No. 23-2699

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

BRENDA CHRISTINE BARRY; ERIC CHRISTOPHER CANNON; and
CALEB AUSTIN MOODY (dba SKY STONE),

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California,
No. 2:15-cv-02563 DDP
Hon. Dean D. Pregerson

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TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

ARGUMENT 1

I. THE PWCG LIFE SETTLEMENT ARRANGEMENTS ARE NOT SECURITIES UNDER *HOWEY*. 1

A. The SEC's Approach Contravenes this Court's Precedents on Impact of an Uncontrollable Force on an Investment. 2

B. The SEC's Control Analysis Shows that the Third *Howey* Prong Is Not Met. 6

C. Other Circuits' Decisions Do Not Compel the Conclusion that PWCG Life Settlement Arrangements Are Securities. 15

II. THE SEC FAILED TO MEET ITS BURDEN TO ESTABLISH THE EXTENT OF THE OFFERING OR OFFERINGS. 18

III. THE DISTRICT COURT COMMITTED A REVERSIBLE ERROR ON REMEDIES. 20

A. The District Court's Imposition of Disgorgement Requires Proof that Appellants Harmed Victims, Which Is Absent Here. 20

1. Congress Did Not Overrule *Liu*'s Equitable Requirements. 21

2. *Govil* Faithfully Applies *Liu's* Equitable Requirements. 22

3. The SEC Identifies No Victims Harmed by Appellants. 24

B. The District Court Imposition of Penalties and an Injunction Contravenes this Court's Rulings. 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)..18

Fed. Lab'ys, Inc. v. Barringer Rsch. Ltd.,
696 F.2d 271 (3d Cir. 1982) 19

Hocking v. Dubois,
885 F.2d 1449 (9th Cir. 1989) 7, 8

Husain, *SEC v. Koracorp Indus., Inc.*,
575 F.2d 692 (9th Cir. 1978) 25, 26, 27, 28

Liu v SEC,
591 U.S. 71 (2020)..1, 20, 21, 22

In re Living Benefits Asset Mgmt., L.L.C.,
916 F.3d 528 (5th Cir. 2019) ....*passim*

Noa v. Key Futures, Inc.,
638 F.2d 77 (9th Cir. 1980) (per curiam) ....*passim*

Rodriguez v. Barco Cent. Corp.,
990 F.2d 7 (1st Cir. 1993)...6

SEC v. Ahmed,
72 F.4th 379 (2d Cir. 2023),
cert denied, No. 23-741, 2024 WL 3014524 (U.S. June 17, 2024)....................21

SEC v. Belmont Reid & Co.,
794 F.2d 1388 (9th Cir. 1986) ....*passim*

SEC v. Eurobond Exch., Ltd.,
13 F.3d 1334 (9th Cir. 1994) 5

SEC v. GenAudio Inc.,
32 F.4th 902 (10th Cir. 2022) 22

SEC v. Goldfield Deep Mines Co.,
758 F.2d 459 (9th Cir. 1985) ....*passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

SEC v Govil,
86 F.4th 89 (2d Cir. 2023) 20, 21, 22

SEC v. LBRY, Inc.,
639 F. Supp. 3d 211 (D.N.H. 2022)....................6

SEC v. Life Partners, Inc.,
102 F.3d 587 (D.C. Cir. 1996) (per curiam)....................16

SEC v. Life Partners, Inc.,
87 F.3d 536 (D.C. Cir. 1996)....................*passim*

SEC v. Murphy,
626 F.2d 633 (9th Cir. 1980) 18, 20

SEC v. Mutual Benefits Corp.,
408 F.3d 737 (11th Cir. 2005) 12, 16, 17, 18

SEC v. Navellier & Assocs.,
--- F.4th ----, 2024 WL 3423045 (1st Cir. July 16, 2024) 23

SEC v. R.G. Reynolds Enters., Inc.,
952 F.2d 1125 (9th Cir. 1991) 2, 3, 9, 15

SEC v. Rubera,
350 F.3d 1084 (9th Cir. 2003) ....*passim*

SEC v. Thompson,
732 F.3d 1151 (10th Cir. 2013) 6

SEC v. W.J. Howey Co.,
328 U.S. 1948 ....*passim*

Solid 21, Inc. v. Hublot of Am.,
685 F. App'x 530 (9th Cir. 2017)....................19

United States v. Brandel,
853 F. App'x 88 (9th Cir. 2021)....................5

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Sumeru,
449 F. App'x 617 (9th Cir. 2011) 5

Vollmert v. Wisconsin Dep't of Transp.,
197 F.3d 293 (7th Cir. 1999) 19

Statutes

15 U.S.C. §77(e) 18

15 U.S.C. § 78u(d) 21

Rules

Federal Rule of Civil Procedure 56 ....20, 25, 26, 28

INTRODUCTION

The Securities and Exchange Commission tries to defend the district court's erroneous conclusion that PWCG's life settlement arrangements constitute securities under *SEC v. W.J. Howey Co.*, 328 U.S. 1 (948). That conclusion, however, reflects a profound misunderstanding of this Court's precedents, which instruct that an investment is not subject to federal securities laws where—as here—the investment's success depends primarily on forces outside of the promoter's control, rather than on the promoter's own entrepreneurial efforts.

The SEC also seeks to invert the burden of proof with respect to exemption defenses, to sidestep the Supreme Court's admonition in *Liu v SEC*, 591 U.S. 71 (2020), that the equitable remedy of disgorgement is inappropriate where defendants' conduct did not involve any investor harm, and to circumvent this Court's decisions prohibiting courts from imposing civil penalties and an injunction without an evidentiary hearing where disputed factual issues exist. This Court should reverse the district court's erroneous decision.

ARGUMENT

I. THE PWCG LIFE SETTLEMENT ARRANGEMENTS ARE NOT SECURITIES UNDER *HOWEY.*

The SEC's response that PWCG life settlement arrangements are securities under *Howey* rests on a misinterpretation of this Court's precedent and a

misunderstanding of how life settlement arrangements function. The PWCG life settlement arrangements hinge overwhelmingly on the death of the insured, and thus cannot be securities under *Howey*.

A. The SEC's Approach Contravenes this Court's Precedents on Impact of an Uncontrollable Force on an Investment.

The SEC does not meaningfully address this Court's precedents, which hold that where the success of an investment depends primarily on an uncontrollable force, rather than on any entrepreneurial efforts of the promoter, it is not an investment contract under *Howey*. *Compare Noa v. Key Futures, Inc.,* 638 F.2d 77 (9th Cir. 1980) (per curiam) and *SEC v. Belmont Reid & Co.,* 794 F.2d 1388 (9th Cir. 1986) *with SEC v. Goldfield Deep Mines Co*., 758 F.2d 459 (9th Cir. 1985) and *SEC v. R.G. Reynolds Enters., Inc.,* 952 F.2d 1125, 1131 (9th Cir. 1991). Those cases dictate the conclusion here.

Both *Noa* and *Belmont Reid* evaluated the defendants' procurement and delivery of pre-purchased precious metals to investors, and held that once the purchasers bought the metals, their value depended "upon the fluctuations of the silver market, not the managerial efforts of [the seller]." *Noa*, 638F.2d at 79; *see also Belmont Reid*, 794 F.2d at 1391. The investors had as their "primary purpose" to profit off of the market for gold—something neither the promoter nor the investor could control. *Belmont Reid*, 794 F.2d at 1391. Even though the promoters could fail to deliver the expected profit through contractual breach, misfortune, or

otherwise (and thus some reliance on the promoter occurred), the profitability of the metal itself depended solely on the price of silver and gold in the market—and so they did not constitute investment under federal securities laws. *Noa*, 638 F.2d at 80; *Belmont Reid*, 794 F.2d at 1391.

That is markedly different from the programs at issue in *Goldfield* and *R.G. Reynolds*. While those cases also involved the delivery of precious metals, the object of the investments were *programs* through which gold *ore* would be turned into the gold that would, in turn, render the expected profits. *See Goldfield*, 758 F.2d at 461; *R.G. Reynolds*, 952 F.2d at 1129. Those programs were governed by contracts that expanded beyond simply purchase agreements (as was the case with PCWG) to "refining contract[s]" for the operation of the "unique" and "revolutionary" technology to "process[]" and "refine[]" the ore to yield profits. *Goldfield*, 758 F.2d at 461, 463. The investors in those cases did not simply buy gold; they bought *ore* and expected the promoter to refine it into gold that would be delivered later. Thus, "[i]nvestors were dependent on [the promoter's] efforts in refining the gold ore to realize profits." *R.G. Reynolds*, 952 F2d at 1135 (alteration added); *see also Goldfield*, 758 F.2d at 464 ("the undeniably significant effort necessary for the success in ore program was that of Goldfield—the provider of what was represented to be the only economically feasible dump ore processing technique").

The purchases made by PWCG purchasers are akin to *Noa* and *Belmont Reid*. PWCG purchasers did not invest in a program through which PWCG would take an item and turn it into something else to yield the expected profit. Rather, they selected a policy from which to purchase an interest in the death benefit, and the benefit from that policy would later be delivered to them. Although the purchase involved some reliance on PWCG's efforts—such as PWCG's administrative work ensuring that the policy remained in-force such that it could deliver the expected profits to purchasers once the insured passed away—that is immaterial. This Court has already held that such efforts are insufficient to satisfy *Howey*. *See Belmont Reid*, 794 F.2d at 1391 ("any sale-of-goods contract in which the buyer pays in advance for delivery and the ability of the seller to perform is dependent, in part, on both his managerial skill and some good fortune"). Where, as here, the primary purpose of the investment is not those ancillary services to ensure delivery, but the gamble on an uncontrollable force, the investment is not a security.

The SEC tries to distinguish *Noa* and *Belmont Reid*, arguing that the primary purpose of purchasers there was to profit from the anticipated increase in the world price of gold. SEC Br. 28. The SEC does not explain how this differs from PWCG purchasers' expectation that they would profit from the insured's passing. Both depend on forces outside the control of the promoter. And both involve some

administrative services that must be undertaken to perform under the contract and deliver the profits. Yet neither investment constitutes securities.

The SEC also discounts the plain language of the materials governing the transaction, which repeatedly confirmed that the success of the investment depended on the longevity of the insured. *See* SEC Br. 29. Invoking out-of-circuit case law, the SEC contends that the language in the purchase agreements must be disregarded. This argument ignores this Court's settled rule of interpreting similar transaction documents in accordance with their plain language. *SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1341 (9th Cir. 1994) (evaluating the "efforts of others" by looking at what the sales materials stressed); *Goldfield*, 758 F.2d at 463-64 (relying on brochure's representations of profit possibility in finding that the ore purchase program satisfied *Howey* test); *United States v. Brandel*, 853 F. App'x 88, 90 (9th Cir. 2021) (evaluating the "efforts of others" prongs in terms of what investors expected). This approach makes sense. Purchaser expectations (or their "primary purpose" for the investment) under *Howey* are undoubtedly informed by the very materials governing the investment. Thus, this Court's evaluation of *Howey* requires consideration of "the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole." *United States v. Sumeru*, 449 F. App'x 617, 620-21 (9th Cir. 2011) (citation omitted). Here, all those factors are aligned, and the agreement's language reflected the realities of the transaction—"the

economic benefit" was derived from the "death of the insured" and "it is impossible to predict the insured's death." 10-ER-2575; 10-ER-2580.[1]

B. The SEC's Control Analysis Shows that the Third *Howey* Prong Is Not Met.

Ignoring this Court's precedents discussing outside forces, the SEC instead focuses on the control afforded to promoters in investment arrangements. But the SEC's analysis both misses the limitations of the control analysis in this context and mischaracterizes the control PWCG purchasers had over their purchases.

Invoking *SEC v. Rubera*, 350 F.3d 1084 (9th Cir. 2003), the SEC argues that "a high level of control by a promoter is indicative of an investment contract." SEC

[1] *SEC v. LBRY, Inc*., 639 F. Supp. 3d 211, 219 (D.N.H. 2022), is inapposite. There, a disclaimer that cryptocurrency tokens were not being offered as an investment did not outweigh the significant statements to the contrary. *SEC v. Thompson*, 732 F.3d 1151, 1160 (10th Cir. 2013), is likewise inapposite. There, the court presumed that the notes at issue were securities, and required a showing that the note bears a strong resemblance to categories of instruments that are not securities. Finally, *Rodriguez v. Barco Cent. Corp.*, 990 F.2d 7, 11 (1st Cir. 1993), actually supports Appellants. There, buyers purchased land in individual parcels with "strong and repeated suggestions that the surrounding area would develop into a thriving residential community. But apart from the promise of an existing lodge or a new country club, the evidence did not show that the promoter or any other obligated person or entity was promising the buyers to build or provide anything." The same is true here. PWCG repeatedly emphasized the singular impact of the longevity of the insured, purchasers bought an interest in one of the policies, and PWCG represented that the policies would eventually mature through no efforts of their own. Thus, "the most that can be said is that the promoter left the distinct … impression that [the insured would pass away] through natural forces." *Id*. at 11.

Br. 22. *Rubera* involved a telephone investment program, where investors would enter purchase agreements for individual telephones, as well as service agreements in which Alpha Telecom would simultaneously service those telephones. 350 F.3d at 1091. Once the purchases were made, Alpha Telecom, with investor money in hand, would choose the telephone's location, install the telephone, and run operational functions, such as paying bills and obtaining regulatory certifications. *Id*. Relying on *Hocking v. Dubois*, 885 F.2d 1449 (9th Cir. 1989), this Court held the program to be an investment contract because the investors in the telephone program were "passive," lacked control, and relied on Alpha Telecom to manage the telephones to generate profit. *Rubera*, 350 F.3d at 1092.

The control discussed in *Rubera* and *Hocking* is not some undefined control, disconnected from the *Howey* test. Rather, it is a mechanism for examining the "efforts of others" prong—*i.e.*, the focus of the control is on *the generation of profits*. *Rubera,* 350 F.3d at 1093 ("it is clear that the investors relied on Alpha's managerial skill and effort to make the telephone investment program a success"); *Hocking*, 885 F.2d at 1460 (discussing investor control in the "efforts of others" prong analysis). In *Hocking* and *Rubera*, the investments at issue were the management of a condominium and the installation and management of pay telephones, respectively. The expected profit tied to these programs did not come from the passing of some event or the impact of market prices. In *Hocking*, the expected profit was generated

through income from renting condos within the building, a service provided under a rental management agreement with the promoter. 885 F.2d at 1452-53. The investors in *Rubera* handed over all control with respect to the telephones, from selecting a profitable location to maintaining them. 350 F.3d at 1092. In both cases, profits likely came from the proper management of the subject of the investment to attract users/renters to generate income.

The same cannot be said for life settlement arrangements. The expected profit from such investments hinges on the moment of the insured's passing. In a sense, the investment itself is passive—neither the investor nor the promoter can control its profitability. "[T]he realization of investor profits is fundamentally outside of the promoter's control and the investor's dependence on the promoter is more circumscribed." *SEC v. Life Partners, Inc.*, 87 F.3d 536, 552 (D.C. Cir. 1996) (Wald, J.) (dissenting). The object of investment is dependent on natural forces, not any managerial skill.

Indeed, this Court recognized as much in *Rubera*. The defendant in *Rubera* relied on the D.C. Circuit's *Life Partners* opinion, which held that viatical settlements were *not* securities, to argue that his management of the telephones was ministerial. *Rubera*, 350 F.3d at 1092. Notably, this Court did not disavow *Life Partners*, but rather found that the circumstances in *Life Partners* were inapposite to the case at hand. As the Court explained, *Life Partners* "held that the sale of life

insurance policies to investors did not meet the 'expectation of profits' prong because the defendants' *post-transaction* ministerial functions had no impact on investor profits." *Id*. (emphasis added) (citation omitted). The viatical settlements, which hinged on the life of the insured, thus differed from what was at issue in *Rubera* because "the telephones required service and expert management to generate the returns for investors." *Id*. The *post-transaction* functions that were in the promoter's control in *Rubera* were not just administrative; they included selecting the location of the phone (which would directly impact the amount of traffic) and installation of the phone (without it, the phone would be entirely unusable).[2]

PWCG's post-purchase activities of paying premiums, monitoring the insureds, and delivering the death benefits mirror those in *Life Partners* and are neither the "primary purpose" of the investment, as defined in *Belmont Reid*, nor

[2] The SEC invokes this Court's decision in *Goldfield* to proffer its "control" argument. *See* SEC Br. 23. But as the SEC acknowledges, the efforts of the promoter in *Goldfield* (the refinement of the ore into gold) occurred "[a]fter [the investors] ma[d]e their investments." *Id*. *Goldfield* investors turned over control, after money was invested, to do the very thing that would result in profits. That is in line with this Court's constant focus on *post-purchase* efforts. *See, e.g.*, *Noa*, 638 F.2d at 79-80 (post-purchase, the investors relied on the market forces to realize profits); *Belmont Reid*, 794 F.2d at 1931 (the post-purchase efforts of minting and delivering the gold was not managerial and instead, the purchasers relied on the market forces to realize profits); *Goldfield*, 758 F.2d at 461–62 (the "revolutionary" ore processing technique, which occurred after purchase, was undeniably significant); *R.G. Reynolds*, 952 F.2d at 1135 (the post-purchase service of milling and refining the ore was enough to result in a security).

managerial functions that affect the profitability of the investment, as acknowledged in *Rubera*. PWCG's so-called "control" over these ministerial functions has no impact because they are disconnected from the generation of profits.[3] Even if premiums were properly paid, if an insured continues to live, the profit from that policy would decrease. The life of the insured dictates the outcome.

Because of this undeniable dependence on the insured's longevity, the only arguably "controllable" piece of the investment scheme for life settlement arrangements stems from the selection of policies. Contrary to the SEC's assertions (*see* SEC Br. 25), that control was in the hands of PWCG purchasers. The purchasers—not PWCG—chose which life settlement arrangement (if any) to invest in prior to submitting any money to PWCG. *See, e.g.*, 4-ER-848, 865–68; *see also* 3-ER-521 n.31 (citing relevant record). Purchasers selected policies from an inventory of policies supplied by PWCG, just as any other ordinary buyer from any ordinary seller would. This Court has found on numerous occasions that such pre-purchase gathering and supplying of goods from which purchasers can choose—even where such goods had to meet certain standards—does not rise to the level of

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[3] For this reason, the SEC's argument that the "ongoing monitoring and eventual payout of the policies" are managerial and similar to the efforts in *Goldfield*, *see* SEC Br. 27, fails. In the SEC's view, if a seller is the only one who has control over any administrative function—for example, delivering the good—the good must be a security. But "exclusivity" is not the test.

managerial efforts affecting profit. *See Belmont Reid*, 794 F.2d at 1391; *Noa*, 638 F.2d at 79 (defendant's selection of silver with a .999 purity was not managerial). This Court's *Howey* analysis does not place significant weight on the selection of "good" investments to sell to purchasers when the purpose of the investment was to profit from the passing of the insured.

The SEC argues, without support, that the "balance of control in selecting policies was heavily weighted toward" PWCG because the pool of policies was "pre-vetted." SEC Br. 25. Appellants already explained (*see* Br. 23-24) why such argument is meritless:

- The promotional materials never led purchasers to expect that PWCG could predict the insured's death or that the four-to-seven-years estimation was a guarantee. PWCG highlighted that the insured's death was *impossible* to predict, and purchasers confirmed the same in executing the contract. 10-ER-2687–701; 10-ER-2574–87; 7-ER-1725; 6-ER-1361; 6-ER-1523; 6-ER-1410; 7-ER-1752; 6-ER-1365; 5-ER-1197–6-ER-1273; 6-ER-1560.
- PWCG did not (nor did it purport to) formally or professionally measure life expectancy with any proprietary method, as was present in cases in which selection of policies *was* entrepreneurial. *See In re*

Living Benefits Asset Mgmt., L.L.C., 916 F.3d 528, 540 (5th Cir. 2019); *SEC v. Mutual Benefits Corp.*, 408 F.3d 737, 738 (11th Cir. 2005)

- PWCG did not hire a medical professional to evaluate complex health markers, which could provide life expectancies comparable to those given to terminally ill patients by doctors. *See Life Partners*, 87 F.3d at 555 (Wald, J., dissenting).

PWCG simply reviewed the same basic in-force illustrations that PWCG ultimately provided to purchasers in choosing the policies. 7-ER-1602–04 7-ER-1558–59; 13-ER-3575; 6-ER-1359; 4-ER-757, 831–32, 834, 849, 865, 867. And those same purchasers could evaluate that information independently or seek outside counsel to evaluate the policies prior to purchase. *See* 4-ER-868; *see also* 6-ER-1354–55; 6-ER-1551, 1553; 5-ER-1197–264, 6-ER-1267–73. They were not forced to rely on PWCG's assessment of the policies. Nor were they forced into purchasing any policies if, after independent assessment, they did not believe it to be a good investment. This is the very investor control that *Rubera* instructs is relevant to finding that success is not dependent on the efforts of the promoter. 350 F.3d at 1093. On balance, the control for selecting policies was in the hands of investors.

The SEC also emphasizes PWCG's control over the reserve structure, which was used to pay premiums.[4] It argues that purchasers believed the reserves to be a "safety net," and thus the "efforts of others" prong is satisfied because PCWG would create and maintain the reserve structure in a way that protected their investment.[5] SEC Br. 26-27. The SEC's argument takes the test a step too far. *First*, the payment of premiums (which is all the reserves were for) is widely recognized as a ministerial action insufficient to satisfy *Howey*. *See Living Benefits*, 916 F.3d at 541 ("the ministerial actions required to administer a life settlement—typically paying premiums and monitoring the insured's health—are insufficient to satisfy *Howey*"); *Life Partners*, 87 F.3d at 550-51 & n.1 (Wald, J., dissenting) (same); *see also* 10-ER-2693 (PWCG "established [the reserves] to pay premiums so that every policy is kept in force."). *Second*, in *Living Benefits* and *Life Partners*, the investors undoubtedly believed and expected the promoter to properly manage and pay the

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[4] The SEC argues that the reserves "allowed [PWCG] to advertise a high rate of return so long as it retained full control of investors' funds." SEC Br. 26. But the evidence that the SEC cites does not support this proposition. 10-ER-2690. Indeed, PWCG's promotional materials emphasized that the life settlements were not dependent on the market and had a fixed minimum return.

[5] The SEC also ignores Appellants' argument that the reserve structure was established prior to purchase and was disclosed as an administrative mechanism to keep the policies in force. The "value of the promoter's efforts has already been impounded into the promoter's fees or into the purchase price of the investment." *Life Partners*, 87 F.3d at 547. Even if this were not the case, purchasers expected to profit off the passing of the insured, not from the management of the reserves.

premiums in a manner that would ensure the policies would remain in force and the profit would be delivered to them. Yet, the courts still found that those specific tasks are administrative, not entrepreneurial to the profitability of the investment. This Court similarly differentiates efforts that affect profitability of an investment from contractual duties that impact delivery or prevent bankruptcy. *See Noa*, 638 F.2d at 80; *Belmont Reid*, 794 F.2d at 1391. And for good reason. The SEC's contrary view is a slippery slope where any purchaser expectation that the business will run properly and without misconduct (whether purposeful or not) leads to a finding of a security. Purchasers are not then left without remedy, but the "federal securities laws do not reach every such scheme." *Noa*, 638 F.2d at 80.[6]

Whether or not PWCG established and properly managed the reserves, if the insured passed away quickly, smaller premiums would be due and the profitability of the policy would be high, regardless of any "efforts" PCWG undertook to fund and manage those reserves. Conversely, if the insured lived for years, greater premiums would be due, and the profitability of the policy would decrease, through no fault of PWCG. Either way, the profitability is dependent on the life of the insured. Just as in *Belmont Reid*, where the purchasers risked that "the mine [would not] yield sufficient gold," 794 F.2d at 1391, PWCG purchasers risked that the

[6] Indeed, the purchasers in this case brought a class action and may settle the case for over $8 million. 2-ER-083.

insured would not pass away. It is not to say that life settlements may never be securities. But where PWCG purchasers picked their own investments, could seek outside evaluation of the policies, knew that PWCG was not using any medical professionals or proprietary method of predicting the insureds' death, and were given the same information that PWCG used to evaluate policies, the object of their investment was truly a bet on the life of the insured; not any managerial effort of PWCG.

C. Other Circuits' Decisions Do Not Compel the Conclusion that PWCG Life Settlement Arrangements Are Securities.

The SEC argues that two of the three circuits that have examined life settlement arrangements have found them to be securities under *Howey*, and thus, PWCG should be treated the same, without regard to the factual nuances of this case that make it distinct. The SEC makes this argument even though one of the cases on which it relies cautioned against this very sort of hasty conclusion: "[A]greements involving sales of life settlements can have myriad structures; thus, because the *Howey* analysis is fact dependent, the question of whether life settlements are investment contracts is not amenable to a universal answer." *Living Benefits*, 916 F.3d at 537. This Court engages in the same fact-based approach, as illustrated by the distinct treatments of precious metals under *Noa* and *Belmont Reid* versus *Goldstein* and *R.G. Reynolds*. *See supra* at II. A. The facts here indicate that whether under the approach taken by the D.C. Circuit in *Life Partners* or the Fifth and

Eleventh Circuits in *Living Benefits* and *Mutual Benefits*, PWCG life settlement arrangements are not securities.

First, the SEC argues that the D.C. Circuit's decision in *Life Partners* should be rejected because it minimizes the importance of pre-purchase efforts in the *Howey* analysis. But the SEC offers no response to the fact that *Life Partners* relied on *this Court's* decision in *Noa* to reach the conclusion that pre-purchase efforts, such as selecting policies and targeting investors, need not be given significant weight in the *Howey* analysis. Appellants Br. 21 (citing 87 F.3d at 546). This reliance was not misplaced or misguided. This Court repeatedly focuses on the efforts made *after* an investor gives a promoter his money. *See supra* at II. A. The reasoning for that distinction is obvious. "[I]nvestors already have a potent weapon—they can refuse to invest in the policy." *Life Partners*, 87 F.3d at 552 (Wald, J.) (dissenting). Moreover, the D.C. Circuit did not create a strict rule that pre-purchase efforts should never factor into the *Howey* analysis, as the SEC incorrectly suggests. *Id*. at 548. It only held that "pre-purchase services cannot by themselves suffice to make the profits of an investment arise predominantly from the efforts of others." *Id*. In fact, the D.C. Circuit expressly clarified on rehearing that "[n]othing in [its] application of the *Howey* test can reasonably be construed to suggest that pre-purchase efforts are 'irrelevant.'" *SEC v. Life Partners, Inc.*, 102 F.3d 587, 588 (D.C. Cir. 1996) (statement of Ginsburg, J.).

Second, this Court need not find that pre-purchase efforts are always minimally relevant. *See* Appellants Br. 22. PWCG's selection efforts were not entrepreneurial. PWCG did not hire a "physician" to perform "life expectancy estimates on several factors" for complex medical markers, such as "incidence of opportunistic infection, platelet count, pulmonary studies, etc.," as was present in *Life Partners*. 87 F.3d at 555 (Wald, J., dissenting). Nor did PWCG use "proprietary software to model life settlement arrangements," like the promoter in *Living Benefits*, or "recruit[] doctors to evaluate the health of an insured and produce a life-expectancy evaluation," like the *Mutual Benefits* promoter. *See Living Benefits*, 916 F.3d at 531; *Mutual Benefits Corp*, 408 F.3d at 739. Here, PWCG and purchasers' both had access to basic in-force illustrations and medical information that led to the estimates PWCG provided. Whether PWCG's analysis was incorrect through no fault, negligence, or fraud, matters not. *Noa,* 638 F.2d at 80. Purchasers knew that life expectancy reports were not used. *See* Appellants Br. 25. The SEC's conclusory assertion that "Appellants do not explain how Pacific West's selection processes differed from the 'proprietary models' used by defendants in *Mutual Benefits* and *Living Benefits*," SEC Br. 34, is simply incorrect.

Third, even beyond the life expectancy analyses, the investment schemes in *Mutual Benefits* and *Living Benefits* are a far cry from PWCG's sale of life settlement arrangements. In both cases, the promoter took on responsibility reminiscent to that

of an investor advisor, "select[ing] polic[ies] that fit the investment goals of the individual investor," *Mutual Benefits*, 408 F.3d at 739, and providing "consulting and advisory services," *Living Benefits*, 916 F.3d at 531. PWCG engaged in no such efforts. Purchasers did not entrust PWCG to take their money and, with that money in hand, select a portfolio of policies that would meet their goals. They simply selected which policy they wanted to buy and gave PWCG the money in exchange for the death benefit.

II. THE SEC FAILED TO MEET ITS BURDEN TO ESTABLISH THE EXTENT OF THE OFFERING OR OFFERINGS.

To sufficiently demonstrate a Section 5 claim, the SEC must prove the existence of a "single continuous offering." Appellants Br. 29. The SEC does not dispute that PWCG engaged in 133 distinct life settlement sales over an eleven year period, but asserts that they were "part of a single, integrated offer." SEC Br. 39. The SEC has the burden to prove integration on summary judgment motion. *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980) (the SEC can only be entitled to summary judgment if it demonstrated, through evidence, that there was no issue of material fact as to whether the transactions could be integrated); Appellants Br. 29-30.

The SEC contends that, because it introduced evidence of a violation of the registration provisions, the burden shifted to Appellants to prove entitlement to an exemption. SEC Br. 37-38. The SEC confuses the issue. But even assuming that Appellants had the burden of establishing integration at trial, they were required only

to establish a genuine issue to preclude summary judgment on that issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Appellants introduced evidence that establishes a genuine issue for trial via their expert, Marc Fagel. The district court, however, improperly (and without any stated reasoning) excluded his testimony on the basis that it would constitute a legal conclusion. That was error. *Solid 21, Inc. v. Hublot of Am.*, 685 F. App'x 530, 531 (9th Cir. 2017) (it was improper to exclude expert testimony solely because it embraces an ultimate issue being decided on summary judgment where district court gave no explanation regarding why the testimony was unhelpful or solely a legal conclusion).

The district court's conclusion ignores that (1) integration is a fact issue and (2) the SEC has offered expert testimony on this very issue in another case. *See* Appellants Br. 31. The exclusion of this testimony was improper, and that testimony would have created a genuine issue precluding the SEC's summary judgment motion. *See Vollmert v. Wisconsin Dep't of Transp.,* 197 F.3d 293, 298 (7th Cir. 1999) (an expert creates a genuine issue of fact when the testimony provides conclusions as well as a factual basis for the conclusions); *Fed. Lab'ys, Inc. v. Barringer Rsch. Ltd.,* 696 F.2d 271, 275 (3d Cir. 1982) (the district court impermissibly disregarded expert

testimony on summary judgment that undoubtedly created a genuine issue of material fact).[7]

III. THE DISTRICT COURT COMMITTED A REVERSIBLE ERROR ON REMEDIES.

In its attempt to salvage the district court's errors in imposing disgorgement, penalties, and a permanent injunction, the SEC ignores *Liu v SEC*, 591 U.S. 71 (2020), as well as this Court's rulings, to fashion an end-run around Rule 56.

A. The District Court's Imposition of Disgorgement Requires Proof that Appellants Harmed Victims, Which Is Absent Here.

In *Liu*, the Supreme Court held that to avoid transforming the equitable remedy of disgorgement into an impermissible penalty, a disgorgement award must adhere to two principles: it must "not exceed a wrongdoer's net profits" and it must be "awarded for victims." 591 U.S. at 75. The Supreme Court reasoned that merely depriving the wrongdoer of ill-gotten gains in the absence of "victims" of the wrongdoing would transform an equitable remedy into an impermissible punitive sanction, and, accordingly, "the SEC's equitable, profits-based remedy must do

[7] The SEC offered no evidence on integration whatsoever. Nor did the facts warrant a finding of integration. Purchasers did not receive any interest in PWCG itself; rather, the purchasers received a fractional interest in a discrete life settlement policy sold by PWCG. And the sales occurred over an eleven-year period and were irregular. *Murphy*, 626 F.2d at 646 ("[t]he separation in time from one system offering to the next").

more than simply benefit the public at large by virtue of depriving a wrongdoer of ill–gotten gains." *Id*. at 74, 89.

The SEC tries to side-step *Liu* by asserting that (1) Congress removed any requirement to establish the existence of "victims" of a defendant's wrongdoing, (2) decisions like *SEC v Govil*, 86 F.4th 89, 98 (2d Cir. 2023), are wrong to apply *Liu* to hold that "[a]n investor who suffered no pecuniary harm as a result of the [violation] is not a victim," and (3) the Supreme Court did not mean to imply a requirement to prove the existence of "victims" when it said disgorgement could only be awarded "for victims." SEC Br. 42-63.

1. Congress Did Not Overrule *Liu*'s Equitable Requirements.

The SEC takes the position that shortly after *Liu* Congress "extinguished any basis" for requiring a finding of pecuniary harm when it adopted 15 U.S.C. § 78u(d) "without using the 'for the benefit of investors' language." SEC Br. 42-59-60. The SEC is wrong to suggest that the National Defense Authorization Act for Fiscal Year 2021 (the "NDAA") adoption of 15 U.S.C. § 78u(d) did anything to change *Liu*'s limitations on the equitable disgorgement remedy. *See* Appellants Br. 33-34 n.16 (collecting cases). The Supreme Court's opinion in *Liu* did not require what the SEC describes as the "textual hook" to impose a requirement to identify "wronged investors"; courts must follow *Liu's* equitable limitations on disgorgement even after the NDAA. *SEC v. Ahmed*, 72 F.4th 379, 395 (2d Cir. 2023), *cert denied*, No. 23-

741, 2024 WL 3014524 (U.S. June 17, 2024) ("*Liu's* equitable limitations on disgorgement survive the NDAA."); *see also* SEC Br. 60 n.8 (conceding that "disgorgement under the post-*Liu* [NDAA] amendments is equitable").

2. *Govil* Faithfully Applies *Liu's* Equitable Requirements.

The SEC also takes issue with the Second Circuit's decision in *Govil*, arguing that it was wrongly decided. SEC Br. 47-60. That criticism is unwarranted. *Govil* simply reflects *Liu*'s requirement that before a court may impose disgorgement on a defendant, there must be "victims" of the defendant's conduct. *Govil*, 86 F.4th at 94.

Rather than grapple with the *Liu/Govil* requirement to prove Appellants harmed investors, the SEC simply emphasizes the first of *Liu*'s requirements involving "a wrongdoer's net profits." SEC Br. 49. But emphasis on disgorgement's role in denying wrongdoers the ability to retain profits does nothing to diminish *Liu*'s requirement that disgorgement must do "more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains." 591 U.S. at 89.

Begrudgingly accepting that *Liu* requires proof of some kind of harm, the SEC overstates decisions by other circuits to imply a broad-based rejection of the need to establish *pecuniary* harm to victims before imposing disgorgement. For example, the SEC invokes *SEC v. GenAudio Inc.*, 32 F.4th 902 (10th Cir. 2022), for rejecting the proposition that "'disgorgement orders must be limited to loss amounts that can

be traced to an investor's reliance on specific representations.'" SEC Br. 54 (quoting 32 F.4th at 953). But the Tenth Circuit's consideration of *Liu* was limited to the question of whether and what business expenses should be deducted in calculating disgorgement. 32 F.4th 902 at 951. Nowhere did the Tenth Circuit suggest that it was abandoning *Liu*'s requirement to establish victims or harm to victims. Rather, the court's analysis related to how closely (in a fraud case) a defendant's ill-gotten gains (not victims' harm) must be causally connected to specific misrepresentations by the defendant relied upon by investors. The Tenth Circuit certainly did not suggest it was permissible to impose disgorgement in the absence of victims beyond the public at large. The SEC similarly overstates *SEC v. Navellier & Assocs.*, --- F.4th ----, 2024 WL 3423045 (1st Cir. July 16, 2024). *See* Dkt. 38.1. In *Navellier*, the First Circuit identified a "direct" monetary harm suffered by clients who "were induced into paying advisory fees . . . by [defendant-appellant's] misrepresentations" and, accordingly, concluded that disgorgement "will thus do more than simply benefit the public at large—it will remedy a direct harm to [defendant-appellant's] clients." 2024 WL 3423045, at *13 n.14. To the extent this Court adopts the First Circuit's requirement of an identifiable "direct harm" to investors caused by Appellants' violations, this Court should reverse the district court's award of disgorgement, which identified no "direct harm" to investors as a result of Appellants' non-fraud violations.

The SEC incorrectly suggests that an ability to *distribute* disgorgement to victims of someone else's fraud violations will suffice to support disgorgement against Appellants, whose non-fraud violations did not cause pecuniary harm to *any* victims. SEC Br. 58. But investors suffered harm because of fraud committed by the other defendants, not by the Appellants, who have never been accused of committing fraud or harming investors. Identifying a viable method of distribution of disgorgement to victims of someone else's wrongdoing does not satisfy *Liu*'s requirement to identify victims of the non-fraud wrongdoing by these Appellants.

3. The SEC Identifies No Victims Harmed by Appellants.

After spending most of its time arguing that it need not identify victims of Appellants' non-fraud registration violations, the SEC abruptly changes tack and attempts to identify harms to such purported victims. SEC Br. 61-63. But the only harms identified by the SEC are harms relating to the fraud committed by other defendants—namely, PWCG. This harm has nothing to do with Appellants' conduct. The SEC alleged only that Appellants participated (without scienter) in the unregistered sale of securities, and should have registered as securities brokers. Nowhere does the SEC suggest that any harm to investors resulted from the Appellants' failure to register the securities offerings or failure to register as securities brokers. Such registrations would not have altered the fraud committed by other defendants, would not have increased the speed with which policies

matured, and would not have reduced the need to make additional premium payments.

The failure to register a securities offering does not change the nature of what the investors received. The investors who purchased life settlements received precisely the same asset they would have received had the sales been registered or satisfied an exemption from registration: private securities with restrictions on reselling. Had Appellants' employer, PWCG, registered the offerings, or had the offerings met one of the exemptions to registration, none of that would have reduced or eliminated the only harm identified by the SEC, namely, the failure of insurance policies to mature within the time projected by PWCG. Because the Appellants' non-fraud violations caused no harm to investors, the district court's imposition of disgorgement should be reversed.

B. The District Court Imposition of Penalties and an Injunction Contravenes this Court's Rulings.

The SEC puts forth a bold way to evade the requirements of Federal Rule of Civil Procedure 56 and this Court's ruling in *Husain*: rather than file one summary judgment motion as to liabilities and remedies subject to Rule 56 (as the SEC did in *Husain*), split the motion into two and claim that the later motion regarding remedies is not being made "on a summary judgment record." SEC Br. 66-67. This attempted end-run around *Husain* and Rule 56 is unavailing.

This Court in *Husain* was clear as to the applicability of Rule 56 to SEC requests for remedies. Specifically, "on a summary judgment record, the district court can impose a civil penalty only after it has determined that no 'genuine issues of material fact exist' and all factual uncertainty is resolved in favor of the non-moving party." *Husain*, 70 F.4th at 1181. Although the district court's order on remedies notes that it is being made "[f]urther to the Court's order granting summary judgment, Dkt. 546, and having considered the parties additional briefing and heard oral argument," the district court makes no mention of *Husain*, *SEC v. Koracorp Indus., Inc.,* 575 F.2d 692 (9th Cir. 1978), Rule 56, or the applicable burdens of proof. *See* 1-ER-029-41. Nor did the district court indicate whether any disputed issues of material fact existed or that it had resolved factual inferences against the SEC as the moving party.

In the SEC's view, for Rule 56 requirements to apply, the non-moving party must "request an evidentiary hearing following the district court's grant of summary judgment"—otherwise district courts remain free to make findings of fact without regard to Rule 56. This Court, however, rejected this approach in *Koracorp*. There, the district court granted *defendants*' motion for summary judgment as to liability and remedies and the record reflects no request by the SEC for an evidentiary hearing in connection with its own cross-motion for summary judgment. *Koracorp*, 575 F.2d at 695, 699. This Court should not endorse a double-standard that would permit

the SEC to evade Rule 56 and an evidentiary hearing when SEC defendants have no such procedural protection.

The SEC further contends that Appellants "point to no disputed material fact that affected the penalty calculation." SEC Br. 68. Not so. *See* Appellants' Br. 40-41. In imposing civil penalties, the district court noted that the penalty amounts (as contrasted with the penalty amounts imposed against other defendants) "reflect the totality of circumstances discussed above, in which [PWCG and its principal] hold more culpability than their sales agents." 1-ER-040. The "totality of the circumstances discussed above" regarding comparative culpability included critical findings such as the reasonableness of Appellants' belief in representations made to them by the company's principal. 1-ER-033-34. Despite finding that Pacific West's principal's "reassurances mitigate, at least somewhat, Defendants' culpability," the district court, without further explanation, proceeded to impose civil penalties twice the amount imposed on a similarly situated defendant. *Id*.

Regarding the permanent injunction imposed by the district court against Appellant Cannon, the SEC incorrectly asserts that "Appellants point to no disputed material fact that affected the district court's issuance of the injunction." SEC Br. 70-71. That is, again, incorrect. The district court specifically made findings on one of the factors considered in determining whether to impose an injunction: the likelihood of future violations. *See* 1-ER-039 (finding that Mr. Cannon is

"reasonably likely to violate securities laws in the future" and that "Mr. Cannon 'minimized the severity of the misrepresentations"); *see also* Appellants Br. 42. As the SEC itself acknowledges, "in *Koracorp*, this Court reversed the district court's denial of an injunction that turned on the defendants' credibility, finding that the district court 'could not decide that these defendants … would not be recidivists' based on the summary judgment record before it." SEC Br. 70.

Here, the district court made credibility determinations about Mr. Cannon "minimizing the severity of the misrepresentations" and partly on that basis imposed an injunction after concluding that he was "reasonably likely to violate securities laws in the future"—all on a summary judgment record. 1-ER-039. Just as it was reversible error for the district court in *Koracorp* to assess the likelihood of recurrent violations on a summary judgment record without drawing all inferences against the moving party, it was reversible error for the district court to do the same in this case. *Koracorp*, 575 F.2d at 699 ("Assessing the likelihood of recurrent violations of the securities laws requires a prediction of future conduct, and that, in turn, requires the court to prove the defendants' states of mind.").

The SEC effectively asks this Court to create a special procedure just for the SEC that would permit bifurcated summary judgment motions: one for liability subject to Rule 56 and one for remedies subject only to the district court's discretion to make findings and draw inferences by some standard not governed by Rule 56,

Husain, and *Koracorp*. Nothing in Rule 56 or this Court's *Husain* or *Koracorp* decisions permits such a special SEC process. The district court abused its discretion imposing penalties and an injunction based solely on the summary judgment record.

CONCLUSION

This Court should reverse the district court's summary judgment order or, at minimum, the imposition of remedies.

DATED: August 2, 2024 *<u>/s/ Igor V. Timofeyev</u>*

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT OF RELATED CASES

Counsel is unaware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellants' Reply Brief was electronically filed with the Clerk of Court on August 2, 2024 using CM/ECF, which will send notification of such filing to counsel of record.

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