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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Plaintiff - Appellee*, v. BRENDA CHRISTINE BARRY; ERIC CHRISTOPHER CANNON; CALEB AUSTIN MOODY, DBA Sky Stone, *Defendants - Appellants*, and PACIFIC WEST CAPITAL GROUP, INC., ANDREW B. CALHOUN IV, PWCG TRUST, BAK WEST, INC., ANDREW B. CALHOUN, Jr., CENTURY POINT, LLC, MICHAEL WAYNE DOTTA, *Defendants*.	No. 23-2699 D.C. No. 2:15-cv-02563-DDP-AS OPINION

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted December 6, 2024
Pasadena, California

Filed August 11, 2025

Before: Ronald M. Gould, Richard R. Clifton, and
Gabriel P. Sanchez, Circuit Judges.

Opinion by Judge Clifton

SUMMARY*

Securities Law

The panel affirmed the district court's summary judgment in favor of the Securities and Exchange Commission (SEC) in the SEC's action alleging that Defendants, who were sales agents for Pacific West Capital Group (PWCG), violated federal securities laws by offering and selling unregistered securities and by not being properly registered as broker-dealers.

Defendants promoted and sold fractional interests in life settlements. The district court held that PWCG's life settlements were securities under the Securities Act of 1933 and that Defendants had not established an applicable exemption from the securities laws' registration requirements.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that fractional interests in life settlements are investment contracts, and thus securities, under the federal securities laws. Three features of PWCG's life settlements—its selection of specific policies on certain terms, its construction and operation of its premium reserve system, and the fractionalized nature of the interests—together satisfy the *Howey* test's requirements that profits come "from the efforts of others." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

The panel held that PWCG's issue of fractional interests in life settlements was not exempt from the federal securities laws' registration requirements. PWCG's life settlements shared a financing scheme, were the same type of security, and were offered to at least one out-of-state resident. Therefore, PWCG's offerings were part of an integrated, interstate offering.

Defendants argued that the district court erred in awarding disgorgement because disgorgement requires pecuniary harm to victims and no pecuniary harm existed. The panel affirmed the district court's finding of pecuniary harm because buyers of PWCG's fractional interests in life settlements suffered pecuniary harm through the loss of the time value of their money.

Finally, the panel affirmed the district court's imposition of an injunction against Defendant Eric Cannon and civil penalties against all three Defendants.

COUNSEL

Kerry J. Dingle (argued), Senior Appellate Counsel; Jordan A. Kennedy, Appellate Counsel; Daniel Staroselsky, Assistant General Counsel; Tracey A. Hardin and Michael A. Conley, Solicitors; Megan Barbero, General Counsel; Securities and Exchange Commission, Washington, D.C.; Kathryn C. Wanner, Securities and Exchange Commission, Los Angeles, California; for Plaintiff-Appellee.

Igor V. Timofeyev (argued), Paul Hastings LLP, Washington, D.C.; Alyssa K. Tapper and Alexander Sweet, Paul Hastings LLP, Los Angeles, California; Nicolas Morgan, Investor Choice Advocates Network, Los Angeles, California; for Defendants-Appellants.

Gregory Nolan, Kenneth P. White, and Tyler C. Creekmore, Brown White & Osborn LLP, Los Angeles, California, for Amicus Curiae Ongkaruck Sripetch.

OPINION

CLIFTON, Circuit Judge:

Pacific West Capital Group (PWCG), a California corporation, sold fractional interests in life settlements to investors. A life settlement is a transaction in which a person who owns a life insurance policy on his or her own life sells that policy to investors for a negotiated price. Thereafter, the investors pay the premiums on the policy until the insured dies, at which point those investors receive the policy's death benefit.

We conclude that the fractional interests in the life settlements sold by PWCG were "investment contracts" and thus securities subject to the registration requirements of the Securities Act of 1933. In our view, as we discuss below, these investments were securities because the purchasers of the fractional interests sold by PWCG depended on the efforts of PWCG to profit through PWCG's selection of policies, its determination of prices to be paid for those policies, and its premium reserve system to maintain investors' fractional interests. Other circuits have previously divided over the question of whether life settlements are securities subject to registration. In concluding that the fractional interests were securities, we join the Eleventh and Fifth Circuits and depart from a conclusion reached by the D.C. Circuit.

Defendants-Appellants Brenda Barry, Eric Cannon, and Caleb Moody (collectively Defendants) were sales agents for PWCG who promoted and sold fractional interests in life settlements. The Securities and Exchange Commission (SEC) alleged that Defendants violated federal securities laws by offering and selling

unregistered securities and by not being properly registered as broker-dealers. The district court granted summary judgment to the SEC, concluding that PWCG's offerings and sales of fractional interests in life settlements were offerings of unregistered securities and that the sales were not exempt from registration under the intrastate offering exemption. As remedies, it ordered disgorgement of a portion of the commissions received by the Defendants, imposed civil penalties against each of the Defendants, and enjoined Cannon from future violations of the securities laws. We affirm.

I. Background

Life settlements emerged from "viatical settlements," which were transactions that arose during the 1980s AIDS crisis in which terminally ill patients sold their life insurance policies to investors. Joy D. Kosiewicz, *Death for Sale: A Call to Regulate the Viatical Settlement Industry*, 48 CASE W. RSRV. L. REV. 701, 701-02 & n.4 (1998). Some people suffering from the disease needed money because the illness often made it hard for them to work and imposed heavy medical costs. *See SEC v. Life Partners, Inc.*, 898 F. Supp. 14, 17 (D.D.C. 1995). An insured could "surrender" their policy to the issuing life insurance company for a fraction of the policy's value. For a larger fraction, however, an insured could sell the policy to others, such as investors. As PWCG's promotional brochure explained, using hypothetical numbers, "Now, instead of being able to receive only $100,000 on a $1,000,000 policy [from the life insurance company], the insured might expect to receive $250,000 from investors." Life settlements allow insureds to get more money for their policies

from private investors than they could otherwise receive from their life insurance companies.

In exchange for paying the insured for their policy and taking on the responsibility of paying the premiums, the investor receives the death benefit after the insured dies. The investor profits if the insured dies early enough to outweigh the cost of the policy and its premiums. As the Fifth Circuit explained, "To put it bluntly, a life settlement is a bet on the length of the insured's life." *Living Benefits Asset Mgmt. v. Kestrel Aircraft Co.*, 916 F.3d 528, 531 (5th Cir. 2019).

PWCG promoted and sold fractional interests in life settlements and structured the payment of their premiums. Life settlement brokers and resellers sent medical and policy information about insureds to PWCG to see if it was interested in purchasing them to sell to its own investors. According to one of its promotional brochures, PWCG reviewed policies every month that were collectively worth hundreds of millions of dollars for investment opportunity. PWCG explained it would invest only in those policies where the insureds were at least 75 years old, the insurance company was reputable, and the policies were not subject to loopholes that could restrict payouts. The brochure stated, "Policies offered by PWCG have a minimum total fixed return of 100%, meaning investors will double their money." PWCG reviewed insureds' medical records to assess the likelihood that insureds would die in four to seven years from the date of purchase, though PWCG did not engage medical professionals to do so.

PWCG established a trust, PWCG Trust, to be the policies' owner and beneficiary, and it appointed as trustee a company with experience administering life

settlements, Mills, Potoczak & Co. (Mills Potoczak). PWCG and Calhoun identified policies for PWCG Trust to purchase. PWCG then offered its investors fractional shares in PWCG Trust's beneficiary interests in specific policies. Mills Potoczak assigned those fractional shares of a particular policy's death benefit to the purchasing investors. As trustee, Mills Potoczak administered premium payments, monitored whether the insured died, and distributed the payouts upon an insured's death. Paying the insurance policies' premiums was essential to the profitability of life settlements because otherwise the policies risked lapsing and future benefits would be lost.

To fund its payment of life settlement premiums, PWCG used investor proceeds to create what it described as a "three-tiered premium reserve system that is unique in the industry." The first tier, the "primary premium reserve," held enough money to pay the premiums on a policy for six to nine years. The second tier, called the "first general reserve," comprised "1% of all investor money for all policies." If PWCG and Mills Potoczak depleted the money from the first tier, then the second tier would be drawn upon to make premium payments. If both the first and second tiers ran out of money, then the third tier, the "second general reserve," would contribute. The third tier was funded by money from the first tier of other policies whose insureds had died before their corresponding first tier funds ran out. PWCG could also make "premium calls" requiring investors to put in more money to pay policies' premiums if the premium reserve system failed.

The system failed. While PWCG intended to buy policies covering insureds who would die within four to

seven years, too many of the original insureds lived longer than that. PWCG's primary reserve system could not make the required premium payments. PWCG turned to the next two tiers, drawing down the secondary and tertiary reserves. When the reserves ran out, PWCG resorted to premium calls or used proceeds from the sale of new policy interests to pay for existing premiums. Around 150 investors received premium calls, totaling more than $1.7 million. Those who did not answer premium calls were told they had lost their investments. A receiver was later appointed by the district court to take over management of PWCG Trust. The receiver said that PWCG's failed bets on insureds' lifespans, as well as PWCG's "failing to engage in the high level of management required to maintain the Policies," had "predestined the shortfalls in reserves amounts for each of the Policies."

In April 2015, the SEC sued PWCG, PWCG Trust, PWCG founder Andrew B. Calhoun IV (Calhoun), Andrew Calhoun Jr. (Calhoun's father), Michael Dotta, and the current Defendants-Appellants: Barry, Cannon, and Moody.[1] The SEC alleged, in relevant part, that PWCG, Calhoun, Calhoun Jr., Dotta, and Defendants violated Sections 5(a) and (c) of the Securities Act of 1933 by offering and selling unregistered securities, 15 U.S.C. §§ 77e(a), 77e(c), and Section 15(a) of the Securities and Exchange Act of 1934 (Exchange Act) by failing to register as broker-dealers, 15 U.S.C. § 78o(a). The SEC also charged PWCG and Calhoun with securities fraud and

[1] In its complaint, the SEC also named two companies, BAK West and Century Point, that received Barry's and Cannon's commissions from PWCG. On appeal here are only Defendants-Appellants Barry, Cannon, and Moody.

Calhoun with controlling person liability. All parties other than the three current Defendants have settled or been dismissed. PWCG and Calhoun each agreed to millions of dollars in disgorgement and hundreds of thousands of dollars in penalties to account for the fraud-based charges. The SEC's settlement with PWCG Trust included appointing the receiver over the Trust. The three current Defendants, who played no managerial role at PWCG and against whom the SEC alleged only nonfraud violations, are the only defendants who remain.

The current appeal results from two orders of the district court from 2023. The first granted the SEC's renewed motion for summary judgment and denied Defendants' cross-motion for summary judgment. The district court held that PWCG's life settlements were securities under the Securities Act of 1933 and that Defendants had not established an applicable exemption from the securities laws' registration requirement. The second order required Defendants to disgorge one-third of the commissions they received selling PWCG's life settlements, pay civil penalties of $15,000 each, and enjoined Cannon from future violations of the securities laws. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

II. Discussion

We review a district court's grant of summary judgment de novo. *SEC v. Belmont Reid & Co., Inc.*, 794 F.2d 1388, 1390 (9th Cir. 1986). We also review de novo a district court's "determination whether a transaction is a security." *Id.* We review remedies ordered by the district court under the Securities Act and the Exchange Act for abuse of discretion. *SEC v. Husain*, 70 F.4th 1173, 1180 (9th Cir. 2023).

A. Investment Contract

We start with the question of whether fractional interests in life settlements are investment contracts, and thus securities, under the federal securities laws. We conclude that they are.

The Securities Act of 1933 defines a security broadly as including an "investment contract." 15 U.S.C. § 77b(a)(1). In *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), the Supreme Court interpreted "investment contract" to mean "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *Id.* at 298-99. The *Howey* test has three elements: first, an investment of money in, second, a common enterprise, and third, the "profits were to come solely from the efforts of others." *SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1338 (9th Cir. 1994). This third element is often described as the "efforts of others" requirement and is the only element of the *Howey* test at issue here.

The *Howey* test's broad definition, the Court explained, "permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of the many types of instruments that in our commercial world fall within the ordinary concept of a security." *Howey*, 328 U.S. at 299 (internal quotation marks omitted). The definition "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* The Supreme Court has since commanded that "form should be disregarded for substance and the emphasis

should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

Whether an investor's expectations of profits are "solely from the efforts of the promoter or a third party" does not require that the efforts of others be the *only* factor for profit but "whether the efforts made by those other than the investor are the *undeniably significant ones*, those essential managerial efforts which affect the failure or success of the enterprise." *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973) (emphasis added). Investors' expectations can be established through promoters' representations in materials such as brochures, advertisements, oral statements, or contracts. *See Hocking v. Dubois*, 885 F.2d 1449, 1457 (9th Cir. 1989); *Eurobond*, 13 F.3d at 1341.

Howey's "efforts of others" element turns on the source of an enterprise's profits. If an enterprise's profit comes from developments outside of the promoter's control, then the transaction is not an investment contract. For example, in *SEC v. Belmont Reid & Co., Inc.*, we held that the sale of gold coins for a fixed price was not an investment contract because the purchasers' opportunity to profit came from increases in the global price for gold and not the efforts of the promoter who sold gold to the investor. 794 F.2d at 1391. Similarly, in *Noa v. Key Futures Inc.*, 638 F.2d 77 (9th Cir. 1980), we held that the sale and storage of silver bars for investors was not an investment contract because the profit depended on fluctuations in the global market for silver and not on Key Futures' managerial or entrepreneurial effort. *Id.* at 79-80.

In contrast, if an investor is dependent on a seller to provide efforts that could lead to profits, then the

Howey "efforts of others" requirement is satisfied. We have explained that a key factor for satisfying the efforts-of-others inquiry is when a promoter has "practical," *SEC v. Goldfield Deep Mines Co. of Nev.*, 758 F.2d 459, 464 (9th Cir. 1985), or "complete control," *SEC v. R. G. Reynolds Enters., Inc.*, 952 F.2d 1125, 1131 (9th Cir. 1991), over the enterprise and its profitability. We have held that the efforts of others could be seen in a promoter's sale of foreign government bonds, financed by foreign currency loans, because "any profits to investors came from the efforts and expertise of" the promoter who chose when to purchase the bonds, which bonds, how many, when to take out a loan, and what currency the loan should be in, among other factors. *Eurobond*, 13 F.3d at 1341; *see also Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 562 (1979) (holding that a pension plan is not an investment contract because whether an employee profits "would depend primarily on the employee's efforts to meet the vesting requirements, rather than the fund's investment success").[2]

The district court here concluded that PWCG's efforts in choosing which policies to offer investors using its own selection criteria, coupled with investors'

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[2] An investment contract is distinguishable from an ordinary sale-of-goods or services contract because investors in investment contracts are motivated by "financial returns on their investments" and not "a desire to use or consume the item purchased." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852-53 (1975). If a transaction merely resembles "any sale-of-goods contract in which the buyer pays in advance of delivery and the ability of the seller to perform is dependent, in part, on both his managerial skill and some good fortune," then the efforts-of-others test is not met. *See Belmont Reid*, 794 F.2d at 1391.

lack of control over which policies PWCG selected, supported the conclusion that investors were reliant on PWCG's efforts to profit. Further, the establishment and operation of the premium reserve system by PWCG represented "the kind of 'essential managerial' efforts that the 'efforts of others' element requires." In concluding that life settlements are investment contracts under the federal securities laws, the district court's decision aligned with opinions of the Eleventh and Fifth Circuits and departed from a contrary opinion of the D.C. Circuit.

We agree with the conclusion of the district court that the fractional interests in life settlements offered and sold by PWCG were investment contracts and thus securities. As we discuss below, three features of PWCG's life settlements—its selection of specific policies on certain terms, its construction and operation of its premium reserve system, and the fractionalized nature of the interests—together satisfy the *Howey* test's requirement that profits come "from the efforts of others." *Howey*, 328 U.S. at 301.[3]

1. Selection and Purchase of Policies

PWCG's selection of life insurance policies, including the evaluation of insureds and the terms of their policies and the negotiation of the price paid for the policies, demonstrates the critical nature of the efforts of PWCG. It is a given that everyone will die at some time. Whether a specific life settlement will be

[3] We do not consider whether any one feature would alone be sufficient under the test. *But see Living Benefits Asset Mgmt.*, 916 F.3d at 541 (holding that the life settlements there were securities based only on pre-purchase selection and no post-purchase efforts and rejecting explicitly the D.C. Circuit's *Life Partners* pre-/post-purchase distinction); *see also* below at 13-22.

profitable depends on choosing those policies that will pay out death benefits soon enough to make it worth the negotiated price of purchasing the life settlement and paying the policy's premiums until the insured's death.

PWCG selected which policies to purchase and negotiated the prices it paid for those policies. PWCG reviewed insureds' ages, medical records, and family histories, among other data, and bought policies only of the insureds that it thought would die within four to seven years of purchase. Company officials necessarily exercised discretion and judgment in choosing policies because, as Calhoun explained, "[T]here's always a policy out there that we can purchase." In making offers to investors, PWCG presented them with policies that had already been selected by PWCG along with summaries of the insureds' medical records—but not the original medical records themselves. Calhoun said, "There's no way that we would be able to redact [a complete set of original medical records] and give all that information to every potential investor." Investors understood PWCG to be recommending policies to them and found the curation valuable, including the assessment that the insured would likely die soon enough to make the purchase profitable.

PWCG emphasized its "efforts and expertise," *Eurobond*, 13 F.3d at 1341, in its promotional materials. In its brochure, PWCG touted its special ability to choose the precise policies that would pay out high returns for investors. PWCG advertised the above-average returns that it would be able to secure because of its "approach that has been tested and proven reliable . . . [with] high standards for investments." The PWCG brochure also said, "We are

proud of the methodology we have devised for supporting preservation of principal and capital and maximizing return potential for our investors." PWCG assured investors that "[e]ach policy submitted to us undergoes rigorous scrutiny using a predetermined set of criteria, and we select the most desirable from approximately $250+ million worth of policies per month." One investor explained that they understood "the whole foundation" of PWCG's business is "to make sure that [investors] get some, you know, good policies." PWCG emphasized its special expertise and skill in choosing policies that would produce profit for potential investors.

We placed similar emphasis on expertise in *SEC v. Eurobond Exchange, Ltd.*, where "it [wa]s beyond dispute that any profits to investors came from the efforts and expertise of Eurobond" in selecting when to purchase bonds, which bonds to purchase, how many bonds to purchase, which banks to borrow from, what currency to transact in, and more. *Id.* Likewise, in *SEC v. Rubera*, 350 F.3d 1084 (9th Cir. 2003), we held that a pay telephone investment program was a security because "investors in Mr. Rubera's telephone investment program were passive, completely relying" on the "expertise and care" of Rubera's company to do things like "select a suitable location for the telephone, install the pay telephone, maintain the telephone," and other tasks. *Id.* at 1092.

Defendants suggest that their life settlements were not investment contracts because investors made the ultimate decision to invest in any specific policy. But all buyers have the ultimate prerogative to decide whether to put their money into a transaction or not. The relevant inquiry under the *Howey* test is whether

PWCG's investors were led to expect profits from the efforts of others. Investors here were so led, in part, because PWCG presented investors with a curated subset of policies that PWCG said it had chosen specifically based on its evaluation of those policies' financial terms and the underlying insureds' health.

Defendants argue that this case is like *Noa* or *Belmont Reid*. Instead of the external market force being the global demand for precious metals, Defendants argue here that the relevant external force is the insureds' date of death. *See Noa*, 638 F.2d at 79; *Belmont Reid*, 794 F.2d at 1391. No one, they point out, can predict *exactly* when an insured will die. Because the unpredictability of death means that life settlement policies are unpredictable too, Defendants contend that profits were not dependent on PWCG but on the variability of insureds' deaths.

Defendants confuse "profit" with "payout." Absent wrongdoing, nobody can predict exactly when someone else will die. Thus, no one can predict exactly when to expect a *payout* from a life insurance policy. But an investor's *profit*, key to the *Howey* test, depends not just on an insured's death but also on the price that PWCG secured for that policy and on the number and size of additional premium payments needed to maintain the policies. The "undeniably significant" efforts that mattered for the success or failure of PWCG's profitability in its life settlements include the research and evaluation that PWCG conducted in selecting policies and the price that PWCG paid. *See Glenn W. Turner Enterprises*, 474 F.2d at 482.

The speculative aspects of life settlements are analogous to the fractional land interests in *SEC v. Schooler*, 905 F.3d 1107 (9th Cir. 2018). In *Schooler*,

we held that the sales of fractionalized interests in land sold via general partnership shares were investment contracts. *Id.* at 1112. Even though "[a]n investment in land for long-term holding is *inherently speculative*, . . . decisions about what property to purchase and how much to pay for it are among the most important decisions in determining the success of the investment." *Id.* at 1113 (emphasis added). Life settlements are likewise, in one respect, "inherently speculative." *Id.* Yet which policies to buy and how much to pay for them are similarly "among the most important decisions in determining the success of the investment." *Id.*; *see also Living Benefits Asset Mgmt.*, 916 F.3d at 540 ("[T]he most important factors bearing on life settlements' profitability are the accuracy of the actuarial estimates and the life settlements' purchase prices.").

In concluding that PWCG's selection of policies helps establish investors' dependence on the efforts of others, we take into account PWCG's "pre-purchase activities," that is, activities PWCG engaged in before transacting with investors. Pre-purchase activities here included the evaluation and selection of policies to offer to investors. We conclude that pre-purchase activities are relevant in assessing whether an investor is dependent on the efforts of others because that approach is consistent with the flexible and remedial purpose of the federal securities laws and with our precedents. We do not limit our consideration to PWCG's "post-purchase activities," that is, actions taken after the sale of the fractional interests to investors, such as paying policy premiums and distributing the benefits when insureds die.

Three other courts of appeal have considered how to weigh pre-purchase activities in this context, with the D.C. Circuit concluding that these activities should be heavily discounted, if weighed at all, and the Eleventh and Fifth Circuits concluding that they should be weighed case by case.

The D.C. Circuit in *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996), held that the viatical settlements at issue there were not investment contracts because they did not meet the efforts-of-others requirement from *Howey*. *Id.* at 538. The majority opinion discounted the pre-purchase entrepreneurial efforts of the promoters, reasoning,

> [I]f the value of the promoter's efforts has already been impounded into the promoter's fees or into the purchase price of the investment, and if neither the promoter nor anyone else is expected to make further efforts that will affect the outcome of the investment, then the need for federal securities regulation is greatly diminished.

Id. at 547. The majority noted that the only significant post-purchase activities Life Partners engaged in were "ministerial functions," as opposed to "entrepreneurial activities" that could affect profits. *Id.* at 546, 548. The main "entrepreneurial activities" occurred *before* purchase and thus were "impounded" into the purchase price. *Id.* at 547-48. The D.C. Circuit concluded that the SEC was "unable to show that the promoter's efforts have a predominant influence upon investors' profits." *Id.* at 548. Therefore, the viatical settlements were not securities. *Id.*

The Eleventh and Fifth Circuits expressly declined to adopt the D.C. Circuit's approach and instead considered promoters' pre-purchase efforts in holding that life settlements are securities. *See SEC v. Mut. Benefits Corp.*, 408 F.3d 737, 745 (11th Cir. 2005); *Living Benefits Asset Mgmt. v. Kestrel Aircraft Co.*, 916 F.3d at 540-41. The Fifth Circuit noted that the *Life Partners* approach "has been widely criticized by both courts and commentators" and said that *Life Partners* "takes an overly rigid approach considering the remedial aim of federal securities law." *Living Benefits Asset Mgmt.*, 916 F.3d at 541.

We agree with the Eleventh and Fifth Circuits that pre-purchase activities can be relevant for evaluating whether profits can be expected to come from the efforts of others. Three factors guide our consideration.

First, a strict distinction between pre- and post-purchase efforts begs the question of whether pre-purchase efforts actually become "impounded" into an investment's purchase price. The D.C. Circuit majority reasoned that it could heavily discount pre-purchase entrepreneurial activities in evaluating the efforts of others because the value of those activities will have "already been impounded into the promoter's fees or into the purchase price of the investment." *Life Partners*, 87 F.3d at 547. Thus, the "need" for the federal securities laws to mandate disclosure "is greatly diminished." *Id.*

The problem with the logic of "impoundment" is that it assumes, unrealistically, that information about pre-purchase efforts will be appreciated by investors and thus become "impounded" into the final price. Yet the "impoundment" of relevant information is why the federal securities laws "compel[] full and

fair disclosure." *See Howey*, 328 U.S. at 299. Full and fair disclosure enables a transaction and its terms to reflect available information and to allow investors to make informed decisions. In other words, the impoundment of relevant information into investors' knowledge depends on the very issue at stake in a failure-to-register case such as this one: whether the securities laws mandate the information disclosure attendant to registration in the first place.

Second, a bright line between pre- and post-purchase activities would be inappropriately formalistic given the purpose and function of the federal securities laws. The securities laws contain a "broad definition of 'security,' sufficient 'to encompass virtually any instrument that might be sold as an investment.'" *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990)). The Supreme Court has said, "We will not read into the securities laws a limitation not compelled by the language that would so undermine the laws' purposes." *Id.* at 395. We think that Judge Wald was correct to note in her dissent from the D.C. Circuit's opinion in *Life Partners* that the majority's "bright-line rule," and its emphasis on post-purchase entrepreneurial efforts, "elevates a formal element, timing, over the economic reality of the investors' dependence on the promoter." 87 F.3d at 551 (Wald, J., dissenting). Judge Wald criticized the pre-/post-purchase distinction for "undercut[ting] the flexibility and ability to adapt to 'the countless and variable schemes' that are the hallmarks of the *Howey* test." *Id.* (quoting *Howey*, 328 U.S. at 299). The Eleventh Circuit agreed that "there is no basis for excluding pre-purchase managerial activities from the analysis." *Mut. Benefits Corp.*, 408 F.3d at 743 (citing *Life*

Partners, 87 F.3d at 551 (Wald, J., dissenting)). "Indeed," that court explained, "investment schemes may often involve a combination of both pre- and post-purchase managerial activities, both of which should be taken into consideration in determining whether *Howey*'s test is satisfied." *Id.* at 743-44.

Third, a disregard of pre-purchase efforts could open loopholes in the securities laws' otherwise broad coverage. If courts discounted pre-purchase entrepreneurial efforts in assessing whether a transaction was an investment contract, then promoters could front-load their activities before any investor provides consideration for a legal interest. The risk here would include transactions where investors are dependent on the expertise of the promoter. Judge Wald warned that the *Life Partners* majority's decision risks "exempting the sale of other risky asset-based interests from the scope of the securities laws," such as curated packages of bonds and financial derivatives, where profits depend on "the promoter's skill in selecting what bonds to purchase" or on "the dealer's expertise in balancing positions in different markets," respectively. *SEC v. Life Partners*, 102 F.3d 587, 590 (D.C. Cir. 1996) (Wald, J., dissenting from denial of rehearing and rehearing en banc).

Our decision in *Noa v. Key Futures* does not compel us to draw a bright line between pre-purchase activities that matter less in an analysis of *Howey*'s efforts-of-others prong and post-purchase activities that matter more. The *Life Partners* majority cited our decision in *Noa v. Key Futures*, 638 F.2d at 79, in support of discounting pre-purchase entrepreneurial activities because there the promoter's "pre-purchase efforts," such as identifying investments and finding

investors, "were only minimally related to the profitability of the investment," which depended primarily on the global price of silver. *Life Partners*, 87 F.3d at 546. We think that a better reading of *Noa* confirms that the *Howey* analysis is more holistic. Key Futures' sale of silver bars were not investment contracts because "the profits to the investor depended upon the fluctuations of the silver market, not the managerial efforts of Key Futures." *Noa*, 638 F.2d at 79. *Noa* thus confirms that the relevant inquiry into whether an investment contract exists depends on whether an investor is led to expect profits from the promoter or a third party. *Noa* does not, however, dictate exactly *when* such representations must have been made. As the Eleventh Circuit noted, "While it may be true that the 'solely on the efforts of the promoter or a third party' prong of the *Howey* test is more easily satisfied by post-purchase activities, there is no basis for excluding pre-purchase activities from the analysis." *Mut. Benefits Corp.*, 408 F.3d at 743.

2. Premium Reserve System

PWCG's system of paying the premiums on insurance policies is another feature that supports our conclusion that its actions were "undeniably significant" and "essential managerial efforts which affect[ed] the failure or success of the enterprise." *Glenn W. Turner Enters.*, 474 F.2d at 482. Calhoun, the head of PWCG, said that "PWCG protects clients' investments with a three-tiered premium reserve system that is unique in the industry." As noted above, at 5-6, the first tier, the "primary premium reserve," contained enough money to pay premiums for six to nine years. If PWCG spent all the money in the first tier, meaning that the insured lived longer than the

six to nine years expected by PWCG, then PWCG could turn to the second tier, financed by "1% of all investor money for all policies." If the second tier ran out of funds, then the tertiary reserve would pay for premiums. The tertiary reserve was made up of "excess or unused premium dollars from any primary reserve" whose insured died before their policy's primary reserve ran out. Finally, if PWCG exhausted all three tiers of the premium reserve system, then PWCG could make "premium calls" where they invoiced investors for additional money.

The premium reserve system reflects that PWCG's investors were dependent on the efforts of PWCG to profit. The premium reserve system was an essential part of PWCG's issuance of life settlements. PWCG emphasized the system as "proprietary" in its promotional materials. Investors relied on PWCG to structure premium payments. Individual investors could not calculate on their own the premiums necessary to maintain policies. PWCG said that it "goes the extra mile to assure policies are protected." Though investors were warned that premium calls were a possibility, PWCG also promised, "We have established this plan to pay premiums so that every policy is kept in force." Together with the selection of the most profitable policies, the premium reserve system played a significant role in whether investors would profit from life settlements.

Promoters' efforts in providing essential ongoing services for an investment are a relevant factor in *Howey*'s efforts-of-others analysis. In *Rubera*, the promoters were an individual, Rubera, and his solely owned corporation, Alpha Telcom, Inc. *See Rubera*, 350 F.3d at 1086-87. In addition to depending on Alpha for

the selection of sites for pay telephones in which purchasers invested, investors were also "completely rel[iant]" on Rubera and Alpha to "install the pay telephone, maintain the telephone, pay all monthly telephone and utility bills, as well as obtain all regulatory certifications." *Id.* at 1092. We explained, "These functions were all crucial to the profitability of the investments in the pay telephones, and, concomitantly, to the success of the investment program as a whole." *Id.* "The entire scheme hinged on Alpha's efforts, managerial skill, and—as became evident at the time of Alpha's demise—continued solvency." *Id.*

PWCG's premium reserve system was more sophisticated than the maintenance of pay telephones by Rubera and Alpha. That fact supports an inference that PWCG investors were dependent on PWCG to profit. Rubera and Alpha were responsible for the operation, accounting, and regulatory compliance of their pay telephones. *Id.* PWCG did similar tasks and more. PWCG had to estimate lifespans and payouts in order to structure and fund the premium reserve system. PWCG chose the amount of money to direct toward paying premiums for six to nine years from the date of purchase, based on the projected cost of insurance, the cash surrender value of the policy, and "interest rates, mortality rates, and expense charges." If the primary reserve system ran out, then PWCG would draw on the secondary and tertiary reserves, which PWCG also structured based on its calculations of contingent events.

Defendants argue that the premium reserve system was simply an administrative, "ministerial" function and did not require managerial or

entrepreneurial skill. Defendants further suggest that PWCG's ultimately inadequate financing of the premium reserve system was indicative of a lack of managerial efforts because insureds' longevity, not PWCG's premium reserve system, was the final determinant of profit.

The ultimate breakdown of the premium reserve system demonstrates the opposite. PWCG's efforts were "undeniably significant," *see Glenn W. Turner Enters.*, 474 F.2d at 482, to investors' realizing profit, because profitability turned on how skillfully PWCG structured that system. If PWCG estimated insureds' lifespans poorly, as it did, then that would undermine investors' profits by increasing the cost investors would have to pay to maintain the policies.

During PWCG's operation, the primary reserve system proved unable to make all premium payments, which resulted in PWCG having to decide between tapping into the reserves, paying the post-purchase premiums with its own profits, not paying the premiums, or asking investors for more money in a "premium call." PWCG eventually drew on its secondary and tertiary reserves and, when those reserves ran out, made premium calls. To predict how large premium calls needed to be, PWCG and the trustee of PWCG Trust, Mills Potoczak, contracted with a third-party who specialized in estimating optimal premium payments. Premium calls often ended up being higher than investors understood they would be from previous representations. At least 150 investors received premium calls for a total of approximately $1.7 million. Those who did not answer were told that they had lost their investments.

The receiver of PWCG Trust, Thomas C. Hebrank, explained that operating a successful premium reserve system required managerial, and not simply ministerial or clerical, skill. In 2018, the district court appointed Hebrank to be receiver over the PWCG Trust as part of the SEC's consent judgment with PWCG Trust. Hebrank attributed PWCG's struggles to its mismanagement and poor judgment as to insureds' lifespans. He explained that PWCG and Calhoun underestimated how long insureds would live because "Calhoun did not use policyholder life expectancies . . . in calculating reserves and instead focused on achieving an immediate return to Pacific West." As a result, by the time Hebrank took control of PWCG Trust, "most . . . reserves ha[d] been exhausted." Hebrank explained that from 2012 to 2017, PWCG used the sale of new policies to pay the outstanding premiums on older policies so that it could avoid drawing on the secondary and tertiary reserves and making premium calls. PWCG's failure to set aside sufficient money in the premium reserve system and failure to use actuarial life expectancy estimates "predestined the shortfalls in reserves amounts for each of the Policies," Hebrank explained. "This problem was then exacerbated by [PWCG's] fail[ure] to engage in the high level of management required to maintain the Policies."

The breakdown of the premium reserve system during PWCG's operation indicates that a lack of managerial skill produced the near failure of PWCG's life settlement investments. By structuring the system initially, maintaining the system as premiums mounted, choosing whether to make premium calls or pay out of its founder's own pocket, and managing premiums after premium calls were filled, PWCG

exercised "essential managerial" and entrepreneurial judgment that "affect[ed] the failure or success of the enterprise." *Glenn W. Turner Enters.*, 474 F.2d at 482.

3. Fractionalized Interests

Finally, the fractionalized nature of investors' interests also supports the conclusion that PWCG's life settlements were investment contracts because investors were dependent on PWCG and their "exercise of control was precluded for all practical purposes." *See Dubois*, 885 F.2d at 1461. While a nonfractionalized investment might involve the purchase of entire life insurance policies in which the investor exerts some measure of control, the fractionalized nature of the life settlements here created an interdependence among numerous investors. This interdependence meant that investors were dependent on PWCG to have properly structured the premium reserve system and on PWCG Trust and Mills Potoczak to implement that system. Investors were particularly dependent on PWCG bringing together sufficient numbers of creditworthy investors to maintain policies. Each policy had multiple investors with fractional interests, sometimes as many as fifty to seventy. Investors could not calculate premium payments themselves. They relied on PWCG and Mills Potoczak to decide when to make premium payments and issue premium calls. If the reserve system broke down and some investors did not pay premium calls, PWCG would have to decide whether its own money would cover any potential shortfalls.

The fractional nature of investors' interests also meant that investors seeking to invest in specific policies had to go through PWCG, a situation akin to our decision in *Goldfield*. There, we held that

Goldfield's ore refining program was "the undeniably significant effort" for the *Howey* test. *Goldfield*, 758 F.2d at 464. Among other factors, we noted that Goldfield had "what was represented to be the only economically feasible dump ore processing technique." *Id.* While the investors in *Goldfield* were allowed to take ore purchased from Goldfield to other processors, they had to pay a $20,000 bond and were told that no other processor would process that ore in such small quantities. *Id.* We explained that "as a practical matter, the investors were forced to rely exclusively upon the services of Goldfield." *Id.* Here, the fractionalized nature of PWCG's policies' beneficiary interests meant that an investor trying to invest in any one of PWCG's policies was similarly "forced to rely exclusively upon" PWCG, both in purchasing their fractionalized interest as well as in maintaining it. *Id.*

The workings of PWCG's whole system—its selection of policies, its premium reserve system, and its fractionalization of those policies—demonstrate PWCG's "undeniably significant" efforts in securing their investors' profits. *Glenn W. Turner Enters.*, 474 F.2d at 482. Investors depended on the entire package of services that PWCG offered to manage and maintain the life insurance policies. We therefore conclude that the fractional interests in life settlements sold by PWCG were investment contracts subject to the federal securities laws.

B. Intrastate Offering Exemption

The Securities Act of 1933 prohibits the interstate sale of securities without a registration statement, which discloses relevant information "in the public interest or for the protection of investors." *See* 15 U.S.C. §§ 77e(a), 77e(c), 77g(a)(1), 77aa. Some types of

securities are exempt from the Securities Act's registration requirement. Relevant here, the intrastate offering exemption excludes from the Securities Act's registration requirement "[a]ny security which is part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory." *Id.* § 77c(a)(11). In other words, if securities are sold entirely within a single state and not part of an interstate offering, then they are exempt from federal registration requirements. We have explained that "[b]ecause registration is so important to the protection of the investing public, exemptions to registration requirements are construed narrowly against the parties claiming their benefits." *World Trade Fin. Corp. v. SEC*, 739 F.3d 1243, 1247 (9th Cir. 2014).

We agree with the district court that PWCG's issue of fractional interests in life settlements was not exempt from the federal securities laws' registration requirements. PWCG's life settlements shared a financing scheme, were the same type of security, and were offered to at least one out-of-state resident. Therefore, PWCG's offerings were part of an integrated, interstate offering.

1. Interstate Offering

Defendants have not shown that they qualify for the intrastate exemption from registration. PWCG did not sell life settlements solely within California. The district court noted that PWCG had offered and sold life settlement interests to Samuel John Bainbridge, a Nevada resident. Bainbridge said that he learned

about PWCG from a seminar PWCG presented in Las Vegas, Nevada. Bainbridge invested with PWCG through his family trust, which was a Nevada state trust. Bainbridge said that PWCG founder Andy Calhoun

> knew without any doubt, 100 percent, that I resided in Las Vegas, Nevada, 100 percent. There's no questions about that. Okay? And there was talk, you know, about, ["]These are California investments but, you know, if you can get something, you know, to state that you're in California, then this will be just all fine and dandy. It's just paperwork.["]

PWCG, a California corporation, offered life settlements to Bainbridge, a Nevada resident. PWCG's offerings do not qualify for the intrastate exemption because PWCG did not offer its securities exclusively within one state.

2. Integration

We conclude that the district court correctly rejected Defendants' argument that the fractional interests in life settlements were not an integrated issue. Integration matters here because many, if not most, of PWCG's sales were to fellow California residents. If those sales were not integrated and instead considered separately from PWCG's sales to out-of-state residents, then all of PWCG's offerings to other California residents could be exempt from federal registration requirements and thus not be bases for Defendants' liability. Conversely, if PWCG's offers and sales were integrated, then PWCG's offer and sale to a non-California resident indicates that the issuance did not qualify for the intrastate exemption.

The district court properly applied the SEC's five-factor inquiry, which we adopted in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980), to conclude that the offering was integrated. The five factors ask

> (1) are the offerings part of a single plan of financing;
> (2) do the offerings involve issuance of the same class of security;
> (3) are the offerings made at or about the same time;
> (4) is the same type of consideration to be received; and
> (5) are the offerings made for the same general purpose.

Id. at 645.

At least four of the five factors favor a conclusion that the offerings were integrated. On the first factor, PWCG's life settlements were "part of a single plan of financing" because, as the district court noted, they were all part of the premium reserve system. On the second factor, all offerings were of the "same class" because they were fractionalized interests in life insurance policies held by PWCG Trust. *Cf. id.* at 646 (characterizing limited partnerships as the same class of security). On the fourth factor, Defendants do not contest that PWCG received the same "type of consideration" for the interests. *Cf. id.* Finally, on the fifth factor, PWCG's life settlement offers were all "made for the same general purpose" of profiting from the deaths of insureds. The third factor, timing, is a closer question, as the offerings were made over an eleven-year period and occasionally showed a lapse of a few months between sales. But the other four factors weigh in favor of the district court's conclusion that

PWCG's life settlement offerings were integrated. *See id.* (concluding that an offering was integrated because four out of five factors sufficiently "militate[d] in favor of finding integration").

Defendants do not contest directly the district court's application of the five integration factors. Instead, they argue that the SEC failed to make its prima facie case that PWCG's offering was integrated and that the district court abused its discretion in excluding their expert witness report on the legal test for integration. On both arguments, Defendants are incorrect.

First, on summary judgment, the SEC did not bear the burden of establishing integration. Federal Rule of Civil Procedure 56(a) mandates summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Non-integration is an element of Defendants' affirmative defense because Defendants claim that they are exempt from federal registration requirements. The burden of proof to establish an exemption is on the party claiming it. *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *World Trade Fin. Corp.*, 739 F.3d at 1247-48. Accordingly, Defendants, not the SEC, bore the burden of establishing a genuine dispute of material fact on the question of integration. To make its prima facie case at summary judgment, the SEC only had to point to an absence of a genuine dispute of material fact on non-integration, not affirmatively establish that PWCG's offering was integrated. The Supreme Court has specifically held that Rule 56 does not require the movant to "support its motion with affidavits or other similar materials *negating* the opponent's claim."

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The district court properly put the burden on Defendants to show a genuine dispute of material fact at summary judgment on the issue of integration.

Second, the district court properly excluded Defendants' expert witness' report on integration. We review a district court's exclusion of expert testimony at summary judgment for abuse of discretion. *See Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1227 (9th Cir. 1998). Rule 702(a) of the Federal Rules of Evidence requires that an expert witness "may testify in the form of an opinion" if, among other factors, "it is more likely than not that . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." The ultimate question of whether a securities offering is integrated is a question of law, as Defendants' expert witness himself acknowledged. Here, Defendants' expert witness was offering a legal interpretation that would not aid the district court in finding facts. Therefore, the district court did not abuse its discretion in excluding the report. *See Aguilar v. Int'l Longshoremen's Union Loc. No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (explaining that "matters of law for the court's determination" are "inappropriate subjects for expert testimony").

C. Disgorgement

We affirm the district court's disgorgement award.

A district court's award of disgorgement for securities violations is reviewed for abuse of discretion. *SEC v. Hui Feng*, 935 F.3d 721, 737 (9th Cir. 2019).

The SEC has the power to seek, and federal courts to award, "any equitable relief that may be appropriate

or necessary for the benefit of investors," including "disgorgement" specifically. 15 U.S.C. §§ 78u(d)(5), 78u(d)(7); *see also Liu v. SEC*, 591 U.S. 71, 75-79 (2020) (upholding 15 U.S.C. § 78u(d)(5)).

The SEC here requested disgorgement of all of the Defendants' profits. The district court awarded disgorgement of one-third of Defendants' commissions "to be distributed to investors." The district court's disgorgement order required Barry to pay $227,000, Cannon to pay $219,333.33, and Moody to pay $180,000, which are one-third of the ill-gotten gains received by each of them as identified by the district court. The district court reasoned that investors were harmed in two ways, in addition to any loss of their principal investment. First, they suffered defeat of their expectations of profit based upon PWCG's representations. Second, the investors lost the time value of their money because of the "substantial delay in recouping the principal amount of their investments." The district court declined, however, to order disgorgement of the full amount of the Defendants' profits because, the district court concluded, they were less blameworthy than Calhoun, whose settlement with the SEC required that he disgorge half of his profits.

On appeal, Defendants argue that the district court erred in awarding disgorgement because disgorgement requires pecuniary harm to victims and no pecuniary harm exists since investors are projected to recover the money they invested.

We affirm the district court's finding of pecuniary harm. Buyers of PWCG's fractional interests in life settlements suffered pecuniary harm through the loss of the time value of their money. The time value of

money refers to the concept that money is worth more today than the same nominal amount in the future because that money could be put to use by its owner in the meantime. *See* Cong. Budget Off., *How CBO Uses Discount Rates to Estimate the Present Value of Future Costs or Savings* 2 (2024). The time value of money relies on the concept of "opportunity cost" or the cost of one activity measured in relation to the next best, foregone activity. *See* Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-4, at 29 (2023) ("The opportunity cost of an alternative includes the value of the benefits forgone as a result of choosing that alternative."). Courts routinely recognize the time value of money by awarding interest on judgments, both post-judgment, to reflect the value between the dates of judgment and payment, and sometimes pre-judgment, incorporating within a damage award the value lost between the date of injury and the date judgment is entered.

We have also recognized the time value of money as a pecuniary harm in the context of the Excessive Fines Clause and Article III standing. *See Pimentel v. City of Los Angeles*, 115 F.4th 1062, 1069 (9th Cir. 2024) (including the "time-value of [parking] fees not collected timely" as a type of "monetary harm" to the city for purposes of an Excessive Fines Clause analysis); *Van v. LLR, Inc.*, 962 F.3d 1160, 1161 (9th Cir. 2020) (holding that the "temporary deprivation of money gives rise to an injury in fact for purposes of Article III standing" because "its rightful owner loses the time value of the money") (internal quotation marks omitted). Our decision in *Van* illustrates that, like the pecuniary harm to investors here, the relevant harm is the loss of "the *use* of [one's] money." *Van*, 962 F.3d at 1165 (emphasis added). The consumer in *Van*

"received a full refund, less interest, on the money she was wrongfully charged." *Id.* at 1162. Similarly, PWCG investors will likely receive a full refund of, but not interest on, the money they put into PWCG's life settlements. Like the consumer in *Van*, the investors here lost out on the ability to use their money for alternate purposes. *See id.* at 1165 ("Interest is simply a way of measuring and remedying . . . injury, not the injury itself.").

Investors put their money into PWCG's life settlements. Net losses across all outstanding policies were "approximately $69 million" as of the end of 2023, according to the receiver overseeing those policies. The receiver reported that "there are now about a dozen Policies that have gone significantly past their prior projected maturity dates, meaning it has taken (and will take) longer to receive the death benefits from those Policies and has required (and for some time, will require) more premium payments to keep the Policies in good standing than previously anticipated." Like everyone, the insureds will eventually die, meaning that life settlements will one day pay out to investors. The receiver has projected that the outstanding life settlements will eventually return to investors at least the money that they put in.[4] But even if investors recover their principal investment in PWCG's life settlements, they still lost out on the opportunity to put that money to other uses, and that loss is a cognizable pecuniary harm.

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[4] Investors appear likely to recoup the principal amount of their payments to PWCG not only because of the SEC's enforcement action here, which led to the appointment of a receiver, but also because the COVID-19 pandemic meant that some insureds died earlier than they likely would have otherwise.

Defendants focus on the district court's conclusion that investors suffered pecuniary harm because they lost out on their expectations of profits.[5] Defendants do not address the district court's alternate and sufficient grounds for finding pecuniary harm, which is the investors' loss of the time value of their money. Ignoring the time value of money is particularly ill-suited here because the whole concept of life settlements rests upon the idea that money today is more valuable than money tomorrow. The original insureds were willing to sell their policies for less than they were potentially worth because they preferred to have money sooner. Letting Defendants disregard the time value of money here would be especially perverse.

We do not need to address the question of whether disgorgement is permissible in the absence of pecuniary harm.[6] Since there was pecuniary harm to

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[5] We do not base our decision on the district court's identification of defeated expectations as a basis for pecuniary harm. *See Maner v. Dignity Health*, 9 F.4th 1114, 1119 (9th Cir. 2021) ("We . . . may affirm on any ground supported by the record."). In other contexts, it has been suggested that defeated expectations could be a type of pecuniary harm. *See, e.g.*, U.S. Sent'g Guidelines Manual § 2B1.1(b)(1)(C)(iii) (U.S. Sent'g Comm'n 2024) ("'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money."); *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 723 (9th Cir. 2022) ("The cancellation of the field trips and prohibition of future field trips caused Riley's Farm to lose a valuable government benefit in the form of an *expected pecuniary gain* . . . ." (emphasis added)). We do not need to resolve whether defeated expectations should qualify as pecuniary loss in this context, as the loss of the time value of money is sufficient to establish that the investors suffered a pecuniary loss here.

[6] Two circuit courts have split on whether pecuniary harm is required for a disgorgement award under the federal securities law. The Second Circuit held that pecuniary harm is required for

investors here in the form of investors' lost time value of money, we affirm the district court's award of disgorgement.

D. Injunction and Civil Penalties

Defendants argue that the district court erred in enjoining Defendant Cannon from future violations of the securities laws and in ordering civil penalties from all three Defendants. We review a district court's remedies for abuse of discretion. *Husain*, 70 F.4th at 1180. We affirm the district court's imposition of its injunction against Cannon and its civil penalties against Barry, Cannon, and Moody.

Before discussing these two remedies, we reject Defendants' argument that the remedies ordered by the district court contravened our recent decision in *SEC v. Husain*, 70 F.4th 1173. In that case, we held that genuine disputes of material fact existed regarding defendant's scienter and recognition of wrongfulness, and that those outstanding issues precluded the imposition of civil penalties at the summary judgment stage. *See id.* at 1184-86. In our

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disgorgement because *Liu*'s requirement that disgorgement under Section 78u(d)(5) be "awarded for victims" and "restore[] the status quo" would render disgorgement unnecessary if investors did not suffer pecuniary harm. *SEC v. Govil*, 86 F.4th 89, 102-03 (2d Cir. 2023) (quoting *Liu*, 591 U.S. at 79-80). The First Circuit rejected *Govil*, relying instead on *Liu*'s explanation that disgorgement deprives wrongdoers of their ill-gotten gains: "Neither *Liu* nor our case law, however, require investors to suffer pecuniary harm as a precondition to a disgorgement award." *SEC v. Navellier & Assocs., Inc.*, 108 F.4th 19, 41 n.14 (1st Cir. 2024), *cert. denied*, __S. Ct.__, 2025 WL 1603606 (June 6, 2025) (No. 24-949). We do not speak to that question, nor do we address the import, if any, of Congress' addition of disgorgement as an available remedy following *Liu* under 15 U.S.C. § 78u(d)(7).

case, the district court did not abuse its discretion in concluding that there were no genuine disputes of material fact regarding the liability of Defendants. It was therefore entitled to weigh facts in determining the appropriate remedy to impose on those Defendants. That the facts could have been weighed differently did not preclude the district court's remedies. *See SEC v. Murphy* (*Murphy II*), 50 F.4th 832, 848 (9th Cir. 2022) (noting that district courts can make factual findings for the purpose of determining appropriate remedies).

1. Injunction Against Cannon

We affirm the district court's injunction against Cannon. In determining whether to issue an injunction, courts consider whether there is a "reasonable likelihood of future violations of the securities laws." *Murphy,* 626 F.2d at 655. To guide that inquiry, we have used five factors as in *Murphy*: (1) "the degree of scienter involved"; (2) "the isolated or recurrent nature of the infraction"; (3) "the defendant's recognition of the wrongful nature of his conduct"; (4) "the likelihood, because of the defendant's professional occupation, that future violations might occur"; and (5) "the sincerity of his assurances against future violations." *Id*.

The district court concluded that the *Murphy* factors favored an injunction against Cannon, but not Barry or Moody, for future securities law violations. Though all Defendants' lack of scienter weighed *against* an injunction and their sincerity of assurances against future violations "weigh[ed] neither for nor against" an injunction, the district court permissibly concluded that the "recurrent nature" of the wrongdoing, Cannon's limited recognition of his wrongdoing as evidenced by misrepresentations,

Cannon's discounting of those misrepresentations, and his intent to remain in the financial services industry, unlike Barry or Moody, together favored an injunction against only Cannon.

Defendants argue that the district court erred in applying the second and third *Murphy* factors. On the second factor, Defendants argue that the district court should have considered a lack of other securities violations as favoring a conclusion that the violations here were "isolated" and not "recurrent." The district court could have placed more weight on the absence of other securities violations, but an absence of other securities violations does not necessarily preclude a finding of "recurrent" violations. *See Murphy II*, 50 F.4th at 840, 842 (holding that Jocelyn Murphy providing false zip codes on at least 21 different occasions for the purpose of one proceeding against her sufficed to make her violations "recurrent"). Although Defendants' sales of PWCG life settlements were part of a single scheme, they were numerous and took place over several years. Therefore, the district court did not err in concluding that Defendants' violations were "recurrent."

Defendants also argue that the district court erred in applying the third *Murphy* factor, which weighs "the defendant's recognition of the wrongful nature of his conduct." In support of their position, they point to Cannon's two attempts to research the legal status of PWCG's life settlements. But Defendants conflate scienter—the first *Murphy* factor—with recognition of wrongfulness—the third. The third factor, recognition, relates to whether the defendant "take[s] responsibility for the impact of his illegal conduct on the market's integrity." *See Husain*, 70 F.4th at 1185

(internal quotation marks omitted). Here, the district court pointed to instances where Cannon "discounted the importance of [past] misrepresentations" (such as the "likelihood of premium calls and PWCG's track record") to investors, which it found was indicative of Cannon's failure to appreciate the wrongfulness of his actions. Defendants do not offer relevant record evidence to cast material doubt on the district court's determination. The district court did not err on the third *Murphy* factor.

2. Civil Penalties Against Barry, Moody, and Cannon

We also uphold the civil penalties of $15,000 each against Barry, Moody, and Cannon. The district court did not abuse its discretion in imposing those penalties.

A district court can apply three "tiers" of civil penalties. The first tier does not require a finding of scienter and authorizes a maximum penalty of $7,500 per violation or the "gross amount of pecuniary gain to such defendant as a result of the violation." 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i); 17 C.F.R. § 201.1001 (adjusting the maximum first-tier penalty to $7,500). "District courts have discretion to determine what constitutes a 'violation' and have relied on various proxies," such as the "number of investors defrauded," "number of fraudulent transactions," "number of statutes . . . violated," "number of months [defendants] engaged in unregistered broker activity," or "number of transactions . . . made as an unregistered broker." *Murphy II*, 50 F.4th at 848. Courts look to the five *Murphy* factors to guide the determination of a civil penalty award "in light of the facts and circumstances of the case." *Husain*, 70 F.4th at 1184 (internal quotations marks omitted).

Defendants raise three arguments on appeal. Two closely resemble their arguments against Cannon's injunction: first, that Defendants did not act with scienter, and second, that the recognition-of-wrongfulness factor favored them. As with the injunction, we reject Defendants' arguments. The district court recognized that Defendants had not been found to have acted with scienter and took these findings into account by imposing a substantially lesser penalty than it could have.

Defendants' third argument is unique to the civil penalty award. Defendants argue that the district court erred in calculating penalties of $15,000 against each Defendant, which they allege is twice the maximum statutory penalty.

The district court did not err because the civil penalty amount of $15,000 each is not greater than the maximum statutory amount. As discussed, the district court had broad discretion to rely on various proxies to determine the number of violations, such as the number of months each Defendant engaged in unregistered broker activity or the number of transactions they conducted while unregistered. *See Murphy II*, 50 F.4th at 848. The district court also expressly declined to impose the statutorily permitted "total amount of pecuniary gain" because that amount was "already accounted for in the disgorgement" discussion. The district court's disgorgement order required Barry to pay $227,000, Cannon to pay $219,333.33, and Moody to pay $180,000, each representing only one-third of each Defendants' gross amount of pecuniary gain. As $15,000 is far less than these amounts, the district court did not err.

III. Conclusion

We affirm the district court's judgment.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff - Appellee, v. BRENDA CHRISTINE BARRY; et al., Defendants - Appellants, and PACIFIC WEST CAPITAL GROUP, INC.; et al., Defendants.	No. 23-2699 D.C. No. 2:15-cv-02563-DDP-AS Central District of California, Los Angeles ORDER

Before: GOULD, CLIFTON, and SANCHEZ, Circuit Judges.

The panel has unanimously voted to deny Appellants' petition for rehearing en banc. Judge Gould and Judge Sanchez vote to deny the petition for rehearing en banc, and Judge Clifton so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 40. The petition for rehearing (Docket Entry No. 70) is therefore DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. BRENDA BARRY; BAK WEST, INC.; ERIC CANNON; CENTURY POINT, LLC; CALEB AUSTIN MOODY (DBA SKY STONE), Remaining Defendants	Case No. 2:15-cv-02563-DDP-MAA **ORDER PARTIALLY GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND GRANTING PLAINTIFF'S MOTION TO EXCLUDE** [Dkt. 482, 483, 490]

I. INTRODUCTION

This order arises on cross-motions for Summary Judgment by Plaintiff Securities and Exchange Commission ("SEC") and remaining Defendants Brenda Barry, Bak West, Inc., Eric Cannon, Century Point, LLC, and Caleb Austin Moody (dba Sky Stone) ("Defendants"). The SEC seeks summary judgment on the unresolved claims: securities registration violations under the Securities Act of 1933 and broker-dealer registration violations under the Securities Act of 1934. Defendants seek summary judgment on the issues of whether the fractional interests in life settlements they sold are investment contracts and therefore securities under federal law and of whether their offerings are part of an integrated issue.

II. FACTUAL BACKGROUND

The parties are familiar with the facts, which remain largely unchanged from the court's order on the first motions for summary judgment. Dkt. 119. The relevant facts are restated below.

A. SALE OF LIFE INSURANCE POLICIES

Life settlement arrangements are arrangements where insureds sell their existing life insurance policies to investors, who then collect the benefit of the policy when the insureds pass away. Pacific West sells fractionalized interests in "Universal" or "Flexible Premium Adjustable" life insurance policies. *See, e.g.*, JA 35 at 650. These life insurance policies have both an insurance component (i.e., they pay out when the insured dies) and a savings component (i.e., they accumulate investment returns). *See* Dkt. 7-6, Declaration of Todd Brilliant in Support of Motion for Preliminary Injunction ("Brilliant Decl."), Ex. 4,

October 23, 2013, deposition of Andrew B Calhoun ("2013 Calhoun Dep.") at 96-97.

B. PACIFIC WEST'S STATEMENTS REGARDING RETURNS

Pacific West advertises that its life settlement arrangements would pay "between 100% and 175% total fixed return on each investment." Dkt. 28-2, Declaration of Andrew B Calhoun IV ("Calhoun Decl.") at ¶ 5 (referenced at Dkt. 106-209, JA 203); *see also* Brochure at 446 ("Policies offered by PWCG have a minimum total fixed return of 100%, meaning investors will double their money.")).

Pacific West states to investors that the rate of return ultimately depends on how many years the insured lives after Pacific West acquires their policy and "no one can predict exactly when" an insured will pass away. *See* Brochure at 446. Pacific West requires that each investor confirm their acknowledgment "that the economic benefit derived from the transaction(s) contemplated by this Agreement will result solely from the maturity of the life insurance policy(ies) upon the death of the insured(s), and will not be derived from the efforts of any person or entity employed by or associated with [Pacific West.]" *See, e.g.*, JA 25, Life Settlement Purchase Agreement at 553; JA 34, Life Settlement Purchase Agreement at 638; JA 104, Life Settlement Purchase Agreement at 1376) (stating that "[t]he life expectancy of any particular insured and the annual rate of return on a life settlement contract are only estimates and cannot be guaranteed").

C. PACIFIC WEST'S POLICY SELECTION PROCESS

Pacific West represents that it "purchase[s] select policies that meet [its] high standards for investment and sell[s] interests to qualified investors." Brochure at 443. Each policy "undergoes rigorous scrutiny using a predetermined set of criteria, and [Pacific West] select[s] the most desirable[.]" *Id.*

Pacific West's "goal is to select policies that will mature in 4 to 7 years." Calhoun Decl. at ¶ 4. In particular, Pacific West "purchases interests in the proceeds of life insurance policies at a discount to face value where the insureds are 75 years of age or older typically with a reduced life outlook due to chronic and degenerative health complications." *See* Brochure at 440. "In seeking to achieve the investment objective, [Pacific West] reviews over $250 million of face value policies each month, selects policies that are non-contestable, and only purchases policies that have been issued by United States life insurance companies that are 'A-rated' or better as determined by Standard & Poors." *Id.*

Once Pacific West selects the policies to be purchased and sold to purchasers, *see*, e.g., 2013 Calhoun Dep. at 103-05; Brochure at 440, 443 & 447; Calhoun Decl. at ¶ 4, it determines a total fixed return of between 100% and 175% for each policy, *see* Calhoun Decl. at ¶ 5, determines the price Pacific West will pay for a policy, *see* Calhoun Dep. at 102- 07, sets the length of the contract period, which is typically four to seven years, *see* Calhoun Decl. at ¶ 4, and "determines an annual outlay amount necessary to keep the policy in- force for a defined number of years, at a minimum of 6 years, up to 9 years." *Id.* at ¶ 7).

D. PREMIUM RESERVES

Another feature of Pacific West's life settlement arrangement is its "three-tiered premium reserve system[,]" which Calhoun claims is "unique in the industry." Calhoun Decl. at ¶ 7. "The central objective of [Pacific West's] three-tiered premium reserve structure is to sufficiently fund each universal life insurance policy acquired by the Trust." *Id.*; *see also* Brochure at 444 (describing Pacific West's policy "to pay premiums so that every policy is kept in force."). Pacific West claims to have large enough reserves to provide the Trust with sufficient funds to pay the premiums on the underlying policies for periods of generally six to nine years, which is longer than the estimated four to seven-year period for a policy to mature. *See, e.g.*, JA 35, Life Settlement Disclosure Form at 652; JA 36, Life Settlement Disclosure Form at 660; JA 37, Life Settlement Disclosure Form at 669; Brochure at 444).

According to Calhoun, Pacific West accomplishes this by doing the following: "Before making a bid on a policy, [Pacific West] carefully reviews various 'in-force' illustrations composed by the underwriting life insurance company (the 'carrier')." Calhoun Decl. at ¶ 7. "Based on the carrier's projected assumptions (i.e., cost of insurance (COI), existing cash surrender value (CSV), interest rates, mortality rates, and expense charges), [Pacific West] determines an annual outlay amount necessary to keep the policy in-force for a defined number of years, at a minimum of 6 years, up to 9 years." *Id.*

"Based on this determination, [Pacific West] escrows a lump-sum amount in the primary premium reserve[,]" which is "funded by a designated

percentage of all gross investment proceeds." Calhoun Decl. at ¶ 8. Pacific West has "also established two other general reserves that can be used to pay premiums should the primary reserve become depleted. The first general reserve is funded from 1% of all investor money for all policies. The second general reserve is funded from excess or unused premium dollars from any primary reserve due to the policy maturing before the primary premium reserve becomes depleted." Brochure at 444; *see also* Calhoun Decl. at ¶ 9. The Purchase Agreement describes the primary premium reserve, stating that it involves "the placement of funds for each policy's premiums in a premium escrow account sufficient to pay premiums for [6, 7, 8, or 9 years]." *See, e.g.*¸ JA 25, Life Settlement Purchase Agreement at 555; The secondary reserve is described in the Purchase Agreement as "an initial general premium reserve . . . established to pay premiums on policies not fully paid by [the primary reserve]. The money for the additional premium reserve comes from the distribution of 1% of all purchase money received by the Escrow Agent." *Id.* The tertiary reserve is "an additional general premium reserve . . . established to pay premiums on policies not fully paid [by the primary and secondary reserves]. The money for this premium reserve comes from unused premiums of matured policies and interest earned on the active premium escrow account." *Id.*

Finally, the Purchase Agreement explains that purchasers may have to make additional out-of- pocket payments—premium calls—if each of the three reserves is depleted. *See, e.g.*, JA 25, Life Settlement Purchase Agreement at 555; JA 34, Life Settlement Purchase Agreement at 640; JA 104, Life Settlement Purchase Agreement at 1378) ("In the event all of the

premium escrow accounts are depleted, in order to safeguard the policy against a lapse in coverage, it will become the responsibility of the Purchaser to make pro rata premium payments on any policy in which they have an Interest.").

E. FUNDING AND MAINTENANCE OF LIFE SETTLEMENTS ARRANGEMENTS

Once Pacific West selects a policy based upon its "quality-based criteria," it "raises capital from investors that are interested in life settlement investments." Calhoun Decl. at ¶ 4; Brochure at 443. "Through the [Trust], [Pacific West] offers universal life policies for purchase in fractional interests by qualified individual investors." Calhoun Decl. at ¶ 4. "The Trust purchases policies from the policy owners and is recorded as the new owner and beneficiary of the policy." *Id.* "When the change of ownership and beneficiary have been officially recorded and recognized by the life insurance company, [Pacific West] then sells fractional interests to investors giving them a percentage of the face value as their beneficiary designation." *Id.* The Trust "then issues an assignment of death benefit confirming the beneficiary designation within a specific policy." *Id.*

After purchase but before the life settlement arrangement matures, the Trust "makes required premium payments on policies, monitors the policy until the insured's death, and handles all investment distributions." Calhoun Decl. at ¶ 6; JA 16, Amended and Restated Trust Agreement at 396-97 (after the Trust sells the fractionalized interests to Pacific West purchasers, the trustee purchases policies, issues the life settlements, establishes and accounts for cash reserves for the premiums, pays the premiums on

policies, and distributes returns to purchasers)). According to Calhoun, Pacific West and the Trust "provide[] all investors in the Trust with complete documentation as to the policy, the insured, changes of ownership and beneficiary, and all other information relevant to the investment." Calhoun Decl. at ¶ 6. "When the policy matures, the life insurance company pays the death benefit to the Trust. The [Trust] then pays the specified beneficiary designation amount to all investors within the matured policy." Calhoun Decl. at ¶ 6.

F. RECEIVERSHIP

In 2018, after mediation, the SEC and the Trust both parties moved for the appointment of a receiver over the Trust, in connection with the Trust's consent to an injunction against future violations. The Court appointed Thomas C. Hebrank as Receiver over the Trust in February 2018.

III. PROCEDURAL BACKGROUND

On April 17, 2014, the SEC filed a Motion for Preliminary Injunction. Dkt. 6 The court denied the motion, finding that the SEC had not met its burden to show "undeniably significant" efforts of the Defendants' that would meet the definition of securities under Circuit precedent. *See* Dkt. 51, Order Re: Motion for Preliminary Injunction at 11 (citing *Noa v. Key Futures*, 638 F.2d 77, 79-80 (9th Cir. 1980); *SEC v. Glenn Turner*, 474 F.2d 476, 482 (9th Cir. 1973); *SEC v. Belmont Reid*, 794 F.2d 1386, 1391 (9th Cir. 1986)).

On March 24, 2016, the SEC and Defendants filed their first cross-motions for summary judgment in this case. Dkt. 104-105. The Court denied both motions,

finding in the record a genuine dispute of material fact regarding whether the Defendants engaged in "undeniably significant" efforts sufficient to meet the definition of securities under Circuit precedent. Dkt. 119. Following the first cross-motions for summary judgment, the Trust, Calhoun, and Dotta were settled out of the litigation or otherwise dismissed.

IV. LEGAL STANDARD

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion an of identifying portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242 (1986). If the moving party does not bear the burden of proof at trial, it is entitled to summary judgment if it can demonstrate that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 323.

Once the moving party meets its burden, the burden shifts to the nonmoving party opposing the motion, who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Summary judgment is warranted if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case,

and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. There is no genuine issue of fact "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

It is not the court's task "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1278 (9th Cir. 1996). Counsel have an obligation to lay out their support clearly. *Carmen v. San Francisco Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001). The court "need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposition papers with adequate references so that it could conveniently be found." *Id.*

DISCUSSION

V. INVESTMENT CONTRACTS

The court finds that Defendants' life settlement arrangements are investment contracts and, therefore, securities. *See* 15 U.S.C.A. § 77b(a)(1) (Securities Act of 1933) *and* 15 U.S.C.A. §78c(a)(10) (Securities Act of 1934) (defining "security" to include "investment contract"). An investment contract is (1) a contract, transaction, or scheme whereby a person invests his money, (2) in a common enterprise, and (3) is led to expect profits, (4) solely from the efforts of the promotor or a third party. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). Defendants dispute only

the last element, averring that the SEC has failed to demonstrate that profits from the life settlement arrangements depended on the efforts of Defendants. *See* Def. Opp. at 4:16.

To meet the "efforts of others" element, "profits need not come 'solely' from the efforts of the promoters or others." *Noa v. Key Futures, Inc.*, 638 F.2d 77, 79 (9th Cir. 1980). The test is "whether the efforts made by those other than the investor are the *undeniably significant ones*, those *essential* managerial efforts which affect the failure or success of the enterprise." *SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973) (emphasis added).

In *SEC v. Eurobond*, the Ninth Circuit analyzed whether defendant's sale of foreign treasury bonds, purchased by foreign currency loans carrying lower interest rates than those received on the bonds, constituted securities under the *Howey* test. *SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1336 (9th Cir. 1994). The court found that defendant's efforts met the "efforts of others" element because the defendant determined when to purchase the bonds, and in what denominations and yields, as well as when to obtain the foreign currency loan, and from what bank and currency. *Id.* at 1341. The court thereby disagreed with defendant's argument that investors' profits depended solely on market forces—specifically, the difference between the interest rate received on the bond and the interest rate paid on the loans. *Id.* at 1339, 1341.

In *Noa v. Key Futures* and *SEC v. Belmont Reid*, on the other hand, the Ninth Circuit found that the challenged transactions did not meet the "efforts of others" element and thus were not securities. *Noa v.*

Key Futures, 638 F.2d at 80; *SEC v. Belmond Reid & Co.*, 794 F.2d at 1391. Both cases involved the sale of gold or silver paid in advance by investors. *Noa v. Key Futures*, 638 F.2d at 79; *Belmont Reid*, 794 F.2d at 1389. The court reasoned in both cases that the defendants' actions resembled a sale-of-goods or brokerage contract, rather than an investment contract relying on the managerial efforts of the promoters. *Noa v. Key Futures*, 638 F.2d at 79 ("Once the purchase of silver bars was made, the profits to the investor depended upon the fluctuations of the silver market, not the managerial efforts of Key Futures."); *Belmont Reid*, 794 F.2d at 1391 (agreeing with the district court that profits "depended upon the fluctuations of the gold market, not the managerial efforts of [the promoters]").

The SEC argues that the life settlement arrangements here are like the investments in *Eurobond*, because defendants determined which policies to purchase and how to keep the policies in force. *See* SEC's Mot. at 16:7-22. Defendants argue that their life settlement arrangements are like the transactions in *Noa* and *Belmont Reid*, because investors only relied on the managerial skill of Defendants "as an ordinary buyer…relies on an ordinary seller." *See* Def. Opp. at 10:7-18 (quoting *Belmont Reid*, 794 F.2d at 1391). That is, the profitability of the life settlement arrangements depended on the "implacable force" of the longevity of the insureds, as the profitability of the prepayment programs in *Belmont Reid* and *Noa* depended on the "implacable force" of fluctuations in the gold and silver market.

Resolving these arguments at the prior cross-motions for summary judgment stage, this Court held that disputed issues of material fact persisted regarding "whether defendants' activities were managerial or ministerial, and to the extent defendants' activities were managerial, whether those were undeniably significant in making the life settlement arrangement a success." Dkt 119 at *10. In the five years since this Court denied the parties' first cross-motions, it has become clear that significant managerial efforts were necessary to effect the profitability of the life settlement arrangements. Further, case law in this circuit and others regarding the proper characterization of life settlement arrangements has increasingly found that life settlement arrangements are securities under *Howey*. In light of this updated factual and legal information, and having heard the parties' oral arguments, summary judgment on behalf of the SEC is now appropriate.

Existing cases examining life settlement arrangements have tended to find that they are investment contracts under the *Howey* test. *See Matter of Living Benefits Asset Management*, 916 F.3d 528, 538-39 (5th Cir. 2019) (collecting cases, including "rare exceptions" in which courts held that life settlement arrangements were not securities). In *SEC v. Life Partners,* a divided panel of the D.C. Circuit held that life settlement arrangements were not securities. *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996) (hereinafter "*Life Partners*"). Analyzing *Howey*'s "efforts of others" element, the court acknowledged that the efforts of promoters to locate life settlements and complete actuarial analysis were "undeniably essential to the overall success of the investment." *Id.*

at 547 (quoting and agreeing with the district court's decision). However, the court drew in part on the Ninth Circuit's reasoning in *Noa v. Key Futures* to distinguish between pre-purchase and post-purchase efforts. *Id.* at 546. Unlike post-purchase efforts, the court reasoned, pre-purchase efforts are "insignificant to the question" of whether the "efforts of others" element is met. *Id.* at 546-57.

The dissent disagreed with the majority's devaluation of pre-purchase efforts. *Id.* at 551. Instead, the dissent read *Howey* and cases interpreting its "efforts of others element to require an analysis of the "kind and degree of dependence between the investors' profits and the promoter's activities." *Id.* Where, as in life settlement arrangements, the pre-purchase activities of the promoter are "pivotal" to the success of the investment, those activities suffice to meet the *Howey* requirement. *Id.* at 552. The dissent distinguished life settlement arrangements from the sale of silver and gold in *Noa* and *Belmont Reid*, because the profits in life settlement arrangements require "special expertise to select items to purchase." *Id.* at 554. Although the defendants argued that the success of the life settlement arrangements depended only on the timing of the insureds' deaths, the dissent noted that the realization of profits in fact depended on whether the death occurred within the period estimated by the promoter *Id.* at 556.

When the issue of life settlement arrangements came before the Eleventh Circuit, the court sided with the *Life Partners* dissent. *SEC v. Mutual Benefits Corp.*, 408 F.3d 737, 743 (11th Cir. 2005) (hereinafter "*Mutual Benefits*"). The distinction between pre-purchase and post-purchase managerial activities, the

Eleventh Circuit reasoned, need not be a bright line rule. *Id.* at 744. Because the investors in life settlement arrangements relied on promoters "to identify terminally ill insureds, negotiate purchase prices, pay premiums, and perform life expectancy evaluations critical to the success of the venture," the "efforts of others" element was satisfied. *Id* at 744-45.

The next circuit to weigh in on life settlement arrangements' satisfaction of the "efforts of others" was the Fifth Circuit.[1] *Matter of Living Benefits Asset Management,* 916 F.3d 528 (5th Cir. 2019) (hereinafter "*Living Benefits*"). The Fifth Circuit noted that the bright-line rule propounded by the *Life Partners* majority was since "widely criticized by both courts and commentators," and concluded that those criticisms were well-founded. *Id.* at 541. Thus, the court held that the defendants' pre-purchase efforts—in particular, its actuarial analysis and negotiation of purchase prices with insureds—satisfied *Howey's* "efforts of others" element. *Id.* at 540-41.

This Court agrees with the weight of federal authority finding that *Noa* does not require courts to disregard pre-purchase managerial efforts that are as specialized and essential to the profits of the venture as life settlement arrangements. *See, e.g.*, *Mutual Benefits*, 408 F.3d at 743 ("While it may be true that the "[efforts of others]" prong o the *Howey* test is more easily satisfied by post-purchase activities, there is no basis for excluding pre-purchase managerial activities from the analysis.") (internal quotations omitted).

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[1] The *Living Benefits* decision came after this Court's denial of summary judgment in 2017 and thus was briefed for the first time in connection with the second cross-motions for summary judgment here.

Having rejected a bright-line distinction between pre-purchase and post-purchase managerial efforts, the Court finds that Defendant exercised "essential managerial efforts" in selecting policies, negotiating prices with insureds, and maneuvering around loopholes that could prevent payout. Defendants' post-purchase efforts, although less uniquely integral to the success of the investment, also included the type of managerial efforts that typify "efforts of others" under *Howey*.

A. INVESTORS' DEGREE OF AGENCY IN SELECTION

Defendants contend that they afforded a greater "degree of agency" to their investors than the investors in *Mutual Benefits* and *Living Benefits*, because investors chose the specific policy they acquired a fractionalized interest in. *See* Def. Mot. at 9n31 (cataloguing citations to JA); *In re Nat'l Mortg. Equity Corp. Mortg. Pool etc.*, 723 F. Supp. 497, 505 (C.D. Cal. 1989) (hereinafter "*National Mortgage*"). Citing to *National Mortgage*, Defendants argue that investors' own role in selecting policies mitigates against the "efforts of others" on Defendants' part.

In *National Mortgage*, defendants sold pooled, mortgage-backed certificate to investor institutions. *Id.* at 500. Defendants selected the loans to sell to investors pursuant to "origination standards." *Id.* Those standards were negotiated between the investors and the defendants prior to the sale, and some investors further negotiated the right to extend the loans, approve replacements for paid-off mortgages, and replace bonds whose insurer they deemed unacceptable. *Id.* The court held that the "efforts of others" element was not satisfied. *Id*. at 505. Although

investors claimed they relied on defendants' discretion in selecting the loans, defendants only had the discretion to select loans that corresponded to the investors' origination standards. *Id.* Investors retained the power to set those origination standards and reject any loans that did not conform to those standards. *Id.* The investors' "control and discretion" meant that defendants' selection efforts were sufficient to meet the "efforts of others" test, the court held. *Id.*

Here, Defendants provided investors with basic information for the "specific policies currently in inventory" before investors committed money to the venture. *See* JS D26, D64. The policies in their inventory were those that Defendants had pre-selected. *See* Ex. 6 to SEC Mot. (advertising "policies *chosen* to meet our high standards" from a pool of over $250 million of policies defendants analyzed per month) (emphasis added). Investors did not negotiate standards to inform Defendants' pre-selection process. Instead, Defendants applied their own "rigorous scrutiny using a predetermined set of criteria" and based on their own "extensive analysis and experience." JS P35, P38, P50. Defendants' promotional materials identify this pre-selection as a factor guaranteeing success: "Since PWGG purchases policies before offering them, investors know exactly what the total return will be before purchasing an interest in the specific policy." *See* Brochure. Thus, unlike in *National Mortgage*, where investor institutions shared considerably in the selection efforts, here the essential efforts of the selection process were under Defendants' control. Investors did not exercise "control and discretion" over the selection process such that that they were not relying on Defendants' efforts.

B. VALUE OF DEFENDANTS' EFFORTS

In addition to the degree of investor agency in selecting policies, Defendants argue that any efforts it did provide were "insufficient to prove any essential managerial effort" on their part. Def. Opp. at 9:18-25. Defendants' argue that efforts to identify and select policies were pre-purchase efforts and do not, without more, amount to essential managerial efforts. Further, their efforts in selecting policies, locating investors, tracking insureds, managing reserves, making premium calls were too "ministerial" to meet the *Howey* standards. Instead, Defendants maintain, the profitability of their life settlement arrangements depended solely on a factor that Defendants could not manipulate: the date the insureds passed away. *See, e.g.*, Def. Mot. at 19-20.

In coming to this conclusion, Defendants contrast *Noa* and *Belmont Reid*, precious metal investments that did not meet the "efforts of others" element, from *Goldfield* and *Reynolds*, precious metal investments that did meet the "efforts of others" element. Defendants argue that their life settlement arrangements did not rely on "efforts of others" because the purchases "have an intrinsic value tied to forces beyond the control of the promotor." *Cf. SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459 (9th Cir. 1985); *SEC v. R.G. Reynolds Enterprises, Inc.*, 952 F.2d 1135, 1130 (9th Cir. 1991). But contrary to Defendants' representations, their life settlement arrangements are more analogous to *Goldfield* and *Reynolds* than *Noa* and *Belmont Reid*.

In *Noa* and *Belmont Reid*, the Ninth Circuit held that investors were not relying on the efforts of others where promoters agreed to extract the metal and

deliver it to investors at a pre-fixed price. *Noa*, 638 F.2d at 79; *Belmont Reid*, 794 F.2d at 1390. What determined the profitability of the investments was not any "essential managerial efforts" of the promoters, but rather the increase in the market-value of gold and silver between the time of purchase and the time of delivery. *Noa*, 638 F.2d at 79; *Belmont Reid*, 794 F.2d at 1390.

But in *Goldfield* and *Reynolds*, also involving ore sales, the Ninth Circuit found that the "efforts of others" element was satisfied. *Goldfield*, 758 F.2d at 464; *Reynolds*, 952 F.2d at 1135. In *Goldfield*, the promotor offered a unique "dump ore processing technique" that investors relied on to make a profit. *Goldfield*, 758 F.2d at 464. In *Reynolds*, the promotor sold interests in gold from a new milling and refinery plant that the promoter was to finance and construct. *Reynolds*, 952 F.2d at 1129. The court reasoned in both cases that the promoters were not merely delivering pre-purchased metals, but rather engaging in "undeniably significant" efforts that "affect the failure or success of the enterprise." *See, e.g.*, *id.* at 1134-35. This distinguished the investors in *Reynolds* and *Goldfield* from those in *Noa* and *Belmont Reid*, who were depending on increases in the market price of silver and gold and not the unique technologies or contributions of the promoters.

Defendants suggest that the longevity of the insured is an analog to the market price factor in *Noa* and *Belmont Reid*; it is an intractable force that outweighs any import attributable to the efforts of the promotors. Indeed, Defendants' promotional materials include an admonition that "the exact date of passing is the single factor that determines the effective

annual rate of return." *See* Brochure at 446. However, it is not the insured's death date alone that determines the profitability of the venture, but the accuracy of Defendants' estimation of the insured's lifespan. *See Life Partners*, 87 F.3d at 321 (Wald, J., dissenting). This estimation, based on multiple layers of actuarial analysis and Defendants' qualification of policies based on the insureds' health conditions and lifestyles, was the precursor to Defendants acquiring the policies. Investors were betting on Defendants' ability to select policies of insureds who would likely pass away within four to seven years. *See* Dkt. 28-2, Calhoun Decl. at ¶ 4.

Further, Defendants exercised pre-purchase efforts significant to the success of the investment when they weeded out policies with "possible loopholes that could affect the full payout." *See* Brochure at 445. For example, Defendants required insureds to submit a statement from their physician confirming the insured was of sound mental capacity and able to enter into the contract. Defendants also required a signed statement from the insureds' would-be beneficiaries acknowledging the extinction of the beneficiaries' interests in the policy payout. *See* Brochure. Defendants even negotiated discounted sales prices with insureds, increasing the rate of return on investment. *See* Brochure at 446; JA P32, P34.

Accordingly, Defendants' efforts in selecting, vetting, and purchasing policies were exactly the kind of specialized, "essential managerial" efforts that the Ninth Circuit identified in *Goldfield* and *Reynolds*. Whereas in *Noa* and *Belmont Reid*, investors captured a profit based on securing interests in gold and silver before the market prices increased, investors in *Goldfield* and *Reynolds* relied on the unique expertise

and technology of their promoters to capture a profit. Likewise here, investors did not rely on Defendants as investors would "in any sale-of-goods contract in which the buyer pays advance of delivery." *See* Def. Mot. at 16, quoting *Belmont Reid*, 794 F.2d at 1391. Instead, investors relied on Defendants to accurately predict the timeframe during which an insured would pass away, negotiate a reduced policy price that would increase the return on investment, and avoid loopholes to payout.

Because this Court need not follow the *Life Partners* distinction between pre-purchase and post-purchase efforts, this Court need not find that the Defendants' efforts in tracking insureds, managing reserves, and making premium calls were also managerial in order to hold that the "efforts of others" element was met. Nonetheless, the evidence submitted by the SEC in connection with their second Motion for Summary Judgment establishes that some of these post-purchase efforts were indeed the kind of "essential managerial" efforts that the "efforts of others" element requires.

Specifically, Defendants used pooled resources from the secondary and tertiary reserves to "pick up" premium payments for policies whose insureds did not pass away within the primary reserve period. *See* Ex. A to Kyle Jones Declaration ("Bauer Deposition") at 163:17-165:2; Dkt 483-2 ("Hebrank Deposition") at 134:2-135:7. The court-appointed receiver and SEC's retained expert agreed that these payments were "discretionary" or "judgmental decisions" on behalf of investors. *See* Bauer Deposition at 164:2; Hebrank Deposition at 134:22. The receiver also exercised

discretion in letting negative policies lapse. *See* Dkt. 227 at 21.

Defendants argue that any action related to the reserve systems "cannot constitute essential managerial efforts" because the purchase agreements between Pacific West and investors did not obligate Pacific West to maintain the secondary or tertiary reserves. *See* Defendants' Motion at 22 (citing *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009), and *De Luz Ranchos Inv., Ltd. v. Coldwell Banker & Co.*, 608 F.2d 1297, 1301 (9th Cir. 1979), for the proposition that only the objective contract terms, and not promotional representations, are relevant under *Howey*). Pacific West's reserve structure is not like the arguably illusory promises in *De Luz Ranchos* that were not essential to investors' decisions to invest. Here, the reserve structure was promised, relied upon, and executed. *See* Order Re: Parties' First Cross-Motions for Summary Judgment at p.10. Further, the reserve structure is indeed discussed in the Life Settlement Purchase Agreements. *See, e.g.*, JA 34 at 640.

Pacific West's design, promotion, and discretionary utilization of funds from the secondary and tertiary reserves also constitute "efforts of others" under *Howey*. Taken together with the managerial pre-purchase efforts Defendants undertook, discussed *supra*, Defendants clearly exercised the "undeniably significant" efforts required to support this Court's holding. *See Glenn W. Turner Enter., Inc.*, 474 F.2d at 482.

VI. REGISTRATION EXEMPTION

Having found in favor of the SEC on the issue of whether Defendants' life settlement arrangements

were securities, the Court now turns to Defendants' registration exemption arguments. Defendants do not claim that they registered any of their life settlement arrangements as federal securities. Thus, unless they can show an exemption to the registration requirements, Defendants engaged in unregistered offer and sale of securities in violation of Sections 5(a) and 5(c) of the Securities Act and violated the broker-dealer registration provisions of Section 15(a). Instead, Defendants contend that the intrastate offering exemption applies to at least some of the 133 life settlement arrangements. *See* Def. Opp. at 17.

A. BURDEN OF PROOF

In their motion for summary judgment, Defendants argue that the SEC has the burden to prove that Defendants' separate life settlement arrangement offerings are integrated into a single offering. Def. Mot. 23. That is not the case. The SEC need only prove (1) defendants, directly or indirectly, offered or sold securities, using interstate transportation or communication or the mails; and (2) no registration was in effect or filed with the SEC. *See* 15 U.S.C. §§ 77e(a), 77e(c). Defendants citations to irrelevant authority and reliance on irrelevant and inadmissible expert testimony do not support their contention otherwise.

Defendants first cite *SEC v. Wayland* for the proposition that the SEC must prove integration as part of their prima facia case. *See SEC v. Wayland*, 2019 WL 2620669, at *3 (C.D. Cal. Apr. 8, 2019). But the *Wayland* court analyzed integration as part of its determination that two distinct corporations were liable for securities violations conducted when only one of the corporations sold the securities. *Id.* at *2, *3

(citing *Rathbone, King & Seeley, Inc.*, 1987 WL 107900, at *4 (S.E.C. No - Action Letter Apr. 20, 1987)). That question is inapposite to the SEC's prima facie case here. Defendants' citation to *SEC v. Murphy* also does not support their proposition that the SEC must prove integration. *See* Def. Mot. 23-24 (citing *S.E.C. v. Murphy*, 626 F.2d 633, 645 (9th Cir. 1980)). The *Murphy* court did not analyze integration as part of the SEC's case, but rather as part of the defendants' assertion of a registration exemption for private offerings. *Id.* at 644-45. Despite Defendants' attempt to argue otherwise, the SEC does not have a burden to prove integration of Defendants' offerings to state a claim for Section 5 violation.[2]

B. PART OF AN ISSUE

Defendants assert that they are exempt from registration requirements under an exemption for intrastate offerings. The intrastate exemption provides that:

> Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

15 U.S.C.A. § 77c (a)(11) (West 2012).

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[2] Defendants also submitted an expert report of former SEC attorney Marc Fagel, analyzing the factors used to determine whether offerings are integrated. Dkt. 483-2, Ex. A to Jones Decl. The SEC moved to exclude Fagel's testimony, arguing that Fagel was impermissibly asked to opine on a legal issue. Dkt. 490. The Court agrees and grants the SEC's motion.

All offerings of common character issued by a corporation are part of a single issue for the purposes of the intrastate exemption. *Shaw v. United States*, 131 F.2d 476, 48 (9th Cir. 1942). After *Shaw*, the SEC promulgated a release note providing the following factors, "any one or more" of which may be determinative of whether an offering is part of an integrated issue:

> (1) are the offerings part of a single plan of financing;
>
> (2) do the offerings involve issuance of the same class of security;
>
> (3) are the offerings made at or about the same time;
>
> (4) is the same type of consideration to be received,
>
> and (5) are the offerings made for the same general purpose.

SEC Release Notice, Release No. 4434 (Dec. 6, 1961).

Since they are claiming the exemption, Defendants have the burden of proof to show its applicability, and the terms of the exemption will be strictly construed against Defendants.[3] *Cap. Funds, Inc. v. SEC*, 348 F.2d 582, 586 (8th Cir. 1965). Defendants argue that, weighing the above factors here, their "133 separate life settlement arrangements" are not part of an integrated issue.

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[3] As discussed above, Defendants are incorrect to suggest that the SEC has the burden of proof on this issue. *See* Def. Reply at 21 and Def. Opp. at 14.

Regarding the first factor, Defendants argue that their offerings were not part of a single plan of financing, because purchasers each received fractional interests in discrete life settlement policies that were independent of each other and of the operations of PWCG overall. Def. Opp. at 15. As discussed above, all of the life settlement sales were connected by Defendants' "three-tiered premium reserve system." *See, e.g.*, JA 35 at 650. According to Defendants' own promotional material the purpose of the premium reserve structure "is to sufficiently fund each universal life insurance policy acquired by the Trust." Calhoun Decl. at ¶ 7. Even if Defendants use the funds towards the purchase of distinct life settlement arrangements, their venture involved a single plan of financing. *See Johnston v. Bumba*, 764 F. Supp. 1263, 1272 (N.D. Ill. 1991), aff'd, 983 F.2d 1072 (7th Cir. 1992) (holding that "even if the funds …were allocated toward the serial purchase of distinct lots of solar water heating units," offerings were part of a single plan of financing).

Regarding the third factor—whether offerings were made at or about the same time—Defendants note that their sales occurred over an eleven-year period and were "irregular." Def. Opp. 15. But Defendants sold life settlement interests continuously throughout the eleven-year period, and only occasionally showed a time lapse of a few months between sales. Dkt. 106-63, JA 61. A months-long gap is well within the bounds of offerings made "about the same time." *See SEC. v. Schooler*, 106 F. Supp. 3d 1157, 1164 (S.D. Cal. 2015), *aff'd in relevant part* 905 F.3d 1107, 1114 (9th Cir. 2018) (finding that the third factor did not weigh against a finding of integration, eve where the gap between offerings was often between two and five years). Defendants have failed to carry their burden to

show that their offers are not part of an integrated issue.

C. INTERSTATE SALE

Where an issuer invokes the intrastate exemption, the onus is on the issuer to "take the greatest care" to make sure that no part of the issue is offered or sold to a non-resident. SEC Release Notice, Release No. 4434 (Dec. 6, 1961). Here, Defendants sold part of their issue to Nevada resident Samuel John Bainbridge. Bainbridge testified at his deposition that Defendants used his Nevada phone number and Nevada mailing address to provide "all the literature" pertaining to Bainbridge's purchase. *See* Dkt. 106-3 at 51.

Instead of disputing Bainbridge's testimony, Defendants argue that the SEC needed to show that "none of the 133 separate life settlement arrangements may be exempted from registration" and that the SEC "cannot rely on a single sale to vitiate the exemption as to every sale of every life settlement arrangement." Def. Opp. At 19. As discussed above, that is not the case. Exemptions from registration provisions are construed narrowly in order to further the purpose of the Securities Act. *SEC v. Murphy*, 626 F.2d at 641 (citations omitted). Accordingly, even one out-of-state offer or sale defeats the exemption as to the entire offering. SEC Release Notice, Release No. 4434 (Dec. 6, 1961); *SEC v. Galaxy Foods*, 417 F. Supp. 1225, 1243 (E.D.N.Y. 1976) (holding that the exemption was not available to any sales because one interstate sale defeated the exemption). Here, Bainbridge's purchase was an out-of-state offer and sale that defeated the exemption.

D. REGISTRATION VIOLATIONS

Because Defendants did not establish an exemption to the registration requirements of the Securities Act, their offer and sale of life settlement arrangements violated Sections 5(a) and 5(c) of the Securities Act and 15(a) of the Exchange Act.

VII. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment is GRANTED in part and Defendants' Motion for Summary Judgment is DENIED. In a separate order, the Court will address the issues of injunctive relief, civil penalties, and disgorgement. IT IS SO ORDERED.

Dated: April 21, 2023

Hon. Dean D. Pregerson

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BRENDA CHRISTINE BARRY/ BAK WEST, INC., ERIC CHRISTOPHER CANNON/ CENTURY POINT, LLC, and CALEB AUSTIN MOODY (dba SKY STONE) Defendants.	Case No. 2:15-cv-02563 DDP (MAAx) **ORDER RE: REMEDIES**

Further to the Court's order granting summary judgment, Dkt. 546, and having considered the parties' additional briefing and heard oral argument, the Court adopts the following order regarding remedies.

The SEC requests the following remedies:

(1) injunctive relief pursuant to Securities Act § 20(b) and Exchange Act § 21(d), enjoining Defendants[1] from violating federal securities laws;

(2) disgorgement of all commissions Defendants received for selling unregistered life settlement investment contracts;[2] and

(3) "substantial" civil penalties

(Dkt. 551 at 7). Each remedy is discussed in turn.

A. Disgorgement

The SEC requests a disgorgement award against Defendants in the full amount of profits received. Defendants argue that disgorgement is precluded by the Supreme Court's admonition that disgorgement must be "awarded for victims." *Liu v. SEC*, 140 S.Ct. 1936, 1940 (2020). Defendants dispute that disgorgement here would be awarded for victims,

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[1] Pacific West Capital Group, Inc., ("PWCG"), its principal Andrew B. Calhoun IV, and one of its sales agents Andrew B. Calhoun Jr. were dismissed as defendants pursuant to a settlement agreement. (Dkt. 165, 167, 168). Remaining defendants are former PWCG sales agents Brenda Christine Barry/BAK West, Inc. ("Barry"), Eric Christopher Cannon/Century Point, Inc. ("Cannon"), and Caleb Austin Moody/Sky Stone ("Moody") (collectively, "Defendants").

[2] Specifically, the SEC requests that the Court order disgorgement of: $681,000 in ill-gotten gains and $272,273.64 in prejudgment interest from Barry; $658,000 in ill-gotten gains and $263,077.89 in prejudgment interest from Cannon; and $540,000 in ill-gotten gains and $215,899.78 in prejudgment interest from Moody.

because the victims are investors who "are likely to be made whole" when they receive payouts from policies still held by the Receivership. (*See* Opp. at 20).

First, the Court disagrees with Defendants' characterization of the facts. The investors are not "likely to be made whole" by distributions from the Receivership. PCWG, often through Defendants, advertised a minimum fixed total return on investment of 100%. (Dkt. 28-2). The Receiver's net losses calculation is based on a "money in, money out" calculation, meaning the difference between the amounts invested by investors (money-in) and amounts distributed to investors in return (money-out). (*See* Dkt. 375). This does not include investors' expectations, based on Defendants' representations, that they would double their investments "in typically 4 to 7 years" (Dkt. 7-66), and it does not account for the substantial delay in recouping the principal amount of their investments.

Second, *Liu* does not preclude disgorgement here. In *Liu*, the Supreme Court addressed whether courts may order disgorgement pursuant to the Securities Exchange Act provision for "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C § 78u(d)(5). Analyzing the history of equity courts, the Court held that courts may indeed order disgorgement in SEC actions so long as the award "satisfies the SEC's obligation to award relief 'for the benefit of investors'" and is "consistent with the equitable principles underlying § 78u(d)(5)." 140 S.Ct. at 1948, 1950. The Court remanded to the lower court to determine whether the disgorgement award at issue in *Liu* satisfied the SEC's obligation and adhered to equitable principles, despite not being distributed to

victims, imposing joint-and-several liability, and not including—rather than deducting—business expenses. *Id.* at 1950.

After *Liu*, Congress added the following provision to the Securities Exchange Act:

> "In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement."

15 U.S.C. § 78u(d)(7). Unlike §78u(d)(5), the new disgorgement provision does not include the phrase "for the benefit of investors." It is not clear whether Congress intended thereby to override *Liu*'s admonition that disgorgement awards must "satisfy[y] the SEC's obligation to award relief 'for the benefit of investors.'" *See, e.g.*, Neil Thoms Smith et. al., *Liu v. SEC: The Supreme Court Limits the SEC's Disgorgement Power and Sets the Stage for Future Legal Battles,* AMERICANBAR.ORG (Sep. 3, 2020), https://www.americanbar.org/groups/business law/resources/business-law-today/2020-september/liu-v-sec-the-supreme-court-limits-the-sec/. The Ninth Circuit has not yet addressed whether §78u(d)(7) overrides any of *Liu*'s admonitions. *Cf. SEC v. Hallam*, 42 F.4th 316, 343 (5th Cir. 2022) (holding that §78u(d)(7)'s new text distinguishes between disgorgement and equitable remedies, such that federal courts may order "legal disgorgement" without meeting the standards for equitable remedies).

That said, even under *Liu*, disgorgement is well within the Court's discretion in this case. Courts have routinely allowed disgorgement in similar circumstances after *Liu*. *See, e.g.*, *SEC v. Almagarby*, No. 17-62255-CIV, 2021 WL 4461831, at *3 (S.D. Fla.

Aug. 16, 2021) (awarding disgorgement and noting that *Liu* "made no ruling, as Defendants suggest, that the SEC must identify specific victims to whom a disgorgement award should be distributed, or that all disgorged funds must be returned to investors, or that a disgorgement award should be limited to those funds that could be returned to investors"); *Sec. & Exch. Comm'n v. Westport Cap. Markets, LLC*, 547 F. Supp. 3d 157, 170 (D. Conn. 2021) (ordering disgorgement in spite of defendants' argument that it "would be an inequitable windfall in contravention of the Supreme Court's clear holding in *Liu*.").

Independent of its legal availability, Defendants consider disgorgement a "draconian" punishment, disproportionate to the wrongfulness of their failure to register with the SEC. (Dkt. 491 at 19). Indeed, unlike PWCG and Calhoun, the SEC did not assert fraud claims against Defendants and the other sales agents named in the Complaint. Nonetheless, the SEC seeks the same amount of disgorgement from Defendants for failure to register as it sought from PWCG and Calhoun: all of their profits.

The SEC is correct that the Court has discretion to order disgorgement of all of Defendants' profits for their failure to register alone. *See, e.g.*, *SEC v. Platforms Wireless Int'l Corp.,* 617 F.3d 1072, 1097 (9th Cir. 2010) (ordering disgorgement for failure to register without ruling on liability for fraud); *SEC v. Thomas*, No. 2:19-cv-01515-APG-VCF, 2021 U.S. Dist. LEXIS 238166, at *34 (D. Nev. Aug. 24, 2021) (ordering disgorgement where defendants sold unregistered securities but were not involved in the Ponzi scheme and were regularly reassured of the scheme's legality by management). Where, as here,

disgorgement is an available remedy, the Court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged. *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) (citation omitted). In exercising its discretion, the Court considers the totality of circumstances underlying the present litigation.

Although the SEC did not bring fraud claims against Defendants, Defendants were, in many cases, the sales agents who provided the allegedly misleading information to investors. For example, Barry told investors that the risk of premium calls was "negligible" because "plenty of funds" were available in reserves (Dkt. 106-4 at 113:10-24, 156:1-19) and that, if issued, premium calls would be a pro-rata share of the premium amount listed on the disclosure form (*see* 106-65 at 155:5-19). Moody told an investor that PWCG had "yet to use any funds from the secondary reserve[,] much less the third" (Dkt. 7-59). Cannon told investors that PWCG had "accumulated millions of dollars in the secondary and tertiary premium reserves," and that, because PWCG had yet to dip into those reserves, he did not "anticipate" investors would be subject to premium calls. (Dkt. 7-102, Dkt. 7-99). At the time that Defendants made these statements, premium reserves for some of the policies in PWCG's portfolio had in fact run out. (Dkt. 28-3 at ¶13).

Defendants claim they relied on information from Calhoun, who lied to or misled Defendants. (*See, e.g.*, Dkt. 106-65 at 156:13-19). It is unclear how reasonable it was for Defendants to parrot, without verifying, these statements to investors. That said, Calhoun's reassurances mitigate, at least somewhat, Defendants' culpability for misleading investors. *See SEC v.*

Thomas, 2021 U.S. Dist. LEXIS 238166, at *34 (D. Nev. Aug. 24, 2021) (finding that the SEC's requested penalties were too high because defendants were "regularly assured…of the scheme's legality").

The SEC's settlements with Calhoun, compared to their settlement with sales agent Calhoun Jr., further support the notion that Calhoun's blameworthiness exceeds Defendants'. Calhoun was the founder, owner, and sole president of PWCG and, as discussed above, "controll[ed] the information provided to investors through the Sales Agent Defendants." (Complaint at ¶ 23). The SEC's settlement with Calhoun included disgorgement of $3,745,416, about half of his approximately $7,600,000 in profits from the life insurance investment contracts. (*Compare id.* ¶ 100 with Dkt. 165). Calhoun Jr., like Defendants, was a sales agent. The Calhoun Jr. settlement included disgorgement of $104,800, less than a quarter of his approximately $485,000 in profits. (*Compare* Complaint ¶ 102 with Dkt. 168). This settlement apportioning tracks the Court's understanding of the relative culpability of PWCG employees; that is, Calhoun, PWCG's founder and owner, was more culpable than Calhoun Jr. and Defendants, PWCG's sales agents.

Lastly, the Court considers Defendants' legitimate business expenses. *Liu*, 140 S. Ct. at 1950 ("We leave it to the lower court to examine whether including those expenses in a profits-based remedy is consistent with the equitable principles underlying § 78u(d)(5)."). It is incumbent on Defendants, not the Court, to identify these expenses. *SEC v. World Tree Fin., L.L.C.*, 43 F.4th 448, 467 (5th Cir. 2022) ("*Liu* does not require the district court to conduct its own search for business

deductions that defendants have not identified."). Barry did not even approximate her legitimate business expenses, instead merely stating that the SEC's net profits account "does not take into account my business expenses." (Dkt. 492-1 ¶ 10). Cannon stated that he paid $86,479 in taxes on his PWCG income, but he did not specify whether that amount was accounted for in the SEC's approximation of his net profits. (*Compare* Dkt. 491-3 ¶ 7 *with* Dkt. 64 ¶ 105). Moody listed his tax payments and the total annual business expenses he deducted from his taxes from 2012-2014, but he did not itemize or describe those expenses. (Dkt. 491-4 ¶ 7-9). Without clear information about the business expenses from any of Defendants, the Court is unable to conclude that those expenses "have value independent of fueling a fraudulent scheme." *Liu*, 140 S.Ct. at 1960.

That said, circumstances mitigating Defendants' culpability weigh against an order of full disgorgement. The Court instead orders Defendants to disgorge a third of their net profits, to be distributed to investors. Barry is ordered to disgorge $227,000, Cannon is ordered to disgorge $219,333.33, and Moody is ordered to disgorge $180,000.

B. Prejudgment Interest on Disgorgement

The SEC further requests prejudgment interest on the disgorgement award. In deciding whether an award of prejudgment interest is warranted, a court should consider "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *SEC. v. First Jersey*

Sec., Inc., 101 F.3d 1450, 1476 (2d Cir. 1996) (citing *Wickham Contracting Co. v. Local Union No. 3*, 955 F.2d 831, 833–34 (2d Cir. 1994)).

As to the third factor, the registration requirements of the Securities and Exchange aim to protect investors from fraud. See *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1085 (9th Cir. 2010); *Turbeville v. Fin. Indus. Regul. Auth.*, 874 F.3d 1268, 1270 (11th Cir. 2017). In particular, the broker-dealer registration requirement is "of the utmost importance in effecting the purposes of the Act because it enables the SEC to exercise discipline over those who may engage in the securities business and it establishes necessary standards with respect to training, experience, and records." *SEC v. Benger,* 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010) (internal quotations omitted). In this case, requiring better training, more experience, and more thorough records may well have prevented Defendants from misleading investors about the likelihood of premium calls and the track record of PWCG's portfolio. On the other hand, the first and second factors—the need to fully compensate investors and the relative equities of the award—weigh against ordering prejudgment interest. As discussed above, PWCG, Calhoun, and Mills Potoczack & Company have agreed to settlements totaling more than $106 million, which is the "total allowed investor net loss" claimed from the receivership.[3] The disgorgement order is sufficient to

[3] Settlement amounts and interim distribution amounts are listed below:

1.	PWCG Disgorgement (Dkt. 166)	$53,654,584.00
2.	PWCG Prejudgment Interest (Dkt. 166)	$5,859,747.58

serve a deterrent function without adding prejudgment interest. Accordingly, the Court declines to exercise its discretion to order prejudgment interest.

C. Injunctive relief

The SEC seeks an injunction prohibiting Defendants from violating Section 5 of the Securities Act and Section 15(b) of the Exchange Act. (Dkt. 481-1 at 24). According to the SEC's oral argument, this permanent injunction would trigger a further "follow on" administrative procedure in which the SEC would seek to prevent Defendants from working in the securities industry.

The Court may, upon a proper showing, order injunctive relief for securities law violations. *SEC v. Arthur Young & Co.*, 590 F.2d 785, 787 (9th Cir. 1979); *SEC v. Martino*, 255 F. Supp. 2d 268 (S.D.N.Y. 2003). In doing so, the Court must assess the likelihood of future violations, given such factors as: (1) the degree of scienter, (2) the isolated or recurrent nature of the infraction, (3) Defendants' recognition of the wrongful nature of their conduct, (4) the likelihood, because of Defendants' occupation, that future violations might occur, and (5) the sincerity of Defendants' assurances against future violations. *SEC v. Murphy*, 50 F.4th 832, 841-42 (9th Cir. 2022) (internal citations omitted). The SEC has the burden to show a reasonable likelihood of

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3.	PWCG Civil Penalty (Dkt. 166)	$750,000.00
4.	Calhoun IV Disgorgement (Dkt. 165)	$3,745,416.00
5.	Calhoun IV Prejudgment Interest (Dkt. 165)	$409,045.99
6.	Calhoun IV Civil Penalty (Dkt. 165)	$320,000.00
7.	Calhoun Jr. Disgorgement (Dkt. 168)	$104,800.00
8.	Calhoun Jr. Prejudgment Interest (Dkt. 168)	$11,445.49
9.	Calhoun Jr. Civil Penalties (Dkt. 168)	$7,500.00
10.	MPC State Court Settlement (Dkt. 550)	$9,750,000.00
11.	Interim Investor Distribution (Dkt. 550)	$37,000,000

future violations. *SEC v. Olins*, 762 F. Supp. 2d 1193, 1196 (N.D. Cal. 2011), as amended (Feb. 25, 2011) (internal citations omitted).

1. Scienter

Although scienter is not an element of the registration violations for which this Court found Defendants liable, the degree of Defendants' scienter regarding their failure to register does bear on the likelihood of Defendants' future violations. Defendants claim to have relied on Calhoun and his attorneys' representations that the investment contracts here were exempted from registration requirements. (Dkt. 491-2; 491-3; 491-4) (asserting, for example, that Calhoun "regularly made comments regarding how much he was spending on 'the best possible attorneys' to ensure that PWCG's business was in compliance with laws and regulations"). Although this Court held that Defendants' investment contracts were indeed federal securities requiring registration, Dkt. 546, the legal issue was close enough that Defendants could reasonably have believed Calhoun and his attorneys. Accordingly, Defendants' level of scienter regarding their failure to register weighs somewhat against a finding that future violations are reasonably likely.

2. Isolated or Recurrent Nature of Infraction

Defendants argue that their infraction was isolated, weighing against granting an injunction, because the infractions at issue here are Defendants' first violations of securities law. (Dkt. 552 at 7). Although Defendants' unregistered transactions were all part of a single scheme of life insurance investment contracts, Defendants were involved in this scheme for several

years.[4] *See SEC v. Alexander*, 115 F. Supp. 3d 1071, 1086 (N.D. Cal. 2015) (finding that the second factor weighed in favor of finding a likelihood of recurrence where defendants took part in a scheme "that spanned nearly two years and impacted dozens of investors"). Thus, the recurrent nature of Defendants' violations weighs somewhat in favor of a finding that future violations are reasonably likely.

3. Defendants' Recognition of the Wrongful Nature of Their Conduct

Defendants argue that they should not be penalized for arguing that life insurance investment contracts were not federal securities requiring registration (Dkt. 552 at 7). Even without penalizing Defendants for taking that position in defense of the SEC's claims, this Court considers Defendants' recognition of the wrongful nature of their misrepresentations to investors relevant to the likelihood of future violations.

As discussed above, Defendants misled investors about such facts as the likelihood of premium calls and PWCG's track record. Defendants claimed that they did so based on information that Defendants received from Calhoun and presumed were true. (*See, e.g.*, Dkt. 106-73 at 105:3-22). Relevant to the question of the likelihood that they will violate securities laws in the future are Defendants' reactions after Calhoun informed Defendants in 2014 that primary reserves on some policies had run out (Dkt. 7-32 at 26:1-27:13), and after Defendants learned of the allegations

[4] Barry worked for PWCG since 2004. (Dkt. 28-8). Moody worked for PWCG since 2012. (Dkt. 491-4). Cannon worked for PWCG sitting 2007. (Dkt. 28-6).

underlying the SEC's claim in 2015. In particular, Cannon discounted the importance of these misrepresentations, claiming that many investors told him they were not concerned with PWCG's track record (Dkt. 106-173 at 118:19-119:14) and that the reliability of Calhoun's seven-year lifespan estimates "doesn't affect the investor" (*id.* 120:7-23). Cannon's statements "evidence[], at a minimum, a lack of sufficient attention…to the securities laws." *Olins*, 762 F. Supp. 2d at 1196 (analyzing the totality of defendant's conduct which evidenced "a willingness to further his goals at the expense of total candor"). As to Cannon, therefore, the third factor weighs somewhat in favor of a finding he is reasonably likely to violate securities laws in the future. The SEC did not point to, and the Court could not locate, similar evidence of Moody or Barry minimizing the severity of the misrepresentations. Thus, as to Moody and Barry, the third factor weighs somewhat against a finding that they are reasonably likely to violate securities laws in the future.

4. Defendants' Occupations

The SEC argues that likelihood of recurrence weighs in favor of ordering an injunction, because nothing prevents Defendants from acting as unregistered brokers in the future. (Dkt. 493 at 16). But Defendants Barry and Moody represent that they do not plan to re-enter the securities industry. (Dkt. 552 at 7). Defendant Cannon represents that he wishes to remain in the financial services industry as an investment advisor. (Dkt. 551 at 2-3).

5. Sincerity of Assurances Against Future Violations

Each Defendant included in their declaration the same statement:

"I believe it is important to uphold the federal securities laws and will continue to do so in my future career." (Dkt. 491-2 at ¶9, 491-3 at ¶8, 491-4 at ¶10).

The SEC did not argue, in its briefing or at argument, that these assurances were not sincere, but even "sincere assurances of an intent to refrain from aiding and abetting future violations are insufficient, without more, to militate against an injunction." *SEC v. Fehn*, 97 F.3d 1276, 1296 (9th Cir. 1996). Thus, this factor weighs neither for nor against granting an injunction.

6. Conclusion

As to Defendant Cannon alone, the totality of circumstances warrant the imposition of an injunction.

D. Civil Penalties

Lastly, the SEC requests "substantial civil penalties be imposed" on each Defendant. (Dkt. 551 at 7). Courts have discretion to determine the appropriate amount of a civil penalty "in light of the facts and circumstances." *SEC v. Rajaratnam*, 918 F.3d 36, 44 (2d Cir. 2019) (citation omitted). The Securities and Exchange Acts each provide that penalties shall be assessed according to a three-tier system. For each tier, the Court may impose a penalty up to the "gross amount of pecuniary gain." 15 U.S.C. §§ 77t(d)(2), 78u(d)(3)(B). The first, or lowest tier applies to any violation of the securities laws; the second tier applies to violations that involve fraud,

deceit, or manipulation, or a deliberate or reckless disregard of a regulatory requirement; and the third, or highest tier applies to violations described in the second tier, and such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons. For each violation, for the period at issue, the maximum first tier penalty is the greater of: (1) $7,500 for a natural person, and $75,000 for any other person; or (2) the "gross amount of pecuniary gain" to the defendant as a result of the violation. 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i).

Here again, the SEC's settlements with Calhoun, PWCG, and Calhoun Jr. are instructive. Calhoun agreed to pay a $320,000 civil penalty and Calhoun Jr. agreed to pay a $7,500 penalty. (Dkt. 165, 168). These amounts reflect the totality of circumstances discussed above, in which Calhoun and PWCG hold more culpability than their sales agents. Accordingly, the Court finds a Tier 1 penalty appropriate. Rather than assess the total amount of pecuniary gain, which is already accounted for in the disgorgement section above, the Court orders each Defendant to pay a civil penalty of $15,000, to be sent to the Treasury.

D. Conclusion

In sum, the Court orders as follows:

- Disgorgement: Brenda Barry is ordered to disgorge $227,000, Eric Cannon is ordered to disgorge $219,333.33, and Caleb Moody is ordered to disgorge $180,000, to be distributed to investors.

- Injunction: Eric Cannon is hereby enjoined from future violations of Section 5 and 15(a) of the Securities and Exchange Acts.

- Civil Penalties: Brenda Barry, Eric Cannon, and Caleb Moody shall pay Tier 1 Civil Penalties in the amount of $15,000 each, to be sent to the Treasury.

IT IS SO ORDERED.

Dated: July 12, 2023

DEAN D. PREGERSON

UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-2563 FMO (FFMX)	Date	June 16, 2015
Title	Securities and Exchange Commission v. Pacific West Capital Group, Inc., et al.		

Present: The Honorable	Fernando M. Olguin, United States District Judge	
Vanessa Figueroa	None	None
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorney Present for Plaintiff(s):	Attorney Present for Defendant(s):
None Present	None Present

Proceedings: (In Chambers) Order Re: Motion for Preliminary Injunction

Having reviewed and considered all the briefing filed with respect to plaintiff's Motion for Preliminary Injunction ("Motion"), the court concludes that oral argument is not necessary to resolve the Motion. See Fed. R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, '684 n. 2 (9th Cir. 2001).

BACKGROUND

On April 7, 2015, plaintiff the Securities and Exchange Commission (the "SEC") filed a Complaint

alleging five federal securities violations against ten defendants: (1) §10(b) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5 promulgated thereunder; (2) §17(a) of the Securities Act of 1933 ("1933 Act"); (3) §15(a) of the 1934 Act; (4) §§ 5(a) and 5(c) of the 1933 Act; and (5) § 20(a) of the 1934 Act. (See Complaint at ¶¶ 6-15 & 108-124).

On April 17, 2015, the SEC filed the Motion against three of the ten defendants in this action: Pacific West Capital Group, Inc. ("Pacific West"), Andrew B Calhoun IV ("Calhoun"), and PWCG Trust ("Trust"). Founded in 2004, Pacific West is a California corporation that "facilitates the sale of interests in life settlements." (Declaration of Andrew B Calhoun IV ("Calhoun Decl.") at ¶ 3). Calhoun is Pacific West's President, CEO, and sole owner. (Id. at ¶ 2). The Trust is an Ohio business trust. (Complaint at ¶ 8). Pacific West is the grantor of the Trust. (Declaration of Todd Brilliant in Support of [the SEC's] Motion for Preliminary Injunction ("Brilliant Decl."), Exh. 6 at 193). Third-party Mills, Potoczak, & Company is its trustee. (Id.).

I. LIFE SETTLEMENTS.

As described in a brochure Pacific West provides its potential investors, life settlements are arrangements where insureds "sell their existing life insurance policies to investors at a more equitable settlement than the life insurance companies [are] willing to offer. . . . [I]nstead of being able to receive[, for example,] only $100,000 on a $1,000,000 policy, the insured might expect to receive $250,000 from investors. The investors would then hold the policy until the insured passed away, at which point the policy would mature and the investors would collect

the face value of $1,000,000." (Brilliant Decl., Exh. 7 at 208).

The life settlement arrangements that Pacific West sells are fractionalized interests in a type of life insurance policy called "universal" or "flexible premium adjustable" life insurance. (See Brilliant Decl., Exh. 1 at 19, Exh. 2 at 46, Exh. 3 at 54). Universal life insurance policies have both an insurance component (i.e., they pay out when the insured dies) and a savings component (i.e., they accumulate investment returns). (See id., Exh. 4 at 35-36).[1]

Pacific West's life settlement arrangements are regulated by the California Securities Division of the Department of Business Oversight. (See Calhoun Decl. at ¶10; Brilliant Decl., Exh. 7 at 209). Pacific West has "responded to multiple subpoenas duces tecum" served by the California Securities Division. (Calhoun Decl. at ¶ 12).

II. PACIFIC WEST'S STATEMENTS REGARDING INVESTOR RETURNS.

According to Calhoun, "[i]nvestors are offered between 100% and 175% total fixed return on each investment." (Calhoun Decl. at ¶ 5): (see Brilliant Decl., Exh. 7 at 207) (investors obtain a "minimum 100% total fixed return, meaning [investors] double [their] money"). "An investor's effective annual rate of return on an investment will vary depending on when the policy matures." (Calhoun Decl. at ¶ 5).

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[1] Citations to Exhibit 4 are to the deposition transcript page numbers.

Calhoun states that "[i]nvestors are clearly informed of this information in the Purchase Agreement," (Calhoun Decl. at ¶ 5), which provides that each investor "acknowledges that the economic benefit derived from the transaction(s) contemplated by this Agreement will result solely from the maturity of the life insurance policy(ies) upon the death of the insured(s), and will not be derived from the efforts of any person or entity employed by or associated with [Pacific West.]" (Brilliant Decl., Exh. 1 at 25 & Exh. 3 at 60). The Purchase Agreement also states that "[t]he life expectancy of any particular insured and the annual rate of return on a life settlement contract are only estimates and cannot be guaranteed. The annualized rate of return would be higher if the actual life expectancy turns out to be less than the estimated life expectancy of the insured." (Id., Exh. 1 at 33 & Exh. 3 at 68).

III. PACIFIC WEST'S POLICY SELECTION PROCESS.

According to the brochure it distributes to potential investors, Pacific West "purchase[s] select policies that meet [its] high standards for investment and sell[s] interests to qualified investors." (Brilliant Decl., Exh. 7 at 209). Each policy "undergoes rigorous scrutiny using a predetermined set of criteria, and [Pacific West] select[s] the most desirable[.]" (Id.).

Pacific West's goal "is to select policies that will mature in 4 to 7 years." (Calhoun Decl. at ¶ 4). In particular, Pacific West "purchases interests in the proceeds of life insurance policies at a discount to face value where the insureds are 75 years of age or older typically with a reduced life outlook due to chronic and degenerative health complications." (Brilliant Decl.,

Exh. 7 at206). "In seeking to achieve the investment objective, [Pacific West] reviews over $250 million of face value policies each month, selects policies that are non-contestable, and only purchases policies that have been issued by United States life insurance companies that are 'A-rated' or better as determined by Standard & Poors." (Id.).

Once Pacific West selects the policies to be purchased and sold to investors, (see, e.g., Brilliant Decl., Exh. 4 at 44-46, Exh. 7 at 206, 209 & 213; Calhoun Decl.. at ¶ 4), it determines a total fixed return of between 100% and 175% for each policy, (see Calhoun Decl. at ¶ 5), determines the price Pacific West will pay for a policy, (see Brilliant Decl., Exh. 4 at 43-48), sets the length of the contract period, which is typically four to seven years, (see id., Exh. 4 at 154; Calhoun Decl. at ¶ 4), and "determines the annual outlay amount necessary to keep the policy in-force for a defined number of years, at a minimum of 6 years, up to 9 years." (Calhoun Decl. at ¶ 7).[2]

IV. PREMIUM RESERVES.

A particular feature of Pacific West's life settlement arrangement is its "three-tiered premium reserve system[,]" which Calhoun claims is "unique in the industry." (Calhoun Decl. at ¶ 7). "The central objective of [Pacific West's] three-tiered premium reserve structure is to sufficiently fund each universal

[2] Additionally, Calhoun drafted, reviewed, or approved Pacific West's purchase agreements, disclosure forms, brochures,. and presentations given to investors. (See Brilliant Decl., Exh. 4 at: 132,.169-170 & 143-144). Calhoun also trains, supervises and provides the sales agents with information about Pacific West's business and its life settlements, and instructs them on what to say to investors. (See id. at 27 & 29).

life insurance policy acquired by the Trust." (Id.); (see Brilliant Decl.; Exh. 7 at 210) (Pacific West claims to have established this policy "to pay premiums so that every policy is kept in force."). Thus, Pacific West claims to have large enough reserves to provide the Trust with sufficient funds to pay the premiums on the underlying policies for periods of generally six to nine years, which is longer than the estimated four-to-seven year period for a policy to mature. (See Brilliant Decl., Exh. 2 at 47, Exh. 3 at 56, Exh. 4 at 154, Exh. 7 at 210 & Exh. 20 at 409). According to Calhoun, Pacific West accomplishes this by doing the following: "Before making a bid on a policy, [Pacific West] carefully reviews various 'in-force' illustrations composed by the underwriting life insurance company (the 'carrier')." (Calhoun Decl. at 11 7). "Based on the carrier's projected assumptions (i.e., cost of insurance (COI), existing cash surrender value (CSV), interest rates, mortality rates, and expense charges), [Pacific West] determines an annual outlay amount necessary to keep the policy in-force for a defined number of years, at a minimum of 6 years, up to 9 years." (Id.).

"Based on this determination, [Pacific West] escrows a lump-sum amount in the primary premium reserve[,]" which is "funded by a designated percentage of all gross investment proceeds.;' (Callhoun Decl. at ¶ 8). "Divisible by the specific number of years, the annual outlays will be made to cover COI, and these premium payments are able to cover COI for that number of years, in conjunction with the policy's existing CSV. Policies with existing CSV sufficient to keep the policy in-force for a period of 6, 7, 8, or 9 years may not require a lump-sum amount escrowed to primary premium reserves[.]" (Id.).

Pacific West has "also established two other general reserves that can be used to pay premiums should the primary reserve become depleted. The first general reserve is funded from 1% of all investor money for all policies. The second general reserve is funded from excess or unused premium dollars from any primary reserve due to the policy maturing before the primary premium reserve becomes depleted." (Brilliant Decl., Exh. 7 at 210; see Calhoun Decl. at ¶ 9). Calhoun states that when existing CSV is sufficient to pay the primary premium reserves, thus requiring to lump-sum payment, that fact is disclosed to potential investors. (See Calhoun Decl. at ¶ 8).

The Purchase Agreement discloses the primary premium reserve, which involves, "the placement of funds for each policy's premiums in a premium escrow account sufficient to pay premiums for [6, 7, 8, or 9 years.]." (Brilliant Decl., Exh. 1 at 29 & Exh. 3 at 64). It discloses the secondary reserve by stating that "an initial general premium reserve is established to pay premiums on policies not fully paid by [the primary reserve]. The money for the additional premium reserve comes from the distribution of 1% of all purchase money received by the Escrow Agent" (Id.). It discloses the tertiary reserve by stating that "an additional general premium reserve is established to pay premiums on policies not fully paid [by the primary and secondary reserve]. The money for this premium reserve comes from unused premiums of matured policies and interest earned on the active premium escrow account." (Id.).

Finally, the Purchase Agreement explains that investors may have to make additional payments out-of-pocket if each of the three reserves is depleted. (See,

e.g., Brilliant Decl., Exh. 1 at 29, Exh. 3 at 64) ("In the event all of the premium escrow accounts are depleted, in order to safeguard the policy against a lapse in coverage, it will become the responsibility of the Purchaser to make pro rata premium payments on any policy in which they have an Interest.").

V. FUNDING AND MAINTENANCE OF LIFE SETTLEMENTS ARRANGEMENTS.

Once Pacific West selects a policy based upon its "quality-based criteria," it "raises capital from investors that are interested in life settlement investments." (Calhoun Decl. at ¶ 4; see Brilliant Decl., Exh. 7 at 209). "Through the [Trust]. [Pacific West] offers universal life policies for purchase in fractional interests by qualified individual investors." (Calhoun Decl. at ¶ 4). "The Trust purchases policies from the policy owners and is recorded as the new owner and beneficiary of the policy." (Id.). "When the change of ownership and beneficiary have been officially recorded and recognized by the life insurance company, [Pacific West] then sells fractional interests to investors giving them a percentage of the face value as their beneficiary designation.." (Id.). The Trust "then issues an assignment of death benefit confirming the beneficiary designation within a specific policy." (Id.).

After purchase but before the life settlement arrangement matures, the trustee of the Trust "makes required premium payments on policies, monitors the policy until the insured's death, and handles all investment distributions." (Calhoun Decl. at ¶ 6); (see Brilliant Decl., Exh. 6 at 195-96) (after the Trust sells the fractionalized interests to Pacific West investors, the trustee purchases policies, issues the life settlements, establishes and accounts for cash

reserves for the premiums, pays the premiums on policies, and distributes returns to investors). According to Callhoun, Pacific West and the Trust "provide all investors in the Trust with complete documentation as to the policy, the insured, changes of ownership and beneficiary, and all other information relevant to the investment." (Calhoun Decl. at ¶ 6).

"When the policy matures, the life insurance company pays the death benefit to the Trust. The [Trust] then pays the specified beneficiary designation amount to all investors within the matured policy." (Calhoun Decl. at ¶ 6).

VI. PACIFIC WEST'S AND CALHOUN'S PROCEEDS AND USE OF PROCEEDS.

According to the SEC, from late 2004 through November 2014, Pacific West raised more than $99.9 million from over 3,200 investors who purchased interests in about 125 policies. (See Declaration of Dora M. Zaldivar in Support of [the SEC's] Motion for Preliminary Injunction ("Zaldivar Decl.") at ¶ 12). Pacific West and Callhoun used about $29.3 million to purchase policies and cover related expenses. (See id. at ¶¶ 12-13). About $24.7 million was used to fund the premium reserves. (See id.). Pacific West and Calhoun received about $45.9' million, or 46% of the $99.9 million raised from investors. (See id.).

LEGAL STANDARD

Section 20(b) of the 1933 Act provides, "[w]henever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of [the 1933 Act] ... the Commission may, in its discretion, bring an action in any district court ... to

enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond." 15 U.S.C. § 77t(b); see also 15 U.S.C. § 78u(d) (1934 Act).

The Ninth Circuit Court of Appeals has not expressly adopted an applicable standard when the SEC seeks a preliminary injunction. See SEC *v.* Eadgear, Inc., 2014 WL 6900938, *1 (N.D. Cal. 2014) ("Although the [Eleventh Circuit] standard is applied in some federal courts, the court of appeals in this circuit has not expressly adopted it."). As such, "there is not clear uniformity on the standard to be applied" in this matter. SEC v. Schooler, 902 F.Supp.2d 1341, 1345 n. 2 (S.D. Cal. 2012).

However. multiple districts in California have adopted the standard set forth in SEC v. Unique Fin. Concepts, 196 F.3d 1195 (11th Cir. 1999). See, e.g., SEC v. Homestead Props., LP., 2009 WL 5173685, *2 (C.D. Cal. 2009); Eadgear, Inc., 2014 WL 6900938, at *1; Schooler, 902 F.Supp.2d at 1345 n. 2. Under that standard, the SEC is entitled to a preliminary injunction when it establishes: (1) a prima facie case of previous viollations of federal securities laws; and (2) a reasonable l1ikelihood that the wrong will be repeated. See Unique Fin. Concepts, 196 F.3d at 1199 n. 2.

The SEC advocates for the application of the Unique Financial Concepts standard. (See Motion at 14-15). Defendants dispute the application of the Eleventh Circuit standard, but' in light of law from this district applying the standard advocated by the SEC," "assumes, without agreement, that the lower standard applies." (Defendants' Opposition to [SEC's] Motion for Preliminary Injunction ("Opp'n") at 4 n. 1).

Accordingly, the court will apply the Unique Financial Concepts standard.

DISCUSSION

Each of the SEC's five claims for relief requires that the underlying arrangement constitute a "security" under the federal securities laws. See 15 U.S.C. § 78j(b) (first claim for relief under § 1O(b) of the 1934 Act, which prohibits any manipulative or deceptive device or contrivance "in connection with purchase or sale of any security"); 15 U.S.C. § 77q(a) (second claim for relief under §17(a) of the 1933 Act, which prohibits types of fraud "in the offer or sale of any securities"); 15 U.S.C. § 78o(a) (third claim for relief for violation of § 15(a) of the 1934 Act, which prohibits "induce[ment] or attempt to induce the purchase or sale of, any security"); 15 U.S.C. §§ 77e(a) and 77e(c) (fourth claim for relief under §§ 5(.a) and 5(c) of the 1933 Act, which prohibits "sale or delivery after sale of unregistered securities" and use of interstate commerce to "sell or offer to buy ... any security'); 15 U.S.C. § 78t(a) (fifth claim for relief in violation of § 20(a) of the 1934 Act, which imposes liability on "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder"). The court, therefore, must reach the threshold issue whether Pacific West's life settlement arrangement is a security under the 1933 and 1934 Acts.

The 1933 and 1934 Acts both define the term "security" to include "investment contracts." See 15 U.S.C. § 77(a)(b)(1)(1933 Act); 15 U.S.C.§ 78(a)(10) (1934 Act); Reves v. Ernst & Young, 494 U.S. 56, 61 n. 1, 110 S.Ct. 945, 949 n. 1 (1990) ("The definition of a security in § 3(a)(10) of the 1934 Act, . . .is virtually

identical [to the definition in the 1933 Act] and, for present purposes, the coverage of the two Acts may be considered the same.") (internal quotation marks omitted). The Supreme Court has recognized that Congress intended that the 1933 and 1934 Acts be read liberally. See Reves, 494 U.S. at 60, 110 S.Ct. at 949 ("In defining the scope of the market that it wished to regulate [via the federal securities laws], Congress painted with a broad brush."). "[l]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." Tcherepnin v. Knight, 389 U.S. 332, 336, 88 S.Ct. 548, 553 (1967). "Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a 'security.'" SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344,351, 64 S.Ct. 120, 124 (1943).

The Supreme Court has provided a four-pronged test for assessing whether an arrangement is an "investment contract."[3] See SEC v. W.J. Howey Co.,

[3] Defendants rely on Life Settlement Task Force, Staff Report to the United States Securities and Exchange Commission (July 22, 2010), to support their claim that Congress was aware of the Task Forces's recommendation to amend the definition of "security" under the 1933 and 1934 Acts to include life settlements, but "consciously. . . did not act in response to that policy." (Opp'n at 5-6) (internal quotation marks omitted). This argument is without merit, because as the SEC notes, that report was "a report by the staff to the SEC[,]" not to Congress. ([SEC's) Reply in Support of Its Motion for Preliminary Injunction Against [Defendants) ("Reply") at 8).

328 U.S. 293, 298-99, 66 S.Ct. 1100, 1102-03 (1946). An investment contract for purposes of the 1933 and 1934 Acts is (1) a contract, transaction or scheme whereby a person invests his money, (2) in a common enterprise, and (3) is led to expect profits, (4) solely from the efforts of the promoter or a third party.[4] See id. at 298-99, 66 S.Ct. at 1103. This test "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promises of profits." Id. at 299, 66 S.Ct. at 1103. "[C]ourts conduct an objective inquiry into the character of the instrument or transaction offered based on what the purchasers were 'led to expect.'" Alaniz, 569 F.3d at 1021.

Here, the parties do not dispute that Pacific West's investors are investing in a common enterprise with the expectation of profits. (See Opp'n at 6; Reply at 3). Rather, they dispute the fourth Howey prong, (see Opp'n at 6; Reply at 3), which asks whether investors expect profits "solely from the efforts of the promoter

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[4] Although the Ninth Circuit has described the Howey test as a "three-pronged" test, it has also stated that the third-prong, "solely from the efforts of the promoter or a third party," see Howey. 328 U.S. at 298-99, 66 S.Ct. at 1103, "involves two distinct concepts: whether a transaction involves any expectation of profit and whether expected profits are the product of the efforts of a person other than the investor." Warfield v. Alaniz, 569 F.3d 1015, 1020 (9th Cir. 2009). The Ninth Circuit further notes that "at least two of [its] sister circuits and one authoritative securities law treatise have identified Howey's test as a four-part test." Id. at 1020 n. 6. For purposes of this order, the court finds it more helpful to construe the Howey test as a four-pronged, rather than a three-pronged, test.

or a third party[.)" Howey, 328 U.S. at 298-99, 66 S.Ct. at 1103.

While it is true that the Ninth Circuit has relaxed the requirement that profits derive "solely" from the efforts of others, see SEC v. Glenn W. Turner Enter., Inc., 474 F.2d 476,482 (9th Cir.), cert. denied, 414 U.S. 821 (1973), the Ninth Circuit has repeatedly required that a promoter's or third party's managerial or entrepreneurial efforts must be "undeniably significant ones," where the "success of the investment program as a whole" is "crucial to" and "hinges on" the efforts by defendants. Id.; see, e.g., SEC v. Rubera, 350 F.3d 1084, 1092 (9th Cir. 2003) (defendant's installation and maintenance of pay telephones, including payment of monthly bills and obtaining regulatory certifications were "crucial to" and "hinged on" the "success of the investment program as a whole"); SEC v. Goldfield Deep Mines Co. of Nev., 758 F.2d 459, 464 (9th Cir. 1985) ("the undeniably significant effort necessary for success in the ore program was that of Goldfield - the provider of what was represented to be the only economically feasible dump ore processing technique."); SEC v. R.G. Reynolds Enter., Inc., 952 F.2d 1125, 1134 (9th Cir. 1991) ("Moreland undertook to finance, construct, and operate the refining plant, to refine investors' ore, and to deliver the gold to a reputable company for hallmarking and certification of its purity. These were the essential managerial efforts that would affect the success or failure of the Moreland Gold Program.").

To be sure, the SEC points to the fact that defendants touted their activities and expertise in promotional literature, leading investors to expect that the success or failure of the enterprise depended

on defendants, especially with respect to increasing the secondary and tertiary reserves, which Pacific West managed through the Trust. (See Reply at 4-6). But these factors, singly and together, do not indicate that defendants' efforts were "crucial" or "undeniably significant" to the "success of the investment program as a whole." See Glenn W. Turner Enter., 474 F.2d at 482; Rubera, 350 F.3d at 1092. While amassing a larger number of investors may be a factor in increasing the size of the secondary and tertiary reserves, it is unclear at this preliminary injunction stage whether the success or failure of Pacific West's life settlement arrangements were predicated on these efforts, or rather, on the timing of the underlying insureds' deaths. See, e.g., Goldfield Deep Mines, 758 F.2d at 464 ("as a practical matter, the investors were forced to rely exclusively upon the services of Goldfield," making it "apparent that the expectation of profit was predicated on the efforts of Goldfield."); SEC v. Belmont Reid & Co., 794 F.2d 1388, 1388 & 1391 (9th Cir. 1986) (although defendants provided services such as guarantees against default, expectation of profit was predicated on "speculati(on] in the gold market").

The SEC asserts that "Calhoun and Pacific West tout[ed] to investors how their managerial efforts w[ould] produce returns of 100% or 150% with little or no risk to the investors." (Reply at 4); see SEC v. Eurobond Exch., Ltd., 13 F.3d 1334, 1341 (9th Cir. 1994) ("it is beyond dispute that any profits to investors came from the efforts and expertise of Eurobond, and that Eurobond's sales material stressed this fact"). However, Pacific West expressly disclaimed that its investors' profits derived from its efforts or expertise. The Purchase Agreement provides

that each investor "acknowledges that the economic benefit derived from the transaction(s) contemplated by this Agreement will result solely from the maturity of the life insurance policy(ies) upon the death of the insured(s), and will not be derived from the efforts of any person or entity employed by or associated with [Pacific West.)" (Brilliant Decl., Exh. 1 at 25, Exh. 3 at 60). The Purchase Agreement also states that "[t]he life expectancy of any particular insured and the annual rate of return on a life settlement contract are only estimates and cannot be guaranteed. The annualized rate of return would be higher if the actual life expectancy turns out to be less than the estimated life expectancy of the insured." (Id., Exh. 1 at 33 & Exh. 3 at 68).

While a defendant's touting of its expertise is a factor under Howey, it is not determinative of defendant's crucialness to the success or failure of the enterprise. For example, in Noa v. Key Futures, Inc., 638 F.2cl 77 (9th Cir. 1980), defendant Key Futures "offered silver bars for sale and, by high-pressure sales efforts, touted bar silver as a superior investment." Id. at 79. Key Futures's efforts included identification of the investment, location of prospective investors, storage of the silver bars at no charge for a year after purchase, and repurchase at the published spot price at any time without charging a brokerage fee. See id. After considering Key Futures's, "high-pressure sales efforts," the Ninth Circuit held that its efforts did "not in [its] opinion amount to the 'undeniably significant' efforts required by SEC v. Glenn Turner, [474 F.2d at 482,]"id. at 80, because "[t]here is a national market for silver which is not dependent upon Key Futures." Id. Rather, the only risk investors faced was that "defendants might become insolvent[,]" but that risk

was "that which any buyer takes when he pays in advance for goods to be delivered in the future." Id.

Also, in Belmont Reid, defendants offered prospective investors an arrangement in which they could prepay gold coins minted by defendants at a price about 33% to 48% below the prevailing world market price of gold. See 794 F.2d at 1389. The arrangement additionally provided further guarantees against the default of defendants or decline in the world price of gold. See id. Although the Ninth Circuit noted that the facts in Belmont Reid made it "a close one[,]" it held that defendants' efforts did not constitute the "undeniably significant" efforts required by Glenn Turner. See id. at 1391. More specifically, the Ninth Circuit held that the prepayment plan was "primar[ily]" a "speculati[on] in the gold market." Id. "To the extent the purchasers relied on the managerial skill of [defendants] they did so as an ordinary buyer, having advanced the purchase price, relies on an ordinary seller." Id. As such, "profits to the coin buyer depended upon the fluctuations of the gold market, not the managerial efforts of [defendants)." Id. (internal quotation marks omitted).

As in Noa and Belmont Reid, the court cannot determine – at least at this preliminary stage – whether Pacific West investors' profits substantially were contingent upon the efforts of Pacific West, or rather, the extrinsic factor of the underlying insureds' death. That is not to say, however, that defendants' conduct does not give the court pause. As in Belmont Reid, this case could be a close one at the summary judgment stage. See 794 F.2d at 1391. The three-tiered reserve system for Pacific West's investors (at a 46% margin), coupled with Pacific West's other activities

may constitute the "undeniably significant" efforts required by Glenn Turner.

Finally, the court notes that there is a circuit split as to whether life settlements constitute investment contracts under the federal securities laws. The SEC relies on SEC v. Mutual Benefits Corp., 408 F.3d 737 (11th Cir. 2005), cert. dismissed, 551 U.S. 1180 (2007), for the proposition that "investment schemes may often involve a combination of both pre- and post-purchase managerial activities, both of which should be taken into consideration in determining whether Howey's test is satisfied." (Reply at 7) (citing Mutual Benefits, 408 F.3d at 744). But in reaching that conclusion, the Eleventh Circuit focused on the complexity of the life settlement arrangements offered by defendants MBC in Mutual Benefits, and compared that apparent complexity with the simplicity of the arrangement in Noa, which depended on market fluctuations of the price of silver. See Mutual Benefits, 408 F.3d at 744 n. 5. Based upon this comparison, the Mutual Benefits court concluded that given the complexity of MBC's life settlement arrangements, the investors in Mutual Benefits relied on MBC's pre-purchase efforts while, for investors in Noa, "public information is available to investors by which they can independently evaluate the possible success of the investment." Id. But the Noa court did not consider the "complexity" or "simplicity" of the underlying arrangement in reaching its op1inion. See, generally, Noa, 638 F.2d 77. Rather, the Noa court considered whether defendants' efforts were "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." kt. at 79 (citing Glenn W. Turner Enter., 474 F.2d at 482).

In turn, defendants rely on SEC v. Life Partners, Inc., 87 F.3d 536, rehearing denied, 102 F.3d 587 (D.C. Cir. 1996), for the proposition that "while post-purchase managerial efforts almost always trigger the application of the securities laws, pre-purchase efforts rarely do." (Opp'n at 7), (citing Life Partners, 87 F.3d at 548). But in reaching that decision, the D.C. Circuit, which also relied on Noa, see Life Partners, 87 F.3d at 546-547, many have created a "pre- and post-purchase" delineation that was not a substantial factor in the Ninth Circuit's Noa decision, which focused on whether the success or failure of the investment was predicated on the essential managerial efforts of defendants, or rather, on market fluctuations :in the underlying silver. See Noa, 638 F.2d at 79.

Ultimately, the court does not believe that the Eleventh or D.C. Circuit opinions in Mutual Benefits and Life Partners answer the question whether the Pacific West life settlement arrangement is a security under the federal securities laws. Each opinion tacitly adds additional factors to the Howey test that may not exist. The U.S. Supreme Court in Howey did not consider the complexity of the underlying transaction. See Howey, 328 U.S. at298-99, 66 S.Ct. at 1102-03. Nor did the Howey Court distinguish between pre- and post- purchase efforts. See Howey. 328 U.S. at 298-99, 66 S.Ct. at 1102-03.

The Ninth Circuit's decisions in Noa, Belmont Reid, and Glenn Turner govern this court's decision. At this early stage, the record is insufficient for the court to conclude that Pacific West investors' profits substantially relied upon the "undeniably significant" efforts of Pacific West. See Glenn Turner, 474 F.2d at 482; Noa, 638 F.2d at 79 & 80; Belmont Reid, 794 F.2d

at 1391. Thus, the court finds that the SEC has not established the threshold issue of whether Pacific West's life settlement arrangement constitutes a security under the federal securities laws. As a result, the SEC has not demonstrated likelihood of success on the meri1ts on any of its claims.

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT the hearing set for June 18, 2015, is hereby **vacated** and the SEC's Motion for Preliminary Injunction (**Document No. 6**) is **denied**.

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Initials of Preparer vdr

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Section 2(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77b(a)(1), provides:

(a) *Definitions*

When used in this subchapter, unless the context otherwise requires—

> (1) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, provides in relevant part:

(b) *Sale or delivery after sale of unregistered securities*

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * *

(c) *Necessity of filing registration statement*

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10), provides:

(a) *Definitions*

When used in this chapter, unless the context otherwise requires—

> (10) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Section 15(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(a)(1), provides:

> (b) *Registration of all persons utilizing exchange facilities to effect transactions; exemptions*
>
> (1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

APPENDIX G

Excerpt of Life Settlement Purchase Agreement (2014) (C.A. E.R. 10-ER-2505–07)

PACIFIC WEST CAPITAL GROUP, INC.
LIFE SETTLEMENT PURCHASE AGREEMENT
No modifications to this Contract may be made without the written consent of the Parties

THIS LIFE SETTLEMENT PURCHASE AGREEMENT ("Agreement") is made this ____ day of _____ 2014, by and between **Pacific West Capital Group, Inc.** ("PWCG" or the "Seller"), and **The Bainbridge Family Trust dated Jan 04, 2007** "Purchaser"). This Agreement covers the purchase of one or more interests in the death benefits (the of a life insurance policy insuring the life of an individual who is at least seventy-five (75) years old, or life settlement interests ("Interests").

WHEREAS, the Purchaser has reviewed and approves and adopts the criteria utilized by the Seller to purchase said Interests; and

WHEREAS, the Purchaser acknowledges that the economic benefit derived from the transaction(s) contemplated by this Agreement will result solely from the maturity of the life insurance policy(ies) upon the death of the insured(s), and will not be derived from the efforts of any person or entity employed by or associated with the Seller, and the Purchaser expressly waives any and all claims to the contrary; and

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, each

party hereby represents that it or its representatives has/have the requisite authority to enter into this Agreement and hereby agree as follows:

1. THE PURCHASE

(a) The Purchaser hereby agrees to deposit the sum of **two-hundred thousand dollars** (**$ 200,000.00**) to acquire an Interest from the Seller.

Upon maturity, Purchaser will receive payment of **150** % total fixed return.

(b) The Purchaser's deposit will be made simultaneous with the delivery of this executed Agreement to Seller, by delivering a check, or effecting a wire transfer, made payable to Seller's Escrow Agent, Bank of Utah. The Purchaser's deposit does not constitute a purchase or a commitment to purchase until five (5) business days after the Purchaser has received all of the disclosures required by California law.

(c) Beginning on the date Seller receives both this executed agreement and the purchase deposit, the Seller will provide, when available, information regarding life insurance policies which meet the requirements of Seller and Purchaser on a Life Settlement Disclosure Form. If after reviewing this information the Purchaser wishes to purchase the described Interests the Purchaser will sign and return the Life Settlement Disclosure Form.

(d) Upon Seller's receipt of the executed Life Settlement Disclosure Form, but in no event sooner than five (5) days after Purchaser's receipt of the Life Settlement Disclosure Form, the Seller will obtain confirmation of the recording of a change of ownership

of such Policy to PWCG Trust and a confirmation of irrevocable beneficiary. In the case of a Group Policy, the Seller will obtain a confirmation of the recording of an absolute assignment of such Group Policy to the PWCG Trust and a confirmation of the recording of a change of beneficiary under such Policy naming as beneficiary the PWCG Trust. To the extent that the Seller does not at the date of this Agreement have available such policies, the Seller shall use its reasonable efforts to obtain a suitable policy(ies) as soon as practicable after the date of this Agreement.

(e) Upon the maturity of the life insurance policy(ies) in which Purchaser has purchased a life settlement interest, the Seller's Post Closing Services Company shall file a claim for the death benefits with the appropriate insurance company. When the PWCG Trust receives payment of such claim, the Purchaser will be paid its pro rata share of the death benefits.

(f) The owner of the life insurance policy in which you will obtain an interest will be a trust. The current trust is PWCG Trust. The current Trustee of the PWCG Trust is Mills Potoczak & Co. The Trustee's sole responsibilities are to maintain accounts for the purpose of making the premium payments as more fully described in Section 2(b) of this Purchase Agreement; to be the beneficiary for the death benefits of the life insurance policy in which you obtain an Interest and to disburse the death benefits in accordance with the assignments of benefits relating to that policy. PWCG has contracted with Mill Potoczak & Co. to perform certain post-closing services as the Trustee, as more fully set forth in Paragraph 3(n) herein.

(g) The Seller's Escrow Agent is Bank of Utah, 200 E South Temple, Suite 210, Salt Lake City, UT 84111.

(h) The responsibilities of the Escrow Agent are:

1. To hold the funds forwarded by the Purchaser pursuant to this Agreement.

2. To make disbursements at the direction of the Trustee.

(i) The Escrow Agent is not representing the Purchaser in this transaction and has no responsibility to the Purchaser with regard to this transaction other than to hold the funds in escrow in accordance with Section 1h.

(j) Purchaser recognizes that the Trustee and Escrow Agent shall not incur any liability to the Seller or to Purchaser for any damages, losses or expenses which either party may sustain or incur, unless the same is a direct result of the gross negligence or intentional misconduct of Trustee or Escrow Agent. Trustee and Escrow Agent shall be protected in any action taken or omitted in good faith with respect to their duties and responsibilities. Trustee and Escrow Agent shall be entitled to rely on any document(s) which Trustee and Escrow Agent reasonably believe satisfy the terms and conditions of the escrow. The Seller and Purchaser each hereby agree to indemnify and hold harmless Trustee and Escrow Agent from and against all losses, except those caused by gross negligence or intentional misconduct, claims, damages, liabilities and expenses which it may sustain or incur hereunder, including, without

limitation, reasonable attorney's fees, which may be imposed upon Trustee or Escrow Agent or incurred by Trustee and Escrow Agent in connection with the performance of their duties.

(k) Seller may from time to time make available for purchase an Interest in a "second to die" life insurance policy. These policies typically insure the life of a husband and wife, and do not mature until both insureds have died.

2. THE SELLER'S OBLIGATIONS TO THE PURCHASER

(a) The Seller represents and warrants to the Purchaser that:

(1) The Insured's attending physician shall confirm in writing that the Insured is of sound mind and under no constraint or undue influence for the life insurance policies in which an Interest is being purchased.

(2) The life insurance policies in which an Interest is being purchased must be in effect and beyond their respective contestability and suicide periods.

(3) The insurance company that issued the policies must have, at the time Seller is provided the Life Settlement Disclosure Form, a rating of "A" or better as determined by Standard & Poors.

(b) Seller has established a five (5) level plan in order to provide that premium payments are made until the date of maturity of the policy. The first level involves the placement of funds for each policy's premiums in a premium escrow account sufficient to pay premiums for a period of time as disclosed in the

Life Settlement Policy Disclosure Form. Second, some policies have a disability waiver rider that pays premiums in the event the insured becomes disabled. Third, an initial general premium reserve is established to pay premiums on policies not fully paid by levels one and two. The money for the additional premium reserve comes from the distribution of 1% of all purchase money received by the Escrow Agent. Fourth, an additional general premium reserve is established to pay premiums on policies not fully paid at levels one, two and three. The money for this premium reserve comes from unused premiums of matured policies and interest earned on the active premium escrow account. In the event all of the premium escrow accounts are depleted, in order to safeguard the policy against a lapse in coverage, it will become the responsibility of the Purchaser to make pro rata premium payments based on the actual cost of insurance at the time premiums become due, on any policy in which they have an Interest. In that event the Trustee shall notify the Purchaser no less than 90 days before any premium payment becomes due.

(c) The Seller shall obtain a written release signed by all the present owners and beneficiaries under the Policy(ies), waiving any and all present and/or future rights to ownership and beneficial interests under the Policy(ies) and provide this information to the Trustee;