UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MARK J. BOUCHER and STRATEGIC WEALTH ADVISOR GROUP SERVICES, INC.

Defendants.

Case No.: 20-CV-1650 DMS (MSB)

ORDER DENYING DEFENDANTS' RENEWED MOTION TO STAY AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY

This case comes before the Court on Plaintiff Securities Exchange Commission's ("SEC") motion for summary judgment on liability for all claims against Defendant Mark J. Boucher ("Defendant" or "Boucher") and the investment advisory firm of which he is the sole owner and operator, Strategic Wealth Advisor Group Services, Inc. ("SWAG"). Defendants also filed a renewed motion to stay these civil proceedings pending conclusion of the criminal indictment against Defendant Boucher. The motions are fully briefed and submitted. For the reasons set forth below, the Court denies Defendants' renewed motion to stay and grants Plaintiff's motion for summary judgment on liability under the antifraud provisions of the federal securities and investment advisor laws.

The SEC alleges Defendants engaged in a fraudulent scheme resulting in the theft of more than $2 million of client investment funds by Defendants Boucher and SWAG. (ECF

No. 1 at ¶¶ 4–12.) Boucher, while serving as a registered investment advisor, allegedly stole significant sums of money from the investment accounts of at least three clients. According to Plaintiff, Boucher forged checks and falsified documents to misappropriate client money and support his extravagant lifestyle. The facts are set forth below.

I.

FACTUAL BACKGROUND

Defendant Boucher is a resident of Carlsbad, California, and the sole owner and employee of SWAG. (ECF No. 1 at ¶ 13; No. 5 at ¶ 7.) He incorporated SWAG in California on February 25, 2015. (ECF No. 1 at ¶ 14; No. 5 at ¶ 8.) Boucher provided securities investment advice and received asset management fees as compensation from at least December 2010 to July 2020, and also did so through SWAG from its 2015 incorporation until July 2020. (ECF No. 1 at ¶¶ 13, 14; No. 5 at ¶¶ 7, 8; No. 32-20 at ¶ 5.)

Boucher was associated with Raymond James Financial Services Advisors, Inc. ("Raymond James") from January 2000 until March 2016, when he was terminated for violation of the firm's trust, estate, and power of attorney relationships policy. (ECF No. 32-49 at ¶ 7; ECF No. 32-50 at 3.) He provided investment advice to Marguerite Lennard ("Ms. Lennard") and her husbands while there. (ECF No. 32-49 at ¶¶ 8, 9.)

Boucher then associated with SCF Investment Advisors, Inc. ("SCF") from December 2016 until May 2019, when he was terminated for misappropriating customer funds. (ECF No. 32-20 at ¶¶ 3, 4, 11; ECF No. 32-49 at ¶ 22; ECF No. 32-60 at 2.) SCF used Charles Schwab & Co., Inc. ("Schwab") as its account custodian. (*Id.*; ECF No. 32-49 at ¶ 23.)

A. Theft of Funds from Marguerite Lennard

Ms. Lennard and her late first husband engaged Boucher as a financial advisor in or around 2001. (ECF No. 32-4 at 21:2–9.) Boucher became a friend to Ms. Lennard, and continued as Ms. Lennard's financial advisor and assisted her with various household chores without remuneration. (*Id.* at 21:13–18; 24:1–21.) On numerous occasions, Boucher sold securities in Ms. Lennard's accounts, transferred some of the proceeds to

separate trust accounts of Ms. Lennard's, and then wrote checks from those accounts to pay his personal credit card bills. These transactions were not pre-approved by Ms. Lennard. (*Id.* at 118:3–119:7; 127:14–129:24.) Boucher made such transactions while associated with Raymond James. (ECF No. 32-49 at ¶ 10.) Plaintiff highlights an example from March 2015, where Boucher sold securities in Raymond James accounts owned by Ms. Lennard and her then husband Mr. Conaway, creating proceeds of approximately $18,000. (ECF No. 32-49 at ¶¶ 11–14.) Boucher then transferred $6,260 to Ms. Lennard's separate Raymond James trust account, (*Id.*), and then wrote check No. 586 for $6,000 from that account to American Express and instructed American Express to credit those funds to his personal account. (*Id.* at ¶¶ 15–17; ECF No. 32-59; ECF No. 32-60.) While the signature on check No. 586 purports to be Ms. Lennard's, she did not have the checks associated with her Raymond James accounts and the check used a different notation than she uses. (ECF No. 32-4 at 17:25–18:13, 128:18–130:11.)

Plaintiff summarizes forty-nine similar instances where Boucher forged checks under Ms. Lennard's signature and misappropriated funds while associated with Raymond James. (ECF No. 32-49 at ¶¶ 21; ECF No. 32-87) (summarizing the transactions and finding a total of at least $230,557 stolen from Ms. Lennard.) Raymond James terminated Boucher in March 2016. (*Id.* at ¶ 7; ECF No. 32-50 at 3.)

Boucher continued to provide investment advice to Ms. Lennard and began misappropriating her funds in a similar way in January 2018, when he was associated with SCF. (ECF No. 32-49 at ¶¶ 22–32; ECF No. 32-20 at ¶ 3, 6.) Plaintiff highlights an example from February 15, 2019, where Boucher sold shares in Ms. Lennard's SCF trust account held at Schwab, generating approximately $16,000 in proceeds. (ECF No. 32-49 at ¶ 26.) He then wrote check No. 127 for $8,393, sent the check to American Express, and instructed American Express to use the funds to credit his various American Express accounts. (*Id.* at ¶¶ 26–28.) As before, Ms. Lennard did not possess the checks associated with the trust account. (ECF No. 32-4 at 118:2–20.) Plaintiff details numerous such instances when Boucher forged checks and misappropriated Ms. Lennard's funds while

associated with SCF. (ECF No. 32-49 at ¶ 15, 25–32; ECF No. 32-88) (summarizing 28 instances of funds from Ms. Lennard's SCF trust account being applied to Boucher's private accounts.)

On or about May 10, 2019, Ms. Lennard received a letter from American Express informing her it could not deposit a check written from her Schwab account because it "needed the specific amounts that [it] should apply to each account." (ECF No. 32-9.) Attached to the letter, Ms. Lennard saw a copy of check No. 132 for approximately $14,000 and the remittance slip for one of Boucher's American Express accounts. (*Id.*; ECF No. 32-4 at 139:11–18.) Ms. Lennard recognized that the signature on the check was not hers. (ECF No. 32-4 at 139:11–18.)

Boucher came to Ms. Lennard's home on Saturday, May 11, and she informed him about the letter from American Express. (*Id.* at 139:18–140:20.) He at first denied misappropriating the funds, but eventually admitted to the single instance of theft using check No. 132. (*Id.*) He offered to pay Ms. Lennard whatever she wanted, as long as she did not tell anyone about the theft. (*Id.*) Ms. Lennard refused and asked him to leave. (*Id.*)

After confronting Boucher, Ms. Lennard contacted Schwab and learned from a representative that numerous checks had been written from her Schwab account to pay Boucher's American Express and Citibank credit cards. (*Id.* at 140:21–141:7.) On or about May 13, 2019, after Schwab received Ms. Lennard's call, Schwab representatives contacted Rick Almageur, SCF's Chief Compliance Officer, to report possible fraudulent conduct in Ms. Lennard's account. (ECF No. 32-20 at ¶¶ 2, 6.) Boucher admitted to his conduct during a subsequent call with Mr. Almageur and SCF's CEO, as well as in a letter to Mr. Almageur. (*Id.* at ¶¶ 7–8; ECF No. 32-20; ECF No. 32-33.) SCF also conducted an internal investigation and determined that Boucher sold securities held by Ms. Lennard and then used the proceeds of these sales to pay his personal bills at American Express and Citibank by writing checks from Ms. Lennard's Schwab trust account, without Ms. Lennard's approval, on at least fifteen separate occasions. (ECF No. 32-20 at ¶¶ 9–10; ECF No. 32-49 at ¶¶ 25–32.) SCF terminated its association with Boucher for making

unauthorized withdrawals from a customer's account. (ECF No. 32-20 at ¶ 11; ECF No. 32-60 at 2.)

B. Theft of Funds from Brett and Ross King

Ross and Brett King are brothers who own and operate King Shock Technology, Inc. ("King Shocks"), which builds and services shock absorbers. (ECF No. 32-10 at 9:17–10:8.) Boucher was a customer of King Shocks, then provided financial advice to the company and acted as a financial advisor to the King brothers. (ECF No. 32-10 at 13:15–23 and 14:5–15:17; ECF No. 32-11 at 16:23–17:7 and 18:22–19:1.)

On March 16, 2017, Boucher sold shares in Brett King's Schwab account, generating approximately $70,000 in proceeds. (ECF No. 32-49 at ¶ 36.) The next day, $89,958.14 was transferred from Brett King's Schwab account to Ross King's Schwab account, but Brett King has no recollection of seeing or signing the transfer form. (*Id.*; ECF No. 32-11 at 35:19–36:21 and 40:13–41:21.) Thereafter, Schwab received a wire authorization form purportedly from Ross King requesting a wire transfer of $60,000 to Rio Vista Chevrolet ("Rio Vista"), a Buelton, California car dealership, with the funds to be withdrawn from Ross King's Schwab account. (ECF No. 32–49 ¶ 39; ECF No. 32-84.)

However, Ross King never authorized a payment of $60,000 to Rio Vista Chevrolet for the purchase of a car. (ECF No. 32-10 at 28:11–13; 29:22–30:25.) He does not recall ever seeing the wire transfer form. (ECF No. 32-11 at 68:21-25; ECF No. 32-10 at 66:8–16.) A Rio Vista employee sought clarification from Boucher, who responded that the "60k is for me not Ross King. Talked to Schwab and they made error on name." (ECF No. 32-16 at ¶ 8; ECF No. 32-19.) In a call with Schwab, a person calling from Boucher's phone number answered security questions for Ross King, verifying the signature to release the $60,000 in funds. (ECF No. 32-49 at ¶¶ 40–41.) Boucher then purchased a Camaro from Rio Vista and registered it in his name. (ECF No. 32-13.)

Ross King later expressed interest in the car, and Boucher offered to sell it to him. (ECF No. 32-10 at 48:20–49:4.) Boucher suggested the price for the Camaro and in September 2018 sold it to Ross King for $52,500. (ECF No. 32-10 at 49:15–51:8.) At the

time he purchased it, Ross King did not know Boucher had used Ross and Brett King's money to purchase the Camaro. (ECF No. 32-10 at 51:25–52:6.) The King brothers did not learn of the misappropriation of funds until receiving a voicemail from Mike Sell, the owner of Rio Vista, who had himself initiated an investigation after learning from his friend Ms. Lennard that Boucher stole funds from her. (ECF No. 32-11 at 66:14–68:25; ECF No. 32-16 at ¶ 3–4.) While Mr. Sell did not find any issues with the funds that Boucher managed for him as his financial advisor, he recalled the sale of the Camaro and had his staff investigate. (ECF No. 32-16 at ¶ 5–6.) Mr. Sell discovered and relayed to Brett King that the wire transfer the dealership received for the car had Ross King's typed name on it, but it was crossed off and replaced with the handwritten name of Mark Boucher. (ECF No. 32-11 at 66:14–68:19; ECF No. 32-16 at ¶ 10; ECF No. 32-18.) When Rio Vista staff had inquired about this, Boucher replied Schwab made a mistake. (ECF No. 32-16 at ¶ 8.)

C. Theft of Funds from the Hendry Trust

Willoene Hendry ("Ms. Hendry") was an investment advisor client of Boucher and SWAG. (ECF No. 1 at ¶ 44; ECF No. 5 at ¶ 30.) Ms. Hendry passed away in August 2019. (*Id.*) Prior to her death, she created a revocable trust document ("Trust Document") and named Boucher successor trustee over the trust ("Hendry Trust"). (ECF No. 1 at ¶¶ 44–45; ECF No. 5 at ¶¶ 30–31; ECF No. 32-14.) Boucher and SWAG also served as the trust's investment advisor. (ECF No. 32-23 at ¶ 11; ECF No. 32-30.)

As successor trustee to the trust, Boucher was obligated to disburse the assets of the trust as set forth in the Trust Document, which stipulated all assets should be held in trust for and disbursed to a sole beneficiary: non-profit organization Canine Companions for Independence, Inc. ("CCI"). (ECF No. 1 at ¶ 45; ECF No. 5 at ¶ 31; ECF No. 32-23 at ¶ 12.)

Between Ms. Hendry's death in August 2019 and December 2019, Boucher opened several new bank and advisory accounts in the name of the Hendry Trust. (ECF No. 1 at ¶ 47; ECF No. 5 at ¶ 32; ECF No. 32-23 at ¶¶ 13, 24, 31.) Between September and October 2019, Boucher sold numerous stocks in the trust's TD Ameritrade account, converting the

trust's assets to cash. (ECF No. 32-23 ¶¶ 15–17, 20.) In October 2019, Boucher transferred cash from these sales from the advisory account at TD Ameritrade to a newly opened Hendry Trust account at Wells Fargo using cashier's checks. (ECF No. 1 at ¶ 47; ECF No. 5 at ¶ 32; ECF No. 32-23 ¶ 16.)

Boucher then began transferring money from the Hendry Trust Wells Fargo account to himself. He sent trust funds to his personal checking account at JP Morgan Chase bank. (ECF No. 32-23 at ¶¶ 18–19, 35.) He also used trust funds to pay his personal credit card bills and withdrew cash from the trust account. (ECF No. 32-23 ¶¶ 21–23, 27, 28, 35.) Approximately $77,330 of funds are listed by Boucher as reimbursements for his work and services to the trust. (ECF No. 42-6 at 21–22.) However, Boucher also sent over $500,000 of trust funds to his personal Chase account, withdrew over $37,000 of cash from the trust's bank accounts, and transferred approximately $379,000 to his personal Fidelity account from the trust, totaling much more than the $77,330 of reimbursements accounted for by Boucher. (ECF No. 32-23 at ¶¶ 29–35.) Boucher sent only $127,958 of trust funds to CCI. (*Id.* at ¶ 34.)

D. Procedural History

On August 25, 2020, Plaintiff filed a civil complaint charging Defendants with violating several antifraud provisions under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Advisors Act. (ECF No. 1.) Defendants filed an answer on November 9, 2020. (ECF No. 5.) On December 28, 2020, the United States, through the U.S. Attorney's Office for the Southern District of California (USAO), moved to intervene and to stay proceedings. (ECF No. 15.) Defendants opposed both motions. (ECF No. 16.) The Court granted the motion to intervene and denied the motion to stay proceedings. (ECF No. 22.) The parties conducted discovery, overseen by Judge Michael S. Berg. (*See* ECF No. 13.) Boucher was indicted by the USAO on October 5, 2021, based on the same facts as in the present case. (ECF No. 33 at 3.)

Plaintiff filed the instant motion on October 6, 2021, seeking partial summary judgment that Defendants violated Section 10(b) of the Exchange Act and Rule 10b-5

thereunder; Section 17(a) of the Securities Act; and Section 206 of the Advisors Act ("the anti-fraud provisions"). (ECF No. 32.) On October 18, 2021, Defendants filed a motion to stay this action pending resolution of the related criminal proceedings, which the Court denied. (ECF Nos. 33, 35, 39.) Defendants filed an opposition to the motion for summary judgment (ECF No. 42), and Plaintiff replied. (ECF No. 43.) On November 30, 2021, Defendants filed a renewed motion to stay these proceedings (ECF No. 45), which Plaintiff opposed. (ECF No. 46.) The Court first addresses the motion to stay.

II.
RENEWED MOTION TO STAY

Defendants seek a stay of the instant case pending the resolution of criminal proceedings in *United States of America v. Mark J. Boucher*, 3:21-CR-2872-BAS. Defendants previously sought and were denied a stay in this case. (ECF Nos. 33, 39.) "While a district court may stay civil proceedings pending the outcome of parallel criminal proceedings, such action is not required by the Constitution." *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989) (citing *Securities & Exchange Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C.Cir.), *cert. denied*, 449 U.S. 993 (1980)). In exercising its discretion to stay civil proceedings when justice so requires, a court should consider the circumstances and interests involved in the case. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir.1995). This includes the interests of plaintiffs in moving forward, the burden on defendants, and the efficient use of judicial resources. *Id.* at 325 (citing *Molinaro*, 889 F.2d at 902, 903).

In their renewed motion to stay, Defendants cite the obstruction of justice charges in the criminal case related to documents that Defendants attempted to, or would otherwise seek to, introduce in the instant case. (ECF No. 45 at 2; and Ex. A.) However, when Defendants previously sought a stay in the case on October 18, 2021 (ECF No. 33), they were already aware of the obstruction of justice charges, as the indictment was filed on October 5, 2021. (ECF No. 45 Ex. A.) Defendants did not argue on these grounds in their

prior motion. (*See* ECF No. 33.) As this is not a newly occurring issue or changed position, the Court's prior reasoning stands.

The use or avoidance of these documents is similar to the invocation of Boucher's Fifth Amendment rights that formed the basis of his prior motion: a choice that he is free to make, but not one that entitles him to a stay. *Cf. Keating*, 45 F.3d at 326. ("A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege."). The benefits and drawbacks of Defendants' litigation decisions must be borne by Defendants, and do not change the calculus of the *Keating* factors; Defendants are still seeking a stay at a late stage of the instant case, after previously opposing the USAO's motion to stay these proceedings, and benefiting from discovery.

Defendants' renewed motion to stay is therefore denied. Having so decided, the Court next considers Plaintiff's motion for summary judgment.

III.
LEGAL STANDARD

Plaintiff seeks partial summary judgment on liability and an adverse inference based on Boucher's invocation of his Fifth Amendment right in the instant civil case. The legal standard for each is addressed below.

A. Summary Judgment

Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the initial burden of demonstrating that summary judgment is proper by "showing the absence of any genuine issue of fact." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The moving party must identify the pleadings, depositions, affidavits, or other evidence that it "believes demonstrates the absence of a genuine issue of material fact." *Id.*; *see also* Fed. R. Civ. P. 56(c)(1). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982); *see*

also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). Credibility determinations are not made at this stage; they remain "exclusively within the province of the factfinder at trial, not the district court on summary judgment." *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1035–36 (9th Cir. 2005).

If the moving party meets its burden, the burden then shifts to the opposing party to show that summary judgment is not appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The opposing party's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255. However, to avoid summary judgment, the opposing party cannot rest solely on conclusory allegations. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, it must designate specific facts showing there is a genuine issue for trial. *Id.* There must be more than "a scintilla of evidence" to establish a genuine issue of material fact. *In re Oracle Corp. Secur. Litig.*, 627 F. 3d 376, 387 (9th Cir. 2010). Indeed, the "non-moving party must go beyond the pleadings and by its own evidence set forth specific facts showing that there is a genuine issue for trial." *See Far Out Products, Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001).

"To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56." *Block v. City of Los Angeles*, 253 F.3d 410, 418–19 (9th Cir. 2001) (citing *Celotex Corp.* at 324). For evidence submitted via affidavits or declarations, Rule 56(c) requires that they "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). However, for summary judgment declarations, "a proper foundation need not be established through personal knowledge but can rest on any manner permitted by Federal Rule of Evidence 901(b) or 902." *S.E.C. v. Phan*, 500 F.3d 895, 913 (9th Cir. 2007) (citing *Orr v. Bank of Am.*, 285 F.3d 764, 774 (9th Cir. 2002)). Unauthenticated documents cannot be considered

on a motion for summary judgment. *Canada v. Blain's Helicopters, Inc.,* 831 F.2d 920, 925 (9th Cir.1987). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact" the court may grant summary judgment if materials show the movant is so entitled. Fed. R. Civ. P. 56(e).

B. Adverse Inference for Invocation of Fifth Amendment Privilege

When a party invokes its Fifth Amendment right not to testify in a civil case, courts can apply an adverse inference that, had the party responded, the responses would have been incriminating in nature. *See United States v. Solano-Godines*, 120 F.3d 957, 962 (9th Cir. 1997); *see also Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (stating the Fifth Amendment does not forbid adverse inferences against parties in civil actions). Indeed, "Parties are free to invoke the Fifth Amendment in civil cases, but when they do, courts are equally free to draw adverse inferences from their failure to offer proof." *SEC v. Strategic Global Investments, Inc.,* 262 F. Supp. 3d 1007, 1023 (S.D. Cal. 2017) (citing *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998)). However, this is not a "blanket rule" as the court must balance the parties' interests in light of "the circumstances of that particular civil litigation." *Doe ex rel. Rudy Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000). No negative inference should be drawn "unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information." *Id.*

IV.
DISCUSSION

Plaintiff seeks summary judgment on liability as to all claims against Defendants Boucher and SWAG. (ECF No. 32-1.) In support of Plaintiff's claims, it seeks the application of an adverse inference based on Boucher invoking his Fifth Amendment privilege and failing to respond to any discovery. (*Id*. at 20.) Defendants counter that there remain genuine issues of material fact and that an adverse inference should not be applied against Boucher. (ECF No. 37.)

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A. The Exchange Act, Securities Act, and Advisors Act

Plaintiff alleges that Defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; Section 17(a) of the Securities Act; and Sections 206(1) and (2) of the Advisors Act.

1. Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 thereunder.

Section 10(b) of the Exchange Act prohibits fraud in connection with the purchase or sale of any security. It states, in pertinent part, that:

> 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 … [t]o 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 … 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 under Section 10(b) expounds on the employment of manipulative and deceptive devices, stating that this covers "employ[ing] any device, scheme, or artifice to defraud" or "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5.

To prove a violation of Section 10(b) and Rule 10b-5 requires showing "[1] a material misstatement or omission [2] in connection with the offer or sale of a security [3] by means of interstate commerce" done with [4] "scienter." *Phan*, 500 F.3d at 907–08 (quoting *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir.2001)). The materiality element is met when 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." *Phan*, 500 F.3d at 908 (internal quotation and citation omitted). Materiality can be resolved as a matter of law on summary judgment only where "the established omissions are so obviously important to an investor, that reasonable minds

cannot differ on the question of materiality." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (internal quotation omitted).

The "in connection with requirement is met if the fraud alleged somehow touches upon or has some nexus with any securities transaction." *Rana Research*, 8 F.3d 1358, 1362 (9th Cir. 1993) (internal citation and quotation omitted). It is "'as broad and flexible as is necessary to accomplish the statute's purpose of protecting investors.'" *SEC v. Zouvas*, No. 3:16-cv-0998, 2016 WL 6834028, at *11 (S.D. Cal. Nov. 21, 2016) (quoting *Rana Research*, 8 F.3d at 1362). This can include the sale of securities for the purpose of subsequently misappropriating the proceeds. *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002). Similarly, the interstate commerce element is broad and met by use of any interstate instrumentality, mail, or any national securities exchange, 15 U.S.C. § 78j(b), and is undisputed in this case. (*See* ECF No. 3, Answer, ¶ 2).

Finally, the scienter element is satisfied by "knowing or reckless conduct." *Vernazza v. S.E.C.*, 327 F.3d 851, 860 (9th Cir.), *amended*, 335 F.3d 1096 (9th Cir. 2003). Courts have found that misuse of client funds can prove "intent to defraud." *United States v. Booth*, 309 F.3d 566, 575 (9th Cir. 2002); *see also SEC v. Wayland*, 2019 WL 2620669, at *7 (C.D. Cal. April 8, 2019) ("[Defendant]'s misappropriation of investor money for personal use is sufficient proof of scienter.") The conduct of a sole owner and operator can be imputed to a corporation that he controls. *See SEC v. Smith*, No. 20-cv-1056, 2020 WL 6115077, *4 (C.D. Cal. June 3, 2020) (citing *SEC v. Platforms Wireless Intern. Corp.*, 559 F. Supp. 2d 1091, 1096 (S.D. Cal. 2008), *aff'd*, 617 F.3d 1072 (9th Cir. 2010)).

2. Section 17(a) of the Securities Act of 1933.

Section 17(a) of the Securities Act of 1933 concerns the use of interstate commerce for fraud or deceit and closely tracks section 10(b) and Rule 10b-5. It states, in pertinent part:

> 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.

The "same elements required to establish a section 10(b) and Rule 10b-5 violation suffice to establish a violation under sections 17(a)(1)-(3)" of the Securities Act. *SEC v. Zouvas*, No. 3:16-cv-0998, 2016 WL 6834028, at *11 (S.D. Cal. Nov. 21, 2016) (citation and quotation omitted). However, Sections 17(a)(2) and 17(a)(3) require only a showing of negligence, not scienter. *Phan*, 500 F.3d at 908.

3. Sections 206(1) and (2) of the Advisors Act.

Section 206 of the Advisers Act provides, in pertinent part, that it is "unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly (1) to employ any device, scheme, or artifice to defraud any client or … (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client." 15 U.S.C. § 80b-6(1) and (2). Section 206(1) requires proof of scienter, while Section 206(2) does not. *Vernazza*, 327 F.3d at 860, n. 6 (9th Cir. 2003). Thus, the standard for violation of 206(1) mirrors Section 10(b) of the Exchange Act. *SEC v. Gendreau & Assocs., Inc.*, No. 09-cv-3697, 2010 WL 11508794, at *6 (C.D. Cal. Dec. 7, 2010).

B. Thefts from Ms. Lennard

1. SEC's facts demonstrate violation of the antifraud provisions.

The moving party must identify the evidence that demonstrates the absence of a genuine issue of material fact. *See* Fed. R. Civ. P. 56(c)(1). Here, the facts presented by the SEC meet all the elements[1] for violations of the anti-fraud provisions.

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[1] The other element, interstate commerce, is undisputed as noted *supra* in Part A of this Section.

a. Sections 10(b) of the Exchange Act and 17(a) of the Securities Act

First, the material misrepresentation or omission here is the taking of Ms. Lennard's funds for Boucher's personal use without authorization or notification. (*See, e.g.*, ECF No. 32-22) (written admission from Mr. Boucher that he took funds without Ms. Lennard's approval). The theft of one's funds is indisputably a fact a reasonable investor would find material, and thus can be appropriately found as a matter of law. *See TSC Indus., Inc.*, 426 U.S. at 450. Second, Boucher's thefts from Ms. Lennard commenced with the undisclosed sale of securities from her accounts thus meeting the in connection requirement. (*See, e.g.*, ECF No. 32-49 at ¶ 26) Third, Mr. Boucher's thefts from Ms. Lennard were undoubtedly done knowingly. The securities were sold and the funds moved directly by Boucher without direction from Ms. Lennard, and the funds were used by Boucher to pay his personal credit card bills. (*See, e.g.*, ECF No. 32-49 at ¶¶ 26–28) (describing Mr. Boucher's use of Ms. Lennard's funds to credit his American Express accounts). Boucher's knowing acts can be imputed to SWAG. *See SEC v. Smith*, No. 20-cv-1056, 2020 WL 6115077, *4 (C.D. Cal. June 3, 2020). Thus, the SEC has provided facts showing a violation of this Section. Because Section 17(a) of the Securities Act contains the same elements as Section 10(b) of the Exchange Act, the elements of Section 17(a)(1)-(3) are met. *See SEC v. Zouvas*, No. 3:16-cv-0998, 2016 WL 6834028, at *11 (S.D. Cal. Nov. 21, 2016). Thus, the Courts finds a violation of 17(a) is established on the same facts.

b. Sections 206(1) and (2) of the Advisors Act

The Advisors Act covers unlawful activity by "any investment adviser." 15 U.S.C. § 80b-6(1). Boucher was an investment advisor to Ms. Lennard. (ECF No. 32-4 at 21:2–9.) As noted, the standard for violation of 206(1) is the same as under Section 10(b) of the Exchange Act. A violation of Section 10(b), as here, suffices to find a violation of 206(1). *See SEC v. Gendreau & Assocs., Inc.*, No. 09-cv-3697, 2010 WL 11508794, at *6 (C.D. Cal. Dec. 7, 2010). And a violation of 206(1) suffices to find a violation of 206(2), which is a lower bar as it does not have a scienter requirement. *See Vernazza*, 327 F.3d at 860, n.

6. Thus, the Court finds a violation of Sections 206(1) and (2) of the Advisors Act on the same facts.

2. Defendants fail to identify a genuine issue of triable fact.

The SEC, having met its burden of production, has shifted the burden to Defendants to identify genuine material disputed facts. Conclusory allegations are insufficient. *Berg*, 794 F.2d at 459. The only issue raised by Defendants in their opposition is that there is "a credibility issue for the trier of fact to determine if Ms. Lennard was aware of the financial activity in question and authorized it." (ECF No. 42 at 7–8.) Defendants suggest that because Ms. Lennard admitted she received monthly activity statements and "only discovered the thefts long after the fact[,]" she potentially knew of and authorized the transactions. (*Id.*) However, Ms. Lennard states in her deposition that she did not authorize the transactions, and Defendants have not submitted or pointed to any contrary evidence. The Court cannot credit Defendants' assertion when Defendants have presented no evidence to support it. *See Anderson*, 477 U.S. at 255. Accordingly, there are not two "differing versions of the truth" that require a trial; rather there is only a conclusory allegation based on a reinterpretation of Ms. Lennard's deposition. *See Seaboard Corp.*, 677 F.2d at 1306. That is insufficient to avoid summary judgment.

In addition, these counts do not rest on a credibility issue as to Ms. Lennard, as the SEC produced ample evidence beyond her deposition. The numerous other sources—including Boucher himself—make clear that Boucher engaged in a number of unauthorized actions. First, Rick Almageur, SCF's Chief Compliance Officer, declares that he was alerted by Charles Schwab & Co. of possible fraudulent conduct by Boucher as to Ms. Lennard's account around May 13, 2019. (ECF No. 32-20 at 2.) He and SCF's CEO, Randy Meadows, called Boucher the next day, and Boucher admitted on the call that he had written checks from Ms. Lennard's Schwab account to pay for his personal American Express bills. (*Id.* at 3.) Almageur further attests that "SCF's investigation revealed that Ms. Lennard did not approve the disbursements between January 2018 and April 2018 from her account that Mr. Boucher used to pay his personal expenses" and that Boucher was

terminated "for misappropriating customer funds." (*Id.* at 4.) The official record of Boucher's termination notes the same. (ECF No. 32-60 at 2.)

Second, the May 14, 2019, call made to Boucher was recorded and a transcript is attached to Almageur's declaration, wherein Boucher admits to writing himself checks from Ms. Lennard's account to pay his credit card bill:

> MALE VOICE 2: … [A]ccording to Schwab, 15 checks were written from Ms. Leonard's account, paid -- made payable to American Express in the dollar amount of roughly $250,000. They spoke to the customer this morning. She said that she confronted you over the weekend. You admitted to what you had done. You asked her to keep this private, and that you would reimburse her, and then now today you transferred roughly the same dollar amount from your account to an outside account.
>
> …
>
> MALE VOICE 3: Hey, Mark. This is Randy. So can you give us kind of a history what happened, what -- what is all of this about?
>
> MALE VOICE 1: She had given me the checkbook, and I wrote the checks, out of stupidity. I guess that's the best thing I can say.
>
> MALE VOICE 3: So --
>
> MALE VOICE 1: I talked to her. I --
>
> MALE VOICE 3: So you wrote the checks -- the checks were for -- to pay your -- your credit card bill? Is that accurate, what they are saying over there at Schwab?
>
> MALE VOICE 1: Yeah

(ECF No. 32-21 at 3–4.)

Finally, at Almageur's request, Boucher wrote out a narrative description of what had occurred. That narrative is also attached to Almageur's declaration. In it, Boucher admits that Ms. Lennard did not approve the payments:

> During the time of Jan 2018 and April 2019 there were disbursements made on account [] maintained by Margee Lennard. The disbursements were made on a non-pre-approval basis.
>
> Margee Lennard asked about the disbursements and I divulged they were done. Arrangements were made with Ms. Lennard to reimburse her for the non-pre-approved disbursements …

(ECF No. 32-22.) Boucher offers no counter to any of these myriad sources that would create a genuine issue of material fact. Indeed, because the sources of proof beyond Ms.

Lennard's deposition are so numerous, the Court need not draw a negative inference against Boucher's invocation of his Fifth Amendment privilege on the claims as to Ms. Lennard. There are no triable issues of fact regarding the theft of funds from Ms. Lennard.

The SEC has provided uncontroverted evidence establishing that each element of the antifraud statutes at issue is satisfied. Accordingly, the Court grants summary judgment on liability as to these claims.

C. Ross and Brett King

1. SEC's facts demonstrate violations of the antifraud provisions.

As with Ms. Lennard, the material misrepresentation or omission here is the taking of funds for Boucher's personal use without notification or authorization. (ECF No. 32-10 at 28:11–13; 29:22–30:25.) The in connection requirement is met as the fraud commenced with the undisclosed sale of securities from Brett King's account. (ECF No. 32-49 at ¶ 36.) The scienter requirement is met as Boucher's actions—selling the securities, moving the funds, purchasing the car using the King brothers' funds—were done knowingly. (*See, e.g.*, ECF No. 32-49 at ¶¶ 36, 40–43) (summarizing Boucher's sale of securities and verifying Ross King's signature from his phone). Boucher's knowing acts can be imputed to SWAG. *See SEC v. Smith*, No. 20-cv-1056, 2020 WL 6115077, *4 (C.D. Cal. June 3, 2020). Thus, the SEC has provided sufficient facts showing a violation of Section 10(b) and Rule 10b-5. As discussed above, the same facts give rise to a violation of Section 17(a)(1)-(3). *See SEC v. Zouvas*, No. 3:16-cv-0998, 2016 WL 6834028, at *11 (S.D. Cal. Nov. 21, 2016).

Because the Advisors Act covers unlawful activity by "any investment adviser[,]" (15 U.S.C. § 80b-6(1)), and Boucher was an investment advisor to the King brothers, (ECF No. 32-10 at 14:18–15:17), the same facts that establish a violation of Section 10(b) suffice to find a violation of 206(1) and 206(2). *See SEC v. Gendreau & Assocs., Inc.*, No. 09-cv-3697, 2010 WL 11508794, at *6 (C.D. Cal. Dec. 7, 2010); *see Vernazza*, 327 F.3d at 860, n. 6. Thus, the Court finds a violation of Sections 206(1) and (2) of the Advisors Act on the foregoing facts.

/ / /

2. Defendants fail to identify a genuine issue of triable fact

The only issue raised by Defendants in their opposition is the assertion that the King brothers may have in fact authorized the purchase of the Camaro as a gift or reimbursement to Boucher because he had been forced to hire an attorney in relation to a separate legal proceeding involving Ross King. (ECF No. 42 at 4–6). This is similar to the credibility issue raised as to Ms. Lennard. Again, Defendants do not point to any evidence but rather offer an alternative interpretation of the King brothers' depositions. Because Defendants do not introduce any evidence to support their interpretation, they fail to create a triable issue. *See Far Out Products,* 247 F.3d at 997 (the "non-moving party must go beyond the pleadings and by its own evidence set forth specific facts showing that there is a genuine issue for trial.").

As with Ms. Lennard, neither brother says he intended to purchase the Camaro for Boucher. Rather, they state the opposite:

> Q. Isn't it a fact that Mark told you that in addition to the $50,000 he had to spend to hire an attorney, he wanted an additional $10,000 –
>
> A. No.
>
> Q. Okay. And isn't it a fact that the manner in which you repaid him is by arranging to buy a Camaro for him?
>
> A. No
>
> …
>
> Q.$50,000 that was paid for the car, was not reimbursement for what you put Mark Boucher through?
>
> [Objection to form]
> A. No.

(ECF No. 32-10 at 27:10–16, 36:18–21; *see also* ECF No. 32-11 at 68:9–25.) Defendants have not identified any contrary facts to this testimony. Defendants attempted to introduce an email during depositions—from the King brothers' late father Lance King, telling Boucher he would have "Ross make good on the cost of the attorneys" that Boucher had been forced to hire—which they argue demonstrates the brothers' motivation to buy the car for Boucher. (ECF no. 42 at 6.) However, Defendants were unable to authenticate the

email. (ECF No. 43 at 5–6) (summarizing the depositions of Ross and Brett King and Defendants' unsuccessful attempts to authenticate the email.) Thus, this email cannot be considered at this stage and is not evidence that gives rise to a triable issue of material fact. *See Canada,* 831 F.2d at 925 (9th Cir.1987) (holding unauthenticated documents cannot be relied upon to defeat summary judgment); *see also Phan*, 500 F.3d at 913 (9th Cir. 2007) (noting that evidence at summary judgment must have some foundation under the Federal Rules of Evidence.)

Defendants also argue that the wire authentication form from Schwab purports to have Ross King's signature and Ross King could not rule out whether he signed the form. (ECF No. 42 at 4–6).

> Q. All right, you have that in front of you, sir?
> A. Yes.
> Q. Is that your signature?
> A. I couldn't tell you.
> Q. Are you saying you didn't sign this?
> A. I'm not saying that I didn't. I can't tell you that that's my signature or not.
> …
> Q. Can you recognize your own signature?
> A. It looks similar, yes.
> Q. Okay. So it appears to be your signature?
> A. Okay.
> Q. Well, I'm asking you, sir. I can't testify.
> A. Well – okay.
> Q. Take a look at it carefully and tell me whether or not you believe that to be your signature.
> A. I can't tell you if I believe it to be my signature or not. It could be; it couldn't be. I don't know.

(ECF No. 32-10 at 29:2–25.) Construing this potential inference in Defendants' favor, *Anderson*, 477 U.S. at 255, there may be a genuine issue as to whether the signature on the wire authorization form is authentic. However, whether the wire authorization form bears Ross King's true signature is not a *material* fact that precludes the entry of summary judgment. *See Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). Ross and Brett King both stated repeatedly that they did not intend to purchase the car for Boucher. Whether the form was inadvertently signed by Ross King without him intending to purchase a car for Boucher, or whether Boucher forged the signature, does not change that a theft of one's funds is a material omission and thus would not alone change the outcome of the antifraud violations at trial.

There is also uncontroverted evidence, beyond any credibility issue as to the King brothers, that establishes liability. The wire transfer form that Rio Vista received for the car had Ross King's name typed on it, but it was crossed off and replaced with the handwritten name of Boucher. (ECF No. 32-16 at ¶ 10; ECF No. 32-18). The person who called Schwab to answer security question and verify Ross King's signature for the wire transfer called from Boucher's phone. (ECF No. 32-49 at ¶¶ 40–41.) These facts show the car was purchased without the King brothers' knowledge, and Defendants have offered no evidence beyond the pleadings to support their contention that the car was a gift. *See Far Out Products,* 247 F.3d at 997.

Boucher has chosen to invoke his Fifth Amendment privilege and not testify as to the details of this alleged gift. Because of other available evidence concerning the theft of funds from the King brothers, the Court need not draw an adverse inference against Boucher. In the absence of triable issues, summary judgment on liability is granted as to these claims.

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D. Hendry Trust

1. SEC's facts demonstrate violations of the antifraud provisions.

As with Ms. Lennard, the material misrepresentation or omission here is the taking of unwarranted funds from the Hendry Trust for Boucher's personal use without authorization. (*See, e.g.*, ECF No. 32-23 at ¶¶ 18–19, 35) (describing Boucher's transfer of Hendry Trust funds to his personal bank account). The in connection requirement is met as the fraud commenced with the sale of securities from Hendry Trust accounts. The scienter requirement is met as Boucher's actions—selling the securities, creating new accounts, moving the funds—were done knowingly. And Boucher's knowing acts can be imputed to SWAG. *See SEC v. Smith*, No. 20-cv-1056, 2020 WL 6115077, *4 (C.D. Cal. June 3, 2020). Thus, the SEC has provided facts showing a violation of this Section 10(b) and Rule 10b-5. As discussed above, these facts also give rise to a violation of Section 17(a). Likewise, as an "investment adviser" to the Hendry Trust, (ECF No. 32-28), the same facts that establish a violation of Section 10(b) suffice to find a violation of Sections 206(1) and 206(2). Thus, the Court finds a violation of Sections 206(1) and (2) of the Advisors Act on these facts.

2. Defendants fail to identify a genuine issue of triable fact.

Defendants submit there is evidence for the trier of fact to consider regarding whether Boucher was entitled to the funds in question, thus precluding summary judgment. (ECF No. 42 at 6–7.) They argue that Boucher (1) was entitled to reimbursement for lawful services rendered, and (2) received a gift from Ms. Hendry for $1.5 million.

Defendants submit a trust accounting which identifies funds Boucher "received personally as reimbursements for his expenses rather than stolen funds." (ECF No. 42 at 7.) However, this evidence can create a triable issue only to the amount of the reimbursements. That some money was owed to Boucher, or that he was legally authorized to take certain actions for the trust, as its trustee, does not explain all funds that Boucher received.

Plaintiff has submitted evidence showing far more money going to Boucher than that properly received by him for services rendered. Defendants' evidence accounts for $77,330 worth of funds due Boucher for services lawfully rendered to the trust. (ECF No. 42-6 at 21–22.) However, Plaintiff provides evidence that Boucher transferred over $500,000 of trust funds to his personal Chase account; withdrew over $37,000 from trust bank accounts; and transferred approximately $379,000 to his personal Fidelity account from the trust. (ECF No. 32-23 at ¶¶ 29–35.) Thus, a genuine dispute exists only as to $77,300 of the total funds at issue. There is no triable issue of fact regarding the remaining funds. While the amount of money that Boucher misappropriated, beyond legitimate reimbursements for services rendered, will need to be determined at the remedies stage, Defendants' evidence does not create a triable issue as to the whole and defeat summary judgment as to liability.

Defendants also contend that Boucher was entitled to additional funds because Ms. Hendry intended to leave him a gift of $1.5 million. In support, Defendants submit a filing from a pending Superior Court case, attached as an exhibit to the declaration of attorney Marc Nurik. (ECF No. 42-3.) The petition in the state court proceeding includes a sworn verification by Boucher that Ms. Hendry added a gift to him in her estate plan, and a letter purportedly written by Ms. Hendry stating she will be gifting him $1.5 million. (*Id.*)

However, the letter is not authenticated. It is not attached to a declaration based on personal knowledge, as the letter was purportedly sent to Boucher, not his counsel Mr. Nurik.[2] *See* Fed. R. Civ. P. 56(c)(4). Defendants proffer no foundation for the letter, such as under Federal Rule of Evidence 901(b) or 902. *See Phan*, 500 F.3d at 913. Because the

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[2] Boucher, of course, was free to authenticate the letter himself, as its purported recipient, but he did not. Thus, while authenticated evidence can be considered at the summary judgment stage without a showing of admissibility at trial, it is unclear to the Court how Defendants would authenticate, let alone later admit, the letter at trial. The letter appears to be hearsay without an exception. *See, e.g.*, Fed. R. Evid 803, 804.

letter is not authenticated, it does not create a triable issue of fact. *See Canada,* 831 F.2d at 925 (9th Cir.1987) (holding unauthenticated documents cannot be relied upon to defeat summary judgment).

Further, Boucher's filing in a separate proceeding in state court is not equivalent to a declaration made in the instant case, and thus fails to create a triable issue. "As a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *M/V Am. Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983); *see also Baker v. California Dep't of Corr.*, 484 F. App'x 130, 132 (9th Cir. 2012) (citing *M/V Am. Queen* and declining to take judicial notice of an expert declaration submitted in another case as it was not an uncontroverted fact for which judicial notice would apply). Instead of submitting a declaration here, Boucher has opted to invoke the Fifth Amendment. Like the thefts from Ms. Lennard and the King brothers, based on other available evidence regarding these counts, the Court need not draw a negative inference from Boucher's invocation to decide the subject motion.

Defendants have not submitted any evidence to demonstrate that Boucher was entitled to funds beyond those for reimbursement. As such, there is no genuine issue of material fact on these counts and the Court grants summary judgment as to liability.

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IV.

CONCLUSION AND ORDER

For the reasons set out above, Defendants' renewed motion to stay this case is denied and Plaintiff's motion for partial summary judgment on liability is granted. A separate remedies stage will be required for the purposes of determining disgorgement and penalties. The Court will address this matter at the pretrial conference.

IT IS SO ORDERED.

Dated: February 8, 2022

Hon. Dana M. Sabraw, Chief Judge
United States District Court