

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
22 CVS 1520

WILLIAM BAKER III, individually, and as personal representative of NANCY BAKER and her IRA; FRANCIS BURTON and JEAN M. BURTON, individually and on behalf of their IRA; BEVERLY BYRNES, individually, on behalf of her IRA, and as personal representative of KATHERINE R. GLEASON and her IRA; MICHAEL FORBIS, individually and on behalf of his IRA; JAMES LESHOCK and CAROLYN LESHOCK, individually and on behalf of their IRA; GARY OSTRANDER and PAM OSTRANDER, individually and on behalf of their IRA; CLIFFORD N. RHODES, individually and on behalf of his IRA; JAMES TANGER, individually and on behalf of his IRA; LARRY BRENT WILSHIRE and CYNTHIA WILSHIRE, individually and on behalf of their IRA; and JOSEPH ZUCKER, individually and on behalf of his IRA,

Plaintiffs<sup>1</sup>,

v.

HOBART FINANCIAL GROUP, INC.;  
HOBART PRIVATE CAPITAL, LLC;  
HOBART INSURANCE SERVICES LLC;  
LEGACY GFIS & KCI HOLDINGS,  
L.L.C.; CHRISTOPHER SCOTT  
HOBART; STEVEN ANDREW GREER;  
and COREY S. SUNSTROM,

Defendants.

**ORDER AND OPINION  
REQUIRING PLAINTIFFS TO  
FILE A SECOND AMENDED  
COMPLAINT**

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<sup>1</sup> On 17 May 2022 the case caption was amended to reflect the change in parties from the Complaint to the Amended Complaint. (ECF. No. 13.)

1. THIS MATTER is before the Court on Defendants' Motion to Dismiss pursuant to rules 12(b)(6) and Rule 9(b) of the North Carolina Rules of Civil Procedure (the "Rule(s)").

2. Having considered the Motion, the parties' initial and supplemental briefs in support of and in opposition to the Motion, the arguments of counsel at the 15 September 2022 hearing on the Motion, (*See* ECF No. 31), the Amended Complaint, and the exhibits thereto, (ECF Nos. 9–9.8), the Court **DENIES** the Motion at this time as moot without prejudice and **ORDERS** Plaintiffs to file a Second Amended Complaint in compliance with the Court's instructions below.

*Eric Spengler, Spengler and Agans, PLLC, and Jason Kane, Peiffer Wolf Carr Kane Conway & Wise, LLP, for Plaintiffs.*

*Mark Nebrig, Josph Piligian, Caroline Savini, and Christopher Tomlinson, Moore & Van Allen PLLC, for Defendants.*

Robinson, Judge.

## I. BACKGROUND

3. Plaintiffs commenced this Action on 1 February 2022 with a Rule 3 Application. (*See* Rule 3 Application and Order, ECF No. 3.) Subsequently, Plaintiffs filed a twenty-two-page Complaint on 21 February 2022, (ECF No. 4). That pleading then evolved into an eighty-four-page Amended Complaint filed on 20 April 2022, (ECF No. 9). Plaintiffs, ten individuals or couples, bring suit against seven defendants alleging seven causes of action: breach of fiduciary duty, constructive fraud, violations of the North Carolina Securities Act, unfair and deceptive trade

practices, fraud, professional negligence, and negligent misrepresentation. (ECF No. 9.)

4. Although the Amended Complaint contains copious detail in its first seventy-seven pages, the Causes of Action as presented on the last seven pages of the Amended Complaint introduce unnecessary confusion due to their lack of clarity and specificity. (Am. Compl. ¶¶ 268–317.) For instance, the First, Third, Fourth, Fifth, Sixth and Seventh Causes of Action are asserted on behalf of “one or more Plaintiffs.” (See Am. Compl. ¶¶ 273, 286, 295, 302, 311, 317). Moreover, every cause of action is asserted against “Defendants” generally. (See Am. Compl. ¶¶ 272, 279, 285, 293, 301, 307, 314.) It appears to the Court, based on the allegations contained in the first seventy-seven pages of the Amended Complaint, that all Defendants likely are not and cannot be responsible for all of the claims, especially if raised by all of the Plaintiffs.

5. The Amended Complaint discloses as much in several places. For instance, it acknowledges that certain Plaintiffs bring claims only against certain Defendants. (See Am. Compl. ¶ 1, “The Claims brought by Mr. Baker, in any capacity, are asserted only against the Hobart Entities and Mr. Sunstrom—and not Mr. Hobart and Mr. Greer.”). Likewise, the Amended Complaint acknowledges that some Plaintiffs only bring certain claims. (See Am. Compl. ¶ 3, “Ms. Byrnes . . . brings claims against Defendants only under the cause of action for constructive fraud.”). Where the Complaint is less direct, the reader is expected to infer which allegations are brought by which plaintiff against which defendant.

6. The facts alleged clearly do not support certain claims by all Plaintiffs—for instance, where a Plaintiff did not purchase a security (in this case, an Alternative Investment) it is obvious there is no claim under the North Carolina Securities Act. Likewise, a plaintiff who did not purchase an insurance product such as a fixed-income annuity likely cannot bring a claim for unfair and deceptive trade practices under N.C.G.S § 58 absent some additional showing not apparent to the Court on the face of the Amended Complaint.

7. Consequently, although the Amended Complaint, as a whole, may contain sufficient detail to withstand a Motion to Dismiss, assessing this information is a herculean task. By the time Plaintiffs assert their Causes of Action against Defendants, they have set out 267 paragraphs that the Court must cross-reference and decipher to determine whether support exists for each claim.

8. Assessing the Amended Complaint is further complicated by Plaintiffs' frequent use of "and/or" throughout. Regarding information about commissions, Plaintiffs allege that "[t]he Hobart Financial Advisory Team deliberately misrepresented and/or withheld this information from all the Plaintiffs[.]". (Am. Compl. ¶ 126.) Whether information was affirmatively misrepresented *or* whether it was concealed is material to the Court's analysis of the claim of fraud, but the Court is unable to discern which occurred. Particularly when the pleading must satisfy Rule 9, use of "and/or" is problematic.

9. In response to the Amended Complaint, on 20 June 2022 Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) and Rule 9(b), (the "Motion," ECF No.

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22.) One of Defendants' chief complaints is that the Amended Complaint contains impermissible group pleading. (Mot. 23-24.) While this may be the case, it is a difficult argument to assess because it is unclear if the specific representations and advertisements referenced were relied on by all—or only some—plaintiffs.

10. Equally concerning, the lack of clarity in the Causes of Action contained in the Amended Complaint means that the Court must guess whether the Rule 9(b) particularity requirement applies to claims other than the fraud claims. For instance, liability for breach of fiduciary duty, unfair and deceptive trade practices, and professional negligence can, but need not, arise from fraudulent conduct. The lengthy factual allegations in the Amended Complaint could support multiple theories of liability that Plaintiffs neither explicitly embrace nor exclude in their broadly worded Causes of Action.

11. In opposition to Defendants' Motion, Plaintiffs filed a Response brief on 26 June 2022 in which counsel acknowledges for the first time that certain Plaintiffs do not assert claims within a five-year statute of limitations. (Pls.' Br. Opp. Mot. Dismiss 35, ECF No. 29.) While the Court appreciates this candor, Plaintiffs' Amended Complaint should itself reflect this concession. In other words, if Plaintiff recognizes that its claim is barred by the applicable statute of limitations, Plaintiff should not bring the claim.

12. Defendants filed a Reply to Plaintiffs Opposition on 15 August 2022. (ECF No. 30.) In the Reply, Defendants note: "the Opposition clarifies what the Amended Complaint does not: which claims belong to which Plaintiffs." (Reply Br. Supp. Defs.')

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Mt. to Dismiss 2, ECF. No. 30.) Even if true, the clarity should exist in the Amended Complaint itself.

13. On 15 September 2022 the Court held a hearing on the Motion at which counsel for all parties were present. (See ECF No. 31.) The Court, during the hearing, requested supplemental briefs addressing the application of the statute of limitations to the claims brought under the North Carolina Security Act, N.C.G.S. § 78A-1 *et seq.* (See ECF Nos. 32, 33.) The parties filed supplemental briefs on 26 September 2022 and 30 September 2022. (ECF Nos. 32, 33.) The Court has reviewed the briefing and considered the arguments.

## II. ANALYSIS

14. “The general standard for civil pleading in North Carolina is notice pleading” pursuant to Rule of Civil Procedure 8(a)(1). *Murdock v. Chatham Cty.*, 198 N.C. App. 309, 316 (2009). Rule 8(a)(1) requires “[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief”. N.C.G.S. § 1A-1 Rule 8. Under the “notice theory of pleading” a statement of a claim is adequate if it gives sufficient notice of the claim asserted “to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought. . . .” *Sutton v. Duke*, 277 N.C. 94, 102 (1970).

15. Importantly, this rule prescribes the minimum information that a pleading must contain; as our Supreme Court has observed, “[t]here is nothing in the rules to

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prevent detailed pleading if the pleader deems it desirable.’” *Sutton v. Duke*, 277 N.C. 94, 105 (1970). Here, Plaintiffs take advantage of their right to provide copious details, but then they frame their Causes of Action without them, leaving the Court and Defendants to parse the exceedingly lengthy pleading in order to pinpoint the legal claims they *think* Plaintiffs are making.

16. The Court is cognizant that pleading a matter with multiple claims and multiple parties is challenging, especially when those claims involve alleged fraud. Given that fraud can occur in a variety of scenarios, Rule 9 requires the pleader to identify the time, place, and content of a fraudulent representation, as well as the identity of the person making the representation, and what was obtained as a result of the misrepresentation. *See Terry v. Terry*, 302 N.C. 77, 84, (1981); N.C.G.S. § 1A-1 Rule 9(b). Thus, a detailed pleading is appropriate, but the objective of that detail is to provide notice, not to obscure it.

17. When an opposing party complains of a pleading’s ambiguity, Rule 12(e) provides the mechanism by which that party can seek a more definite statement before filing a responsive pleading. N.C.G.S. § 1A-1 Rule 12(e). Together with Rule 8, Rule 12(e) guards against vague and ambiguous complaints that impede either the defendants’ receipt of adequate notice of the claims asserted against them or their ability to form a responsive pleading. *Parker v. Learn the Skills Corp.*, No. 03-6936, 2004 U.S. Dist. LEXIS 21499, at \*3 (E.D. Pa. Oct. 25, 2004).

18. Although Defendants bring their motion pursuant to Rules 12(b)(6) and 9(b), a presiding judge “is empowered to exercise his discretion in the interest of

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efficiency, practicality and justice.” *Shute v. Fisher*, 270 N.C. 247, 253 (1967); *see also Beard v. The N.C. State Bar*, 320 N.C. 126, 129 (1987) (“[t]hrough its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice”). It is the Court’s opinion that, in this matter, requiring the filing of a Second Amended Complaint that contains a more definite statement is both necessary and appropriate. *See Page v. Mandel* , 154 N.C. App. 94, (2002) (finding no abuse of discretion in the trial court’s treating defendants’ motion to dismiss, under Rule 12(b)(6) as a motion for a more definite statement, under Rule 12(e), and ordering plaintiff to file a second amended complaint); *see also Ross v. Ross*, 33 N.C. App. 447 (1977) (“[t]he grant or denial of a Rule 12(e) motion for a more definite statement rests in the sound discretion of the trial judge, and his ruling thereon will not be overturned on appeal absent a showing of abuse of discretion”) (citation omitted).

19. Although there is nothing *per se* inappropriate with a Complaint that requires the Court to cross-reference over 300 paragraphs, it is the Court’s opinion that justice and economy would be better served by requiring Plaintiffs to file a Second Amended Complaint that identifies which Plaintiffs bring which causes of action against which Defendants.<sup>2</sup>

20. The Court, cognizant of its duty to confirm subject matter jurisdiction, also proposes that Plaintiffs consider whether they can bring claims both personally and

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<sup>2</sup> The Court notes that the parties have presumably been conducting discovery and exchanging information which should aid Plaintiffs in sharpening their claims allegations.



on behalf of their self-directed IRAs, and include in their pleading facts relevant to this consideration.

### III. CONCLUSION

21. Wherefore, the Court hereby **Orders** as follows:
  - a. Plaintiffs shall file a Second Amended Complaint on or before 21 April 2023. The Second Amended Complaint shall make clear which causes of action are brought by which Plaintiffs against which Defendants based on which alleged facts. Where Plaintiffs have admitted that a particular cause of action is not being brought by a particular Plaintiff or against a particular Defendant, Plaintiffs' causes of action should so reflect. Plaintiffs are further instructed to avoid use of "and/or" because of the confusion it can create regarding the facts alleged.
  - b. Given the Court's direction to Plaintiffs, Defendants' pending Motion to Dismiss is denied as moot. Defendant may file a renewed Motion to Dismiss in Response to Plaintiffs' Second Amended Complaint.

This the 22nd day of March, 2023.

/s/ Michael L. Robinson

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Michael L. Robinson  
Special Superior Court Judge  
for Complex Business Cases