INITIAL DECISION RELEASE NO. 941
ADMINISTRATIVE PROCEEDING
File No. 3-16311

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of RELIANCE FINANCIAL ADVISORS, LLC, TIMOTHY S. DEMBSKI, AND WALTER F. GRENDA, JR.	INITIAL DECISION AS TO TIMOTHY S. DEMBSKI January 11, 2016

APPEARANCES: Tony M. Frouge and Michael D. Birnbaum, for the Division of Enforcement, Securities and Exchange Commission

Paul Batista, for Respondent Timothy S. Dembski

BEFORE: Jason S. Patil, Administrative Law Judge

Summary

In this initial decision, I conclude that Respondent Timothy S. Dembski violated and aided, abetted, and caused violations of the antifraud provisions of the federal securities laws as the result of repeated material misrepresentations to investors. A cease-and-desist order, disgorgement of $363,784.66 plus prejudgment interest, a civil penalty of $250,000, and industry bars are appropriate and in the public interest.[1]

I. Procedural History

On December 10, 2014, the Securities and Exchange Commission issued an order instituting proceedings (OIP) pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, against Reliance Financial Advisors, LLC, Dembski, and Walter F. Grenda, Jr. That same day, the Commission issued a consent order in related Administrative Proceeding File No. 3-16312 in which it accepted Respondent Scott M. Stephan's offer of settlement, made findings and conclusions, imposed certain sanctions, and directed further proceedings to be held. *Scott M. Stephan*, Securities Act Release No. 9687, 2014 SEC LEXIS 4832 (Dec. 10, 2014).

[1] This decision applies only to Dembski and the findings and conclusions herein do not apply to any other respondent.

On January 9, 2015, I ordered that the proceedings be consolidated for purposes of the hearing, pursuant to Commission Rule of Practice 201, 17 C.F.R. § 201.201. *Reliance Fin. Advisors, LLC*, Admin. Proc. Rulings Release No. 2205, 2015 SEC LEXIS 96. On May 11-14 and 18, 2015, a consolidated hearing was held as to Dembski and Stephan. Respondents Reliance and Grenda settled with the Commission on July 31, 2015. *See Reliance Fin. Advisors, LLC*, Securities Act Release No. 9872, 2015 SEC LEXIS 3176. On September 25, 2015, I issued an initial decision as to Stephan. *Scott M. Stephan*, Initial Decision Release No. 888, 2015 SEC LEXIS 3924. I do not rely on prior findings made as to Stephan, Reliance, or Grenda to determine Dembski's liability.[2]

II. Findings of Fact

At the hearing I heard the testimony of eleven fact witnesses, including Dembski, and one expert witness. I admitted 296 exhibits. I base my findings and conclusions on the record, applying preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 100-04 (1981). Arguments and proposed findings that are inconsistent with this decision were considered and rejected.

Despite the considerable number of exhibits, this proceeding largely hinges on competing accounts of oral representations. Two principal factual disputes are at issue. The first is whether Dembski made oral misrepresentations to his clients who invested in the Prestige Wealth Management Fund LP (the Fund), a hedge fund he co-owned. Dembski was adamant he did not, but all of his testifying client-investors represented that he did. Dembski submits that greed drove those witnesses to lie at the coaxing of their lawyers. Tr. 622-23, 627-29. Over the Division of Enforcement's objection, I granted Dembski the right to call as many investor witnesses as he needed to establish that he did not make oral misrepresentations, but he failed to call any. Tr. 709. In other words, faced with the undivided testimony of eight investor-witnesses against him, Dembski failed to call even one investor-witness to support his story.[3] These findings of fact reflect my determination that the testimony of the investor-witnesses was more credible than that of Dembski regarding the oral representations he made to them about the Fund. While it is not impossible that all of the testifying investor-witnesses conspired to commit perjury, I find it more plausible that they testified truthfully concerning what Dembski told them about the Fund.

The second dispute concerns the factual predicates for Dembski's advice of counsel defense, namely what facts Dembski provided to counsel, and what legal advice was sought, provided, and relied upon. While Dembski claims that he disclosed everything to counsel and relied on their advice fully, the documentary evidence and testimony of counsel establish that

[2] Citations to the hearing transcript are noted as "Tr. ___." Citations to exhibits offered by the Division of Enforcement are noted as "Div. Ex. __". The Division and Dembski's post-hearing briefs are noted as "Div. Br. ___" and "Resp. Br. ___," respectively.

[3] While the absence of an oral misrepresentation to one investor does not by itself rebut testimony that an oral misrepresentation was not made to another investor, if Dembski could show he sold the Fund to investors without making misrepresentations, his claim that he consistently marketed the Fund truthfully would have at least some support. *See* Tr. 625-27.

there was never a complete, accurate disclosure of the critical facts. Instead, the Fund's counsel relied completely upon Dembski and Stephan for the accuracy of the statements in question and never knew they were inaccurate until years afterwards.

A. Background

Dembski, age forty-three at the time of the hearing, is a resident of Lancaster, New York, and a longtime investment adviser and tax preparer. Tr. 501, 506-07, 509-10; Answer ¶ 10; OIP ¶ 10. Over the course of his career, Dembski has rendered investment advisory services to hundreds of clients and holds Series 7, 63, and 66 securities licenses. Tr. 507, 510; Div. Ex. 60 at 5. From October 2006 through March 2011, and from September 2011 to July 2013, Dembski was a registered representative associated with a broker-dealer. Answer ¶ 10; OIP ¶ 10. In late 2010 or early 2011, Dembski and Stephan co-founded the Fund and Prestige Wealth Management LLC (Prestige LLC), its general partner. Answer ¶¶ 2, 10; OIP ¶¶ 2, 10; Tr. 67, 81, 636-37; Div. Ex. 88 at 5; Div. Ex. 90 at 7. Around that same time period, Dembski co-founded Reliance Financial Advisors, LLC, a registered investment adviser, with Grenda, and was a managing partner and officer. Tr. 446-47; Div. Ex. 55 at 1, 19-20; Div. Ex. 140 ¶ 1; Answer ¶ 10; OIP ¶ 10.

1. Dembski's and Stephan's Early Relationship

Dembski and Stephan met in 1997 in Buffalo, New York, while playing on a baseball team. Tr. 55, 511. The two became best friends and Dembski is the godfather of one of Stephan's children. Tr. 55, 57, 133, 663. Stephan is a high school graduate and was working at GE Capital in Buffalo, New York, collecting on overdue auto loans, at the time he met Dembski. Tr. 52-53, 55. Prior to that, Stephan had served in the United States Air Force, and was dishonorably discharged after two years of service. Tr. 52-53. In 1999, Stephan left GE Capital to manage a collections call center for overdue auto loans for First Investors Financial Services in Atlanta, Georgia. Tr. 53-54, 119. Dembski and Stephan remained best friends after Stephan moved away. Tr. 56-57. Neither of Stephan's jobs at GE Capital or First Investors involved securities, trading, or investing, which Dembski knew. Tr. 55, 57-58, 60, 95-96, 663-65. In 2007, Stephan moved back to Buffalo and Dembski offered him a job at Reliance as a telemarketer. Div. Ex. 1; Tr. 54-55, 58-59, 665.

2. Stephan's Work at Reliance

As a telemarketer for Reliance, Stephan mailed postcards advertising investment seminars and registered those who replied. Tr. 61. Dembski and Grenda oversaw Stephan's work and Stephan interacted with Dembski on a daily basis regarding seminar attendance. Tr. 60-62. During his time as a telemarketer for Reliance, Stephan never: spoke at a seminar, traded or invested securities, made investment decisions, managed any money or portfolios, or provided investment advice. Tr. 62-63, 139. In August 2009, Stephan obtained Series 7 and 63 licenses, and a Series 66 license in October 2009. Tr. 66. From approximately August 2009 through March 2011, Stephan was a registered representative associated with a registered broker-dealer. Div. Ex. 67 at 1. Even after obtaining the securities licenses, however, Stephan's exclusive responsibility at Reliance Financial was telemarketing. Tr. 67. Stephan never had any clients at

Reliance, which Dembski knew. Tr. 67, 665. At no point in his career did Stephan's work involve securitizing loans or other products, nor did he ever tell Dembski that it did. Tr. 96.

Dembski also knew that Stephan had declared bankruptcy twice and that he was having difficulties paying his mortgage. Tr. 130-31; *see* Tr. 64. Consequently, Dembski offered to pay Stephan earlier so Stephan could pay his bills. Tr. 64-65.

3. Formation of the Prestige Fund

In approximately 2010, Stephan proposed to Dembski that the two create a hedge fund, based on a trading idea Stephan had conceived of. Tr. 67-70, 660. Stephan's idea was to have a computer algorithm trade at specific times during each day, taking long and short positions based on the share price of certain stocks at designated times. Tr. 68-69. Stephan conducted "back-testing" on his formula using software that allowed him to "go back as far as seven years" to see the returns that the algorithm would have had. Tr. 70-71. This testing did not involve actual money or orders. Tr. 71. Stephan expressed concern to Dembski that in actual operation orders may not get filled at a price point to make the algorithm as profitable as he projected. Tr. 71-73.

With Dembski's backing, Stephan hired Anthony Cascino, a computer programmer he found online, to assist him with translating his trading formula into a computer algorithm that would allow Stephan to conduct automated trades. Tr. 101. Stephan recommended to Dembski that they contact HedgeCo Securities, a company he found online that held itself out as providing assistance in setting up hedge funds. Tr. 5-76, 523. Dembski and Stephan then spoke to HedgeCo executives by phone, who assured them that they would connect them with all the entities necessary to establish and operate a fund. Tr. 525. HedgeCo recommended the law firm Holland & Knight LLP for assistance in setting up hedge funds. Tr. 76, 140.

In late October or early November 2010, Dembski and Stephan hired Holland & Knight to assist them in forming their hedge fund. Tr. 734-35. Stephan was primarily responsible for communicating with Holland & Knight, and Amy Rigdon, an associate at Holland & Knight, was the primary contact at the firm. Tr. 545, 549-50, 736-37, 818. While Dembski claims Scott MacLeod, a partner at Holland & Knight at the time, held Dembski's and Stephan's hands throughout the process of setting up the Fund, Tr. 536-37, MacLeod does not recall speaking with Dembski during the time the law firm helped establish the Fund. Tr. 817-18.

Holland & Knight provided oral and written notice that they would rely upon Dembski and Stephan to furnish the information necessary for the attorneys to discharge their responsibilities. Tr. 87-88, 737-39. The "Terms of Engagement" prescribed in Holland & Knight's engagement letter stated: "You will provide us with the factual information and materials we require to perform the services identified in the letter, and you will make such business or technical decisions and determinations as are appropriate." Div. Ex. 3 at PWM0000123. Holland & Knight obtained the information they needed through a questionnaire, supplemented with phone and email requests. Tr. 737-38, 740; *see also* Tr. 534-35.

On December 8, 2010, Rigdon asked Stephan and Dembski to provide information, including their professional biographies, to be included in the Fund's private placement memorandum (PPM). Div. Ex. 14 at 2; *see also* Tr. 742. Holland & Knight did not ask Dembski or Stephan any specific questions regarding their professional experience. Tr. 539-41. On December 9, 2010, Dembski advised Rigdon that he and Stephan were working on their professional biographies. Div. Ex. 14 at 1; Tr. 674-75. On December 13, 2010, Dembski sent Rigdon an email with draft professional biographies for Stephan and himself. Div. Ex. 15; Tr. 675. The language Dembski sent to Holland & Knight for Stephan's professional biography was virtually identical to that used in the final PPM. *Compare* Div. Ex. 15, *with* Div. Ex. 90 at 55; Tr. 554. Stephan's biography in the PPM read:

> Mr. Stephan has worked in the financial services industry for over 14 years. The first half of his career he co-managed a portfolio of over $500 million for First Investors Financial Services. Afterwards, Mr. Stephan took a position as Vice President of Investments for a New York based investment company in which he was responsible for portfolio management and analysis.

Div. Ex. 90 at 55. At the hearing, Stephan admitted that this biography was "highly misleading." Tr. 100. Stephan never managed a securities portfolio of over $500 million. Tr. 95. Indeed, prior to the Prestige Fund, Stephan never managed any securities portfolios at all. Tr. 95-96. Stephan never served as the vice president of Reliance Financial Group, or any other investment company in New York, or elsewhere.[4] Tr. 490; Div. Ex. 139 ¶ 16. Prior to the Prestige Fund, Stephan did not have any experience with a hedge fund nor had he ever invested or traded with actual money. Tr. 75.

When Dembski first read Stephan's biography, he knew that at least part of the biography was inaccurate. Tr. 679. Dembski knew that Stephan had never managed $500 million in securities. Tr. 680-82. Yet, Dembski never told Holland & Knight that he was concerned about the accuracy of that statement. Tr. 683. Dembski also did not understand the reference to fourteen years of experience in the financial services industry in light of what Dembski knew about Stephan's actual work experience collecting overdue auto loans and scheduling attendees at investment seminars. Tr. 683-84. Dembski also knew that Reliance Financial's corporate documents did not list Stephan as a vice president. Tr. 515.

When Rigdon received the biographies from Dembski via email on December 13, 2010, she forwarded the drafts to Stephan to ensure he was aware Dembski had submitted them. Tr. 745. Rigdon read the biographies and after making grammatical edits, incorporated them in the PPM. Tr. 745; *see also* Tr. 746-47, 801-02. Rigdon never told Dembski or Stephan that anyone at Holland & Knight would fact-check the information they provided, and Rigdon never fact-

[4] At the hearing, Stephan alleged that Grenda had given him the title of vice president of investments, but that he was never held out as vice president of investments to clients. Tr. 97-98. However, Stephan previously stipulated that he "never was a Vice President of Investments for a New York[-]based investment company," Div. Ex. 139 ¶ 16, which Grenda confirmed during the hearing, Tr. 490.

checked the biographical information because Holland & Knight had made clear to Dembski and Stephan that they were relying on the information provided and expected it to be accurate. Tr. 747-49; *see also* Tr. 88, 738, 821-22. Holland & Knight attorneys never discussed the content of Stephan's professional background nor what his biography should say with Stephan or Dembski before the PPM was finalized. Tr. 93-94, 749-51, 755, 799, 822-23.

Rigdon sent Stephan and Dembski the final version of the PPM on January 28, 2011. Div. Ex. 21; Tr. 749-50. Although Holland & Knight sent Dembski and Stephan drafts of the PPM for their review and comment, Dembski never provided the attorneys with any comments on the drafts, and Stephan's comments were limited to a bankruptcy-related disclosure. Tr. 751-52. Other than a few sections that he did review, including the biographies, Dembski did not review the PPM in its entirety for accuracy before using it to sell investments. Tr. 668-69, 679-80.

After the PPM was finalized, Dembski did not discuss Stephan's biography with counsel until 2013, when he was done selling investments in the Fund. Tr. 755-56. Dembski never told Holland & Knight about Stephan's actual work experience. Tr. 840-41. Even in 2013, when Dembski discussed Stephan's biography with counsel on a call he secretly recorded, Tr. 828-29, he did not disclose Stephan's true work experience. *See* Tr. 830-31; Div. Ex. 294 (recording of telephone call at 9 min., 34 seconds); Div. Ex. 295 at 11-12.

Neither Dembski nor Stephan ever requested or received any legal advice regarding the work experience contained in Stephan's biography before Dembski sold the Fund to his clients, nor did Stephan ever tell Dembski that Holland & Knight had provided legal advice to him about his biography. Tr. 93-94, 99-100, 678-79, 753-54, 822-23.

4. Operation of the Prestige Fund

The Fund, a pooled investment vehicle, was set up to give Stephan sole responsibility for investment decisions and operation of the Fund so that he and Dembski could lawfully collect performance fees from investors. Tr. 80, 780-82; Div. Ex. 10 at 1. Because of that structure, Dembski was barred from daily operation and even observing daily performance of the Fund. Tr. 631-32, 783-84. Dembski was comfortable granting Stephan exclusive responsibility for trading in part because Stephan would rely on the computer algorithm. Tr. 704-05. Dembski understood that all trading would be driven by the computer algorithm, with Stephan's day-to-day role limited to turning the algorithm on and off and monitoring the Fund. Tr. 704.

The Fund's business plan was to target Dembski's and Grenda's existing clients as potential investors, in part because of the trust relationship that existed. Tr. 106. When Dembski pitched the Fund investment to his clients, he knew that Stephan did not have any experience running a similar fund, but did not disclose his lack of experience or that Stephan's professional biography in the PPM was inaccurate. Tr. 665-67, 685. In total, forty-three investors collectively invested over $12 million in the Fund. Tr. 111; Div. Ex. 87.

When the Prestige Fund began trading in spring 2011, Stephan used the computer algorithm to trade five stocks. Tr. 69, 111. However, the algorithm did not work as well as hoped. Tr. 112. Stephan alerted Dembski that the algorithm could not fill orders at the right prices so he had to make adjustments to the algorithm as a result. Tr. 112-14. In summer 2011, Stephan told Dembski he was trading manually because of problems with the algorithm. Tr. 112-14. Dembski did not express any concerns to Stephan about Stephan trading manually. Tr. 116. Stephan's attempts to fix the algorithm failed and he continued to trade manually. Tr. 114-15. Stephan never told Dembski that he stopped trading manually or that he started trading pursuant to the algorithm again, and Dembski never asked if he had stopped trading manually. Tr. 115-16.

In October 2012, Grenda redeemed his clients' investments in the Fund. Tr. 116-17. With only Dembski's clients' money remaining in the Fund, Stephan traded stocks and options. Tr. 116. In December 2012, Stephan lost eighty-five percent of Dembski's clients' investments, mostly through options trading, which amounted to over $3 million in losses. Tr. 116-17; Div. Ex. 140 ¶ 5.

At that time, Grenda believed the Fund should be shut down because of its poor performance, among other reasons. Tr. 494-96. Grenda wrote to the Commission on December 21, 2012, to report, among other things, that the Fund would close by year's end. Tr. 493-94; *see also* Div. Ex. 33. Grenda told Dembski about his letter. Tr. 695, 496; Div. Ex. 34. Although Dembski did not intend to close the Fund at that time, he did not correct Grenda's letter. Tr. 695-96.

Notwithstanding the Fund's failure, Dembski received more money in fees from his clients' investments in the Fund than he would have had he kept his clients' money in their prior investments. Tr. 696-97. Dembski received $363,784.66 in total management and performance fees from the Fund from July 11, 2011, to December 7, 2012. Div. Ex. 140 ¶ 4. Dembski received two-thirds of the Fund's fees because he had advanced some Fund expenses and was supplying the investors. Tr. 639-40, 107.

Dembski also earned fees on Fund investments from Grenda's clients. Tr. 697. Although Dembski gave Grenda money during that time, Dembski denies the payments related to the Fund. Tr. 697-98. However, Dembski wrote checks to Grenda referencing the Fund, including a $4,000 check with "PWM Dist." written on the memo line, which Dembski acknowledged referred to Prestige Wealth Management Distribution. Tr. 698-99, 702-03; Div. Ex. 252. The version of the same check Dembski produced through a former counsel to the Commission, however, had no writing in the memo section. Div. Ex. 265. Dembski testified that he had no explanation for why the check had been altered and simply stated that his former attorney was responsible for the production. Tr. 700-01.

B. Investor-Witnesses

Although Dembski did not read the entire PPM before recommending and selling interests in the Fund to his clients, he expected his clients to read the Prestige Fund PPM "in its entirety." Tr. 668. He did not understand certain parts of the PPM he did read, and believed his clients were unlikely to understand those and other parts of the PPM. Tr. 669. Dembski speculated that his clients "read the most important things [in the PPM] that could be understood," though he could not explain how his clients would know which parts to read. Tr. 669-71. Notwithstanding the PPM's language that the investments "may be risky and subject to total loss," Div. Ex. 90 at (i)-(iii), Dembski disagreed with the PPM's language that "investment in the fund is speculative." Div. Ex. 90 at 32; Tr. 691-92. The pertinent facts established by the testifying investors are summarized below.

1. Anna Barrett

Anna Barrett, age seventy at the time of the hearing, is a lifetime resident of Buffalo, New York. Tr. 307-08. She retired from full-time work teaching the deaf in 2005 but continues to work part-time as a substitute teacher. Tr. 308.

Dembski began doing Barrett's taxes in 1997 and became her financial adviser several years later. Tr. 308-09. Dembski had previously attempted to get Barrett to move her investments over to him for several years, and Barrett finally did so after a former financial adviser put her in an investment she felt was too risky. Tr. 309-10. Barrett told Dembski she had left her prior adviser because she wanted to invest conservatively and avoid risky funds. Tr. 309-10. Barrett told Dembski that her primary investment goal was preservation of capital. Tr. 310.

Dembski introduced Barrett to the Fund. Tr. 310. Dembski told her that he had developed the Fund which he projected would make her a great deal of money, and that Dembski would monitor it daily so that if it started to have losses he could withdraw Barrett's money right away. Tr. 310-11, 318. These representations were important to Barrett and assuaged her concern about the risk of losing money. Tr. 312. Dembski also told Barrett that investing in the Fund would make her granddaughter very rich. Tr. 318. Dembski did not provide Barrett with any paperwork concerning the Fund before she invested. Tr. 320, 323.

Barrett invested $225,000 in the Prestige Fund and lost approximately $208,000. Tr. 324-25. After Dembski informed Barrett most of her investment in the Fund was lost, he told her that a conflict of interest had precluded him from monitoring the fund, because he was also an investor. Tr. 312. Barrett was surprised by that, because Dembski previously told her that he would monitor the fund daily. Tr. 313-14. Dembski told Barrett that her money was lost because Stephan, a friend managing the Fund, had invested in "crazy things." Tr. 312-13. Barrett had never heard of Stephan prior to that. Tr. 313. Barrett would have wanted to know that Stephan had exclusive authority to trade and run the Fund prior to investing, because her decision to invest in the Fund was based on her long-term relationship of trust with Dembski. Tr. 314-15. Barrett never would have invested in the Fund if she knew it was high risk. Tr. 324.

2. Richard and Vicki Blaszkiewicz

Richard Blaszkiewicz, age sixty-two at the time of the hearing, is a resident of Holland, New York. Tr. 326-27. Mr. Blaszkiewicz was a machinist at Moog, Inc., until he retired in 2011. Tr. 326-28. His wife, Vicki Blaszkiewicz, who was sixty-three years old at the time of the hearing, has a high school education. Tr. 351, 364. The Blaszkiewiczes first met Dembski approximately sixteen or seventeen years ago at a financial seminar. Tr. 352. Shortly thereafter, Dembski became Mrs. Blaszkiewicz's financial adviser. Tr. 352-53. At that time, Mrs. Blaszkiewicz had about $100,000 in assets and Dembski advised her on how she should invest her money. Tr. 353.

Dembski became Mr. Blaszkiewicz's financial adviser when he retired in 2011. Tr. 328. Mr. Blaszkiewicz told Dembski that because he was retiring, he and Mrs. Blazkiewicz needed a secure investment program to provide money for the rest of their lives. Tr. 329. Mrs. Blaszkiewicz always attended meetings Mr. Blaszkiewicz had with Dembski. Tr. 356. Dembski consistently told Mrs. Blaszkiewicz she worried too much about finances and that they would have "plenty of money" for their retirement. Tr. 339, 356-59.

Dembski introduced the Blaszkiewiczes to the Fund around the time of Mr. Blaszkiewicz's retirement. Tr. 327-28, 336, 352. The Blaszkiewiczes had the following understanding of the Fund based on representations from Dembski: (1) it would make them a lot of money, with very little downside, Tr. 328-29, 357-58, 367, in part because it was guaranteed and insured by the FDIC, Tr. 332-333, 360; (2) Dembski came up with the idea for the Fund, and had tremendous success testing it himself with money, Tr. 330, 357-58; and (3) a big bank was interested in investing millions of dollars in the Fund, Tr. 331-32, 359, 370-71.

Though the Blaszkiewiczes knew Stephan, Stephan never participated in any meetings the Blaszkiewiczes had with Dembski about the Fund, and Dembski never told them that Stephan had exclusive authority to make all the investment decisions, which the Blaszkiewiczes would have wanted to know when making their decision to invest. Tr. 330-31, 358. Dembski never told the Blaszkiewiczes that he was prohibited from regularly monitoring the Fund, which the Blaszkiewiczes would have wanted to know because they invested based on their understanding that Dembski would monitor the fund. Tr. 332.

Mr. Blaszkiewicz invested $250,000 of their savings in the Fund. Tr. 329-30. After the investment, Mr. Blaszkiewicz received the Fund documents by mail when he was in South Carolina. Tr. 361, 339-40. Mrs. Blaszkiewicz made many calls to Dembski to get statements for the Fund, but did not receive them regularly. Tr. 362. When Mr. Blaszkiewicz learned that his investment lost over $30,000, he met with Dembski, who told him that the Fund had a "glitch"; Dembski did not reveal that the Fund had stopped its automated trading using the algorithm, and was instead trading manually. Tr. 333-34. Mrs. Blaszkiewicz called Dembski repeatedly to tell him she and her husband wanted to withdraw their money. Tr. 362. Dembski assured her that if they kept their money in the Fund they would make up the amount that had been lost. Tr. 362. After a month of persistent efforts, the Blaszkiewiczes finally were able to get back roughly $212,000 of their investment in the Fund. Tr. 335-36, 345-46, 363.

As soon as the Blaszkiewiczes withdrew their money from the Fund, they transferred it to another financial professional because they no longer trusted Dembski. Tr. 346-47, 363.

3. Renee Broderick

Renee Broderick, age forty at the time of the hearing, is a resident of Clarence, New York. Tr. 278. Broderick first met Dembski in 2003 through her late husband and his father, who were long-term clients of Dembski. Tr. 279, 292-93. After her husband passed away, Broderick contacted Dembski around January 2011 because she wanted to make sure the $250,000 in life insurance benefits she had received from her husband's death was invested in a way that would provide for her and her son. Tr. 280-81, 291-92. Broderick told Dembski she wanted to be conservative and avoid risk so that she and her son could have financial security in the future. Tr. 281, 290-91.

Dembski introduced Broderick to the Fund and told her that the minimum investment in the Prestige Fund was $250,000. Tr. 279-81. Dembski represented to Broderick that: (1) she could not lose by investing in the Fund because it provided high returns with low risk, Tr. 280, 282; (2) Dembski came up with the idea for the Fund and the algorithm, Tr. 283; (3) Dembski would manage and monitor the Fund daily, Tr. 284, 297; (4) the computer algorithm prevented a loss of more than 1% per day, Tr. 282-83; (5) Dembski met with Wall Street lawyers to try to get the algorithm patented, Tr. 284-85; (6) Dembski invested his own money in the Fund because it was a "sure thing," Tr. 305; (7) Dembski could pull Broderick's money out at any time, Tr. 283-84; and (8) there would be a website where she could monitor her investment, Tr. 286-87. Dembski never told Broderick that Stephan—whom she had no knowledge of—had exclusive authority to make the Fund's investment decisions, which Broderick would have wanted to know when making her own investment decision. Tr. 285-86. She invested in the Fund based on these representations and because she trusted Dembski to manage and monitor the Fund daily. Tr. 284.

Broderick did not receive any documents regarding the Prestige Fund from Dembski until the day she handed over her check for $250,000 to invest in the Fund. Tr. 295, 297-99. Broderick did not read the Fund PPM because she trusted Dembski and felt that it was his job, as her financial adviser, to go through those details for her. Tr. 299-300.

Dembski never explained to Broderick that the Fund stopped using the computer to trade as of summer 2011. Tr. 286. After Broderick learned she had lost $40,000, she tried to withdraw her money from the Fund, but Dembski kept giving her the "run-around." Tr. 287. It took three months for Broderick to withdraw her money from the Fund. Tr. 287-88; *see also* Div. Ex. 127 at 6. Broderick left Dembski for a new financial adviser, Tr. 287-88, who recommended that she hire an attorney and sue for her losses, which she successfully did. Tr. 303-04.

4. William Haubrick

William Haubrick, age seventy-one at the time of the hearing, is a resident of Corfu, New York. Tr. 381. Haubrick worked as metalworker until retiring in 2002. Tr. 381.

In early 2011, at which point Dembski had been Haubrick's investment adviser for over a decade, Dembski introduced Haubrick to the Fund. Tr. 391. Dembski represented to Haubrick that: (1) Dembski had personally invested more than $250,000 in the Fund, which was important to Haubrick's belief that it was a safe investment, Tr. 383-84; (2) the Fund was a "win/win . . . positive" investment, Tr. 384; (3) stocks would be chosen and traded daily by a computer based on a formula that a computer expert, who was Dembski's friend, had developed, Tr. 382; and (4)

Dembski would run the Fund on a daily basis, which was important to Haubrick because he trusted Dembski, Tr. 383.

Haubrick invested $250,000 in the Fund. Tr. 384. At the time he invested, Haubrick received a series of documents from Dembski, but he did not read any of them because he trusted Dembski. Tr. 389. Haubrick received Fund statements sporadically and when he questioned Dembski about the sporadic nature, Dembski told him it cost too much to have statements audited on a monthly basis. Tr. 385.

In 2012, Haubrick became worried about his investment in the Fund because it was declining in value. Tr. 385-86. When Haubrick asked to withdraw his money, Dembski told him not to worry and that Dembski would withdraw his money by the end of 2012 if the Fund was not performing. Tr. 386. Haubrick kept his money in the Fund because he trusted and believed Dembski. Tr. 386.

Haubrick ultimately received a letter from Dembski stating that the Fund had collapsed, and that Dembski had not monitored the Fund because he had been busy taking income tax courses. Tr. 386-87; *see also* Tr. 694-95. Haubrick was shocked because Dembski had assured him that he would monitor the Fund. Tr. 387-88. After the Fund collapsed, Haubrick received a statement regarding Stephan's bankruptcy, which was the first time he learned that someone else was involved in running the Fund. Tr. 388. Haubrick recovered approximately $18,000 of his $250,000 investment. Tr. 387, 396. Haubrick no longer uses Dembski as his investment adviser. Tr. 396-97.

5. Thomas Krajewski

Thomas Krajewski, age sixty-eight at the time of the hearing, is a resident of Boston, New York. Tr. 204. In 2004, Dembski became Krajewski's financial adviser. Tr. 204-05. Krajewski and his wife told Dembski that they were "interested in maintaining, preserving our money, and likewise earning some money on it." Tr. 205.

Dembski pitched the Fund to Krajewski in 2010, explaining that he came up with the idea for the Fund on a trip to Las Vegas when he observed something at the roulette table that would apply to investing. Tr. 204, 206, 214-15. Dembski told Krajewski that his associate, Stephan, whom he described as having many years of experience in the financial industry and as the manager of a half-billion dollar portfolio at one point, implemented the idea through a computer program. Tr. 206, 209-10. Krajewski told Dembski he was overwhelmed by the PPM, which Dembski assured him was just "legalese." Tr. 210, 223. Dembski told Krajewski that although Stephan would be the one executing the transactions, Dembski would have oversight, which was important to Krajewski because he trusted Dembski to make good decisions. Tr. 208-09. Krajewski would have wanted to know if Stephan really did not have experience managing a portfolio of millions of dollars because he would not "leave [his money] for a stranger to have complete control over it." Tr. 211.

Dembski told Krajewski that the Fund would earn a 20% annual return. Tr. 211-12, 216; *see also* Div. Ex. 75. Krajewski invested nearly his entire IRA fund, $250,000, in the Prestige

Fund because he believed that was the minimum amount someone could invest. Tr. 207-08. Dembski never told Krajewski that the Fund had stopped trading using the computerized system. Tr. 213. In January 2013, Krajewski received a call informing him that the Fund had collapsed and that there was "very little money left it in it." Tr. 214. Krajewski withdrew an unspecified amount of money from what was left in the Fund. Tr. 214. Krajewski no longer uses Dembski's services. Tr. 214.

6. John Skop

John Skop, age seventy-five at the time of the hearing, is a resident of Clarence Center, New York. Tr. 167. In early 2001, after Skop received a $352,000 insurance payment following his son's death in military service, Skop began using Dembski's investment advisory services. Tr. 168-69. Skop told Dembski that he did not want a risky investment. Tr. 169-70, 188. Skop retired that year based in part on Dembski's assurance that he could set up a monthly allowance that would allow Skop to continue living at the same income level. Tr. 170-71.

In 2011, Dembski introduced Skop to the Fund. Tr. 167-68, 186. Dembski told Skop that: (1) the Fund was a "low risk" investment, Tr. 188; (2) he and Stephan generated "great" returns over eighteen months when they ran the Fund as a "skeleton investment," Tr. 173; (3) New York investment bankers were seeking to buy into the Fund, Tr. 175; (4) Dembski believed so strongly in the Fund that he put every dollar he could into it to pay for his kids' college education, Tr. 174, 200; (5) he was going to look at the Fund daily to make sure it was performing because Dembski had his personal investments in it, Tr. 174; (6) and that Stephan was going to be a "full-time overseer" of the Fund, Tr. 176. Dembski told Skop that he originally met Stephan when they were classmates at St. Bonaventure University, which was significant to Skop. Tr. 176-78.

After reading the PPM and seeing various warnings and disclaimers, Skop expressed his concern to Dembski that the terms in the PPM were not favorable to investors. Tr. 175-76, 193. Dembski told Skop to disregard the PPM and assured him that he would not have invested his own money in the Fund if he believed the warnings listed in the PPM. Tr. 176, 190-94.

Based on his trust in Dembski, Skop invested $250,000 in the Fund, the minimum amount Dembski said he could invest. Tr. 171-72, 177, 179, 196. That amount constituted more than half of Skop's life savings. Tr. 172. In order to come up with the $250,000, Skop suffered a $16,000 penalty to cash in an annuity, which Dembski was aware of. Tr. 171-72. In February 2013, after Skop saw that only $37,000 of his investment remained, he withdrew his money from the Fund. Tr. 180. Skop was furious with Dembski, who responded that "he was completely caught off guard also" and "knew nothing about this." Tr. 181. Skop no longer uses Dembski's investment advisory services. Tr. 181.

7. Gregory Thuman

Gregory Thuman, age sixty-four at the time of the hearing, is a resident of Hamburg, New York. Tr. 417-18. In 2006 or 2007, Dembski became Thuman's tax advisor, and in 2010, Dembski pitched the Fund to him. Tr. 418-19, 427-28. Dembski advised Thuman that he could move half of his 401(k) to the Fund to create "an income stream" in his retirement. Tr. 419-20.

Dembski made the following representations to Thuman: (1) Dembski's mother's money and children's tuition was invested in the Fund, which made Thuman feel very comfortable and secure about the investment, Tr. 423-24; (2) Dembski was going to manage the Fund and watch the stocks on a daily basis, Tr. 421, 423; and (3) the algorithm had a "proven track record," having been tweaked over years using "real money" in "real time." Tr. 424-25. After Thuman expressed concern to Dembski about the Fund's contingency plans if something were to happen to Dembski, Dembski told him that Stephan would be his backup. Tr. 421. Thuman did not inquire about Stephan and was satisfied to hear that there was someone else involved as a backup. Tr. 422-23.

Thuman separately discussed the potential investment in the Fund with Grenda, but Grenda recommended that Thuman not invest in the Fund because Grenda did not think Thuman sufficiently understood the risks. Tr. 480-81. Dembski knew of Grenda's advice to Thuman. Tr. 592-93.

Dembski presented the Fund documents to Thuman in Dembski's office the day Thuman signed up for the Fund. Tr. 434. Thuman told Dembski that he did not understand the documents, and Dembski acknowledged the documents were complex and not "something that [Thuman] would probably relate to." Tr. 425-26. Although Thuman did not understand the paperwork, he relied on and trusted Dembski's judgment that everything was appropriate. Tr. 426-27. Thuman invested $250,000 in the Fund in May 2012, which Dembski knew constituted half of Thuman's retirement savings. Tr. 420, 423.

After Thuman invested in the Fund, he became concerned that he had not received any Fund statements, so he repeatedly called Dembski to request them and received his first statement in September 2012. Tr. 428; *see also* Div. Ex. 73. The next update he received on his investment came in January 2013 via a letter from Dembski, informing him that his investment lost 80% of its value. Tr. 428. When Thuman called Dembski, Dembski said he did not know anything except that a "rogue trader" was involved and that Dembski was trying to get to the bottom of it. Tr. 428-29. Thuman was surprised Dembski did not have any information because he had understood that Dembski would be looking at the Fund on a daily basis. Tr. 429. Of his $250,000 investment, Thuman recovered roughly $24,000. Tr. 430. Thuman no longer uses Dembski's investment advisory services. Tr. 430.

C. Dembski's Rejoinder

At the hearing, Dembski denied making any of the misrepresentations the investors testified about. He denied telling them that: (1) he would "run" or "monitor" the Fund on a daily basis, Tr. 633; (2) he invested his own or his children's money in the Fund, Tr. 594, 623-24; (3) he would regularly receive information about the Fund, Tr. 649-50; (4) the Fund was his, rather than Stephan's idea, Tr. 661-62; (5) a big bank was going to invest in the Fund, Tr. 558, 566; (6) investors could not lose by investing in the Fund, Tr. 558-59, 572; (7) the Fund was FDIC insured, Tr. 559, 567, 580, 584, 621-22; (8) the Fund's trading idea was something Dembski came up with at a gambling table in Las Vegas, Tr. 660-61; (9) Stephan attended St. Bonaventure University, Tr. 514; (10) the Fund's algorithm or trading system would be patented, Tr. 654-55; (11) the Fund was not riskier than their existing investments, *see* Tr. 570-71, 573-76; and (12) the Fund would perform better than their previous investments, Tr. 652-54.

Dembski submits that everyone who took the stand at the hearing committed perjury, and that he is the only one who has been truthful. Since the alleged misconduct that is the subject of the instant proceedings took place, Dembski has taken on former clients of Grenda as his own investment advisory clients. Tr. 605. Dembski intends to continue serving as an investment adviser and tax preparer. *See* Tr. 602-05.

Considering all of the above facts and circumstances, I credit the consistent testimony of the investors and attorney-witnesses as more plausible than that of Dembski, and, therefore find that Dembski sold Fund investments using false and misleading oral and written representations.

D. Expert Testimony

The Division offered Arthur Laby, Professor of Law at Rutgers University School of Law, as an expert. Tr. 231; Div. Ex. 144 at 3. Prior to joining Rutgers, Professor Laby practiced securities law in various law firms before joining the Commission staff, where he served for nearly a decade. Div. Ex. 144 at 4. Professor Laby has authored many publications on topics relating to investment advisers and investment companies, and regularly serves as an expert consultant to financial firms and service providers on the standards of conduct governing investment advisers. *Id.* at 5-7, App. 1 at 1-7.

Professor Laby testified that Dembski failed to act consistently with the customs and practices of investment advisers by (a) failing to accurately disclose Stephan's background and qualifications in the Fund's PPM, and (b) marketing and selling investments in the Fund using a PPM which he knew or should have known contained false or misleading information about Stephan's professional background. *Id.* at 2-3. Professor Laby opined that Dembski's actions regarding the PPM were a decided departure from what one should expect from an investment adviser. *Id.* at 20-24.

Dembski objected to Professor Laby's testimony as amounting to inadmissible legal conclusions, and moved during the hearing to exclude his report. Tr. 227-29. Rule of Practice 320 affords discretion to admit "relevant" evidence, including expert testimony. 17 C.F.R. § 201.320; *see Anthony Fields, CPA*, Securities Act Release No. 9727, 2015 SEC LEXIS 662, at *30-31 nn.32-33 (Feb. 20, 2015). Even assuming Professor Laby's testimony amounted to legal conclusions, such testimony is not inadmissible, but rather *may* be excluded, at the hearing officer's discretion. *Robert D. Potts*, Exchange Act Release No. 39126, 1997 SEC LEXIS 2005, at *45 & n.56 (Sept. 24, 1997). I find Professor Laby's testimony relevant in showing what the prevailing customs and practices in the investment adviser industry are, and how Dembski's behavior toward his clients deviated from that industry standard. *See Stephen Michael Sohmer*, Exchange Act Release No. 49052, 2004 SEC LEXIS 41, at *30 & n.34 (Jan. 12, 2004) ("[T]estimony regarding industry practice [is] helpful in resolving enforcement and self-regulatory actions."). I therefore deny Dembski's motion to exclude Professor Laby's testimony.

III. Conclusions of Law

A. Exchange Act Section 10(b), Rule 10b-5, and Securities Act Section 17(a)

The Division alleges that as a result of the conduct outlined above, Dembski violated Exchange Act Section 10(b), Rule 10b-5, and Securities Act Section 17(a). OIP at 10; Div. Br. at 4-13.

Section 10(b) of the Exchange Act makes it:

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails. . .
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5 makes it:

> unlawful for any person, directly or indirectly . . .
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. To demonstrate liability under Section 10(b) and Rule 10b-5, the Division must show that Dembski acted with scienter. *Aaron v. SEC*, 446 U.S. 680, 691 (1980); *John P. Flannery*, Securities Act Release No. 9689, 2014 SEC LEXIS 4981, at *30 (Dec. 15, 2014), *vacated on other grounds*, --- F.3d ----, Nos. 15-1080, 15-1117, 2015 WL 8121647 (1st Cir. Dec. 8, 2015). "[O]nly conduct that is itself manipulative or deceptive violates Rule 10b-5." *John P. Flannery*, 2014 SEC LEXIS 4981, at *38-39. Misrepresentations violate not only Rule 10b-5(b) but also subsections (a) and (c). *Id.* at *42 ("[P]rimary liability under Rule 10b-5(a) and (c) *also* encompasses the 'making' of a fraudulent misstatement to investors, as well as the drafting or devising of such a misstatement.")

Section 17(a) of the Securities Act provides that:

> It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> > (1) to employ any device, scheme, or artifice to defraud, or
> >
> > (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> >
> > (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). In order to demonstrate liability under paragraph (1), the Division must show that Dembski acted with scienter, which is defined as an "intent to deceive, manipulate, or defraud." *Aaron*, 446 U.S. at 686 n.5, 697. Liability under paragraphs (2) and (3) can be predicated on a showing of negligence. *John P. Flannery*, 2014 SEC LEXIS 4981, at *31.

Section 17(a)(1), which prohibits the employment of "any device, scheme, or artifice to defraud," encompasses "all scienter-based, misstatement-related misconduct." *John P. Flannery*, 2014 SEC LEXIS 4981, at *58. Because a misstatement qualifies as "a 'device' or 'artifice' to defraud," anyone "who (with scienter) 'makes,'" "drafts[,] or devises" "a material misstatement in the offer or sale of a security has violated Section 17(a)(1)." *Id.* at *58-59. Liability under Section 17(a)(2) "turns on whether one has obtained money or property 'by means of' an untrue statement." *Id.* at *33. Finally, Section 17(a)(3) premises liability on "any transaction, practice, or course of business." 15 U.S.C. § 77q(a)(3). "[W]hile a misstatement (or misstatement-related activity) may fairly be characterized as an 'act,' a misstatement is not a 'transaction.'" *John P. Flannery*, 2014 SEC LEXIS 4981, at *61. As a result, subsection (a)(3) does not apply to "'acts' . . . that are not 'transactions,' 'practices' or 'courses of business.'" *Id.* at *61-62. However, one may violate Section 17(a)(3) by making multiple misstatements. *Id.* at *62-63 ("Of course, one who *repeatedly* makes or drafts such misstatements over a period of time may well have engaged in a fraudulent 'practice' or 'course of business' [under 17(a)(3)], but not every isolated act will qualify.").

1. Dembski is liable for Exchange Act Section 10(b), Rule 10b-5, and Securities Act Section 17(a) violations

As an initial matter, Dembski's use of the telephone, mail, and wires to sell Fund securities satisfies the required interstate commerce nexus of Exchange Act Section 10(b), Rule 10b-5, and Securities Act Section 17(a). *See* Div. Ex. 72; Div. Ex. 99 at iv; Tr. 339-40; *David F.*

Bandimere, Securities Act Release No. 9972, 2015 SEC LEXIS 4472, at *18-20 (Oct. 29, 2015) ("The required interstate nexus is de minimis and is satisfied by even 'tangential mailings or intrastate phone calls.'"). Moreover, because Dembski's misrepresentations were made to induce investors to invest in the Fund, they were both made "in connection with the purchase or sale of any security," as well as "in the offer or sale of securities." 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

Dembski's misrepresentations were material. An omission or misrepresentation is material if "there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by [a] reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Materiality does not require proof that accurate disclosure would have caused the reasonable investor to change her decision, but only that the omitted fact would have assumed actual significance in the deliberations of the reasonable investor. *TSC Indus., Inc.*, 426 U.S. at 449.

Dembski made the following false statements about the Fund to his clients: (1) Dembski would play an active role in running, managing, monitoring, and overseeing the Fund; (2) Dembski invested his family's money in the Fund; (3) a big bank expressed interest in investing millions of dollars in the Fund or its trading formula; (4) the Fund was insured by the FDIC; (5) the Fund's trading formula was Dembski's idea; (6) Dembski was engaged in efforts to patent the Fund's algorithm; (7) the Fund had little or no risk, and would gain 20% in value annually; and (8) investors could withdraw their money at any time. In making repeated misrepresentations he knew were false, Dembski intended to deceive and acted with scienter.

Dembski also omitted material facts he had a fiduciary duty to disclose to investors. He failed to disclose that the Fund prohibited Dembski from playing any meaningful role in managing or running the Fund, which contradicted what he told investors. This omission was clearly material to Dembski's clients because for many of them his active role in the Fund was a crucial part of the decision to invest. Dembski also never told investors that Stephan stopped using the Fund's computer algorithm to trade for the Fund in or around summer 2011, a particularly important fact underscored by Dembski's own testimony that a key reason he trusted Stephan to manage the Fund—despite Stephan having no prior investment management experience—was because Stephan's role would be limited to turning the computer algorithm on and off.

Dembski sold the interest in the Fund using a PPM which he knew falsely represented that Stephan had substantial relevant experience to run the Fund, when in reality he had none. The PPM's description of Stephan, who was the principal manager of the Fund, was of utmost importance, given that an investor would use that information to determine whether or not to invest in the Fund. *See Dow Theory Forecasts, Inc.*, Advisers Act Release No. 223, 1968 SEC LEXIS 996 (July 22, 1968) ("Investment advisers hold themselves out as professionals who occupy a relationship of trust and confidence with their clients, and because of the expertise which they claim and the service they offer, statements made in their advertisements have a significant appeal especially for persons inexperienced in securities."). In evaluating the materiality of this misrepresentation, it is instructive to consider how an accurate description of

Stephan's professional experience would have been viewed by a reasonable investor considering the Fund; if the PPM had accurately disclosed that Stephan only had a high school degree, had never managed investments before, had no prior experience with a hedge fund, had been dishonorably discharged from the military, and that his only professional experience consisted of collecting overdue auto loans and scheduling seminar attendees, a reasonable investor would most certainly have found this information meaningful.

The materiality of Dembski's oral misrepresentations is similarly plain and evidenced by testimony of the investors at the hearing, who confirmed that those representations were the reason why they were willing to invest in the Fund. Indeed, the very fact that Dembski repeatedly made many of the same misleading statements as part of his attempt to sell Fund investments is indicative of the materiality of those misrepresentations. *See United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1122-23 (D.C. Cir. 2009).

The fact that the PPM contained generic statements regarding risk of loss and did not guarantee profit does not excuse Dembski from liability for the misrepresentations that he made to his clients. *See Flannery*, 2014 SEC LEXIS 4981, at *71-73. For cautionary statements to be "meaningful," they must "discredit the alleged misrepresentations to such an extent that the real risk of deception drops to nil." *In re Bear Stearns Cos.*, 763 F. Supp. 2d 423, 495 (S.D.N.Y. 2011) (quotations omitted). The cautionary statements in the PPM did not discredit Dembski's various misrepresentations, and even if they had, Dembski instructed the few investors who tried to understand the PPM to disregard its contents. *See Credit Suisse First Bos. Corp. v. ARM Fin. Grp., Inc.*, 99 CIV 12046, 2001 WL 300733, at *8 (S.D.N.Y. Mar. 28, 2001) ("[W]arnings of specific risks . . . do not shelter defendants from liability if they fail to disclose hard facts critical to appreciating the magnitude of the risks described."); *In re Prudential Sec. Ltd. P'ships Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) ("Cautionary language . . . must precisely address the substance of the specific statement or omission that is challenged.").

Accordingly, Dembski's repeated, material misrepresentations to induce investors to invest in the Fund violated Exchange Act Section 10(b) and Rule 10b-5(b). 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b). They also constituted a "device, scheme, or artifice to defraud," as well as a "practice or course of business" which defrauded his clients, in violation of Rule 10b-5(a) and (c), and Securities Act Section 17(a)(1) and (3). 15 U.S.C. §§ 77q(a)(1), (3); 17 C.F.R. § 240.10b-5(a), (c). Finally, as the material misrepresentations were used to obtain money—they induced investors to invest in the Fund and Dembski earned substantial fees as a result—he violated Securities Act Section 17(a)(2). 15 U.S.C. § 77q(a)(2).

2. Dembski's Advice of Counsel Defense Fails

To establish an advice of counsel defense, Dembski has the burden to show that he: (1) made a complete disclosure of the relevant facts of the intended conduct to counsel; (2) sought advice on the legality of the intended conduct; (3) received advice that the intended conduct was legal; and (4) relied in good faith on counsel's advice. *Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994); *Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 SEC LEXIS 3939, at *46 & n.41 (Oct. 23, 2009).

Dembski has failed to establish any of the four elements of the defense. First, counsel was never told the truth about Stephan's professional background, so they lacked sufficient information to render legal advice about the biography. Moreover, counsel made clear to Dembski and Stephan from the start that the Fund was responsible for providing accurate information that would be used to populate the PPM. Dembski sent counsel a draft biography of Stephan that included the false and misleading statements, but never advised counsel of any of his concerns.

Second, neither Dembski nor Stephan ever asked counsel for any legal advice regarding the professional background described in Stephan's biography prior to the finalization and issuance of the PPM. While Dembski avers that such discussions took place between Stephan and counsel, both counsel and Stephan testified that no such legal advice was requested before the PPM was finalized and used. The only request for assistance regarding Stephan's work experience appears to have taken place years after the fact, in response to a Commission investigation.

Third, counsel never provided any legal advice regarding the substance of Stephan's professional biography. Counsel simply received the draft biographies Dembski sent, made grammatical edits, and put them in the PPM. Dembski admitted he never received any legal advice concerning Stephan's biography before giving the PPM to his clients. Although Dembski claims that counsel provided legal advice concerning Stephan's biography to Stephan, who in turn passed along that advice to Dembski, I credit counsel and Stephan's testimony that no such advice was provided.

Fourth, even if Dembski had received legal advice regarding the biographies, Dembski cannot credibly claim to have relied in "good faith" on such advice, because he knew Stephan's biography was inaccurate. As an investment adviser, Dembski "cannot shift his duty of compliance with the [Advisers] Act to his counsel," because "[t]he investing public is entitled to the fullest protection of the law regardless of what counsel's view may have been." *Dow Theory Forecasts, Inc.*, 1968 SEC LEXIS 996, at *24. Because Dembski was fully aware of the facts of Stephan's professional experience which rendered the PPM biography misleading, even if counsel had advised him to use it (which, as noted, they did not), he could not have relied on such advice in good faith. *John P. Flannery*, 2014 SEC LEXIS 4981, at *119 & n.158. In sum, Dembski's advice of counsel defense fails.

B. Advisers Act Section 206(1) and (2)

Advisers Act Section 206(1) and (2) makes it:

> unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client; [or]
>
> (2) to engage in any transaction, practice, or course of business

> which operates as a fraud or deceit upon any client or prospective client.

15 U.S.C. § 80b-6(1), (2).

"The 'fundamental purpose of [the Advisers Act is] to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus . . . achieve a high standard of business ethics in the securities industry.'" *Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *51-52 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015) (quoting *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 186 (1963) (substitutions and omissions in original)). Section 206, therefore, "establishes 'federal fiduciary standards' to govern the conduct of investment advisers." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 471 n.11 (1977)). As a result, investment advisers must fully disclose all material facts and "employ reasonable care to avoid misleading [their] clients." *Montford & Co.*, 2014 SEC LEXIS 1529, at *50 (internal quotation marks omitted, alterations in original).

In order to establish liability under Section 206(1), the Division must show that Dembski acted with scienter. *Montford & Co.*, 2014 SEC LEXIS 1529, at *55; *see SEC v. Steadman*, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). A showing of negligence, however, is sufficient to establish a violation of Section 206(2). *Montford & Co.*, 2014 SEC LEXIS 1529, at *55-56.

An investment adviser is defined in relevant part as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11). It is undisputed that Dembski sold Fund investments to his advisory clients at Reliance Financial in his capacity as an investment adviser. Tr. 630-31; Div. Ex. 140 ¶ 2.

Section 206(1) and (2) encompasses the making of fraudulent misstatements of material fact and omissions of material fact necessary to make the statements made not misleading. *Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3628, at *42-43 (Sept. 3, 2015); *see Capital Gains Research Bureau, Inc.*, 375 U.S. at 197-99; *Montford & Co.*, 2014 SEC LEXIS 1529, at *50-51; *David Henry Disraeli*, Securities Act Release No. 8880, 2007 SEC LEXIS 3015, at *32-33 (Dec. 21, 2007).

Thus, the same misconduct that supports Dembski's liability under the Securities Act and Exchange Act antifraud provisions also demonstrates his liability under Section 206(1) and (2) of the Advisers Act. *See SEC v. Young*, 09-cv-1634, 2011 WL 1376045, at *7 (E.D. Pa. Apr. 12, 2011) ("Facts showing a violation of Section 17(a) or 10(b) by an investment adviser will also support a showing of a Section 206 violation." (citations omitted)).

C. Aiding, Abetting and Causing

The Division charges Dembski with liability for aiding and abetting and causing (i) Prestige LLC's and Reliance Financial's violations of Securities Act Section 17(a) and Exchange

Act Section 10(b) and Rule 10b-5; (ii) Reliance Financial's violations of Advisers Act Section 206(1) and (2); and (iii) Prestige LLC's violations of Advisers Act Section 206(4) and Rule 206(4)-8. OIP at 10-11.

To establish aiding and abetting liability, the Division must show: (1) that a primary violation of the securities laws was committed; (2) that the aider and abettor provided substantial assistance to the primary violator in the commission of the primary violation; and (3) that the aider and abettor had the necessary scienter. *Brendan E. Murray*, Advisers Act Release No. 2809, 2008 SEC LEXIS 2924, at *16 (Nov. 21, 2008).

For "causing" liability, three elements must be established: (1) a primary violation was committed; (2) an act or omission by the respondent was a cause of the primary violation; and (3) the respondent knew, or should have known, that his conduct would contribute to the violation. *Robert M. Fuller*, Securities Act Release No. 8273, 2003 SEC LEXIS 2041, at *13-14 (Aug. 25, 2003), *pet. denied*, 95 F. App'x 361 (D.C. Cir. 2004). One who aids and abets a primary violation is necessarily a cause of that violation. *Montford & Co.*, 2014 SEC LEXIS 1529, at *71; *Eric J. Brown*, Securities Act Release No. 9299, 2012 SEC LEXIS 636, at *33 (Feb. 27, 2012); *Brendan E. Murray*, 2008 SEC LEXIS 2924, at *16; *Sharon M. Graham*, Exchange Act Release No. 40727, 1998 SEC LEXIS 2598, at *29 n.35 (Nov. 30, 1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000).

As the co-owner of investment adviser Reliance Financial, Dembski was a controlling principal of Reliance Financial and his violations of Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5, and Advisers Act Section 206(1) and (2) are imputed to it as primary violations. *See SEC v. Manor Nursing Ctrs., Inc*., 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972); *Raymond J. Lucia Cos.*, 2015 SEC LEXIS 3628, at *45 & n.58. Similarly, as the co-owner of the Prestige LLC, the general partner of the Fund, Dembski was a controlling principal of Prestige LLC, and his violations of Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 are imputed to it as primary violations.

Dembski acted with scienter and was responsible for the misrepresentations and omissions he made, and therefore provided "substantial assistance" to Reliance Financial's and Prestige LLC's commission of these violations. Accordingly, Dembski aided and abetted and caused (i) Prestige LLC's and Reliance Financial's violations of Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder, and (ii) Reliance Financial's violations of Advisers Act Section 206(1) and (2).

The Division also charges Dembski with aiding and abetting and causing Prestige LLC's violations of Advisers Act Section 206(4) and Rule 206(4)-8. OIP at 10.

Advisers Act Section 206(4) makes it:

> unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--

> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

15 U.S.C. § 80b-6(4). A showing of negligence is sufficient to establish a violation of Section 206(4). *SEC v. Steadman*, 967 F.2d at 647; *ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4249, 2015 SEC LEXIS 4474, at *33 & n.42 (Oct. 30, 2015).

Advisers Act Rule 206(4)-8 provides:

> (a) Prohibition. It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser to a pooled investment vehicle to:
>
> (1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or
>
> (2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

17 C.F.R. § 275.206(4)-8.

As the general partner of the Fund, a pooled investment vehicle, Prestige LLC was the Fund's investment adviser within the meaning of the Advisers Act. *See* 15 U.S.C. 80b-2(a)(11); *James C. Dawson*, Advisers Act Release No. 3057, 2010 SEC LEXIS 2561, at *8 n.11 (July 23, 2010) ("The general partner of a hedge fund is an investment adviser who owes a duty to his or her limited partners."); *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *12-13 & nn.16-17 (Feb. 13, 2009) (finding that general partner of a hedge fund is an investment adviser), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *see Abrahamson v. Fleschner*, 568 F.2d 862, 871 (2d Cir. 1977) ("These provisions reflect the fact that many investment advisers 'advise' their customers by exercising control over what purchases and sales are made with their clients' funds.").

Prestige LLC committed primary violations of Advisers Act Section 206(4) and Rule 206(4)-8 by using a materially misleading PPM, failing to disclose the Fund's abandonment of the trading algorithm to investors, and through Dembski's repeated misrepresentations to Fund investors, which constituted a fraudulent practice or course of business.

Dembski provided substantial assistance to Prestige LLC's and Reliance Financial Advisors' primary violations using the means of interstate commerce. To satisfy the "substantial assistance" component of aiding and abetting a securities fraud violation, the Division must show that the respondent "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed." *SEC v. Apuzzo*, 689 F.3d 204, 206 (2d Cir. 2012) (internal quotation marks omitted, alterations in original). Dembski associated himself with the venture of selling investments in the Fund by jointly owning the Fund and soliciting clients to invest in the Fund through material misrepresentations and a materially misleading PPM. The substantial assistance prong is also satisfied by a respondent's failure to act where he "has a clear duty to act and the failure to act itself constitutes the underlying primary violation." *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 SEC LEXIS 2216, at *44-45 (July 2, 2010); *see Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983) (recognizing that inaction may be treated as substantial assistance when "it was designed intentionally to aid the primary fraud or it was in conscious and reckless violation of a duty to act"). As a co-owner of Prestige LLC, Dembski was an associated person of Prestige LLC, and thus a fiduciary of the Fund. *See* 15 U.S.C. § 80b-2(a)(17); *Manor Nursing Ctrs., Inc*., 458 F.2d at 1096-97 nn.16-18; *Raymond J. Lucia Cos.*, 2015 SEC LEXIS 3628, at *45 & n.58; *see also Fundamental Portfolio Advisors, Inc.*, Securities Act Release No. 8251, 2003 SEC LEXIS 1654, at *54 (July 15, 2003) (investment advisers and associated persons are fiduciaries), *pet. dismissed*, 167 F. App'x 836 (2d Cir. 2006). Dembski was aware that: the PPM was false and contained materially misleading information, that Stephan had abandoned the use of the algorithm, and that many of the representations Dembski had made to his advisory clients were false. Therefore, Dembski provided Prestige LLC substantial assistance in the commission of its violations, and did so with scienter.

Accordingly, Dembski aided and abetted and caused Prestige LLC's violation of Advisers Act Section 206(4) and Rule 206(4)-8.

IV. Sanctions

The Division seeks (i) disgorgement of ill-gotten gains and prejudgment interest; (ii) civil penalties; (iii) industry bars; and (iv) a cease-and-desist order.

A. Disgorgement

Securities Act Section 8A(e), Exchange Act Sections 21B(e) and 21C(e), Investment Company Act Section 9(e), and Advisers Act Section 203(j) and (k)(5) authorize disgorgement in this proceeding, including reasonable interest. 15 U.S.C. §§ 77h-1(e), 78u-2(e), 78u-3(e), 80a-9(e), 80b-3(j), (k)(5). Disgorgement of ill-gotten gains "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Montford & Co.*, 2014 SEC LEXIS 1529, at *94 (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)). "When calculating disgorgement, 'separating legal from illegal profits exactly may at times be a near-impossible task.'" *Id*. "As a result, disgorgement 'need only be a reasonable approximation of profits causally connected to the violation.'" *Id.* (quoting *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995)). "Once the Division shows that the disgorgement is a reasonable approximation, the burden shifts to the respondent to show that the amount of disgorgement is not a reasonable approximation." *Id.* (citing *SEC v. Happ*, 392 F.3d 12, 32 (1st Cir. 2004)). "The risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* (quoting *Happ*, 392 F.3d at 31).

The Division seeks for Dembski to disgorge $487,290.57, the total management and performance fees received by the Fund, of which $363,784.66 went to Dembski and $123,505.91 went to Stephan. I find that holding Dembski jointly and severally liable for Stephan's portion of the management and performance fees is unwarranted here, and I decline to do so. During the life of the Fund, the fees were divided by agreement between Dembski and Stephan and paid to each in their individual capacity. After that, each individually exercised control over that money. In Stephan's case, he spent that money long ago on essential living expenses for his family. Tr. 130. I have already ordered that Stephan disgorge approximately half of the fees he received, excusing complete disgorgement only because of his showing of an inability to pay. *Scott M. Stephan*, 2015 SEC LEXIS 3924, at *9-15. In keeping with the overall goal of disgorgement – depriving violators of their actual ill-gotten gains— I decline to order Dembski to pay back money he never received.

However, Dembski must disgorge the $363,784.66 in fees that he did receive. "[T]he amount of disgorgement should include all gains flowing from the illegal activities." *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *43 (Dec. 5, 2014). I find that $363,784.66 is a reasonable approximation of profits causally connected to the violation because the fraud pervaded the Fund's entire operation.

I also order that Dembski pay prejudgment interest, calculated on his share of the Fund-related fees. *See Terence Michael Coxon*, Securities Act Release No. 8271, 2003 SEC LEXIS 3162, at *65 (Aug. 21, 2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005). The prejudgment interest will be calculated from January 1, 2013, the first day of the month following the date on which Dembski last received a share of the management and performance fees (i.e., December 7, 2012),[5] to the last day of the month preceding the month in which payment of disgorgement is made, consistent with 17 C.F.R. § 201.600.

B. Civil Penalties

Securities Act Section 8A(g), Exchange Act Section 21B(a), Investment Company Act Section 9(d), and Advisers Act Section 203(i) authorize civil penalties in this proceeding if in the

[5] Rule of Practice 600(a) states that "[p]rejudgment interest shall be due from the first day of the month following each such violation through the last day of the month preceding the month in which payment of disgorgement is made." 17 C.F.R. § 201.600(a). The precise date of each of Dembski's violations is unclear. However, given that Dembski received his last share of management and performance fees on December 7, 2012, I use January 1, 2013, as the starting date for purposes of calculating prejudgment interest.

public interest, with some of these provisions also requiring the violations at issue to have been willful, as was the case here. 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80a-9(d), 80b-3(i). The factors relevant to determining whether civil penalties are in the public interest are: (1) whether the violation involved fraud; (2) whether the violation resulted in harm to others; (3) the extent to which there was unjust enrichment; (4) whether the individual has committed previous violations; (5) the need to deter the individual and others; and (6) such other matters as justice may require. 15 U.S.C. §§ 78u-2(c), 80a-9(d)(3), 80b-3(i)(3); *John P. Flannery*, 2014 SEC LEXIS 4981, at *149-50.

The statutes set out a three-tier system identifying the maximum amount of civil penalties, depending on the severity of the respondent's conduct. 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b), 80a-9(d)(2), 80b-3(i)(2). Third-tier penalties are awarded in cases where, as here, (1) violations involve fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement and (2) the conduct in question directly or indirectly resulted in substantial losses, or created a significant risk of substantial losses to other persons, or resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b), 80a-9(d)(2), 80b-3(i)(2). By contrast, second tier penalties are appropriate in cases involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, but that did not result in substantial pecuniary gain to the person who committed the act or omission, or substantial losses or risk of substantial losses to others. 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b), 80a-9(d)(2), 80b-3(i)(2). First tier penalties may be imposed simply for each violation. 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b), 80a-9(d)(2), 80b-3(i)(2).

For the time period at issue, the maximum first, second, and third tier penalty for each violative act or omission by a natural person is $7,500, $75,000, and $150,000, respectively. 15 U.S.C. §§ 77h-1(g), 78u-2(b), 80a-9(d), 80b-3(i); 17 C.F.R. § 201.1004 & Subpt. E, Table IV.

I have discretion in determining the appropriate penalty within a given tier. *See S.W. Hatfield, CPA*, 2014 SEC LEXIS 4691, at *48 (the Commission has "discretion in setting the amount of penalty"); *First Sec. Transfer Sys., Inc.*, Exchange Act Release No. 36183, 1995 SEC LEXIS 2261, at *11 n.15 (Sept. 1, 1995) ("Nothing in the language of the statute or its legislative history suggests that the Commission is prohibited from assessing any lesser amount up to the maximum.").

I find that third-tier penalties are appropriate in these circumstances. First, Dembski's violations undoubtedly involved fraud, deceit, and manipulation. Second, Dembski's fraud inflicted substantial harm on his investors, many of whom were elderly and lost more than $200,000, which constituted most of their retirement savings. And, because many of them were retired and not generating additional income, the loss is especially acute. In total, Dembski's frauds caused the Fund's investors to lose millions of dollars, all at a time while Dembski was being unjustly enriched with hundreds of thousands of dollars in Fund fees.

However, I take into account that Dembski has no prior disciplinary history. Prior to the misconduct that gave rise to this matter, Dembski had never been the subject of any proceedings by FINRA, its predecessor, the Commission, or any other regulatory authority. *See* Tr. 510. However, the frauds which Dembski perpetrated were not brief, one-time departures, but persisted for the better part of two years, showing a troubling pattern of recurrent violations involving various victims.

Moreover, Dembski's refusal to accept any responsibility for his actions suggests that only a substantial penalty will effectively accomplish the aims of deterrence. During this hearing, rather than acknowledge his wrongdoing and apologize for his misconduct, Dembski submitted that all the investors perjured themselves on the stand and only he was telling the truth. Dembski's theory that all of the investors and lawyers conspired to lie under oath is simply incredible and not supported by the evidence. In addition, in carrying out his fraud, Dembski appears to have doctored at least one document—a check—in order to conceal the fact that he had paid Grenda money for persuading Grenda's clients to invest in the Fund. Dembski suggested that his former counsel may have altered the document, but failed to provide any reasonable explanation as to why that counsel would have done so. It strains credulity that Dembski's former counsel would commit a crime to help his client. The person with the greatest incentive would have been Dembski. Dembski has demonstrated a troubling propensity to point the finger at others rather than accept responsibility for his wrongdoing.

I am authorized to award third-tier penalties of $150,000 "for each" violative "act or omission." 15 U.S.C. §§ 77h-1(g), 78u-2(b), 80a-9(d), 80b-3(i). While violative acts or omissions may be parsed many different ways, I find that there are two categories of violations that are particularly deserving of a penalty: first, the written misrepresentations in the PPM concerning Stephan, which Dembski, knowing the information was inaccurate, nonetheless used to sell the Fund to his numerous clients; and second, the oral misrepresentations employed by Dembski in order to persuade his clients to invest and remain in the Fund. For each of these, I find that a penalty of $125,000 is appropriate to satisfy the public interest, for a total $250,000 civil penalty. While $150,000 is authorized, I have discounted the amount in consideration of Dembski's prior clean record and the deterrence that will be served by ordering that amount, in combination with the other sanctions ordered below.

C. Industry Bars

The Division requests full industry-wide bars against Dembski. Div. Br. at 20-22. These bars are authorized by Exchange Act Section 15(b), Advisers Act Section 203(f), and Investment Company Act Section 9(b). 15 U.S.C. §§ 78*o*(b), 80a-9(b), 80b-3(f).

Exchange Act Section 15(b) and Advisers Act Section 203(f) authorize barring Dembski from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization if Dembski: (1) was associated with a broker or dealer or investment adviser at the time of the misconduct, respectively; (2) willfully violated, or aided and abetted any violation of, the Securities Act, Exchange Act, Investment Company Act, or Advisers Act; and (3) the sanction is in the public interest. 15 U.S.C. §§ 78*o*(b)(4)(D), (E), (6)(A), 80b-3(e)(5), (6), (f). Exchange Act Section 15(b) also authorizes a penny stock bar if the same conditions are met. 15 U.S.C. § 78*o*(b)(6)(A).

Investment Company Act Section 9(b) authorizes barring Dembski from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, if Dembski: (1) willfully violated or willfully aided and abetted violations of any provision of the Securities Act, Exchange Act, Advisers Act, or Investment Company Act; and (2) such a bar is in the public interest. 15 U.S.C. § 80a-9(b).

As discussed above, Dembski was an investment adviser and a registered representative associated with a broker-dealer at the time of his misconduct. Dembski's primary and secondary violations of the Securities Act, Exchange Act, and Advisers Act were committed with scienter, and were therefore willful. *See David. F. Bandimere*, 2015 SEC LEXIS 4472, at *109.

In determining whether a bar is in the public interest, the Commission considers the *Steadman* factors: (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Brendan E. Murray*, 2008 SEC LEXIS 2924, at *34-35.

Dembski's conduct was highly egregious. He knowingly lied to numerous clients—many of whom were elderly and had trusted him to make conservative investments—for his own financial gain. In so doing, Dembski acted with a high degree of scienter. Although Dembski has an otherwise clean record, the violations he committed were not isolated, as they continued over the course of approximately two years and were made to numerous investors. Dembski refuses to recognize the wrongful nature of his conduct, and therefore offers no assurances against future violations. Given that Dembski intends to continue working as an investment adviser, Dembski's occupation presents clear opportunities for future violations.

Therefore, it is in the public interest to impose full, permanent industry bars on Dembski.

D. Cease-and-Desist Order

Securities Act Section 8A, Exchange Act Section 21C(a), and Advisers Act Section 203(k) authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of those Acts or rules thereunder, as well as any person who caused such violation "due to an act or omission the person knew or should have known would contribute to such violation." 15 U.S.C. §§ 77h-1(a), 78u-3(a), 80b-3(k)(1).

In determining whether to issue a cease-and-desist order, the Commission considers the *Steadman* factors and: (1) whether there is a reasonable likelihood of future violations; (2) how recent the violations are; (3) whether the violations caused harm to investors or the marketplace; and (4) what remedial function the cease-and-desist order would serve in the overall context of any other sanctions sought in the same proceeding. *ZPR Inv. Mgmt., Inc.*, 2015 SEC LEXIS 4474, at *115-16. This inquiry is flexible, and no single factor is dispositive. *Gordon Brent Pierce*, Securities Act Release No. 9555, 2014 SEC LEXIS 839, at *83 (Mar. 7, 2014), *pet.*

denied, 786 F.3d 1027 (D.C. Cir. 2015). Although "'some' risk is necessary, it need not be very great to warrant issuing a cease-and-desist order." *ZPR Inv. Mgmt., Inc.*, 2015 SEC LEXIS 4474, at *116. "Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation." *Id.* (internal quotation marks omitted).

As described above, given that Dembski fails to acknowledge any wrongdoing and continues to serve as an investment adviser and grow his client base, there is a reasonable likelihood of future violations. The violations Dembski committed were fairly recent and caused substantial harm to investors, many of whose retirement savings are nearly depleted. Although I have ordered permanent industry bars against Dembski, given the egregious circumstances surrounding Dembski's intentional violation of the securities laws, a cease-and-desist order is warranted and sends an appropriate deterrence message.

V. Fair Fund

Pursuant to 17 C.F.R. § 201.1100, I require that the amount of disgorgement, prejudgment interest, and civil monetary penalties be used to create a fair fund for the benefit of Dembski's clients harmed by the violations.

VI. Record Certification

Pursuant to 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the record index issued by the Commission's Office of the Secretary on September 4, 2015.

VII. Order

I ORDER that, pursuant to Section 8A(e) of the Securities Act of 1933, Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, Section 9(e) of the Investment Company Act of 1940, and Section 203(j) and (k)(5) of the Investment Advisers Act of 1940, Timothy S. Dembski shall PAY DISGORGEMENT in the amount of $363,784.66, plus prejudgment interest on that amount, calculated from January 1, 2013, to the last day of the month preceding the month in which payment of disgorgement is made, consistent with 17 C.F.R. § 201.600. Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and shall be compounded quarterly. 17 C.F.R. § 201.600. Interest shall continue to accrue on all funds owed until they are paid.

I FURTHER ORDER that, pursuant to Section 8A(g) of the Securities Act of 1933, Section 21B(a) of the Securities Exchange Act of 1934, Section 9(d) of the Investment Company Act of 1940, and Section 203(i) of the Investment Advisers Act of 1940, Timothy S. Dembski shall PAY A CIVIL MONEY PENALTY in the amount of $250,000.

I FURTHER ORDER that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Timothy S. Dembski is PERMANENTLY BARRED from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

I FURTHER ORDER that, pursuant to Section 9(b) of the Investment Company Act, Timothy S. Dembski is PERMANENTLY BARRED from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

I FURTHER ORDER that, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Timothy S. Dembski is PERMANENTLY BARRED from participating in an offering of penny stock, including acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance of trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

I FURTHER ORDER that, pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Section 203(k) of the Investment Advisers Act of 1940, Timothy S. Dembski shall CEASE AND DESIST from committing or causing violations, and any future violations, of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, and Section 206(1), (2), and (4) of the Investment Advisers Act of 1940 and Rule 206(4)-8.

I FURTHER ORDER that, pursuant to 17 C.F.R. § 201.1100, any funds recovered by way of disgorgement, prejudgment interest, or penalties shall be placed in a FAIR FUND for the benefit of investors harmed by the violations.

Payment of civil penalties, disgorgement, and prejudgment interest shall be made no later than twenty-one days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, bank cashier's check, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address alongside a cover letter identifying Respondent and Administrative Proceeding No. 3-16311: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

Jason S. Patil
Administrative Law Judge