UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **GEORGE CHARLES CODY PRICE,** **Respondent.**	**ADMINISTRATIVE PROCEEDING** **FILE NO. 3-16946**

RESPONDENT'S OPPOSITION & RESPONSE

TO THE DIVISION'S MOTION FOR SUMMARY DISPOSITION

Respondent George Charles Cody Price ("PRICE") files the Response to the Division of Enforcement's (the "DIVISION") Motion for Summary Disposition (the "MOTION") in the above captioned Administrative Proceeding (the "PROCEEDING") initiated by the Securities and Exchange Commission (the "SEC") in its Order Initiating Proceeding (the "OIP") dated November 5, 2015.

I. INTRODUCTION.

While this Response does not argue that Price did not consent to a permanent injunction nor does it dispute the allegations deemed true for purposes of this proceeding, Price challenges the Division's assertions that he engaged conduct amounting to violations of Section 17(a) of the Securities Act of 1933 or Rule 10(b) of the Securities and Exchange Act of 1934 ***to the extent it warrants the punishment requested***, above and beyond the relief consented to by Price in the underlying Consent Decree and Final Judgment.

Contrary to the Division's position the following uncontroverted points demonstrate that a permanent bar and disqualification from the financial industry, such that Price will for the rest of his natural life be labeled a "bad actor" is not appropriate and should be very limited:

1. Any evidence of misrepresentation, misappropriation, and mismanagement of the ABS Fund, LLC (Arizona), ABS Fund, LLC (California) and Capital Access Fund, LLC (Nevada) collectively the "FUNDS" should be taken in consideration of the complete record of the underlying civil case;

2. Any calculation of investor loss is complicated by the fact that actual determination of the Funds' performance will be dictated by the outcome of a separately pending FINRA case number 14-02711;

3. Price has cooperated extensively in this proceeding and in the Division's investigation in the underlying civil case and voluntarily entered into the Consent Decree and Final Judgment to resolve the underlying civil case; and

4. Price has been stripped of a livelihood and effectively barred from the industry as a result of the Complaint filed on February 11, 2013.

Accordingly, Price assert the harsh sanctions already ordered against him: the permanent injunction, cease and desist order, civil fines and penalties, are sufficient punishment for his violations.

II. LEGAL ARGUMENTS & AUTHORITIES.

A. Procedural Background.

This is a follow-up proceeding which originates from a Final Judgment entered by Consent Decree against the Respondent on or about June 26, 2015, permanently enjoining Price from future violations of Section 17(a) of the Securities Act of 1933 (the "Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) and 206(4) of the Investment Advisers Act of 1940 (the "Adviser's Act") and Rule 206(4)-8 thereunder, in the civil action entitled *Securities and Exchange Commission v. ABS Manager, LLC, et al.*, Civil Action Number 13 CV 0319 GPC (BGS), in the United States District Court for the Southern District of California (the "Court"). (see Exhibits B and C to Declaration of Lynn Dean filed in support of the Division's Motion.)

After denying the SEC's *ex parte* temporary restraining order and requested receivership in early 2013, the Court later granted in part and denied in part the SEC's motion for preliminary injunction on March 20, 2013. Consistent with the parameters of the Preliminary Injunction Order, ABS Manager, LLC (a single member LLC wholly owned and controlled by Price) has continued to make monthly distributions from the bonds remaining in the ABS Manager controlled accounts to

certain investors, up to and through the present date. Per the order, there have also been no manager fee or any sort of profit sharing, or expenses taken out from investor proceeds since January 2013 to present date.

Prior to Settlement, the parties completed discovery, which included depositions of expert witnesses, investors and several third parties, along with the exchange of voluminous sets of documents primarily related to the Funds' investors and investment accounts. Each party brought its own Motion for Summary Judgment. The Court on June 11, 2014 denied the SEC's MSJ and granted in part/denied in part the MSJ filed by Price and the other Defendants.

Specifically, the Court granted the Defendants' request for summary judgment on the SEC's first two causes of action for: (1) violations of Sections 206(1) and 206(2) of the Adviser's Act; and (2) and Violations of Section 206(4) of the Advisor's Act and Rule 206(4)-8.[2] The Court later upon the SEC's Motion for Reconsideration reversed its decision stating, "based on the parties' arguments, the Court concludes there are genuine issues of material fact as to whether Defendants provided advisory services as to non-agency securities."

The issue for the Court turned on the fact that the Defendants' held one non-agency bond (owned separately by Price, and bought by Price prior to the formation of any of the Funds) in the same account as the ABS and Capital Access Fund bond portfolios. There was no issue of material fact as to the Defendants' qualified use of the exemption from registration under Advisors Act with respect to all other fund assets.[3]

Ultimately, the case was resolved by mutual agreement of the Respondent and the SEC upon the language in Exhibit 1, the Consent Decree and Final Judgment, in a Settlement Conference before Hon. Bernard Skomal, Magistrate Judge on or about February 6, 2015. The Respondent has at each juncture of this proceeding and in the underlying civil case cooperated and

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[2] Order on Motion for Summary Judgment dated June 11, 2014 attached hereto as **Exhibit A**.

[3] Order on Motion for Reconsideration dated December 18, 2014 attached hereto as **Exhibit B**.

voluntarily complied with the requests of the Commission to the greatest extent possible, without sacrificing procedural and due process rights available to him.

B. Allegations Deemed True.

While the Motion for Summary Disposition by the Division is eager to attribute additional responsibility to the Respondent's conduct in a forum where he is unable to contest such allegations, this Proceeding is scheduled to be resolved *after* the Respondent's agreement to enter a Consent Decree and Final Judgment, but *before* the hearing in a related FINRA arbitration.

For purposes of this Proceeding these are the only allegations deemed true by the Respondent:

1. Exhibit A to the Declaration of Lynn Dean filed in support of the Division's Motion is a true and correct copy of the complaint filed by the SEC in the underlying civil case.

2. The Allegations in Exhibit A

3. Exhibits B and C to the Declaration of Lynn Dean filed in support of the Division's Motion constitute true and correct copies of the Consent Decree and Final Judgment entered in the underlying civil case.

4. The Respondent has agreed in principle to be enjoined from violations of federal securities laws as of February 6, 2015.

5. The Respondent consented to the entry of the final judgment and permanent injunction on a neither admit nor deny basis entered on July 16, 2015.

6. The Respondent is the sole owner and officer of ABS Manger, LLC (of Arizona), the manager of the Funds.

The Commission also is bound by these findings, which simply do not support the notion that the Respondent was in any way involved with the principal acts of fraud and deceit as alleged by the Division, based solely on the above mentioned violations, which Price does not (nor *cannot*) dispute, this Court must now determine, in its discretion, the appropriate sanctions for such violations, giving regard to the sanctions previously agreed to, Price's circumstances, and the public interest.

C. Consent to Judgment and Monetary Penalties.

Price consented to the entry of the Final Judgment (see Exhibit 1) and the imposition of the permanent injunction by Consent Decree (also contained at Exhibit 1) through a voluntarily participation in a one-day settlement conference presided over by Magistrate Skomal in February 2015. It was at the suggestion of Magistrate Skomal that the issue was raised whether the Division's staff attorneys were aware of any other actions threatened or pending against the Respondent. The response was a negative, and on such basis the settlement process continued without further amending the Consent Decree and Final Judgment and not knowing this action would be brought seeking the relief requested. This is by no means to suggest that the Division staff attorneys were dishonest in their response to the issue raised by Magistrate Skomal, rather the point is raised to shed light on the mindset of the Respondent and his counsel at the time the Consent Decree and Final Judgment were agreed to. Further, Price requested the word "misconduct" be stricken from the language of the settlement decree. This was granted by the commission as part of the final language.

Price has complied with these sanctions and will hereafter continue to comply with these sanctions; has assured the SEC he will not commit future violations; recognizes the seriousness of the injunction against future violations, and is willing to accept a permanent bar, but only under the limitations as set forth in this Response. The initiation of the underlying civil case in February 2013 has until the present time (and will in perpetuity) end Price's career in the securities industry and at this point in his life – at 37 years of age – Price will have to transition to a new means of employment and livelihood to support his family.

The permanent bar can "permanently deprive" a respondent of his/her "career and livelihood" and is a harsh remedy in and of itself. *SEC v. Jasper*, No. C-07-06122, 2010 WL 8781211 at 10-11 (N.D.Cal. July 21, 2010) (noting that the permanent bar can be an unduly harsh and draconian sanction in certain circumstances); *Arthur Lipper Corp. v. SEC*, 547 F. 2d 171, 184 (2nd Cir 1976) (describing the permanent bar as severe).

Based on these agreements, Price is simply requesting that the bar be for a period of time less than permanent (3 to 10 years); and that a bad-actor waiver (or partial bad-actor waiver) be incorporated into the settlement agreement resolving this proceeding.

D. Agreement for Further Cooperation.

In addition to the foregoing, Price will agree to furnish a copy of the Consent Decree, Final Judgment, and Settlement of this proceeding to any interested persons for the next ten (10) years. Further, as demonstrated more fully below Price, at all times, complied with the preliminary injunction requested by the Division and approved by the District Court, with his consent.

Despite the weight of factors in the Respondent's favor, including (1) Price's record of working fully and cooperatively with the Commission; (2) his lack of any prior violations; (3) the sincerity of his assurances that he would not commit future violations (4) his recognition of the seriousness of the allegations and the nature of his conduct (5) the unlikeliness that his future occupation (if any) will present opportunities for future violations, the Division now seeks additional penalties in the form of a permanent bar which is unjust, unreasonable, and unsupported by the evidence.

A permanent bar will preclude Price from participation in the profession he has worked in his entire professional life. Price respectfully requests the Court order that the current sanctions imposed are sufficient and that any bar be either: (a) limited in time (less than permanent); or (b) limited in scope (including a partial bad actor waiver or at a minimum not expressly precluding Price's right to apply for such at the end of the limited ban, and that no further sanctions are in the public interest.

II. LEGAL ARUMENT & AUTHORITIES.

A. Applicable Standards.

This Commission has broad discretion to set sanctions in administrative proceedings. *Butz v Glover Livestock Comm'n Co.*, 411 U.S. 182, 188-189 (1973); *In re Philip A. Lehman* Release No, 34-54660, 2006 WL 3054584 at 3 (Oct. 27, 2006). When the Commission determines

administrative sanctions, it considers the following factors:

1. The egregiousness of the defendant's actions;
2. The isolated or recurrent nature of the infraction;
3. The degree of scienter involved;
4. The sincerity of the defendant's assurances against future violations;
5. The defendant's recognition of the wrongful nature of his conduct; and
6. The likelihood that the defendant's occupation will present opportunities for future violations.

See: Steadman v. SEC, 603 F. 2d 1126, 1140 (5th Cir. 1979) quoting *SEC v. Blatt*, 583 F. 2d 1325, 1334 n.29 (5th Cir. 1978) affirmed on other grounds, 450 U.S. 91 (1981). In addition, the Commission must determine the sanctions pursuant to a public interest standard. In considering whether a sanction is in the public interest, the Commission may consider the following factors:

1. Whether the act for which the penalty is assessed involved fraud, deceit, manipulation, or deliberate reckless disregard of a regulatory requirement;
2. The harm to other persons as a result of the respondent's actions;
3. The extent to which the respondent was unjustly enriched, taking into account any restitution made to persons injured by the behavior;
4. Whether the respondent previously violated federal securities (and other) laws;
5. The need for deterrence; and
6. Other matters as justice may require.

See: Exchange Act Section 21B(c); Advisors Act Section 203(i)(3); and Investment Company Act Section 9(d)(3). An analysis of these factors demonstrates the sanctions requested by the Division are not in the public interest and unwarranted under the circumstances.

B. Nature of Price's Actions.

The first three of the Steadman factors relate to the nature of the respondent's actions and violations. *Steadman*, 603 F.2d at 1140. These factors are the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, and the degree of scienter involved. *Id.* Although Price does not challenge that his conduct may have constituted violations of the relevant securities law, and he is aware that the allegations in the underlying complaint are deemed true for purposes of this proceeding, he does assert that in this circumstance, each of these factors weighs either in favor of the sanctions he requests the Court adopt, or a minimum, fails to support the additional sanctions now sought by the Division in its OIP.

The Division alleges the Respondent violated various federal securities laws in connection

with the offer, sale and management of investments in the Funds; however, the SEC does not allege that Defendants are conducting a Ponzi scheme or that the Funds' assets do not exist. The Court even went so far as to say there was no evidence that Defendant Price would dissipate assets when it came time to determine whether to impose an asset freeze on Price, (*Note: Order Granting Plaintiff's Motion for Preliminary Injunction and Orders* Dkt. No. 31, p. 9, lines 1-2), as investors were regularly receiving monthly distributions at the promised rate of return, based in their original capital contributions, as set forth in each of the offering memorandums.

As set forth below, and noted by the District Court, this case boils down to a fundamental disagreement over the valuation of the underlying assets held by the Funds, and cannot be properly determined until such time as the FINRA arbitration resolves such issue in September 2016.

To support its claims for misappropriation, the SEC claims the Respondent was wrongfully paid some $500,000 in management fees. The uncontroverted evidence on record in District Court thus far shows, however, that the SEC is plainly wrong on this contention. To the contrary, the evidence unequivocally establishes that $332,100 of such funds were transferred to the third-party account of three investors, and were not disbursed or used for the benefit of Defendants or Relief Defendants.

There is no evidence of misappropriation here, and ***no*** evidence that any investor failed to receive the distributions due from the Funds as laid out clearly in the offering materials that each investor agreed to Indeed, investors have received over $3,257,000 in distributions from the Funds over the past three (3) years.

Insofar as management and performance of the Funds are concerned, the SEC's case is nothing more than a technical dispute about estimates of the value of esoteric securities that trade in an opaque market. The SEC concedes that the Funds have been generating high rates of return: "From 2010 to 2012, the Funds received interest payments from the securities they held in excess of 12% to 18%." (PI Motion, p. 5, lines 24-26).

The SEC claims, however—largely on the basis of unreliable *estimates* of the value of unsold securities—that the Fund's holdings have declined in value, thereby reducing the Funds' total return, that Defendants have misrepresented the Funds' assets under management and performance, and that management was not entitled to compensation.

To support its claims that Price made material misrepresentations or omitted to disclose material information in connection with the offer and sale of securities to investors and prospective investors, the SEC claims Defendants (i) failed to disclose the Funds' investments in risky interest-only CMOs ("IOs") and (ii) misrepresented Defendant Price's investment experience.

As to the former, IOs are a type of CMO. The overall risk factors and risk disclosures in the offering documents (including PPMs) were sufficiently broad such that the overall risk of each type of CMO Defendants offered, purchased and managed by the Funds was sufficiently disclosed to investors and prospective investors. As to the latter, there is a debate as to whether he was employed or just affiliated with two major financial institutions, the allegations by the Division are by no means conclusive.

Regardless, certain investors (note **Exhibit C**) provided declarations in which they stated that they understood that: (1) the share prices were discretionary and not related to the values of the securities owned by the Funds; (2) the value of those shares may not change even though the values of the underlying securities owned by the Fund would; (3) the rates of return were based on the investor's capital contributions, that the rates did not take into account the actual value of the securities owned by the Fund at any given time; (4) the high risk of investing in these types of securities, including total loss of investment; (5) the preferred return was not guaranteed, nor were there any guarantees regarding the backing for those securities purchased by the Fund; (6) the rate of return indicated on the investor account statements were based on the investor's capital contributions and did not correlate with the actual value of the securities owned by the Fund. Per the Nevada Limited Liability Company Act, investors in an LLC have no ownership in the LLC's assets, and only have a right to the profits or distributions of the LLC – here we are talking about Capital Access, LLC a Nevada LLC, thus note Nevada Revised Statutes Section 86, *et. seq.*

The Funds investors further declared that they understood: (1) the description of the securities provided on the account statements were for illustration purposes only and may not reflect the actual positions at that time; (2) the Fund was not providing values for the securities because it was difficult to accurately price the value of those securities; (3) Mr. Price's employment history was not a factor in their decisions to purchase fund interests, nor was the amount of securities in the Fund's account or the amount of monies others invested in the Fund. (*See* Dkt. No.

73-3, Exhibits F and G).

The Division, on the other hand, has presented no investors declarations or testimony to support its claims, rather it merely introduces the unproven allegations as set forth in the complaint to the initiation of the underlying civil case dated February 13, 2013, which fails to take into account any of the information gleaned through the discovery process.

The other serious fact for consideration is that the FINRA arbitration case against Morgan Stanley Smith Barney ("MSSB") where the Respondent has taken issue with the manner in which the Funds' bond portfolios were liquidated will not be decided until at the earliest September 2016. This hearing will conclusively determine what amount the Funds' investors lost, if any, as the expert testimony in support of the Respondent's position in this matter is that the Funds' portfolio is greater of greater value (*true value*) than that represented on the books of MSSB (*book value*) at the time of the sale. It is equally as likely that the Funds' investors (specifically the investors of ABS Fund, LLC (of California) and Capital Access Fund, LLC (of Nevada) will, like the ABS Fund, LLC (of Arizona) have no loss no money.

At present, ABS Fund, LLC (of Arizona) and its investors have not lost any money and will lose no money. The fund has been closed to new investment and existing investors since 2010, and will receive their principal and interest pro rata distribution upon liquidation of the fund assets – something which Price is currently in the process of, and which he would be forced to abandon and withdraw from, were he to agree to the SEC's Settlement Offer proposed during the Settlement Conference before Hon. Cameron Elliot, ALJ. Otherwise, Price will agree voluntarily or otherwise to the prohibitions in the proposed settlement with the SEC, provided there is some transition period between the present time and September 2016, the time of the FINRA arbitration hearing.

At present, any Capital Access Fund, LLC loss which may have occurred, is contingent upon the separate outcome of a now pending FINRA arbitration by Price, Capital Access, LLC and ABS Manager, LLC against Morgan Stanley Smith Barney ("MSSB") which takes issue with the manner in which MSSB liquidated the assets of ABS Manager LLC, and subsequently For the benefit of Capital Access Fund. Although the contention is that the Funds have decreased substantially in value, this is something, which clearly cannot actually be determined until the outcome of the FINRA arbitration hearing.

Finally, Price is a critical witness and participant in the above-described FINRA matter. An order by this Court that Price is barred from the industry and labeled a "bad actor" would have potential adverse consequences related to the outcome of this action, to the detriment of Capital Access Fund's investors, by limiting his involvement in this matter.

B. Price's Post Violation Conduct.

The final three *Steadman* factors relate to the Respondent's post-violation conduct: the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations. These factors, with the limitations proposed by Respondent for a Settlement of this proceeding, clearly weigh in favor of the sanctions Price request, that the Court Order, the sanctions already impose by the SEC, and against those now requested by the Division.

C. Penalties.

The division seeks to bar the Respondent permanently as set forth in the OIP from the financial industry and bar him from association with any registered person permanently. It is our contention that while the "disqualifying events" were in connection with an offering under Regulation D, the other factors relevant for consideration, as well as the absence of any determination of any investor loss, mitigate any harm caused thereby.

Moreover, the remedial measures which Price is willing to voluntarily employ in conjunction with the proposed settlement and existing judgment significantly decrease any likelihood of future harm from the very conduct which Price is enjoined and from which the SEC seeks to further ban him from in this proceeding.[4]

We note, the arguments set forth herein by the Respondent, are analogous to arguments made by others seeking a waiver from disqualification under Regulation D or A, where such disqualification

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[4] See: RBS Securities Waiver Request: http://www.sec.gov/divisions/corpfin/cf-noaction/2013/rbssecurities-section3(b)-112513.pdf

would disproportionally harm them and their clients.[5] In light of the grounds for relief discussed above, we believe that disqualification from being able to rely on the exemptions is not necessary, in the public interest, or for the protection of the Funds' investors, and that Price has shown good cause that relief should be granted. At a minimum, Respondent will submit to a three (3) year industry bar, provided a waiver of bad actor status is not expressly prohibited or incorporated in some form into the Settlement of the OIP.

III. CONCLUSION.

WHEREFORE, the Respondent George Charles Cody Price, by and through his undersigned counsel requests the Court consider the arguments and authorities set forth in this Response and Opposition to the Division's Motion for Summary Adjudication as an alternative means for resolution of the OIP in a manner consistent with the objective and purpose behind the SEC's policy on administrative proceedings, but mindful of the relevant public policy considerations in considering punishment of respondents such as Price.

DATED: January 21, 2016

Respectfully submitted,

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COUNSEL FOR RESPONDENT GEORGE CHARLES CODY PRICE

[5] See Credit Suisse Waiver Request: https://www.sec.gov/divisions/corpfin/cf-noaction/2014/credit-suisse-group-ag-022114.pdf

In the Matter of George Charles Cody Price
Administrative Proceeding File No. 3-16946

Service List

Pursuant to Commission Rule of Practice 151(17 C.F.R. § 201.151), I certify that the attached:

RESPONSE & OPPOSITION TO THE MOTION FOR SUMMARY DISPOSITION BY RESPONDENT GEOREGE CHARLES CODY PRICE

On January 21, 2016.

By: Facsimile and Overnight Mail
Brent J. Fields, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549-1090
Facsimile: (202) 772-9324
(Original and three copies)

By: Email
Honorable Brenda P. Murray
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E., Mail Stop 2557
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Email: alj@sec.gov

By: Email and Overnight Mail
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Email: deanl@sec.gov

DATED: January 21, 2016 BY: _____
John E. Dolkart, Jr., Esq.

Exhibit A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. ABS MANAGER, LLC and GEORGE CHARLES CODY PRICE, Defendants, ABS FUND, LLC [ARIZONA]; ABS FUND, LLC [CALIFORNIA]; CAPITAL ACCESS, LLC; CAVAN PRIVATE EQUITY HOLDINGS, LLC; and LUCKY STAR EVENTS, LLC, Relief Defendants.	CASE NO. 13cv319-GPC(BGS) **ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT; AND GRANTING DEFENDANTS' MOTION TO SET ASIDE DEFAULT** [Dkt. Nos. 61, 64, 66, 72.]

Before the Court are Plaintiff Securities and Exchange Commission's motion for summary judgment; and Defendants ABS Manager, LLC and George Charles Cody Price's motion for summary judgment and motion to set aside default. (Dkt. Nos. 61, 64, 66.) Oppositions and replies were filed. (Dkt. Nos. 70, 71, 73, 74, 75, 77.) After a review of the briefs, supporting documents, and the applicable law, the Court DENIES Plaintiff's motion for summary judgment; GRANTS Defendants' motion for

partial summary judgment; and GRANTS Defendants' motion to set aside default.

Background

On February 8, 2013, Plaintiff Securities and Exchange Commission ("SEC") filed a complaint along with an *ex parte* application, without notice, for a temporary restraining order ("TRO") and order freezing assets; appointing a receiver over defendant ABS Manager, LLC and the entities it controls and manages; prohibiting the destruction of documents; granting expedited discovery; and requiring an accounting. (Dkt. Nos. 1, 2.) The SEC also filed an *ex parte* application, without notice, for an order temporarily sealing the entire file until the asset freeze is served. (Dkt. No. 2.) On February 11, 2013, the Court denied Plaintiff's *ex parte* application for TRO and denied Plaintiffs' *ex parte* application to temporarily file entire case under seal. (Dkt. No. 3.) On February 19, 2013, Plaintiff filed a motion for preliminary injunction along with an *ex parte* motion to shorten time for hearing on the motion for preliminary injunction. (Dkt. No. 5.) After briefing by both parties, on February 27, 2013, the Court granted Plaintiffs' *ex parte* motion and set the matter for hearing on March 15, 2013, which was continued to March 19, 2013 after granting the parties' joint motion to continue the hearing date. (Dkt. Nos. 22. 24, 30.) On March 20, 2013, the Court granted Plaintiff's motion for preliminary injunction and for an order partially freezing assets of ABS Manager and the Funds, preserving documents, and requiring an accounting and denying Plaintiff's motion for an order freezing all funds' asset and personal assets and order appointing a receiver. (Dkt. No. 31.) A preliminary injunction order was filed on April 4, 2013. (Dkt. No. 35.)

The complaint alleges violations of sections 206(1) and 206(2) of the Investment Advisers Act of 1940; violations of section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8; violations of section 17(a) of the Securities Act of 1933 ("Securities Act"); violations of section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5; and violations of section 20(a) of the Securities Exchange Act of 1934. (Dkt. No. 1.)

Plaintiff moves for summary judgment as to all causes of action in the complaint. Defendants move for summary judgment as to the first two causes of action based on violations of the Investment Advisers Act of 1940 as they contend they fall under an exception to the definition of investment adviser. Defendants also move to set aside default entered against Relief Defendants Cavan Private Equity Holdings, LLC and Lucky Star Events, LLC. (Dkt. No. 59.)

Factual Background

ABS Manager, LLC was formed by George Charles Cody Price ("Price") in March 2009. Price is ABS Manager's sole member, and serves as its President and Chief Executive Officer. From 2009 to the present, 35 individuals invested about $20 million to three Funds, ABS Fund, LLC (Arizona) ("ABS Fund Arizona"), ABS Fund, LLC (California) ("ABS Fund California") and Capital Access, LLC Fund (collectively known as the "Funds") managed by Defendants. Investors received membership units or interests in the Funds in which they invested and a brokerage held the securities.

The ABS Fund Arizona was first offered in March 2009 and sold units to about 13 or 14 investors for around $2.4 million. (Dkt. No. 64-3, Dean Decl., Ex. 1 at 1.) ABS Fund Arizona's Private Placement Memorandum ("PPM") stated that investors were entitled to a rate of 18% on their unreturned capital contribution. (Id. at 6.)

The ABS Fund California, also known as the Nationwide Platinum Fund, was first offered in June 2010 and sold units to 35 investors for about $14.1 million. (Dkt. No. 64-3, Dean Decl., Ex. 2 at 1-2.) The ABS Fund California's PPM stated that investors were entitled to a 12.5% variable return with a minimum of 7.48% on their unreturned capital contribution. (Id.)

The Capital Access Fund was first offered in August 2012 and sold units to 35 investors for about $18.8 million. (Dkt. No. 64-3, Dean Decl., Ex. 3 at 1.) This Fund provided that investors were entitled to a 12.5% variable return with a minimum of 7.48% on their unreturned capital contribution. (Id. at 8-9.)

The Funds used investor funds to obtain U.S. government issued agency interest

only ("IO") collaterized mortgage obligations ("CMO") and reverse IO CMOs which were purchased through brokerage accounts maintained by the Funds with licensed broker dealers, such as Morgan Stanley Smith Barney ("Morgan Stanley"). The investors receive monthly interest payments that accumulate in the accounts. These calculations are conducted by a third-party accounting professionals. The Fund, through ABS Manager, distributed the accumulated monthly interest to the investors according to the accountant's spreadsheets. The accounting firms send monthly account statements to each investors, which reflect distributions and the investor's monthly membership interest account statements. The third party accounting firms also calculate the compensation that ABS manager is to receive after distributions are made to the Fund's investors. SEC disputes theses facts to the extent that the accounting firms did not base calculations or did not take into consideration the net asset value of the Funds.

Mortgage-backed securities ('MBS") are bonds whose payments are secured by the principal and interest payments made by borrowers in a collection, or pool, of mortgages. (Dkt. No. 64-28, Weiner Expert Report at 6.) Mortgage backed securities can be either "Agency" or "Non-Agency." (Id. at 9.) A government-backed instrument is known as Agency.

> An Agency carries the names of one of the mortgage Government Sponsored Entities ("GSE"): Fannie Mae, Freddie Mac or Ginnie Mae. In return for a fee taken as a slice of interest from the mortgage payments in the pool, the GSEs guarantee the timely payment of principal and interest of each of the mortgages in the pool. (Id.) This 'Agency' guarantee effectively removes default risk from the investment because if a mortgagor defaults, the Agency purchases the loan from the pool at full face value, along with any interest accrued and owed, and that repurchase is passed along to investors in the pool.

(Id.)

Ginnie Mae is not a government agency, but is a 'wholly-owned government corporation located within the U.S. Department of Housing and Urban Development (HUD)'" (Id. at 10.) Fannie Mae and Freddie Mac are "government-chartered, but publicly-owned, corporations, with common and preferred stock that trade on public

stock exchanges." (Id.) This Agency "guarantee" applies to timely payment of interest and principal but not on a decline in the market value of any security or a guarantee that an investor will necessarily earn a positive return on the holding of a security. (Id.)

An Agency Collateralized Mortgage Obligation ("Agency CMO") was created from MBS and "redirects the principal and interest cash flows from a pool of similar mortgage pass-throughs into a different and newly-created set of bond classes or 'tranches.'" (Id. at 12.) CMO tranches can be tailored to meet a particular investment need or investor class. (Id.) While there is an Agency guarantee as to the required payments to investors, it does not guarantee a liquid market or a positive return on an investment, especially one that is sold prior to its maturity date. (Id. at 13.) A type of Agency CMO is an interest only ("IO") where investors receive only the interest payments. (Id.) Because it receives no principal, it has no underlying principal balance but instead has a "notional" balance which tracks the balance of the underlying bond from which it was structured. (Id. at 14.) Since there is no principal payment, the investor does not receive a final return of principal as a single payment on the final maturity date or as a stream distributed throughout the life of the investment. (Id.) The investor is only entitled to interest flows during the time the security is outstanding. (Id.) Should mortgage refinancings increase, then the flow is reduced and ultimately extinguished. (Id.) Owning an IO security "constitutes a sort of race to recoup the initial investment plus enough additional interest to produce a desired level of return before the security disappears." (Id.)

An Inverse IO is a CMO tranche that pays only interest and with a coupon that resets monthly according to an inverse-type formula. (Id. at 18.) These are the "among the most complex, difficult to understand, value and manage mortgage derivative securities . . . and are considered to be among the riskiest forms of CMO securities."

(Id.)[1]

According to Plaintiff, the Inverse IOs contain two risks. First, the risk of a rise in LIBOR reducing the coupon as a result of the coupon formula, and second, the risk of an increase in mortgage prepayments, which will cause the notional balance of the security to pay down and eventually evaporate. The Agency guarantee provides no protection as to these risks. According to Price, the "government backing" of Agency IOs and Inverse IOs eliminates IO credit risk and several other risks. (Dkt. No. 73-2, Price Decl. ¶ 34.)

All three of the Funds' PPMs state the Fund would invest in various types of collateralized mortgage obligations ("CMO") but do not mention the specific type. (Dkt. No. 64-3, Dean Decl., Ex. 1 at 1; Ex. 2 at 11; Ex. 3 at 7.) Ultimately, the ABS Funds were invested in two particular types of Agency CMOs: IO and Inverse IO tranches. (Dkt. No. 68-4, Suppl. Dean Decl., Ex. 37, Price Depo. at 118:20-23; 119:19-120:7; 121:10-18; 122:3-8; 123:34-124:1; 249:5-12.)

Agency IO and Inverse IO tranches of CMOs are high risk, volatile securities. (Dkt. No. 64-3, Dean Decl., Ex. 7 at 16-17; see also Dkt. No. 64-28 Weiner Report. at 15.) While the parties dispute the degree of risk, it is clear that these investments were not for the ordinary investor but required a sophisticated investor. (See Dkt. No. 64-3, Dean Decl., Ex. 1 at 5 (only certain sophisticated accredited investors who are able to bear a substantial loss of their capital contribution may invest); Ex. 2 at 7 (investor required to represent that they are sophisticated in busines and financial matters or have been advised by someone who is); Ex. 3 at 5 ("this offering involved substantial risks . . . investors in the company must have such knowledge and experience in business and financial matters as will enable them to evaluate the merits of the proposed

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[1]Defendants' expert testified that Inverse IOs are not considered to be among the riskiest forms of CMO securities. (Dkt. No. 73-3, Beirne Depo. at 96:12-15.) Then, Plaintiff cites to the deposition of Defendants' expert, Beirne, where he states "this is a high-risk fund"; however, Plaintiffs do provide sufficient portions of the transcript for the Court to determine which fund he is talking about. (Dkt. No. 84-3, Dean Decl., Ex. 43, Beirne, Depo. at 112:7.) There is an implication that the CMO IO securities are high risk. (Id. at 116:3-15.)

investment . . . and be able to bear the economic risks of this investment.") In their opposition, Defendants concede and state that the investors understood the high risk of investing in these types of securities and that they could lose their total investment and they also understood that the preferred return was not guaranteed nor were there any guarantees regarding the backing for the securities purchased by the fund. (Dkt. No. 73-3, Price Decl., Ex. F, Flagg Decl.¶ 9; Dkt. No. 73-3, Price Decl., Ex. G, Murch Decl. ¶ 16.)

According to Price, Agency CMOs are "fairly sophisticated and not easily understood by the average financial advisor. This is primarily due to the simple fact these securities are traded in a specialized market and are considered 'odd lot' purchases. Where as most banks look to lend against what are called "round lot' CMOs which are larger in average size than 'odd lot' smaller in size CMOs. While there is always a market in which these securities can be sold, it requires doing a lot of homework and making sure that the bid and ask prices are commensurate with the value of the income generated by the interest-only CMOs in order to obtain a fair price. Not every firm has a person who is an expert in this area, and there are only a few qualified individuals at the films that do have the ability and desire to evaluate and trade these securities." (Dkt. No. 73-2, Price Decl., Ex. A, Price Decl. in Opp. to Pl's Ex Parte Appl. ¶ 11.)

From 2010 to 2012, the Funds made interest payments to investors of 12% to 18%. However, the value of certain portfolios held by ABS Arizona and Capital Access had decreased significantly in value.

Discussion

A. Legal Standard for Federal Rule of Civil Procedure 56

Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action. " Celotex Corp. v. Catrett, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. Celotex Corp., 477 U.S. at 323. The moving party can satisfy this burden by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element of his or her claim on which that party will bear the burden of proof at trial. Id. at 322-23. If the moving party fails to bear the initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970).

Once the moving party has satisfied this burden, the nonmoving party cannot rest on the mere allegations or denials of his pleading, but must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. If the non-moving party fails to make a sufficient showing of an element of its case, the moving party is entitled to judgment as a matter of law. Id. at 325. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In making this determination, the court must "view[] the evidence in the light most favorable to the nonmoving party." Fontana v. Haskin, 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the trier of fact. Anderson, 477 U.S. at 255.

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B. Anti-Fraud Provisions: Sections 17(a)(1)-(3) of the Securities Act; Section 10(b) of the Exchange Act and Rule 10b-5

Plaintiff moves for summary judgment on the anti-fraud provisions of the Securities Act and the Exchange Act. The third cause of action alleges violations of sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act, 15 U.S.C. §§ 77q(a)(1), 77q(a)(2), & 77q(a)(3). Section 17(a) prohibits fraud in the offer or sale of securities and provides:

> It shall be unlawful for any person in the offer or sale of any securities . . .by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. §§ 77q(a)(1) -(3).

The fourth cause of action is for violations of section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b); and Rules 10b–5(a-c), 17 C.F.R. § 240.10b–5. Section 10(b) prohibits fraud in connection with the purchase or sale of any security:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange - - . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b–5 seeks to enforce these statutes by making the following acts in connection with the purchase or sale of any security unlawful:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or

> of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b–5.

Section 17(a) of the Securities Act, section 10(b) of the Exchange Act, and Rule 10b-5 consist of the same elements. See SEC v. Rauscher, Inc., 254 F.3d 852, 855-56 (9th Cir. 2001). They all "forbid making [1] a material misstatement or omission [2] in connection with the offer or sale of a security [3] by means of interstate commerce." SEC v. Phan, 500 F.3d 895, 907-08 (9th Cir. 2007) (citing Rauscher, 254 F.3d at 855-56). Section 17(a)(1), section 10(b) and Rule 10b-5 also require scienter while violations of sections 17(a)(2) and (3) require a showing of negligence. Phan, 500 F.3d at 908. In a securities fraud action, '[m]ateriality and scienter are both fact-specific issues which should ordinarily be left to the trier of fact,' although 'summary judgment may be granted in appropriate cases.'" Kaplan v. Rose, 49 F.3d 1363, 1375 (9th Cir. 1994) (citation omitted).

In this case, the parties dispute whether Defendants made a material misstatement or omission, and whether Defendants acted with scienter.

1. Material Misrepresentation or Omission of Fact

The SEC alleges affirmative material misrepresentations and omissions made by Defendants to the Fund investors in the Funds' account statements, newsletters, on the Funds' websites, on the radio and in the PPMs provided to the investors. The SEC asserts that Defendants misrepresented how the Funds were performing, failed to disclose risks of the Funds, misrepresented Price's experience, and misrepresented assets under management.

Defendants argue that the SEC misunderstands the nature of these agency CMOs as they are sophisticated and not easily understood by the average financial advisor.

They also contend that ABS Manager provided written and verbal disclosures regarding the nature of IO and inverse IO investments. Price further denies he misrepresented his prior work experience. Lastly, he alleges that the SEC's use of the term "assets under management" is incorrrect.

Violations of the securities antifraud provisions prohibit the making of material misstatements or omissions. SEC v. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001); see also Basic, Inc. v. Levinson, 485 U.S. 224, 231–32 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). "An omitted fact is material 'if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1092 (9th Cir. 2010) (quoting Phan, 500 F.3d at 908). In other words, a misrepresentation, misstatement, or omission is material if there is a substantial likelihood that a reasonable investor would consider the true or complete information important in making an investment decision. See id. As such, the antifraud provisions of the securities statutes and regulations impose a "'duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading.'" SEC v. Fehn, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 504 (9th Cir. 1992)).

Determining materiality in securities fraud cases "should ordinarily be left to the trier of fact." Phan, 500 F.3d at 908 (citing In re Apple Computer Secs. Litig., 886 F.2d 1109, 1113 (9th Cir. 1989)). "Materiality typically cannot be determined as a matter of summary judgment because it depends on determining a hypothetical investor's reaction to the alleged misstatement." Id. "The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact. Only if the established omissions are 'so obviously important to an investor, that reasonable minds cannot differ on the question

of materiality' is the ultimate issue of materiality appropriately resolved 'as a matter of law' by summary judgment." TSC Indus., 426 U.S. at 450.

a. Defendants Misrepresented and/or Failed to Disclose the Funds' Performance

The SEC alleges Defendants made affirmative misrepresentations and omissions by claiming that since 2010, ABS Arizona earned annual returns of 18% and ABS Fund California and Capital Access earned annual returns of 12.5%; however, these statements as to returns do not take into consideration the value of the underlying securities. Specifically, the monthly account statements represented that each CMO held in the Funds was individually performing at 18% or better for the ABS Fund Arizona or 12% or better for ABS Fund California and Capital Access Fund. In addition, in an October 2010 newsletter by email, Price wrote that "[a]ll of the bonds are making well over 18% and will continue to do so for quite some time." (Dkt. No. 63-4, Dean Decl., Ex. 35.) Further, as of January 2013, the Capital Access website included a "Historic Reference" table showing monthly returns of 1.04% (12.5% annualized) from January 2010 through June 2012. (Id., Ex. 12 at 10.) Lastly, in a radio show, Price stated that the Funds have a variable return that "starts in the single digits and goes all the way up into the double digits" and the Funds had seen some extraordinary returns. (Id., Ex. 6 at 23, 32.) It is undisputed that these reports did not take into account the value of the assets held by the Funds. In fact, the underlying value of many of these securities held by the Funds decreased during this time and the SEC alleges that Defendants did not incorporate that fact into their calculation of "returns." For example, at least three CMOs held by the Funds were stated as performing when, in fact, they had expired and were no longer generating any returns at all.

Defendants allege that the SEC fails to understand the difficulties in valuing the securities at issue and disputes the SEC's method for valuation. According to Defendants, the SEC's use of the Interactive Data Corporation ("IDC"), a third party

aggregator used in the industry to price securities, reports are inaccurate as they only value "round lot" CMOs, not the "odd lot" CMOs at issue, which are bought at a deeper discount than "round lot" CMOs. Defendants argue that the only way to accurately value these securities is to sell them. They also contend that there is no rule or regulation that requires Defendants to report the value of the bonds to investors.

Underlying these arguments is a dispute on how the "rate of return" is defined. The parties use the term "return" loosely without a precise definition or reference to an expert. The SEC seeks to define "rate of return" to include not just the interest rate payments but also how the underlying values of the bonds are performing which Defendants admittedly failed to include.[2] Contrarily, Defendants argue that the "rate of return" on these Agency IO and Inverse IO CMO's has nothing to do with the value of the underlying assets; in fact, Price stated he had no idea about their values. Price uses interest payments to calculate returns and not the underlying asset values. (Dkt. No. 68-4, Suppl. Dean Decl., Ex. 37, Price Depo. at 175:13-24; 226:18-25; 228:12-19.)

First, the Court concludes that there is a material issue of disputed fact as to whether it is even possible to value the underlying asset without selling the underlying property. Second, while the parties do not dispute that there is no requirement that the account statements, newsletter comments, the Funds' websites, the radio comments and the PPMs regarding rate of return had to include the underlying value of the assets, there is an issue of material fact in dispute as to whether there is a substantial likelihood that a reasonable investor would have acted differently if the alleged misrepresentation had not been made and the value of the underlying asset been disclosed. See Phan, 500 F.3d at 908.

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[2]SEC writes in its moving papers, "Although Defendants used the terms 'rate of return,' and 'performing' in communicating with investors regarding the Funds and their securities, they were really referring to 'current yield.'" (Dkt. No. 68-1 at 10.) The Court notes that the SEC fails to define each of the terms of art to assist the Court in understanding its argument.

b. Defendants Failed to Disclose the Risks of the Funds Investment

The SEC argues that Defendants failed to disclose the true nature of the investment in the CMOs, particularly that the Funds would invest in the high-risk, volatile Agency IOs and Inverse IO tranches of CMOs. In response, Defendants argue that the investors were informed, in writing and orally, about the nature of the investment in Agency IO and Inverse IO CMOs.

In support, the SEC presents two investors who state they never spoke to Price before investing demonstrating that they did not know the Funds would be investing in IOs and Inverse IO tranches. (Dkt. No. 64-3, Dean Decl., Ex. 39, Nittoli Depo. at 29:22-30:2; Ex. 18, Musumeci email dated 1/28/13.) According to [redacted] Nittoli, he did not talk to anyone connected with ABS Fund before investing in the Fund except Glenn Howard.[3] (Dkt. No. 64-3, Dean Decl., Ex. 39, Nittoli Depo. at at 29:22-30:2.) He explained that he does not recall what Howard told him about the ABS Fund except that it was a good Fund. (Id. at 30:4-31:14.) He did not remember or care what the Fund invested in or whether the principal would be protected because Howard was his friend and he relied on Howard's advice. (Id. at 31:12-18.)

SEC also presents an email from an investor named [redacted] Musumeci explaining his understanding of his investment in the ABS Manager Funds. According to his email, which is not sworn under penalty of perjury, Musumeci states that his accountant introduced him to ABS Fund, LLC in January/February 2012. (Id., Ex. 18.) Subsequently, he spoke with Jay Cowan, who worked for the Fund. (Id.) In a telephone conversation, Cowan informed him that ABS Funds primarily invested in

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[3]It is not clear whether Mr. Howard works with ABS Manager or not. Since the SEC provides only portions of the deposition transcript that does not describe who Mr. Howard is and does not explain who Nittoli is talking about, the Court is unable to determine whether his conversations with Howard prior to investing in the Funds was sufficient disclosure. In Dewan's deposition transcript, it appears that Price invested in Glenn John Capital LLC, a private equity firm raising capital to make certain investments selected by Glenn Howard. (Dkt. No. 64-3, Ex. 40, Dewan Depo. at 24:12-26:6.)

government agency bonds and mortgage backed securities and said that the Fund provided a return of 7.48% plus a 5% bonus that was subject to change. (Id.) While he does not recall if Cowan explained that the ABS Fund invested in CMOs; however, upon his review, the PPM stated that the Fund would invest in CMOs. (Id.) Based on Cowan's representations, he believed the investment was safe since they were government agency bonds. (Id.) Cowan also told him that ABS Fund managers had previous experience investing in government agency bonds and that Price "previously interacted with contacts at Goldman Sachs who had experience with investing in government agency bonds." (Id.) In addition, at least one investor understood that the principal and interest payments were "guaranteed" by Ginnie Mae and that he expected that he would receive 100% of his principal back in addition to monthly "returns" paid by Defendants. (Id., Ex. 40, Dewan Depo. at 42:16-44:17; 44:20-47:15; 52:17-53:19; 58:20-59:2.) He believed the investment was safe because they were backed by Ginnie Mae. (Id.)

However, Dewan also stated that he was told by Price, prior to the date he made his investments, that the Fund was investing in an IO strip of a CMO. (Dkt. No. 73-3, Dewan Depo. at 49:6-23.) Price also explained the risk as to the interest and that the rate of return was probably going to be LIBOR inversed. (Id. at 59:3-11.) He understood that it was possible that the interest rate might fluctuate. (Id. at 59:13-16.) He also testified that he knew that the rate of return that was calculated in the offering documents was always based on his capital contribution and not on the value of the underlying bond. (Id. at 191:17-25.)

Defendants also present the declarations of two investors who state they fully understood the type of investment and the risks of IOs as they were disclosed by Price. (Dkt. No. 73-3, Price Decl., Ex. F, Flagg Decl.; Dkt. No. 73-3, Price Decl., Ex. G, Murch Decl.)

[redacted] Flagg was a financial advisor to [redacted] Kern, an investor. (Dkt. No. 73-3, Price Del., Ex. F., Flagg Decl. ¶ 2.) Prior to investing, Kern and Flagg talked with

Price about the Capital Access Fund. (Id. ¶ 3.) Price sent written materials including, investor suitability forms, the PPM, an investor's guide to CMOs and other related materials. (Id.) Kern decided to invest $2 million in May 2012, over $4 million in July 2012 and $2.5 million in September 2012 into the Fund. (Id. ¶ 4.) At the time, they understood that Kern was purchasing interests in a limited liability company that would be purchasing CMOs of varying risks in odd lot transactions. (Id.) They understood that the Fund was investing in IO versions of agency CMO bonds and understood that factors, such as a change in the one month LIBOR that could cause fluctuations in value. (Id. ¶ 5.) They expected to receive a preferred return on a monthly basis between 7.48 and 12.5% of the capital contributions made by Kern and they understood that the rates did not take into account the actual value of the securities owned by the Fund at any given time. (Id. ¶ 8) They understood the higher risk but opted due to the potential higher yield. (Id. ¶ 5.) They also understood that the preferred return was not guaranteed and that Kern could lose his total investment. (Id. ¶9.) Price explained that the Fund made odd lot purchases and it was difficult to value these types of CMOs once purchased. (Id.) Price's employment history was not a factor in Kern's decision to invest. (Id. ¶ 6.)

Another investor, [redacted] Murch met Price at the Online Trading Academy where Price made an educational presentation about different types of bonds. (Dkt. No. 73-3, Price Decl., Ex. F, Murch Decl. ¶ 6.) Subsequently, Murch attended three to four more presentations regarding bonds and stocks and established a relationship with Price. (Id. ¶ 7.) He inquired whether Price was involved with these types of assets. (Id.) Price provided him with market data and educational materials about agency bonds and CMOs. (Id. ¶ 8.) Murch decided to invest $100,000 into ABS Fund Arizona in November 2009. (Id.) Later, he invested another $100,000. (Id.) Price's employment history was not a factor in his decision whether to invest in ABS Fund Arizona. (Id. ¶ 10.) He was informed the Fund was a high risk start-up type of offering. (Id.) He understood that he was purchasing limited liability company units and that the Fund

would be purchasing high risk securities such as different types of CMOs including various IOs. (Id. ¶11.) He understood that the values of the units may not change even though the values of the underlying securities owned by the Fund would. (Id. ¶ 12.) Murch understood that he expected to receive a preferred return of 18% per year on his unreturned capital contributions and that the rates did not take into account the underlying value of the assets owned by the Fund. (Id. ¶¶13, 14.) He recognized the risk because he wanted a greater return that would not have been earned from a lower risk type of CMO. (Id. ¶ 15.) He understood that the account statement was a snapshot of the various securities but no values were listed for those securities as they were provided for illustrative purposes only. (Id. ¶ 17.) He had conversations with Price over the years and was told that some bonds had gone up drastically and some had gone down but overall the portfolio was able to meet its obligations to pay him the 18% interest. (Id. ¶ 18.) Price also testified that he verbally disclosed to investors in ABS Fund California that its investments would consist of IO tranches of CMOs. (Dkt. No. 73-3, Ex. B, Price Depo. at 247:16-20; 248:18-21; 249:13-18.)

Defendants also state that they also provided written disclosures such as the Investor's Guide to Collateralized Mortgage Obligations, which was provided to investors in person and this information was also on the Fund's website. (Dkt. No. 73-2, Price Decl. ¶ 9; Dkt. No. 64-3, Dean Decl., Ex. 7.)

These declarations, testimony and email raise issues of disputed material facts as to whether Defendants disclosed that the Funds would invest in IOs and Inverse IOs and the risks associated with those types of investments.

Plaintiff also alleges that Defendants falsely claimed that the IOs and Inverse IOs Funds were "guaranteed", "safe & reliable bonds" and that Funds' "number one goal [was] preserving Capital" in the radio program, Wealth Weekend Hour and a power point presentation. (Dkt. No. 64-3, Dean Decl., Ex. 6 at 12, 24; Ex. 17 at 2; Ex. 37, Price Depo. at 154-55.) Defendant argues that such statements are forward looking statements and are protected by the "bespeaks caution" doctrine. Plaintiff argues that

the doctrine does not apply as it applies to forward looking statements, not current statements.

The bespeaks caution doctrine "provides a mechanism by which a court can rule as a matter of law that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." Livid Holdings, Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 947 (9th Cir. 2005) (quoting In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1408 (9th Cir. 1996)). We have applied the bespeaks caution doctrine in situations where "optimistic projections coupled with cautionary language . . . affect[ ] the reasonableness of reliance on and the materiality of those projections." In re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1414 (9th Cir. 1994). Plaintiff alleges misrepresentations as to past and present statements, and not the future. Therefore, the bespeaks caution doctrine does not apply in this case. However, there is a disputed issue of fact as to whether the investors heard these statements and whether they were material.

c. Defendants Misrepresented Price's Experience

The SEC alleges that Defendants affirmatively misrepresented Price's working experience falsely claiming that he had worked at Goldman Sachs and was a trader at Wells Fargo and specialized in mortgage-backed bonds. In opposition, Price states that he was an independent contractor at Goldman Sachs and that he was a branch manager at Wells Fargo; he states he did not allege that he specialized in mortgage- backed bonds while at Wells Fargo.

The Capital Access Fund website described Price as "structuring the buying and selling of mortgage pools on the secondary market for Wells Fargo and locat[ing] hard to find assets with small institution banks as a consultant for Goldman Sachs." (Dkt. No. 64-3, Dean Decl., Ex. 12 at 8.) On the Wealth Weekend Hour radio program, Price stated:

> I started at Wells Fargo Bank as a branch manager several, several years ago, and went from there to working with Goldman as [sic] independent contractor dealing with REOs and foreclosed homes portfolios, getting them sold, things of that nature. . . .

(Dkt. No. 64-3, Dean Decl., Ex. 6 at 7-8.) The Funds' PPMs state the Price held the position of Branch Manager at Well Fargo and then progressed to the position of Manager of Mortgage Resources for 23 retail branches where he became familiar with high-yield return investments on the secondary market. (Id., Ex. 1 at 22; Ex. 2 at 20; Ex. 3 at 9-10.) The PPMs also similarly state that he was hired as a consultant for Goldman Sachs and became an independent contractor for Goldman Sach's asset management department where he was responsible for the buying and selling of mortgage pools worth hundreds of millions of dollars. (Id.)

Plaintiff presents a declaration from the Vice President within the Human Capital Management Division of Goldman Sachs where he states that there is no record of Price's employment as an employee, consultant or independent contractor. (Dkt. No. 64-3, Dean Decl., Ex. 31.) Moreover, at Wells Fargo he was a Subprime Branch Sales Manager and worked in mortgage origination. (Id., Ex. 30.)[4] He was not involved in trading mortgage backed securities or in the securitization of mortgages. (Id.)

In opposition, Price states that he worked for Goldman Sachs as an independent contractor and/or consultant and other large institutions interested in purchasing securities and various other types of CMOs prior to forming ABS Fund, LLC. (Dkt. No.73-2, Price Decl. ¶ 20.) At Wells Fargo, he states he was a Branch Manager in their Mortgage Resources division. (Id. ¶ 21.)

The description on the Capital Access Fund website as to Price's work at Wells Fargo was false since he did not "structure the buying and selling of mortgage pools

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[4]Defendants object and move to strike the Declaration of Peter DeLanoit arguing that he does not have any personal knowledge of Price or of his job responsibilities at Wells Fargo Bank and that DeLanoit does not have any personal knowledge of the contents and documents submitted in support of his declaration. (Dkt. No. 72.) Plaintiff opposes. (Dkt. No. 77-17.) DaLanoit states the he has personal knowledge of the matters set forth and he is Senior VP in Human Resources with 16 years experience at Wells Fargo. (Dkt. No. 64-3, Dean Decl., Ex. 30.) The Court concludes that the declaration establishes a basis for his knowledge about the human resources files he reviewed. Accordingly, the Court overrules Defendants' objection and DENIES their motion to strike the Declaration of Peter DaLanoit.

on the secondary market for Wells Fargo." It is not clear whether the other descriptions of Price's past work experience was misleading; however, Plaintiff must show that these misleading statements were material.

Plaintiff has presented one investor, [redacted] Dewan who stated that Price's work experience at Wells Fargo and Goldman Sachs would have affected his decision to invest. (Dkt. No. 64-3, Dean Decl., Ex. 40, Dewan Depo. at 56:13-58:6.) In opposition, Defendants present the declarations of Flagg and Murch who state that Price's employment history was not a factor in their decision to invest. (Dkt. No. 73-3, Price Decl., Ex. F., Flagg Dec. ¶ 6; Dkt. No. 73-3, Price Decl., Ex. F, Murch Decl. ¶ 10.) Accordingly, there is a disputed issue of material fact as to whether Price's past work experience was material to investors.

d. Defendants Misrepresented Assets under Management

The SEC alleges that Defendants overstated the assets under management as much as three times and this would have affected one investor's decision to invest. Dewan testified that the amount of assets under management reported in the PPM gave him a little comfort in the sense that "there happened to be other investors besides myself. So it would give a little more credibility." (Dkt. No. 64-3, Dean Decl., Ex. 40, Dewan Depo. at 54:11-55:2.) Defendants dispute the term "assets under management" as that term does not appear in the 2012 spreadsheet referenced by Plaintiff. Defendants state that this spreadsheet does not provide any information about current values of assets under management but only provides the amount of each investor's capital contribution. (Dkt. No. 73-2, Price Decl.¶ 22.)

The ABS California Fund's PPM stated that the Fund had "company owned assets" of $62.4 million as of June 1, 2010. (Dkt. No. 64-3, Dean Decl., Ex. 2 at 11.) In addition, ABS Manager's website stated that "ABS Fund has grown to having $72 million assets under management as of May 2011." (Id., Ex. 27 ¶ 5.) However, the November 2012 spreadsheet reflects total assets under management of $17,435,462. (Id., Ex. 5.) In 2013, Price stated in an email that ABS Manager had $18 million assets

under management. (Dkt. No. 64-3, Dean Decl., Ex. 48.)

Again, there is a disputed issue as to the definition the parties use of "assets under management" Neither party properly defines total assets under management. Accordingly, there is a disputed issue of material fact as to whether Defendants misrepresented assets under management.[5]

2. Scienter

"A plaintiff cannot recover without proving that a defendant made a material misstatement *with an intent to deceive* –not merely innocently or negligently." Merck & Co., Inc. v. Reynolds, 559 U.S.633, 649 (2010). In the Ninth Circuit, the meaning of scienter is similar in section 10(b), Rule 10b-5, and section 17(a)(1). Vernazza v. SEC, 327 F.3d 851, 860 (9th Cir. 2003). Scienter may be supported by "knowing or

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[5]Plaintiff also raises facts surrounding the liquidation of the Funds' CMOs that were held by Morgan Stanley. In June 2012, Capital Access began to allow investors to obtain a line of credit from ABS Manager for up to 70% of the value of their investment in Capital Access. ABS Manager obtained a "non-purpose loan" from Morgan Stanley, its broker-dealer and clearing firm. Plaintiff alleges and Defendants dispute that Defendants falsified the loan application for the line of credit claiming Price intended to use the proceeds to purchase commercial and residential real estate. The facility was collateralized by the IOs and Inverse IOs held by the Funds. Plaintiff alleges that the addition of the line of credit to the Fund's brokerage account heightened the risk to investors because it made the account susceptible to a "margin call" which was realized at the end of 2012. At the end of 2012, Morgan Stanley Smith Barney requested that the Fund moves its account and requested a transfer to a different firm by the end of January 2013. Defendants were unable to locate another broker so in February 2013, all the assets of Capital Access were liquidated by Morgan Stanley. According to Plaintiff, investors did not seem to understand Morgan Stanley's ability to call the loan and liquidate the underlying collateral and Defendants have not been honest with them about the events related to this liquidation. As a result, all the investors in Capital Access suffered a total loss.

In opposition, Defendants assert that the line of credit did not heighten the investors' risk but lowered the risk of investment losses for the investors who used the line of credit as it was not allowable to be clawed back and the investor held no liability for any shortfalls. This was stated in the PPMs and margin disclosure documents provided to investors. The line of credit was considered as a payment of principal back to the investors, thus lowering the exposure of outstanding investments to only 30%. They also dispute representations made to Morgan Stanley as to the purpose of the line of credit. Price states that he opened the line of credit to acquire real estate and bonds. (Dkt. No. 73-2, Price Decl. ¶¶ 25-29.) Defendants have presented evidence to create a genuine issue of material disputed fact as to whether there were misrepresentation as to the liquidation of the Funds' CMOs with Morgan Stanley.

reckless conduct" without a showing of "willful intent to defraud." Id. (citing Nelson v. Serwold, 576 F.2d 1332, 1337 (9th Cir.1978); see also Howard v. Everex Sys., Inc., 228 F.3d 1057, 1063 (9th Cir. 2000). Scienter is satisfied by recklessness. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568–69 (9th Cir. 1990). Reckless conduct is conduct that consists of a highly unreasonable act, or omission, that is an "extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." Id. at 1569.

Plaintiff asserts that Price, as the sole manager and CEO of ABS Manager, knew or was reckless in not knowing that the misrepresentations and omissions made by the Defendants were false. Price managed the Funds' investments and he knew they were only reporting the interest rate and not the underlying value of the assets. Defendants argue that based on the advice and reliance on outside third-party professionals, they reasonably believed that information was being accurately transmitted to the investors; and there are disputed issues of fact regarding the value of the bonds.

Here, as discussed above, there is a genuine disputed issue of material fact as to whether these representations and omissions were violations of the securities laws. While Plaintiff believed that his method of valuating the returns was correct, there is a genuine issue of fact as to whether it was reckless conduct.

Based on the above, the Court DENIES Plaintiff's motion for summary judgment on the anti-fraud causes of action pursuant to the Securities Act and the Exchange Act.

B. Section 17(a)(2) and 17(a)(3) of the Securities Act

The SEC also moves for summary judgment as to sections 17(a)(2) and 17(a)(3) of the Securities Act. Defendants oppose.

Sections 17(a)(2) and 17(a)(3) does not require a finding of scienter but requires a showing of negligence. Rauscher, Inc., 254 F.3d at 856; see also Aaron v. SEC, 446 U.S. 680, 696–702 (1980).

Here, as there are material issues of disputed fact as to whether the elements of

the antifraud provisions of the securities law, the Court also DENIES Plaintiff's motion for summary judgment on sections 17(a)(2) and 17(a)(3) of the Securities Act.

C. Section 20(a) of the Exchange Act - Control Person Liability

The SEC moves for summary judgment under the control person liability contending that Price controlled and exercised power over Defendant ABS Manager. Defendants oppose arguing that since there is a genuine issues of material fact as to whether they violated the Exchange Act, Plaintiff's motion for summary judgment should be denied.

Section 20(a) of the Exchange Act provides,

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . ."

15 U.S.C. § 78t(a). A defendant may be liable for securities violation if (1) there is a violation of the Exchange Act and (2) the defendant directly or indirectly controls any person liable for the violation. SEC v. Todd, 642 F.3d 1207, 1223 (9th Cir. 2011). The SEC defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405; Todd, 642 F.3d at 1223 n.4. The definition of "person" under the Act encompasses a "company." Todd, 642 F.3d at 1223 (citing 15 U.S.C. § 78c(a)(9)).

As there is a genuine issue of material fact as to whether there was a violation of the Exchange Act, the Court DENIES the SEC's Motion for Summary Judgment with regard to this cause of action.

D. Sections 206(1) and 206(2) of the Advisors Act, 15 U.S.C. 80b-6(1) and (2) (fraud by an investment advisor); Section 206(4) of the Advisers Act, 15 U.S.C. 80b-6(4) and Rule 206(4)-8, 17 C.F.R. § 275.206(4)-8

The SEC moves for summary judgment that Defendants violated sections 206(1),

206(2), and 206(4) of the Investment Advisers Act, and accompanying Rule 206(4)-8. Defendants also move for summary judgment that they are exempt under the Investment Advisers Act.

Sections 206(1) and 206(2) provide:

> [i]t shall be unlawful for any investment adviser . . . (1) to employ any device, scheme, or artifice to defraud any client or prospective client; [or] (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

15 U.S.C. § 80b-6(1); 15 U.S.C.§ 80b-6(2). Section 206(4) and Rule 275.206(4)-8 prohibit the same conduct but as it relates to pooled investment vehicles. 15 U.S.C. § 80b-6(4); 17 C.F.R. § 275.206(4)-8. The definition of investment adviser is as follows:

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (E) **any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States,** or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934 [15 U.S.C.A. § 78c(a)(12)], as exempted securities for the purposes of that Act [15 U.S.C.A. § 78a et seq.] . . . ."

15 U.S.C. § 80b-2(a)(11)(E) (emphasis added).

Plaintiff argues that Defendants were investment advisers subject to the Investment Advisers Act. Defendants engaged in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing or selling securities. Moreover, ABS Manger even applied to be registered as an investment adviser in California, and ABS Manager and Price, its sole manager, managed the Funds and their investments and were compensated for it in the form of a management fee. The SEC also alleges Defendants violated section 206(4) and Rule 275.206(4)-8 which prohibit the same conduct as sections 206(1) and 206(2) but in connection with

"pooled investment vehicles."

In their motion for partial summary judgment, Defendants argue that they provided management services to the Funds as to the Funds' securities which solely consisted of Agency CMOs and IOs which fall within the exclusion of the definition of Investment Adviser. Moreover, they contend that they were managers, not advisers.

In opposition, Plaintiff asserts that contrary to Defendants' allegations that the Funds' securities consisted solely of Agency CMOs and IOs, at least one was a non-Agency CMO. Defendants purchased 1 private CMO bond, issued by Countrywide. The bond, CWALT 2005-J10 Class 1A14 has CUSIP No. 12668ABL8 and was an inverse IO bond. (Dkt. No. 71-9, Weiner Decl. ¶¶ 2-5; Exs. 1-2.) It appeared for the first time in the May 2009 Andrew Garrett account statement for ABS Arizona and sold on April 11, 2011. (Id.)

Moreover, Defendants offered investment advisory services to investors about two different types of securities, the Agency CMOs and private bonds. For example, the 2009 PPM for the ABS Arizona Fund states:

> The Fund expects to invest only in certificates tied to residential mortgages with the following characteristics: Government National Mortgage Association backed Bonds with Guaranteed payments by the Treasury Department, OR borrowers with a minimum of 720 credit scores, loans with at least 18% equity, a history of limited defaults, and AAA rating.

(Dtk. No. 64-14, Ex. 68 at SEC-MAJ-0000399.) The SEC argues that Defendants held themselves out as trading in government and private mortgage backed securities.

In reply, Defendants state that the Countrywide bond was purchased by Relief Defendant Cavan Private Equity Holding, LLC in November 2008, prior to the existence of the ABS Arizona Fund's 2009 startup date, and it was for personal use and not intended to be purchased for the Fund. (Dkt. No. 76, CSAMF, Ex. A, Price Decl. ¶¶ 2, 3; see also, Ex. 1.) All monies contributed by investors for all new securities were used to purchase Agency CMOs. (Id. ¶ 4.) Price testified that 100% of the assets purchased by ABS Fund California and Capital Access Fund were IO tranches of

CMOs. (Dkt. No. 73-3, Ex. B, Price Depo at 249:5-12.) Investors understood that the Fund intended to invest in Agency CMOs. (Dkt. No. 76, CSAMF, Ex. B, Dewan Tr. at 53:23-54:18.)

Defendants also allege they were managers of the Funds, not investment advisers. At least two investors stated that no one from Defendant ABS Manager represented themselves as investment advisers, (Dkt. No. 76, Ex. B, Chester Decl., Ex. 3, Nittoli Depo., 120:5-7; Ex. 2, Dewan Depo. at 137:10-12), while another investor acknowledged his understanding that the Capital Access, LLC Fund was not a registered investment advisory company and that its officer, directors and manager have no ability to offer any sort of investment advice and they never represented to be an investment adviser. (Id., Chester Decl., Ex.4; Necomb Decl. ¶7).

While the PPMs state that the Funds would invest in either agency bonds and private bonds, there is no additional evidence provided by Plaintiff that Defendants informed investors that they would invest in "private mortgage backed securities." While the definition of investment advise can be in the form of "writings", such as the PPMs, it should also involve "advising others" "as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." See 15 U.S.C. § 80b-2(a)(11)(E). Besides one documents, Plaintiff has presented no contrary evidence that Defendants informed investors that they would invest in private mortgage backed securities. The evidence reveals verbal and written communications by Defendants that solely addressed Agency CMOs and all statements concerning the Funds such "guaranteed", "safe and reliable" were referencing Agency bonds. Accordingly, the Court concludes that Defendants are exempt from the Investment Advisers Act under the exception as provided in the definition of investment adviser. See 15 U.S.C. § 80b-2(a)(11)(E).

Accordingly, the Court DENIES Plaintiff's motion for summary judgment and GRANTS Defendants' motion for partial summary judgment as to the first two causes of action under sections 206(1), 206(2) and 206(4) of the Investment Advisers Act and

Rule 206(4)-8. .

E. Evidentiary Objections

Plaintiff filed evidentiary objections. (Dkt. No. 77-18.) The Court notes its objections. To the extent that the evidence is proper under the Federal Rules of Evidence, the Court considered the evidence. To the extent that the evidence is not proper, the Court did not consider it.

F. Defendants' Motion to Set Aside Default

Defendants move to set aside the default entered against Relief Defendants Cavan Private Equity Holdings, LLC ("Cavan") and Lucky Star Events, LLC ("Lucky Star"). While Cavan and Lucky Star have not answered the complaint, they have been "otherwise defending" the lawsuit. Plaintiff opposes arguing that ABS Manager and Price improperly have moved to set aside default instead of Cavan and Lucky Star. Second, SEC argues that they have never appeared in this matter and it is their culpable conduct that led to the entry of default.[6]

On January 15, 2014, Plaintiff moved for default as to Cavan and Lucky Star. (Dkt. No. 58.) Default was entered on January 16, 2014 for failure to "plead or otherwise defend." (Dkt. No. 59.) Defendants note that while there are five Relief Defendants, Plaintiff only sought default as to two of them. Cavan is owned by Defendant Price and Lucky Star is owned by Price's wife. According to the Complaint, the SEC alleges that the Funds improperly paid management fees to Lucky Star and Cavan. In this case, the personal and legal interests of Defendants are closely tied and aligned with the Relief Defendants. Therefore, while Defendants filed the motion instead of Lucky Star and Cavan, the Court will allow the motion considering the close knit relationship between all defendants.

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[6]SEC also argues that the motion is not even timely, as it was filed on April 1, 2014, past the March 28, 2014 motion cut-off date. Defendants maintain that clerical errors caused the delay. As noted on the docket, Defendants attempted to file their motion to set aside default on March 28, 2014; however it was stricken due to failure to obtain a hearing date. (Dkt. Nos. 63, 65.) Due to the clerical error, the Court concludes that Defendants' motion is timely.

According to Federal Rule of Civil Procedure 55(c), "[t]he court may set aside an entry of default for good cause . . . ." Fed. R. Civ. P. 55(c). The good cause standard under Rule 55(c) is identical to the standard governing vacating a default judgment under Rule 60(b). Franchise Holding II, LLC v. Huntington Rests. Group, Inc., 375 F.3d 922, 925 (9th Cir. 2004); TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001). The decision to set aside an entry of default is at the discretion of the trial court judge. Brandt v. American Bankers Inc. Co. of Florida, 653 F.3d 1108, 1110 (9th Cir. 2011). The moving party bears the burden of showing the following factors: (1) whether the defendant engaged in culpable conduct that led to the default; (2) whether the defendant has a meritorious defense; and (3) whether lifting the default would prejudice the plaintiff. Franchise Holding II, 375 F.3d at 926. "Default is not to be freely granted, however, as "a case should, whenever possible, be decided on the merits." TCI Group, 244 F.3d at 697.

Defendants argue they did not engage in culpable conduct as they have been defending the case. Both entities are subject to and complying with the preliminary injunction order issued by this Court which included a wide array of equitable orders to maintain the status quo, and to provide accountings to the SEC. (Dkt. No. 35.) Price has also appeared and defended the claims in this case including those involving the Relief Defendants. Plaintiffs maintain that Cavan and Lucky Star engaged in culpable conduct by not answering the complaint once they had notice of the lawsuit when Mr. Chester, counsel for Defendants, accepted service of the complaint on their behalf. Based on the proceedings in this case, the Court concludes the Defendants did not engage in culpable conduct as they have been involved in defending this case.

Defendants contend there is a genuine issue of fact whether the funds transferred to Cavan and Lucky Star were wrongfully received based on ill gotten gains and whether they were entitled to pay themselves. SEC argues that Cavan and Lucky Star failed to produce competent evidence that they have a meritorious defense to the claim that they are in possession of investor money that was wrongfully transferred to them

by Defendants. As discussed above on Plaintiff's motion for summary judgment, there is a genuine issue of disputed material fact whether Defendants violated the securities laws. As such, this factor weighs in favor of Defendants.

Defendants further contend that the SEC will not be prejudiced because the SEC has been conducting discovery as to these Relief Defendants. In opposition, SEC argues it will be prejudiced because it will be hindered in its ability to conduct discovery as to these relief defendants. When the SEC attempted to take the deposition of Lucky Star, Chester indicated he was not counsel for Lucky Star, so it spent weeks attempting to effect service of a deposition notice. When it became clear that Lucky Star was evading service, the SEC decided that it would simply take defaults of Cavan and Lucky Star. Plaintiff contends that Defendants waited several months until April 1, 2014 to move to set aside the defaults.

In reply, Defendants assert that Plaintiff has conducted discovery as the Relief Defendants. While the deposition of Mrs. Price was not yet conducted, it was not due to Defendants. Defense counsel, Mr. Chester, informed the SEC that a representative from Lucky Star and its counsel were available for deposition on November 5th or 6th; but SEC never responded and did not take further action to obtain a deposition. As for Cavan, the SEC did not issue a deposition subpoena specifically for Cavan because it deposed Cowan and Price, who are also representatives of Cavan. Moreover, Defendants produced documents to the SEC related to Cavan. The Court concludes that the SEC will not be prejudiced as it has conducted discovery as to Cavan and appears to only need to depose Lucky Star's representative.

Both parties have been litigating the case even though the Relief Defendants never filed an answer. The Complaint was served on February 22, 2013. It was not until January 15, 2014, almost a year later, that the SEC moved for entry of default. Then it was not until April 1, 2014 that Defendants moved to set aside the default. When it became difficult to schedule the deposition of Mrs. Price, the SEC sought entry of default.

Based on the fact that Relief Defendants Cavan and Lucky Star were otherwise defending the lawsuit, the Court finds good cause and grants Defendants' motion to set aside the defaults entered against Cavan and Lucky Star. While Defendants argue that the claims against Relief Defendants are not ripe until the Court determines that Defendants misappropriated funds and transferred those ill gotten gains to Cavan and Lucky Star, or that they have been "otherwise defending the case" by participating in discovery, that does not preclude them from filing an answer. According to the Federal Rule of Civil Procedure 12(a), Relief Defendants must file an answer to the complaint.

Conclusion

Based on the above, the Court DENIES Plaintiff's motion for summary judgment on all causes of action; GRANTS Defendants' motion for partial summary judgment as to the first two causes of action; and GRANTS Defendants' motion to set aside default against Relief Defendants Cavan Private Equity Holdings, LLC and Lucky Star Events, LLC. Relief Defendant Cavan and Lucky Star shall file an answer within seven (7) days from the date this order is "filed." While the other Relief Defendants are not before the Court on motion, the Court recommends that the other Relief Defendants also file an answer. The hearing set for June 13, 2014 shall be **vacated.**

IT IS SO ORDERED.

DATED: June 11, 2014

HON. GONZALO P. CURIEL
United States District Judge

Exhibit B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. ABS MANAGER, LLC and GEORGE CHARLES CODY PRICE, Defendants, ABS FUND, LLC [ARIZONA]; ABS FUND, LLC [CALIFORNIA]; CAPITAL ACCESS, LLC; CAVAN PRIVATE EQUITY HOLDINGS, LLC; and LUCKY STAR EVENTS, LLC, Relief Defendants.	CASE NO. 13cv319-GPC(BGS) **ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION** [Dkt. No. 87.]

Before the Court is Plaintiff's motion for reconsideration of the Court's order granting Defendants' motion for partial summary judgment on the claims under the Investment Advisers Act. (Dkt. No. 87.) An opposition was filed by Defendants on August 15, 2014. (Dkt. No. 91.) A reply was filed on August 29, 2014. (Dkt. No. 93.) A hearing was held on September 19, 2014. (Dkt. No. 97.) Sam Puathasnanon, Esq. and Lynn Dean, Esq. appeared on behalf of Plaintiff and Mark Chester, Esq. and John Dolkart, Esq. appeared on behalf of Defendants. After a review of the briefs,

supporting documentation, the applicable law, and the parties' arguments, the Court GRANTS Plaintiff's motion for reconsideration.

Background

On February 8, 2013, Plaintiff Securities and Exchange Commission ("SEC") filed a complaint against Defendants ABS Manager, LLC and George Charles Cody Price, along with an *ex parte* application, without notice, for a temporary restraining order ("TRO") and order freezing assets; appointing a receiver over defendant ABS Manager, LLC and the entities it controls and manages; prohibiting the destruction of documents; granting expedited discovery; and requiring an accounting. (Dkt. Nos. 1, 2.) The SEC also filed an *ex parte* application, without notice, for an order temporarily sealing the entire file until the asset freeze is served. (Dkt. No. 2.) On February 11, 2013, the Court denied Plaintiff's *ex parte* application for TRO and denied Plaintiffs' *ex parte* application to temporarily file entire case under seal. (Dkt. No. 3.) On February 19, 2013, Plaintiff filed a motion for preliminary injunction along with an *ex parte* motion to shorten time for hearing on the motion for preliminary injunction. (Dkt. No. 5.) After briefing by both parties, on February 27, 2013, the Court granted Plaintiffs' *ex parte* motion and set the matter for hearing on March 15, 2013, which was continued to March 19, 2013 after granting the parties' joint motion to continue the hearing date. (Dkt. Nos. 22. 24, 30.) On March 20, 2013, the Court granted Plaintiff's motion for preliminary injunction and for an order partially freezing assets of ABS Manager and the Funds, preserving documents, and requiring an accounting and denying Plaintiff's motion for an order freezing all funds' asset and personal assets and order appointing a receiver. (Dkt. No. 31.) A preliminary injunction order was filed on April 4, 2013. (Dkt. No. 35.)

The complaint alleges violations of sections 206(1) and 206(2) of the Investment Advisers Act of 1940; violations of section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8; violations of section 17(a) of the Securities Act of 1933 ("Securities Act"); violations of section 10(b) of the Securities Exchange Act of 1934

("Exchange Act") and Rule 10b-5; and violations of section 20(a) of the Securities Exchange Act of 1934. (Dkt. No. 1.)

On June 11, 2014, the Court denied Plaintiff's motion for summary judgment on all causes of action and granted Defendants' motion for partial summary judgment on the first two causes of action as to the SEC's claims under the Investment Advisers Act of 1940 ("IAA"). (Dkt. No. 81.) The Court granted Defendants' motion holding that an exception applied because Plaintiff failed to establish a genuine issue of material fact that the exception under the Investment Advisers Act did not apply. See 15 U.S.C. § 80b-2(a)(11)(E).

On July 9, 2014, Plaintiff filed a motion for reconsideration as to the Court's order granting Defendants' motion for partial summary judgment on the claims under the Investment Advisers Act. (Dkt. No. 87.) Defendants filed an opposition and Plaintiff filed a reply. (Dkt. Nos. 91, 93.)

A. Legal Standard on Motion for Reconsideration

A district court may reconsider a grant of summary judgment under either Federal Rule of Civil Procedure ("Rule") 59(e) or Rule 60(b). Sch. Dist. No. 1J, Multnomah County, Or. v. AcandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). Plaintiff moves for reconsideration pursuant to Rule 59(e) arguing that the Court "committed clear error or the initial decision was manifestly unjust." See id. at 1263.

Federal Rule of Civil Procedure 59(e) provides for the filing of a motion to alter or amend a judgment. Fed. R. Civ. P. 59(e). A motion for reconsideration, under Federal Rule of Civil Procedure 59(e), is "appropriate if the district court (1) is presented with newly discovered evidence; (2) clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Sch. Dist. No. 1J, Multnomah County, Or., 5 F.3d at 1263; see also Ybarra v. McDaniel, 656 F.3d 984, 998 (9th Cir. 2011).

In addition, Local Civil Rule 7.1(i)(1) provides that a motion for reconsideration must include an affidavit or certified statement of a party or attorney "setting forth the

material facts and circumstances surrounding each prior application, including inter alia: (1) when and to what judge the application was made, (2) what ruling or decision or order was made thereon, and (3) what new and different facts and circumstances are claimed to exist which did not exist, or were not shown upon such prior application." Local Civ. R. 7.1(i)(1).

The Court has discretion in granting or denying a motion for reconsideration. Fuller v. M.G. Jewelry, 950 F.2d 1437, 1441 (9th Cir. 1991). A motion for reconsideration should not be granted absent highly unusual circumstances. 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). "A motion for reconsideration cannot be used to ask the Court to rethink what the Court has already thought through merely because a party disagrees with the Court's decision. Collins v. D.R. Horton, Inc., 252 F. Supp. 2d 936, 938 (D. Az. 2003) (citing United States v. Rezzonico, 32 F. Supp. 2d 1112, 1116 (D. Az.1998)).

B. Causes of Action under the Investment Advisers Act

Plaintiff argues that the exception Defendants rely on under the IAA does not apply because Defendants provided advisory services and held themselves out to be investment advisers for both private and government-backed investments. Defendants contend that the SEC is rearguing issues on summary judgment without providing any "new" evidence and assert that the exemption applies because they did not provide advisory services to non-agency bonds.

In the Court's order granting Defendants' motion for partial summary judgment, it concluded that Defendants are excluded from the definition of investment adviser because they did not provide advisory services concerning non-agency private bonds.

"Investment advisor" under the Investment Advisers Act includes a "person who, for compensation, engages in the business of advising others, either directly or indirectly . . . as to the advisability of investing in . . . securities. . . ." 15 U.S.C. § 80b–2(a)(11). A person is not an investment adviser when "(E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct

obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest . . . ." 15 U.S.C. § 80b-2(a)(11)(E).

The key argument in the motion for reconsideration is whether ABS Arizona held one non-agency bond rendering the exception to not apply.

In its motion for reconsideration, Plaintiff presents additional evidence, not submitted before on the motion for summary judgment. Defendants represented to their "due diligence" firm, Mick and Associates,[1] that the non-agency bond was an asset of the ABS Arizona Fund. (Dkt. No. 87-2, Dean Decl., Ex. 1 at 6.) Defendants stated that the bond was an "institutional bond" or "bank bond" and the "bond was purchased from a consulting firm who sold it directly to [Arizona] ABS Fund. This bond was added to the portfolio before ABS Fund had decided to invest only into Agency bonds . . . . The PPM ABS Fund operates under allows of these types of bonds to be placed into the fund. However, they are not the strategy of the fund." (Id.) In response, Defendants admit they created the document which was provided to Mick and Associates, but it was not provided directly to the investors. In addition, Plaintiff provided the account statements of three investors showing the Countrywide bond as part of the investors' portfolio. (Id., Exs. 2-5.)

There was one non-agency bond held by ABS Arizona, the Countrywide bond or CWALT 2005-J10 Class 1A14 with CUSIP No. 12668ABL8, which was an inverse IO bond. (Dkt. No. 71-9, Weiner Decl. ¶¶ 2-5; Exs. 1-2.) The Countrywide bond was purchased by Relief Defendant Cavan Private Equity Holding, LLC in November 2008, prior to the existence of the ABS Arizona Fund's 2009 start up date and it was for personal use and not intended to be purchased for the Fund. (Dkt. No. 76, CSAMF, Ex.

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[1]Plaintiff argues that it did not raise this evidence in the prior motion for summary judgment because the issue of ownership of the bond was not raised until Defendants filed a reply. Plaintiff alleges that it intended to raise the evidence at the motion hearing on the summary judgment motions but was unable to since the Court, exercising its discretion, ruled without oral argument. Since Defendants presented new evidence and argument in their reply, the Court will consider the additional evidence Plaintiff provides in its motion for reconsideration.

A., Price Decl. ¶¶ 2, 3; see also Ex. 1.) All monies contributed by investors for all new securities were used to purchase Agency CMOs. (Id., Price Decl. ¶ 4.) The non-agency bond was then transferred into ABS Fund Arizona in May 2009 as evidenced from the statements of investors and held until April 2011. The ABS Fund Arizona was first offered in March 2009 and sold units to about 13 or 14 investors for around $2.4 million. (Dkt. No. 64-3, Dean Decl., Ex. 1 at 1.) The report to Mick and Associates reveals that the Countrywide bond was considered an asset of ABS Arizona.

Based on the evidence before the Court, Plaintiff has demonstrated a disputed issue of fact regarding the ownership and management of the non-agency bond asset. There are also unresolved legal issues not briefed by the parties. There is a genuine issue of fact as to how ABS Fund Arizona obtained the Countrywide bond. There are also issues as to the effect of this acquisition and its effect on the other investor's money, and whether Defendants, who would have been exempt under the IAA at the time ABS Arizona was established, can lose its exempt status by the acquisition of the one non-agency bond a couple months later. There is also an issue as to whether it matters that the investors' monies were not used to purchase this bond.

The Court also concluded that there was no advice provided by Defendants as to the non-agency bond. The SEC alleges that Defendants provided advisory services and held themselves out to be investment advisers for private and government-backed investments. The SEC points to the PPM where it informed investors that the fund intended to invest in non-agency bonds, the radio informercial called "The Wealth Weekend Hours" which aired on KFMB Radio in San Diego and offered to perform portfolio reviews for investors, and the fact that ABS Manager applied to be registered as an investment adviser in California. Defendants argue that these do not constitute advice as contemplated under the IAA. They also contend that at least two investors stated that no one from ABS Manager represented themselves as investment advisers. (Dkt. No. 76, Ex. B, Chester Decl., Ex. 3, Nittoli Depo., 120:5-7; Ex. 2, Dewan Depo. at 137:10-12.)

The SEC cites to Abrahamson where the Second Circuit held that the act of "advising" is broader than communicating a recommendation to a client but investment advisers can "advise" their customers by exercising control over what purchases and sales are made with their clients' funds." Abrahamson v. Fleschner, 568 F.2d 862, 871 (2d Cir. 1977). "[P]eople who manage[ ] the funds of others for compensation are 'investment advisers' within the meaning of the statute." Id. at 870; see also S.E.C. v. Haligiannis, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007) (same citing Abrahamson). One who "effectively controls" an investment advisory firm and its decisionmaking is an investment advisor within the meaning of the Advisers Act. SEC v. Berger, 244 F. Supp. 2d 180, 193 (S.D.N.Y. 2001).

On the other hand, Plaintiffs cite to a later case of Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006) where the D.C. Circuit held that the SEC could not issue a regulation specifying that hedge fund managers must "count as clients the shareholders, limited partners, members, or beneficiaries . . . of [the] fund" for purposes of the IAA. 451 F.3d 873, 877, 883 (D.C. Cir. 2006). In Goldstein, the court explained that, generally, a hedge fund manager's client is the hedge fund itself, and not the investors in the fund. Id. This is because the manager's fiduciary duties are owed to the fund, whose interests can diverge from those of the fund's investors. Id.

Based on the parties' arguments, the Court concludes there are genuine issues of material fact as to whether Defendants provided advisory services as to non-agency securities. Specifically, there is a genuine issue of material fact as to whether the ABS Funds are investment partnerships with general and limited partners as described in Abrahamson or are hedge funds as described in Goldstein.[2]

On Plaintiff's motion, the Court reconsiders its ruling and concludes that Plaintiff has demonstrated a genuine issue of material fact as to the ownership of the

[2]Even Defendants note the disputed fact stating that the "SEC is attempting to equate the Fund with a publicly traded mutual fund that falls under the auspices of the 1940 Investment Company Act, even though the Fund is actually akin to a private unregistered hedge fund." (Dkt. No. 91 at 15.)

Countrywide non-agency bond and a genuine issue of material fact as to whether Defendants were engaged in advisory services to the investors.

Conclusion

Based on the above, the Court GRANTS Plaintiff's motion for reconsideration and DENIES Defendants' motion for partial summary judgment on the first two causes of action for violations of the Investment Advisers Act.

IT IS SO ORDERED.

DATED: December 17, 2014

HON. GONZALO P. CURIEL
United States District Judge

Exhibit C

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

ABS MANAGER, LLC and GEORGE CHARLES CODY PRICE,

Defendants,

ABS FUND, LLC [ARIZONA]; ABS FUND, LLC [CALIFORNIA]; CAPITAL ACCESS, LLC; CAVAN PRIVATE EQUITY HOLDINGS, LLC; and LUCKY STAR EVENTS, LLC,

Relief Defendants.

Case No. 13 CV 0319 GPC (BGS)

DECLARATION OF [redacted] FLAGG IN SUPPORT OF DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

I, [redacted] Flagg, do hereby declare as follows:

1. I am over the age of eighteen (18) years, have personal knowledge of the facts stated herein and am competent to testify as to the same.

2. I have been the Chief Financial Officer since September 2006 for PCK Management, LLC, whose sole member was Peter C. Kern. In that capacity, I worked closely with Mr. Kern and helped him manage all of his personal and business investments. Mr. Kern invested in Capital Access, LLC, which I will refer to as the Capital Access Fund or the Fund. Mr. Kern first purchased membership interests (also referred to as shares) in the Fund, or its predecessor, in May 2012. The following facts are true of my own personal knowledge. If called as a witness, I could and would testify as follows.

3. Prior to investing, Mr. Kern and I had several conference calls with Cody Price in which we discussed the Capital Access Fund. Mr. Price also sent us materials regarding the Fund, which included investor suitability forms, a private placement memorandum ("PPM"), exhibits to the PPM (such as the Fund's operating agreement), an investor's guide to CMOs, and other related materials. I had numerous discussions with Mr. Kern in which we discussed our conference calls with Mr. Price as well as the materials that we reviewed.

4. Based on our discussions with Mr. Price and our review of the Capital Access materials, Mr. Kern decided to invest $2 million in May 2012, over $4 million in July 2012, and $2.5 million in September 2012 into the Fund. At the time that he invested, we understood that he was purchasing interests in a limited liability company that would be purchasing CMOs of varying risk in odd lot transactions.

5. We understood that the Fund was investing in interest only (IO) versions of agency CMO bonds, and understood the factors, such as a change in the one month LIBOR, that could cause fluctuations in value. Mr. Kern and I were informed about the risks of IOs. Regardless, we decided to opt for the higher yield from these types of CMOs compared to the lower yielding CMOs that were considered to have much less risk. Mr. Price explained that the Fund made odd lot purchases, and that it was difficult to value these type of CMOs once they are purchased.

6. Mr. Price's employment history was not a factor in Mr. Kern's decisions to purchase Fund interests, nor was the amount of securities in the Fund's account or the amount of money others invested in the Fund.

7. We also understood that the $5 per share price was discretionary and not related to the value of the securities owned by the Fund. We also understood that the value of those shares may not change even though the values of the underlying securities owned by the Fund would.

8. Based on our discussions with Mr. Price and review of the Capital Access PPM and materials, we expected to receive a preferred return on a monthly basis between 7.48 and 12.5% of the capital contributions made by Mr. Kern. We understood that the rates of returns discussed by Mr. Price and which were in the materials were based on Mr. Kern's capital contributions, and that the rates did not take into account the actual value of the securities owned by the Fund at any given time.

9. We understood the high risk of investing in these types of securities and that Mr. Kern could lose his total investment. We also understood that the preferred return was not guaranteed, nor were there any guarantees regarding the backing for the securities purchased by the Fund.

10. We understood that a line of credit was available for Mr. Kern's use through Morgan Stanley Smith Barney. Specifically, he could borrow up to 70% of his capital contributions and use the proceeds as a non-purpose loan, such as investing in real estate. We understood that it was a non-recourse loan from a line of credit, which meant that if Morgan Stanley liquidated the assets and there was a deficiency with respect to the line of credit, that it could not satisfy that deficiency from any of the borrowers, including Mr. Kern. We further understood that the securities and cash in the account were the sole collateral for the line of credit, and if the value of the underlying securities and cash in the account were insufficient to cover the amount of the outstanding line of credit, that Morgan Stanley could liquidate the Fund's assets in the account to satisfy the

line of credit.

11. We also understood that the monthly interest charges for the line of credit would be deducted by Morgan Stanley from the monthly distributions that Mr. Kern was receiving from the Fund.

12. Mr. Kern received a monthly Statement of Account which provided information about his investment in the Fund. A true and correct copy of his October 2012 statement is attached as **Exhibit A** hereto. We understood that the rate of return indicated on the statement was based on Mr. Kern's capital contributions and did not correlate with the actual value of the securities owned by the Fund. Mr. Kern and I also understood that the description of the securities provided on the statement were for illustration purposes only and may not reflect the actual positions at that time. We were also aware that the Fund was not providing values for the securities because it was difficult to accurately price the value of those securities.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on the 25th day of April, 2014, in Pilot Point, Texas.

[redacted] Flagg

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

ABS MANAGER, LLC and GEORGE CHARLES CODY PRICE,

Defendants,

ABS FUND, LLC [ARIZONA]; ABS FUND, LLC [CALIFORNIA]; CAPITAL ACCESS, LLC; CAVAN PRIVATE EQUITY HOLDINGS, LLC; and LUCKY STAR EVENTS, LLC,

Relief Defendants.

Case No. 13 CV 0319 GPC (BGS)

DECLARATION OF [redacted] MURCH IN SUPPORT OF DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

I, [redacted] Murch, do hereby declare as follows:

1. I am over the age of eighteen (18) years, have personal knowledge of the facts stated herein and am competent to testify as to the same.

2. I have been an investor in ABS Fund, LLC (Arizona) since 2009. The following facts are true of my own personal knowledge. If called as a witness, I could and would testify as follows.

3. [redacted].

4. In 2009, I attended the Online Trading Academy, where I became familiar with certain securities, including various types of bonds.

5. Based on this education, I became interested in investing in Ginnie Mae bonds, as I understood those bonds to be safer than corporate or junk bonds.

6. I first met Cody Price at the Online Trading Academy, where Mr. Price made an educational presentation about different types of bonds, including different types of bank, CMOs, agency and IO agency bonds. Thereafter, I attended approximately three to four more presentations regarding bonds and stocks. Mr. Price made it clear he was not there to promote any investments.

7. During these presentations, I gained a relationship with Mr. Price and after one of the last classroom sessions, asked him if he was involved in these types of assets. Following our discussions he called me a month or so later and we discussed that he was working for a company he started called ABS Fund, and I learned that ABS Fund, LLC (Arizona) invested in odd lot bonds with the potential for good returns.

8. After reading some market data and educational materials about agency bonds and CMOs, provided by Mr. Price, I became more interested and filled out a prequalification form to see if I was eligible to learn more about his company. He called me back a week or so later and told me I was approved as an accredited investor, but wanted to know more about me and my understanding of the markets and investments in general. After a long discussion, he told me he would then send me his confidential legal documents and we could read them together with my financial advisor. After I read them and had long discussions with him, I decided to invest $100,000 into ABS Fund, LLC

(Arizona) sometime around November 2009. Thereafter, I invested another $100,000 into the Fund.

9. At the time that I invested, I understood that the Fund was relatively new. I did not know whether the Fund had assets under management at that time nor was that a factor in my decision to invest.

10. Mr. Price's employment history was also not a factor in my decision in whether to invest in ABS Fund, LLC (Arizona). At the time that I invested, I understood that the Fund was relatively new. I did not know whether the Fund had assets under management at that time nor was that a factor in my decision to invest. I knew that it was operating as an LLC only, and not as an advisory or investment company. I was told it was a high risk start up type of offering with a solid business plan to take advantage of low LIBOR rates after the big crash of 2008. I was also informed that although Mr. Price was not a licensed advisor, all investment decisions went through a qualified licensed advisor who worked for the Fund.

11. I fully understood that I was purchasing limited liability company units, and that the Fund would be purchasing high risk securities such as different types of CMOs, including various IOs.

12. I understood that the $5 per unit price was discretionary and not necessarily related to the value of the securities owned by the Fund. I also understood that the value of the units may not change even though the values of the underlying assets owned by the Fund could.

13. Based on the ABS Fund, LLC (Arizona) Private Placement Memorandum and representations from Cody Price, I expected to receive a preferred return of 18% per annum on my unreturned capital contributions.

14. I understood that the rates of returns discussed by Mr. Price were based on my capital contributions, and that the rates do not take into account the underlying value of the assets owned by the Fund, and any changes to those values over time.

15. I understood the risk in investing in these types of securities, especially, the interest only CMOs. I understood that I was receiving a good return on my contributions, and that a principal and interest CMO may have less risk. However, I wanted a greater return than what could have been earned from a lower risk type of CMO.

16. I also understood that the 18% preferred return was not guaranteed, as neither Cody Price nor anyone from ABS Manager, LLC (Arizona) ever made any guarantees regarding the preferred return or any government backing for the bonds purchased by ABS Fund, LLC (Arizona).

17. I received a monthly Statement of Account reflecting my investment in the Fund, which showed my capital contributions along with the distributions that I had received. A true and correct copy of my November 2009 account statement is attached as **Exhibit A** hereto. I understood that the rate of return was once again based on my capital contributions and not related to the underlying value of the assets owned by the Fund. I also understood that on the statement there was a snapshot of the various securities owned by the Fund, but no values were listed for those securities, as they were provided for illustrative purposes only.

18. I have had a few update calls with Mr. Price over the years. During those calls he told me that some bonds had gone up drastically, and some had gone down, but overall the portfolio was able to meet its obligations to me to pay me the 18% interest I need for my income. He referenced some policy changes by Fannie Mae and Freddie Mac back in 2010 or 2011 which I believe caused some of the bonds to get taken right out of the account. While this had some impact, it did not change my income.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on the 25th day of April, 2014, in Glendale, Arizona.

[redacted] Murch

DECLARATION

I, [redacted] Newcomb declare as follows:

(Name of Shareholder)

1. I have personal knowledge of the facts stated in this declaration, except for those stated upon information and belief, and if called upon could competently testify thereto.

2. I am a shareholder of Capital Access, LLC a California limited liability company (hereinafter referred to as "Capital Access, LLC" or the "company").

3. I learned of the opportunity to invest in the company based on a preexisting relationship with a Capital Access corporate officer. I was not approached by any third party solicitors, consultants, finders, friends, or representatives of any other entity or individual acting on behalf of Capital Access, LLC.

4. I purchased shares for my own account. (or for the benefit of the account of another whom I am duly authorized to sign for).

5. Prior to any discussions about the investment, a corporate officer of Capital Access, LLC provided me with a questionnaire which explained that: (a) I had to be qualified as an "accredited investor" as defined under Rule 501(a) of the Securities Act of 1933, (b) that the questionnaire would help the company determine my eligibility as an "accredited investor," and (c) that a period of 30 to 45 days after the questionnaire was completed and returned to the company must elapse before I could receive copy of the company's limited offering memorandum, entitled "Capital Access, LLC."

6. Capital Access thereafter informed me that I had qualified as an "accredited investor" and only upon my qualification as such, was provided to me with a copy of the company's limited offering memorandum. This document was the determining factor in my investment decision; no other materials or representations were utilized for me to make my investment decision.

7. I understand that Capital Access, LLC is not a registered investment advisory company, broker dealer, or investment company. I further understand that Capital Access, LLC is limited liability corporation with an opportunity to invest in class "A" preferred shares, that

these shares are the only thing I have invested in, and that based on the number of shares I own, I am entitled to an annual stated dividend ranging from 7.48% to 12.5% based the One Month London Interbank Offered Rate.

8. I understand my rate of return fluctuates based on the profitability of Capital Access, LLC and its business operations. I further understand that the assets owned by Capital Access, LLC may decrease in value or increase in value due to a variety of factors and market conditions.

9. I understand that Capital Access, LLC has transferred to ABS Manager, LLC ("ABS Manager") of Arizona control over the assets of the company, which includes my investment. I further understand that ABS Manager, LLC, and it alone have the ability to offer a line of credit against assets of Capital Access, LLC.

10. I understand my investment was used to purchase shares of Capital Access, LLC and that the strategy of the company is to purchase "Odd Lot" Agency Bonds. Due to the fact that there is no liquid market known to the Fund that can value "Odd Lot" purchases, I understand the value of the shares I own will remain consistent as long as Capital Access, LLC is profitable with a direct correlation to the interest the "Odd Lot" assets accrue on a monthly basis.

11. I understand that ABS Manager will cover the expense of the line of credit for me, owed to Smith Barney, and lower my return from 12.5% variable to 11.44% in order to offset the cost of the credit line, which has a variable cost associated with it based on the one month LIBOR rate.

12. I trust the investment decision made by ABS Manager's licensed investment Adviser, Robert Armijo, and understand that no corporate officer other than Robert Armijo makes any decision on the investments of assets by Capital Access. LLC.

13. I understand that Capital Access, LLC and its officers, directors, mangers have no ability to offer me any sort of investment advice whatsoever and have never represented to be an investment adviser of any sort.

I declare under penalty of perjury of the laws of the state of California that the foregoing is true and correct. Executed on 7th JAN 2013, (~~Month~~) ~~2012~~ at OKLAHOMA City, OK. (City, State)

By: [redacted] Newcomb (Name of Shareholder)