. Defendant Tremont Group Holdings, Inc. is the corporate parent of Tremont Partners.

Defendant MassMutual owns co-defendant MassMutual Holding Company. (Referred to collectively herein as “MassMutual”). Defendant Oppenheimer Acquisition Corp. (“OAC”) is a subsidiary of MassMutual Holding Co. Tremont Group is a wholly-owned subsidiary of OAC. In its Complaint, Agile alleges that MassMutual and OAC “were involved in and had oversight of the solicitation, sale, operation and management of the Rye Funds, through Tremont Partners and Tremont Group.” Consequently, Plaintiffs refer to MassMutual, MassMutual Holding, and Oppenheimer collectively in the Complaint as “the Controlling Defendants.”

Agile invested millions of dollars through Tremont and the Rye funds with Bernard L. Madoff (“Madoff”) and his affiliated companies with the understanding that Madoff would be using a “split-strike conversion strategy.” A “split-strike conversion strategy” is a conservative way of investing that limits risk but also limits rewards. Instead, Madoff was engaged in a now infamous Ponzi scheme and Agile lost tens of millions of dollars.

Agile is barred from recovering directly from Madoff, or his investment company, Bernard L. Madoff Investment Securities LLC (“BMIS”), because pursuant to the Securities Investor Protection Act of 1970 (“SIPA”), hedge funds that invested in Madoff through feeder funds, like Tremont, are not eligible to recover on an individual basis. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 285, 302 – 7 (Bankr. S.D.N.Y. 2011). As a broker-dealer registered with the Securities and Exchange Commission (“SEC”), BMIS is a member of the Securities Investor Protection Corporation (“SIPC”), a corporation to which most registered brokers and dealers are required to belong. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 401 B.R. 629, 632 (Bankr. S.D.N.Y. 2009).

Congress created the SIPC in conjunction with SIPA to provide a way for claimants who qualify as “customers” to recover financial losses in the event of their broker’s insolvency.

Investor Prot. Corp., 401 B.R. 629 at 633-4. However, the definition of “customers” has been narrowly construed by the courts and applies to investors in privity with the insolvent brokers, rather than hedge funds that have invested with a specific broker through feeder funds. *Id.*; *Sec. Investor Prot. Corp.*, 454 B.R. 285 at 302-7. Because Agile did not have a contract directly with BMIS, but rather invested its funds through Tremont, Agile is not a “customer” under SIPA and therefore cannot recover directly from BMIS.

Agile states that it relied on Tremont’s due diligence and other contractual duties enumerated in the Rye Funds’ limited partnership agreements (“the LPAs”) and the Rye Funds’ private placement memoranda (“the PPMs”) to safeguard Agile’s investments. Agile believed that Tremont would be supervising the investments and monitoring Madoff’s actions.

According to the SEC Office of Investigations’ “Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme,” there were numerous “red flags” that led other investment professionals to avoid investing with Madoff and that were instrumental in the SEC’s investigation and ultimate discovery of Madoff’s fraud. Agile alleges that Tremont either disregarded those “red flags” or intentionally participated in the fraud, causing Agile to lose its investment.

Agile filed a complaint seeking relief against OAC on four counts: Count I: Violation of the Colorado Securities Act, C.R.S. §11-51-101 to 11-51-908; Count VI: Nondisclosure or Concealment; Count X: Aiding and Abetting Breach of Fiduciary Duty; Count XII: Aiding and Abetting Fraud.

Subsequently, OAC filed a motion to dismiss all of Agile’s claims against it pursuant to Rules 12(b)(5) and 9(b) of the Colorado Rules of Civil Procedure. Agile responded to all

motions to dismiss jointly in its Combined Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Opposition Memo"). OAC then filed a reply.

II. STANDARD OF REVIEW

OAC argues that Agile fails to state a claim upon which relief can be granted. The purpose of a Rule 12(b)(5) motion is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). When reviewing a motion to dismiss, the Court must accept all averments of material fact as true in the light most favorable to the plaintiff. *Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999). Motions to dismiss for failure to state a claim upon which relief can be granted, under Rule 12(b)(5) are viewed with disfavor and should not be granted unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

III. MERITS

This Court has dispensed with several of Agile's claims against OAC in its previous order regarding Tremont's Motion to Dismiss, filed April 25, 2012. The same legal analysis described in the Order on Tremont's Motion to Dismiss applies here. Instead of restating its analysis with respect to issues of Colorado's economic loss rule and Plaintiffs' standing, the Court hereby incorporates the applicable sections of its April 25, 2012 order. Therefore, Agile's claims against OAC for Nondisclosure or Concealment, Aiding and Abetting Breach of Fiduciary Duty, and Aiding and Abetting Fraud are hereby dismissed. For an explanation regarding the Court's ruling on these counts, the Parties may refer to the Court's April 25th Order on Tremont's Motion to Dismiss. The only remaining claim against OAC is liability for Tremont's alleged violation of § 11-51-501, C.R.S. pursuant to § 11-51-604(5), C.R.S.

1. Violation of the Colorado Securities Act, § 11-51-501, C.R.S.

a. Colorado law applies

Agile states in its Complaint that the units it purchased from Tremont are securities as defined by § 11-51-201(17), C.R.S., and that Tremont offered the sales of the units to Agile in Colorado (Compl. at 47). Tremont does not dispute these facts. As the sales were offered in Colorado, Agile asserts that Tremont violated § 11-51-101, C.R.S. On the basis of these stipulated facts, the Court concludes that Colorado law applies.

b. Agile does not properly allege that OAC controlled Tremont or the Rye Funds as defined in § 11-51-604(5), C.R.S.

Agile alleges that Tremont violated § 11-51-501, C.R.S. Fraud and Other Prohibited Conduct. Section 11-51-501, C.R.S. states:

- (1) It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:
 - (a) To employ any device, scheme, or artifice to defraud;
 - (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
 - (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Pursuant to § 11-51-604(5)(a), C.R.S., secondary liability may attach to a person *controlling* another person who violates § 11-51-501, C.R.S. Similarly, under § 11-51-604(5)(c), C.R.S., joint and several liability may extend to “[a]ny person who knows that another person ... is engaged in conduct which constitutes a violation of § 11-51-501 and who gives substantial assistance to such conduct...”

In order to establish a *prima facie* case of “controlling person” liability, a plaintiff must establish both the existence of a primary violation of the securities laws and “control” by the

alleged controlling person. *First Interstate Bank of Denver, N.A. v. Pring*, 969 F.2d 891, 895-98 (10th Cir. 1992) (Interpreting § 20(a) of the Securities Exchange Act of 1934, the model for § 11-51-604(5), C.R.S.). “Control” may be established by showing the defendant had “some indirect means of discipline or influence” over the primary violator. *Id.* at 896.

Agile claims that it has asserted facts, in addition to ultimate corporate ownership, that establish and raise inferences regarding OAC’s control over Tremont. First, Agile makes a general allegation that OAC was involved in and had oversight of the “solicitation, sale, operation and management” of the Rye Funds, through Tremont. (Compl. ¶ 18). Agile also relies on the fact that OAC represented to the SEC that MassMutual and OAC were “control persons” on its Uniform Application for Investment Advisors Registration (“ADV” Form) (Compl. ¶56). Further indicia of control, Agile argues, is the overlap of directors between OAC and Tremont (Compl. ¶¶ 48 – 51, 55).

In its Motion to Dismiss, OAC argues that Agile’s claims are conclusory and boilerplate and fail to properly allege facts sufficient to show that OAC exerted control over either Tremont’s day-to-day operations or over the alleged violations. Therefore, OAC requests that the Court dismiss Agile’s claims under § 11-51-604(5), C.R.S. (OAC’s Mot. at 17).

This Court concludes that Agile has failed to state a claim for violation of C.R.S. § 11-51-604(5)(b) and (c). When reviewing a 12(b)(5) motion to dismiss, the court must accept all averments of material fact as true in the light most favorable to the plaintiff. *Coors Brewing Co.*, 978 P.2d 663. Although the control person determination is not “ordinarily subject to resolution on a motion to dismiss,” this Court finds that Plaintiffs have failed to allege facts from which it can reasonably be inferred that OAC was a “control person” for purposes of secondary liability under § 11-51-604. *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1305 (10th Cir. 1998).

Plaintiffs concede that the mere existence of a parent/subsidiary relationship between OAC and Defendant Tremont is insufficient to plead control. (Pl.'s Resp. at 36-37). The Court is similarly unpersuaded by Plaintiff's argument that there is overlap on Tremont and OAC's board of directors. An allegation that someone from OAC was a member of Tremont's board of directors is insufficient, "without a specific allegation demonstrating control or influence over the wrongdoing or over the day-to-day business of the company." *Grubka v. WebAccess Inter., Inc.*, 445 F.Supp.2d 1259 (D.Colo. 2006).

Finally, the Court agrees with OAC that Tremont's statement on the ADV form regarding OAC's status as a controlling person is not dispositive. OAC was listed as an indirect owner in Tremont Partner's filing based on its ownership of 25% or more of a class of voting securities of a direct owner. The case cited by Plaintiffs in support of their argument can be distinguished on its facts. In that case, the statement on the ADV form was one of several allegations the Court considered, including plaintiffs' allegation that the defendant exercised "day-to-day" control over the primary offender. *Belmont v. MB Inv. Partners, Inc.*, No. 0904951, 2010 WL 2348703, at *10 (E.D. Pa. June 10, 2010). In the present case, Plaintiffs have made no such claim.

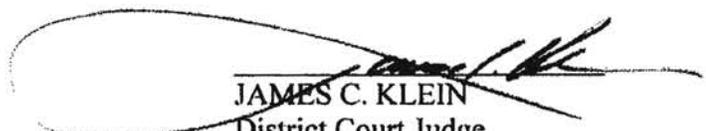
The Court concludes that Plaintiffs' allegations fail to demonstrate that OAC exercised the requisite degree of control over Tremont that would sustain a control person claim pursuant to § 11-51-604, C.R.S.

IV. CONCLUSION

For the foregoing reasons, OAC's Motion to Dismiss is GRANTED.

Done this 8^R day of June, 2012.

BY THE COURT:



JAMES C. KLEIN
District Court Judge