

United States District Court  
For the Northern District of California

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E-FILED on 10/12/2011

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MARK SHEPHERD and DELIA SHEPHERD,  
  
Plaintiffs,  
  
v.  
  
S3 PARTNERS, LLC; ALARIS  
DEVELOPMENT; THE SHIELDS  
FOUNDATION; NORTHWEST  
CONSULTING GROUP, LLC; CORINTHIAN  
WEALTH MANAGEMENT; GOLDEN  
CREST WEALTH MANAGEMENT; PIERCE  
ARROW INVESTORS, LLC; LIVINGSTONE  
CAPITAL; STAGECOACH RETAIL, LLC;  
SONTERRA RETAIL CENTER, LLC;  
MICHAEL SIMS; SAM STAFFORD;  
MELVIN RUSSELL SHIELDS; DAVID  
VAUGHN; DAVID SAMUELS; CHASTAN  
SHIELDS; DOUG BURKE,  
  
Defendants.

No. C-09-01405 RMW

ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
SUMMARY JUDGMENT

[Re Docket No. 69]

Defendants S3 Partners, LLC ("S3"),<sup>1</sup> Northwest Consulting Group, LLC ("Northwest"),  
Livingstone Capital ("Livingstone"), Stagecoach Retail, LLC ("Stagecoach"), Sonterra Retail  
Center, LLC ("Sonterra"), and Melvin Russell "Rusty" Shields ("Shields," and collectively the

<sup>1</sup> Although S3 is included as a moving party in the notice of motion and motion, it was omitted from the list on the first page of moving defendants' memorandum of points and authorities.

1 "moving defendants") move for summary judgment on all six claims asserted in plaintiffs' Third  
2 Amended Complaint. Plaintiffs oppose the motion. On September 30, 2011, the court held a  
3 hearing on defendants' motion. Having considered the papers submitted by the parties and the  
4 arguments of counsel, and for the reasons set forth below, the court grants in part and denies in part  
5 moving defendants' motion for summary judgment.

6 **I. BACKGROUND**

7 Plaintiff Mark Shepherd ("Shepherd") is a videographer. He was hired by defendant Michael  
8 Sims to videotape a presentation given by defendants Sims, Sam Stafford, and Rusty Shields in  
9 March 2007 (the "Presentation"). At the Presentation, Sims, Stafford, and Shields discussed the  
10 formation of S3, their backgrounds and qualifications, and their respective roles in S3. The three of  
11 them had merged their three separate companies to form S3, so that they could continue doing the  
12 same things but "in a much better and larger way." Sims introduced Shields as having "a big  
13 banking background, investment background in a big way, and that's what he handles in the  
14 company." He explained that "a lot of the decision making is done by the three of us but we all take  
15 our own disciplines and we apply our -- our discipline, and, you know, we keep on track in that."

16 During the Presentation, Sims, Stafford, and Shields also described S3's investment system  
17 and ways their clients could invest through S3. Sims explained that investors' money would be used  
18 to buy land for development and S3 would then borrow money to develop the project, adding that  
19 "when you come into the office you'll find out all the details." Sims stated, "We give a predictable  
20 return to our clients, it's a good return and it's predictable. You know what you're going to get.  
21 You're secured against land so the exchange is valid." Shields then introduced using a home equity  
22 line of credit to borrow money for investments. He explained that "you're maintaining that  
23 investment [on the property you own] and you're also moving into a new market with us with a very  
24 predictable return." Shields also gave an example of investing \$250,000 in a three year project,  
25 again stating that "it's very predictable, very easy," and "the total return's 355,568.75, less the  
26 original investment of 250,000, so you get your original investment back at the end of 36 months."  
27 Later, Shields stated that investors would get paid first over the S3 partners and that "we own it all.  
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1 So it's a small portion of risk. I mean, it's going to work. We have our vested interest in making  
2 sure it works."

3 After the Presentation, Shepherd contacted Sims to ask about investing through S3.  
4 Shepherd had further meetings with Sims and persuaded his wife, Delia Shepherd, to invest as well.  
5 On July 6, 2007, the Shepherds signed an agreement to invest \$510,000 in Sonterra Retail, one of  
6 S3's projects. The Shepherds obtained the money by taking out a mortgage loan on their home with  
7 the assistance of mortgage brokers who work with S3. On September 25, 2007, the Shepherds  
8 signed an agreement to invest \$150,000 in another S3 project, Stagecoach Retail. Soon after, on  
9 October 25, 2007, Sonterra Retail Center LLC was involuntarily suspended by the Texas attorney  
10 general.

11 In 2008, Shepherd asked for the return of his investment but was informed that, while the  
12 money was secure, it could not be returned. On June 23, 2008, Stafford and Shields each promised  
13 to be responsible for one third of the "deficit" in the Sonterra project, corresponding to their  
14 fractions of ownership in S3. On July 11, 2008, Shields stated that "[t]here is an over-raise of funds  
15 for [the Sonterra] project based on the continual down-sizing, first from 93 acres down to 24 acres  
16 then to a little over 5 acres." Thus, Shields had reduced the Shepherds' initial investment from  
17 \$510,000 to \$155,982.44 and offered to issue a note from S3 for the remaining amount. Shepherd  
18 asked why the over-raised money could not simply be returned. On July 22, 2008, Sims responded  
19 that the money could not be returned because, as best as he could determine, "Rusty just took it."

20 It is unclear whether the Shepherds ever recovered any of their money, but they never  
21 received any returns on their investments. Moving defendants acknowledge that "plaintiffs invested  
22 and lost a great deal of money." Dkt. No. 78 at 9. The Shepherds claim they were misled by  
23 statements made at the Presentation and relied on them in deciding to invest through S3. The  
24 Shepherds also contend defendants fraudulently concealed the fact that Shields had been convicted  
25 of felony larceny and been involved in a personal bankruptcy. The Shepherds filed the present case  
26 on March 31, 2009. The operative complaint asserts six claims for relief: (1) federal securities fraud  
27 in violation of Sections 10(b) and 20(a) of the Exchange Act; (2) state securities fraud; (3)  
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1 intentional misrepresentation; (4) negligent misrepresentation; (5) fraud in the inducement; and (6)  
2 rescission and restitution.

## 3 II. ANALYSIS

### 4 A. Summary Judgment Standard

5 Summary judgment is proper where "there is no genuine dispute as to any material fact and  
6 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party  
7 bears the initial burden of informing the court of the basis for the motion and identifying portions of  
8 the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the  
9 absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the  
10 moving party meets its initial burden of production, the burden shifts to the nonmoving party to go  
11 beyond the pleadings and, by citing materials in the record, show there is a genuine issue for trial.  
12 *Id.* at 324; Fed. R. Civ. P. 56(c)(1). The ultimate burden of persuasion on the motion remains with  
13 the moving party, even if he would not bear the burden of persuasion at trial. *Nissan Fire & Marine*  
14 *Ins. Co., Ltd. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

### 15 B. Violation of Federal Securities Laws

16 Plaintiffs claim defendants are liable for federal securities fraud under sections 10(b) and  
17 20(a) of the Exchange Act. Section 10(b) prohibits the use of manipulative or deceptive devices "in  
18 connection with the purchase or sale of any security" and "by the use of any means or instrumentality  
19 of interstate commerce or of the mails." 15 U.S.C. § 78j(b). To recover under Section 10(b) and  
20 Rule 10b-5 promulgated thereunder, plaintiffs must prove (1) a misstatement or omission (2) of  
21 material fact (3) made with scienter (4) on which they relied (5) which proximately caused plaintiffs'  
22 injury. *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 388 (9th Cir. 2002) (citation  
23 omitted). Section 20(a) makes liable those who directly or indirectly control a person who is directly  
24 liable for a violation of the Exchange Act, unless the controlling person acted in good faith and did  
25 not directly or indirectly induce the acts constituting the violation. 15 U.S.C. § 78t(a).

#### 26 1. Fraud "in Connection with" the Purchase or Sale of a Security

27 Moving defendants argue they are entitled to summary judgment because plaintiffs have not  
28 identified any statements they made that were "in connection with" the purchase or sale of a security.

1 Moving defendants argue that no securities were offered for sale during the Presentation, Shepherd  
2 did not attend as an investor, and the Sonterra and Stagecoach projects were never mentioned until  
3 later, after Shepherd had met with Sims several times.<sup>2</sup> Moving defendants take the narrow view that  
4 none of the statements at the Presentation can be actionable and none of the other parties can be  
5 responsible for Sims' conduct. Plaintiffs respond that the Presentation was part of a multi-step  
6 process by which defendants executed the sales of securities. Plaintiffs argue defendants cannot  
7 escape liability simply because the securities were not identified by project name during the  
8 Presentation and the agreement and exchange therefore did not occur in the same conversation as the  
9 misrepresentation.

10 "Courts have not pinned down with any specificity the meaning of the requirement that fraud  
11 occur in connection with the purchase or sale of a security." *Ambassador Hotel Co. v. Wei-Chuan*  
12 *Inv.*, 189 F.3d 1017, 1025 (9th Cir. 1999). However, courts have held that one factor to be  
13 considered is whether the elements of transaction and loss causation are met. *See In re Fin. Corp. of*  
14 *Am. Shareholder Litig.*, 796 F.2d 1126, 1129-30 (9th Cir. 1986). Moving defendants do not  
15 challenge the element of transaction causation, and plaintiffs have asserted they relied on defendants'  
16 statements in deciding to invest. The court addresses loss causation separately below.

17 In considering whether the "in connection with" requirement is met, courts also ask whether  
18 the misrepresentation has to do with the intrinsic nature of the security or with risks related to the  
19 method of their purchase. *Id.* at 1130; *see Ambassador Hotel*, 189 F.3d at 1026. In *Arrington v.*  
20 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 651 F.2d 615, 619 (9th Cir. 1981), the court held that  
21 "[m]isrepresentation of the risks of buying securities on margin in a declining market is fraud 'in  
22 connection with' the purchase of securities." The court noted that the defendant had also  
23 misrepresented analyst recommendations with respect to specific stocks. *Id.* Together, the  
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25 <sup>2</sup> On similar grounds, moving defendants object to several exhibits attached to the declaration of  
26 Mark Shepherd, Dkt. No. 76, including a DVD recording of the Presentation. Defendants argue the  
27 exhibits are irrelevant and inadmissible because they do not mention Sonterra or Stagecoach,  
28 moving defendants were not involved in creating the document, and/or plaintiffs do not claim  
reliance or falsity of the document. The objections are overruled. While some of moving  
defendants' arguments may be reasons that the exhibits do not contain actionable misrepresentations,  
they are not grounds for finding the exhibits entirely irrelevant and inadmissible. These documents  
are relevant to show, for example, the relationships between the parties.

1 misrepresentations "made up a scheme to induce Arrington to borrow money from Merrill Lynch to  
2 engage in commission-producing securities purchases through Merrill Lynch," which was sufficient  
3 to meet the "in connection with" requirement. *Id.* The situation here is similar to *Arrington*. During  
4 the Presentation, defendants discussed both the nature of investments with S3, such as their  
5 predictable returns, and the risks related to their method of purchase, such as the use of home equity  
6 lines of credit to finance the investment. Plaintiffs, like those in *Arrington*, assert a fraudulent  
7 scheme to induce them to take out loans and invest in defendants' real estate development projects.

8         Moreover, in the context of public documents, the "in connection with" requirement is met  
9 where the document is reasonably calculated to influence the investing public or is something on  
10 which an investor would presumably rely, such as a press release or annual report. *See SEC v. Rana*  
11 *Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993). The Presentation appears to have served an  
12 analogous purpose here: it was designed to influence investors and convince them to make  
13 investments through S3. Sims even referred to providing full details about the investments "when  
14 you come into the office." Moving defendants emphasize that Shepherd did not attend the  
15 Presentation as an investor; however, they have not explained the implications of that fact nor cited  
16 any authority on why it is relevant.

17         The approach in *Rana* and the cases it cites do not appear to require that misstatements occur  
18 at the point of sale, and the court has not found support for such a rule elsewhere. Thus, whether or  
19 not securities were directly offered at the Presentation is not dispositive.<sup>3</sup> In addition, the statements  
20 made at the Presentation were broadly applicable to all of the securities S3 offered, such that they  
21 bore upon the nature and risks of Sonterra and Stagecoach, even if those projects were not mentioned  
22 by name. Defendants also made representations about their qualifications and experience, which  
23 would again reflect on the risks of any S3-managed investment and be reasonably expected to  
24 influence investors. Thus, the court finds that misrepresentations during the Presentation were made  
25 "in connection with" the sale of securities.

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27  
28 <sup>3</sup> Plaintiffs object to the admissibility of Shepherd's deposition testimony that no securities were  
offered at the Presentation. The court does not rely on that testimony in this order.



1 at § 6.1(a). Public records indicate that both companies existed before the Presentation was given.  
2 Dkt. No. 77 Exhs. 4, 5.<sup>4</sup> As discussed above, plaintiffs have presented sufficient evidence that the  
3 Presentation was designed to attract investors to S3's projects. Plaintiffs also present evidence that  
4 S3 used the same form agreement for its investments and simply plugged in the specific project  
5 names. *See* Dkt. No. 75 Exh. A at 67:5-12. Thus, there is a question of fact as to whether the  
6 promotional statements made during the Presentation by Sims and by S3 as manager of the projects  
7 can be attributed to Sonterra and Stagecoach.

8 As to Northwest and Livingstone, plaintiffs have not presented evidence that would support  
9 direct liability under the federal securities laws. Plaintiffs fail to address Livingstone's liability at all  
10 in their opposition, and on that basis summary judgment is granted as to Livingstone on all counts.

11 **b. Control Person Liability**

12 To prove a prima facie case under Section 20(a), a plaintiff must prove (1) a primary  
13 violation of federal securities laws and (2) that the defendant exercised actual power or control over  
14 the primary violator. *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000). The  
15 plaintiff need not show that the defendant was a culpable participant in the violation or that there  
16 was the exercise of actual power,<sup>5</sup> but the defendant may assert a good faith defense if he can show  
17 no scienter and an effective lack of participation. *Id.*

18 \_\_\_\_\_  
19 <sup>4</sup> Plaintiffs request judicial notice of this court's March 26, 2010 minute order, information about  
20 defendant corporations from the websites of various secretaries of state, and a cease and desist letter  
21 issued by the California Department of Corrections to certain defendants. Dkt. No. 77. Moving  
22 defendants do not object, but they argue that the findings in the cease and desist letter have no  
23 bearing on the this litigation. Moving defendants are correct that, while the court may take judicial  
24 notice of the existence of the cease and desist order, it may not take judicial notice of the truth of the  
25 facts stated therein. *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). With that  
26 understanding, the court grants plaintiffs' request for judicial notice.

27 <sup>5</sup> Moving defendants miscite *Howard* as requiring culpable participation. *See* Dkt. No. 69 at 14. In  
28 their reply, moving defendants instead cite *Knollenberg v. Harmonic, Inc.*, 152 Fed. Appx. 674, 685  
(9th Cir. 2005). But *Knollenberg*, an unpublished case, relies on *Durham v. Kelly*, 810 F.2d 1500,  
1503-04 (9th Cir. 1987). After *Durham*, the Ninth Circuit decided *Hollinger v. Titan Capital Corp.*,  
914 F.2d 1564 (9th Cir. 1990) (en banc), and held that "a plaintiff is *not* required to show 'culpable  
participation' to establish that a broker-dealer was a controlling person under § 20(a)." *Id.* at 1575.  
Although *Hollinger* limited its holding to the broker-dealer/registered representative context,  
subsequent cases have applied the same standard more broadly. *See, e.g., Paracor Fin., Inc. v. Gen.  
Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996); *Howard*, 228 F.3d at 1065-66. Thus, the  
court declines to follow *Knollenberg* and pre-*Hollinger* cases in requiring plaintiffs to affirmatively  
show culpable participation.



1 Plaintiffs have presented ample evidence that Sims, Shields, and Stafford were the principals  
2 and primary decision-makers for S3. Moving defendants argue that Sims acted unilaterally in his  
3 later meetings with Shepherd, but they do not attempt to present a good faith defense as to  
4 statements made during the Presentation. In addition, Shields testified that Northwest was the owner  
5 of one third of S3. Dkt. No. 75 Exh. A at 25:3-12. Thus, Northwest may be liable under Section  
6 20(a) as a controlling shareholder of S3. Plaintiffs do not address Section 20(a) liability for  
7 Livingstone, Sonterra, or Stagecoach.

8 Because the court finds moving defendants may be liable as direct violators and/or  
9 controlling entities, the court does not address plaintiffs' alter ego theory of liability.

### 10 3. Loss Causation

11 Moving defendants argue that plaintiffs cannot establish loss causation. The element of loss  
12 causation requires that the misrepresentation "touches upon the reasons for the investment's decline  
13 in value." *McGonigle v. Combs*, 968 F.2d 810, 821 (9th Cir. 1992). For example, if the alleged  
14 misrepresentation relates to the defendant's honesty and competence, the plaintiff must show that he  
15 lost his investment because the defendants were not honest and competent, rather than because other  
16 factors caused a general decline in the market. *See Bastian v. Petren Res. Corp.*, 892 F.2d 680, 682,  
17 684-85 (7th Cir. 1990). Here, plaintiffs present evidence that they were promised safe, secure  
18 investments with predictable returns, when in fact they have received no returns and likely lost most  
19 of their principal. They have also presented evidence that part of their loss may have been due to  
20 Shields simply taking their money, which creates a question of fact as to whether misrepresentations  
21 about his background and integrity are causally related to plaintiffs' loss. Thus, summary judgment  
22 cannot be granted based on lack of loss causation.

### 23 4. Use of an Instrumentality of Interstate Commerce

24 Moving defendants' last contention with respect to plaintiffs' federal claim is that plaintiffs  
25 have failed to demonstrate the use of any instrumentality of interstate commerce in the alleged fraud.  
26 Moving defendants argue that Shepherd met personally with Sims in San Jose and plaintiffs do not  
27 cite any telephone conversations involving misstatements or admissions. Plaintiffs respond that  
28 Shepherd was instructed to wire money to S3's bank in Hickory, North Carolina, and the wiring

1 service is an instrumentality of interstate commerce. The use of an instrumentality of commerce  
2 need not be itself a fraudulent act; it suffices if the use is "in furtherance of the alleged fraud."  
3 *Hilton v. Mumaw*, 522 F.2d 588, 602 (9th Cir. 1975). Obtaining plaintiffs' money was clearly a  
4 central component of the alleged fraudulent scheme, and Sims instructed Shepherd use a wire  
5 transfer. Moving defendants have not disputed that this was an instrumentality of interstate  
6 commerce or that such use does not meet the jurisdictional requirement of Section 10(b). Thus,  
7 summary judgment cannot be granted on this ground.

8 **C. Violation of California Securities Laws**

9 Cal. Corp. Code § 25401 makes it unlawful "to offer or sell a security . . . by means of any  
10 written or oral communication which includes an untrue statement of a material fact or omits to state  
11 a material fact necessary in order to make the statements made . . . not misleading." Cal. Corp. Code  
12 § 25501 makes a violator of section 25401 liable for rescission or damages. Liability under section  
13 25501 is limited to actual sellers. *SEC v. Seaboard Corp.*, 677 F.2d 1289, 1296 (9th Cir. 1982).  
14 However, Cal. Corp. Code § 25504 provides for joint and several liability of those who control a  
15 direct violator of section 25501 or who are officers and directors of a liable corporation. Similarly,  
16 Cal. Corp. Code § 25504.1 provides for joint and several liability of those who materially assist in a  
17 violation of section 25401. Moving defendants argue they are entitled to summary judgment  
18 because (1) plaintiffs cannot prove their claim and (2) strict privity is required under section 25501  
19 and plaintiffs only stand in privity with Stagecoach and Sonterra.

20 Moving defendants do not elaborate on their assertion that "Mr. Shepherd cannot prove a  
21 claim against any of the defendants." Thus, they have not met their burden to show there is no  
22 dispute as to any material fact and they are entitled to judgment as a matter of law. To the extent the  
23 assertion is based on the theory that statements made at the Presentation did not constitute offering  
24 or selling a security "by means of" a misrepresentation, moving defendants have not cited any  
25 authority that such statements are not actionable as a matter of law. As discussed above, the  
26 Presentation appears to have been calculated to influence investors and to induce them to invest with  
27 S3, which plaintiffs ultimately did.  
28

1 As to the requirement of privity, there is a question as to whether S3 was also in privity with  
2 plaintiffs. From the operating agreements, it appears that Sims signed on behalf of himself as well  
3 as S3. Dkt. No. 76 Exhs. G, J. Moreover, as noted above, the operating agreements provide that S3  
4 shall be the initial manager of the projects. *Id.* at § 6.1(a). Shields and Stafford also later  
5 acknowledged responsibility for the Sonterra project as owners of S3. Should plaintiff ultimately  
6 establish privity with S3, Shields and Northwest would potentially be liable as controlling entities.  
7 Shields may also be liable for materially assisting a violation, which does not require privity. *See In*  
8 *re ZZZZ Best Sec. Litig.*, 1990 U.S. Dist. LEXIS 11867 at \*62 (C.D. Cal. 1990); *cf. Seaboard*, 677  
9 F.2d at 1296 n.7 (declining to address liability under section 25504.1). Thus, summary judgment is  
10 denied except as to Livingstone.

11 **D. Fraud, Negligent Misrepresentation, and Fraud in the Inducement**

12 Moving defendants seek summary judgment on plaintiffs' third through fifth claims for relief  
13 on the grounds that plaintiffs have failed to identify any statements made by any moving defendants.  
14 However, moving defendants' entire argument appears to be based on the assertion that the  
15 statements made during the Presentation cannot be considered because plaintiffs' investments in  
16 Sonterra and Stagecoach occurred later. As discussed above, the court disagrees with moving  
17 defendants' narrow conception of fraud. Plaintiffs have identified specific statements made by Sims  
18 and Shields on which they relied. There is at least a question of fact as to whether Sims and Shields  
19 made these statements as agents of other moving defendants, who could be liable as principals.  
20 Thus, summary judgment is denied except as to Livingstone.

21 **E. Rescission and Restitution**

22 Similar to the second count, moving defendants argue they are entitled to summary judgment  
23 on plaintiffs' claim for rescission and restitution because plaintiffs cannot establish a "primary  
24 violation" and because privity is required. Again, moving defendants fail to elaborate on their first  
25 argument and therefore have not met their burden of showing there is no dispute of material fact and  
26 they are entitled to judgment as a matter of law. Regarding privity, for the reasons discussed in  
27 section II.C above, there is a question as to whether privity exists between plaintiffs and S3.  
28

1 Plaintiffs argue that privity is not required under Cal. Corp. Code § 25503, on which their  
2 rescission claim is partly based. Plaintiffs note that section 25503 provides for liability of "any  
3 person" who violates Cal. Corp. Code §§ 25110, 25130, or 25133. However, plaintiffs ignore the  
4 implications of the language that follows: "Any person who violates [certain statutory sections] shall  
5 be liable to any person acquiring from him the security sold in violation of such section . . . ." Cal.  
6 Corp. Code § 25503 (emphasis added). This language establishes the requirement of privity, as it  
7 specifies that liability is from a seller to a buyer. See 9 Witkin, Summary 10th (2005) Corp, § 446,  
8 p. 1182; see also *Seaboard*, 677 F.2d at 1296 (finding liability under Cal. Corp. Code § 25501  
9 limited to actual sellers because it provides violators are liable "to the person who purchases a  
10 security from him"). Unlike count two, plaintiffs have not presented a theory to support liability  
11 beyond those in direct privity. Thus, summary judgment is granted as to Livingstone, Northwest,  
12 and Shields.

13 **III. ORDER**

14 For the foregoing reasons, the court grants moving defendants' motion for summary  
15 judgment as follows:

- 16 1. As to defendant Livingstone on all counts;
- 17 2. On count six, for rescission and restitution, as to defendants Northwest and Shields.

18 The remainder of moving defendants' motion for summary judgment is denied.

19  
20  
21 DATED: 10/12/2011

  
RONALD M. WHYTE  
United States District Judge