UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MAZ PARTNERS LP,

Plaintiff,

v. **Case No: 6:19-cv-619-Orl-40LRH**

FIRST CHOICE HEALTHCARE SOLUTIONS, INC. and CHRISTIAN ROMANDETTI, SR.,

Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT:

This cause came on for consideration without oral argument on the following motions filed herein:

MOTION:	**DEFENDANT FIRST CHOICE HEALTHCARE SOLUTIONS, INC.'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW (Doc. No. 13)**
FILED:	**April 30, 2019**

THEREON it is **RECOMMENDED** that the motion be **DENIED.**

MOTION:	**DEFENDANT ROMANDETTI'S MOTION TO DISMISS (Doc. No. 28)**
FILED:	**May 22, 2019**

THEREON it is **RECOMMENDED** that the motion be **DENIED.**

I. BACKGROUND.

On March 29, 2019, Plaintiff MAZ Partners LP ("MAZ") filed a purported class action complaint against First Choice Healthcare Solutions, Inc. ("First Choice") and Christian Romandetti, Sr. (collectively, "Defendants"), alleging violations of the federal securities laws. Doc. No. 1. The allegations of the complaint relate to an alleged "classic pump and dump scheme"[1] that artificially inflated the price of First Choice's common stock, which was perpetrated by First Choice's former CEO and board chairman, Defendant Romandetti. *Id.* ¶¶ 3, 19, 78, 94. The proposed "class" consists of:

> all persons other than Defendants who purchased or otherwise acquired First Choice common stock from April 1, 2014 through November 14, 2018, both dates inclusive (the "Class Period"), seeking to recover damages caused by Defendants' violations of the federal securities laws and to pursue remedies under Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5 promulgated thereunder, against Defendants.

Id. ¶ 1. The complaint alleges that Defendants violated section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated thereunder (Count I), and it asserts a claim of derivative liability against Romandetti pursuant to section 20(a) of the Securities Exchange Act (Count II). *Id.* at 35, 38.

MAZ moved to be appointed lead plaintiff in this case pursuant to the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B). Doc. No. 29. On June 27, 2019, MAZ was appointed lead plaintiff, and the law firm of Wolf Popper, LP was appointed as lead counsel representing the purported class. Doc. No. 35. No other putative class members have joined the suit.

[1] "A pump and dump scheme involves artificially inflating the price and volume of an owned stock—by promotional or trading activity—to sell the stock at a higher price. Once the overvalued shares are dumped, the price and volume of shares plummet and unsuspecting investors lose their money." *United States v. Curshen*, 567 F. App'x 815, 816 (11th Cir. 2014) (cited as persuasive authority).

Both Defendants have moved to dismiss the complaint. Doc. Nos. 13, 28. Pursuant to the PSLRA, discovery in this matter is stayed pending the Court's ruling on the motions to dismiss. *See* 15 U.S.C. § 78u-4(b)(3)(B). Both motions to dismiss were referred to the undersigned for issuance of a Report and Recommendation, and the matter is ripe for review.[2]

II. STANDARD OF REVIEW.

A. Federal Rule of Civil Procedure 12(b)(6).

Defendants move to dismiss the complaint pursuant to Federal Rule of Civil 12(b)(6), Federal Rule of Civil Procedure 9(b), and the PSLRA. Under Rule 12(b)(6), "[t]o 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*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). A pleading must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

B. Federal Rule of Civil Procedure 9(b).

"[S]ecurities fraud claims, like other types of fraud claims, have always been subject to Fed. R. Civ. P. 9(b)'s heightened pleading requirements, which require a complaint 'to state with particularity the circumstances constituting fraud.'" *Mizzaro v. Home Depot, Inc*., 544 F.3d 1230, 1237 (11th Cir. 2008). Pursuant to Rule 9(b), a complaint alleging fraud must set forth "(1) precisely what statements were made in what documents or oral representations or what omissions

[2] Both First Choice and MAZ requested oral argument on the motion to dismiss. Doc. Nos. 13, 36. The undersigned determined that oral argument was unnecessary for issuance of this Report and Recommendation.

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." *Tello v. Dean Witter Reynolds, Inc*., 494 F.3d 956, 972 (11th Cir. 2007) (quoting *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001)). "[W]hile mere conclusory allegations of fraud will not satisfy Rule 9(b), allegations which provide a reasonable delineation of the underlying acts and transactions allegedly constituting the fraud are sufficient." *In re Sahlen & Associates, Inc. Sec. Litig.*, 773 F. Supp. 342, 352 (S.D. Fla. 1991) (citations omitted).

C. Pleading Requirements Under the PSLRA.

The PSLRA adds yet another level of pleading specificity that goes above and beyond that required by Rule 9(b). Under the PSLRA, a plaintiff must plead with particularity each statement or omission that is alleged to be misleading, the reasons why it is misleading, and the facts on which that belief is formed. 15 U.S.C. § 78u–4(b)(1)(B). The PSLRA also requires that a plaintiff "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u–4(b)(2). "Thus, in a securities fraud class action, a plaintiff can no longer plead the requisite scienter element generally, as he previously could under Rule 9(b)." *Mizzaro*, 544 F.3d at 1238. In addition, "the complaint must allege facts supporting a strong inference of scienter 'for each defendant with respect to each violation.'" *Id.* (quoting *Phillips v. Scientific–Atlanta, Inc.*, 374 F.3d 1015, 1016 (11th Cir. 2004)).

If the pleading requirements of the PSLRA are not met, the court must, on motion from any defendant, dismiss the complaint. 15 U.S.C. § 78u-4(b)(3)(A).

III. ALLEGATIONS OF THE COMPLAINT.

The allegations of the complaint, which are accepted as true for the purpose of ruling on the motions to dismiss,[3] are, in summary, as follows:

A. The Parties.

First Choice is a Florida healthcare services company focused on orthopedic care and treatment. Doc. No. 1 ¶ 2. First Choice issues common stock that trades on the over-the-counter ("OTC") market under the ticker symbol "FCHS." *Id.* ¶ 18. Romandetti is the former chair of the board of First Choice. *Id.* ¶ 19. He also served as the company's president and chief executive officer until November 2018. *Id.* As of March 23, 2018, Romandetti owned 6,931,578 shares of FCHS stock, which was 21.5% of the company's outstanding shares. *Id.* MAZ is a hedge fund that primarily invests in equities. *Id.* ¶ 17. MAZ purchased 250,859 shares of FCHS stock during the class period. *Id.*

B. The "Pump and Dump" Scheme.

MAZ alleges that beginning in September 2013, Romandetti and several co-conspirators engaged in a "classic pump and dump scheme" that artificially inflated the price of FCHS stock. *Id.* ¶¶ 3, 19, 78, 94. Romandetti worked in concert with Elite Stock Research, Inc., Mark Burnett, Jeffrey Miller, Frank Sarro, and Anthony Vassallo. *Id.* ¶ 3.[4] Starting in September 2013, the alleged conspirators acquired large blocks of FCHS shares at below market prices; many of the transfers were facilitated by Romandetti through the use of shell companies. *Id.* ¶¶ 4, 78–79. Romandetti, Burnett, Miller, and Sarro engaged Elite Stock Research, a "boiler room" company

[3] At the motion to dismiss stage, courts must assume "that all the [factual] allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted).

[4] The complaint does not allege that Burnett, Miller, Sarro, or Vasallo are affiliated with First Choice Healthcare Solutions, Inc.

operated and controlled by Vassallo, to artificially promote, or fraudulently "pump," the market price and trading volume of FCHS shares. *Id.* ¶ 4. Elite Stock Research engaged in several manipulative trading patterns to artificially drive up the price and trading volume of FCHS shares. *Id.* ¶¶ 57–58, 66–67. Elite Stock Research and Vassallo also undertook a large scale and aggressive campaign to market FCHS stock to retail investors, most of whom were elderly. *Id.* ¶¶ 56–58, 65. Elite Stock Research and Vassallo engaged in manipulative trades designed to artificially increase the trading volume and market price of FCHS common stock while their co-conspirators simultaneously sold their shares at the inflated price. *Id.* ¶ 5. The "pump and dump" scheme generated more than $3.3 million in profits for the co-conspirators, which included $560,000 in kickbacks for Romandetti. *Id.* ¶¶ 6, 56, 59, 61, 79, 84–85. The "pump and dump" scheme also resulted in at least $2.5 million in losses to investors. *Id.* ¶ 6.

C. The DOJ Indictment and SEC Complaint.[5]

On November 14, 2018, the Department of Justice ("DOJ") filed a criminal indictment against Romandetti and his alleged co-conspirators based on the stock manipulation scheme. *Id.* ¶¶ 6, 56. The charges included conspiracy to commit securities fraud, wire fraud and money laundering, and substantive securities fraud. *Id.* ¶ 56. According to a DOJ press release issued on November 15, 2018:

[5] The complaint incorporates by reference an indictment of Romandetti by the Department of Justice ("DOJ"), *United States v. Romandetti*, CR 18-614-JS-GRB, ECF No. 1 (E.D.N.Y. Nov. 14, 2018); and a complaint filed against Romandetti by the Securities Exchange Commission ("SEC"), *Securities and Exchange Commission v. Burnett*, No. 2:18-CV-6501-JS-AKT, ECF No. 1 (E.D.N.Y. Nov. 15, 2018). "When considering a motion to dismiss in a securities fraud case, the Court may take judicial notice of the contents of relevant public documents that were required to be filed with the [SEC] and were actually filed. The Court may also consider evidence outside the pleadings that is undisputedly authentic and on which Plaintiffs specifically relied in the complaint." *McAdams v. Greenberg Traurig, LLP*, No. CIV. 1:06-CV-1778-JTC, 2007 WL 2310112, at *3 (N.D. Ga. Aug. 9, 2007) (first citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999), then citing *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999)). "The documents may only be considered to show their contents, not to prove the truth of matters asserted therein." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

> As alleged in the indictment, between May 2013 and June 2016, the Defendants, together with others, engaged in a multi-million dollar scheme to defraud investors in FCHS, many of whom were elderly, by artificially controlling the price and volume of traded shares in the FCHS by artificially generating price movements and trading volume in the shares, and by including material misrepresentations and omissions in their communications with victim investors about FCHS stock. The Defendants promoted the stocks primarily through cold-call campaigns and circulation of a newsletter. The Defendants fraudulently concealed their control of FCHS shares by holding them in brokerage accounts in the names of other individuals or entities. The Defendants then laundered over $3 million in proceeds of the foregoing stock manipulation scheme.

Id. Romandetti and the co-conspirators "profited from the manipulative trading in FCHS shares when they . . . sold substantial amounts of the shares at the inflated prices that their fraudulent conduct had generated." *Id.* ¶ 59. Romandetti was arrested the same day. *Id.* ¶ 60.

Also on November 15, 2018, the Securities and Exchange Commission ("SEC") filed an SEC complaint against Romandetti, alleging that he and his alleged co-conspirators had been engaged in a fraudulent scheme to manipulate the market price and trading volume of FCHS securities from September 2013 through June 2016. *Id.* ¶¶ 6, 61–62. The SEC complaint notes that Elite Stock Research represented itself on its website as a company providing investors "top quality trade recommendations and . . . research that you can trust." *Id.* ¶ 64. However, Elite Stock Research really operated as a boiler room engaged in manipulative trading practices. *Id.* Through the manipulative trading, Romandetti, Elite Stock Research, and the other co-conspirators artificially increased the price of FCHS stock. *Id.* ¶ 67. The scheme had inflated FCHS common stock from less than $1.00 per share to $3.40 per share. *Id.* ¶ 61.

After news of the filings from the DOJ and SEC, the price of FCHS common stock declined dramatically: the closing price on November 14, 2018 was $1.01 per share, and the closing price on November 15, 2018 was $0.35 per share. *Id.* ¶¶ 11, 68.

On November 15, 2018, First Choice filed a form 8-K with the SEC, acknowledging the November 15, 2018 arrest of Romandetti on criminal charges of conspiracy to commit securities fraud, conspiracy to commit wire fraud, securities fraud, and conspiracy to commit money laundering. *Id.* ¶ 60. On November 16, 2018, First Choice filed another form 8-K with the SEC, disclosing that Romandetti was placed on "indefinite administrative leave." *Id.* ¶ 69. On December 6, 2018, First Choice filed a form 8-K disclosing the resignation of Romandetti from the company's board. *Id.* ¶ 70.

D. Misleading Statements and Representations.

MAZ claims that First Choice, through Romandetti, made several materially misleading statements and/or omissions during the class period. *Id.* at 7. For instance, an annual report for fiscal year ending December 31, 2013 to the SEC on a form 10-K contained signed certifications pursuant to the Sarbanes-Oxley Act ("SOX") that the form 10-K did "not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report," and that Romandetti had disclosed "[a]ny fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal control over financial reporting." *Id.* ¶¶ 9, 21. The 2014, 2015, 2016, and 2017 fiscal year form 10-Ks contained the same signed certifications by Romandetti. *Id.* ¶¶ 25, 30, 35, 40. MAZ claims that these certifications were materially misleading because Romandetti knew that he himself had committed fraud, and that the fluctuations in FCHS stock were materially affected by the "pump and dump" scheme. *Id.* ¶¶ 74–75.

In its 2013 form 10-K, First Choice represented that the market price of its common stock could "be subject to wide fluctuations in response to many risk factors . . . ," and listed several

factors such as fluctuations in operating results; retention or departure of key personnel; failure to meet projections; or fluctuation in valuation perceived by investors. *Id.* ¶ 22. The 2014, 2015, 2016, and 2017 form 10-Ks contained similar warnings about the fluctuation of First Choice's common stock. *See id.* ¶¶ 26, 31, 32, 36, 37, 41, 42. MAZ alleges that a primary cause of the fluctuations in the FCHS stock price was the "pump and dump" scheme, which Defendants failed to disclose. *Id.* ¶ 55.

The form 10-Ks for fiscal years 2014, 2015, 2016, and 2017 also stated:

> ***Loss of key executives and failure to attract qualified managers and sales persons could limit our growth and negatively impact our operations***
>
> We depend upon our management team to a substantial extent. In particular, we depend upon Christian Charles Romandetti, our President and Chief Executive Officer for his skills, experience and knowledge of our Company and industry contacts. Mr. Romandetti does not have an employment agreement with the Company and we currently do not have key employee insurance policies covering any of our management team. The loss of Mr. Romandetti or other members of our management team could have a material adverse effect on our business, results of operations or financial condition.

Id. ¶¶ 23, 28, 33, 38, 43. According to MAZ, this statement created the misleading impression that Romandetti was a valuable, critical, and indispensable member of management, but it failed to disclose Romandetti's fraudulent conduct and market manipulation. *Id.* ¶¶ 24, 29, 34, 39, 44.

First Choice's 2014 SEC form 10-K stated that First Choice had "engage[d] the services of [Elite]" by a 4-month cancelable consulting agreement. *Id.* ¶ 27. MAZ alleges that this statement was materially misleading because First Choice failed to disclose that "Elite was a boiler room operation hired to engage in a pump and dump scheme, and was paid in kickbacks from Romandetti and his co-conspirators." *Id.* ¶¶ 4, 6, 63, 80, 85–86.

The SEC filings also touted First Choice's company "Compliance Program," which included a compliance committee and code of ethics applicable to its employees. *Id.* ¶ 45. During the class

period, First Choice also employed a Code of Conduct and Ethics, which was implemented to deter wrongdoing and which defines conflicts of interest. *Id.* ¶¶ 46–51. First Choice also had a Disclosure Policy, available on its website, "to develop and maintain realistic investor expectations by making all required disclosures on a broadly disseminated basis, without being unduly optimistic or pessimistic on prospects for future Company performance." *Id.* ¶ 52. First Choice likewise had a Disclosure Policy Committee chaired by Romandetti, which was implemented to "set insider-trading policies, oversee issues management and message consistency, assure compliance with applicable disclosure laws and regulations and coordinate ongoing disclosure practices," as well as to monitor "unusual market price movements or activity and information generally circulating in the marketplace to determine if such movements or activity can be traced directly or indirectly to selectively disclosed non-public material information by the Company or anyone acting on its behalf." *Id.* ¶ 53. The Disclosure Policy stated that "[a]ny information that could be expected to affect the Company's stock price . . . should be considered material." *Id.* ¶ 54.

MAZ alleges that all of the above statements or representations by First Choice were materially misleading because these statements failed to disclose that: (1) First Choice retained Elite Stock Research to falsely promote First Choice to investors in order to materially inflate the price of FCHS stock; (2) First Choice, through Romandetti, participated in a scheme to materially inflate the price of FCHS stock through an unlawful, paid promotional campaign, which enabled Romandetti to personally profit from the scheme; (3) First Choice was in violation of its internal company policies including its Compliance Program, the Code of Ethics, and Disclosure Policy by Romandetti's participation in the "pump and dump" scheme; and (4) a primary cause of fluctuations in the FCHS stock price was the unlawful "pump and dump" scheme orchestrated by Romandetti

and his co-conspirators, which caused the price of FCHS stock to be inflated, and at the same time, allowed others to dump their shares of FCHS stock for profit. *Id.* ¶ 55.

MAZ alleges that it relied on these statements and/or omissions in purchasing its 250,859 shares of FCHS common stock. *Id.* ¶¶ 17, 102. Had MAZ been aware that the price of FCHS common stock had been artificially inflated, it would not have purchased the common stock at the artificially inflated prices, or at all. *Id.* ¶ 103.

MAZ further alleges that the above statements and representations were made with the requisite scienter because Romandetti was a senior officer with final approval over the public statements on behalf of First Choice. *Id.* ¶ 71. Romandetti had personal knowledge of and approved the company's Compliance Program, Code of Conduct, and Disclosure Policy, which he knew were seriously flawed and therefore he was able to circumvent their procedures. *Id.* ¶¶ 72–73. When Romandetti signed the SOX certifications, he knew that he himself had committed fraud, and that the fluctuations in FCHS stock were materially affected by the illicit "pump and dump" scheme in which he was a primary participant. *Id.* ¶¶ 74, 75. Romandetti was motivated to inflate FCHS stock as high as possible in order to personally profit from the inflation; he personally profited over $500,000 from the "pump and dump" scheme. *Id.* ¶ 77. MAZ alleges that because Romandetti was First Choice's most senior officer and director, the requisite scienter is imputed to First Choice. *Id.* ¶ 89.

IV. APPLICABLE LAW.

The complaint alleges that Defendants violated section 10(b) of the Securities Exchange Act of 1934 and rule 10b–5 promulgated thereunder (Count I) and that Romandetti is liable under section 20(a) of the Securities Exchange Act (Count II). Doc. No. 1, at 35, 38.

A. Section 10(b) & Rule 10b–5.

"Section 10(b) and Rule 10b–5 of the Exchange Act prohibit false statements and market manipulation." *S.E.C. v. Curshen*, 888 F. Supp. 2d 1299, 1307 (S.D. Fla. 2012). Specifically, Section 10(b) of the Securities Exchange Act makes it unlawful to:

> use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . 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). Rule 10b–5, in turn, makes it unlawful for any person, directly or indirectly:

> (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.

The complaint is not a model of clarity regarding the causes of action that MAZ is asserting. Count I of the complaint cites the entirety of Rule 10b–5. Doc. No. 1, at 36. MAZ does not explain under which subsections of Rule 10b–5 it seeks to proceed, and it incorporates all of the 95 paragraphs containing the factual allegations of the complaint into Count I. *Id* ¶ 96. However, it appears that MAZ is proceeding under Rule 10b–5(b) because MAZ alleges that Defendants issued statements that were rendered materially misleading by failure to disclose information regarding the "pump and dump" scheme. *Id.* ¶¶ 100–03. In the motions to dismiss, Defendants have interpreted MAZ's claims as raising omission/misrepresentation claims pursuant to Rule 10b-5(b). Doc. Nos. 13, 28. Moreover, MAZ nowhere argues in either its complaint or in its response that it is seeking

relief under either subsection (a) or (c). Doc. No. 36. To the contrary, the only time MAZ references either subsections (a) or (c) is in relation to arguments it makes that a failure to disclose conduct that amounts to market manipulation under Rule 10b-5(a) or (c) may give rise to a violation of Rule 10b–5(b). Doc. No. 36, at 11; *see In re Initial Pub. Offering Secs. Litig.*, 241 F. Supp. 2d 281, 381 (S.D.N.Y. 2003). Accordingly, construing the complaint as presented, the undersigned will consider whether the motions to dismiss under Federal Rules of Civil Procedure 12(b)(6) and 9(b) should be granted for failure to state a claim solely under Rule 10b–5(b).[6]

Pursuant to Rule 10b–5(b), a plaintiff must prove: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 157 (2008) (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341–342 (2005)).

B. Section 20(a).

In Count II of the complaint, MAZ also raises a claim against Romandetti pursuant to Section 20(a) of the Securities Exchange Act. Section 20(a) provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

[6] I note that allegations regarding "pump and dump" schemes and claims for market manipulation are frequently raised pursuant to Rules 10b–5(a), and (c). *See Curshen*, 888 F. Supp. 2d at 1307 (noting that a "pump-and-dump stock scheme is a classic violation" of Rules 10b–5(a) and (c)); *Desai v. Deutsche Bank Secs. LTD*, 573 F.3d 931, 940-41 (9th Cir. 2009) ("Manipulative conduct . . . is actionable under Rule 10b-5(a) or (c) and includes activities designed to affect the price of a security artificially by simulating market activity that does not reflect genuine investor demand."). Yet, as discussed above, MAZ's allegations, arguments, and authorities relate to claims solely brought under Rule 10b–5(b).

15 U.S.C. § 78t(a). Section 20(a) "imposes derivative liability on persons that control primary violators of the Act." *Mizzaro*, 544 F.3d at 1237 (quoting *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008) (per curiam)). A claim under Section 20(a) must allege three elements: (1) a primary violation of the securities laws; (2) that the individual defendant had the power to control the general business affairs of the corporation; and (3) that the individual defendant "had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in primary liability." *Id.* (quoting *Theoharous v. Fong*, 256 F.3d 1219, 1227 (11th Cir. 2001)).

V. ANALYSIS.

First Choice moves to dismiss Count I of the complaint, arguing that: (1) the complaint fails to adequately plead that First Choice made a material misrepresentation or omission; (2) the complaint fails to adequately plead the necessary element of reliance; (3) the complaint fails to adequately plead the required element of scienter; and (4) the proposed class definition results in an improper fail-safe class. Doc. No. 13, at 9–25. Romandetti also moves to dismiss the complaint. Doc. No. 28. Romandetti joins in First Choice's contention that the complaint fails to allege a material misrepresentation. *Id.* at 7 n.1. Romandetti also argues that: (1) the complaint constitutes an impermissible shotgun pleading[7]; (2) Count I of the complaint does not adequately plead justifiable reliance; and (3) Count I of the complaint fails to state a claim, and therefore Count II likewise fails. *Id.* at 6–11. Each of Defendants' contentions will be addressed in turn.

[7] Romandetti's contention that the complaint should be dismissed as a shotgun pleading is unpersuasive. He contends that each count of the complaint impermissibly incorporates all of the preceding allegations of the complaint. However, "this is not a situation where a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1324 (11th Cir. 2015). There are only two counts in the complaint, and importantly, all of the factual allegations are relevant to both, particularly because Count II relates to derivative liability and cannot be established without a violation under Count I.

A. Material Misrepresentation or Omission (Count I).

In Count I the complaint, MAZ contends that Defendants made material misrepresentations in Form 10-Ks, in other SEC filings, and on First Choice's website. Each of these alleged misrepresentations are premised on Defendants' failure to disclose in those filings that Romandetti was allegedly engaged in a "pump and dump" scheme that artificially inflated the price of FCHS common stock. In other words, MAZ claims that Defendants' failure to disclose the "pump and dump" scheme rendered all of the identified statements Defendants made materially misleading. This theory comports with the law of this Circuit. *See Fried v. Stiefel Labs., Inc*., 814 F.3d 1288, 1294 (11th Cir. 2016) ("[T]his Court has never held that a failure to disclose material information is an omission *under subsection (b)* absent a statement made misleading by that failure."). Therefore, "you can't have one without the other" – absent any omission, the statements would not be misleading, and absent any statements that were rendered misleading by the omission, the omission by itself would not be actionable.

In its motion to dismiss, First Choice argues that the complaint fails to adequately plead that the Company made a material misrepresentation or omission for several reasons: (1) there was no duty to disclose the alleged market manipulation;[8] (2) statements that Romandetti was "key" were not false or misleading; (3) the complaint contains no allegations that First Choice's financial reporting was false, and thus the SEC filings cannot form the basis of an actionable misrepresentation claim; (4) the risks reported in its form 10-Ks were not misleading; (5)

[8] First Choice first argues that there was no duty to disclose (*see* Doc. No. 13 at 9–10). However, because a duty to disclose would not arise in this case unless Defendants' disclosures would be rendered misleading based on the omission of material information, the undersigned finds it prudent to first address materiality and whether Defendants' statements were misleading. *See Thompson v. RelationServe Media, Inc*., 610 F.3d 628, 681 (11th Cir. 2010) ("Most commonly, a duty to disclose is triggered either because the omitted fact was necessary to render a preexisting statement not misleading, or because the securities law otherwise required its disclosure.").

representations in a compliance program, code of ethics, and company disclosure policy are not actionable; and (5) the complaint does not allege that First Choice knew that Elite Stock Research was a "boiler room." Doc. No. 13, at 9–19. Romandetti joins in each of these contentions. Doc. No. 28, at 7 n.1.

Defendants' arguments in this regard are all interrelated and raise three independent questions: (1) whether the alleged omission was material; (2) whether the alleged misrepresentations were materially misleading; and (3) whether Defendants had a duty to disclose that which they did not. *See Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) ("[I]n order to prevail on a Rule 10b–5 claim, a plaintiff must show that the statements were *misleading* as to a *material* fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant."); *see also Fried v. Stiefel Labs., Inc*., 814 F.3d at 1294 ("[T]his Court has never held that a failure to disclose material information is an omission *under subsection (b)* absent a statement made misleading by that failure.").

1. Whether Defendants' Statements and/or Omissions Were Material.

An omission is material for purposes of a securities fraud claim if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc.*, 485 U.S. at 231–32 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). "For securities fraud, a statement is material if there is a substantial likelihood that a reasonable investor would consider it important in making a decision." *United States v. Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004) (citations omitted). However, the question of materiality is usually not appropriate at the motion to dismiss stage; rather, it is "the trier of fact [who] usually decides the issue of materiality." *See Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1189 (11th Cir. 2002)

(discussing materiality in context of § 11 securities claim (citing *Cooperman v. Individual, Inc.*, 171 F.3d 43, 47 (1st Cir. 1999))); *see also In re Recoton Corp. Sec. Litig.*, 358 F. Supp. 2d 1130, 1142 (M.D. Fla. 2005) (noting that materiality is a question of fact that typically is not resolved at the motion to dismiss stage) (citations omitted); *In re Initial Pub. Offering Sec. Litig*., 241 F. Supp. 2d at 379 ("The question of materiality is rarely amenable to disposition as a matter of law. Rather, it is considered a ''mixed question of law and fact.'" (quoting *TSC Indus., Inc*., 426 U.S. at 450 (citations and quotation marks omitted))). "Only if the lack of importance of the omission is so plain that reasonable minds cannot differ thereabout is it proper for the court to pronounce the omissions immaterial as a matter of law." *Oxford Asset Mgmt.*, 297 F.3d at 1189 (citing *Ganino v. Citizens Utils., Co.*, 228 F.3d 154, 161–164 (2d Cir. 2000) and *Cooperman*, 171 F.3d at 49); *see also In re: Fidelity/Micron Sec. Litig.*, 964 F. Supp. 539, 547–48 (D. Mass. 1997) ("The issue of whether an omission or misleading statement is material is ordinarily a question of fact for the jury.").

Following this precedent, I will review the materiality of Defendants' alleged statements and omissions only to determine whether the lack of importance of these statements and omissions would be so plain that reasonable minds could not differ about it. MAZ points to the following statements and omissions: (1) statements that Romandetti was "key" to the company; (2) omissions concerning the market manipulation scheme from Defendants' SEC filings and SOX certifications; (3) Defendants' statements regarding the risk factors impacting the fluctuation of stock prices (including their failure to disclose their purported market manipulation as one of the risk factors); (4) omitting the market manipulation scheme from statements Defendants made in First Choice's code of ethics and code of compliance; and (5) falsely stating the reason why First Choice had retained Elite Stock Research.

The undersigned cannot state, as a matter of law at this early stage of the litigation, that Defendants' omissions regarding the alleged stock manipulation scheme would be so plainly unimportant to a reasonable investor that reasonable minds could not differ. To the contrary, I note that several courts have found substantially similar omissions material. *See, e.g.*, *City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc.*, 686 F. Supp. 2d 404, 416 (D. Del. 2009) ("In our view, facts regarding an anti-competitive rate-fixing scheme 'would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" (quoting *Basic, Inc.*, 485 U.S. at 231–32)); *Metzner v. D.H. Blair & Co.*, 689 F. Supp. 262, 264 (S.D.N.Y. 1988) ("[M]arket manipulation is a fact 'reasonable investor[s] might have considered . . . important in the making of the[ir] decision[s].'" (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 154 (1972))); *see also U.S. S.E.C. v. Sierra Brokerage Servs., Inc.*, 608 F. Supp. 2d 923, 961 (S.D. Ohio 2009) (a defendant's "failure to disclose that market prices are being manipulated constitutes a material omission of fact in the offer of securities." (citing *Pagel, Inc. v. SEC*, 803 F.2d 942, 946 (8th Cir. 1986))), *aff'd*, 712 F.3d 321 (6th Cir. 2013); *U.S. S.E.C. v. Corp. Relations Grp., Inc.*, No. 6:99-cv-1222-Orl-28KRS, 2003 WL 25570113, at *8 (M.D. Fla. Mar. 28, 2003) ("[T]he fact that the . . . Defendants were selling their stock at the same time they were encouraging their readers to buy would clearly be material to reasonable investors."). Accordingly, for purposes of the motions to dismiss, MAZ has sufficiently pleaded that Defendants' alleged omission concerning the "pump and dump" scheme was material.

2. Whether Defendants' Statements Were Materially Misleading.

MAZ must also demonstrate that Defendants' statements were rendered materially misleading by Defendants' omission. *See Basic Inc.*, 485 U.S. at 239 n.17 (in addition to being material, "a statement must also be misleading."). "A statement or omission is misleading in the securities fraud context if it would give a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 691 (9th Cir. 2011) (citation and quotation marks omitted). Misrepresentations are evaluated "in the light of the circumstances under which they were made." 17 C.F.R. § 240.10b–5(b).

Defendants argue that none of the statements alleged by MAZ were false or misleading. Doc. No. 13, at 9–19. I will address each such statement in turn.

a. Statement that Romandetti was "Key" to the Company.

First Choice contends that its statement that Romandetti was "key" to the company is insufficient to form an actionable misrepresentation claim. Doc. No. 13, at 10.

The form 10-Ks for fiscal years 2014, 2015, 2016, and 2017 stated:

> ***Loss of key executives and failure to attract qualified managers and sales persons could limit our growth and negatively impact our operations***
>
> We depend upon our management team to a substantial extent. In particular, we depend upon Christian Charles Romandetti, our President and Chief Executive Officer for his skills, experience and knowledge of our Company and industry contacts. Mr. Romandetti does not have an employment agreement with the Company and we currently do not have key employee insurance policies covering any of our management team. The loss of Mr. Romandetti or other members of our management team could have a material adverse effect on our business, results of operations or financial condition.

Doc. No. 1 ¶¶ 23, 28, 33, 38, 43.

Defendants do not really address whether the description of Romandetti as a "key employee" or the statements about the risks to business if Romandetti left are themselves misleading. Rather, Defendants argue that because MAZ does not contend that describing Romandetti as "key" was false on its face, First Choice was not obligated to disclose an uncharged, alleged market manipulation scheme due to this statement. Doc. No. 13, at 10. I agree.

MAZ contends that the statement that Romandetti was "key" was misleading based on the omitted fact that he engaged in market manipulation of the company's stock. Doc. No. 36, at 14. However, MAZ has not sufficiently alleged that this disclosure was misleading or that it was rendered misleading by First Choice's omission of Romandetti's purported unlawful conduct. Specifically, there is nothing in First Choice's statements concerning Romandetti that are false on their face—for example, MAZ has not alleged that First Choice had knowledge that Romandetti was slated to leave the company. *See Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co.*, 964 F. Supp. 2d 1128, 1141 (N.D. Cal. 2013) (holding that risk factor statements that "[t]he failure to hire executives and key employees or the loss of executives and key employees could have a significant impact on our operations" were not false and misleading because, if anything, they merely suggest "that some personnel might leave, not that [a key executive] would stay.").[9] Nor has MAZ otherwise demonstrated that a "rational investor would conclude from such statements of corporate optimism" that First Choice intended to retain Romandetti or that Romandetti was not engaged in corporate misconduct. *See Nathanson v. Polycom, Inc.*, 87 F. Supp. 3d 966, 975–76 (N.D. Cal. 2015). "If anything, these statements merely

[9] The decisions relied upon by MAZ only support this finding. In each case, the company knew that the "key" employee was leaving the company at the time that the company made its risk factor loss of "key employees" statements. *See Miller v. Apropos Tech., Inc.*, No. 01 C 8406, 2003 WL 1733558, at *6 (N.D. Ill. Mar. 31, 2003); *Voit v. Wonderware Corp.*, 977 F. Supp. 363, 370 (E.D. Pa. 1997), *abrogated by In re Advanta Corp. Sec. Litig.*, 180 F.3d 525 (3d Cir. 1999).

remind investors that [Romandetti] or any other member of the senior executive or management teams might leave [First Choice], not that [Romandetti's] position was secure or no misconduct was afoot." *See id.*; *see also Fries v. N. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018) ("[C]ourts must consider whether the omitted mismanagement or uncharged criminal conduct is sufficiently connected to defendants' existing disclosures.").

Accordingly, the statement that Romandetti was "key" in the SEC filings is insufficient to form the basis for MAZ's securities fraud claim.

b. SOX Certifications.

According to First Choice, Romandetti's SOX certifications in the SEC filings are not actionable because there is no allegation that the information relating to First Choice's financial situation was misleading or erroneous. Doc. No. 13, at 11. I disagree.

MAZ alleges in its complaint that Romandetti certified that the SEC filings during the relevant time period did not contain untrue statements of material fact or omit material facts. Romandetti also certified that he had disclosed "[a]ny fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal control over financial reporting." Doc. No. 1 ¶¶ 9, 21, 25, 30, 35, 40. However, according to the DOJ and SEC, during the relevant time periods, Romandetti was engaged in a "pump and dump" scheme that fraudulently and artificially inflated the price of FCHS common stock to the detriment of investors. *Id.* ¶¶ 6, 56, 61–62. Accordingly, Defendants made "a statement that can be understood, by a reasonable investor, to deny that the illegal conduct is occurring." *See Fries*, 285 F. Supp. 3d at 719. Taking the allegations of the complaint as true, such statements would clearly be false and misleading to a reasonable investor.

First Choice further argues that alleged misstatements in a SOX certification cannot form the basis of a securities fraud claim as a matter of law.[10] However, courts have held that "where the complaint asserts facts indicating that, at the time of the [SOX] certification, defendants knew or consciously avoided any meaningful exposure to the information that was rendering their [SOX] certification erroneous, a false or misleading certification may form the basis of a § 10(b) and Rule 10b–5 claim." *City of Roseville Emps.' Ret. Sys.*, 686 F. Supp. 2d at 417–18 (quotation marks omitted) (quoting *In re Intelligroup Sec. Litig*., 527 F. Supp. 2d 262, 290 (D.N.J. 2007)); *see also Rabkin v. Lion Biotechs.*, Inc., No. 17-CV-02086-SI, 2018 WL 905862, at *10 (N.D. Cal. Feb. 15, 2018) (finding SOX certifications actionable); *Limantour v. Cray Inc*., 432 F. Supp. 2d 1129, 1158–60 (W.D. Wash. 2006) (finding SOX certifications actionable); *In re Banco Bradesco S.A. Sec. Litig*., 277 F. Supp. 3d 600, 655 (S.D.N.Y. 2017) (finding SOX certification actionable that stated: "based on [his] knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading with respect to the period covered by this report"). The allegations of MAZ's complaint are in line with these cases and therefore these decisions are persuasive here.

[10] The decision First Choice relies upon for this bold proposition – *In re Silicon Storage Tech., Inc., Sec. Litig.*, No. C-05-0295PJH, 2007 WL 760535, at *17 (N.D. Cal. Mar. 9, 2007) – is readily distinguishable and not persuasive. The court in that case was addressing whether a "statement in a [SOX] certification that financial statements comply with GAAP [Generally Accepted Accounting Principles] is independently actionable." *Id.* Here, the allegations do not relate to failure to adhere to GAAP, which "standing alone, are insufficient to create an inference of fraud." *See In re AFC Enters., Inc. Sec. Litig*., 348 F. Supp. 2d 1363, 1372 (N.D. Ga. 2004) (and cases cited therein). First Choice also cites cases where the court has concluded that SOX certifications were not actionable when the allegations do not challenge the content of the certifications themselves. *See In re KBR, Inc. Sec. Litig*., CV H-17-1375, 2018 WL 4208681, at *8 (S.D. Tex. Aug. 31, 2018). Here, however, MAZ is challenging two specific statements in the SOX certifications—a certification that the SEC filings did not omit material information and a certification that any fraud, material or not, had been disclosed.

Accordingly, I recommend that the Court find that MAZ has sufficiently alleged that the SOX certifications were rendered materially misleading based on the omission regarding the stock manipulation scheme, which could form an actionable basis for a securities fraud claim.

c. Risk Disclosures – Volatility and Fluctuations in Market Price.

In the complaint, MAZ alleges that First Choice represented in its Form 10-Ks that the market price of FCHS common stock could "be subject to wide fluctuations in response to many risk factors." *E.g.*, Doc. No. 1 ¶ 22. According to MAZ, First Choice was obligated to include Romandetti's alleged market manipulation scheme as one of those risk factors because the unlawful campaign was a primary cause of the fluctuation in the FCHS stock price. *Id.* ¶ 55.

First Choice contends that it had no obligation to disclose uncharged criminal conduct as a risk factor, in part because MAZ "has not alleged that any of the stated risk factors were rendered untrue by the existence of the alleged market manipulation." Doc. No. 13, at 14.

MAZ, however, points to persuasive authority demonstrating that the allegations of the complaint may be sufficient. *In re Galena Biopharma, Inc. Securities Litigation*, 117 F. Supp. 3d 1145 (D. Or. 2015) is instructive. In that case,

> [T]he scheme, as alleged, had the risk of making Galena's stock price both increase and decrease. If the alleged plan was successful, the stock price would increase. If the alleged secret paid promotional campaign came to light, the stock price would decrease, as happened. Additionally, the fact that, as alleged, Company insiders were planning to sell large amounts of personally-held stock after the price was inflated could also result in a decrease in the stock price, after the public became aware of an insider sell-off, even if the alleged promotional campaign was not discovered. Thus, the alleged scheme was a risk that might result in the fluctuation of Galena's stock price, up or down.
>
> Regardless of whether Galena had an independent duty to disclose the paid promotional campaign in its SEC filings, Rule 10b–5(b) "prohibits the telling of material half-truths, where the speaker 'omit[s] 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.'" *U.S. v. Laurienti*, 611 F.3d 530, 539 (9th Cir.2010) (quoting Rule 10b–5(b)). After Galena chose to disclose a lengthy list of

> reasons why its stock price might fluctuate, it needed to include in that list the alleged scheme that Galena was manipulating the stock price with the help of DreamTeam and Lidingo. *See Ansell v. Laikin*, 2011 WL 3274019, at *4 (C.D. Cal. Aug. 1, 2011) (finding a material omission where "Defendant represented in the Tender Offer that past and future stock price fluctuations were due to factors beyond the Company's control, but did not disclose that Defendant had been manipulating the stock price with the help of the stock promoter" because by "failing to mention [the] scheme but listing several other risks" in the Tender Offer, the company "misled investors into believing that the Tender Offer had disclosed all known risks of investing in the Company").

In re Galena Biopharma, Inc. Sec. Litig., 117 F. Supp. 3d at 1181.

Accordingly, for purposes of ruling on the motion to dismiss, I recommend that the Court follow *In re Galena Biopharma, Inc. Securities Litigation*, and find that MAZ has sufficiently alleged in the complaint that the risk factors were misleading.

First Choice further contends, however, that the risk factors associated with future financial conditions are the types of "forward-looking statements" subject to the PSLRA's safe harbor provision and the judicially created "bespeaks caution" doctrine. Doc. No. 13, at 14; *see* 15 U.S.C. § 78u–5(c)(1); *Edward J. Goodman Life Income Tr. v. Jabil Circuit, Inc*., 594 F.3d 783, 796 (11th Cir. 2010) (noting that the PSLRA safe harbor provision is "statutory equivalent" of judicially created "bespeaks caution" doctrine).[11]

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[11] As explained by the Eleventh Circuit:

> The Reform Act's safe harbor protects "forward-looking statements" from serving as a basis of liability in private securities fraud suits if the statements qualify as "forward-looking" under 15 U.S.C. §§ 78u–5(i)(1)(A)–(F), and meet any one of the statutory conditions set forth in 15 U.S.C. §§ 78u–5(c)(1)(A)–(B). 15 U.S.C. § 78u–5(i)(1) defines "forward-looking statements" as encompassing, *inter alia*, projections of revenues, such as EPS estimates, *see* 15 U.S.C. § 78u–5(i)(1)(A), statements regarding management's future plans and objectives, *see* 15 U.S.C. § 78u–5(i)(1)(B), and statements regarding future economic performance. *See* 15 U.S.C. § 78u5(i)(1)(C).
>
> Thus, statements in the nature of economic forecasts . . . are considered "forward-looking" and may garner the protection of the statutory safe harbor, 15 U.S.C. § 78u–5(c): 1) if they are identified as forward-looking statements and are accompanied by the appropriate cautionary language, *see* 15 U.S.C. § 78u–5(c)(1)(A)(i); 2) if such statements are immaterial, *see* 15 U.S.C. § 78u–5(c)(1)(A)(ii); or 3) if the plaintiff fails to prove that the statements

As to the PSLRA safe harbor provision, this argument is a red herring. As MAZ argues, the PSLRA safe harbor is inapplicable because it does not "apply to a forward-looking statement . . . that is made with respect to the business or operations of the issuer, if the issuer . . . issues penny stock." 15 U.S.C. § 78u-5(b)(1)(C); *see also Sec. & Exch. Comm'n v. Strategic Glob. Investments, Inc.*, 262 F. Supp. 3d 1007, 1021 (S.D. Cal. 2017) ("Congress expressly excluded all issuers of penny stocks from the protections afforded by the Safe Harbor provisions."). First Choice's 10-Ks filed during the class period demonstrated that FCHS common stock was "subject to the SEC's 'penny stock' rules." *See, e.g.*, Doc. No. 13-1, at 24; Doc. No. 13-2, at 25.

Regarding the judicially created bespeaks caution doctrine, courts have found that this doctrine applies in enforcement actions involving penny stocks. *See, e.g., Sec. & Exch. Comm'n v. Thompson*, 238 F. Supp. 3d 575, 602 (S.D.N.Y. 2017) ("There is no doubt that the common law bespeaks caution doctrine . . . applies in enforcement actions and actions involving penny stocks." (citing *S.E.C. v. Meltzer*, 440 F. Supp. 2d 179, 191 (E.D.N.Y. 2006))). MAZ argues that this doctrine has not been applied in this Circuit beyond statements in offering documents. Nonetheless, even assuming the doctrine is applicable, the risk disclosures regarding the volatility of the company's stock were not sufficiently specific to speak to MAZ's concern because the risk disclosures did not include a forewarning about market manipulation schemes. Accordingly, it

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were made with actual knowledge of their falsity. *See* 15 U.S.C. § 78u–5(c)(1)(B).

> The "bespeaks caution" doctrine, the safe harbor's judicially created counterpart, operates similarly, protecting statements in the nature of projections that are accompanied by meaningful cautionary statements and specific warnings of the risks involved, so as to "bespeak caution" to investors that actual results may differ, thereby shielding the statements from § 10(b) and Rule 10b–5 liability. *See Saltzberg v. TM Sterling/Austin Assoc*., 45 F.3d 399 (11th Cir.1995) (per curiam) (holding that explicit cautionary language in private placement memorandum rendered alleged misstatements immaterial and made them not actionable under "bespeaks caution" doctrine).

Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1276 n.7 (11th Cir. 1999).

does not appear that the bespeaks caution doctrine applies in this case. *Cf. In re NationsMart Corp. Sec. Litig*., 130 F.3d 309, 318 (8th Cir. 1997) ("Because of inadequate and nonspecific warnings of short-term risks, and because of the plaintiffs' allegations that the defendants omitted material information from the Prospectus, the bespeaks-caution doctrine cannot, simply as a matter of pleading, defeat the plaintiffs' § 11 claim.").

Moreover, to the extent that MAZ alleges Defendants' knowledge of/involvement in the alleged stock manipulation scheme, it appears that the bespeaks caution doctrine may not apply. *See FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1299 (11th Cir. 2011) ("[T]he inclusion of general cautionary language regarding a prediction [does] not excuse the alleged failure to reveal known material, adverse facts."); *see also Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004) ("The doctrine of bespeaks caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away.'" (quoting *In re Prudential Sec. Inc. P'ships Litig*., 930 F. Supp. 68, 72 (S.D.N.Y. 1996))).

d. Compliance Program, Code of Conduct, and Disclosure Policy.

The complaint next alleges that First Choice's Compliance Program, Code of Conduct and Ethics, and Disclosure Policy were rendered materially misleading by failing to disclose the market manipulation scheme. *E.g.*, Doc. No. 1 ¶¶ 45–55.

First Choice argues that "courts have 'soundly rejected' as 'untenable' the position that 'any company with a code of ethics . . . would be required to disclose all violations of that code or face liability under federal securities law." Doc. No. 13, at 17 (quoting *City of Roseville Emps. Ret. Sys.*, 686 F. Supp. 2d at 415). First Choice contends that these programs and policies constituted corporate puffery and contained aspirational statements, rendering them non-actionable. *Id.* at 18.

In response, MAZ maintains that the statements set forth in these policies were misleading; these policies "were a sham in practice and were not followed." Doc. No. 36, at 17–18.

First Choice is correct that the allegations of the complaint do not demonstrate that the corporate policy statements are actionable misrepresentations. The policies are rife with aspirational language such as how employees "should" conduct themselves; how they "should" support the company's goal of full disclosure; and how they "should" promptly report any perceived misconduct. *E.g.*, Doc. No. 1 ¶¶ 45, 47, 50. Similarly, the Compliance Program states that it would provide "a solid framework" to meet the company's commitments and obligations; the Code of Conduct and Ethics likewise "sets out basic principles to guide" employees. *Id.* ¶¶ 45, 47.

These are the types of aspirational statements that courts have concluded are not actionable. *See, e.g., In re Braskem S.A. Sec. Litig*., 246 F. Supp. 3d 731, 755 (S.D.N.Y. 2017) ("The statements here were . . . inherently immaterial puffery. The statements which plaintiffs claim were materially misleading at issue broadly touted Braskem's "trustworth[y]" culture, its commitment to "integrity," its "compliance with the laws," its "fundamental values such as transparency, ethics, clarity of information and responsibility for Supply decisions," and its commitment to "transparency and good corporate governance practices."); *In re Sanofi Sec. Litig*., 155 F. Supp. 3d 386, 401 (S.D.N.Y. 2016) (citations omitted) (citations and quotation marks omitted) (finding defendants' statements about maintenance of an "effective compliance organization" and "efforts toward transparency, accountability, and disclosure" were "too general to cause a reasonable investor to rely on them. Each of the statements [was] an example of corporate 'puffery,' which does not give rise to securities violations"); *City of Roseville Emps.' Ret. Sys.*, 686 F. Supp. 2d at 415 (citations and quotation

marks omitted) ("[A] company's publishing a code of ethics on its website is [not] equivalent to a representation that the code is not being violated and therefore cannot be considered misleading.").[12]

Therefore, I recommend that the Court find that the statements contained in First Choice's Compliance Program, Code of Conduct and Ethics, and Disclosure Policy cannot form the basis of a securities fraud claim in this case.

e. Elite Stock Research – A Boiler Room.

Finally, the complaint alleges that in First Choice's 2014 Form 10-K, it stated that it had entered into an agreement with Elite Stock Research, but failed to disclose that Elite Stock Research was a boiler room operation hired to engage in a pump and dump scheme. Doc. No. 1 ¶ 27. The statement at issue provided:

> ***Elite Stock Research - Equity Compensation for Services***
>
> On September 18, 2014, the Company entered into a cancelable 4-month agreement (the Agreement") to engage the services of Elite Stock Research, Inc. The Agreement provided for a monthly cash retainer, and 100,000 restricted shares of the Company's common stock that were issued in 2014 at a cost of $98,000. The shares were issued in reliance upon the exemption from registration under Section 4(a)(2) of the Securities Act.

Doc. No. 13-2, at 30.

First Choice contends that this does not present an actionable misrepresentation because MAZ has not alleged that anyone at First Choice knew or should have known that at the time of the statement, Elite Stock Research was engaged in wrongful conduct. Doc. No. 13, at 18–19. MAZ,

[12] The authority on which MAZ relies is factually distinguishable because the statements at issue in those cases were concrete, "affirmative statements of present fact." *See FindWhat*, 658 F.3d at 1298. For example, in *FindWhat*, the statements at issue included that the company "strictly enforce[d] advertising guidelines," that the company "employ[ed] an integrated system of numerous automated and human processes that continually monitor traffic quality," that the company "enforce[d] strict guidelines with [its] Network partners," and that its policy "prohibit[ed] engaging agents or third parties to do indirectly" what the company could not do under its policies. *Id.* at 1297. The Eleventh Circuit found that those statements could have been considered materially misleading because they were "affirmative statements of present material fact," based on the "enforcement" system that the defendants' voluntarily touted. *Id.* at 1298.

on the other hand, argues that omitting information as to the true nature of Elite Stock Research rendered the disclosure regarding the hiring of Elite Stock Research materially misleading. Doc. No. 36, at 13–14.

First Choice has the better of this argument because the complaint does not demonstrate that this is an actionable misleading statement. Simply put, the complaint is devoid of any allegations that MAZ or other class members purchased stock due to Elite Stock Research's promotions, or that First Choice did not disclose that Elite Stock Research was being paid for its promotions. To the contrary, First Choice clearly stated that it was compensating Elite Stock Research, as well as the manner in which it was being compensated. Accordingly, MAZ has not sufficiently alleged that First Choice's disclosures regarding Elite Stock Research were misleading.[13]

In sum, based on the foregoing, although several of the statements on which MAZ relies do not appear actionable, I recommend that the Court find that the complaint sufficiently alleges that some of the disclosures by First Choice were materially misleading, namely the SOX certifications and the risk factors in the Form 10-Ks.

3. Duty to Disclose.

"Section 10(b) of the Exchange Act and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information." *In re Galectin Therapeutics, Inc. Secs. Litig*., 843 F.3d 1257, 1274 (11th Cir. 2016). "Silence, absent a duty to disclose, is not misleading under Rule 10b-5." *Basic Inc.*, 485 U.S. at 239. However, Rule 10b-5 prohibits "any omissions of material fact

[13] MAZ's arguments in its opposition brief are not well-taken as the authority on which MAZ relies is inapplicable to the present situation. Those cases deal with a company's failure to disclose that the stock promoter was paid for his promoting. *See, e.g., Corp. Relations Grp., Inc.*, 2003 WL 25570113, at *7; *see also S.E.C. v. Huttoe*, No. CIV.A. 96-2543 (GK), 1998 WL 34078092, at *4 (D.D.C. Sept. 14, 1998) (finding that promoter was receiving stock in exchange for writing articles was material, "so long as there is a 'substantial likelihood' that a reasonable investor would consider the motivation of the person recommending the purchase of a stock a significant factor in making an investment decision"). As discussed above, First Choice clearly stated that it was compensating Elite Stock Research.

'necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.'" *In re Galectin Therapeutics, Inc. Sec. Litig*., 843 F.3d at 1274 (quoting *FindWhat*, 658 F.3d at 1305); *see* 17 C.F.R. § 240.10b–5(b) (actionable omission claim exists only when disclosure is "necessary . . . to make the statements made, in light of the circumstances under which they were made, not misleading."). Thus, although "securities laws do not impose a general duty to disclose corporate mismanagement or uncharged criminal conduct . . . a duty to disclose uncharged criminal conduct does arise if it is necessary to ensure that a corporation's statements are not misleading." *In re Sanofi Sec. Litig*., 155 F. Supp. 3d at 403; *see also Fries*, 285 F. Supp. 3d at 718 ("Allegations that defendants concealed corporate mismanagement or uncharged criminal conduct are not actionable unless the non-disclosures render other statements by defendants misleading.").[14]

As discussed above, the complaint contains adequate allegations demonstrating that First Choice had a duty to disclose the alleged market manipulation scheme based on its alleged materially misleading statements. The complaint adequately alleges that some of the statements made by First Choice could have been rendered misleading by its failure to disclose the stock

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[14] As explained by the court in *Fries*:

> [C]ourts must consider whether the omitted mismanagement or uncharged criminal conduct is sufficiently connected to defendants' existing disclosures. Specifically, the requisite connection triggering a duty to disclose arises in the following three circumstances:
>
> (1) when a corporation puts the reasons for its success at issue, but fails to disclose that a material source of its success is the use of improper or illegal business practices;
>
> (2) when a defendant makes a statement that can be understood, by a reasonable investor, to deny that the illegal conduct is occurring; and
>
> (3) when a defendant states an opinion that, absent disclosure, misleads investors about material facts underlying that belief.

Fries, 285 F. Supp. 3d at 719 (citations and quotation marks omitted).

manipulation scheme, namely the SOX certifications and the risk disclosures in the SEC filings. The SOX certifications in particular could have been understood, by a reasonable investor, "to deny that the illegal conduct is occurring." *Fries*, 285 F. Supp. 3d at 719. For purposes of the motions to dismiss, the undersigned has also presumed that the omission regarding the stock manipulation scheme was material. Accordingly, the undersigned recommends that the Court find that the complaint adequately alleges that First Choice had a duty to disclose the conduct forming the basis for the alleged market manipulation. *See Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986) ("A defendant who intentionally did not reveal what he knew to be fraud might more reasonably be expected to speak out than a defendant who merely failed to learn of a material but ambiguous omission. The extent of the defendant's participation in the fraud might also be important.").

B. Scienter (Count I).

"To survive a motion to dismiss under the [PSLRA], the factual allegations contained in a private securities fraud class action complaint must raise a 'strong inference,' one that is 'cogent and compelling,' that the named defendants acted with the requisite scienter." *Mizzaro*, 544 F.3d at 1235; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 314 (2007) ("The inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the 'smoking-gun' genre, or even the 'most plausible of competing inferences,' but it 'must be more than merely plausible or reasonable' . . . it must be . . .cogent and at least as compelling as any opposing inference. . . .").

1. Romandetti.

In the motions to dismiss, neither Romandetti nor First Choice argue that MAZ has failed to sufficiently allege that Romandetti acted with the requisite scienter. *See* Doc. Nos. 13, 28. "A

plaintiff can plead a strong inference of scienter where she sufficiently alleges that the defendants: (1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor." *In re Sanofi Sec. Litig.*, 155 F. Supp. 3d at 405 (citations and quotation marks omitted).

Here, MAZ alleges that Romandetti engaged in deliberately illegal behavior by perpetrating a "pump and dump" scheme related to FCHS stock. "These particular and express allegations of deliberate misconduct 'easily satisfy the standard for pleading scienter.'" *Absolute Activist Master Value Fund, Ltd. v. Ficeto*, No. 09 CIV. 8862(GBD), 2013 WL 1286170, at *6 (S.D.N.Y. Mar. 28, 2013) (quoting *In re Philip Servs. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 472 (S.D.N.Y. 2004)); *see also Tellabs*, 551 U.S. at 325 (noting that "personal financial gain may weigh heavily in favor of a scienter inference"); *In re Initial Pub. Offering Sec. Litig*., 241 F. Supp. 2d at 361 ("The rule—of logic as much as of law—is that whenever a defendant engages in clearly manipulative practices, and then conceals those practices by making misstatements, the concealment is presumptively done with the intent to defraud.").

2. First Choice.

Corporations may be liable for securities fraud committed by their employees and agents who act within the course and scope of their employment and within their actual or apparent authority. *See Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1118–19 (5th Cir. 1980).[15] Courts may impute the acts of a corporate officer to the corporation if those acts are "intended to benefit [the] corporation to the detriment of outsiders." *In re Spear & Jackson Sec.*

[15] The Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Litig., 399 F. Supp. 2d 1350, 1361 (S.D. Fla. 2005) (citing *In re Sunbeam Secs. Litig.*, 89 F. Supp. 2d 1326, 1340 (S.D. Fla. 1999)). "In determining whether to impute an executive's scienter to the company, [the relevant inquiry is] whether an executive's fraud operates to benefit the company or whether the fraud is committed against the company." *In re JPMorgan Chase & Co. Sec. Litig.*, No. 06C4675, 2007 WL 4531794, at *9 (N.D. Ill. Dec. 18, 2007) (citation omitted); *see also F.D.I.C. v. Shrader & York*, 991 F.2d 216, 224 (5th Cir. 1993).

First Choice contends that "courts have frequently refused to impute the scienter of executives to their corporation where the executive acted out of nothing other than his own self interest, and his conduct did not benefit the corporation." Doc. No. 13, at 22–23 (citing *Nathanson*, 87 F. Supp. 3d at 981). First Choice acknowledges that it may be "difficult to apply" this adverse interest exception on a motion to dismiss. *Id.* at 23. However, First Choice states that the complaint establishes only an alleged hidden market manipulation perpetrated by a lone actor at the company, and which did not benefit First Choice. *Id.* at 24.[16]

As MAZ argues, the facts of this case do not support application of the exception on a motion to dismiss. "There are certainly plenty of 10(b) cases where the CEO's attempts to inflate his company's stock price are imputed to the corporation." *In re Spear & Jackson Sec. Litig.*, 399 F. Supp. 2d at 1361. Here, "it is difficult to argue" that Romandetti's interests were totally averse to that of First Choice, because although Romandetti personally benefitted from the stock manipulation scheme, First Choice likewise would have benefitted from the rise in the value of its stock. *See id.*

[16] First Choice primarily relies on *Fries*, 285 F. Supp. 3d at 715, to support its position. In *Fries*, the court concluded that the inference of scienter was not "as compelling as any opposing inference of nonfraudulent intent." *Fries* did not involve an organized market manipulation scheme perpetrated by the CEO as alleged in this case, and therefore it is factually inapposite as to this point. Moreover, First Choice argues that this case involves "hidden market manipulation," which "did not benefit First Choice." Doc. No. 13, at 23–24. However, as discussed *infra*, First Choice's contention that it did not benefit from the alleged manipulation scheme is not well taken.

Accordingly, based on the circumstances of this case, I recommend that the Court find at this stage of the case that MAZ has properly alleged that imputation of Romandetti's conduct to First Choice is proper. *See also In re ChinaCast Educ. Corp. Sec. Litig*., 809 F.3d 471, 478 (9th Cir. 2015) (finding imputation of scienter of CEO to corporation proper in part because it "comports with the public policy goals of both securities and agency law—namely, fair risk allocation and ensuring close and careful oversight of high-ranking corporate officials to deter securities fraud").

C. Reliance (Count (I)).

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action. It ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Stoneridge Inv. Partners, LLC*, 552 U.S. at 159 (quoting *Basic Inc.*, 485 U.S. at 243). However, in cases "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact." *Affiliated Ute Citizens of Utah*, 406 U.S. at 153–54 (citations omitted); *see also Stoneridge Inv. Partners, LLC*, 552 U.S. at 159 ("[I]f there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance.").

As an initial matter, "the element of reasonable reliance ordinarily is a fact-intensive issue not proper for determination as a matter of law at the pleading stage, but one more appropriate for the fact-finder after discovery has developed a sufficient evidentiary record." *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 449 (S.D.N.Y. 2010); *see also Maloul v. Berkowitz*, No. 07 Civ. 8525, 2008 WL 2876532, at *2 (S.D.N.Y. July 23, 2008) (noting that element of reliance "is

intensely fact-specific and generally considered inappropriate for determination on a motion to dismiss"). Thus, I recommend that the Court defer its determination regarding reliance.

However, should the Court consider whether the complaint sufficiently alleges reliance, I will alternatively analyze this argument herein. Both Defendants argue that MAZ's allegations are insufficient to satisfy the requirements of Rule 9(b). Doc. No. 13, at 19; Doc. No. 28, at 8. Defendants further contend that MAZ cannot plead reliance on behalf of a class under the "fraud on the market" theory.[17] Doc. No. 13, at 19–20; Doc. No. 28, at 8–9. Specifically, Defendants argue that MAZ must demonstrate that the market in which it purchased its shares is efficient; because FCHS common stock is traded on the OTC market, MAZ cannot demonstrate market efficiency as a matter of law. Doc. No. 13, at 20–22; Doc. No. 28, at 9.[18]

As MAZ argues, however, Defendants' motions to dismiss on the basis of reliance are due to be denied. First, MAZ specifically alleges reliance in the complaint. Doc. No. 1 ¶¶ 17, 102,

[17] "[F]raud on the market is a substantive doctrine of federal securities-fraud law that can be invoked by any Rule 10b–5 plaintiff[.] [T]he doctrine has particular significance in securities-fraud class actions. Absent the fraud-on-the-market theory, the requirement that Rule 10b–5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class. The fraud-on-the-market theory, however, facilitates class certification by recognizing a rebuttable presumption of classwide reliance on public, material misrepresentations when shares are traded in an efficient market." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 462–63 (2013) (citations omitted).

[18] The parties point to conflicting authority on whether the OTC market is considered an efficient market. *Compare, e.g.*, *Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 493 (S.D.N.Y. 2011) (citation and quotation marks omitted) ("[W]hile the NASDAQ is recognized as maintaining an efficient market . . . the Court is unaware of any court holding that the [OTC] . . . meet[s] this same standard."), *aff'd sub nom. Alki Partners, L.P. v. Windhorst*, 472 F. App'x 7 (2d Cir. 2012), *with, e.g.*, *In re Amerifirst Sec. Litig*., 139 F.R.D. 423, 430 (S.D. Fla. 1991) ("[T]he majority of courts considering the issue have held that the fact that securities traded on an OTC market, rather than on a national stock exchange, will not necessarily defeat a finding of market efficiency provided there is evidence that the stock at issue traded in an environment where material information concerning the company is widely available and accurately reflected in the price of the stock."). Regardless, the question of whether the OTC market is efficient should not be decided on a motion to dismiss. *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d at 377 ("[W]hether the fraud on the market theory applies is not a pure question of law. Rather, that determination turns on whether the relevant market has the traits of an "efficient market" as described in *Basic*. Thus, the question of whether securities were traded in an efficient market should not be decided on a motion to dismiss.").

103. MAZ alleges that had it been aware that the price of FCHS common stock had been artificially inflated, it may not have purchased the common stock. *Id.* ¶ 103. These allegations are sufficient. *See Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 187 (2d Cir. 2001) (citation omitted) ("[P]laintiffs may allege transaction and loss causation by averring both that they would not have entered the transaction but for the misrepresentations and that the defendants' misrepresentations induced a disparity between the transaction price and the true 'investment quality' of the securities at the time of the transaction."); *Stephenson v. Deutsche Bank AG*, 282 F. Supp. 2d 1032, 1058 (D. Minn. 2003) (citation omitted) ("Because Plaintiffs have alleged that they would not have purchased the security but for defendant's [fraud], or that they would have purchased it at a lower price, they have established transaction causation.").[19]

Moreover, because this case centers on Defendants' omissions, it appears that MAZ may be able to rely on "the presumption of reliance" as stated in *Affiliated Ute Citizens of Utah*, 406 U.S. 128. *Dingler v. T.J. Raney & Sons, Inc*., 708 F. Supp. 1044, 1051 (W.D. Ark. 1989); *see Affiliated Ute Citizens of Utah*, 406 U.S. at 153–54 (citations omitted) (in cases "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery"); *see also Abrams & Wofsy v. Renaissance Inv. Corp.*, No. 1:87-CV-2074WCO, 1991 WL 319050, at *4 (N.D. Ga. Aug. 22, 1991).

Accordingly, I recommend that the Court decline to grant the motions to dismiss on reliance grounds.

D. Proposed Class Definition.

First Choice argues that the class allegations in the complaint should be stricken because the complaint creates an "improper fail-safe class." Doc. No. 13, at 24. A "fail-safe" class" is

[19] "[T]ransaction causation is generally understood as reliance." *Castellano*, 257 F.3d at 186.

created where the class "is defined in a way that precludes membership unless the liability of the defendant is established." *Alhassid v. Bank of Am., N.A.*, 307 F.R.D. 684, 693 (S.D. Fla. 2015) (citation omitted). Here, the proposed "class" consists of:

> all persons other than Defendants who purchased or otherwise acquired First Choice common stock from April 1, 2014 through November 14, 2018, both dates inclusive (the "Class Period"), seeking to recover damages caused by Defendants' violations of the federal securities laws and to pursue remedies under Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5 promulgated thereunder, against Defendants.

Doc. No. 1 ¶ 1; *see also id.* ¶ 90 ("Plaintiff brings this action . . . on behalf of a Class, consisting of all those who purchased or otherwise acquired First Choice common stock during the Class Period (the 'Class') and were damaged thereby.").

First Choice's argument ignores the Court's ability to refine the class definition if necessary. *See, e.g., A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co*., 321 F.R.D. 688, 696 (S.D. Fla. 2017) (and cases cited therein). *Cf. Messner v. Northshore Univ. HealthSystem,* 669 F.3d 802, 825 (7th Cir. 2012) ("Defining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem is more of an art than a science. Either problem can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis."). Moreover, this argument is more properly resolved in opposition to class certification, rather than on a motion to dismiss. *See, e.g.*, *Smith v. Rainey*, No. 8:09-cv-1628-T-27MAP, 2011 WL 4352179, at *3 (M.D. Fla. Sept. 16, 2011) ("With respect to the sufficiency of Plaintiffs' class action allegations, the Court agrees with Plaintiffs that compliance with Rule 23 is not to be tested by a motion to dismiss for failure to state a claim."); *Nelson v. Quimby Island Reclamation Dist. Facilities Corp*., No. C-77-0784, 1978 WL 1059, at *2 (N.D. Cal. Feb. 3, 1978) (denying motion to strike class allegations in federal securities case, finding "Defendant does not contend that no class

would be proper; rather, it objects to the dimensions of the class alleged by plaintiffs. Defendant's objections should be interposed when plaintiffs move to certify their classes.").

Accordingly, I recommend that the Court deny the portion of First Choice's motion to dismiss seeking to strike the class allegations without prejudice to First Choice raising its arguments in opposition to any motion for class certification.

E. Count II of the Complaint.

To state a claim under Section 20(a), MAZ must allege three elements: (1) that First Choice committed a primary violation of the securities laws; (2) that Romandetti had the power to control the general business affairs of First Choice; and (3) that Romandetti "had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in primary liability." *Mizzaro*, 544 F.3d at 1237 (citations omitted). "Because a primary violation of the securities laws is an essential element of a § 20(a) derivative claim, . . . a plaintiff adequately pleads a § 20(a) claim only if the primary violation is adequately pleaded." *Id.*

Here, Romandetti moves to dismiss Count II of the complaint on a single ground—if the Court finds that MAZ fails to state a claim in Count I of the complaint, Count II must also be dismissed. Doc. No. 28, at 9–10. As discussed above, I recommend that the Court find that MAZ has stated a claim in Count I of the complaint for violations of federal securities laws. Accordingly, I recommend that the Court decline Romandetti's request to dismiss Count II of the complaint on this basis. *See, e.g.*, *Cheney v. Cyberguard Corp.*, No. 98-6879-CIV-GOLD, 2000 WL 1140306, at *6 (S.D. Fla. Jul 31, 2000) (holding that shareholder-plaintiffs stated a § 20(a) claim against a corporation's Chairman of the Board, President, and CEO, based on his power to control the corporate policy that resulted in corporate liability under § 10(b)).

VI. RECOMMENDATION.

For the foregoing reasons, **I RESPECTFULLY RECOMMEND** that the Court **DENY** Defendants' Motions to Dismiss (Doc. Nos. 13, 28). I further **RECOMMEND** that the Court **ORDER** the parties to meet and confer to prepare a Case Management Report, within a time established by the Court, upon issuance of its ruling on this Report and Recommendation.

NOTICE TO PARTIES

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

Recommended in Orlando, Florida on October 16, 2019.

Leslie R. Hoffman

LESLIE R. HOFFMAN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Party
Courtroom Deputy