UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15625

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In the Matter of

AMBASSADOR CAPITAL MANAGEMENT, LLC and DEREK H. OGLESBY,

Respondents.

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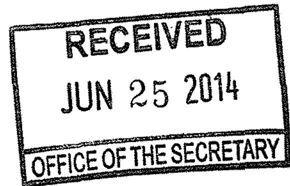

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In its Order Instituting Proceedings, the Division of Enforcement alleges that Ambassador Capital Management and Derek Oglesby engaged in several violations of the securities laws and rules in their management of the Ambassador Money Market Fund. The alleged violations include misleading the Fund's Board and other very serious violations. A careful review of the evidence demonstrates that ACM and Mr. Oglesby did not violate the securities laws and rules and did not cause the Fund to violate any of those laws and rules.

Mr. Oglesby and his ACM colleagues, Brian Jeffries and Gregory Prost, created a business that provided outstanding service to ACM's clients. No investor in the Ambassador Fund or in ACM's separately managed accounts has ever lost a penny of its investment. In their management of the Fund, Mr. Oglesby, Mr. Jeffries, and Mr. Prost kept the risk to their investors to a minimum, sacrificing yield to the investors and profits to themselves. Mr. Oglesby, Mr. Prost, and Mr. Jeffries never misled the Fund's Board of Trustees. They did not mislead Guyna Johnson of Standard & Poor's, nor did they mislead Marita Bartolini of the SEC's Office of Compliance Inspections and Examinations.

ACM and Mr. Oglesby did not violate any of the statutes or rules addressed in the OIP.

I. RESPONDENTS DID NOT MISLEAD THE BOARD OF THE AMBASSADOR MONEY MARKET FUND

A. ACM and Mr. Oglesby Did Not Mislead the Board Regarding the Fund's Italian and Eurozone Holdings

The OIP alleges that ACM and Mr. Oglesby violated Sections 206(1) and 206(2) of the Investment Advisers Act, 15 U.S.C. § 80b-6(1)–(2), by misrepresenting or failing to disclose

material information to the Board with regard to the Fund's purchases of Italian securities during the period between August 2011 and February 2012.[1]

Specifically, the OIP alleges that Respondents made false and misleading statements at the Board meetings of August 8, 2011 and November 14, 2011. OIP ¶ 34. At the August meeting, the OIP alleges, Respondents informed the Board that ACM was "trying to stay away from Greece, Spain, [and] Italy," when in fact the Fund continued to invest in Italian-related securities after that meeting. OIP ¶¶ 36, 38. The OIP further alleges that Respondents misrepresented the Fund's holdings by stating that the Fund's sole remaining Italian holding, ENI Finance (USA), "would be off the books of the Money Market Fund in mid-November, after which time the Money Market Fund would have no exposure to the Italian market," and by thereafter failing to disclose the fact that the Fund resumed purchasing "Italian-sponsored asset-backed commercial paper" (*i.e.*, ENI[2]) on December 1, 2011. OIP ¶¶ 37, 39.

1. European Investments as Part of an Integrated and Careful Investment Strategy

In 2011 Respondents had long employed a deliberate strategy of making substantial investments for the Fund in European commercial paper. Tr. 1627. Mr. Prost, the Chief Investment Officer for ACM, believed that the Fund should invest in European commercial paper because, in his experience, European commercial paper was less exposed to default risk than American commercial paper. Mr. Prost believed that European governments would support

[1] Throughout the proceedings the Division has made allegations regarding "other troubled Eurozone countries" in which ACM invested. The Division has never introduced any evidence to show which countries it believes were "troubled," or attempted to demonstrate that ACM deceived the Board as to any purchases in countries other than Italy. Indeed, the minutes of both the August and November 2011 meeting demonstrate the opposite of deception—at both meetings, ACM discussed with the Board the fact that it would continue making investments in Eurozone countries, and the Board approved of ACM's investment strategy. This Court should disregard the Division's references to "other troubled Eurozone countries."

[2] The allegation in the OIP is inaccurate—ENI did not issue asset-backed commercial paper.

their troubled banks, and that American banks were less likely to receive support from the Federal government. Tr. 1627, 1681.

As European instability became more pronounced in the second half of 2011, ACM took several measures to limit risk to the Fund and its shareholders. It reduced the Fund's weighted average maturity; boosted the Fund's liquidity; and ceased investing in Spain and Greece, the countries it deemed to be at the greatest risk.

2. The August 8, 2011 Board Meeting

On August 8, 2011, the Board of the Fund had its regular quarterly meeting (the "August 8th meeting"). The minutes of that meeting were drafted by Karen Blake, a retired librarian whose services were used for only two meetings (August 8th and November 14th). More than two months later, Ms. Blake sent draft minutes to Maria De Nicolo, the Chief Compliance Officer of the Fund; Ms. De Nicolo revised the minutes and sent them to Richard Cutshall, one of the lawyers for the Fund, for further revisions. Exs. 88, 75. Ms. Blake, Ms. De Nicolo, and Mr. Cutshall were in Illinois during the August 8th meeting. Mr. Prost and Mr. Oglesby were in Detroit, Michigan during the meeting. Exs. 98, 92. Ms. Blake and Mr. Cutshall had not met Mr. Oglesby or Mr. Prost in person. Tr. 832.

At the meeting ACM reviewed the performance of the Fund and discussed the ongoing situation in Europe.[3] According to the minutes, the Board was informed that ACM was taking steps to reduce the risk to the Fund presented by investments in issuers based in some of the European countries. The discussion lasted approximately 15 to 20 minutes.

[3] The evidence is unclear as to whether it was Mr. Prost or Mr. Oglesby who actually spoke at the August 8th meeting. Tr. 533; *see also* Tr. 1668.

During the editing process, the language in the minutes describing the discussion of the Fund's European investments was changed. The initial draft of the minutes recorded that ACM was "trying to stay away from Greece, Spain, Italy and other countries doing poorly in the credit area," and was instead gravitating toward "better" European countries. Ex. 88. The draft approved by Ms. De Nicolo contained the same language. Ex. 75. The phrase was later changed by Mr. Cutshall, in an effort to revise language that he viewed as "less than precise." Tr. 820:2-3. According to Mr. Cutshall's revised minutes, "Mr. Oglesby" reported that "ACM is *avoiding* Greece, Spain, Italy and other countries seen as higher-risk investments by ACM." Ex. 98 at A-1.14 (emphasis added).

At the time, the Fund did not have any investments in securities issued by any entity based in Greece or Spain, but did have investments in the securities of three issuers related to or based in Italy: Arabella Finance LLC,[4] Romulus Funding Corp.,[5] and ENI Finance (USA) Inc. ("ENI").[6] After the August 8th meeting, ACM continued to purchase securities of these three issuers, but at short maturities. ACM stopped purchasing Arabella and Romulus for the Fund at the beginning of November 2011. In short, starting in August, ACM significantly reduced the Fund's exposure to Italian securities. See Ex. 92 at B-2-c.

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[4] The asset-backed commercial paper of Arabella was collateralized by a pool of loans diversified across Europe (the value of which represented more than 100% of the value of the commercial paper itself) and secured by a guarantee from Bayerische Hypo-und Veriensbank, one of the largest private banks in Germany and a member of the Italian UniCredit Group. Tr. 1672; Ex. 67A at 3; Ex. 404.

[5] The asset-backed commercial paper of Romulus had a structure similar to the Arabella structure and also had a guarantee from Intesa Sanpaolo, an Italian bank. Ex. 405.

[6] ENI is a U.S. subsidiary of Eni S.p.A., an Italian-based global oil and gas company that operates in more than 60 countries worldwide and that is 30% owned by the Italian government. ("S.p.A.," the abbreviation for Società Per Azioni, denotes an Italian corporation.) ENI, however, receives its revenues from the U.S. operations of a domestic company located in the Gulf of Mexico. Ex. 406.

3. The November 14, 2011 Board Meeting

The next Board meeting occurred on November 14, 2011 (the "November 14th meeting"). Before that meeting, the members of the Board received a package of documents for their review. In addition to Mr. Cutshall's version of the minutes of the August 8th meeting, the package included a purchase journal listing the securities purchased in the previous quarter, the list of securities approved by the Board for purchase by the Fund (referred to as the Approved List), and a compliance report.[7] Ex. 92 at B-3-a. This particular package also included a Schedule of Portfolio Investments that provided a detailed breakdown of the Fund's portfolio holdings as of September 30, 2011, the end of the previous quarter. The Schedule of Portfolio Investments included investments in securities of issuers based in France, Italy, Germany, and the United Kingdom. *See* Ex. 58 at C-1-d.4.

At the November 14th meeting, the Board reviewed and approved the minutes of the August 8th Board meeting. Tr. 1308; Tr. 1313. Shortly thereafter, the members of the Board and representatives of ACM discussed the Fund's investments for the past quarter and reviewed the Schedule of Portfolio Investments. Ex. 92 at A-1(27). The Board also received an overview of the Fund's response to the Eurozone crisis: according to the minutes, "Mr. Oglesby noted for the Board the Money Market Fund's limited exposure to European markets, including that the Money Market Fund has . . . minimal second-hand exposure to the Italian market (and that the asset in question would be off the books of the Money Market Fund in mid-November, after which time the Money Market Fund would have no exposure to the Italian market)." Ex. 92 at A-1(28). The "asset in question" was ENI.

[7] The material in this package was essentially the same as the material provided to the Board before all meetings.

According to the minutes, nobody on the Board expressed any concern regarding the fact that the Fund had continued to invest in securities issued by entities based in Italy. *Id.* Nor did anybody on the Board say that the Fund's statements were inconsistent with ACM's statements at the August Board meeting. *Id.*; *see* Tr. 1313.

After the Adviser's presentation, the Board passed the following resolution:

> RESOLVED that, in the judgment of the Board of Trustees, the securities purchased by Ambassador Money Market Fund from July 1, 2011 through September 30, 2011 were purchased in accordance with the appropriate board-approved creditworthiness guidelines and were of eligible quality and presented minimal credit risks.

Ex. 92 at A-1(29). This resolution approved not only the purchases specifically discussed at the meeting, but also the entire set of purchases listed on the Purchase Journal provided to the Board in advance of the November 14th meeting. *See* Ex. 58.

4. The Repurchase of ENI

After the November 14th meeting, ACM stopped purchasing commercial paper issued by ENI and permitted the ENI commercial paper already on the books of the Fund to mature, just as ACM had told the Board. Mr. Prost decided to stop purchasing Italian securities because of the volatility of the European markets. As Mr. Prost testified, he was confident that the European governments would step in to support their banks; the markets had, however, grown impatient, and he was concerned that investors would act in an irrational manner. Tr. 1681. There is no evidence suggesting that at the time of the November 14th meeting either Mr. Prost or Mr. Oglesby expected that the Fund would resume buying ENI commercial paper.

On December 1, 2011, the Fund again began investing in securities issued by ENI. In preparation for the next Board meeting, which took place in February 2012, the Board was provided with a purchase journal that listed each security purchased for the Fund after the November 14th meeting, including each purchase of ENI in December 2011. Ex. 92 at B-2-c.

5. Respondents Did Not Misstate or Conceal Italian and Eurozone Purchases

The statements Mr. Prost and Mr. Oglesby made to the Board at the August and November meetings were not misleading. The Respondents did not mislead the Board at the November 14th meeting, nor did they hide the fact that the Fund reinvested in ENI in December 2011. Indeed, the evidence demonstrates that Respondents had absolutely no reason to do so.

i. Respondents Did Not Mislead the Board at the August 2011 Meeting

First, the minutes of the August 8, 2011 Board meeting are simply not reliable. The minutes do not purport to be a verbatim transcript of statements made at the meeting. The minutes were intended to summarize the topics discussed at each meeting, sometimes condensing extended discussions into one or two sentences. Tr. 1307. The minutes were taken and revised by individuals who listened to ACM's comments over the telephone, individuals who had never met Mr. Oglesby or Mr. Prost in person. The minutes were also contradicted by the testimony of Ms. De Nicolo, who recalled from the August meeting "some statement about [ACM] avoiding making investments in . . . Greece and Spain," but "[didn't] believe that's the case for Italy." Tr. 751:18-22.

Second, Respondents did not conceal their Italian and Eurozone purchases from the Board. To the contrary, Respondents provided extensive disclosures to the Board both before and during the November 14th meeting. A week in advance of the November 14th meeting, the Board was provided with a purchase journal showing a number of investments in Italy and the Eurozone during the quarter that followed the August meeting, Ex. 58 at C-2-c.1, and a detailed portfolio breakdown showing that, on September 30, 2011, the portfolio contained securities issued by French, German, and Italian issuers, *id.* at C-1-d.5. Additionally, the Board was explicitly informed during the November meeting that the Fund had been—and indeed

remained—invested in Italy. Ex. 92 at A-1(29). Ms. Hodges confirmed that there was "some statement" at the November 14th meeting "that the [F]und was continuing to purchase securities in the Italian market." Tr. 1312-13.

Third, the discussion at the November 14th meeting demonstrates that the Board was not misled at the August 8th meeting. Having just reviewed the minutes of the August 8th meeting, on November 14th the members of the Board not only did not express surprise or dismay over Respondents' disclosures regarding Italian and Eurozone investments, but they also approved the investments made in the previous quarter. If the members of the Board thought that they had been told at the August 8th meeting that ACM would no longer invest in Italian securities, and if they thought that was important, they would have expressed some concern when they were told that ACM had continued to purchase Italian securities for the Fund.

The most reasonable inference is the Board was not told in August 2011 that the Fund would no longer invest in Italian securities, and that it was instead told that the Fund would not invest in securities based in Greece or Spain and that it was reducing its exposure to Italian securities.

ii. Respondents Did Not Mislead the Board in November 2011

The statement that Mr. Prost or Mr. Oglesby made at the November 14th meeting was entirely accurate. After the ENI securities in the Fund matured on November 16th and 18th, the Fund had no exposure to Italian securities.

On November 30th, two weeks after the November 14th Board meeting, the central banks of several countries, including the Federal Reserve Bank, announced joint economic support measures. Also during this time, the European Central Bank ("ECB"), which sets monetary policy for banks in the Eurozone, signaled that it would provide liquidity support for the European banks. These measures reassured the markets. *See, e.g.*, Exs. 439, 440. In particular,

in the last week of November ENI's stock price climbed, and on November 30, 2011, the volume of trading in ENI stock increased substantially. *See* Ex. 492. At the same time, the price of credit-default swaps for ENI declined significantly. *See* Ex. 469. These indicia reflected the market's confidence in ENI. *See also* Ex. 436.

As Mr. Prost testified, once his generalized economic concerns were resolved, he decided to resume purchasing ENI because it was a "big solid" credit, with which ACM was familiar and comfortable. Tr. 1681-82, 1687-90, 1779. Accordingly, on December 1st, ACM resumed buying ENI for the Fund at very short maturities. Mr. Prost and Mr. Oglesby had no motive to conceal the Fund's ENI purchases. The ENI securities were among the lowest-yielding in the portfolio: the ENI securities purchased on December 1, 2011 had a yield of just 27 basis points. Tr. 1694. The Fund's average yield for that day was 41 basis points. The Fund could have invested in other securities at a higher yield. *See* Tr. 1692. Mr. Prost chose to purchase the low-yielding ENI because he believed it was a low-risk investment. Tr. 1693.

ACM's statement to the Board at the November 14 meeting would have been misleading if Mr. Prost or Mr. Oglesby had known or expected at the time that the Fund would soon resume purchasing ENI securities. There is no evidence to support that theory. Rather, ACM resumed purchasing ENI by December 1st because circumstances had changed.

iii. Respondents Informed the Board That the Fund Had Resumed Purchasing ENI Securities

ACM informed the Board of its purchases of ENI securities shortly before the next meeting of the Board on February 13, 2012. These purchases were disclosed in the Purchase Journal and Approved List in the Board package. The Purchase Journal listed each and every purchase of ENI in December 2011, and the Approved List specifically noted that ENI had been held in the portfolio in the past quarter. Ex. 92 at B-2-c, B-3-a.

At the February 2012 meeting, after the Board had reviewed the Board package showing that the Fund had reinvested in ENI, and after the Board had reviewed and approved the minutes of the November 14th meeting, the Board approved all investments made by the Fund in the previous quarter—including the December 2011 investments in ENI.

The Division has suggested that Respondents deceived the Board by failing to disclose the purchases *immediately*, rather than simply disclosing them, as they did, in the normal course—in other words, that the Respondents had the duty to provide a special update to the Board regarding the fact that ACM had resumed purchasing ENI for the Fund.

Indeed, ACM rarely provided any information to the Board between regularly scheduled meetings. OCIE's closing letter, which was received in May 2010, while clearly important to the Fund, was not provided to the Board by special communication. Instead, the closing letter was included in the Board package in advance of the next meeting in June. *See* Ex. 165 at C-10. Nor was the Board provided with Fund counsel's summary of the February 2010 revisions to Rule 2a-7 outside of the normal process; rather, the Board received information regarding the revisions in the Board package for the March 2010 meeting. Ex. 358 (agenda Tab 6). In other words, the mere fact that information has some importance to the Board does not mean that it must be disclosed to the Board in the interval between meetings.

The evidence demonstrates that at the time of the February 2012 meeting the Board did not think it should have been told earlier that ACM had resumed purchasing ENI securities for the Fund. The minutes of that meeting reflect that the members of the Board did not express any disapproval of the Fund's investments in ENI; nor did anybody say that the Board should have been told about these investments prior to the February 2012 meeting.

iv. Respondents Did Not Have Any Motive to Lie

The Division alleges that Respondents deliberately "concealed" the Fund's Italian investments from the Board. It argues that ACM invested in ENI because such "risky" purchases "provided higher yield," and that ACM hid its investments from the Board because it wished to keep the Trustees "in the dark" about the fact that the Fund had been exposed to these risks. Exs. 112 at 4, 475 at 14.

The evidence at the hearing flatly contradicts the Division's theory: neither Mr. Oglesby nor anybody else at the Adviser benefited financially from the purchase of ENI securities. To the contrary, the investment actually lowered the overall yield on the Fund. Tr. 1692:14-21. Mr. Prost chose to purchase ENI securities for the Fund, notwithstanding their low yield, because ENI was a "good solid company" that he had "always liked." Tr. 1692:14-21; 1692:3-17. Neither Mr. Prost nor Mr. Oglesby had any reason to hide what they viewed as a conservative, beneficial investment. As the court said in *S.E.C. v. Steadman*, "[i]f we were to conclude that the [respondents] meant to defraud [the Board], we would have to believe that they did so for the sheer joy of it rather than for profit." 967 F.2d 636, 642 (D.C. Cir. 1992).

B. Alleged False Statements Concerning the Redemption on September 30, 2011

The OIP alleges that Respondents stated to the Board at the November 14, 2011 Board meeting that "on October 3, 2011 . . . no more than 5% of the assets of the Money Market Fund were invested in the securities of any one issuer." Ex. 92 at A-1(31). The Division alleges that this statement was false and misleading because on October 3, 2011 the Fund had over ten holdings for which over 5% of the Fund's assets were invested. The Division has also alleged that Respondents falsely "assured the trustees that the breach was only limited to securities of a single issuer," when in fact the securities of several issuers were affected by the redemption. *See* Tr. 1832:23-1833:4.

1. The Redemption Request on September 30th

On September 30, 2011, at 11:59 a.m., ACM received an unexpected request from the City of Detroit to redeem $25 million of the City's investment in the Fund. The request came one minute before the noon cutoff for redemptions. At the time of the request, the majority of the Fund's assets had been invested. The City of Detroit apologized for the lack of notice. The Fund nevertheless honored the redemption, and Detroit was able to withdraw its money from the Fund. Tr. 1256-57.

2. ACM Informed FSG and the Board of the Redemption

As a result of the redemption on September 30th, several of the securities acquired earlier that morning exceeded 5% of the Fund's portfolio. Mr. Oglesby became aware that these securities had exceeded 5% of the portfolio when he entered the redemption into his compliance model: the redemption caused those securities to turn red because they each represented over 5% of the portfolio. Although Mr. Oglesby understood that the diversification requirement applied at the time of purchase, he had never before seen a situation in which inputting a redemption into the Trading Model caused purchases that had been under 5% at the time of purchase to rise over 5% on same day they were purchased. Tr. 1258.

Mr. Oglesby became concerned that there might have been a compliance violation. In fact, there had not been. Mr. Oglesby promptly discussed the occurrence with the Fund's compliance personnel, who instructed Mr. Oglesby to draft a letter to memorialize the event. Tr. 1258-61. The letter stated as follows:

> On Friday, September 30, 2011, at approximately 11:59 est., one minute before the shareholder services deadline, an uncharacteristically large $25 million redemption was made . . . . This redemption caused several issuer percentages to climb above the 5% issuer limit. Prior to the redemption, several security purchases were made that were well within the 5% issuer guideline and had maturity dates of October 3rd (1 business day). Given the inopportune timing of the redemption (i.e.- late-in-the-day for cash

> settle, month-end and quarter-end) any attempt at a sale to comply with the 5% issuer rule could have resulted in unnecessary stress to the Fund and unwarranted losses. We were aware of the 5% issuer limit rule, but this situation was unavoidable and unintentional. Monday, October 3rd, the Fund was back in compliance.

This letter was included in the Board package for the November 14th meeting, as an attachment to a compliance report. Ex. 58 at C-3-b.1.

Along with Mr. Oglesby's October 3rd letter, the Board package for the November 14th meeting included a snapshot of the Fund's assets for September 30, 2011—the Schedule of Portfolio Investments. That schedule listed 14 portfolio holdings that exceeded 5% of the Fund's assets as a result of redemptions. The schedule also listed the maturity dates for those portfolio holdings, noting that nine of those 14 holdings would mature *after* October 3, 2011. In other words, the schedule made clear that only five of the 14 holdings over 5% would mature on October 3rd, and that the other nine holdings would remain in the portfolio at a concentration over 5% after October 3rd. This schedule was not only included in the Board package, but it was also discussed with the Board members during the November 14th meeting.

3. The November 14th Meeting

The minutes of the November 2011 record that the September 30th redemption was discussed with the Board. The minutes state as follows:

> The Board's attention was . . . directed to the daily compliance review summary of Rule 2a-7 compliance for each week ending during the fiscal quarter ended September 30, 2011.
>
> The Board was informed by ACM that, as a result of an uncharacteristically large redemption of $25 million, which redemption occurred at 11:59 a.m. Eastern Standard Time (or one minute before the shareholder services deadline), the percentage of Money Market Fund assets invested in the securities of a single issuer climbed to above 5% with respect to several issuers. However, all purchases made prior to such event were made within the 5% limitation and, following the maturity of certain securities in the Money Market Fund's portfolio on October 3, 2011 (the next business day after the redemption), no more than 5% of the assets of the Money Market

> Fund were invested in the securities of any one issuer. ACM stated it was aware of the issue following the redemption on September 30, 2011, but stated that it believed that, due to the timing of the redemption (being late in the date on a date that was both a month- and quarter-end), ACM believed that attempted sales to return all holdings to within the 5% limitation was both unwarranted and could subject the Money Market Fund and its investors to unnecessary risks. ACM also noted its belief that this was a one-time occurrence.
>
> The Board expressed concern over this matter, but understood the unique circumstances surrounding the event.

4. Respondents Did Not Mislead the Board

Respondents did not mislead the Board regarding the contents of the Fund's portfolio on September 30th or on October 3rd.

Although the Fund was not out of compliance with Rule 2a-7 on either September 30th or October 3rd, Mr. Oglesby's report that the Fund was "back in compliance" reflected his confusion about Rule 2a-7. Mr. Oglesby accurately reported the incident, and the Board reviewed his accurate report.

i. The Minutes Incorrectly Record the Discussion and Incorrectly Attribute the Report to "ACM"

In the discussion of the September 30th redemption, the minutes of the November 14th meeting are wrong. Certainly, the statement recorded in the minutes and attributed to "ACM," that "following the maturity of certain securities in the . . . Fund's portfolio on October 3, 2011 . . . no more than 5% of the assets of the Money Market Fund were invested in the securities of any one issuer," was inaccurate. As noted above, on October 3rd, the portfolio contained nine positions that had exceeded 5% as a result of redemptions. This inaccurate statement cannot be attributed to Mr. Oglesby or ACM.

The record is unclear as to how or why this inaccurate statement came to be recorded in the minutes. The most reasonable explanation is that the minutes are simply inaccurate. As

Respondents noted in discussing the minutes of the August 8th meeting, the minutes are not a verbatim transcript of what was said at the Board meeting. When the minutes were prepared, the person who prepared them clearly made mistakes.

Although the record is clear that Ms. De Nicolo spoke for at least part of the discussion, Ms. De Nicolo denied that she made the inaccurate statement.[8] Tr. 797. She further testified that she did not believe that this statement was made by anyone. Tr. 781. In fact, if she had heard such a statement, she "would have said something because [she knew] that [was] not an accurate statement." Tr. 785. Both Mr. Oglesby and Mr. Prost also denied making that statement, and Mr. Jeffries did not recall that statement being made.

If the statement was made, the evidence presented at the hearing casts doubt on whether Mr. Oglesby or anyone at ACM was the speaker. The discussion about the redemption is recorded in the compliance section, and Mr. Cutshall testified that the topic was viewed as a compliance issue. Tr. 839. Ms. De Nicolo testified that she was ordinarily the person who would report to the Board regarding compliance issues, and, as noted, she admitted to having made at least some of the statements that that section of the November 2011 minutes attributed to "ACM."[9] Tr. 780.

Ms. De Nicolo also testified that, as matter of general practice, by the time she reported to the Board on compliance matters, Mr. Oglesby and Mr. Prost had left the meeting. Tr. 797-98. According to the minutes of the November 14th meeting, Mr. Oglesby and Mr. Prost had followed their normal practice and had left the meeting by the time the September 30th

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[8] Ms. De Nicolo testified at the hearing that she told the Board that the situation was "unique." Tr. 779-80.

[9] Ms. De Nicolo is recorded as having attended Board meetings and reported on compliance issues in her capacity as the Fund's chief compliance officer. The Board minutes do not record Ms. De Nicolo as having attended these meetings in any capacity related to the Adviser.

redemption was discussed. Both Ms. De Nicolo and Ms. Hodges specifically recalled that Ms. De Nicolo was the speaker during that portion of the meeting, Tr. 530:18-20; Mr. Cutshall thought Mr. Oglesby might have spoken as well but could not be sure, Tr. 837; and Mr. Guy did not name a speaker, Tr. 476. Additionally, although the minutes attribute the statement to "ACM," the phrasing is unusual. The minutes generally named the individual speaker, but this particular section of the minutes attributes statements to "ACM."[10]

There is, however, another possible explanation for this passage of the minutes. The language and phrasing of that portion of the minutes is extremely similar to the language and phrasing of Mr. Oglesby's letter. The only part of the minutes that varies in form or substance from the letter is in fact the statement at issue: the letter's statement, "Monday, October 3rd, the Fund was back in compliance" became "following the maturity of certain securities in the . . . Fund's portfolio on October 3, 2011 . . . , no more than 5% of the assets of the . . . Fund were invested in the securities of any one issuer." *Compare* Ex. 58 at C-3-b.1 *with* Ex. 92 at A-1(31). In light of the similarity of the text of the minutes to the text of the letter, and based on the odd attribution of the statements to "ACM" rather than to any individual, it is possible either that the Board did not actually discuss the incident but instead reviewed the letter, or that whoever drafted the minutes did so while referring to the letter, and simply misinterpreted Mr. Oglesby's statement in paraphrasing it.

[10] When Mr. Cutshall was asked during the hearing why the minutes would reflect that Mr. Oglesby and Mr. Prost left the meeting before this discussion if the statements were attributed to ACM, his testimony was that he occasionally changed the order and the content of the minutes, and that he must have done so on this occasion. Tr. 829-30. This testimony casts further doubt on the accuracy of the minutes of the Board meetings.

ii. Respondents Fully Disclosed the Concentration of the October 3, 2011 Portfolio to the Board

Although the Division has alleged that Respondents misled the Board by inaccurately "assur[ing] the trustees that the breach was only limited to securities of a single issuer," Tr. 1832:23-1833:4, the letter and the minutes contradict that assertion. Mr. Oglesby's letter states that the "redemption caused *several issuer percentages* to climb above the 5% issuer limit." The minutes record that "the percentage of . . . [Fund] assets invested in the securities of a single issuer climbed to above 5% *with respect to several issuers*." Ex. 92 at A-1(31) (emphasis added). Both documents fully disclose that the Board was told that securities of "several issuers" were affected by the September 30th redemption.

Second, far from hiding the degree of concentration that existed in the Fund's October 3, 2011 portfolio, Respondents fully disclosed the issue in their Schedule of Portfolio Investments. Although the Schedule of Portfolio Investments is a snapshot of the September 30th portfolio, not the October 3rd portfolio, the Schedule provides all the information the Board would have needed to understand the diversification of the portfolio going into the fourth quarter of 2011. The snapshot showed that, despite the upcoming maturity of five of the investments (the investments that had been made on September 30th), nine of the 14 over-5% investments would remain over 5% of the portfolio at the end of the day on October 3rd. The snapshot was not only reviewed by the Trustees before the meeting, but it was also reviewed by them *during* the meeting—only three pages before the minutes record the discussion regarding the September 30th redemption having taken place. It would make absolutely no sense for Respondents to lie about the state of the portfolio when just minutes earlier they had reviewed the accurate state of the portfolio with the Trustees.

C. Maturity Restrictions

The OIP alleges that Respondents caused the Fund to exceed internal maturity restrictions on portfolio securities and then hid that fact from the Board. OIP ¶ 24. As a part of this allegation, the OIP notes that Respondents developed a system by which certain "tiers" of securities were restricted to certain maturity lengths, and then failed to follow those "restrictions" on "dozens of occasions." The OIP alleges that Respondents failed to inform the Board that "ACM often exceeded its own maturity restrictions." OIP ¶¶ 29-30.

1. The Origin of the Holding Periods

Throughout the period at issue, all securities purchased by Respondents for the Fund met the minimal credit risk standard. Starting in 2009, Respondents occasionally used additional terms to describe some of the securities purchased for the Fund. In an effort to focus on gradations of risk, the Adviser's credit research reports occasionally used the words "moderate risk," "some risk," and "risk" to describe variations within the minimal credit risk category. Tr. 1642-43. In 2010, the Adviser began using internal ratings—Tier 1(A), Tier 1(B), and Tier 1(C)—to represent similar distinctions within the category of minimal credit risk securities. Tr. 1643-44.

In approximately October 2011, ACM for the first time attached holding period benchmarks to the internal ratings. Tr. 1644-45. Tier 1(A) securities were given no holding period; Tier 1(B) securities were generally to be held for no more than 30 days; and Tier 1(C) securities generally should not be held for more than seven days. These holding periods were intended to be a "guideline to help [ACM] manage the portfolios better." Tr. 1144:2-10. The guideline was to be used by the portfolio manager in conjunction with all of the other factors that went into determining whether a particular security represented an appropriate investment, including pricing, yield, and the macroeconomic context. *See* Tr. 55, 1103-05, 1108.

The holding periods were not intended to replace or supplement the required determination that the security presented minimal credit risk. As Mr. Prost explained, the holding periods had no "impact . . . on a determination of minimal credit risk," but rather constituted "a more granular look within minimal credit risk." Tr. 1656. Nor did the holding periods constitute a hard restriction, or a "thou shall not cross" line. Tr. 1144:9. Because all of the securities rated Tier 1(C) by the Fund were "high quality securities," Mr. Prost testified that ACM "had no reason to put strict restrictions [on them]," Tr. 1646, and that "these were all minimal [credit risk securities]. [ACM] didn't have any problem with any of these securities." Tr. 1145-46. However, because the holding periods were intended to serve as a baseline guide for determining appropriate maturities, Mr. Oglesby incorporated a holding period check into his pre-purchase model. Ex. 490; Tr. 1205-06.

ACM's internal rating system was discussed with S&P, the Fund's rating agency, at its annual on-site visit in early October 2011. When Guyna Johnson of S&P met with Mr. Oglesby, Mr. Prost, and Ms. De Nicolo, she was provided with extensive information about the Fund. *See* Ex. 55; Tr. 558. This information included a list of securities on the Approved List, as well as the internal ratings that had been assigned to each security by ACM. In a follow-up email, Ms. Johnson asked whether a portfolio manager would be able to tell from the Approved List any "diversification [or] maturity restrictions which have been placed on the credit." Mr. Oglesby responded, stating that "Tier 1(A) = no maturity restriction; Tier 1(B) = 30 day maturity restriction; Tier 1(C) = 7 day maturity restriction." Ex. 50. Whether the "restrictions" represented a rigid or flexible investment strategy was not discussed, either at the meeting or during the follow-up conversations. Tr. 1153:14-15; 650-51. Both Mr. Oglesby and Ms. Johnson, as well as Mr. Guy and other witnesses, used the terms "restrictions" and "guidelines"

interchangeably during their testimony, and Ms. Johnson testified that whether the holding periods were hard or soft would not have mattered to her in rating the Fund. Tr. 651-52.

The following month, in advance of its November 16th examination, OCIE requested information on any restrictions that may have been placed on the securities in the Fund. OCIE was informed of "Ambassador Internal Rating Maturity Restrictions": "Tier 1(A) = 0 – 397 days (B) = 0 – 30 days (C) = 0 – 7 days." The evidence does not show who sent this response to OCIE's request. Ex. 172.

2. Respondents Did Not Conceal Information from the Board

The Division alleges that Respondents deliberately concealed from the Board the fact that ACM regularly purchased for the Fund securities that exceeded the maturity "restriction" applicable to those securities, and that this alleged concealment violated Sections 206(1) and 206(2) of the Advisers Act. The Division's allegation mischaracterizes ACM's policy. The policy was structured to permit the investment team flexibility where market opportunities required deviation from the holding periods. Tr. 1646. In other words, the purchase of securities at maturities that exceeded the holding periods was expressly contemplated by the policy. Tr. 1145. Respondents were not required to disclose these purchases to the Board.

Further, the holding periods did not come about until October 2011. Mr. Oglesby and Mr. Prost both testified that ACM adopted its holding periods policy at that time. Tr. 1143. Ms. Johnson testified that she first learned of the holding periods at the October 2011 meeting. Tr. 648-49. ACM used an internal tiering system as early as 2010, but the tiering system was not linked to holding periods until October 2011. Although no purchases exceeding the holding

periods were required to be disclosed to the Board, certainly no disclosure was required of purchases that occurred before the policy was even implemented.[11]

3. Respondents Did Not Mislead S&P or OCIE

Respondents did not have any reason to mislead S&P or OCIE about the maturity guidelines. S&P did not instruct ACM to employ maturity restrictions; indeed, Ms. Johnson testified that whether "the maturity restrictions were soft guidelines rather than hard restrictions" "wouldn't have" mattered to her. Tr. 651-52. Nor did Ms. Bartolini testify that the presence or absence of maturity restrictions would have been important to her or would have affected the OCIE examination.

II. ACM AND OGLESBY DID NOT CAUSE THE FUND TO VIOLATE ANY PROVISIONS OF RULE 2A-7

A. Overview

The OIP charges that Respondents caused the Fund to deviate from the requirements of Rule 2a-7 relating to the minimal credit risk determination, issuer diversification, and stress testing. Rule 2a-7 is an exemptive rule, which permits money market funds to maintain a stable net asset value and to employ the amortized cost method and the penny-rounding method, rather than being required to price their shares based on the actual net asset value of the fund as is generally required of mutual funds by Rule 22c-1. A "violation" of Rule 2a-7 is not in and of itself actionable; however, a failure to comply with the rule can result in liability under the various rules and regulations designed to govern the activities of a mutual fund. In this case, the

[11] The Division has alleged only eleven instances, out of hundreds of trades, in which the Fund exceeded the holding periods after October 2011. Ex. 174C.

OIP alleges that Respondents caused the Fund to commit five violations of the Investment Company Act, each of which is predicated on the finding of a violation of Rule 2a-7.[12] Tr. 1811.

B. Minimal Credit Risk Determinations—Rule 2a-7(c)(3)

1. Summary of the Division's Allegations

Rule 2a-7(c)(3) requires a money market fund to limit its portfolio investments to securities that the fund's board of directors determine, based upon independent analysis and on the securities' ratings by nationally recognized ratings organizations, present "minimal credit risks." The OIP charges that ACM caused the Fund to violate Rule 2a-7's "minimal credit risk" requirements by (1) purchasing securities for the Fund without the required determination that the securities presented "minimal credit risks," and (2) failing to maintain a written record of its minimal credit risk determination. OIP ¶¶ 31-33.

2. ACM Determined That Every Security Purchased for the Fund Presented Minimal Credit Risk, and ACM Maintained Written Records of That Determination

The evidence shows that ACM and Mr. Oglesby conducted a careful and extensive analysis of each security that ACM considered purchasing for the Fund's portfolio. The result of this analysis was a minimal credit risk determination. That determination was memorialized in writing by the addition of the security and its NRSRO rating to the Approved List. That determination was also memorialized by the creation of a written credit research report. At each Board meeting the Fund's Board of Trustees reviewed and approved the Approved List of issuers whose securities were deemed minimal credit risk and were therefore eligible for purchase, and then adopted a resolution determining that the securities on the list presented minimal credit risk.

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[12] Mr. Oglesby is alleged to have caused four of the five violations; Violation Three (relating to Rule 38a-1 of the Investment Company Act) is alleged only against ACM.

The creation of the credit research reports and the Board resolutions approving the Approved List satisfied the requirements that the Fund make a determination that each security purchased posed minimal credit risk and that that determination was memorialized in writing.

3. The Minimal Credit Risk Determination Complied with Rule 2a-7(c)(3)

When ACM was considering purchasing securities of an issuer whose securities were not on the Fund's Approved List, ACM began by researching whether the securities were rated by a Nationally Recognized Statistical Rating Organization ("NRSRO") such as Standard & Poor's and Moody's. Tr. 1099-1100. ACM purchased only First Tier securities.

After determining that a security was rated First Tier, ACM analyzed the security's trading history, including how the security traded in the market over time and whether multiple, reliable brokers traded a security. As Mr. Oglesby explained, frequent trades in relatively large quantities are hallmarks of higher-quality securities; their absence, Mr. Oglesby noted, could be a red flag. Therefore, even though the Fund held its securities to maturity in virtually all cases, ACM nevertheless considered for purchase only securities with an established trading history that were traded through multiple, reputable brokers. Tr. 1100.

After determining that a security had the requisite NRSRO rating, and confirming that the way the security was trading provided indicia of liquidity and quality, ACM reviewed the security's Private Placement Memorandum and analyzed the cash flow that supported the security. ACM also looked at the financial statements of the issuer and guarantor.

If the credit analyst concluded that the security should be considered by ACM for a determination regarding minimal credit risk, the next step was to present the research and analysis to ACM's credit committee. The credit committee then decided whether the particular security met the minimal credit risk standard. Tr. 1116.

If the credit committee determined that a security presented minimal credit risk, this determination was recorded by adding the security to the Approved List. Tr. 1118; see, e.g., Ex. 92 at B-3-a. That list reflected the name of the issuer whose securities were determined to present minimal credit risk, the applicable guarantor, and the NRSRO rating. The only securities on the Approved List were those that ACM determined met the minimal credit risk standard. The Approved List was incorporated into ACM's Trading Model. In addition, if ACM determined that a security met the minimal credit risk standard, an analyst drafted a credit research report. ACM created credit research reports only for those securities that it had determined presented minimal credit risk. The existence of a credit research report meant that ACM had determined that the security met the minimal-credit-risk standard.

4. The Process by Which Respondents Maintained Written Records of Their Minimal Credit Risk Determinations Complied with Rule 2a-7(c)(11)(iii)

The Fund also satisfied the requirements of Rule 2a-7 in the ways that it recorded its minimal credit risk determinations. Rule 2a-7(c)(11)(iii) requires a money market fund to maintain a "written record" of the minimal credit risk determination as well as the Designated NRSRO ratings (if any) used as part of determining the eligibility of the security for purchase:

> [A] written record of the determination that a portfolio security presents minimal credit risks and the Designated NRSRO ratings (if any) used to determine the status of the security as an Eligible Security . . . shall be maintained and preserved.

ACM created a written record of its determination by adding the security and its NRSRO rating to the Approved List and by creating a written credit research report.

5. The Use of Terms Other Than "Minimal Credit Risk" in a Credit Research Report Does Not Violate Rule 2a-7

Some of the credit research reports do not state that the security discussed in the report met the minimal credit risk standard. Other reports used terms such as "moderate risk" or "some

risk." As Respondents testified, however, ACM did not prepare a credit research report until after the credit had been determined to represent *minimal* credit risk. Tr. 1130. The use of the terms "some risk" or "moderate risk" within the credit research reports for minimal-credit-risk securities reflected ACM's efforts to address gradations within the category of minimal credit risk. They did not indicate that the security was anything other than minimal credit risk. *See, e.g.*, Tr. 1128-30. As the Court noted at the hearing, the issue here is not whether the "magic words" were used, but whether ACM performed the required analysis and made a written determination that each security purchased met the minimal credit risk standard.

C. Rule 2a-7(c)(4)'s Issuer-Diversification Rule

1. Summary of the Division's Allegations

The OIP alleges that ACM and Mr. Oglesby caused the Fund to violate the issuer-diversification rule in Rule 2a-7(c)(4). That part of Rule 2a-7 states that, immediately after the acquisition of the security of an issuer, a money market fund shall have invested no more than 5% of its assets in the securities of that issuer. The rule permits a money market fund to invest up to 25% of its assets in the securities of a single issuer, so long as that position is reduced below 5% within three days of acquisition. This has been called the "safe harbor" provision.

The OIP alleges that "ACM has admitted that AMMF violated Rule 2a-7's condition on issuer diversification at the time of purchase on six different occasions in 2009." OIP ¶ 45. In subsequent filings with the Court, the Division has alleged that Respondents also caused the Fund to violate the issuer-diversification rule on other occasions in 2009 and on three occasions in 2010. Ex. 475 at 9-10.

ACM and Mr. Oglesby did not cause the Fund to violate Rule 2a-7(c)(4).

2. ACM Did Not Cause Any Violation of the Issuer-Diversification Rule of 2a-7(c)(4)

Throughout the life of the Fund, ACM worked hard to ensure that the Fund's purchases and holdings complied with Rule 2a-7(c)(4)'s issuer-diversification rule. ACM instituted extensive pre- and post-purchase compliance reviews designed to prevent and, if necessary, detect any violation of that rule.

In 2009, Ms. De Nicolo, who was at that time Chief Compliance Officer of both the Fund and ACM, had a mistaken understanding of the "safe harbor" provision: she believed that the Fund was permitted to invest more than 5% of its assets in the securities of *multiple* issuers, so long as together those securities comprised no more than 25% of the Fund's assets. Tr. 724-25. In reality, the rule permitted the Fund to invest more than 5% of its total assets in the securities of a *single* issuer.

Relying on Ms. De Nicolo's implementation of the rule, on a few occasions in 2009, ACM purchased securities of more than one issuer that each exceeded 5% of the portfolio immediately after acquisition. On each such occasion, the holdings were reduced below 5% within three days.

OCIE performed an examination of the Fund in Fall 2009. After this exam, OCIE issued a closing letter to Ambassador Funds dated May 18, 2010, highlighting certain areas to be addressed in connection with Rule 2a-7 compliance, including the explanation that Rule 2a-7's "safe harbor" provision applied to the securities of a single issuer.[13] Tr. 729-30. After ACM

[13] Although OCIE brought to ACM's attention a single instance of such multiple holdings, ACM's prior counsel Miller Canfield informed the Division that there appeared to have been three additional dates in 2009 on which purchases of the securities of more than one issuer exceeded 5% of the portfolio at the time of acquisition. *See* Ex. 70.

received this letter, FSG revised its compliance checks to reflect the correct statement of the diversification provision.

After OCIE's closing letter was received, the Fund did not violate the issuer-diversification rule.[14]

3. ACM and Mr. Oglesby Are Not Liable for Causing the Fund's Alleged Violations of Rule 2a-7(c)(4)'s Issuer-Diversification Rule

The OIP charges that Respondents are liable for causing the Fund to violate the issuer-diversification rule on a series of occasions in 2009. It is important to note that Mr. Oglesby did not make investment decisions or execute trades for the Fund in 2009. He became the Fund's portfolio manager in May 2010, and therefore is not liable for any violations of Rule 2a-7 that took place prior to May 2010. Tr. 1225.

ACM and Mr. Oglesby are not liable for causing the Fund's alleged violations of Rule 2a-7(c)(4) unless the Division establishes all of the following: (1) a primary violation; (2) an act or omission by the respondents that caused the violation; and (3) knowledge that the conduct would contribute to the violation. *Robert M. Fuller*, 80 SEC Docket 3539, 3545 (Aug. 25, 2003); *see also Howard v. S.E.C.*, 376 F.3d 1136, 1141 (D.C. Cir. 2004); *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175 (2001).

There were no primary violations of the issuer-diversification rule except on three or four days in 2009 as a result of Ms. De Nicolo's misunderstanding of the rule. Nobody at ACM knew in 2009 that the Fund had violated the rule.

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[14] The Commission's response to learning that Ms. De Nicolo had misinterpreted the safe harbor provision is evidence that non-compliance with Rule 2a-7(c)(4)(i)'s issuer-diversification rule generally would not give rise to an investigation, much less to the institution of enforcement proceedings and imposition of financial penalties or disgorgement. Rather than taking action, the Commission simply "remind[ed] the Fund of the requirements of Rule 2a-7(c)(4)(i)(A)" in its closing letter. *See* Ex. 165 at C-10.1.5 (page 110 of the PDF) (Board package enclosing May 18, 2010 closing letter from the Division).

i. The Fund Substantially Complied with Rule 2a-7(c)(4)

In 2009, there appear to have been violations of Rule 2a-7(c)(4) on three or four days, when the Fund's Chief Compliance Officer Maria De Nicolo and FSG had a mistaken understanding of the law.[15] At the time of these transactions, the individuals at ACM believed that the Fund was in compliance with Rule 2a-7(c)(4). FSG reviewed the purchases, confirmed that the purchases were in compliance with Rule 2a-7 because they were "within [the] 3 day limit," and provided ACM with a copy of the compliance report prepared by FSG. Ex. 70.

In 2010, there appear to have been no violations whatsoever, and indeed the OIP alleged none. Nevertheless, in its pre-hearing brief, the Division—for the first time—alleged three additional dates in 2010 on which the Fund was alleged to have violated the issuer-diversification rule: January 28th, June 21st, and December 17th. Yet the evidence shows that none of these instances was in fact a violation of Rule 2a-7's issuer-diversification rule.

The Fund did not violate Rule 2a-7(c)(4) on January 28, 2010.[16] On January 28, 2010, the Fund purchased the securities of a single issuer, Paradigm Funding LLC, in a quantity that exceeded 5% of the portfolio. The next day, the Fund sold Paradigm securities to bring the quantity of securities of that issuer below 5% of the portfolio's total assets. *See* Exs. 72, 71.

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[15] In its pre-hearing brief—for the first time—and then at summation, without any discussion at the hearing, the Division alleged several additional days in 2009 on which the Fund allegedly purchased Amstel securities in violation of the issuer-diversification rule. The Division has presented no evidence in support of the claim that these purchases violated the issuer-diversification rule. Indeed, in some instances, such as November 19, 2009, the Division has presented no evidence that a purchase of Amstel even occurred. Ex. 12 at 99-101.

[16] Of course, as discussed above, even if there had been a violation on that date, it would not have been caused by Respondents' negligence, because ACM had not yet received the SEC's May 2010 closing letter correcting Ms. De Nicolo's misunderstanding of Rule 2a-7.

Although the Division alleges that this series of transactions did not comply with Rule 2a-7, in fact the transactions were permissible under the "safe harbor" provision of Rule 2a-7(c)(4)(i).[17]

Second, it appears that the Fund did not violate Rule 2a-7(c)(4) on June 21, 2010. At the beginning of the day, the Fund's total portfolio was $200,431,591.79. Ex. 66 at FSG000117. At 10:42 AM, ACM caused the Fund to purchase securities of Fairway Financial with a one-day maturity in the amount of $10,000,944.44, approximately 4.99% of the portfolio. Ex. 482. At 12:05 PM, ACM caused the Fund to purchase securities of Charta LLC, also with a one-day maturity, in the amount of $9,999,941.67, also roughly 4.99% of the total portfolio as of that morning.[18] *See* Ex. 482 (trade ticket confirmations). According to the net shares report compiled by the Fund's custodian at 12:16:11 PM, there was a $3,000,000 redemption that day. Ex. 66 at FSG000117. After the redemption, the Fairway Financial holding and the Charta LLC holding each comprised 5.06% of the Fund's total portfolio. Given ACM's pre-purchase compliance checks which tested each hypothetical purchase against the most up-to-date portfolio composition available to ensure that the purchase would be in compliance, the most reasonable inference is that the Fairway Financial acquisition preceded the redemption, and the Charta LLC holding fell within Rule 2a-7(c)(4)(i)'s allowance of a holding of up to 25% for up to three days. See Tr. 1205-06, 1215. Accordingly, the Fund did not violate the issuer-diversification rule on June 21, 2010.

Third, the Fund did not violate Rule 2a-7(c)(4) on December 17th, 2010. That day, there were three purchases of securities that, by the end of the day, appeared to create positions over

[17] The Division has criticized ACM for investments that fall within Rule 2a-7's safe harbor and suggested that a position that takes advantage of the safe harbor is nevertheless in "breach" of the issuer-diversification rule. Rule 2a-7 explicitly permits the purchase of securities of a single issuer that exceed 5% of the total portfolio, up to 25% of the total portfolio, so long as the holdings are reduced to 5% or below within three days.

[18] $10,000,944.44 is 4.98970% of $200,431,591.79. $9,999,941.67 is 4.98920% of $200,431,591.79.

5% of the portfolio by 14 basis points, *i.e.*, 0.14%. The three purchases were of securities issued by Louis Dreyfus Corporation, Bunge Asset Funding, and Compass Securities. In the normal course, FSG's computerized compliance system flagged various holdings in the portfolio for further review, including those three purchases. Ex. 68 at ACM0001793-1798. Upon review, FSG confirmed that all were in compliance at the time of purchase, and in the case of those three purchases confirmed that redemptions that took place after the purchases had caused the holdings to rise above 5%. Consequently, the Fund was in compliance with Rule 2a-7(c)(4).[19] *Id.*

ii. Mr. Oglesby's Conduct Did Not Cause Any of the Violations in 2009 or the Alleged Violation on June 21, 2010

While Respondents acknowledge that there were three violations of the issuer-diversification rule in 2009, Mr. Oglesby did not cause them. Kathy Nurre, not Mr. Oglesby, was the portfolio manager who purchased securities on behalf of the Fund until May 2010. In addition, Mr. Oglesby was on vacation on June 21, 2010. If there was a violation of Rule 2a-7 on that day, he did not cause it. *See* Exs. 181, 182.

[19] In its pre-hearing brief, the Division alleged—for the first time—that Respondents lied to the Board regarding the true facts of the three December 17, 2010 purchases and the subsequent, same-day redemption that caused the holdings to exceed 5% of the total portfolio. This late addition to the Division's theories is demonstrably false.

The minutes of the Board meeting on February 18, 2011, at which all three of the December 17, 2010 purchases at issue were disclosed to the Board, suggest that only one position rose above 5% as a result of the redemption that day. Ex. 464 at 11. But this statement in the minutes, prepared by Fund counsel Richard Cutshall, appears to be another example of the imprecision of the Board meeting minutes. FSG provided the Board package to the Trustees and Fund counsel several days in advance of the meeting. Included in this package was the FSG compliance report that explicitly identified all three positions purchased in the morning of December 17, 2010, and explained that there was no violation of Rule 2a-7 because the purchases were in compliance when made, and a redemption after the acquisition of those securities had caused the positions to exceed 5%. Ex. 463 at 157. The information ACM provided in the Board package showed that all three positions exceeded 5%. The information ACM in the Board package was accurate. It does not make sense that ACM misled the Board when the subject was discussed at the meeting.

iii. ACM and Mr. Oglesby Neither Knew Nor Should Have Known of the Fund's Alleged Failure to Comply with Rule 2a-7(c)(4)

Finally, neither ACM nor Mr. Oglesby caused the Fund to violate Rule 2a-7(c)(4) because neither knew, nor should have known, that the alleged purchases violated the rule. *See Upton v. S.E.C.*, 75 F.3d 92 (1996) (reversing SEC finding of liability where respondent neither knew nor should have known that his conduct caused a violation of the securities laws).

Respondents did not cause the Fund's violations of the issuer-diversification rule because they did not know that the Fund violated the rule.[20] Respondents followed the rule as they understood it, and had no reason to know that the rule had been misinterpreted by the Fund's compliance personnel. There can be no liability for negligence under such circumstances. *See Upton*, 75 F.3d 92; *S.E.C. v. Slocum, Gordon & Co.*, 334 F. Supp. 2d 144, 181-82 (D.R.I. 2004) (rejecting liability for a knowing and willful violation where defendant had no reason to believe he was following an incorrect interpretation of the law).

D. Stress Testing

1. Summary of the Division's Allegations

The OIP makes two allegations relating to the stress testing requirements of Rule 2a-7. The OIP charges that the initial stress test failed to comply with Rule 2a-7(c)(10)(v)(A) because it failed to address the ability of the Fund to withstand two scenarios: (1) increased shareholder redemptions and (2) a downgrade of or default on portfolio securities. OIP ¶ 48-51. The Division takes issue only with the initial stress test performed. Tr. 1810. Second, the OIP

[20] The evidence at the hearing illustrates Respondents' efforts to comply with the issuer-diversification rule. As early as 2007, Mr. Oglesby incorporated an issuer-diversification rule check into ACM's pre-purchase compliance model in order to ensure that no purchase was made that would, at the time of purchase, be out of compliance with the rule. Each day's trading records were sent by Respondents to FSG for a post-purchase compliance check.

alleges that the Fund failed to establish written procedures for stress testing as required by Rule 2a-7(c)(10)(v). OIP ¶ 46-47.

2. The Fund's Initial Stress Testing Complied with Rule 2a-7(c)(10)(v)

The Fund's initial stress test complied with the stress testing requirements of Rule 2a-7(c)(10)(v).[21]

The initial stress test addressed the Fund's ability to maintain a stable net asset value per share in the event of "an increase in shareholder redemptions" as required by Rule 2a-7(c)(10)(v)(A). Tr, 1267-92. Such an increase would not inherently stress the Fund, because if there were sufficient daily liquidity in the portfolio, the Fund would simply honor the increase with its cash on hand.[22] Tr. 1282-83. For this reason, the test accounted for a combination of increased redemptions and insufficient liquidity, which could require the Fund to liquidate portfolio securities at "fire sale" prices in order to meet the redemptions. The test measured the effect of a reduction in value for those securities, as represented by the indicator "50% of the Portfolio Widens by 500 bps." Tr. 1283-84; Ex. 463 at II-4.e.[23]

The initial stress test addressed the Fund's ability to maintain a net asset value per share in the event of "a downgrade of or default on portfolio securities" by testing a hypothetical default of one or multiple portfolio securities. Ex. 463 at II-4.e ("Default ($1MM)"); Tr. 1273,

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[21] The Division takes issue only with the initial stress test. Tr. 1810.

[22] The Fund's daily liquidity during times of market stress reached 50% or more of the portfolio. *See* Ex. 485.

[23] "50% of Portfolio Widens by 500 bps" means that, for half of the portfolio's holdings, the interest rate spread between the holdings' yields and the market's yields would widen, or increase, by 500 bps (5%). In this hypothetical, bonds that the Fund had purchased at a yield of 0.2% would now be available in the market at the much, much greater yield of 5.2%. Because the value of fixed-income securities depends in large part upon their yield, this hypothetical "catastrophic" event would cause substantial losses in the value of half of the portfolio. Tr. 1282-84.

1281, 1288-89. In addition, by addressing the impact of forced sales at distressed prices, the test also addressed the Fund's ability to maintain a stable net asset value per share in the event of the combination of numerous, substantial downgrades of the Fund's securities that resulted in a substantial loss in the value of half the Fund's portfolio. Ex. 463 at II-4.e ("50% of Portfolio Widens by 500 bps"); Tr. 1288-89.

The initial stress test addressed every requirement of Rule 2a-7(c)(10)(v).[24]

3. The Fund Complied with Rule 2a-7(c)(10)(v)'s Requirement of Written Procedures Providing for Stress Testing

The OIP also charges that the Fund did not "fully" and properly implement written stress test procedures, as required by Rule 2a-7(c)(10)(v). OIP ¶ 46-47.

The Fund's written procedures, as reflected in the minutes of several Board meetings, satisfied the requirements of Rule 2a-7(c)(10)(v). The November 2010 Board package included the amended rule, and the Board adopted resolutions at that meeting adopting and implementing the rule's requirements. Ex. 468 at I-a.7. These resolutions satisfied the requirement that the Fund had to implement written stress testing procedures.[25]

[24] In its pre-hearing brief, the Division suggested for the first time that the initial stress test was not performed by the date required by Rule 2a-7. Ex. 472 at 1. But, as the Division acknowledged at the hearing, there was no rule or other form of legal guidance that stated when stress testing should begin or when the stress-testing procedures should have been in place. Tr. 1810. The rule leaves the determination of timing to the Board. In this case, the Board engaged in a series of discussions with Fund counsel over the course of four Board meetings, and at the November 19, 2010 meeting adopted a resolution providing for annual stress tests. The resolution called for the first stress test to be performed using data as of December 31, 2010, and to be presented at the next board meeting in February 2011. The initial stress test was conducted and presented by Mr. Oglesby precisely on schedule.

[25] If there had been a failure to comply with Rule 2a-7(c)(10)(v)'s requirement of written procedures, that failure would not have been caused by ACM or Mr. Oglesby. Rule 2a-7 imposed on the Fund and its Board the responsibility of implementing written procedures. Rule 2a-7(e), which sets out what a money market fund's Board may delegate to the fund's Adviser, forbids delegation of determinations relating to stress testing. The Board could not delegate the establishment of written procedures or a determination of the appropriate schedule for the conducting of stress tests. These determinations were the responsibility of the Fund, Fund counsel, and the Fund's Chief Compliance Officer, who reported to the Fund—not ACM or Mr. Oglesby. Furthermore, if there was a violation here, it was caused by the Fund's lawyers, not by ACM or Mr. Oglesby.

E. ACM and Mr. Oglesby Did Not Cause the Fund to Violate Any Sections or Rules of the Investment Company Act

A money market fund that fails to comply with Rule 2a-7 may, as a result, violate other statutes and rules that govern mutual funds, including the rules and regulations that form the basis for the allegations in Violations Two through Six of the OIP. Each of these alleged violations is predicated on non-compliance with Rule 2a-7. Tr. 1811. Because ACM and Mr. Oglesby did not cause any violation of Rule 2a-7, they did not cause any of the violations alleged in Violations Two through Six.

III. SANCTIONS

As we have explained in this brief, we believe that ACM and Mr. Oglesby have not violated the securities laws and rules. If the Court disagrees with us, we cannot anticipate whether the Court will find that ACM and Mr. Oglesby have violated all the provisions addressed in the OIP or some of them. We submit that it would be better to address the issue of sanctions after the Court has ruled on whether ACM and Mr. Oglesby have engaged in conduct that violates the securities laws and rules.

A. There Is No Public Interest in Imposing a Penalty

If this Court finds that there has been a violation, it must decide whether to impose a sanction. In order to impose a sanction of any kind, the Court must determine that a sanction would be in the public interest. The factors identified in *Steadman v. S.E.C.*, 603 F.2d 1126 (5th Cir. 1979), provide the framework for analysis of the public interest in imposing sanctions. These factors include the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or

her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. *Id.* at 1140.

The *Steadman* factors weigh against imposing a sanction in this case. No investors were harmed by the Respondents. None of the shareholders in the Fund lost money. *See, e.g.*, Tr. 243, 392, 930. Indeed, the shareholders presented by the Division as witnesses against ACM both gave glowing references to ACM, Tr. 386-387, 390, 413, and even though they are well aware of the allegations against ACM and Mr. Oglesby, they continue to rely on market analysis developed by Mr. Oglesby. Tr. 386-87, 411, 417. Far from feeling betrayed or harmed, the investors clearly believe that they had received excellent service and advice from ACM and its personnel.

The question of Respondents' "recognition of the wrongful nature of [their] conduct" is inapposite here, where Respondents genuinely do not believe that their conduct was unlawful. Respondents should not be penalized for exercising their right to defend themselves against charges they view as unjustified and unfounded. Although Respondents continue to believe that they did not violate the securities laws or any rule or regulation promulgated by the Commission, they have repeatedly acknowledged the importance of complying with the securities laws and rules. *See, e.g.*, Tr. 1293.

There is no likelihood that ACM or Mr. Oglesby will violate any of the relevant statutes or rules in the future. Respondents no longer operate a money market fund, nor do they have any interest in doing so in the future. Tr. 1469. Their sole business is managing investments for separate, non-pooled clients. Tr. 1479. There is no investment company that Respondents could aid, abet, or cause to violate the Companies Act.

Further, the nature of Respondents' business makes the imposition of even a nominal penalty a career-ending blow. Should this Court find a violation and impose a penalty of any kind, however small, Respondents will not recover. Neither ACM nor Mr. Oglesby has the financial means to pay a penalty. Any financial penalty will bankrupt them. The company that Mr. Prost, Mr. Jeffries, and Mr. Oglesby have worked so hard for over a decade to build will be forced to close, and its employees—including two single mothers—will be searching for a job in a city in which nearly a quarter of its residents are unemployed.

As Mr. Prost testified, before the OIP was filed, given its conservative management and consistent track record of successful stewardship of clients' assets, ACM had never lost a client. Tr. 1622-23. Since the OIP in this case was filed, ACM has lost three. *Id.* The remaining clients, many of which are municipalities, have continued to invest with ACM for now. But should there be an adverse judgment, it is extremely unlikely that any of ACM's clients would continue to do business with a firm that has been censured by the SEC.

If Mr. Oglesby is censured for even a technical violation, even if no bar is imposed, he will never again be able to find work in the securities industry. For a man who has worked hard throughout his career to comply with the securities laws and rules, it would be entirely unjust to drive him out of the business.

Although Respondents understand and accept that if they violated the law there must be consequences, Respondents believe that any penalty that puts ACM out of business and its ten employees out of a job, and that prevents Mr. Oglesby from being able to work in the securities industry, would be excessive and unwarranted.

B. There Is No Basis for a Cease and Desist Order

A cease and desist order would be unnecessary because there is no possibility of future violation of the securities laws and rules, and because there was no harm to investors. *See KPMG Peat Marwick LLP*, Exchange Act Release No. 43862 (Jan. 19, 2001), 54 S.E.C 1135, 1185 (requiring courts to consider whether there is a "reasonable likelihood of such violations in the future" and "the degree of harm to investors"). The Ambassador Money Market Fund has been closed; the Adviser does not advise any money market fund; and it has no plans to create a money market fund in the future. Tr. 1469. Because there is no likelihood of future violation, and because no investor ever lost money by investing in the Fund, no cease and desist order is warranted. The facts in this case do not justify putting ACM out of business, causing its ten employees to be out of work.

C. There Is No Basis for Disgorgement

There is no basis for any disgorgement. Disgorgement is an equitable remedy intended to deprive a party that has violated the law of "a reasonable approximation of [his] profits causally connected to the violation." *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). Disgorgement requires a willful violation of the securities laws and rules. In *SEC v. Slocum*, the court ruled that where a defendant does not know that his or her conduct violates the securities laws, any violation arising out of that conduct is not willful. *S.E.C. v. Slocum, Gordon & Co.*, 334 F. Supp. 2d 144, 181 (D.R.I. 2004). In this case, if either ACM or Mr. Oglesby did anything that violated or caused the Fund to violate the securities laws, they did not know of it.

D. There Is No Basis for Money Penalties

There is no basis under these facts for the imposition of a money penalty of any kind, let alone a third-tier penalty. A money penalty may be imposed if it is in the public interest and if a

violation is willful. Advisers Act § 203(i); Company Act § 9(d). For the various reasons Respondents have set forth, a money penalty against ACM or against Mr. Oglesby would not be in the public interest. *See Slocum*, 334 F. Supp. 2d at 181.

The Division has requested a third-tier penalty, which would be both crippling and unnecessary. A third-tier penalty may be imposed if the alleged act or omission "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, *and* . . . such act or omission 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." Advisers Act Section 203(i)(2)(C) (emphasis added). None of these factors applies here.

Section 203(i)(4) explicitly permits the Commission to consider evidence regarding the Respondents' ability to pay a penalty and whether a penalty would affect the Respondents' ability to continue in business. If this Court chooses to impose a penalty, it should not impose a penalty that would drive ACM out of business or force Mr. Oglesby into bankruptcy.

E. There Is No Basis For an Associational Bar

Finally, there is no basis for an associational bar against Mr. Oglesby. Section 203(f) permits the Commission to "censure or place limits on the activities" of "any person associated . . . with an investment adviser . . . if . . . such censure, placing of limitations, suspension, or bar is in the public interest and . . . such person has" willfully violated the securities laws. Again, if Mr. Oglesby committed any violation of the securities laws here, it was entirely without knowledge or intent, and was therefore not willful. Under these circumstances, there should not be any associational bar.

IV. THE RESPONDENTS

A. Ambassador Capital Management

1. ACM's Fourteen-Year Track Record

Mr. Jeffries, Mr. Prost, Mr. Oglesby, and the rest of the ACM team have built a 14-year success story in downtown Detroit. Tr. 1622-23, 1478. They are decent, hard-working people who have had to work hard for their success.

As a result of their hard work and conservative, skillful management, the Fund had an impressive record of success. Tr. 1623-24. From 2007 to its closing, the Fund was rated AAAm by Standard & Poor's, the highest rating available to money market funds. Tr. 643-44, 1646-47. Every Fund holding was rated A-1/P-1, the top ratings given by Standard & Poor's and Moody's. Tr. 332, 712, 1107. Every shareholder redemption was made on time. No portfolio holding ever defaulted. Most importantly, no investor ever lost any money. *See, e.g.*, Tr. 243, 930.

Before the OIP was filed, ACM had never lost a client—an unusual accomplishment for a money manager. Tr. 1621-23.

2. ACM's Work in the Service of Its Community

ACM provides jobs in a city with more than 20% unemployment, and serves its community in other ways as well. Tr. 1481-82. ACM was one of the founding sponsors of the Detroit Summer Finance Institute, a mentorship program that places Detroit public high school students as interns in the financial industry. ACM takes on sophomores and juniors as interns each year, hoping to provide the same kind of opportunity that the INROADS program provided to Mr. Oglesby decades ago. *Id.*

The people of ACM serve diligently in their churches and schools as trustees and volunteers. Tr. 1482, 1590-92. They provide bank research free of charge to former municipal

shareholders of the Fund. *See, e.g.*, Tr. 417, 1618-20. They have remained in Detroit when so many other businesses and companies have fled.

B. Derek Oglesby

Mr. Oglesby is from a family of educators. His father was a professor of theology. His mother taught remedial reading in middle school. His brother is a high school principal. Mr. Oglesby is a has a passion for math, but his passion for math is eclipsed by his passion for his family. He met and fell in love with his wife Naomi, an attorney, while in college. He coaches his sons' tee-ball and little-league teams. At the hearing, Mr. Oglesby testified until he could barely speak, but he answered all the questions put to him by the Court and by the lawyers for the parties.

C. The People of ACM

1. Brian Jeffries

Brian Jeffries was born on a military base and grew up in Detroit. His mother was a bank teller. His father completed his service in the military and recently retired after a 30-year career as a police officer for the City of Detroit. He is still working as a security guard. Tr. 1453-54. Neither of Mr. Jeffries's parents graduated from college. Mr. Jeffries attended Central Michigan University on an athletic scholarship. He later earned a law degree from Michigan State University while working full-time as an investment manager and has been working in the fixed-income field for more than 25 years. Mr. Jeffries loves his family dearly; during the hearing, Mr. Jeffries broke down when talking about meeting his wife Miko on a blind date. Mr. and Mrs. Jeffries are the proud parents of Zachary, Matthew, and Gabrielle. Mrs. Jeffries volunteers with the children's ministry at their church, and Mr. Jeffries is a trustee of the church. Tr. 1482.

2. Greg Prost

Greg Prost is the son of a court reporter and a librarian, who has worked hard for everything he has achieved. He and his wife Lee have two children, and sponsor a kindergarten class in Detroit so that the children there have access to books to read in the classroom and at home. Tr. 1590-92. Mr. Prost was running a bond fund by the age of 20. While working, Mr. Prost earned an M.B.A. from Western Michigan University. Tr. 1591-92. He brings more than 25 years of fixed income experience to ACM. Mr. Prost has an extraordinary knowledge of the bond markets, and has been primarily responsible for ACM's successful conservative investment policy. Tr. 1592-94.

3. The ACM Family

ACM is a close-knit company of 10 employees. Tal Gunn has been a senior portfolio manager at ACM for eight years. He and his wife have two children. Tr. 1596-97. Mike Vandenbossche, a senior portfolio manager at ACM, is married and the father of two children. Tr. 1597-99. Mike Krushena, another senior portfolio manager at ACM, is married and the father of three children. Tr. 1598-99.

Valaise Smith is a single mother who has worked at ACM for more than 10 years and has a daughter who graduated college. Tr. 1599-1600. Barbara Cunningham, ACM's administrative assistant, has been at the firm for more than five years. Tr. 1600. Zuwena Boyd, ACM's receptionist, has worked at ACM for more than three years and has a child in high school. Tr. 1601.

Melanie Mayo West is ACM's General Counsel and Chief Compliance Officer. She and her husband have two young children. Ms. West is a highly qualified professional with a J.D. and an M.B.A. from the University of Michigan. She brings decades of legal, finance, and compliance experience to ACM. Tr. 1600-01.

V. CONCLUSION

Ambassador Capital Management and Derek H. Oglesby have not violated the securities laws, nor did they cause the Ambassador Money Market Fund to violate the securities laws. We respectfully ask the Court to dismiss all charges set forth in the Order Instituting Proceedings.

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