[redacted]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

D. RAY STRONG, as Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust, the Castle Arch Opportunity Partners I, LLC Liquidating Trust and the Castle Arch Opportunity Partners II, LLC Liquidating Trust,

Plaintiff,

v.

JEFF AUSTIN; AUSTIN CAPITAL SOLUTIONS; WILLIAM H. DAVIDSON; ROBERT D. GERINGER; ROBERT D. GERINGER, P.C.; FINE ARTS ENTERTAINMENT; ROBERT CLAWSON; HYBRID ADVISOR GROUP; and JOHN DOES 1-50,

Defendants.

Civil Action No. 2:14-cv-00788-TC

DEFENDANTS [redacted] OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON SECOND CLAIM FOR RELIEF

Judge Tena Campbell

Magistrate Judge Evelyn J. Furse

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Defendant [redacted] hereby respectfully submits his opposition to the motion for summary judgment of Plaintiff on the second claim for relief. Dkt. 221.[1]

I. INTRODUCTION

Three years after filing the Complaint and five years after taking control of CAREIC in bankruptcy, Plaintiff is unable to present any evidence to support its unsubstantiated allegation that [redacted] was a board member, executive officer or similar whom was undisclosed solely "[b]ecause of his history of securities fraud and discipline before the SEC." Rather than present even a modicum of evidence, Plaintiff relies on four pages of unfairly prejudicial, inadmissible character (propensity) evidence that has no probative value[2] that forces [redacted] to defend himself from alleged misrepresentations not made by him and not under his control or authority, but instead against a securities enforcement and bar order entered more than three years before the formation of CAREIC (2001), based on conduct that occurred more than 25 years ago (1992), more than 12 years before CAREIC's formation in 2004, more than 17 years before leaving CAREIC (May 2009) and more than 22 years prior to the initiation of this action

[1] Contemporaneously herewith, [redacted] through his counsel, files a motion for relief for this untimely filing based serious medical complications pursuant to Fed. R. Civ. P. 6 (excusable neglect).

[2] "[E]vidence of the two-decades-old injunction would be minimally probative at best…the Federal Rules of Evidence and the SEC's own internal policies both suggest that the probative value of prior bad acts is diminished after ten years. Under the Federal Rules, evidence that a witness in a civil or criminal trial has been convicted of a felony must be admitted within ten years of the conviction; after ten years, the conviction is admissible only if its probative value, 'supported by specific facts and circumstances, substantially outweighs its prejudicial effect.' Similarly, the SEC's own regulations on reporting for public companies require that directors and officers disclose legal proceedings 'material to an evaluation of ... ability and integrity' only from the last ten years." *U.S. Sec. & Exch. Comm'n v. Jensen*, 835 F.3d 1100, 1116–17 (9th Cir. 2016) (internal citations omitted).

(October 2012).[3] At this stage of litigation, not only must the reasonable inference be drawn in [redacted]'s favor, the Court should follow "Occam's Razor and slice off needless complexity[,]"[4] to simply conclude that [redacted] was not disclosed because he was not a board member, executive officer or similar, and ignore Plaintiff's manufactured complex story, armed with the benefit of hindsight, designed to make a compelling theory of corporate malfeasance. "In the law, as in life, the simplest explanation is sometimes the best one." *Loan Syndications & Trading Ass'n v. S.E.C.*, 818 F.3d 716, 718 (D.C. Cir. 2016).

While clearly an unfortunate loss, through this Motion, Plaintiff attempts to lay blame on [redacted] as the "last man standing" based on 25-year-old historical conduct "on the ground that he was a bad person[,]"[5] instead of where it belongs, on the global recession generally and the domestic real estate market meltdown in particular, while circumventing any evidence from the personal knowledge of the actual assigning investors that Plaintiff purports to represent. However, Plaintiff has not satisfied his "'burden of showing beyond a reasonable doubt that [he] is entitled to summary judgment.'" *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir. 2008) (citation omitted). As Plaintiff "has the burden of proof, a more stringent summary judgment standard applies" and he "cannot force the nonmoving party to come forward with 'specific facts showing there [is] a genuine issue for trial' merely by pointing to parts of the record that it believes illustrate the absence of a genuine issue of material fact…Instead, the moving party must establish, as a matter of law, all essential elements of the issue before the nonmoving party can

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[3] The continued validity of the bar order and its evidentiary value is questionable based on the recent Supreme Court finding that SEC's administrative law judges were unconstitutionally appointed. The Supreme Court relied on the [redacted]'s bar order to dispute that such ALJ's were not inferior officers. *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018).
[4] *Commodity Futures Trading Comm'n v. Zelener*, 373 F.3d 861, 868 (7th Cir. 2004).
[5] *Therrien v. Target Corp.*, 617 F.3d 1242, 1257 (10th Cir. 2010).

be obligated to bring forward any specific facts alleged to rebut the movant's case." *Id*. (internal citations omitted).

In summary, the Motion is fatally defective and must be denied:

1. Plaintiff's proffered evidentiary support for his Motion is wholly inadequate to determine whether an omission occurred, let alone materiality. Plaintiff cobbles together a patchwork of objectionable evidence that is neither contemporaneous (not temporally linked) nor demonstrative of the "means of" the alleged omission in the subject CAREIC, CAS and CASDF PPMs. Plaintiff either mischaracterizes, misrepresents or draws improper inferences by taking such evidence out of context to press the claim. As provided in the Response to Plaintiff "Undisputed" Material Facts and Statement of Additional Material Facts, such "alleged" facts are clearly in dispute. **Notably, Plaintiff cites no evidence that even one investor supports its interpretation of any of the alleged omissions**.

2. Plaintiff's faulty analysis of relevant state securities law, the material differences therein and the applicable choice of law applicable to each alleged assigning investor's individual claim does not satisfy the burden to demonstrate that Plaintiff is entitled to judgment as a matter of law and precludes summary judgment.

3. Plaintiff's impossibly vague Motion fails to demonstrate a primary violation as a matter of law as the Motion does not specify the primary violator (required to determine control thereof), where the security was offered or sold (necessary for applicable law and relief) and relies on nonactionable, total nondisclosure or otherwise nonmaterial statements. Further, there is a genuine dispute as to the required privity between seller of CAS, CASDF and CAREIC Series E securities that precludes summary judgment.

4. Plaintiff fails to meet burden to demonstrate elements to establish control person liability precludes summary judgment – group published doctrine has no application in summary judgment context. Further, Plaintiff fails to demonstrate lack of knowledge, as required under California securities law for secondary liability.

5. Plaintiff relies on inapplicable or clearly distinguishable legal authority that fails to demonstrate that he is entitled to judgment as a matter of law.

II. BACKGROUND

The general background of CAREIC has been described to this Court several times. For purposes of judicial efficiency, pursuant to DUCivR 7-1(a)(4), [redacted] incorporates the background in Austin's Opposition to the Motion (Dkt. 250).

III. RESPONSE TO PLAINTIFF'S STATEMENT OF "UNDISPUTED" MATERIAL FACTS

Except as otherwise provided herein, for purposes of judicial efficiency, [redacted] incorporates the responses and objections in Austin's Opposition (Dkt. 250) pursuant to DUCivR 7-1(a)(4):

5. Each investor who purchased CAS, CASDF, or Series E securities, and on whose behalf the Trustee seeks summary judgment, executed a subscription agreement to memorialize his or her purchase.

Response: Denied in part. Plaintiff is not seeking summary judgment on behalf of specific investor(s) who purchased CAS, CASDF, or Series E securities on which the second claim is based. Instead, Plaintiff is seeking summary judgment on behalf of the Consolidated Legacy Debtors Liquidating Trust, of which the specified investors constitute some, but not all,

of the beneficiaries. (*Cf.* Appendix of Evidence in Support of [redacted]'s Opposition (hereinafter, "C.Apx.") at 404 (such claims are "for the benefit of all Beneficiaries of those Trusts.")).

6. These investors' subscription agreements were delivered to CAREIC's offices in Kaysville, UT, and were accepted by the signature of [Doug Child], CAREIC's CFO, who worked in the Kaysville office.

Response: Objection, calls for a legal conclusion (and personal knowledge) as to acceptance; otherwise, not disputed for limited purpose of this Motion.

7. The Trustee owns each of the securities fraud claims, formerly owned by investors, on which the Trustee seeks summary judgment.

Response: Objection, calls for a legal conclusion as to ownership of the securities fraud claims. Denied, the assignments in the Plan of Liquidation were not effective as a matter of law as provided in a forthcoming Motion for Summary Judgment to be filed by [redacted] as Plaintiff has not received express assignments; rather, claims were transferred regardless of investor action, vote on bankruptcy plan or otherwise (65% of the alleged assigning investors did not even respond to the solicitation). *See generally* C.Apx. at 404 ("all holders of Individual Claims unconditionally agree, regardless of whether they voted to accept or reject the Plan"). *See also* Response to Statement of Plaintiff's Statement of "Undisputed" Material Facts ("R.SUF") No. 5.

10. Prior to forming CAREIC, Mr. Cochran did not have any meaningful real estate development experience.

Response: Disputed. Objection FRE 401, 402 and 403 (Irrelevant) – Cochran's experience prior to forming CAREIC in 2004 is irrelevant in evaluating representations related to his experience made in 2007-2009, three years or more later. Thus, the interviews and testimony provide no insight as to Cochran's experience as of the date of each of the PPMs at issue, or

otherwise do not provide any demonstrable evidence as to the truth or falsity of the disclosures years later. Importantly, the Motion misstates the evidence and [redacted] disputes the inferences drawn by Plaintiff.

In his deposition testimony, Cochran stated that he had "limited" experience with real estate development "before Castle Arch." But the statement is relative, subjective, and temporally limited. As Cochran testified, prior to joining CAREIC, he had purchased multiple homes and two pieces of real estate in Wyoming, one piece consisting of approximately 900-plus acres and another piece of approximately 70 acres. (Plaintiff's Appendix of Evidence ("P.Apx."), v1 at 251-53). Cochran elaborated in testifying that he made improvements on the properties, including having "roads built, a house built, changed zoning, platted lots, [and] sold lots." (*Id.*) Overall, Cochran found that purchasing the land, developing it, and selling it was profitable. (*Id.*) In fact, CAREIC purchased land approximately 30 miles from this property. In addition, Cochran later testified that he "did not have significant experience" when asked whether he had "significant experience in [the business of acquiring raw agricultural land or land that had an opportunity to be developed into residential lots or commercial property] before Castle Arch?" (P.Apx., v1 at 995-96). It is entirely relative whether someone's experience over an entire career is "significant" or not. Nonetheless, when Cochran formed/joined CAREIC, he had already purchased and developed almost 1,000 acres of land, which many would infer to be "meaningful." In any case, by the date of the CAS PPM (first PPM relevant to Motion), CAREIC had been in business over three years with the Kingman, Tooele, Coalinga, Firebaugh and Smyrna projects in various stages of development; thus, each had relevant experience by the time of the relevant securities offerings. (Geringer Decl. at ¶ 19).

Objection FRE 602 (Foundation), FRE 802 (Hearsay) and FRE 106 (Rule of Completeness) – the Castle Arch / Internal Investigation Transcription, P.Apx., v1 at 1292-1349 attached to the Declaration of Brent B. Baker as Exhibit "A" that fails to provide necessary foundation, including how the transcription was made and by whom. The foundational paragraph simply states: "Attached hereto is as (sic) **Exhibit 1** is a copy of an interview transcription for Kirby Cochran that I produced to the Trustee in response to his demand that we provide him with all files related to the SEC matter and internal investigation." (P.Apx., v1 at 1289). Because the proper foundation has not been laid, the alleged transcript also amounts to hearsay. Further, it is not full and complete as it does not include the entire transcript to put the interview in context.

12. When he joined CAREIC, Doug Child was not experienced in residential development.

Response: Disputed. Objection FRE 401, 402 and 403 (Irrelevant) – Child's experience prior to forming CAREIC in 2004 is irrelevant in evaluating representations related to his experience made in 2007-2009, three years or more later.[6] The documents must be considered as a whole. FRE 106 (Rule of Completeness). Child was the CFO and a Certified Public Accountant and the PPMs do represent, claim or infer that Child, particularly or specifically, had "significant experience in raw land development" to be engaged in. (*See, e.g.*, P.Apx., v.2 at 50). *See also* R.SUF ¶ 9(c), incorporated by reference. Further, prior to CAREIC's formation, Child

[6] Plaintiff cites the trial testimony of Geringer from his claims hearing, wherein he states "[t]here was nobody else in the company that had real estate experience." (P.Apx., v.1 at 718). The statement is vague and relative at best. Geringer had by far the most experience in real estate development at the time CAREIC was founded. But to take Mr. Geringer's statement as meaning no one had any real estate experience is to entirely take the statement out of context. Importantly, the testimony is temporally fixed to pre-formation in 2004, not 2007-2009, the date of the offerings at issue.

was an owner of an LLC that he created "to buy and sell distressed real estate, homes." (C.Apx. at 494).

13. On May 12, 2008, the Company's auditor informed the Audit Committee and Board of Directors that, in connection with the audit of CAREIC's 2007 financial statements, the auditors had

> noted certain matters involving the internal control [of the Company] and its operation that [they] consider[ed] to be reportable conditions under standards established by the American Institute of Certified Public Accountants.

Response: Disputed. Objection FRE 602 (Foundation), FRE 702 (Expert Opinion), FRE 802 (Hearsay) and FRE 106 (Rule of Completeness). The letter is inadmissible opinion testimony on the subject matter and constitutes impermissible hearsay if offered for the truth of the matter asserted. Further, the document needs to be considered in its entirety, including information related to recipients and any documents submitted with the letter and information reviewed by the audit firm. For example, the letter also states that "[t]his report is intended solely for the information and use of the Audit Committee, management, and others within the Company and is not intended to be and should not be used by anyone other than these specified parties." (P.Apx., v.2 at 525). Further, Plaintiff provides no foundation for the letter. [redacted] has no recollection of receiving the letter prior to discovery in this case, and on that basis, refutes that he received a copy, that it was provided to the board of advisors of CAREIC or the audit committee of CAREIC. *See* Declaration of [redacted] ("[redacted] Decl."), filed concurrently herewith as Exhibit 3 to the Appendix of Evidence at ¶ 66 (C.Apx. at 35).

14. The audit letter identified as a "reportable condition," and "significant deficiency" in internal control that

> Robert D. Geringer, the Company's President, appears to negotiate contract terms independently and outside of the Company. The result is that neither the

> Company nor its other executives have significant if any, input on the terms or the structure of certain deals or their purchase price. Properties are then acquired by Mr. Geringer or another unrelated party in their name and subsequently transferred to the Company via assignment agreements. . . .
> There appears to be no review of HUD closing documents and disclosures by parties other than Mr. Geringer prior to closing.

Response: Disputed and objection. *See* R.SUF No. 13. While the letter speaks for itself, including this statement, the letter also states: "During our audit we also became aware of several other matters that are opportunities for strengthening internal controls and operating efficiency." (P.Apx., v2 at 525). Similarly, the inference drawn by Plaintiff is directly contradicted by other reports from the accountants. *See also* Statement of Additional Material Facts (hereinafter, "C.SAF") at ¶¶ 18-20; [redacted] Decl. at ¶ 66.

15. In 2007-08, Geringer was the only CAREIC executive who was fully informed about CAREIC's real estate projects. He shared limited information with the Board. The Board allowed him to operate without oversight.

Response: Disputed. Objection: FRE 602 (Foundation), FRE 802 (Hearsay) and FRE 106 (Rule of Completeness) as to the "Interview of K. Cochran Vol. 2." *See* R.SUF 10 *supra*. Objection FRE 401, 402 and 403 (Irrelevant) as to Email and "Overview of Castle Arch" as both are temporally distinct from the relevant time period of the PPMs (2009 and 2011) and provide no demonstrable evidence of truth or falsity during the offering of securities at issue (2007-09).

Further, both the Davidson deposition and email misstate the evidence. (*See, e.g.*, P.Apx., v.1 at 393-94 ("key role in identifying properties" does not address the sharing of information or oversight). In addition, this is denied by those defendants that were either on the advisory board of CAREIC, or others that regularly attended. *See* Dkt. 250-1 (Austin Decl.) at ¶¶ 28, 245-1 (Davidson Decl.) at ¶¶ 16-21; 245-2 (Hunt Decl.) at ¶¶ 21-23, 25-26; Dkt. 248-1 (Geringer Decl.) at ¶¶ 10-15.

16. None of these facts were disclosed to investors in the Series E PPM, the CAS PPM, or the CASDF PPM.

Response: Disputed. Objection. *See* R.SUF No. 15.

17. In early 2001, [redacted] was tried before an SEC ALJ on claims that he had willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. The ALJ determined that "the evidence establishe[d] that [redacted] participated in a scheme to defraud in violation of the antifraud provisions," that [redacted] had acted with "an intent to deceive, manipulate, or defraud," and "that [redacted] acted with scienter and willfully engaged in a scheme to defraud Enrotek investors in violation of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder."

Response: Denied in part. Plaintiff misrepresents the plain language of the document as only one of the three quotations was a determination by the ALJ.

Objection FRE 404 (Character Evidence). Under the Federal Rules of Evidence ("FRE"), rule 404(b)(1), evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with character. Plaintiff is not offering this "evidence" to show [redacted]'s motive, intent or knowledge (and could not); rather, he is offering to propensity, which is prohibited under Rule 404(b). "This inference is precisely the sort proscribed by Rule 404(b); inferring character from an act, and then a different act from that character, is impermissible." *McCue v. State of Kan., Dep't of Human Res.*, 165 F.3d 784, 790 (10th Cir. 1999). Importantly, Rule 404 was "amended to clarify that in a civil case evidence of a person's character is **never admissible** to prove that the person acted in conformity with the character trait." Fed. R. Evid. 404 advisory committee's note to 2006 amendment (emphasis added). **Plaintiff attempts to prejudice [redacted] with one**

page of cumulative, irrelevant evidence in the SUF and three pages in the background section in an attempt to bias the Court to overlook the noticeable absence of any demonstrative evidence establishing control person liability or material participation in the alleged primary violation.[7]

While Plaintiff spends numerous pages discussing historical findings of conduct occurring more than 25 years ago (ending on March 1992), it is notable and demonstrative of improper purpose to prejudice [redacted] and others that Plaintiff never actually states the sanction in the Plaintiff's SUF or his argument, a bar from association with any broker or dealer or participation in a penny stock offering, (P.Apx., v1 at 1248), or attempts to argue that [redacted]'s conduct at issue is violative of such bar. Objection as irrelevant and incomplete and should be excluded. Fed. R. Evid. 106, 401, 403.[8] CAREIC was not a publicly-traded company – its shares were not sold on any market. (*See, e.g.*, P.Apx., v1 at 42). Thus, CAREIC was not a penny stock and the ban had no impact on CAREIC's operation. Further, [redacted] affirmatively Disputed. *See* R. SUF 23 & 24. Admit the [redacted] was not disclosed in PPM, but affirmatively asserts **there is no legal or factual basis requiring disclosure** as: (i) Plaintiff neither provides that it is undisputed that [redacted] is an executive officer or director of CAREIC nor provides any relevant

[7] *See* Fed. R. Evid. 404, notes to Subdivision (a) ("Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.")

[8] *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); *see, e.g., Old Chief v. United States*, 519 U.S. 172, 180-92 (1997) (evidence should be excluded when the prejudicial impact of the evidence outweighs the probative value).

evidentiary support for such position and (ii) [redacted] is not affirmatively disclosed as a significant employee to establish a potential omission. (P.Apx., v2 at 52, 196, 305). *See* R.SUF at ¶¶ 20-24. Further, as the Motion argues, "the blue sky laws of California and Utah…do not require proof of reliance, scienter, or that the individual defendant personally made the alleged misstatement or omission[,]" no "probative value" exists, but rather Plaintiff provides this improper, inadmissible evidence to create an unfair prejudice and confuse the court over its lack of demonstrative evidence. *See* Fed. R. Evid. 403.[9]

Plaintiff's cumulative evidence is all the more prejudicial based on the recently decided Supreme Court case holding that "administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such 'Officers[]'" and the staff members selection of such ALJ was unconstitutional under the Appointments Clause of the Constitution. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2049 (2018). Notably, the Supreme Court quoted the [redacted]'s case before the SEC to overrule the distinctions made by the amicus counsel and the basis for [redacted]'s constitutional argument made to the Ninth Circuit. *Id*. 138 S. Ct. at 2055 (noting that "the Commission adopts [ALJ's] "credibility finding[s] absent overwhelming evidence to the contrary.") (*quoting In Re Clawson*, Release No. 48143 (July 9, 2003)).[10] Lucia followed the well-reasoned opinion by Judge Matheson in finding that the "SEC ALJ held his office unconstitutionally when he presided over [appellant's] hearing.").

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[9] Further, as provided in the SEC review, the Commission expressly overruled the ALJ's findings as not consistent with the Order Instituting Proceedings and based its findings on a wholly different factual argument. *See In Re Clawson*, Release No. 48143 at * 6 (July 9, 2003).
[10] Lucia followed the well-reasoned opinion by Judge Matheson in finding that the "SEC ALJ held his office unconstitutionally when he presided over [appellant's] hearing." *Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1188 (10th Cir. 2016), cert. denied sub nom. *S.E.C. v. Bandimere*, No. 17-475, 2018 WL 3148308 (U.S. June 28, 2018).

18. The ALJ imposed administrative sanctions against [redacted], including (1) barring [redacted] from association with any broker or dealer or from participating in penny stock offerings; (2) imposing a second-tier civil money penalty of $100,000. The ALJ found that imposition of these sanctions was justified in the public interest because "[redacted] acted with a high degree of scienter in furtherance of the fraudulent scheme," and that "[redacted]'s continued presence in the securities industry presents the opportunity for future violations."

Response: Objection, incorporating R. SUF ¶ 17. Denied in part. Plaintiff misrepresents the plain language of the document as to the basis for the imposition of the sanctions.

19. [redacted] appealed the ALJ's decision to the Securities and Exchange Commission. The Commission affirmed the ALJ's decision in all material respects. The Commission found that "[redacted] willfully violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5."

Response: Objection, incorporating R. SUF ¶ 17. Denied in part. Plaintiff misrepresents the plain language of the document as the SEC overruled the ALJ's findings as not consistent with the Order Instituting Proceedings and based its findings on a wholly different factual argument. *See In Re Clawson*, Release No. 48143 at * 6 (July 9, 2003).

20. [redacted] was one of CAREIC's first employees.

Response: Denied. The cited document shows that Mr. [redacted] was not an "employee" of CAREIC, but a "consultant." Objection pursuant to FRE 106 (Rule of Completeness), FRE 401-403 (Irrelevant), FRE 802 (Hearsay), FRE 602 (Foundation) and FRE 701 (Lay Opinion). This is clearly not full and complete and taken out of context, as such provides no demonstrable evidence as to which consultants or employees were engaged prior to, contemporaneously or subsequent to [redacted] and the implied inference drawn is disputed (*i.e.*, status as officer,

director or "significant employee") as such order is irrelevant, based on relevant legal authority, for control person status. Date of hiring/association/contracting is irrelevant, based on relevant legal authority, for control person status.

Contrary to Plaintiff's improperly incorporated background section,[11] [redacted] did not enter a "Consulting Agreement" similar to Geringer, Cochran, Child and Austin's agreement. Rather, [redacted]'s consulting agreement was materially different from the "officer" agreements with Geringer, Cochran, Austin and Child, which contained various rights, duties and obligations, including: (i) an agreement "to serve as an officer of Castle Arch;" (ii) "perform…executive duties and functions;" (iii) pursuant to the "authority vested in Officer pursuant to [the Officer Agreements]" and "consistent with the operating agreement of" CAREIC; (iv) providing the officer with a role on the advisory board; and (v) other restrictions and covenants relating to the duties. (*See* Declaration of Christiaan Carrillo ("Carrillo Decl."), C.Apx. at 8-10, ¶¶ 8-9; [redacted] Decl. at ¶ 43; compare the "officer" consulting agreements of Geringer, Cohcran and Austin (P.Apx., v2 at 511, 573, 557-63) ("officer" agreements") to the non-officer consulting agreement of [redacted] (P.Apx., v2 at 565) and a sampling of others, including Carillo, Hunt, Ming Lee, Sam Lee and Shelton (C.Apx. at 12, 123, 126, 28, 130) (similar non-officer agreements)). Further, [redacted] did not receive founder's units like such individuals. *See* Declaration of [redacted] in Support of Motion to Dismiss for Lack of Personal Jurisdiction ("PJ-Decl."), Dkt. 163-1, at ¶ 19.

21. [redacted] was one of CAREIC's most highly paid employees, behind only Robert Geringer, Kirby Cochran, and Jeff Austin.

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[11] *See infra* R. SUF ¶¶ 35-36.

Response: Admit that [redacted] was compensated, denied for all other purposes. Objection pursuant to FRE 106 (Rule of Completeness), FRE 401-403 (Irrelevant), FRE 802 (Hearsay), FRE 602 (Foundation and FRE 701 (Lay Opinion). This is clearly not full and complete and taken out of context, as such inference is based on a comparison of consulting agreements (of only named defendants and Cochran) based a narrow temporal period and without foundation for its accuracy as well as based on transfer analysis based on Plaintiff's review to named defendants, Cochran and Child. Further, the implied inference drawn is not only disputed (i.e., status as officer, director or "significant employee") as such is irrelevant, based on relevant legal authority, for control person status.

Importantly, the "alleged" undisputed fact is not only **false, with Plaintiff and his counsel maintaining full knowledge of its falsity,[12] but also entirely misleading** by disregarding all other consultants and/or employees of CAREIC during any other periods of time during [redacted]'s service to CAREIC. Contrary to Plaintiff's improperly incorporated background section,[13] effective February 1, 2009: (i) [redacted] made, inclusive of office expense reallowance, less than Christiaan Carrillo, Keith Green, Bill Grundy, Jeff Austin, Kirby Cochran, Robert Geringer and Andrew Feola and (ii) [redacted] made approximately the same, or less than 20% more than, Ken Gneuhs, David Hunt, Jad Howell, Douglas Child and Dave Demerest. ([redacted] Decl. at ¶ 44; C. Apx. at 85-89). In addition, [redacted] made substantially less

[12] In his complaint, Plaintiff alleged that CAREIC "paid Geringer's real estate assistant, Andrew Feola, compensation of $300,000 for 2007, $400,000 for 2008, and $225,000 for the first six month of 2009. **At this level of compensation, Feola was the highest paid employee in the company**." *See* Dkt. 115-17 at 65, ¶ 287 (emphasis added); *see also* [redacted] Decl. at ¶ 45.
[13] *See infra* R. SUF ¶¶ 35-36.

($150,000 a year less) than Andrew Feola in 2008 and beginning of 2009. Further, [redacted] did not receive founder's units like Cochran, Geringer and Austin. (PJ-Decl., Dkt. 163-1, at ¶ 19).

22. Throughout his time at CAREIC, [redacted] was deeply involved in the management of CAREIC's operations.

Response: Denied. Objection FRE 106 (Rule of Completeness), FRE 602 (Foundation) and FRE 802 (Hearsay) as to the proffered emails as such are taken out of context, not full and complete and importantly do not demonstrate any involvement, let alone substantive involvement in the management of CAREIC or its board meetings. Objection 701/702 (legal conclusion as to management for joint/several liability under control person provisions).

The proffered email evidence establishes only that: (i) [redacted] was copied on various emails, potentially invited to certain board of advisors meetings as an observer or presenter to the board; (*See* P.Apx. v.2 at 458, 460, 474, 516); (ii) knowledgeable of the dates of particular meetings (*id*. at 462); (iii) reporting to Cochran on his activities as an inferior individual would to his superior (*id*. at 518-19); or (iv) performing follow-up tasks at the request and direction of Cochran (*id*. at 550, 518-19; [redacted] Decl. at ¶ 58).[14] Rather, the majority of the emails do not demonstrate any action, inaction, involvement, participation, thoughts, statements or otherwise by [redacted]. ([redacted] Decl. at ¶¶ 57-58).

Objection FRE 602 (Foundation), FRE 802 (Hearsay) and FRE 106 (Rule of Completeness) as to the informal interview of Austin,[15] which is **refuted and contracted by**

[14] Ventimiglia correspondence was one of Cochran's project that began as early as July 2006 previously tasked to Hugh Matheson that Cochran requested [redacted] to follow-up after Matheson's departure. (C.Apx. at 136-142; [redacted] Decl. at ¶ 58).

[15] The Castle Arch / Internal Investigation Transcription of Austin (P.Apx. at 1350-1399) is attached to the Declaration of Baker that fails to provide necessary foundation, including how the

Austin's testimony under oath that he "reported to Kirby Cochran from day one" and did not "report to anyone else." (P.Apx. v.1 at 494-95). *See also* Dkt. 250-1 (Austin Decl.) at ¶¶ 20-22.

Objection FRE 106 (Rule of Completeness) as to the emails, improperly incorporated,[16] inferring "participation" at the board meeting. Rather, the cited evidence is **refuted and contradicted** by the actual board minutes and written resolutions of CAREIC that demonstrates that: (i) [redacted] was not "substantively involved in the management of CAREIC," (ii) [redacted] did not "participate[] in" the numerous alleged board meetings, (iii) his involvement, when at the request of the board, was fully disclosed, not "undisclosed." (C.Apx. 46-102).

Contrary to Plaintiff's improperly incorporated background section,[17] the proffered evidence does not support a finding that [redacted] was deeply involved in CAREIC's management, and CAREIC's legal counsel, David Hunt, made a determination to the contrary after an evaluation of whether the SEC action was required to be disclosed to investors. (Hunt Decl.-2 at ¶ 6-9; Hunt Decl. at ¶¶ 28-32). [redacted] was not "deeply involved in the management of CAREIC's operations." [redacted] Decl. at ¶¶ 56-59; Carrillo Decl. at ¶ 7; PJ-Decl., Dkt. 163-1, at ¶¶ 19-21; Hunt Decl. at ¶¶ 31-33; Hunt Decl.-2 at ¶¶ 8-12; Austin Decl. at ¶ 23; Davidson Decl. at ¶ 23). *See also* C.SAF ¶¶ 4-15.

23. [redacted] was deeply involved in CAREIC's securities offerings.

Response: Denied. Objection FRE 106 (Rule of Completeness), FRE 602 (Foundation) and FRE 802 (Hearsay) as to the proffered emails as such are taken out of context, not full and complete and importantly do not demonstrate any involvement, let alone substantive

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transcription was made and by whom. Because the proper foundation has not been laid, the alleged transcript also amounts to hearsay.

[16] *See infra* R. SUF ¶¶ 35-36.

[17] *See infra* R. SUF ¶¶ 35-36.

involvement in CAREIC's securities offerings. Objection FRE 401/403 (Irrelevant) as the emails confuse the issues by the Motion as the majority are not related to the securities at issue in this action and were created before or after the relevant PPMs. Objection 701/702 (legal conclusion as material aiding for purposes of joint/several liability under securities liability provisions).

Plaintiff's proffered objectionable and inadmissible evidence does not support a finding that [redacted] was deeply involved in CAREIC's securities offerings, misrepresents the evidence or is refuted when put in full and complete context of the partial documents submitted, or otherwise refuted. The emails demonstrate administrative functions (primarily unrelated to PPMs at issue) and the "official memo" was drafted by Alan Davis (materially altered from non-investor correspondence), not [redacted], when put in context. ([redacted] Decl. at ¶ 48; C. Apx. at 132-134).

Contrary to Plaintiff's improperly incorporated background section,[18] Plaintiff has failed to even contradict [redacted]'s prior declaration that: PPMs and disclosure therein was drafted by Hunt, not [redacted]; [redacted] did not possess authority to approve PPMs or Hunt's work, such was within the sole purview of Hunt; [redacted] did not have the knowledge or experience to draft language related to CAREIC's core business as not involved in the real estate acquisitions, operations and development; he only provided insight based on his prior experienced as a broker that Hunt or Cochran may incorporate in their sole discretion; and he was not the designer of CASDF as such was a replica of IMH Secured Loan Fund, LLC ("IMH"). (PJ-Decl.. Dkt. 163-1, at ¶¶ 16-18).

[18] *See infra* R. SUF ¶¶ 35-36.

Rather, [redacted] was **not** deeply involved in CAREIC's securities offerings. (PJ-Decl.. Dkt. 163-1, at ¶¶ 16-18; Decl. [redacted] at ¶ 39-42; Carrillo Decl. at ¶ 6; Hunt Decl. at ¶ 33; Hunt Decl. at ¶¶ 10-13). Hunt drafted the PPMs, SEC filings and disclosures. (C. Apx. at 1105; Hunt Decl. at ¶¶ 12-14, 33; Hunt Decl.-2 at ¶¶ 4-6, 10-13). *See also* C.SAF ¶¶ 8, 10-11, 13, 15.

24. [redacted] was the principal architect of CASDF.

Response: Denied. Objection FRE 106 (Rule of Completeness), FRE 602 (Foundation) and FRE 802 (Hearsay) as to the proffered emails as such are taken out of context, not full and complete and importantly do not demonstrate that [redacted] "design[ed] and frame[d] [the] complex structure" or was "the Creator" of CASDF.[19] As to the cited emails: (i) Nov. 11, 2006 does not relate to CASDF, attaching three UBS public note offerings, pursuant to Cochran's request and irrelevant; (ii) June 11, 2007 supports the long-standing testimony of [redacted] and declaration that IMH was the basis for the structure of CASDF; (iii) Nov. 29, 2007 attaches a summary drafted by Hunt (not [redacted]); (iv) Jan. 28, 2008 email lacks foundation and otherwise irrelevant as such does not demonstrate drafting of CASDF or that the sensitivity analysis was incorporated; (v) Feb. 5, 2008 email is irrelevant and not full and complete – it attaches documents drafted by Hunt.

Plaintiff has failed to even contradict [redacted]'s prior declaration that [redacted]: (i) was not the "principal architect of CASDF" or "the designer of CASDF and its PPM;" and (ii) did not "determine[] the structure of [the] offering" or "personally draft[] substantial portions of the offering documents" for CASDF. (PJ-Decl. at ¶ 18). *See also* P.SUF No. 23 (Hunt, not [redacted], was drafter of PPMs).

[19] *See Architect*, The Oxford English Dictionary (2nd ed. 1989).

Contrary to Plaintiff's "alleged" undisputed fact, CASDF was modeled, structured and designed to replicate a nearly identical offering, the IMH Secured Loan Fund, LLC ("IMH"), that originated from the request of Cochran request due to CAREIC's "need for project-related capital." [redacted] Decl. at ¶¶ 50-52; PJ-Decl. at ¶ 18). Hunt drafted CASDF based on the nearly-identical IMH (C.Apx. at 160-301; Dkt. 250-2 ("Hunt Decl.2") at ¶¶ 10, 13; Hunt Decl. at ¶ 33), even investor correspondence was copied from IMH (C. Apx. at 305-316), while [redacted]'s suggested alterations to IMH were rejected. (compare Apx. v2 at 491-493 with [redacted] Decl. at ¶ 53). The executive summary attached to the email to Geringer was drafted by Hunt, not [redacted], and was based off an original "talking points" summary drafted by Hunt, incorporating comments from another not [redacted]. (Compare P.Apx. v2 at 495 with C.Apx. at 303, 1171-1180 and [redacted] Decl. at ¶ 54). [redacted]s "labor of love" (birth) does not establish drafting, structuring or capital raising for CASDF; further, such "birth announcement" was [redacted] attempting to demonstrate value when CAREIC was engaged in cost-cutting, including terminating personnel. [redacted] Decl. at ¶ 55). *See also* C.SAF ¶¶ 8, 10-11, 13, 15.

25. None of these facts were disclosed to investors in the Series E PPM, the CAS PPM, or the CASDF PPM.

Response: Disputed. See R. SUF 23 & 24. Admit the [redacted] was not disclosed in PPM, but affirmatively asserts **there is no legal or factual basis requiring disclosure** as: (i) Plaintiff neither provides that it is undisputed that [redacted] is an executive officer or director of CAREIC nor provides any relevant evidentiary support for such position and (ii) [redacted] is not affirmatively disclosed as a significant employee to establish a potential omission. (P.Apx., v2 at 52, 196, 305). Therefore, no information needed to be disclosed as to [redacted]. (Hunt Decl.-2 at ¶¶ 8-13; Hunt Decl. at ¶¶ 28-33; Geringer Decl. at ¶ 8)

35. [redacted] occupied a status and performed functions similar to those of a Board member and an Executive Officer of CAREIC.

Response: Denied. Plaintiff provides no citation to evidence that asserts such factual assertion. DUCivR 56-1(b)(3) requires that the "moving party must cite with particularity the evidence in the Appendix of Evidence that supports each factual assertion."[20] As discussed herein, *see* Section V(E) *infra*, "[l]ocal rules that are consistent with the national rules have the force of law." *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1284-85 (10th Cir. 2010). Such conclusory statements, without any factual support, do not meet moving party's burden and should not require any response. *Id.* at 1284-85 (the Court and [redacted] "should not have to guess" as to Plaintiff's material facts claimed to be undisputed). Further, Objection FRE 701/702 (legal conclusion as to management for joint/several liability under control person provisions).

To the contrary, [redacted] did not occupy a status and perform functions similar to those of a board member and an executive Officer of CAREIC. ([redacted] Decl. ¶¶ 67-94; PJ-Decl. at ¶¶ 19-21; Carrillo Decl. at ¶ 5; Davidson Decl. at ¶ 22; Hunt Decl. at ¶¶ 31-32; Hunt Decl.-2 at ¶¶ 8, 9, 12; Geringer Decl. at ¶ 5). *See also* C.SAF ¶¶ 4-15.

36. [redacted] was a CAREIC employee who materially aided on the sale of CASDF.

Response: Denied. [redacted] incorporates the objection and discussion in Response No. 35 *supra*.

To the contrary, [redacted] was not a CAREIC employee who materially aided on the sale of CASDF. ([redacted] Decl. ¶¶ 67-94; PJ-Decl. at ¶¶ 12-14; Hunt Decl. at ¶ 31; Hunt Decl.-2 at ¶¶ 8-13). *See also* C.SAF ¶¶ 4-15.

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[20] *See* also DUCivR 56-1(b)(2) ("Factual summaries in the background section need not be limited to undisputed facts and need not cite to evidentiary support.").

IV. STATEMENT OF ADDITIONAL MATERIAL FACTS

A. Actual Control and Power to Control, Directly or Indirectly, Solely Vested with Kirby Cochran, CAREIC's CEO; Advisory Board, not Board of Directors

1. The sole authority to control all aspects of CAREIC's operations and business were vested with its Kirby Cochran ("Cochran), CAREIC's CEO, unless otherwise authorized by Cochran (as provided only to one person for real estate acquisition and development). Cochran could resign, but could only be removed "for cause" by a super majority of common unit holders. All officers shall be "subject to the chief executive officer's direction." (P. Apx., v2 at 370-78; P.Apx., v1 at 601; P.Apx., v1 at 382-383; P.Apx., v1 at 723-74; Davidson Decl. at ¶¶ 5, 9-10; Hunt Decl. at ¶¶ 7-8).

2. The Bankruptcy Court, on April 15, 2013, after Plaintiff had a full and fair opportunity to litigate the matter, found that CAREIC's Operating Agreement gave Cochran full and complete authority, power and discretion over CAREIC. The Bankruptcy Court stated:

> [CAREIC] was organized on April 15, 2004 with Geringer as president, Cochran as CEO, and CPA Doug Child as CFO **along with an advisory board**…. Castle Arch's Operating Agreement **gave Cochran "full and complete authority, power and discretion** to make any and all decisions and to do any and all things which the chief executive officer shall deem to be reasonably required to accomplish the business and objectives of the Company. **No Member, other than the chief executive officer, shall have the authority to bind the Company, unless given that authority by the chief executive officer**."

See C.Apx. at 1184 (emphasis added).

3. Board was an "advisory board" not a "governing board." (C.Apx. at 1121). Board of directors was not required as LLC, solely advisory. (C.Apx. at 1121). Cochran oversaw all employees and all functions (other than real estate acquisitions and development). (C.Apx. at 1184). Thus, Cochran could approve major contracts (such as Feola's $1.05 million compensation) without board approval. (C.Apx. at 1041, 1122, 1163-64).

B. Not Listed as Board Member or Officer in Plaintiff's Prior Bankruptcy Pleadings and Prior Testimony, Interviews, Depositions of CAREIC Employees

4. [redacted] is never described as an executive officer, advisory board member or de facto officer or board member in testimony or statements made by former officers, advisory board members, employees and consultants. (*See, e.g.*, C.Apx. at 915-16, 972, 1105, 355; *see also* Geringer Decl. at ¶ 5).

5. Plaintiff did not list [redacted] as a director, officer or insider in filing schedules or during approval of its plan of liquidation and disclosure statement associated therewith. (C.Apx. at 367 "Management of the Debtors); (C.Apx. at 367 ("Insider Equity Interests" attached as Exhibit D); *id*. at 445).

C. Subordinate, Insignificant Role with Little Value and No Control of CAREIC

6. [redacted] was an assistant, "confidante," "right-hand man," and sometimes "had the ear" of Cochran. (C.Apx. a 743; [redacted] Decl. ¶ 68; Davidson Decl. at ¶ 22; Hunt Decl. at ¶¶ 32; Hunt Decl.2 at ¶ 12; Austin Decl. at ¶ 23). [redacted] was subordinate to Cochran, serving at his pleasure and performing the tasks assigned to him by Cochran. ([redacted] Decl. ¶ 69). [redacted] left CAREIC in May 2009. (C. Apx. at 447).

7. No employees or contractors reported to [redacted] according to internal organizational charts. (C.Apx. at 351-52; [redacted] Decl. ¶ 70)

8. [redacted] did not have any authority to approve any correspondence, offering or marketing material for use with investors and could not send any material without approval from both Cochran and Hunt. (C.Apx. at 144; Austin Decl. at ¶ 44). Further, he was restricted from writing investor newsletters as senior management mandated that Hunt must review and approve. (C.Apx. at 149; [redacted] Decl. ¶ 85).

9. [redacted] and his role were insignificant at CAREIC. His work, role and duties were not memorable even by a board member that claimed to push for his termination during settlement with Plaintiff. (C.Apx. at 898-99). He was insignificant, not really involved with all aspects of the business similar to a board member, but worked in the background. (C.Apx. at 466). [redacted] was only "in charge of business development" as he basically knew a lot of people as an introducer, and that's it. (C.Apx. at 1148).

10. [redacted]'s comments, suggestions or insights were routinely rejected; often with condescension or likened to an administrative proof reader. (C. Apx. at 146-47, 151-52, 155; Davidson Decl. at ¶ 22).

11. David Hunt, corporate and securities counsel for CAREIC, clearly considered [redacted] insignificant as he noted several problems with [redacted], including that he: (1) provides little value; (2) delegates all responsibility; (3) takes all credit; (4) shifts all blame; and (5) relies totally on politicking to get ahead. (C.Apx. at 154; [redacted] Decl. ¶ 49).

12. [redacted]'s participation was fully disclosed in the board minutes, where at the invitation of Cochran or others, he was involved in only 10% of the meetings (Aug. 15, 2006, Oct. 22, 2007, and Feb. 19, 2008), and less than 8% of the board minutes or actions when considering written resolutions. (C. Apx. at 55, 69, 75). Child testified that he had no reason to think that the minutes reflected something other than happened at the meetings. (C. Apx. at 581). Hunt and Child testified that the minutes were an accurate representation of what he witnessed or heard at the board meetings. (P.Apx. at 663-64; C. Apx. at 581). Further, it was not unusual for non-board members to attend the meetings as Child testified (C. Apx. at 600) and the minutes reflect that H. Matheson, D. Hunt, K. Green, B. Grundy and P. Polich attended one or more meetings. (*see, e.g.*, C. Apx. at 47, 63, 92, 94, 99, 101; *see also* [redacted] Decl. at ¶ 89)

13. [redacted] was not an employee of CASDF, did not solicit, offer or sell to each of the listed CASDF investors on Plaintiff's exhibits, or materially aid in the CASDF PPM disclosure. ([redacted] Decl. at ¶ 92-94). [redacted] did not draft CASDF (or any other offering materials) and his involvement was limited to administrative, pre-incorporation activities. ([redacted] Decl. at ¶¶ 50-53; Hunt Decl. at ¶ 13, 33; Hunt Decl.-2 at ¶¶ 4-5, 10, 13).

14. [redacted]: (i) did not sign or was not substantively involved in any written resolutions of the board (C.Apx. at 104-117), (ii) did have a vote on any board, (iii) did not enter into a "officer" consulting agreement, (iv) did not supervise or have authority over any division of CAREIC, (v) did not serve on any committees of the board, (vi) was not involved in accounting or auditing, (vii) did not have the authority to bind CAREIC, (viii) did not have authority to hire or fire employees, (ix) did not exercise control or have the power to exercise control over CAREIC, CAS, CASDF or any of the other defendants in this action, (x) did not possess the power, directly or indirectly, to control the disclosure in the PPMs, the terms of the offering or the offer or sale of the units in CAREIC, CAS or CASDF, (xi) did not possess the power, directly or indirectly, to direct or cause the direction of management and policies, and (xii) any attendance at board was an observer as an invitee of Cochran (or others). ([redacted] Decl. at ¶¶ 67-91). [redacted] was not involved in the day-to-day decisions of CAREIC or make management-level decisions. (Davidson Decl. at ¶ 22).

15. In summary, [redacted] was not disclosed in the PPMs or other filings as a member of CAREIC's board of advisors, executive officer or significant employee because [redacted] was neither a member of the board, an executive officer or significant employee of CAREIC nor did he occupy a status or perform functions similar to those of a board member or an executive

officer. ([redacted] Decl. at ¶ 86). [redacted] did not actually exercise control over CAREIC, CAS or CASDF, or possess the power to control the sales of units or the disclosure in the PPMs.

D. SEC Administrative Enforcement Action, Resulting Bar and Disclosure

16. [redacted] has never concealed and freely disclosed and discussed the securities enforcement action and resulting bar before and after finality. (C.Apx. at 1148; Carrillo Decl. at ¶ 4; [redacted] Decl. at ¶¶ 60, 63). Further, the order instituting proceedings, ALJ findings and SEC ruling has been publicly-available and publicly-disclosed by the SEC and the NASD/FINRA since December 23, 1996. (*Id*. at ¶ 62). The bar does not restrict [redacted] from consulting, working or being employed in any or every capacity with a public, public reporting or publicly-traded company. (*Id*. at ¶ 61).

17. [redacted] notified Cochran and sent copies of the SEC and Court of Appeals decision as well as notes from his counsel and his own personal observations to Hunt notifying him of the finality of the decision, so he could take appropriate action and advise CAREIC, which Hunt acknowledged. (C.Apx. at 318-345). Hunt determined, upon evaluation, that [redacted]'s SEC action was not required to be disclosed to investors. (Hunt Decl. at ¶¶ 28-32; Hunt Decl.-2 at ¶¶ 6-12). Further, Hunt stated that [redacted] did not engage in any brokerage activities and "would not be in violation of anything." (C. Apx. at 348).

E. Alleged Material Omissions of Internal Control Deficiencies and Auditor Notice

18. Audit firm that issued the May 2008 letter to CAREIC's audit committee found that the stated reportable conditions did not result in a misstatement of CAREIC's 2007 audited financial statements. (P.Apx. v1 at 123) ("In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the financial position of" CAREIC as of December 31, 2007, results of its operations and cash flows "for the years ended December 31,

2007 and 2006 and for period from inception on April 15, 2004 to December 31, 2007 in conformity with" GAAP). The audit firm further opined that stated reportable conditions did not result in a misstatement of CAREIC's 2008 audited financial statements. (P. Apx. v1, p.179)

19. The CEO and principal officer, responsible for reviewing and designing the internal control process certified that they disclosed all significant deficiencies and material weaknesses reasonably likely to adversely affect the small business issuer's ability to record, process, summarize and report financial information for both calendar year 2007 and 2008. (P. Apx. v.1, p.160-63; 216-218).

20. Incorporated risk disclosures cautioned prospective investors of the potential for issues with internal controls related to CAREIC that had limited resources. PPMs notified prospective investors of public filings that CAREIC's "filings with the SEC, including annual reports on Form 10-KSB, quarterly reports on Form 10-QSB, current reports on Form 8-K and amendments" are accessible and available at www.sec.gov. (See, e.g. P.Apx. v.1 at 37). Prior public filings disclosed significant changes in CAREIC's "internal controls over financial reporting that have materially affected or are reasonably likely to materially affect our internal controls over financial reporting" and the material risk of CAREIC's "ability to manage and operate [its] business" while executing its "development and growth strategy will require effective planning….Significant rapid growth could strain our internal resources, and other problems that could adversely affect our financial performance. We expect that our efforts to grow will place a significant strain on our personnel, management systems, infrastructure and other resources. Our ability to manage future growth effectively will also require us to successfully attract, train, motivate, retain and manage new employees and continue to update and improve our operational, financial and management controls and procedures." (Apx. v.1,

p.72-73 disclosing significant changes to internal procedures to address issues that "materially affect our internal controls over financial reporting included the following: 1) Internal controls implemented and related to separation of incompatible duties and restricted access of cash,…2) Internal controls implemented and related to the recording of cash….3) Internal controls implemented and related to the separation of incompatible duties and restricted access of equity,…4) Internal controls relating to the recording of equity have been implemented.").

V. ARGUMENT

A. Legal Standard for Summary Judgment

The party seeking summary judgment has both the initial burden of production and the burden of persuading the Court that "there is no genuine dispute as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).[21] Rule 56(a) requires that "*where the moving party has the burden*-the plaintiff on a claim for relief or the defendant on an affirmative defense-*his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party.*" *Calderone v. United States*, 799 F.2d 254, 258–59 (6th Cir. 1986) (*quoting* Summary Judgment Under The Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984)) (emphasis in original); *see also Leone v. Owsley*, 810 F.3d 1149, 1153 (10th Cir. 2015). In the Tenth Circuit, the "moving party carries the burden of showing **beyond a reasonable doubt** that it is entitled to summary judgment." *Pelt v. Utah*,

[21] The moving party "always bears" the initial burden "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

539 F.3d 1271, 1280 (10th Cir. 2008)[22] (internal quotations and alteration omitted) (emphasis added).

Here, as Plaintiff is the moving party with "the burden of proof, a more stringent summary judgment standard applies." *Id*.

> [T]o obtain summary judgment, it cannot force the nonmoving party to come forward with "specific facts showing there is a genuine issue for trial' merely by pointing to parts of the record that it believes illustrate the absence of a genuine issue of material fact. Instead, the moving party must establish, as a matter of law, **all essential elements** of the issue before the nonmoving party can be obligated to bring forward any specific facts alleged to rebut the movant's case.

Id. (internal citations and alteration omitted) (emphasis added).[23] **Only after satisfying this burden,** the burden shifts to the opposing party to come forward with specific facts showing that there remains a genuine material factual dispute for trial. *See Leone*, 810 F.3d at 1153; *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970) (where "evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.") (*quoting* advisory notes to Fed. R. Civ. P. 56); *Reed v. Bennett*, 312 F.3d 1190, 1194 (10th Cir. 2002) ("burden on the nonmovant to respond arises only if the summary judgment motion is properly "supported" as required by Rule 56(c)."). A fact is "material" if, under the governing law, it could have an effect on the outcome of the lawsuit. *Anderson*, 477 U.S. at 248. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id*. at 255 ("Credibility

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[22] *quoting Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002*), as amended on denial of reh'g* (Jan. 23, 2003).

[23] "Even when…moving party does not have the ultimate burden of persuasion at trial, it has both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law." *Trainor*, 318 F.3d at 979 (citation omitted).

determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."). "A party is thus entitled to summary judgment if the evidence points only one way and no reasonable inferences could support the non-moving party's position." *Genberg v. Porter*, 882 F.3d 1249, 1253 (10th Cir. 2018) (citations omitted); *see also Leone*, 810 F.3d at 1154 (10th Cir. 2015) ("'In other words, the evidence in the movant's favor must be so powerful that no reasonable jury would be free to disbelieve it. Anything less should result in denial of summary judgment.'") (citation omitted).

As detailed herein, Plaintiff's Motion completely fails to satisfy Rule 56 or Plaintiff's burden, as the moving party, to demonstrate, through admissible evidence based on personal knowledge, that there is no genuine dispute of material fact and establish, as a matter of law, all essential elements of the securities fraud claim.

B. Genuine Dispute as to Choice of Law as to Choice of Law Precludes Summary Judgment

The plain language of Utah's Uniform Securities Act demonstrates that Plaintiff is incorrect in arguing that the "offer to buy is made and accepted in" Utah pursuant to Utah Code Ann. § 61-1-26(1)(b). *See* MSJ at 43-44 ("Utah's blue sky laws…apply to the investors' claims" as the "undisputed facts show that the investors' offers to buy CAREIC securities were made and accepted in Utah."). Offers to buy are limited to those "accepted in this state" defined as "**communicated to the offeror in this state**." *Id.* § 61-1-26(4)(a). The offeror (investor) must be located in Utah and it is irrelevant that an officer counter-executed the subscription agreement in Utah. See MSJ at 44 (arguing acceptance in Utah because "executed by CAREIC officers in this state."). Utah's version of the Uniform Securities Act "only intends to regulate securities sold within its borders." *Dillon Sec., Inc. v. Bartolini*, 944 F.2d 911 at *3 n. 2 (10th Cir. 1991)

(unpublished) (*citing* Jack E. McClard, The Applicability of Local Securities Acts to Multi-State Securities Transactions, 20 U. Rich. L. Rev. 139, 160 n. 25 (1985). Utah "apparently decided to regulate only securities sold within its borders and has adopted the territoriality provisions after so limiting them." *Id*. at 145. Here, if the offeror was a resident of another state, "Utah's Uniform Securities Act does not apply because the actual sale occurred outside the State of Utah." *Chaney v. W. States Title Ins. Co.*, 292 F. Supp. 376, 380 (D. Utah 1968) (plaintiff was citizen of California and defendant was Utah corporation with its principal place of business in Salt Lake).

Similarly, Plaintiff whiffs by relying only Cal. Corp. Code § 25008 and the dicta in *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal. 4th 1036, 1050-51 (1999) to blanketly argue that the California Corporate Securities Law of 1968 (hereinafter, "CSL") applies. *See* MSJ at 41-43. Ironically, Plaintiff makes a similar losing argument to the defendant in that case: Plaintiff "fails to acknowledge that section 25400 does not regulate securities transactions other than those described in section 25400 which are undertaken 'in this state' to manipulate the market. It regulates market manipulation, not third party transactions affected by market manipulation." *Diamond Multimedia*, 19 Cal. 4th at 1048. Thus, the penal section (like 25401) regulates the "unlawful conduct in California," with the civil liability section (like 25501) providing "a remedy for third parties whose sale or purchase of stock is affected by" such conduct, which does not contain "any express territorial limitation." *Id*. at 1048; *see also id*. at 1052 ("If the statement is made by a person in California or is willfully disseminated in California, it is made 'in this state'" for purposes of section 25400(d));[24] *Anschutz Corp. v.*

[24] In contrast, Section 25008 "defines 'in this state' for the purpose of determining when a stock transaction takes place in California" (offer, purchase or sale), not the unlawful conduct. *Id*. at 1051.

Merrill Lynch & Co., 690 F.3d 98, 112 (2d Cir. 2012) ("alleged unlawful conduct at the crux of this case—Merrill Lynch's placement of support bids to manipulate the market—is not alleged to have occurred, and did not occur, in California. In the absence of any alleged unlawful conduct in California, Anschutz cannot assert claims against the Merrill Defendants under § 25500 of the California Corporations Code."). The civil liability provisions of sections 25500, 25501 and 25502 are limited to purchases or offers to buy based on further territorial definitions "in this state." *See also* Harold Marsh, Jr. & Robert H. Volk, Practice Under the California Securities Laws § 3.08[5] (2001) (hereinafter, "CSL Treatise").[25]

Assuming arguendo that Plaintiff was correct (rather than "guesstimated" as to the law), Plaintiff's reliance on *Diamond Multimedia* precludes its Motion as a material dispute exists as to the applicable choice of law: (1) CAS and CASDF are Nevada limited liability companies; *see* P.Apx. v.2 at 217, 324; and (2) Plaintiff's own prior pleading and sworn declaration that: (a) CAREIC was "nominally" a California limited liability company with "many of its operations were based in Utah. Specifically, CAREIC's chief executive officer, Kirby Cochran, its chief financial officer, Douglas Child, its legal counsel, Dave Hunt, and its controllers, Jad Howell and Glen Martinsen were all located in Utah[;]" (b) accounting for CAREIC and its affiliates "took place in Utah and checks and other payments originated from the Utah office[;]" and (c) "investor documents were sent to, processed in, and stored in Utah." *See* Dkt. 177 at 2-3. *Cf. Diamond Multimedia*, 19 Cal. 4th at 1042, 1051 ("sale occurs in California if the offer emanates from this state" where Diamond Multimedia is California corporation "having its executive

[25] The California "Supreme Court has referred to former Commissioner Volk and Professor Marsh as the Act's "principal drafters" and relied on their treatise interpreting the Act as authoritative." *Dep't of Corps. v. Superior Court*, 153 Cal. App. 4th 916, 930 n. 8 (2007) (*citing Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1103, 858 P.2d 568, 580 n. 10 (1993)).

offices and principal place of business in San Jose, California."); *see, e.g.*, California Corporation Commission Interpretative Opinion No. 69/22, 1969 WL 1939 (Nov. 21, 1969) (ruled that offer or sale was not made in this state by corporation which had its principal place of business in California but also maintained an office in Arizona, where its president resided, and all transactions in relation to the sale of the securities were negotiated and closed in Arizona, including the delivery of the securities); *Robinson v. Cupples Container Co.*, 513 F.2d 1274, 1279 (9th Cir. 1975) (required execution of contract or delivery of unregistered stock to take place in California if valid in another state); *Parvin v. Davis Oil Co.*, 524 F.2d 112, 117 (9th Cir. 1975) ("difficult question" of oral agreement in Colorado with no written contract executed, but payment mailed from California may constitute sale "[a]s the purpose of the California Securities Law is to protect investor-residents."); California Corporation Commission Interpretative Opinion No. 81/10C, 1981 WL 15161 (Nov. 12, 1981) (finding Cal. Corp. Code § 25008 inapplicable to offer and sale to units of out-of-state LP despite certain activities performed by California general partners); *Siegal v. Gamble*, No. 13-CV-03570-RS, 2016 WL 1085787, at *7 (N.D. Cal. Mar. 21, 2016) (court held "[t]hat a person is a citizen of a state is insufficient to leap to the conclusion that the sale of a security took place in that state" and dismissed complaint as plaintiff "has not, however, satisfactorily pleaded facts establishing liability attaching to [defendants] for a section 25501.5 violation.").

Plaintiff's argument that "California and Utah's blue sky laws are identical material respects relevant here" is without support, an oversimplification and naive. MSJ at 45. *See, e.g.* 12A JOSEPH C. LONG, BLUE SKY LAW § 9:4 (2018) (California has not adopted any version of the Uniform Securities Act while Utah is one of only three states to adopt the Revised Uniform Securities Act of 1985). For example, "the California statute rejects that portion of

Section 410(b) of the Uniform Securities Act that imposes the same standard of care upon these collateral persons as is imposed upon the principal actor, *i.e.*, that they 'did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.'" CSL Treatise § 14.03[4][c] (2001). Rather, California "adopted the standard of care set forth in Section 15 of the 1933 Act[,]…[which] clearly would not require any independent investigation on the part of these defendants, or even any inquiry, so long as they were not aware of any suspicious circumstances." *Id*. Further, contrary to Plaintiff's summary conclusion that state blue sky laws "are remedial in nature and should be broadly and liberally construed[,]"[26] the purpose of the CSL "is to create statutory liability that eliminates some of the elements of common law fraud, but balances this expansion of liability by placing other restrictions on recovery." *California Amplifier, Inc. v. RLI Ins. Co.*, 94 Cal. App. 4th 102, 109 (2001); *see also AREI II Cases*, 216 Cal. App. 4th 1004, 1013–14 (2013) ("Legislature chose to specify the elements of a statutory cause of action in detail and 'decided to make it clear that the judiciary is not authorized to invent causes of action inconsistent with or additional to those provided in the statute.'"). To avoid any doubt, the CSL provides "[e]xcept as explicitly provided in this chapter, no civil liability in favor of any private party shall arise against any person by implication from or as a result of the violation of any provision of this law or any rule or order hereunder." Cal. Corp. Code § 25510. Thus, there is a question of fact as to the appropriate securities law to apply to the transactions, but for purposes of this Opposition, [redacted] focuses on California law as the majority of investors, based on prior disclosure, resided at some point in California.

[26] MSJ at 1 (state blue sky laws "are remedial in nature and should be broadly and liberally construed.") (*quoting Payable Accounting Corp. v. McKinley*, 667 P.2d 15, 17-18 (Utah 1983)).

C. The Motion Must Be Denied as Plaintiff Cannot Prove All the Elements of a Primary Violation of the State Securities Law

The Motion fails to meet Plaintiff's burden to demonstrate all essential elements as a matter of law, by admissible evidence, a primary securities law violation under the CSL, including: (i) the "person" that made the statement (the primary violator); (ii) security was offered or sold in California (or sold in Utah); (iii) that such offer or sale by means of the PPMs omitted to state a material fact or facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; (iv) resulting damages; and (v) that the primary violator knew of the falsity of such communication. *See Hardisty v. Moore*, 6 F. Supp. 3d 1044, 1064 (S.D. Cal. 2014) ("to establish a cause of action under Section 25401, a plaintiff must plead and prove that 'there was a sale or purchase of stock in California by fraudulent untrue statements or by omitting material facts that would by omission make the statements misleading.'") (citations omitted).

Plaintiff fails to clarify who the primary violator (the speaker): is it "CAREIC (or Defendants themselves)[?]" *See* MSJ at 45. First, as discussed in section V(D) *infra*, both state securities provisions require privity, which means that none of the individual defendants can be the primary violator, but also, CAREIC cannot be primary violator of CAS or CASDF. *See, e.g.*, P.Apx., v.2 at 275 ("Castle Arch Secured Development Fund, L.LC. ("the Fund") is offering…"). Plaintiff must not only specify and prove a primary violator, but how each individual defendant controlled such primary violator to establish secondary liability. *See, e.g.* Cal. Corp. Code § 25504 ("Every person who directly or indirectly controls a person liable under Section 25501…").

Plaintiff fails to demonstrate where the securities were offered or sold, not only an essential element of the claim, but also necessary to determine damages as California has a different damages provision than other states. The "last known address" is not evidence of the applicability of the particular state law. *See* P.Apx., v.2 at 578-595. Plaintiff fails to essential elements for rescission or damages. California provides that civil liability for a primary violation is rescission with damages available only "if the plaintiff or the defendant, as the case may be, no longer owns the security." Cal. Corp. Code § 25501; *see also Viterbi v. Wasserman*, 191 Cal. App. 4th 927, 937 (2011) ("Thus, under section 25501, because plaintiffs still own the securities at issue in this action, their sole potential remedy is rescission."). Plaintiff failed to provide "competent evidence demonstrating actual damage to" investors to demonstrate recovery. *Malik v. Universal Res. Corp.*, 425 F. Supp. 350, 361 (S.D. Cal. 1976) ("absent evidence of damage or value, rescission would obviously be an inappropriate and unworkable remedy."). In addition, there is a genuine dispute as to the evidence submitted. For example: (i) MacMillan's damages are based off an investment of $150,000 in CASDF but the subscription agreement only shows an investment of $100,000 (Compare P.Apx., v.2 at 587 with P. Apx., v.4 at 497-504); (ii) Ostrem's damages are based off an investment of $125,000 in CASDF, but according to records produced by Plaintiff, $22,000 was previously redeemed (Compare P.Apx., v.2 at 590 with C.Apx. at 1206); (iii) Marshall & Katherine Smith's investment damages are based off an investment of $150,000, but according to records produced by Plaintiff, $16,000 was previously redeemed (Compare P.Apx., v.2 at 592 with C.Apx. at 1206); and (iv) 1031 ECI, LLC's damages are based off an investment of $500,000 in CASDF, but according to records produced by Plaintiff, $100,000 was previously transferred to another party (Compare P.Apx., v.2 at 578 with C.Apx. at 1209-1223). Further, the amount of damages or rescission is reduced by the amount of

value received during an investor's holding and internal records produced by Plaintiff demonstrate that at least some investors received distributions. See C.Apx. at 1225-26.

Finally, Plaintiff fails to demonstrate that CAREIC, CAS, CASDF or that any Defendant knew of the falsity of such alleged omissions. The California Supreme Court has stated that "a civil action by an injured investor, the Legislature did expressly provide that recovery of damages was permissible ***only if the offeror was aware***, or with reasonable care would have been aware, that statements by which the sale was made were false or misleading." *People v. Simon*, 9 Cal. 4th 493, 516 (1995) (emphasis added); *see also infra* Section V(F).

1. Genuine Dispute as to Materiality of Claimed Omissions

Plaintiff's Motion fails to prove an actionable primary securities violation as claimed omissions were not materially misleading, amounted to simple or total nondisclosure, or were otherwise immaterial. Section 25401 only applies to "an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading." Cal. Corp. Code § 25401. "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).[27] To fulfill the materiality requirement, "there must be 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." *Id*. Materiality is a "mixed question of law and fact," and undisputed "underlying

[27] "The test of materiality under the California Corporations Code is the same." *Ins. Underwriters Clearing House, Inc. v. Natomas Co.*, 184 Cal. App. 3d 1520, 1526 (Ct. App. 1986).

objective facts…are merely the starting point for the ultimate determination of materiality" in considering summary judgment. *Id*. at 450.

> 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.

Id. (emphasis added) (citations omitted).[28] Indeed, as the Supreme Court has warned, if securities fraud could be alleged based on immaterial omissions or misstatements, "management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information a result that is hardly conducive to informed decisionmaking." *Id*. at 448-49.

First, Plaintiff has failed to meet his burden to demonstrate that the statements in the PPMs were materially misleading at the time made. "Materiality…must be determined in light of facts existing at the time of nondisclosure or misinformation." *Toombs v. Leone*, 777 F.2d 465, 469 (9th Cir. 1985). For example, as to the management experience, Plaintiff relies on testimony or non-admissible interviews that do not relate, cite or discuss the CAS, CASDF or CAREIC Series E offerings, or otherwise discuss experience as it relates to the time period of such offerings (e.g., Plaintiff cites experience at the time of CAREIC's formation in 2004, not experience at the time of the offerings, such as CAREIC Series E that was offered four years later according to Plaintiff from "June 1, 2008 and continued through at least July 1, 2009"). As to [redacted] even if the PPMs were subject to public offering disclosure requirements, SEC

[28] Materiality is a "fact-specific issues which should ordinarily be left to the trier of fact." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989).

guidance provides that Regulation S-K's historical disclosure provisions are not applicable to significant employees "unless such persons are de facto executive officers."[29]

Second, reasonable investors do not base investing decisions on corporate "puffery" – generalized, non-verifiable vaguely optimistic statements are immaterial. *See Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997). "The generalized, positive statements about the company's competitive strengths, **experienced management**, and future prospects are not actionable because they are immaterial." *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 372 (5th Cir. 2004) (emphasis added).[30] These statements are mere 'puffery' and cannot give rise to a duty to disclose.

Third, as to the management experience, despite that Plaintiff has failed his burden, other Defendants, such as Austin, have detailed that these statements were not misleading when made.

2. Simple or Total Nondisclosure is Not Actionable Absent Duty to Disclose

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[29] *See* Regulation S-K Compliance and Disclosure Interpretation 116.03, available at https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm (July 3, 2008).

[30] *See also In re Xinhua Fin. Media, Ltd. Sec. Litig.*, No. 07 CIV. 3994 LTS/AJP, 2009 WL 464934, at *8 (S.D.N.Y. Feb. 25, 2009) ("used to describe the management team, such as "strong," "experienced," and "capable," …are nothing more than puffery, which is not actionable under the securities laws."); *Hammer v. Frontier Fin. Corp.*, No. C10-0643, 2011 WL 13229260, at *9 (W.D. Wash. Sept. 7, 2011) ("statements about the experience level of management…are non-actionable puffery."); *Se. Pennsylvania Transp. Auth. v. Orrstown Fin. Servs., Inc.*, No. 1:12-CV-00993, 2015 WL 3833849, at *30 (M.D. Pa. June 22, 2015) (Defendant "advertised its '[d]eep and experienced management team with strong community ties, operational ability and proven track record of acquisition integration.'…This statement consists of vague and general expressions of management's belief in its own capabilities [and] is immaterial puffery: "deep and experienced," "strong," and "proven track record" are all examples of corporate puffery on which no reasonable investor would rely."); *U.S. S.E.C. v. Kearns*, 691 F. Supp. 2d 601, 617 (D.N.J. 2010) ("MedQuist's success to 'back to basics management discipline,' 'disciplined business practice,' and the experience and discipline of its management team, are mere 'puffery' and cannot give rise to a duty to disclose.").

The remaining alleged omissions amount to nonactionable nondisclosure. Plaintiff alleges that the PPMs "**entirely failed to disclose**" (*admitted nondisclosure*) that: (i) "Geringer was operating unilaterally to acquire property without from, or approval of, the" board or management as identified by the auditors as a "reportable condition;" (ii) "[redacted] had been found by the SEC to have willfully violated federal securities laws;" and (iii) "CAREIC's prior securities offerings had been sold by unlicensed broker-dealers." However, Section 25401 does not apply to cover cases of "simple" or "total" nondisclosure as admitted by Plaintiff (CAREIC "entirely failed to disclose" such facts). *See Tse v. Ventana Med. Sys., Inc.*, 297 F.3d 210, 224–25 (3d Cir. 2002) (defendants entitled to summary judgment on § 25401 because statute does not cover activity alleged as "§ 25401 does not cover cases of "simple" or "total" nondisclosure.") (*quoting* Harold Marsh, Jr. & Robert H. Volk, Practice Under the California Securities Laws § 14.03[2][a] (2001)); *Lynch v. Cook*, 148 Cal. App. 3d 1072, 1088 (Ct. App. 1983) ("Section 25401 only applies to an 'untrue statement of material fact' or an omission to state a 'material fact *in order to make the statements made*, in light of the circumstances under which they are made, *not misleading*.'…Section 25401 does not apply to simple nondisclosure.") (emphasis in original) (citations omitted); *see also State v. Johnson*, 224 P.3d 720, 731 (Utah Ct. App. 2009), *overruled on other grounds by State v. Ogden*, 416 P.3d 1132 (Utah Ct. App. 2018) (plain language of Utah Code Ann. § 61-1-1(2) "makes no mention of an affirmative duty to disclose in the absence of a prior statement" requiring a "predicate statement."); *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002) (duty to disclose arises under securities laws only where both the statement made is material, and the omitted fact is material to the statement in that it alters the meaning of the statement); *Employees' Ret. Sys. of Rhode Island v. Williams Companies, Inc.*, 889 F.3d 1153, 1164 (10th Cir. 2018) (alterations and citations

omitted) ("Silence, absent a duty to disclose, cannot serve as the basis for liability under Rule 10b–5.").

Even assuming an alleged misleading statement, Plaintiff does not argue or cite any statement that was misleading as a result of these claimed omissions that would create a duty to disclose.

D. Genuine Dispute as to Required Privity and Seller of CAS, CASDF and CAREIC Series E Securities Precludes Summary Judgment

Section 25401 does not apply where, as detailed below, [redacted] was not the actual seller of the securities at issue. Under Section 25501, a violator of Section 25401 is liable only "to the person who purchases a security from him or sells a security to him." Cal. Corp. Code § 25501. Accordingly, California courts have held that the private right of action permitted by Section 25501 extends only to actions against the "actual seller" of a security with whom the purchaser has privity. *See Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 252–53 (2007); [31] *see also In re ZZZZ Best Sec. Litig.*, No. CV-87-3574-RSWL (BX), 1994 WL 746649, at *12 (C.D. Cal. Oct. 26, 1994) (granting defendants' summary judgment "strict privity is required under section 25401, and under that Section, 'only actual sellers, i.e. that transferors of title, can be liable.'"); *S. E. C. v. Seaboard Corp.*, 677 F.2d 1289, 1296 (9th Cir. 1982) (affirming summary judgment as defendant "was not the literal seller, as required by" sections 25401 and 25501 as "liability was limited to actual sellers."); *California Amplifier*, 94 Cal. App.

[31] California courts have rejected arguments that because the current version of Section 25401 was derived from the analogous federal provision § 12(a)(2) of the Securities Act of 1933, it, too, should be construed as applying to at least some persons who urged the buyer to purchase. *Id.* at 253.

4th at 109 (Section 25501 "retain[s] the privity requirement from common law fraud.").[32] In *Apollo Capital Fund*, the defendant, a securities "placement agent" employed by the company who issued the securities, was not liable because the securities were transferred from the issuing company itself. Thus, the issuing entity (and not the securities placement agent defendant) was deemed the "actual seller" with whom the plaintiff had privity of contract for liability purposes. 158 Cal. App. 4th at 253.

Directors and officers are treated no differently, and they are not liable as primary violators here because they are not the actual seller. *Jackson v. Fischer*, 931 F. Supp. 2d 1049, 1063 (N.D. Cal. 2013) (dismissing §§ 25401 and 25501 claim against director and officer defendants because plaintiff "fail[ed] to allege facts showing that she was in privity with regard to the D & O defendants, which is required for a § 25501 claim"); *see also Kronk v. Landwin Grp.*, LLC, 517 F. App'x 605, 606 (9th Cir. 2013) (unpublished) (upholding dismissal of officers and managers of fund and its manager "under Section 25501 of the California Corporations Code because Kronk failed to assert the claim against the "literal seller" of the security—Landwin Partners Fund I, LLC. Without a primary Section 25501 violation, there can be no liability for any defendant under Section 25504.") (unpublished) (internal citations omitted); *Alberts v. Razor Audio, Inc.*, No. CIV S-10-1215 KJM, 2012 WL 530427, at *7 (E.D. Cal. Feb. 17, 2012) (dismissed as "[plaintiff] has wholly failed to allege that [CFO defendant] sold him a security");

[32] Similarly, privity is required under Utah state securities laws. *Gohler v. Wood*, 919 P.2d 561, 565–66 (Utah 1996) ("Privity, which is not an element of the federal implied private cause of action, establishes the necessary link between the alleged misrepresentation and the plaintiff's injury and therefore serves the same purpose as the reliance requirement of common law fraud and the federal implied cause of action.").

Kainos Labs., Inc. v. Beacon Diagnostics, Inc., No. C-97-4618 MHP, 1998 WL 2016634, at *14 (N.D. Cal. Sept. 14, 1998) (dismissed claims against CEO and VP because "neither is the actual seller of [defendant company] stock" and agreed with Marsh & Volk that no justification exists for liability other than actual vendor of security as other provisions set forth extent to which persons other than vendor may be liable).

Here, [redacted] cannot be liable because he did not issue, offer or sell the securities to the investors; thus, rescission, the sole potential remedy provided to Plaintiff under the CSL is unavailable (as to control person). *See Viterbi v. Wasserman*, 191 Cal. App. 4th 927 (2011) (rescission under Cal. Corp. Code § 25504 not allowed against non-issuer of securities). In *Viterbi*, the California Court of Appeal, Fourth District, "conclude[d] that privity of contract is necessary to maintain an action for rescission under sections 25504 and 25504.1, and therefore a purchaser of securities may not maintain such a claim against someone other than the direct seller. That is so because rescission requires the contracting parties to be placed in the position they were in prior to contracting, and a non-seller, who did not receive any money from the purchaser, cannot return that money to the purchaser." *Id*. at 929; *see also In re Diasonics Sec. Litig.*, 599 F. Supp. 447, 459 (N.D. Cal. 1984) ("Section 25504, by its terms, applies to violations of section 25501. Hence, strict privity is still required. The complaint does not make clear what either the privity or control relationships were. A blanket allegation that all defendants were agents of each other does not satisfy the strict privity requirement of the statute."); *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1453 (S.D. Cal. 1988) (similar). *Cf. Moss v. Kroner*, 197 Cal. App. 4th 860, 878 (2011) (split by Court of Appeal, Second District, finding concluding that section 25504 places "certain secondary actors in the shoes of the principal violator for the purpose of civil liability as long as the original direct violator was in privity with the plaintiff.").

The split of authority and lack of demonstrative evidence as to the sellers of the securities are a genuine issue of fact and law that should preclude summary judgment.

E. Plaintiff Fails to Meet His Burden as Claim for Control Person Liability Requiring Denial of Summary Judgment

Plaintiff fails to meet his initial burden to present evidence to show not only the absence of disputed issue of fact, but also that Plaintiff is entitled to judgment as a matter of law that [redacted] is a control person or otherwise secondarily liable. First, as a preliminary matter, Plaintiff's conclusory statements, without any factual support, do not meet moving party's burden and should not require any response. *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1284-85 (10th Cir. 2010); *see* R.SUF at ¶¶ 35-36; DUCivR 56-1(b)(2)-(3) (background need not be limited to undisputed facts and need not cite evidentiary support, while undisputed facts must be supported "with particularity" to the evidence in the appendix). "Local rules that are consistent with the national rules have the force of law." *Nahno-Lopez v. Houser*, 625 F.3d at 1284. The statement of undisputed material facts "is an important tool to identify and address the facts at issue on summary judgment: a district court" and [redacted] "should not have to guess" as to the "movant's material facts" that are claimed to be undisputed. *Id*. In the end, however, Plaintiffs' failure to produce the evidence specifically required…warrant[s] [denial of] summary judgment." *Id*.

While Plaintiff's failure to proffer evidence negating any requirement to respond, to establish secondary liability under section 25504:

> [P]laintiff must plead facts that: i. the defendant offered and sold a security; ii. by means of communications that contained untrue statements of material fact or failed to state material facts necessary to make the statements not misleading; iii. the defendant was a secondary actor to the issuer of the security; and iv. **the defendant possessed knowledge of the true facts**.

Chassin Holdings Corp. v. Formula VC Ltd., No. 15-CV-02294-EMC, 2017 WL 66873, at *10 (N.D. Cal. Jan. 6, 2017) (emphasis added) (citing *Moss*, 197 Cal. App. 4th at 879). Initially, as previously discussed, Plaintiff's claim under Section 25504 fails because there is no actionable underlying claim under Section 25401. *See* Cal. Corp. Code § 25504 (providing for joint and several liability for violations of §§ 25401/25501); *Bains v. Moores*, 172 Cal. App. 4th 445, 479 (2009) (affirming dismissal of § 25504 claim where no primary liability claim due to lack of privity).

Second, Plaintiff fails to meet his burden to show that [redacted] "directly or indirectly controls a person liable under Section 25501" or was "occupying a similar status or performing similar functions" of a "principal executive officer or director of a corporation so liable," or (ii) [redacted] was an "employee of a person so liable who materially aids in the act or transaction constituting the violation" to establish joint and several liability under Cal. Corp. Code § 25504.[33] For purposes of control, "controls a person" as used in section 25504 requires the same allegations as "controls any person" as used in Title 15 of the Securities Act. *Hellum v. Breyer*, 194 Cal. App. 4th 1300, 1315 n. 8 (2011). Thus, for purposes of control, Plaintiff is required to show that [redacted]: (1) actually exercised control over the operations of the entity primarily liable; and (2) he possessed the power to directly or indirectly control the specific transaction or activity upon which the primary violation was predicated. *See, e.g., Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000); *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1108 (10th Cir. 2003), *as amended on denial of reh'g* (Aug. 29, 2003) ("assertion that a person was a

[33] *See* MSJ at 54 ("Defendant [redacted], although deprived of the formal title, occupied a status similar to that of a director and officer of CAREIC. And, with respect to at least the CASDF offering, he was an employee of CAREIC who materially aided in the sale.").

member of a corporation's board of directors, without any allegation that the person individually exerted control or influence over the day-to-day operations of the company, does not suffice to support an allegation that the person is a control person"). Both the Ninth and Tenth Circuit have deferred to the SEC definition of control in 17 C.F.R. § 230.405(f) as "the possession, direct or indirect, of the power to direct or cause the direction or management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." *See Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1162 (9th Cir. 1996) ("inquiry must revolve around the 'management and policies' of the corporation, not around discrete transactions."); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1305 (10th Cir. 1998) (citing with approval).[34] Such determination "'is an intensely factual question, involving scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's power to control corporate actions." *Howard*, 228 F.3d at 1065 (citations omitted).

Misleading, wholly conclusory allegations (even if true) that [redacted] was "one of CAREIC's first employees," "one of CAREIC's most highly paid employees," "deeply involved in the management of CAREIC's operations," "deeply involved in CAREIC's securities offerings," and "the principal architect of CASDF" fails to allege, let alone demonstrate by evidence, that [redacted] possessed, directly or indirectly, of the power to direct or cause the direction or management of CAREIC, CASDF or CAS, whether through ownership of voting securities, by contract or otherwise. Further, *assuming arguendo*, that [redacted] was an undisclosed board member, the CAREIC's Amended Operating Agreement is unambiguous in

[34] *See also Hellum*, 194 Cal. App. 4th at 1316 (SEC definition "is almost identical in terms as California "general definition of 'control' for use throughout the Corporations Code, including section 25504 [], is 'the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation.'").

that its "board" was an "advisory board" without authority of oversight. Rather, as a matter of law and undisputed fact, the board could not exercise the requisite control over CAREIC – its operating agreement vests complete authority in the CEO (Cochran). *See* SAF ¶¶ 1-3. While Plaintiff should be precluded arguing otherwise as being in party to the prior finding of the Bankruptcy Court, reviewing the operating agreement is appropriate in determining control. Plaintiff should be estopped from arguing otherwise. *See e.g., IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 945-47 (3d Cir. 1998) (dispute between IBSF and the Committee seeking declaratory relief to determine whether there was "adequate disclosure of individuals or entities 'controlling' members of the [Schedule] 13D group[,]" the court reviewed the operating agreements to determine control in nearly identical definition of control under 17 C.F.R. § 240.12b–2).

Third, Plaintiff fails to meet his burden, and cannot meet his burden, to demonstrate that [redacted] was an "employee of a person so liable who materially aids in the act or transaction constituting the violation" to establish joint and several liability under Cal. Corp. Code § 25504. By the plain language, this secondary liability provision would be limited **to employees of CASDF (the seller and issuer of the CASDF units), not CAREIC**, based on Plaintiff's allegation that "[redacted] was a CAREIC employee who materially aided on the sale of CASDF." *See, e.g.* BLUE SKY LAW § 9:72 (use of "employee" intentional, rather than general term "agent," as such was "done to limit liability under this section"). Further, Plaintiff fails to demonstrate that [redacted] materially aided in the sale: "To be jointly and severally liable under section 25504, [[redacted]] must have materially aided, not simply in the transaction, but in the violation—that is, in [CASDF's] sales of the [units] by means of false or misleading statements in the offering documents. Merely 'play[ing] an active role[]' does not suffice." *Apollo Capital*

Fund, 158 Cal. App. 4th at 256. Further, the evidence demonstrates only administrative tasks, not "material aid." *See* [redacted] Decl. at ¶¶ 92-94; *see also* Hunt Decl. at ¶ 33; Hunt Decl.-2 at ¶¶ 10-13; *see, e.g.*, *Prince v. Brydon*, 307 Or. 146, 149, 764 P.2d 1370, 1371 (1988) ("Typing, reproducing, and delivering sales documents may all be essential to a sale, but they could be performed by anyone.").

Fourth, as discussed in the following section, to prove secondary liability Plaintiff must prove knowledge of falsity – to prove that [redacted] "materially aided [CASDF's] sales of the [units] by false or misleading representations, the investors were required to plead **facts showing [[redacted]'s] knowledge** of the false or misleading nature of the representations in the offering documents (or that [[redacted]] knew facts giving it reasonable grounds to know the statements were false or misleading)." *Apollo Capital Fund*, 158 Cal. App. 4th at 256.

Finally, California courts have concluded "that the group published information doctrine, or group pleading doctrine, as its alternative name suggests, is a pleading device that has no application in the summary judgment context." *Bains v. Moores*, 172 Cal. App. 4th 445, 470 (2009). Thus, the doctrine "does not apply in determining whether a party has presented sufficient evidence of its claims to avoid summary judgment, under California law." *Id*. at 476; *see also Herm v. Stafford*, 663 F.2d 669, 684 (6th Cir. 1981) (claims against alleged de facto director and controlling person "cannot survive a motion for summary judgment" as plaintiff "does not show that Dinkler, although allegedly a director of DBFC, exercised even an indirect means of influence on DBFC… A director of a corporation is not automatically liable as a

controlling person. There must be some showing of actual participation in the corporation's operation or some influence before the consequences of control may be imposed.").[35]

F. Plaintiffs Fail to Allege [redacted]'s Knowledge of Falsity

Plaintiffs allege a claim against [redacted] under the fourth ("every person occupying a similar status or performing similar functions") and fifth clause ("every employee of a person so liable who materially aids in the act or transaction constituting the violation") of section 25504,[36] but these provisions do not impose mere strict secondary liability based on a [redacted]s position alone. Indeed, joint and several liability may not be imposed under any clause of Section 25504 if the defendants had no knowledge of (or reasonable grounds to believe in) the facts by reason of which the liability is alleged to exist. Cal. Corp. Code § 25504. This provision effectively sets forth a requirement of actual knowledge (or at least negligence) before extending secondary liability to an officer or director. Thus, "[t]o assert a viable cause of action for secondary liability under section 25504, plaintiff must plead facts that: i. the defendant offered and sold a security; ii. by means of communications that contained untrue statements of material fact or failed to state material facts necessary to make the statements not misleading; iii. the defendant was a secondary actor to the issuer of the security; and iv. **the defendant possessed knowledge of the true facts**." *Chassin Holdings Corp.*, 2017 WL 66873, at *10 (emphasis added) (citing *Moss*, 197 Cal. App. 4th at 879).

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[35] *See Underhill v. Royal*, 769 F.2d 1426, 1433 (9th Cir. 1985) ("control person statute under California law is substantially the same as the federal statute.").

[36] *See* MSJ at 54 ("Defendant [redacted], although deprived of the formal title, occupied a status similar to that of a director and officer of CAREIC. And, with respect to at least the CASDF offering, he was an employee of CAREIC who materially aided in the sale.").

California rejected the standard of care imposed under the Uniform Securities Act (and Utah) that imposes the same standard of care on control persons as the primary actor,[37] instead California "adopted the standard of care set forth in Section 15 of the 1933 Act[,] similar to that imposed on officers and directors under Section 11 with respect to statements made in a registration statement on the authority of an 'expert,' [which] clearly would not require any independent investigation on the part of these defendants, or even any inquiry, so long as they were not aware of any suspicious circumstances." *See* CSL Treatise at 14.03[4](c). Therefore, the "liability imposed on these collateral persons solely by virtue of their status or relationship to the vendor or purchaser of the security **should only be based on actual knowledge of the false or misleading nature of the statement** or upon knowledge of facts that gave the collateral person reasonable grounds to know that the statement was false or misleading, whether or not he or she in fact believed it to be so." *Id*. (emphasis added).

In *Apollo Capital Fund*, the Court of Appeal stated "[t]o plead that Roth materially aided eNucleus in the latter's sales of the bridge notes by false or misleading representations, the investors were required to plead facts **showing Roth's knowledge of the false or misleading nature of the representations in the offering documents** (or that Roth knew facts giving it reasonable grounds to know the statements were false or misleading)." 158 Cal. App. 4th at 256. Thus, to impose control person liability, "[r]ecovery in a civil action for a section 25401

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[37] Compare Cal. Corp. Code § 25504 ("unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist") with Utah Code Ann. § 61-1-22(4)(a) ("unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that the nonseller or nonpurchaser did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.").

violation is permitted '*only* if the seller was aware or was negligent in failing to be aware that his representations were misleading.'" *Id*. at 256 n. 15 (citations omitted) (emphasis in original).

Here, Plaintiff fails to demonstrate lack of knowledge. *Cf.* [redacted] Decl. at ¶¶ 65-66.

G. Plaintiff Fails to Demonstrate Entitlement to Judgment as Matter of Law Relying on Inapplicable and Clearly Distinguishable Legal Authority

The cases relied upon by Plaintiff to establish, as a matter of law, that the alleged omissions were material are clearly distinguishable or completely inapplicable:

Undisputed Material Facts. As opposed to the cases relied on by Plaintiff, the material facts are clearly in dispute as provided in Section III *supra*. *See Schaffer Family Inv'rs LLC v. Sonnier*, No. 213CV05814SVWJEM, 2016 WL 6917269, at *5 (C.D. Cal. July 5, 2016) (court stated that "[i]t is undisputed that Defendant false represented Plaintiffs that he was a retired Beverly Hills attorney" as he admitted the misrepresentation); *Commodity Futures Trading Comm'n v. Int'l Fin. Servs. (New York), Inc.*, 323 F. Supp. 2d 482, 486 (S.D.N.Y. 2004) (Defendant "must rely almost exclusively on the Commission's evidence in an effort to establish genuine issues of material fact sufficient to defeat summary judgment" as both invoked Fifth Amendment rights against self-incrimination at depositions so that "few of the relevant facts can be disputed."); *Spatz v. Borenstein*, 513 F. Supp. 571, 579-80 (N.D. Ill. 1981) (defendant did not "controvert the conclusion that these facts were not disclosed" but rather materiality and disclosed elsewhere); *Jaffe v. Bosco*, No. 3:93-CV-2064-X, 1996 WL 727981, at *1 (N.D. Tex. Sept. 26, 1996) (only disputed was whether a security with certain defendants not responding to motion);

Trading Experience and Selective Disclosure of Trading Profit Potential under Commodity Exchange Act by Commission. *See Commodity Futures Trading Comm'n v.*

Commonwealth Fin. Grp., Inc., 874 F. Supp. 1345, 1353–54 (S.D. Fla. 1994) (flouted that "customers have recently doubled their money" while omitting "80% or greater failure rate on its trading recommendations"). *Id*. at 1353 n. 10 ("misrepresentation when salespeople emphasize the profits enjoyed by Commonwealth customers without mentioning any of the losses."). Further, in actions by the Commodity Futures Trading Commission for disgorgement and injunctions, there is no right to jury trial. *See S.E.C. v. Rind*, 991 F.2d 1486, 1493 (9th Cir. 1993).

Reliance on SEC Enforcement Actions Misleads the Court. SEC actions may be subject to different elements of proof, different burdens of proof and different rights of defendant, may be based on scheme liability, may not have right to jury trial depending on relief sought and may have right of action where private civil liability is unavailable. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 752 n. 14 (1975) ("purchaser-seller rule imposes no limitation on the standing of the SEC to bring actions for injunctive relief under s 10(b) and Rule 10b-5."); *S.E.C. v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993) ("restrictions on who may invoke the power of the federal judiciary to enforce the securities laws by collecting damages do not bear on the determination of whether a violation of the securities laws has been committed…Conduct may be fraudulent and so violate Rule 10b–5, exposing the perpetrator to liability, but may not result in the types of harm necessary to subject the actor to liability to a particular private plaintiff."); *id*. at 1363 ("SEC action to enjoin securities violations is not an action 'under' Rule 10b–5, as is the judicially created cause of action for damages implied for private plaintiffs.").

H. To the Extent the Court Grants Plaintiff's Motion, Affirmative Defenses Must Still be Resolved by the Trier of Fact (or through Summary Adjudication)

Assuming arguendo that the Court finds that both that Plaintiff has carried its heavy burden to demonstrate through admissible evidence that there is no genuine dispute of material fact and establish, as a matter of law, all essential elements of the securities fraud claim and [redacted] has not demonstrated facts and evidence to rebut that a genuine material factual dispute (or disputes) remain as the Motion on Plaintiff's second claim, [redacted]'s affirmative defenses and counterclaim must still be tried (or resolved by summary adjudication) prior to entry of judgment (contrary to Plaintiff's request). Here, Plaintiff brings the Motion on Plaintiff's Motion is on the second claim of relief, not defenses or counterclaims relating thereto. *See* MSJ at 1; *see e.g.*, Fed. R. Civ. P. 56(a) and the advisory committee's note to 2010 amendment (clarifying that "summary judgment may be requested…as to a claim, defense or part of a claim or defense). The Motion does not seek summary judgment on [redacted]'s counterclaim or affirmative defenses. *See* Dkt. 221. To seek summary judgment on such defenses and counterclaim (where ultimate burden remains with [redacted]), Plaintiff must, but did not attempt to, "carry its initial burden either by producing affirmative evidence negating an essential element of the nonmoving party's claim, or by showing that the nonmoving party does not have enough evidence to carry its burden of persuasion at trial." *Trainor*, 318 F.3d at 979.

I. Incorporation of Co-Defendants Arguments

Pursuant to DUCivR 7-1(a)(4), [redacted] incorporates by reference the made and evidence submitted by the other defendants in this action in opposition to Plaintiff's Motion.

VI. CONCLUSION

For the foregoing reasons, [redacted] respectfully request that the Court deny in its entirety Plaintiff's motion for summary judgment on its second claim for relief.

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DATED: August 15, 2018

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CERTIFICATION OF COMPLIANCE TO WORD COUNT

Pursuant to DUCivR 56-1(g)(1), By affixing his electronic signature to this document below and pursuant to the Court's order granting [redacted]'s Ex Parte Motion to File an Over-Length Opposition (Dkt. 251), counsel affirms that according to the word count function on

Microsoft Word, the word count of this brief, exclusive of the items listed in DUCivR 56-1(g)(1) is 18,627.

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2018, I electronically filed the foregoing along with the Appendix of Evidence with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

[redacted]

[redacted] [redacted]

[redacted] [redacted]

and I hereby certify that I have mailed the document by United States Mail, first-class postage prepaid, to the following non-CM/ECF participants:

(No manual recipients)

/s/ Brett G. Evans