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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re FRANK MATTHEW HOGLE and
CHARLENE ANNE HOGLE,

Debtors.

In re HAROLD BRUCE HOGLE and
KIMBERLY RAE HOGLE,

Debtors.

GARY SMESTAD, et al.,

Plaintiffs,

v.

FRANK MATTHEW HOGLE, CHARLENE
ANNE HOGLE, HAROLD BRUCE
HOGLE, and KIMBERLY RAE HOGLE

Defendants.

Chapter 7

Case No. 11-bk-08991-SSC
Case No. 12-bk-00046-GBN

Adv. No. 11-ap-1205-SSC
(Consolidated with Adversary Case No. 12-
ap-183)

(Not for Publication- Electronic Docketing
ONLY)

MEMORANDUM DECISION

1 I. INTRODUCTION

2 This matter comes before the Court on the Plaintiffs’ Motion for Partial Summary
3 Judgment (“Motion”) against Frank Matthew Hogle and Charlene Hogle, and Harold and
4 Kimberly Hogle, filed on October 5, 2012, and the Response and Reply filed thereto.¹ On
5 January 10, 2013, the Court heard oral argument on the current Motion and took the matter under
6 advisement. The Motion alleges non-dischargeability pursuant §523(a)(19)–violation of
7 securities laws. There is disagreement as to whether bankruptcy courts may determine liability
8 arising from alleged violations of securities laws for purposes of dischargeability under
9 § 523(a)(19).² This Court raised the issue at oral argument. The parties consented to this Court’s
10 authority and requested the Court make a determination of liability under the Arizona securities
11 law. Therefore, in this Memorandum Decision, the Court has set forth its findings of fact and
12 conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The issues
13 addressed herein constitute a core proceeding over which this Court has jurisdiction pursuant to
14 the parties’ consent. 28 U.S.C. §§ 1334(b) and 157(b) (West 2013).

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18 **1.** A separate adversary proceeding had been initiated against Harold and Kimberly
19 Hogle in connection with their administrative case, but it was subsequently consolidated with the
20 adversary against Frank Matthew Hogle and Charlene Hogle.

21 **2.** Before 2005, the language in § 523(a)(19) explicitly limited this discharge exception to
22 pre-petition judgments finding a violation of securities law. Clearly, this precluded a bankruptcy
23 court from making a determination of securities violations and entering such a judgment. In
24 2005, the language was changed to allow for the exception to be based on judgments made
25 “before, on, or after the date on which the petition was filed.” Some bankruptcy courts have
26 interpreted this change to mean that bankruptcy courts may now determine whether a party
27 violated the securities laws. *See In re Chan*, 355 B.R. 494, 497 (Bank. E.D. Pa. 2006); *In re*
Jensen-Ames, 2011 WL 1238929 (Bank. W.D. Wash. 2011). Others have concluded that the new
language merely affected a temporal change, allowing plaintiffs to obtain a judgment post-
petition (and after obtaining appropriate stay relief) in courts other than the bankruptcy court.
See In re Jafari, 401 B.R. 494 (Bankr. D. Colo. 2009); *In re Pujdak*, 462 B.R. 560 (Bankr. D.
S.C. 2011). *In re Bundy*, 468 B.R. 916, 918 (Bank. E.D. Wash. 2012); *In re Anderson*, 2012 WL
3133827 (Bank. D. Idaho 2012).

1 II. FACTUAL BACKGROUND

2 In 2006, Debtor Frank Matthew Hogle (“Matt Hogle”) and his brother Harold
3 Hogle (collectively, the “Hogles”) formed an Arizona limited liability company known as True
4 Imaging LC (“True Imaging”). The Hogles were the only shareholders and True Imaging was
5 managed by True Imaging Management Corporation, an Arizona corporation. The business of
6 True Imaging was to establish a medical imaging center for patients referred by physicians in the
7 metropolitan Phoenix area. In connection with promoting investment in the company, True
8 Imaging issued a Private Placement Memorandum (“PPM”) to potential investors, including the
9 Plaintiffs, dated May 1, 2007. True Imaging also promulgated two other documents in
10 connection with the sale of securities: (1) “True Imaging LC: The Opportunity” and (2)
11 “Executive Summary for True Imaging, LC.”

12 In sum, the PPM provided that True Imaging was to sell a minimum of 5 Units
13 and a maximum of 8,000 units at a price of \$1,000 per unit. True Imaging would then keep the
14 proceeds in a segregated bank account in the metropolitan Phoenix area until the company either
15 entered a lease with Hogle Brothers LLC (“Hogle Bros.”)—a company owned by Matt and Harold
16 Hogle— or purchased certain medical imaging equipment. True Imaging eventually was to use
17 the proceeds to purchase medical imaging equipment, to fund tenant improvements and other
18 capital improvements, to provide working capital, and to cover the costs of the offering.

19 III. DISCUSSION

20 A. Standard for Summary Judgment

21 A motion for summary judgment should be granted if the movant has shown that
22 there are no genuine issues of material fact and the movant is entitled to judgment as a matter of
23 law. Fed.R.Bankr.P. 7056(c). Ruling on a motion for summary judgment necessarily implicates
24 that substantive evidentiary standard of proof which would apply at trial. Anderson v. Liberty
25 Lobby, Inc., 477 U.S. 242 at 252, 106 S.Ct. 2505 at 2512, 91 L.Ed.2d 202 (1986);
26 FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010). A material fact is
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1 genuine if the evidence is such that a reasonable jury could return a verdict in favor of the non-
2 moving party. Id. Procedurally, "the proponent of a summary judgment motion bears a heavy
3 burden to show that there are no disputed facts warranting disposition of the case on the law
4 without trial." In re Younie, 211 B.R. 367, 372 (9th Cir. BAP 1997). Once that burden has been
5 met, "the opponent must affirmatively show that a material issue of fact remains in dispute." Id.

6 The opponent may not assert the existence of some alleged factual dispute
7 between the parties. Liberty Lobby, 477 U.S. 242 at 252, 106 S.Ct. 2505 at 2512, 91 L.Ed.2d
8 202; " Younie, 211 B.R. at 372. Instead, to demonstrate that a genuine factual issue exists, the
9 objector must produce affidavits which are based on personal knowledge, and the facts set forth
10 therein must be admissible in evidence. Younie, 211 B.R. at 372. In addition, summary
11 judgment is reviewed in the light most favorable to the non-moving party. In re SNTL Corp.,
12 571 F.3d 826, 834 (9th Cir. 2009); Younie, 211 B.R. at 372.

13 **B. § 523(a)(19) Non-Dischargeability Claims: Violation of A.R.S. § 44-1991**

14 Pursuant to 11 U.S.C. § 523(a)(19), a monetary debt is nondischargeable to the
15 extent that it is for the violation of any federal or state securities laws (or related regulations or
16 orders) resulting in a judgment, order, consent order, or decree entered in any federal or state
17 judicial or administrative proceeding. The parties here have agreed that the bankruptcy court
18 may enter such an order finding a violation of securities law. Therefore, this Court must
19 determine whether Defendant Debtors violated relevant Arizona securities law.

20 Arizona securities fraud law is governed by Sections 44-1991 to 44-2000.
21 Section 44-1991 provides:

22
23 A. It is a fraudulent practice and unlawful for a person, in
24 connection with a transaction or transactions within or from this
25 state involving an offer to sell or buy securities, or a sale or
26 purchase of securities, including securities exempted under
27 § 44-1843 or 44-1843.01 and including transactions exempted
28 under § 44-1844, 44-1845 or 44-1850, directly or indirectly to do
any of the following:

- 1 1. Employ any device, scheme or artifice to defraud.
- 2 2. Make any untrue statement of material fact, or omit to state any
- 3 material fact necessary in order to make the statements made, in
- 4 the light of the circumstances under which they were made, not
- 5 misleading.
- 6 3. Engage in any transaction, practice or course of business which
- 7 operates or would operate as a fraud or deceit.

8 B. In a private action brought pursuant to subsection A, paragraph
9 2 of this section or § 44-1992, if the person who offered or sold the
10 security proves that any portion or all of the amount recoverable
11 under subsection A, paragraph 2 of this section or § 44-1992
12 represents an amount other than the depreciation in value of the
13 subject security resulting from the part of the prospectus or oral
14 communication, with respect to which the liability of the person is
15 asserted, not being true or omitting to state a material fact required
16 to be stated or necessary to make the statement not misleading,
17 then the amount shall not be recoverable. This subsection does not
18 apply to any actions based on allegations of activities constituting
19 dishonest or unethical practices in the securities industry.

20 Ariz. Rev. Stat. Ann. § 44-1991 (2013). The Arizona legislature “made the task of proving
21 securities fraud much easier than proving common-law fraud.” Aaron v. Fromkin, 196 Ariz.
22 224, 227, 994 P.2d 1039, 1042 (Ariz. Ct. App.2000). Under section 44-1991(A)(2), a plaintiff
23 need not demonstrate the existence of damages. *See Aaron*, 196 Ariz. at 227. A plaintiff must
24 only prove that a misrepresentation of material fact was made in the sale of securities *Id.* (citing
25 State v. Superior Court of Maricopa Cnty., 123 Ariz. 324, 331, 599 P.2d 777, 784 (1979)). It is
26 not necessary to show either that the speaker had knowledge of the statement’s falsity or that the
27 statement was material to the particular buyer. *Aaron*, 196 Ariz. at 227. A plaintiff must merely
28 show that the statements were material and misleading to a reasonable buyer. *Id.* An omitted fact
is considered material if there is a “showing of a substantial likelihood that, under all the
circumstances, the omitted fact would have assumed actual significance in the deliberations of
the reasonable (buyer).” Rose v. Dobras, 128 Ariz. 209, 214, 624 P.2d 887, 892 (Ariz. Ct. App.
1981) (quoting T.S.C. Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S.Ct. 2126, 2132,
48 L.Ed.2d 767 (1976)).

Section 44-1999 provides that any person who controls a person liable under

1 § 44-1991 is jointly and severally liable with the “controlled person” unless the controlling
2 person acted in good faith and did not directly or indirectly induce the act underlying the action.
3 The controlling person does not need to participate in the underlying sale or purchase of
4 securities. E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm’n, 206 Ariz. 399, 412, 79 P.3d 86, 99
5 (Ariz. Ct. App. 2003). Instead, the controlling person is liable as long as the person had direct or
6 indirect “possession of the *power to direct or cause the direction of the management and policies*
7 *of a person*, whether through the ownership of voting securities, by contract, or otherwise.” Id.
8 (quoting the SEC’s definition of “control” found in 17 C.F.R. § 230.405). Here, the Hogles
9 clearly controlled True Imaging and directly induced the Plaintiffs to invest in True Imaging.
10 Thus, the Hogles are within the definition of a “controlling person” and are jointly and severally
11 liable for any acts of securities fraud perpetrated by True Imaging.

12 The Plaintiffs make nine (9) allegations of material misrepresentations or
13 omissions. Each will be addressed in turn.

14 **i. The Hogles never disclosed to Plaintiffs the fact that the Arizona State**
15 **Board of Chiropractors had disciplined Debtor Matt Hogle**

16 The Plaintiffs argue that disciplinary actions taken against Matt Hogle by the
17 Arizona State Board of Chiropractors (“the Board”) should have been disclosed to potential
18 investors in True Imaging. They presented a Consent Order entered into between Matt Hogle and
19 the Board on November 14, 2005, which placed Matt Hogle on probation for two years. The
20 Plaintiffs contend that this constitutes a material omission that the Plaintiffs—and a reasonable
21 buyer—would want to know prior to investing in True Imaging. As a preliminary matter, the
22 Defendants argue that the Consent Order is inadmissible because paragraph seven of the Consent
23 Order provides that:

24 All admissions made by Respondent in this Consent Agreement
25 are made solely for the final disposition of this matter, and any
26 related administrative proceedings or civil litigation involving the
27 Board and Respondent. Therefore, any admissions made by
28 Respondent in this Consent Agreement are not intended for any
 other use, such as in the context of another regulatory agency’s

1 proceedings, or civil or criminal proceedings, whether in the State
2 of Arizona or in any other state or federal court.

3 The Defendants fail to mention paragraph 11 in which Matt Hogle, as Respondent, recognized
4 that the Consent Agreement is a public record that may be publicly disseminated as a formal
5 action of the Board. Therefore, the Court finds the agreement admissible as a public record. Fed.
6 R. Evid. 1005.

7 The Consent Order indicates that Matt Hogle was to have been on probation
8 through December 2007, meaning that he was to have been on probation when the PPM was
9 issued on May 1, 2007. Defendants have offered evidence that the Board, in fact, terminated the
10 probation on February 15, 2007. Thus, Matt Hogle was not on probation at the time the PPM was
11 disseminated. Nevertheless, this Court finds that the failure to disclose Matt Hogle's disciplinary
12 history with the Board was a material omission.

13 Defendants argue that the omission in this case is similar to that of a defendant in
14 Strategic Diversity, Inc. v. Alchemix Corp., in which the Ninth Circuit held that the defendant's
15 failure to disclose to potential investors that he was a defendant in a securities fraud case
16 involving a separate business was not a material omission. Strategic Diversity Inc. v. Alchemix
17 Corp., 666 F.3d 1197 (9th Cir. 2012). This case is factually distinguishable. First, the defendant
18 in Strategic Diversity did not have an order or judgment, based on a stipulation or a
19 determination by a trier of fact, entered against him. One may assume that the defendant had
20 appropriate defenses to the allegations being made by the plaintiff. However, in this matter, Matt
21 Hogle agreed to have a Consent Order entered in the public record that placed him on probation.

22 Second, in Strategic Diversity, the defendant omitted the fact that he was the
23 defendant in a securities fraud case related to a completely separate company that "was in no
24 way related to Alchemix [the defendant's company issuing the securities] (except by [the
25 defendant's] association), and it was not connected to the instant transaction." Here, the Hogles
26 operated several related entities that were actually involved in the True Imaging offering and
27 would determine whether the offering would be successful. They were the shareholders of True

1 Imaging, and were also the shareholders of True Imaging Management Corporation—the manager
2 of True Imaging—and Hogle Bros.—the landlord for True Imaging. Most importantly, True
3 Imaging planned to share the facility with Matt Hogle’s chiropractic practice. Thus, True
4 Imaging was intimately tied to Defendant Matt Hogle, both individually and in relation to his
5 chiropractic practice. Under this set of circumstances, recent disciplinary action against Matt
6 Hogle was material to potential investors, so it was a material omission under A.R.S. § 44-1991.

7 **ii. The Hogles never disclosed their lack of experience in managing a medical**
8 **imaging center**

9 The Plaintiffs allege that the Hogles’ failure to disclose their lack of experience
10 constitutes a material omission. The Court agrees. The PPM states that the management of True
11 Imaging was to be True Imaging Management Corporation, an Arizona corporation comprised of
12 shareholders Matt Hogle and Harold Hogle. The PPM assigns a variety of rights and
13 responsibilities to True Imaging Management Corporation as the “Manager.” As the controlling
14 shareholders of True Imaging Management Corporation, the Hogles were, in essence, the
15 management of True Imaging. The Defendants respond in two ways. First, they contend that they
16 never intended to manage the operations of the medical imaging center and hired an individual
17 for this specific purpose. Second, Defendants argue that each investor met with Matt Hogle prior
18 to their investment, and each knew that Matt Hogle was a chiropractor and Harold Hogle was a
19 building contractor. The PPM does not disclose either of these facts; it only refers to the Hogles,
20 through True Imaging Medical Management Corporation, as the management. There is no
21 reference in the PPM to the individual manager described by the Defendants, and there is no
22 section on the relevant background—or lack thereof—of management. The Court finds that the
23 failure to disclose the Hogles’ lack of experience constitutes a material omission under A.R.S.
24 § 44-1991.

25 **iii. The Hogles told Plaintiffs that True Imaging would pay a certain amount**
26 **of rent under the lease with Hogle Bros. and later paid a greater amount of**
27 **rent**

28 Initially, the PPM stated that True Imaging would pay Hogle Bros. rent of

1 \$6625.00 per month. Later, True Imaging issued a supplement to the PPM stating that the
2 amount would increase to \$11,000 per month. Plaintiffs allege that this was a misrepresentation
3 because Hogle Bros. actually charged True Imaging \$18,000 per month. The Defendants do not
4 deny that Hogle Bros. charged a rental rate of \$18,000 per month, but instead attempt to justify
5 the increased rent as an attempt by Hogle Bros. to recoup money provided to purchase
6 equipment used by True Imaging. Additionally, Defendants contend that, regardless of what is
7 set forth in the lease document, True Imaging did not actually pay the rent due, or even the lower
8 rent set forth in the PPM and supplement.

9 Defendants' arguments are essentially equitable in nature and do not address the
10 standard set forth under Arizona securities law. As previously stated, to prevail under A.R.S.
11 § 44-1991, a plaintiff must merely show that the statements were material and misleading; it is
12 not necessary to show that the defendant knew they were false at the time the statements were
13 made. Aaron, 196 Ariz. at 227. In this case, the Hogles, as the controlling persons of True
14 Imaging, represented that True Imaging would pay a certain amount in rent, but later caused
15 Hogle Bros.—a company within their control—to charge True Imaging significantly more. Thus,
16 the purported justifications³ do not change the fact that the statements made in the PPM and
17 Supplement were misleading and material to a reasonable investor.

18 **iv. The Hogles state that the lease with Hogle Bros. would begin on January**
19 **1, 2008 but True Imaging was charged rent starting in May 2007**

20 The Plaintiffs base this allegation on the lease itself, executed on January 1, 2008,
21 and the schedule of rent payments showing that True Imaging was charged for rent dating back
22 to May 2008. In fact, the PPM states that the proposed lease with Hogle Bros. had not yet been
23 executed and made no assurances that it would lease the space from Hogle Bros. The PPM does
24 not list January 1, 2008 as the date on which the lease would commence. It merely states that

25 _____
26 **3.** The Court does note that, while it may or may not be true that True Imaging paid far
27 less than the rent due under the lease with Hogle Bros., evidence shows that True Imaging made
at least some rental payments actually exceeding \$18,000 per month.

1 subscription proceeds would be refunded if a lease was not entered into on or before April 30,
2 2008. Any alleged misrepresentations made by the Hogles regarding the commencement of the
3 lease would have occurred outside the context of the PPM. Because no misrepresentations were
4 made regarding the commencement of the lease in relation to the PPM and the sale of securities,
5 the Court cannot find a violation of Arizona securities fraud law on this matter.⁴

6 **v. The Hogles stated that True Imaging would pay for \$35,000 in tenant**
7 **improvements but True Imaging actually paid at least \$340,000**

8 The Plaintiffs contend that the Hogles knew that improvements would cost
9 approximately \$600,000, intended True Imaging to pay that full amount, and, in fact, caused
10 True Imaging to pay Hogle Bros. \$340,000 before the executed lease began. This allegation
11 focuses on allegedly improper allocation of tenant improvement costs to True Imaging. The use
12 of these funds prior to the authorized time period, which is tied to either the execution of the
13 lease or purchase of equipment, is a separate allegation addressed below in Part vii.

14 In any event, the Defendants explain that the draft lease attached to the PPM
15 provided that the tenant—True Imaging—would pay the first \$35,000 in improvements, the
16 landlord—Hogle Bros.—would pay the next \$120,000, and the tenant was responsible for all
17 further improvements. These terms were later incorporated into the executed lease. The
18 Defendants assert that the improvements cost \$634,233.19 and that True Imaging paid \$391,000.
19 Taken as true, this would mean that True Imaging actually paid less than what it owed under the
20 lease. The Court finds that this matter is a triable issue of fact and inappropriate for resolution on
21 summary judgment.

22 **vi. The Hogles represented to the Plaintiffs that they either had the MRgFUS**
23 **or had the ability to acquire the MRgFUS yet never acquired the MRgFUS**

24 The Plaintiffs rely on two documents issued in conjunction with the sale of an
25 interest in True Imaging— “True Imaging LC: The Opportunity” (“The Opportunity”) and

26 **4.** For purposes of this decision, the Court is only focusing on the limited issues raised in
27 the Motion for Partial Summary Judgment.

1 “Executive Summary for True Imaging, LC” (“Executive Summary”) in support of this
2 allegation. The Opportunity includes a section entitled “Our technology” that lists various pieces
3 of medical imaging equipment and a separate section entitled “Magnetic Resonance guided
4 Focused Ultrasound Surgery.” The latter section describes the machine (the “MRgFUS”) and its
5 then-pending approval by the FDA. The Executive Summary states True Imaging is “very
6 excited to announce our ability to acquire the newest technology in healthcare for the imaging
7 and treatment of cancer, Magnetic Resonance guided Focused Ultrasound Surgery (MRgFUS)”
8 and that it was “poised and ready to help bring this treatment to the mainstream of our everyday
9 lives.” The Executive Summary lists all of the equipment it planned to purchase and explicitly
10 states: “And of course we will have the Magnetic Resonance guided Focused Ultrasound.”
11 Finally, the Executive Summary concludes by saying that the MRgFUS would be True
12 Imaging’s “Ace in the Hole.”

13 Defendants counter that, because True Imaging was only able to raise
14 \$2,647,390.20 through the offering rather than the limit of \$8,000,000, True Imaging did not
15 have sufficient funds to actually purchase the MRgFUS. Moreover, they argue, the PPM
16 provided that the utilization of the proceeds was at the discretion of the company’s Manager and
17 might change based on events that occurred during or after the offering.

18 The Court finds the Defendants arguments unpersuasive. The Offering and the
19 Executive Summary make numerous assertions that True Imaging would acquire this piece of
20 equipment. Moreover, these representations were material, because the MRgFUS was central to
21 True Imaging’s business plan. This piece of equipments was supposed to set True Imaging apart.
22 Indeed, the Executive Summary goes so far as to call it the company’s “Ace in the Hole.” True
23 Imaging’s short, blanket statement that utilization of proceeds was at the discretion of
24 management is not enough to overcome the misrepresentations that True Imaging would acquire
25 the MRgFUS.

26 **vii. The Hogles told the Plaintiffs that their investments would be held in a**
27 **segregated account and would not be accessed until True Imaging either**

1 **purchased equipment or entered into a lease, but more than \$340,000 of**
2 **Plaintiffs' funds were spent months before either of those events occurred.**

3 While it is unclear whether the Hogles improperly allocated the costs of tenant
4 improvements between True Imaging and Hogle Bros., Plaintiffs assert that any use of investor
5 funds was improper because certain conditions precedent had not been satisfied. The PPM states:

6 Investors' funds will be held in a segregated Company account at a
7 local bank in the metropolitan Phoenix area pending the sale of
8 additional Units or until the Company purchases or enters into a
9 purchase agreement to purchase certain medical imaging
10 equipment or the Company enters into a lease with HB LLC (as
11 defined below). Any investors' funds received after Company
12 purchases or enters into a purchase agreement to purchase certain
13 medical imaging equipment or the Company enters into a lease
14 with HB LLC, shall immediately be available to the Company for
15 use in the Company's operations and/or expenses.

16 Plaintiffs contend that the Hogles caused True Imaging to use investors funds
17 prior to either purchasing medical imaging equipment or entering into a lease with Hogle Bros.
18 In fact, True Imaging never purchased any medical equipment; Hogle Bros. purchased the
19 equipment.

20 Thus, the only avenue for True Imaging to begin accessing investors' funds was
21 to enter into a lease with Hogle Bros. Plaintiffs allege that True Imaging paid around \$340,000 to
22 Hogle Bros. for tenant improvements in the leased space prior to January 1, 2008, the date that
23 True Imaging and Hogle Bros. entered into a lease. Matt Hogle admitted that these funds were
24 used prior to January 1, 2008. Matt Hogle stated that the "lease was presumed" by the parties to
25 begin prior to January 1, 2008, but no evidence was offered to confirm that, and it directly
26 contradicts the terms of the lease itself. The Defendants argue that the \$340,000 utilized by True
27 Imaging during this period of time was not restricted, because it came from two other investors
28 who did not base their investments on the PPM. The Defendants offer a balance sheet dated
December 31, 2007 showing the investments from several investors, including the two investors
cited by the Defendants. The investments from these two investors totaled \$400,000 at that time.
Nonetheless, the Defendants have offered no evidence that these investments were properly

1 segregated, nor that the segregated funds not subject to the PPM were those, in fact, used for the
2 tenant improvements. Therefore, the Court finds that the Defendants used Plaintiffs' funds
3 contrary to the terms of the PPM, and this constitutes a material misrepresentation.

4 **viii. The Hogles led Plaintiffs to believe that True Imaging had counsel while**
5 **in fact the PPM was prepared by an attorney representing only the Hogles'**
6 **interest.**

7 The PPM provides:

8 Legal counsel to the Company may represent the Company and its
9 Manager after the consummation of this Offering. Such counsel
10 has not acted independently on behalf of the investors. Each
11 investor must rely upon his own legal counsel for advice in
12 connection with an investment in the Company.

13 The PPM does not reveal the identity of legal counsel to the Company, but it
14 implies that True Imaging had separate legal counsel. The first sentence only makes sense if the
15 focus is on whether the Company's legal counsel may also represent the Manager, an affiliate
16 controlled by the individuals, at a later point in time: to wit, after the consummation of the
17 offering. The next sentence indicates that True Imaging had an attorney by stating: "counsel has
18 not acted independently on behalf of the investors." The Defendants admitted in a state court
19 pleading, however, that the attorney who authored the PPM never represented True Imaging. The
20 attorney must then have been representing the Hogles in their individual capacity, rather than
21 True Imaging. This constitutes both a material misrepresentation that True Imaging had obtained
22 an attorney as well as a material omission that the attorney only represented the interests of the
23 Hogles.

24 **ix. The Hogles represented that True Imaging would purchase medical**
25 **imaging equipment but never did so.**

26 Although not explicitly alleged in the Motion, Plaintiffs' counsel raised this
27 additional allegation at oral argument, and the Court found sufficient supporting material in the
28 Statement of Facts in order to make a ruling. It is represented numerous times throughout the
PPM that True Imaging would purchase medical imaging equipment. For instance, in "Section

1 VI: Use of Proceeds,” the PPM places the purchasing of medical imaging equipment first in a list
2 of intended use of proceeds. In fact, it is recited throughout the PPM that investors would receive
3 a refund of their subscription proceeds if True Imaging did not either purchase medical imaging
4 equipment or enter into a lease with Hogle Bros. As the PPM makes clear, the purchase of
5 medical imaging equipment was central to the business objectives of True Imaging.

6 The Hogles employed other materials in connection with promoting True Imaging
7 that likewise emphasized the importance of the medical imaging equipment to True Imaging’s
8 business. For instance, The Opportunity includes a section entitled “Our Technology.” The list
9 includes a 1.0 Tesla Short bore MRI, Multi-Slice CT, Digital Mammography and the MRgFUS.
10 Another document, the Executive Summary includes a section outlining how True Imaging
11 would select equipment to purchase, and includes another section describing the “wide variety of
12 imaging equipment types” that True Imaging would utilize. The Executive Summary also
13 provides a “cost breakdown of the equipment worth *in our center.*” (Emphasis added). The list
14 sets forth approximately \$5 million worth of equipment in total.

15 Thus, the Hogles represented—via the PPM, The Opportunity, and The Executive
16 Summary— that True Imaging either had the equipment or had the ability to obtain the
17 equipment. As it turned out, True Imaging never owned or acquired any of the medical imaging
18 equipment as represented. Instead, Hogle Bros. acquired some of the equipment listed in the
19 promotional material materials, which apparently allowed True Imaging to operate for a period
20 of time. Nonetheless, the Hogles made representations that True Imaging itself would acquire
21 medical imaging equipment. These representations were made throughout the promotional
22 materials and would be material to a reasonable buyer. The failure of True Imaging to acquire
23 any of the critical equipment makes these material misrepresentations.

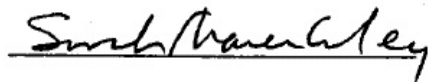
24 IV. CONCLUSION

25 Based upon the foregoing, the Court concludes that the Hogles made material
26 misrepresentations in connection with promoting investments in True Imaging in violation of
27

1 A.R.S. § 44-1991. Having found that the Defendants violated Arizona securities fraud laws,
2 many of the claims of the Plaintiffs related to their investments in True Imaging must be deemed
3 non-dischargeable pursuant to 11 U.S.C. § 523(a)(19). The Plaintiffs' Motion for Partial
4 Summary Judgment is granted, in part, and denied, in part. Since not all of the claims necessarily
5 result in summary judgment, it is unclear to this Court whether the Plaintiffs wish to proceed on
6 the remaining claims. It also appears that A.R.S. § 44-1991(B) may limit the amount of damages
7 that may be awarded under A.R.S. § 44-1991(A)(2). The Court has simply concluded that certain
8 claims of the Plaintiffs have resulted in a non-dischargeable debt, the amount of which has not
9 yet been determined by this Court. Therefore, the Court will set a 7016 Conference to determine
10 how the parties wish to proceed in light of the Court's ruling.
11

12 IT IS ORDERED setting a 7016 Conference on this matter for the 24th day of
13 April, 2013, at 2:30 p.m., in Courtroom 701, United States Bankruptcy Court, 230 N. First
14 Avenue, 7th Floor, Phoenix, Arizona 85003.
15

16
17 DATED this 13th day of March, 2013.
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20

21 Honorable Sarah Sharer Curley
22 United States Bankruptcy Judge
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