Becky S. James (SBN 151419)
Jaya C. Gupta (SBN 312138)
Rachael A. Robinson (SBN 313991)
JAMES & ASSOCIATES
23564 Calabasas Road, Suite #201
Calabasas, CA 91302
Telephone: (310) 492-5704
Facsimile: (888) 711-7103

Attorneys for Defendants Peter H. Pocklington, Terrence J. Walton, Robert Vanetten, Nova Oculus Partners, LLC f/k/a The Eye Machine, LLC, and AMC Holdings LLC, and Relief Defendants Eva S. Pocklington, DTR Holdings, LLC, Cobra Chemical, LLC and Gold Star Resources, LLC

IN THE UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

PETER H. POCKLINGTON, LANTSON ELDRED, TERRENCE J. WALTON, YOLANDA C. VELAZQUEZ a/k/a LANA VELAZQUEZ a/k/a LANA PULEO, VANESSA PULEO, ROBERT VANETTEN, NOVA OCULUS PARTNERS, LLC, f/k/a THE EYE MACHINE, LLC, and AMC HOLDINGS, LLC,

Defendants,

EVA S. POCKLINGTON, DTR HOLDINGS, LLC, COBRA CHEMICAL, LLC, and GOLD STAR RESOURCES, LLC.

Relief Defendants.

Case No. 5:18-cv-00701

NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBIT

[PROPOSED] ORDER

Date: August 20, 2018
Time: 9:00 a.m.
Court: Courtroom 1
Honorable Jesus G. Bernal

TO THE COURT, THE PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on Monday, August 20, 2018, at 9:00 a.m., or as soon as this motion may be heard in Courtroom 1, located at the George H. Brown Jr. Federal Building and United States Courthouse, 3470 Twelfth Street, Riverside CA 92501-3801, by the Honorable Jesus G. Bernal, or any person sitting in his stead, Defendants Peter H. Pocklington ("Pocklington"), Terrence J. Walton ("Walton"), Robert Vanetten ("Vanetten"), Nova Oculus Partners, LLC f/k/a The Eye Machine, LLC (the "Eye Machine"), AMC Holdings LLC ("AMC Holdings") and Relief Defendants Eva S. Pocklington ("Eva Pocklington"), DTR Holdings, LLC ("DTR Holdings"), Cobra Chemical, LLC ("Cobra Chemical") and Gold Star Resources, LLC ("Gold Star") (collectively, the "Relief Defendants") will move to dismiss claims made against them in the Complaint filed by the Securities and Exchange Commission (the "SEC"), pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

//

//

//

//

//

//

[1] Defendants' counsel inadvertently failed to meet and confer with the SEC's counsel 7 days prior to the filing deadline for this motion pursuant to L.R. 7-3, and counsel apologizes for this error. Counsel did contact the SEC's counsel on July 5, 2018 and arranged to meet and confer during the week of July 9, 2018, which would allow ample time for the parties to address any possible resolution well in advance of the hearing or the deadline for the SEC's opposition. Given that this is a dispositive motion, it appears highly unlikely the parties will reach a resolution through the meet-and-confer process. Nevertheless, the SEC has indicated that it does not waive any rights pursuant to L.R. 7-3.

This motion is based on this Notice and Motion and accompanying Memorandum of Points of Authorities and exhibit, and such additional matter as may properly be brought before the Court at or before the hearing of this motion.

DATED: July 5, 2018

JAMES & ASSOCIATES

By: /s/ Becky S. James
Becky S. James

Attorneys for Defendants Peter H. Pocklington, Terrence J. Walton, Robert Vanetten, Nova Oculus Partners, LLC f/k/a The Eye Machine, LLC, and AMC Holdings LLC, and Relief Defendants Eva S. Pocklington, DTR Holdings, LLC, Cobra Chemical, LLC and Gold Star Resources, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

Other Authority

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The SEC has mounted a baseless attack on the Eye Machine, a small start-up company dedicated to developing an innovative non-invasive treatment for Age-Related Macular Degeneration, one of the leading causes of blindness. The SEC does not, nor could it, claim that the business is not in fact developing this sight-preserving medical device. Nor does the SEC claim that the Eye Machine misled investors as to the likely returns or the inherent riskiness of the investment. Indeed, the Eye Machine's private placement memoranda ("PPMs") were nothing if not detailed in the disclosures they made to the sophisticated and wealthy investors who decided to invest funds in the venture. Instead, the SEC picks apart the PPMs to find a few isolated instances of what it claims to be misrepresentations or omissions. Yet, even the one-sided and often misleading allegations in the Complaint fail to muster up a viable claim of fraud in the offering of securities.

The SEC first attempts to allege a "scheme to defraud." Yet, this claim fails as a matter of law. The Ninth Circuit has made clear that "scheme liability" cannot attach under the securities laws where, as here, the alleged scheme is actually mere misrepresentations or omissions.

The SEC's claims of false or misleading representations or omissions also fail. The SEC alleges three categories of statements or omissions it proclaims to be fraudulent: (1) the amount of the offering costs, (2) the company's use of proceeds, and (3) the omission of Defendant Peter Pocklington's alleged role in the company. First, the PPMs plainly disclosed that offering costs could exceed 50 percent of the capital raised, far in excess of the 40.72 percent the SEC alleges were the actual offering costs. Second, the Complaint fails to establish that the handful of specific expenditures challenged by the SEC (totaling less than 5 percent of the capital raised over the years of operation), fell outside of the wide discretion granted to the

manager to make expenditures deemed in the best interests of the company and the right of the managing member to compensation, all of which was disclosed in the PPMs. Even if the SEC disagrees with the way these particular expenditures were handled, the Supreme Court has made clear that a claim of mismanagement is insufficient to support a claim of fraud. Finally, as to Pocklington's role, the allegations fail to establish that any statements or omissions in the PPMs were false or misleading, that the information was not otherwise known, or that the statements or omissions were material and made with the requisite scienter.

The allegations also fail to establish a claim of negligence as to Defendant Walton and fail to establish aiding and abetting liability as to any defendant. Accordingly, the Court should grant this motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state claims upon which relief can be granted.

STATEMENT OF FACTS

I. Eye Machine Background

After receiving a diagnosis of age-related macular degeneration ("AMD"), Defendant Peter Pocklington, founded the Eye Machine in January 2014 to develop, manufacture, and lease to medical professionals a biomedical device designed to treat AMD and other forms of eye diseases. (Compl. ¶¶ 37-38; *see also* Ex. 1 at 1, 3.) AMD is the leading cause of severe and irreversible vision loss in the developed world, yet the treatments are aimed at slowing the progression of the disease and few restore vision. (Ex. 1 at 4.) Currently, there are no FDA-approved treatments for the most common form of AMD. (Ex. 1 at 4.)

Studies have shown the extensive restorative effects of BioCurrent therapy as a treatment for AMD, and the Eye Machine's focus has been on creating an FDA approved device using this innovative and non-invasive BioCurrent therapy to treat all forms of AMD. (Ex. 1 at 4.) Since its founding, the Eye Machine has made great progress in the development of its device to treat macular degeneration, including

submitting patent applications with the United States Patent and Trademark Office ("USPTO") for its device. (Compl. ¶ 88, Ex. 1 at 1.)

II. Eye Machine Private Offerings

To raise money for research and development, the Eye Machine began to make private offerings to accredited investors through PPMs. (Compl. ¶ 46.) The PPMs contained detailed disclosures on numerous topics, including offering costs and company expenditures. The PPMs estimated that offering costs would be approximately 28% under certain conditions. (Ex. 1 at 20.) However, the PPMs warned investors that, "our estimate of offering costs is an estimate only, and actual offering costs may differ significantly from and be higher than the amount we estimate." (Ex. 1 at 15.) Additionally, the PPMs expressly warned that syndication costs (part of offering costs) "may be higher than expected" and "could range up to 50% of the capital raised." (Ex. 1 at 15).

Additionally, the PPMs expressly delineated certain categories of expenditures the company expected to make, including not only research and development but marketing and other expenses. (Ex. 1 at 2.) The PPMs also stated, however, that "the Company reserves the right to use the funds obtained from this offering for similar purposes not presently contemplated which the Manager deems to be in the best interest of [The Eye Machine] and its Members in order to address changed circumstances or opportunities." (Ex. 1 at 15.)

III. SEC Investigation and Complaint

On November 2, 2016, the SEC issued a formal order instituting an investigation. On April 5, 2018, the SEC filed its Complaint in the instant matter. The Complaint alleges violations of Section 10(b) of the Exchange act and Rule 10b-5(a) and (c); violations of Sections 17(a)(1), (2), and (3); violations of Sections 5(a) and 5(c) of the Securities Act; violations of Section 15(a) of the Exchange Act and violation of Section 15(b)(6)(B)(i) of the Exchange Act.

LEGAL STANDARD

A complaint may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) if it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *Scott v. ZST Digital Networks, Inc.*, 896 F. Supp. 2d 877, 881 (C.D. Cal. 2012); *see also SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). Dismissal under Rule 12(b)(6) is warranted when the plaintiff has either failed to plead a cognizable legal theory or has failed to plead sufficient facts under a cognizable legal theory. *Scott*, 896 F. Supp. 2d at 881.

To survive a Rule 12(b)(6) 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) (internal quotation marks removed). A claim is facially plausible when the facts pleaded "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint which "pleads facts that are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (internal quotations omitted)).

In evaluating a complaint's sufficiency under these standards, the court must first "tak[e] note of the elements a plaintiff must plead to state a claim." *Iqbal*, 556 U.S. at 675. Next, the court should "identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.'" *Iqbal*, 556 U.S. at 679; *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1031 (9th Cir. 2016) ("mere legal conclusions are not entitled to an assumption of truth."). Finally, where the allegations are well-pled, the court "should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. A court, however, should not accept as true "allegations that are merely

conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Claims alleging securities fraud are subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b), which requires a party to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *Web v. SolarCity Corp.*, 884 F.3d 844, 851 (9th Cir. 2018). In essence, "a plaintiffs' complaint must identify the who, what, when, where, and how of the misconduct alleged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *SEC v. Bardman*, 216 F. Supp. 3d 1041, 1050 (N.D. Cal. 2016) (quoting *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013)).

ARGUMENT

The SEC has failed to adequately plead claims under Section 10(b) and Rule 10b-5(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), Section 17(a) of the Securities Act of 1933 (the "Securities Act"), or aiding and abetting liability pursuant to Section 20(e) of the Exchange Act. Each is addressed in turn below. Given the deficiencies in the SEC's pleading, this Court should grant this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. The First and Second Claims for Relief Fail to Allege a Cognizable Scheme Under Controlling Ninth Circuit Law

The First and Second Claims for Relief both seek to impose liability based on a supposed scheme to defraud. Under Rule 10b–5(a) or (c), alleged in the First Claim for Relief, a defendant who uses a "device, scheme, or artifice to defraud," or who engages in "any act, practice, or course of business which operates or would operate as a fraud or deceit," may be liable for securities fraud. *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011). Like Rule 10b-5(a) and (c), Section 17(a) of the Securities Act, alleged in the Second

Claim for Relief, makes it unlawful for any person in the offer or sale of any security "(1) to employ any device, scheme, or artifice to defraud, 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)(1), (3); *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). Claims under Section 17(a) generally share the same elements of a claim under Rule 10b-5(a). *SEC v. Phan*, 500 F.3d 895, 907-08 (9th Cir. 2007).[2]

The Ninth Circuit, along with other courts, have made clear that alleged misrepresentations and omissions are chargeable only under Rule 10b-5(b) and are insufficient to establish a fraudulent scheme under Rule 10b-5(a) or (c). *WPP Luxembourg*, 655 F.3d at 1057; *Desai v. Deutsche Bank Securities Ltd.*, 573 F.3d 931, 940-941 (9th Cir. 2009); *Oaktree Principal Fund*, 2016 WL 6782768 at *15; *accord Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177-78 (2d Cir. 2005) ("if the "sole basis for market manipulation claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under 10b–5(a) and (c)."") (Sotomayor, J.); *SEC v. Lucent Technologies*, 610 F. Supp. 2d 342, 360-61 (D.N.J. 2009) (stating "the allegations of a scheme based on the same misstatements that would form the basis of a misrepresentation claim under Rule 10b-5(b) and nothing more do not go beyond misrepresentations") (cited with approval by *WPP Luxembourg*, 655 F.3d at 1057); *TCS Capital Mgmt., LLC v. Apax Partners, L.P.*, No 06-cv-13447, 2008 WL 650385, *22 (S.D.N.Y. Mar. 7, 2008) ("Plaintiff thus does not allege market manipulation in the sense recognized by Section 10(b). The so-called 'deceptive practices' identified by TCS are the very same misrepresentations and omissions that underlie plaintiff's disclosure claim.").

As the Ninth Circuit has held, "[a] defendant may only be liable as part of a

[2] Because of this overlap, for simplicity, Defendants will generally refer only to Rule 10b-5, but the same arguments apply equally to the Section 17(a) claims.

fraudulent scheme based upon misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions." *WPP Luxembourg*, 655 F.3d at 1057. This is because courts, including the Supreme Court, have recognized the importance of "maintaining a distinction among the various Rule 10b-5 claims from one another." *Id.*; *Desai*, 573 F.3d at 940-941; *Swack v. Credit Suisse First Boston*, 383 F. Supp. 2d 223, 238 (D. Mass. 2004) ("The conduct necessary to form a Rule 10b–5(a) or (c) violation can vary widely, but presumably these sections are intended to cover different conduct than Rule 10b–5(b)."). As the Ninth Circuit in *Desai* explained,

> Omissions are generally actionable under Rule 10b-5(b). …[T]hey stem from the failure to disclose accurate information relating to the value of a security where one has a duty to disclose it….Manipulative conduct, by contrast, is actionable under Rule 10b-5(a) or (c) and includes activities designed to affect the price of security artificially…In order to succeed, manipulative schemes must usually remain undisclosed to the general public. If such nondisclosure of a defendant's fraud was an actionable omission, then every manipulative conduct case would become an omissions case. If that were so, then all of the Supreme Court's discussion of what constitutes manipulative activity would be redundant. We decline to read the Supreme Court's case law on manipulative conduct as little more than an entertaining, but completely superfluous, intellectual exercise.

573 F.3d at 940-41 (internal citations omitted). Thus, acts that merely demonstrate that a person has made a material misrepresentation or omission in violation of Rule 10b–5(b) cannot also serve as an act in furtherance of a scheme to defraud subject to liability under Rule 10b–5(a) or (c). *WPP Luxembourg*, 655 F.3d at 1057; *Desai*, 573 F.3d at 940-41. Instead, the alleged acts must be shown to be "part of a *broader* fraudulent 'scheme,' 'practice,' or 'course of business[.]'" *Swack*, 383 F. Supp. 2d at 237 (D. Mass. 2004).

In *WPP Luxembourg*, the Ninth Circuit affirmed the dismissal of a scheme liability claim that was based on an omission, explaining:

> WPP does not allege any facts that are separate from those already alleged in their Rule 10b–5(b) omission claims. The fraudulent scheme allegedly involved the Defendant–Appellees planning together to not

> disclose the Founders' sale of securities in the secondary offering, and then not disclosing those sales; fundamentally, this is an omission claim.

WPP Luxembourg, 655 F.3d at 1058.

To illustrate this doctrine, the Ninth Circuit contrasted *Swack v. Credit Suisse First Boston*, 383 F. Supp. 2d 223, 237 (D. Mass. 2004) where the district court found allegations sufficient to state a claim under Rule 10b-5(a) and (c) because the plaintiff had alleged that the defendant "in addition to issuing misleading investor reports, worked extensively to boost [the] company's market price artificially through activities that were not omissions." *WPP Luxembourg*, 655 F.3d at 1058. Those activities included promoting the company's stock in conference calls and elsewhere "with the deliberate aim of boosting [the company's] market price artificially." *Swack*, 383 F.3d at 239. The court in *Swack* otherwise recognized that "[i]f the claimed fraudulent schemes or practices consisted simply of misleading statements and omissions," such as just the misrepresentations contained in the investor reports, "then they would fall entirely within the ambit of Rule 10b–5(b), and no separate (a) or (c) actions would lie." *Id*. at 239.

Here, just as in *WPP Luxembourg*, the SEC relies on acts that fundamentally constitute misrepresentations or omissions. Specifically, the SEC alleges:

> Defendants Eye Machine, AMC Holdings, Pocklington, and Eldred each defrauded investors by concealing Pocklington's control of Eye Machine, and by misappropriating and misusing investor funds when, in fact, they knew, or were reckless in not knowing, that defendant Pocklington, a convicted felon found to have committed securities fraud in the past, was the one controlling Eye Machine, and that investor funds were not being used in accordance with the PPMs.

(Compl. at ¶ 128.) Yet, these are the very same misrepresentations and omissions that the SEC alleges in its Fourth and Fifth Claims for Relief violated Rule 10b-5(b) and Section 17(a)(2). Indeed, it is telling that in the next sentence, the SEC makes the circular allegation that "Defendants Eye Machine, AMC Holdings, Pocklington, and Eldred engaged in numerous deceptive acts to conceal their scheme to defraud."

(*Id.*) The SEC's own wording makes clear that the purported "scheme to defraud" is the previously alleged misrepresentations and omissions themselves, and not any independent or broader scheme.[3] Thus, the SEC scheme liability claims run directly afoul of *WPP Luxembourg* and other case law.

Because the SEC impermissibly recycles alleged misrepresentations and omissions and impermissibly repackages them as supporting scheme liability, the SEC's First and Second Claims for Relief must be dismissed.

II. The Complaint Fails to Plead a Viable Claim of Misrepresentations or Omissions under Section 10(b) and Rule 10b-5(b), and Section 17(a)(2), in the Fourth and Fifth Claims for Relief

To make out its Fourth Claim for Relief alleging a violation of Rule 10b-5(b), the SEC must allege with particularity that each defendant "made": (1) a false or misleading statement or omission, (2) that is material, (3) in connection with the purchase or sale of a security, (4) with scienter, (5) by means of interstate commerce. *See SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855-56 (9th Cir. 2001) (citing *SEC v. Rana Research, Inc*., 8 F.3d 1358, 1364 (9th Cir.1993)); *Allstate Ins. Co. v. Countrywide Financial Corp.*, 824 F.Supp.2d 1164, 1186 (C.D. Cal. 2011) (citing *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 141 (2011) and stating "[m]aking a misrepresentation is an unavoidable requirement for primary liability under section 10(b) and Rule 10b-5."). Similarly, to make out its Fifth Claim of Relief alleging a violation of Section 17(a)(2), the SEC must show "[1] a material misstatement or omission [2] in connection with the offer or sale of a security [3] by means of interstate commerce." *Phan*, 500 F.3d at 907-08 (9th Cir. 2007).

A plaintiff asserting a Rule 10b-5(b) claim must show that the defendant

---

[3] Nor can the SEC claim some amorphous, undefined scheme. Claims brought pursuant to Section 10(b) and Rule 10b-5(a) and (c), as well as the parallel provisions in Section 17(b), must be pled with particularity under Rule 9(b). *Oaktree Principal Fund*, 2016 WL 6782768 at *15.

made a statement that was at least "misleading as to a material fact." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011). A statement is false if it is directly contradicted by other allegations or information. *In re Atossa Genetics Inc. Securities Litig.*, 868 F.3d 784, 794 (9th Cir. 2017). A statement is misleading "if it would give a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists." *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1109 (9th Cir.2010) (internal quotation marks omitted); *Schaffer Family Inv'rs, LLC v. Sonnier*, 120 F. Supp. 3d 1028, 1044 (C.D. Cal. 2015) (same).

As to omissions, under Rule 10b–5(b), a defendant can only be liable for the omission of material information if he or she first has a duty to disclose that information. *WPP Luxembourg* 655 F.3d at 1048-49 (citing *Chiarella v. United States*, 445 U.S. 222, 235 (1980) [a duty to disclose "does not arise from the mere possession of non-public information."]); *Desai*, 573 F.3d at 938; *Matrixx*, 563 U.S. at 45. "[I]n the case of an omission, '[s]ilence, absent a duty to disclose, is not misleading under Rule 10b–5.'" *McCormick v. Fund American Companies*, 26 F.3d 869, 875 (9th Cir.1994) (quoting *Basic v. Levinson*, 485 U.S. 224, 239 n. 17 (1988)).

To maintain a Rule 10b-5(b) claim, one must show that the defendant made a "material" misrepresentation. *Matrixx Initiatives v. Siracusano*, 563 U.S. at 38 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988). A misrepresentation or omission is "material" 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 made available." *SEC v. Todd*, 642 F.3d 1207, 1215 (9th Cir. 2011) (citing *Basic, Inc.*, 485 U.S. at 231-32). While "determining materiality in securities fraud cases should ordinarily be left to the trier of fact, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *In re Cutera Securities Litig.*, 610 F.3d 1103, 1108-1109 (9th Cir. 2010).

Further, to state a claim under Section 10b and Rule 10b-5(b), the SEC must adequately plead scienter. Scienter is the "mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *Todd*, 642 F.3d at 1215. Reckless conduct, which is a highly unreasonable act or omission that is an "extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it[,]" may constitute scienter. *Todd*, 642 F.3d at 1215.

The SEC alleges three categories of claimed material misrepresentations and omissions: (1) statements as to how investor funds would be spent on "offering costs" such as commissions, [¶¶ 78, 79, 83, 93], (2) other unspecified statements in the PPMs as to how investor funds would be spent [¶¶ 88-94], and (3) statements and omissions as to Pocklington's alleged control of Eye Machine [¶¶ 59, 60, 62]. Even assuming the SEC's allegations were true, they fail to establish actionable misrepresentations or omissions and fail to meet the other elements of a Rule 10b-5 violation.

A. The Complaint Fails to Adequately Allege False or Misleading Statements or Omissions Regarding Commissions Where the Potential Amount of the Offering Costs Was Expressly Disclosed in the PPMs

The Complaint fails to allege any falsity with respect to the alleged misrepresentations and/or omissions pertaining to offering costs (including commissions); in fact, ironically, the SEC misrepresents the disclosures made in the PPMs to create the appearance of falsity.[4] The SEC alleges that the "PPMs claimed,

[4] It is well-established that in deciding a motion to dismiss under Rule 12(b)(6), a court may consider documents referenced in or relied upon in the complaint. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 ("In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. However, in order to '[p]revent … plaintiffs from surviving a Rule 12(b)(6) motion

in substance, that only approximately 28% of the gross offering proceeds were 'expected' to be used to pay all of the offering costs for the offers…." (Compl. at ¶ 79.) The SEC alleges that the statement was misleading because "the statements failed to disclose that offering costs were consistently higher than 28%" and "approximately 40.72% of the funds raised from investors went to pay offering costs (not 28%)." (Compl. at ¶ 83.) However, in the "Risk Factors" section, the PPMs disclosed that syndication costs, part of the offering costs, "may be higher than expected" and "could range up to 50% of the capital raised." (*Id*. at ¶ 83.)

As a threshold matter, the PPMs *never stated* that "only" approximately 28% of the gross offering proceeds were expected to be used to pay offering costs. In the section entitled "USE OF PROCEEDS," the PPMs stated that "[t]he net proceeds from the offering are expected to be approximately" an amount equal to 72 percent of the gross proceeds. (Ex. 1 at 2.) The SEC's addition of the word "only" significantly alters the meaning of the statement in the PPMs. Moreover, in the very same section, the PPMs expressly caution, in language the SEC fails to include in the Complaint, that "[t]he estimated use of proceeds is only an estimate by management, and the actual use of proceeds *may differ substantially*." (Ex. 1 at 2 (emphasis supplied).) The only other reference to the 28 percent estimate is in a section entitled "MANAGEMENT COMPENSATION," where the PPMs merely stated that "[a]n amount equal to 28% of the gross proceeds of the offering has been

---

by deliberately omitting ... documents upon which their claims are based,' a court may consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned." (internal citations omitted)). Here, it is proper for this Court to consider the actual language in the PPMs in determining this motion to dismiss, particularly given the SEC's selective quotation from and misrepresentation of the statements made therein. Moreover, the authenticity of the PPMs attached cannot be disputed as they were produced to the SEC pursuant to the subpoena. Because the PPMs are each voluminous, only one has been attached hereto as Exhibit 1. The remaining PPMs are available for this Court's review.

set aside to pay estimated organization, offering and Unit marketing compensation and costs." (Ex. 1 at 20.) Again, that section gave no promise to investors that the offering costs would not exceed 28 percent.

Even more significantly, the PPMs expressly cautioned that offering costs could actually exceed *50 percent*:

> Our syndication costs will be less to the extent that capital is raised by management, since they will not be paid any selling commissions or referral fees. While we estimate that some capital may be raised by management and the balance raised through consultants and other outside referral sources, there is no assurance that all or a substantial majority of our capital will not be raised through outside consultants, causing us to incur higher syndication costs. Syndication costs incurred to outside consultants could range up to ***50%*** of the capital raised with their assistance. Accordingly, ***our estimate of offering costs is an estimate only, and actual offering costs may differ significantly from and be higher than the amount we estimate.***

(Ex. 1 at. 15 (emphasis supplied).) The PPMs thus not only disclosed the possibility that offering costs could exceed 28 percent, but explained the reason why: the need to pay outside consultants at a rate that could be as high as 50 percent of the capital raised. The PPMs explained that the estimated offering costs assumed that some capital may be raised by management but warned that "there is no assurance that all or a substantial majority" of the capital would not be raised by outside consultants. Given that offering costs included not only syndication costs but other expenses (see Ex. 1 at 2), investors were plainly informed that offering costs could be greater than 50 percent, well above the 40.72 percent alleged by the SEC.

Moreover, the alleged estimate of offering costs cannot be deemed material. A statement alleged to be false or misleading is not material as a matter of law if it falls into the "bespeaks caution" doctrine. *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413 (9th Cir. 1994) ("[t]he bespeaks caution doctrine provides a mechanism by which a court can rule as a matter of law (typically in a motion to dismiss for failure to state a cause of action…) that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect

the defendant against claims of securities fraud."); *see also Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995). The "bespeaks caution" doctrine holds that:

> [E]conomic projections, estimates of future performance, and similar optimistic statements in a prospectus are not actionable when precise cautionary language elsewhere in the document adequately discloses the risks involved. It does not matter if the optimistic statements are later found to have been inaccurate or based on erroneous assumptions when made, provided that the risk disclosure was conspicuous, specific, and adequately disclosed the assumptions upon which the optimistic language was based.

Worlds of Wonder,35 F.3d at 1413. The "bespeaks caution" doctrine is analyzed under the "materiality" element of a securities fraud claim. *Id*.

As discussed above, no reasonable investor could believe that offering costs would be limited to 28% when other statements in the PPMs clearly and specifically "bespoke caution" and disclosed to investors on no less than three occasions that offering costs could depart "significantly" from the 28% set aside for that purpose. (*See* Ex. 1 at 2 ("[t]he estimated use of proceeds is only an estimate by management, and the actual use of proceeds may differ substantially[,]"), 15 ("[s]yndication costs incurred to outside consultants could range up to 50% of the capital raised with their assistance," and "actual offering costs may differ significantly from and be higher than the amount we estimate.").)

Moreover, the Ninth Circuit has observed that "detailed risk disclosure…negate[s] an inference of scienter." *Worlds of Wonder*, 35 F.3d at 1425 (finding no scienter because company made detailed disclosure of risks in a debenture prospectus). Here, for the same reason that the statements or omissions regarding offering costs cannot be considered false or misleading or material, they do not reflect the requisite scienter. Had the defendants intended to misrepresent the potential offering costs to investors, they would not have included the disclosure that offering costs could actually exceed 50 percent, which was significantly higher than what they actually were.

B. The Complaint Alleges No Actionable Misrepresentations or Omissions Pertaining to the Company's Expenditures

The SEC also alleges that "[c]ontrary to the representations made to investors in the PPMs, defendants… misappropriated $681,587 of investor funds from Eye Machine's bank account, which were used to pay for the following undisclosed and unauthorized expenses[.]" (Compl. at ¶ 89.) The SEC, however, fails to allege which "representations made to investors in the PPMs" are either false or misleading because of the supposed "misappropriation." This is plainly insufficient under Rule 9(b). *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) (allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so they can defend against the charge and not just deny that they have done anything wrong."). Indeed, that a plaintiff must set forth "what is false or misleading about a statement, and why it is false" under Rule 9(b) logically requires that the plaintiff first identify which statements it alleges are fraudulent or misleading. *In re GledFed. Inc. Sec. Litig.*, 42 F.3d 1541, 1543 (9th Cir. 1994). The SEC's failure to specify which "representations made to investors in the PPMs" it takes issue with requires dismissal.

To the extent that the SEC means that the allegations set forth in the preceding paragraph, Paragraph 88, regarding use of "net proceeds of investor funds" on development of the Eye Machine constitute the false or misleading "representations made to investors in the PPMs[,]" such "representations" are neither false nor misleading. The allegations in Paragraph 88 do not constitute false misrepresentations because they do not represent that net proceeds would *only* be used toward the development of the Eye Machine, and nothing else. In fact, in the "USE OF PROCEEDS" section, in language omitted by the SEC, the PPMs fully disclosed that net proceeds could be used for a much broader range of expenses:

> [N]et proceeds available for investment are estimated to be utilized by the Company for…(6) marketing the Company's Eye Machine and other potential products and services… [and] (9) to pay a one-time management administration fee to the Majority Member equal to 7% of

> the gross proceeds of the offering, from which the Majority Member will pay the Company's initial start-up and administrative costs and will pay any fees due to the Manager until commencement of revenue and positive cash flow…

(Ex. 1 at 2.)

Additionally, the PPMs expressly disclosed elsewhere that the Company may use net proceeds from the offerings for other purposes that the Manager deems in his business judgment "to be in the best interests of the Company":

> The net proceeds from this offering are expected to be used for the purposes described in this Memorandum. The Company reserves the right to use the funds obtained from this offering for similar purposes not presently contemplated which the Manager deems to be in the best interests of the Company and its Members in order to address changed circumstances or opportunities.

(Ex. 1 at 14.)

Here, the SEC has failed to allege that the funds used to purchase "Flowers" and to make "Charitable and Political Donations" and "Retail Purchases (Including Clothing and Furniture)," as well as the payments made to Gold Star Resources and to Cobra Chemical, were *not* used for marketing or for purposes that the Manager deemed in his business judgment to be in the best interests of the Company. Moreover, as to the "Flowers," "Retail Purchases" and "Charitable and Political Donations," because the SEC fails to specify who made and who was the recipient of these purchases, it is an unwarranted inference that such funds were misappropriated. It is equally, if not more plausible that these expenditures were expenses incurred for marketing or for other purposes that the Manager, in his business judgment, believed were in the bests interests of the company.

Further, it is equally if not more plausible that the alleged misappropriated funds paid to or on behalf of Eva Pocklington and DTR Holdings, of which Eva Pocklington is the beneficial owner, actually constituted part of the "one-time management administration fee to the Majority Member equal to 7% of the gross proceeds of the offering…" or part of the up to $25,000 per month consulting fee

that the Eye Machine was authorized to pay to its Majority Member. (Ex. 1 at 20.) As the SEC elsewhere alleges, Eva Pocklington is the beneficial owner of AMC Holdings, which is the majority member of Defendant Eye Machine, and is the beneficial owner of DTR Holdings. (Compl. at ¶¶ 13, 21.) If one calculates the allegedly misappropriated amounts purportedly "paid" to or on behalf of Eva Pocklington and DTR Holdings, totaling $489,395 and compares them with the $14,089,422 dollars that defendants allegedly raised, it is clear that that the amount allegedly misappropriated for Eva Pocklington's benefit constitutes approximately 3.47% of the gross proceeds of the offerings, which is well short of the 7% of gross proceeds, not to mention the consulting fee, due to the Majority Member under the PPMs. The Complaint fails to allege that the total amounts paid exceeded the total compensation to AMC Holdings that was fully disclosed in the PPMs.

Even if the Court were to draw the unreasonable inference that the expenditures were not appropriate, that would not establish any fraudulent misrepresentations or omissions. At most, it would constitute lapses in business judgment by management. Yet, the Supreme Court has made clear that Congress did not intend to "bring within the scope of § 10(b) instances of corporate mismanagement." *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477 (1977); *see also Gaines* v. *Haughton*, 645 F.2d 761, 779 (9th Cir. 1981) ("[D]irector misconduct of the type traditionally regulated by state corporate law need not be disclosed in proxy solicitations. . . ."), *overruled on other grounds by Stahl* v. *Gibraltar Fin. Corp.*, 967 F.2d 335, 338 (9th Cir. 1992). In *Santa Fe Industries*, a minority shareholder alleged a violation of Rule 10b–5 based on the assertion that a merger undertaken by the company lacked a legitimate business purpose. *Santa Fe Industries*, 430 U.S. at 469. The Court held that the complaint should be dismissed because, while it may have alleged a breach of fiduciary duty, it did not allege the necessary deceit or nondisclosure. *Id.* at 473-74. Similarly, here, even if the SEC

does not agree with certain specific expenditures, that does not satisfy the requirement of Rule 10b-5 of a false or misleading representation or omission.

For similar reasons, the Complaint fails to adequately allege materiality. No reasonable investor could find the expenditures material when the PPMs expressly disclosed that the Company would expend funds on marketing, on payments to the Majority Member, and on other things found to be "in the bests interest of the Company" according to the manager's business judgment. The Complaint further fails to address how a reasonable investor could find material the Company's use of $681,587 – less than 5 percent of the gross proceeds of the offerings – for particular discrete expenses. (Compl. ¶ 89.) Moreover, the PPMs clearly and specifically "bespoke caution" in warning:

> the success of the Company will be substantially dependent upon the discretion and judgment of the Manager with respect to the application and allocation of the net proceeds of this offering. Members will be entrusting their funds to the Manager, upon whose judgment and discretion the Members must depend.

(Ex. 1 at 14.) *See Worlds of Wonder*,35 F.3d at 1413.

Finally and similarly, the Complaint fails to adequately allege scienter. Given the broad discretion disclosed in the PPMs, it is not reasonable to infer that the defendants intended to make false or misleading statements or omissions regarding how or how much of the net proceeds would be used. *See id.* at 1425. Moreover, the Complaint alleges no facts establishing that defendants knew that the expenses the SEC quarrels with were in fact not legitimate business expenses or compensation. On its face, it is not reasonable to infer that the defendants intended to misappropriate given the very small percentage of funds allegedly misappropriated.

Accordingly, the SEC has failed to allege that any of the allegedly "misappropriated" funds rendered any statement in the PPMs false or misleading or established the requisite materiality or scienter.

C. The Complaint Alleges No Actionable Misrepresentations or Omissions Regarding Pocklington's Role with the Eye Machine

The SEC has failed to plead facts that plausibly suggest that Defendants Eye Machine and Pocklington concealed Pocklington's role, thereby rendering statements made in the PPMs as to who controlled the company materially misleading. Specifically, the SEC alleges that that Defendants Eye Machine, Pocklington and Eldred misled investors when they made the following statements or omissions: (1) that Eldred had "'full, exclusive, and complete authority and discretion in the management and control of the business' of Eye Machine, subject only to the right of the members to vote on certain matters"; (2) omitted Pocklington's name from the first five PPMs; and (3) described Pocklington's role as "administrator and advisor" in the sixth PPM. (Compl. at ¶¶ 52, 59-60.) The SEC alleges that these statements or omissions were misleading because "Pocklington was the one who actually controlled Eye Machine." (Compl. at ¶ 54.)

Even assuming the truth of the SEC's allegations as this Court must on a motion to dismiss, defendants did not have a duty to disclose Pocklington's role as there is no general duty to disclose non-public information. *See WPP Luxembourg*, 655 F.3d at 1048-49; *Chiarella*, 445 U.S. at 235; *Matrixx*, 563 U.S. at 38. Moreover, there is no duty to disclose a "known condition." *Worlds of Wonder*, 35 F.3d at 1417. Here, the SEC fails to allege that investors were not aware of Pocklington's alleged role with the Eye Machine. Other facts alleged by the SEC likewise demonstrate that Defendants Pocklington, Eldred, and Eye Machine were transparent about Pocklington's role in the company. (See, e.g., Compl. at ¶¶ 56, 57.) Given the SEC's failure to plead that investors did not know about Pocklington's alleged role in the company, coupled with allegations suggesting Pocklington and others were forthright about Pocklington's role, the more compelling and more plausible inference to be drawn is that Defendants Eye Machine and Pocklington did not omit any material information because there was

no duty to disclose information already known to investors.

Nor were the statements in the PPMs false or misleading. Eldred *was* the manager, and Pocklington was not. As a matter of corporate governance, Eldred, not Pocklington, did have the duties and discretion described in the PPMs. The statements that Eldred managed and controlled Eye Machine, "subject only to the right of the members to vote on certain matters" (Compl. at ¶ 52) and that Pocklington was an "administrator and advisor" (Compl. at ¶ 60), were also neither false nor misleading. AMC Holdings, as to which Pocklington's wife had a beneficial interest, was the majority member and did, for that reason, have voting rights and therefore the power to make decisions for the company. Pocklington, having no official role, was in fact an "administrator and advisor." And these statements could only be misleading if investors were entirely unaware of Pocklington's involvement. Yet, the SEC fails to allege that they were, and instead pleads fact that belie such lack of knowledge. (*See* Compl. at ¶ 58.)

As to materiality, the only allegation the SEC has made is that "[t]he misrepresentations and omissions in the PPMs about Pocklington's true role at the company pertained to material facts that reasonable investors would have found important in making their investment decisions." (Compl. at ¶ 61.) This allegation is wholly conclusory and thus is "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679; *ESG Capital Partners*, 828 F.3d at 1031. Given the truthful disclosures regarding company management and ownership and the absence of allegations that investors were not aware of Pocklington's role, no statements or omissions on this issue could be deemed material.

Finally, the Complaint fails to adequately allege scienter. As noted, the Complaint alleges that Pocklington and others were transparent about Pocklington's role in the company. This conduct is consistent with the inference that investors knew about Pocklington's role and that defendants did not intend to deceive

investors, or anyone else, about that role.

Accordingly, the Fourth and Fifth Claims of Relief fail to adequately allege, on any theory, false or misleading misrepresentations or omissions actionable under Rule 10b-5.

D. The Complaint Fails to Adequately Plead that Defendant Pocklington Was the "Maker" of Any Alleged Misrepresentations

The SEC's allegations are insufficient as a matter of law to plead a viable claim that Pocklington is directly liable under Section 10(b) and Rule 10b-5(b) and Section 17(a)(2) because he did not "make" any of the alleged misrepresentations. (Compl. at ¶¶ 62, 142, 147.)

In *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 141 (2011) the Supreme Court held that to state a claim against a defendant under Rule 10b-5(b), a plaintiff must adequately plead that the defendant was the "maker" of the statement at issue. "For the purposes of Rule 10b-5, 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*. at 142. As the Supreme Court observed, the person or entity with the statutory obligation to file a particular document containing an alleged misrepresentation or omission is often the one with "ultimate authority" over the challenged statement. *Id*. at 146-47. Merely assisting in the preparation of a statement, even if the assistance was significant, does not render that person a "maker" of that statement. *Id*. at 142, 147-48; *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 693 n.8 (9th Cir. 2011); *Oaktree Principal Fund V, LP v. Warburg Pincus LLC*, No. 15-cv-8574, 2016 WL 6782768, *10 (C.D. Cal. Aug. 9, 2016) (allegations that defendant "controlled, drafted and participated in investor calls" were "generalized, conclusory allegations" that were insufficient to show that the defendant controlled the statement or omissions attributed to others or to written materials); *SEC v. Mercury Interactive, Inc.*, No. 07-cv-02822, 2011 WL 5871020,

*2 (N.D. Cal. Nov. 22, 2011) (allegations that one was involved in preparing annual and quarterly reports that were not signed or otherwise attributable to her were insufficient to state a claim against her under Rule 10b-5(b)). Moreover, attribution of the statement to someone or something else is "strong evidence that a statement was made by—and only by—the party to whom it is attributed." *See, e.g.*, *Janus*, 564 U.S. at 142-43; *Oaktree Principal Fund*, 2016 WL 6782768 at *10.

Nowhere in the complaint does the SEC allege facts demonstrating that Pocklington drafted the PPMs or had ultimate authority over their content. Rather, the SEC relies on conclusory allegation that the alleged misrepresentations and omissions were "made" by Pocklington, Eldred and Eye Machine. (Compl. at ¶¶ 62, 78, 93.) These wholly conclusory allegations are not entitled to the assumption of truth and are insufficient to support the SEC's claims. *ESG Capital Partners*, 828 F.3d at 1031.

Indeed, the only factual allegations supporting the SEC's conclusory assertions that Pocklington "made" the misrepresentations alleged are blanket allegations that "Pocklington and Eldred each helped draft the PPMs, by providing the factual information contained in the PPMs, and by reviewing the PPMs before they were provided to investors[,]" (Compl. at ¶ 47), and that "Eldred and others would, if necessary due to Pocklington's eyesight, explain the key provisions of the PPMs to Pocklington so he understood what was being said in them[,]" (Compl. at ¶ 48). Neither allegation connects Pocklington to the specific misrepresentation alleged, nor does either allegation establish that Pocklington had "ultimate authority" over the specific misrepresentations alleged. For example, the allegation that Pocklington "helped" draft the PPMs insufficiently pleads that Pocklington was the "maker" of the alleged misrepresentations or omissions as mere assistance is not enough under *Janus*. *Janus*, 564 U.S. at 141. Further, simply alleging that Pocklington "reviewed" the PPMs before they were provided to investors fails to

plead that Pocklington had "ultimate authority" because it fails to allege that by reviewing the PPMs, Pocklington had any discretion to change the content. Because the SEC has failed to plead any facts establishing that either Pocklington "made" any of the misrepresentations complained of, its claims under Rule 10b-5(b) and Section 17(a)(2) fail and must be dismissed.

III. The Third Claim for Relief Fails for the Further Reason that It Fails to Allege Sufficient Facts to Establish Negligence Liability as to Defendant Walton

Like Rule 10b-5(c), Section 17(a) of the Securities Act makes it unlawful for any person in the offer or sale of any security "(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)(1), (3); *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). Violations of Sections 17(a)(3) require a showing of negligence. *Phan*, 500 F.3d at 907-08 (9th Cir. 2007). Like other fraud claims, any claim under Section 17 must be pled with particularity pursuant to Rule 9(b). Fed. R. Civ. Pro. 9(b).

As to Defendant Walton, the SEC has failed to plead with particularity that he negligently engaged in a course of business that operated as a fraud under Section 17(a)(3). Specifically, the SEC has pled that Defendant Walton engaged in a course of business that operated as a fraud (Compl. at ¶ 138), because he, as Eye Machine's Chief Financial Officer, "took no steps to determine whether the [allegedly improper payments] were permitted under the PPMs," including failing to "read the other portions of the PPMs that explained how investor proceeds should have been spent." (Compl. at ¶¶ 97-99.) The SEC also alleges that Walton signed at least one of the checks made to relief defendant, Cobra Chemical. (Compl. at ¶ 98.) The SEC claims that Walton therefore "acted negligently, and failed to exercise reasonable care…particularly in light of his background as a CPA." (Compl. at ¶ 99.)

For the same reasons discussed above, nothing about the questioned expenditures was fraudulent. Thus, even assuming for purposes of this motion the

truthfulness of the allegations against Walton, they do not establish that he participated in "any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Further, the SEC's allegation that Walton acted negligently is conclusory as the SEC has failed to allege what the applicable standard of care was or how Walton fell below it as a CPA. Instead, the SEC asks this Court to accept the conclusion that Walton was negligent without pleading that as a CPA, Walton had a duty to engage or not to engage in the acts he is alleged to have committed or failed to have committed. On this additional ground, the SEC's claim against Defendant Walton should be dismissed.

IV. Because the SEC Fails to State Claims for Primary Liability, the Complaint Fails to Allege Aiding and Abetting Liability Under Section 17(a) and Section 10(b) and Rule 10b-5 in the Sixth Claim for Relief

Section 15(b) of the Securities Act, 15 U.S.C. § 77o(b), and Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e), provide for liability for aiding or abetting a primary violation of Sections 17(a), and 10(b) and Rule 10b-5.

Section 15(b) provides that "any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." Section 20(e) similarly provides that "any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." 15 U.S.C. § 78t(e).

To establish a claim for aiding and abetting liability under either Section 15(b) or Section 20(e), the SEC must demonstrate: (1) a primary violation, (2) substantial assistance in the primary violation, and (3) scienter. *SEC v. Fehn*, 97

F.3d 1276, 1289 (9th Cir. 1996).

For the same reasons that the SEC has failed to state a claim for a primary violation of either Section 10b and Rule 10b-5 or Section 17(a) against Defendant Eye Machine, the SEC has failed to state claims for aiding and abetting violations by Defendant Pocklington. Accordingly, the SEC's sixth claim for relief should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants Pocklington, Walton, Vanetten, the Eye Machine, and AMC Holdings, and Relief Defendants respectfully ask this Court to dismiss the claims brought against them pursuant to Federal Rule of Civil Procedure 12(b)(6).

DATED: July 5, 2018 JAMES & ASSOCIATES

By: /s/ Becky S. James
Becky S. James

Attorneys for Defendants Peter H. Pocklington, Terrence J. Walton, Robert Vanetten, Nova Oculus Partners, LLC f/k/a The Eye Machine, LLC, and AMC Holdings LLC, and Relief Defendants Eva S. Pocklington, DTR Holdings, LLC, Cobra Chemical, LLC and Gold Star Resources, LLC