UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-cv-21301-DPG

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.
_____/

DEFENDANT ARIEL QUIROS'S MOTION TO DISMISS THE AMENDED COMPLAINT AND SUPPORTING MEMORANDUM OF LAW

Defendant Ariel Quiros ("Mr. Quiros"), by and through his undersigned attorneys, hereby respectfully requests that this Court pursuant, *inter alia*, to Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6), enter an order dismissing Plaintiff Securities and Exchange Commission's ("SEC") Amended Complaint ("Amended Complaint") (DE 120), because many of the claims are time-barred and, in any event, none of the claims are pled with sufficient particularity or plausibility.

In the alternative, and to the extent that the Court finds any portion of the Amended Complaint will survive the Motion to Dismiss, Mr. Quiros seeks to strike the paragraph labeled "B. Permanent Injunctive Relief" in the "Relief Requested" part of Amended Complaint (*see* p. 80) as an improper request for an "obey-the-law" injunction.

In the further alternative, and to the extent that the Court finds any part of Counts 1-29 of the Amended Complaint survives the Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), Mr. Quiros also moves the Court under Rule 12(e) to direct the SEC to substantially revise the Amended Complaint to comply with the 11th Circuit's recent decision in *SEC v. Graham*, 2016 U.S. App. LEXIS 9650 (11th Cir. May 26, 2016), which provides that the SEC cannot bring claims for disgorgement, restitution, penalties, or any other monetary relief regarding offerings that occurred more than five years prior to filing of the initial complaint in this action. The Amended Complaint makes claims going back almost *ten years* and is vague and ambiguous regarding what relief the SEC intends to seek for each claim.

The Memorandum in Support of this Motion follows and sets forth the reasons for this relief with more particularity.

I. INTRODUCTION

Even after undertaking a three-year investigation that included depositions, interviews, and plenary access to relevant documents, the SEC still offers a fundamentally flawed Amended Complaint against Mr. Quiros. The SEC remains unable to provide a factually and legally coherent theory for Mr. Quiros's liability. Not only does it rely on conclusory labels (*e.g.*, "systematic looting," "pilfering," "fraudulent scheme") rather than reasoned analysis, but it also repeatedly mischaracterizes alleged breaches of contract as misrepresentations or omissions related to securities offerings. There is a simple reason for the SEC's inadequate pleading: *Mr. Quiros played no role in selling or marketing any securities to any investor*. For this reason, the Court should dismiss the SEC's claims against Mr. Quiros.

In trying to bring claims against Mr. Quiros, the SEC uses the guise of securities fraud, claiming he made "*misrepresentations*" and "*omissions*" in the offering of securities in seven limited partnerships. But, as to Mr. Quiros, the Amended Complaint describes, not *misrepresentations* or *omissions* at the time of the offerings, but *conduct* occurring *after* the offerings. The SEC says that Mr. Quiros moved investor money and used margin loans inappropriately. While the implication is that Mr. Quiros acted in violation of applicable agreements, there is no pleading of facts supporting even this conclusion. The SEC tellingly neglects to quote from any agreements or to allege facts that the documents contained statements that were false at the time they were made. In fact, the offering documents broadly authorize the movements of money that the SEC faults.

As set forth below in detail, apart from its general incoherence, the Amended Complaint suffers from a number of legal infirmities. First, the 11th Circuit has just issued a ruling that bars 29 of the 52 claims, to the extent those claims seek any relief other than an injunction. *SEC v. Graham*, 2016 U.S. App. LEXIS 9650 (11th Cir. May 26, 2016). Under that ruling, the SEC cannot bring claims for disgorgement, restitution, penalties, or any other monetary relief regarding offerings that occurred more than five years prior to filing of the initial complaint in this action. The ruling renders most of the factual allegations in the Amended Complaint irrelevant, including all allegations regarding the allegedly improper acquisition of the Jay Peak resort.

Second, even for the claims that the statute of limitations does not bar, the SEC's allegations against Mr. Quiros are lacking. While apparently alleging that Mr. Quiros participated in a scheme to fraudulently induce investments in the partnerships, the SEC has not alleged and cannot allege that Mr. Quiros played any management role in six of the seven partnerships. And, for all seven of the offerings, the SEC has not alleged and cannot allege that Mr. Quiros drafted, influenced, or approved the offering documents; indeed, there are no allegations that Mr. Quiros even *read* the offering documents prior to the securities being issued or that he participated in any way in persuading any investor to invest.

Third, even if the SEC alleged that Mr. Quiros was responsible for misleading offering statements, the SEC's claims against Mr. Quiros would fail. Whether characterized as misrepresentations, omissions, or fraudulent conduct, the allegations do not set forth the sort of factually particularized allegations required by Rule 9(b). While the SEC might question Mr. Quiros's business acumen or management decisions, the federal securities laws only speak to deliberate, fraudulent wrongdoing. The SEC has still not set forth facts that, if true, would support such a finding.

II. FACTUAL BACKGROUND[1]

A. The Offerings

The SEC's claims in this case arise from the offering of investments in seven limited partnerships: Jay Peak Hotel Suites L.P. (the "Phase I Partnership"), Jay Peak Hotel Suites II L.P. (the "Phase II Partnership"), Jay Peak Penthouse Suites L.P. (the "Phase III Partnership"),

[1] The following facts are based on the Complaint, as well as the relevant offering documents (*e.g.*, Private Offering Memoranda and Limited Partnership Agreements), where necessary to correct the SEC's misstatements of, or failure to disclose, material terms of the Offering. A court need not accept as true allegations that contradict matters properly subject to judicial notice or are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Wilson v. Henderson*, 2005 U.S. Dist. LEXIS 35505, at *4 (M.D. Fla. July 18, 2005) ("While courts must liberally construe and accept as true allegations of fact in the complaint and inferences reasonably deductive therefrom, they need not accept factual claims that are internally inconsistent; facts which run counter to facts of which the court can take judicial notice; conclusory allegations; unwarranted deductions; or mere legal conclusions asserted by a party."). A Court may also consider documents referenced in the complaint or that are essential to the claims. *Drew Estate Holding Co., LLC v. Fantasia Distrib., Inc.*, 2012 U.S. Dist. LEXIS 7910, at *10 (S.D. Fla. Jan. 24, 2012) (court may consider "documents central to or referenced in the complaint, and matters judicially noticed.").

Jay Peak Golf and Mountain Suites L.P. (the "Phase IV Partnership"), Jay Peak Lodge and Townhomes L.P. (the "Phase V Partnership"), Jay Peak Hotel Suites Stateside L.P. (the "Phase VI Partnership"), and Jay Peak Biomedical Research Park , L.P. (the "AnC Bio Partnership"). (Amended Complaint ("Am. Comp.") ¶¶ 15-26.) All of the investors in all of the partnerships are foreign nationals who invested a minimum of $500,000 each seeking to earn permanent U.S. residency through the U.S. Citizenship and Immigration Services EB-5 Immigrant Investor Program. (Am. Comp. ¶¶ 1, 5.) Each of the Partnerships was formed for purposes of building a separate project, ranging from hotels, condominiums, and townhomes to a biomedical research and manufacturing facility. (Am. Comp. ¶¶ 15-27; RJN Exs. 1, 6, 11, 16, 21, 26, 31 (offering memoranda).)

B. The Jay Peak Partnerships

The Phase I-VI Partnership projects are all located at the Jay Peak Ski Resort in Northern Vermont. The Jay Peak Resort is owned and operated by Jay Peak Inc. ("JPI"). At all times relevant to this matter, William Stenger ("Mr. Stenger") was the President and CEO of JPI. (Am. Comp. ¶¶ 11, 14.) Prior to June 23, 2008, JPI was owned by Mont Saint-Saveur International, Inc. ("MSSI"), a Canadian company. (Am. Comp. ¶¶ 57.) On June 23, 2008, MSSI sold JPI to Q Resorts. (*Id*. at ¶¶ 57, 58.) Mr. Quiros was and is the sole owner, officer and director of Q Resorts. (*Id*.at ¶ 12.) The Phase I-V Partnership projects are completed, open and operating. (*Id*. at ¶¶ 15-22.) The Phase VI Partnership project is largely complete; a hotel is ready to open and 84 vacation cottages have been partially constructed, though the medical and recreation centers that are part of the project have not yet been constructed. (*Id*. at ¶ 24.)

The general partners for the Phase I-VI Partnerships were Jay Peak Management Inc. (Phases I and II), Jay Peak GP Services, Inc. (Phase III), Jay Peak GP Services Golf, Inc. (Phase IV), Jay Peak GP Services Lodge, Inc. (Phase V), and Jay Peak Services Stateside, Inc. (Phase VI). (*Id*. at ¶¶ 17, 19, 21, 23, 25.) The SEC does not allege that Mr. Quiros was an officer, director, or principal of any of the general partner entities discussed in this paragraph.

The EB-5 investors in the Phase I-VI Partnerships received offering statements describing those investments. (*Id*. at ¶¶ 44-46.) The offering statements were prepared and dated as of the following dates: Phase I (December 22, 2006), Phase II (March 31, 2008), Phase III (July 10, 2010), Phase IV (December 22, 2010), Phase V (May 18, 2011), Phase VI

(October 31, 2011). (RJN Exs. 1, 6, 11, 16, 21, 26 (offering memoranda).) Each offering memoranda identifies the limited partnership to which it pertains as the offeror: the entity making all of the representations and the source of the information in the offering statement. (*See, e.g.*, RJN Ex. 26 at 11, 14 (Phase VI Offering Memo); RJN Ex. 1 at 7, 9 (Phase I Offering Memo); RJN Ex. 6 at 4, 7(Phase II Offering Memo); RJN Ex. 11 at 9, 12 (Phase III Offering Memo); RJN Ex. 16 at 11, 14 (Phase IV Offering Memo); RJN Ex. 21 at 10, 13 (Phase V Offering Memo).)

The SEC does not allege that Mr. Quiros had any involvement in preparing, issuing, or disseminating any of the offering documents for Phases I-VI, nor does the SEC allege that Mr. Quiros reviewed the offering documents before they were issued. (*See* Am. Comp. ¶ 51.) Rather, the SEC merely alleges that Mr. Quiros – at some unspecified time – "reviewed the contents of the Phase I-VI offering documents . . . and understood that he had to abide by them." (*Id*.) Similarly, the SEC does not allege that Mr. Quiros was involved in any way in selling the investments to potential investors. (*Id*. at ¶¶ 42-43.)

Despite this lack of involvement, the SEC alleges that Mr. Quiros was part of a "fraudulent scheme" by which he "misused," "misappropriated," and "pilfered" investor funds. (*Id.* at ¶¶ 2-4, 8.) In making such strong allegations, one might expect the SEC to methodically set forth the legal basis of Mr. Quiros's supposed obligations to investors, how Mr. Quiros breached specific language of applicable agreements, and how such alleged conduct amounts to more than alleged mismanagement or breaches of contract and enters the realm of securities fraud. The SEC does not do this. (*Id*., passim.)

The SEC repeatedly fails to explain how the payments at issue are improper. The SEC repeatedly insinuates that the use of margin loans (rather than direct payments) was somehow nefarious, but doesn't explain this view, nor why provided business reasons for this approach are unavailing. (*See e.g.*, *id*. at ¶¶ 78-95.) Similarly, the SEC alleges that Mr. Quiros helped move funds between affiliated companies and that it violated applicable agreements, even though these payments appear to consist largely of contractual permissible payments to an affiliate Jay Construction Management ("JCM") for construction services. (*Id*. at ¶¶ 96-115.) In making these allegations, SEC makes passing reference to "offering materials consisting of a private placement memorandum, a business plan, and a limited partnership agreement." (*Id.*at ¶¶ 44-

50.) Even though the SEC admits that these various documents set forth the terms for each of the respective investments (*id.* at ¶ 45), in alleging wrongdoing, the SEC fails to quote from the documents to show how movements of money breach the applicable agreements by the parties to those agreements, let alone amount to a fraud on investors (nevermind a fraud for which Mr. Quiros is legally culpable). (*See e.g.*, *id.* at ¶¶ 78-115.) For instance, 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. Yet, it unfairly alleges that such conduct amounted to "commingling," "pilfering," and "looting." (*Id.* at ¶¶ 1-3, 96-115.)

Indeed, by the Limited Partnership Agreements (*See e.g.*, RJN Exs. 3, 5, 8, 13, 18, 23, 28.) that governed the investments, investors broadly accepted that the General Partner had almost plenary discretion in running the development. A representative document provides:

> **Section 5.01. Authority of General Partner.**
>
> (a) Subject to the terms of this Agreement, the General Partner shall be further responsible for the overall management and control of the business assets and affairs of the Partnership, and the General Partner shall have the right, power, and authority, acting for and on behalf of and in the name of the Partnership, to: (i) execute and deliver on behalf of the Partnership any contract, agreement, or other instrument or document required or otherwise appropriate to acquire, construct, lease, operate, encumber, mortgage or refinance the Partnership Property (or any part thereof); (ii) convey Partnership Property by deed, mortgage, certificate, bill of sale, agreement, or otherwise, as appropriate.

Moreover, investors broadly waived their ability to bring claims against the various defendants for any actions done in good faith to advance the project:

> **Section 5.05. Liability to Partnership and Limited Partner.**
>
> The General Partner, and its Affiliates, and their officers, directors, agents, employees, representatives, attorneys, accountants and other persons operating on its behalf shall not be liable, responsible, or accountable in damages or otherwise (including attorneys fees and expenses) to the Limited Partner or to the Partnership for any acts performed in good faith and within the scope of authority of the General Partner, or its Affiliates if any of

> the General Partner's duties have been contractually delegated to them, pursuant to this Agreement.

Finally, the Partnership Agreements *expressly authorizes* transactions between and among the various limited partnerships and other Jay Peak companies, including payments for services:

> **Section 5.07. Dealing with Affiliates: Fees.**
>
> The General Partner may, in the name and on behalf of the Partnership, enter into agreements or contracts for performance of services for the Partnership with an Affiliate of the General Partner, including without limitation services necessary to oversee construction of the Buildings and other improvements and for the leasing of the Penthouse Suites Hotel and the Mountain Learning Center Buildings, and the General Partner may obligate the Partnership to pay compensation for and on account of any such services; provided, however, such compensation shall be at costs to the Partnership not in excess of those disclosed in the Confidential Memorandum, but such limitation on costs shall not prevent the Resort Owner, if necessary, from advancing funds to complete the Project and being reimbursed with the grant of Resort Owner Interests. In addition, the General Partner shall pay the Resort Owner its development fees and pay whomever it hires to manage the Leases a fee equal to ten percent (10%) of the rent paid by the tenants, as further disclosed in the Confidential Memorandum.

See RJN Ex. 8 at 22 § 5.07 ; *see also e.g.* RJN Ex. 3, 5 at 20 § 5.07 (Phase I Limited Partnership Agreement); RJN Ex. 18 at 21 § 5.07 (Phase IV Limited Partnership Agreement); RJN Ex. 28 at 21- 22 § 5.07 (Phase VI Limited Partnership Agreement). The lengthy Complaint eschews quoting the agreements. The SEC makes no attempt to distinguish contractually authorized affiliated transactions from any "improper" transactions. (Comp., *passim*.)

C. The AnC Bio Project

The AnC Bio Project is the seventh, and last, partnership. At the outset, it is important to identify the applicable offering documents for this investment. ANC Bio Partnership issued and sent amended offering documents to investors on or about January 30, 2015. (RJN Ex. 31.) All investors who had invested in the AnC Bio Partnership prior to the preparation of the amended offering statement were given an opportunity to rescind their prior investment or re-subscribe to

the AnC Bio Partnership. (RJN Ex. 37.) Accordingly, the amended offering statement, not the original offering statement, is the statement relevant to the SEC's claims in this action.

The general partner of the AnC Bio Partnership is AnC Bio Vermont GP Services, LLC. (Am. Comp. ¶ 27.). As with the other investments, there are no allegations that Mr. Quiros had any involvement in preparing the amended offering statement for the AnC Bio project or that he personally made any misrepresentation to any AnC Bio Partnership investor. (*Id*., *passim*.)

The SEC's contentions regarding the AnC Bio Partnership and the amended offering statement fall into two categories. First, the SEC contends that the revenue projections in the amended offering statement were false and misleading because they did not account for the need to obtain FDA approval for products that were to be manufactured and sold by the AnC Bio Partnership. (*Id*.at ¶¶ 116-126.) Second, the SEC contends that AnC Bio Partnership funds were misused in a manner inconsistent with the projected sources and uses of funds set out in the amended offering statement. (*Id*. at ¶¶ 127-140.) The amended offering statement for the AnC Bio Partnership in several places discloses that FDA approval of AnC Bio products will be required, that none of the products were currently approved, and that approval could take time, could be delayed, and may not occur. (*See, e.g.*, RJN Ex. 31 at 14, 24, 39; RJN Ex. 32 at 27-28.) Among other things, it states:

> AnC Bio Products will be subject to rigorous testing by the US Food and Drug Administration (FDA) and numerous international, supranational, federal and state authorities. The process of obtaining approvals to manufacture, distribute and market artificial organs, cell based therapy medicine and certain medical devices can be costly and time-consuming, and approvals might not be granted on a timely basis, if at all. Delays in the receipt of, or failure to obtain approvals for AnC Bio Products could result in delayed realization of product revenues, reduction in revenues, and in substantial additional costs. In addition, no assurance can be given that AnC Bio will remain in compliance with applicable FDA and other regulatory requirements once approval or marketing authorization has been obtained for a product. These requirements include, among other things, regulations regarding manufacturing practices, product labeling, and advertising and postmarketing reporting, including adverse event reports and field alerts due to manufacturing quality concerns.

RJN Ex. 31 at 39. Further, the amended offering statement also warned that actual dates and results could differ materially from those projected and that assumptions used in the projections could prove incorrect. (*See, e.g., id.* at 14, 35; RJN Ex. 32 at 3.) Notably, the SEC's allegations seem to presuppose that FDA approval and product development for the project would not occur until the completion of construction on the AnC Bio facility in Vermont. (Am. Comp. ¶ 126 ("Taking into account that Biomedical Phase VII could not start developing and testing its products under April 2014 when its facilities would be operational . . .").) However, the amended offering statement disclosed that some of the AnC products were already under development in Korea. (RJN Ex. 31 at 24; RJN Ex. 32 at 12.)

With respect to the SEC's contention that AnC Bio Partnership funds were misused or commingled, the amended offering statement discloses the following projected uses of AnC Bio Partnership funds, among others:

Construction and fit out (e.g., equipment)	$72.8 million
Construction supervision and expenses	$12.6 million
Purchase of distribution and market rights	$10 million
Purchase of land	$6 million
Design, architect and engineering fees	$2.1 million

RJN Ex. 32 at 11. The amended offering statement and the AnC Bio Limited Partnership Agreement, like those for Phases I-VI, also specifically permit dealings with affiliates, provided that the amounts paid to the affiliates be at "costs to the Partnership not in excess of those disclosed in the [offering memoranda]." (RJN Ex. 33 at 21 (AnC Bio Limited Partnership Agreement § 5.07).)[2] Once again, the SEC does not explain how the alleged conduct of Mr. Quiros violated the agreements.

[2] In fact, the amended offering statement even goes farther and specifically notes that (a) the property upon which the facility was to be built had been purchased for $6,000,000 from GSI of Dade County, Inc. ("GSI"), a company owned by Quiros, (b) a construction supervision contract was entered into with North East Contract Services, LLC ("NECS"), a company owned by William Kelly, JPI's COO, and (c) a Design, Procurement and Construction Management Services Contract (the "JCM Contract") had been entered into with JCM. (RJN Ex. 31 at 24-25.) The amended offering statement attached the executed real property purchase and sale agreement, and the contracts with NECS and JCM. (RJN Ex. 36 at 49-59, 90-94.)

III. SUMMARY OF THE SEC'S CLAIMS AGAINST MR. QUIROS

The SEC has alleged that Mr. Quiros violated the antifraud provision of the Securities Act of 1933 (the "Securities Act") and certain provisions of the antifraud provision of the Securities Exchange Act of 1934 (the "Exchange Act), as follows:

- as to all partnerships (*i.e.*, Phase I-VI Partnerships and AnC Bio Partnership): violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)];
- as to Phase I-VI Partnerships: violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and SEC Rule 10b-5(a) and (c) (17 C.F.R. § 240.10b-5(a) and (c)) promulgated thereunder;
- as to the AnC Bio Partnership: violating Section 10(b) of the Exchange Act and SEC Rule 10b-5(a), (b) and (c); and
- as to all of the partnerships: aiding and abetting others' violations of Rule 10b-5(b), and, as to all partnerships except the AnC Bio Partnership, liability for the partnerships' violations of the Securities Act and Exchange Act as a controlling person under Section 20(a) of the Exchange Act [15 U.S.C. § 78t].

IV. THE STATUTE OF LIMITATIONS BARS MOST OF THE SEC'S CLAIMS

On May 26, 2016, after the filing of the Complaint in the instant action, the 11th Circuit issued a ruling that definitively bars most of the SEC's claims in this case. *SEC v. Graham*, 2016 U.S. App. LEXIS 9650 (11th Cir. May 26, 2016). *Graham* concerns the latest interpretation of 28 U.S.C. § 2462, which provides a statute of limitations and repose for a wide array of government actions, including enforcement actions by the SEC; it prohibits any action "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise . . . unless commenced within five years from the date when the claims first accrued."

Three years ago, the Supreme Court in *Gabelli v. SEC*, 133 S. Ct. 1216, 1221-24 (2013) unanimously held that the 5-year limitations period applied to SEC actions for monetary penalties. In so holding, the Court held that the limitations period in Section 2462 should not be extended by the "discovery rule," citing the difference between the SEC – an agency with an affirmative duty to actively police the markets – "bringing an enforcement action" and "a defrauded victim seeking recompense" as a private party. *Id.* at 1221.

Now, in *Graham*, the 11th Circuit has confirmed that Section 2642 applies not only to actions in which the SEC seeks penalties, but those in which the SEC seeks disgorgement and

declaratory relief. All such "backward-looking" claims are subject to the same 5-year limitations period under Section 2462.[3] *Id.* at 9-14. In this way, *Graham* signals the end of the road for efforts by the SEC to bring claims for monetary relief many years after they accrue. Accordingly, since the SEC filed its initial complaint in this action on April 12, 2016, the statute of limitations bars all non-injunctive claims that first accrued prior to April 12, 2011.

In this case, most of the SEC's claims for monetary relief are time-barred. Time and again, the SEC has framed its claims against Mr. Quiros as arising from "misrepresentations and omissions" in offering documents pertaining to the various, separate Phase I-VII securities offerings. (Am. Comp. ¶ ¶ 57-77 (setting forth alleged fraud related to the procurement of Phases I and II to purchase the Jay Peak Resort); *see also id.* at ¶¶ 96-115 (setting forth "MISREPRESENTATIONS AND OMISSIONS IN PHASES II-VI").

It is well-established that a legal claim accrues – and a statute of limitations period commences – on the date when all elements of the cause of action exist. *Barnes v. Compass Bank*, 568 Fed. Appx. 743, 744 (11th Cir. 2014) ("As a general rule, the statute of limitations clock begins to tick when the plaintiff first has a complete and present cause of action") (*citing Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1220 (2013)). As set forth below, Section 17(a) and Section 10(b) claims require an "offer or sale" or "purchase or sale" of securities. The initial transaction of any offering marks the moment that a claim by the SEC under Section 17(a) or Section 10(b) first accrues – at that point the negligent or intentional misrepresentation / omission must exist. *See e.g.*, *Landy v. Mitchell Petroleum Tech. Corp.*, 734 F. Supp. 608, 618 (S.D.N.Y. 1990) ("the Court finds the statute of limitations begins to run from the date of purchase of the partnership units"). Under Section 2642, then, the limitations period for the SEC first accrues no later than the time of the initial offering / sale of a security under an offering plan – *i.e.*, when the SEC could first have brought suit. *United States v. Dearborn Ref. Co.*, 777 F. Supp. 2d 1077, 1080

[3] Although the court concluded that Section 2462 did not apply to injunctions per se, it cautioned that "obey-the-law" injunctions seeking to bar future securities violations may be unenforceable. *Id.* at *10-11 n. 2. To the extent that the Court finds that any of Counts 1-29 survives the Motion to Dismiss under Rule 12(b)(6), Mr. Quiros respectfully moves that that the Court, acting pursuant to Rule 12(f), strike the Permanent Injunctive Relief" sought by the SEC under Section B of the "Relief Requested," which is nothing more than an "obey-the-law" injunction.

(E.D. Mich. 2011) ("the date triggering the clock under § 2462 is the earliest date on which the Government could have brought the present enforcement").

Section 2642 therefore bars most of the SEC's claims at the outset because the Phase I-IV offerings each issued prior to April 12, 2011.[4] (*See* Am. Comp. at ¶ 15 and RJN Ex.1 (Phase I first offered December 22, 2006); Am. Comp. ¶ 16 and RJN Ex. 6 (Phase II first offered March 31, 2008); Am. Comp. ¶ 18 and RJN Ex. 11 (Phase III first offered on July 10, 2010); Am. Comp. ¶ 20 and RJN Ex. 16 (Phase IV first offered on December 22, 2010).) Accordingly, Section 2642 bars Counts 1-29 to the extent those Counts seek any non-injunctive relief, including "Disgorgement," "Civil Penalty," and "Asset Freeze," and the Court should dismiss such claims without leave to amend.

Stripped of its improper time-barred claims, the SEC's complaint is much more limited in scope. Indeed, Section 2642 bars all claims for monetary relief regarding the improper use of funds regarding the purchase of Jay Peak (*see* Am. Comp. ¶¶ 57-77), most of the claimed improper use of margin loans (*see id*. at ¶¶ 78-90), many of the alleged claims of misrepresentations and omissions (*see id*. at ¶¶ 96-106), and most of the claims for relief (*see id*. at ¶¶ 149-246).

To the extent the Court grants the SEC leave to amend its complaint (or to the extent the SEC seeks now to argue that Counts 1-29 should not be dismissed because the SEC claims to now only seek "injunctive relief" under those Counts), the Court should order the SEC, under Rule 12(e), to amend the Amended Complaint and the "Relief Requested" to comply with the 11th Circuit's recent decision in *Graham*, and clearly indicate the relief that the SEC will seek for each Counts. *See e.g.*, *Anderson v. Dist. Bd. Of Trustees of Cent. Fla. Community College*, 77 F.3d 364, 366-67 (1996) (granting Rule 12(e) motion in a Section 10(b) case when plaintiff engaged in "shotgun pleading" in which it was "virtually impossible to know which allegations of fact [were] intended to support which claim(s) for relief.") As drafted, the Amended

[4] Even if Section 2642 were to only bars claims based on when investors purchased partnership interests (rather than the date securities were first offered), all sales of Phase I and Phase II (and many sales of Phases III and IV) were complete prior to April 12, 2011. (Am. Comp. ¶ 57 (Phase I sales ended May 2008); ¶ 60 (Phase II sales ended Sept. 2008).)

Complaint makes blunderbuss claims going back almost *ten years* and is vague and ambiguous regarding what relief the SEC intends to seek for each claim.[5]

V. THE AMENDED COMPLAINT FAILS TO SATISFY THE HEIGHTENED PLEADING STANDARDS OF RULE 9(b)

A. The Amended Complaint Must Satisfy Rule 9(b)

The Amended Complaint makes repeated reference to Mr. Quiros's participation in a "fraudulent scheme." (*See e.g.*, Am. Comp. ¶¶ 1 and 2.) As such, the SEC must make its allegations with particularity under Rule 9(b). *SEC v. Betta*, 2010 U.S. Dist. LEXIS 25830, at *8-9 (S.D. Fla. Mar. 15, 2010) (The SEC "must plead the circumstances of the conduct with particularity. Complaints alleging falsity shall specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading. Additionally, a complaint must present facts from which a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.") (internal quotations and citations omitted); *SEC v. Spinosa*, 31 F. Supp. 3d 1371, 1376-79 (S.D. Fla. 2014) (requiring Rule 9 pleading for Section 17(a) claims). As explained below in more detail, the SEC has not met this heavy pleading burden.

B. The SEC's Section 17(a) And Section 10(b) Claims Regarding Phases I-VI Fail To Allege Misrepresentations Or Omissions By Mr. Quiros In Connection With The Sale Of Securities

To establish a violation of Section 17(a)(1), the SEC must prove, *inter alia*, (1) material misrepresentations or materially misleading omissions (2) in the offer or sale of securities (3) made with scienter. *See SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. Fla. 2014); *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007) (*citing Aaron v. SEC*, 446 U.S. 680,

[5] It should be noted that the new *Graham* limitations on monetary remedies render the Receivership sought and received by the SEC in this case grossly overbroad. The SEC's prior representations to this Court of potential monetary relief are grossly in excess of the limitations imposed in *Graham*, and the Receivership should be modified accordingly. The SEC confirms on its web page that the SEC seeks "a receiver in cases in which the SEC fears a company or an individual may dissipate or waste corporate property and assets." https://www.sec.gov/oiea/investor-alerts-bulletins/ib_receivers.htm. Accordingly, a Receivership should not extend to assets over which the SEC has no claim.

695 (1980)).[6] Section 10(b) and Rule 10b-5 have substantially similar requirements, requiring the SEC to show: (1) material misrepresentations or materially misleading omissions, (2) in connection with the purchase or sale of securities, (3) made with scienter. *Merch. Capital*, 483 F.3d at 766 (*citing Aaron*, 446 U.S. at 695).

Accordingly, for *each misrepresentation and/or omission claim* and *each defendant*, the SEC must allege facts showing participation in the making of a misleading statement in direct connection to the purchase and/or sale of securities. *Razi v. Razavi*, 2012 U.S. Dist. LEXIS 187072, at *15 (M.D. Fla. Dec. 13, 2012) ("The Eleventh Circuit has held that a complaint does not meet Rule 9(b)'s particularity standard where it is 'devoid of specific allegations with respect to each defendant' and instead, merely 'lump[s] together all of the defendants in their allegations of fraud.') (*quoting Ambrosia Coal & Constr. Co. v. Pages Morales*, 482 F.3d 1309, 1317 (11th Cir. 2007). The SEC has not and cannot meet this basic burden for *any* claim against Mr. Quiros, failing to allege that he: (i) made any representations to investors; (ii) prepared, issued, or disseminated any of the offering documents; (iii) provided statements or contributed information contained in the offering statements; (iv) sold or marketed any of the investments in any way; or (v) owed any duty to disclose to investors such that he should be liable for omissions. (*See* Am. Comp. ¶ 51, ¶¶ 42-43, and *passim*.)[7]

The offering documents make clear that Mr. Quiros played no role managing the Phase I-VI Partnerships, and that all representations made therein were made by the partnerships, not Mr. Quiros. (RJN Exs. 1, 6, 11, 16, 21, 26 (offering memoranda).) The Supreme Court has made clear that the law will not hold parties liable for misrepresentations and omissions that they did not make. *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011).

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[6] Under Section 17(a)(2) or 17(a)(3), the SEC must demonstrate (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence. *Id.* (*citing Aaron*, 446 U.S. at 702). So, while scienter is not required under Section 17(a)(2) or 17(a)(3) of the Securities Act, both subsections require the same pleading and proof of (i) a misrepresentation and/or omission (ii) in connection with the purchase or sale of a security.

[7] Remarkably, the SEC fails even to allege that Mr. Quiros reviewed any of the offering documents before they were issued or that Mr. Quiros spoke to any investor prior to making his or her investments. (*Id*. at ¶ 51 (conclusory claim that Mr. Quiros– at some unspecified time – "reviewed the contents of the Phase I-VI offering documents . . . and understood that he had to abide by them").)

Janus held that "the maker of a statement is the person or entity with ultimate authority over a statement, including its content and whether and how to communicate it." *Id*. at 142. The SEC has not and cannot do this. Even after conducting a purportedly detailed investigation, the SEC cannot allege Mr. Quiros had any involvement in the preparation of, or responsibility for, the offering documents for Partnership Phases I-VI; he therefore cannot be liable for any statements or omissions contained in them.

C. The SEC's Section 17(a) And Section 10(b) Claims Regarding Phases I-VI Fail To Allege Actionable Conduct By Mr. Quiros In Connection With The Sale Of Securities

The Amended Complaint evidences a deliberate attempt by the SEC to mischaracterize alleged *conduct* occurring long after securities offerings with *misrepresentations* and *omissions* at the time of the offerings. For instance, the Amended Complaint uses headings labelling allegations "misrepresentations and omissions" (*see* Am. Comp. ¶¶ 96-140 (setting forth "misrepresentations" and "omissions" for Phases II-VII), but the allegations contained in those paragraphs concern movements of and uses of investor funds long after the offerings. The result is an incoherent and legally unavailing pleading, particularly as to Mr. Quiros.

The misrepresentation and omission allegations fail for the reasons set forth above. To the extent that the SEC seeks to bring claims related to "deceptive acts" as part of a scheme under subsections (a) and (c) of Rule 10b-5 or Sections 17(a)(1) and 17(a)(3) (*compare Monterosso*, 756 F.3d at 1334-35), the Court also must reject the claims.

In the first case, courts have not allowed so-called "scheme liability" to replace the rigorous pleading required for misrepresentation and omission claims. As set forth above, the misrepresentations and omissions that underlie the SEC's purported claims regarding Phases I-VI were each made by persons other than Mr. Quiros. Liability under Rules 10b-5(a) and (c) requires proof of misconduct in addition to the making of misrepresentations or omissions. *See SEC v. PIMCO Advisors Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 467 (S.D.N.Y. 2004) (holding that to permit liability to "attach to individuals who did no more than facilitate preparation of material misrepresentations or omissions actually communicated by others…would swallow" the bright-line test between primary and secondary liability); *Monterosso*, 756 F.3d at 1334 ("Section 17(a) of the Securities Act, requires substantially similar proof [as Section 10(b)].").

Liability under Rules 10b-5(a) and (c) does not arise simply by virtue of repackaging a fraudulent misrepresentation as a "scheme to defraud." *See SEC v. Kelly*, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011) ("Courts have not allowed subsections (a) and (c) of Rule 10b-5 to be used as a 'back door into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b-5.") (citations omitted); *accord In re Galectin Therapeutics, Inc. Sec. Litig.*, 2015 U.S. Dist. LEXIS 173767, at *20-22 (N.D. Ga.) (dismissal of Rule 10b-5(a) and (c) claims where plaintiff "repeats and realleges each and every allegation" set forth in the preceding paragraphs of the complaint and does not identify any factual allegations that form the basis of Rule 10b-5(a) and (c) claims that are separate from the factual allegations that form the basis of Rule 10b-5(b) claim) (*citing WPP Luxembourg Gamma Three SARL v. Spot Runner, Inc.*, 655 F.3d 1039, 1057-58 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 2713 (2012)).

"Section 10(b) of the Exchange Act requires that the alleged actions be 'in connection with' the sale or purchase of securities." *SEC v. Coplan*, 2014 U.S. Dist. LEXIS 22796, at *12-13 (S.D. Fla. Feb. 24, 2014). While courts apply this rule "flexibly to effectuate [the] remedial purposes," *SEC v. Zandford*, 535 U.S. 813, 819(2002) (*quoting Affiliated UTE Citizens of Utah v. United States*, 406 U.S. 128, 151(1972)), the SEC's claims amount to *at most* alleged *ex post* breaches of contract or financial mismanagement, rather than allegations of deliberate fraudulent conduct designed to induce investments. To the extent, for instance, that the SEC would like to allege that there was a "scheme" to raise funds through later projects to cover funding shortfalls in earlier projects, the SEC's allegations lack any particularity or any connection to any purchase or sale of securities. The SEC has not alleged *facts* from which it can reasonably be inferred that Mr. Quiros moved or used money in order to induce any investor's purchase of securities, nor that any such movement of money had a causal or temporal relationship to any investor deciding to make his or her investment. Particularly in light of Mr. Quiros's lack of involvement in producing any offering statements, the SEC must set forth facts which, if true, would evidence Mr. Quiros's purported movements of money influencing investment decisions. *SEC v. Roanoke Tech. Corp.*, 2006 U.S. Dist. LEXIS 92995, at *1 (M.D. Fla. Dec. 26, 2006) ("Section 10(b) and Section 17(a) have essentially similar requirements that the deceptive conduct occur in connection with the 'purchase or sale' or 'offer or sale,' respectively, of any security" requiring, at minimum, "an injury as a result of deceptive practices touching its sale of securities[.]") The

allegations of wrongful conduct in the Amended Complaint are completely unmoored from the securities transactions at issue – they touch on no sale or purchase of securities.

D. The SEC Has Not Sufficiently Alleged Scienter Regarding Phases I-VI

Scienter is a state of mind embracing an intent to deceive, manipulate, or defraud. It consists of either the "intent to defraud" or "severe recklessness." *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 790 (11th Cir. 2010); *Betta*, 2010 U.S. Dist. LEXIS 25830, at *8-9. Severe recklessness is "limited to those highly unreasonable omissions or misrepresentations that involve . . . an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008). Allegations of motive and opportunity to commit fraud, standing alone, are insufficient to establish scienter. *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1303 (11th Cir. 2011); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285 (11th Cir. 1999).

Whether the SEC's allegations against Mr. Quiros are more properly considered misrepresentations, omissions, conduct, or some combination thereof, they offer no plausible basis to conclude Mr. Quiros acted with scienter. Among other things, the SEC bases its claims against Mr. Quiros on alleged movements of money in violation of the terms of offering documents, but there is no factual allegation that Mr. Quiros even knew of any contractual obligations let alone that he knowingly acted in supposed derogation of the provisions. Moreover, as a whole, the SEC's complaint requires the reader to repeatedly jump to conclusions – that movements of money between entities and the use of margin loans didn't just violate the terms of the offerings or constitute mismanagement (the SEC has not sufficiently alleged even this), but that such acts were fraudulent.

VI. THE CONTROL PERSON ALLEGATIONS ALSO FAIL REGARDING PHASES I-VI

Section 20(a) liability derives from liability under § 10(b) and therefore necessarily requires a finding of Section 10(b) liability. *See Sapssov v. Health Mgmt. Assocs.*, 608 Fed. Appx. 855, 859 n. 6 (11th Cir. 2015*); Thompson v RelationServe Media, Inc.*, 610 F.3d 628, 635-

36 (11th Cir. 2010). Because the SEC has not sufficiently alleged Section 10(b) liability for the reasons set forth above, it cannot establish Section 20(a) liability.

Moreover, Section 20(a) liability requires the SEC to show that (1) the defendant had the power to control the general affairs of the primary violator, and (2) the defendant had the power to control the specific corporate policy that resulted in the primary violation. *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396 (11th Cir. 1996). The SEC has not made this showing. The alleged primary violators were the limited partnership entities, Partnership Phases I-VI. *See Janus Capital Group*, 564 U.S. at 148. The SEC has alleged no plausible fact supporting an inference that Mr. Quiros exercised any control over the partnerships nor any evidence that he had the power to control the corporate policies of the partnerships.

The SEC also alleged that Mr. Quiros aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5(b). In order to establish aiding and abetting liability, the SEC must show: (1) a primary violation by another party; (2) a "general awareness" by the accused aider-abettor "that his role was part of an overall activity that is improper"; and (3) that "the accused aider-abettor" must have "knowingly and substantially assisted the violation." *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 800 (11th Cir. 2015). The SEC has not established Mr. Quiros's participation in or awareness of the contents of any of the offering documents for Partnership Phases I-VI.

VII. THE RESULT IS NO DIFFERENT FOR THE AnC BIO PARTNERSHIP

A. The SECs Allegations Regarding the AnC Bio Partnership

The SEC's contentions regarding the AnC Bio Partnership and the amended offering statement fall into two categories. First, the SEC contends that the revenue projections in the amended offering statement were false and misleading because they projected revenues earlier than was possible because they did not properly account for the need to obtain FDA approval for products that were to be manufactured and sold by the AnC Bio Partnership. (Am. Comp. ¶¶ 117-126.) Second, the SEC contends that AnC Bio Partnership funds were misused in a manner inconsistent with the amended offering statement. (*Id.* at ¶¶ 127-140.)

B. The SEC Has Not Sufficiently Alleged That Mr. Quiros Is Legally Responsible For Any Misrepresentations Or Omissions Regarding the AnC Bio Partnership

The SEC alleges that Mr. Quiros is responsible for alleged misrepresentations and omissions in offering documents for AnC Bio Partnership because he was one of the "principals" of the Partnership's general partner and because, at some unspecified time, he "reviewed and approve the Phase VII offering materials." (*Id*.at ¶ 123.) Such allegations are insufficient.

While the issuer of securities has a duty to disclose material information under Section 10(b) and Rule 10b-5(b),[8] the 11th Circuit recently made clear that there is no general duty of disclosure by corporate insiders absent an affirmative statement by them. *Fried v. Stiefel Labs., Inc.*, 814 F.3d 1288, 1294 (11th Cir. 2016) ("[a]n individual with a duty to disclose may violate Rule 10b-5(b) by omitting a material fact from a statement … and an individual with a duty to disclose may commit a fraud under Rule 10b-5 by failing to disclose material information … *[b]ut this Court has never held that a failure to disclose material information is an omission under subsection (b) absent a statement made misleading by that failure*.") (citations omitted and emphasis added). The SEC offered no evidence of affirmative statements made by Mr. Quiros to investors that were rendered misleading because he failed to provide other or subsequent disclosures.

C. The SEC's Allegations Regarding FDA Approval / Revenue Projections Are Not Actionable

As noted above, the ANC Bio Partnership issued and sent amended offering documents to investors on or about January 30, 2015 and offered investors the opportunity to rescind their prior investment or re-subscribe to the AnC Bio Partnership. (RJN Ex. 37.) Accordingly, the amended offering documents control in this matter. The offering documents directly contradict the SEC's allegations regarding alleged misstatements concerning FDA process and approvals and projected revenues from the project. The amended offering statement discloses that FDA approval of AnC Bio products will be required, that none of the products were currently approved, and that approval could take time, could be delayed, and may not occur. (*See, e.g.*,

[8] As noted above, the pleading and proof requirements of Section 10(b) are the same as Section 17(a) as to misrepresentations and omissions. *Monterosso*, 756 F.3d at 1334.

RJN Ex. 31 at 14, 24, 39; RJN Ex. 32 at 27-28.) Further, the amended offering statement also warned that actual dates and results could differ materially from those projected and that assumptions used in the projections could prove incorrect. (*See, e.g., id.* at 14, 35; RJN Ex. 32 at 3.) Notably, the SEC's allegations seem to presuppose that FDA approval and product development for the project would not occur until the completion of construction on the AnC Bio facility in Vermont. (Am. Comp. ¶ 126 ("Taking into account that Biomedical Phase VII could not start developing and testing its products under April 2014 when its facilities would be operational . . .").) However, the amended offering statement disclosed that some of the AnC products were already under development in Korea. (RJN Ex. 31 at 24; RJN Ex. 32 at 12.)

Apart from explicit language in the offering documents rendering them not materially misleading, claims regarding future performance are only actionable when they are "supported by specific statements of fact … or if the speaker does not genuinely or reasonably believe them." *Merch. Capital*, 483 F.3d 747, 767 (11th Cir. 2007) (*quoting Kowal v. IBM Corp.* (*In re IBM Corp. Sec. Litig.*), 163 F.3d 102, 107 (2d Cir. 1998)). Moreover "[s]tatements classified as 'corporate optimism' or 'mere puffing' are typically forward-looking statements, or are generalized statements of optimism that are not capable of objective verification. "Vague, optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997). Finally, the 11th Circuit follows the "bespeaks caution" doctrine. *Merch. Capital*, 483 F.3d at 767-68. "When an offering document's projections are accompanied by meaningful cautionary statements and specific warnings of the risks involved, that language may be sufficient to render the alleged omissions or misrepresentations immaterial as a matter of law." *Saltzberg v. TM Sterling/Austin Assocs*., 45 F.3d 399, 399 (11th Cir. 1995). "The bespeaks caution doctrine is ultimately simply 'shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law.'" *Merch. Capital*, 483 F.3d at 767 (*quoting Kaufman v. Trump's Castle Funding (In re Donald J. Trump Casino Sec. Litig.)*, 7 F.3d 357, 364 (3d Cir. 1993)).

The SEC has not pled facts to support any allegations that the provisions in the amended offering statement, read in context, contained any guarantees of performance or false statements of fact, nor that – to the extent he was responsible for such statements – that Mr. Quiros did not

genuinely believe the statements in the amended offering statement, if he read them, or that his belief was not reasonable. The amended offering statement specifically warned of the risk that FDA approvals may be delayed or not occur at all. These cautionary statements rendered immaterial those forward-looking statements that assumed FDA approval. *See id.* at 768 ("This cautionary language, specifically tailored to several of the risks faced by the debt purchasing business, rendered the projections immaterial as a matter of law, even if they were misrepresentations.").

D. The SEC's Allegations Regarding Use Of Funds Regarding The AnC Bio Partnership

The amended offering statement disclosed the proposed affiliated transactions and the projected uses of AnC Partnership funds to be paid to affiliates, and the limited partnership agreements included among the offering documents specifically authorize the general partner to enter into agreements with affiliates. The SEC also argues that once the funds were paid to JCM, they were used in ways inconsistent with the amended offering statement. Indeed, most if not all of the SEC's misuse and commingling allegations relate to funds that were paid by the AnC Bio Partnership to JCM pursuant to the JCM Contract. The offering documents disclose very substantial payment for construction and other amounts:

Construction and fit out (e.g., equipment)	$72.8 million
Construction supervision and expenses	$12.6 million
Purchase of distribution and market rights	$10 million
Purchase of land	$6 million
Design, architect and engineering fees	$2.1 million

RJN Ex. 32 at 11. Just as with the Phases I-VI, 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 procurement services—it was thereafter obligated to deliver licenses, a distribution agreement, design/engineering services, and equipment, not account for funds. Certainly the amended offering statement does not represent that once JCM is paid for the equipment, rights, and services it is obligated to deliver, JCM will segregate and account for the monies it has been paid. Accordingly, whether amounts were in fact used thereafter for corporate taxes (Am. Comp. ¶ 130.) or for a supposed purchase of a condominium in Trump Place (*id.*), is immaterial. What the SEC must do, and what it has not done, is allege how the actual expenditures of money

deviated in any way from the disclosures. For instance, the offering documents disclose that AnC Partnership would pay exactly $6 million for the purchase of land; the SEC admits that AnC Partnership paid *exactly that amount* for the land. (*Id.*; RJN Ex. 31 at 24.)[9]

E. The SEC's Secondary Liability Allegations Regarding The AnC Bio Partnership Also Fail

The SEC also brings Section 10(b) violations against Mr. Quiros for aiding and abetting AnC Bio Partnership's allegedly unlawful sales of its limited partnership interests. For the reasons discussed above, because the SEC failed to provide the requisite showing that the issuer of the securities, AnC Bio Partnership, violated Section 10(b) or Rule 10b-5(b), there can be no secondary liability. *See Sapssov,* 608 Fed.Appx. at 859 n. 6.

Even if AnC Bio Partnership violated Section 10(b), the SEC has failed to allege, as it must, that Mr. Quiros had a "general awareness . . . that his role was part of an overall activity that [was] improper" and that Mr. Quiros must have "knowingly and substantially assisted the violation." *See Big Apple Consulting USA, Inc.*, 783 F.3d at 800.

Respectfully submitted,

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[9] The SEC challenges this payment on the grounds that the deed has not yet been recorded. (Am. Comp. ¶ 130.) The SEC has not pled why the deed has not been recorded, how it might be significant, or why Mr. Quiros is somehow at fault for the failure to record the deed. The SEC then asserts that the AnC Bio Partnership paid too much for the land. (*Id.*) The amended offering statement includes an appraisal supporting the price from a Vermont Certified General Appraiser supporting the $6 million purchase price; the SEC (hardly experts in real property valuation) offers no facts supporting its conclusion that the price for the land was too high or any factual basis to disregard the Appraiser's opinion. (RJN Ex. 32 at 11; RJN Ex. 36 at 97-106.)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Clerk of the Court and furnished via CM/ECF to all participating recipients, on this 24th day of June, 2016.

By: /s/Karen L. Stetson