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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

JOSEPH MILANOWSKI,

Defendant.

Case No. 2:08-CV-00511-KJD-PAL

ORDER

Currently before the Court is Plaintiff’s Motion for Summary Judgment (#30). Defendant filed a Response (#40), to which Plaintiff filed a Reply (#42).

I. Background

On April 23, 2008, the Securities and Exchange Commission (“SEC”) filed a Complaint against Defendant Joseph Milanowski (“Defendant” or “Milanowski”) alleging violations of federal securities laws. The Complaint brings three claims for relief, for (1) the unregistered offer and sale of securities in violation of Sections 5(a) and 5(c) of the Securities Act; (2) fraud in the offer or sale of securities in violation of Section 17(a) of the Securities Act; and (3) fraud in connection with the purchase or sale of securities in violation of section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Plaintiff seeks declaratory relief that Defendant Milanowski committed the alleged violations, and an issuance of judgment pursuant to Fed. R. Civ. P. 65(d) enjoining Defendant and

1 his officers, agents, servants, employees, and attorneys from violating Sections 5(a), 15 U.S.C. §
2 77e(A), 5(c), 15 USC § 77e(c), and Section 17(a) of the Securities Act, 15 U.S.C. §§ 77e(c) and
3 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5 thereunder, 17 C.F.R.
4 § 240.10b-5. The SEC also seeks that the Court order Defendant to disgorge all ill-gotten gains
5 resulting from his alleged conduct, and to order Defendant to pay civil penalties under Section 20(d)
6 of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. §
7 78u(d)(3).

8 The Complaint alleges that Defendant, while acting as Director and Chief Operating Officer
9 of U.S.A. Capital Diversified Trust Deed Fund (“the Fund” or “Diversified Fund”), and/or the
10 owner/manager of USA Investment Partners, LLC (“USAIP”) and other securities and investment
11 companies, defrauded investors by offering and selling securities fraudulently, conducting
12 unregistered offerings, making misrepresentations to investors about the Fund in prospectuses, sales
13 materials, and monthly account statements, and misappropriating and/or misusing the Fund’s
14 offering proceeds, among other things. Specifically, the SEC details the entities involved, and
15 Milanowski’s conduct as follows:

16 **A. The Entities**

17 **1. USA Capital Diversified Trust Deed Fund** (“the Fund”) is a Nevada limited liability
18 company headquartered in Las Vegas, Nevada over which Milanowski was the President and Chief
19 Operating Officer (“COO”) from 1998 to April 2006, and a director from 1998 to March 2007.

20 **2. USA Commercial Mortgage Company, dba USA Capital** was a Nevada limited liability
21 company, headquartered in Las Vegas, Nevada. USA Capital was a mortgage broker licensed by the
22 State of Nevada that originated and serviced the loans made by the Fund.

23 **3. USA Securities, LLC** is a Nevada limited liability company and was registered as a
24 broker-dealer from May 2002 to February 2006, and was managed by Milanowski from March 1999
25 to April 13, 2006. USA Securities solicited investors in the registered fund only.

26

1 **4. USA Investment Partners, LLC (“USAIP”)** is a Nevada limited liability company,
2 headquartered in Las Vegas, Nevada that was owned and managed (directly or indirectly) by
3 Milanowski and his partner from 1999 to March 28, 2007. USAIP was the manager of USA Capital
4 Realty Advisors, LLC, the manager of the Fund from its inception until April 13, 2006. USA Capital
5 owned a 100% interest in USAIP from May 2001 to August 2005 and was the manager of USAIP
6 from November 1999 to June 2004.

7 The Complaint alleges that Defendant Milanowski violated securities laws through a series of
8 fraudulent acts and misrepresentations. More specifically, the Complaint avers that Milanowski
9 offered and sold securities while failing to file a registration statement with the Commission; and that
10 USA Capital made numerous misrepresentations to investors and misappropriated and misused the
11 fund’s offering proceeds. The details of the allegations are set forth more specifically below.

12 **B. USA Capital’s Business**

13 The Commission avers that USA Capital made loans to developers to finance the
14 construction of real estate projects which were funded by USA Capital and its broker-dealer, USA
15 Capital Securities through investors. As of April 13, 2006, USA Capital had raised \$962 million, net
16 of redemption from 6,800 investors. In addition to the Fund, USA Capital raised \$66.7 million from
17 1,300 investors through a registered securities offering, and \$745 million from 3,600 investors who
18 invested directly in various USA Capital loans. USA Capital was to service the loans by collecting
19 the monthly payments from borrowers and, after deducting servicing fees, remitting the interest and
20 principal payments to the investors in the loan.

21 Additionally, from May 2000 to September 27, 2005, the Fund raised \$150 million, net of
22 redemptions, from 1,900 investors. Although the Fund stopped sales to new investors in the fourth
23 quarter of 2004, the Fund allowed members to reinvest their distributions in the Fund until
24 September 27, 2005, when USA Capital announced that it was liquidating the Fund. Through a
25 series of prospectuses dated from May 2000 to December 2004, the Fund made a continuous offering
26 of membership units ranging in price from \$5,000–\$25,000 per unit. The maximum number of units

1 increased over the course of the offering from approximately 3,000 to 27,000 units. According to the
2 Complaint, Milanowski actively participated in the preparation of the Fund's prospectuses and was
3 the principal point of contact for the Fund's lawyers who prepared those documents. Additionally,
4 the Commission avers that USA Capital solicited investors for the Fund through brochures and a
5 website, and that Milanowski was responsible for all of the content on the website. (Compl. ¶ 12.)

6 The Commission avers that the membership units in the Fund that were offered and sold by
7 Milanowski were securities in the form of investment contracts. The Commission further avers that
8 no registration statement was ever filed or put into effect with respect to the Defendant's offer or sale
9 of securities in the form of investment contracts. The Fund claimed it was conducting an intrastate
10 offering to Nevada residents that was exempt from registration with the Commission pursuant to
11 Section 3(a)(11) of the Securities Act.

12 **C. The Fund's Misrepresentations to Investors**

13 The Complaint avers that USA Capital made representations to potential and existing
14 investors about the Fund in its prospectuses, various sales materials, and monthly account statements.
15 The Fund's prospectuses represented that an estimated 99.5% of the offering proceeds would be used
16 to make mortgage loans and the remaining .5% would be used for the Fund's reserves and working
17 capital. The Prospectuses further represented that the Fund would invest only in loans that met the
18 following criteria.

- 19 a. The loans had to be secured by first deeds of trust on real property;
- 20 b. No loans would be to the Fund's manager, USA Capital Realty Advisors LLC, or
its affiliates; and
- 21 c. Once the Fund had \$100 million invested, which occurred in early 2003, the Fund
would:
 - 22 i. Not make any loan in excess of \$20 million;
 - 23 ii. Not make any loan that would exceed 15% of its total then outstanding
loans; or
 - 24 iii. Have no more than 25% of its outstanding loans made to a single borrower
or affiliate of that borrower.

25 (Mot. at 5; Business Overview at p. 9, Allison Dep. Ex. 326 at SJ 37–38, 40–41; Allison Dep. Ex.
26 418 at SJ 329, 331–333.) (See Allison Dec. at ¶ 30 at SJ 13.)

1 According to the Complaint and record in the Fund’s sales materials, USA Capital touted the
2 high return and safety of an investment in the Fund. For example, in brochures and on its website,
3 USA Capital represented to investors that:

- 4 a. Investments in the Fund would be secured by First Deeds of Trust;
- 5 b. The fund historically paid a 12% to 13% rate of return on investment and had a
projected Yield of 10% to 12%.
- 6 c. The Fund concentrated on providing double-digit returns while focusing on
protection of principal;
- 7 d. Since 1989, USA Capital has placed over \$1 billion in trust deeds on behalf of
clients without ever losing a dime of investor’s principal. (Compl. ¶ 17.)
- 8 e. The Fund was “commi[ted] to the safety and preservation of capital.”
- 9 f. The Fund reduced the risk of investing in trust deeds by diversifying – i.e., investing
in “many loans, covering many different properties in various markets, with
multiple borrowers, much like a mutual fund holds a basket of stocks. If a
particular loan defaults, the impact to an investor is minimized.”

10 (Compl. at ¶ 17.) According to the Complaint, USA Capital sent account statements to each
11 investor stating that the “dividend” paid to investors for the month and the annualized rate of return
12 for the month, which was between 8.98% and 12.37%. The Complaint alleges that Milanowski was
13 responsible for supervising the accounting function at USA Capital, and the account statements were
14 prepared by the accounting department under his supervision. The Commission additionally avers
15 that the account statements included an attachment that contained information about the loans in
16 which the Fund had invested. The attachment listed each of the Fund’s loans, specified that the loan
17 was secured by a first deed of trust, and identified the property that secured the loan, yet failed to
18 indicate whether the loans were performing, which created the impression that the loans were
19 performing and that the distributions to investors were interest payments, which induced investors to
20 continue investing. The Commission avers that the impression created by the attachment was false
21 because the loans were not performing, and the distributions were not payments of interest. The loan
22 portfolio updates were prepared under Milanowski’s direction.

23 **C. Milanowski’s Alleged Misuse of the Fund’s Offering Proceeds**

24 The Commission also avers that USA Capital acted contrary to the representations it had
25 made to investors when Milanowski misappropriated and misused most of the Fund’s offering
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1 proceeds to make unsecured loans to entities to which he was affiliated. (Mot. at 8–9; Allison Dec.
2 at ¶¶ 19, 20 at SJ 9–10; Allison Dep. Ex. 408 at SJ 187–188.) More specifically, as of November 30,
3 2006, the Fund had 23 loans originated and serviced by USA Capital with outstanding balances,
4 excluding unpaid interest, totaling \$92,306,536. (Mot. at 9; Allison Decl. ¶ 30–31.) Of that amount,
5 \$86.9 million, or 94% of the Fund’s outstanding portfolio balance, was in loans that were not secured
6 by first trust deeds, and/or loans that were made to USA Capital affiliates. Defendant Milanowski
7 was principally responsible for USA Capital making these improper loan balances.

8 Additionally, undisclosed to investors, these loans became non-performing or defaulted
9 during the Fund’s offering. As a result, the Fund sustained substantial losses and declared
10 bankruptcy on April 13, 2006. According to the bankruptcy court’s December 19, 2006 approved
11 plan or reorganization, the Fund investors will receive only \$.25 to \$.46 cents for every dollar they
12 invested. Due to this result, USA Capital falsely represented in its brochures and on its website that
13 investors would likely have double-digit returns, that it was committed to the protection of investor
14 principal, and that the investments were diversified and therefore less risky. (Compl. ¶ 21.)

15 The Complaint and Motion set forth in detail, the loans which USA Capital made in
16 contravention to the representations made to investors in the Fund’s prospectuses, sales materials,
17 and account statements. Specifically, the Complaint and Motion detail seven loans totaling \$86.9
18 million, that were not secured by a first deed of trust, and either were, or possibly were made to an
19 affiliate of Milanowski, and which became non-performing or defaulted.

20 Plaintiff’s Motion avers that Milanowski attempted to obtain audited financials in connection
21 with an SEC registration statement by retaining T. Garth McBride of the accounting firm of Reeves,
22 Evans, McBride and Zhang (Motion at 19; McBride Dep. Ex. 606, at SJ 976.) While preparing for
23 the audit, McBride and his staff discovered the existence of the alleged affiliate transactions. (Id. at
24 at SJ 986.) The accounting firm required that the affiliated transactions be disclosed in the audited
25 financials that were to be submitted with USA Capital’s upcoming SEC 12(g) registration statement.

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1 As a result of these findings, and after conferring with counsel, Milanowski sent a letter to investors
2 dissolving the Diversified Fund.

3 On April 1, 2006, Milanowski retained Allison and Mesrow Financial to reorganize the
4 Diversified Fund and the related USA Capital entities. (Motion at 19; Allison Decl. ¶ 3 at SJ 2–3.)
5 Two weeks later, Allison placed these entities into bankruptcy. Id. The Record demonstrates that
6 once Allison was appointed as the Chief Restructuring Officer by the bankruptcy court, he brought in
7 a team of 41 forensic experts including accountants, loan workout officers and investment bankers,
8 who assisted Allison in conducting a review of all the outstanding loans. During his review of the
9 USA Capital operations, Allison learned that Milanowski was not returning principal to the
10 Diversified Fund investors when a loan was paid off, rather he was simply using these monies to pay
11 the scheduled interest payments to the investors so that all loans looked as though they were
12 performing when, in fact, many of them were not performing. (Motion at 7; Allison Dep. at SJ 880-
13 881; Allison Dec. ¶ 14 at SJ 7.) Milanowski continued to make interest payments to Diversified
14 Fund investors, even when their loans were non-performing. (Id. at Allison Dep. at SJ 885.) He did
15 this by placing all funds into a “Collections Trust Account” and then disbursing payments from this
16 account to his investors. (Id. at Allison Dep. at SJ 885.) According to the SEC, this was a
17 commingling of all the different investments and accounts and concealment of whether loans were
18 performing or nonperforming. (Id. at Allison Dec. at ¶14–15 at SJ 7.)

19 The SEC avers that Milanowski used various techniques to conceal the commingling of funds
20 and misappropriation of monies of the Diversified Fund, including having the Collections Trust
21 Account issue a large check on the account payable to the Diversified Fund and then have the
22 Diversified Fund fail to present the check for its payment. (Id.) Allison found a series of large
23 checks in the total amount of \$18.9 million drawn on the “Collections Trust Account” which were
24 simply not cashed and were kept in a secretary’s drawer in the USA Capital offices. (Id. at Allison
25 Dep, Ex. 406 at SJ 171–76.) Milanowski informed Allison that if the Diversified Fund had cashed
26

1 the checks, there would not have been sufficient funds to continue to operate the USA Capital
2 business. (Mot. at 7; Allison Dep. at SJ 886.)

3 Additionally, Allison testified that he determined from a review of the general ledger of USA
4 Capital that there were intercompany transfers between USA Capital and USAIP which were
5 undocumented and totaled \$58 million. (*Id.*; Allison Dec. at ¶¶ 17, 18 at SJ8–9; Allison Dep. at SJ
6 887–88.) Of the \$58 million received by USAIP from USA Capital, or for the benefit of USAIP,
7 payments of \$29.9 million were made to or for multiple entities many of which were controlled by
8 Milanowski. (Mot. at 8; Allison Decl. at ¶¶ 19, 20 at SJ 9–10; Allison Dep. Ex. 408 at SJ 187–88.)

9 The Complaint and Motion list seven loans in particular, amounting jointly to \$86.9 million
10 made with monies raised by the Diversified Fund that were nonconforming to the representations
11 made to investors in the prospectuses, sales materials, and monthly account statements. Those loans
12 are: (1) 10-90; (2) Sheraton; (3) Epic; (4) Colt #1; (5) Colt #2; (6) Colt CREC; and (7) Fiesta.

13 The general allegations of wrongdoing for each loan are outlined below:

14 **10-90 Loan**

15 Plaintiff avers that the entity 10-90 acted solely as a shell corporation incorporated by David
16 A. Fogg (“Fogg”) of Temecula, California at the request of Milanowski, and that all of the 10-90
17 transactions were entirely fictional. (Mot. at 10; Fogg Dep., Ex. 605, at SJ 953.) The SEC avers
18 *inter alia* that Milanowski transferred monies from the Diversified Fund to 10-90, and that the
19 monies were then simply transferred back to USAIP or to entities affiliated with USAIP by Fogg. In
20 order to provide monies which 10-90 could loan to USAIP, Milanowski caused the Diversified Fund
21 to loan monies to 10-90. According to Allison’s account, Milanowski caused the Diversified Fund to
22 execute a Revolving Loan and Security Agreement under which the Diversified Fund agreed to lend
23 \$40 million to 10-90. (Allison Dec. Ex. 428 at SJ 469–476, Fogg Dec. Ex. 103 at SJ 469–476; Fogg
24 Dep. at SJ 960–961.) 10-90 also executed a Promissory Note secured by Deed of Trust in favor of
25 the Diversified Fund. (Allison Dep. Ex. 429 at SJ 477–483, Fogg Dep. Ex. 104 at SJ 477–483, Fogg
26 Dep. at SJ 961.) The Promissory Note was secured not by real property but by a Collateral

1 Assignment of Beneficial Interest, dated April 12, 2002, from Fogg to the Diversified Fund. (Allison
2 Dep. Ex. 430 at SJ 484–488; Fogg Dep. Ex. 105 at SJ 484–488; Fogg Dep. at SJ 961–962.) The
3 assets which USAIP had given to 10-90 to secure the loan from 10-90 to USAIP were now being
4 pledged as collateral for the Diversified Fund’s loan to 10-90. (Fogg Dep. at SJ 962.) The
5 Diversified Fund also increased the size of its loan from \$40 million to \$75 million by a First
6 Amendment to Loan Documents dated October 6, 2003. (Allison Dec. Ex. 431 at SJ 489–491, Fogg
7 Dep. Ex. 106 at SJ 489–491; Fogg Dep. at SJ 962.)

8 Fogg operated by receiving e-mails or telephone calls from Milanowski who advised him that
9 money from the Diversified Fund was coming into 10-90. Milanowski then directed Fogg to
10 immediately wire the monies back to USAIP. (Fogg Dep. at SJ 966–968.) All of the monies
11 Milanowski caused the Diversified Fund to send to 10-90 were immediately sent back to USAIP by
12 Fogg on behalf of 10-90. (Allison Dep. ¶ 36 at p. 17; Allison Dep. Ex. 434 at SJ 518–519 and
13 Allison Dep. Ex. 435 at SJ 520–528; Allison Dep. at SJ 907–908.) Thus, Fogg and 10-90 did not
14 individually benefit from this whole series of transactions, but simply operated as a “pass through” or
15 wash transaction and the series of transfers allowed Milanowski to conceal the transfer of monies
16 from the Diversified Fund to USAIP, an affiliate of Milanowski. None of the Diversified Fund
17 transfers of monies to 10-90 were secured by first deeds of trust and all were loans made to USAIP,
18 an affiliate of Milanowski. Moreover, the 10-90 loan violated the diversification requirements set
19 forth in the offering memoranda.

20 **Sheraton & Epic Loans**

21 The Summit Airport Hotel transaction (“Summit Hotel”) began as a loan by certain Direct
22 Lenders managed by USA Capital in 1999. This loan originally was secured by a Deed of Trust.
23 (Mot. at 14; Allison Dec. at ¶ 37 at SJ 18–19, Allison Dep. Ex. 436 at SJ 529–536.) In 2001
24 Milanowski and USA Capital caused the Direct Lenders (investors not in the Diversified Fund) to
25 assign the loan to the Diversified Fund and the Diversified Fund repaid 100% of the Direct Lender’s
26 investment. Shortly after the transfer to the Diversified Fund, the loan went into default and in 2003

1 the Diversified Fund foreclosed on the property. The original Promissory Note secured by a Deed of
2 Trust was executed on September 17, 1999 for \$7.9 million. (Id.; Allison Dec. at ¶ 37 at SJ 18–19;
3 Allison Dep. Ex. 436 at SJ 529–536, Allison Dep. at SJ 909.) A Sixth Amendment to Loan
4 Documents was executed on January 9, 2002 and the note was increased to \$9,980,000. (Id.; Allison
5 Dep. Ex. 437 at SJ 537-540; Allison Dep. at SJ 909.) The assignments from the Direct Lenders in
6 the Summit Hotel Loan were made between September 19, 2001 and December 19, 2001. (Id.;
7 Allison Dep. Ex. 438 at SJ 541–564; Allison Dep. at SJ 909–910.)

8 On February 14, 2003, the Diversified Fund obtained title to the Summit Airport Hotel
9 property via a foreclosure and a Trustee’s Deed at the then loan value of \$9.98 million. (Id.; Allison
10 Dec. ¶37 at SJ 18-19; Allison Dep. Ex. 439 at SJ 565–567; Allison Dep. at SJ 910.) A Management
11 Agreement dated November 27, 2002 shows the hotel which was located at 307 North Admiral Byrd
12 Road, Salt Lake City, Utah 84117 as a Sheraton Hotel owned by USA Capital Investors VI, LLC.
13 (Id.; Allison Dec. ¶37 at SJ 18–19; Allison Dep. Ex. 440 at SJ 568–593; Allison Dep. at SJ 910.)
14 USA Capital Investors VI, LLC applied for registration in California on April 22, 2004 as a Limited
15 Liability Company originally formed in Nevada. Its application was signed by Milanowski. (Id.;
16 Allison Dec. ¶37 at SJ 18–19; Allison Dep. Ex. 441 at SJ 594–595; Allison Dep. at SJ 910.) USA
17 Investors VI operated the hotel as a Sheraton Hotel until 2005 when it was sold to a third party for a
18 net of \$6.2 million with a then outstanding loan of \$9.96 million. (Id.; Allison Dec. at ¶37 at SJ
19 18–19.) The Settlement Statement dated October 14, 2005 on the sale shows net proceeds of \$6.2
20 million remitted to the Diversified Fund. (Id.; Allison Dec. at ¶37 at SJ 18–19; Allison Dep. Ex. 442
21 at SJ 596–597; Allison Dep. at SJ 908–910.) This left a shortfall of \$3.7 million on the loan amount
22 due to the Diversified Fund investors. Milanowski continued to carry this \$3.7 million shortfall on
23 the books of the Diversified Fund as a “loan” even though the property had been sold on October 14,
24 2005. This means Milanowski continued to make interest payments to the Diversified Fund
25 investors even though there was no more loan and no property securing the loan. (Id.; Allison Dec.
26 at ¶37 at SJ 18–19.) Milanowski explained his conduct to Allison by stating that he had hoped to

1 make up the deficiency from the sale from other assets in the USA Capital complex. (Mot. at 15;
2 Allison Dep. at SJ 908–909, 911.)

3 Another situation similar to the Summit Hotel loan matter was the Epic “loan” on the
4 Palm Springs Marquis Villas. The properties involved in this transaction were condominiums
5 located in Palm Springs, California. In 2000, the Diversified Fund entered into a Loan
6 Agreement with Epic Resorts—Palm Springs Marquis Villas, LLC (“Epic”) wherein the Diversified
7 Fund lent \$11.5 million to Epic. The Loan Agreement was signed by Milanowski on behalf of
8 the Manager of the Diversified Fund. (Id.; Allison Dec. at ¶ 39 at SJ 20–21; Allison Dep. Ex. 445 at
9 SJ 607–633; Allison Dep. at SJ 911-912.) In 2004, the loan went into default and the Diversified
10 Fund foreclosed on the Palm Springs condominium resort. However, rather than sell the property
11 and remit the proceeds to the Diversified Fund, Milanowski transferred the property to an entity
12 created by himself, Tree Moss Partners, LLC. (“Tree Moss”). He continued to treat the loan as being
13 in existence and continued to make interest payments to the Diversified Fund investors, even though
14 there was no longer a loan outstanding on the property. Ultimately, an involuntary bankruptcy
15 petition was filed against Tree Moss and the property was sold in the subsequent bankruptcy
16 proceedings. (Mot. at 15–16; Allison Dep. at SJ 911–912.)

17 The Diversified Fund obtained title to the condominium project through a foreclosure sale
18 and Trustee’s Deed dated January 13, 2004. (Mot. at 16; Allison Dec at ¶ 39 at p. 19–20; Allison
19 Dep. Ex. 446 at SJ 634–636.) However, Milanowski caused the Diversified Fund to quitclaim the
20 property to Tree Moss by Quitclaim Deed dated September 15, 2003 and recorded on February 23,
21 2006, about two months before Allison placed the Diversified Fund into bankruptcy. (Id.; Allison
22 Dec. at ¶ 40 at SJ 21; Allison Dep. Ex. 449 at SJ 690-691; Allison Dep., Ex. 603, at SJ 915–916.)
23 The Diversified Fund received no consideration for this transfer. Tree Moss was an entity owned by
24 Milanowski through USAIP (Id.; Allison Dep. Ex. 447 at SJ 637–681.) Milanowski told Allison that
25 he hoped to sell the Palm Springs condominiums and make a profit but the property was on Indian
26

1 lands and an Indian chief refused to give his consent. (Id.; Allison Dep. at SJ 912.) In this
2 transaction, Milanowski took for himself and his entity, Tree Moss, property belonging to the
3 Diversified Fund. He concealed the transfer to Tree Moss. After the 2004 foreclosure there was no
4 longer a loan on the property secured by a first deed of trust. Moreover, Milanowski simply
5 converted unto himself the condominium project which rightfully belonged to the Diversified Fund.

6 **Colt Loan**

7 During the period from 2003 to 2005, Milanowski also caused the Diversified Fund to
8 transfer monies to a series of projects with Robert A. MacFarlane (“MacFarlane”), an East Coast
9 developer who developed projects through an entity known as Homes for America, Inc., a Nevada
10 corporation. (“HFA” or “Homes for America”). In September 2003, Milanowski caused USAIP to
11 enter into a joint venture Operating Agreement with Homes for America. The parties formed an
12 entity to be known as Colt Gateway, LLC, a Connecticut Limited Liability Company (“Colt
13 Gateway”). The purpose of the entity was to redevelop the old Colt Arms factory in
14 Hartford, Connecticut. (Id.; Allison Dec. at ¶41 at SJ 21; Allison Dep. Ex. 450 at SJ 692–750,
15 Allison Dep. at SJ 917.) Milanowski funded the Homes for America projects with monies from the
16 Diversified Fund but used these monies to become an equity partner with MacFarlane in
17 development projects on the East Coast. The purported loans included two separate unsigned notes:
18 an unsigned note dated July 10, 2003 between the Diversified Fund and Colt Gateway for \$1,500,000
19 (Mot. at 17; Allison Dep. Ex. 451 at SJ 760–766A) and an unsigned note dated September 26, 2003
20 for \$3,718,777.18 (Id.; Allison Dep. Ex. 452 at SJ 767–773). Allison could not find any
21 documentation to support that any of these loans by the Diversified Fund were supported by first
22 deeds of trust.

23 MacFarlane and Homes for America lost money on the Colt Gateway Project because they
24 had expended money in getting banking commitments and governmental permits for the project
25 which included substantial tax credits for redevelopment work. (Id.; MacFarlane Dep. at SJ 1025-
26 1026.) Once the USA Capital Bankruptcy was filed, it was impossible to complete the project and

1 the matter was tied up in litigation in Connecticut with the Bankruptcy Trustees. (MacFarlane Dep.
2 at SJ 1025, 1042.)

3 **Fiesta Loan**

4 Milanowski also caused the Diversified Fund to enter into a number of projects with Richard
5 Ashby, a Southern California Real Estate Developer. (Mot. at 18; Allison Dec. at ¶ 44 at SJ 22–23;
6 Allison Dep. Ex. 454 at SJ 779–812; Allison Dep. at SJ 920.) In March 2001, USAIP had entered
7 into a Joint Venture with Ashby Development Company, Inc., a California corporation and
8 Butterfield Development Corporation, Inc., a California corporation. (Id.; Allison Dep. Ex. 454
9 at SJ 779–812.) Milanowski also caused the Diversified Fund to make an unsecured loan to an
10 Ashby project known as Fiesta Development. (Id.; Allison Dep. Ex. 455 at SJ 813–820.) The
11 Promissory Note for \$6,000,000 was unsecured and was dated January 10, 2005. (Id.; Allison Dep.
12 Ex. 456 at SJ 821–831.) The investment was not secured by a first deed of trust, but Ashby
13 personally guaranteed the Note. (Id.; Allison Dep. Ex. 456 at SJ 821–831.) The \$6,000,000 was
14 wired out in two installments, one of \$4,000,000 and a second of \$2,000,000. (Allison Dep. Ex.
15 457 at SJ 832–839.) Ashby has paid back this note in full with interest. (Allison Dep. at SJ 920.)

16 **III. Defendant’s Response**

17 Defendant, in opposition, fails to deny the detailed allegations set forth in the Complaint and
18 Motion, but instead, asserts that a business partner, Thomas Hantages, was also involved in the
19 alleged misconduct, and should have been the primary target for the SEC. Milanowski also avers
20 that the SEC failed to look to other actors who may have violated securities laws. Additionally,
21 Milanowski avers that USA Commercial “believed that it was operating within the intrastate
22 exemption for the Diversified Trust Deed Fund,” due to “conversations with counsel when setting up
23 the Diversified Trust Deed Fund and what it was meant to do.” (Def.’s Resp. at 4.) Milanowski
24 avers that USA Commercial Mortgage was advised by legal counsel that it fit within the exemption
25 “as long as the Diversified Trust Deed Fund was only being sold to Nevada investors.” Id.

26

1 Milaowski offers several arguments in opposition to the SEC's Motion for Summary
2 Judgment in regards to the 10-90 loan. His arguments fail however, as he is estopped from
3 relitigating facts contesting liability based on conduct to which he has entered a plea of guilty in his
4 related criminal case: United States v. Joseph D. Milanowski, Case No. 09-CR-11291-RLH-PAL.
5 Specifically, Milanowksi has already pled guilty to wire fraud in violation of 18 U.S.C. § 1343,
6 wherein he is charged with transferring \$22,528,000 to 10-90, Inc. and then concealing the transfer.
7 The Information charges that Milanowski caused the Diversified Fund to attribute \$55.9 million in
8 Diversified Fund investors' monies to the 10-90 loan. (Information at 3.) Accordingly, the Court
9 finds that Milanowski, by entering a guilty plea to the Information, has admitted under oath the
10 essential facts of the 10-90 transaction alleged in the instant case.

11 Milanowski also disclaims wrongdoing with regard to the loan on Palm Springs Marquis
12 Villas, averring that Mr. Allison's characterization regarding the operation of the loan is "not
13 completely forthright," and that Milanowski had indicated to Allison that the proceeds from any sale
14 of the property would go to the Diversified Trust Deed Fund. He additionally avers that there was no
15 commingling within the Collection Trust Account, and that the account was rather, "one account
16 which held funds from the payment of interest or the repayment principal from several loans . . . to
17 be accounted for separately until they were remitted to investors," and that "there were no funds
18 belonging to the investors that were deposited into the operating account of USA Commercial
19 Mortgage." (Resp. at 5.)

20 **IV. Standard of Law for Summary Judgment**

21 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,
22 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
23 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.
24 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the
25 initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at
26 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a

1 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
2 587 (1986); Fed. R. Civ. P. 56(e).

3 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.
4 See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere
5 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit
6 or other evidentiary materials provided by Rule 56(e), showing there is a genuine issue for trial. See
7 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual
8 issues of controversy in favor of the non-moving party where the facts specifically averred by that
9 party contradict facts specifically averred by the movant. See Lujan v. Nat'l Wildlife Fed'n., 497
10 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345
11 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine
12 issue of fact to defeat summary judgment). “[U]ncorroborated and self-serving testimony,” without
13 more, will not create a “genuine issue” of material fact precluding summary judgment. Villiarimo v.
14 Aloha Island Air Inc., 281 F.3d 1054, 1061 (9th Cir. 2002).

15 Summary judgment shall be entered “against a party who fails to make a showing sufficient
16 to establish the existence of an element essential to that party’s case, and on which that party will
17 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted
18 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

19 **V. Legal Standard**

20 **A. Registration**

21 Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) & 77e(c), prohibit the
22 unregistered offer and sale of securities in interstate commerce unless the securities are exempt from
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1 registration.¹ Anderson v. Aurotek, 774 F.2d 927, 929 (9th Cir. 1985) (citing SEC v. Murphy, 626
2 F.2d 633, 640 (9th Cir. 1980).

3 To establish a prima facie case of a Section 5 violation, the SEC must prove three essential
4 elements: “(1) no registration statement was in effect as to the securities, (2) the defendant sold or
5 offered to sell these securities, and (3) interstate transportation or communication and the mails were
6 used in connection with the sale or offer of sale.” SEC v. Continental Tobacco Co. Of S.C., 463 F.2d
7 137, 155 (5th Cir. 1972).

8 The units in the Fund were investment contracts and, therefore, securities. Section 2(a)(1) of
9 the Securities Act and Section 3(a)(10) of the Exchange Act define the term “security” to include
10 “investment contracts.” An investment contract involves (1) An investment of money, (2) in a
11 common enterprise, (3) with an expectation of profits derived from the efforts of others. SEC v.
12 Edwards, 540 U.S. 389, 394 (2004)(citing SEC v. W.J. Howey Co., 328 U.S. 293 (1946). The Ninth
13 Circuit has held that the common enterprise element is satisfied by the existence of either horizontal
14 commonality (a pooling of investor funds and interests) or strict vertical commonality (the fortunes
15 of the investor are linked with those of the promoter). See SEC v. R.G. Reynolds Enterprises, Inc.,
16 952 F.2d 1125, 1130 (9th Cir. 1991). Here, all of the required elements of a Section 5 violation are
17 present.

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20 ¹ Section 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C., § 77e, provides: Section 5.

21 (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly-(1)
22 to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell
23 such security through the use or medium of any prospectus or otherwise; or(2) to carry or cause to be carried through the
24 mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale
25 or for delivery after sale.

26 (c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or
communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any
prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the
registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration
statement) any public proceeding or examination under section 77h of this title.

1 No registration statement was filed with the Commission or was in effect. (Motion at 21, Ex.
2 600 at SJ 862.) Additionally, Defendant Milanowski has offered and sold the securities interests to
3 over 1,900 investors. According to the evidence, from approximately May 2000 to September 27,
4 2005, the diversified Fund raised \$150 million, net of redemptions, from 1,900 investors. Although
5 the Fund stopped sales to new investors in the fourth quarter of 2004, the Fund allowed members to
6 reinvest their distributions in the fund until September 27, 2005, when USA Capital announced that
7 it was liquidating the Fund.

8 Defendant Milanowski avers that the Fund was told by counsel that it was able to claim
9 exemption from registration pursuant to Section 3(a)(11) of the Securities Act. Section 3(a)(11)
10 provides an exemption for “[a]ny security which is a part of an issue offered and sold only to persons
11 resident within a single state or territory, where the issuer of such security is . . . a corporation,
12 incorporated by and doing business within such State or Territory.”

13 Defendant Milanowski avers that he relied on the advice of legal counsel in structuring the
14 sale of the units of the Fund as an exemption under Section 3(a)(11). Specifically, Milanowski avers
15 that he was informed that because the “actual underwriting, documentation, and servicing of the
16 loans took place in Nevada, 100% of the actual ‘business’ of making loans took place in the state of
17 Nevada regardless of where the collateral was, thus giving rise to the intrastate exemption.” (Resp.
18 At 4.) Defendant additionally avers that counsel informed him that the Section 3(a)(11) exemption
19 applied as long as the Diversified Trust Deed Fund was only being sold to Nevada investors. (Id.) As
20 a result, Milanowski avers that “at all times the principals of USA Commercial Mortgage Company
21 believed they were operating with an intrastate exemption for the Diversified Trust Deed Fund,” and
22 maintains the opinion that the Fund’s operations fit within the exemption. (Resp. at 4.)

23 The argument that he relied on the advice of counsel in structuring the sale of the units of the
24 Diversified Fund as an exemption under Section 3(a)(11) is raised for the first time in Defendant’s
25 Response. Milanowski never asserted this defense in his Answer filed June 27, 2009 (See #13), or at
26 any other time during this litigation. Rather, as to all questions propounded in either written or oral

1 discovery, Milanowski asserted his Fifth Amendment rights and refused to answer any inquiries.
2 (Motion for Summ. J. at 19–20.) Moreover, Milanowski fails to establish the prerequisites for
3 asserting the defense of counsel under established Ninth Circuit precedent. SEC v. Goldfield Deep
4 Mines, 758 F.2d 459, 467 (9th Cir. 1985) citing SEC v. Savoy Industries, Inc., 665 F.2d 1310, 1314,
5 n.28 (D.C. Cir. 1981). To establish the defense of reliance on counsel, Milanowski must
6 demonstrate that (1) he made a complete disclosure to counsel; (2) requested counsel’s advice as to
7 the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good
8 faith on that advice. SEC v. Goldfield Deep Mines, 758 F.2d at 467. Other than Milanowski’s
9 uncorroborated self-serving allegations, Defendant has offered no evidence to establish his defense
10 of good faith reliance on advice of counsel. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054,
11 1061(9th Cir. 2002). Moreover, “[e]ven if [Milanowski] had established a claim of reliance, ‘such
12 reliance does not operate as an automatic defense, but is only one factor to be considered in
13 determining the propriety of injunctive relief.’” Id. citing SEC v. Manor Nursing Centers, Inc., 458
14 F.2d 1082, 1101 (2d Cir. 1972) (“While good faith reliance on advice of counsel may be a factor to
15 consider in deciding whether to grant injunctive relief, appellants’ proven lack of good faith here
16 precludes them from relying on this argument.”)

17 Moreover, as stated above, the Section 3(a)(11) exemption applies only for “[a]ny security
18 which is part of an issue offered and sold only to persons resident within a single State or Territory,
19 where the issuer of such security is . . . a corporation, incorporated by and doing business within such
20 State or Territory.” Here, the Fund was not “doing business within” the state of Nevada only, as
21 required by Section 3(a)(11) because almost all of the property underlying the loans it invested in
22 was outside the state, and were not “genuinely local in character” or “carried out through local
23 investment” as the Section’s legislative history suggests. 17 C.F.R. § 230.147. The Fund failed to
24 meet the “Safe Harbor” provisions established by the Commission Rule 147, 17 C.F.R. § 230.147,
25 because the Diversified Fund derived most of its revenue from, and principally did its business
26 outside the State of Nevada. Moreover, the Rule 506 exemption is unavailable to the Diversified

1 Fund because the company engaged in a “general solicitation” of investors in violation of Rule
2 502(c), 17 C.F.R. § 230.502(c).

3 **B. Violations of Antifraud Provisions**

4 Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), prohibits fraud in the offer or sale of
5 securities, while Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder,
6 17 C.F.R. § 240.10b-5, prohibit fraud in connection with the purchase or sale of securities. These
7 provisions require that the fraud concern a material fact. Basic Inc. v. Levinson, 485 U.S. 224,
8 231–32 (1988); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). The Supreme
9 Court has held that a fact is material if there is a substantial likelihood that a reasonable investor
10 would consider the information important in making an investment decision. TSC Industries, Inc.,
11 426 U.S. at 449. Though considered a mixed question of law and fact, the Supreme Court has held
12 that if established omissions are “so obviously important to an investor, that reasonable minds cannot
13 differ on the question of materiality” then materiality may be “appropriately resolved as a matter of
14 law.” Id. at 450.

15 The Ninth Circuit has held that misrepresentations as to the use of investor funds are clearly
16 material. SEC v. First Pacific Bancorp, 142 F.3d 1186, 1189, n.3 (9th Cir. 1998)(diversion of funds
17 from one public offering to fund another found to be fraudulent.) Here, Defendant Milanowski
18 represented to the Diversified Fund investors that all loans would be secured by first deeds of trust
19 and that the Fund would make no loans to Milanowksi or his affiliates. Milanowski caused the
20 Diversified Fund to violate these restrictions on numerous occasions as outlined above, including the
21 10-90 transaction which also violated the loan diversification requirement. The Court finds these
22 omissions and misrepresentations to be unquestionably material under the standard set forth in TSC
23 Industries, Inc. and also meet the standard established by the Ninth Circuit.

24 Section 17(a)(1) of the Securities Act 15, U.S.C. § 77q(a)(1), Section 10(b) of the Exchange
25 Act, and Rule 10b-5 thereunder, require a showing of scienter. Scienter is defined as a “mental state
26 embracing intent to deceive, manipulate or defraud.” Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193

1 n.12 (1976). The Ninth Circuit has held that scienter may be established by a showing of
2 recklessness. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568–69 (9th Cir. 1990)(en banc.);
3 See also, SEC v. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001).

4 The Court finds that Milanowski’s actions, as demonstrated by the evidence, denote the
5 requisite level of scienter under Section 17(a)(1), Section 10(b) of the Exchange Act, and Rule
6 10b-5. Moreover, even if the Court were not to have found that Milanowski’s conduct evinced the
7 requisite scienter, scienter is not required to establish a violation of Sections 17(a)(2) or 17(a)(3) of
8 the Securities Act, 15 U.S.C. §§ 77q(a)(2) or 77q(a)(3). Aaron v. SEC, 446 U.S. at 701–02. Rather,
9 proof of mere negligence is sufficient to establish a violation. SEC v. Dain Rauscher, 254 F.3d at
10 856. Even a cursory examination of Milanowski’s behavior with regard to the various transactions
11 listed herein demonstrates, at a minimum, negligence on his part.

12 **VI. Relief**

13 **A. Injunctive Relief**

14 When provided with the proper record, the Court may grant injunctive relief. SEC v.
15 Murphy, 626 F.2d at 655. To merit injunctive relief however, the SEC must establish that there is a
16 reasonable likelihood of future violations of the securities laws. Id. Among the things to be
17 considered when evaluating the likelihood of future violations, are circumstances of past illegal
18 conduct. SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975); see also SEC v.
19 Murphy, 626 F.2d at 655 (the existence of past violations may give rise to an inference that there will
20 be future violations). Other factors the Court may consider include the degree of scienter involved,
21 the isolated or recurrent nature of the infraction, the defendant’s recognition of the wrongful nature
22 of his conduct, the likelihood—because of the defendant’s professional occupation—that future
23 violations might occur, and the sincerity of his assurances against future violations. SEC v. Murphy,
24 626 F.2d at 655.

25 As stated above, the Court finds that Milanowksi acted with scienter while conducting the
26 transactions outlined herein above. Additionally, his defalcations with Fund monies were large and

1 frequent. He acted surreptitiously to conceal his actions and has failed to admit that he
2 inappropriately misused Diversified Fund monies. Milanowski has been involved with the
3 investment business for a number of years and was affiliated with a registered broker-dealer, USA
4 Securities, LLC from September 2001 to December 2005 and held series 22, 39, and 63 NASD
5 licenses.

6 Therefore, having examined the record and allegations made against Defendant Milanowski,
7 the Court finds that there is a reasonable likelihood of future violations and that injunctive relief is
8 merited. Accordingly, Plaintiff's request for injunctive relief is granted.

9 **B. Disgorgement, Prejudgment Interest and Civil Penalty**

10 The SEC also seeks that the Court order disgorgement in the amount of \$80.9 million against
11 Defendant Milanowski for ill-gotten gains. The Ninth Circuit has held that the amount of
12 disgorgement should include all gains flowing from a defendant's illegal activities. See SEC v. JT
13 Wallenbrock, 440 F.3d 1109, 1117 (9th Cir. 2006). Thus, in an offering fraud case such as this one,
14 "it [is] appropriate for the district court to order [Defendants] to disgorge the proceeds received in
15 connection with the . . . offering." SEC v. Manor Nursing Centers, 458 F.2d 1082, 1104 (2d Cir.
16 1972); see also SEC v. Friendly Power Co., 49 F. Supp.2d 1363, 1373 (S.D. Fla. 1999) (ordering
17 defendants to disgorge all proceeds received from investors. Specifically, the Commission seeks
18 that the Court order disgorgement in the amount of \$80.9 million, which is calculated from the non-
19 performing loans as set forth in its Motion for Summary Judgment (\$86.9 million), less the Fiesta
20 loan (\$6 million) which has been paid in full. The Commission avers that it will "give Milanowski a
21 credit on any disgorgement for all mon[ies] collected by the various Bankruptcy trustees in the
22 Bankruptcy proceedings relating to the facts of this case and now pending in the District of Nevada,
23 less the costs of collection, including Trustees fees and administrative expenses as approved by the
24 bankruptcy Court" (Reply at 15.) Additionally, the Commission avers that in the event restitution is
25 awarded against Milanowski in his criminal proceeding, the Commission will give him credit for all
26 sums paid on any restitution order as it relates to the actions described in this litigation. (Id.)

1 The Supreme Court has held that district courts may grant relief beyond injunction in SEC
2 enforcement actions, if the relief will “effectuate the purposes of the federal securities laws.” SEC v.
3 Manor Nursing Centers, 458 F.2d at 1104 (citing SEC v. Texas Gulf Sulfur Co., 446 F.2d 1301,
4 1308 (C.A.N.Y. 1971)(disgorgement sought by SEC upheld “so long as such relief is remedial relief
5 and is not a penalty assessment.”) The Court has established that Milanowski’s actions constitute
6 violations of federal securities laws. The Court is persuaded that the sum the SEC requests
7 represents a reasonable calculation of the disgorgement warranted from Milanowski, who has
8 presented no evidence to refute an award of that amount. Accordingly, the Court grants the
9 Commission’s request for disgorgement in the amount of \$80.9 million calculated from the non-
10 performing loans as set forth in the Summary Judgment Motion and supporting record.

11 Additionally, the Commission seeks a third-tier civil money penalty of \$130,000 against
12 Milanowski pursuant to Section 20(d) of the Securities Act, 15 U.S.C. §77t(d), and Section 21(d)(3)
13 of the Exchange Act, 15 U.S.C. § 78u(d)(3).

14 The Securities Act and Exchange Act authorizes imposition of civil financial penalties in
15 three tiers, depending on the severity of the offense, for violations of federal securities laws. See 15
16 U.S.C. §§ 77t(d) and 78u(d)(3). The penalty amounts vary per tier, from \$5,000 for the first tier,
17 \$50,000 for the second tier, and \$100,000 for the third. In each case, the penalty cannot exceed the
18 greater of these amounts, or the pecuniary gain the defendant obtained resultant of the violation. The
19 Court may impose third-tier penalties if it finds that the defendant’s actions entailed “fraud, deceit,
20 manipulative, or deliberate or reckless disregard of a regulatory requirement,” and also “resulted in
21 substantial losses or created a significant risk of substantial losses to other persons.” Id. §§
22 77t(d)(2)(c) and 78u(d)(3)(B)(iii).

23 Here, the Court finds that Milanowski’s conduct warrants the imposition of third-tier
24 penalties. His actions satisfy the standard involving fraud and deceit and creating losses or risk of
25 substantial losses to investors. Accordingly, the Court grants the Commission’s request for a third-
26 tier civil money penalty against Milanowski in the amount of \$100,000.

1 **C. Officer and Director Bar**

2 The Commission also seeks an officer and director bar against Milanowski. Section 20(e) of
3 the Securities Act, 15 U.S.C. § 77t(e), and Section 21(d)(2) of the Exchange Act, 15 U.S.C. §
4 78u(d)(2), authorize federal courts to bar an individual who violates the antifraud provisions of the
5 federal securities laws if the person's conduct demonstrates "unfitness" to serve as an officer or
6 director of a public company.

7 The Court finds that Milanowski's conduct demonstrates that he is unfit to serve as an officer
8 or director of a publicly held company. As stated above, Milanowski participated in fraudulent
9 misconduct with a high degree of scienter. His fraudulent conduct spanned several years and he
10 reaped significant benefits as a result of his misconduct. The Commission avers that as the
11 controlling person of the manager of USA Capital First Trust Deed Fund, a public reporting
12 company, Milanowski was the functional equivalent of an officer of a public company. The Court
13 agrees. Exchange Act Rule 3b-2, 17 C.F.R. § 240.3b-2 states that "[t]he term 'officer' means
14 president, vice president, secretary, treasurer or principal financial officer, comptroller or principal
15 accounting officer, and any person routinely performing corresponding functions with respect to any
16 organization whether incorporated or unincorporated."

17 Accordingly, the Court finds that Defendant Milanowski's involvement and actions with the
18 Diversified Fund and U.S.A. Capital First Deed of Trust are sufficient to merit an officer and director
19 bar pursuant to Section 20(e) of the Securities Act, 15 U.S.C. § 77t(e), and Section 21(d)(2) of the
20 Exchange Act, 15 U.S.C. § 78u(d)(2).

21 **VII. Conclusion**

22 Accordingly, for the reasons set forth herein, **IT IS HEREBY ORDERED** that Plaintiff's
23 Motion for Summary Judgment (#30), is **GRANTED**.

24 DATED this 15th day of March 2010.



25
26 _____
Kent J. Dawson
United States District Judge