IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

U.S. SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

SPARTAN SECURITIES GROUP, LTD., ISLAND CAPITAL MANAGEMENT, CARL E. DILLEY, MICAH J. ELDRED and DAVID D. LOPEZ,

Defendants.

CASE NO.: 8:19-cv-448-VMC-CPT

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF NO. 103)

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Defendants Spartan Securities Group, LTD, Island Capital Management LLC, Carl E. Dilley, Micah J. Eldred, and David D. Lopez respond in opposition to Plaintiff, U.S. Securities and Exchange Commission's, Partial Motion for Summary Judgment ("MSJ" ECF No. 103).

SEC has fallen far short of its burden of proving any violation of § 5 of the Securities Act. SEC has never even identified *which* transfers it thinks were unregistered. Every transfer that Island recorded was either properly registered or exempt. Moreover, SEC's theory of liability rests on a radical expansion of the applicable rules. It proposes to hold transfer agents strictly liable for merely recording others' sales of securities, even when the transfer agent played no role in arranging the sale and would face liability for refusing the transfer. This theory was rightly rejected by the only court to consider it, as it would mean that every transfer agent is *always* liable for any underlying misconduct.

SEC also cannot prove a violation of Rule 15c2-11. Market-makers, like the defendants, need only establish a "reasonable basis" for their decision to publish quotations in an over-the-counter market. The defendants amply complied with their obligations, gathering all required information, and supporting it with reams of documents above and beyond the lawful requirements.

Finally, a word about candor. Having brought this enforcement action based on alleged misrepresentations and omissions, SEC's own presentation to this Court is remarkably misleading. SEC's most salacious factual assertions spring from multiple exaggerations of the record evidence. In some instances, SEC has cherry-picked the evidence in a way that fundamentally alters the meaning of testimony. This conduct alone merits rejection of SEC's motion.

DEFENDANTS' COUNTER STATEMENT OF MATERIAL FACTS

1. Admitted.

2. Admitted

3. Admitted.[1]

4. Admitted in part, denied in part. Island segregated its business operations and its files from Spartan and Spartan's employees. **Ex. 1**[2], Eldred Dep. 137:2-138:7; **Ex. 2**, Dilley Aff. ¶ 7; **Ex. 3**, Lopez Aff. ¶ 49. Spartan never acted as a transfer agent for any shares of stock. **Ex. 2**, ¶ 7; **Ex. 3**, ¶ 49. Island was not involved with filing Form 211 applications. **Ex. 2**, ¶ 6; **Ex. 3**, ¶ 48.

5. Admitted in part, denied in part. Island acted as a transfer agent for transfers of a controlling portion of shares in Kids Germ, Obscene Jeans, On the Move, Rainbow Coral, First Titan, Neutra, Aristocrat, First Social, Global, E-Waste, First Independence, Changing Tech, Dinello, Court Document, Wallbeds, and Top to Bottom. **Ex. 3**, ¶¶ 55-56.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted that Alvin Mirman and Sheldon Rose pled guilty pursuant to the plea agreements related to Kids Germ, Obscene Jeans, On the Move, Rainbow Coral, First Titan, Neutra, Aristocrat, First Social, E-Waste, First Independence, Changing Tech., Global, Envoy, E-Waste, and First Xeris. **Ex. 4**, Mirman Dep. Ex. 1 p. 12; **Ex. 5**, Rose Dep. Ex. 19 p. 12. Denied that "Mirman and Rose had to be in a position to control all or nearly all of the publicly traded shares of the companies, so that when they later sold the company, part of the sale would include the undisclosed transfer of the unrestricted shares to the purchaser." SEC has not identified specific issuers or specific shareholders or transfers to which this statement refers.

10. Admitted only with respect to the issuers referenced in the respective plea agreements.

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[1] Defendants object to the inclusion of these allegations as they are irrelevant. SEC does not even attempt to connect prior disciplinary actions by FINRA or NASDAQ with any allegation in this case, and thus these allegations are irrelevant and inadmissible at trial. *See* Fed. R. Evid. 401, 402, 403. Motions for summary judgment must be premised on admissible evidence, see Fed. R. Civ. P. 56(c)(2), and thus this paragraph should be disregarded entirely.

[2] "**Ex.**" refers to exhibits attached to this motion.

11. Admitted only with respect to the issuers referenced in the respective plea agreements.

12. Admitted.

13. Admitted only with respect to the issuers referenced in the respective plea agreements.

14. Admitted in part, denied in part. FINRA does not give "approval for the sale of shares." Instead, FINRA clears a market-maker to publish a quotation for an issuer's security as a market-maker. **Ex. 6**, Adams Dep., 12:18-13:9; 68:20-69:1. Shares can still be sold without utilizing a market-maker, and FINRA clearance neither ensures that a market-maker will publish a quotation, nor that any share will be sold on a market or otherwise. **Ex. 7**, Lopez Aff., Sept. 11, 2020, ¶ 2. Mirman and Rose sought approval only related to the issuers in their plea agreements. **Ex. 4**, p. 12; **Ex. 5**, p. 12. They also represented to Defendants that the *issuers* were seeking approval, and that they were intermediaries for the issuers. **Ex. 8**, Rose Dep. 42:15-19; 56:19-57:19, 66:22-25; **Ex. 2**, ¶ 4.

15. Admitted in part, denied in part. With respect to Mirman and Rose, Island processed transfers only for Kids Germ, Obscene Jeans, On the Move, Rainbow Coral, First Titan, Neutra, Aristocrat, First Social, Global, E-Waste, First Independence, and Changing Tech. **Ex. 3**, ¶ 55. Mirman and Rose did not sell "all shares of the issuer" "together" for any issuer. **Ex. 7**, ¶ 3. Only some of the issuers engaged in reverse mergers but did so with sales of majority positions of the shares. **Ex. 7**, ¶ 3. No issuer sold all its shares, and all mergers occurred in multiple sales at different times. **Ex. 7**, ¶ 3.

16. Admitted in part. Mr. Dilley was the registered principal for 15 issuers. **Ex. 3**, ¶ 9.

17. Denied. Mirman and Rose held themselves out to be intermediaries for some issuers. **Ex. 8.**, 42:17-19; 56:19-57:19; **Ex. 2**, ¶ 4. They forwarded all documents from the issuers' officers who represented the information as being accurate in all respects. **Ex. 8**, 42:15-19; 56:19-57:19, 66:22-25; **Ex. 2**, ¶ 4. They also represented that the documents, including notarized affidavits from the officers, and signed subscription agreements with proof of payment and copies of identification, were genuine and authentic. **Ex. 8**, 63:11-13, 64:15-65:1; **Ex. 2**, ¶ 4. Mirman and Rose never informed Spartan, or

any of its employees, that any of the information concerning any issuer was materially inaccurate or misleading. **Ex. 8**, 63:11-13, 64:15-65:1; **Ex. 2**, ¶ 5. Rose never told "anyone at Spartan Securities that [he] and Mr. Mirman controlled the shares" of any issuer. **Ex. 8**, 63: 11-19, 64: 15-21, 65:1.

18. Denied. Defendants gathered documents, instructions and directions from the issuers' officers and directors, including signed Form 211 agreements and notarized affidavits. **Ex. 3**, ¶ 15. Mirman and Rose represented that all information and directions came from the issuer and was accurate. **Ex. 8**, 63:11-13, 64:15-65:1; **Ex. 2**, ¶ 4.

19. Denied. The application says, with respect to 15c2-11(b)(1)-(3), "Describe the circumstances surrounding the submission of this application. Include the identity of any person(s) for whom the quotation is being submitted and any information provided to your firm by such person(s)."

20. Denied. SEC has identified only 7 issuers, and its allegations are denied with respect to any others. The Form 211 applications contained no representations concerning the submission of the applications. A cover letter submitted with the application did contain a section titled "Introduction to Spartan Securities." Each cover letter was different, and the statements speak for themselves.

21. Admitted in part, denied in part. Mr. Dilley's normal practice was to speak to an officer or director of every issuer on the phone. **Ex. 9**, Dilley Aff., Sept. 14, 2020, ¶ 3. He did not recall if he spoke to the specific officers on the phone. **Ex.** 10, Dilley Dep. 120:24-121:4.

22. Admitted that FINRA examiners requested information in deficiency letters for the issuers referenced in the exhibits.

23. Admitted in part, denied in part. There is no evidence the shareholder charts were "provided and prepared by Mirman or Rose." Exhibits 32, 33, and 34 are emails where Rose forwarded completed forms that had been signed and attested by officers of the issuer. There is no evidence he "prepared" these documents. Rose presented this information as being accurate and originating from the issuer. **Ex. 8**, 42:15-19; 56:19-57:19, 66:22-25; **Ex. 2**, ¶ 4.

24. Defendants are without sufficient information to respond to this allegation.

25. Denied. Exhibit 37 is an email from Rose asking Mr. Dilley if he recommended that Kids Germ seek DTC eligibility. Defendants could not and did not apply for DTC eligibility for any issuer. **Ex. 11**, Cangiano Dep. 184:4-7; **Ex. 3**, ¶ 36. Defendants could only make certifications to DTC or participant firms related to an issuer's application. **Ex. 3**, ¶ 37.

26. Admitted in part, denied in part. DTC eligibility was not required for a stock to be traded in an OTC market. **Ex. 11**, 182:1-21; **Ex. 3**, ¶ 36.

27. Admitted in part, denied in part. Rose requested that Spartan seek DTC eligibility through a participant firm. SEC Ex. 38. Spartan did not apply for DTC eligibility for any issuer because it was not a DTC participant. **Ex. 11**, 184:4-7; **Ex. 3**, ¶ 36. Spartan's referenced application to a participant firm was denied. SEC Ex. 38.

28. Admitted Rose sent the cited email, which speaks for itself.

29. Admitted Rose sent the cited email, which speaks for itself.

30. Admitted in part. The escrow agreement was signed, but the transaction was never executed. **Ex. 8**, 144:14-20.

31. Admitted the email chain was sent, but the emails speak for themselves. SEC has misrepresented the exchange. Anna Krokhina communicated with Michael Muellerleile, an intermediary for On Time Filings Inc., which is not at issue in this case. SEC Ex. 42. Muellerleile asked for the "appropriate party" to "talk[] to" for Obscene Jeans, and Krokhina responded that she "d[id]n't know who is selling it," Muellerleile could "[t]ry Sheldon Rose" but Krokhina "d[id]n't know if he is still involved." SEC Ex. 42.

32. Denied. SEC has misstated the testimony. Mr. Dilley's testimony at 143: 4-19 was that he did "not know" if he had communicated with Rose or Mirman concerning Neutra. At 147: 1-6, Mr. Dilley was asked if "Mr. Mirman was also involved with Neutra" and he said "Perhaps." The cited testimony

does not reference "payment instructions" or "invoices" at all. Mirman and Rose held themselves out to be intermediaries for some of the 19 issuers but represented that all directions and communications originated with the issuer. **Ex. 8**, 42:17-19; 56:19-57:19; **Ex. 2**, ¶ 4.

33. Admitted Mirman sent the email, which speaks for itself. Mirman and Rose held themselves out to be intermediaries for some issuers but represented that all directions and communications originated with the issuer. **Ex. 8**, 42:17-19; 56:19-57:19; **Ex. 2**, ¶ 4.

34. Admitted Dilley signed the stock certificates after Island gathered all appropriate transfer instructions and documents. **Ex. 3**, ¶ 55.

35. Admitted Mirman sent the cited email, which speaks for itself.

36. Admitted that Mr. Dilley sent the letter, which speaks for itself.

37. Admitted Rose sent the cited email, which speaks for itself.

38. Admitted that Mr. Dilley sent the letter, which speaks for itself.

39. Admitted Mirman sent the cited email, which speaks for itself. Denied that Mr. Dilley was aware that Rose participated in the sale. Mr. Dilley's cited testimony was that he agreed it was "[s]afe to say that both Alvin Mirman and Sheldon Rose were participating in the 211 application process for Global." SEC Ex. 53; Dilley Tr. 175:3-6. This does not reference any subsequent "sale of Global." The Form 211 application for Global was filed on May 2, 2011, nearly two years before the referenced email. **Ex. 12**, Form 211 Application.

40. Admitted the transfer documents are genuine and Island processed the listed transfers. Each transfer was processed individually upon presentation of appropriate documents. **Ex. 3,** ¶ 55. Island processed a total of 26 transfers for Global on October 15, 2012 and March 1 and 20, 2013. SEC Ex. 55. Island processed a total of 27 transfers for E-Waste on September 20 and October 11, 2012, and January 17, 29 and April 19, 2013. SEC Ex. 58.

41. Admitted that Island processed the transfers. Denied that "Spartan never" questioned the alleged facts and denied that any issuers were a "Mirman/Rose Company" and had filed "substantially similar Forms S-1." The Form S-1 statements were filed and signed by the issuers' officers or directors and declared effective by SEC. *See* SEC Ex. 45, 62-72. Defendants gathered signed attestations from officers or directors of the issuer that each S-1 was accurate. **Ex. 1**, 123:12-124:21; **Ex. 3**, ¶¶ 14, 39.

42. Admitted Rose sent the email, which speaks for itself. Rose represented that the information provided was from the issuer and accurate. **Ex. 8**, 42:15-19; 56:19-57:19, 66:22-25; **Ex. 2**, ¶ 4.

43. Denied. Spartan filed a Form 211 application, which speaks for itself. SEC has quoted a cover letter submitted with the application, which was not part of the application itself, was not an "exhaustive" description of the information in Spartan's possession, and which also speaks for itself. **Ex. 1**, 128:21-129:6; **Ex. 13**, Lopez Dep. 98:17-21, 99:20-100:8; **Ex. 2**, ¶ 34. SEC's Exhibit 11 is not the complete application for Envoy, it has omitted materials submitted with the application. *See* **Ex. 1**, 145:22-146:12; **Ex. 3**, ¶ 34; **Ex. 7**, ¶ 4. Spartan began its "limited due diligence" process for issuers by reviewing every S-1 registration statement approved by the Commission for issuers that met Spartan's criteria. **Ex. 1**, 121:13-122:1. Mr. Dilley's common practice was to speak to an officer or director of the issuer on the phone prior to filing a Form 211 application and the cover letter's reference to the relationship with the issuer's "representatives" was meant to refer to formal financial relationships with officers, directors, or controlling shareholders of the issuer. **Ex. 9**, ¶¶ 3, 5-6. This was a true statement. **Ex. 9**, ¶¶ 3, 5-6.

44. Admitted that FINRA sent the referenced deficiency letters, which speak for themselves.

45. Admitted that FINRA sent the referenced deficiency letters, and the referenced emails were sent, which all speak for themselves.

46. Admitted that the emails were sent, and Spartan responded to the FINRA deficiency, which all speak for themselves. Rose represented that the letter signed by Jocelyn Nicholas was genuine and accurate. **Ex. 8**, 42:15-19; 56:19-57:19, 66:22-25; **Ex. 2**, ¶ 4.

47. Admitted that FINRA sent the referenced deficiency letter, which speaks for itself.

48. Admitted that Spartan sent the response, which speaks for itself.

49. Denied that Spartan "failed to investigate" FINRA's inquiries. As SEC acknowledged in Paragraphs 46 and 48, Spartan compiled responsive documents signed by the issuer to adequately respond to the deficiency letters. Spartan compiled documents from officers and directors of both Envoy and Kids Germ that were presented as genuine and accurate. **Ex. 1**, 123:3-124:9; **Ex. 13**, 67:11-68:12; **Ex. 3**, ¶¶ 13, 14. Dilley never "attempted to arrange a sale" of any issuer. **Ex. 9**, ¶ 7. SEC's Exhibit 37 does not support its assertion—it references an email from Rose to Mr. Dilley and references an "atty interested in the company." SEC Ex. 37. Mr. Dilley did not help broker a sale of Kids Germ, and the attorney was merely requesting information concerning the issuer. **Ex. 9**, ¶ 7.

50. Admitted that Spartan had registration statements and shareholder lists for issuers in its files. Denied that "Dilley and Lopez responded offhand that they were not familiar with Kids Germ and instructed the assistant simply to see what Envoy says." SEC has misrepresented the referenced emails. Exhibit 73 is an email from Taylor Zajonc to Mr. Dilley and Mr. Lopez asking to "run" FINRA's first comment letter for Envoy "by" them "before [he] sent it on to the Issuer" for its explanation. Both Mr. Dilley and Mr. Lopez responded that they could not answer the deficiency letter, and Mr. Dilley told Mr. Zajonc he should "send it to the company" for a response. SEC Ex. 73.

51. Admitted that Mirman sent the cited email, which speaks for itself. Both Mirman and Rose represented they were working as intermediaries for the issuers and the issuers were seeking listing. **Ex. 8**, 42:15-19; 56:19-57:19, 66:22-25; **Ex. 2**, ¶ 4.

52. Denied. SEC Exhibits 15 and 79 are cover letters submitted with the Form 211 applications, not the application themselves. **Ex. 1**, 128:21-129:6; **Ex. 13**, 98:17-21, 99:20-100:8; **Ex. 3**, ¶ 34. The cover letters' statement concerning Mirman's "relationship" to Spartan referred to Spartan's corporate relationship with Mirman. The statement was accurate. **Ex. 9**, ¶¶ 5-6.

53. Admitted that FINRA sent the referenced deficiency letter, which speaks for itself.

54. Denied. SEC has misrepresented Exhibit 80. Mr. Zajonc forwarded FINRA's comment letter to Mirman, the issuer's intermediary, with the direction that it was the "issuer's responsibility" to answer the deficiencies. SEC Ex. 80.

55. Denied. SEC's cited source does not support its assertion. SEC Exhibit 15 p. 8 is Spartan's cover letter, dated Nov. 22, 2013, which predated the December deficiency letter. Spartan Responded to the deficiency letter by saying the "issuer has made" a series of "representations" that were responsive, and provided a spreadsheet based on information provided by the issuer. **Ex. 7**, ¶ 5.

56. Denied. SEC has misrepresented Exhibit 81. The exhibit is an email from Mr. Zajonc forwarding Spartan's due diligence intake forms to Rose so that they could be signed by the issuer. The issuer responded with completed forms and a signed Form 211 listing agreement, including numerous certifications and a notarized affidavit, all signed by David Mullins, Sole Officer and Director for First Xeris. **Ex. 7**, ¶ 6.

57. Admitted that the Court entered the order. The defendants consented to the order but neither admitted nor denied the factual assertions made by SEC.

58. Admitted that the Commission entered the order. The respondents neither admitted nor denied the Commission's findings.

59. Admitted in part, denied in part. SEC's Exhibits reference only Daniels's admission for Court Document and Top to Bottom.

60. Admitted in part, denied in part. SEC's Exhibits reference only Court Document.

61. Admitted. SEC's Exhibit 84 has no bearing on this assertion. The email is taken out of context and was written long after Court Document had already been quoted on a public market.

62. Defendants lack sufficient information to answer this assertion. SEC's reference to Defendants' Answer does not support its assertion. Defendants admitted only that the Commission entered a cease-and-desist order on Fan's consent. *See* ECF No. 46, ¶ 22.

63. Defendants lack sufficient information to answer this assertion.

64. Admitted in part, denied in part. Harrison signed a Form 211 agreement for Dinello and PurpleReal. Daniels signed a Form 211 agreement for Court Document, Quality Wallbeds, and Top to Bottom. **Ex. 7**, ¶ 7.

65. Admitted in part, denied in part. Mr. Eldred "was aware that Daniels and [] Harrison, through their law practice, were active in the reverse merger business" and "had consummated a number of reverse mergers prior for clients who wanted to enter the public market." **Ex. 1**, 64:2-6.

66. Admitted.

67. Admitted that the email exchange exists, which speaks for itself. Mr. Eldred explained that he was asking for Harrison's "practitioner's experience" concerning "any complications with FINRA or NASD" for "internal policies and processes that aren't always written regulations." **Ex. 1**, 55:6-56:3. His concern was related to the "performance of the company, and if it wasn't very successful," and if that would "be held against" the applicant. **Ex. 1**, 58: 8-18.

68. Admitted.

69. Admitted.

70. Admitted in part, denied in part. SEC's referenced exhibit is to a cover letter submitted to FINRA, not a Form 211 application. SEC Ex. 91, p. 8.

71. Denied. SEC's Exhibit 91 p. 8 shows that Spartan wrote that the "issuer has represented" certain facts concerning future arrangements. This was based, in part, on affidavits provided by the

issuers. *See* **Ex. 1**, 123:3-124:9; **Ex. 13**, 67:11-68:12; **Ex. 3**, ¶¶ 13-14. The relevant affidavits were also attached to the cover letter and sent with the application. SEC Ex. 91 p. 9.

72. Admitted in part, denied in part. Admitted that the referenced emails were sent, which speak for themselves. Denied that "Eldred was aware that Dinello … was for sale as a public vehicle." Mr. Eldred understood that Daniels was "active in the reverse merger business," but Dinello was not a vehicle that was for sale, instead it was an operational business. **Ex. 1**, 64:2-6, 65:3-4, 12-20, 139:2-20.

73. Admitted that the email exchange exists, which speaks for itself.

74. Admitted in part, denied in part. Admitted that the referenced emails were sent, which speak for themselves. Mr. Eldred understood the email to mean the opposite of SEC's assertions that Daniels was looking to sell Dinello—Daniels was "asking [] if I knew of any public vehicles that were for sale that he might be able to acquire." **Ex. 1**, 65:12-14.

75. Denied. SEC Exhibit 97 shows only that Dinello filed an 8-K showing that "Andy Fan was appointed President of the company as of October 7, 2011." This does not support the assertion that Mr. Eldred was "aware" the company had been "sold" to Fan.

76. Admitted in part denied in part. The referenced emails were sent, which speak for themselves. After Fan acquired Dinello, he changed its business model to bring Chinese companies "to the US and list," and Mr. Eldred proposed that Fan invest in Spartan. **Ex. 1**, 98:21-99:12, 101:5-25. The proposed transaction was never executed. **Ex. 1**, 102:7-14.

77. Admitted.

78. Admitted in part denied in part. Admitted that the referenced emails were sent, which speak for themselves. Denied that "Eldred [] became aware that Daniels and Harrison were manufacturing Court/ChinAmerica, Wallbeds/Sichuan, and TTB/Ibex for Fan as public vehicles." SEC Exhibit 84 does not reference Wallbeds or TTB. The referenced email refers to a separate transaction proposed by Fan concerning an investment in Spartan, which was never executed. **Ex. 1**, 98:21-99:12, 101:5-25,

102:7-14. Mr. Eldred did not know or suspect that Harrison or Daniels intended to sell any issuer as a public vehicle *at the time* Spartan filed an application. **Ex. 1**, 35:9-36:21; 136:9-12; 147:13-148:10.

79. Admitted that the exhibits were provided by the respective issuers.

80. Denied. SEC's citations do not support its assertion. Mr. Eldred testified that his "belief [was] that we are required to conduct due diligence. Red flags that may come into our possession should be investigated, but I believe that what seems to be the enforcement staff's interpretation of what that means is far or greater than what the rule and what historical business [requires.]" **Ex. 1**, 112:9-16. This does not reference registration statements at all. Mr. Eldred also testified that Spartan staff reviewed "documents" in its "possession," such as a "registration statement," but did not have an obligation to review "a registration statement for its accuracy." **Ex. 1**, 111:10-18.

81. Admitted.

82. Admitted FINRA sent the referenced deficiency letter, which speaks for itself.

83. Admitted in part, denied in part. Spartan drafted responses to deficiency letters based on representations made by the issuers, including documents obtained prior to filing the Form 211 application. **Ex. 3**, ¶¶ 13-14. As officers or directors for each issuer, Harrison and Daniels presented all required documents for the Form 211 process on behalf of the issuer and represented the documents and information as being accurate. **Ex. 14**, Harrison Dep. 25: 21-25, 26:1-12, 44:11-45:10, 47:19-23, 92:5-8; 139:17-19, 143:3-15; **Ex. 15**, Daniels Aff. ¶¶ 3-6.

84. Admitted Spartan submitted the response, which speaks for itself. Spartan had no obligation to disclose additional information. Denied that "Eldred kn[ew] that Daniels had prepared three Forms S-1 for Fan." SEC Exhibit 84 references an email where Daniels said, "Andy has three (3) companies that he is doing registrations on including the 211 we filed on Court," but does not say who prepared the registrations or which companies this referenced.

85. Admitted.

86. Admitted in part, denied in part. Spartan forwarded information provided by the issuer concerning PurpleReal to FINRA, which indicated that the "subscriptions were paid by 5 Dogs, Inc. as gifts to those subscribers." **Ex. 1**, 155:16-22, 156:1-18, 158:14-23.

87. Denied. Spartan forwarded all statements from the issuer concerning the source of payments to FINRA. **Ex. 1**, 155:16-22, 156:1-18, 158:14-23.

88. Admitted.

89. Admitted that Mr. Lopez was Chief Compliance Officer. Mr. Lopez did not have the authority to direct Spartan's or Island's business activities, or otherwise bind the company in any way. **Ex. 13**, 17:7-8, 18:5-7, 18:24-25; **Ex. 3**, ¶ 4. Mr. Lopez could not have made the unilateral decision for Spartan to file a Form 211 application nor refuse to do so. **Ex. 3**, ¶ 12.

90. Admitted in part, denied in part. Spartan had written policies and procedures for how it processed Form 211 applications. These do not define Spartan's "responsibilities" under the rule.

91. Denied. Each Form 211 application was attested to by the principal as being solely responsible for the application. **Ex. 13**, 88:22-89:17, 93:5-10, 131:13-17; 163:13-20. Mr. Lopez did not sign the Form 211 applications for any of the 19 issuers as either a principal or a registered representative of Spartan. **Ex. 13**, 16:17-17:2; **Ex. 3**, ¶ 11. Spartan's Written Supervisory Procedures (WSPs) provided that Lopez *or* a signing principal would be responsible for the application. SEC Ex. 110 p. 4.

92. Admitted in part, denied in part. Spartan considered its review of issuers to be a "limited due diligence" process. **Ex. 1**, 121:13-122:1.

93. Admitted.

94. Admitted that Spartan had relevant WSPs, which speak for themselves.

95. Admitted that Spartan had relevant WSPs, which speak for themselves.

96. Admitted that Spartan had relevant WSPs, which speak for themselves.

97. Denied. The registered representative could answer deficiency letters raising "static or very simple" deficiencies without elevating it to the registered principal. **Ex. 13**, 32:2-16; 43:19-44:12.

98. Denied. The registered representative could answer deficiency letters raising "static or very simple" deficiencies without elevating it to the registered principal. **Ex. 13**, 32:2-16; 43:19-44:12. SEC's Exhibits do not support the assertion that "Dilley and Eldred ceded all responsibility after the filing of the initial Form 211." Mr. Dilley said the registered representative would "typically" "collect the information" for a response and he would "review it briefly" and then "sign it and send it off." SEC Ex. 7, 23:17-19. Mr. Eldred said he allowed the staff to compile responses to FINRA comments, but would review any "question that was outside the norm," and that he would have "reviewed the actual Form 211 and made sure that we had the information required on the Form 211 in our possession and that [he] believed it was from a reliable source." SEC Ex. 86, Eldred Tr. at 95:4-112-20.

99. Admitted in part, denied in part. FINRA sent Spartan seven deficiency letters concerning the applications for First Independence, Top to Bottom, Envoy, Changing Tech., and First Xeris, none of which referred to "red flags." **Ex. 3**, ¶¶ 40-46. Mr. Dilley was the registered principal for each application. **Ex. 13**, 89:2-4, 89:14-17, 93:5-10, 110:3; **Ex. 3**, ¶¶ 40-46. Spartan's registered representative reviewed the deficiency letters and gathered responsive information from the issuer, including signed letters from the issuers' officers and directors, and drafted responses. **Ex. 3**, ¶¶ 40-46. Mr. Lopez reviewed Spartan's responses to the deficiency letters, as well as the supporting documents, and approved them. **Ex. 13**, 89:2-4, 89:14-17, 93:5-10, 94:2-3, 110:3; **Ex. 3**, ¶¶ 40-46.

100. Admitted in part, denied in part as set out in responsive paragraph 99.

101. Admitted in part, denied in part as set out in responsive paragraph 99.

102. Admitted that Island had written policies, which speak for themselves. Transfers of shares could only be initiated by a shareholder, upon receiving a signed stock certificate or certificate with a signed stock power with a medallion guarantee. **Ex. 3**, ¶¶ 55, 56.

103. Admitted Island had written policies, which speak for themselves. Island's policies did not prohibit communication with an issuer's representatives. **Ex. 7**, ¶ 8.

104. Admitted in part as stated in paragraph 103.

105. Admitted in part, denied in part. Rose testified that he was sent certificates by Island after a transaction had been completed. SEC Ex. 5, Rose Tr. 107:8-13. Island only processed transfers at the direction of the shareholders themselves, as evinced by medallion guaranteed signatures, subscription agreements, and proof of payments. **Ex. 3**, ¶ 55.

106. Admitted that Island had written policies, which speak for themselves.

107. Admitted that Island did not produce lists of insiders or control persons.

108. Denied. SEC has flatly misstated Anna Kotlova's testimony. Kotlova testified that an affiliate was normally "an insider of the company, which held over 15 percent of the stock in the company," but could also be "[a]nybody that's connected to the control person," including "children, wives … immediate relatives," as well as officers, even those who did not own shares. SEC Ex. 115, Kotlova Tr. 56:10-25, 57:3-24.

109. Denied as set out in responsive paragraph 108.

110. Admitted.

111. Admitted in part. Transfer agents have no obligation to recognize "potential red flags involving unregistered distributions."

ARGUMENT

"The moving party bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259 (11th Cir. 2004) (citation omitted). The court must view all evidence and draw all reasonable inferences in the light most favorable to the defendants. *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1296 (11th Cir. 2002).

I. SEC HAS FAILED TO ESTABLISH ANY VIOLATION OF § 5

To establish a prima facie case for a violation of § 5, "SEC must demonstrate that (1) the defendant directly or indirectly sold or offered to sell securities; (2) through the use of interstate [] communication []; (3) when no registration statement was in effect." *SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004). Section 5 does not include aiding and abetting liability, but it does encompass a "participant" theory. *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir. 2013). Under this theory, "[t]o demonstrate that a defendant sold securities, SEC must prove that the defendant was a necessary participant or substantial factor in the illicit sale." *Calvo*, 378 F.3d at 1215 (citation omitted).

A. SEC Has Not Alleged Any Unregistered Sales

SEC's request for summary judgment fails right out of the gate because it has not established there were *any* unregistered sales. Instead, it has skipped ahead to its argument that the defendants were "necessary participants and substantial factors," without even bothering to articulate *what* transfers are issue. *See* MSJ at 31. It is SEC's burden to prove a prima facie case. This Court should thus deny SEC's motion on this basis alone. *See Calvo*, 378 F.3d at 1215.

B. Every Sale Island Processed Was Registered or Exempt

The best guess anyone has about SEC's theory is its cryptic citation to Paragraphs 9, 15, and 34-40 of its statement of facts, and its statement that "the control people … resold the securities in offerings without the separate registration statements for that [sic] separate transactions." *See* MSJ at 30. The only specific transfers that SEC cites are found in Paragraph 40, where SEC references transfers for Global and E-Waste. *See* MSJ ¶ 40. Merely citing to the existence of transactions is not the same as discharging the burden of proving they were *unregistered*.

The cited transfers were both registered and exempt. Even if SEC meets its initial burden, a defendant can still show the transaction involved a registered or exempt security. *SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998). A registration statement permits an issuer to make "the offers and sales

described in the registration statement." *Id.* Once a registration statement is filed and declared effective, "misstatements in a registration statement" do not "serve to invalidate that statement ab initio." *SEC v. Husain*, No. 16-cv-03250, 2017 WL 810269, at *5 (C.D. Cal. Mar. 1, 2017).

Every transfer in this case involved a valid registration statement. Lopez Aff. ¶¶ 55-56. Every *initial* transfer outlined in the registration statement was lawful. *See Husain*, 2017 WL 810269, at *5.

All secondary offerings that Island processed were also exempt. Section 4(a)(1) exempts "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(a)(1). An "underwriter" is "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security... ." 15 U.S.C. § 77b(a)(11).

Whether a party's "receipt of the unregistered shares was made 'with a view to' distribution focuses on their investment intent at the time of acquisition." *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 807 (11th Cir. 2015). "Because it is difficult to discern a party's intent at the time of purchase with respect to downstream sales of unregistered shares, courts … have typically focused on the amount of time a security holder holds on to shares prior to reselling them." *Id.* (citation omitted). "Courts have generally agreed that a two-year holding period is sufficient to negate the inference that the security holder did not acquire the securities with a 'view to distribute.'" *Id.*

Separately, courts examine "whether the resale was made 'for an issuer in connection with a distribution'" and the "the best objective evidence of whether a sale is 'for an issuer' is whether the shares have come to rest." *Ackerberg v. Johnson*, 892 F.2d 1328, 1336 (8th Cir. 1989). A court should ask "whether the resale involved a public offering," with a "public offering" being "defined not in qualitative terms, but in terms of whether the offerees are in need of the protection which the Securities Act affords through registration." *Id.* at 1337. If the offerees "have access to" information that would typically be found in a registration statement, then there is "no public offering, and thus no distribution. Absent a distribution, [a person] cannot be an underwriter within § 4[a](1)." *Id.*

Undisputed evidence of which this Court may take judicial notice[3] proves that the challenged transfers were not a part of a distribution. First, the purchasers of E-Waste's control shares have held the shares they acquired in the alleged unregistered transfers for the past 7 years—much longer than the two-year limit that ordinarily dispels any finding of intent to distribute. *See Big Apple*, 783 F.3d at 807. Island processed transfers for a minority position of the company prior to 2013. Defendants' Counter Statement of Material Facts ("CSF") ¶ 40. According to E-Waste's annual 10-K filing, GEM Global Yield Fund LLC SCS purchased a control position of the company on January 14, 2013.[4] As of E-Waste's June 2020 10-K filing, the control shares had not been sold, and "no active trading market ha[d] been established."[5]

Next, for both E-Waste and Global, the shares "came to rest" with sophisticated institutional investors who had access to all the relevant information necessary to protect themselves, meaning they were exempt under § 4(a)(1). *See Ackerberg*, 892 F.2d at 1336, 1337. GEM Global Yield Fund LLC SCS acquired a majority position of Global on February 27, 2013.[6] Island issued the relevant transfer documents for these transfers. CSF ¶ 40. As mentioned, that same entity also acquired a majority stake in E-Waste. But as an institutional investor, GEM Global Yield Fund LLC SCS is not the type of entity that needs the protections of the disclosure requirements. Moreover, both issuers *had effective registration statements*, which serve the purpose of providing sufficient disclosures to obviate the need for investor protection. *See Ackerberg*, 892 F.2d at 1337.

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[3] Information concerning the issuers has been taken from public filings made with the SEC. Courts often take judicial notice of these documents under Federal Rule of Evidence 201 because "they are matters of public record not subject to reasonable dispute." *Hastey on behalf of YRC Worldwide, Inc.* v. *Welch*, 19-cv-2266, ---F.3d ----, 2020 WL 1503494, at *3 (D. Kan. Mar. 30, 2020) (collecting cases); *accord Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

[4] The 2014 10-K filing is available at https://www.sec.gov/Archives/edgar/data/1543066/000116169713000388/form_10-k.htm.

[5]The 2020 10-K filing is available at https://www.sec.gov/Archives/edgar/data/1543066/000116169720000242/form_10-k.htm.

[6] Global filed an 8-K describing the transfers, which is available at https://www.sec.gov/Archives/edgar/data/1537917/000116169713000203/form_8-k.htm.

To be sure, when a selling shareholder is an "affiliate" at the time of the sale, he is considered an "issuer" for purposes of § 4. *See Cavanagh*, 155 F.3d at 134 ("A control person, such as an officer, director, or controlling shareholder, is an affiliate of an issuer and is treated as an issuer when there is a distribution of securities."). But to the extent that the transfers involved affiliates, they were exempt under § 4(a)(2), 15 U.S.C. § 77d(a)(2), which provides an exemption for "transactions *by an issuer* not involving any public offering." (emphasis added). Registration was designed to "protect investors by promoting full disclosure of information ... necessary to [make] informed investment decisions." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953). Thus, an offering made to parties who have "access to the kind of information which registration would disclose" and, therefore, can "fend for themselves," is a private offering exempt from the registration requirements. *Id.* at 127, 125.

In *Doran v. Petroleum Management Corp.*, 545 F.2d 893, 900 (5th Cir. 1977), the Old Fifth Circuit[7] said that § 4(a)(2) often turned on whether an offeree had been "furnished registration information directly" or was in a position "to obtain the information registration would provide." *Id.* at 903. "Stated otherwise, the ultimate test is did the offerees know or have a realistic opportunity to learn facts essential to an investment judgment." *Mary S. Krech Tr. v. Lakes Apartments*, 642 F.2d 98, 103 (5th Cir. 1981). When sophisticated investors have been given information akin to registration statements, the exemption applies. *See Weprin v. Peterson*, 736 F. Supp. 1124, 1128-29 (N.D. Ga. 1988).[8]

As mentioned, the shares in both E-Waste and Global were acquired by GEM Global Yield Fund LLC SCS, which was a sophisticated institutional investor. Moreover, both issuers had effective registration statements that fully disclosed relevant information about the issuer and its finances. *See*

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[7] Courts in the Eleventh Circuit are bound by precedential decisions of the Old Fifth Circuit. *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000).

[8] Regulation D provides a "safe harbor" from registration in addition to § 4(a)(2). *Id.* at 1130. But failure to meet the safe harbor provision in Regulation D does not mean the statutory exemption does not apply. *Id.*; *see also* 17 C.F.R. § 230.500(c) ("Attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption."); *Krech*, 642 F.2d at 102 ("[A] failure to satisfy all conditions of the Rule does not raise the presumption that the offering cannot be exempt.").

CSF ¶ 41. This Court need not search to see if the transferees had a "realistic opportunity to learn facts essential to an investment judgment"—they had all the information required for registered offerings. *See Krech*, 642 F.2d at 103. The exemption in § 4(a)(2) therefore applies.

SEC's oblique suggestion that Mirman and Rose's fraudulent statements in the registration statements concerning undisclosed control persons somehow made these sales non-exempt sales "in bulk from affiliates," is not supported by the law. *See* MSJ at 31, 33. If the shares were truly from affiliates, then they would be considered the same as issuers, and thus subject to the § 4(a)(2) exemption. *See Cavanagh*, 155 F.3d at 134. As discussed, the disputed transfers were from the shareholders who SEC claims were affiliates to sophisticated institutional investors who had access to full disclosures concerning the issuers in effective registration statements, and were thus exempt. Fraud in registration statements does not void registration. *See Husain*, 2017 WL 810269, at *5. SEC has thus failed in its threshold burden and its motion should be denied.[9]

C. None of the Defendants Were Necessary Participants or Substantial Factors in Any Sale of Securities

Ignoring its burden, SEC devotes its argument to claiming that the defendants "were necessary participants and substantial factors" in unregistered sales "of the Mirman/Rose Companies." MSJ at 31. But to get there, SEC disregards the most relevant precedent, and cobbles together a theory of liability that has been rejected by every court to consider it. Indeed, SEC rests its belief on purported "legal requirements" the Commission has explicitly recognized do not currently exist.

The only court of appeals to have considered the issue has held that merely acting as a transfer agent does not make a defendant a "substantial participant" under the statute. *CMKM Diamonds*, 729

[9] Even if SEC's failure to specify which transfers were at issue could be forgiven, every transfer relevant to the issuers in the complaint was properly registered or exempt. As argued in Defendants' motion for summary judgment, the transfers were either pursuant to an effective registration statement or under a relevant exemption. Defs. Mot. for Summ J., ECF No. 102 at 45. Every secondary offering was made to a party that could access the disclosure information in the effective registration statements. *See* Lopez Aff. ¶¶ 55-56. Thus, the offerings made to parties who have "access to the kind of information which registration would disclose" were exempt from the registration requirements under either § 4(a)(1) or (2). *See Ralston Purina Co.*, 346 U.S. at 124, 125, 127; *Ackerberg*, 892 F.2d at 1337.

F.3d at 1258.[10] A court must ask whether the transfer agent did more to effect the sale, such as whether it "participated heavily in the offerings," "devised the corporate financing scheme for the issuer," "prepared and reviewed offering memoranda," "met personally with broker-dealers, investors and their representatives," or "spoke at broker-dealer sales seminars." *Id.* at 1257-58. (citations omitted). Without "clear evidence that [a defendant] was involved in negotiations, signing documents, or engaging in anything more substantial than [an] administrative task," § 5 does not provide liability. *SEC v. Bio Def. Corp.*, 12-cv-11669, 2019 WL 7578525, at *15 (D. Mass. Sept. 6, 2019).

As argued in Defendants' motion for summary judgment, SEC cannot meet its burden. *See* ECF No. 102 at 44-45. Island did not arrange any sale of any stock, never processed transfers until after a sale had been completed by the stockholder, and never received any proceeds of any sale of stock beyond routine transfer fees. **Ex. 2**, ¶ 8, 10; **Ex. 3**, ¶ 52. Defendants acted only after they gathered evidence evincing the stockholder's ownership, a signed stock power certificate directing the transfer with a medallion guarantee stamp provided by a reputable financial institution, and stockholder's instructions. CSF ¶ 105. This was entirely consistent with industry practice, and a far cry from the conduct typically required to prove liability. **Ex. 16**, Harmon Report 1, June 16, 2020.

D. SEC's Legal Arguments Are Unsupported and Its Factual Arguments Rely on Extraordinary Distortions of the Evidence

SEC does not engage with any of the relevant law, it just pretends that *CMKM Diamonds* does not exist. *See* MSJ at 29. It argues, without any legal basis, that Spartan's and Mr. Dilley's participation in the Form 211 process constitutes the relevant involvement, and then that Mr. Dilley and Island had an affirmative obligation to investigate potentially unregistered transactions. *See* MSJ at 29-33. Both arguments fail.

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[10] This case has been followed by courts in the Eleventh Circuit. *See SEC v. PV Enterprises, Inc.*, 16-cv-20542, 2016 WL 8808697, at *4 (S.D. Fla. June 28, 2016).

With respect to Spartan's alleged conduct, SEC says, "Participation in the Form 211 process can constitute the participation necessary for Section 5 liability." MSJ at 29. SEC points to *SEC v. Farmer*, 2015 WL 5838867, *18 (S.D. Tex. Oct. 7, 2015), where a "defendant who, among other things, provided false information in Form 211 process was a 'necessary participant' liable under Section 5," and *Husain*, 2017 WL 810269, at *5-6, where "subsequent sales to shell company purchasers were not exempt from registration and supported … [a] violation of Section 5[.]" MSJ at 29.

SEC has seriously misrepresented these precedents. SEC's use of the phrase "among other things," concerning *Farmer*, is the understatement of a lifetime. There the defendant orchestrated unregistered sales from start to finish, by arranging for a broker-dealer to file Form 211 applications, providing "false or misleading" information to the broker-dealer in the process, and "sold over a million shares" of stock in the issuer, earning "over $4 million from the proceeds of his sales." 2015 WL 5838867 at *2, 18. In *Husain*, the court, *relying on CMKM Diamonds*, ruled that the defendant was a substantial participant because he "devised the [] method that produced the shells, found six of the seven shell company purchasers, and was at least partially responsible for crafting and processing the deals themselves." 2017 WL 810269 at *6. These precedents *support* the lack of liability here.

If SEC's position about the law were accurate then § 5 would allow liability for any entity involved in the Form 211 process. Presumably the FINRA examiners who cleared the applications would share this liability because, just as with Spartan, "The Mirman/Rose Companies could not have become marketable public vehicles" had they not been given "approval for the sale of the shares of these companies to the public." *See* MSJ at 31. Courts have resoundingly rejected such expansive theories of but-for liability. *See Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004) ("[N]ot everyone in the chain of intermediaries between a seller of securities and the ultimate buyer is sufficiently involved in the process to make him responsible for an unlawful distribution.") (citation omitted).

SEC's factual argument concerning the Form 211 applications is also without basis. SEC says that the "Mirman/Rose Companies could not have become marketable public vehicles without the services of Spartan and Dilley" because Spartan filed Form 211 applications "in order to obtain approval for the sale of the shares of these companies to the public." MSJ at 31. But shares *can* be sold without being cleared, and clearance does not guarantee a sale. CSF ¶ 14. SEC also says the defendants "assisted the Mirman/Rose Companies with obtaining DTC eligibility, which made the companies more valuable to shell buyers." MSJ at 32. But DTC eligibility was not required for a stock to be traded in an OTC market and Spartan did not apply for DTC eligibility for any issuer because it was not a DTC participant. CSF ¶ 25. SEC's but-for premise is simply false.

SEC also claims the defendants were intimately involved with Mirman and Rose's scheme, but, lacking factual support, it resorts to exaggerations and misstatements. SEC says the defendants were "hiding Mirman and Rose's involvement with the companies," and when asked "responded to FINRA with a lie that Mirman had referred the issuer but that Spartan 'does not have any other relationship with Al Mirman.'" MSJ at 32-33. These assertions misstate the evidence. Mirman and Rose held themselves out to be intermediaries for the issuer, and provided the defendants with documents (including notarized affidavits from the officers and signed subscription agreements with proof of payment and copies of identification) as having originated from the issuer and being genuine. CSF ¶¶ 17, 18, 22. When FINRA sent comments, the defendants forwarded them to Rose, who in turn provided signed documents and information from the issuer. CSF ¶¶ 54, 55, 56. Rose agreed that he never told "anyone at Spartan Securities that [he] and Mr. Mirman controlled the shares" of any issuer. **Ex. 8**, 63: 11-19, 64: 15-21, 65:1. Spartan then represented, truthfully, that the "issuer ha[d] made" responsive representations. CSF ¶ 55. Spartan also had no legal obligation to disclose Mirman or Rose's status as an intermediary for the issuer, and because it had no formal financial relationship with either man, all representations in the cover letter concerning them were true. CSF ¶¶ 43, 52.

SEC next resorts to simple fabrications. Citing paragraphs 27-31 and 49 of its statement of facts, SEC says, "Dilley and Spartan were aware that … Mirman and Rose were looking to sell the companies," and that "Dilley attempted to arrange a sale of the company Kids Germ for Rose shortly after the Form 211 clearance." MSJ at 33. These allegations are not just disputed—they are not supported by *any* evidence. Defendants were not "aware" that "Mirman and Rose were looking to sell the companies." On the contrary they held themselves out to be intermediaries for some of the 19 issuers but represented that all directions and communications originated with the issuer. CSF ¶ 32. Emails purportedly showing Spartan's knowledge of Rose's role show that Krokhina "d[idn't] know" if Rose was still acting as an intermediary for the company. CSF ¶ 31. Rose's request that Island serve as an escrow agent proves only that *one issuer* had been sold *after* it had been cleared for quotation, which is hardly evidence that Spartan knew that *every issuer* intended to be sold. *See* CSF ¶ 30.

SEC's allegation that Mr. Dilley "attempted to arrange a sale," based solely on an email without context or supporting testimony, is outrageous. Dilley never "attempted to arrange a sale" of any issuer. CSF ¶ 49. SEC references an email from Rose to Mr. Dilley where Rose references, without explanation, an "atty interested in [a] company." CSF ¶ 49. Mr. Dilley did not help broker a sale of Kids Germ, and the attorney was merely requesting information concerning the issuer. CSF ¶ 49.

Having struck out with its arguments concerning Spartan, SEC argues that "Island and Dilley's actions went beyond arms-length stock processing given they … ignored red flags that shell purchaser were acquiring securities in bulk from affiliates and publicly reselling those securities without satisfying … [any] exemption." MSJ at 33.

Yet again, SEC's argument is premised on a faulty view of the law. SEC relies on a single 45-year-old, out-of-circuit district court opinion, *Wassel v. Eglowsky*, 399 F. Supp. 1330, 1367-68 (D. Md. 1975), for the notion that a "transfer agent has duty to forestall illegal distribution which it knows or has reason to know is occurring." MSJ at 33. Whatever the weight of the opinion, SEC has

misrepresented the holding of that case. After finding a separate party liable for a § 5 violation, the court also considered whether other defendants were liable for "contribution" as "joint tortfeasor[s]" to the violation. *Wassel*, 399 F. Supp. at 1367. After noting that "[n]o case has been cited to or located by this Court in which a transfer agent, in the absence of other circumstances, has been found liable for violation of the federal securities laws," the court also concluded that the defendants "did not know or have reason to know that an illegal distribution was occurring or would occur," and thus there was no basis for liability under a contribution theory. *Id.* 1367-68 The absence of evidence in one case hardly establishes a rule that transfer agents have a duty to investigate every transfer.

The reason that transfer agents are *not* tasked with investigating transfers is that they have a competing legal obligation. Uniform Commercial Code § 8-401 *requires* a transfer agent to promptly register a transfer when presented with appropriate instructions. Transfer agents can also be liable under SEC regulations for failing to promptly turn around transfers. 17 C.F.R. § 240.17Ad-2. Thus, as Mark Harmon, an expert in transfer agent practice and compliance, opined, "Transfer agents do not have investigatory powers nor do the laws and regulations governing their conduct provide the framework for transfer agents to perform non-ministerial functions. To the contrary, state laws and federal regulations restrict a transfer agent's ability to examine critically the facts and circumstances underlying facially acceptable supporting documentation." **Ex. 16**, 4.

The Commission has recognized that current law does not obligate transfer agents to investigate every transfer. In a 2015 "Concept Release," the Commission explained the existing obligations for transfer agents. *Transfer Agent Regulations*, Release No. 76743, 2015 WL 9311555, at *60 (Dec. 22, 2015). The Commission recognized that it had brought § 5 violations against transfer agents "[i]n some cases" based on a "necessary participant and substantial factor" theory of primary liability, but cited *only* to *CMKM Diamonds*. *See id.* at *59, n. 395. Recognizing that existing law does not require transfer agents to investigate possible fraud, the Commission said it "intend[ed] to propose a new rule

prohibiting any registered transfer agent … from directly or indirectly taking any action to facilitate a transfer of securities if such person knows or has reason to know that an illegal distribution of securities would occur in connection with such transfer." *Id.* at *60. The Commission even asked commentators whether it should "enumerate a non-exhaustive list of 'red flags' or other specific factors which would trigger a duty of inquiry by the transfer agent." *Id.* at *62.

The Commission, however, never proposed such a rule, much less adopted one. **Ex. 11**, 220:20-22. As SEC's own proposed expert witness recognized, there would be no need to propose a rule if the Commission believed the law already imposed such an obligation. **Ex. 11**, 220:24-221:9. Thus, SEC's enforcement stance here is not supported by law.

Regardless, the purported "red flags" establish nothing. SEC cites to claimed instances where an issuer paid the expenses of another, Island allegedly gave information to Mirman and Rose, and issuers requested "attestation letters." MSJ at 33-34. The facts are very much in dispute about Mirman and Rose's involvement. SEC's allegation in Paragraph 32 is typical—rather than support its statement that "Dilley was aware that Island sent the invoices for the [] Companies to Mirman and Rose, and took payment instructions from them," the cited testimony reveals that Mr. Dilley did "not know" of any such communications, and agreed only that "perhaps" "Mr. Mirman was also involved with Neutra." CSF ¶ 32. No evidence references "payment instructions" or "invoices." CFS ¶ 32. SEC's argument proceeds from nothing. Processing transfers and issuing attestation letters was simply what a transfer agent is supposed to do when presented with valid transfer instructions. *See* CSF ¶ 105.

SEC also says that Defendants should have realized "that the sales involved securities owned and/or controlled by affiliates[.]" MSJ at 34. This argument proceeds from perhaps the most egregious example of SEC's disingenuous factual assertions. SEC says, Kotlova "mistakenly understood that someone was an affiliate only if they were a named officer or 15%+ shareholder" and that "someone with less than 15% could [n]ever be deemed an 'affiliate.'" MSJ at 34-35. SEC has flatly misstated

Kotlova's testimony. Kotlova testified that an affiliate was normally "an insider of the company, which held over 15 percent of the stock in the company," but could also be "[a]nybody that's connected to the control person," including "children, wives … immediate relatives," as well as officers, even those who did not own shares. CSF ¶ 108.

Finally, expert testimony makes summary judgment for SEC improper. *See Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996) ("As a general rule, summary judgment is inappropriate where an expert's testimony supports the non-moving party's case."). Mr. Harmon opined that Island "acted in accordance with generally accepted practices and procedures of transfer agents and in fulfillment of its legal obligations." **Ex. 16**, 1. Indeed, he concluded that "Island Stock Transfer did not have any basis for refusing to issue these Shares which had been approved for issuance by the Commission and were accompanied by documents authorizing and substantiating the issuance." **Ex. 16**, 4.

II. THERE IS NO EVIDENCE SUPPORTING ANY VIOLATION OF RULE 15C2-11

Rule 15c2-11, 17 C.F.R. § 240.15c2-11(a), provides that a broker-dealer may not "publish any quotation for a security … unless such broker or dealer has in its records" specific "documents and information." The documents include 20 enumerated items, such as prospectus information and annual reports. *Id.* at §§ (a)(1)-(5). If the broker-dealer has the required information, it complies with the rule if it "has a reasonable basis under the circumstances for believing that the paragraph (a) information is accurate in all material respects, and that the sources of the paragraph (a) information are reliable." *Id.* at § (a).

A. Defendants Complied with Rule 15c2-11

There is no doubt that Defendants gathered all required paragraph (a) information under the Rule. Spartan always gathered its standard documents prior to filing an application. *See* **Ex. 1**, 41:23-42:22, 123:3-124:21, 128:23; **Ex. 13**, 67:11-68:12; **Ex. 3**, ¶¶ 13-14. This included gathering all paragraph (a) information, including relevant public filings for each issuer. *See id.* And because each issuer was a

reporting company, Spartan was entitled to rely on all the representations in the public filings. *See Initiation or Resumption of Quotations Without Specified Info.*, SEC Release No. 29094, 1991 WL 292186, at *4 (Apr. 17, 1991) (1991 Proposed Rule) (information provided to a broker-dealer "by the issuer of the securities or its agents, including its officers and directors, attorney, or accountant" would "satisfy the Rule's requirements regarding reliability of the information's source").

SEC does not argue that Defendants were deficient in gathering information—it just insists that they lacked "a reasonable basis" for believing the information provided to them. MSJ at 37. Spartan amply cleared this hurdle. Moreover, SEC cannot show that any defendant acted with anything approaching extreme recklessness, which it must prove for aiding and abetting liability.

As a threshold, with respect to Spartan, SEC suggests that Rule 15c2-11 "do[es] not require a finding of scienter," but that is both irrelevant and misleading. *See* MSJ 36. Rule 15c2-11 has its own standard on which SEC's theory rests—a lack of a "reasonable basis" to believe the information and the reliability of its source. 17 C.F.R. § 240.15c2-11(a). The Commission has emphasized that this is a limited obligation, and one that "will not *begin* to approach the depth and breadth of an underwriter's due diligence investigation." *1991 Proposed Rule*, 1991 WL 292186, at *7 (emphasis added).

Spartan had ample reasons to trust its information. For every issuer Spartan gathered: (1) a signed Form 211 Filing Agreement; (2) a notarized Principal Officer Affidavit; (3) a signed Director and Officer Questionnaire; and (4) a Shareholder Data Spreadsheet. **Ex. 3**, ¶ 14. Spartan gathered these documents for all 19 issuers, and always from people who had represented that the information had come directly from the issuer. **Ex. 1**, 123:12-124:21, 125:6-126:10; **Ex. 3**, ¶¶ 14, 39.

With respect to the aiding and abetting count, SEC acknowledges that it must show a heightened showing of fault. MSJ at 36 (citing *SEC v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012)). This requires a showing of "severe recklessness." *Big Apple Consulting*, 783 F.3d at 800. This can be satisfied

only by a defendant's "extreme recklessness" in the face of "a danger so obvious that the actor must have been aware of it." *Howard v. SEC*, 376 F.3d 1136, 1142 (D.C. Cir. 2004) (citation omitted).

SEC hardly bothers arguing that any defendant acted with extreme indifference to obvious dangers that the information they gathered was materially incorrect. That alone warrants rejection of SEC's motion. *See Provenz*, 102 F.3d at 1489 ("Generally, scienter should *not* be resolved by summary judgment."). Spartan's gathering of extensive support above and beyond that required by the rule shows that they acted much more carefully than the industry baseline, which refutes any notion of extreme recklessness. All three men also attested that they neither knew nor suspected that any of the information provided by the issuers or their intermediaries related to the 19 issuers was materially inaccurate or misleading. **Ex. 1**, 135:20-24, 136:24; **Ex. 2**, ¶ 3; **Ex. 3**, ¶ 47.

B. SEC's Arguments Concerning Red Flags Ignore Relevant Law and Rely on Factual Distortions

Ultimately, SEC's argument boils down to its assertion that "[p]ursuant to Rule 15c2-11 Spartan and its principals were obligated to, but failed to address red flags[.]" MSJ at 37. This is wrong both legally and factually.

Of course, dispelling "red flags" is not a requirement under Rule 15c2-11, and the Commission has done nothing more than provide examples of factors a market-maker "may wish" to consider. *See* 17 C.F.R. § 240.15c2-11. This hardly imposes an additional regulatory obligation above and beyond the rule. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all … lack the force of law[.]").

Regardless, for every purported "red flag," the defendants "satisf[ied themselves] with respect to the accuracy of the information." *See 1991 Proposed Rule*, 1991 WL 292186, at *6. First, SEC devotes much of its briefing to Mr. Lopez, likely because it is aware that its case against him is nonexistent. SEC says that Mr. Lopez "did not attempt to familiarize himself with the issuers when approving Spartan's responses" and failed "to conduct any investigation or inquiry into red flags explicitly raised

by FINRA in at least 7 deficiency letters." MSJ at 38, 44. It also insists that "Lopez was Spartan's Chief Compliance Officer and the principal responsible for effectuating its extensive written policies and procedures applicable to Form 211 applications." MSJ at 44.

But SEC rushes past the fact that Mr. Lopez never signed any of the applications at issue. *See* **Ex. 13**, 16:17-17:2; **Ex. 3**, ¶ 11. Mr. Lopez did not file an application for any issuer in the Complaint, and never made any representations to anyone outside of Spartan in the Form 211 application process. **Ex. 3**, ¶ 12. SEC's misleading reliance on Spartan's policies that *either* the principal or Mr. Lopez was responsible for the Form 211 applications, is irrelevant. *See* SF ¶ 92. SEC has no basis to argue that Mr. Lopez was a "substantial factor" in any substantive violation of Rule 15c2-11.

SEC's factual allegations are also seriously misleading. SEC's assertion that Mr. Lopez failed "to conduct any investigation or inquiry into red flags," MSJ at 44, is false. Mr. Dilley was the registered representative for every application SEC now seeks to pin on Mr. Lopez. CSF ¶ 99. Moreover, Zajonc reviewed the deficiency letters and gathered responsive information from the issuer, including signed letters from the issuers' officers and directors. CSF ¶ 99. Mr. Lopez reviewed Spartan's responses to the deficiency letters, as well as the supporting documents, before approving them. CSF ¶ 99. Thus, this dispute of material facts concerning Mr. Lopez's review by itself warrants denial of SEC's motion.

Changing tack, SEC argues generally about things Spartan disclosed to FINRA in its cover letters. *See* MSJ at 32. But these arguments are also irrelevant to the alleged violation. Rule 15c2-11 requires nothing more than a broker-dealer to have information "in its records" prior to publishing a quotation. 17 C.F.R. § 240.15c2-11(a). It has no *disclosure* requirement. The Form 211 application is a distinct mechanism FINRA uses to ensure its members meet this obligation. *See* FINRA Rule 6432. But SEC is trying to enforce Rule 15c2-11, not FINRA's rules. Thus, SEC's insistence that Spartan

should have *disclosed* more information about Mirman and Rose or about the circumstances of the application is irrelevant. *See* MSJ at 32.[11]

SEC's arguments are also factually unsupported. SEC says, "Dilley knew that Mirman and Rose solicited him to file the Forms 211, and misrepresented to FINRA that it was the sole officers who had done so." MSJ at 39. The officers *did* solicit Mr. Dilley. Mirman and Rose held themselves out to be intermediaries for some issuers, but forwarded all required documents involved with the process from the issuers' officers, after representing that the *issuers* had sought listing. CSF ¶ 17. And Mr. Dilley did not affirmatively provide this information to FINRA because the Commission expects issuers to work with intermediaries. *See 1991 Proposed Rule*, 1991 WL 292186, at *4.

SEC also audaciously says "Spartan did nothing to confirm the authority of Mirman and Rose to act for the Mirman/Rose Companies … nor did it receive any documentation establishing that authority." MSJ at 38. SEC's assertion requires it to pretend that *all* of Spartan's document-gathering never occurred. Defendants gathered instructions and directions from the issuers' officers and directors, including signed Form 211 agreements, and *notarized* affidavits for every issuer. CSF ¶¶17-18. Defendants have exhaustively catalogued these thousands of pages of documents in their motion for summary judgment. *See* ECF No. 102 at 23-24.

SEC also says both Mr. Dilley and Mr. Eldred "misrepresented in the Form 211" that they had been contacted by the officers of the relevant companies. MSJ at 39, 41. But, yet again, it references cover letters, which are simply irrelevant as to whether Spartan gathered paragraph (a) information. Regardless, Mr. Dilley's normal practice was to speak directly to the issuer, and the witnesses simply did not recall whether they spoke to these specific issuers or not. CSF ¶ 21, 71.

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[11] Further, while Rule 15c2-211(b) requires the broker-dealer to have a "record of the circumstances involved in the submission of publication of such quotation," the "reasonable basis" obligation does not apply to that information. 17 C.F.R. § 240.15c2-11(b)(1). A broker-dealer only needs to "ha[ve] a reasonable basis under the circumstances for believing that *the paragraph (a) information* is accurate in all material respects, and that the sources of *the paragraph (a) information* are reliable." *Id.* at §(a) (emphasis added). Any argument about Spartan's information concerning the circumstances involved in the submission cannot proceed from the reasonable basis standard.

SEC next argues that Spartan should have been aware that the various issuers intended future reverse mergers, which, somehow, should have caused it to refuse to file a Form 211 application. *See* MSJ at 40, 42. Once Spartan published a quotation, its involvement with an issuer generally ended a short time later. **Ex. 1**, 131:21-18; **Ex. 3**, ¶ 38. More importantly, *every* issuer provided multiple attestations that at the time of the application the issuer did not intend to change control, and would instead continue with its business. **Ex. 3**, ¶ 14. Even if Spartan had known that unrelated issuers had subsequently changed control, it still had no reason to dismiss sworn attestations by new issuers.

The market conditions also provide context—at the time many issuers received multiple offers to change control the day Spartan published quotations for them. **Ex. 1**, 131:9-20. Changes in control were comon. Many of the issuers had even suggested as much in their registration statements—saying they had no present intent to change control but that they would consider opportunities should they arise. *See* **Ex. 11**, 268:11-16, 276:18-25, 277:1-19, 280:9-15, 281:1-22. Even SEC's own putative expert agreed that it would not have been surprising for one of these issuers to enter into a subsequent merger or acquisition. **Ex. 11**, 281:18-22.

In the face of these facts, SEC falsely claims "Dilley also knew … that the Mirman/Rose Companies were intended for reverse mergers[.]" MSJ at 40. But its own statement of facts hardly supports that outrageous claim. SEC presents only an email where Rose obliquely referenced an "atty interested in" Kids Germ *after* Spartan made a market in its stock. CSF ¶ 49. And Mr. Dilley did what he was obligated to do—he agreed to provide information about the shares to the attorney. CSF ¶ 49. This is hardly proof that Mr. Dilley "knew" the issuers "were intended" for sale all along.

SEC also falsely says that "Spartan [] misrepresented that there was no present or future arrangement with respect to the transfer or disposition of any of the registered shares despite Eldred being aware that Dinello/AF Ocean was for sale as a public vehicle soon after FINRA cleared its Form 211." MSJ at 41. This sentence could not possibly be true. The first half references Spartan's

representation in the Form 211 application, while the last half references what happened "after FINRA cleared its Form 211." Should Spartan have been clairvoyant? Spartan's representations at the time of filing were that the *issuer* had attested that there were no plans to change control, which was unequivocally true. *See* CSF ¶ 71. The latter allegation that Spartan was "was aware that Dinello/AF Ocean was for sale as a public vehicle" is pure fantasy. The email upon which SEC relies states the opposite—Daniels represented that he was *looking* for a shell company for sale. CSF ¶ 72.

SEC also tries to construct a false narrative that Mr. Eldred had special knowledge because he was aware "that Daniels and Harrison were taking companies public to sell as 'OTCBB vehicles.'" SMJ at 40. To be sure, Mr. Eldred was aware that, as a part of her law practice, Harrison and Daniels were selling vehicles for mergers. CSF ¶ 65. But the Commission has "recognize[d] that companies and their professional advisors often use shell companies for many legitimate corporate structuring purposes." *Use of Form S-8, Form 8-k, & Form 20-F by Shell Companies*, Release No. 1293, 2005 WL 1667452, at *2 (July 15, 2005). And reverse mergers are a lawful way for issuers to access capital from investors by going public. *See* SEC Investor Bulletin: *Reverse Mergers*, p. 1 (June 2011) *available at* https://www.sec.gov/investor/alerts/reversemergers.pdf. Furthermore, shortly after Dinello was quoted for trading, Daniels asked Mr. Eldred if he knew of any available vehicles for sale. CSF ¶ 72. This proves Mr. Eldred's understanding that this business was distinct from any Form 211 applications Spartan had filed. Mr. Eldred did not know or suspect that Harrison or Daniels intended to sell any issuer as a public vehicle *at the time* Spartan filed the applications. CSF ¶ 78.

Mr. Eldred's involvement with business combinations reinforces his understanding of their business. The SEC ominously says that he "sought guidance from Harrison regarding whether FINRA would grow suspicious if his wife 'created another public company.'" MSJ at 41. Mr. Eldred wanted Harrison's "practitioner's experience" concerning "any complications with FINRA" for "internal policies … that aren't always written regulations." CSF ¶ 67. Seeking advice is hardly blameworthy.

SEC also says that "Eldred sought to use one of the Daniels/Harrison Companies for his own purposes even while the Form 211 Eldred had signed was pending (in contravention of the purported business plan as set forth in the Form S-1.)" MSJ at 42. Yet again, SEC relies on material omissions. SEC references an email where Daniels proposed to use an issuer as a vehicle in a transaction that was never executed. CSF ¶ 78. It was never a formal agreement and the email suggests nothing more than the possibility of a transaction. The issuer's representations underlying the Form 211 application were that no discussions had then occurred, which was undoubtedly true as it predated the email. **Ex. 15**, ¶ 1, p. 7. Furthermore, page 24 of the S-1 makes the issuer's intent crystal clear—the issuer said, "If we are pursued by a larger company for a business combination … we would consider a merger … or other business combination for the purposes of continuing the business and maintaining or increasing shareholder value."[12] One can hardly fault Mr. Eldred for relying on that statement.

SEC next relies on the "similarities [] in the public filings across the issuers," particularly with respect to shareholder information, to suggest that Spartan should have investigated further. MSJ at 37, 40. But FINRA examiners noted that it was "pretty common" for small issuers to have shareholders with close relationships to the officers or directors, and it was not always a red flag to see such relationships. **Ex. 17**, Martins Dep. 36:25-16, 65:3-13; **Ex. 6**, 38:11-18. They cleared the applications despite shareholder overlap. **Ex. 3**, ¶ 45. Similarly, SEC examiners reviewed relevant Form 211 files where many of the shareholders overlapped and had apparent relationships with the issuers and where Ms. Harrison was counsel for each issuer, yet they did not consider this information to be a suggestion that Spartan had failed to find "red flags." **Ex. 18**, Dyer Dep. 50:18-22, 80:16-18; **Ex. 19**, Franceschini Dep. 40:2-46:10, 46:16-47:12, 49:7-11, 54:13-20, 51:20-52:1, 54:13-16. These purported "red flags" were unimportant to the validity of the applications.

[12] This Court can once again take judicial notice of this filing. The S-1 registration statement for Court Document is available at https://www.sec.gov/Archives/edgar/data/1543605/000117337512000041/cdsis1a2.htm.

Finally, SEC yet again resorts to a wild exaggeration that it cannot support factually. It states, "Spartan [] created a gaping hole in its review process by the fact that Dilley and Eldred … ceded all responsibility after the initial filing of the Form 211 application." MSJ at 38. SEC also falsely says that "Eldred did not review the Forms S-1 in connection with the Forms 211 – rather he believed Rule 15c2-11 required only that Spartan possess certain documents that it had received from a reliable source." MSJ at 42. But the principals personally reviewed any FINRA response "outside the norm." CSF ¶ 98. Only "static or very simple" inquiries were handled exclusively by staff. CSF ¶ 98. And Mr. Eldred ensured that Spartan gathered and reviewed S-1s even though Spartan did not have an independent obligation to review them for "accuracy." CSF ¶ 80.

SEC also faults Spartan's responses to FINRA's comments as being inadequate. Specifically, it suggests that Mr. Dilley should not have allowed an issuer's sole officer to answer a question about her relationship with another person or forward a letter "signed by" the officer to FINRA. MSJ at 39. Relatedly, SEC faults Spartan for responding to inquiries about shareholders for an issuer by providing a spreadsheet and letter created by the issuer. MSJ at 43. This is a curious position to take as Spartan lacked the information requested and went directly to the source for an appropriate answer. Spartan's responses presented the information as coming from the issuer and supplied the relevant documents. *See* CSF at ¶¶ 46, 83. What else should Spartan have done?

Last, SEC accuses Spartan of "misrepresent[ing] that the shareholders [of PurpleReal] had purchased their shares and submitted checks to the issuer." MSJ at 43-44. This accusation is based on a clear falsehood. When FINRA requested information about how the shareholders had paid for their shares, Spartan gathered statements from Harrison that she had paid for the shares through Daniels's company. CSF ¶ 87. This was forwarded to FINRA. CSF ¶ 87. Spartan never misrepresented anything.

CONCLUSION

This Court should deny SEC's motion in its entirety.

Dated: September 14, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully,

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