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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,  Plaintiff,  v.  STRATEGIC GLOBAL INVESTMENTS, INC. et al.,  Defendants.
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Case No.: 16-cv-514 JLB (WVG)

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

**[ECF No. 22]**

This is a Securities and Exchange Commission enforcement action against Defendants Strategic Global Investments, Inc. and Andrew Fellner related to their entrance into the Colorado retail marijuana industry. Plaintiff's First Amended Complaint alleges that in early 2014, Defendants issued press releases and a Form 1-A Filing that contained false and misleading information in violation of Section 10(b) of the 1934 Securities Exchange Act and SEC Rule 10b-5 promulgated thereunder, and Section 17(a)(2) of the 1933 Securities Act. (ECF No. 18 at 9.) In addition, the operative complaint alleges that Defendant Fellner aided and abetted Defendant Strategic's violations of the same. (*Id.* at 10–11.)

Plaintiff SEC now moves for summary judgment against Defendants Strategic and Fellner as to their violations of Section 10(b) of the 1934 Exchange Act and SEC Rule

1 10b-5 only. (ECF No. 22.) Defendants oppose the motion. (ECF No. 24.) The Court held  
2 a hearing on Plaintiff’s motion for partial summary judgment on March 16, 2017. (*See*  
3 ECF No. 31.) Having considered the parties’ papers, supporting evidence, and oral  
4 arguments, and for the reasons set forth below, the Court hereby **GRANTS** Plaintiff’s  
5 motion. (ECF No. 22.)

6 **I. FACTUAL BACKGROUND**

7 Defendant Strategic is a San Diego-based, Delaware corporation that was formed in  
8 2008. (ECF No. 18, ¶ 11; ECF No. 19, ¶ 9.) Strategic’s common stock is a penny stock  
9 that is traded on the OTC Pink marketplace. (ECF No. 18, ¶¶ 11–12; ECF No. 19,  
10 ¶¶ 9–10; ECF No. 24 at 2.)

11 Defendant Fellner, a resident of Carlsbad, California, acquired a controlling interest  
12 in Strategic in 2010. (ECF No. 18, ¶ 13; ECF No. 19, ¶ 11.) Fellner serves as the Chief  
13 Executive Officer, Secretary, Treasurer, and Sole Director of Strategic. (*Id.*)

14 **A. Legalization of Recreational Marijuana in Colorado**

15 On November 6, 2012, Colorado voters approved Amendment 64, which legalized  
16 recreational marijuana in Colorado as a matter of state law. On December 10, 2012, the  
17 State of Colorado amended its constitution to provide that the use of marijuana should be  
18 legal in the state and regulated in a manner similar to alcohol. Colo. Const. art. 18,  
19 § 16(1)(a). On May 28, 2013, the Colorado legislature enacted the Colorado Retail  
20 Marijuana Code, Colo. Rev. Stat. § 12-43.4-101 *et seq.*, which provides the statutory  
21 framework for the regulation of retail marijuana establishments in the State. Two aspects  
22 of the constitutional amendment and its implementing regulations are relevant to this  
23 action.

24 First, the Colorado Retail Marijuana Code prohibits all retail marijuana  
25 establishments, including marijuana cultivation facilities, from operating until licensed by  
26 the Colorado State Licensing Authority and approved by the local jurisdiction. Colo. Rev.  
27 Stat. §§ 12-43.4-103(17), -309(2) (2016). At all times relevant to this action, the Code  
28 prohibited the issuance of a marijuana cultivation facility license to “[a]n owner who has

1 not been a resident of Colorado for at least two years prior to the date of the owner’s  
2 application.” Colo. Rev. Stat. § 12-43.4-306(k) (2013). The Code defined “owner” to  
3 mean “any person having a beneficial interest, as defined by the state licensing authority  
4 in a retail marijuana establishment other than a holder of a permitted economic interest.”  
5 Colo. Rev. Stat. § 12-43.4-103(12) (2013).

6 The Colorado State Licensing Authority promulgated rules related to Colorado’s  
7 Retail Marijuana Code on September 9, 2013. *See* 1 Colo. Code Regs. § 212-2 (2013).  
8 The rules further defined “owner” as “the Person or Persons<sup>1</sup> whose beneficial interest in  
9 the license is such that they bear risk of loss other than as an insurer, have an opportunity  
10 to gain profit from the operation or sale of the establishment, and have a controlling interest  
11 in a Retail Marijuana Establishment license, and includes any other Person that qualifies  
12 as an Owner pursuant to Rule R 204.” 1 Colo. Code Regs. § 212-2.103 (2013). Rule  
13 R 204.D stated that “ownership of a share or shares in a corporation . . . which is licensed  
14 . . . constitutes ownership and a direct financial interest.” 1 Colo. Code Regs. § 212-2.204  
15 (2013).

16 Second, the constitutional amendment provides that any county, municipality, or city  
17 may enact an ordinance to prohibit the operation of marijuana cultivation facilities,  
18 marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana  
19 stores. Colo. Const. art. 18, § 16(2)(e), (5)(f). In March 2013, Teller County, Colorado,  
20 exercised the option to prohibit the operation of all marijuana establishments, including  
21 marijuana cultivation facilities, within the unincorporated boundaries of its county. Teller  
22 County, Colo., Ordinance 18 (March 14, 2013).

### 23 **B. Defendants’ Involvement in the Colorado Marijuana Industry**

24 On February 5, 2014, Defendant Strategic entered into a Stock Purchase Agreement  
25 with Robert Coffy through which Strategic purchased the only-issued share of common  
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27 <sup>1</sup> “Person” was defined to mean “a natural person, partnership, association, company, corporation,  
28 limited liability company, or organization, or a manager, agent, owner, director, servant, officer, or  
employee thereof.” 1 Colo. Code Regs. § 212-2.103 (2013).

1 stock in BearPot, Inc., a Colorado Corporation and controlling entity of an existing  
2 marijuana cultivation facility in Teller County, Colorado. (*See* ECF No. 22-14.) At the  
3 time that Strategic acquired BearPot, BearPot’s assets included “equipment with a market  
4 value of \$10,000” and “living plants that are healthy and growing and have a market value  
5 of \$5,000.” (*Id.*, ¶ 2.01(f).) BearPot did not own any real property and was leasing its  
6 marijuana cultivation facility. (*Id.*, ¶ 2.01(g).) Although the Stock Purchase Agreement  
7 was executed on February 5, 2014, Robert Coffy did not incorporate BearPot in Colorado  
8 until February 14, 2014. (ECF No. 22-15 at 4.)

9       Between February 10, 2014, and March 27, 2014, Defendant Strategic issued six  
10 press releases via the website [www.marketwired.com](http://www.marketwired.com) that chronicled its acquisition of  
11 BearPot and entrance into Colorado’s recreational marijuana market. (ECF Nos. 22-7 to  
12 22-12.) Defendant Strategic specifically identified the purpose of the shareholder letter  
13 quoted in the February 24, 2014 press release as being to update existing shareholders and  
14 potential investors about Strategic’s developments related to its newly acquired Colorado  
15 marijuana cultivation facility. (ECF No. 22-9 at 2.) The content of the press releases is  
16 the subject of the instant motion and discussed in greater detail throughout this order.

17       By the third quarter of 2014, Strategic decided not to obtain any marijuana licenses  
18 from the State of Colorado and not to pursue further its marijuana business. (ECF No. 24  
19 at 3–4.) Strategic abandoned BearPot in October 2014. (*Id.* at 4.)

### 20       **C. SEC Subpoena**

21       On July 9, 2014, the SEC issued to Strategic a subpoena seeking documents that  
22 supported some of the statements Strategic made in its February and March 2014 press  
23 releases. (ECF No. 22-13.) Specifically, the SEC requested that Strategic produce “[a]ll  
24 documents evidencing, showing, and reflecting Bearpot’s marijuana facility, including . . .  
25 the location and/or address of such facilities” (Request No. 4), “[d]ocuments sufficient to  
26 identify the location, specifications . . . and ownership of [the] ‘Marijuana Growing facility  
27 located in Teller County, Colorado,’ as described in a press release issued by [Strategic]  
28 on February 20, 2014” (Request No. 10), “[a]ll applications, permits, licenses, and other

1 documents provided to or issued by the State of Colorado, Colorado’s Marijuana  
2 Enforcement Division, or any other regulatory agency in the State of Colorado in  
3 connection with [Strategic]’s and Bearpot’s entrance into the marijuana industry” (Request  
4 No. 17), and “[a]ll documents evidencing, showing, and reflecting Bearpot’s authorization  
5 by the State of Colorado to cultivate, grow, and/or sell marijuana” (Request No. 18). (*Id.*  
6 at 6–8.)

7 Strategic responded to the SEC’s subpoena on August 18, 2014. (ECF No. 22-16.)  
8 In response to Request No. 4 regarding the location of the marijuana cultivation facility,  
9 Strategic produced the documents bates numbered STRATEGIC 00020–STRATEGIC  
10 00030, which consist of several March 2014 invoices for marijuana cultivation equipment  
11 that BearPot purchased. (ECF No. 22-16 at 2; ECF No. 34-18 at 21–31.) The invoices  
12 provide no information as to the location of BearPot’s marijuana cultivation facility. (*See*  
13 *id.*) Strategic’s August 18, 2014 subpoena response did not address Request No. 10  
14 regarding the location, specifications, and ownership of the marijuana cultivation facility.  
15 (*See* ECF No. 22-16.) In response to Request No. 17 regarding any permits and licenses  
16 issued by Colorado regulatory agencies, Strategic responded, “No documents.” (ECF No.  
17 22-16 at 3.) In response to Request No. 18 regarding BearPot’s authorization by the State  
18 to grow or sell marijuana, Strategic responded, “No documents, other than the laws of the  
19 state of Colorado.” (*Id.*)

20 Strategic provided the SEC with a supplemental response to the July 9, 2014  
21 subpoena on August 28, 2014. (ECF No. 22-17.) In its supplemental response to Request  
22 No. 4, Strategic produced the documents bates numbered STRATEGIC 00097–  
23 STRATEGIC 000104, which consist of a list of BearPot’s January–July 2014 banking  
24 transactions, several receipts from May and June 2014 BearPot purchases, a copy of a June  
25 1, 2014 check written by BearPot for “Equipment,” and two invoices, one of which was  
26 for electrical services performed at 847 Ridge Road, Divide, Colorado, on or around March  
27 17, 2014. (ECF No. 22-17 at 2; ECF No. 34-19 at 2–9.) In response to Request No. 10,  
28 Strategic produced the documents bates numbered STRATEGIC 000105–STRATEGIC

1 000111, which consist of an unsigned residential lease for the property located at 847 Ridge  
2 Road, Divide, Colorado. (ECF No. 22-17 at 2; ECF No. 34-19 at 10–16.) The parties  
3 stipulate that the Ridge Road property is located in unincorporated Teller County. (ECF  
4 No. 22-3, ¶ 4.)

## 5 **II. PROCEDURAL HISTORY**

6 Plaintiff SEC commenced this action by filing a complaint in this Court on February  
7 29, 2016. (ECF No. 1.) It filed an amended complaint on July 22, 2016. (ECF No. 18.)  
8 Defendants answered Plaintiff’s amended complaint on August 8, 2016. (ECF No. 19.)

9 Plaintiff filed the instant motion for partial summary judgment on December 20,  
10 2016. (ECF No. 22.) Defendants filed their opposition to Plaintiff’s motion on January  
11 17, 2017. (ECF No. 24.) Plaintiff filed a reply in support of its motion on January 20,  
12 2017. (ECF No. 26.) The Court heard oral arguments on Plaintiff’s motion on March 16,  
13 2017. (ECF No. 31.) As directed by the Court (*see* ECF No. 32), on March 29, 2017,  
14 Plaintiff filed the Appendix to the November 14, 2016 stipulation of the parties (ECF No.  
15 34), which had been previously filed as Exhibit 1 to the declaration of Andrew O. Schiff  
16 filed in support of the SEC’s motion for partial summary judgment (*see* ECF No. 22-3).

## 17 **III. LEGAL STANDARDS**

18 Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment  
19 on factually unsupported claims or defenses and thereby “secure the just, speedy and  
20 inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327  
21 (1986). Summary judgment is appropriate if the materials in the record, together with the  
22 affidavits, if any, show that there is no genuine issue as to any material fact and that the  
23 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Albino v.*  
24 *Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc).

25 Each party’s position as to whether a fact is disputed or undisputed must be  
26 supported by: (1) citation to particular parts of materials in the record, including but not  
27 limited to depositions, documents, declarations, or discovery; or (2) a showing that the  
28 materials cited do not establish the presence or absence of a genuine dispute or that the

1 opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P.  
2 56(c)(1). The Court may consider other materials in the record not cited to by the parties,  
3 but it is not required to do so. Fed. R. Civ. P. 56(c)(3). If a party seeking summary  
4 judgment supports its motion by declaration, the declaration must set out facts that would  
5 be admissible in evidence and show that the declarant is competent to testify on the matters  
6 stated. Fed. R. Civ. P. 56(c)(4). An affidavit will not suffice to create a genuine issue of  
7 material fact if it is “conclusory, self-serving . . . [and] lacking detailed facts and any  
8 supporting evidence.” *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir.  
9 1997).

10 When the party seeking summary judgment has carried its burden under Rule 56(c),  
11 the burden shifts to the nonmoving party, who “must do more than simply show that there  
12 is some metaphysical doubt as to the material facts.” *Scott v. Harris*, 550 U.S. 372, 380  
13 (2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87  
14 (1986)). The nonmoving party “must come forward with specific facts showing that there  
15 is a *genuine issue for trial*.” *Matsushita*, 475 U.S. at 587. If the nonmoving party fails to  
16 make a sufficient showing of an element of its case, the moving party is entitled to  
17 judgment as a matter of law. *Celotex*, 477 U.S. at 325.

#### 18 **IV. ANALYSIS**

19 Plaintiff moves for summary judgment only with respect to its first cause of action  
20 against Defendants Strategic and Fellner. Plaintiff argues that Defendants, through the  
21 issuance of Strategic’s February and March 2014 press releases, violated Section 10(b) of  
22 the 1934 Securities Exchange Act and SEC Rule 10b-5 thereunder.<sup>2</sup> (ECF No. 22-1 at 5.)

##### 23 **A. Applicable Law**

24 Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful  
25 for any person, directly or indirectly, by the use of any means or  
26 instrumentality of interstate commerce . . . [t]o use or employ, in connection

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27 <sup>2</sup> Although the press releases were issued by Defendant Strategic (*see* ECF Nos. 22-7 to 22-12),  
28 Plaintiff asserts, and Defendants admit, that Defendant Fellner, in light of his position at Strategic, had the  
ultimate authority over the content of the press releases. (ECF No. 18, ¶ 24; ECF No. 19, ¶ 23.)

1 with the purchase or sale of any security . . . any manipulative or deceptive  
2 device or contrivance.

3 15 U.S.C. § 78j(b); *SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1092 (9th Cir.  
4 2010). SEC Rule 10b-5, which was promulgated under Section 10(b), makes it unlawful

5 for any person, directly or indirectly, by the use of any means or  
6 instrumentality of interstate commerce . . . [t]o make any untrue statement of  
7 a material fact or to omit to state a material fact necessary in order to make  
8 the statements made, in the light of the circumstances under which they were  
made, not misleading.

9 17 C.F.R. § 240.10b-5(b); *Platforms Wireless*, 617 F.3d at 1092.

10 Thus, to prevail on summary judgment on its Section 10(b) and Rule 10b-5 claim,  
11 the SEC must show that there is no genuine dispute of material fact as to whether  
12 Defendants (1) made a material misrepresentation or omission (2) in connection with the  
13 purchase or sale of any security (3) by use of any means or instrumentality of interstate  
14 commerce (4) with scienter. *See SEC v. Phan*, 500 F.3d 895, 907–08 (9th Cir. 2007)  
15 (quoting *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001)).

16 **B. Defendants Made Material Misstatements and Omissions in Strategic’s**  
17 **February and March 2014 Press Releases**

18 Section 10(b) and Rule 10b-5 prohibit the making of material misstatements or  
19 omissions. *Dain Rauscher, Inc.*, 254 F.3d at 856. A misstatement or omission is “material”  
20 if there is “a substantial likelihood that the disclosure of the omitted fact would have been  
21 viewed by the reasonable investor as having significantly altered the total mix of  
22 information made available.” *Platforms Wireless*, 617 F.3d at 1092 (quoting *Phan*, 500  
23 F.3d at 908). As such, Section 10(b) and Rule 10b-5 “impose[] a duty to disclose material  
24 facts that are necessary to make disclosed statements, whether mandatory or volunteered,  
25 not misleading.” *SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (quoting *Hanon v.*  
26 *Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992)). A statement or omission is  
27 “misleading” “if it would give a reasonable investor the impression of a state of affairs that  
28 differs in a material way from the one that actually exists.” *Reese v. BP Exploration*



1 (*Alaska Inc.*, 643 F.3d 681, 691 (9th Cir. 2011) (quoting *Berson v. Applied Signal Tech.,*  
2 *Inc.*, 527 F.3d 982, 985 (9th Cir. 2008)).

3 The determination of materiality in securities fraud cases “requires delicate  
4 assessments of the inferences a ‘reasonable shareholder’ would draw from a give set of  
5 facts.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Therefore, these  
6 assessments “should ordinarily be left to the trier of fact.” *Phan*, 500 F.3d at 908 (citing  
7 *In re Apple Computer Secs. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989)). “Only if the  
8 established omissions are ‘so obviously important to an investor that reasonable minds  
9 cannot differ on the question of materiality’ is the ultimate issue of materiality  
10 appropriately resolved ‘as a matter of law’ by summary judgment.” *TSC Indus., Inc.*, 426  
11 U.S. at 450 (quoting *Johns Hopkins University v. Hutton*, 422 F.2d 1124, 1129 (4th Cir.  
12 1970)).

13 Plaintiff argues that Defendants made material misstatements and omissions in  
14 Strategic’s February and March 2014 press releases. The press releases, Plaintiff argues,  
15 misled the public to believe that Strategic was acquiring, and then did acquire, a  
16 functioning marijuana cultivation facility that could quickly yield revenue when in fact it  
17 was prohibited from legally growing and distributing marijuana. (ECF No. 22-1 at 14–16.)

18 As the SEC correctly points out, Strategic was prohibited from operating its  
19 marijuana cultivation facility under two facets of Colorado law. First, the Colorado Retail  
20 Marijuana Code requires that all retail marijuana establishments, including marijuana  
21 cultivation facilities, be licensed by the Colorado State Licensing Authority. Colo. Rev.  
22 Stat. §§ 12-43.4-103(17), -309(2) (2016). In 2014, when Strategic acquired BearPot and  
23 published the press releases at issue, the Code expressly prohibited the issuance of a license  
24 to the owner of a marijuana cultivation facility who had not been a resident of Colorado  
25 for at least two years prior to the date of the owner’s license application. Colo. Rev. Stat.  
26 § 12-43.4-306(k) (2013). Both Strategic and Fellner qualified as owners of the Colorado  
27 marijuana facility under Colorado licensing laws. *See* 1 Colo. Code Regs. §§ 212-2.103,  
28 .204 (2013). However, neither Defendant was a Colorado resident and therefore both

1 Defendants were precluded from obtaining the license necessary to operate the facility.

2 Second, in 2013, Teller County, Colorado, the county in which Strategic's facility  
3 was located, prohibited all marijuana businesses within its unincorporated boundaries. *See*  
4 Teller County, Colo., Ordinance 18 (March 14, 2013). Thus, when Strategic acquired  
5 BearPot and its existing marijuana cultivation facility in February 2014, it was prohibited  
6 under the March 2013 Teller County Ordinance from operating the facility on Ridge Road.

7 Not one of Strategic's February and March 2014 press releases mentioned that  
8 Defendants were prohibited from legally operating the marijuana cultivation facility that  
9 Strategic had acquired. To the contrary, Strategic's press releases contained statements  
10 that would lead the public to believe that Strategic was legally operating a functioning  
11 marijuana cultivation facility that would soon yield revenue. The first press release, dated  
12 February 10, 2014, stated that Strategic had "entered into meaningful negotiations for the  
13 purchase of a Marijuana Growing facility located in Teller County, Colorado" and, after  
14 having "fully evaluated the industry," expected to "yield a harvest and generate revenues  
15 from the sale of plants by the 3rd Quarter of [2014]." (ECF No. 22-7 at 2.) The press  
16 release made no mention of Teller County's prohibition against all marijuana  
17 establishments or Defendants' inability to obtain a license to operate the cultivation facility  
18 based on their residency.

19 The second press release, dated February 20, 2014, announced that Strategic had  
20 "completed negotiations[] and . . . signed an agreement for the purchase of Bearpot, Inc.,  
21 [the] controlling entity of an existing Marijuana Growing facility located in Teller County,  
22 Colorado." (ECF No. 22-8 at 2.) The press release stated that the acquisition brought with  
23 it "existing equipment and inventory" and that plans for the marijuana cultivation facility  
24 were already underway. (*Id.*) Strategic claimed that it had "evaluated the industry and  
25 expect[ed] to be able to yield a harvest and generate revenues from the sale of plants by  
26 the 4th Quarter of th[e] year." (*Id.*) The press release made no mention of Teller County's  
27 prohibition against all marijuana establishments or Defendants' inability to obtain a license  
28 to operate the cultivation facility.

1           The third press release, dated February 24, 2014, declared that Strategic “[n]ow . . .  
2 own[ed]” and was “the controlling entity for” a marijuana growing facility. (ECF No. 22-  
3 9 at 2.) In addition, the press release stated that Strategic had “started drafting a short term  
4 plan to modernize and expand the cultivation processes in the facility.” (*Id.*) Again,  
5 Strategic noted that it anticipated its “first yield to harvest and generat[e] additional  
6 revenues with the expanded capabilities by Q4 of 2014” and did not mention the Teller  
7 County Ordinance or Defendants’ inability to obtain a license to operate the facility. (*Id.*)

8           The fourth press release, dated February 25, 2014, stated that Strategic was working  
9 with BearPot’s president “to develop and expand further into the Colorado Marijuana  
10 market.” (ECF No. 22-10 at 2.) This press release acknowledged, for the first time, that  
11 the marijuana cultivation facility was not yet licensed; however, it did not suggest that  
12 obtaining a license would be problematic. Instead, it stated that BearPot had the funding  
13 from Strategic to “make sure [it would] be properly licensed and permitted.” (*Id.*) Strategic  
14 reiterated that it had “evaluated the industry and expect[ed] to be able to yield a harvest  
15 and generate revenues from the sales by the 4th Quarter of th[e] year.” (*Id.*) The press  
16 release made no mention of the Teller County Ordinance or Defendants’ legal inability to  
17 obtain said licenses and permits.

18           The fifth press release, dated February 28, 2014, summarized an interview of  
19 Defendant Fellner by SmallCapReporter regarding Strategic’s entrance into the Colorado  
20 marijuana market. (ECF No. 22-11.) SmallCapReporter posted the interview transcript  
21 online the same day that the press release issued. (ECF No. 22-21.) The press release  
22 quoted Defendant Fellner as having stated during the interview that “[t]he largest amount  
23 of growth that we will see in the next 3–6 months for [Strategic] will surely be in the  
24 growing and distributing of medical and recreational marijuana.” (ECF No. 22-11 at 2.)  
25 When asked during the interview what Defendant Fellner thought were the key risks  
26 Strategic then-currently faced, he responded, “The key risks that the company faces right  
27 now are really related to human resources and making sure that all of our new employees  
28 are hard working and responsible. As far as the market goes we are doing great and I

1 couldn't be happier with the volume in the stock.” (ECF No. 22-21 at 2.) Neither the press  
2 release nor the interview transcript made any mention of Teller County's prohibition  
3 against all marijuana establishments or Defendants' inability to obtain a license to operate  
4 the cultivation facility.

5 In the sixth and final press release, dated March 27, 2014, Strategic stated that it had  
6 experienced “a very busy quarter.” (ECF No. 22-12 at 2.) Defendant Fellner, on behalf of  
7 Strategic, articulated the company's “intent to keep [its] shareholders and investor fully  
8 informed . . . .” (*Id.*) The press release announced that BearPot had completed “all  
9 electrical and structural upgrades to [the] facility,” a “new state of the art equipment  
10 purchase from Growlife,” and “the installation of all new equipment at [the] facility.” (*Id.*)  
11 It continued, “We have acquired the highest quality equipment for this operation, and are  
12 confident that the facility will run extremely efficient [sic].” (*Id.*) The press release did  
13 not mention Teller County's prohibition against all marijuana establishments or  
14 Defendants' inability to obtain a license to operate the cultivation facility.

15 Based on the foregoing facts, the Court concludes that there is no genuine issue of  
16 fact as to whether Strategic's February 10, 2014 through February 25, 2014 press releases  
17 contained material misstatements and omissions of material facts.<sup>3</sup> Strategic represented  
18 both that it had “evaluated” or “fully evaluated the industry” and that it expected to “yield  
19 a harvest” and “generate revenues” within the year. (*See* ECF Nos. 22-7 to 22-10.) There  
20 is no doubt that the disclosure that Strategic's marijuana cultivation facility was located in  
21 a county that prohibits these facilities and that Defendants were prohibited from obtaining  
22 a license to legally operate the facility based on their residency would have been viewed  
23 by the reasonable investor as having significantly altered the total mix of information that  
24 Strategic provided to the public. Due to the material misstatements and omissions in  
25 Strategic's press releases, the press releases were misleading. Without question,  
26 Strategic's press releases would have given the reasonable investor the impression of a  
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28 <sup>3</sup> Because these four press releases are clearly misleading, the Court need not evaluate the last two  
press releases.

1 state of affairs—that Strategic had acquired and was legally operating a marijuana  
2 cultivation facility—that differed materially from the one that actually existed—that  
3 Strategic’s operation of its Colorado marijuana cultivation facility was a legal  
4 impossibility.

5 Defendants, in their opposition, offer a number of arguments as to why Plaintiff  
6 should not prevail on summary judgment with respect to this issue. For the reasons below,  
7 Defendants’ arguments fail.

8 First, Defendants argue that Strategic’s press releases were not misleading because  
9 Strategic “moved [its] facility to El Paso County, where marijuana cultivation is legal.”  
10 (ECF No. 24 at 6.) In support of this claim, Defendants point to Strategic’s September  
11 2014 SEC Form 1-A, which states, “We had only a small facility in El Paso County,  
12 Colorado where we grew approximately 50 marijuana plants.” (ECF No. 24-1 at 23.)  
13 Plaintiff objects to Defendants’ use of Strategic’s own out-of-court statement to prove the  
14 truth of the fact that Strategic moved its facility to El Paso County on the basis that this  
15 statement is inadmissible hearsay. (ECF No. 26 at 5–6 (citing Fed. R. Evid. 801(c)).)

16 A district court may consider hearsay evidence submitted in an inadmissible form at  
17 the summary judgment stage. *JL Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d  
18 1098, 1110 (9th Cir. 2016). However, it may do so only if the content of the evidence  
19 proffered could later be provided in an admissible form at trial. *Id.*; see *Fraser v. Goodale*,  
20 342 F.3d 1032, 1036 (9th Cir. 2003). When a party objects that material cited to dispute a  
21 fact cannot be presented in a form that would be admissible at trial, as Plaintiff does here,  
22 the burden shifts to the proponent of the evidence to either show that the material is  
23 admissible as presented or explain the admissible form that it anticipates it will produce at  
24 trial. Fed. R. Civ. P. 56(c)(2) advisory committee’s note to 2010 amendment.

25 Here, neither side fully or adequately analyzed in their pleadings the issues of  
26 admissibility with respect to Strategic’s September 2014 Form 1-A. Moreover, neither  
27 side was prepared to meaningfully address these issues at oral argument. After some  
28 prompting, Defendants suggested the document would be admissible as a business record

1 under Federal Rule of Evidence 803(6) or as a public record under Federal Rule of  
2 Evidence 803(8) through the testimony of a witness from the SEC. Both of these  
3 exceptions to the hearsay rule can be defeated if the opponent of the evidence shows that  
4 “the source of information or the method of circumstances of preparation indicate a lack of  
5 trustworthiness.” Fed. R. Evid. 803(6)(E), 803(8)(B). At oral argument, Plaintiff called  
6 into question the trustworthiness of the contents of Strategic’s September 2014 Form 1-A.  
7 However, the vague arguments of the parties did not address the specifics necessary for the  
8 Court to rule on Plaintiff’s objection to the admissibility of this document.

9       Ultimately, the Court need not determine the admissibility of Strategic’s Form 1-A,  
10 as Defendants have an even more fundamental problem than that of admissibility.  
11 Specifically, Strategic’s Form 1-A, even if assumed to be admissible, does not create a  
12 genuine dispute of material fact. As stated above, Strategic’s Form 1-A is proffered as the  
13 only evidence in support of Defendants’ claim—made only in their opposition and not in  
14 any supporting declaration—that Strategic, “shortly [after purchasing the existing  
15 cultivation facility,] moved [its] facility to El Paso County, where marijuana cultivation is  
16 legal.” (ECF No. 24 at 6.) To be material, any evidence of an alleged move of the facility  
17 to El Paso County must be tied to the period when Strategic issued the press releases that  
18 are the subject of this litigation. There is no such evidence in the record. To the contrary,  
19 on August 28, 2014, five months after the last of the relevant press releases issued, Strategic  
20 responded to the SEC’s subpoena for all documents “evidencing, showing, and reflecting  
21 Bearpot’s marijuana facility, including . . . the location and/or address of such facilities”  
22 and documents “sufficient to identify the location . . . of [the] ‘Marijuana Growing facility  
23 located in Teller County, Colorado,’ as described in a press release issued by [Strategic]  
24 on February 20, 2014 . . . [and] all other Bearpot growing facilities or growing houses.”  
25 (ECF No. 22-13 at 6–7.) The only documents produced by Strategic responsive to the issue  
26 of the location of the marijuana growing facility were the lease for the residential property  
27 located at 847 Ridge Road in unincorporated Teller County and an invoice for electrical  
28 services performed at that property on or around March 17, 2014. (ECF No. 22-17; ECF

1 No. 34-19 at 1–16.) No documents produced in response to the SEC’s subpoena indicate  
2 in any way a move of the cultivation facility to El Paso County. (*See* ECF No. 34-18, ECF  
3 No. 34-19.) Furthermore, Defendants conceded at oral argument that they have no  
4 admissible evidence of a move date. Thus, Defendants fail to point to any evidence that  
5 places into dispute the material fact that *at the time* the subject press releases issued,  
6 Defendants could not have operated the BearPot marijuana cultivation facility because it  
7 was located within the unincorporated area of Teller County.

8       Second, Defendants argue that Strategic’s press releases were not misleading  
9 because the requirement that Defendants be Colorado residents for at least two years before  
10 obtaining a license to operate the marijuana cultivation facility was repealed on June 10,  
11 2014. (ECF No. 24 at 6.) Here, Defendants’ assertion is simply legally incorrect. The  
12 residency requirement set forth in the Colorado Retail Marijuana Code was repealed on  
13 June 10, 2016, over two years after Strategic acquired BearPot and published the press  
14 releases at issue. *See* S. 40, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016).<sup>4</sup> Thus, there  
15 is no genuine issue for trial with respect to whether the residency requirement was in place  
16 at the time Strategic acquired BearPot and issued the February and March 2014 press  
17 releases.

18       Third, Defendants argue that Strategic’s press releases did not contain material  
19 misstatements and omissions because they informed the public only of the company’s  
20 *intention* to enter the Colorado marijuana industry and did not indicate that Strategic was  
21 conducting a business. (ECF No. 24 at 6–7.) Further, Defendants appear to argue that its  
22 press releases contained only forward-looking statements that were protected by the “Safe  
23 Harbor” language that Strategic included in the releases. Specifically, the “Safe Harbor”  
24 declarations contained in the press releases stated, “Forward-Looking Statements are  
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27       <sup>4</sup> The Court takes judicial notice of these regulations. *See Martinez v. Welk Group, Inc.*, No. 09-  
28 cv-2883 MMA (WMc), 2011 WL 90313, at \*2 (S.D. Cal. Jan. 11, 2011) (“Courts routinely take judicial  
notice of state or federal statutes and regulations.”). Furthermore, Defendants conceded this point at oral  
argument on March 16, 2017.

1 included within the meaning of Section 27A of the Securities Act of 1933, and Section 21E  
2 of the Securities Exchange Act of 1934, as amended,” that such forward looking statements  
3 “involve risks, uncertainties and contingencies, many of which are beyond [Strategic’s]  
4 control,” and that Strategic is “under no obligation to (and expressly disclaim any such  
5 obligation to) update or alter [its] forward-looking statements, whether as a result of new  
6 information, future events or otherwise.” (ECF Nos. 22-7 to 22-12.)

7         This argument fails to create a genuine issue of fact for trial. As discussed above,  
8 Strategic’s press releases went well beyond a statement of the company’s mere intention  
9 to undertake a new business venture. The press releases gave the public the unmistakable  
10 false impression that Strategic had acquired a functioning marijuana cultivation facility  
11 with existing equipment and inventory that would generate revenue in the short term. For  
12 the reasons addressed above, Defendants’ failure to mention that Strategic was barred from  
13 obtaining a license to legally operate a marijuana cultivation facility as contemplated in the  
14 press releases was misleading and material.

15         In addition, the Safe Harbor provisions of the Securities Litigation Reform Act of  
16 1995 do not apply in the instant case. As Plaintiff correctly points out in its reply, the  
17 protections afforded by the Safe Harbor provisions applies only in private securities actions  
18 and not in enforcement actions brought by the SEC. *See* 15 U.S.C. §§ 77z-2(c)(1), 78u-  
19 5(c)(1); *Gebhart*, 595 F.3d at 1041 n.9. Furthermore, Congress expressly excluded all  
20 issuers of penny stocks from the protections afforded by the Safe Harbor provisions. *See*  
21 15 U.S.C. §§ 77z-2(b)(1)(c), 78u-5(b)(1)(c).<sup>5</sup> Thus, any litigation protections offered by  
22 the Safe Harbor provisions are inapplicable here.

23         Finally, Defendants argue that Plaintiff should not prevail on summary judgment  
24 because Strategic’s press releases did not have an influence over Strategic’s investors or  
25 an effect on Strategic’s stock value. (ECF No. 24 at 7–8.) This argument, like Defendants’  
26 others, fails to create a genuine issue of material fact. As Plaintiff correctly points out in  
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28         <sup>5</sup> At the March 16, 2017 oral argument, Defendants conceded that they had nothing to refute this  
authority.



1 its reply, materiality in the context of securities fraud does not depend on a demonstration  
2 of a market reaction to a misstatement. *United States v. Jenkins*, 633 F.3d 788, 802 (9th  
3 Cir. 2011). Thus, a lack of a positive reaction from the stock market to the press releases  
4 is irrelevant to the materiality of the misstatements and omissions contained therein.

5 For the reasons above, the Court concludes that no reasonable juror could find that  
6 Defendants did not make material and misleading misstatements and omissions in  
7 Strategic’s February 10, 20, 24, and 25, 2014 press releases.

8 **C. Defendants’ Material Misstatements and Omissions Were Made in**  
9 **Connection with the Purchase or Sale of a Security**

10 In the context of Section 10(b) and Rule 10b-5, false and misleading statements are  
11 made “in connection with” securities trading whenever such statements are made “in a  
12 manner reasonably calculated to influence the investing public.” *McGann v. Ernst &*  
13 *Young*, 102 F.3d 390, 393 (9th Cir. 1996) (quoting *Wessel v. Buhler*, 437 F.2d 279, 282  
14 (9th Cir. 1971)). Liability under Section 10(b) extends to material fraudulent statements  
15 contained in a publicly disseminated document, “such as a press release . . . on which an  
16 investor would presumably rely.” *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir.  
17 1993); *see also Phan*, 500 F.3d at 908.

18 The Court concludes that there is no question of fact as to whether the “in connection  
19 with” requirement is satisfied here. Defendants’ material misstatements and omissions  
20 were made in press releases that were publicly disseminated and intended to influence  
21 potential investors. The February 24, 2014 press release specifically states that the purpose  
22 of that communication was to maintain an “active line of communication with current and  
23 potential shareholders.” (ECF No. 22-9 at 2.) Thus, the Court concludes that the “in  
24 connection with” requirement is met. Defendants fail to provide any evidence to the  
25 contrary.<sup>6</sup>

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27  
28 <sup>6</sup> Defendants do not address in their opposition whether the misstatements and omissions were  
made in connection with the purchase or sale of a security. (*See* ECF No. 24.) At oral argument on March  
16, 2017, Defendants conceded that they do not dispute the evidence as to this element.

1           **D. Defendants’ Material Misstatements and Omissions Were Made by Use**  
2           **of an Instrumentality of Interstate Commerce**

3           The Ninth Circuit has explicitly held that “the Internet is an instrumentality and  
4 channel of interstate commerce.” *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir.  
5 2007) (quoting *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam)).  
6 By disseminating its press releases via the Internet, Strategic made its material  
7 misstatements and omissions by use of an instrumentality and channel of interstate  
8 commerce. There is no issue of fact for trial with respect to this element.<sup>7</sup>

9           **E. Defendants’ Material Misstatements and Omissions Were Made with**  
10           **Scienter**

11           Scienter, within the context of section 10(b) and Rule 10b-5, “is the ‘mental state  
12 embracing intent to deceive, manipulate, or defraud.’” *SEC v. Todd*, 642 F.3d 1207, 1215  
13 (9th Cir. 2011) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)).  
14 Reckless conduct may also constitute scienter. *Id.* (citing *Dain Rauscher, Inc.*, 254 F.3d at  
15 856); *Gebhart v. SEC*, 595 F.3d 1034, 1041 (9th Cir. 2010). The Ninth Circuit has adopted  
16 the following standard with respect to reckless conduct in the context of securities fraud  
17 actions:

18           [R]eckless conduct may be defined as a highly unreasonable omission,  
19 involving not merely simple, or even inexcusable negligence, but an extreme  
20 departure from the standards of ordinary care, and which presents a danger of  
21 misleading buyers or sellers that is either known to the defendant or is so  
obvious that the actor must have been aware of it.

22 *In re VeriFone Holdings, Inc. Securities Litigation*, 704 F.3d 694, 702 (9th Cir. 2012)  
23 (quoting *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc)).  
24 Scienter requires a subjective inquiry into a defendant’s actual state of mind. *Gebhart*, 595  
25 F.3d at 1042. Courts may consider the objective unreasonableness of a defendant’s conduct  
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27           <sup>7</sup> Defendants also do not address in their opposition whether the misstatements and omissions  
28 were made by use of an instrumentality of interstate commerce. (*See* ECF No. 24.) At oral argument on  
March 16, 2017, Defendants conceded that they do not dispute the evidence as to this element.

1 to raise an inference of scienter; however, the ultimate question is whether the defendant  
2 knew his statements were false or was consciously reckless as to their truth or falsity. *Id.*;  
3 *see Ernst & Ernst*, 425 U.S. at 206 (“There is no indication that Congress intended anyone  
4 to be made liable [under Section 10(b)] unless he acted other than in good faith.”).

5 Plaintiff argues that it was, at a minimum, deliberately reckless for Defendants to  
6 announce Strategic’s imminent entry into a market without disclosing the legal prohibitions  
7 to its doing so. (ECF No. 22-1 at 6, 18.)

8 Defendant Fellner has consistently invoked his Fifth Amendment privilege not to  
9 testify about the press releases. At Defendant Fellner’s December 13, 2016 deposition, the  
10 SEC asked Fellner whether, prior to March 27, 2014, he attempted to find out or received  
11 any information about whether: (1) marijuana cultivation was permitted in unincorporated  
12 Teller County, Colorado; (2) Strategic or BearPot would be able to obtain a Colorado  
13 license to cultivate marijuana; and (3) his status as a nonresident of Colorado would affect  
14 the ability of Strategic or BearPot to obtain a Colorado license to cultivate marijuana. (ECF  
15 No. 22-19 at 4–5.) Fellner responded, “I take the Fifth,” to all of the SEC’s inquiries. (*Id.*)  
16 In addition, Mr. Fellner declared that he would continue to assert the Fifth Amendment  
17 privilege regarding all questions pertaining to Strategic’s entry into the Colorado marijuana  
18 cultivation market, the press releases Strategic issued in February and March 2014, and  
19 any other matters related to the amended complaint in this case. (*Id.* at 5.) Due to  
20 Defendant Fellner’s consistent invocation of the Fifth Amendment privilege, Plaintiff  
21 urges this Court to draw an adverse inference against Defendants and shift to them the  
22 burden of proving their good faith. (ECF No. 22-1 at 6, 18.)

23 Parties are free to invoke the Fifth Amendment in civil cases, but when they do,  
24 courts are equally free to draw adverse inferences from their failure to offer proof. *SEC v.*  
25 *Colello*, 139 F.3d 674, 677 (9th Cir. 1998). In addition, district courts have broad discretion  
26 in responding to a party’s invocation of the Fifth Amendment. *Id.* For example, a district  
27 court may shift the burden of proof on summary judgment to the party who invokes the  
28 privilege. *Id.* On summary judgment, an adverse inference alone is not enough to support

1 the absence of a genuine dispute of material fact. *Id.* at 678 (citing *Lefkowitz v.*  
2 *Cunningham*, 431 U.S. 801, 808 n.5 (1977); *Baxter v. Palmigiano*, 425 U.S. 308, 318  
3 (1976)). Such an inference may be drawn only when there is independent evidence of the  
4 fact to which the party refuses to answer. *Id.*; *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232  
5 F.3d 1258, 1264 (9th Cir. 2000). When there is no corroborating evidence to support the  
6 fact under inquiry, no negative inference is permitted. *Glanzer*, 232 F.3d at 1264.

7 Defendants argue that public policy should preclude the shifting of the burden to the  
8 them because they invoked their Fifth Amendment rights to protect them from prosecution  
9 under federal marijuana laws unrelated to the “claims and allegations in this case.” (ECF  
10 No. 24 at 5.) Defendants provide no evidence to support this factual assertion and cite no  
11 authority for their legal position.

12 The Court finds that Plaintiff sets forth sufficient independent evidence for the Court  
13 to draw the adverse inference that Defendants acted with scienter when they made material  
14 misstatements and omissions in the press releases at issue. Three of Strategic’s press  
15 releases claimed that the company had “evaluated the industry” or “fully evaluated the  
16 industry” and “expect[ed] to be able to yield a harvest and generate revenues from the sale”  
17 by the 3rd or 4th Quarter of 2014. (ECF Nos. 22-7, -8, -10.) Due to the legal prohibitions  
18 that Strategic faced with respect to operating its marijuana cultivation facility, it cannot be  
19 that both of these statements are true. If it were true that Strategic fully evaluated the  
20 industry, it must have learned that it could not legally operate the facility that it acquired.  
21 Thus, it can only be that Strategic either: (1) knowingly made the false statement that its  
22 facility could generate revenue in 2014 after learning that it legally could not; or (2)  
23 knowingly made the false statement that it evaluated the industry when it in fact had not,  
24 while also being consciously reckless with respect to the truth or falsity of its statement  
25 that its facility was poised to generate revenue in 2014. Thus, the Court finds that there is  
26 independent corroborating evidence of Defendants’ *mens rea* and this Court may properly  
27 draw an adverse inference from Defendant Fellner’s Fifth Amendment invocation and shift  
28 to Defendants the burden of proving that they did not act with scienter when they issued

1 the subject press releases.

2 Defendants fail to meet this burden. First, Defendants argue that they did not act  
3 with scienter because neither Defendant Strategic nor Defendant Fellner were trading in  
4 the market during the relevant period. (ECF No. 24 at 8.) This argument is not only  
5 irrelevant but also unsubstantiated by any materials in the record.

6 Second, Defendants argue that they did not act with scienter because they made  
7 significant efforts to comply with Colorado law by consulting with Clifton Black, an  
8 attorney who specialized in Colorado's new marijuana laws. (ECF No. 24 at 3.) This  
9 argument fails to preclude summary judgment against Defendants. To establish an advice  
10 of counsel defense, Defendants must show that they made a full disclosure of all material  
11 facts to their attorney and that they relied in good faith on the specific course of conduct  
12 recommended by the attorney. *United States v. Bush*, 626 F.3d 527, 539 (9th Cir. 2010)  
13 (citing *United States v. Ibarra-Alcaarez*, 830 F.2d 968, 973 (9th Cir. 1968)). Defendants do  
14 not argue that they disclosed to attorney Black the Teller County location of their marijuana  
15 cultivation facility and the fact that Defendant Fellner was a California resident; that  
16 attorney Black, aware of these facts, advised Defendants that they could legally operate the  
17 marijuana cultivation facility that they had acquired; or that Defendants relied in good faith  
18 on that specific advice. Instead, Defendants have asserted the attorney-client privilege with  
19 respect to their communications with attorney Black. (ECF No. 24-1 at 11.) This Court  
20 will not permit Defendants to assert an advice of counsel defense and at the same time  
21 refuse to disclose the nature of their communications that form the basis for the defense.  
22 *See Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d  
23 1186, 1196 (9th Cir. 2001) (holding that a district court may preclude a defendant from  
24 invoking the advice-of-counsel defense when he refused to answer questions regarding  
25 relevant communications with counsel); *see also Chevron Corp. v. Pennzoil Co.*, 974 F.2d  
26 1156, 1162 (9th Cir. 1992) (“The privilege which protects attorney-client communications  
27 may not be used both as a sword and shield.”).

28 ///

1 Even if the Court considered Defendants' advice-of-counsel defense, the defense  
2 would still fail to defeat Plaintiff's motion for summary judgment for lack of factual  
3 support. The November 28, 2016 letter from attorney Black to Plaintiff's counsel that  
4 Defendants proffer in support of their defense indicates that Defendants did not consult  
5 with attorney Black until at least February 14, 2014, four days *after* Strategic's first press  
6 release claimed that Strategic had "fully evaluated the industry." (ECF No. 24-1 at 11.)  
7 Thus, even fully crediting an advice-of-counsel defense as of February 14, 2014,  
8 Defendants would still face summary judgment of this claim based upon the February 10,  
9 2014 press release.

10 Third, Defendants argue that they did not act with scienter because they retained two  
11 marijuana consulting firms to assist with the business. (ECF No. 24 at 3.) This argument  
12 also fails to defeat summary judgment against Defendants. According to Defendants,  
13 Strategic consulted with the two firms on "how best to produce medical marijuana," "which  
14 kinds of plants to grow and then how to convert it to oils or edibles including identifying  
15 the amount of THC or CBDs in each oil or edible," and "how to set up the overall grows  
16 as to the type of greenhouses, HVAC systems, growing equipment and variety of plants,  
17 as well as other details such as soil nutrients and how to properly trim the flowers and make  
18 best use of all flowers and trim." (*Id.*) Defendants neither argue that they consulted with  
19 the firms regarding the legality of Strategic's marijuana cultivation facility nor proffer any  
20 evidence that supports the fact that Defendants obtained and relied in good faith upon  
21 advice from the consulting firms regarding the legality of Strategic's cultivation facility.  
22 (*See id.*) Thus, Defendants fail to show how their retention of the consulting firms creates  
23 a genuine dispute of material fact for trial as to whether Defendants acted with scienter  
24 when they made material misstatements and omissions regarding Strategic's legal ability  
25 to operate its marijuana cultivation facility.

26 Finally, Defendants argue that they did not act with scienter because they moved the  
27 cultivation facility from Teller County to El Paso County, where marijuana cultivation is  
28 legal. (ECF No. 24 at 3.) As discussed above, this claim fails to defeat Plaintiff's motion

1 for summary judgment because Defendants have failed to put forth any evidence tying any  
2 such claimed move to the time that the subject press releases issued. And, in any event,  
3 moving the facility to El Paso County would not remedy the second legal prohibition to  
4 Defendants' operating their marijuana cultivation facility, that Defendant Fellner could not  
5 obtain a license to operate the marijuana cultivation facility due to his being a California  
6 resident. Accordingly, Defendants' assertion that they moved the cultivation facility to El  
7 Paso County fails to meet their burden on the issue of scienter.

8 For the reasons above, the Court concludes that no reasonable juror could find that  
9 Defendants did not act with scienter when they made material misstatements and omissions  
10 in the subject press releases.

11 **V. CONCLUSION**

12 For the reasons above, Plaintiff's motion for partial summary judgment (ECF No.  
13 22) is **GRANTED**.

14 **IT IS SO ORDERED.**

15 Dated: April 17, 2017



Hon. Jill L. Burkhardt  
United States Magistrate Judge