IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00529-MSK-MEH

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JEFFREY O. FRIEDLAND,
GLOBAL CORPORATE STRATEGIES LLC, AND
INTIVA PHARMA LLC,

Defendants,

and

LANE 6552 LLC,
KATHY B. FRIEDLAND,
ASPEN UPPER RANCH LLC,
ASSURANCE MANAGEMENT, LLC, AND
THE JEFFREY AND KATHY FRIEDLAND IRREVOCABLE TRUST,

Relief Defendants.

DEFENDANTS' JEFFREY FRIEDLAND, GLOBAL CORPORATE STRATEGIES LLC, LANE 6552 LLC, KATHY FRIEDLAND, AND THE JEFFREY AND KATHY FRIEDLAND IRREVOCABLE TRUST BRIEF IN SUPPORT OF THE MOTION TO DISMISS THE COMPLAINT

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Defendants Jeffrey Friedland, Global Corporate Strategies LLC, Lane 6552 LLC, Kathy Friedland, and the Jeffrey and Kathy Friedland Irrevocable Trust by and through their attorneys, respectfully submit this memorandum of law in support of their motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

The Defendants certify that, pursuant to D.C. Colo. L. Civ. R. 7.1(A), counsel discussed the grounds for this motion and the relief requested with counsel for the Plaintiff on April 18, 2018. Plaintiff's counsel opposes the relief requested herein.

INTRODUCTION[1]

The Securities Exchange Commission's (the "SEC" or "Commission") allegations of securities fraud and violations of the "touting" rule of Section 17(b) of the Securities Act of 1933, are improperly pleaded, lack the particularity required by Federal Rules of Civil Procedure 8 and 9, entirely fail to state a claim, and amount to a scattershot effort to penalize Jeffrey Friedland for what is otherwise a legal and permissible stock transaction.

Jeffrey Friedland is a Colorado businessman who is a leading industry expert in the medical marijuana industry, the author of a book on the subject, and an investor in and executive of several businesses in the medical marijuana industry. (Compl. ¶ 19). The SEC's complaint focuses on Mr. Friedland's relationship with OWC Pharmaceutical Research Corp. ("OWC") --- a U.S.-based publicly traded company with its business operations in Israel focused on the research and development of medical cannabinoid-based pharmaceuticals. (Compl. ¶ 27). Mr. Friedland was the Managing Director of Intiva Pharma LLC ("Intiva"), which was an early investor in OWC. (Compl. ¶¶ 2, 21).

In January 2016, Mr. Friedland's company, Global Corporate Strategies LLC ("Global"), separately entered into a consulting, media, and investor relations agreement with OWC and

[1] The facts recited in this brief are based on the allegations in the complaint.

received 5.1 million shares of OWC stock (worth only pennies per share at the time) in exchange. (Compl. ¶ 3). In February 2016, OWC disclosed in its public SEC filing that Global and Mr. Friedland owned the 5.1 million shares and that he controlled, at that time, 6.3% of OWC shares. (Compl. ¶ 32). A few months later, OWC named Mr. Friedland publicly to its advisory board and disclosed Mr. Friedland's role in a press release and in an 8K filing with the SEC. (Compl. ¶ 36). Over the next year and a half, Mr. Friedland appeared in various interviews, attended conferences, and was quoted in press releases where he expounded on the global cannabis industry, including at times, on OWC. (Compl. ¶ 4). Mr. Friedland's interviews and speeches typically pertained to the medical marijuana industry as a whole, not to OWC specifically. On each occasion, cited by the SEC that he mentioned OWC, however, Mr. Friedland disclosed that he was an investor in the company and that he served on its advisory board. (Compl. ¶¶ 35--38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106). In March 2017, Mr. Friedland sold Global's OWC stock for a total of approximately $6.5 million. Intiva sold its shares in summer 2017, for approximately $480,000. (Compl. ¶ 109).

The SEC alleges that Mr. Friedland's failure to disclose Global's consulting agreement with OWC in certain interviews, press releases, and videotaped interviews was a violation of the "touting" rule of Section 17(b) of the Securities Act of 1933 ("Section 17(b)"), 15 U.S.C. § 77a(b).[2] (Claim I). (Compl. ¶ 13). The SEC further claims that Mr. Friedland and the other defendants committed securities fraud, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 (Count II); and in violation Section 17(a) of the

[2] Section 17(b) makes it unlawful "to publish, give publicity to, or circulate any . . . communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer . . . without fully disclosing the receipt . . . of such consideration and the amount thereof." 15 U.S.C. § 77q(b).

Securities Act for fraud in the offer or sale of securities (Count III). (Compl. ¶ 14). These allegations must be dismissed for failure to state a claim.

The SEC's complaint flatly violates Rule 9(b)'s pleading requirements for fraud offenses. The complaint lumps Mr. Friedland, Intiva, and Global together in group pleadings that fail to allege each defendant's purported wrongdoing. The complaint proceeds by an impermissible shotgun approach that simply reincorporates the 114 paragraphs of the complaint, block-quotes the statutory text, and collectively alleges that the defendants violated the touting and securities fraud statutes. (*See, e.g.* Compl. ¶¶ 115-124). The SEC does not even bother to specify subsections of each statute the defendants purportedly violated. These claims do not come close to Rule 9(b)'s requirement that a plaintiff plead with particularity the "who, what, when, where, and how" of the fraud alleged as required. The complaint does nothing more than amass the particulars into sweeping generalities targeted at comments made by Mr. Friedland. This is exactly the approach rejected by Rule 9(b). The complaint cannot be sustained.

The SEC further fails to state a violation of Section 17(b). The allegations of the Complaint demonstrate that Mr. Friedland and OWC fully disclosed to the public and to the SEC that Mr. Friedland was a member of OWC's advisory board, that he owned a substantial amount of OWC stock, and that he worked for OWC as a consultant and to promote the company with the U.S. investment community. (Compl. ¶¶ 35-38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106). The SEC fails to make out a touting violation based on mere failure to disclose the consulting agreement itself or to disclose that the shares were compensation for his advisory and investor relations activity, particularly where that inference is readily drawn from the publicly disclosed information.

The vast majority of the allegations could not substantiate a touting case, in any event, because they do not involve "describing a security" or do not involve a public statement by Mr. Friedland. For example, seventeen instances cited by the SEC involve nothing more than Mr. Friedland listing his investment in OWC and his role on their advisory board (both undisputedly truthful facts) among other biographical information about Mr. Friedland. (Compl. ¶¶ 40, 42, 55, 59, 64, 74-76, 80, 84, 89, 91, 92, 99, 104-106). These allegations do not involve "describing a security for compensation" under Section 17(b). In addition, the allegations do not establish that Mr. Friedland should be held responsible for *OWC*'s press releases. *See Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). Those statements, in any event, disclosed Mr. Friedland's advisory role and investment in OWC. (Compl. ¶¶ 36, 37, 58). Still other allegations pertain to videotaped interviews by Cannabis Media FN, which disclosed that OWC paid to conduct the interview. (Compl. ¶ 34). Again, in those interviews, Mr. Friedland also disclosed that he served as an advisor to OWC and/or that he owned OWC stock. (Compl. ¶¶ 35, 41). Moreover, the complaint does not allege that Mr. Friedland directed Cannabis Media FN to publicly post the interview. The SEC does not specify with particularity which purported statements it attributes to Mr. Friedland and Global. The Complaint does not otherwise establish that Mr. Friedland engaged in illegal touting. The Court accordingly should dismiss Count I for failure to state a claim under Section 17(b).

The allegations of securities fraud (Claims II and III) also are utterly deficient. The Complaint makes no allegation of any false or misleading statements. The SEC instead focuses the majority of its efforts on the negligible omission of the specific terms of Global's consulting agreement with OWC. The SEC fails to allege, however, that Mr. Friedland had any duty to disclose those facts. The complaint further fails to identify any actual investors who were party

to the alleged omissions. No duty of disclosure is owed to potential or prospective investors. In any event, as discussed above, Mr. Friedland and OWC disclosed to both the public and the SEC that Mr. Friedland owned 5.1 million shares of OWC stock through Global, that Intiva owned additional stock in OWC, and that Mr. Friedland served as an advisor and performed investor relations for OWC. (Compl. ¶¶ 32, 35-38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106).

The complaint fails to allege materiality of the purported omissions. There is no likelihood, much less a substantial one, that any investor would have been misled based on the "total mix" of information available. Given the disclosures made by Mr. Friedland and OWC, no fraud can be established by the mere omission of the specific terms of Global's consulting agreement. The allegations further do not give rise to a duty by Mr. Friedland to have disclosed Global or Intiva's plans to sell OWC stock.

The Complaint also suffers from a series of other fatal deficiencies. The SEC does not plead scienter, and does not allege at all, must less with the required particularity, that Mr. Friedland acted with an intent to deceive or with knowing misconduct. Nor can the SEC rely on actions by others (OWC, media organizations, and Intiva) to make out a fraud claim against Mr. Friedland. The securities fraud causes of action are patently deficient and fail to state a claim under any standard, much less under the demanding particularity requirements of Rule 9(b).

The complaint accordingly must be dismissed.

FACTUAL BACKGROUND

In August 2014, Intiva Pharma LLC ("Intiva") --- a company where Jeffrey Friedland served as a Managing Director --- was an early investor in OWC, a publicly traded Israeli biotech company focused on medical uses of cannabis. (Compl. ¶¶ 2, 13). Intiva purchased 1.3 million shares of OWC stock at that time. (Compl. ¶ 2)

In January 2016, Global entered into a two-year consulting, media, and investor relations agreement with OWC to help OWC interface with the U.S. investor public. (Compl. ¶ 3). The agreement specified that Global would assist OWC in writing news releases, shareholder letters, website copy, and establish Facebook and Twitter accounts. (Compl. ¶ 31). The agreement did not state that it included compensation for Mr. Friedland's own public appearances, podcasts, or radio programs (which Mr. Friedland had been involved with for many years as an industry expert in the global cannabis industry). (*Id.*). OWC paid Global 5.1 million shares of restricted company stock as compensation under the agreement. (*Id.*).

In February 2016, OWC disclosed in a public SEC filing that Global owned the 5.1 million shares – 6.3% of OWC's common stock at that time – and that Friedland controlled them as Global's President and CEO. (Compl. ¶ 32). In March 2016, OWC announced publicly in a press release and in a subsequent 8K filing with the SEC that Mr. Friedland had joined OWC's Advisory Board to advise on business development efforts and that Mr. Friedland would serve as the Company's U.S. representative to the investment community. (Compl. ¶ 36).

The Complaint provides a laundry list of listserve postings, web interviews, conference announcements, and press releases in which Mr. Friedland was quoted or appeared between February 2016 and July 2017. (Compl. ¶¶ 34, 36-38, 40-42, 47, 55, 58-59, 64, 65-68, 74-76, 80-81, 84, 89, 91-92, 95-97, 99, 101-102, 104-106). By the SEC's own admission, "In virtually all of the appearances discussed [in the complaint], Friedland mentions. . . Intiva's early investment in OWC when discussing investment opportunities in the medical marijuana industry in general and OWC in particular." (Compl. ¶ 30). In public communications, Mr. Friedland also invariably stated that he was a member of the OWC advisory board. (Compl. ¶¶ 35-38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106). These disclosures were made

on top of the public SEC filings that established Mr. Friedland's ownership of the 5.1 million of shares of OWC stock, that his role included interfacing with the U.S. investor community on OWC's behalf, and his position on OWC's advisory board. (Compl. ¶ 32).

In January 2017, Kathy Friedland established Lane 6552 LLC. (Compl. ¶ 39). Between January and the end of February 2017, Jeffrey Friedland submitted requests to a transfer agent to reissue the 5.1 million shares to Lane 6552 LLC and to remove the restricted stock legend. (Compl. ¶ 43). OWC's lawyer provided an opinion letter to support the removal of the legend. (Compl. ¶ 46). A transfer agent removed the restricted stock legend. (Compl. ¶ 51). No allegations are made that the removal of that restriction violated any law or regulation. After an initial broker dealer declined to execute a sale of the stock, Mr. Friedland engaged a second broker dealer to sell the stock, whom Mr. Friedland informed that Global had received the OWC shares pursuant to Global's consulting agreement with OWC, and that the value of the services provided was $125,000. (Compl. ¶ 57). Global transferred the shares to Lane 6552's account and sold them between March 2 and 21, 2017. (Compl. ¶¶ 62-63, 70-71, 73). Although Global sold the shares at a significant gain, no allegation is made that the rise in the stock price, which peaked and then significantly declined in price before Global's sale of its shares, was attributable to any statement or action by Mr. Friedland.

In early 2017, Mr. Friedland began initial steps to enable Intiva to sell its shares in OWC, which it had held for nearly three years. (Compl. ¶ 82). The removal of the restricted stock legend and sale of the shares was handled by Intiva's CFO. (Compl. ¶¶ 85, 87-88.). Intiva sold its OWC stock in the summer of 2017. (Compl. ¶ 90).

On March 5, 2018, the SEC filed this complaint.

ARGUMENT

The Court should dismiss each of the Commission's claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The complaint violates bedrock pleading rules, which require a complaint to provide sufficient notice of what each defendant is alleged to have done wrong, and in the case of fraud, to plead those facts with particularity. The Complaint makes no connection between the scattered allegations and the three causes of action. It impermissibly proceeds by group pleading and without particular allegations establishing the necessary elements of a touting or securities fraud claim.

The allegations do not establish a violation of Section 17(b)'s "touting" rules under Claim I because the complaint establishes that the required disclosures were publicly made by Mr. Friedland and OWC. The complaint also does not state a claim for securities fraud in Claims II or III and omits the key elements of those offenses: the complaint does not specify that Mr. Friedland made any false or fraudulent misrepresentations or omissions, that any omissions were material, that Mr. Friedland owed investors a duty to disclose any omitted information, or that Mr. Friedland acted with scienter. The complaint further fails to allege that Mr. Friedland was responsible for many of the cited statements. The complaint must accordingly be dismissed.

I. Each Count Should be Dismissed for Failure To Meet Pleading Requirements under Rules 8 and 9(b).

A. Federal Pleading Standards Require Securities Fraud to Be Alleged with Particularity

Rule 12(b)(6) provides that a party may move for dismissal of an action for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court should disregard conclusory allegations, for they are "not entitled to the assumption of truth." *Id.*

at 664. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. It follows, that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief." *Id.* at 679. (citations omitted).

Federal Rule of Civil Procedure 9(b) imposes heightened pleading requirements for fraud claims, and demands that a party to "state with particularity the circumstances constituting fraud or mistake." Furthermore, "[t]o satisfy the particularity requirement, a plaintiff is generally required to 'set forth the time, place and contents of the false representation, the identity of the party making the false statements, and the consequences thereof.'" *Sec. & Exch. Comm'n v. Arnold*, No. 03-CV-0328-REB-OES, 2007 WL 2786428, at *2 (D. Colo. Sept. 24, 2007) (citing *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (emphasis added)); *see United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005) (Rule 9(b) requires the pleader to set forth the "who, what, when, where, and how" of the fraud alleged.) "The primary purpose of Rule 9(b) is to afford [a] defendant fair notice of the plaintiff's claim and the factual ground upon which it is based . . . Rule 9(b) also safeguards defendant's reputation and goodwill from improvident charges of wrongdoing." *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 987 (10th Cir. 1992). Failure to comply with Rule 9(b)'s requirements authorizes the Court to dismiss the pleadings as it would for failure to state a claim under Rule 12(b)(6). *United States ex rel. Williams v. McKesson Corp.*, No. 3:12-CV-0371-B, 2014 WL 3353247, at *3 (N.D. Tex. July 9, 2014) (citing *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996)).

B. The SEC's Complaint Flatly Violates Federal Pleading Standards

The SEC's complaint fails every measure of the applicable pleading standards. For each count, the SEC merely states that "Paragraphs 1 through 114 are re-alleged and incorporated by reference." (Compl. ¶¶ 115, 118, 122). The complaint then simply block quotes the statutory text and concludes by alleging that "[b]y reason of the foregoing, Friedland, Global, and Intiva violated" the quoted statute. (Compl. ¶¶ 117, 121, 124). The SEC thus merely parrots the statutory text without providing *any* facts or allegations supporting the elements of the claim, much less identifying which defendants were responsible for the violations at issue or what conduct purportedly establishes the elements of each cause of action. The SEC patently violates basic federal pleading standards, not to mention its failure to plead with the heightened particularity required for fraud claims.

First, the SEC engages in impermissible group pleading by lumping Mr. Friedland, Global, and Intiva into each count without specifying what conduct each entity or individual engaged in to violate the cited provisions. Group pleading "does not provide the specificity required by *Twombly, Iqbal,* and related cases." *Seni ex rel. Ciber, Inc. v. Peterschmidt*, No. 12-CV-00320-REB-CBS, 2013 WL 1191265, at *3 (D. Colo. Mar. 22, 2013). Courts have repeatedly held that group pleadings are inappropriate because the court will not make the "assumption or presumption" that each member of the group shared knowledge, acted in concert, or were otherwise responsible for the actions of the others. *See id.*

The SEC further styles its complaint as a disfavored shotgun pleading, "with each separate claim incorporating 'every antecedent allegation by reference into each subsequent claim for relief.'" *Mellette v. Branch*, No. CIV.A. 07–cv–02065–WDM–KMT, 2008 WL 4001044, at *8-*9 (D. Colo. Aug. 26, 2008) (citing *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006)). When, as here, "pleadings require a defendant 'to guess

which allegations in the complaint were pleaded against it,'" it is "difficult (if not impossible) to adequately frame a response, which is precisely the problem that Rule 9(b) was designed to remedy." *Zimmerschied v. JP Morgan Chase Bank, N.A.*, 49 F. Supp. 3d 583, 592 (D. Minn. Sept. 23, 2014); *see also Wagner*, 464 F.3d at 1279. Neither Mr. Friedland nor the Court should be forced to parse through the 114 paragraphs of allegations (none of which allege any affirmative false statement in connection with communications with investors or the general public) to infer which actions supposedly establish which element of each cause of action. *See Sec. & Exch. Comm'n v. Fraser*, No. CV-09-00443-PHX-GMSC, 2009 WL 2450508, at *13-14 (D. Ariz. Aug. 11, 2009) (noting Court should not be tasked with "untangling which (if any) act(s) engaged in by which (if any) defendant(s) applies to which (if any) claim(s).").

In *Wagner*, for example, the court of appeals found that shotgun pleadings warranted the dismissal of a securities fraud complaint under Rule 12(b)(6). Just like the SEC's complaint in this case, the plaintiff's complaint in *Wagner* simply "repeat[ed] and reallege[d] the allegations set forth above as though fully set forth herein." 464 F.3d at 1279. But, the court observed that because "[n]o further reference [was] made to the previous allegations in the complaint," "the reader [was left] to wonder which prior paragraphs support[ed] the elements of the fraud claim." *Id.* The court observed that the problem with shotgun pleadings "was not that Plaintiffs did not allege enough facts, or failed to recite magic words; the problem lay in the fact that while Plaintiffs introduced a great deal of factual allegations, the amended complaint did not clearly link any of those facts to its causes of action." 464 F.3d at 1280. This complaint follows the same flawed and insufficient model. It does not meet the particularity demanded by Rule 9(b).

Making matters worse, the SEC does not even bother to specify which theories of liability it invokes under Section 17(a) or Section 10(b)/Rule 10b-5. Both Rule 10b-5 and

Section 17(a) have three subsections. (Compl. ¶¶ 116, 119, 120, 123). The SEC does not identify the subsection(s) under which they are proceeding. That is particularly problematic since each subsection establishes a distinct theory of liability. *See United States v. Naftalin*, 441 U.S. 768, 774 (1979) ("[E]ach subsection [of Securities Act § 17(a)] proscribes a distinct category of misconduct. Each succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." (footnote omitted)). Mr. Friedland is therefore left to wonder which law he is alleged to have violated, much less the "who, what, where, when, and how" required by Rule 9(b). This mode of pleading is entirely unsatisfactory under the federal rules. The complaint must be dismissed for its failure to comply with basic pleading requirements.

II. The SEC Fails to Allege a Violation of Section 17(b) in Claim I.

The SEC's allegations establish that Mr. Friedland and OWC disclosed to the public and in SEC filings the full measure of Mr. Friedland's ownership of OWC stock, his position on OWC's advisory board, and the fact that Mr. Friedland served as a consultant and performed investor relations functions for OWC. (Compl. ¶¶ 35-38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106). Under the circumstances, the SEC's allegations do not establish that Mr. Friedland's failure to disclose the specific terms of Global's consulting agreement with OWC in interviews, press releases, and videotaped interviews constituted a violation of the "touting" rule of Section 17(b).

Section 17(b) makes it unlawful "to publish, give publicity to, or circulate any . . . communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer . . . without fully disclosing the receipt . . . of such consideration and the amount thereof." 15 U.S.C.

§ 77q(b). In addition, Section 17(b) requires proof that the defendant acted with scienter. *United States v. Wenger*, 427 F.3d 840, 851 (10th Cir. 2005).

The SEC's complaint piles on instances where Mr. Friedland purportedly mentioned OWC. But the allegations demonstrate that Mr. Friedland and OWC repeatedly and regularly informed the public of Mr. Friedland's investment and advisory role with OWC. Mr. Friedland and OWC thus disclosed the relevant facts required by Section 17(b) by publicly stating that: (1) Mr. Friedland was an investor in OWC through Intiva; (2) Mr. Friedland, through Global, owned 5.1 million shares of OWC stock; (3) Mr. Friedland, through Global, was engaged by OWC to interface with the U.S. investor community; and (4) Mr. Friedland served on OWC's advisory board. (Compl. ¶¶ 35-38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106). Instead of acknowledging the substantial disclosures of information provided by Mr. Friedland and OWC, the SEC attempts to make out a touting violation based on the modicum of information (that could be readily inferred from the publicly disclosed information) that Mr. Friedland obtained the shares, in part, as compensation for performing investor relations services. In light of the circumstances and ample public disclosures, that limited omission is insufficient as a matter of law to make out a touting case in violation of Section 17(b).

This case is miles away from the typical touting case in which a purportedly neutral analyst or journalist conceals that he or she received compensation to promote a stock. The House Committee Reports note that Section 17(b) was "particularly designed to meet the evils of the 'tipster sheet', as well as articles in newspaper or periodicals that purport to give an unbiased opinion but which opinions in reality are bought and paid for." See H. R. REP. NO. 85, at 24 (1933), *reprinted in* FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1933-1982, at 161 (1983). The allegations in this case involve nothing of the sort. Mr. Friedland never

posed as a disinterested third-party; rather, he disclosed his OWC investment and association. The SEC does not explain how any of its allegations make out a touting claim against Mr. Friedland when all the relevant information required by Section 17(b) was publicly disclosed.

The vast majority of the allegations could not substantiate a touting case in any event because they do not involve "describing a security" or do not involve a public statement by Mr. Friedland. For example, seventeen paragraphs of the complaint involve nothing more than Mr. Friedland listing his investment in OWC and his role on their advisory board (both undisputedly truthful facts) among many other biographical facts about Mr. Friedland. (Compl. ¶¶ 40, 42, 55, 59, 64, 74-76, 80, 84, 89, 91, 92, 99, 104-106). These allegations do not involve "describing" a security under Section 17(b).

Many other allegations do not involve public statements attributed to Mr. Friedland. For example, the SEC repeatedly cites quoted statements in press releases issued by *OWC*, not Mr. Friedland. (Compl. ¶¶ 36-37, 58). Mr. Friedland cannot be held to account for OWC's press releases absent allegations that he was responsible for the content. *See Janus Capital Grp., Inc.*, 564 U.S. at 142. Those statements, in any event, disclosed Mr. Friedland's advisory role and investment in OWC. (Compl. ¶¶ 36-37, 58). Still other allegations pertain to videotaped interviews by Cannabis Media FN, which publicly disclosed that it was paid by OWC to conduct the interview, and did not distribute the interview except on its website that bears the disclosure. (Compl. ¶ 34). The public was fully on notice that this interview was a paid segment. Again, in those interviews, Mr. Friedland himself disclosed that he served as an advisor to OWC and owned OWC stock. *Id.* Moreover, the complaint does not allege that Mr. Friedland directed Cannabis Media FN to publicly post the interview. The SEC does not otherwise specify which allegations it relies on to establish that Mr. Friedland or Global "describe[d]" a security.

Finally, the SEC does not allege that Mr. Friedland acted with scienter. Nor do the facts support any inference of willful behavior. Quite the contrary, Mr. Friedland disclosed his relationship with OWC and his ownership interest in the company at every turn. The complaint suggests no reason why Mr. Friedland would not have also disclosed the additional information about Global's consulting agreement unless he was unware of that obligation or believed that he had complied with its requirements. Nothing in the SEC's complaint alleges otherwise.[3]

The Court accordingly should dismiss Count I for failure to state a touting claim.

III. Counts II and III Should Be Dismissed For Failure to Allege The Elements Of Securities Fraud With Particularity

The SEC's Claims II and III omit critical elements of a securities fraud claim. Claim II alleges that the defendants committed fraud in the purchase of a security, in violation of Section 10(b) of the Exchange Act[4]("Section 10(b)") and Rule 10b-5.[5] Claim III alleges the defendants

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[3] This case is therefore readily distinguishable from *United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005), where the court of appeals found evidence sufficient to sustain a criminal touting violation under Section 17(b). In that case, the defendant repeatedly touted stocks for which he received a "consulting" fee of either cash or stock. The defendant would state that he was a paid consultant and offer to send details of the compensation upon request. The subsequent letters "disclosed (inaccurately) his consulting fee, which far understated the value of the stock given to him for touting" the stock. The defendant further falsely claimed that he purchased one stock, when in fact that he had received that stock as compensation for touting it. *See id.* at 844-45. By contrast, in this case, Mr. Friedland repeatedly acknowledged his investment in OWC, the amount of his stock holdings were a matter of public record as was the fact that he and Global served an investor relations function for OWC.

[4] Section 10(b) of the Exchange Act provides

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange * * * [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

[5] Acting under its rulemaking authority, the SEC promulgated Rule 10b–5, which provides:

committed fraud in the offer or sale of securities, in violation of Section 17(a) of the Securities Act ("Section 17(a)") (Count III).[6]

At the outset, and as argued above, responding to these allegations is made particularly challenging by the SEC's failure to state what subsections of these offenses are being alleged, which defendant violated those provisions, or what conduct amounted to the violations asserted. The theories of liability differ among the three subparts of Section 17(a). Rule 9(b) requires that the SEC specify which subsection of Section 17(a) and Rule 10b-5 that it invokes. The SEC fails to give even that basic notice of the alleged offense.

But even parsing through the Complaint's sweeping and scattershot allegations, critical elements of those offenses are plainly absent. To prove a violation of the Section 10(b), the SEC must establish the following elements: (1) a misrepresentation or omission or (2) of material fact

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> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b–5.

[6] Securities Act § 17(a) provides that it is:

> unlawful for any person in the offer or sale of any securities[,] ...by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a).

(3) made with scienter (4) in connection with the purchase or sale of a security (5) using any means of interstate commerce or the mails. *Sec. & Exch. Comm'n v. Wolfson*, 539 F.3d 1249, 1256 (10th Cir. 2008); *see Sec. & Exch. Comm'n v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466 (2d Cir. 1996).

The elements of a Securities Act § 17(a) are "essentially the same" as under Rule 10(b). *Wolfson*, 539 F.3d at 1257. The principal difference between "[Section] 17(a) and [Section] 10(b) lies in the element of scienter, which the SEC must establish under § 17(a)(1), but not under § 17(a)(2) or § 17(a)(3)." *Id.* at 1256.

In the case of an omission, securities fraud incorporates the common law requirement that the defendant had a duty to disclose the omitted fact --- even if that omission involved material information. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 174 (1994); *Sec. & Exch. Comm'n. v. Curshen*, 372 Fed. App'x 872, 880 (10th Cir. 2010). Under Rule 10b–5(b) and Section 17(a), only the "maker of the statement" is liable. *Janus Capital Grp.*, 564 U.S. at 142. "[T]he 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." *Id.*; *see also Sec. & Exch. Comm'n v. Coddington*, No. 13-CV-03363-CMA-KMT, 2015 WL 1401679, at *5 (D. Colo. Mar. 23, 2015).

The complaint entirely fails to plead key elements of these offenses including a duty to disclose, materiality, scienter, or attribution of statements to Mr. Friedland. Claims II and III accordingly must be dismissed.

A. The Complaint Points to No False Statement and Does Not Allege that Mr. Friedland Had a Duty To Disclose the Omitted Information.

The SEC points to no affirmative false statement. Instead, their scattershot complaint implicitly suggests that Mr. Friedland committed fraud by failing to disclose his consulting

agreement with OWC and his plans to sell his OWC stock. (Compl. ¶¶ 8-9). The SEC acknowledges, however, that Mr. Friedland repeatedly stated that he served as an advisor to OWC, that he assisted OWC in interfacing with the investment community in the United States, and that he himself owned OWC stock. (Compl. ¶¶ 35-38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106). It also alleges no false or misleading statement to investors relating to the sale of Global's OWC stock. The case is purely one of alleged omission. Opinion and Order Regarding Motion for Temporary Restraining Order and Asset Freeze, at 2 ("The SEC does not allege that Mr. Friedland made any affirmative false representations.").

But where, as here, an allegation of fraud is based upon nondisclosure, "there can be no fraud absent a duty to speak." *Cent. Bank of Denver,* 511 U.S. at 174 (internal citation omitted); *Curshen,* 372 F. App'x at 880 ("There is no liability under § 10(b) for failure to disclose information absent a duty to do so."); *see also Matrixx Initiatives, Inc. v. Siracusano,* 563 U.S. 27, 44 (2011) ("[Section] 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information.").

A duty to disclose may arise when disclosure of information is "necessary to make . . . statements made, in the light of the circumstances under which they were made, not misleading." *Matrixx Initiatives,* 563 U.S. at 44. In some cases, a duty may also be created by statute or regulation. *Roeder v. Alpha Indus., Inc.,* 814 F.2d 22, 26-27 (1st Cir. 1987). Otherwise a duty to disclose arises only from "a fiduciary or other similar relation of trust and confidence" between the parties. *Chiarella v. United States,* 445 U.S. 222 (1980); *Sec. & Exch. Comm'n v. Cochran,* 214 F.3d 1261, 1264 (10th Cir. 2000) (applying *Chiarella* and finding that duty to disclose only exists when "one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.") (internal quotation and

citation omitted); *see also Sec. & Exch. Comm'n. v. Tambone*, 597 F.3d 436, 448 (1st Cir. 2010) (dismissing securities fraud claim where underwriters had no duty to disclose material information omitted from prospectus). In the absence of a duty to disclose, a case alleging even material omissions is "dead on arrival" and requires dismissal. *Roeder*, 814 F.2d at 26-27. The allegations do not establish a duty to disclose.

First, the SEC has not pled with particularity that *any* of Mr. Friedland's statements were misleading or false. The SEC also does not explain how any omission rendered any other statement misleading or false. The Commission has failed to plead, with particularity, that Mr. Friedland's purported omission of the fact that he entered into a "Media, Public Relations and Investor Relations Services Agreement" and received 5.1 million shares of OWC stock would have rendered his other statements false or misleading. Similarly, the SEC's contention that Mr. Friedland's omission that he was selling shares, as discussed further in Section III, also does not render his existing statements false or misleading.

The SEC does not allege that Mr. Friedland had a fiduciary relationship with any investors giving rise to a duty to disclose. In fact, the complaint does not establish that Mr. Friedland made any of the cited statements to *actual* investors. Aside from one conclusory statement in the "Summary" section of the complaint and a smattering of generic references to "investors," the complaint does not establish that any OWC investor were party to Mr. Friedland's statements. (Compl. ¶¶ 1, 5, 9, 13, 14, 34-35, 68, 81). Such ambiguous references to generic "investors" do not meet the particularity and plausibility requirements of Rules 8 and 9(b). The one other time the complaint identifies an existing OWC investor, it is in the context of Mr. Friedland fully disclosing to the investor that he was liquidating Intiva's investments in OWC. (Compl. ¶ 82). The SEC does describe *potential* or *prospective* investors. (Compl. ¶¶ 5,

18, 28). But no fiduciary duties are owed to potential or prospective investors. *See, e.g. Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000) (citing *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1174–77 (Del.1988)); *Kunzweiler v. Zero.Net, Inc.*, No. CIV.A.3:00-CV-2553-P, 2002 WL 1461732, at *17 (N.D. Tex. July 3, 2002) ("Plaintiff was a potential investor, to whom no fiduciary duties are owed.").

The absence of a duty to disclose is fatal to the SEC's securities fraud claims, and requires the dismissal as a matter of law.

B. The SEC Does Not Plead Materiality

The SEC has alleged securities violations that require proof of materially false or misleading statements or omissions. "Liability under § 10(b) [is] limited in its reach to 'only the making of a material misstatement (or omission) or the commission of a manipulative act.'" *Wolfson*, 539 F.3d at 1257 (quoting *Cent. Bank of Denver*, 511 U.S. at 177-78). Likewise, "proof of a material misrepresentation or a materially misleading omission is required to establish a violation of § 17(a)(1)." *Sec. & Exch. Comm'n v. Coffman*, No. 06-CV-00088 REB-BNB, 2007 WL 2412808, at *12 (D. Colo. Aug. 21, 2007).

"The test for materiality in the securities fraud context is 'whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action.'" *Sec. & Exch. Comm'n v. Recycle Tech, Inc.*, No. 12-21656-CIV-LENARD/O'SULLIVAN, 2013 WL 12063952, at *4 (S.D. Fla. Sept. 26, 2013) (citing *Sec. & Exch. Comm'n v. Merch. Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007)). In other words, a fact will be considered material within the meaning of these provisions "if there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available.'" *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267–68 (2d Cir.1993) (quoting *TSC Industries, Inc. v.*

Northway, Inc., 426 U.S. 438, 449 (1976)) (interpreting § 10(b)); *see also Andropolis v. Red Robin Gourmet Burgers, Inc.*, 505 F. Supp. 2d 662, 681–82 (D. Colo. Jan 2. 2007); Michael J. Kaufman, *Securities Litigation: Damages*, 26A Sec. Lit. Damages § 18:2 (2017).

The SEC fails to plead materiality. No reasonable investor would have been misled based on the "total mix" of information available, particularly considering the ample disclosures regarding Mr. Friedland's investment and work for OWC as an advisor and in investor relations. (Compl. ¶¶ 35-38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106). Likewise, OWC disclosed publicly in a press release and filing with the SEC that Mr. Friedland was a member of its advisory board. (Compl. ¶¶ 32, 36). Moreover, in February 2016, OWC disclosed in reports that it filed with the SEC that "Global owned [the 5.1 million] shares of stock – 6.3% of OWC's common stock at that time – and that Friedland controlled them as Global's President and CEO." (Compl. ¶ 32). Those disclosures surely would have alerted any reasonable investor to Mr. Friedland's interest in and affiliation with OWC. The SEC makes no allegation that Mr. Friedland posed as a neutral or disinterested analyst. Minimal marginal value could be added by the additional information that the stock that Mr. Friedland owned and publicly disclosed was obtained pursuant to Global's consulting agreement. *See Andropolis*, 505 F. Supp. 2d at 681 (holding that "[a] statement or omission is material only if a reasonable investor would consider it important in determining whether to buy or sell stock.") (citation omitted).

Additionally, the SEC's conclusory allegation that Mr. Friedland indicated that he was a "buy-and-hold long-term investor in OWC" and that investors should be "patient like he has been" while he allegedly was making plans to or already selling shares, must fail for similar reasons. (Compl. ¶ 5). First, nowhere in the complaint does the SEC allege any facts that Mr.

Friedland stated that he was a "buy-and-hold long-term investor in OWC." To the contrary, in one of Mr. Friedland's interviews in July 29, 2017 – months after Mr. Friedland allegedly began selling his shares in OWC – Mr. Friedland explicitly stated, by the SEC's own admission, "I'm not here to suggest anybody buy [shares in OWC] or any holders sell it." (Compl. ¶ 101). Second, in the paragraphs where the SEC discusses Mr. Friedland's statements in two interviews, held on March 6, 2017 and July 29, 2017, that an investor should be "patient like he has been," the SEC does not allege any false or misleading statements. (Compl. ¶ 67, 101). Mr. Friedland's quote concerning patience on March 6, 2017 merely states: "if people can be patient investors, they can see why I can talk about Insys Therapeutics, INSYS on NASDAQ – GW Pharm, GWPH, and I can talk about OWC Pharmaceutical Research, OWCP in the same sentence." (Compl. ¶ 67). Nowhere in that quote does Mr. Friedland once state that listeners should be patient like him or that the listeners should purchase or hold OWC stock. Mr. Friedland's statement about patience on July 29, 2017 states: "I think a lot of investors who've been involved in the company are not as patient as I am, because when you're talking about drug development, you're talking about pharmaceuticals, it takes time, you know? It just takes time." (Compl. ¶ 101). There, Mr. Friedland makes no misleading or false statement. Moreover, at that point, Mr. Friedland, through Intiva, still possessed shares in OWC; his statement about being a patient investor was an accurate reflection of his then-situation. Furthermore, Mr. Friedland, in that quote, does not even describe what the consequences would be for investors if they were "patient."

Other alleged statements that Mr. Friedland made during interviews, both before and after he was purportedly selling or considering selling his shares in OWC, are mere puffery. Puffery is neither material nor actionable as a matter of law. *See In re Plains All Am. Pipeline, L.P. Sec.*

Litig., 245 F. Supp. 3d 870, 891 (S.D. Tex. Mar. 29, 2017). "'Corporate cheerleading' in the form of 'generalized positive statements about a company's progress' is not a basis for liability under the securities laws." *Id.* "In determining whether a statement is puffery, the context matters. The relative expertise of the speaker and the listener can be a critical factor. So can the size of the audience. What is said to a particular person may take on meaning that would not be present if made to a large group." *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1106–07 (10th Cir. 2009) (internal citation omitted). Furthermore, "The statements the plaintiffs rely on must be something more than a corporate officer's generalized optimistic comments about the company's policies, programs, or performance." *In re Plains*, 245 F. Supp. 3d at 891.

Mr. Friedland's statements in various interviews are examples of mere puffery. For example, these statements include the following: "2017 is going to be a fabulous, fabulous year globally in the cannabis industry, and especially for companies like OWC Pharmaceutical Research that have an incredibly good business model and business plan," (February 29, 2016); "what the world needs and what OWC Pharmaceutical Research is bringing to the table is real medicine based on real science" (January 4, 2017); and Israel is at the "leading edge on pharma development world-wide" (July 8, 2017). (Compl. ¶¶ 35, 41, 96). All of these statements can be characterized as corporate cheerleading, particularly in the context that these statements arose; namely, in a one-on-one interview setting. Moreover, although the SEC states that these interviews were posted online, the SEC has not alleged that Mr. Friedland himself posted the interviews or that he had knowledge that these interviews would be disseminated.

Other quotes in these interviews, which the SEC has emphasized and bolded, are not alleged to have been false statements. For example, the SEC does not claim inaccuracy in Mr. Friedland's statement, on March 6, 2017, that "OWC has $2 million in the bank. How many

companies are debt-free that you have – on your show?" (Compl. ¶ 67). Similarly, the description that OWC is "a pharmaceutical development company, and [listeners] have to also understand that it's about Israel" (July 8, 2017 interview) and that "[w]e still own the stock [in OWC]" (July 29, 2017 interview) are also not alleged to have been either false or misleading statements. (Compl. ¶ 96).

Finally, allegations that Mr. Friedland and Global promoted OWC through emails to listserve groups, while allegedly selling his OWC holdings, are rife with red herrings as they do not discuss *any* statement that is false or misleading. (Compl. ¶¶ 64, 74-76, 80, 84, 89, 91-92, 99, 104-106). These paragraphs merely provide the topic of the email, state that Mr. Friedland disclosed that he was a member of the OWC advisory board and that he made an early-stage investment in OWC through Intiva. In each instance, that statement was made in the context of an extensive recitation of other biographical information about Mr. Friedland's long-standing expertise and role in the medical cannabis industry including Mr. Friedland's business activities, his authorship of a book on the medical and other uses of cannabis, and Mr. Friedland's substantial international business experience. *Id.* The SEC has not pled why Mr. Friedland's alleged failure to disclose his Agreement with OWC or plans to sell OWC stock were material or required since the listserve emails involved no promotion or description of OWC other than as a biographical fact.

C. The Complaint does not Plead Scienter Required for Securities Fraud

The SEC also does not allege that Mr. Friedland acted with the requisite intent to deceive or with knowing misconduct. *See Sec. & Exch. Comm'n. v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996) (defining scienter for securities fraud purposes) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382-83 (1983) (mere negligence not sufficient)). Indeed, the allegations in the Complaint

dispel the notion that Mr. Friedland was acting with an intent to deceive or defraud. His repeated, public disclosures of his investment in OWC and his affiliation with OWC as its advisor and as an investor relations representative in the United States clearly refutes the notion that he was trying to deceive investors. (Compl. ¶¶ 35--38, 40, 42, 47, 55, 58, 59, 64, 66, 74-76, 80, 84, 89, 91-92, 96, 99, 104-106).

The SEC's inclusion of gratuitous facts and speculation does not amount to allegations of scienter. For example, the SEC repeatedly alleges that an attorney for OWC was apparently disbarred. (Compl. ¶¶ 10, 29, 32, 46, 57, 86, 90). That attorney approved the removal of the restricted stock legend for OWC. (Compl. ¶¶ 10, 86). The complaint does not, however, allege that Mr. Friedland chose that attorney or knew that the attorney was not fully licensed. Likewise, the establishment of an LLC in Kathy Friedland's name to receive the proceeds of the stock sale for use in the purchase of real estate is a legal and legitimate; not evidence of any fraudulent intent.

The SEC also does not claim that there was any legal bar to the removal of the restricted stock legend at the time of the stock sale. The SEC lodges only the conclusory claim that the information provided to the transfer agent was "inaccurate," but does not specify (as Rule 9(b) would require) what information was inaccurate, and whether any such information was material or required for the sale to be permitted. (Compl. ¶ 46). The SEC identifies no other reason why Mr. Friedland could not remove the restricted legend and sell his OWC stock at that time. *See* Compl. ¶ 50-51 (stating that transfer agent "rel[ied] on the information provided by Friedland," and "removed the restrictive legend from [the] stock" but not that such reliance was improper).[7]

[7] Notably, the first transfer agent did not end up selling the stock. The stock sale was completed by a second transfer agent with the express disclosure that Mr. Friedland obtained the stock pursuant to a consulting agreement with OWC. (Compl. ¶ 57.).

The SEC cannot rely on insinuation and innuendo to prove scienter. These gratuitous allegations are not sufficient under Rule 9(b), particularly where they lack any obvious indicia of an intent to defraud.

D. Certain Misstatements and Omissions Attributed To Mr. Friedland Are Not Actionable

Under Rule 10b-5(b) and Section 17(a), only the "maker of the statement" is may be held liable. *Janus Capital Grp.*, 564 U.S. at 142. "For Rule 10b–5 purposes, 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." *Id.* (emphasis added). Here, the SEC has implied that Mr. Friedland is liable under Section 17(a) and Section 10(b), and Rule 10b-5 for statements omissions made in OWC press releases or by other third parties. (Compl. ¶¶ 34, 36-37, 41, 58, 65, 81, 95, 101). The Complaint does not allege that Mr. Friedland or Global are responsible for those third party statements.

The SEC does not allege anywhere that Mr. Friedland or other personnel at Global had ultimate authority over OWC's press releases and other communications, including control over the content of the statement or how to communicate it. To the contrary, the complaint specifically provides that the press releases were "OWC issued." (Compl. ¶¶ 36-37, 58). The fact that certain OWC press releases quoted Mr. Friedland is not sufficient absent control over the entire statement and release. That is because "[w]ithout control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." *Janus Capital Grp.*, 564

The SEC further alleges that OWC's attorney provided an incorrect date for the acquisition of the stock and inaccurately stated that Mr. Friedland was not involved in Lane 6552 (the LLC established in Kathy Friedland's name). That information was provided by OWC's attorney, not Friedland. In any event, any mistake in the date of acquisition or the relationship between Mr. Friedland and Lane 6552 is not alleged to have been intentional or material. (Compl. ¶ 57). In the preceding paragraph, the SEC acknowledges that Mr. Friedland fully informed the transfer agent that it was he and his wife that were selling the shares and that they had been unsuccessful in doing so with the prior transfer agent. (Compl. ¶ 58).

U.S. at 142 (2011). Similarly, the consulting agreement between Global and OWC does not establish the requisite control. The agreement provides only that "*Global would assist OWC* in reaching investors by writing news releases, shareholder letters, corporate summaries, profiles, and website copy, and would establish OWC's Facebook and Twitter accounts." (Compl. ¶ 31 (emphasis added)). The Supreme Court in *Janus* observed, however, that "[e]ven when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said." 564 U.S. at 143. Thus even to the extent that Mr. Friedland played a role in drafting OWC press releases, the Complaint does not allege that he had ultimate control over their content.

Furthermore, with respect to Mr. Friedland's statements concerning being a "buy-and-hold long-term investor" in interviews, the SEC has specifically alleged that other parties — Cannabis FN Media, OWC, and "Looking at the Markets" — posted the interviews in question. (Compl. ¶¶ 34, 41, 65, 81, 95, 101). The SEC has not alleged any facts suggesting that Mr. Friedland had ultimate authority over the posting of these interviews. Moreover, with respect to Cannabis FN Media, the SEC acknowledges that the posting was accompanied by a disclaimer that Cannabis FN Media was itself paid by OWC to post the video. (Compl. ¶ 34). As a result, the Defendants cannot be held liable for any purported violations under Section17(a), Section 10(b), and Rule 10b-5, for statements or omissions in press releases or interviews made and disseminated by others.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Plaintiff's Complaint with prejudice, and award such other and further relief as this Court deems just and proper.

DLA PIPER LLP (US)

By: s/ Mark A. Nadeau
Mark A. Nadeau, #11434
Mark.nadeau@dlapiper.com
2525 East Camelback Road, Suite 1000
Phoenix, AZ 85016-4232
Telephone: 480.606.5100

Ilana Eisenstein, PA Bar # 94907
Ilana.eisenstein@dlapiper.com
One Liberty Place
1650 Market Street
Suite 4900
Philadelphia, PA 19103-7300
Phone: 215.656.3300

Jonathan Haray, D.C. Bar # 480140)
Jonathan.haray@dlapiper.com
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, DC 20004
Phone: 202.799.4000

Attorneys for Defendants Jeffrey O. Friedland and Global Corporate Strategies LLC, as well as Relief Defendants Lane 6552 LLC, Kathy B. Friedland, Aspen Upper Ranch LLC, and The Jeffrey And Kathy Friedland Irrevocable Trust

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