UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS,
WILLIAM STENGER,
JAY PEAK, INC.,
Q RESORTS, INC.,
JAY PEAK HOTEL SUITES L.P.,
JAY PEAK HOTEL SUITES PHASE II L.P.,
JAY PEAK MANAGEMENT, INC.,
JAY PEAK PENTHOUSE SUITES L.P.,
JAY PEAK GP SERVICES, INC.,
JAY PEAK GOLF AND MOUNTAIN SUITES L.P.,
JAY PEAK GP SERVICES GOLF, INC.,
JAY PEAK LODGE AND TOWNHOUSES L.P.,
JAY PEAK GP SERVICES LODGE, INC.,
JAY PEAK HOTEL SUITES STATESIDE L.P.,
JAY PEAK GP SERVICES STATESIDE, INC.,
JAY PEAK BIOMEDICAL RESEARCH PARK L.P.,
AnC BIO VERMONT GP SERVICES, LLC,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC,

Relief Defendants.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT ARIEL QUIROS' MOTION TO DISMISS

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I. INTRODUCTION

Defendant Ariel Quiros' Motion to Dismiss is meritless – nothing more than a mix of incorrect legal assertions about the pleading standards Plaintiff Securities and Exchange Commission must satisfy and improper attempts to have the Court resolve disputed issues of fact. The Commission's Amended Complaint (DE 120) more than sufficiently pleads both fraud with particularity and facts demonstrating Quiros violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act"). Furthermore we have easily satisfied the minimal requirements for pleading injunctive relief and disgorgement of ill-gotten gains.

Quiros makes four primary claims as to why the Court should dismiss portions of the Commission's Amended Complaint: (1) many of the Commission's claims are time barred; (2) the Commission has not specifically enough pled a basis for injunctive relief and disgorgement; (3) the Commission has not pled fraud with particularity; and (4) the Commission has not pled the required elements to demonstrate Quiros' liability under the anti-fraud provisions of the securities laws. None of Quiros' arguments are supported by the case law he cites. As the rest of this response shows, his claims run contrary to well-established securities law standards and demonstrate a vast misunderstanding or erroneous assertions of what the law requires.

First, none of the 148 factual paragraphs or 52 counts in the Amended Complaint are time barred under *SEC v. Graham*, 2016 WL 3033605 (11th Cir. May 26, 2016). Quiros has completely misstated *Graham*'s holding. As discussed in Section III.A below, while *Graham* held that claims for disgorgement are subject to the five-year statute of limitations in 28 U.S.C. §2462, it left intact the Commission's ability to obtain injunctive relief for violations without regard to how long ago they occurred. Because each of the 148 factual paragraphs and 52 counts of the Amended Complaint give rise to our claims for injunctive relief, none of them are subject to Section 2462's five-year limitation under the express holding of *Graham*. Therefore, the Court should not dismiss any claims or counts.

Second, Quiros has fabricated out of whole cloth the claim that the Commission must specify what disgorgement it seeks or the factual basis for injunctive relief in each count. As discussed in Sections III.B and C below, the law does not require the Commission to plead disgorgement or injunctive relief in a complaint with anywhere near the level of factual specificity Quiros asserts.

Third, the Commission's detailed 148 factual paragraphs plead fraud with particularity under Federal Rule of Civil Procedure 9(b). As discussed in Section IV below, the Commission is only required to allege the substance of the fraudulent acts, who engaged in the fraud, and when the fraud occurred, to meet the dictates of Rule 9(b).

Fourth, Quiros misstates the standards for liability under Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. Neither statute requires Quiros to have *personally* made a misrepresentation or omission to be liable. As discussed in Sections IV and V below, the Commission has properly pled facts showing Quiros is liable for misrepresentations and omissions, scheme liability, and a fraudulent course of conduct under each of the three sections of Sections 17(a) and Rule 10-5. We also have pled facts to demonstrate aiding and abetting and control person liability. For all these reasons, the Court should deny Quiros' motion to dismiss.

II. STANDARDS ON A MOTION TO DISMISS

Quiros moves to dismiss the Amended Complaint, in part, under Federal Rules of Civil Procedure 12(b)(6) and 8(a) (Motion at 2). However, his motion engages in no discussion of the high burden he must meet to warrant a dismissal.

To start with, the Court must accept as true all facts alleged in the Amended Complaint in the light most favorable to the Commission. *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). All reasonable inferences in the Amended Complaint must be drawn in the Commission's favor. *Ventrassist Pty. Ltd. v. Heartware, Inc.*, 377 F. Supp. 2d 1278, 1285 (S.D. Fla. 2005) (citing *Jackson v. Birmingham Bd. of Ed.*, 309 F.3d 1333, 1335 (11th Cir. 2002). This is true regardless of the fact that Quiros has attached to his motion the offering documents from the seven Jay Peak limited partnerships. While the Commission has no objection to Quiros attaching the offering documents because they are central and referred to in the Amended Complaint, Quiros cannot use them to have the Court resolve disputed fact issues:

> In order for a fact to be judicially noticed under Rule 201(b), indisputability is a prerequisite. Since the effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence and in effect, directing a verdict against him as to the fact noticed, the fact must be one that only an unreasonable person would insist on disputing.

United States v. Marvin Jones, 29 F.3d 1549, 1553 (11th Cir. 1994) (footnote and citations omitted). *See also Ventrassist*, 377 F. Supp. 2d at 1285 ("the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merit of the plaintiff's

case"). As discussed in Section IV.B below, under the guise of judicial notice and attaching documents referred to in the Amended Complaint, Quiros asks the Court to resolve several disputed issues of fact.

Moreover, under the liberal notice pleading standards of Rule 8(a), all the Commission must do is set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *McMillian v. AMC Mortgage Servs., Inc.*, 560 F. Supp. 2d 1210, 1212 (S.D. Ala. 2008). The Court's inquiry at the motion to dismiss stage still focuses on whether the challenged pleadings "give the defendant fair notice of what the . . . claim is and the grounds on which it rests." *Id.*, quoting. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). "The proper test is whether the complaint 'contains either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory.'" *McMillian*, 560 F. Supp. 2d at 1213 (citation omitted). The threshold for withstanding a motion to dismiss based on a claim of inadequate pleading is "exceedingly low." *In the Matter of Southeast Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995).

III. THE COMMISSION HAS PLED SUFFICIENT FACTS TO ESTABLISH ITS ENTITLEMENT TO INJUNCTIVE RELIEF AND DISGORGEMENT

A. Graham Does Not Mandate Dismissal Of Any Claims Or Counts

As Quiros' motion notes, after the Commission filed this case, the Eleventh Circuit held in *Graham* that the Commission's claims for disgorgement, like those for civil penalties, are subject to the five-year statute of limitations in 28 U.S.C. §2462. *Graham*, 2016 WL 3033605 at *4-*5.[1] However, of equal importance, which Quiros' motion glosses over, is that *Graham* held Section 2462 has no applicability to the Commission's claims for injunctive relief, and that there is no five-year statute of limitations on acts giving rise to injunction claims. *Id.* at *3.

Thus, Quiros' argument that the majority of the Commission's claims are now time-barred (Motion at 3, 11-14) is a gross misstatement of *Graham*'s holding. The Amended Complaint clearly specifies that the Commission is seeking permanent injunctions against all Defendants, including a conduct-based injunction against Quiros. DE 120 at 4, 80-81. Every factual allegation and count of the Amended Complaint gives rise to the Commission's request for injunctive relief against Quiros. Therefore, no fact or claim is "irrelevant" or time-barred as

[1] The Commission disagrees with *Graham's* holding regarding disgorgement and is evaluating its options, but recognizes that for now, it is binding precedent on this Court.

Quiros asserts. Motion at 3. Consequently, Quiros' entire discussion of when the Commission's claims first accrued, in addition to being legally wrong as discussed in Section III.C below, is immaterial. No time limit applies to our request for injunctions against Quiros; therefore it does not matter when our causes of action arose. As discussed in Section C, the much narrower holding of *Graham* is that our claims for *disgorgement* must have accrued no more than five years before we filed the original Complaint, which is a very different question and analysis.

B. Quiros Wrongly States The Burden To Plead Disgorgement and Injunctive Relief

Quiros asks the Court to require the Commission to specify "the relief that the SEC will seek for each Counts [sic]." Motion at 13. As discussed above, *Graham* requires no such amended pleading, because none of the Commission's claims are time-barred. Quiros cites no law to support this request,[2] for the simple reason that the law does not require the Commission to plead remedies with such specificity in a complaint.

1. The Specificity Required To Plead Disgorgement

The Amended Complaint contains a number of specific factual allegations concerning disgorgement as to Quiros, including ill-gotten gains for which Quiros may be jointly and severally liable with other Defendants or Relief Defendants.[3] At a minimum, these include:

> Quiros and the other Defendants misused more than $200 million of investor money. Amended Complaint at ¶3.
>
> Quiros personally misappropriated more than $50 million in investor money for a variety of purposes. *Id.* at ¶4.
>
> Jay Construction Management ("JCM"), a company of which Quiros was the sole officer and director, received more than $160 million of investors' funds, much of it without any legitimate purpose. *Id.* at ¶28.
>
> GSI of Dade County ("GSI"), another company of which Quiros was the sole officer

[2] The only case Quiros cites, *Anderson v. Dist. Bd. of Trustees of Central Fla. Comm. College*, 77 F.3d 364 (11th Cir. 1996), had nothing to do with the *remedies* the plaintiff sought, but with whether the complaint was a "shotgun pleading." However, our Amended Complaint is not a shotgun pleading because, unlike the complaint in *Anderson*, it did not incorporate prior counts into each successive count. *Id.* at 365-66. *See also SEC v. City of Miami*, 988 F. Supp. 2d 1343, 1354-55 (S.D. Fla. 2013) (complaint that set out facts in support of each count and did not incorporate prior counts into each successive count was not a "shotgun pleading").

[3] It is well settled that Quiros may be jointly and severally liable for disgorgement with other Defendants and Relief Defendants. *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004); *SEC v. SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1117 (9th Cir. 2006).

and director, also received investors' proceeds without any legitimate basis. *Id.* at ¶29.

Quiros improperly used approximately $29 million of investors' funds to buy Q Burke Mountain Resort and Jay Peak. *Id.* at ¶¶31 and 57-77.[4]

Quiros improperly used investor funds to pay off and pay down margin loans. *Id.* at ¶¶78-95.

Quiros used more than $3.8 million of Golf and Mountain Phase IV investor funds to purchase the Setai condominium. *Id.* at ¶105.

The Defendants failed to make $6.6 million of required contributions to Lodge and Townhouse Phase V. *Id.* at ¶109.

Quiros and the other Defendants failed to complete the Stateside Phase VI project as promised, misusing money, among other things, to pay $2 million of JCM's taxes, and failing to make at least $7.4 million in required contributions to the project. Stateside is at least $26 million short of the funds needed for completion. *Id.* at ¶¶111-115.

Quiros and the other Biomedical Phase VII Defendants spent only about $10 million of the $69 million raised on Phase VII construction costs. Quiros misused and misappropriated the rest, failing to make more than $6 million in required contributions, and using investor funds, among other things, to pay corporate taxes, back a personal line of credit, pay off a margin loan, buy a condominium at Trump Place, and purchase Q Burke Resort. *Id.* at ¶¶127-142.

See also Id. at ¶¶10, 81 (prayer for disgorgement).

This detail more than satisfies the remedy pleading requirements in a complaint. Courts typically hold it is improper to weigh *any* factual allegations of disgorgement until the remedies stage of the case. *SEC v. Payton*, Case No. 14 Civ. 4644, 2016 WL 3023151 at *3 (S.D.N.Y. May 16, 2016) ("the SEC was not required in its complaint to state the precise amount of disgorgement that it sought"). In *Payton*, the District Court rejected the argument that the Commission was limited to seeking the amount of disgorgement it sought in the complaint: "In any SEC enforcement action, the determination of remedies is for the Court . . . In this case, the full amount of disgorgement flows directly from the jury's holding." *Id.*

Many other courts have held identically. *SEC v. Zwick*, Case No. 03 Civ. 2742, 2007 WL 831812 at *22 (S.D.N.Y. March 16, 2007) (rejecting defendant's argument that disgorgement should be limited to amounts specified in the complaint); *FTC v. Cephalon, Inc.*, 100 F. Supp. 3d 433, 439 (E.D. Pa. 2015) (Rule 8(a)(3) does not require that the demand for judgment be pled with specificity); *SEC v. Daifotis*, Case No. C 11-10037, 2011 WL 2183314 at *15 (N.D. Cal.

[4] We further address the timeliness of our claim for disgorgement stemming from these securities law violations in Section C below.

June 6, 2011) (denying defendants' motion to strike Commission claim for disgorgement and holding that "it would be premature to strike this prayer for relief, as we do not know how the evidence will develop"); *SEC v. Kovzan*, Case No. 11-2017, 2011 WL 3421327 at *9 n.3 (D. Kan. Aug. 4, 2011) (rejecting as premature a motion to dismiss disgorgement remedy); *SEC v. Conaway*, Case No. 2:05-CV-40263, 2009 WL 902063 at *19 (E.D. Mich. March 31, 2009) ("decision whether to order disgorgement, and in what amount, is a fact intensive one that many courts suggest should be considered only after a finding of liability"); *SEC v. Buntrock*, Case No. 02 C 2180, 2004 WL 1179423 at *3 (N.D. Ill. May 25, 2004) (rejecting as "untimely" a motion to dismiss disgorgement remedy because defendants had not yet been found liable for any securities law violation alleged in the complaint).

Given the detailed facts giving rise to our disgorgement claim already in the Amended Complaint, and the minimal level of pleading required at this stage of the case (as the cases cited above hold), there is no legal grounds for the Court to dismiss any of the Commission's disgorgement claims. As discussed in Section C below, whether any of the Commission's disgorgement claims are time-barred will be determined at a much later point in the case.

2. *We Are Not Required To Specify Which Counts Give Rise To Injunctive Relief*

In similar fashion, Quiros also claims the Court should require the Commission to specify our factual basis for injunctive relief. Motion at 2-3 and 13. Quiros also asserts the Court should strike our prayer for injunctive relief at Page 80 of the Amended Complaint because it is an improper "obey the law" injunction. *Id.* at 2. Quiros fails to cite a single case to support his claims, and the law on pleading injunctive relief supports denying his motion on these points.

The great weight of authority holds that courts should not dismiss claims for injunctions on a motion to dismiss. *SEC v. C. Jones & Co.*, 312 F. Supp. 2d 1375, 1382 (D. Col. 2004) (argument that Commission had not pled adequate basis for injunction premature on motion to dismiss and must await Commission presentation of evidence); *SEC v. Hopper*, Case No. Civ.A H-04-1054, 2006 WL 778640 at *16 (S.D. Tex. March 24, 2006) (same); *SEC v. Fenster*, 929 F. Supp. 1346, 1349 (D. Col. 1996) (refusing to dismiss complaint on grounds that Commission had not shown likelihood of future violations when Commission had not had opportunity to present evidence on issue); *SEC v. Delphi Corp.*, No. 06-114891, 2008 WL 4539519 at *1 (E.D. Mich. Oct. 8, 2008) (denying motion to dismiss and stating court must await proof before it can determine whether the Commission established whether there was a reasonable likelihood of

future violations); *SEC v. Warner*, 652 F. Supp. 647, 650 (S.D. Fla. 1987) (defendant's claims that Commission had not stated adequate basis for injunction in a complaint concerned "a matter of proof," and therefore court would deny motion to dismiss).

Under this well-established authority, Quiros' claims that the Court should require the Commission to plead more specifically what facts and counts give rise to its claim for injunctive relief are meritless. So is his argument that the Commission is seeking an improper obey-the-law injunction.[5] Until such time as the Commission presents its factual basis for an injunction if we prevail on liability and what kind of injunction we seek, any Court ruling on our claim for permanent injunctive relief is premature.

C. Quiros Incorrectly States When A Claim First Accrues

In arguing for dismissal of numerous counts, Quiros incorrectly states the Commission's causes of action accrued on the first date in each of the seven Phases that the Defendants began offering the limited partnership interests. Motion at 12-13. As discussed in Section A above, this is wrong because none of the Commission's claims are time-barred. The argument is also wrong because it misstates when a claim for *disgorgement* first accrues under the securities law. Finally, the argument ignores the "continuing violation" doctrine applicable to disgorgement and penalty claims subject to the five-year statute under Section 2462. Under that doctrine, claims for conduct (in this case disgorgement and civil penalties) that occurred outside the limitations period are not barred if that conduct was part of "an unlawful practice that continue[d] into the limitations period." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982).

1. When A Disgorgement Claim First Accrues

A claim accrues at the time all the elements of a cause of action exist. *Gabelli v. SEC*, 133 S.Ct. 1216, 1220 (2013) (for Section 2462 purposes, the Commission's claims accrue when it "has a *complete* and present cause of action") (emphasis added). A plaintiff lacks a cause of action until *all* of the elements of the claim are satisfied. *Green v. Brennan*, 136 S.Ct. 1769, 1777 (2016). To state a claim for disgorgement, the Commission must show the Defendant received ill-gotten gains. *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014). Therefore, until a Defendant has unlawfully acquired money or property, the Commission will not have a

[5] The Commission is seeking a conduct-based injunction against Quiros that would prevent him from participating in EB-5 offerings and managing EB-5 projects. DE 120 at 81. This is not an obey-the-law injunction and complies with *SEC v. Goble*, 682 F.3d 934, 948-52 (11th Cir. 2012).

"complete and present cause of action" for disgorgement. *Id.* at 1337.

Thus, Quiros' argument that the Commission's disgorgement claims accrued on the first date in each Phase that the Defendants began *offering* securities is wrong. The claims for disgorgement against Quiros accrued when he illegally pocketed investor funds – i.e., received ill-gotten gains connected to the fraud. Furthermore, there is no merit to the argument that disgorgement claims are frozen at the very first moment Quiros obtained ill-gotten gains. Rather, *each time* Quiros or an entity with which he is jointly and severally liable received ill-gotten gains constitutes a new claim for disgorgement against him. *SEC v. e-Smart Techs.*, 31 F. Supp. 3d 69, 88 (D.D.C. 2014) ("[e]ach time e-Smart and Defendants filed a new 10-KSB, they made their misrepresentations anew, violated the statute anew, and exposed themselves to liability anew"); *SEC v. Huff*, 758 F. Supp. 2d 1288, 1341 (S.D. Fla. 2010) (each false filing that fell within five years of complaint constituted a violation of the securities laws).

A contrary rule, requiring the limitations period to begin running for *all* ill-gotten gains at the time a Defendant realizes his *first* one, would require the Commission to commit resources to new, comparatively minor frauds, "lest those [frauds] eventually grow in magnitude." *Patrella v. Metro-Goldwyn-Mayer*, 134 S.Ct. 1962, 1976 (2014) (plaintiff could recover damages for copyright infringement for all violations occurring within the statute of limitations regardless of when the claims first accrued). Given that securities frauds can be complicated and occur over years, such a rule would incentivize violators such as Quiros to continue to defraud investors and reap ill-gotten gains knowing their liability was fixed at an earlier point. This is contrary to common sense and the law. *BP America Prod. Co. v. Burton*, 549 U.S. 84, 96 (2006) (a statute of limitations that bars the government must be construed in favor of government interests).

Determining when Quiros received ill-gotten gains is a fact-intensive inquiry that the Court may not determine on a motion to dismiss, as discussed above in Section III.B. Until the Commission has had a chance to present its evidence on when Quiros received ill-gotten gains, it would be impermissible under the law for the Court to dismiss any of our disgorgement claims.

2. The Continuing Violation Doctrine

The Commission may also seek to hold Quiros liable for disgorgement for acts falling outside the five-year period that were part of a continuing violation. *Huff*, 758 F. Supp. 2d at 1339-42 (allowing the Commission to obtain remedies, including civil penalties, for acts occurring more than five years before the complaint was filed because they were part of a

continuing course of conduct). Under that doctrine, the conduct is actionable if "there was some timely violative conduct and the conduct as a whole can be considered a single course of conduct." *SEC v. Strebinger*, 114 F. Supp. 3d 1321, 1328 (N.D. Ga. 2015) (quoting *Birkelbach v. SEC*, 751 F.3d 472, 479 n.7 (7th Cir. 2014)). *See also Patrella*, 134 S.Ct. at 1970 n.7 (the Supreme court has, for limitations purposes, drawn a "distinction between discrete acts independently actionable and conduct cumulative in effect"); *Coughlan v. NTSB*, 470 F.3d 1300, 1307-08 (11th Cir. 2006) (Section 2462 did not bar proceeding where sufficient conduct related to earlier wrongs occurred within five years of complaint); *Huff*, 758 F. Supp. 2d at 1341; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (allowing plaintiff to pursue housing discrimination claim under the continuing violation doctrine even though only one of the five discriminatory instances fell within the applicable 180-day time limit).

As in *Huff* and *Havens Reality*, the Amended Complaint alleges facts which would allow the Commission to pursue disgorgement claims for acts that started more than five years before the filing of the Amended Complaint but continued into the five-year period. This included, among other things, including paying off and paying down the margin loans (Amended Complaint at ¶¶78-95), using Phase I and II investor funds to purchase Jay Peak, which caused shortfalls that culminated in no money to finish Phase VI and build Phase VII (*Id.* at ¶¶57-142).

Ultimately, the Court will determine whether the continuing violations doctrine applies, and whether the acts the Commission has alleged in the Amended Complaint both inside and outside the five-year period constitute a continuing course of conduct. However, as discussed above in Sections III.B and III.C.1, the law does not allow the Court to make such a fact-intensive determination on a motion to dismiss. Under the law, the Commission has pled sufficient facts to give rise to claims for disgorgement (and civil penalties) that encompass acts going back further than five years under the continuing violation doctrine.

IV. THE COMMISSION HAS PLED FRAUD WITH PARTICULARITY

A. Rule 9(b) Standards

As with his claims about disgorgement pleading, Quiros overstates the requirements for pleading fraud with particularity under Federal Rule of Civil Procedure 9(b). Rule 9(b) does not abrogate the concept of notice pleading set forth in Rule 8(a). *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001); *SEC v. Physicians Guardian Unit Inv. Trust*, 72 F. Supp. 2d 1342, 1352 (M.D. Fla. 1999) (denying motion to dismiss on grounds that plaintiff did not plead

fraud with enough specificity). The purpose of Rule 9(b) is to ensure allegations of fraud are specific enough to provide sufficient notice of the acts complained of and eliminate those complaints filed as a pretext for discovery of unknown wrongs. *SEC v. Ginsburg*, Case No. 99-8694-CIV, 2000 WL 1299020 at *2 (S.D. Fla. Jan. 10, 2000).

Pleading fraud with particularity does not require pleading "detailed evidentiary matter." *Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 n.20 (2nd Cir. 1979) (reversing dismissal of a private Section 10(b) action). The complaint need only provide a reasonable delineation of the underlying acts and transactions constituting the fraud. *Anderson v. Transglobe Energy Corp.*, 35 F. Supp. 2d 1363, 1369-70 (M.D. Fla. 1999) (denying motion to dismiss on grounds that plaintiff did not plead fraud with particularity). A complaint pleads fraud with particularity if it alleges the substance of the fraudulent acts, who engaged in the fraud, and when the fraud occurred. *Hekker v. Ideon Group, Inc.*, Case No. 95-681-Civ, 1996 WL 578335 at *4 (M.D. Fla. Aug. 19, 1996) (denying motion to dismiss on lack-of-particularity grounds). *See also SEC v. Homa*, Case No. 99 C 6895, 2000 WL 1100783 at *3-*4 (N.D. Ill. Aug. 4, 2000) (Commission "pleaded the who, what, when, where, and how of the fraud in sufficient detail" by setting forth the role of the various defendants in the offerings, how the securities were marketed to investors nationwide, the time frames of the offerings, and the substance of the misrepresentations).

Even the cases Quiros cites support our recitation of Rule 9(b)'s standards. For instance, in *SEC v. Betta*, Case No. 09-80803-Civ, 2010 WL 963212 at *4-*5 (S.D. Fla. March 15, 2010), the Court denied the defendants' motion to dismiss on fraud with particularity grounds. Judge Marra noted that "[U]nder Rule 9(b), it is sufficient to plead the who, what, when, where, and how of the allegedly false statements and then allege generally that those statements were made with the requisite intent." *Id.* at *4 (quoting *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008)). *Betta* went on to hold that the Commission had satisfied Rule 9(b)'s requirements by alleging the defendant made material misrepresentations to customers regarding the security, risk, liquidity, and suitability of specific investments. *Id.* at *5.

Under those standards, the Commission's detailed Amended Complaint satisfies the requirements for pleading fraud with particularity. It sets forth in great detail the misrepresentations and omissions by Quiros and the other Defendants in each of the seven Phases, the specific offering documents that were false in each Phase, the details of what was false about each document, how the Defendants, including Quiros, offered and sold the limited

partnership interests to investors around the world, the time frames of each offering, and the specific fraudulent acts Quiros committed in addition to the misrepresentations and omissions he made. This is exactly the type of detailed pleading that constitutes pleading fraud with particularity under Rule 9(b). More specifically, the Amended Complaint alleges:

Generally

> The specific time frame, amount of money raised, projects for which the Defendants solicited investments, and the number of investors who invested, in each of the seven Phases. Amended Complaint at ¶¶15-27.
>
> The officers, general partners, and other managers in each of the corporations involved, including the Relief Defendants. *Id.* at ¶¶11-31.
>
> Quiros' role in and control over each of the Defendant and Relief Defendant corporations involved in the fraud, and the Raymond James accounts. *Id.* at ¶¶11-13, 28-31, 33-34, 43, 51-52, 55-56, 57-77, 78-95, and 116-147.
>
> The manner in which Quiros and the other Defendants solicited investors and raised money. *Id.* at ¶¶41-56.

Suites Phase I

> Quiros assumed practical control of Jay Peak in January 2008 and ran it for six months to learn its operations, including how it raised money from investors. *Id.* at ¶¶58-61. During that time, Phase I raised money from at least eight investors. *Id.*
>
> Quiros became the owner of Jay Peak through Q Resorts' purchase of it in June 2008. *Id.* at ¶¶11-13 and 58.
>
> Quiros reviewed the contents of the Phase I offering documents, was familiar with them, and understood he had to abide by them. *Id.* at ¶51.
>
> The previous owners of Jay Peak informed Quiros in June 2008 that he could not use Phase I investor funds to collateralize or pay the purchase price of Jay Peak under the Phase I limited partnership agreements with investors. *Id.* at ¶65.
>
> Despite being told this, Quiros used $12.4 million in investor funds to help finance his purchase of Jay Peak. *Id.* at ¶¶67-77.
>
> Quiros' use of Phase I investor funds to buy Jay Peak violated the Source and Use of Investor Funds document in the business plan portion in the Phase I offering documents, which showed investors specifically how Suites Phase I would use their money. *Id.* at ¶74. *See also* Ex. 2 to Quiros' Motion (DE 172-3) at 4.
>
> Quiros' use of investor funds to purchase Jay Peak also violated Section 5.02 of the limited partnership agreement, which prevented the Phase I general partner from borrowing, using, or commingling investor funds for this non-approved purpose. Amended Complaint at ¶77.
>
> Also in violation of both the business plan and the limited partnership agreement, Quiros improperly took another $1.5 million in Phase I investor funds as Phase I construction proceeded. *Id.* at ¶74.

Quiros continued to violate both the business plan and Section 5.02 of the limited partnership agreement when he used Phase I investor funds to collateralize, pay margin interest on, and pay down the first three margin loans at Raymond James. *Id.* at ¶¶77-91; Quiros Ex. 2 at 4.

Hotel Phase II

Quiros became the owner of Jay Peak in June 2008. Amended Complaint at ¶¶11-13 and 58.

Phase II began raising money in March 2008 and continued to do so through January 2011. In total, Phase II raised $75 million from 150 investors. *Id.* at ¶¶16, 60.

The previous owners of Jay Peak told Quiros in June 2008 that he could not use Phase II investor funds to collateralize or pay for the purchase of Jay Peak; nonetheless he used $9.5 million in investor funds to help finance the purchase. *Id.* at ¶¶65-77.

In addition, Quiros reviewed the contents of the Phase II offering documents, was familiar with them, and understood he had to abide by them. *Id.* at ¶51.

Quiros' use of Phase II investor funds to purchase Jay Peak violated the Estimated and Projected Cost of Development document in the business plan of the Phase II offering documents, which showed investors specifically how Phase II would use their money. *Id.* at ¶75. *See also* Quiros Ex. 7 (DE 172-8) at 10.

Quiros' use of investor funds to purchase Jay Peak also violated Section 5.02 of the limited partnership agreement in the offering documents, which prevented the Phase II general partner from borrowing, using, or commingling investor funds for this purpose. Amended Complaint at ¶77. *See also* Quiros Ex. 8 (DE 172-9) at 20.

After misusing these $9.5 million in investor funds, Quiros and the other Defendants did not change the Phase II offering documents to inform investors Quiros had used $9.5 million of investor funds to purchase Jay Peak in violation of both the limited partnership agreement and the business plan. Amended Complaint at ¶76.

Quiros continued to violate both the business plan and Section 5.02 of the limited partnership agreement when he used Phase II investor funds to collateralize, pay margin interest on, and pay down the first three margin loans at Raymond James. *Id.* at ¶¶78-91; Quiros Ex. 7 at 10; Quiros Ex. 8 at 20.

Quiros and the other Defendants violated Section 13.01 of the Phase II limited partnership agreement when they transferred investor funds to Raymond James' accounts, which were not insured by an agency of the federal government. Amended Complaint at ¶63; Quiros Ex. 8 (DE 172-9) at 32.

As Phase II was constructed, Quiros and the other Defendants improperly took another $9.4 million in investor funds as fees in violation of the business plan and the limited partnership agreement. Amended Complaint at ¶¶96-97; Quiros Ex. 7 at 10; Quiros Ex. 8 at 20.

Quiros and Q Resorts used a net amount of $4.7 million of Phase II investor funds for Phase I project costs. Amended Complaint at ¶¶96-97; Quiros Ex. 7 at 10; Quiros Ex. 8 at 20.

Quiros and Q Resorts used a net amount of $3 million of Phase II investor funds on Penthouse Phase III project costs. Amended Complaint at ¶¶96-97; Quiros Ex. 7 at 10; Quiros Ex. 8 at 20.

Penthouse Phase III

Phase III raised $32.5 million from 65 investors between July 2010 and October 2012. Amended Complaint at ¶¶18, 100.

The Phase III offering documents contained a document entitled Investor Funds Source and Application in the business plan that set forth exactly how Phase III would spend investor money. *Id.* at ¶100; Quiros Ex. 12 (DE 172-13) at 9.

The Phase III offering documents also contained a Section 5.02 of the limited partnership agreement that prevented the Phase III general partner from borrowing, using, or commingling investor funds for non-approved purposes. Amended Complaint at ¶102; Quiros Ex. 13 (DE 172-14) at 18-19.

Quiros reviewed the contents of the Phase III offering documents, was familiar with them, and understood he had to abide by them. *Id.* at ¶51. He also approved the Investor Funds Source and Application document in the business plan. *Id.*

Quiros violated the business plan and the limited partnership agreement when he used almost all of the $32.5 million of Phase III investor funds on paying down Margin Loan III. *Id.* at ¶¶80-81, 90, 101-102; Quiros Ex. 12 at 9; Quiros Ex. 13 at 18-19.

Quiros further violated Section 5.02 of the limited partnership agreement when he commingled $4.5 million of Phase III investor funds with Phase II funds in his Q Resorts' Raymond James account. Amended Complaint at ¶102; Quiros Ex. 13 at 18-19.

Golf and Mountain Phase IV

Phase IV raised $45 million from 90 investors between December 2010 and November 2011. Amended Complaint at ¶¶20, 104.

The Phase IV offering documents contained a use of proceeds document in the business plan that set forth exactly how Phase IV would spend investor money. *Id.* at ¶104; Quiros Ex. 17 (DE 172-18) at 9.

The Phase IV offering documents also contained a Section 5.02 of the limited partnership agreement that prevented the Phase IV general partner from borrowing, using, or commingling investor funds for non-approved purposes. Amended Complaint at ¶105; Quiros Ex. 18 (DE 172-19) at 18-19.

Quiros reviewed the contents of the Phase IV offering documents, was familiar with them, and understood he had to abide by them. *Id.* at ¶51. He also approved the use of proceeds document in the business plan. *Id.*

Quiros violated the business plan and the limited partnership agreement when he used a net amount of $15.8 million of Phase IV investor funds to pay down Margin Loan III at Raymond James between May and November 2011. *Id.* at ¶¶105-106; Quiros Ex. 17 at 9; Quiros Ex. 18 at 18-19.

Quiros further violated the use of proceeds document in the business plan when he and the other Phase IV Defendants took more than $6.5 million in excess of what they should have taken in fees and failed to make at least $3.8 million in developer contributions to the project. Amended Complaint at ¶105; Quiros Ex. 17 at 9.

Quiros also violated the business plan when he used more than $3.8 million of investor funds to purchase the Setai condominium. Amended Complaint at ¶105; Quiros Ex. 17 at 9.

Quiros also violated Section 5.02 of the limited partnership agreement when he commingled $34.3 million of Phase IV investor funds with funds from Phases V-VII in a JCM account. Amended Complaint at ¶106; Quiros Ex. 18 at 18-19.

Lodge and Townhouses Phase V

Phase V raised $45 million from 90 investors between May 2011 and November 2012. Amended Complaint at ¶¶22, 108.

The Phase V offering documents contained a use of proceeds document in the business plan that set forth exactly how Phase V would spend investor money. *Id.* at ¶108; Quiros Ex. 22 (DE 172-23) at 10.

The Phase V offering documents also contained a Section 5.02 of the limited partnership agreement that prevented the Phase V general partner from borrowing, using, or commingling investor funds for non-approved purposes. Amended Complaint at ¶110; Quiros Ex. 23 (DE 172-24) at 19.

Quiros reviewed the contents of the Phase V offering documents, was familiar with them, and understood he had to abide by them. *Id.* at ¶51. He also approved the use of proceeds document in the business plan. *Id.*

Quiros violated the business plan and the limited partnership agreement when he used at least $25.2 million of Phase V investor funds to pay down Margin Loans III and IV at Raymond James and to pay off Margin Loan III. *Id.* at ¶¶109-110; Quiros Ex. 22 at 10; Quiros Ex. 23 at 19.

Quiros further violated the use of proceeds document in the business plan when he and the other Phase V Defendants took more than $1.2 million in excess of what they should have taken in fees and failed to make at least $6.6 million in developer contributions to the project. Amended Complaint at ¶109; Quiros Ex. 22 at 10.

Quiros also violated Section 5.02 of the limited partnership agreement when he commingled $36 million of Phase V investor funds with funds from Phases IV, VI, and VII in a JCM account. Amended Complaint at ¶110; Quiros Ex. 23 at 19.

Stateside Phase VI

Phase VI raised $67 million from 134 investors between October 2011 and December 2012. Amended Complaint at ¶¶24, 112.

The Phase VI offering documents contained a use of proceeds document in the business plan that set forth exactly how Phase VI would spend investor money. *Id.* at ¶112; Quiros Ex. 27 (DE 172-28) at 10.

The Phase VI offering documents also contained a Section 5.02 of the limited partnership agreement that prevented the Phase IV general partner from borrowing, using, or commingling investor funds for non-approved purposes. Amended Complaint at ¶114; Quiros Ex. 28 (DE 172-29) at 19.

Quiros reviewed the contents of the Phase VI offering documents, was familiar with them, and understood he had to abide by them. *Id.* at ¶51. He also approved the use of proceeds document in the business plan. *Id.*

Quiros violated the business plan and the limited partnership agreement when he used at least $5.8 million of Phase VI investor funds to pay off Margin Loan III and up to $2.5 million to pay down Margin Loan IV. *Id.* at ¶¶113-114; Quiros Ex. 27 at 10; Quiros Ex. 28 at 19.

Quiros further violated the use of proceeds document in the business plan when he and the other Phase VI Defendants took more than $3 million in excess of what they should have taken in fees and failed to make at least $7.4 million in developer contributions to the project. Amended Complaint at ¶113; Quiros Ex. 27 at 10.

Quiros also violated the use of proceeds document when he used nearly $2 million of Phase VI investor funds to pay JCM's taxes. Amended Complaint at ¶113; Quiros Ex. 27 at 10.

Quiros also violated Section 5.02 of the limited partnership agreement when he commingled $63 million of Phase VI investor funds with funds from Phases IV, V, and VII in a JCM account. Amended Complaint at ¶114; Quiros Ex. 28 at 19.

As a result of Quiros' looting of investor funds, State VI is almost out of money but needs at least another $26 million to finish the project. Amended Complaint at ¶115.

Biomedical Phase VII

Quiros was one of the two managing members of the Phase VII general partner while Phase VII raised approximately $83 million from 166 investors from November 2012 through April 2016. Amended Complaint at ¶¶26-27.

As a managing member, Quiros reviewed and approved the contents of both the Phase VII original and revised offering documents and had ultimate authority over them. *Id.* at ¶¶52 and 123.

The Phase VII original offering documents made clear the majority of the Phase VII products required FDA approval before they could be marketed and sold in the United States. *Id.* at ¶¶118-119.[6]

[6] Quiros claims without legal support that the original Phase VII offering materials are void because the Defendants put out revised offering materials and gave investors a chance to "re-subscribe." Motion at 8-9. Even if true (which the Commission disputes), the original Phase VII offering materials still contained misrepresentations and omissions for which Quiros was responsible. In a Commission enforcement action, reliance and loss causation are not at issue. *Goble*, 682 F.3d at 943. Therefore, the misrepresentations and omissions in the original Phase VII offering documents are relevant because they are still misrepresentations and omissions. *Overseas Comm. Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2nd Cir. 1998)

> The Phase VII original offering documents contained numerous false statements that various products were "under process" or "under progress" of FDA approval, when Quiros and the other Defendants knew no Phase VII product had been submitted or was even close to being submitted to the FDA for approval. *Id.* at ¶¶120-22.
>
> The original Phase VII offering documents also contained revenue projections that were baseless because, among other things, they contemplated the company realizing revenue from its products before its facilities were operational and before the company received FDA approval. *Id.* at ¶¶124-26.
>
> Both the original and revised Phase VII offering materials contained a use of proceeds document that spelled out exactly how Phase VII would spend investor money. *Id.* at ¶¶128 and 146-47; Quiros Ex. 32 (DE 172-33) at 11.
>
> These offering materials also contained a Section 5.02 of the limited partnership agreement that restricted the general partner's ability to borrow, commingle, and use investor funds. Amended Complaint at ¶129; Quiros Ex. 33 (DE 172-34) at 18-19.
>
> Quiros and the other Phase VII Defendants violated both the business plan and the limited partnership agreement when they used investor funds on a variety of improper purposes, including: $18.2 million towards paying off Margin Loan IV at Raymond James; $4.2 million for corporate taxes to the IRS and the State of Vermont; $10.7 million to back Quiros' personal line of credit (out of which he used $6 million for personal income taxes and $3.5 million to pay Phase VI construction vendors); $2.2 million to purchase a Trump Place condominium; $7 million to purchase the Q Burke resort; $7.9 million to a Relief Defendant for purported construction supervision fees; and $6 million for the sale of land from a company Quiros owned to Phase VII that was fraudulently marked up. Amended Complaint at ¶¶130-140.
>
> The revised offering materials fail to disclose this massive misuse and misappropriation of investor funds as well as repeat the baseless revenue projections. *Id.* at ¶¶146-147.
>
> The revised offering memorandum also fails to disclose that Quiros and the other Phase VII defendants only used about $10 million of the first $69 million raised on Phase VII construction costs, and that the project needs $84 million to be finished – more than can be raised. *Id.* at ¶¶141-142.

It is clear that against those incredibly specific and detailed factual allegations, Quiros' claims that the Commission has not pled fraud with particularity under Rule 9(b) are meritless.

B. Quiros Asks The Court To Determine Disputed Issues Of Fact

As discussed in Section II above, it is a well-settled precept of law that the Court cannot determine disputed issues of fact in ruling on a motion to dismiss. Yet throughout his motion,

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("The antifraud provisions are designed to remedy deceptive and manipulative conduct with the potential to harm the public interest or the interests of investors," even if such potential does not materialize).

Quiros asks the Court to do exactly that under the guise of judicial notice and attaching documents referenced in the Amended Complaint.

In the most glaring example, Quiros claims "the SEC cannot dispute that JCM enjoyed a contractual right to be paid for its services; the SEC has not and cannot allege that JCM had a contractual (or other) obligation to segregate investor funds or account for their use once it was paid for its general contractor services." Motion at 7. *See also* Motion at 6 (alleging payments to affiliated companies "appear to consist largely of contractual permissible payment to an affiliate" (JCM)); Motion at 22 (JCM entitled to receive funds under a contract and not obligated to segregate them). Quiros cites nothing in the Amended Complaint or any of the offering documents attached to his Motion that supports these statements.[7]

In direct contrast to Quiros' statement that the Commission "cannot dispute" and "cannot allege" contradictions to his statements about JCM, the Amended Complaint does exactly that. It alleges JCM received more than $160 million of investor funds from several projects, which Quiros misused. Amended Complaint at ¶28. It also alleges that JCM received investors' proceeds "without any legitimate basis." *Id.* The Amended Complaint alleges Quiros improperly commingled and misspent investor funds in JCM accounts under the limited partnership agreements and the Phase VII use of proceeds documents. *Id.* at ¶¶106, 110, 114, 129-130, 132-135, 139-140. The Court must accept these allegations as true, particularly because Quiros has not cited a single statement in the Amended Complaint or any of the attached documents contradicting them. Even if Quiros had cited factual support for his statements, all that would do is create a disputed issue of fact that the Court may not resolve now.

In another example, Quiros cites to three provisions of the limited partnership agreements: Section 5.01 (setting forth the general powers of the general partner in each phase); Section 5.05 (limiting the conditions under which the general partner is liable to *investors*); and Section 5.07 (allowing the general partner to contract with "affiliates" to provide services for compensation). Motion at 7-8. Quiros asks the Court to blindly accept his interpretation of those provisions, disregarding the Amended Complaint's allegations or the contradictory sections of the offering documents the Amended Complaint cites (and which Quiros has attached).

For example, Quiros ignores that Section 5.01 is specifically limited by the following

[7] Quiros cites to the revised offering materials' use of proceeds document (Ex. 32 at 11), but there is no reference on that page anywhere to JCM receiving funds.

Section, 5.02, which sets forth restrictions on each general partner's powers. Motion at 7. The Amended Complaint refers repeatedly to this provision and alleges that numerous actions of Quiros and the other Defendants violated it. *See* Section IV.A above. Section 5.05 is irrelevant. It merely establishes when the general partner and any affiliates would be liable to *investors* for their actions. Motion at 7-8. However, the Commission is not a private investor, and no contractual provision addressing investors could limit the Commission's ability to bring an enforcement action. *Hossain v. Rauscher Pierce Refsnes, Inc.*, 46 F. Supp. 2d 1164, 1168 (D. Kan. 1999) (clearing firm could not disclaim by contract obligations under the securities laws).

Third, Section 5.07 contains broad language allowing the general partner of each offering to enter into agreements for services with affiliates. Motion at 8. Quiros wants the Court to accept his interpretation that this provision authorized all of the payments at issue in this case. *Id.* That simply is not the standard by which the Court can rule on a motion to dismiss. Quiros asks the Court to ignore language in Section 5.07 that limits the compensation involved and the myriad of other provisions in the offering documents the Amended Complaint cites which the Court must interpret in the light most favorable to the Commission. At best, Quiros has created a factual dispute with these provisions that the Court cannot resolve on a motion to dismiss.

None of these alleged "facts," nor any of the other purported facts Quiros cites, merit dismissal of any portion of the Amended Complaint.

V. THE COMPLAINT STATES CAUSES OF ACTION UNDER SECURITIES ACTION SECTION 17(a) AND EXCHANGE ACT SECTION 10(b) AND RULE 10b-5

Quiros misstates virtually every legal standard applicable to securities fraud under Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. He falsely asserts that: (1) to be liable under the securities laws he must have *personally* made a misrepresentation or omission; and (2) the Commission has not stated he personally made or was legally responsible for any misrepresentations and omissions. He is wrong on both counts. As to the first claim, we discuss in the following sections that without personally making a misrepresentation or omission Quiros can be liable for violating Sections 17(a) and 10(b) and Rule 10b-5. As to the second claim, he is simply wrong as discussed immediately below.

A. Quiros' Misrepresentations And Omissions Under Rule 10b-5(b)

1. Facts Showing Quiros' Misrepresentations And Omissions In Phase VII

We allege Quiros directly made misrepresentations and omissions in violation of Exchange Act Rule 10b-5(b) in Biomedical Phase VII. Amended Complaint at Count 50. Under

Section 10(b) and Rule 10b-5(b), a person is liable if he makes a material misrepresentation or omission in connection with the purchase or sale of securities with scienter. *Monterosso*, 756 F.3d at 1333-34. Under Rule 10b-5(b), the "maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital Group, Inc. v. First Derivative Traders,* 564 U.S. 135, 142 (2011). More than one person or entity may have authority over a statement and therefore may be considered the maker of a false statement or responsible for a material omission. *City of Pontiac Gen. Employees' Retirement Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) (It is not inconsistent with *Janus* to presume that multiple people in a single corporation have the joint authority to "make" a misstatement); *In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252, 268-69 (S.D.N.Y. 2013) (multiple individual defendants had ultimate authority over company press releases and thus could be considered "makers" of statement under *Janus*).

As set forth in Section IV.A above (on Pages 15-16), the Amended Complaint alleges that both the original and revised Phase VII offering documents contained several material misrepresentations and omissions involving: (1) false statements about the status of FDA approval; (2) baseless revenue projections; (3) false statements in the use of proceeds document about how the Defendants would spend investor money; (4) false statements in the limited partnership agreements about restrictions on the general partner's use of investor funds; (5) and failure to disclose in the revised offering documents the misuse of money in Phase VII that had already occurred.

Quiros, as one of the managing members of the Phase VII general partner, reviewed and approved the contents of both offering materials. Amended Complaint at ¶¶27, 52, and 123. He had ultimate authority over the contents, as well as when and how to distribute the materials. *Id.* He also participated in the marketing of Phase VII to investors. *Id.* at ¶¶43 and 144-145. Thus, under the standard established in *Janus* and its progeny, the Amended Complaint alleges facts showing that Quiros is liable as a "maker" of the false statements and omissions in both sets of offering materials. The fact that co-Defendant William Stenger also had authority over the contents, or that the Phase VII corporate defendants were also "makers" of the statements, does not absolve Quiros of liability. As set forth above, there can be multiple "makers" of false statements and omissions in offering documents. Thus, the Amended Complaint alleges facts giving rise to Quiros' violations of Exchange Act Section 10(b) and Rule 10b-5(b).

2. Facts Showing Quiros' Liability For Baseless Revenue Projections In Phase VII

The misrepresentations and omissions of which Quiros is a "maker" in the Phase VII offering materials include the baseless revenue projections in both sets of offering materials. Amended Complaint at ¶¶124-126 and 147. Under the securities laws, projections are actionable as misrepresentations if there is no reasonable basis to support them or there are no undisclosed facts undermining the accuracy of the projection. *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1298-1300 (M.D. Fla. 2007) (statements about occupancy rates in letters to investors violated Rule 10b-5(b) because defendant was in possession of regular reports showing occupancy rates were far less than his letters stated); *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766-69 (11th Cir. 2007) (company's statements about projected returns were materially misleading because company was aware its business was not generating revenues sufficient to pay those returns); *In re John Alden Fin. Corp.*, 249 F. Supp. 2d 1273, 1277 (S.D. Fla. 2003) ("If a company chooses to disclose a forecast or projection, that disclosure is subject to attack on the ground that it was issued without a reasonable basis").

Quiros claims the revenue projections in the Phase VII offering materials are subject to the "bespeaks caution" doctrine. That doctrine holds that when offering documents contain "meaningful cautionary statements and specific warnings of the risks involved, that language may be sufficient to render the alleged omissions or misrepresentations material as a matter of law." *Saltzberg v. TM Sterling/Austin Assoc.*, 45 F.3d 399 (11th Cir. 1995). However, the cautionary statement Quiros cites in the Motion do not address the reasons we allege the revenue projections are baseless. Quiros points to statements in the revised Phase VII offering materials warning that the company's products might not receive FDA approval. Motion at 9-10 and 20-21. However, we do not allege the revised offering materials contain misrepresentations and omissions about the status of FDA approval – only the original offering materials, which contain no such cautionary language. Amended Complaint at ¶¶124-126.

Just as importantly, the bespeaks caution doctrine is inapplicable because cautionary statements may *never* serve to render projections about future performance immaterial where the maker of the projections is aware of information undermining the projections or adverse past performance but fails to disclose it. *Merchant Capital*, 483 F.3d at 768-69; *SEC v. Carriba Air*, 681 F.2d 1318, 1323-24 (11th Cir. 1982); *Rubenstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994) ("[t]o warn that the untoward may occur when the event is contingent is prudent, to caution that

it is only possible for the unfavorable events to happen when they already have is deceit").

Here, the Amended Complaint alleges Quiros and the other Defendants were aware of facts at the time they issued the revenue projections in both the original and revised offering documents showing they *could not achieve* the revenue they were projecting. Amended Complaint at ¶¶124-126 and 147. For example, the Amended Complaint alleges the business plan in the first Phase VII offering materials showed Phase VII starting to realize revenues in 2014. However, a separate document in the business plan that not all investors received showed the Defendants knew development of the products, testing of the facilities, and receiving FDA approval would make that date impossible to achieve. *Id.* at ¶¶124-26. The same document showed the Defendants could only realize 20 to 33 percent of the annual revenues they were projecting by 2018. *Id.* The revised business plan contained similar baseless projections in that it showed the Defendants realizing revenues before their facilities were operational and before Phase VII could receive FDA approval.[8] *Id.* at ¶147.

Thus, the Amended Complaint alleges facts showing Quiros and the other Defendants knew they could not achieve the revenue projections at the time they made and distributed them to Phase VII investors. Under well-established case law, the bespeaks caution doctrine is therefore inapplicable. The Amended Complaint therefore alleges facts showing Quiros is liable under Exchange Act Section 10(b) and Rule 10b-5(b) for the baseless revenue projections.

B. Quiros' Liability Under Securities Act Section 17(a)(2)

Securities Act Section 17(a)(2) makes it illegal for "any person in the offer or sale of any securities . . . to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact." 15 U.S.C. §77q(a)(2); *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 796 (11th Cir. 2015). The Eleventh Circuit and numerous other courts have held that the term "by means of" in Section 17(a)(2) is broader than the term "make" a misrepresentation or omission in Exchange Act Section 10(b) and Rule 10b-5(b), and that under Section 17(a)(2) "it is irrelevant for purposes of liability whether the seller uses his own false statement or one made by another individual." *Big Apple*, 783 F.3d at 797-98 (Section 17(a)(2)

[8] Quiros attempts to dispute the Amended Complaint's allegations that development of the Phase VII products would take place solely in Vermont. Motion at 21. Quiros' citations do not support his claim that product development was taking place in Korea. Even if Quiros' statement were true, at best it would establish a factual dispute as to whether the revenue projections in both sets of offering documents were baseless, not ripe for resolution on a motion to dismiss.

language of obtaining money or property by means of any untrue statement encompasses a broader range of misconduct than making a misstatement as defined in Exchange Act Rule 10b-5(b)). *See also SEC v. Tambone*, 550 F.3d 106, 127 (1st Cir. 2008) (*en banc* at 597 F.3d 436, 450 (1st Cir. 2010)) (irrelevant for liability under Section 17(a)(2) whether seller uses his misstatement or misstatements of others).

The Amended Complaint alleges Quiros violated Section 17(a)(2) in Phase VII. DE 120 at Count 47. For identical reasons as described in Section A above, Quiros' material misrepresentations and omissions in the Phase VII offering documents constitute violations of Section 17(a)(2). Quiros obtained money by means of his own material untrue statements to investors about the FDA approval process, how Phase VII would use investor funds, and restrictions on how the general partner could use investor funds. By means of these statements to induce investors to invest, Quiros obtained approximately $30 million of investor funds for his own use as alleged in Paragraphs 116-140 of the Amended Complaint.

The Commission has also alleged Section 17(a)(2) liability against Quiros in Phases II-VI. DE 120 at Counts 7, 15, 23, 31, and 39. Liability attaches because the Amended Complaint alleges Quiros obtained money and property by means of other Defendants' material misrepresentations and omissions in each of those Phases. *Big Apple*, 783 F.3d at 797-98; *Tambone*, 597 F.3d at 450. As discussed in Section IV.A, the Defendants in Phases II-VI made material misrepresentations and omissions in offering documents to investors concerning how they would use investor funds and restrictions on the general partner's use of funds. Quiros obtained money or property by means of those misstatements as discussed in the same section by: (a) using $9.5 million in Phase II investor funds to purchase Jay Peak; (b) using investor funds in Phases II-VI to pay off or pay down Margin Loans III and IV, including paying margin loan interest; (c) commingling the funds improperly into his Q Resorts account at Raymond James; and (d) using Phase IV investor funds to buy the Setai Condominium in New York.

Under the express language of Securities Act Section 17(a)(2), *Tambone*, and *Big Apple*, it does not matter that *other* Defendants made the material misrepresentations and omissions. The allegations of the Amended Complaint are sufficient to establish violations of Section 17(a)(2) in Phases II-VI because he obtained money or property by means of those misrepresentations and omissions.

C. Quiros' Liability For A Fraudulent Scheme And Course Of Conduct

1. Standards Under Sections 17(a)(1) and (3) And Rules 10b-5(a) And (c)

Exchange Act Section 10(b) and Securities Act Section 17(a) reach beyond misrepresentations or omissions to encompass any wrongdoing by any person that rises to the level of a deceptive practice. *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6, 10 (1971). A defendant violates Securities Act Sections 17(a)(1) and (3) and Exchange Act Rules 10b-5(a) and (c) when he commits any manipulative or deceptive that are part of a fraudulent or deceptive course of conduct, or are in furtherance of a scheme to defraud. *Huff*, 758 F. Supp. 2d at 1347-48. To state a claim for violating these provisions, the Commission must establish: (1) the defendant committed a deceptive or manipulative act; (2) in furtherance of the alleged scheme to defraud; (3) with scienter.[9] *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005) (citing *In re Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004)); *SEC v. Fraser*, Case No. CV-09-00443, 2010 WL 5776401 at *7 (D. Ariz. Jan. 28, 2010) (defendant "must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme").

The Amended Complaint alleges acts by Quiros in all seven Phases that give rise to liability under Securities Act Sections 17(a)(1) and (3) and Exchange Act Rules 10b-5(a) and (c):

> He misappropriated $21.9 million from Phase I and II investor funds to purchase Jay Peak in violation of the use of proceeds documents and limited partnership agreements in both Phases. Amended Complaint at ¶¶57-77.
>
> He took another $1.5 million more of Phase I investor funds than the Phase I corporate defendants were entitled to in management and other fees. *Id.* at ¶74.
>
> He improperly took another $9.4 million in Phase II investor funds as management and other fees from Phase II. *Id.* at ¶¶96-97.
>
> He commingled and misused more than $200 million of investor funds across all seven Phases to pay off and pay down Margin Loans III and IV, including paying more than $2.5 million of margin loan interest with investor funds. *Id.* at ¶¶78-95.
>
> He improperly collateralized all four margin loans with investor funds from all seven Phases. *Id.*
>
> He improperly used a net amount of $4.7 million of Phase II investor funds for Phase I project costs. *Id.* at ¶¶96-97.
>
> He improperly used a net amount of $3 million in Phase II investor funds on Phase III

[9] Section 17(a)(3) requires only a showing of negligence. *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

project costs. *Id.* at ¶¶96-97.

He took more than $6.5 million in excess of what he should have taken in fees in Phase IV investor funds and failed to make at least $3.8 million in developer contributions to Phase IV. *Id.* at ¶105.

He improperly spent more than $3.8 million in Phase IV investor funds to buy the Setai Condominium. *Id.*

He took more than $1.2 million of Phase V investor funds in excess of what he should have taken in fees and failed to make at least $6.6 million in developer contributions to Phase V. *Id.* at ¶109.

He took more than $3 million in excess of what he should have taken in Phase VI investor funds in fees and failed to make at least $7.4 million in developer contributions to the project. *Id.* at ¶113.

He used nearly $2 million in Phase VI investor funds to pay JCM's taxes. *Id.*

He used more than $18.2 million in Phase VII investor funds to pay off Margin Loan IV at Raymond James. *Id.* at ¶¶130-133.

He used $4.2 million in Phase VII investor funds to pay corporate taxes to the IRS and the State of Vermont. *Id.* at ¶¶130 and 134.

He used $10.7 million in Phase VII investor funds to back his personal line of credit at Citibank, out of which he used $6 million for personal income taxes, $1.4 million to pay returns to investor in earlier projects, and $3.5 million to pay Stateside construction vendors. *Id.* at ¶¶130 and 135-136.

He used $2.2 million in Phase VII investor funds to buy another luxury condominium at Trump Place in New York. *Id.* at ¶¶130 and 137.

He used $7 million from Margin Loan IV to purchase the Q Burke resort. *Id.* at ¶¶130 and 138.

All of these actions constituted deceptive acts that were part of a fraudulent scheme and course of conduct that: (1) violated the terms of the offering documents and the limited partnership agreements; and (2) caused shortfalls in several of the projects that led to insufficient funds to pay annual returns and complete Phase VI and build Phase VII. *Id.* at ¶¶57-142.

None of the four Securities Act or Exchange Act sections at issue require Quiros to have personally made a misrepresentation or omission. *Monterosso*, 756 F.3d at 1334 ("Monterosso and Vargas are liable under section 17(a), section 10(b), and Rule 10b-5, because they made 'deceptive contributions to an overall fraudulent scheme' . . . The operative language of section 17(a) does not require a defendant to 'make' a statement in order to be liable . . . Likewise, subsections (a) and (c) of Rule 10b-5 'are not so restricted' as subsection (b), because they are not limited to 'the making of an untrue statement of a material fact.'") (citations omitted); *Fried*

v. Stiefel Labs., Inc., 814 F.3d 1288, 1294-95 (11th Cir. 2016) ("Rule 10b-5(a) and (c) 'are not so restricted' as Rule 10b-5(b) because they do not require making statements").

Quiros argues that the Court should dismiss the fraudulent scheme and course of conduct allegations because they are purportedly based entirely on misrepresentations and omissions. Motion at 16-17. Quiros is correct that some courts have held that those sections of the securities laws require conduct in addition to misstatements and omissions. *See, e.g., WPP Luxembourg Gamma Three SARL v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011); *Public Pension Fund Group v. KV Pharm Co.*, 679 F.3d 972, 987 (8th Cir. 2012). However, many other courts have suggested the opposite, and the issue is an open question in the Eleventh Circuit.[10] *Chadbourne & Parke LLP v. Troice*, 134 S.Ct. 1058, 1063 (2014) (Rule 10b-5 "forbids the use of any 'device, scheme, or artifice to defraud' ('*including* the making of 'any untrue statement of a material fact' or any 'omission')" in connection with the purchase or sale of any security) (emphasis added); *SEC v. Pentagon Capital Mgmt., Inc.*, 725 F.3d 279, 286-87 (2nd Cir. 2013) (holding that a mutual fund advisor and its principal were liable under all three clauses of Rule 10b-5 where they were the architects of a scheme and were "makers" of false statements under *Janus*); *VanCook v. SEC*, 653 F.3d 130, 138 (2nd Cir. 2011) (holding that the same market timing and late trading allegations could give rise to liability under Rules 10b-5(a) and (c) for misconduct *and* Rule 10b-5(b) for making misrepresentations and omissions); *SEC v. Simpson Capital Management, Inc.*, 586 F. Supp. 2d 196, 208 (S.D.N.Y. 2008) (denying motion to dismiss where defendants were alleged to be the "architects" or "creators" of a fraudulent scheme that encompassed others making misstatements).[11]

Even if this Court were to hold that conduct beyond misrepresentations and omissions is required to allege violations of Securities Act Sections 17(a)(1) and (3) and Exchange Act Rules 10b-5(a) and (c), the Amended Complaint passes muster. As set forth earlier in this section, the Amended Complaint alleges numerous deceptive and manipulative acts Quiros committed that did not directly involve misrepresentations and omissions. All of these deceptive acts enabled

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[10] *In re Galectin Therapeutics, Inc., Sec. Litig.*, Case No. 1:15-CV-29, 2015 WL 9647524 (N.D. Ga. Dec. 30, 2015), which Quiros cites for the same principal, interpreted 9th Circuit law.

[11] The Commission recently rejected the notion that these sections and rules require proof of conduct beyond misrepresentations and omissions. *In the Matter of Dennis J. Malouf*, 2016 WL 4035575 at *8-*10 and *11 (July 27, 2016). The Commission's reasonable interpretation of its statutes is entitled to deference. *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002).

Quiros to use investor funds improperly in violation of how the offering documents described the use of funds. This is conduct beyond the misstatements and omissions the Amended Complaint alleges in all seven Phases. Accordingly, the Amended Complaint meets the standards in this Circuit for pleading scheme liability. *Monterosso*, 756 F.3d at 1329-32 (defendants liable under Sections 17(a)(1) and (3) and Rules 10b-5(a) and (c) not for making any false statements but for their acts in generating fictitious revenue for a company that separately reported the inflated revenue figures); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 504 (S.D.N.Y. 2005) (banks could be liable under Rule 10b-5(a) and (c) for engaging in deceptive transactions that allowed issuer to misstate its financial condition); *Global Crossing*, 322 F. Supp. 2d at 336-37 (auditor could be liable under Rule 10b-5(a) and (c) for masterminding sham swap transactions that inflated company's publicly stated revenues).

2. Quiros' Misconduct Was In Connection With Securities Transactions

Quiros argues his manipulative conduct is not "in connection with" the securities transactions at issue because it occurred after investors invested. Motion at 17. This misstates the standard for determining whether conduct is in connection with securities transactions.

Quiros misappropriated and misused investor funds solicited through the offering documents with specific statements of how he and the other Defendants would use that money. Quiros then used the money differently than the offering documents stated. Accordingly, Quiros' misconduct occurred "in connection with" the purchase or sale of securities as is required by Exchange Act Section 10(b) and Rule 10b-5. *Zandford*, 535 U.S. at 819 (courts should interpret the "in connection with" requirement broadly to effectuate the remedial purpose of the federal securities laws); *SEC v. Merkin*, No. 11-23585-CIV, 2012 WL 5245561 at *8 (S.D. Fla. Oct. 3, 2012) (the "in connection with" requirement is satisfied if the SEC shows that the material misrepresentations were relayed to the public in a way that a reasonable investor would rely on them) (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 860-62 (2nd Cir.1968)).

This is true even in Phase I, where Quiros and the other Defendants are only charged with engaging in a fraudulent scheme and a fraudulent course of conduct under Exchange Act Rules 10b-5(a) and (c) and Exchange Act Sections 17(a)(1) and (3). The Amended Complaint alleges Quiros committed deceptive acts in misappropriating approximately $12.4 million in Phase I investor funds to purchase Jay Peak in violation of the offering documents and the Phase I limited partnership agreement. This occurred in connection with the Phase I investors' purchase of the limited

partnership agreements; it was that money that Quiros misappropriated. The connection is even clearer in the remaining Phases, where Quiros also misappropriated and misused money he and the other Defendants raised through misrepresentations and omissions in the offering documents.

Thus, as in *Zandford*, "[t]he securities sales and respondent's fraudulent practices were not independent events." 535 U.S. at 820. *Zandford* concerned the case of a broker stealing the proceeds of securities sales. The broker argued his misappropriation of the proceeds, though fraudulent, was not in connection with the securities sales. *Id.* The Supreme Court rejected that theory, ruling the theft of the proceeds were "properly viewed as a 'course of business' that operated as a fraud or deceit on a stockbroker's customer." *Id.* at 821. Similarly in this case, Quiros' misappropriation of investor funds was not an act independent of the securities sales. The two were connected and properly viewed as a fraudulent scheme and course of conduct on investors.

D. Quiros' Scienter

Courts have defined scienter as a state of mind embracing intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976). The Commission may establish scienter for violations of Sections 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act by "a showing of knowing misconduct or severe recklessness." *Monterosso,* 756 F.3d at 1335 (quoting *Carriba Air, Inc.*, 681 F.2d at 1324).

In contrast to Quiros' hollow claims that the Commission has not alleged he knew any of his conduct violated any of the offering documents' requirements, the Amended Complaint contains numerous allegations of Quiros' requisite mental state. For example, it alleges the former owners of Jay Peak told Quiros in June of 2008 that he could not use Phase I and Phase II investor funds to finance or collateralize his purchase of Jay Peak under the Phase I limited partnership agreement, but he did it anyway. Amended Complaint at ¶¶57-77. Furthermore, the Amended Complaint alleges Quiros reviewed and knew the contents of the Phase II-VI offering materials, *and knew he had to abide by them. Id.* ¶51. He also approved the source and use of funds documents in the business plans in Phases III-VI that described specifically how the Defendants would spend investor money. *Id.* Yet the Amended Complaint also alleges he routinely violated both the source and use of funds description of how his companies would spend investor money as well as the limited partnership agreements. As described in Section IV.A Quiros used investor money on different projects, paid off and paid down margin loans, and took more than $50 million for his own use. At a minimum, Quiros was extremely reckless

in not knowing his actions violated the offering documents.

Furthermore, the Amended Complaint alleges that as a managing member of the general partner of Biomedical Phase VII, Quiros also reviewed and approved Phase VII's offering materials before they were distributed to investors. *Id.* at ¶52. Therefore, Quiros knew, or was severely reckless in not knowing, that those materials contained baseless revenue projections, and statements about restrictions on the general partner's authority, how Biomedical Phase VII would use investor money, and the FDA approval process. Therefore, the Amended Complaint contains sufficient allegations establishing Quiros' knowing or severely reckless misconduct.

E. Quiros' Aiding And Abetting Violations

The Amended Complaint alleges Quiros aided and abetted the other Defendants' violations of Section 10(b) and Rule 10b-5(b) in connection with the offerings in Phases II-VI. DE 120 at Counts 13, 21, 29, 37, and 45. To establish aiding and abetting liability, the Commission must show: (1) a primary violation by another party; (2) a general awareness by the aider and abettor that his role was part of an overall activity that is improper; and (3) the aider and abettor provided "substantial assistance" to the violator. *Big Apple*, 783 F.3d at 800, *citing Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009-10 (11th Cir. 1985). The scienter requirement can be satisfied by extreme recklessness, *Big Apple*, 783 F.3d at 801, which can be shown by "red flags," "suspicious events creating reasons for doubt," or "a danger . . . so obvious that the actor must have been aware of" the danger of violations. *SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1307 (S.D. Fla. 2008).

The "substantial assistance" prong of the aiding and abetting test can proved by demonstrating the accused aider and abetter "in some sort associated himself with the venture" (i.e., the primary violation), "that he participated in it as something that he wished to bring about," and that he sought by his actions to make it succeed. *SEC v. Apuzzo*, 689 F.3d 204, 206 (2nd Cir. 2012). *See also SEC v. China Northeast Petroleum Holdings Ltd.*, 27 F. Supp. 3d 379, 395 (S.D.N.Y. 2014) (allegations that vice president disbursed corporate funds to his father (who committed the primary violation of signing and filing misleading corporate documents) without disclosure satisfied substantial assistance requirement of aiding and abetting liability); *SEC v. Jackson*, 908 F. Supp. 2d 834, 863-64 (S.D. Tex. 2012) (allegations that corporate officer repeatedly approved "special handling" fees to customs agent, despite knowing fees were associated with false paperwork, satisfied "substantial assistance" requirement).

The Amended Complaint alleges numerous facts showing primary violations by the other Defendants in Phases II-VI. As described in more detail in Section IV.A, the Amended Complaint alleges that Stenger and the corporate Defendants, among other things, misrepresented in the offering documents the restrictions on the general partners' use of investor funds and misstated in each Phase's business plan how the Defendants would spend investors' money. Those same allegations show Quiros committed numerous acts that substantially assisted those primary violations by, in effect, making the statements in the offering documents about use of proceeds and restrictions on the general partner's use of investor funds false:

> Quiros misappropriated $9.5 million in Phase II investor funds to purchase Jay Peak. Amended Complaint at ¶¶57-77.
>
> He improperly took another $9.4 million in investor funds as management and other fees from Phase II. *Id.* at ¶96.
>
> He commingled and misused more than $200 million of investor funds across all seven Phases to pay off and pay down Margin Loans III and IV, including paying more than $2.5 million of margin loan interest with investor funds. *Id.* at ¶¶78-95.
>
> He improperly used a net amount of $4.7 million of Phase II investor funds for Phase I project costs. *Id.* at ¶¶96-97.
>
> He improperly used a net amount of $3 million in Phase II investor funds on Phase III project costs. *Id.*
>
> He took $6.5 million in management and other fees in excess of what the Phase IV corporate Defendants were entitled to in Phase IV investor funds; $3.8 million of which he used to buy the luxury Setai Condominium in New York. *Id.* at ¶¶105-106.
>
> He took approximately $1.2 million more in management and other fees than the Phase V corporate Defendants were entitled to in Phase V investor funds. *Id.* at ¶109.
>
> He took $3 million more in management and other fees than the Phase VI corporate Defendants should have in investor funds. *Id.* at ¶113.

As discussed in Section D above, the Amended Complaint alleges Quiros committed all of these acts knowingly or extremely recklessly. Jay Peak's former owners told him he could not use Phase II investor funds to purchase Jay Peak, but he did anyway. The Amended Complaint alleges Quiros knew what the offering documents said about use of proceeds, but used them in contrary fashion for his personal gain anyway. Therefore, he satisfies the knowledge requirement for aiding and abetting, and the Commission has demonstrated he aided and abetted the misrepresentations and omissions the other Defendants made in Phases II-VI.

F. Quiros Is Liable As A Control Person

To establish Quiros' liability as a control person under Section 20(a) of the Exchange

Act, the Commission must show: (i) a primary violation of the securities laws, and (ii) that Quiros had 'control' over the primary violator. *Financial Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 288 (5th Cir. 2006). Section 20(a) requires only "some indirect means of discipline or influence short of actual direction." *Lane v. Page*, 649 F. Supp.2d 1256, 1306 (D.N.M. 2009) (quoting *Richardson v. Macarthur*, 451 F.2d 35, 41 (10th Cir. 1971)).

In the Eleventh Circuit, a Defendant is liable as a control person where he "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws ... [and] had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." *Huff*, 758 F. Supp. 2d at 1343; *Brown v. The Enstar Group, Inc.*, 84 F.3d 393, 397 (11th Cir.1996) (citation and quotation marks omitted). The Eleventh Circuit has held that neither Section 20(a) nor the SEC regulation defining "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person," 17 C.F.R. § 230.405 (1995), requires participation in the wrongful transaction to establish liability. *Brown*, 84 F.3d at 397 n.5.

The Amended Complaint contains ample allegations that Quiros exercised control over Jay Peak and each of the general partners and limited partnerships in Phases I-VI. Among other things, it alleges Quiros is the sole owner, officer, and director of Q Resorts, which wholly owns Jay Peak. Amended Complaint at ¶¶12-13. Quiros is the Chairman of the Board of Jay Peak, which is the umbrella entity that is the project sponsor for all of the projects, and manages and operates all of the completed projects. *Id.* at ¶¶11-13. Furthermore, Quiros had sole control over the Raymond James accounts where Stenger transferred each limited partnership's investor funds. *Id.* at ¶¶53-55. He controlled the accounts with the margin loans. *Id.* at ¶¶53-55 and 78-95. Quiros also owned and controlled JCM, which received $160 million of investor funds. *Id.* at ¶28. Thus, Quiros alone controlled the finances and operations of each limited partnership, including how investor money ultimately was used.

VI. CONCLUSION

For all the foregoing reasons, the Court should deny Quiros' motion to dismiss.

August 2, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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