UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **FREDERICK L. SHARP, ZHIYING YVONNE GASARCH, COURTNEY KELLN, MIKE K. VELDHUIS, PAUL SEXTON, JACKSON T. FRIESEN, WILLIAM T. KAITZ, AVTAR S. DHILLON, and GRAHAM R. TAYLOR,** **Defendants.**	**Civil Action No. 21-CV-11276 (WGY)**

PLAINTIFF'S OPPOSITION TO DEFENDANT JACKSON FRIESEN'S MOTION TO DISMISS COMPLAINT

Plaintiff Securities and Exchange Commission (the "SEC") submits this opposition to defendant Jackson Friesen's ("Friesen") motion to dismiss the complaint. *See* Dkt. Nos. 109, 110. Friesen's analysis ignores the principal scheme at the heart of this case – the coordinated conspiracy by Friesen, Veldhuis and Sexton, using the services provided by the "Sharp Group," and relying on a corrupt corporate insider, Avtar Dhillon, to control the stock of various public companies and sell that stock to unsuspecting investors while concealing their control. Friesen's constrained interpretation of the scheme as relating only to promotional campaigns he helped coordinate to generate demand for the stock he was selling misses the mark. When examined in its totality, and giving credence to its well-pled and plausible allegations, the Complaint describes a complex scheme in which Friesen acted with scienter and together with others to violate the antifraud, registration, and disclosure provisions of the federal securities laws. As set

forth further below, the SEC has stated claims for which relief can be granted and Friesen's motion should be denied.

BACKGROUND

On August 5, 2021, the SEC sued Friesen and others for engaging in a sophisticated, multiyear, multi-national attack on United States financial markets and retail investors. Dkt. No. 1 ("Complaint"). Friesen and co-defendants Mike Veldhuis and Paul Sexton teamed with defendants Frederick Sharp, Courtney Kelln, and Yvonne Gasarch (together the "Sharp Group") to run lucrative, fraudulent schemes to sell stock surreptitiously in the public markets. *See* Complaint ¶7. At various times, Friesen collaborated with other defendants—including public company insider Avtar Dhillon and stock promoter William Kaitz—to sell illegally the stock of various public companies. *Id.* ¶8.

In furtherance of the scheme, Friesen used the Sharp Group's services to conceal his conduct. Friesen used Encrypted Communications (as defined in the Complaint) and nominee shareholders to conceal the fact that he was the beneficiary of illegal stock sales. *Id.* ¶¶87, 103, 104, 135. For example, he used Encrypted Communications to discuss distributing proceeds from fraudulent stock sales and to direct trades originating from nominee shareholders. *Id.* ¶¶83, 89, 91a., 91b., 111. And, Friesen failed to disclose his beneficial ownership and register his stock sales as legally required, all in furtherance of his scheme to conceal his stock sales. *Id.* ¶¶17, 63, 75, 77, 83, 142, 167, 196. Friesen and others also coordinated secretly with Dhillon on stock promotions designed to inflate the price of the stock that Friesen secretly sold. *See id.* ¶168. As a result of his fraudulent conduct, Friesen benefited substantially from the schemes. *Id.* ¶¶89, 140, 173.

In light of the foregoing, the Complaint alleges that Friesen violated Sections 5(a), 5(c), 17(a)(1) and 17(a)(3) of the Securities Act of 1933 ("Securities Act") and Sections 10(b) and 13(d) of the Exchange Act of 1934 ("Exchange Act") and Rules 10b-5(a), 10b-5(c), and 13d-1.

PROCEDURAL POSTURE

On November 1, 2021, Friesen filed a motion to dismiss and a memorandum of law in support. *See* Dkt. Nos. 109 (Motion to Dismiss) and 110 (Memorandum of Law). Friesen essentially raises two issues, neither of which have merit. First, Friesen claims that the SEC is barred from seeking disgorgement for conduct beyond five-years from the date the Complaint was filed. Second, Friesen asserts that the SEC failed to state a claim for the securities laws violations pled in the Complaint. Friesen's motion to dismiss should be denied.

ARGUMENT

I. THE SEC'S CLAIMS ARE NOT TIME-BARRED.

Friesen contends that the SEC's claims against him are time-barred. To advance that argument, Friesen incorrectly claims that the Complaint contains allegations against him beginning in 2013 and "*no* allegations regarding Friesen after 2014." Dkt. No. 110, at 13 (emphasis in original). In actuality, the Complaint alleges that Friesen—as a member of the Veldhuis Control Group (along with Mike Veldhuis and Paul Sexton)—illegally sold stock at least through 2018, *see* Complaint ¶¶130-140, and Friesen does not dispute that the statute of limitation as to all remedies applies to conduct from *at least* August 5, 2016. Regardless of Friesen's misapprehension of the Complaint, the SEC is entitled to seek disgorgement of his ill-gotten gains derived from violations of Sections 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Rules 10b-5(a) and (c) thereunder, on and after August 5, 2011. That is because the SEC filed its Complaint on

August 5, 2021, and the SEC has express statutory authorization to seek disgorgement of ill-gotten gains derived from scienter-based charges for 10 years.

On January 1, 2021, Congress enacted Section 6501 of the National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 ("NDAA"), which amended Section 21(d) of the Exchange Act to provide a 10-year statute of limitations for disgorgement awards in SEC enforcement actions, like this one, that involve scienter-based violations. *See* 15 U.S.C. §78u(d)(8)(A)(ii). In so doing, Congress directed that these amendments "*shall apply* with respect to any action or proceeding that is pending on, *or commenced on or after*, the date of the enactment of this act." NDAA §6501(b) (emphasis added). Friesen does not dispute that (a) the claims against him include scienter-based violations; and (b) this case commenced after January 1, 2021. Instead, Friesen raises three arguments, all of which are easily dispatched.

First, Friesen contends that the SEC failed to plead that he acted with scienter and, therefore, the NDAA does not apply. This circular argument would require the Court to dismiss the SEC's Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Rule 10b-5 claims against him to then conclude that the NDAA is inapplicable. However, those claims are well-pled, as set forth below in Section II, and those claims cannot be dismissed at this stage. As to scienter in particular, the SEC alleges that Friesen (a) used Encrypted Communications, nominee accounts, and was paid in cash to conceal his involvement in the fraudulent trading scheme; (b) coordinated with a company insider, who was secretly selling stock in coordination with Friesen and others; and (c) failed to disclose his stock ownership and register his stock sales, all in furtherance of his concerted effort to sell stock secretly and illegally. *See* Complaint ¶¶1-7, 63, 75, 83-91, 104, 111, 130-140, 142-43, 167, 168.

Second, Friesen argues that the NDAA is unclear as to its retroactive effect and, therefore, cannot revive a time-barred claim for disgorgement. The NDAA unambiguously says that it "shall apply" to any case "commenced" after January 1, 2021. NDAA §6501(b). The Supreme Court has stated that such language constitutes an "explicit retroactivity command," and Friesen cites no decision describing such language as insufficient. *Landgraf v. USI Film Products*, 511 U.S. 244, 255-56 & n. 8 (1994) (stating that the language "all proceedings pending on *or commenced* after the date of enactment" amounted to "an explicit retroactivity command") (emphasis added). As the Supreme Court explained in *Bank Markazi v. Peterson*, "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases," and thus logically can direct courts to apply newly enacted legislation to cases filed after a law is passed, like this one. 136 S. Ct. 1310, 1325 (2016).

Third, Friesen argues that the NDAA violates the *ex post facto* clause. He is wrong. The Supreme Court has construed the *ex post facto* clause in Article I of the Constitution as applicable only to criminal legislation. *See Landgraf*, 511 U.S. at 266 n.19 (citing *Calder v. Bull*, 3 U.S. 386, 390-91 (1798)). There is no authority for the proposition that an SEC civil enforcement action involves criminal sanctions that would bring it under the *ex post facto* clause. Friesen's reliance on both *Landgraf* and *Lynce v. Mathis* is misplaced. *See* Dkt. No. 110, at 15. *Landgraf* does not stand for the proposition that new civil legislation violates the *ex post facto* clause. To the contrary, *Landgraf* not only reiterated the Supreme Court's long standing precedent that the *ex post facto* clause applies to criminal rather than civil legislation, but also it made clear that retrospective legislation can "serve entirely benign and legitimate purposes" and will be given effect where, as here, Congress makes its retroactive intent clear. *Landgraf*, 511 U.S. at 266-268 & n.19. *Lynce v. Mathis*, 519 U.S. 433 (1997) is unhelpful to Friesen's argument because it is a criminal case.

Faced with this precedent, Friesen urges the Court to view disgorgement as a criminal penalty. *See* Dkt. No. 110, at 15-16. One court already decided—and rejected—the precise NDAA issue raised by Friesen. *See SEC v. Kellen*, No. 20-cv-3861-RSWL-AGR, 2021 WL 4907238, *3-5 (C.D. Cal. Sept. 14, 2021). As *Kellen* described, "[t]o determine whether a law constitutes forbidden punishment or a civil remedy, the Court must look first to legislative content." *Id.*, at *3 (collecting cases). "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotations omitted). Applying this required analysis, *Kellen* concluded that the "SEC's mechanism for disgorgement—15 U.S.C. §78u(d)—evinces a clear contemplation of disgorgement as a civil remedy." *Kellen*, at *4. Indeed, several circuits have held that disgorgement is a civil remedy, not a criminal penalty. *See, e.g., United States v. Bank*, 965 F.3d 287, 296-97 (4th Cir. 2020) (concluding that disgorgement in an SEC action is not a criminal penalty); *United States v. Dyer*, 908 F.3d 995, 1002-03 (6th Cir. 2018) (same); *United States v. Melvin*, 918 F.3d 1296, 1299-1301 (11th Cir. 2017) (same); *United States v. Van Waeyenberghe*, 481 F.3d 951, 958-59 (7th Cir. 2007) (same); *United States v. Gartner*, 93 F.3d 633, 635 (9th Cir. 1996) (same).

Notwithstanding these cases—none of which Friesen cites—Friesen rests his argument on the Supreme Court's holding in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). Any reliance on *Kokesh* is misplaced. *Kokesh* only stands for the proposition that disgorgement constitutes a civil penalty under 28 U.S.C. §2462. *See id.* at 1652 n.3 ("The *sole* question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitation period." (emphasis added)). As *Kellen* notes: "*Kokesh* does not hold that disgorgement rises to the level of a criminal penalty. *See Bank*, 965 F.3d at 301 (citation

omitted) (quoting with approval the district court's observation that 'because *Kokesh* was expressly limited to the application of 28 U.S.C. § 2642, it did not . . . declare disgorgement to be a criminal punishment'); *Dyer*, 908 F.3d at 1001 (recognizing that the Supreme Court did not say [in *Kokesh*] that SEC civil disgorgement is a criminal punishment')." *Kellen*, 2021 WL 4907238, at *4, n.4.

Finally, Friesen suggests that "[t]his is a matter of first impression," implying that no court within the First Circuit has addressed the application of the NDAA, a thinly veiled effort to urge this Court to take a position contrary to *Kellen*'s sound analysis. Dkt. No. 110, at 15, n.5. However, on October 28, 2021, the Court in *SEC v. Navellier & Assoc's, Inc.*, 2021 WL 5072975, at *4 (D. Mass. Oct. 28, 2021), expressly stated that "[a]s of January 1, 2021, the statute of limitations for disgorgement applicable to disgorgement in this [pending] case has been changed to ten years."

For the reasons stated above, the SEC's disgorgement claims are not time-barred.

II. THE COMPLAINT STATES A CLAIM AGAINST FRIESEN FOR EACH ALLEGED SECURITIES LAW VIOLATION.

A. Friesen Has Not Satisfied the Legal Standard to Dismiss a Claim.

A Rule 12(b)(6) motion to dismiss a complaint for "failure to state a claim upon which relief can be granted" tests the sufficiency of the claims in the written pleading. In reviewing the sufficiency of stated claims, the Court must accept as true all well-pled facts and must draw all reasonable inferences in favor of the non-moving party. *See SEC v. Tambone*, 597 F.3d 436, 441 (1st Cir. 2010); *see also North Bridge Assocs., Inc., v. Boldt*, 274 F.3d 38, 40 (1st Cir. 2001) (the Court must "indulge every reasonable inference in favor of allowing the lawsuit to proceed"). Dismissal is appropriate only if the pleadings fail to support "a plausible entitlement to relief." *Rodriguez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007). The assessment of

plausibility within the pleadings is "context-specific . . . [requiring] the reviewing court to draw on its judicial experience and common sense." *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009).

B. The SEC Sufficiently Pled that Friesen Violated the Antifraud Provisions of the Securities Act and the Exchange Act.

Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit any person, in connection with the purchase or sale of any security, from, directly or indirectly: (a) employing any device, scheme or artifice to defraud; or (c) engaging in any act, practice, or course of business that operates as a fraud or deceit upon any person, in connection with the purchase or sale of a security. *See* 15 U.S.C. §78j(b); 17 C.F.R. §240.10b-5(a), (c). Section 17(a) of the Securities Act contains similar prohibitions in the offer or sale of any security. *See* 15 U.S.C. §77q(a).

The language of these provisions is "expansive" and they "capture a wide range of conduct." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019). *Lorenzo* defined the term "device," simply as something "devised, or formed by design," defined a scheme as a "project, plan or program of something to be done," and defined an artifice as "an artful stratagem or trick." *Id.* (internal quotations and citations omitted). The Court similarly defined "act" and "practice" broadly to include things done, actions and deeds. *See id.*

To establish violations of Section 10(b) and Section 17(a)(1), the SEC must show that defendants acted with scienter, but negligence is sufficient to establish liability under Section 17(a)(3). *See Aaron v. SEC*, 446 U.S. 680, 687 n.5, 695-97 (1980); *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002) (scienter may be established by a showing of recklessness). Direct evidence of scienter is unnecessary; rather, "proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence." *Herman & MacLean v. Huddleston*,

459 U.S. 375, 390 n.30 (1983). Further, while Friesen tries to draw distinctions between his roles in the sales of sock of Stevia/Vitality, Arch and Oncosec, as if this were a criminal indictment with one count of fraud per security, that analysis is meaningless here, where Friesen's conduct in relation to all of the securities in which he traded illegally supports the single Section 10(b) claim and the single Section 17(a) claim pled in the Complaint. Friesen's deceptive schemes as to any one of these companies' securities is sufficient to establish his violation of the law. The fact that he engaged in misconduct over and over again is relevant only to remedies and to show his scienter.

1. Friesen's Motion to Dismiss Misstates the Gravamen of the Complaint and Ignores Significant Allegations.

Friesen's motion to dismiss rests on a fundamental misunderstanding of this case, his omission of significant factual allegations in the Complaint about his conduct, and arguments that are irrelevant.

According to Friesen, "the SEC claims that Friesen engaged in a fraudulent scheme by inflating the price of securities through a marketing campaign and then selling stock at inflated prices." Dkt. No. 110, at 23. Friesen sets up a strawman argument that he is merely charged with engaging in a pump-and-dump scheme, and then he seeks to knock it down by claiming that the SEC has not sufficiently pled his involvement in false or misleading stock promotions.[1] In actuality, this case focuses on corporate control persons concealing their identities when selling the stock of penny stock companies they controlled. *See* Complaint ¶¶5, 7. By disguising their

[1] "In a typical 'pump-and-dump' scheme, insiders inflate demand for a stock by disseminating laudatory information about a company-information that is usually false. If the market reacts favorably, the insiders cash in their shares before the market readjusts and the share price collapses." *Garvey v. Akoosh*, 354 F. Supp. 2d 73, 76 n.4 (D. Mass. 2005). Only a part of the conduct alleged as part of Friesen and his co-defendants' scheme follows this pattern.

identities, Sharp Group clients like Friesen fraudulently concealed the fact that public company control persons were reselling large blocks of stock to investors. *See id.*

To be sure, in furtherance of defendants' scheme to sell stock secretly to investors, Friesen—as a member of the Veldhuis Control Group—coordinated with Kaitz to promote the securities the group sold secretly. *Id.* ¶¶8, 12, 80, 118, 120, 168. But, that aspect of the scheme is not dispositive as to whether the SEC sufficiently alleged that Friesen acted with scienter (or negligently) when he concealed his control over, and sold the stock of, Stevia First, Vitality, Arch, and other companies. Indeed, the SEC alleges that Friesen was part of the "Veldhuis *Control* Group." *Id.* ¶7 (emphasis added). Notably, Friesen's brief fails to address these allegations about Friesen's concealment of control, including allegations about Friesen's use of nominee shareholders to make it seem as if various independent shareholders were the beneficial owners of company stock, and his coordination with Dhillon, a company insider. *Id.* ¶¶2, 7, 50, 83, 91, 103, 104, 107, 111, 120, 135, 140, 167, 168, 173.

Not only does Friesen misconstrue the claims, but also he makes several emphatic assertions in support of his motion to dismiss that are demonstrably wrong. For examples:

Friesen claims that "[t]here is not a *single* factual allegation demonstrating his alleged membership in [the Veldhuis Control Group] or connecting him to any other defendant with whom 'the Veldhuis Control Group' purportedly teamed." Dkt. No. 110, at 8. Friesen is wrong. Among other examples "demonstrating [Friesen's] alleged membership in the" Veldhuis Control Group, the SEC specifically alleges that Friesen received a cut of the Stevia First/Vitality stock sale proceeds—in cash—from Veldhuis, as discussed in a quoted Encrypted Communication. *See* Complaint ¶89. And, for just two of multiple examples "connecting [Friesen] to any other defendant with whom 'the Veldhuis Control Group' purportedly teamed," the SEC specifically

alleges that Friesen communicated with Veldhuis and Sexton about (a) plans to sell the 15,750,000 shares of Stevia First/Vitality stock that Dhillon had transferred to the Sharp-Group administered nominee shareholders; and (b) whether Dhillon would "have a set of news releases to begin issuing" in connection with the sale of Arch stock. *Id.* ¶¶111, 168. Similarly, Friesen's claim that the Complaint contains "*no* facts alleging Friesen was aware of or was involved in the Veldhuis Group's alleged scheme" concerning Stevia First and Vitality, Dkt. No. 110, at 10 (emphasis in original), cannot be credited when considering the foregoing allegations.

Friesen also claims that the Complaint "does not allege *any facts* to support whether Friesen received [an Encrypted Communications device], how it was delivered, when it was delivered, and who delivered it." Dkt. No. 111, at 9 (emphasis added). To the contrary, the SEC specifically alleges that Friesen used an Encrypted Communications device to, among other things, direct trades for the Veldhuis Control Group. *See* Complaint ¶91. To the extent Friesen is laying the groundwork for a defense that he was not the person who used the Encrypted Communications device on that date, such an argument is premature. That is the purpose of discovery. Now, however, the Court must accept the SEC's allegations as true. *See Tambone*, 597 F.3d 436 at 411. Further, the precise person who delivered Friesen his Encrypted Communications device—or when and how it was delivered—has no bearing on the elements of the securities laws Friesen is charged with violating.

Making a similarly irrelevant argument, Friesen asserts that "the Complaint does not contain a single allegation that Friesen actually received any funds in connection with the alleged scheme." Dkt. No. 110, at 8. However, the Complaint alleges that Friesen was the beneficiary of fraudulent stock sales and that millions of dollars of those proceeds were allocated to him.

See Complaint ¶¶87-89, 140, 173. Consequently, it is clear that Friesen is merely setting the stage now to make an argument later about disgorgement. This argument is also premature.

These examples demonstrate that Friesen's motion to dismiss is flawed on a number of fronts. As set forth further below, the SEC has sufficiently pled each securities law violation in this case.

2. The SEC Sufficiently Pled that Friesen Engaged in a Scheme to Defraud.

The SEC pled that Friesen engaged in numerous deceptive acts in violation of Sections 17(a)(1) and (3) of the Securities Act, and Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c). *See Lorenzo*, 139 S. Ct. at 1101. The core allegation against Friesen is that he secretly sold stock to investors, and took steps to conceal those stock sales. *See e.g.*, Complaint ¶7. The numerous steps that Friesen and the other members of the Veldhuis Control Group took to conceal their control of numerous companies' stock certainly qualify as a "project, plan or program" to sell stock illegally. *See Lorenzo*, 139 S. Ct. at 1101. Notwithstanding the Complaint's claims, and ignoring *Lorenzo*'s instruction that the language defining scheme claims are to be interpreted "expansively," Friesen incorrectly asserts that "the only semblance of a fraudulent 'scheme' in the complaint that could conceivably be tied to Friesen is the alleged scheme by the Veldhuis Control Group to inflate the price of securities through a marketing campaign and to sell stock at the inflated prices." Dkt. No. 110, at 20-21. As discussed in Section II.B.1, above, this position fundamentally misconstrues the allegations in the Complaint. While aspects of Friesen's fraudulent scheme involved promoting the stock he secretly held (*see e.g.*, Complaint ¶168), the crux of the scheme is actually Friesen's coordination with others to conceal the fact that he and his partners were affiliates of public companies—including by virtue of working in concert with Dhillon—that were selling stock secretly to unwitting investors. *See*

e.g., *id.* ¶¶1-4, 7. Friesen flouted the securities laws designed to enable investors to make informed decisions when purchasing stock, particularly the laws that require company insiders to disclose their control and sale of stock. In furtherance of their scheme, Friesen, Veldhuis and Sexton functioned as a group to control the stock of over a dozen public penny stock companies (including Stevia/Vitality, Arch, and others), whose securities they sold into U.S. markets. *Id.* ¶¶7-8, 76-81, 84-91, 118-27, 130-140, 160-64, 220.

Further, Friesen *directed* trades on behalf of nominee shareholders (because it was really his stock). *Id.* ¶91; *see Lorenzo*, 139 S. Ct. at 1101 (issuing an email in furtherance of a scheme is a sufficient basis to find the defendant liable under Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c)). Friesen's use of multiple nominee shareholders to hold under five percent each of various companies' stock was another deceptive act designed to make it seem as if several, independent, shareholders were the beneficial owners when, in fact, Friesen and others secretly had a controlling interest in the companies and directed trades for those shareholders. *See* Complaint ¶¶6, 7, 10, 46-48, 50, 55, 56, 77, 84-91, 104, 107-117, 130-140, 142, 157, 166, 167. These particular allegations alone, taken as true as the Court must, meet the pleading requirement of Fed. R. Civ. P. 9(b) and support the plausible inference that Friesen violated Sections 17(a)(1) and (3) of the Securities Act, Section 10(b) of the Exchange Act, and Rules 10b-5(a) and (c). *See In re Lernout & Hauspie Sec. Litig.*, 236 F. Supp. 2d. 161, 173 (D. Mass. 2003) (Section 10(b) of the Exchange Act and Rule 10b-5 thereunder "impose primary liability on any person who substantially participates in a manipulative or deceptive scheme by directly or indirectly employing a manipulative or deceptive device (like the creation or financing of a sham entity) intended to mislead investors, even if a material misstatement by another person creates the nexus between the scheme and the securities market"); *SEC v. Bio Defense Corp.*, 2019 WL

7578525, at *21 (D. Mass. Sept. 6, 2019) (liability under Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder requires substantial participation with scienter by each defendant, but substantial participation does not necessarily require orchestration or direction of a deceptive scheme).

Similarly, at no point in time did Friesen disclose his beneficial ownership interests or register his stock sales as required by law. *See* Complaint ¶¶17, 63, 142, 143, 167, 196. This Court can deny Friesen's motion to dismiss on these well-pled allegations alone. *See United States v. Wey*, 2017 WL 237651, at *8 (S.D.N.Y. Jan. 18, 2017) (denying motion to dismiss indictment alleging violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder predicated on failure to disclose stock holdings); *cf. United States v. Bilzerian*, 926 F.2d 1285, 1299 (2d. Cir. 1991) (upholding Section 10(b) conviction based on defendant's erroneous description of the source of funds used to purchase blocks of shares); *SEC v. Brown*, 740 F. Supp. 2d 148, 172 (D.D.C. 2010) (allegations that a corporate officer failed to file required stock ownership disclosures under Section 16(a) of the Exchange Act stated claim for scheme liability under Rules 10b-5(a) and (c)). Had Friesen actually disclosed his beneficial ownership interests in Vitality or registered his sale of Stevia First/Vitality, Arch, or OncoSec stock, it would have thwarted the entire purpose of the scheme: to sell stock secretly to investors who would have no way to know who was actually behind those stock sales. As described above, the language of Rules 10b-5(a) and (c) is "expansive" and they "capture a wide range of conduct." *Lorenzo*, 139 S. Ct. at 1101. In the end, Friesen's substantial participation in the scheme was rewarded. He was the beneficiary of millions of dollars of proceeds from sales of stock he directed and sales of stock by nominee shareholders that he controlled with his partners, Veldhuis and Sexton, through the Sharp Group. *See* Complaint ¶¶87-89, 140, 173.

3. The SEC Sufficiently Pled Facts Supporting the Conclusion that Friesen Acted with Scienter.

The SEC sufficiently pled facts supporting a plausible inference that Friesen acted with scienter. "[P]roof of *scienter* is often a matter of inference from circumstantial evidence." *Huddleston*, 459 U.S. at 390 n.30; *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000) (under Fed. R. Civ. P. 9(b), plaintiffs may allege scienter by "alleging facts to show that defendants had both motive and opportunity to commit fraud" or by "alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness"); *SEC v. Alt. Green Techs, Inc.*, No. 11-cv-9056, 2012 WL 4763094, at *3 (S.D.N.Y. Sept. 24, 2012) (pleadings "are sufficient if there exists a minimal factual basis giving rise to a strong inference of fraudulent intent"); Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge and other conditions of a person's mind may be alleged generally"). Friesen, nonetheless, baldly asserts that "the alleged facts do not support *any* inference of scienter, let alone a strong one." Dkt. No. 110, at 23 (emphasis in original). Friesen ignores the following allegations:

i. Friesen, Veldhuis and Sexton organized their stock sales through the Sharp Group, which charged extensive fees to provide numerous services centered on concealing their identities (Complaint ¶¶2, 5-7, 52-54, 107, 114, 158);

ii. Friesen sold stock through nominee entities that did not name him as the beneficial owner of the stock held by those nominees (*Id.* ¶91);

iii. Friesen did not file a Schedule 13D, as required, disclosing his stock ownership (*Id.* ¶¶142-143);

iv. Friesen did not register his stock sales, as legally required (*Id.* ¶¶63, 75, 104, 167);

v. Friesen used an Encrypted Communications device to confer with others about Stevia First/Vitality and Arch (*Id.* ¶¶91, 111, 168); and

vi. Friesen was allocated cash as payments for his stock sales (*Id.* ¶¶83-89).

Each of the foregoing allegations is sufficient to give rise to a strong inference of fraudulent intent, *i.e.*, Friesen engaged in a concerted, multi-year effort to conceal his involvement in the stock sales subject to the Complaint intending to deceive investors and/or securities markets intermediaries about the true beneficial owner of those shares. *See SEC v. Lek Securities Corp.*, --- F. Supp. 3d ----, 2020 WL 1316911, at *7 (S.D.N.Y. Mar. 20, 2020) ("Defendants' scienter is also illustrated by their efforts to conceal their activity and connections to the scheme"). Friesen may offer an innocuous explanation for these acts at some later stage of the case, but the SEC's well-pled allegations suffice to demonstrate scienter at the pleadings stage. Summary judgment and trial are the proper vehicles to sort out any state of mind defenses Friesen wishes to raise. Now, the Court must take the SEC's allegations as true and apply a common sense inference: Friesen tried to conceal his conduct from investors and regulators because he was intentionally, knowingly, or recklessly selling stock illegally. *See* Complaint ¶¶232-39.

C. The SEC Sufficiently Pled that Friesen Sold Unregistered Stock in Violation of Sections 5(a) and 5(c) of the Securities Act.

Section 5(a) of the Securities Act prohibits the direct or indirect sale of securities through interstate commerce unless a registration statement has been filed and is in effect. Section 5(c) of the Securities Act prohibits the offer to sell securities through the mail or interstate commerce unless a registration statement has been filed. A *prima facie* showing of a Section 5(a) or 5(c) violation requires that: (1) no registration statement was filed or is in effect; (2) the defendant directly or indirectly offered to sell the securities; and (3) the offer or sale was made in connection with the use of interstate communications. *See SEC v. Esposito*, 260 F. Supp. 3d 79, 88 (D. Mass. 2017); *SEC v. Tropikgadget FZE*, 146 F. Supp. 3d 270, 280 (D. Mass. 2015) (citing *SEC v. Spence & Green Chemical Co.*, 612 F. 2d 896, 901-02 (5th Cir. 1980)). Section 5

violations are strict liability offenses and do not require proof of scienter. *See Esposito*, 260 F. Supp. 3d at 88-89; *SEC v. Current Fin. Servs., Inc.*, 100 F. Supp. 2d 1, 5-6 (D.D.C. 2000).

Regarding the first element, the requirement for a registration statement applies to each separate offer and sale of a security, not to the security itself; thus, "proper registration of a security at one stage does not necessarily suffice to register subsequent offers or sales of that security." *SEC v. Universal Exp., Inc.*, 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007). No registration statement existed to govern Friesen's sales of Stevia, Arch or OncoSec stock. *See* Complaint ¶¶63, 75, 77, 86, 110, 118, 167, 169, 172, 179, 187, 196, 212, 218. For the third element, Friesen's stock sales were in connection with the use of interstate communications because the sales were effectuated using interstate methods to communicate with the foreign and domestic bank and brokerage accounts through which the nominee shareholders sold via OTC Markets. *Id.* ¶¶31-33, 91.

The second element of a Section 5 violation concerns whether a defendant directly or indirectly sold the securities. *See Esposito*, 260 F. Supp. 3d at 88. Friesen's take on this element is incorrect for several reasons.

First, Friesen suggests that there is "sparse evidence espoused" in the Complaint and that he is on a "mere five communications" concerning the sale of Stevia First/Vitality, Arch, and OncoSec. Dkt. No. 110, at 25. Friesen further complains that the SEC "fails to establish" that he was a necessary and substantial participant in the fraudulent sales of stock. But, a motion to dismiss analysis does not concern the sufficiency of the evidence and the SEC need not plead all of the evidence it will present at trial in its Complaint. Rather, the only relevant inquiry at this stage is whether the SEC's allegations support "a plausible entitlement to relief." *Rodriguez-Ortiz*, 490 F.3d at 95. The SEC pled that Friesen directed, or shared in the proceeds of, the sales

of Stevia/Vitality, Arch and OncoSec stock through the Sharp Group. Complaint ¶¶91, 118, 137-38, 140, 146, 166, 173-75, 180-89, 212-13, 218-19. The SEC, therefore, plausibly alleges that Friesen was part of the group that sold stock in these companies without registering it.

Second, Friesen summarily applies the necessary participant or substantial factor test without analyzing why it needs to be applied here. *See* Dkt. No. 110 at 24-25. This test is *only* applicable to *indirect* sellers. It would be inconsistent with the purpose of Section 5 of the Securities Act if Friesen could avoid strict liability for his own unregistered sale of stock merely by using intermediaries, particularly if those intermediaries were necessary factors and substantial participants and would themselves be liable. The cases cited by Friesen prove this point. *See SEC v. Jones*, 300 F. Supp. 3d 312, 315-16 (D. Mass. 2018) (applying necessary factor and substantial participant test to investor who solicited new investors on behalf of a promoter, who was offering and selling securities); *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1257 (9th Cir. 2013) (applying necessary factor and substantial participant test to a transfer agent); *see also Zacharias v. SEC*, 569 F.3d 458, 464 (D.C. Cir. 2009) (noting that, even though the petitioners—officers of a public company and a brokerage firm representative—did not actually sell shares to the public, they could nonetheless be liable if they were necessary participants and substantial factors). Here, the SEC alleges that Friesen sold *his* stock to the public. Complaint ¶¶91, 118, 137-38, 140, 146, 166, 173-75, 180-89, 212-13, 218-19. Accordingly, the second element of the Section 5 *prima facie* case is met.

In any event, even if the Court applies the necessary participant and substantial factor test, the SEC's allegations are sufficient. With regards to Stevia First/Vitality, the SEC alleges that Friesen, among other things, directed trades. *Id.* ¶91. With regards to Arch and OncoSec, the SEC alleges that Friesen schemed with Veldhuis, Sexton, and others to allocate stock across

various nominee companies and distribute those shares to the public. *Id.* ¶¶154-159, 167-168, 173, 196-199.

For the foregoing reasons, the SEC sufficiently pled the Sections 5(a) and 5(c) claims against Friesen.

D. The SEC Sufficiently Pled that Friesen Failed to Make Required Disclosures Pursuant to Section 13(d) of the Exchange Act and Rule 13d-1 Thereunder.

Section 13(d)(1) of the Exchange Act and Rule 13d-1 together require any person who has acquired, directly or indirectly, beneficial ownership of more than 5% of a voting class of equity securities registered under Section 12 of the Exchange Act to file a statement with the SEC disclosing the identity of the beneficial owners and the purpose of the acquisition. *See* 17 C.F.R. §240.13d-1. This statement, which is called a Schedule 13D, must be filed with the SEC within ten business days after the acquisition, and is available to investors. A "beneficial owner of a security" is "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares . . . investment power which includes the power to dispose, or to direct the disposition, of such security." Rule 13d-3 [17 C.F.R. §240.13d-3]. Scienter is not required to establish a violation of Section 13(d). *See SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989).

Stevia/Vitality had a voting class of equity securities registered under Section 12 of the Exchange Act. Complaint ¶31. Between January and March 2012, the Sharp Group-administered nominee shareholders received 19,600,000 shares of Stevia First/Vitality stock, which they held on behalf of Friesen, Veldhuis and Sexton. *Id.* ¶77. At the time, those shares represented over 37% of the outstanding common stock of Vitality. *Id.* Friesen, along with his partners Veldhuis and Sexton, was empowered to dispose of those Stevia/Vitality shares. *Id.* ¶81.

Once again, however, Friesen conflates a sufficiency of the evidence challenge with the proper standard to be applied in a motion to dismiss analysis. *See* Dkt. No. 110, at 16 ("Friesen is included in *only a fraction* of the alleged communications attributed to the Veldhuis Control Group and Friesen was allegedly allocated *only a fraction* of the proceeds purportedly allocated to the whole group" (emphasis added)). Put differently, Friesen concedes that the SEC has actually alleged communications involving him and other members of the Veldhuis Control Group, evincing Friesen's participation in that group. *See* Complaint ¶¶87-89, 111, 168. Whether the SEC alleged that Friesen is on every communication—or just "a fraction"—is of no moment. Further, Friesen's acknowledgment that the Complaint alleges that he was allocated "only a fraction" of the proceeds demonstrates plausibly that Friesen shared the proceeds with Veldhuis and Sexton, as common sense would dictate how partners—or "group" members—operate. *Id.* ¶140.

Finally, Friesen's contention that the SEC's theory that Veldhuis, Sexton and Friesen functioned as a group is based on "unmitigated speculation" ignores well-pled allegations of the Complaint. *See* Dkt. No. 110, at 26. The Complaint actually pleads facts showing that Veldhuis and Sexton treated Friesen as part of a group with them. *See* Complaint ¶89 (Encrypted Communication from Veldhuis to Friesen: "u r getting 173k today. *A cut* from MDDD [] and STVF []" (emphasis added) (bracketed text omitted)); *see also id.* ¶91 (Friesen directing trades on behalf of Sharp-administered nominee entities that were holding stock for the Veldhuis Control Group); ¶140 (Friesen's allocation of significant illegal stock sale proceeds).

The SEC has thus sufficiently pled that Friesen violated Section 13(d) of the Exchange Act and Rule 13d-1 thereunder.

CONCLUSION

For the reasons set forth above, the SEC respectfully requests that the Court DENY Friesen's Motion to Dismiss.

Dated: November 15, 2021

Respectfully submitted,

SECURITIES AND EXCHANGE SEC
By its attorneys,

/s/ Eric A. Forni
Eric A. Forni (Mass Bar No. 669685)
Kathleen Burdette Shields (Mass Bar No. 637438)
SECURITIES AND EXCHANGE SEC
33 Arch St., 24th Floor
Boston, MA 02110
Phone: (617) 573-8827 (Forni direct), (617) 573-8904 (Shields direct)
Fax: (617) 573-4590 (fax)
Fornie@sec.gov; Shieldska@sec.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, a true and correct copy of the foregoing document was filed through the Court's CM/ECF system, and accordingly, the document will be sent electronically to all participants registered to receive electronic notice in this case. A copy will also be sent via first class mail and/or email to those parties who have not yet registered for notice via the Court's CM/ECF system.

/s/ Eric A. Forni
Eric A. Forni