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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

PACIFIC WEST CAPITAL GROUP, INC.; ANDREW B CALHOUN IV; PWCG TRUST; BRENDA CHRSTINE BARRY; BAK WEST, INC.; ANDREW B CALHOUN JR.; ERIC CHRISTOPHER CANNON; CENTURY POINT, LLC; MICHAEL WAYNE DOTTA; and CALEB AUSTIN MOODY (dba SKY STONE),

Defendants.

Case No. 2:15-cv-02563 (FMO) (FFMx)

PARTIES' JOINT SUBMISSION FOR THEIR CROSS-MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

Date: April 21, 2016
Time: 10:00 a.m.
Ctrm: 22
Judge: Hon. Fernando M. Olguin

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I. INTRODUCTORY STATEMENTS

A. The SEC's Introduction

The Securities and Exchange Commission ("SEC") moves for partial summary judgment and summary judgment against Defendants Pacific West Capital Group, Inc. ("PWCG"); PWCG's owner and principal Andrew B Calhoun IV ("Calhoun"); the PWCG Trust ("Trust"); and sales agents Brenda Barry, Andrew Calhoun Jr., Eric Cannon, Caleb Moody, and Michael Dotta (the "Sales Agents"). The SEC now seeks judgment on the following issues and claims:

- The "life settlement" investments offered and sold by Defendants are "securities" under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act");
- All Defendants violated Sections 5(a) and (c) of the Securities Act by offering and selling these securities without registration;
- PWCG, Calhoun and the Sales Agents violated Section 15(a) of the Exchange Act by acting as unregistered brokers or dealers; and
- PWCG and Calhoun violated Sections 17(a)(2) and (3) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act by recklessly or negligently making admittedly false statements.

In June 2015, after this case was filed and the SEC moved for a preliminary injunction, the Court addressed the "threshold" issue of whether the life settlements are securities. *See* Dkt. No. 51 ("PI Ruling"). Of the four factors used to make that determination, only the fourth was in dispute—whether investor returns were "produced by the efforts of others." The Court concluded that the record "at least" at that "preliminary stage" was "insufficient" to determine if the investors' profits depended on "the 'undeniably significant' efforts" of others. The Court went on to note that "this case could be a close one at the summary judgment stage."

Since that ruling, the parties have engaged in nine months of extensive discovery, taking 20 depositions and exchanging more than 15,000 documents. It is

now no longer a close call. Substantial, irrefutable evidence confirms that the investors' profits depend entirely on the managerial efforts of PWCG, Calhoun and the Trust. "Life settlements" are fractionalized interests in life insurance policies that provide a return only if the underlying policies remain in force when the insured dies. Thus, the size of the returns depends on the costs to keep the policies in force, and if a policy lapses for any reason, there will be no return at all. The undisputed record shows that PWCG investors depended on Defendants to select policies based on Defendants' life expectancy estimates, to set up their "proprietary" three-tiered cash reserve system to keep the policies in force during the lifetime of the insureds, and to manage the payment of the premiums to make sure the policies do not lapse. If any of these tasks were not done properly, then the investors may not get any return at all, let alone the returns promised them by Defendants.

But the reserve system has now fallen apart. Since the preliminary injunction ruling, the cash reserves, which the Defendants had set up and claimed for years had not been touched, became depleted. So PWCG began to institute premium calls, thus far requiring over 150 investors to pay their *pro rata* share of the premiums. These premiums are several times higher than the premium levels Defendants had originally disclosed and so, not surprisingly, as of December 2015, nearly one-third of the investors had not complied with the premium calls. If PWCG cannot locate new investors to take over the interests of those who do not pay, then the policies will lapse and none of the investors—even those who paid premiums—will get a return.

These recent events show more than anything what the Defendants cannot now deny—that the investors' profits depend substantially on the Defendants' efforts. The life settlements, therefore, are securities. As a result, establishing the Defendants' registration violations under Sections 5 and 15(a)—for failing to register the offer and sale of these securities and for failing to register as broker-dealers—easily follows.

Moreover, while the fraud committed by PWCG and Calhoun was substantial and widespread, for summary judgment purposes, the SEC moves only on the aspect

of that fraud that is now beyond dispute. In particular, investors were told that all policies had matured timely within the "primary reserve periods" and that PWCG's secondary reserve had never been touched, even after these statements were no longer true. During discovery, Calhoun admitted it "would have been false" and not appropriate to continue to tell investors this. PWCG and Calhoun were thus reckless, or at least negligent, to allow these admittedly false statements to be made, and Calhoun is liable for PWCG's actions as a control person under Exchange Act 20(a).

B. The Defendants' Introduction

The Court should enter summary judgment against all of the SEC's claims because the fractionalized life settlement products sold by Pacific West Capital Group Inc. ("Pacific West") are not securities under federal law.[1] Acknowledging that life settlement products are not included in the definition of "security" under the 1933 and 1934 Acts, the SEC argues that life settlement products are "investment contracts" under 15 U.S.C. §§ 77b(a)(1) and 78c(a)(10). That argument fails as a matter of law because the SEC cannot satisfy the fourth prong of the test for determining whether Pacific West's purchase agreement qualifies as an investment contract: (1) a contract "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." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946); *accord Noa v. Key Futures, Inc.*, 638 F.2d 77, 79 (9th Cir. 1980) (per curiam). Defendants are entitled to judgment as a matter of law.[2]

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[1] A finding that Pacific West's products are not securities would dispose of this entire case. The SEC's claims alleging sale of an unregistered security fail because there is no security to sell. The SEC's fraud claims fail—without any analysis of their merit (or lack thereof)—because the statutes underlying those claims apply only to securities transactions; they "were not intended to provide a federal remedy for all fraud or misconduct arising out of commercial transactions." *Youmans v. Simon*, 791 F.2d 341, 346 (5th Cir. 1986) (citing *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982)).

[2] Defendants have consolidated their summary judgment briefing, in order to avoid repetition, into a joint brief. Although each of the four separately-represented groups of Defendants would be entitled to 25 pages, the consolidated brief has 32 pages. Dkt. No. 69: Order Re: Summary Judgment ¶ 6 ("Each separately-represented party

In addition to Defendants' cross-motion for summary judgment, Defendants respond to the SEC's motion for partial summary judgment as follows. Because the life settlement products are not securities, the SEC's motion for summary judgment on must be denied (and all of the claims dismissed). Even if the Court should find that the life settlement products are securities, the SEC has not shown that it is entitled to summary judgment on Defendants' affirmative defenses of exemption from registration and there is—at a bare minimum—a genuine dispute of material fact as to whether Pacific West and Mr. Calhoun negligently or recklessly made false statements in the offer of the life settlement products.

The SEC makes much of having conducted "extensive discovery" since the Court's ruling on the SEC's unsuccessful request for a preliminary injunction. The parties did indeed conduct 20 depositions: the SEC subjected Mr. Calhoun, Mr. Potoczak, and the sales agents to repetitive depositions on the same topics to which they had already testified under oath, then required numerous Pacific West purchasers to testify at lengthy depositions. As anticipated by Defendants in their *Ex Parte* Application (Dkt. No. 79), this "extensive" discovery has done nothing but retrace the SEC's steps over ground already covered in its investigation prior to the Court's denial of the SEC's motion for preliminary injunction. The SEC's continued battle of

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shall be limited to twenty-five (25) pages").

The SEC has not responded to Defendants' motion for summary judgment, and it should consequently be treated as unopposed pursuant to Local Rule 7-12. The Court's Order requires and makes clear that the "single, *fully integrated joint* brief covering all parties' summary judgment motions" (emphasis in original) shall set forth each issue raised by a party "immediately followed by the opposing party's/parties' response." (Dkt. No. 69 ¶ 3.) The SEC has failed to provide any response to the issues raised by Defendants. Instead, counsel for the SEC has represented to Defendants' counsel that the SEC intends to respond to Defendants' motion only in the Supplemental Memorandum permitted by the Court's Summary Judgment Order at ¶ 11. This circumvention of the Court's Summary Judgment Order would deprive Defendants of their opportunity to rebut any responsive arguments raised by the SEC in their supplemental memoranda. The SEC's failure to respond to Defendants' issues waives its right to file a response, and the Court should strike any supplemental memorandum filed by the SEC. Therefore Defendants' motion should be considered unopposed.

attrition against Pacific West has gained it no new theory of jurisdiction; it has only succeeded in further draining Pacific West's resources.

Nothing about the premium call process that has taken place since this case was filed changes the nature of the life settlement products; they are, as they were before, not investment contracts. Instead, the undisputed evidence confirms that the SEC cannot satisfy the *Howey* test under Ninth Circuit law because the success of Pacific West's life settlement products depends on the uncertain longevity of the insured, not profit-producing work to be performed by Pacific West or others. Pacific West's selection and pricing of policies and reserves are purchased as part of the product; such *ex ante* costs cannot produce profits. Premium payments, through reserves or premium calls, are made routinely and are determined by the terms of the insurance policy, not by any efforts by Defendants. Finally, the PWCG Trust's ministerial services cannot satisfy the "efforts of others" requirement, since their incidental effect on profits does not rise to the level of "essential managerial efforts [that] determine the failure or success of the investment." *SEC v. Glenn W. Turner Enter.*, 474 F.2d 476, 482 (9th Cir. 1973). The Court should grant Defendants' motion for summary judgment and deny the SEC's motion for summary judgment.

Furthermore, the SEC is not entitled to judgment as a matter of law on its Section 17(a) and 10(b) claims. There is—at the very least—a genuine dispute of material fact regarding whether Pacific West and Mr. Calhoun acted negligently or recklessly in any material representation (which they did not do); consequently, even if the products were securities (which they are not), the SEC's motion must be denied. The SEC's theory of scienter reveals the hubris with which it has approached every aspect of this case—the SEC may believe it is entitled to run Pacific West's business into the ground without jurisdiction and on no evidence of scienter, but the law and the facts show otherwise.

II. POINTS OF CONTENTION

A. Issue: Are The Life Settlements Securities?

1. The SEC's Position

As this Court recognized in its prior ruling on the SEC's motion for a preliminary injunction, whether or not the Defendants' life settlements are securities under the federal securities laws requires examining whether they are "investment contracts" as defined under the Securities and Exchange Acts. *See* PI Ruling at 6. The life settlements are "investment contracts," and thus securities, if they meet the "four-pronged test" established by the Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. at 299—that is, a transaction is an "investment contract" when an investors make "(1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits[,] [(4)] produced by the efforts of others," rather than by the efforts of the investors themselves. *Hocking v. Dubois*, 885 F.2d 1449, 1455 (9th Cir. 1989) (*en banc*) (citing *Howey*, 328 U.S. at 299); PI Ruling at 7-8.

The first three elements of this test are satisfied because the Defendants do no contest that "PWCG's investors are investing in a common enterprise with the expectation of profits." PI Ruling at 8. The only question here is whether the fourth element is met. *See id*. As this Court explained, for this element, "the Ninth Circuit has repeatedly required that a promoter's or third party's managerial or entrepreneurial efforts [] be 'undeniably significant ones' where the success of the investment program as a whole' is 'crucial to' and 'hinges on' the efforts of the defendants" or other third parties. *Id*. In deciding the SEC's preliminary injunction motion at the beginning of the case, the Court concluded that "[a]t this early stage, the record is insufficient for the court to conclude that PWCG investors' profits substantially relied upon the 'undeniably significant' efforts of PWCG" (or, presumably, other third parties). *Id*. at 11. Noting that the Defendants' conduct gave the Court "pause," the Court further explained that "this case could be a close one at the summary judgment stage." *Id*. at 10.

a. The "undeniably significant" efforts of Defendants

The SEC submits that it is no longer a close call. Through nine months of discovery, the SEC has amassed substantial evidence that adds to and confirms the record established with its preliminary injunction motion showing that the "success of the investment program as a whole" undeniably hinges on the efforts of Calhoun, PWCG and the Trust.

i. The Defendants' selection and funding of policies

The key promise that PWCG made to investors was that they would receive "fixed returns" of 100%, 125% or 175%, depending on the specific policy.[3] In order to make good on that promise, PWCG had to ensure that investors would not have to put in any additional funds to keep the policies in force, and indeed investors were expressly told that the risk that they would have to pay additional premiums was "negligible."[4] To investors the investment would be a "success" only if they did not have to put in any additional funds. And the only way that PWCG could achieve that success on behalf of investors was to reasonably estimate the life expectancies of the insureds, to set primary reserves periods of sufficient length and with sufficient funds to cover premiums during the primary reserve period, and to ensure that the secondary and tertiary reserves were sufficient to cover what should have been the outlier policies—those where the insureds lived beyond the life expectancy.[5] But if the insureds selected by the Defendants live too long, or if the reserve amounts set and maintained by the Defendants are not sufficient, or if the Defendants did not properly oversee the payments of premiums, then *either* the investors would have to take on the burden of paying the premiums (which would result in ever-decreasing returns) *or* the policies would lapse (which would result in no returns at all). In other

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[3] SS 211. JA Tab 19 ("T19"), p.441: T114, p.1465; T4, p.93. *See also* SS 1-17; 2-30.
[4] SS 198-200. JA T9, p.204, 216, 203, 213; T3, p.71-72; T4, p.96; T102, ¶4; T127, ¶ 3:21-23; T128, p.1610; T41, p. 697; T47, p.770; T144, ¶ 3.
[5] SS 197. JA T101, p.1255-59, ¶10-18.

words, the Defendants' active management of the entire investment determines whether the PWCG investors will or will not earn returns on their investment.

The Defendants' selection of policies. The significant managerial efforts required by PWCG begin with Calhoun's selection and evaluation of the policies. SS 31-61. PWCG purports to select policies that Calhoun "expects to mature in four-to-seven years." JA Tab 7 ("T7"), p. 162-032 to 033. PWCG represents to investors that it applies "rigorous scrutiny using a predetermined set of criteria" and that it "select[s] the most desirable from approximately $250+ million worth of policies per month." JA T19, 443; T7, 162-016. PWCG also tells its investors that it purchases only those policies that "meet [its] high standard for investment." *Id*. PWCG negotiates the price, evaluates the terms and conditions, and purports to evaluate the insureds' health. JA T7, 162-027 to 029; Doc. 28-2 ¶ 7(SS 34, 35, 40, 53-55).

As the evidence developed during discovery shows, this is not just "touting."[6] The *actual* success or failure of the investment depends on PWCG's ability to use its management skills and expertise to select policies that Calhoun expects would mature in four-to-seven years. SS 189-97.[7] In the words of one investor, the Defendants' ability to pick these four-to-seven year maturities "was the whole criteria" and "was absolutely imperative." JA T2, 17.[8] Those selection efforts, therefore, are "undeniably significant ones" that are "crucial to the success of the investments." *E.g., Life Partners, Inc. v. Arnold*, 464 S.W.3d 660, 682 (Texas 2015) (applying

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[6] In its prior ruling, the Court stated that "[w]hile a defendant's touting of its expertise is a factor under *Howey*, it is not determinative of a defendant's crucialness to the success or failure of the enterprise." PI Ruling at 9. Here, PWCG's ability to obtain the returns it promised to investors depends on PWCG's ability to actually perform the services it touted. Therefore, these representations are properly considered. *See Hocking*, 885 F.2d at 1457 (en banc) (court must consider "promotional materials" in considering whether the investment is a security.)

[7] JA T101, p.1255-56, ¶¶ 10-18, 149-54; T2, p.17, 21; T10, p.252; T5, p.115; T9, p.191 (sales agent); T127, ¶3:16-21; T144, ¶ 4. *See also* SS 41; 45.

[8] *See also* JA T2, pp. 21-21A, 40, 45-46, 47; T7, p.162-20:22 to 162-21:8.

federal law; the selection and evaluation of policies is undeniably significant).

Pooling investors to buy the policies. Another key role Defendants play in the success of the investments is locating investors to buy fractionalized interests in the policies, with up to 70 investors investing in a single policy. In depositions, both Calhoun and the investors recognized the importance of these efforts; individual investors would not and could not buy a single policy on their own.[9] Rather, PWCG's efforts allow the investors to own fractionalized interests. PWCG determines the price at which to purchase the policy, and the price to which to offer the policy to the investor.[10] PWCG, the Trust and its Trustee take the necessary actions to effect the purchase transactions, and the Trustee uses its professional expertise to review the policies and closing documentation.[11] The Trust issues assignments of the fractionalized interests in the death benefits to investors, who are designated as beneficiaries of the trust.[12] Again, the investors' returns "hinge on" these "efforts of others," because without them, there would be no investment.

The funding of policies through the lifetime of the insured. The managerial efforts of PWCG and the Trust continue with the *funding* of the policies. Investors obtain a return only if the policies remain in force for the insureds' lifetime, and investors relied on PWCG to ensure that the premiums necessary to keep the policies in force were funded and paid.[13] And, the return is adversely impacted if an investor is required to make additional payments to keep a policy in force.[14]

PWCG represented to investors that the premiums would be paid through a

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[9] SS 62-64. JA T7, pp.162-110, 162-018 to 020; T2, p.24; T6, pp.144:25-145:3; T10, p.241; T14, p.359 .

[10] SS 54-55. Calhoun Decl., Doc. 28-2, ¶ 4-7; T14, p.377:3-7.

[11] SS 57-60. T17, pp.409-10 (1.1 & 4th "whereas"); T11, p.266-67; T7, p.162-064.

[12] SS 57, 18, 158. JA T19, pp.443- 444; *see also* D47.

[13] SS 198-212. JA T6, p.136-37, 143-44, 147-48, 152, 157; T4, p.96-103; T127, ¶ 3; T128, p.1610; T102, ¶4;T144, ¶ 3; T14, p. 69; T15, p. 43; T9, p.204, 216, 203, 213; T3, p.71-72; T41, p.697; T47, p.770.

[14] SS 212. JA T2, p.43; T6, p.149-149B; T101, p.1318, ¶¶135-38.

system of reserves that PWCG and Calhoun devised. Investors were led to believe that, because of this so-called "proprietary" system, they would not be responsible for paying any additional premiums.[15] Investors were also repeatedly told that the risk that they would have to make any additional premium payments was "negligible" and "was not likely to happen."[16] As investors confirmed in discovery, they were entirely dependent on PWCG and the Trustee to ensure that the premiums were paid and that the policies would remain in force.[17] As the SEC's expert confirms, keeping the policies in force without requiring additional premiums—as was promised to investors—would have required significant managerial efforts (efforts that PWCG ultimately failed to provide in accordance with its representations).[18]

Determining the length of and funding of the primary reserve period. For each policy, PWCG set a "primary reserve period" of between six to nine years, and purported to set aside sufficient funds to fund the policy premiums for that period.[19] Investors were led to believe that the length of the primary reserve period was based on—or was longer than—the life expectancy of the insured and they were entirely dependent on PWCG to make this determination.[20] PWCG also had to calculate the amount of premiums sufficient to keep the policies in effect during that time.[21] As discovery has confirmed, the investors were again entirely dependent on PWCG to perform this calculation.[22] PWCG had access to in-force premium illustrations, the policies' cash value, maximum annual cost of insurance, and the terms of the policies

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[15] SS 198-230. *See* Note 11 (citing evidence).
[16] SS 199. JA T42, p.710; T9, p.214-16; T47, p.770; T40, p.689-90; Note 11, *supra*.
[17] SS 56. *See* Note 11 (citing evidence).
[18] SS 197. JA T101, p.1255-56, ¶¶ 10-18, 149-54
[19] SS 65. JA T7, p.162-39 to 40.
[20] SS 66-67. JA T6, p.138-42, 153-54, 160-61; T10 p.237-38; T14, p.360-361. SS68. JA T7, p.162-52 to 54, 162-44; T9, p.193-94; T11, p.332-33; T2, p.34; T14, p.379:13-380:5; T120 ¶ 5; T144 ¶8; T131 ¶4..
[21] SS 72. JA T7, p.162-41 to 43; T9, p.193-94.
[22] SS 73. JA T7. p.162-53 to 54.

themselves. Investors were provided with none of this.[23]

And the calculation was no mere ministerial task. Indeed, for a substantial number of policies, PWCG's calculation was wrong, and the amounts set aside were not sufficient to fund the premiums through the end of the primary reserve period.[24] In at least some those instances—years after the investors' initial purchase—PWCG used funds raised from new investors to pay premiums on old policies for which the primary reserves were not sufficient.[25] PWCG's managerial decision to cover the shortfall in premiums directly affected the returns of the early investors, because the investors would have otherwise have had to pay the shortfall themselves in order to avoid forfeiting their investments.[26]

The Defendants' funding and management of the contingent reserves. PWCG also had to manage the contingent reserves. Investors were told that if policies did not mature during the primary reserve period, premiums would be paid with the secondary and tertiary reserves, and that reserves were "expected" to cover policies through maturity.[27] Investors again were entirely dependent on PWCG to manage these reserves to ensure they were sufficient to cover premiums.[28] Investors often asked, but PWCG would not disclose, the balances in the contingent reserve accounts, other than to falsely assure investors that there were "millions of dollars" in them.[29] Nor were investors provided with any information regarding competing demands on the contingent reserves, such as how many other policies were near to the end of the primary reserve period and what the annual cost of insurance would be

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[23] SS 61. JA T8, p.168A-168B; Calhoun Decl., Doc. 28-2, ¶ 7. *See also* SS 65-89.
[24] SS 77. JA T7, p.162-55.
[25] SS 78. JA T7, p.162-55; T148, ¶16; T84-97, p.588-1228.
[26] SS 79-80. JA T7, p.162-56 to 57.
[27] SS 205; 198-210. *See* Note 11 (citing evidence).
[28] SS 198-210. *See* Note 11 (citing evidence).
[29] SS 82. JA T72, p.912 (3rd email); T68, p.899-901; T76, p.932 (2nd paragraph).

on those policies.[30] Thus, as discovery has confirmed, the investors had to rely on PWCG to ensure the adequacy of the funding of the contingent reserves.

The secondary reserves consisted of 1% of all investor funds, pooled so that it could be used (theoretically) for all investors.[31] PWCG touted the existence of these secondary reserves in its marketing materials and pitches.[32] Its sales agents called it core sales point, one of the key features that distinguished PWCG's program from other sellers of life settlement investments.[33] But, as discovery in this case has shown, because of PWCG's management of these reserves—and in particular PWCG's allocation decisions—only early investors will get the benefit of the secondary reserves.[34] In fact, PWCG began to tap the secondary reserves in December 2014, and they were completely depleted by August 2015.[35] Although all of the investors contributed to these reserves, the only investors who got any benefit from them were investors who invested in 2005-08 (and investors in one small policy in 2009).[36]

For investors after 2009 to get any benefit of all from the reserves, PWCG would have to raise additional funds from new investors to replenish the depleted reserves.[37] Thus, the very existence of these secondary reserves depends entirely on PWCG's ongoing efforts to sell and market new life settlement investments to new investors, years after the earlier investors' initial purchases. This, by itself, demonstrates that the investment program required significant entrepreneurial efforts of PWCG after the initial purchase of the policies.[38]

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[30] SS 93. *See* Note 11 (citing evidence); *see also* SS 91-112 (overview of payment of premiums).SEC Response to Fact D88.
[31] SS 83. JA T7, p.162-113.
[32] SS 86. JA T7, p.162-51 to 52.
[33] SS 86, 213. JA T7, p.162-51 to 52; T9, p.188.
[34] SS 214-216; 227. JA T9, p.189; T2, p.19; T154, p.155; T11, p.304:20-305:22; 276.
[35] SS106, 111. JA T11, p.325; 180; T7. p.162-87.
[36] SS 215. JA T154, p.1982; T155, p.1987.
[37] SS 216. JA T11, p.304:20-305:22; 276.
[38] *See also* SS 91-112 (overview of payment of premiums).

The Defendants' tracking and monitoring of the insureds and submitting of claims. There are numerous other tasks beyond those required for the funding of the premiums that must be performed by PWCG, the Trustee, or other third parties for the investors to receive any return.[39] The Trustee monitors the status of each insured to determine if they are alive or dead, because PWCG and the Trust generally are not notified when an insured dies.[40] The Trustee tracks the insureds by reviewing databases for death certificates, contacting the insureds and their relatives to assess whether the insured is still alive, and even hiring private investigators to track down the insured.[41] Individual investors do not know the identity of the insured and therefore cannot perform this function.[42] These functions directly affect the success of the investment, because (*i*) investors get no returns at all unless and until a claim is submitted, and (*ii*) any delay in discovering the insureds' deaths and submitting a claim has the effect of lowering the investors' annual returns.[43] In addition, the Trust provides professional accounting services and keeps the Trust's books and records, including the reserve accounts.[44] In discovery, the Trustee admitted that these are not ministerial tasks.[45]

ii. Management of the premium call process

If there is anything that shows just how much investors must rely on the managerial efforts of PWCG and the Trust, it is the efforts that must be undertaken to deal with the recent collapse of the reserve structure. Because of PWCG's management failures, the premium reserves (with minor exceptions) have not been sufficient to fund the policies through maturity. Thus, upon depletion of the

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[39] *See generally* SS 166-85; T17, p.409 ("whereas" clauses); T16.
[40] SS 166-76. JA T17, p.409 ("whereas" clauses & § 1.3(B)); T11, p.268-71, 311; T2, p.30-31; T10, p.249-50; T6, p.149-150; T14, p.378; T4, p.106; T7, p.162-65 to 67, 162-69, 162-22:12-16; T9, 223.
[41] SS 175. JA T7, p.162-67 to 69.
[42] SS 172. JA T11, p. 269-70; T2, p.30-31; T10, p.249-251.
[43] SS 176-78. JA T11, p.269:19-271:18; T7, p.162-65 to 67, 162-69, 162-22:12-16.
[44] SS 88. JA T11, p.280-83.
[45] SS 28. JA T11, p.323 (Potoczak considers services "professional services").

secondary and tertiary reserves in August 2015, the Trust began to institute premium calls, that is, invoicing individual investors for their *pro rata* share of the premiums.[46] These premium calls began *after* the Court's ruling on the preliminary injunction motion, and thus the evidence regarding these extensive management efforts is new.

PWCG's management of the premium call process has been and will continue to be critically important to ensuring that investors get any return at all on their investments (let alone some or all of the promised returns).[47] The management of this process requires "undeniably significant efforts" by PWCG and the Trust to ensure that the policies do not lapse. *Id.* Indeed, the magnitude of this managerial task demonstrates, by itself, that success of the investment scheme requires ongoing managerial efforts of PWCG and the Trust.

That is because each individual investor who is invoiced for premiums must depend on PWCG to collect the invoiced amounts *from all other investors in the policy*—up to 70 investors in a single policy.[48] Each investor is invoiced for his or her *pro rata* share of the premium, but the *entire* premium must be paid to keep the policy in force and for the individual investor to get any return.[49] An individual investor could pay his or her *pro rata* share, but still lose his or her investment if the *other* investors also fail to pay their share. But the individual investors do not even know the identity of the other investors—they are entirely dependent on PWCG and the Trust to perform this task.[50] To keep the policies in force, PWCG must either collect premiums from *all* investors in a single policy or find other investors to take over the shares of those who fail to make their premium calls.[51]

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[46] SS 113. JA Tab 7, p.162-87 to 96.
[47] *See generally* SS 113-65.
[48] SS 114. JA T10, p.242-43; T11, p.297:24-298:18; T9, p.223; T4, 108-09.
[49] SS 113-18. JA T11, p.292-93, 296:2-7, 297:24-298:18; T7, p.162-106:20 to 107:8.
[50] SS 131-33. JA T2, p.28:9-15; T5, p.120:16-21; T10, p.242-43; *see also* T4,106:5-9.
[51] SS 129. JA T11, p. 303-04.

As the Trustee expressly admitted, if this process is not managed properly, the policies could lapse and all of the investors in the policies could lose their entire investment:

> Q. Is the managing of this entire premium call process important to maintaining the policies in effect?
> A. Yes.
> Q. And if this whole process were not managed properly, would there be a risk to investors that they may not get a return on their investment?
> A. It's always a possibility.
> Q. And is PWCG's role in obtaining investors to take over the interest in defaulting investors, is that important to the success of other investors in the policy?
> A. Yes.
> Q. And is that because if the premiums aren't paid, the policy could lapse?
> A. Yes. (JA T11, p.297-98 (Potoczak Depo. at 96:24-97:7)).

This is not an easy managerial task, and the outcome is not certain. The challenges that PWCG faces are exacerbated by its earlier management failures (and outright fraud). Investors were told that they would not have to make additional premium payments and that the risk of premium calls was "negligible," but they are now being invoiced for premiums. Further, the invoiced amounts were substantially higher than the investor's *pro rata* share of the annual premiums that were disclosed to investors at the time of investment—up to ten times higher, in some cases.[52] As they have made clear in discovery, investors are thus justifiably angry about having to pay the invoiced amounts, which makes the management task faced by PWCG and the Trust even more difficult.[53]

Thus, there is a substantial chance that these collection efforts will fail. In fact, by December 2015—only five months after premium calls began—over 150 investors

[52] SS 198-212; *see* Note 11 (citing evidence). JA T102, ¶4, 6; T128, ¶5, 6; T131, ¶ 6; T136, ¶5; T139, ¶6; T144, ¶5, 6.SS 231-63; SS 251; T3, p.81-82.
[53] *See* Note 50 (citing evidence).

have received premium calls, and nearly a third of them did not comply with them.[54] PWCG does not have sufficient capital to cover the premiums for the purportedly defaulting investors, and the Trustee has testified that he is concerned there may not be investors available to take over those interests.[55] Thus, there is a very real risk that certain policies will lapse and all investors in those policies will lose their entire investments.[56] This underscores the importance of these efforts and makes clear that the investors' returns turn on the managerial efforts of PWCG and the Trust.

There are other aspects of the premium call process that make clear that "significant managerial efforts" are required. For example, disputes have arisen between PWCG and certain investors as to whether the failure to comply with a premium call should actually result in the forfeiture of the investment.[57] PWCG will have to resolve such disputes before those shares may be offered to other investors, or PWCG and the investors could be faced with competing claims that could ultimately interfere with distribution of the proceeds. Because of these and other factors, investors have confirmed that they understood that PWCG's management of the premium call process is critically important to the success of their investment.[58] *See, e.g.*, JA T2, p.28 (Bainbridge at 49:3-7: "Absolutely" "important that PWCG and/or the trust manage the premium call process properly").

The management of the premium call process has involved, among other things, fielding investor phone calls and questions, persuading individual investors to comply with the premium calls, locating alternative investors, and dealing with investor disputes.[59] Providing some of the necessary information has required the

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[54] SS 119-20. JA T11, p.298-299; T128, ¶6; T136, ¶5; T139, ¶6; T144, ¶5-6.
[55] SS 154, 124-25. JA T7, 162-10; T11, p.300.
[56] SS127. JA T11, p.303.
[57] SS 151, 155. JA T7, p.162-99 to 100; p.162-107 to 110.
[58] SS 131. JA T6, p.155:7-11; T4, 106:5-9; T14, p.370-72, 374; T5, p.119:18-120:21.
[59] SS 113-65, *e.g.*, SS 137, 160. JA T11, p.284-301, 303-04, 308-13; T3, p.81-83; T7, 162-50, 162-97, 162-99 to 104.

Trustee to seek outside expertise. For example, the Trustee has engaged a premium optimization company to prepare estimates, for each policy for which the primary reserve period has expired, of the amount of premiums that will be necessary to keep the policies in force through maturity.[60] These actions constitute ongoing "efforts of others" under the *Howey* test—they are undertaken by PWCG and Calhoun, *not* by the investors. *SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d at 480-83 (making clear that the efforts of others prong compares the efforts required by the investor, to the efforts required by the promoter and others).

The efforts that PWCG and the Trust must undertake in managing the premium call process are thus "undeniably significant efforts" that the investors depend on in order for them to get any return. But the fact that PWCG has instituted premium calls at all is important for another reason—it underscores the importance of the earlier management efforts, efforts that have failed. The very fact that investors are having to pay additional premiums (after being promised that the risk of premium calls was "negligible") is all due to the fact that PWCG has failed to pick the right policies and set the right reserve amounts. Had PWCG managed this process properly in the first place, then the primary reserves would have been sufficient to fund most policies, and the secondary and tertiary reserves would have been sufficient to cover the remainder. Investors depended on PWCG to perform these functions.

b. Disclaimers in the contract are not relevant.

In the preliminary injunction ruling, the Court noted that "PWCG expressly disclaimed that its investors' profits derived from its efforts or expertise" in the Purchase Agreement. PI Ruling at 9. But discovery has made clear that investors did in fact rely on the managerial efforts of PWCG, and that the contractual language quoted in the opinion does not reflect either the investors' understanding of the PWCG's role *or* the economic realities of the transactions. Investors testified that the

[60] SS 254. JA T11, p.289-92 & p.288 (for context).

"economic benefit derived from the transaction resulted at least in part from: (*i*) PWCG's selection of policies," (*ii*) PWCG's and the Trustee's "management of the premium reserves," and (*iii*) the duties of the Trustee "in monitoring the deaths and submitting claims."[61] Investors further testified that if they had the opportunity, they would modify the whereas clause at issue to reflect the economic reality of the transaction.[62] Further, other portions of the agreement make clear that the success of the investment depends on the establishment and maintenance of the reserves, the trustee's payment of premiums, and on the "post-closing servicing activities" of the Trustee. JA T34, p.640, 643 (Ex. 181 at p.3, § 2(b); p.6, § 3(f) ("The Trustee is responsible for making premium payments . . . .") & § 3(n) ("There are certain post-closing services that must be undertaken . . . includ [ing] but not limited to maintaining contact with the insured, tracking the health status of the insured, . . . and filing claims for benefits and death certificates with the insurance companies."). All of these efforts constitute "efforts of others" beyond the investor under *Howey* test.

Indeed, Ninth Circuit authority is clear that the language in an agreement does not control in determining whether the investment is a security; rather, the economic realities of the transaction must be considered. *See Hocking*, 885 F.2d at 1457 (*en banc*). As the Circuit held in *Hocking*, when evaluating representations of the promoter, courts must consider, among other things, "promotional materials, merchandising approaches [and] oral assurances," in addition to contractual language. *Id.* The key issue is whether the investor has the ability to manage and control the investment, or whether the investor must depend on the managerial efforts of the promoter and other third parties. *Id*. at 1460. The Defendants simply cannot use these contract provisions to magically wipe away the truth about their significant role

[61] SS 261. JA T2, p.47, 40; T4, p.107; T10, p.249-51, 239-40; T5, p.49-50; T6, 147-52; T102 ¶ 5; T120, ¶5; T144, ¶ 8; T131, ¶ 4; T139, ¶ 5; T127, ¶ 6.
[62] SS 262. JA T2, 47-48; T10, 244-45.

in the success of their investors' life settlements.

c. The "efforts of others" prong is met under the law

The Court in its earlier ruling pointed to the Ninth Circuit's rulings in *Noa v. Key Futures, Inc.*, 638 F.2d 77 (9th Cir. 1980) and *SEC v. Belmont Reid & Co.*, 794 F.2d 1388 (9th Cir. 1986) to conclude that, "at least at this preliminary stage," it could not determine "whether PWCG investors' profits substantially were contingent upon the efforts of PWCG, or rather, the extrinsic factor of the underlying insureds' death." PI Ruling at 9-10. Now, with discovery complete, it is clear that the life settlements in this case are not like the silver or gold investments in *Noa* or *Belmont Reid.*

In *Noa*, each individual investor purchased individual silver bars, after which the enterprise had no further obligation except to repurchase the item at market value. *See* 638 F.2d at 79-80. There were no continuing efforts required to maintain the value of the commodity, and the profits to the investor depended *entirely* on the fluctuations of the silver market, not on any managerial efforts of the promoter. *See id*. at 79. As Court in *Mutual Benefits* observed, "when profits depend upon market forces, public information is available to investors by which they can independently evaluate the possible success of the investment." *SEC v. Mutual Benefits*, 408 F.3d 737, 744 & n.5 (11th Cir. 2005). Here, by contrast, investors were entirely dependent on the efforts of PWCG, and did not have access to most basic information about the investment. And unlike the world-wide market for silver, there is no resale market for these life settlement investments. The purchase of the life-settlements here—with the risk of an unknown amount of future capital calls and no resale market—could not be more different from the purchase of a commodity traded on the open market.

Belmont Reid similarly concerned investors' "speculat[ion] in the world gold market." 794 F.2d at 1391. The investors in that case entered into an agreement for the purchase of gold to be delivered at a future time. *See id*. Focusing on the particulars of the sales contract—and not on the economic realities of the investment scheme—the Circuit concluded that the contract at issue was indistinguishable from

any other sale-of-goods contract. *See id*. Indeed, the Ninth Circuit later limited its holding in *Belmont Reid* to its very particular facts, noting in a subsequent case involving contracts for gold that "our decision in *Belmont Reid* was based on the unique fact that those contracts were made during a period when the value of gold was appreciating rapidly and that investors 'had as their primary purpose to profit from the anticipated increase in the world price of gold.'" *SEC v. R.G. Reynolds Enterprises, Inc.*, 952 F.2d 1125, 1135 (9th Cir. 1991). There is no similar world-wide market for fractionalized interests in life settlements, let alone rapid appreciation in such a market.

Rather than *Noa* or *Belmont Reid*, the complete record now shows that the life settlements in this case are much more like the investments in the Ninth Circuit's decision in *SEC v. Eurobonds Exchange, Ltd*., 13 F.3d 1334 (9th Cir. 1993). There, promoters had offered investors interests in foreign treasury bonds that were purchased in part with the proceeds from low interest loans. *See id*. at 1337. The Ninth Circuit held that the "efforts of others" prong in *Howey* was met because the promoter had control over four aspects of this investment arrangement, all of which concerned the *acquisition and funding* of the assets that served as the investment vehicle (*i.e.*, the foreign treasury bonds):

> (1) when to purchase the government-issued treasury bonds, and in what denominations and yields; (2) from what funding bank to obtain the loan, as well as when to obtain it, and what currency and what interest rate to use; (3) what government-issued treasury bonds to purchase with the loan proceeds, as when as when to purchase them and in what denominations and yields; and (4) when to effect the various currency exchanges necessary for the above transactions.

Id. at 1341. These four factors are all analogous to PWCG's evaluation and selection of the life settlement policies to be offered to investors and the initial funding of the reserves. PWCG and Calhoun determined what policies to buy and when (just as the *Eurobonds* defendants did in deciding when to purchase the bonds, and in what denominations). Also, like the *Eurobonds* defendants' decisions as to which banks to use to fund the bonds and when to affect the currency exchanges—all of which

impacts how the investment vehicle will be funded—PWCG and Calhoun set up the reserves, determine the primary reserve periods and amounts, and evaluate the sufficiency of the secondary reserves. In fact, PWCG's managerial efforts went far beyond those in in *Eurobonds* because significant efforts have been and will continue to be required to keep the policies in force for the lifetime of the insureds.

Eurobonds thus provides strong support for the conclusion that the life settlement investments were securities. Indeed, in *SEC v. Mutual Benefits Corp.*, the Eleventh Circuit relied on and followed the Ninth Circuit's holding in *Eurobonds* to conclude that the viatical settlements in that case were securities. 408 F.3d at 744. Many other courts have reached the same conclusion. *See Arnold*, 464 S.W.3d at 682 (decided after preliminary injunction ruling in this case; concluding that life settlements are securities after thorough analysis of federal law); *SEC v. Life Partners Holdings, Inc.*, 41 F. Supp. 3d 550, 555-556 (W.D. Tex. 2013); *Wuliger v. Christie*, 310 F. Supp. 2d 897 (N.D. Ohio 2004); *In re Trade Partners, Inc. Investors Litig.*, 2008 WL 3992168, *5-6 (W.D. Mich. Aug. 22, 2008) (holding that viaticals are securities, following federal law).[63]

2. The Defendants' Position

The fourth prong of the *Howey* test requires a showing that "the efforts made by those other than the investor are the undeniably significant ones, those essential

[63] One of the very few cases concluding that life settlement or viatical investments are not "investment contracts" is *SEC v. Life Partners*, 87 F.3d 536 (D.C. Cir. 1996). Unlike other courts that have considered the issue, *Life Partners* concluded that only the managerial efforts that occur after the purchase of the policy should be given weight in determining whether an investment is a security. But, as this Court concluded in ruling on the preliminary judgment motion, the *Howey* Court did not "distinguish between pre- and post-purchase efforts." PI Ruling at 10; *see also Eurobonds*, 13 F.3d at 1341 (finding that the selection and funding of investment vehicle constituted "significant managerial efforts). Further, in contrast to the record in that case, the record here overwhelmingly establishes that the success of the investment as a whole depended on the management efforts of PWCG and the Trustee, both before and after the purchase of the policy. There is no discussion in that case, for example, regarding the management of reserves or a premium call process. Thus, *Life Partners* can be distinguished on its facts.

managerial efforts which affect the failure or success of the enterprise." *Glenn Turner*, 474 F.2d at 482. It is satisfied *only if* profits are expected from "others' work," or labor to be performed by another in the future. *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1130 (9th Cir. 2013).[64] Here, neither Pacific West's pre-purchase efforts to locate and obtain policies, nor the PWCG Trust's post-purchase ministerial administration of the policies, constitute "efforts of others" under *Glenn Turner*. Fundamentally, the expected profits depend on the date of death of an insured, not on the efforts of Pacific West or the PWCG Trust, which do nothing to bring about the insured's death. Summary judgment is therefore appropriate.

The Court's June 16, 2015 Order denying the SEC's Motion for Preliminary Injunction correctly notes that Pacific West's life settlement products have three distinct elements: policy selection, premium reserves, and funding and maintenance of policies. *See* Dkt. No. 51 at §§ III–V. As will be set forth below, none of these elements constitutes "efforts of others" under *Howey's* fourth prong, and Pacific West's purchasers had no expectation that Pacific West or the PWCG Trust would undertake non-ministerial, post-purchase efforts. These expectations are critical because *Howey*'s fourth prong requires "an objective inquiry into the character of the instrument or transaction offered based on what the purchasers were 'led to expect.'" *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009) (quoting *Howey*, 328 U.S. at 298–99).

a. Pacific West's pre-purchase policy selection process is not "efforts of others."

Pacific West's pre-purchase policy selection process does not satisfy the fourth

[64] *Compare Howey*, 328 U.S. at 295-99 (investment contract existed because profits resulted from cultivation of citrus crop); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 348 (1943) (profits resulted from oil drilling operations); *SEC v. Rubera*, 350 F.3d 1084, 1087 (9th Cir. 2003) (profits resulted from operation of pay telephone business), *with SEC v. Life Partners, Inc.*, 87 F.3d 536, 546-47 (D.C. Cir. 1996) (no investment contract where profits depended on "how long the insured survives"); *SEC v. Belmont Reid & Co., Inc.*, 794 F.2d 1388, 1391 (9th Cir. 1986) (profits depended on fluctuations in the gold market); *Noa*, 638 F.2d at 79 (profits depended on "the fluctuations of the silver market").

Howey prong because that process occurs before any purchase is made, and therefore cannot "affect the failure or success of the enterprise." *Glenn Turner*, 474 F.2d at 482. The distinction between *post*-purchase managerial efforts (which can create a security) and *pre*-purchase managerial efforts (which cannot) has been enshrined in the case law almost as long as the *Howey* test itself. The distinction was explicitly recognized in the Ninth Circuit's seminal *Noa* opinion, which addressed a contract to purchase silver bars and held that the dispositive fact was that the seller's work had ended with the sale: "[o]nce the purchase of silver bars was made, the profits of the investor depended upon the fluctuations of the silver market, not the managerial efforts of [the promoter]." *Noa*, 638 F.2d at 79. Because "[t]he method by which the silver was to be purchased by the seller did not alter the relationship of the seller and the buyers," the purchase was not an investment contract. *Id*. at 80; *accord SEC v. Belmont Reid & Co.*, 794 F.2d 1388, 1391 (9th Cir. 1986) (purchasers prepaid for gold coins with delivery secured by deed to gold mine: "[t]o the extent the purchasers relied on the managerial skill of [the promoter] they did so as an ordinary buyer, having advanced the purchase price, relies on an ordinary seller").

The Ninth Circuit has held that investment contracts exist when an investment's success turns on *post*-purchase efforts. For example, in addressing an "ore purchase program" in which investors purchased ore that the promoter would then process into precious metals, *SEC v. Goldfield Deep Mines Co. of Nev.*, 758 F.2d 459 (9th Cir. 1985), the court held that purchases were investment contracts *only because* the promoter was obligated to process the purchased ore using what the promoter "represented to be the only economically feasible dump ore processing technique." *Id*. at 464; *accord SEC v. R.G. Reynolds Enters.*, 952 F.2d 1125, 1134 (9th Cir. 1991) (in a similar ore-processing program, post-purchase "commitment to

build a new refinery" and process the ore was "the essential managerial efforts that would affect the success or failure" of the investment).[65]

Other courts of appeals have distinguished between pre-purchase and post-purchase efforts. The First Circuit has held that a land-purchase deal was not an investment contract because "the evidence did not show that the promoter or any other obligated person or entity was promising the buyers to build or provide anything" once the sale was complete. *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 11 (1st Cir. 1993). *See also McCown v. Heidler*, 527 F.2d 204, 211 (10th Cir. 1975) (noting that a contract to purchase land is not a security, while a contract to purchase land *and* substantial future improvements to be built on it is a security).

The D.C. Circuit has applied the *Noa* distinction, together with the other cited authorities, to hold that life settlement products are not securities. *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996). The *Life Partners* court began its analysis by noting the longstanding distinction between pre- and post-purchase efforts:

> In both *Noa* and *McCown*, the courts of appeals regarded the promoter's pre-purchase efforts as insignificant to the question whether the investments—in silver bars and parcels of land, respectively—were securities. The different outcomes trace wholly to the promoters' commitment to perform meaningful post-purchase functions in *McCown* but not in *Noa*.

Id. at 547. The *Noa* distinction was considered dispositive: "While we doubt that pre-purchase services should ever count for much, for present purposes we need only agree with the district court that pre-purchase services cannot by themselves suffice to make the profits of an investment arise predominantly from the efforts of others." *Id*. at 548. The court noted that the SEC had not "pointed to a single case in which an

[65] While neither *Goldfield Deep* nor *R.G. Reynolds* expressly relied on *Noa*, the analysis in the decisions is identical to the *Noa* court's analysis.

investment vehicle was deemed a security subject to the federal securities laws although the investor did not look to the promoter (or another party) to provide significant post-purchase efforts." *Id.*; *accord SEC v. Life Partners, Inc.*, 102 F.3d 587, 588 (D.C. Cir. 1996) (opinion on denial of rehearing) ("Absent even one entrepreneurial post-purchase service . . . there simply is no on-going common enterprise involved in owning an interest in an insurance contract from which the profit depends entirely upon the mortality of the insured.").

Life Partners directly addressed pre-purchase efforts specific to the life settlement business, concluding that compensation for efforts "to locate insureds and to evaluate them and their policies, as well as to negotiate an attractive purchase price" is included in the price paid by purchasers, and therefore does not contribute to their profits. *Life Partners*, 87 F.3d at 546-47 (citing, *inter alia*, *Noa*, 638 F.2d 77). That conclusion comports with the Ninth Circuit's guidance in *Belmont Reid*: "To the extent the purchasers relied on the managerial skill of [the promoter] they did so as an ordinary buyer, having advanced the purchase price, relies on an ordinary seller." *Belmont Reid*, 794 F.2d at 1391.

Pacific West's policy selection process is straightforward, as accurately described in Section III of the Court's Preliminary Injunction Order:

> Once Pacific West selects the policies to be purchased and sold to investors, it determines a total fixed return of between 100% and 175% for each policy, determines the price Pacific West will pay for a policy, sets the length of the contract period, . . . 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.

Dkt. No. 51 at p.3 (quotations omitted).[66] Pacific West's pre-purchase actions in selecting and acquiring policies for sale to purchasers are virtually identical to those

[66] *See* JA 394, 409, 442-46, 2023-24, 2072-76, 2078, 2082-84, 2086-88, 2096-2104,

in *Life Partners*, and they are directly analogous to the selection and acquisition of precious metals in *Noa* and *Belmont Reid*. Because the entirety of Pacific West's policy selection process occurs before any purchaser buys a life settlement interest, *see* SS D20, that policy selection process is not "efforts of others" under *Howey's* fourth prong. *E.g.*, *Life Partners*, 102 F.3d at 588; *Belmont Reid*, 794 F.2d at 1391.

The SEC's reliance on the Eleventh Circuit's decision in *SEC v. Mutual Benefits Corp.*, 408 F.3d 737 (11th Cir. 2005), is misplaced because Mutual Benefits' life settlement products were nothing like Pacific West's products; and because the court was careful to confirm the rationale of *Noa* and *Life Partners* that "the *Howey* test is more easily satisfied by post-purchase activities." *Id*. at 743. Because the many post-purchase managerial efforts undertaken by Mutual Benefits included the selection of the particular policies into which investors' funds would be placed, a Mutual Benefits investor received post-purchase managerial services under *Noa* and *Life Partners*. Investors deposited their money with Mutual Benefits and *then relied on Mutual Benefits to select the policies into which they would invest*. Pacific West purchasers, on the other hand, make their own determination about which policies (if any) to purchase, and they make that determination *before* committing any money.[67] The *Mutual Benefits* decision is inapplicable.

b. Escrowed policy premiums are not "efforts of others."

The second element of Pacific West's program—pre-purchase calculation of amounts to be placed in escrow to cover future premium payments—likewise does not constitute "efforts of others" sufficient to satisfy *Howey's* fourth prong. The Court's Preliminary Injunction Order accurately describes the escrow program:

2114-15, 2126-27, 2131-33, 2186-87, 2191, 2243-70, 2273-74, 2277-79, 2299; Dkt. No. 28-2 ¶¶ 4, 7-8 & Exs. A-C; Dkt. No. 28-5 ¶¶ 2-3; Dkt. No. 28-6 ¶¶ 10-11; SS D2, D4-15, D18-21, D28-36, D63-68; *see also* JA 2010, 2049, 2052-54, 2058-59, 2218, 2338, 2347, 2364-66, 2368, 2372, 2374, 2383, 2486-2560 (Supp. Compen. ¶¶ 4-6).

[67] JA 445 2010, 2016-17, 2078, 2186-87, 2191, 2207, 2209, 2217-18, 2326, 2346-47, 2362-64, 2368, 2374; Dkt. No. 28-2 ¶ 41; Dkt. No. 28-6 ¶ 10; SS D20, D24-32, D37-40.

> Pacific West escrows a lump-sum amount in the primary premium reserve, which is funded by a designated percentage of all gross investment proceeds. . . .
>
> 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.

Dkt. No. 51 at p. 4 (quotations and citations omitted).[68] As with the policy selection process, all three tiers of premium reserves are part of Pacific West's pre-purchase work: the reserve system is described at length in the Purchase Agreement, and is incorporated into the interest bought by Pacific West's purchasers.[69] As with the pre-payment program for gold coins in *Belmont Reid*, Pacific West's purchasers rely on Pacific West's efforts in establishing the reserves only "as an ordinary buyer, having advanced the purchase price, relies on an ordinary seller." *Belmont Reid*, 794 F.2d at 1391.

In addition to constituting a pre-purchase service, the establishment of the premium reserves does not "affect the failure or success of the enterprise" as necessary to establish *Howey's* fourth prong. *Glenn Turner*, 474 F.2d at 482. The SEC, in an "investor bulletin," explains life settlements in these terms: "[t]he return on a life settlement depends on the insured's life expectancy and the date of the

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[68] *See* JA 394-98, 444, 2075, 2099-2104, 2126-27, 2130, 2144-46, 2412-74; Dkt. No. 28-2 ¶¶ 7-9; Dkt. No. 28-5 ¶ 3; SS D11-13, D66-73; *see* JA 2372-74, 2486-2560 (Supp. Compen. ¶ 6).

[69] JA 2256-64, 2410, 2486-2560 (Supp. Compen. ¶ 6). Because the value of the premium reserves is incorporated into Pacific West's offering and is paid for by the purchaser at the time of purchase, the federal securities laws do not reach the premium reserves. *See Life Partners*, 87 F.3d at 547 ("if 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.").

insured's death." JA 2405-07; SS D43, D81. Given that explanation, the SEC cannot be heard to argue here that Pacific West's establishment of premium reserves—or, for that matter, the PWCG Trust's servicing of policies (discussed below)—somehow drive the success of Pacific West's product.

Pacific West's purchasers have come forward in droves[70] to oppose the SEC's actions in this case, agree with the substance of the SEC's investor bulletin, and testify that they expected a return based on the longevity of the insured. Those expectations are of paramount importance, because whether an investment contract exists turns on "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 (quoting *Howey*, 328 U.S. at 298-99). Pacific West's purchasers universally understood that the primary reserve was established at the time of their purchase, and that neither the existence nor the amount of funds in the secondary and tertiary reserves was guaranteed. JA 2486-2560 (Supp. Compen. ¶ 6). Indeed, every Pacific West purchaser acknowledged that his or her return "will result solely from the maturity of the life insurance policy(ies) . . . and will not be derived from the efforts of any person or entity employed by or associated with [Pacific West]." *See, e.g.*, JA 2256. The declarations submitted with this motion aver that the declarants "understood . . . and continue to stand by that acknowledgment." JA 2486-2560 (Supp. Compen. ¶ 3).[71] Far from expecting a return as a result of the reserve system, declarants expected that the "return depends on how long the insured lives." (*Id.* ¶ 4).

In depositions taken by the SEC, Pacific West's purchasers confirmed their

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[70] In addition to the 21 purchaser declarations submitted with Pacific West's Response to the SEC's Motion for Preliminary Injunction, 18 more declarations are filed as part of the joint evidentiary appendix. *See* JA 2486-2560.

[71] *See also* JA 2486-2560 (Supp. Compen. ¶¶ 4-5) ("I understood that if the insured does not live long, the annualized return increases. On the other hand, if the insured lives longer, the annualized return decreases. Pacific West cannot affect when the insured dies, and thus cannot affect when the policy will mature or what the annualized rate of return will be.").

expectations that longevity drives the success of their purchase. Michael Waks, a licensed attorney, testified that he understood that his "return on investment changes depending upon how long these people live and how much I have to pay in premiums." JA 2338.[72] And Thomas Blackwood—an experienced investor with multiple homes who has purchased hundreds of thousands of dollars in interests from multiple life settlement companies—testified as follows:

> Q. Mr. Blackwood, what's your understanding of when an investment in PWCG will mature?
>
> A. When it will mature?
>
> Q. Yes, sir.
>
> A. When the insured passes.
>
> Q. And Ms. Escalante asked you a bunch of questions earlier about whether PWCG was doing anything to facilitate the success or failure of the investment. Do you think that PWCG has anything to say about when an insured passes?
>
> A. No.
>
> Q. Do you think PWCG does anything to speed up or slow down the maturity of your policy?
>
> A. No.

JA 2049.[73] Another purchaser, Wynnewood Ritch, chuckled when asked if he expected Pacific West to affect his return:

> Q. Okay. Can Andy Calhoun, who you dealt with, can he affect or alter when that insured will pass away?
>
> A. No, no. He's not the type of guy that would do that, no.

[72] Mr. Waks similarly testified that he understood and agreed with the disclosure in the purchase agreement explaining that any benefit derived from his purchase would result from the maturity of the policy, not any efforts of Pacific West or others. JA 2347.

[73] Other purchasers testified similarly. *See* JA 2033, 2049, 2060, 2218, 2346-47.

JA 2326-27; *see* SS D62.

Jason Wuest, another experienced investor with a net worth of millions of dollars, flatly rejected the SEC's suggestion that reserves drive the success of his purchase:

> I looked at the age of the person being insured, I looked at the escrow amount, you know, how many years it's guaranteed for per contract, and I calculated . . . roughly is this person going to live to be past [that time]. . . . I guess [the additional reserves] are a safeguard, but I didn't rely on them for any of my decision-making [because] it's almost impossible to say what's going to be in those reserves.

JA 2374; *see also* SS D77-80.

The expectations of Pacific West's purchasers are squarely in line with a determination that their purchase agreements are not investment contracts. Pacific West's purchasers did not rely on Pacific West to produce their profits; after purchasing, they "did not anticipate that Pacific West would render any additional services other than basic administrative and customer service assistance." JA 2486-2560 (Supp. Compen. ¶ 2); SS D44. In short, Pacific West's purchasers confirm that they expected no "undeniably significant [and] essential managerial efforts which affect the failure or success of the enterprise." *Glenn Turner*, 474 F.2d at 482. Those expectations both begin and end the "objective inquiry into the character of the instrument or transaction offered." *Howey*, 328 U.S. at 298-99; *Alaniz*, 569 F.3d at 1021. Pacific West's life settlement products are not securities.

c. Policy maintenance is not "efforts of others."

The policy maintenance efforts of the PWCG Trust following a purchaser's decision to acquire a beneficial interest are not "undeniably significant [and] essential managerial efforts," *Glenn Turner*, 474 F.2d at 482, as is necessary to satisfy *Howey's* fourth prong. The Court's Preliminary Injunction Order accurately described the PWCG Trust's maintenance efforts:

> 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. . . . 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.

Dkt. No. 51 at p.5.[74]

The easily answered question with respect to the PWCG Trust's maintenance efforts is whether these efforts are entrepreneurial or ministerial. The cases applying *Howey* "have never suggested that purely ministerial or clerical functions are by themselves sufficient; indeed, quite the opposite is true." *Life Partners*, 87 F.3d at 545. The PWCG Trust's services are purely ministerial and clerical; they are limited to:

a. monitoring notices and correspondence from insurance carriers;
b. causing premiums to be paid;
c. verifying policy status;
d. providing status updates to beneficial interest holders upon request;
e. monitoring the life of the insured under each policy;
f. submitting benefit applications upon maturity of a policy; and
g. distributing funds on matured policies to the beneficial interest holders.

JA 2480. In the words of its trustee, the PWCG Trust "acts as servicer, performing bookkeeping, monitoring, and clerical functions, for the Pacific West policies." *Id*. These are ministerial or clerical tasks, analogous to those provided by a mortgagee's servicer. The fees Pacific West pays to the PWCG Trust's trustee also confirm the ministerial nature of the PWCG Trust's work. While the PWCG Trust holds 119 policies with face values totaling more than $236 million spread over 3188 beneficial

[74] *See* JA 394-405, 439-449, 2107-08, 2121, 2138-40, 2143, 2163-65, 2410, 2412-2474, 2275-76, 2282, 2298, 2480; Dkt. No. 28-2¶ 6; SS D14-7, D45, D47, D48-61, D73, D76, D80; *see also* JA 2031-32, 2369, 2486-2560 (Supp. Compen. ¶ 7).

interests, its fees amount to $2.35 per beneficial interest per quarter. JA 2410; SS D48-51. The SEC's position that some $9 a year worth of clerical services constitutes significant and essential managerial efforts is, in a word, absurd.

Not only are the PWCG Trust's services not essential managerial efforts, but they also do not "affect the failure or success of the enterprise." *Glenn Turner*, 474 F.2d at 482. While *any* investment's profitability may be marginally affected by many factors, *Glenn Turner* makes clear that, to satisfy *Howey's* fourth prong, the affect must be more than marginal. Rather, it must reach the very "failure or success of the enterprise." *Id*. *Noa* reached the same conclusion with its holding that storing silver—directly analogous to the PWCG Trust's "storing" policies until maturity—"do[es] not in our opinion amount to the undeniably significant efforts required by *SEC v. Glenn Turner*." *Noa*, 638 F.2d at 80.

Life Partners applied these principles in the life settlement context to hold that post-purchase policy maintenance efforts do not satisfy the *Howey* requirements because "the near-exclusive determinant of the investors' rate of return" is "how long the insured survives," not whether post-purchase administration is performed. *Life Partners*, 87 F.3d at 546-47 (citing, *inter alia*, *Noa*, 638 F.2d 77).[75] The court noted that "[o]nly if [defendant] misappropriated the investors' funds, or failed to perform its post-purchase ministerial functions, would it affect the investors' profits," and that "[s]uch a possibility provides no basis upon which to distinguish securities from non-securities." *Id*. at 545.

Pacific West's purchasers have confirmed their expectations that the PWCG Trust's post-purchase bookkeeping services were ministerial:

> At the time of my purchase, I understood, and continue to understand, that Mills Potoczak & Company, the Trustee of the PWCG Trust, is

[75] *See also* JA 2406 ("The return on a life settlement depends on the insured's life expectancy and the date of the insured's death.").

> responsible for making routine premium payments on the policies in which I have a beneficial interest, monitoring the insured, submitting a claim to the insurance company upon the insured's death, and distributing the death benefit funds. **I view these tasks as ministerial functions that will not increase or decrease the ultimate return of my beneficial interest once the insured passes away**.

JA 2486-2560 (Supp. Compen. ¶ 7) (emphasis added).[76]

In his deposition, Mr. Wuest testified that he had expected no effect on his return from the PWCG Trust's ministerial actions: "I understood that there was a trust. . . . I don't believe that it would affect a return or anything. . . . I couldn't see how it affects a return." JA 2369. Mr. Wuest was steadfast that he understood both his purchase and what could affect its success or failure; he rejected a declaration drafted by the SEC's counsel, who was "saying I was misled, I didn't understand the investments, I didn't understand premiums, I didn't . . . understand anything." JA 2378.[77] Because the PWCG Trust performs ministerial and clerical functions, not "undeniably significant [and] essential managerial efforts which affect the failure or success of the enterprise," *Glenn Turner*, 474 F.2d at 482, Pacific West's purchase agreements are not investment contracts.

* * *

The work performed by Pacific West prior to purchase does not constitute

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[76] One declarant preferred the word "clerical" to "ministerial." JA 2546. Pacific West submits that is a distinction without a difference. *Life Partners*, 87 F.3d at 545 (rejecting "ministerial or clerical functions" as insufficient).

[77] Throughout his deposition, Mr. Wuest was adamant that he and other purchasers fully understood the parameters of their purchase. When asked *by the SEC* if he thought the SEC's allegations were true, Wuest testified: "I believe from my own personal experience on being interviewed and investigated that they're untrue." JA 2378. When pushed (again by the SEC), Mr. Wuest reiterated:

> "I believe this whole case is based on people being manipulated to say what Todd Brilliant wanted people to say. If . . . he's the main course of your investigation, then this whole . . . case is . . . based . . . on lies." *Id*.

"efforts of others" under *Glenn Turner*. The post-purchase administrative work performed by the PWCG Trust does not equate to "undeniably significant" managerial efforts, nor does it affect the success of a life settlement interest. *Glenn Turner*, 474 F.2d at 482. Because purchasers' profits depend on the insured's longevity, not on the managerial efforts of others, Pacific West's life settlement products are not investment contracts. Accordingly, summary judgment against the SEC's claims is proper.

d. The SEC Misunderstands and Misapplies the Law (Response to the SEC's Motion)

The SEC's argument rests on two fundamental misconceptions: one about the law and one about the facts. First, the SEC misunderstands the nature of the "efforts of others" inquiry under Ninth Circuit precedent. This inquiry is not about the balance of power between purchaser and seller, but about whether the seller's (or another's) work is what will produce the investor's profits. Second, the SEC misunderstands what makes a life settlement purchase a "success." In the SEC's conception, the purchase cannot be a success if the investor must pay a single dollar in response to a premium call, no matter what the rate of return or its relationship to other possible uses of the funds. This definition of success is divorced from economic reality and, importantly, is emphatically not how purchasers understood the transaction.

i. The SEC Asks the Court to Add an Extra Factor to the *Howey* Test

The SEC misunderstands "efforts of others" as a balancing test between the purchaser's and the seller's control over the enterprise. *See* SEC Brief at III.A.1 (defining the test as "'produced by the efforts of others,' rather than by the efforts of the investors themselves."). This is not the test. The investors' own efforts are no more than a consideration that, in some factual scenarios, provides insight into the true test: whether profits will be produced, if at all, by work to be performed by the seller or another. If it is really the efforts of the purchaser himself that produce his

profits, it follows that profits are not produced by the efforts of "others." But the SEC implicitly asks the Court to add this balancing inquiry as an additional factor in the *Howey* test. The Court must decline to do so.

Courts discuss the balance of power between seller and purchaser because in many cases this is the seller's argument for why there is no investment contract. *See e.g. Hocking v. Dubois*, 885 F.2d 1449, 1460 (9th Cir. 1989) (en banc) (analyzing purchaser's power to manage because "[t]he crux of [seller's] argument" was that the purchaser could "maintain a high degree of control," "thus making any managerial efforts [of seller] non-essential to the success" of the investment); *R.G. Reynolds*, 952 F.2d at 1133–34 (analyzing investors' ability to refine the gold themselves because defendants argued that this technical, albeit illusory, ability removed the arrangement from *Howey*); *Glenn Turner*, 474 F.2d at 480–83 (comparing efforts of buyers and seller because it was raised as a defense). But this argument is not always relevant. For example, it has no application in real estate investment, where profits are to be produced by the value of the real estate, not by any work of the purchaser or seller. *See, e.g.*, *Rodriguez*, 990 F.2d at 11. In a real estate investment case, as in this case, profits are the result of an independent factor, not work performed by *either* the seller or the purchaser. *See also SEC v. Eurobond Exch.*, 13 F.3d 1334, 1341 (9th Cir. 1994) (finding an investment contract without discussion of efforts of purchaser, which were not at issue); *Noa*, 638 F.2d 77 (finding *no* investment contract without discussion of efforts of purchaser, which were not at issue). The Court must reject the additional factor that the SEC asks it to add to the *Howey* test.

Here, Pacific West does not argue that the investors' own efforts will produce the profits (except insofar as they make "efforts" to select a policy and pay premiums, which does nothing to distinguish this purchase from any other). Profits from a life settlement are produced neither by the purchaser's efforts nor work performed by

Pacific West; they result from the longevity of the insured.[78]

ii. The SEC Ignores the Economic Realities of the Transaction

The SEC knows it can only cram Pacific West's life settlement products into the definition of "security" by twisting the economic realities of the transaction, realities that were disclosed to and understood by purchasers of the products.[79] The SEC's flawed framing of the *Glenn Turner* issue—"To investors the investment would be a 'success' only if they did not have to put in any additional funds"—assumes its conclusion. Under the SEC's theory, only possession of a crystal ball would allow investors to achieve "success"—but it is precisely the nonexistence of crystal balls that makes life settlements, like life insurance itself, worth the risk. If it were possible to predict time of death with certainty, there would be no market for life settlements, transactions in which the purchasers of a policy pit their money against the life insurance companies' predictions.

Even if the SEC's theory made economic sense (it does not), it is not reflected in the evidence. Purchasers of Pacific West life settlements do not define "success" using the SEC's narrow terms. Jason Wuest testified that his goal for the purchase was "not to lose money" (JA 2384)—a goal far different than the SEC's flawed understanding of "success"—and that he understood that even if he paid premium calls for years, it would be ten years before he ran the risk of "break[ing] even," much less of losing money. JA 2366, 2382. Numerous investors testified that they appreciated the risk that the insured(s) would survive beyond the premium reserves. JA 2040, 2211a, 2338, *see also* JA 2027. Some explained their reasoning: even with the risk of premium calls, the life settlement products were likely to give a better

[78] JA 2012, 2033, 2049, 2060, 2218, 2327, 2230-31, 2486-2560 (Supp. Compen. ¶ 4); SS D20, D31, D41-43, D77-79.

[79] JA 2012, 2033, 2049, 2060, 2218, 2327, 2230-31, 2486-2560 (Supp. Compen. ¶ 4); SS D20, D31, D62, D67-72.

return than leaving the purchase price in the bank or the stock market. JA 2054, 2324. Greg Korver testified that he understood there was a risk that future premium calls would affect his net gains: "that's why I took in the fact that I always look at the negative side before I invested in this." JA 2211a. "I've never invested in anything . . . that was risk-free," he explained. JA 2216. Purchasers do not take the SEC's narrow view of "success."

In theory, Pacific West could have completely eliminated the risk of premium calls by setting aside (and requiring investors to pay up front) premium reserves that would cover the policies for 25 or 30 years on the off-chance that an insured survives that long, but doing so would have real costs to purchasers, who would need to put up more capital up front and would not receive the extra reserves back upon maturity. Purchasers may rationally choose possible costs in the future over certain (and nonrefundable) costs today, as Pacific West purchasers have done. JA 2216.

The SEC also disregards the economic realities of the transactions by relying on numerous "efforts" by Pacific West that are part of the pre-purchase creation of the life settlement products, but are not profit-producing work and therefore cannot satisfy the *Howey* test. Pacific West selects policies, sets premium reserves based on projections from the life insurance company, and sells fractional interests to its purchasers.[80] The SEC ignores what it cannot deny: these "efforts" are not profit-producing work because they are part of the cost of investment. Under Ninth Circuit precedent, such "efforts" cannot satisfy the *Howey* test. *Noa*, 638 F.2d at 79; *Belmont Reid*, 794 F.2d at 1391. This economic reality is borne out in *Howey*,

[80] The SEC repeatedly points out that Pacific West provides a valuable service to individual investors who wish to purchase fractional interests in life insurance policies. This is true and is relevant to the fact that the life settlement products are part of the "joint enterprise," which is not disputed here, but the fact that there are multiple purchasers cannot also be crammed into the "efforts of others" inquiry. If this fact satisfied "efforts of others," then there would be no need for this component of the *Howey* test, since every arrangement would already be captured by the "joint enterprise" requirement.

notwithstanding that the Court did not have occasion to expressly address the economic principle that work already included in the purchase price cannot create profits. In *Howey*, the seller's previous work (planting the acreage) was taken into account in the purchase price, which was set per acre based on "the number of years the particular plot ha[d] been planted with citrus trees." 328 U.S. at 295. In other words, investors did not expect these pre-purchase services to produce their profit, since they had already paid for them in the purchase price of the investment; instead, profit was to be derived from the future efforts of the Howey Company to produce a citrus crop for sale. Pre-purchase work performed by the defendant that is included in the price of the product is part of the cost, not the profits.

It is for this reason that the SEC's reliance on *Eurobond Exchange* is misplaced. Unlike Pacific West, the *Eurobonds* provider performed all of the work that would create a profit after receipt of investors' funds. First, the investors sent their investment checks [to defendant Rogers]," who would use the funds to "select and purchase foreign treasury bonds with high interest rates." *Eurobond Exch.*, 13 F.3d at 1339. "Second, Rogers would obtain . . . a low-interest loan to finance additional bond purchases on behalf of investors" using the bonds as collateral. *Id.* "Third, Rogers and Eurobond then used all the loan proceeds to buy, on behalf of the investor, more foreign government-issued bonds." *Id.* "The profit to the investor was derived from the difference between the interest rate received on the foreign treasury bond and the interest rate paid on the foreign-currency loans, less fees and costs." *Id.* Certainly the defendants performed profit-producing work in *Eurobond*, selecting and obtaining appropriate bonds and loans and arranging for the entire enterprise, but, unlike with Pacific West's products, this work was to be performed after investors sent in funds that would be applied to the arrangement. In *Eurobond*, investors purchased nothing but the future application of the defendants' expertise in

negotiating foreign markets.[81] That is not the case here.

In this case, potential purchasers are presented with a finished product for consideration; if they choose to purchase an interest, they do so on the understanding that part of their purchase price goes towards paying Pacific West (through its margin) for work it has already performed and that their profit results from how long the insured survives thereafter. SS D74-75. Not so in *Eurobond*, where it was the seller's future work that would create the profits.

The SEC next points to "funding of policies through the lifetime of the insured," including "funding and management of the contingent reserves" as a basis for finding "efforts of others." The uncertainty inherent in life settlements means that there is a risk that additional premiums may be needed after the primary reserves are used: but this risk is driven by the uncertain longevity of the insured. "Efforts" only satisfy the *Howey* test if they are work, labor, or services that produce profits. Here, profits are not "produced" by payment of premiums; these are maintenance services. SS D60-61. The *sine qua non* of a life settlement is how long the insured survives, a factor that Defendants cannot control.

The SEC makes much of the fact that someone must coordinate all investors in a policy to pay their premiums. But Pacific West and the Trust are obligated to do

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[81] The Eleventh Circuit was likewise incorrect to rely on *Eurobond* in its conclusion, contrary to Ninth Circuit precedent, that pre-purchase efforts can be relevant to the *Howey* test. *See Mut. Benefits* 408 F.3d at 743-44. The SEC's citation to *Mutual Benefits* reveals its misunderstanding of the economic realities of the transaction, as reflected in Ninth Circuit precedent.

Other cases cited by the SEC are also inconsistent with Ninth Circuit precedent. *See SEC. v. Life Partners Holdings, Inc.*, 41 F. Supp. 3d 550, 556 (W.D. Tex. 2013) (rejecting the relevance of whether promoter's work was performed prior to or after the investment); *Life Partners, Inc. v. Arnold*, 464 S.W.3d 660, 680 (Tex. 2015), *reh'g denied* (Sept. 11, 2015) (same). Still others are factually distinguishable from the business model here. *See Mutual Benefits*, 408 F.3d at 743-44 (discussed *supra*); *Wuliger v. Christie*, 310 F. Supp. 2d 897, 907 (N.D. Ohio 2004) ("Once the investor agreed to purchase a viatical settlement, [defendant] would match the viatical settlement in an insurance policy maintained by Alpha. There is nothing to suggest the investor was involved or instrumental in the selection of the appropriate viatical policy, relying on the promise of the agent, broker or Alpha that their money would be in a matched policy.").

so,[82] and "'efforts' . . . not to breach [one's] contract are not the sort of entrepreneurial exertions that the *Howey* Court had in mind when it referred to profits arising from 'the efforts of others.'" *Life Partners*, 87 F.3d at 545. The "risk" that Defendants will fail to collect the funds for premium calls is no different than the risk that the seller of gold coins in *Belmont Reid* would fail to deliver the coins. *Belmont Reid*, 794 F.2d at 1390. This argument should also be rejected because it is a misplaced attack on whether a "joint enterprise" exists. *See supra* n.80. The SEC's attempts to drag this factor in as part of the "efforts of others" inquiry muddies the waters and should be rejected.

Finally, the SEC desperately argues that the PWCG Trust's duties to track insureds and submit claims upon maturity must satisfy "efforts of others" because purchasers will not receive the death benefit if no claim is submitted to the insurance company. These are incidental costs of maintenance, akin to the brokerage and storage fees rejected by the *Noa* court as insufficient to satisfy "efforts of others." Defendants are contractually obligated to perform these ministerial functions;[83] the risk that they will fail to perform cannot turn these obligations into "efforts of others." *See Belmont Reid*, 794 F.2d at 1390. In the same way, proper performance of the Trustee's ministerial duties is insufficient to overcome the reality that profits are the result of the time of death of the insured, and no "efforts of others" cause that result.

3. The SEC's Further Response to Defendants' Position

The SEC opposes Defendants' motion for the reasons stated above and in its supplemental brief.[84]

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[82] JA 2107-08, 2163-65, 2296; SS D17.

[83] SS D54, D56-57. The SEC flatly misrepresents the Trustee's testimony in its claim that he "admitted" the services are not ministerial; indeed, he testified to the opposite. JA 2300, 2480 ¶ 2.

[84] The SEC objects to the Defendants' investor declarations on the grounds that the witnesses were not identified in Defendants' Rule 26 disclosures. *See* JA T51&52.

B. Issue: The SEC's Section 5(a) and (c) Claims against All Defendants

1. The SEC's Position

Given that the life settlements are securities, the undisputed evidence establishes that defendants violated the registration provisions in Sections 5(a) and 5(c) of the Securities Act. Section 5 prohibits the unregistered offer or sale of securities in interstate commerce, unless an exemption from registration applies. *See Eurobonds Exchange, Ltd.*, 13 F.3d at 1338. A defendant violates Section 5 when (*i*) the defendant, directly or indirectly, offers or sells securities; (*ii*) no registration is in effect or filed with the SEC for those securities; and (*iii*) interstate transportation or communication or the mails are used in connection with the offer and sale. *See* 15 U.S.C. §§ 77e(a), 77e(c); *SEC v. Phan*, 500 F.3d 895, 902 (9th Cir. 2007). "Once the SEC introduces evidence that a defendant has violated the registration provisions, the defendant then has the burden of proof in showing entitlement to an exemption." *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir. 2013). The SEC does not need to show scienter to establish a Section 5 violation because Section 5 operates as a strict liability statute. *See SEC v. Holschuh*, 694 F.2d 130, 137 n.10 (9th Cir. 1982).

Here, there is no dispute that there is a registration statement was never in effect for PWCG's offerings. The life settlements were also offered and sold in interstate commerce since PWCG, Calhoun and the Sales Agents offer and sell the securities in California, and the issuer, the Trust, is located in Ohio. Defendants also advertise the sale of life settlements through television and radio, and use the internet, email and mails to sell them.[85]

The undisputed evidence also establishes that the Defendants "directly or indirectly" offered and sold the life settlement investments. PWCG, as promoter, and the Trust, as the owner and issuer, directly offer and sell these securities to the public. *CMKM Diamonds*, 729 F.3d at 1255 (liability under section 5 for entity that passes

[85] SS 264-71. JA T7, p162-111-112, 162-10; T11, p314, 261-62; T7, p.38; T3, 62-63

title to the security). Calhoun and the Sales Agents are also directly involved in the offer and sale of these securities, because they are the ones actually selling them to investors. *See id.*; *SEC v. Murphy*, 626 F.2d 633, 648 (9th Cir.1980). At the very least, they "indirectly" offer and sell them, since liability under Section 5 "is not limited to the person or entity that passes title to the security," but also extends to those who "actively participate[]" in the transaction. *CMKM Diamonds*, 729 F.3d at 1255. That standard is met when the person is both a "necessary participant" and a "substantial factor" in the sales transactions. Here, Calhoun participated in every aspect of the sales and marketing of the securities, from the drafting of the marketing material and disclosure documents, training the sales agents, directly selling to certain investors, and ultimately running every aspect of PWCG's business.[86] The sales agents directly solicited orders from investors, provided investors with disclosure documents and other information about the investments, and signed the purchase agreements on behalf of PWCG, and expressly admitted that they were both necessary participants in the transactions, and that their efforts were a substantial factor in effectuating the sales transactions.[87][88]

2. The Defendants' Position

Even if the life settlement interests offered by Pacific West were "securities" (and they are not) the Court should nevertheless deny the SEC's motion and dismiss its Section 5 claims because the interests sold by Pacific West are exempt from registration. The SEC has not met its basic burden of showing it is entitled to

[86] SS 272. Ans, Doc. 62, ¶7, 28, 34, 38; JA T7, p.162-9A to 10, 162-14A-15A; T8, p. 165-167B,

[87] SS 273-291. JA T9, p.178-79, 181-84; T3, p. 65-67.

[88] In the Defendants' Response below, Defendants argue that the SEC did not respond to the Defendants' arguments regarding exemptions and that the SEC has thus waived any response. But the Defendants did not address exemptions in the parties' exchange of moving portions of this Joint Brief; exemptions were raised only in Defendants' responsive portions. The SEC intends to address Defendants' arguments regarding exemptions in its Supplemental Brief.

judgment as a matter of law on these defenses, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986), and its motion must be denied.

The life settlement products qualify under Section 3(a)(11) of the 1933 Act's exemption for intrastate offerings. 15 U.S.C. § 77c(a)(11) (securities "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" exempt from registration). The intrastate exemption's "safe harbor" provision, promulgated in Rule 147, is met here. *See* 17 C.F.R. § 230.147(c) (1974, am. 2013). Pacific West is the issuer of the life settlement products, as the SEC conceded by bringing claims for primary liability (rather than aiding and abetting liability) against Pacific West and Andrew B Calhoun IV, and Pacific West is a business entity incorporated in California, doing business in California, and all offers for sale are made to California residents.[89] Because Rule 147 and Section 3(a)(11) require that no part of an issue be offered or sold to non-residents, Pacific West required each and every investor to certify that he or she was an individual resident of the state of California.[90] Since its operations are local in nature and scope, Pacific West's offerings are exempt from registration under the 1933 Act.

Pacific West's life settlement products are further exempt from registration under Section 3(a)(8) of the 1933 Act. *See* 15 U.S.C. § 77c(a)(8) (investments regulated by an "insurance commissioner . . . or any agency or officer performing like functions, of any State" as contemplated by the exemption provision are exempt from

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[89] *See* Dkt. No. 28-2 ¶¶ 4, 10-11, 13; SS D95-107.

[90] Dkt. No. 28-2 ¶¶ 4, 10-11, 13; *see, e.g.* JA 2267-70; SS D109-110. No Court has ever found that the exemption is void where an issuer has a good faith reasonable belief that the purchaser's written representation as to his residence is true, when in fact the investor is lying. In any event, any single sale made to an out-of-state resident would not void the exemption as to other insurance policies because each offer by Pacific West of an investment in a particular life insurance policy is a separate issue to investors. *See* 18 C.F.R. § 230.147 & n.3; *see also* Securities Act Rel. No. 4434 (Dec. 6, 1961).

registration). In California, life agents authorized to sell fractionalized interest in life settlements are under the Commissioner's supervision.[91] The life settlement products are therefore exempt.

Finally, Pacific West's life settlement products are exempt under 17 C.F.R. § 230.1001 (1996), which provides an exemption for investment products that are compliant with state law. Specifically, Section 230.1001 under Regulation CE provides that "[o]ffers and sales of securities that satisfy the conditions of paragraph (n) of § 25102 of the California Corporations Code . . . shall be exempt from the provisions of Section 5 of the Securities Act of 1933 by virtue of Section 3(b) of that Act." 17 C.F.R. § 230.1001. Pacific West's offerings meet these criteria, as well as the additional criteria set out by Paragraph (q) of the Corporations Code, which applies specifically to life settlements.[92] California has enacted some of this country's most comprehensive securities laws, including those which specifically regulate fractionalized interests in life settlement contracts, like those offered by Pacific West. *See* CAL. CORP. CODE § 25102(q). Under these circumstances, registration is unnecessary.

As noted above, *supra* n.2, the SEC has put forward no evidence or argument to refute the applicability of the foregoing exemptions, and consequently its motion must be denied.

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[91] SS D111-112; Dkt. No. 28-2 ¶¶ 10-11.

[92] SS D95-107. Because Paragraph (q) is a more specific requirement than Paragraph (n) and was passed later in time, Pacific West was required to follow the more specific Paragraph (q) as opposed to the more general Paragraph (n). Here, Section 230.1001 does not specifically mention Paragraph (q) because it had not been passed when the SEC enacted 230.1001. In the task of statutory interpretation, a court's purpose is to determine the intent of the enacting body. *See U.S. Aviation Underwriters Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1096 (9th Cir. 2012); *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1133 (9th Cir. 2010). In this case, the SEC intended to provide an exemption for issuers of securities who were compliant with California law, which is more detailed and better developed than other states' securities law. It is consistent with the purpose of 230.1001 to include issuers' compliant with Paragraph (q) in the exemption.

C. Issue: The SEC's Section 15 Claims

1. The SEC's Position

PWCG, Calhoun and the Sales Agents are not SEC-registered brokers or dealers, and Calhoun and the Sales Agents not associated with any registered broker or dealer. They are therefore violating Section 15(a)(1) of the Exchange Act, which provides that, absent an exception or exemption, any person acting as a "broker or dealer" who uses any means of interstate commerce to effect transactions in, or to induce or attempt to induce purchases or sales of securities, must register or be associated with a broker or dealer who is registered with the SEC. *See* 15 U.S.C. § 78o(a)(1). The SEC is not required to show scienter under Section 15(a). *See, e.g.*, *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

Under the Exchange Act, a "broker" is "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4). Although the phrase "engaged in the business" is not defined, courts have held that regularly participating in the trading of securities on behalf of someone is the primary indicia of being "engaged in the business." *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998). "Transaction-based compensation, or commissions, are one of the hallmarks of being a broker-dealer." *Cornhusker Energy Lex., LLC v. Prospect Street Ventures*, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006).

Here, PWCG, Calhoun and the Sales Agents are acting as brokers-dealers in offering and selling life settlements. They effect transactions in life settlements for the account of others by soliciting and encouraging investors to buy, taking investors' orders and by consummating the purchases. *See SEC v. Devon*, 977 F. Supp. 510, 518 (D. Me. 1997). They also receive transaction-based compensation. PWCG has received on average about 46% from each sale of a life settlement, and Calhoun and the Sales Agents receive 8% commissions on their sales. And PWCG, Calhoun and

the Sales Agents are not registered as brokers or dealers with the SEC. As such, they are violating Section 15(a)(1).[93]

2. The Defendants' Position

The SEC's motion for summary judgment on its Section 15 claims must be denied because, even if the life settlement products were securities, the life settlement products are exempt from registration for the reasons explained above. *See* 15 U.S.C. § 78o(a)(1) (applicable to non-exempted securities).

D. Issue: The SEC's Fraud Claims under Sections 17(a)(2) and 10(b)

1. The SEC's Position

The undisputed evidence also establishes that Calhoun and PWCG are liable under Sections 10(b) and 17(a) for recklessly, or at least negligently, making fraudulent misrepresentations and omissions. To establish a claim under those sections, the SEC must show that the defendants made material misrepresentations or omissions, with the requisite state of mind, in connection with the purchase or sale of a security, or to obtain money in the offer or sale of a security. *See SEC v. Platforms Wireless Intern. Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010). While claims under Section 10(b) and Section 17(a)(1) require a showing of scienter, Sections 17(a)(2) and (3) only require a showing of negligence. *See Vernazza v. SEC*, 327 F.3d 851, 859-60 (9th Cir. 2003). Scienter is proven with "'knowing or reckless conduct,' without a showing of 'willful intent to defraud.'" *Vernazza*, 327 F.3d at 860.

As detailed in the SEC's complaint, Calhoun and PWCG committed widespread fraud that affected every aspect of the transactions. But at this summary judgment stage of the case, the SEC moves only for partial summary judgment on the part of the Defendants' fraud that is now admitted and beyond dispute. Specifically, the SEC moves for partial summary judgment on its Sections 17(a)(2) and 10(b) claims with respect to the following representations to investors:

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[93] SS 293-05. JA T8, p. 166-68; T148, p. 1735 ¶¶ 12-13; Docs. 7-107, 7-119 to 126.

(a) The Defendants' claims, after March 2012, that "all policies have matured before their primary reserves were exhausted," "all policies purchased since the inception of the company are currently being funded by primary premium reserves," "no policy had gone beyond the primary reserve period," and that "all policies were being funded by primary reserves."[94]

(b) The Defendants' representations after December 2014 that the "secondary and tertiary reserves had not been touched."[95]

Each of these statements was blatantly false, and Calhoun admitted that they should not have been made to investors.[96] There can be no dispute that it was reckless—or at least negligent—for these statements to be made.[97]

These representations were false. For each of its policies, PWCG established a primary reserve period of six to nine years and purported to set aside funds that would be sufficient to fund the policies during that period. By March 2012, there were policies that had not matured during the primary reserve period and that had run out of primary reserves.[98] To create the illusion that policies were performing as expected and to induce new investors into the scheme, PWCG began to pay premiums on old policies with funds raised from new investors.[99]

But it is undisputed that PWCG continued to tell investors and prospective

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[94] SS 310. JA T75, p.924; T30, p.607; T81, p.956-58; T31, p.615; T39, p.681; T31, p.615; T46, p.763; T3, p.69-70; T9, p.194-98; T120, p.1553-54 ¶¶ 4, 6 & 7.

[95] SS 319. JA T32, p. 620.

[96] SS 313-14, 320. JA T7, p.162-79 to 162-80, 162-84 to 162-85.

[97] These statements were made by PWCG through the Sales Agents, and thus PWCG is primarily liable for them. Calhoun had ultimate responsibility for these statements as well. *See Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). He is also liable for them because, as PWCG's CEO and sole shareholder (SS 270), he was the controlling person of PWCG under Exchange Act 20(a). *See SEC v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011).

[98] SS 306. JA T148, ¶16 & T153, p.1979.

[99] SS 307-08. Calhoun Decl., PI Motion, Doc. 28-2, ¶20; JA T148, ¶16.

investors that policies were maturing as expected, that all policies were being funded from the primary reserve, and that no policy had gone beyond the primary reserve period. For example, from May 2012 through at least January 2014, Sales Agent Mike Dotta told investors and prospective investors: "[W]e've never had a premium call. To date, *all of our policies have matured before their primary reserves were exhausted* and therefore we have not needed to utilize funds from the secondary or even tertiary reserves." JA T30, p.607 (emphasis added). Sales Agent Eric Cannon made similar statements in 2012-2013. For example, in May 2012, in response to questions about the likelihood of premium calls, Cannon told a prospective investor: "All policies purchased since the inception of the company are *currently being funding [sic] by primary premium reserve (their respect[ed]) 6 to 9 years*." JA T75, p.924 (emphasis added). In July 2013, Cannon told a potential investor:

> In the 9 years we've been in business, we have NEVER had to use the assets held in the secondary and/or tertiary reserves. Thus, there has never been a so-called 'premium call' . . . . In fact, *all of the policies currently being held in the trust are being funded from the primary reserves*.

JA T39, p.681 (emphasis added).[100]

However, it is beyond dispute that after March, 2012, the statements that "all policies had matured in the primary reserve period" and "all policies currently held in the trust are being funded from the primary reserves" were blatantly false.[101] In his deposition, Calhoun admitted that it "would have been false" and inappropriate to continue to make these claims to Pacific West investors.[102]

Similarly, Pacific West made blatantly false statements about the use of the secondary reserves after December 2014. Pacific West began to tap into the secondary and tertiary reserves in December 2014.[103] Despite that fact, sales agents

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[100] *See also* SS 310. *See* Note 84 (citing evidence).
[101] SS 306-07. JA T148, ¶16; T153, p.1979; Calhoun Decl., Doc. 28-2, ¶20.
[102] SS 313-14. JA T7, p.162-79 to 162-80, 162-84 to 162-85.
[103] SS 318. Calhoun Decl., PI Motion, Doc. 28-2, ¶22.

continued to tell investors that PWCG had "never used contingent premium reserves (secondary and tertiary reserves) to fund policies that have exceeded funds escrowed in primary premium reserves." JA T32. These statements were also false, and Calhoun admitted that the statements should not have been made.[104]

It was reckless or at least negligent to make these false statements. The undisputed facts establish that these statements were reckless, or, at the very least negligent. "Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers … that is either known to the defendant or is so obvious that the actor must have been aware of it." *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990). Negligence involves a lesser mens rea, where a defendant "fails to exercise reasonable care or competence in obtaining or communicating the information." *SEC v. Hughes Capital Corp.*, 124 F. 3d 449, 453-54 (3d Cir. 1997) (quotations omitted).

It was reckless, or at least negligent, for PWCG to be making admittedly false statements to investors. Sales agents were agents of PWCG, and were authorized to make statements on behalf of the company. Calhoun admitted that it would not be appropriate for the sales agents to make these statements.[105] The undisputed facts establish that Calhoun knew the true facts when these statements were made, but did not take sufficient steps to ensure that they were not being made.

These misrepresentations were material. There also can be no dispute that this fraud concerns material information. *See Basic Inc. v. Levinson*, 485 U.S. 224,

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[104] SS 320. JA T7, p.162-84 to 162-85. The SEC also claims that the statements that the secondary and tertiary reserves had not been touched were misleading even before December 2014, because they falsely suggested that the primary reserves had sufficient. The misleading statements are not part of this motion, but are part of the overall fraud that the SEC will prove at trial.

[105] SS 313-14, 320. JA T7, p.162-79 to 162-80, 162-84 to 162-85.

231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See TSC Indus., Inc.*, 426 U.S. at 449; *Platforms Wireless*, 617 F.2d at 1092. Here, investors had asked about the risk of premium calls, and the sales agents relied on PWCG's purported track record in falsely assuring investors that premium calls were not likely. A reasonable investor would likely consider this material. Investor Samuel Bainbridge stated that the representation that the secondary reserves had not been touched was significant in his decision to invest with PWCG, for the following reason:

> [F]or me, obviously that immediately implied that all of the policies had, at that point, matured as expected or within the range and are still on track, you know, to mature as expected. And, obviously to me, again, that's—that's my major risk in this investment, is if a policy goes long . . . .
>
> [S]o, therefore, for me, that was a major, major item that I wanted to make sure . . . was there, because how else can I know if . . . all these policies that are being selected and bundled together and packaged, if they're going to work out, other than the person that's selecting them and packaging them and putting them out there has that track history . . .

JA T2, p.21-21A (Bainbridge Depo. at 40:17-41:14). That track history would be relevant to any reasonable investor.

2. The Defendants' Position

Because the life settlement products sold by Pacific West are not securities, the SEC lacks jurisdiction over Defendants and all of its remaining claims also fail as a matter of law. Even assuming arguendo that the SEC does maintain jurisdiction over Defendants, the facts underlying the SEC's Section 17(a)(2) and 10(b) claims are clearly in dispute and therefore summary judgment is not appropriate. Indeed, the SEC's limited argument is insufficient, and, at a minimum, several issues of material fact exist as to these specific claims.

The SEC's contention, set forth in three scant pages of briefing, that it has proved securities fraud as a matter of law should be rejected. First, the SEC's motion will not limit any of the issues to be tried. The SEC complains—without citing any

evidence at all—that "Calhoun and PWCG committed widespread fraud that affected virtually every aspect of the transaction," but the SEC only moves on discrete statements allegedly made by "Sales Agents." Summary judgment on one narrow aspect of the alleged "widespread fraud" would contribute nothing towards efficiency or judicial economy. The waste of time and resources inherent in trying the same issues at both the summary judgment stage and at trial is manifest. The Court should deny the SEC's motion on that basis alone.

Second, the SEC's flyby attempt to prove fraud conflates its own burdens of proof. The SEC seeks judgment "on its Section 17(a)(2) and 10(b) claims" on the grounds that certain statements were "reckless—or at least negligent." Whether recklessly or negligently, the SEC ignores the fact that Supreme Court precedent "eliminate[s] negligence as a basis for liability" under Section 10(b). *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir. 1978) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976)). The SEC has not even articulated which burdens of proof properly apply to which claims, much less has the SEC explained to the Court how it contends it has established those burdens.

Third, the SEC wholly fails to articulate any basis for imputing the allegedly negligent or reckless representations (assuming they were made) to Pacific West and Calhoun, the only two defendants as to whom the SEC contends it has established fraud as a matter of law. The SEC argues, in a footnote and without any citation to evidence, that Pacific West and Calhoun are liable for the alleged misstatements of others because Calhoun is "PWCG's CEO and sole shareholder," which the SEC contends creates "controlling person" liability. That argument ignores the Ninth Circuit's holding that the "fact that a person is a CEO or other high-ranking officer within a company does not create a presumption that he or she is a controlling person." *SEC v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011) (quotation omitted). The

SEC has failed to provide any competent summary judgment evidence connecting Calhoun to any of the alleged misrepresentations.[106] Absent some articulated factual and legal basis to impute statements of others to Pacific West and Calhoun—and the SEC has none—its motion should be denied.

Fourth, the SEC's bold claim that "there can be no dispute" of the statements' materiality must be rejected. There is clear evidence in the record that investors did not rely on the contingent reserves. Jason Wuest made this very clear: "I guess they are a safeguard, but I didn't rely on them for any of my decision-making." JA 2374; *see* SS D108. Likewise, the past returns on policies that have already matured do not have any predictive power as to future returns on policies being considered for purchase, as each policy's return depends on the unique factor of how long the insured lives. *See* JA 2196. The SEC cannot show that statements about an aspect of the product that was not relied upon by purchasers are material as a matter of law.

Fifth, and most fundamentally, there is a threshold fact question as to the reliability of the declarations the SEC contends establish fraud as a matter of law. Pacific West's own purchasers have repeatedly questioned any declaration obtained by the SEC's counsel. One such purchaser, Jason Wuest, testified that "this whole thing started with one of your investigators, Todd Brilliant, calling me and sort of informing me, you know, 'We're doing an investigation on Pacific West Capital. You being a long-term investor, do you mind answering some questions for me and signing a statement?'" JA 2375. Wuest agreed, and after he spent an hour and a half on the phone with Brilliant, Brilliant sent him a declaration that was "absolutely nothing along the terms of what our conversation was." *Id.* Wuest was so appalled at Brilliant's mischaracterization of their conversation that Wuest called Brilliant "back and brought it to his attention that, look, this isn't what I – I'm not fairly being represented in this

[106] Mr. Calhoun's testimony makes clear that he did not authorize the alleged statements pointed to by the SEC as the basis for the single theory of fraud on which it seeks summary judgment. JA 2149-52; SS D90-93.

documentation or this declaration that you're have -- want me to sign, can you rewrite it?" *Id.* Brilliant "refused to rewrite it" and never called Wuest back again. *Id.*

Wuest was disgusted after his interaction with the SEC staff. Wuest testified that Brilliant "was trying to make it seem like I was manipulated into buying something, that I had no idea what I was doing." JA 2376. Wuest finds Brilliant "very unethical." JA 2377. Most importantly, Wuest flatly rejected the contention that the SEC's claims are supported by even a shred of truth:

> "I believe that this whole case is based on people being manipulated to say what Todd Brilliant wanted people to say. If he's the main course of your investigation, then this whole case is based on lies."

JA 2378. In addition to the affirmative "lies" and mischaracterizations identified by Wuest, counsel for the SEC was perfectly content to leave in the minds of other Pacific West purchasers the false implication that their policies do not even exist. After a call from Brilliant, one purchaser thought Pacific West was a "Ponzi scheme [and] [t]here is no actual underlying policy investments." JA 2008. That purchaser thought "I have zero underlying investment to recoup . . . that's what's in my head at that time with the first phone call back." *Id.* Even though the SEC has never alleged that the underlying policies do not exist, or that Pacific West is operating a Ponzi scheme, Brilliant was satisfied that he had left that misimpression in the mind of a Pacific West purchaser, and he took no steps at all to correct it.

Even after the parties exchanged their initial summary judgment briefs, counsel for the SEC continued a campaign of misinformation. After he contacted Pacific West purchaser Raj Kohli, Mr. Kohli called him back and left the following message:

> Todd, I have looked at the arguments of both sides, and emphasize that I was well aware that I might have to pay premiums in the event the covered persons lived past the eight years provided for in the primary reserves…. I am very comfortable with my investments, and in fact I plan to reinvest the proceeds once my current policies mature.

JA 2477. As he had done with Wuest, the SEC's counsel abandoned his quest to obtain summary judgment evidence upon hearing that it would not support the SEC's case: "Todd never called me, so I assume my message was clear, even if it wasn't what he was hoping to hear." *Id.* Prior to the SEC's campaign of misinformation and attempts to orchestrate a case against Defendants (instead of actually attempting to conduct an unbiased investigation to determine the true facts), PWCG had never received a single complaint from a purchaser. Dkt. No. 28-2 ¶ 32. Having never had a complaint, PWCG has an AAA rating from the Business Consumer Alliance, an A+ rating from the Better Business Bureau. *Id.* ¶ 3. Over the last ten years, PWCG has been monitored by the California Department of Business Oversight, Securities Division, and responded to multiple subpoenas duces tecum. PWCG has been found, at all times, to be in compliance with California law. *Id.* ¶ 10.

In short, the SEC's fraud claims are, at this stage, a battle of purchaser declarations. Against the few the SEC has obtained through SEC counsel's indefensible conduct, the Court must weigh the myriad declarations testifying that "[e]ven in light of the SEC's allegations, I am satisfied with my dealings with Pacific West Capital Group." Dkt. No. 28-10. The Court must also consider deposition testimony, such as the following:

> Q: Mr. Waks, sitting here today are you satisfied with your investments with Pacific West Capital Group?
>
> A: Very satisfied.[107]

And

> Q. Do you think that [Pacific West agent] Caleb Moody has ever told you anything that is misleading?
>
> A. No.
>
> Q. Do you think Andrew Calhoun has ever told you anything that is misleading?

[107] JA 2348.

A. My conversations with Andrew have been minimal, but, no, I don't think intentionally he has.

Q. Do you think that either of them has ever lied to you?

A: No.[108]

Pacific West respectfully submits that the myriad purchasers who are happy with both their purchases and Pacific West create, at a minimum, significant fact questions as to the SEC's fraud claims, especially when the SEC's own purchaser declarations are properly considered in light of the manner in which they were obtained. Ultimately, the fact that the Court has before it competing evidence on the SEC's Section 17(a) and 10(b) claims is dispositive of the SEC's motion: summary judgment is simply not the proper venue for weighing evidence. *See, e.g., France v. Johnson*, 795 F.3d 1170, 1172 (9th Cir. 2015) ("In deciding a motion for summary judgment, a court should not weigh the evidence or determine the truth of the matter; it should only determine whether there is a genuine dispute of fact for trial."). The SEC's motion should be denied.

DATED: March 24, 2016

SECURITIES AND EXCHANGE COMMISSION

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[108] JA 2048.

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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

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Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

On March 24, 2016, I caused to be served the document entitled **PARTIES' JOINT SUBMISSION FOR THEIR CROSS-MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT** on all the parties to this action addressed as stated on the attached service list:

[ ] **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

[ ] **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

[ ] **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

[ ] **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

[ ] **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

[ ] **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

[X] **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

[ ] **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: March 24, 2016

/s/ Kristin S. Escalante
Kristin S. Escalante

SEC v. Pacific West Capital Group, Inc.; Andrew B. Calhoun IV, *et al.*
United States District Court – Central District of California
Case No. 2:15-CV-02563-FMO-FFMx
(LA-04248)

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