

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DOUGLAS FERRIE, an individual,

Plaintiff,

v.

WOODFORD RESEARCH, LLC, a  
Kentucky limited liability company;  
HUBERT SENTERS, an individual;  
KAREN ARVIN, an individual; ROSS  
GIVENS, an individual; and JARED  
CARTER, an individual; et al.

Defendant.

CASE NO. 3:19-cv-05798-RBL

ORDER ON WOODFORD  
DEFENDANTS' MOTION TO  
DISMISS

**INTRODUCTION**

THIS MATTER is before the Court on Defendants Woodford Research, LLC; Hubert Senters; Karen Arvin; Ross Givens; and Jared Carter's (collectively the "Woodford Defendants") Motion to Dismiss. Dkt. # 30. Ferrie's lawsuit against the Woodford Defendants is predicated on their role in promoting a cryptocurrency arbitraging scheme that Ferrie invested a substantial sum of money in. Although Ferrie claims his investments were subject to undisclosed fees, including a 95% withdrawal fee.

1 Ferrie claims the Woodford Defendants are liable for violations of Sections 10 and 12 of  
2 the Securities Act, various forms of fraud, and unjust enrichment. The Woodford Defendants  
3 argue that Ferrie lacks standing to sue and that the Court lacks personal jurisdiction. They also  
4 contend that Ferrie’s claims are impermissibly broad and legally insufficient. For the following  
5 reasons, the Court GRANTS the Woodford Defendants’ Motion in part and DENIES it in part.

### 6 **BACKGROUND**

7 According to the First Amended Complaint, Woodford Research is a Kentucky Limited  
8 Liability Company. Ferrie alleges that the four individual Woodford Defendants—Senters,  
9 Arvin, Givens, and Carter—“manage and control” the company, with Senters also owning it.  
10 FAC, Dkt. # 29, at 3-4. All four individuals are Kentucky residents, while Ferry lives in  
11 Washington State.

12 For several years, Ferrie has followed the “Hubert Senters Daily Video Update,” in which  
13 Senters “discusses price trends of stocks and commodities to predict future prices.” FAC at 5.  
14 Ferrie’s declaration states that he subscribes to an email list associated with these videos and  
15 received an email in November 2018 from Senters notifying him of a Webinar presentation about  
16 the “1% Club.” Ferrie Dec., Dkt. # 33, at 2. Ferrie watched the Webinar on November 30, 2018.  
17 He alleges that Senters, Arvin, and Woodford Research published the Webinar, which “described  
18 a new investment opportunity involving arbitraging cryptocurrencies.” FAC at 5. According to  
19 Ferrie, Senters, Arvin, and Woodford Research made the following representations (among  
20 others) during the Webinar:

- 21 • There are approximately 200 exchanges and over 2,000 cryptocurrencies.  
22 Defendant ARBITRAGING developed a “highly advanced arbitrage bot” that  
23 tracked all of the exchanges and searched for the largest price differentials in each  
24 cryptocurrency. Upon finding sufficient price differentials, ARBITRAGING  
executed trades to exploit those differentials. On a daily basis, Defendant  
ARBITRAGING totaled the profits and distributed those earnings to investors

1 based upon a pro rata share of their investment.

- 2 • Defendant ARBITRAGING consistently received an average rate of return of  
3 0.73 percent within the seven-month period preceding December 2018. In other  
4 words, an investor’s money doubled every three months.
- 5 • This opportunity only arises once in a generation.
- 6 • Projected returns of 0.73 percent per day will likely remain available for another  
7 18 to 24 months.
- 8 • Defendant ARBITRAGING had been thoroughly scrutinized by both Defendant  
9 SENTERS’ own WOODFORD RESEARCH team as well as by members of the  
10 Masterminds Association, where he is also a member. Considerable due diligence  
11 was undertaken to ensure that both Defendant ARBITRAGING and Defendant  
12 PETERSON were legitimate and trustworthy.
- 13 • The only risk is the setup procedure; if it is followed cautiously and precisely  
14 according to the procedure he provides, then risk is eliminated.
- 15 • There is an early withdrawal penalty if funds are withdrawn within the first three  
16 weeks of opening an account. After three weeks, there would be no withdrawal  
17 penalty.
- 18 • No other fees or assessments.
- 19 • Enter an affiliate code on Defendant ARBITRAGING’s website during the  
20 registration process to obtain additional perks, such as an invitation to the 1%  
21 Club Telegram group chat.

22 FAC at 6-7.<sup>1</sup> Ferrie further alleges that Senters made the following statements during the  
23 Webinar:

- 24 • “I recommend [that an investor] put whatever risk amount of money you’re going  
to start with, whether its \$250 or if it’s a million dollars. \* \* \* Whatever your risk  
profile is, I would initially go ahead and put it in Coinbase, buy your ETH and  
then just start moving it over in small increments, and then once you’re cool with  
it go: ‘Okay, I know what I’m doing.’”

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<sup>1</sup> The Court notes that these representations, unlike those attributed to Senters alone, are not in quotations marks in the FAC.

- 1 • “Let’s just get the money in here and get you making some money. Who cares if  
2 it’s going to cost you \$0.02 or \$20.00, you need to get it working for you.”
- 3 • “Right now, I’m making \$600, \$700 a day, so I’m under that \$1,000 limit; so I  
4 just take it out like clockwork: \$600, \$700 a day. Ding, ding! It takes five  
5 minutes.”
- 6 • “I’m being completely transparent.”
- 7 • . . . this is sketchy too, so I have a limited amount of funds that I want to put in  
8 this in case this is too good to be true and it just stops working and dude runs off  
9 with all of our money and goes to Belize with his secretary. I’m going to protect  
10 myself at all times. The same thing I’m telling you guys.”
- 11 • “There must be an acid test for Ponzi schemes spilling. [I]t smells just like one,  
12 right? You’re like: ‘This smells and tastes fishy as hell.’ I can just tell you it’s  
13 working.”
- 14 • “I’ve got \$100,000 working in this robot.”
- 15 • “Who are the guys that control this, and where are they located? Guy’s name is  
16 David [Peterson], and he lives in Texas. They have won a couple of  
17 cryptocurrency awards at conferences. If it is a Ponzi scheme, it is one of the most  
18 well pulled off ones I’ve ever seen. \* \* \* I know a lot of other guys in the  
19 Mastermind that know him personally.”
- 20 • “Folks, this is real. Let someone -- and A-Bot -- do it for you.”

21 FAC at 7-8.

22 Based on these representations, Ferrie purchased a “1% Club” subscription on December  
23 1, 2018, for which he paid \$997.00 to Woodford Research, Senters, and Arvin. The subscription  
24 included a promise from Senters, Arvin, and Woodford Research to assist Ferrie with setting up  
and working his Arbitraging account.

Senters then put Ferrie in contact with Defendants Infogenesis Consulting Group, LLC  
and Kurt F. Weinrich Sr., who gave Ferrie advice on how to withdraw money from his  
retirement accounts to invest with. They also helped him set up his own company: DCAE Ltd.,  
LLC. Under this name, Ferrie opened a bank account and cryptocurrency account at the Gemini

1 exchange. Ferrie then “proceeded to withdraw his retirement funds from his investment accounts,  
2 transfer those funds to the Plaintiff-DCAE Gemini cryptocurrency account, convert those U.S.  
3 Dollar funds into Ether (ETH), and then deposit those ETH into Plaintiff’s new account at  
4 Defendant ARBITRAGING.” FAC at 9-10.

5 Ferrie made his first investment of \$12,000 in his Arbitraging.co account on December  
6 31, 2018. He observed that the daily returns “ranged from 0.57 to 1.01 percent” with an average  
7 of .644 percent. *Id.* at 10. Ferrie admits this was “relatively close” to the rate described in the  
8 Webinar.

9 On January 1, 2019, Arbitraging’s website shut down. Ferrie emailed Woodford  
10 Research’s support address and was reassured that this was not abnormal and trading would  
11 continue. The site went back online a few days later but announced an audit to address problems  
12 with high volume trading. The announcement mentioned additional fees related to the audit, but  
13 Ferrie was able to avoid these fees.

14 On January 13, 2019, Ferrie alleges that he emailed Arvin to request discontinuance of a  
15 “2-percent referral commission” being deducted from his account. *Id.* at 12. The FAC is unclear  
16 about when or how Ferrie discovered this fee. Arvin responded the next day and informed Ferrie  
17 that “[the 2 percent referral fee] was addressed by [Defendant] Hubert [Senters] in the live  
18 member webinar on 1/3/19.” *Id.* Arvin also informed Ferrie that the only way to end the “affiliate  
19 relation” was to close his current Arbitraging account and open a new one. *Id.* at 12-13. Ferrie  
20 alleges that this fee was never disclosed.

21 On January 17 and 18, 2019, Ferrie invested an additional \$140,000 into his Arbitraging  
22 account. His investment continued to accrue earnings in excess of 0.5%. On February 25, he  
23  
24

1 added another \$25,179, this time from his health savings account. This brought his balance up to  
2 \$184,045.59.

3 On March 23, 2019, Arbitraging announced the following additional fees on daily  
4 earnings:

- 5 • Requiring daily earnings to be limited to 500 ARBs (approximately \$400.00)  
6 unless the account holder has at least 50,000 ARBs invested in Defendant  
Arbitraging's Vault.
- 7 • 5 percent daily earning fee on accounts with an Active aBot value of between  
8 \$25,000.00 and \$99,999.00;
- 9 • 7 percent daily earning fee on accounts with an Active aBot value of \$100,000.00  
or greater; and
- 10 • Withdrawal fees and extremely unfavorable and arbitrary exchange rate  
11 formulations that would translate into losing approximately 95 percent of all  
funds invested.

12 FAC at 14. Ferrie alleges that these fees applied to gross profits, rather than net profits, resulting  
13 in "a net negative return for accounts with an active aBot value of \$100,000.00 or more." *Id.*

14 Woodford Research, Senters, and Arvin denied knowledge of these fees but also stated  
15 that they did not care about them because they were still making money. However, Senters also  
16 "confessed to being one of the high volume account holders that made a majority of profits by  
17 trading on Defendant ARBITRAGING's internal exchange." *Id.* at 15. When Ferrie requested  
18 Peterson's email address, Arvin responded that the Woodford Defendants were simply customers  
19 of Arbitraging and did not have Peterson's contact information.

20 Ferrie alleges that his account would be valued at \$441,307.20 if not for various  
21 undisclosed fees and penalties. He sued on August 28, 2019 to recover his investment of  
22 \$177,179.00, plus lost profits, interest, and attorneys' fees. *Id.* at 3.

## DISCUSSION

### 1. Standing

“A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if the action . . . is not a case or controversy within the meaning of the Constitution”—i.e., if the plaintiff lacks standing to assert a claim. *United Transp. Union v. Burlington N. Santa Fe R. Co.*, No. C06-5441 RBL, 2007 WL 26761, at \*2 (W.D. Wash. Jan. 2, 2007), *aff’d*, 528 F.3d 674 (9th Cir. 2008). As with other motions based on subject matter jurisdiction, the plaintiff has the burden of demonstrating that standing exists. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Defendants assert a “facial attack” against standing, which is limited to the complaint’s allegations. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

The Woodford Defendants argue that Ferrie lacks standing because all his investments were made via DCAE Ltd., LLC, meaning Ferrie himself was not injured. “Generally, a shareholder does not have standing to redress an injury to the corporation in which it holds stock.” *EMI Ltd. v. Bennett*, 738 F.2d 994, 997 (9th Cir. 1984) The same holds true for members of an LLC. *Finley v. Takisaki*, No. C05-1118JLR, 2006 WL 1169794, at \*3 (W.D. Wash. Apr. 28, 2006) (citing *In re Real Marketing Servs., LLC*, 309 B.R. 783, 788 (S.D.Cal.2004)). “There are two major, often overlapping, exceptions to the general rule: (1) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders, and (2) where there is a special duty, such as a contractual duty, between the alleged wrongdoer and the shareholder.” *Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 713 P.2d 1197, 1199 (Alaska 1986); *see also Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 640 (9th Cir. 1988). Injury to a shareholder is distinct from the corporation when, for example, “the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly.” *Von*

1 *Brimer v. Whirlpool Corp.*, 536 F.3d 838 (9th Cir. 1976) (quoting *Erllich v. Glasner*, 418 F.2d  
2 226, 228 (9th Cir. 1969)).

3 Here, Ferrie alleges a fraud affecting him personally. When the Woodford Defendants  
4 published their Webinar and accepted Ferrie’s subscription to the 1% Club, DAE did not exist.  
5 Indeed, it was through the Woodford Defendants’ contact that Ferrie was advised to create DAE,  
6 which acted solely as a vehicle for moving Ferrie’s personal funds into his Arbitrating account  
7 and, allegedly, into the Woodford Defendants’ pockets. Because Ferrie’s lawsuit focuses on  
8 losses from a fraud against him, his injury is separate from DAE’s and he has standing to sue  
9 individually.

## 10 **2. Personal Jurisdiction**

11 “Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the  
12 plaintiff bears the burden of demonstrating that jurisdiction is appropriate.” *Mavrix Photo, Inc. v.*  
13 *Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011). If the plaintiff succeeds, the burden  
14 shifts to the defendant to show jurisdiction is unreasonable. *Id.* “For purposes of plaintiff’s prima  
15 facie jurisdictional showing, ‘uncontroverted allegations in . . . [plaintiff’s] complaint must be  
16 taken as true, and conflicts between the facts contained in the parties’ affidavits must be resolved  
17 in . . . [plaintiff’s] favor.” *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1129  
18 (9th Cir. 2010) (quoting *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir.  
19 2002)); see also *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

20 A court’s personal jurisdiction analysis begins with the “long-arm” statute of the state in  
21 which the court sits. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d  
22 1114, 1123 (9th Cir. 2002). Washington’s long-arm statute extends the court’s personal  
23 jurisdiction to the broadest reach that the United States Constitution permits, so the jurisdictional  
24



1 analysis under state law and federal due process are the same. *Byron Nelson Co. v. Orchard*  
2 *Management Corp.*, 95 Wn.App. 462, 465 (1999); *Schwarzenegger*, 374 F.3d at 800–01.

3 Personal jurisdiction exists in two forms: general and specific. *Dole Food Co. v. Watts*,  
4 303 F.3d 1104, 1111 (9th Cir. 2002). For specific jurisdiction, which is at issue here, the Ninth  
5 Circuit applies a three-prong test. *Schwarzenegger*, 374 F.3d at 802. First, “[t]he non-resident  
6 defendant must purposefully direct his activities or consummate some transaction with the forum  
7 or resident thereof; or perform some act by which he purposefully avails himself of the privilege  
8 of conducting activities in the forum, thereby invoking the benefits and protections of its laws.”  
9 *Id.* (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir.1987)). Second, “the claim must be one  
10 which arises out of or relates to the defendant’s forum-related activities.” *Id.* Finally, “the  
11 exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be  
12 reasonable.” *Id.*

13 For the first prong, the “purposeful direction” analysis typically applies in tort cases<sup>2</sup> and  
14 “usually consists of evidence of the defendant’s actions outside the forum state that are directed  
15 at the forum, such as the distribution in the forum state of goods originating elsewhere.” *Id.* at  
16 803. To determine if the defendant purposefully directed activities at the forum, the Ninth Circuit  
17 applies the “effects test” from *Calder v. Jones*, 465 U.S. 783 (1984). Under this test, “the  
18 defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum  
19 state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.”  
20 *Mavrix Photo*, 647 F.3d at 1228 (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606  
21 F.3d 1124, 1128 (9th Cir. 2010)).

22 \_\_\_\_\_  
23 <sup>2</sup> The Woodford Defendants argue that the purposeful direction analysis is appropriate because  
24 Ferrie’s claims against them are not based in contract. Ferrie does not dispute this. The Court  
agrees that purposeful direction applies.

1 The parties mainly dispute whether the Woodford Defendants “expressly aimed” at the  
2 forum. In cases involving online commerce, the Ninth Circuit has held that simply maintaining a  
3 passive website is not enough to satisfy the express aiming prong. *Id.* at 1229. But “a passive  
4 website in conjunction with ‘something more’—conduct directly targeting the forum—is  
5 sufficient.” *Id.* (quoting *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1020 (9th Cir.  
6 2002)).

7 A defendant therefore has likely targeted the forum when it has actual or constructive  
8 knowledge of its consumer base there. *Id.* at 1230. For example, in *Mavrix Photo*, the court  
9 concluded that the defendant had such knowledge because its third-party advertisers expressly  
10 targeted forum state residents. *Id.* at 1230; *see also Wilson v. PTT, LLC*, 351 F. Supp. 3d 1325,  
11 1335 (W.D. Wash. 2018) (express aiming where defendant carried out numerous transactions  
12 with forum state residents and could determine their IP addresses). The court concluded that  
13 when “a website with national viewership and scope appeals to, and profits from, an audience in  
14 a particular state the site’s operators can be said to have ‘expressly aimed’ at that state.” *Mavrix*  
15 *Photo*, 647 F.3d at 1231.

16 However, the Supreme Court has made clear that the specific jurisdiction analysis “looks  
17 to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons  
18 who reside there.” *Walden v. Fiore*, 571 U.S. 277, 285 (2014). “To be sure, a defendant’s  
19 contacts with the forum State may be intertwined with his transactions or interactions with the  
20 plaintiff or other parties.” *Id.* at 286. But, in the context of intentional torts, it is “insufficient to  
21 rely on a defendant’s ‘random, fortuitous, or attenuated contacts’ or on the ‘unilateral activity’ of  
22 a plaintiff.” *Id.* at 286 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).  
23  
24

1 Here, Ferrie argues the Woodford Defendants “expressly aimed” at the forum because he  
2 “believe[s] [he is] just one of many Washington residents who subscribed to the Woodford  
3 Defendants’ ‘One Percent Club.’” Opposition at 10. Ferrie further asserts that the Woodford  
4 Defendants “can be charged with actual or constructive knowledge of the user base . . . because  
5 they were aware that individuals with Washington IP addresses viewed the webinar and  
6 subsequently subscribed to the ‘One Percent Club.’” *Id.* at 10-11. In addition, Ferrie points out  
7 that the Woodford Defendants communicated with him directly after he joined the 1% Club. *Id.*  
8 at 10.

9 The Woodford Defendants argue that Ferrie has only shown that *he* targeted *them* by  
10 watching the Webinar and subscribing to the 1% Club, not the other way around. Motion at 7.  
11 Even if Ferrie was targeted, his allegations and declaration only establish a link to him  
12 personally, not the forum. *Id.* The Woodford Defendants further argue that their communications  
13 with Ferrie occurred after the harm-causing events, which were the Webinar and 1% Club  
14 subscription, and therefore cannot support jurisdiction. *Id.* Finally, the Woodford Defendants  
15 argue that Ferrie’s alleged harm was not predictable because it was Arbitraging that suddenly  
16 imposed fees months after Ferrie viewed the Webinar. *Id.*

17 The Court agrees with the Woodford Defendants that there is insufficient information to  
18 establish whether Woodford Research and its related individuals expressly aimed at the forum.  
19 Ferrie’s arguments merely assume that the Woodford Defendants have a substantial base of  
20 subscribers, viewers, and customers in Washington and that they can identify the location of  
21 these individuals. Yet there are no allegations or evidence supporting these theories. Ferrie’s  
22 FAC and declaration only describe the Woodford Defendants’ engagement with him alone. This  
23 might be enough for jurisdiction if that engagement was “intertwined” with the forum, but Ferrie  
24

1 does not describe what forum-related information he provided that would have apprised  
 2 Woodford Defendants of his location.<sup>3</sup> Absent more information about the Woodford  
 3 Defendants' contact with Washington, the Court cannot determine if jurisdiction exists.<sup>4</sup>

4 Limited discovery regarding jurisdiction is the most efficient way of resolving this issue.  
 5 A district court may order discovery where "pertinent facts bearing on the question of  
 6 jurisdiction are controverted or where a more satisfactory showing of the facts is necessary."  
 7 *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (quoting *Butcher's Union*  
 8 *Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir.1986)); *see also Blair v. CBE Grp.*  
 9 *Inc.*, No. 13-CV-134-MMA WVG, 2013 WL 2029155, at \*3 (S.D. Cal. May 13, 2013) (granting  
 10 "limited jurisdictional discovery because at least some evidence exists that [the defendant]  
 11 directed its activities to residents of this District."). Ferrie's allegations suggest that the  
 12 Woodford Defendants may have sufficient contacts with the forum to support jurisdiction. This  
 13 justifies limited discovery into the Woodford Defendants' viewer and customer base in  
 14 Washington, as well as their knowledge of Ferrie's location.

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15  
 16 <sup>3</sup> The Court notes that there is ambiguity, and potentially a dispute of fact, regarding whether  
 17 Senters himself emailed Ferrie to advertise the Webinar or whether that email was sent by  
 18 Woodford Research. *Compare* Senters Dec., Dkt. # 31, at 2-3 (stating that Washington residents  
 19 receive communications from Woodford Research only if they request them by "signing up for  
 20 Woodford's email distribution list") *with* Ferrie Dec., Dkt. # 33, at 2 (describing subscription to  
 21 "Hubert Senters Daily Video Update," through which Ferrie received "an e-mail from Mr.  
 22 Senters soliciting [him] to attend a webinar").

23 <sup>4</sup> As the Court discusses more later, Ferrie's allegations are currently insufficient to impute  
 24 Woodford Research's actions to the individual Woodford Defendants. "[T]he veil separating  
 affiliated corporations may . . . be pierced to exercise personal jurisdiction over a foreign  
 defendant in certain limited circumstances." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1071 (9th Cir.  
 2015). "In order to find an alter ego relationship and pierce the corporate veil, a party must prove  
 "(1) that there is such a unity of interest and ownership that . . . separate personalities no longer  
 exist and (2) that failure to disregard [the separate entities] would result in fraud or injustice."  
*Langlois v. Deja Vu, Inc.*, 984 F. Supp. 1327, 1336 (W.D. Wash. 1997). Ferrie's allegations  
 supporting his "alter ego" theory are formulaic and conclusory. *See* FAC at 26-28. In particular,  
 the FAC barely mentions Givens and Carter.

1 **3. Failure to State a Claim**

2 Dismissal under Fed. R. Civ. P. 12(b)(6) may be based on either the lack of a cognizable  
3 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*  
4 *v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege  
5 facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662,  
6 678 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual  
7 content that allows the court to draw the reasonable inference that the defendant is liable for the  
8 misconduct alleged." *Id.* The allegations must be "enough to raise a right to relief above the  
9 speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although the court  
10 must accept as true the complaint's well-pled facts, conclusory allegations of law and  
11 unwarranted inferences will not defeat an otherwise proper 12(b)(6) motion to dismiss. *Vazquez*  
12 *v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*,  
13 266 F.3d 979, 988 (9th Cir. 2001). On a 12(b)(6) motion, "a district court should grant leave to  
14 amend even if no request to amend the pleading was made, unless it determines that the pleading  
15 could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N. Cal.*  
16 *Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990).

17 Fed. R. Civ. P. 9(b) establishes heightened pleading standards for claims "grounded in  
18 fraud." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). For such claims, "a  
19 party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ.  
20 P. 9(b). "A motion to dismiss a complaint or claim 'grounded in fraud' under Rule 9(b) for  
21 failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule  
22 12(b)(6) for failure to state a claim." *Vess*, 317 F.3d at 1107.

1 **a. Conspiracy, Alter Ego, and Over-Broad Pleading**

2 In addition to attacking Ferrie’s claims as insufficient, the Woodford Defendants argue  
3 that Ferrie impermissibly lumps all Defendants together when asserting his claims. The  
4 Woodford Defendants also contend that Ferrie’s allegations of civil conspiracy and alter ego  
5 liability are implausible. These issues are related: if Ferrie’s allegations of civil conspiracy or  
6 alter ego liability are plausible, then Defendants’ actions can be attributed to each other and  
7 Ferrie’s decision to lump them together may be proper, at least in some cases.

8 “Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons  
9 who, although not actually committing a tort themselves, share with the immediate tortfeasors a  
10 common plan or design in its perpetration.” *Cisco Sys., Inc. v. STMicroelectronics, Inc.*, 77 F.  
11 Supp. 3d 887, 894 (N.D. Cal. 2014). In Washington State, civil conspiracy requires ‘that (1) two  
12 or more people combined to accomplish an unlawful purpose, or combined to accomplish a  
13 lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to  
14 accomplish the conspiracy.’” *Neravetla v. Virginia Mason Med. Ctr.*, No. C13-1501-JCC, 2014  
15 WL 12787979, at \*6 (W.D. Wash. Feb. 18, 2014) (citing *All Star Gas, Inc. of Wash. v. Bechard*,  
16 998 P.2d 367, 372 (Wash. Ct. App. 2000)).

17 “Mere suspicion or commonality of interest is insufficient to prove a conspiracy.”  
18 *Schweickert v. Hunts Point Ventures, Inc.*, No. 13-CV-675RSM, 2014 WL 6886630, at \*6 (W.D.  
19 Wash. Dec. 4, 2014). Instead, a plaintiff must allege facts sufficient for the court to “reasonably  
20 infer that [the defendants] entered into an agreement.” *Kische USA LLC v. Simsek*, No. C16-  
21 0168JLR, 2016 WL 7212534, at \*16 (W.D. Wash. Dec. 13, 2016). Further, “Rule 9(b) imposes  
22 heightened pleading requirements where ‘the object of the conspiracy is fraudulent.’” *Swartz v.*  
23  
24

1 | *KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (quoting *Wasco Prods., Inc. v. Southwall Techs.,*  
2 | *Inc.*, 435 F.3d 989, 991 (9th Cir.)).

3 |         Like civil conspiracy, “[a] request to pierce the corporate veil is only a means of  
4 | imposing liability for an underlying cause of action and is not a cause of action in and of itself.”  
5 | *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th Cir. 1999). The  
6 | alter ego theory applies when “the corporate entity has been disregarded by the principals  
7 | themselves so that there is such a unity of ownership and interest that the separateness of the  
8 | corporation has ceased to exist.” *Grayson v. Nordic Const. Co.*, 92 Wash. 2d 548, 553 (1979).  
9 | Consequently, if an individual principal “so dominates and controls a corporation that such  
10 | corporation is [their] alter ego, a court is justified in piercing the veil of corporate entity and  
11 | holding that the corporation and private person are one and the same.” *Rapid Settlements, Ltd.’s*  
12 | *Application for Approval of Transfer of Structured Settlement Payment Rights*, 166 Wash. App.  
13 | 683, 692 (2012) (quoting *Standard Fire Ins. Co. v. Blakeslee*, 54 Wash.App. 1, 5 (1989)).

14 |         Ferrie’s allegations of civil conspiracy and alter ego liability do not pass scrutiny. Rather  
15 | than describe each Defendant’s conspiratorial conduct, Ferrie broadly alleges that “Defendants  
16 | agreed and combined to engage in a civil conspiracy to commit the unlawful acts as described [in  
17 | the complaint].” FAC at 29. Although Ferrie’s allegation that the Woodford Defendants received  
18 | a 2% fee on his investments suggests a relationship between them and Arbitraging, it does not  
19 | support an inference that they benefitted from Arbitraging’s later, more draconian fees.<sup>5</sup> There is  
20 | also no plausible allegation showing that the Woodford Defendants conspired amongst

21 |  
22 |  
23 | <sup>5</sup> Ferrie’s allegations about the 2% commission fee are also vague and sometimes confusingly  
24 | overlap with his allegations about another referral fee allegedly paid by Arbitraging to the  
Woodford Defendants.

1 themselves; indeed, Carter and Givens receive only a passing reference in the FAC. Ferrie's  
2 conspiracy allegations are therefore not plausible.

3 The same applies to his theory of alter ego liability. Again, Ferrie broadly asserts that the  
4 individual Defendants "controlled, dominated, and operated" their respective entities,  
5 "intermingled their assets," and utilized company funds for individual use. FAC at 28-29. These  
6 allegations are conclusory and do not support an alter ego theory at this stage. Conspiracy and  
7 alter ego are also not independent causes of action, so Ferrie's claims are dismissed insofar as  
8 they assert separate causes of action under these theories.

9 To survive a Rule 12(b)(6) motion to dismiss, a complaint cannot treat the defendants as  
10 an "undifferentiated mass." *In re Washington Mut., Inc. Sec., Derivative & ERISA Litig.*, No.  
11 2:08-MD-1919 MJP, 2009 WL 3246994, at \*10 (W.D. Wash. Oct. 5, 2009). "Generally,  
12 '[u]ndifferentiated pleading against multiple defendants is improper' because it fails to give each  
13 defendant notice of the specific allegations and claims that pertain to it." *Steinley v. Health Net,*  
14 *Inc.*, No. CV 18-5458 PSG (SKX), 2018 WL 6985318, at \*5 (C.D. Cal. Dec. 4, 2018) (quoting  
15 *Corazon v. Aurora Loan Servs. LLC*, No. 11-542 SC, 2011 WL 1740099, at \* 4 (N.D. Cal. May  
16 5, 2011)).

17 All of Ferrie's claims lump Defendants together in just this manner. This is unacceptable  
18 and the FAC must be amended so to fix this problem. Further, the FAC contains no specific  
19 allegations about the actions of Givens and Carter. Ferrie must explain how these individuals are  
20 subject to liability, improve his allegations of imputed liability, or leave them out of the lawsuit.

21 ***b. Section 12 of the Securities Act***

22 Under Section 12(1) of the Securities Act, "[a]ny person who . . . offers or sells" an  
23 unregistered security using means of interstate transportation or communication is liable to the  
24



1 purchaser of the security. 15 U.S.C. § 771(a)(1) (citing § 77e(a)). In *Pinter v. Dahl*, the Supreme  
2 Court held that the Act’s definition of a “seller” encompasses not only those who transfer title to  
3 a security but also those who “solicit securities purchases.” 486 U.S. 622, 646 (1988). The Court  
4 pointed out that “solicitation is the stage at which an investor is most likely to be injured, that is,  
5 by being persuaded to purchase securities without full and fair information.” *Id.* at 646-47.  
6 Liability under Section 12(a) therefore extends to anyone who “solicits the purchase, motivated  
7 at least in part by a desire to serve his own financial interests or those of the securities owner.”  
8 *Id.* at 647; *see also Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 537 (9th Cir. 1989)  
9 (adopting the *Pinter* definition of “seller” for both Section 12(1) and (2) of the Securities Act).

10 However, *Pinter* also notes the Act’s “failure to impose express liability for mere  
11 participation in unlawful sales transactions” as evidence that “Congress did not intend that the  
12 section impose liability on participants’ collateral to the offer or sale.” *Pinter*, 486 U.S. at 650,  
13 651 n.27. Courts have looked to this language when assessing claims brought against a security  
14 issuer that utilized an underwriter to transfer title. In such situations, the Third Circuit has held  
15 that the “purchaser must demonstrate [the issuer’s] direct and active participation in the  
16 solicitation of the immediate sale.” *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 716 (3d Cir.  
17 1996) (quoting *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989)). And  
18 according to the Fifth Circuit, “[t]o count as ‘solicitation,’ the seller must, at a minimum, directly  
19 communicate with the buyer.” *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003).  
20 Merely signing the registration statement for the security is not enough. *Id.*

21 Some courts have applied these principles to dismiss Section 12 claims predicated on  
22 promotional statements about an IPO or merger by company officers at “road show”  
23 presentations. In *In re Infonet Services Corporation Securities Litigation*, for example, the court  
24

1 held that statements at road shows did not make the defendants “sellers” because there was no  
2 allegation that they “personally or directly solicited any of the named Plaintiffs.” 310 F. Supp. 2d  
3 1080, 1102 (C.D. Cal. 2003); *see also Fouad v. Isilon Sys., Inc.*, No. C07-1764 MJP, 2008 WL  
4 5412397, at \*7 (W.D. Wash. Dec. 29, 2008) (holding that “[t]he weight of authority indicates  
5 that [preparing a prospectus and speaking at road shows] does not constitute active solicitation  
6 under *Pinter*.”). *Vanguard Specialized Funds v. VEREIT Inc.* reached a similar conclusion when  
7 scrutinizing press releases and a conference call describing an upcoming merger as an “epic  
8 transaction” that would lead to a “much stronger company.” No. CV-15-02157-PHX-ROS, 2016  
9 WL 5858735, at \*17 (D. Ariz. Oct. 3, 2016). The court drew an analogy with road shows and  
10 dismissed the statements as lacking “direct and active participation in the solicitation of [an]  
11 immediate sale.” *Id.*

12 The Woodford Defendants would like the Court to similarly analogize their Webinar with  
13 a road show presentation because it does not involve direct communication targeting Ferrie  
14 specifically. But not all courts apply such a strict standard to Section 12 claims. *In re Charles*  
15 *Schwab Corporation Securities Litigation*, for example, observed that “the Ninth Circuit has not  
16 explained precisely what [a defendant’s] direct role [in solicitation must] entail.” 257 F.R.D. 534,  
17 549 (N.D. Cal. 2009) (citing *In re Daou Sys., Inc.*, 411 F.3d 1006, 1029 (9th Cir. 2005)). The  
18 court went on to hold that the defendants’ signing of a registration statement and marketing of  
19 the fund demonstrated “more than mere participation” and were sufficient to survive dismissal.  
20 *Id.*; *see also Pirani v. Slack Techs., Inc.*, No. 19-CV-05857-SI, 2020 WL 1929241, at \*11 (N.D.  
21 Cal. Apr. 21, 2020) (declining to dismiss where “Plaintiff alleges that all of the Individual  
22 Defendants signed the Offering Materials, that certain defendants solicited sales at the Investor  
23 Day, and that all of the Individual Defendants were financially motivated to solicit sales”);

1 *Harelson v. Miller Fin. Corp.*, 854 F.2d 1141, 1142 (9th Cir. 1988) (“Wilson did not personally  
2 seek out the customers, but, like a car salesman, waited for them to come to his place of business.  
3 He presented the basic facts necessary to effectuate a sale. . . . He solicited the sale. He was a  
4 seller.”).

5 The Woodford Defendants’ alleged actions likewise go beyond mere participation and  
6 satisfy *Pinter*’s test for solicitation at the pleading stage. The Webinar included statements that  
7 not only promoted the benefits of ARBs but actively encouraged viewers to invest. *See* FAC at 7  
8 (“I recommend [that an investor] put whatever risk amount of money you’re going to start with,  
9 whether its \$250 or if it’s a million dollars. . . . Let’s just get the money in here and get you  
10 making some money.”). This was “more than mere participation” in the sale of securities.

11 *Charles Schwab*, 257 F.R.D. at 549. Further, although the Woodford Defendants did not sell the  
12 ARBs themselves, their 1% Club program was essentially the gateway that enabled Ferrie to  
13 invest. Ferrie had to pay for his 1% Club subscription and he also alleges that the Woodford  
14 Defendants received a fee from Arbitraging for recruiting investors. FAC at 15. The Woodford  
15 Defendants therefore had a financial interest in getting Ferrie to invest in ARBs.

16 The Court is unpersuaded by the Woodford Defendants’ arguments that a plaintiff cannot  
17 state a Section 12 claim without alleging interaction with and targeting by the solicitor. The  
18 Woodford Defendants claim that Ferrie must allege a “back and forth” exchange in order to  
19 show active solicitation, but they cite no cases imposing that requirement. They also argue that  
20 the Webinar had to target Ferrie in particular, citing *Rensel v. Centra Tech, Inc.*, No. 17-24500-  
21 CIV, 2019 WL 2085839, at \*3-4 (S.D. Fla. May 13, 2019). In *Rensel*, the court held that  
22 allegations of general advertising of a crypto-currency token via Twitter were insufficient to state  
23 a claim under Section 12. *Id.* at \*4. But the Woodford Defendants ignore that *Rensel*’s holding  
24

1 was based on the plaintiffs' failure to allege they ever *saw* the promotional tweets or were  
2 motivated by them. *Id.* In contrast, Ferrie alleges that he purchased his 1% Club subscription and  
3 began investing after viewing the Webinar. FAC at 9. Indeed, it is hard to imagine how he would  
4 have known about Arbitraging otherwise.

5 Finally, the Woodford Defendants argue that Ferrie's Section 12 claim sounds in fraud  
6 but fails to comply with Rule 9(b)'s heightened pleading requirements. However, as several  
7 courts have observed, "failure to register securities [under Section 12(1)] need not be pled with  
8 the specificity required by Rule 9(b)." *Wanetick v. Mel's of Modesto, Inc.*, 811 F. Supp. 1402,  
9 1406 n.4 (N.D. Cal. 1992); *see also In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates*  
10 *Sec. Litig.*, 636 F. Supp. 1138, 1172 (C.D. Cal. 1986) (holding that Section 12(1) "is not  
11 grounded in fraud"); *see also Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 646 (C.D. Cal.  
12 1983) (omitting Section 12(1) claim from heightened pleading requirements).

13 The Woodford Defendants cite cases applying Rule 9(b) to claims under Section 12(2).  
14 *See In re CytRx Corp. Sec. Litig.*, No. CV141956GHKPJWX, 2015 WL 5031232, at \*13 (C.D.  
15 Cal. July 13, 2015); *In re Infonet*, 310 F. Supp. 2d at 1093-94, 1100. But liability under Section  
16 12(2) turns on the defendant's knowing or negligent misrepresentations. Section 12(1), by  
17 contrast, "impos[es] strict liability upon persons who offer or sell unregistered securities" and  
18 therefore does not rely on Ferrie's allegations of misrepresentation and concealment. *McDaniel*  
19 *v. Compania Minera Mar de Cortes, Sociedad Anonimo, Inc.*, 528 F. Supp. 152, 159 (D. Ariz.  
20 1981). Ferrie's Section 12 claims against Woodford Research, Senters, and Arvin for publishing  
21 the Webinar need not satisfy Rule 9(b). Nonetheless, the FAC is impermissibly broad and  
22 attributes actions to all Defendants indiscriminately. FAC at 19. As with his other claims, Ferrie  
23 must amend his Section 12 claim to remedy this problem.

1 **c. Fraud-Based Claims**

2 Ferrie asserts the following fraud-based claims against the Woodford Defendants: Violation  
3 of Section 10(b) of the Exchange Act and SEC Rule 10b5(b), Fraudulent Misrepresentation,  
4 Fraudulent Concealment, and Negligent Misrepresentation. FAC at 19-26. The elements of a  
5 securities fraud claim under Rule 10b-5 are: “(1) a material misrepresentation or omission by the  
6 defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase  
7 or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6)  
8 loss causation.” *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1206 (9th Cir. 2016); *Atari Corp. v. Ernst*  
9 *& Whinney*, 981 F.2d 1025, 1030 (9th Cir. 1992).

10 Similarly, a Washington fraudulent misrepresentation claim requires: “(1) a representation of  
11 existing fact, (2) that is material, (3) and false, (4) the speaker knows of its falsity, (5) intent to  
12 induce another to act, (6) ignorance of its falsity by the listener, (7) the latter’s reliance on the truth of  
13 the representation, (8) her right to rely on it, and (9) consequent damage.” *See Baker Boyer Nat’l*  
14 *Bank v. Foust*, 436 P.3d 382, 386 n.4 (Wash. Ct. App. 2018). A defendant is liable for negligent  
15 misrepresentation if (1) it supplied false information, (2) that it knew or should have known would be  
16 used as guidance in the plaintiff’s business transactions, (3) was negligent in obtaining or  
17 communicating the false information, (4) the plaintiff reasonably relied on the false information, and  
18 (5) the false information proximately caused damages. *Ross v. Kirner*, 172 P.3d 701, 704 (Wash.  
19 2009).

20 “To establish fraudulent concealment, the plaintiff may either ‘affirmatively plead and prove  
21 the nine elements of fraud or simply show that the defendant breached an affirmative duty to disclose  
22 a material fact.’” *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 293 P.3d 407, 412 (Wash. Ct. App. 2013)  
23 (quoting *Crisman v. Crisman*, 85 Wash.App. 15, 21 (1997)). “Where the law imposes a duty on one  
24 party to disclose all material facts known to him and not known to the other, silence or concealment

1 in violation of this duty with intent to deceive will amount to fraud as being a deliberate suppression  
2 of the truth and equivalent to the assertion of a falsehood.” *Stiley v. Block*, 130 Wash. 2d 486, 515-16  
3 (1996) (Talmadge, J., concurring) (quoting *Oates v. Taylor*, 31 Wash. 2d 898, 902-03 (1948)).

4 Fed. R. Civ. P. 9(b) imposes a heightened pleading standard for claims “grounded in  
5 fraud,” a category that includes any claim relying upon a “unified course of fraudulent conduct”  
6 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003), or in which fraud is an  
7 “essential element.” *Vernon v. Qwest Commc’ns Int’l, Inc.*, 643 F. Supp. 2d 1256, 1265 (W.D.  
8 Wash. 2009). For such claims, “the complaint must ‘set forth what is false or misleading about a  
9 statement, and why it is false.’” *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1161 (9th Cir.  
10 2009). This means the plaintiff is required to “state the time, place, and specific content of the  
11 false representations as well as the identities of the parties to the misrepresentation.” *Sanford v.*  
12 *MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010).

13 Ferrie’s claims of misrepresentation and concealment have fraud as an essential element  
14 and therefore must satisfy Rule 9(b), as Ferrie himself concedes. In his fraudulent and negligent  
15 misrepresentation claims, Ferrie describes the following misleading statements:

16 Defendants made false misrepresentations of material facts regarding their  
17 products, goods and services, including their involvement in the production,  
18 development, and functionality of Defendant ARBITRAGING’s “highly  
19 advanced” arbitrating bot, the legitimacy of Defendant ARBITRAGING’s  
20 services, including the existence of a functioning “highly advanced” arbitrating  
21 bot, the ability to generate steady returns from arbitrating cryptocurrencies  
22 among different exchanges, and the legitimacy of profits derived from arbitrating  
23 cryptocurrencies as opposed to generating commissions based on new  
24 investments, among other fraudulent misrepresentations.

21 FAC at 29.

22 Ferrie’s fraudulent concealment claim resembles his misrepresentation claim and alleges  
23 the following:

1 Defendants intentionally concealed material information that was otherwise  
2 unknown to Plaintiff and intended to deceive Plaintiff by concealing such  
3 information, including but not limited to: Defendants receipt of a portion of  
4 Plaintiff's investment via commissions, referral fees, and other charges of a  
5 portion of his investment; Defendants were not making daily returns of  
approximately 0.73 percent exclusively based on arbitrage trading; Defendants  
would charge numerous undisclosed and oppressive fees after receipt of  
Plaintiff's investment; and Defendants did not have a "highly advanced"  
arbitraging bot, among other concealments.

6 FAC at 25. For his Section 10(b) claim, Ferrie merely asserts that Defendants' "promotional  
7 materials, releases and statements were materially false and misleading in that they failed to  
8 disclose material adverse information and misrepresented the truth about ARBITRAGING's  
9 business and ARBs' value." *Id.* at 20. All four claims incorporate Ferrie's more detailed factual  
10 allegations from earlier in the FAC.

11 First, Ferrie's Section 10(b) claim against the Woodford Defendants is entirely  
12 conclusory. His basis for the claim does not clearly correspond to any of his more specific  
13 allegations about statements in the Webinar. Ferrie also makes no effort to defend this claim in  
14 his Opposition. The Section 10(b) claim against the Woodford Defendants accordingly fails.

15 As for Ferrie's state law misrepresentation claims, the Court agrees with the Woodford  
16 Defendants that statements in the Webinar about Arbitraging's "legitimacy" or "trustworthiness"  
17 are vague opinions that cannot support a fraud claim. *Police Ret. Sys. of St. Louis v. Intuitive  
18 Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014) ("vague statements of optimism like 'good,'  
19 'well-regarded,' or other feel good monikers, . . . [are] non-actionable puffing." (internal  
20 quotation omitted)). Senters also qualified these statements by describing Arbitraging as  
21 "sketchy" and warning viewers about over-exposure. FAC at 8.

22 Other statements that Ferrie identifies as fraudulent are not revealed as false in the FAC  
23 or were never made. Ferrie alleges no specific problems with Arbitraging's bot or the bot's non-

1 existence, nor did the Woodford Defendants claim to be have been involved in producing or  
2 developing the bot. Ferrie also does not allege that his returns were not “steady;” indeed, Ferrie  
3 was pleased enough with his returns that he put all his savings into his Arbitraging account. In  
4 addition, statements in the Webinar about future returns were projections that need not be  
5 completely precise. *See Zowine v. Prussin*, No. CV-14-00892-PHX-GMS, 2016 WL 558550, at  
6 \*8 (D. Ariz. Feb. 12, 2016) (“A reasonable person knows that investments involve risk, and a  
7 ‘promise’ that an investment will reap high returns cannot amount to more than a prediction.”);  
8 *Marx v. Comp. Scis. Corp.*, 507 F.2d 485, 489 (9th Cir. 1974) (“a reasoned and justified  
9 statement of opinion,” with “a sound factual or historical basis, is not actionable” absent a “gross  
10 disparity” between the prediction and an actual, undisclosed reality).

11 This leaves the representation about “the legitimacy of profits derived from arbitraging  
12 cryptocurrencies as opposed to generating commissions based on new investments.” This may  
13 refer to Senters’s statements in the Webinar that he was “making \$600, \$700 a day” and had  
14 “\$100,000 working in this robot” when Senters was also making money off referral and  
15 commission fees. FAC at 8. However, the fact that hypothesizing is necessary to understand  
16 Ferrie’s claim means it does not comply with Rule 9(b). Ferrie’s claim must identify the  
17 misrepresentation and explain why it was false. And, even if the Court’s hypothesis is correct,  
18 the FAC does not explain why Senters’s failure to mention his profits from fees would mean his  
19 profits from Arbitraging were non-existent. Because Ferrie does not clearly identify any explicit  
20 misrepresentations in the Webinar, his fraudulent and negligent misrepresentation claims are  
21 dismissed.

22 Ferrie’s fraudulent concealment claim fares better. Here, Ferrie at least identifies  
23 information—Senters’s use of Arbitraging’s “internal exchange,” receipt of a commission and  
24



1 2% rereferral fees, and Arbitraging’s other impending “oppressive fees”— that was omitted from  
2 the Webinar. These omissions were also material. A “material fact” is one “to which a  
3 reasonable [person] would attach importance in determining his or her choice of action in the  
4 transaction in question.” *Guarino v. Interactive Objects, Inc.*, 122 Wash. App. 95, 114 (2004)  
5 (quoting *Aspelund v. Olerich*, 56 Wash.App. 477, 481-82 (1990)). “For an undisclosed fact to be  
6 material, ‘there must be a substantial likelihood that the disclosure of the omitted fact would  
7 have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of  
8 information made available.’” *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)).

9 The Woodford Defendants attempt to single out each misrepresentation and explain why,  
10 for example, failing to mention the 2% referral fee could not have been material because Ferrie  
11 continued to invest even after learning of it. But the FAC alleges a collection of omissions that,  
12 together, induced Ferrie to act. Viewed in this light, it is plausible that knowing these facts would  
13 have “significantly altered the ‘total mix’ of information.” *Guarino*, 122 Wash. App. at 114.

14 However, Ferrie’s fraudulent concealment claim against the Woodford Defendants still  
15 fails to satisfy Rule 9(b). Like his other claims, Ferrie fails to differentiate the Defendants or  
16 explain with specificity what each concealed and when. For example, the FAC confusingly refers  
17 to both a “2-percent referral commission” that Ferrie paid to Woodford Research (or perhaps just  
18 Senters) and a “commission from Arbitraging” that Senters received. FAC at 12, 15. The  
19 relationship between these payments and how/when Ferrie learned of each is unclear.

20 Ferrie also fails to articulate the concrete basis of each Defendant’s duty and when it  
21 arose. “A duty to disclose material facts exists for a person who, in the course of business,  
22 supplies information for the guidance of others in their business transactions.” *Giraud v. Quincy*  
23 *Farm & Chem.*, 102 Wash. App. 443, 453 (2000). Ferrie alleges that “Defendants had a duty to  
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1 disclose to Plaintiff material information when they made partial or outright false disclosures that  
2 conveyed a false impression regarding the nature of Defendant ARBITRAGING’s products,  
3 goods, and services, including the absence of them featured ‘highly advanced’ arbitraging bot”  
4 and “Defendants had a duty to disclose to Plaintiff material information when they solicited and  
5 accepted Plaintiff’s investment.” FAC at 25. These statements are vague, conclusory, and based  
6 partially on allegations that the Court has identified as unsupported by the rest of the FAC.  
7 Ferrie’s fraudulent concealment claim therefore fails to satisfy Rule 9(b).<sup>6</sup>

8 ***d. Unjust Enrichment***

9 “Unjust enrichment is the method of recovery for the value of the benefit retained absent  
10 any contractual relationship because notions of fairness and justice require it.” *Young v. Young*,  
11 164 Wash. 2d 477, 484 (2008). “Three elements must be established in order to sustain a claim  
12 based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an  
13 appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the  
14 defendant of the benefit under such circumstances as to make it inequitable for the defendant to  
15 retain the benefit without the payment of its value.” *Id.* (quoting *Bailie Commc’ns, Ltd. v. Trend*  
16 *Bus. Sys., Inc.*, 61 Wash. App. 151, 159 (Wash. Ct. App. 1991)).

17 The Woodford Defendants argue that Ferrie’s unjust enrichment claim must satisfy  
18 Rule 9(b) because it relies on the same allegations that support his fraud claims. They further  
19 contend that Ferrie’s allegations do not meet this standard because they do not explain which  
20 Defendant received which funds or why circumstances indicate unjustness.

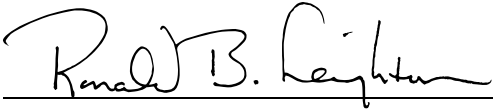
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22  
23 <sup>6</sup> The Woodford Defendants make additional arguments about scienter, reliance, causation, and  
24 address if Ferrie amends his allegations.



1 should be completed within 60 days of this Order. The Woodford Defendants may renew their  
2 motion to dismiss for lack of personal jurisdiction at the conclusion of discovery if they wish.

3 IT IS SO ORDERED

4 Dated this 14<sup>th</sup> day of July, 2020.

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6 Ronald B. Leighton  
7 United States District Judge

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