UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20301-CIV-LENARD/GOODMAN

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MATHIAS FRANCISCO SANDOVAL HERRERA, MARIA D. CIDRE, and JOSE ANTONIO MIRANDA GONZALEZ,

Defendants.
_____/

ORDER DENYING DEFENDANTS' JOINT MOTION TO DISMISS CLAIMS ONE, TWO, FIVE, AND SIX OF THE COMPLAINT (D.E. 25)

THIS CAUSE is before the Court on Defendants Mathias Francisco Sandoval Herrera ("Sandoval") and Maria Cidre's ("Cidre") Joint Motion to Dismiss Claims One, Two, Five, and Six of the Complaint, ("Motion," D.E. 25), filed March 27, 2017. Plaintiff, the United States Securities and Exchange Commission ("SEC"), filed a Response on April 26, 2017, ("Response," D.E. 36), to which Defendants filed a Reply on May 15, 2017, ("Reply," D.E. 42). Upon review of the Motion, Response, Reply, and the record, the Court finds as follows.

I. Background[1]

General Cable Corporation ("GCC") is a global manufacturer of copper, aluminum, and fiber optic wire and cable products headquartered in Highland Heights, Kentucky. (Compl. ¶ 19.) The "segment" of GCC that includes GCC's operations in Brazil ("GCC Brazil") is GCC's "Rest of World" segment ("ROW" or "GCC ROW"). (Id.)

During the relevant period, Defendant Sandoval was GCC ROW's Chief Executive Officer ("CEO"), Defendant Cidre was GCC ROW's Chief Financial Officer ("CFO"), and Defendant Miranda was GCC ROW's Senior Vice President for Latin America.[2] (Id. ¶¶ 1, 3-4.) Sandoval and Cidre received annual bonuses linked to GCC ROW's performance, and each was being considered for promotion. (Id. ¶¶ 15-16.)

In the fall and winter of 2011, Sandoval and Cidre felt pressure for ROW to meet its targets for operating income and other financial performance metrics for the fourth quarter of 2011. (Id. ¶ 21.) In December 2011, for example, Sandoval sent Cidre an email, stating: "We have a major issue on our hands. The IV quarter is down today by $3.0 M dollars and given the situation in Thailand [a GCC subsidiary within ROW] it can be down further $4.0 M." (Id.)

In late 2011, GCC Brazil's Controller discovered significant inconsistencies between GCC Brazil's general ledger and supporting documentation for intercompany

[1] The following facts are gleaned from the SEC's Complaint (D.E. 1) and are deemed to be true for purposes of ruling on Defendants' Motion.

[2] On March 21, 2017, the Court entered a Consent Judgment resolving the claims against Defendant Miranda. (D.E. 24.)

sales. (Id. ¶ 22.) The Controller, together with GCC Brazil's CFO, investigated the discrepancies and suspected that the value of GCC Brazil's inventory was vastly overstated due to the potential manipulation of GCC Brazil's accounting system and an inventory theft involving GCC Brazil personnel. (Id.) GCC Brazil's CFO and Controller notified Cidre of an estimated $12 million inventory shortfall. (Id. ¶¶ 22-23.)

On January 25, 2012, Cidre emailed GCC Brazil executives regarding the shortfall, noting the "potential major impact and the proximity date for the corporation to release 2011 results . . . ."[3] (Id. ¶ 23.) The email further warns of the "detrimental consequences this might have for all of us if this is certain." (Id. ¶ 23.)

On January 26, 2012, Sandoval and Cidre participated in a video conference call from Florida with Miranda and GCC Brazil's CFO, Controller, and Country Manager, who were in Brazil. (Id. ¶ 26.) The GCC Brazil CFO and Controller told Sandoval and Cidre that they had identified a $12 million accounting discrepancy and that they suspected that GCC Brazil personnel were stealing copper and creating false manual accounting entries to hide the theft. (Id.) During the call, Sandoval expressed disbelief in—and displeasure with—the findings of GCC Brazil's CFO and Controller, but agreed that the investigation should continue. (Id.) At the urging of GCC Brazil's CFO and Controller, Sandoval promised to send someone from ROW to assist them in their continuing investigation. (Id.) Sandoval refused, however, to disclose the suspected improper accounting or theft of copper to GCC executives in Kentucky, (id.), even though GCC's Code of Ethics required all associates to immediately report any improper

[3] Cidre copied Sandoval on the email. (Id. ¶ 23.)

conduct, violation of law, or regulations of the Code of Ethics, (id. ¶ 25). Sandoval further instructed the participants on the conference call to keep the matter confidential and not to make any disclosures to GCC's internal or external auditors. (Id. ¶ 26.) In fact, during the video conference call Sandoval and Cidre instructed GCC Brazil's CFO to sign and submit a sub-certification of GCC Brazil's financial statements that was due shortly thereafter, knowing that the sub-certification required the GCC Brazil CFO to certify that she did not know of any "fraud or suspected fraud" at the subsidiary.[4] (Id. ¶¶ 26, 44.)

Beginning in February 2012, GCC's internal audit department conducted an on-site inspection at GCC Brazil. (Id. ¶ 27.) Cidre directed GCC Brazil personnel, including GCC Brazil's CFO, not to disclose the improper inventory accounting and ongoing investigation into missing inventory to GCC's internal audit department, even though GCC's Code of Ethics required employees "not to take any action to . . . mislead any member of the Company's internal auditors engaged in the performance of an internal audit or investigation." (Id.)

Also during February 2012, Cidre called Miranda who had travelled to Brazil and told him to destroy all documents referencing suspected theft of copper in Brazil, even

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[4] According to the SEC's Response brief:

> Section 302 of the Sarbanes-Oxley Act of 2002 [15 U.S.C. § 7241] requires the CEO and CFO of publicly traded companies to personally certify the material accuracy of the financial statements and other items. Frequently, public companies require less senior employees to sub-certify matters within their respective authority and to provide these sub-certifications to senior management as an internal control measure.

(Resp. at 4 n.2.)

though GCC's Code of Ethics expressly provided that "[r]ecords should be retained or destroyed only in accordance with the Company's document retention policies[.]" (Id. ¶ 29.) Cidre told Miranda that Sandoval had issued the directive to destroy such documents and noted that such documents could have negative consequences for the Company. (Id.) "In response to Cidre's call, Miranda spoke to GCC Brazil's Controller and relayed Sandoval and Cidre's instruction. The Controller refused to destroy any documents, but Miranda followed Sandoval and Cidre's orders and personally destroyed emails discussing the issue." (Id. ¶ 30.) On February 13, 2012, in an email about the ongoing internal audit of GCC Brazil, GCC Brazil's Controller advised Cidre: "I just met Miranda here at Plant and he told me you requested to delete all emails regarding and/or the one that mention . . . ." (Id. ¶ 31 (ellipsis in original).) Cidre simply responded, "Don't worry . . . Thanks[.]" (Id.)

In mid-May 2012, Cidre authorized a GCC ROW Cost Accountant to travel to Brazil and assist the GCC Brazil CFO and Controller's ongoing investigation of the improper inventory accounting. (Id. ¶ 32.) In less than two weeks, the ROW Cost Accountant not only corroborated the GCC Brazil CFO and Controller's findings, but advised Cidre that the magnitude of the inventory accounting errors was much larger than initially reported and was approximately $30 million. (Id.) The GCC Brazil CFO and Controller continued their own internal investigation, independent of the work by the ROW Cost Accountant, and also concluded in May 2012 that the inventory overstatement was at least $23 million and potentially much higher. (Id. ¶ 33.) On July 10, 2012, the

ROW Cost Accountant submitted a written report to Cidre confirming that GCC Brazil's inventory had been overstated by approximately $29 million. (Id. ¶ 34.)

In late September 2012, Sandoval and Cidre met with the ROW Cost Accountant, as well as Miranda, GCC Brazil's CFO, and GCC Brazil's Controller. The ROW Cost Accountant informed them that GCC Brazil had an accounting discrepancy in the amount of approximately $40 million. (Id. ¶ 35.) Also in late September 2012, GCC Brazil's CFO informed Sandoval and Cidre that she intended to disclose the accounting overstatement to GCC's executive management and external auditors, who were preparing for the upcoming fiscal year audit. (Id. ¶ 36.)

Shortly thereafter, Sandoval and Miranda traveled to Argentina with GCC's CEO. During that trip, Sandoval alerted GCC's executive management for the first time to a multimillion dollar overstatement of inventory in GCC Brazil's accounting records. GCC's executive management immediately directed an internal investigation of the inventory issues. (Id. ¶ 37.)

According to the Complaint, "[p]ursuant to Section 302 of the Sarbanes-Oxley Act of 2002 [15 U.S.C. § 7241], GCC's CEO and CFO were required throughout the relevant period to certify the financial and other information contained in GCC's quarterly and annual reports filed with the Commission." (Id. ¶ 39.) GCC's CEO and CFO relied on information provided by Sandoval and Cidre in making their certifications to the Commission. (Id.) During this time period, both Sandoval and Cidre signed and submitted to GCC's CEO and CFO three false and misleading sub-certification letters for the quarters ended December 31, 2011, March 31, 2012, and June 30, 2012. (Id. ¶ 40.)

These sub-certifications, were provided "in connection with the financial statements and related supplemental financial data of [ROW] . . . which are included in the consolidated financial statements of General Cable Corporation." (Id.) GCC's CEO and CFO relied on these sub-certifications when certifying GCC's consolidated financial statements filed with the SEC. (Id.) Specifically:

1. On February 1, 2012, they submitted a false and misleading sub-certification that GCC used in connection with:
    a) a Form 8-K on February 8, 2012, regarding the fourth quarter of 2011; and
    b) a Form 10-K on filed on February 23, 2012, regarding fiscal year 2011;
2. On April 23, 2012, they filed a false and misleading sub-certification that GCC used in connection with:
    a) a Form 8-K on April 30, 2012, regarding the first quarter of 2012; and
    b) a Form 10-Q filed on May 4, 2012, regarding the first quarter of 2012;
3. On July 23, 2012, they filed a false and misleading sub-certification that GCC used in connection with:
    a) a Form 8-K on July 30, 2012, regarding the second quarter of 2012; and
    b) a Form 10-Q filed on August 3, 2012, regarding the second quarter of 2012.

(Id.) In all three of these sub-certifications, Sandoval and Cidre falsely certified:

> We have no knowledge of any fraud or suspected fraud affecting the GC Rest of the World business units involving (1) management, (2) employees who have significant roles in internal control over financial reporting, or (3) others where the fraud could have a material effect on the financial information.

> We have no knowledge of any allegations of fraud or suspected fraud affecting the GC Rest of the World business units in communications from employees, former employees, regulators, or others.
>
> There are no reportable conditions, including significant deficiencies and/or material weaknesses, in the design or operation of internal control that could adversely affect our ability to initiate, record, process, and report financial information.
>
> There are no violations or possible violations of laws or regulations whose effects should be considered for disclosure in the Financial Statements or as a basis for recording a loss contingency.

(Id. ¶ 41 (emphasis added).) Sandoval failed to disclose the accounting issues raised by GCC Brazil's CFO and Controller in January 2012 and later confirmed by the ROW Cost Accountant, including the millions of dollars in missing inventory and the suspected theft of copper by company employees, in any of the monthly reports Sandoval sent to GCC's executive management in 2012. (Id. ¶ 43.)

On September 25, 2012, GCC completed the sale of $600 million of 5.750% Senior Notes due 2022 in a private placement offering ("Note Offering"). The offering memorandum incorporated by reference GCC's financial statements in its 2011 Form 10-K, First Quarter 2012 Form 10-Q, and Second Quarter 2012 Form 10-Q, which contained the material misstatements and omissions discussed above. (Id. ¶ 45.)

In a March 1, 2013 Form 10-K/A, GCC restated its annual earnings from 2009 to 2011, and the first two quarters of 2012 which reflected the cumulative overstatement of GCC Brazil's inventory was more than $47 million. (Id. ¶ 51.)

On January 24, 2017, the SEC instituted this lawsuit asserting the following claims for relief against Sandoval and Cidre: **Count 1**: Violation of Section 10(b) of the

Exchange Act and Rule 10b-5 thereunder; **Count 2**: Violation of Section 17(a) of the Securities Act; **Count 3**: Violation of Section 13(b)(5) of the Exchange Act; **Count 4**: Violation of Rules 13b2-1 and 13b2-2 of the Exchange Act; **Count 5**: Aiding and abetting GCC's and each other's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; **Count 6**: Aiding and abetting GCC's and each other's violations of Section 17(a) of the Securities Act; **Count 7**: Aiding and abetting GCC's violation of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder; and **Count 8**: Aiding and abetting GCC's violations of Sections 13(b)(2)(A) & (B) of the Exchange Act.[5] (Id. ¶¶ 53-93.)

Defendants move to dismiss Counts 1, 2, 5, and 6 only pursuant to Federal Rule of Civil Procedure 12(b)(6). (See Mot. at 1.)

II. Legal Standards

To survive a Rule 12(b)(6) motion to dismiss, a claim brought under Rule 10b–5 must satisfy the federal notice pleading requirements in Federal Rule of Civil Procedure 8(a)(2) and the special fraud pleading requirements in Federal Rule of Civil Procedure 9(b). See In re Galectin Therapeutics, Inc. Secs. Litig., 843 F.3d 1257, 1269 (11th Cir. 2016).[6]

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[5] Additional claims were pled against Defendant Miranda only. (See Compl. ¶¶ 94-113.)

[6] A claim brought under Rule 10b-5(b) must also satisfy the additional pleading requirements in the Private Securities Litigation Reform Act of 1995. In re Galectin Therapeutics, Inc. Secs. Litig., 843 F.3d 1257, 1269 (11th Cir. 2016). However, the SEC has not alleged a claim under Rule 10b-5(b).

Under Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. (quoting Fed. R. Civ. P. 8(a)(2)). "The complaint must allege 'enough facts to state a claim to relief that is plausible on its face,' and the factual allegations 'must be enough to raise a right to relief above the speculative level.'" Id. (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions." Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1260 (11th Cir. 2009) (citing Iqbal, 556 U.S. 662), abrogated on other grounds by Mohamad v. Palestinian Auth., 566 U.S. 449, 453 n.2 (2012). The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting Iqbal, 556 U.S. at 679).

"In addition to the Rule 8(a)(2) requirements, Rule 9(b) requires that, for complaints alleging fraud or mistake, 'a party must state with particularity the circumstances constituting fraud or mistake,' although '[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally.'" In re Galectin Therapeutics, Inc. Secs. Litig., 843 F.3d at 1269 (quoting Fed. R. Civ. P. 9(b)); see also

Wagner v. First Horizon Pharm. Corp., 464 F.3d 1273, 1275 (11th Cir. 2006) (holding that "even securities claims without a fraud element must be pled with particularity pursuant to Federal Rule of Civil Procedure 9(b) when that nonfraud securities claim is alleged to be part of a defendant's fraudulent conduct").

III. Discussion

Defendants move to dismiss Counts 1 and 5—the claims under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5—and Counts 2 and 6—the claims under Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).[7]

Section 10(b) of the Exchange Act provides that it is

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

15 U.S.C. § 78j(b). Section 10(b)'s implementing regulation, Rule 10b-5, provides that it is

[7] Count 1 alleges "primary" violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. (Compl. ¶¶ 53-57.) Count 5 alleges that Sandoval and Cidre committed "secondary" violations of Section 10(b) and Rule 10b-5 when they aided and abetted GCC's and each other's violations of Section 10(b) and Rule 10b-5. (Compl. ¶¶ 74-78).

Count 2 alleges "primary" violations of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a). (Compl. ¶¶ 58-63.) Count 6 alleges that Sandoval and Cidre committed "secondary" violations of Section 17(a) when they aided and abetted GCC's and each other's violations of Section 17(a). (Compl. ¶¶ 79-83.)

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

17 C.F.R. § 240.10b-5. Rule 10b-5, which regulates the "purchase or sale" of securities, is similar in form and substance to Section 17(a), which regulates the "offer or sale" of securities. See SEC v. Big Apple Consulting USA, Inc., 783 F.3d 786, 795 (11th Cir. 2015) (noting that Rule 10b-5 "borrows much, though not all, of its language from § 17(a)"). The statutory codification of Section 17(a) provides:

> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> **(1)** to employ any device, scheme, or artifice to defraud, or
> **(2)** to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> **(3)** to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). In light of their similarities, "[e]ssentially the same elements are required" for claims under Section 17(a) and Rule 10b-5. SEC v. Monarch Funding

Corp., 192 F.3d 295, 308 (2d Cir. 1999). However, "no showing of scienter is required for the SEC to obtain an injunction under [Section 17](a)(2) or (a)(3)." Id.

Counts 1 and 5 allege claims for "scheme liability" under Rule 10b-5(a) and (c), as opposed to liability based on a misstatement or omission under Rule 10b-5(b). (See Compl. ¶¶ 54, 75.) Counts 2 and 6 allege claims for scheme liability under Section 17(a)(1) and (3), and misstatement/omission liability under Section 17(a)(2). (Id. ¶¶ 59, 80.)

Because claims for scheme liability under Rule 10b-5(a) and (c) and Section 17(a)(1) and (3) require "[e]ssentially the same elements,"[8] Monarch Funding, 192 F.3d at 308, the Parties address those claims together. (See Mot. at 16-17 (arguing that the claims under Section 17(a)(1) and (3) fail for the same reasons the claims for scheme liability under Rule 10b-5(a) and (c)); Resp. at 9 n.5 ("[B]ecause the purported deficiencies in the Complaint concern matters that would require similar proof under either Section 10(b) and Rule 10b-5(a) and (c) or Section 17(a)(1) and (a)(3), the SEC will address the provisions collectively herein, even though the statutory and regulatory

[8] "To state a claim based on conduct violating Rule 10b-5(a) and (c), plaintiff must allege (1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance." In re Alstom SA Sec. Litig., 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005) (citing In re Global Crossing, 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004)).

"To prove its claim under section 17(a)(1) of the Securities Act, the SEC must establish (1) the direct or indirect use of a device, scheme or artifice, to defraud; (2) with scienter; (3) in the offer or sale of a security; (4) using interstate commerce or the mail." SEC v. St. Anselm Exploration Co., 936 F. Supp. 2d 1281, 1298 (D. Colo. 2013) (citing SEC v. Coffman, Civil Case No. 06–cv–00088–REB–BNB, 2007 WL 2412808, at *10 (D.Colo. Aug. 21, 2007))

To prove a claim under section 17(a)(3), "the SEC must demonstrate that defendants (1) engaged in acts, practices, or courses of dealing which operate as a fraud or deceit; (2) in the offer or sale of securities; (3) using interstate commerce or the mails; and (4) negligence." Id. (citing Aaron v. SEC, 446 U.S. 680, 701 (1980)).

language would lead to different jury instructions and some differences in proof at trial.").

The Court will likewise address the scheme liability claims collectively. See SEC v. Wey, 246 F. Supp. 3d 894, 915-16 (S.D.N.Y. 2017) (analyzing scheme liability claims under Section 17(a)(1) and (3) and Rule 10b-5(a) and (c) together); SEC v. Wealth Strategy Partners, LC, No. 8:14–cv–02427–T–27TGW, 2015 WL 3603621, at *8 (M.D. Fla. June 5, 2015) (same). Then, the Court will separately address Defendants' arguments regarding the scope of liability under Section 17(a)(2).

a. Scheme liability

Scheme liability recognizes that "[c]onduct itself can be deceptive." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 158 (2008).

> Scheme liability occurs when a defendant employs "any device, scheme, or artifice to defraud," 17 C.F.R. § 240.10b–5(a) (Rule 10b–5(a)), or "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," 17 C.F.R. § 240.10b–5(c) (Rule 10b–5(c)). A scheme liability claim is different and separate from a nondisclosure claim. See In re DVI, Inc. Sec. Litig., 639 F.3d at 643 n. 29. Because "[c]onduct itself can be deceptive," a defendant can be liable under § 10(b) and Rule 10b–5 for deceptive conduct absent a misstatement or omission. See Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, 552 U.S. 148, 158, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008).

IBEW Local 595 Pension & Money Purchase Pension Plans v. ADT Corp., 660 F. App'x 850, 858 (11th Cir. 2016).

Defendants argue that Counts 1 and 5 "must be dismissed because they are an impermissible attempt to couch ordinary [Rule 10b-5(b)] misrepresentations and omissions as [Rule 10b-5(a) and (c)] 'scheme liability' and thereby avoid the limitations

on primary Section 10(b) (Rule 10b-5(b)) liability that the Supreme Court announced in Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011)." (Id. at 10.)

In Janus, the Supreme Court discussed Rule 10b-5(b)'s language providing that it is unlawful to "'make any untrue statement of fact' in connection with the purchase or sale of securities." Janus, 564 U.S. at 141. The Court observed that only a statement's "maker" can be liable under Rule 10b-5(b), and held that "[f]or 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. "Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." Id.

However, "'Janus does not extend to claims based on schemes to defraud under Rule 10b–5(a) and (c).'" SEC v. Big Apple Consulting USA, Inc., 783 F.3d 786, 796 (11th Cir. 2015) (emphasis added) (quoting SEC v. Garber, 959 F. Supp. 2d 374, 380 (S.D.N.Y. 2013)); see also SEC v. Monterosso, 756 F.3d 1326, 1334 (11th Cir. 2014) ("Janus only discussed what it means to 'make' a statement for purposes of Rule 10b–5(b), and did not concern section 17(a)(1) or (3) or Rule 10b–5(a) or (c)."). This is because such illegal "schemes" "do not focus on the 'making' of an untrue statement." Garber, 959 F. Supp. 2d at 380.

Nevertheless, "[c]ourts have not allowed subsections (a) and (c) of Rule 10b–5 to be used as a 'back door into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b–5.'" SEC v. Kelly, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011) (quoting In re Parlamat Sec. Litig., 376 F. Supp. 2d 472, 503

(S.D.N.Y. 2005)). Indeed, the Eleventh Circuit has stated that "[m]isleading statements and omissions only create scheme liability in conjunction with 'conduct beyond those misrepresentations or omissions.'" IBEW Local 595, 660 F. App'x at 858 (citing WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039, 1057 (9th Cir. 2011)); see also See Pub. Pension Fund Grp. v. KV Pharm. Co., 679. F.3d 972, 987 (8th Cir. 2012) ("We join the Second and Ninth Circuits in recognizing a scheme liability claim must be based on conduct beyond misrepresentations or omissions actionable under Rule 10b–5(b)."); Lentell v. Merrill Lynch & Co., 396 F.3d 161, 177 (2d Cir. 2005) ("[W]here the sole basis for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b–5(a) and (c) . . . ."). The Eleventh Circuit has further held that a complaint alleging misleading statements or omissions states a claim under Rule 10b-5(a) and (c) where the defendants "made deceptive contributions to an overall fraudulent scheme." Monterosso, 756 F.3d at 1334 (internal quotation marks omitted) (finding that the case against the defendants "did not rely on their 'making' false statements, but instead concerned their commission of deceptive acts as part of a scheme to generate fictitious revenue for GlobeTel").

Defendants argue that the SEC is attempting to plead a "back door" misrepresentation/omission claim around the holding in Janus in violation of the rules announced in cases like IBEW Local 595 and WPP Luxembourg. (Mot. at 11-16.) They argue that Counts 1 and 5 must be dismissed because the Complaint fails to allege that they engaged in conduct separate from misrepresentations and omissions. (Id. at 12-13.)

The same argument was made, and rejected, in Monterosso, 756 F.3d at 1334. In that case, the defendants engaged in a fraudulent scheme to generate fictitious revenue for their telecommunications company GlobeTel. Id. at 1329. The fictitious revenue accounted for approximately 58% of GlobeTel's total revenue in 2004, and approximately 87.4% of its revenue in 2005. Id. at 1331. Due to the fictitious revenue, GlobeTel's financial statements misstated the company's revenue by more than $100 million, and those misstatements were made part of the company's periodic reports, securities registration statements, and press releases. Id. at 1331-32. The SEC investigated and filed claims against the executives under Rule 10b-5 and Section 17(a). Id. at 1332. The defendants argued that, pursuant to Janus, they could not be liable under Section 10(b) and Rule 10b-5(b) because they did not "make" the misstatements included in their employer's periodic reports, securities registration statements, and press releases. Id. at 1334. The Eleventh Circuit held that Janus applied only to Rule 10b-5(b), and that the defendants were liable under, inter alia, Rule 10b–5(a) and (c) "because they made 'deceptive contributions to an overall fraudulent scheme.'" Id. That is, the SEC's case against the defendants "did not rely on their 'making' false statements, but instead concerned their commission of deceptive acts as part of a scheme to generate fictitious revenue for GlobeTel." Id.

Similarly, here, the Court finds that in the light most favorable to the SEC, the Complaint sufficiently alleges that Defendants made "deceptive contributions to an overall fraudulent scheme" beyond mere misrepresentations and omissions. Id. The Complaint alleges that Defendants submitted false sub-certifications to the individuals

responsible for issuing GCC's financial statements, (id. ¶¶ 40); knowingly failed to report the inventory accounting errors to GCC's executives, (id. ¶¶ 26); directed their subordinates at GCC Brazil to destroy documentation related to the inventory accounting errors, (id. ¶¶ 29-31); directed their subordinates not to disclose the inventory accounting issues to GCC's internal or external auditors, (id. ¶¶ 27); and instructed GCC Brazil's CFO to submit a false sub-certification, (id. ¶¶ 26, 44). This conduct goes beyond making misrepresentations and omissions by, for example, covering up the inventory theft, and directing subordinates to participate in covering up the inventory theft, by destroying documents and lying to auditors. See SEC v. Kovzan, Case No. 11-2017-JWL, 2013 U.S. Dist. LEXIS 147947, at *22-23 (D. Kan. Oct. 15, 2013) (finding that misrepresentations to auditors were deceptive acts under Rule 10b-5(a) and (c)); SEC v. Kearns, 691 F. Supp. 2d 601, 618 (D.N.J. 2010) (finding that SEC stated a claim for scheme liability under Rule 10b-5 and Section 17(a) where the defendant knew of a fraudulent billing scheme, discussed it with its chief architects, permitted the scheme to continue by implementing inadequate investigations when claims of fraud were made, and affirmatively misled auditors by assuring them that there were no allegations of fraud and no billing irregularities); SEC v. Fraser, No. CV-09-00443-PHX-GMS, 2010 U.S. Dist. LEXIS 7038, at *23-25 (D. Ariz. Jan. 28, 2010) (finding that defendant who directed a controller to conceal a financial shortfall, "knowing that his instruction would have a material effect on the company's reported earnings and financial statements," was subject to scheme liability under Rule 10b-5(a) and (c)).

The Complaint further alleges that Defendants' conduct would and did operate as a fraud or deceit upon GCC, GCC's executive management, and investors. (Id. ¶ 55.) It alleges that "GCC's CEO and CFO relied on the[] sub-certifications when certifying GCC's consolidated financial statements filed with the Commission" on Form 8Ks filed on February 8, 2012, April 30, 2012, and July 30, 2012; on a Form 10-K filed on February 23, 2012; and on From 10Qs filed on May 4, 2012 and August 3, 2012. (Id. ¶ 40). GCC's reliance on the sub-certifications resulted in GCC overstating its inventory by $47 million between 2009 and 2011. (Id. ¶ 51.)

Furthermore, the Complaint alleges that by actively concealing the inventory accounting errors and submitting false sub-certifications upon which GCC executives relied, "GCC completed the sale of $600 million of 5.750% Senior Notes due 2022 in a private placement offering." (Id. ¶ 45.) "The offering memorandum incorporated by reference GCC's financial statements in its 2011 Form 10-K, First Quarter 2012 Form 10-Q, and Second Quarter 2012 Form 10-Q, which contained the material misstatements and omissions discussed above." (Id.)

Accordingly, the Court finds that the Complaint sufficiently alleges (1) that the Defendants committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance. In re Alstom SA Sec. Litig., 406 F. Supp. 2d at 474. The claims under Rule 10b-5(a) and (c) therefore survive Defendants' Motion to Dismiss.

And, "[b]ecause claims under subsections (1) and (3) of Section 17(a) are treated the same as claims under subsections (a) and (c) of Rule 10b–5," Kelly, 817 F. Supp. 2d at 346, the SEC's claims under subsections (1) and (3) also survive dismissal.

b. Scope of liability under Section 17(a)(2)

Section 17(a)(2) makes it "unlawful for any person in the offer or sale of any securities . . . directly or indirectly . . . to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact." 15 U.S.C. § 77q(a)(2).[9] Both Parties recognize that there is disagreement among the courts as to whether, for purposes of imposing liability under Section 17(a)(2), an individual defendant must personally obtain money or property, or whether it is sufficient that the defendant obtained money or property for his employer. (Mot. at 17; Resp. at 18.)

Defendants argue that Section 17(a)(2) should impose liability only when the defendants themselves obtain the money or property. (Mot. at 17 (citing SEC v. DiMaria, 207 F. Supp. 2d 343, 358 (S.D.N.Y. 2016); SEC v. Syron, 934 F. Supp. 2d 609, 637–39 (S.D.N.Y. 2013); SEC v. Daifotis, No. C 11–00137 WHA, 2011 WL 2183314, at *10 (N.D. Cal. June 6, 2011); SEC v. Burns, Civil No. 84-0454, 1986 WL 36318, at *3-4 (S.D. Cal. Feb. 19, 1986)).). Defendants argue that the Complaint's allegations that

[9] "[T]o show that the defendants violated section 17(a)(2) . . . , the SEC need only show (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence." SEC v. Merchant Capital, LLC, 483 F.3d 747, 766 (11th Cir. 2007) (citing Aaron, 446 U.S. at 695).

The Eleventh Circuit has held that the holding in Janus does not apply to Section 17(a)(2) because it prohibits obtaining money or property "by means of any untrue statement"—as opposed to Rule 10b-5(b)'s prohibition against "mak[ing]" an untrue statement. Big Apple Consulting, 783 F.3d at 796-97. As such, "it is irrelevant for purposes of liability whether the seller uses his own false statement or one made by another individual." Id. (quoting SEC v. Tambone, 550 F.3d 106, 127 (1st Cir. 2008)).

Sandoval and Cidre received bonuses in 2012 that were tied to GCC ROW's financial performance is conclusory and not pled with particularity. (Id. at 17-18.)

The SEC argues that Section 17(a)(2) should impose liability where the defendants obtain money or property for either (1) themselves or (2) their employer. (Resp. at 16-18 (citing SEC v. Stoker, 865 F. Supp. 2d 457, 463 (S.D.N.Y. 2012); SEC v. StratoComm Corp., 2 F. Supp. 3d 240, 263 (N.D.N.Y. 2014); SEC v. Mudd, 885 F. Supp. 2d 654, 669-70 (S.D.N.Y. 2012); SEC v. Delphi Corp., No. 06–14891, 2008 WL 4539519, at *9 (E.D. Mich. Oct. 8, 2008)).) It argues that the Complaint adequately alleges that (1) both Defendants personally received bonuses as a result of their fraudulent conduct, and (2) GCC obtained money or property as a result of Defendants' fraudulent conduct when it completed the sale of $600 million Note Offering. (Resp. at 16-17 (citing Compl. ¶¶ 15-16, 45, 61.)

Stoker is one example of a case finding that a defendant may be subject to liability under Section 17(a)(2) when he obtains money or property for his employer. 865 F. Supp. 2d at 463. In that case, the court initially found that the "the statute, on its face, does not state that a defendant must obtain the funds personally or directly." Id. It found that the modifier "directly or indirectly," which precedes all three subsections of Section 17(a), suggests that a defendant need not personally obtain funds. Id. "It would be contrary to this language, and to the very purpose of Section 17(a), to allow a corporate employee who facilitated a fraud that netted his company millions of dollars to escape liability for the fraud by reading into the statute a narrowing requirement not found in the statutory language itself." Id. See also StratoComm, 2 F. Supp. 3d at 263 (finding that

the defendant was liable under Section 17(a)(2) because the defendant (1) personally obtained money in the form of a discretionary bonus, and (2) generated funds for his employer); Mudd, 885 F. Supp. 2d at 669-70 ("It is sufficient to allege either that the defendant directly 'obtained money or property for his employer while acting as its agent, or, alternatively, for the SEC to allege that [the defendant] personally obtained money indirectly from the fraud.'") (quoting Stoker, 865 F. Supp. 2d at 463); Delphi, 2008 WL 4539519, at *9 ("Section 17(a)(2) does not require that the person who makes the false or misleading statement in an offering documents need to obtain a financial benefit. Rather, it is sufficient that Kudla's actions resulted in a benefit to Delphi's efforts to raise money through its public offerings.").

Conversely, in Syron the court rejected Stoker's reasoning and found that a defendant must personally obtain money or property from the fraud. 934 F. Supp. 2d at 639-40. In that case, the court initially found that the statute is unambiguous and, therefore, there was no need for the Stoker court to resort to a "purposive analysis." Id. at 639. In this regard, the Syron court noted the Supreme Court's cautionary statement that

> generalized references to the remedial purposes of the securities laws will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit. Thus, if the language of a provision of the securities laws is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary to examine the additional considerations of policy . . . that may have influenced the lawmakers in their formulation of the statute.

Aaron v. SEC, 446 U.S. 680, 695 (1980). Next, the court rejected Stoker's statement that Section 17(a)(2) does not facially require a defendant to personally obtain money or property, finding that "the requirement of personal gain inheres in the word

'obtain.'" Id. With regard to Section 17(a)'s "direct or indirect" modifier, the court noted that a defendant can personally obtain money or property "indirectly," i.e., in a "highly roundabout manner." Id. (citing SEC v. Wolfson, 539 F.3d 1249, 1264 (10th Cir. 2008); SEC v. Glantz, No. 94 Civ. 5737 (CSH), 1995 WL 562180, at *5 (S.D.N.Y. Sept. 20, 1995)). The court concluded that it is "essential" for the defendant to personally gain money or property, "for otherwise the defendant may have fraudulently induced the victim to part with money or property, but he has not obtained that money or property himself." Id. See also SEC v. Ustain, 229 F. Supp. 3d 739, 775 (N.D. Ill. 2017) ("[T]here still must be money obtained by the defendant, not just lost by the investor or gained by the defendant's employer."); DiMaria, 207 F. Supp. 3d at 358 (adopting Syron reasoning and finding that the defendant must personally obtain money or property); Daifotis, 2011 WL 2183314, at *10 (holding "that the plain meaning of [Section 17(a)(2)] requires that the defendant himself be alleged to have obtained money or property"); Burns, 1986 WL 36318, at *3-4 (finding that "the literal language of the statute requires a finding that the Defendant, quote, 'obtain money or property,' end of quote[,]" and that there was no evidence that the defendant personally obtained money or property).

This Court agrees with the latter view. Section 17(a)(2)'s statutory provision, on its face, imposes liability upon the defendant only when he personally obtains money or property. See 15 U.S.C. § 77q(a)(2) ("It shall be unlawful for any person in the offer or sale of any securities. . . to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the

statements made, in light of the circumstances under which they were made, not misleading[.]") The Court does not interpret the phrase "directly or indirectly" to modify who may obtain the money or property, but how it is obtained. See Syron, 934 F. Supp. 2d at 639-40 ("The statute clearly creates liability where a defendant 'indirectly' obtains money or property . . . ."). Therefore, the Court finds that Defendants cannot be liable for any money or property GCC allegedly obtained in the Note Offering as a result of Defendants allegedly misleading statements and omissions.

Rather, to state a claim under Section 17(a)(2), the SEC must allege that Defendants personally obtained money or property. Ustain, 229 F. Supp. 3d at 775; Syron, 934 F. Supp. 2d at 639-40; DiMaria, 207 F. Supp. 3d at 358; Daifotis, 2011 WL 2183314, at *10; Burns, 1986 WL 36318, at *3-4. In this regard, courts have found that a complaint may state a claim under Section 17(a)(2) where it alleges that the defendant received "increased compensation" or bonuses from the employer as a result of the fraud. SEC v. Spinosa, 31 F. Supp. 3d 1371, 1379 (S.D. Fla. 2014) ("The plain meaning of 'indirectly obtaining money' may include receiving increased compensation based on the volume of business enlarged by the alleged fraudulent activity."); see also Stoker, 865 F. Supp. 2d at 463; Mudd, 885 F. Supp. 2d at 670. For example, in Mudd, the court found that the complaint stated a claim under Section 17(a)(2) because the SEC alleged that the defendants "directly or indirectly obtained money or property by means of their false statements, because each received a bonus that was tied to both [their employer's] performance and their own personal performance in attaining individual year-end goals."

885 F. Supp. 2d at 670; see also Spinosa, 31 F. Supp. 3d at 1379; Stoker, 865 F. Supp. 2d at 464.

The SEC makes almost identical allegations here. Specifically, the Complaint alleges that both Sandoval and Cidre received annual bonuses from 2009 to 2012. (Compl. ¶¶ 15-16.) The "bonus incentive structure was linked to the performance of GCC, which in turn depended in part upon the performance of ROW." (Id.)

> Sandoval and Cidre signed and submitted false and misleading sub-certifications concerning ROW's financial statements, thereby resulting in GCC filing the Forms 8-K, 10-K, and 10-Q specified in paragraph 40 above, which contained material misstatements and omissions. As a result of the material omissions and misstatements in GCC's filings, Sandoval and Cidre directly or indirectly obtained money or property in that each received a bonus as part of their 2012 compensation, which was tied in part to the financial performance of GCC and/or ROW.

(Id. ¶ 61.) Although Defendants' state of mind is not at issue in the current Motion, the Complaint further alleges that Defendants acted "knowingly, recklessly, or negligently." (Id. ¶ 62.)

Defendants argue that the allegations regarding their bonuses are conclusory, not pled with particularity, and therefore fail under Rule 9(b). (Mot. at 17-18.) They argue that "[t]he Complaint provides no actual specific allegation as to the amount of the bonus, how the bonus was calculated, whether the bonus was inflated, or whether the overstated inventory even affected the bonus." (Id.) They further argue that

> Complaint is internally inconsistent insofar as it implies that the defendants' bonus for 2012 was somehow inflated because there is no allegation that the financial performance for FY2012 – that is, the Form 10-K for 2012 – was misstated in any way. Rather, the SEC alleges that the 10-Qs for the first and second quarters of 2012, which do not determine the bonus at all, were misstated. (DE1:¶40).

(Id. at 18.)

To satisfy Rule 9(b), a securities fraud claim based on a misrepresentation or omission must set forth:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997)). "The application of Rule 9(b), however, "must not abrogate the concept of notice pleading." Id. (quoting Durham v. Bus. Mgmt. Assocs., 847 F.2d 1505, 1511 (11th Cir. 1998)).

The Complaint's allegations regarding increased compensation are similar to the allegations in Spinosa where the court found that the Rule 17(a)(2) claim was adequately pled. In that case, the complaint alleged that "Spinosa received compensation and bonuses from TD Bank and Commerce Bank based, in part, on the size and volume of accounts at branches he managed, including the Rothstein and RRA accounts." Case No. 13-62066-Civ-Marra, D.E. 5 ¶ 22 (S.D. Fla. Oct. 21, 2013).

On the other hand, the allegations in Stoker and Mudd were more specifically pled. 865 F. Supp. 2d at 462. In Stoker, the complaint alleged that "[i]n 2006, Citigroup paid Stoker a salary of $150,000 and a bonus of $1,050,000. In February 2007, Stoker negotiated a salary of $150,000 and a guaranteed bonus of $2.25 million for 2007." Id. The court concluded that in the light most favorable to the SEC, the allegations " permit

the plausible inference that Stoker's compensation increase was at least partly the fruit of his fraud." Id. at 464.

Similarly, in Mudd, the complaint alleged that the defendants received an annual bonus that was tied to (1) company performance, "measured by attaining corporate year-end goals," and (2) personal performance, "measured by attaining individual year-end goals." Case No. 1:11-cv-09202-PAC, D.E. 1 ¶ 41 (S.D.N.Y. Dec. 16, 2011). The complaint further alleged that one defendant received a $2.5 million bonus in 2006 when his employer's stock improved by more than 20%; received a $3.5 million bonus in 2007 when business in the employer's primary division grew by 5.6%; and received a $2.2 million bonus in 2008 based on his personal performance in 2007. Id. ¶ 42. The complaint further alleged that, "as a result of [the employer's] success and timely filing of the company's periodic reports," another defendant's compensation more than doubled from $617,866 in 2006 to $2.68 million in 2007, including a $1.04 million bonus. Id. ¶¶ 58, 60.

Here, although the Complaint is not as specific as those in Stoker and Mudd, the Court finds that the SEC has adequately alleged "what the defendants obtained as a consequence of the fraud[,]" Ziemba, 256 F.3d at 1202; specifically, "each received a bonus as part of their 2012 compensation, which was tied in part to the financial performance of GCC and/or ROW." (Compl. ¶ 61.) This is specific enough to put defendants on notice of the fraud alleged against them. Spinosa, 31 F. Supp. 3d at 1379; see also Ustain, 229 F. Supp. 3d at 776 ("Despite Ustian's natural request for more information, the Court finds that the SEC's allegations are sufficient to allege that when

Ustian championed the first prototype engine and its development, he positively influenced Navistar stock, which allowed him to obtain benefits from the stock when he sold it in April 2011.").

Finally, insofar as Defendants argue that the Complaint fails to state a claim regarding an alleged 2012 bonus because the Complaint does not allege misstated financial performance for that year, (Mot. at 18), the Court finds that drawing the reasonable inferences in the light most favorable to the SEC, the Complaint adequately alleges that the 2012 bonuses were based on GCC and GCC ROW's 2011 financial performance.[10]

IV. Conclusion

Accordingly, it is **ORDRED AND ADJUDGED** that:

1. Defendants' Joint Motion to Dismiss Claims One, Two, Five, and Six of the Complaint is **DENIED**; and

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[10] The SEC states in a footnote:

> Although not alleged in the Complaint, this inference is supported by the proxy statement filed by GCC on March 28, 2012, which is available on the SEC's website at https://www.sec.gov/Archives/edgar/data/886035/000119312512136519/d284873ddef14a.htm. On page 44, the filing states that "[a]wards under the [bonus plan] are determined based on a calendar year" and that 2011 bonuses "were paid in February 2012[] for each of our named executive officers," including Sandoval. The court may take judicial notice of the proxy statement. Thompson v. RelationServe Media, Inc., 610 F.3d 628, 631 n.5 (11th Cir. 2010) (citing Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1278 (11th Cir 1999)). The proxy statement is attached hereto as Exhibit A.

(Resp. at 17 n.10.) The Court finds that even without the proxy statement, a reasonable inference is that the 2012 bonuses were based on GCC Row's 2011 performance.

2. Defendants shall have fourteen days from the date of this Order to file an Answer to the SEC's Complaint.

DONE AND ORDERED in Chambers at Miami, Florida this 11th day of April, 2018.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE