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## Hedge Fund Founder Calls SEC's Fraud Claims Deficient

By **Cara Mannion**

Law360, New York (March 21, 2017, 1:39 PM EDT) -- A hedge fund founder accused of spending investor money on his rent and car payments told a New York federal court Monday that the U.S. Securities and Exchange Commission's securities fraud allegations are deficient, saying a disclaimer in newsletters sent to prospective investors renders his statements immaterial.

Matrix Capital Markets LLC principal Nicholas Mitsakos moved to dismiss the SEC's suit alleging he lied on marketing materials to lure investors and then spent part of one buyer's \$2 million stake on personal expenses, arguing he didn't actually solicit offers to buy or sell securities because he never sent offering memorandums to potential investors, as required by a disclaimer in the marketing materials.

"The fact that Matrix was marketed solely to qualified and institutional investors, and that the written marketing materials explicitly provided that no solicitation of an offer to buy or sell any securities would be made until the qualified and institutional investors received the applicable offering memorandum, Mitsakos's alleged oral representations and representations through written marketing materials were nothing more than preliminary, non-actionable puffery, and thus immaterial," he said.

The SEC and federal prosecutors in August **launched** dual civil and criminal securities fraud claims against Mitsakos, alleging he essentially "ran an imaginary portfolio" by lying to investors about his fund's performance and retroactively faking trades, in addition to telling investors that his fund had ties to KPMG LLP when in fact the auditing giant was never formally retained.

Federal authorities also alleged that Mitsakos used \$2 million sent to him by a Cayman Islands-based investor on personal expenses including credit card debt, car payments and rent.

But Mitsakos said on Monday that no investor, other than the Cayman Islands-based investment manager, could have given money to his fund because no offering memorandums were ever distributed. Newsletters sent to investors, which the SEC says contained false information, stated there was no "solicitation of an offer to buy or sell any securities" until qualified investors received offering memorandums.

This renders the allegedly false statements immaterial, Mitsakos said.

"Any reasonable investor in these circumstances would not rely on statements about expectations of future growth, or statements putting a 'spin' on historical performance," he said. "In these circumstances, such statements, in the absence of an offering memorandum, concerning a hedge fund trying to raise capital cannot be anything more than nonactionable puffery."

Mitsakos also said the SEC's allegations concerning the Cayman Islands-based investor don't amount to securities fraud.

This unnamed investor entered into a "relationship agreement" with Mitsakos to jointly run a hedge fund, giving Mitsakos full sole discretion over investment decisions, according to the motion.

Mitsakos said he never misled this investment manager about any actions "in connection with" the

purchase or sale of securities, as required by securities laws to prove fraud. Instead, the SEC's allegations actually allege Mitsakos breached their relationship agreement by taking more fees than he was entitled to for personal expenses, according to the motion.

"Critically, the complaint is devoid of any allegation that Mitsakos misrepresented to the investment manager the nature or value of the securities he would trade or his trading strategy," he said. "This defect is fatal to the SEC's complaint."

Mitsakos created Matrix Capital in 2013, calling himself a "long-short" hedge fund that invested in undervalued securities and sold overvalued ones short, according to charging documents.

A now-deleted LinkedIn profile bearing Mitsakos' name said that Matrix Capital was a value-based public equity fund launched in 2015, and that it has received more than \$500 million in capital commitments. It characterized Mitsakos as the fund's chairman, CEO and chief investment officer.

The government alleged Mitsakos and an unnamed co-conspirator told potential clients he already had a little more than \$60 million in his hedge fund when he went around trying to drum up investors, promising them huge returns like the ones he said he had earned in the past.

But Mitsakos had no real investors in his hedge fund when he roped in the Cayman Islands-based investor, who forked over \$2 million, prosecutors said.

Mitsakos put about \$1.2 million of that to work in the markets buying and selling stocks, but his investments "resulted in significant losses," the DOJ said. And he put the rest to work in his own life, spending hundreds of thousands of dollars on business and personal expenses, according to prosecutors.

Mitsakos **pled not guilty** in October to conspiracy, wire fraud and securities fraud charges in a September indictment.

Counsel for Mitsakos did not immediately respond on Tuesday to a request for comment. The SEC does not comment on pending litigation.

The SEC is represented by its own Andrew Matthew Calamari, Alexander Javad Janghorbani, Alison Rose Levine and Valerie Ann Szczepanik.

Mitsakos is represented by Eric M. Creizman and Amanda Shoffel of Creizman PLLC.

The case is Securities and Exchange Commission v. Matrix Capital Markets LLC et al., case number 1:16-cv-06395, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Pete Brush and Kat Greene. Editing by Emily Kokoll.