UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-80496-CIV-MARRA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

DANIEL P. MCKELVEY, ALVIN S. MIRMAN, STEVEN SANDERS, SCOTT F. HUGHES, JEFFREY L. LAMSON and EDWARD G. SANDERS,

Defendants,

AU CONSULTING LL, FORTE CAPITAL PARTNERS LLC, MBN CONSULTING LLC, and ILENE P. MIRMAN,

Relief Defendants.
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ORDER

This cause is before the Court upon Defendant McKelvey and Relief Defendant Forte Capital Partners LLC's Motion to Dismiss or, in the Alternative, for More Definite Statement (DE 38) and Motion to Dismiss Complaint by Defendant Alvin S. Mirman and Relief Defendant Ilene P. Mirman (DE 39). The Court has carefully considered the Motions and is otherwise fully advised in the premises.

I. Background

A. The Parties and the Claims

On April 16, 2015, Plaintiff, the Securities and Exchange Commission, ("Plaintiff" "SEC") filed a 29-count Complaint against Defendants Daniel P. McKelvey ("McKelvey"), Alvin S. Mirman ("Mirman"), Steven Sanders ("S. Sanders"), Scott F. Hughes ("Hughes"),

Jeffrey Lamson ("Lamson") and Edward Sanders ("E. Sanders") (collectively, "Defendants") and Relief Defendants AU Consulting LLC ("AU"), Forte Capital Partners LLC ("Forte"), MBN Consulting LLC ("MBN") and Ilene P. Mirman ("I. Mirman") (collectively, "Relief Defendants"). (Compl., DE 1.)

With respect to McKelvey, Mirman and S. Sanders, the Complaint brings claims for fraud in violation of section 17(a)(1) of the Securities Act (count one); fraud in violation of section 17(a)(2) of the Securities Act (count two); fraud in violation of section 17(a)(3) of the Securities Act (count three); fraud in violation of section 10(b) and Rule 10b-5(a) of the Exchange Act (count four); fraud in violation of section 10(b) and Rule 10b-5(b) of the Exchange Act (count five); fraud in violation of section 10(b) and Rule 10b-5(c) of the Exchange Act (count six); violations of 13(b)(5) and Rule 13b2-1 of the Exchange Act (count fourteen); aiding and abetting violations of Rule 13b2-2 of the Exchange Act (count seventeen); control person violations of section 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), 13(b)(5) and 15(d) and Rules 10b-5, 12b-11, 12b-20, 13a-1, 13a-13, 13a-14, 13a-15, 13b2-1, 13b2-2, 15d-1, 15d-13, 15d-14 and 15d-15 of the Exchange Act pursuant to section 20(a) of the Exchange Act (count twenty-eight) and violations of section 20(b) of the Exchange Act (count twenty-nine).

With respect to all Defendants, the Complaint brings claims for violation of section 13(b)(5) and Rule 13b2-1 of the Exchange Act (count thirteen) and aiding and abetting violations of section 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act (count eighteen).[1] With respect to

[1] With respect to Hughes, Lamson and E. Sanders, the Complaint brings claims for aiding and abetting fraud in violation of section 17(a)(1) of the Securities Act (count seven); aiding and abetting fraud in violation of section 17(a)(2) of the Securities Act (count eight); aiding and abetting fraud in violation of section 17(a)(3) of the Securities Act (count nine); aiding and abetting fraud in violation of section 10(b) and Rule 10b-5(a) of the Exchange Act (count ten);

McKelvey, Mirman, S. Sanders, Lamson and E. Sanders, the Complaint brings a count for aiding and abetting violations of Rule 13a-15 of the Exchange Act (count twenty); aiding and abetting violations of Rule 15d-15 of the Exchange Act (count twenty-two) and aiding and abetting violations of section 13(a) and Rules 12b-11, 12-20, 13a-1, 13a-13 and 13a-14 of the Exchange Act and Rule 302 of Regulation of S-T of the Securities Act (count twenty-five). With respect to McKelveny, Mirman, S. Sanders and E. Sanders, the Complaint brings a count for aiding and abetting violations of section 15(d) and Rule 12b-11, 12b-20, 15d-13 and 15d-14 of the Exchange Act and Rule 302 of the Regulation S-T of the Securities Act (count twenty-six).[2]

Defendants McKelvey and Forte contend that the Complaint does not satisfy Rule 9(b) of the Federal Rules of Civil Procedure and the alleged misconduct took place more than five years before the filing of the action, making it barred by the statute of limitations. Mirman also argues that the claims against him are time-barred and the Complaint fails to plead fraud with particularity. In addition, Mirman also contends that facts are insufficient to show that Mirman was a "controlling person" under the applicable statute as well as to support the aiding and

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aiding and abetting fraud in violation of section 10(b) and Rule 10b-5(b) of the Exchange Act (count eleven); aiding and abetting fraud in violation of section 10(b) and Rule 10b-5(c) of the Exchange Act (count twelve); aiding and abetting violations of Rule 13b2-1 of the Exchange Act (count fifteen) and violations of Rule 13b2-2 of the Exchange Act (count sixteen). With respect to Lamson and E. Sanders, the Complaint brings a claim for a violation of Rule 13a-15 of the Exchange Act (count nineteen) and violations of Rule 13a-14 of the Exchange Act (count twenty-three). With respect to Hughes and E. Sanders, the Complaint brings a count for violations of Rule 15d-15 of the Exchange Act (count twenty-one) and violations of Rule 15d-14 of the Exchange Act (count twenty-four). With respect to Hughes only, the Complaint brings a count for aiding and abetting violations of section 15(d) and Rule 12b-11, 12b-20, 15d-13 and 15d-14 of the Exchange Act, and Rule 302 of Regulation S-T of the Securities Act (count twenty-seven).

[2] The only remaining Defendants that contest liability are McKelvey and Mirman and the only Relief Defendants that contest liability are Forte and I. Mirman.

abetting counts.

B. The Allegations of the Complaint

From January 2007 through December 2013, McKelvey, Mirman and S. Sanders (collectively, the "control persons") participated in a scheme to manufacture at least 22 undisclosed "blank check" companies as defined under Rule 419 of the Securities Act of 1933 using Hughes, Lamson and E. Sanders as sole officers for some of those entities. The control persons subsequently sold 18 of the blank check companies by reverse merger or other change-of-control transactions for approximately $6 million. (Compl. ¶ 1.) Each of the control persons recruited on behalf of the blank check company a sole officer, director, employee and majority shareholder (the "sole officer") to act in name only. S. Sanders and Mirman incorporated the blank check companies while McKelvey and Mirman prepared a variety of corporate documents, including board resolutions for the issuance of shares that were then the subject of false and misleading registration statements. These registration statements and subsequent filings with the Commission falsely depicted the blank check companies as actively pursuing business plans, when the control persons' only plan from the outset was for the companies to be sold as public vehicles. (Compl. ¶ 2.)

The control persons retained a small group of attorneys, auditors, broker-dealers and transfer agents, and through devices such as McKelvey's use of the sole officers' forged signatures and at times impersonation of the sole officers through email, controlled the communications with other professionals. The control persons kept the blank check companies current in their periodic reports, which misrepresented the purpose and governance of the blank check companies. Mirman and McKelvey collectively forged approximately 300 false officer

certifications accompanying the periodic reports. (Compl. ¶ 3.)

To make the blank check companies more attractive merger candidates, the control persons also orchestrated the filing of applications with both the Financial Industry Regulatory Authority ("FINRA") and the Depository Trust Company ("DTC"), which contained false information about the blank check companies, false legal opinions, false certifications and affidavits of the sole officers and forged notarizations. (Compl. ¶ 4.) The control persons then consummated change-of-control transactions for the blank check companies, with the use of forged signatures. The control persons split the proceeds of each sale after paying a nominal sum to some of the sole officers for their minimal time and involvement and to friends and family for acting as straw investors. The control persons controlled every step in this process, but did not disclose their control in any filings with the Commission, FINRA or DTC. (Compl. ¶ 5.) McKelvey used Relief Defendant Forte Capital and Mirman used Relief Defendant I. Mirman as conduits for the disbursements of process from the sale of the blank check companies. (Compl. ¶ 7.)

The control persons teamed up in different configurations to control and effectuate the creation, registration, and public offering of 22 separate blank check companies, and the sale of 18 of those companies. The control persons followed a basic blueprint to accomplish their goals of creating and selling the blank check companies as public companies without disclosing to the public or the SEC the true purpose of the companies or the control persons' involvement in the companies. (Compl. ¶ 24.) The control persons intended to sell the companies as "clean shells," meaning the blank check companies had no operations and no value other than their registration status with the Commission and a particular capital structure. (Compl. ¶ 25.)

S. Sanders and Mirman controlled the earliest blank check companies, while McKelvey was brought on as the sole officers of one blank check company (liquid financial) and control person of all subsequent ones. Eventually, S. Sanders and McKelvey severed ties with Mirman and controlled a number of the later blank check companies on their own. (Compl. ¶ 26.) Mirman and McKelvey handled day-to-day mechanics, including the drafting of SEC filings and FINRA applications, communicating with the various professionals hired to perform services for the companies, and addressing the bookkeeping and other financial matters. (Compl. ¶ 27.) All of the blank check companies either had a class of securities registered pursuant to section 12of the Exchange Act and were required to file or had filed reports with the SEC pursuant to section 13(a) of the Exchange Act or filed reports under section 15(d) of the Exchange Act. (Compl. ¶ 31.)

Each blank check company began with the recruitment of a sole officer.[3] (Compl. ¶ 32.) McKelvey and S. Sanders outsourced this responsibility to Lamson. (Compl. ¶ 33.) The control persons signed in the name of the entities controlled by him (and in the case of Mirman, his wife) purported consulting agreements with the sole officers. Mirman forged his wife's signatures on many of these agreements. (Compl. ¶ 35.) The consulting agreements were originally provided by Mirman. The control persons controlled the actions of the sole officers in connection with the blank check companies. (Compl. ¶ 36.)

Once the sole officer was on board, Mirman incorporated the blank check companies, all but two as Florida corporations. (Compl. ¶ 37.) Mirman prepared bylaws without the

[3] McKelvey recruited several other defendants to be the sole officers of the blank check companies. (Compl. ¶ ¶ 74, 81.)

involvement of the sole officers, minutes of organizational meetings that never took place and board resolutions that never were entered into by the sole officers in their capacities as directors or otherwise. The bylaws expressly provided shares could be issued only by resolution of the respective companies' board of directors and only upon the board's finding that the consideration received for such shares was fair and adequate. (Compl. ¶ 39.) In violation of the by-laws, Mirman (for the earlier blank check companies) and McKelvey (for the later blank check companies) prepared two separate purported board resolutions with respect to the issuance of shares. No shares were ever validly issued for the blank check companies. (Compl. ¶ 40.)

McKelvey superimposed the sample signatures of the sole officers onto a series of documents. (Compl. ¶ 43.) McKelvey created and maintained at least 11 email accounts in the names of the sole officers without their knowledge or consent. McKelvey impersonated the sole officers from these email accounts for correspondence with multiple persons and entities, including the SEC. (Compl. ¶ 44.) McKelvey and Mirman drafted the financial statements and provided supporting evidence to accountants for the blank check companies' filings with the SEC. (Compl. ¶ 45.)

The control persons prepared Form S-1 registration statements ("Forms S-1") seeking to register a public offering of the common stock of each of the blank check companies. (Compl. ¶ 46.) In the Form S-1 comment process, McKelvey and Mirman drafted and revised the responses to the SEC's comments. These responses repeatedly misrepresented to the SEC that, among other things, some of the blank check companies were not blank check companies under Rule 419 of the Securities Act. (Compl. ¶ 48.)

After the Forms S-1 became effective, the control persons set out to amass exactly 25

shareholders for the blank check companies per FINRA requirements. (Compl. ¶ 50.) The control persons solicited family and friends to invest in the blank check companies and sign a subscription agreement. (Compl. ¶ ¶ 52-53.) For the majority of the blank check companies, McKelvey forged the signatures of the sole officers as having accepted the subscription agreements on behalf of the companies. (Compl. ¶ 53.) McKelvey rejected unsolicited investments from outsiders. (Compl. ¶ 54.)

McKelvey and Mirman drafted periodic reports and submitted them for submission to the SEC. The majority of the sole officers never received, reviewed or signed any periodic report. (Compl. ¶ 57.) Instead, McKelvey and Mirman electronically forged the certifications they filed as exhibits to the periodic reports. (Compl. ¶ 58.) McKelvey and Mirman drafted the false statements collectively in over 300 periodic report certifications, applied the electronic signatures of the sole officers without their knowledge or consent and/or filed the certifications knowing the statements were false. (Compl. ¶ 60.)

McKelvey and Mirman prepared exhibits required by FINRA that falsely identified the sole officers as solicitors and friends of shareholders when in fact the sole officers had never met or even heard of shareholders. (Compl. ¶ 61.) McKelvey forged signatures of the sole officers on documents submitted with the FINRA applications as well as notary publics' signature, attestation, and license stamp on at least 21 documents submitted to FINRA. (Compl. ¶ ¶ 63-64.) McKelvey also made false submissions to the DTC, including at least on one occasion a forged attestation by a sole officer. (Compl. ¶ 65.)

The sale of the blank check companies was supported through the use of false agreements. (Compl. ¶ 66.) Securities purchase agreements and merger agreements were

executed and often forged with a series of false representations and warranties upon which the sales were expressly based. (Compl. ¶ 68.) McKelvey often forged consents, sole officers resignation letters and Forms 9-K surrounding the sale of blank check companies. (Compl. ¶ 69.)

The control persons received at least $6 million for the sale of 18 blank check companies by reverse merger or other change-of-control transactions. The control persons often instructed escrow agents to disburse their share of the sale proceeds to the Relief Defendants .(Compl. ¶ 71.)

II. Legal Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quotations and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 1950. When considering a motion

to dismiss, the Court must accept all of the plaintiff's allegations as true in determining whether a plaintiff has stated a claim for which relief could be granted. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

For allegations of fraud or mistake, the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) apply. That rule provides that "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

The Eleventh Circuit has held that:

> Rule 9(b) is satisfied if the complaint sets 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 Intern., Inc., 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1371 (11th Cir.1997)). In short, "under Rule 9(b) a plaintiff must plead the who, what, when, where, and how of the allegedly false statements." Begualg Inv. Management Inc. v. Four Seasons Hotel Ltd., No. 10-22153-CIV, 2011 WL 4434891, * 2 (S.D. Fla. 2011) (quoting Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1237 (11th Cir. 2008)).

III. Discussion

A. Particularity of Fraud Allegations

After reviewing the Complaint, the Court concludes that it must be re-pled to meet the

requirements of Rule 9(b) of the Federal Rules of Civil Procedure. While the Complaint alleges that Defendants filed numerous false and forged certifications, forms and agreements, the Complaint does not provide adequate detail with respect to the dates of these filings. Moreover, given the sheer number of companies at issue, the Complaint fails to identify the relationship between the false statements and the particular company at issue. Instead, the Complaint simply alleges a broad-based scheme that lasted the period of January 2007 through December 2013. In fact, the Complaint is devoid of specific dates connecting the conduct and misrepresentations of McKelvey and Mirman to a specific date and time. While the Court agrees with Plaintiff that there are other means to satisfy the specificity rule besides listing the date and time of the fraud,[4] given the sheer volume of forged and falsified documents alleged, it is necessary to provide a workable framework to identify the specific alleged false statements to a particular date, defendant and company. This is particularly important with respect to Mirman because the Complaint alleges, at some point, Mirman was no longer part of the scheme. (Compl. ¶ 26.) Finally, while the Court does not find the Complaint to be a shotgun pleading,[5] it does find that the brevity of each counts and the wholesale inclusion of the entire factual recitation section into each of those counts makes it difficult to determine which facts relate to which count and to which defendant.

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[4] See Durham v. Business Management Assoc., 847 F.2d 1505, 1512 (11th Cir. 1988) ("[a]llegations of date, time or place satisfy the Rule 9(b) requirement that the circumstances of the alleged fraud must be pleaded with particularity, but alternative means are also available to satisfy the rule").

[5] See SEC v. Maimi, 988 F. Supp. 2d 1343, 1354-55 (S.D. Fla. 2013) (finding the complaint is not a shotgun pleading when each count of the complaint incorporates by reference the factual allegations of the complaint).

At this point, the Court will not address the remaining arguments regarding the sufficiency of the claims pled. Instead, the Court will give Plaintiff leave to amend the Complaint to remedy the Rule 9(b) pleading deficiencies. Once remedied, the Court will be in a better to position to determine whether the claims met the substantive pleading requirements. While the Court leaves it to Plaintiff to comply with Rule 9(b), the Court requests that any amendments to the Complaint are highlighted, thus making it easier for the Court and the parties to sift through the Complaint.

B. Statute of Limitations

28 U.S.C. § 2462 provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. The "five-year clock begins to tick [ ] when a defendant's allegedly fraudulent conduct occurs." Gabelli v. S.E.C., 133 S. Ct. 1216, 1220 (2013). However, section 2462 only applies to claim for legal relief, not equitable remedies. National Parks and Conservation Ass'n v. Tennessee Valley Auth., 502 F.3d 1316, 1326 (11th Cir. 2007). Disgorgement and injunctive relief are equitable remedies. S.E.C. v. Monterosso, 756 F.3d 1326, 1337 (11th Cir. 2014) ("Disgorgement is an equitable remedy"); U.S. v. Banks, 115 F.3d 916, 919 (11th Cir. 1997) (a government action to enjoin future conduct is a claim for equitable relief not subject to section 2462).

Based on the foregoing, the only issue involving the statute of limitations would concern the SEC's civil penalty claims. Given the lack of compliance with Rule 9(b), the Court is unable to determine whether the statute of limitations bars the civil penalty claim. Thus, the Court will defer ruling on this argument at this point.

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant McKelvey and Relief Defendant Forte Capital Partners LLC's Motion to Dismiss or, in the Alternative, for More Definite Statement (DE 38) and Motion to Dismiss Complaint by Defendant Alvin S. Mirman and Relief Defendant Ilene P. Mirman (DE 39) are **GRANTED**. Plaintiff shall file its amended complaint **within 20 days of the entry of this Order**

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 9th day of November, 2015.

KENNETH A. MARRA
United States District Judge