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Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Hoskins, Janet

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR ADA COUNTY

STATE OF IDAHO, DEPARTMENT OF FINANCE, SECURITIES BUREAU, Plaintiff, vs. SEAN ZARINEGAR and PERFORMANCE REALTY MANAGEMENT, LLC, Defendants, PREMIUM PERFORMANCE GROUP, LLC, CBA CAPITAL, INC., CORIX BIOSCIENCE, INC, KORIZ, LLC, and KORI ZARINEGAR, Nominal Defendants.	Case No. CV01-18-13410 MEMORANDUM DECISION AND ORDER

THIS MATTER comes before the Court on Plaintiff's Motion for Summary Judgment (filed February 22, 2019), Defendants' Motion for Summary Judgment (filed March 20, 2019), Defendants' three Motions to Strike (filed April 3, 2019 and May 7, 2019), Plaintiff's Motion to Partially Strike (filed May 9, 2019), and Defendants' Motion for Leave to Withdraw as Counsel of Record (filed May 14, 2019). A hearing was held May 21, 2019, and all the Motions were taken under advisement.

UNDISPUTED FACTS

This is a securities fraud action brought by the State of Idaho, Department of Finance, Securities Bureau ("Plaintiff") against Sean Zarinegar and Performance Realty Management, LLC.[1]

[1] Plaintiff named the following as "Nominal Defendants" – Premium Performance Group, LLC; CBA Capital, Inc.; Corix Bioscience, Inc.; Koriz, LLC; and Kori Zarinegar.

In July 2007, Sean Zarinegar ("Zarinegar") was ordered to cease and desist from offering sales of securities within the state of Alabama in connection to his employment with a company called Malory Investments, LLC.[2] That same month and year, a Cease and Desist Order was also entered in Kansas with respect to Zarinegar and Malory Investments, LLC.[3]

On October 21, 2009, Zarinegar incorporated Performance Realty Management, LLC ("PRM"). Zarinegar is and has always been the managing member of PRM. On September 3, 2013, Zarinegar incorporated American Realty Partners, LLC ("ARP").

A November 4, 2013 Private Placement Memorandum ("PPM") for ARP offered 1,000 units at $10,000 each ("ARP PPM"). The ARP PPM sought to raise $10,000,000. PRM is identified as ARP's manager and "Sean Zar" is listed as the Chief Executive Officer. There is no dispute that "Sean Zar" is Zarinegar. The ARP PPM stated that ARP

> was formed on September 3, 2013 to (i) acquire; finance, own, refinance, maintain, improve, develop, construct lease, manage, sell, exchange, or otherwise dispose of residential and/or commercial real property located in the western United States (including without limitation Arizona, Colorado, Nevada and Utah) (each, a "Property"), and (ii) engage in such other activities as are reasonably incidental to the foregoing.

The ARP PPM stated in all caps that the units have not and will not be registered under the Securities Act of 1933 (the PPM stated later on that ARP intended to complete the offering pursuant to an exemption from registration) and that investors must rely on their own examination of the company and the terms of the units, including the merits and risks involved with any such investment.

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[2] Nancy Ax. Aff. Ex. I (filed Feb. 22, 2019).
[3] *Id.* at Ex. J.

The ARP PPM stated "Each of the Investments of ARP will be related to real estate, and therefore, are subject to the fluctuations in value associated with the real estate market."[4] The ARP PPM did not disclose that Alabama and Kansas Cease and Desist Orders were entered against Zarinegar.[5]

The allegations in this case stem from an Idaho resident's total loss of his investment of over half a million dollars with ARP and PRM in 2014 through 2016. James Rees ("Rees")[6] invested a total of $550,800.03 in ARP and PRM. Rees, who was 75 at the time, testified that he was initially cold-called by a PRM sales agent named Jack Combs ("Combs"). Rees stated that the sales agent represented that the investment was safe and backed up by real estate that was purchased at a reduced price from the appraised value and then rented. Rees testified that Combs represented that the company planned to turn the investment into a publically traded Real Estate Investment Trust ("REIT"). Rees testified that Combs told him that he could get his money out by selling his shares once the REIT was formed and it was a public company.

In May of 2014, Rees made his first investment in ARP. Rees made additional investments in ARP in June 2014, December 2014, and May 2015.

On July 6, 2015, ARP became a wholly owned subsidiary of American Housing Income Trust ("AHIT") after a Plan of Conversion and Stock Exchange Agreement was completed. Thus, Rees's shares in ARP were converted into shares of AHIT at that time.

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[4] *Id.* at Ex. E, p. 14.
[5] Apparently, Zarinegar was also sanctioned by Illinois; however, Plaintiff has not submitted any admissible evidence on that Cease and Desist Order (it withdrew Exhibit M to the first Ax Affidavit). Accordingly, the Court will not consider any sanctions by Illinois in this proceeding.
[6] Rees died during the pendency of this litigation.

PRM issued a PPM, dated November 1, 2015 to January 1, 2016 ("PRM PPM"). The PRM PPM provided numerous representations regarding the real estate business that PRM was engaged in:

> The Company is devoted to real estate management, acquisition and investor relations for its related-entities, such as American Realty, AHIT and their respective subsidiaries, and future management opportunities captured through capital raised through this Offering. . . .[7]
>
> . . .
>
> It is the Company's intention to use proceeds raised through the Offering towards the general operations of the Company in serving as Manager of American Realty [ARP].[8]
>
> . . .
>
> The Company remains very involved in the Arizona real estate market, allowing access a vast network of industry contacts and up-to-the-minute information about new listings and identify, assess and acquire properties. By making our move now, the Company intends on benefiting from the downturn of the market cycle by buying and holding through the anticipated market upswing and eventually selling at higher market values.[9]

The PRM PPM also contained numerous disclaimers and disclosures about the high degree of risk involved with the investment, such as the following:

> Although management believes that the assumptions underlying the forward looking statements included in its public filings and this offering are reasonable, they do not guarantee our future performance, and actual results could differ from those contemplated by these forward looking statements.[10]
>
> . . .
>
> To the extent that the assumed events do not occur, the outcome may vary substantially from anticipated or projected results, and, accordingly, no opinion is expressed on the achievability of those forward-looking statements. In the light of these risks and uncertainties, there can be no assurance that the results and events contemplated by the forward-looking statements contained in this filing will in fact transpire. You are cautioned not to place undue reliance on these forward-looking statements, which speak only as of their dates. We do not undertake any obligation to update or revise any forward-looking statements.[11]
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> . . .

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[7] Ax. Aff. Ex. G, p. 3.
[8] *Id.* at p. 5.
[9] *Id.*
[10] *Id.* at p. 3.
[11] *Id.* at p. 4.

> The Class A Units offered involve a high degree of risk. No one should invest who is not prepared to lose his or her, or its entire investment. There is no active public market in the foreseeable future for the resale of the units. . . .[12]

Rees signed a Subscription Agreement, which contained the following representations by Rees:

> (d) The Subscriber has received in writing from the Company such information concerning its operations, financial condition and other matters as the Subscriber has requested in writing (such information is collectively, the "Company information"), and considered all factors the Subscriber deems material in deciding on the advisability of investing in the Units.
> . . .
> (g) The Subscriber represents and warrants that he/she/it understands that the Company's Manager [Zarinegar] exclusively controls whether the Units subscribed for hereunder may be exchanged with another company's common stock, preferred stock or membership interests. The Subscriber further represents and warrants that he/she/it grants the Manager limited power of attorney to vote their respective Units on any exchange, merger or reorganization to the extent a vote is required under Arizona law.[13]

The PRM PPM granted Zarinegar (as its Manager) the power to "hold and own any Company real or personal properties in the name of the Company."[14] Likewise, the Operating Agreements for both ARP and PRM (which were attached to the ARP and PRM PPMs) specified that "The Company shall hold all of its property in the name of the Company or its subsidiaries and not in the name of any Member or the Manager." PRM's Operating Agreement also specified as follows under "Purpose and Powers":

> The business and purpose of the Company is to (i) manage, maintain, improve, develop, construct, lease, manage, sell, exchange, or otherwise dispose of residential and/or commercial real property for the benefit of third-parties, related or not, affiliated or not, regardless of location, either directly or indirectly through one or more subsidiary entities; (ii) engage in such other activities as are reasonably incidental to the foregoing; and (iii) engage in and do any act concerning any or all lawful businesses for which limited liability companies may be organized under Arizona law. The Company shall have all the powers now or

[12] *Id.* at p. 5.
[13] *Id.* at p. 14.
[14] *Id.* at p. 26.

> hereafter conferred by the laws of the State of Arizona on limited liability companies in furtherance of the Company's purposes.

Rees made investments in PRM in December 2015, January 2016, and February 2016. The PRM PPM did not disclose that Alabama and Kansas Cease and Desist Orders were entered against Zarinegar.

On January 1, 2016, PRM began to serve as the manager of AHIT. On January 19, 2016, AHIT filed a Form S-11/A Registration Statement with the Securities and Exchange Commission. In that filing, AHIT "in an abundance of caution," disclosed the Alabama, and Kansas proceedings/orders referenced in the Complaint.[15] Any Illinois proceedings/orders were not disclosed at that time even though Defendants stated that they were in their briefing.[16]

PRM had a Wells Fargo bank account, which ended in 1692. ARP had a Wells Fargo bank account, which ended in 5976. Zarinegar maintained two TD Ameritrade bank accounts, one which ended in 0250 (under Zarinegar's personal name) and another which ended in 1665 (under Premium Performance, LLC's name). Zarinegar also had a personal checking account with Wells Fargo that ended in 3345.

On November 25, 2015, Rees's first investment in PRM, which totaled $172,283, was deposited into PRM's Wells Fargo bank account ending in 1692. Prior to that deposit, the balance of the bank account totaled $155,004.08. On November 30, 2015, the ending balance of that account

[15] Defs.' Mem. in Supp. of Defs.' Mot. for Partial Summ. J. p. 4 (filed March 20, 2019).
[16] *Id.*

totaled $325,648.59. Only two withdrawals and one transfer (totaling $255) took place between Rees's investment and the ending balance.

On December 1, 2015, $30,500 was deposited into PRM's Wells Fargo bank account. On December 9, 2015, $14,862 was deposited into PRM's Wells Fargo bank account, $6,000 was transferred to Zarinegar's personal checking account ending in 3345, and a check totaling $2,000 was cashed. The balance of PRM's account on December 9, 2015 was $363,010,59.

On December 16, 2015, $175,000 was transferred from PRM's Wells Fargo bank account to Zarinegar's personal checking account ending in 3345. On December 17, 2015, $175,000 was transferred from Zarinegar's personal checking account ending in 3345 to Zarinegar's TD Ameritrade personal checking account ending in 0250. Prior to this large transfer, the 0250 account's balance was $759.52. After the transfer, the 0250 account balance totaled $175,760.24.

From January 1, 2016 to July 31, 2016, Zarinegar used over $67,000 of the funds (which included Rees's investment money) in his personal TD Ameritrade account ending in 0250 for over 500 various personal debit card transactions, including purchases such as $5.37 at Starbucks on March 8, 2016, $14.88 at In N Out Burger on March 16, 2016, $90.99 at the Blue Stag Bar on March 28, 2016, $36 at Great Clips on April 20, 2016, and $24.99 at Jacksons Car Wash on May 10, 2016. The transactions ranged from the largest for $3,800 at Arizona Heat Pest Services on March 21, 2016, down to $1.00 at City of Newport Beach on July 11, 2016.

AHIT thereafter transferred its shares to a cannabis company named Corix Bioscience, Inc. ARP was dissolved pursuant to Articles of Termination, which were filed on August 7, 2017. Rees's investments in ARP and PRM were transferred into Corix Bioscience, a cannabis enterprise. Rees was unable to track his shares and investment, and a positive return was never paid to Rees. Rees lost his entire $550,800.30 investment. Rees testified that he had no notice that his investment would be transferred from a real estate to cannabis enterprise. He testified that he would not have invested had he known his money would have been invested in cannabis, especially since it is illegal in Idaho.

On July 20, 2018, Plaintiff filed the instant action against Sean Zarinegar and PRM (collectively, "Defendants"). Various other nominal defendants were also named. The Complaint alleged (1) misrepresentations and omissions of material fact in the PRM PPM with respect to the bank account transfers from PRM to Zarinegar's personal checking accounts and the cease and desist orders issued against Zarinegar, and (2) fraudulent conversion with respect to the transfers from PRM to Zarinegar's personal checking accounts.

On February 22, 2019, Plaintiff filed a Motion for Summary Judgment against Zarinegar and PRM. On March 20, 2019, Defendants filed a Motion for Summary Judgment. Both parties filed various Motions to Strike. Seven days before the hearing, Defendants' attorney filed a Motion for Leave to Withdraw. On May 21, 2019, a hearing was held, and the matters were taken under advisement.

LEGAL STANDARDS

1) Motion to Strike

When a motion to strike is filed contemporaneously with a motion for summary judgment, the "admissibility of [the challenged] evidence . . . is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial." *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012). The admissibility of supporting and opposing affidavits is governed jointly by Rule 56 of the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence. The former states "An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." I.R.C.P. 56(c)(4). If an affidavit refers to "papers or parts of papers," sworn or certified copies of such papers or parts "must be attached to or served with the affidavit." *Id.* A trial court has broad discretion, within the bounds set by the Rules of Evidence, with respect to questions regarding the admissibility of evidence. *State v. Watkins*, 148 Idaho 418, 421, 224 P.3d 485, 488 (2009).

2) Summary Judgment

Summary judgment may be entered only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). The Court "liberally construes the facts and existing record in favor of the non-moving party" in

making such determination. *Hall v. Forsloff*, 124 Idaho 771, 773, 864 P.2d 609, 611 (1993). "If reasonable people could reach different conclusions or inferences from the evidence, the motion must be denied." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). Moreover, "[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment." *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001) (citations omitted).

The moving party bears the initial burden of proving the absence of a genuine issue of material fact, and then the burden shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of material fact. *See Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (1994). When the nonmoving party bears the burden of proving an element at trial, the moving party may establish a lack of genuine issue of material fact by establishing the lack of evidence supporting the element. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

A party opposing a motion for summary judgment "may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial." *Gagnon v. W. Bldg. Maint., Inc.*, 155 Idaho 112, 114, 306 P.3d 197, 199 (2013). Such evidence may consist of affidavits or depositions, but "the Court will consider only that material . . . which is based upon personal knowledge and which would be admissible at trial." *Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). If the evidence reveals no disputed issues of material fact, then only a question of law remains on which the court may then enter summary judgment as a matter of law. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 445, 65 P.3d 184, 186 (2003).

The mere fact that the parties have filed cross motions for summary judgment does not necessitate a finding that there are no genuine issues of material fact; however, "[w]here the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment." *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp*., 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." *Id*.

3) Withdrawal of Attorney

"An attorney may withdraw from an action but only by strict compliance with the requirements of I.R.C.P. 11.3." *Nunez v. Johnson*, 163 Idaho 692, 695, 417 P.3d 1018, 1021 (Ct. App. 2018).

Idaho Rule of Civil Procedure 11.3(b)(1) provides that an attorney must obtain leave from the Court to withdraw from an action. The attorney seeking to withdraw must file a motion with the court, set the matter for hearing, provide notice to all parties, including the party the withdrawing attorney represents in the proceeding, and provide the last known address of the client. I.R.C.P. 11.3(b)(1). "[T]he court may grant leave to withdraw for good cause and upon such conditions or sanctions as will prevent delay or prejudice to the parties." I.R.C.P. 11.3(b)(2).

ANALYSIS

(1) Motions to Strike

Defendants objected to a lot of the evidence submitted by Plaintiffs, and each objection will be addressed below. However, Defendants also relied on many of the exhibits that they objected to in their "Statement of Undisputed Facts," and in their recitation of the facts in various other briefings. There is no statement by the Defendants that they did not intend to waive their objections to the admissibility of the evidence by relying on these exhibits. Instead, the briefing appears to concede that the exhibits are admissible and undisputed.[17]

The general rule recognized in Idaho is that the trial court has sole discretion in deciding whether to admit or exclude evidence, and the trial court must exercise reason in making its decision. *State v. Thompson*, 132 Idaho 628, 634, 977 P.2d 890, 896 (1999). In *State v. Gray*, the trial court granted the defendant's motion in limine prior to trial and ruled that various statements were inadmissible. However, the defendant did not object to those statements when they were elicited at trial, and the Court of Appeals held that agreeing to the admission of evidence which had previously been deemed inadmissible is a waiver of any prior objection. *State v. Gray*, 129 Idaho 784, 794, 932 P.2d 907, 917 (Ct. App. 1997).

Here, the Court finds that Defendants are both estopped and have waived objections to certain exhibits by relying on them in their recitation of facts that they represent are undisputed. *See A*

[17] Likewise, even though Plaintiff did not submit admissible evidence regarding the Illinois sanctions against Zarinegar, Defendants do not appear to dispute that Zarinegar was in fact sanctioned by Illinois.

& J Const. Co. v. Wood, 141 Idaho 682, 684, 116 P.3d 12, 14 (2005) ("Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position."). Each objection will be addressed below.

a. Stephanie Sze's Affidavit

Defendants moved to strike Exhibit DD from Stephanie Sze's Affidavit (filed February 22, 2019), as well as paragraphs 3—5 (paragraphs 3 and 4 set forth the basis for Exhibit DD). Defendants asserted that Exhibit DD is inadmissible hearsay, lacks foundation, and lacks authentication. Defendants did not object to Exhibit EE. Plaintiff responded to this Motion to Strike by withdrawing Exhibit DD.

Paragraph 5 sets forth the basis for Exhibit EE (transcript of Rees's deposition). Defendants cited to Paragraph 5 and to Rees's deposition numerous times in their statement of undisputed facts;[18] therefore, their objection to paragraph 5 is waived.

Accordingly, Defendants' Motion to Strike Exhibit DD and paragraphs 3—4 is GRANTED, and Defendants' Motion to Strike paragraph 5 is DENIED.

b. Nancy Ax's Affidavit

Defendants moved to strike Nancy Ax's Affidavit (filed February 22, 2019) in its entirety. Defendants asserted the Affidavit failed to show that Ax has personal knowledge. Defendants

[18] Defs.' Mem. in Supp. of Mot. for Summ. J. p. 3 (filed March 20, 2019).

only argued that Exhibits N—BB and I—M are inadmissible. Defendants argued that the bank records (Exhibits N—BB) are inadmissible hearsay. Defendants objected to the orders and notices from other states (Exhibits I—M) as they are not authenticated.

Plaintiff asserted that it inadvertently omitted the statement that Ax had personal knowledge of the matters contained within the Affidavit and that it cured that deficiency by filing a Second Affidavit.

"An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated[.]" I.R.C.P. 56(c)(4). These requirements "are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge." *State v. Shama Res. Ltd. P'ship*, 127 Idaho 267, 271, 899 P.2d 977, 981 (1995). "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." I.R.E. 602. "There is no case law in Idaho to suggest that an affidavit must explicitly aver that it is based on personal knowledge." *Mitchell v. State*, 160 Idaho 81, 86, 369 P.3d 299, 304 (2016). "[A]n affidavit need not contain an explicit recital of personal knowledge when it can be reasonably inferred from its contents that the material parts thereof are within the affiant's personal knowledge." *Id.* (citation omitted) (holding that personal knowledge requirement for affidavit was satisfied where it stated that the affiant was employed as a financial executive officer, thus the court could reasonably infer the affiant had personal knowledge of budget cuts).

Although Ax's Affidavit does not state specifically that Ax has "personal knowledge," her statements in paragraphs 1—5 demonstrate personal knowledge. She stated that she is employed by the Idaho Department of Finance as a Securities Examiner/Investigator and has worked for the Department for over 20 years. She also described how she became familiar with the documents attached to her Affidavit:

> 3. As part of my duties with the Department, I perform detailed analyses of financial service providers, I analyze the extent of full disclosure of material facts and risks of securities offerings, I investigate financial service providers, and I review financial records related to examinations and investigations.
> 4. I initially handled the Notice Filing for Regulation Rule 505 filed by Performance Realty Management, LLC received by the Department on January 11, 2016. Due to irregularities with that application, I conducted further inquiry. Eventually that inquiry became an investigation, Docket No. 2016-7-10.
> 5. During the course of the application review, the inquiry, and the investigation, I gathered the following documents, which are ordered below in related groups. . . .

Accordingly, the Court finds that Ax demonstrated that she has personal knowledge of the matters contained within her Affidavit. Defendants next objected to the admissibility of Exhibits I—M (out of state orders and notices) and N—BB (bank statements).[19]

i. Orders

Public records are an exception to the rule against hearsay, so long as the following criteria are met:

> A record or statement of a public office if:
> (A) it sets out:
> i the office's regularly recorded and regularly conducted activities; or
> ii a matter observed while under a legal duty to report, or factual findings resulting from an investigation conducted under legal authority, but not including:

[19] Defendants did not cite any specific objections to Exhibits A—H and CC, and relied on several of these Exhibits in their briefing. The Court finds any objection to the admissibility of Exhibits A—H and CC is waived.

> (a) a statement or factual finding offered by the public office in a case in which it is a party; or
> (b) an investigative report by law enforcement personnel or a public office's factual finding resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case; and
> (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

I.R.E. 803(8).

Although it does not appear that Idaho has specifically ruled on the issue, some courts have held that uncertified court orders do not meet the public records exception to the hearsay rule. *Zeus Enterprises, Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 242 (4th Cir. 1999) (citing *Nipper v. Snipes*, 7 F.3d 415, 417 (4th Cir.1993) (holding factual findings of a court are not admissible under Rule 803(8)'s hearsay exception, because "[a] judge in a civil trial is not an investigator, rather a judge.")). However, *Zeus Enterprises* noted that findings by an agency may be admissible under Rule 803(8):

> We did say in *Nipper* that "[a] judge in a civil trial is not an investigator, rather a judge." *Id.* We were careful, however, to distinguish between the findings made by a judge in the judicial branch from those made by "agencies and offices of the executive branch." *Id.* As *Nipper* recognizes, *see id.*, this distinction between judicial and agency findings is supported by the advisory committee note to Rule 803(8). The advisory note focuses on the admissibility of findings of officials and agencies within the executive branch, but makes no mention whatsoever of findings by a court. *See* Fed.R.Evid. 803(8) advisory committee's note; *see also Nipper*, 7 F.3d at 417; *Zenith Radio Corp.*, 505 F.Supp. at 1185. Because *Nipper* is limited to excluding the findings of judges in the judicial branch, it does not require us to exclude the decision of an [administrative law judge] who is an officer in the executive branch.

Zeus Enterprises, Inc., 190 F.3d at 242.

The Idaho Supreme Court has held that a certified copy of an out of state order satisfies the public records exception to the hearsay rule. *Navarro v. Yonkers*, 144 Idaho 882, 886, 173 P.3d 1141, 1145 (2007) ("Idaho Rules of Evidence allow for the admission of public records as an exception to the hearsay rule. I.R.E. 803(8). The Nevada guardianship order, as a certified copy of a public record, falls within this exception and should have been admitted."). In addition to being certified, a document is self-authenticating if it bears a seal of any state or department or agency of a state and is signed. I.R.E. 902(1).

Exhibit I is an administrative order issued by the Alabama Securities Commission. It contains findings of fact and is signed by Joseph P. Borg, the director of the Alabama Securities Commission. It also contains a state seal. The Court finds that this Exhibit meets the requirements of the public records exception and it is self-authenticating.

Exhibit J is an administrative order issued by the Kansas Securities Commission. It also contains findings of fact and is signed by Chris Biggs, the securities commissioner. The order contains a state seal. The Court finds that this Exhibit meets the requirements of Idaho Rule of Evidence 803(8) and it is self-authenticating.

Exhibit K is stipulation for consent order issued in the Kansas Securities Commission case. It is signed by Zarinegar and is notarized. Exhibit L is a Consent Order issued in the Kansas Securities Commission case. It is signed by Chris Biggs, the securities commissioner, and it contains the state seal. Plaintiff also subsequently filed certified copies of Exhibits J, K, and L.

As certified copies, the Court finds that these Exhibits meets the requirements of Idaho Rule of Evidence 803(8) and are self-authenticating.

Exhibit M is a lengthy Notice of Hearing issued by Illinois and signed by Jesse White, the secretary of state. Plaintiff withdrew this Exhibit.

ii. Bank Statements

Defendants objected to the admissibility of Exhibits N—BB, which include bank statements from Wells Fargo and Ameritrade. Exhibit N is a Wells Fargo business account application for PRM. The account number ends in 1692. Exhibit O is a Wells Fargo business account application for ARP. The account number ends in 5976. Exhibit R is ARP's Wells Fargo bank account statement for the account ending in 5976 for May 2014. Exhibit S is ARP's Wells Fargo bank account statement for the account ending in 5976 for June 2014. Exhibit T is ARP's Wells Fargo bank account statement for the account ending in 5976 for December 2014. Exhibit U is ARP's Wells Fargo bank account statement for the account ending in 5976 for May 2015. Exhibit V is PRM's Wells Fargo bank account statement for the account ending in 1692 for November 2015. Exhibit W is PRM's Wells Fargo bank account statement for the account ending in 1692 for January 2016. Exhibit X is PRM's Wells Fargo bank account statement for the account ending in 1692 for March 2016. Exhibit Y is PRM's Wells Fargo bank account statement for the account ending in 1692 for December 2015. Exhibit Z is Zarinegar's Wells Fargo bank account statement for the account ending in 3345 for December 2015.

Exhibit P is a Declaration from a Krista Yu, a Wells Fargo employee, who certified the authenticity of the Wells Fargo documents and testified that the documents produced were prepared by Wells Fargo in the ordinary course of business. The Declaration listed the "Document Type," the account number, and the paper count. Documents related to account numbers 1692, 5976, 3345 are listed in this document. All four pages of the Declaration reference "Case No: 17352977; Agency Case No. 2016710" at the bottom. Ax explained in her third affidavit that this is the same Bank Reference number referenced in the email responses Wells Fargo sent to respond to subpoena requests. In addition, Ax explained that the "Agency Case No." matches the Docket No. of the subpoena, which was 2016-7-10.

Exhibit AA is Zarinegar's TD Ameritrade statement for the account ending in 0250 for December 2015. Exhibit BB is Zarinegar's TD Ameritrade statement for the account ending in 0250 for January through July 2016. Subsequent to Defendants' objection to these documents, Plaintiff obtained a declaration from Patrick Rowley, an employee of TD Ameritrade, who testified that the documents were true copies and were kept in the regular course of business.

Defendants argued that the above records are inadmissible hearsay, because they are simply attached to Ax's Affidavit and not to a bank employee's affidavit.

The Court finds that Exhibits N—Z are admissible as Yu is a Wells Fargo Bank employee who testified to the documents' authenticity and also that the account documents were kept in the course of regularly conducted business activity. *See* I.R.E. 803(6). As to AA and BB, the Court finds that although the evidentiary deficiency was cured in an untimely manner (i.e. Ax's Third

Affidavit was filed seven days before the summary judgment hearing), the Declaration from Rowley complies with Rule 803(6).[20]

In sum, Defendants' Motion to Strike Nancy Ax's Affidavit (filed February 22, 2019) is DENIED. Ax's Affidavit demonstrated personal knowledge of the matters contained therein. The Orders fall within the public records exception to the hearsay rule and are self-authenticating. Plaintiff withdrew Exhibit M. The bank statements are submitted along with declarations from bank employees testifying as to their authenticity and that they were kept in the regular course of business, which satisfies the business records exception to the hearsay rule.

c. Nancy Ax's Second Affidavit

Defendants moved to strike the entirety of Nancy Ax's Second Affidavit (filed April 3, 2019). Defendants asserted Ax lacks personal knowledge as to the attached exhibits, the exhibits are inadmissible hearsay, and unauthenticated.

Ax testified in her Second Affidavit that it is a continuation of her first Affidavit; it is based on her personal knowledge, and upon documents within her custody or control. Based on the reasons set forth above, the Court finds that Ax adequately demonstrated personal knowledge.

[20] The Court has discretion to disregard untimely filings. *See Cumis Ins. Soc'y, Inc. v. Massey*, 155 Idaho 942, 946, 318 P.3d 932, 936 (2014). Although Defendants did not file a motion to suppress Ax's Third Affidavit, counsel did lodge an objection to the timeliness of the Affidavit at the hearing. Here, the untimely filing is neither a surprise nor prejudicial to the Defendants. The Affidavit merely cures an evidentiary deficiency. Defendants were well aware of the substance of the documents and have only objected to their admissibility on technical grounds, which technical deficiency has since been cured.

The attached exhibits include: (FF) a copy of the 16 exhibits to James Rees's videotaped deposition that was taken on October 29, 2018; (GG) letter from Zarinegar's counsel to Plaintiff dated February 5, 2016, (HH) AHIT's six page "Building Wealth Together" sales brochure; (II) AHIT's 16 page "Building Wealth Together" sales brochure; (JJ) AHIT's Press Release dated March 13, 2017 (announcing acquisition of cannabidol oil company IX Biotechnology, Inc.; (KK) Wells Fargo bank statement (same as Exhibit Y in Ax's first Affidavit); (LL) PPG's Wells Fargo bank statement for November 24, 2015 to December 21, 2015; (MM) cover letter from Ameritrade in response to request for information from the Plaintiff; (NN) letter from Zarinegar's attorney to the Plaintiff; (OO) a response letter from Plaintiff to Zarinegar's attorney, dated November 17, 2017; (PP) Amended PRM balance sheet as of December 31, 2015 (provided to the Plaintiff by Zarinegar); (QQ) a second PRM balance sheet for December 31, 2015 (provided to the Plaintiff by Zarinegar); (RR) a third PRM balance sheet for December 31, 2015 (provided to the Plaintiff by Zarinegar); (SS) a fourth PRM balance sheet for December 31, 2015 (provided to the Plaintiff by Zarinegar); (TT) two IRS Forms 4562 in 2015; (UU) Maricopa County Assessor's Office Title Chain Inquiry for Gavilan 24102; (VV) Maricopa County Assessor's Office Title Chain Inquiry for Gavilan 33102; (WW) Business Loan Agreement and Promissory Note between PPG and Lead Funding, LLC; (XX) Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing for first properties in Maricopa County Arizona; (YY) Deed of Release and Full Reconveyance (dated November 10, 2016); (ZZ) Final Settlement Statement of Old Republic Title Agency; (AAA) email from the Maricopa County Assessor's Office to Ax, dated June 2, 2017; (BBB) Business Loan Agreement (dated February 12, 2016); (CCC) Deed of Trust Assignment of Rents, Security Agreement and Fixture Filing (dated February 12, 2016); (DDD) balance sheet dated June 30, 2016; (EEE) IRS Form 4562 and

IRS Form 1065; (FFF) Evidence of Commercial Property Insurance (February 10, 2016); (GGG) Warranty Deed dated January 26, 2017.

Here, the above documents do not satisfy the public records exception to the hearsay rule. The documents do not "set out" the Plaintiff's "recorded and regularly conducted activities." I.R.E. 803(8)(A)(i). While the matters above could be considered "factual findings resulting from an investigation conducted under legal authority," the Rule specifically excludes

> (a) a statement or factual finding offered by the public office in a case in which it is a party; or
> (b) an investigative report by law enforcement personnel or a public office's factual finding resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case

I.R.E. 803(8)(A)(ii). The Department of Finance is the Plaintiff in this lawsuit and the documents attempted to be introduced are a public officer's factual findings resulting from an investigation into complaints regarding the Defendants. Rule 803(8) specifically excludes such documents from the public records exception.

Exhibit FF lacks foundation and is hearsay. However, Defendants waived their objection to Exhibits 1, 2, and 3 within Exhibit FF.[21] Thus, they will not be stricken. Exhibits 4—16 within Exhibit FF are stricken.

Ax testified in her Third Affidavit that she obtained the documents comprising Exhibits GG, HH, and II from James Rees. While Rees may be able to testify about those documents and set forth personal knowledge about the matters contained therein, Ax has not demonstrated personal

[21] Defs.' Mem. in Supp. of Mot. for Summ. J. pp. 3—4 (filed March 20, 2019).

knowledge of the documents. Accordingly, Exhibits GG, HH, and II are hearsay and will be stricken.

Exhibit JJ is a press release Ax obtained from the Securities and Exchange Commission's public Edgar database website.[22] Ax has not demonstrated personal knowledge regarding the press release, it is not a public record under Rule 803(8), and it is hearsay.

Exhibits KK, LL, and MM were bank statements that were previously covered and addressed. Those Exhibits are admissible. Exhibit NN is a letter prepared personally by Ax, which is admissible.

Exhibit OO is inadmissible hearsay. However, Defendants waived their objection to Exhibit OO.[23] Thus, it will not be stricken.

Exhibits PP, QQ, RR, SS, and DDD are admissible as statements by a party opponent. *See* I.R.E. 801.

Exhibits TT, UU, VV, WW, XX, YY, ZZ, AAA, BBB, CCC, EEE, FFF, and GGG lack foundation, are hearsay, and/or do not fall within the public record exception. However, Defendants waived their objection to Exhibit WW.[24] Thus, it will not be stricken.

[22] A website link is listed; however, the link led to an error page when the Court attempted to access it.
[23] Defs.' Objection to Pl.'s Mot. for Summ. J. pp. 2—3 (filed April 3, 2019).
[24] *Id*. at 3.

Accordingly, the Motion to Strike is GRANTED in part and DENIED in part. It is granted with respect to the following exhibits which are hereby stricken: Exhibits 4—16 within Exhibit FF, GG, HH, II, JJ, TT, UU, VV, XX, YY, ZZ, AAA, BBB, CCC, EEE, FFF, and GGG. It is denied with respect to the remaining exhibits, which are not stricken.

d. Sean Zarinegar's Declaration

Plaintiff moved to strike paragraphs 7, 9, 10, and 11 from Sean Zarinegar's Declaration. Those paragraphs are as follows:

> 7. All of the actions of PRM identified in Plaintiff's Complaint were expressly authorized by specific provisions of the PRM Operating Agreement, a copy of which was provided by PRM to "JR" (the abbreviation given by the Plaintiff, in its Complaint, to one Idaho-based PRM investor) prior to PRM's acceptance of any investment money from "JR."
> . . .
> 9. As it clearly states, the intended purpose of that Paragraph 3.3 (d) was to allow me, as PRM's Manager, to hold PRM-owned real or personal properties in trust, with me as trustee, which would allow PRM to achieve its goals and objectives under the PRM Operating Agreement.
> 10. At no time did I engage in any unauthorized or fraudulent "commingling" of PRM funds with my personal funds.
> 11. Pursuant to the answers "JR" provided on the Investor Questionnaire that he provided to PRM, I believed (and I had very good reason to believe) that "JR" was a sophisticated, qualified, and accredited investor.

Plaintiff asserted the above paragraphs are conclusory, unsupported by a factual basis, and lack foundation. Plaintiff also contends the above paragraphs are nonspecific.

Plaintiff's objections go to the weight to be given to such testimony, but not to the statements' admissibility. The above paragraphs are based on Zarinegar's personal beliefs and understanding. The Court can determine for itself the contents of the Operating Agreement and

make its own legal conclusions as to whether Zarinegar engaged in fraudulent commingling of company funds. Accordingly, Plaintiff's Motion to Strike is DENIED.

(2) Motions for Summary Judgment

Plaintiff asserted it is entitled to summary judgment against Defendants because they have violated Idaho's Uniform Security Act (2004) by misrepresenting and omitting material facts in connection with the offer and sale of securities. Specifically, Plaintiff asserted that Zarinegar and PRM violated Idaho Code § 30-14-501(2) by (1) failing to disclose that PRM's investment funds would be transferred to Zarinegar's personal bank accounts, (2) failing to disclose the Cease and Desist Orders, and (3) failing to disclose that the real estate investment could be converted into a cannabis operation. Plaintiff also asserted that Zarinegar fraudulently converted PRM's funds to his personal use under Idaho Code § 30-14-501(4).

Defendants asserted they are entitled to summary judgment and dismissal of count one (misrepresentation and omissions of material fact) because (1) the Cease and Desist Orders were disclosed and (2) the Orders were not required to be disclosed. Defendants also asserted that Rees agreed to any conversion of his stock and that Plaintiff failed to plead a piercing the corporate veil claim with particularity.[25]

[25] Here, the Court finds the Complaint adequately alleged an alter ego or piercing the corporate veil claim. "To prove that a company is the alter ego of a member of the company, a claimant must demonstrate (1) a unity of interest and ownership to a degree that the separate personalities of the [company] and individual no longer exist and (2) if the acts are treated as acts of the [company] an inequitable result would follow." *Lunneborg v. My Fun Life*, 163 Idaho 856, 868, 421 P.3d 187, 199 (2018) (citation omitted) (holding that "trial courts are free to consider the myriad of factors cited by the authorities catalogued herein, without resorting to a formulaic recitation of elements that must be proven" in determining whether to pierce the corporate veil). Idaho is a notice pleading state. "A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief.

a. Misrepresentations and Omissions of Material Fact

Idaho Code § 30-14-501(2) provides "It is unlawful for a person,[26] in connection with the offer, sale, or purchase of a security, directly or indirectly . . . To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading[.]" Intent is not an element of securities fraud under this section. *State v. Shama Res. Ltd. P'ship*, 127 Idaho 267, 272, 899 P.2d 977, 982 (1995) (interpreting an older version of this rule that is virtually identical to the current rule). "[I]t is sufficient that the person engage in those enumerated activities, in connection with the offer, sale, or purchase of a security, to commit securities fraud under the relevant portions of the Idaho Securities Act." *Id.*

"An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also Shama Res. Ltd. P'ship*, 127 Idaho at 273, 899 P.2d at 983 (finding omission of information that a party was not a registered broker-dealer and securities were unregistered were material misrepresented facts because it may have resulted in an alteration of the offerees or investors investment decision). There must have been a substantial likelihood that a reasonable investor would have viewed the disclosure of the omitted fact as significantly altering the total mix of the information available. *Id.* If the omitted facts are so obviously important to the investor, that reasonable minds could not differ as to their materiality,

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A party's pleadings should be liberally construed to secure a 'just, speedy and inexpensive' resolution of the case." *Youngblood v. Higbee*, 145 Idaho 665, 668, 182 P.3d 1199, 1202 (2008) (citations omitted).

[26] "Person" means "an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity." I.C. § 30-14-102(20).

the ultimate issue of materiality can appropriately be resolved as a matter of law by summary judgment. *Id.* at 450.

Here, Plaintiff met its initial burden to establish that Zarinegar and PRM omitted material facts in connection with the sale of PRM stock in that the PPM for PRM did not disclose the Cease and Desist Orders that had been issued against Zarinegar, Zarinegar and PRM made an untrue statement of material fact by stating in the offering materials that PRM would hold all of its property in its name (and not in the name of any Member or Manager), and that the real estate investment could be converted into a cannabis operation. Defendants' arguments that summary judgment is improper will be addressed below.

i. Consent Orders

Defendants argued that (1) the Cease and Desist Orders were disclosed in AHIT's publically filed documents and the PRM PPM made reference to those documents and (2) the Cease and Desist Orders were not required to be disclosed and any omission was immaterial because Zarinegar was a mere employee of Malory Investments, LLC and not an issuer or related affiliate.

Plaintiff asserted that Rees never invested in AHIT and the January 19, 2016 publically filed disclosure by AHIT was after Rees had already invested in ARP and PRM. After the January 19, 2016 disclosure, Rees invested only in PRM and the PPM for PRM specifically noted that it was

not offering AHIT shares and background information related to AHIT was not a part of any representation in connection with the sale of PRM stock.

Defendants' arguments regarding the Cease and Desist Orders are unavailing. It is undisputed that the Cease and Desist Orders were never disclosed in offering documents related to the sale of ARP or PRM. The Cease and Desist Orders were disclosed by AHIT on January 19, 2016, which was after Rees had invested in ARP and PRM. Rees only invested in PRM following that disclosure. There is no reason he should have relied on the AHIT filing, given the explicit disclaimer regarding AHIT in the PRM PPM:

> This offering is not an offering of any securities of American Realty or AHIT . . .
> . . .
> Although not made a part of any representation in connection with this Offering, background information related to the relationship between AHIT, American Realty and the Company are detailed in AHIT's public disclosures at www.sec.qov/edgar. Furthermore, audited financials outlining the value of the 1,000,000 shares of AHIT stock owned by the Company are set forth therein.[27]

The Court also concludes that there is no genuine issue of material fact that the failure to disclose the Cease and Desist Orders was so obviously important to the investor, that reasonable minds could not differ as to their materiality. *See, e.g., United States v. Bessesen*, 433 F.2d 861, 864 (8th Cir. 1970) (defendant's failure to disclose that company for which he was selling securities was subject to cease and desist order in another state constituted omission of material fact under similar federal rule regarding securities fraud); *State ex rel. Corbin v. Goodrich*, 726 P.2d 215 (Ariz. Ct. App. 1986) (securities sellers' failure to disclose certain background information of corporate officers, including a previous cease and desist order, was a material and relevant fact); *State, Dep't of Fin., Sec. Bureau v. Smiley*, 2008 WL 4202433, at *7 (Idaho Dist. Aug. 28, 2008)

[27] Ax. Aff. Ex. G, pp. 1, 3 n.1.

(unreported) (finding failure to disclose Cease and Desist Orders as an omission of a material fact that any reasonable investor would view as significantly altering the mix of information available); *accord SEC v. Merchant Capital, LLC*, 483 F.3d 747, 771–72 (11th Cir. 2007). In addition, the fact that Zarinegar was only an employee of Malory Investments, LLC is immaterial. The Cease and Desist Orders applied equally to Zarinegar and prohibited him from selling securities in those states. Accordingly, the Court finds that the Cease and Desist Orders were not disclosed and their omission from ARP and PRM's PPMs was material.

ii. Commingling

Defendants asserted there was no commingling, but the potential for commingling was disclosed. Defendants asserted PRM's Operating Agreement and the PRM PPM endowed Zarinegar with unfettered discretion to use company funds in any manner he (as the Manager) deemed appropriate. Defendants argued that Zarinegar understood and reasonably believed he was entitled to the money.

Plaintiff asserted that Defendants have failed to address the language in PRM's Operating Agreement, which specifically stated that company property shall be held only in its name and not in the name of any Member or Manager.

Here, there is no genuine issue of material fact that the plain language of both PRM's Operating Agreement and the PRM PPM were violated when Zarinegar transferred investor funds to his personal bank accounts. The PRM PPM granted Zarinegar (as its Manager) the power to "hold

and own any Company real or personal properties in the name of the Company." Likewise, the Operating Agreements for both ARP and PRM (which were attached to the ARP and PRM PPMs) specified that "The Company shall hold all of its property in the name of the Company or its subsidiaries ***and not in the name of any Member or the Manager***." (Emphasis added). Zarinegar's intent regarding his transfers of the funds is irrelevant as intent is not an element of securities fraud under this Section. *Shama Res. Ltd. P'ship*, 127 Idaho at 272, 899 P.2d at 982. There is a substantial likelihood that a reasonable investor would have viewed the disclosure of the possibility that investor funds could be transferred to Zarinegar's personal bank account as significantly altering the total mix of the information available. Accordingly, the Court finds that the omission or misrepresentation regarding the transfer of PRM's property to Zarinegar's personal bank accounts was material.

iii. Transfer of Investment from Real Estate to Cannabis

Defendants argued that Rees agreed, as part of his Subscription Agreement, that Zarinegar (as PRM's Manager) could enter into any stock exchange, merger or restructuring agreement and that Rees specifically approved of ARP's transfer to AHIT.

Plaintiff asserted that Rees was sold a real estate investment and not a cannabis investment. Plaintiff argued that Rees relied on the numerous statements that the investment was real estate based.

ARP and PRM's Operating Agreements and PPM are replete with statements and representations that the business of the companies is real estate. There is no genuine issue of material fact that there is a substantial likelihood that a reasonable investor would have viewed the disclosure of the possibility that investor funds could be converted from a real estate venture to a cannabis venture would have significantly altered the total mix of the information available. Rees testified that he would never have invested if he had known that his investment would have gone toward a cannabis enterprise, especially because it is illegal in Idaho. In viewing the documents as a whole, a reasonable investor would not have concluded or been put on notice that their investment could be transferred from real estate to cannabis. The omission of this fact was material.

Accordingly, the Court finds there is no genuine issue of material fact that Defendants violated Idaho Code § 30-14-501(2) by failing to disclose the consent orders, omitting or misrepresenting that the investment funds could be transferred from PRM to Zarinegar, and omitting or misrepresenting that the real estate investment could be transferred to a cannabis enterprise.

b. Fraudulent Conversion

Idaho Code § 30-14-501(4) provides: "It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly . . . To divert investor money to the personal use of the issuer, offeror or seller, or to pay prior investors without specifically disclosing that use before receiving the investor's money."

Defendants argued that PRM's Operating Agreement and the PPM specifically disclosed that the investment funds could be used for investment vehicles for PRM and any other activities reasonably incidental to such activities. They asserted Zarinegar had the power and authority to use funds to acquire or sell property, even to related parties or affiliates. Defendants also argued the Complaint alleged "conversion" rather than diverting funds.

As set forth previously, the Operating Agreement and PPM specifically stated that company property is to be kept in the name of the company and not in the name of any Manager. It is undisputed that Zarinegar transferred PRM property to his personal bank accounts. There is no showing (and no genuine issue of material fact) that the funds were then expended for anything other than personal matters (i.e. haircuts, pest services, and car washes, to name a few). His intent regarding the transfers is irrelevant. Defendants' argument regarding the semantics of convert and divert is also unavailing. Idaho is a notice pleading state, and in any event, Count Two in the Complaint specifically alleged a violation of Idaho Code § 30-14-501(4).

Accordingly, the Court finds there is no genuine issue of material fact that Zarinegar diverted investor money for his personal use without specifically disclosing that use before receiving Rees's investment money.

In sum, Plaintiff's Motion for Summary Judgment is GRANTED with respect to Counts One and Two in its Complaint. Defendants' Motion for Summary Judgment is DENIED. Plaintiff seeks an award of $550,880.03 to be paid to Rees's Estate and penalties for Defendants' violation of

the Idaho Securities Act. Plaintiff represented that it wanted liability to be determined prior to litigating the issues concerning the final judgment, including alter ego liability.

(3) Motion for Leave to Withdraw

After all the above Motions and material was filed (and a mere seven days before the hearing), Defendants' counsel filed a Motion to Withdraw. Given the voluminous filings that were already before the Court, and the prejudice and delay it would cause, the Court considered all of the above Motions before considering Defendants' Motion to Withdraw. The Motion to Withdraw was ultimately taken under advisement along with all the other Motions.

While the matter has been under advisement, Zarinegar filed in Odyssey and mailed to the Court's chambers numerous *pro se* and *ex parte* filings, even though the Court had not yet granted the Motion to Withdraw. Accordingly, Zarinegar and PRM were still represented by counsel at the time of those filings and mailings. This Court cannot act on *ex parte* communications from a party, nor can this Court act on *pro se* motions submitted by a party who is represented by an attorney. Accordingly, those materials are HEREBY STRICKEN from the record and the Court will take no action on them.

The Court finds (at this time) good cause to GRANT Defendants' Motion to Withdraw. Brian Webb Legal is HEREBY WITHDRAWN as counsel of record for Defendants Sean Zarinegar and PRM, and Nominal Defendants Premium Performance Group, LLC, CBA Capital, Inc., Koriz, LLC, and Kori Zarinegar.

IT IS ORDERED that the clerk of court shall serve a copy of this Order on all parties, including the parties represented by the withdrawing attorney, in accordance with Idaho Rule of Civil Procedure 11.3(c)(1).

IT IS FURTHER ORDERED that the above-captioned matter is STAYED for a period of 21 days, pursuant to Idaho Rule of Civil Procedure 11.3(c)(2).

Defendants Sean Zarinegar and Performance Realty Management, LLC and Nominal Defendants Premium Performance Group, LLC, CBA Capital, Inc., Koriz, LLC, and Kori Zarinegar are each HEREBY NOTIFIED AS FOLLOWS:

> **Your claims will be subject to dismissal with prejudice or default judgment may be entered against you if you do not, within 21 days after service of this Order, either appoint another attorney to appear or file notice with the Court that you will be self-represented in the action.**
>
> **If a notice of appearance of a new attorney or a notice of self-representation is not filed within 21 days after service of this Order allowing withdrawal, the Court may dismiss with prejudice any claims of the party or may enter default judgment against you.**

Defendants are further advised that under Idaho law, a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before a judicial body. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 744–45, 215 P.3d 457, 464–65 (2009).

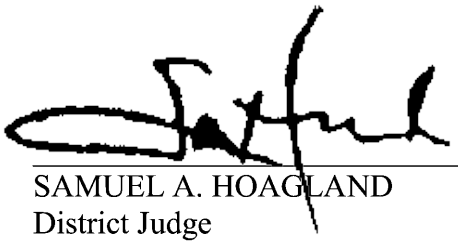
CONCLUSION

For the reasons set forth within, the Court rules as follows. Plaintiff's Motion for Summary Judgment is GRANTED, and Defendants' Motion for Summary Judgment is DENIED.

Defendants' Motion to Strike Stephanie Sze's Affidavit (filed February 22, 2019) is GRANTED with respect to Exhibit DD and paragraphs 3—4, and DENIED with respect to paragraph 5. Defendants' Motion to Strike Nancy Ax's Affidavit (filed February 22, 2019) is DENIED and Plaintiff withdrew Exhibit M. Defendants' Motion to Strike Nancy Ax's Second Affidavit (filed April 3, 2019) is GRANTED with respect to Exhibits 4—16 within Exhibit FF, GG, HH, II, JJ, TT, UU, VV, XX, YY, ZZ, AAA, BBB, CCC, EEE, FFF, and GGG, and DENIED with respect to the remaining exhibits. Plaintiff's Motion to Partially Strike Sean Zarinegar's Declaration (filed May 7, 2019) is DENIED.

Defendants' Motion for Leave to Withdraw as Counsel of Record is GRANTED.

IT IS SO ORDERED.



Signed: 7/1/2019 01:49 PM

SAMUEL A. HOAGLAND
District Judge

Date