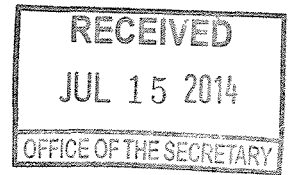


UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING

File No. 3-15526 3-15625

In the Matter of

AMBASSADOR CAPITAL  
MANAGEMENT, LLC

and

DEREK H. OGLESBY,

Respondents.

**THE DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF**

Robert M. Moye  
Jonathan S. Polish  
Amy S. Cotter  
Robin Andrews  
U.S. Securities and Exchange Commission  
175 West Jackson Boulevard, Suite 900  
Chicago, Illinois 60604  
Telephone: (312) 353-7390  
Facsimile: (312)353-7398

*Counsel for the Division of Enforcement*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. RESPONDENTS' MISREPRESENTATIONS TO THE FUND'S TRUSTEES REGARDING EUROZONE INVESTMENTS .....	1
III. RESPONDENTS' MISREPRESENTATIONS TO THE FUND'S TRUSTEES REGARDING ISSUER DIVERSIFICATION .....	9
IV. DEFICIENCIES AS TO MINIMAL CREDIT RISK DETERMINATION.....	11
V. ACTIVE BREACHES OF THE ISSUER DIVERSIFICATION LIMITATION .....	16
VI. RESPONDENTS' DEFICIENT INITIAL STRESS TESTING.....	18
VII. THE CAUSING VIOLATIONS ALLEGED IN THIS CASE ONLY REQUIRE A FINDING OF NEGLIGENCE .....	19
VIII. SIGNIFICANT SANCTIONS SHOULD BE IMPOSED AGAINST THE RESPONDENTS .....	20
IX. CONCLUSION.....	22

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Ganino v. Citizens Utilities Co.</i> , 228 F.3d 154 (2d Cir. 2000) .....	8, 11
<i>Graham v. SEC</i> , 222 F.3d 994 (D.C. Cir. 2000) .....	18
<i>Howard v. SEC</i> , 376 F.3d 1136 (D.C. Cir. 2004).....	20
<i>SEC v. Blatt</i> , 583 F.2d 1325 (5th Cir. 1978).....	20
<i>SEC v. Manor Nursing Centers, Inc.</i> , 458 F.2d 1082 (2d Cir. 1972) .....	16
<i>SEC v. Mudd</i> , 885 F. Supp. 2d 654 (S.D.N.Y. 2012) .....	8, 11
<i>SEC v. Platforms Wireless Intern. Corp.</i> , 559 F. Supp. 2d 1091 (S.D. Cal. 2008) .....	17
<i>SEC v. Reys</i> , 712 F. Supp. 2d 1170 (W.D. Wash. 2010) .....	8, 11
<i>Steadman v. SEC</i> , 603 F.2d 1126 (5th Cir. 1979), <i>aff'd on other grounds</i> , 450 U.S. 91 (1981).....	20

### ADMINISTRATIVE PROCEEDINGS

<i>In re Fundamental Portfolio Advisors, Inc.</i> , 56 S.E.C. 651, Securities Act Rel. No. 8251, Advisers Act Release No. 2146 (July 15, 2003).....	22
<i>See J. Kenneth Alderman, CPA</i> , File No. 3-15127, Administrative Proceedings Rulings Release No. 743 at 5 .....	17
<i>In the Matter of KPMG Peat Marwick LLP</i> , Exchange Act Rel. Number 43862, 54 S.E.C. 1135 (Jan. 19, 2001) .....	20
<i>In the Matter of Robert M. Fuller</i> , Exchange Act Rel. No. 48406, 2003 SEC LEXIS 2041 (Aug. 25, 2003), <i>pet. denied</i> , 95 F. App'x. 361 (D.C. Cir. 2004).....	20
<i>In the Matter of Stephen J. Horning</i> , File No. 3-12156, Exchange Act Rel. No. 56886 (Dec. 3, 2007) .....	17

## I. INTRODUCTION

In their brief, Respondents claim that: they provided outstanding service to ACM's clients, who didn't lose a penny of their investments; they consistently minimized investment risk; and that they never misled the Board of Trustees, Standard & Poor's, or the SEC's examiners. Lastly, they contend that the imposition of *any* sanction in this case, however small, would put ACM and all of its employees out of business. To make these arguments, Respondents distort the facts in three principal ways: (1) by blaming the Trustees for not ferreting out ACM's misstatements; (2) by ignoring the plain language of ACM's own documents; and (3) by citing predominantly to their own testimony while ignoring the rest of the record. As explained below, these arguments are not persuasive.

First, Respondents had a fiduciary duty to make full and accurate disclosures to the Fund's Trustees. It was not the Trustees' responsibility to search through voluminous records to verify ACM's representations. Second, Respondents' own documents demonstrate that they did not invest only in securities that constituted a minimal credit risk. Third, Respondents' self-serving testimony cannot be reconciled with their own documents and the testimony and opinions of the other witnesses, including Fund Trustees, Fund counsel, a Standard & Poor's director, an SEC examiner, and the unrebutted testimony of the SEC's expert.

Every witness testified that it was crucial that the Respondents provide accurate information and carefully comply with Rule 2a-7's risk-limiting provisions. By failing to adhere to Rule 2a-7, the Respondents forfeited the Fund's right to identify and market itself as a money market fund, and violated the investment policies of the Fund's municipal investors, who were drawn to the Fund precisely because it was a money market fund. Those investors were clear that they would have pulled their investments had they known that the Fund was not in compliance

with the Rule. By failing to provide complete and accurate information to the Trustees, the Respondents deprived the Trustees of information that they needed to carry out their own responsibilities under Rule 2a-7.

And Respondents had obvious reasons both to disregard Rule 2a-7's requirements and to misrepresent their compliance problems to the Trustees. Respondents needed to maximize the yield on the Fund's investments in order to gain additional clients, which was needed to prop up the fund.

The Commission cannot allow firms and professionals that advise money market funds, like Respondents, to treat their responsibilities in such a cavalier manner. Money market funds constitute a unique and important role in the country's financial sector. Such funds invest billions of dollars of investor assets. The applicable rules ensure that funds do so in a manner that minimizes risk while ensuring the availability for withdrawals on short notice. Unless money market funds, like the Ambassador Fund, adhere to the requirements of Rule 2a-7, they risk breaking the buck during a national financial crisis, or whenever a large shareholder makes an unexpected redemption request.

The evidentiary record compels the conclusion that Respondents violated the federal securities laws, acting intentionally, recklessly, or negligently, and must be sanctioned to protect the investing public.

## **II. RESPONDENTS' MISREPRESENTATIONS TO THE FUND'S TRUSTEES REGARDING EUROZONE INVESTMENTS**

### **A. The August 8, 2011 Misrepresentation About "Avoiding" or "Trying to Stay Away From" Italian Issuers.**

Respondents half-heartedly try to disavow ownership of the following statement from the August 8, 2011 meeting minutes:

**. Mr. Oglesby discussed Europe's roll in the current market environment.**

**He noted ACM is avoiding Greece, Spain, Italy and other countries seen as higher-risk investments by ACM.**

(Ex. 98, PDF p. 3) Respondents' deride these minutes as "not reliable" because the stenographer never met Mr. Oglesby or Mr. Prost "in person," and because Ms. De Nicolo did not recall the reference to Italy at this particular meeting. (Brief at 7) But it is irrelevant whether or not the stenographer ever met either Oglesby or Prost. And it is nonsensical to suggest that the reference to Italy in the minutes was the result of some sort of creative license on the stenographer's part. On the contrary, the fact that the stenographer included Italy in the record is compelling evidence that someone participating in the meeting specifically referenced Italy.

As for Ms. De Nicolo's testimony, Respondents conveniently ignore the rest of her testimony on the topic. She further testified that, soon after the meeting, she reviewed the stenographer's draft meeting minutes. De Nicolo then forwarded the minutes to Mr. Cutshall. Those minutes included the following statement:

**The short term markets have been hard, and**

**Europe has played a huge roll in that risk assessment. They are trying to stay away from Greece, Spain, Italy and other countries doing poorly in the credit area and are focused on the better countries such as England and Germany.**

(Ex. 75, PDF p. 15) Ms. De Nicolo testified that this statement comported with her recollection soon after the meeting was held:

Q So would I be correct that as of early October 2011, you thought that Mr. Oglesby had spoken, and he had indicated that ACM was going to avoid investing in Greece, Spain and Italy and certain other countries?

A Obviously, because I didn't make any changes to it.

(Tr. 755:22-756:3)

This testimony is also supported by three other witnesses who attended the August 8, 2011 meeting – Marlene Hodges, Richard Cutshall, and John L. Guy, Jr. These witnesses testified that they remembered Respondents mentioning Italy during the meeting. (Tr. 532:20-534:13; 814:14-815:1; 478:24-479:23) Fund counsel Richard Cutshall testified that he consulted his contemporaneous notes from this meeting while finalizing the draft meeting minutes. (Tr. 820:6-11; 825:19-826:1) Moreover, the minutes were approved by the Trustees a mere three months later based on their more-recent memory of what was said and who had said it. (*See, e.g.*, Tr. 437:15-22) This process ensured that the minutes were finalized when the memory of the meeting was much fresher in everyone's mind than it is today.

Thus, Prost and Oglesby stand alone in denying that Oglesby told the Trustees that the Fund was “avoiding” or “stay[ing] away from” Italy. Oglesby claimed that he believed he did not make this statement because “it wouldn't have made any sense” - because it was not true. (Tr. 1222:7-20) Oglesby also claims that he doesn't think Greg Prost made that statement either. (Tr. 1223:11-16) Prost at first testified that he had no recollection of the meeting (Tr. 1667:18-25), but when asked by his attorney whether the minutes accurately reflected what Oglesby said, he answered “I don't see how it could be” – again, because it was not true. (Tr. 1670:1-13) These vague denials were the best Oglesby and Prost were able to offer at the hearing.

Oglesby's and Prost's testimony is instructive about why they felt the need to disown any such statement. As Oglesby explained to the Court: “Well, we owned Italian securities at that time... We didn't buy any Greece or Spain securities, and we did own Italian securities.” (Tr. 1222:16-19) Thus, by Respondents' own admission, to suggest that ACM was either “avoiding”

or “trying to stay away from” Italian issuers was clearly inaccurate.<sup>1</sup> In any event, as discussed in Section B below – and as they cannot dispute – there is ample precedent for them specifically mentioning Italy as one of the troubled Eurozone countries they were seeking to avoid.

In short, to accept Respondents’ version of events – that they did not tell the Trustees that ACM was either “avoiding” or “trying to stay away from” Italian issuers – assumes that: (1) Cutshall’s notes were completely wrong, and that he imagined a discussion about avoiding Italy; (2) the stenographer similarly conjured a reference to avoiding Italy out of thin air; and (3) Cutshall, De Nicolo, Guy, and Hodges *all* misremembered the August meeting – in exactly the same way, no less. Common sense compels the more likely explanation: that Oglesby really did say what all of these witnesses recorded him saying, but that he is now trying to disown making a statement that conceded was demonstrably misleading.

B. November 30, 2011 Misrepresentations about Future Exposure to the Italian Market

While Respondents disavow the statement attributed to them in the August meeting, they concede that either Mr. Oglesby or Mr. Prost made the following statement during the November 30, 2011 meeting:

**Mr. Oglesby assisted in this review, discussing general market conditions, the options available to the Money Market Fund and the foreign and domestic short-term fixed income markets, noting for the Board the Money Market Fund’s limited exposure to European markets, including that the Money Market Fund has no assets issued in the Greek marketplace and had minimal second-hand exposure to the Italian market (and that the asset in question would be off the books of the Money Market Fund as of mid-**

---

<sup>1</sup> Respondents argue that they changed their approach to Italian securities by shortening the average maturity of each purchase. (Brief at 4) But this is not what they told the Trustees. They told them that they were “trying to stay away from” or “avoiding” Italy altogether.



November, after which time the Money Market Fund would have no exposure to the Italian market).

(Ex. 92, PDF pp. 8-9)

Respondents argue that this statement was “entirely accurate” at the time it was made. (Brief at 8) First, they claim that the Fund had “minimal second-hand exposure to the Italian market.” But that was not an accurate characterization of the Fund’s Italian holdings. On the contrary, on the same day of that meeting, Respondent made a *\$4 million* investment for the Fund in ENI Finance securities. (Tr. 1415:23-1416:5; Ex. 92 at 60) That was on top of the *\$5 million* of ENI securities that the Fund already owned. (Ex. 92 at 61) That constituted a more than “minimal” investment. And there was nothing “second-hand” about the Fund’s exposure to the Italian market either. Rather, Respondents themselves previously characterized ENI’s parent corporation as having “*direct and indirect ownership by the Italian state.*” (Ex. 67 at 98; emphasis added)

Second, Respondents argue that it was literally true that “the asset in question would be off the books of the Money Market Fund as of mid-November, after which time the Money Market Fund would have no exposure to the Italian market.” (Brief at 8) Of course, this lack of exposure to the Italian market lasted all of 12 days, after which Respondents caused the Fund to jump back into Italy as it had done throughout 2011. Thus, the critical question is whether Respondents – at the time when they made these statements to the Trustees on November 14 – intended to keep the Fund free of exposure to the Italian market after mid-November.

Contrary to Respondents’ argument (Brief at 9), the evidence establishes that they never intended to free the Fund from future exposure to Italy. In anticipation of this proceeding, Respondents cobbled together newspaper articles reflecting superseding events that may have caused reconsideration of their decision to reduce exposure to Italy. This litigation-driven

narrative is belied by the contemporaneous evidence – or more specifically the lack of contemporaneous evidence – supporting Respondents’ supposed change of heart. There is not a single document that Respondents drafted – or even so much as collected – during the relevant timeframe that reflects ACM’s reassessment of the risks posed by Italian holdings. Not one revised analysis. Not one email. Not even one article or third-party analysis that anyone printed out at the time – either to review later or to retain for their files.

Even the articles culled in anticipation of this proceeding – which Respondents cannot recall ever seeing before this litigation – don’t support their “world was changing” story. Many of the articles ran on December 1<sup>st</sup>, the very same day Respondents dove back into the Italian market, purchasing \$9 million of ENI commercial paper. (*See* Exs. 439-40; Ex. 13 at FSG000989) It strains credulity that Respondents read the morning paper, found something “world changing,” and impulsively caused the Fund to immediately dive head-first back into the Italian market to the tune of \$9 million.

Such skepticism is appropriate because no other prime money market fund shared Respondents’ view that the “world changed” in late November to warrant re-exposure to Italian investments. (Ex. 112 at 20-21) Professor Wermers further provided compelling and unrebutted testimony about his analysis of objective economic metrics, such as the value of the Euro to the dollar. This analysis confirmed that in early December 2011 the market as a whole did not share Respondents’ views about dramatically changed circumstances within the Eurozone. (Tr. 881:24-882:22)

In the final analysis, the evidence supporting Respondents’ position that they had some sort of change of heart, or that the world was changing during those 12 days in late November, is

flimsy at best. Rather, the overwhelming evidence establishes that, in late 2011, Respondents were simply not being candid with the Trustees about the Fund's Italian exposure.

C. The Spreadsheet of the Fund's Holdings Did Not Cure Respondents' Misrepresentations to the Trustees about the Fund's Italian Holdings.

Respondents repeatedly argue that the "purchase journals" – the multipage, dense spreadsheets reflecting daily purchases included in a thick packet supplied to the Trustees before each meeting – constituted adequate disclosure of the fact that the Fund never fully divested itself of Italian issuers. But the law does not permit a speaker to amplify a misrepresentation, bury the truth, and avoid liability. *See Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000) (corrective information must be conveyed to the public "with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by' the alleged misstatements") (citations omitted); *SEC v. Reys*, 712 F. Supp. 2d 1170, 1176 (W.D. Wash. 2010) (same); *SEC v. Mudd*, 885 F. Supp. 2d 654, 667 (S.D.N.Y. 2012) (same).

In any event, there was nothing curative about disclosing in a lengthy spreadsheet that the Fund had resumed investing in "ENI Finance USA." (*See* Tr. 1235:1-6) Although the Trustees were provided with the voluminous list of purchases for each quarter, they were not provided with background information about each and every investment. Thus, they could not be aware that ENI Finance USA was an Italian credit. (Tr. 323:5-19; 439:2-17; 537:11-18) For precisely the same reasons, the Trustees' ratification of the prior quarter's purchases does not cure Respondent's prior deception. Rather, in light of Respondents' serious misrepresentations, the only subsequent disclosure that would have been truly curative is one that would have clearly disclosed to the Trustees that they had reconsidered their aversion to Italian issuers in light of new developments.

But Respondents did no such thing. On the contrary, the overwhelming weight of the evidence establishes that in August 2011, they told the Trustees that they were “avoiding” or “staying away” from Italy, while they continued to invest in it. Then in November, Respondents represented to the Trustees that the Fund would be divested of Italian issuers by mid-November when they had no intention of doing so. The Respondents were never straight with the Trustees about their intentions. Given this reality, the fact that the “Board did not express any disapproval of the Fund’s investment in ENI” is meaningless, since the Respondents never bothered sharing with the Trustees the provenance of that investment.

Respondents argue that they had no motive to lie, since “neither Mr. Oglesby nor anybody else at the Adviser benefited financially from the purchase of ENI securities.” Since Ambassador Fund was the lone prime money market fund to venture back into Italy in December 2011, however, it is fair to assume that, Respondents believed they were making a financially advantageous investment decision with a benefit equal to or greater than the risk they were assuming. Thus they had a reason to lie.

### **III. RESPONDENTS’ MISREPRESENTATIONS TO THE FUND’S TRUSTEES REGARDING ISSUER DIVERSIFICATION**

On September 30, 2011, the City of Detroit made a \$25 million redemption – more than 10% of the Fund’s total net assets. (Ex. 45; Ex. 92 at 11) The Fund’s holdings were already highly concentrated. This large withdrawal only exacerbated the risky and undiversified nature of the Fund’s investments, triggering “passive breaches” for almost half of the Fund’s holdings. (Report of Russell Wermers, Ex. 112 at 18)

In the wake of this incident, Mr. Oglesby drafted the following letter to memorialize what had occurred:

To Whom It May Concern:

On Friday, September 30, 2011, at approximately 11:59am est., one minute before the shareholder services deadline, an uncharacteristically large \$25 million redemption was made in the Ambassador Money Market Fund. 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 3 (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 3, the Fund was back in compliance.

Thank you for your understanding on this matter. If you have any questions, please contact us at 313-961-3111. Thank you.

Regards,



Derek H. Oglesby, CFA  
Portfolio Manager

(Ex. 54) This letter was inaccurate and misleading. In fact, a majority of the fund's holdings exceeded the 5% limit well beyond October 3rd. In the wake of the redemption, fully 10 of the 21 issuers represented in the Fund's holdings exceeded 5%. (*Id.*)

In their post-hearing brief, Respondents argue that even if the letter was not accurate, it doesn't matter. The dense packet of materials they supplied to the Trustees included among its many documents a "Schedule of Portfolio Investments" that accurately disclosed both "14 portfolio holdings that exceeded 5% of the Fund's assets as a result of redemptions" and "also listed the maturity dates for those portfolio holdings, noting that nine of those 14 holdings would mature *after* October 3, 2011." (Brief at 13; emphasis in original).

In other words, Respondents argue that they disclosed the raw data that enabled the Trustees to independently discern the falsity of the statements made in Oglesby's letter. Such

spreadsheets, Respondents argue, were tantamount to curative disclosures that fully insulated them from liability. As noted earlier, however, the law doesn't allow someone to escape liability for an amplified misrepresentation by subsequently – and discreetly – burying the truth in a mountain of raw data. *See, e.g., Ganino.*, 228 F.3d at 167; *Reys*, 712 F. Supp. 2d at 1176; *Mudd*, 885 F. Supp. 2d at 667.

Respondents also dispute the minutes' recitation of what was discussed about this incident at the November 14<sup>th</sup> meeting. They theorize that “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.” (Brief at 16). Given the material misrepresentations that Respondents' included in that letter, however, the fact that the Trustees might have focused on that letter during its meeting doesn't help Respondents' cause. On the contrary, Respondents' theory serves only to highlight the importance of their materially inaccurate letter.

#### **IV. DEFICIENCIES AS TO MINIMAL CREDIT RISK DETERMINATION**

##### **A. Respondents Failed to Perform or Document Minimal Credit Risk Determinations.**

Respondents claim there was “careful and extensive analysis of each security” by the “credit committee” before it was added to the approved list. (Brief at 22) But as Oglesby admitted during the hearing, these “credit committee” meetings were nothing more than “informal chats” as part of a “water cooler” discussion. (Tr. 1323:9-1324:16) Respondents did not maintain any records of these chats. (*Id.*) The “approved list” contained bare-bones information about the issuer and its support institution, including the issuer's national rating by S&P and Moody's.

The only records that Respondents maintained that reflect any kind of analysis are the credit research reports, which were prepared only *after* placing an issuer on the “approved” list; a number of months could pass by before a report was prepared. (Tr. 1328:5-1330:9; Ex. 112 at 13 (citing Oglesby’s investigative testimony); *compare* Ex. 19 and Ex. 67 for date of report and date of information used) Respondent Derek Oglesby signed nearly all of these research reports. (*See* Ex. 19; Ex. 67)

Respondents argue that the Court should rely solely on the simple *existence* of research reports as confirmation that they performed their required written determination. By making this argument, Respondents attempt to minimize the actual *content* of the research reports. The Respondents’ effort to downplay what they wrote in these reports makes sense, since:

- In those reports Respondents oftentimes describe credit risk in terms *other than* minimal. This is not consistent with the robust protections intended by Rule 2a-7’s minimal credit risk requirement;
- The reports were often prepared using data that was months old and were updated no more than once per year. (*See* Ex. 19; Ex. 67) For example, Exhibit 89 shows that ACM was late in documenting its decisions regarding five issuers of commercial paper, including White Point Funding, by periods of one month to over a year. This continued even when Respondents apparently changed their mind from month to month about the soundness of certain investments, such as during the Eurozone crisis; and
- As Professor Wermers noted in his report, based on his analysis of the credit research reports, in many instances there was little evidence of the independent written analysis required by Rule 2a-7, including the factors specified in the

“McGrath Letters”: (1) “macro-economic factors which might affect the issuer’s or guarantor’s current and future credit quality;<sup>2</sup> (2) the strength of the issuer’s or guarantor’s industry within the economy and relative to economic trends; (3) the issuer’s or guarantor’s market position within its industry; (4) cash flow adequacy; (5) the level and nature of earnings; (6) financial leverage; (7) asset protection; (8) the quality of the issuer’s or guarantor’s accounting practices and management; and (9) the likelihood and nature of event risks. (Ex. 112 at 12-13)

Respondents’ failure to consider these factors in their analysis, and the numerous research reports showing acceptance of risk exceeding “minimal,” coupled with Respondents’ willingness to ignore their own analysis, collectively demonstrate that Respondents failed to make a minimal credit risk determination as required by Rule 2a-7.

**B. Respondents Disregarded Internal Maturity Restrictions**

In early 2010, ACM started designating issuers and guarantors as Tier 1(A), (B), or (C). These tiers are featured on credit research reports for some – but not all – portfolio securities starting in early 2010. (Tr. 1644:19-21; Ex. 67 at ACM0008841 (Tier 1(A) rating assigned in February 2010))

In October 2011, Oglesby informed Standard & Poor’s what these tiers signified. He explained that “Tier 1(A) = no maturity restriction; Tier 1(B) = 30 day maturity restriction; Tier 1(C) = 7 day maturity restriction.” (Ex. 51 at 1) In November 2011, ACM made a similar representation to the SEC examiners in response to a request for documents related to their holdings. (Ex. 172 at 3-6)

---

<sup>2</sup> Oglesby testified that such factors were considered. But Respondents kept none of the records that supposedly reflected the numbers they considered or the analysis they performed. (Tr. 1322:19-1324:7)



During the hearing, Respondents tried minimizing the significance and meaning of tiering. They contended that the ratings and maturity restrictions merely represented flavors of “good,” “better” and “best” minimal credit risk, and thus didn’t mean much of anything.<sup>3</sup>

Of course, this wasn’t their story to Standard & Poor’s and the SEC during the relevant timeframe. Instead, when they were touting their internal controls, they explained that the tiers corresponded with respective maturity *restrictions*, not guidelines. In October 2011, Guyna Johnson of Standard & Poor’s asked how ACM was able “mitigate the credit risk to the fund with respect to the large number of names on the approved list”. (Tr. 617:8-25) In response, Oglesby represented that the Tier 1(A), 1(B), and 1(C) designations “determined how long the maturities of that particular security could be in the fund.” (Tr. 618:1-7)

Tellingly, ACM used the word “restrictions,” not “guidelines.” In an email, Ms. Johnson asked: “I see the S&P ratings on [the approved list], but when trading and the list is pulled, would a manager also know what the internal rating is? Or *diversification and maturity restrictions* which have been placed on the credit?” (Ex. 51 at 1-2; emphasis added) Oglesby responded that “Tier 1(A) = no maturity restriction; Tier 1(B) = 30 day maturity restriction; Tier 1(C) = 7 day maturity restriction.”<sup>4</sup> (Ex. 51 at 1)

---

<sup>3</sup> Respondents’ story does not make sense. Greg Prost conceded that the ACM “internal ratings” corresponded to relative levels of risk, and that Tier 1(C) was the riskiest category of the three ratings. (Tr. 1643:21-1644:4) Labelling an issuer’s securities as Tier 1(C), but making no effort to hold them for a shorter period of time than Tier 1(A) or Tier 1(B) securities would mean that ACM was deliberately accepting an elevated investment risk for an extended period of time. The only reason to do so would be to pursue an attractive yield. This also would explain why ACM would have disregarded the shorter maturity period.

<sup>4</sup> If Oglesby really considered these tiers to be guidelines, not restrictions, he should have said so. During the hearing, Oglesby tried to explain this away, claiming that he was simply parroting the words Johnson used in her email to him. (Tr. 1337:2-6) This is just not credible. Oglesby surely knew that the terms “restriction” and “guideline” are not synonyms. Oglesby also knew that it was important to give accurate information in response to a factual inquiry by Standard & Poor’s regarding ACM’s procedures in determining credit risk.

Critically, at no time during this exchange did Oglesby preface this by saying “Going forward, the following restrictions will be implemented . . . .” Moreover, even after they – by their own admission – were bound by the “maturity restrictions” they touted to Standard & Poor’s and the SEC, they ignored such self-imposed restrictions. For example, after October 2011, ACM purchased Autobahn – which had been rated Tier 1(C) and thus could only be held for up to 7 days – for stretches of 27, 26, and 25 days. (Ex. 174C)

ACM made identical representations to the SEC in November 2011 in response to an official request for information. The SEC’s document request specified information and documentation “for the period January 1, 2011 through October 31, 2011 (“Review Period”)”. (Ex. 172 at 3) Item F similarly requested: “A copy of any counterparty and credit issuer approval list that was in use *during the Review Period.*” (*Id.*; emphasis added) Item G requested “A copy of the most recent plan that defines *any limits, parameters and restrictions* with respect to the approved counterparty and credit issuer list.” (*Id.*; emphasis added)

In response to Item G, ACM told the SEC that the “Ambassador Internal Rating Maturity Restrictions” for the tiers were: Tier 1(A) = 0-397 days, Tier 1(B) = 0-30 days, and Tier 1(C) = 0-7 days. (Ex. 172 at 6) Again, these tiers weren’t described as a new internal control that ACM intended to implement on a going forward basis. Oglesby, Jeffries, and Prost are all highly educated men. All three have extensive experience in the securities industry – an industry with myriad precise terms of art. Respondents surely knew – or at least should have known – that it was important to be accurate and complete when detailing their internal controls to Standard & Poor’s and the SEC.

Whatever Respondents called their analysis, the evidence establishes that they routinely disregarded it. In ACM’s June 2009 research report for White Point Funding, signed by Oglesby,

Respondents state: “The portfolio is comprised of 100% credit cards and *should only be purchased between 1-3 days* to avoid long-term risk exposure. This credit represents risk.” (Ex. 19B; emphasis added) Despite this, throughout the second half of 2009 Respondents repeatedly purchased large amounts of White Point Funding commercial paper for time periods well in excess of 3 days, including maturities of 90, 20, 21, 28, 32, 29, and 63 days. (Ex. 174A) Even if Respondents simply changed their mind about the risk of White Point Funding, they never bothered updating their research to reflect their revised thinking. Thus, Respondents failed to properly document this revised determination of minimal credit risk.

#### V. ACTIVE BREACHES OF THE ISSUER DIVERSIFICATION LIMITATION

Respondents admit that in 2009 there were violations of Rule 2a-7’s diversification rule, Rule 2a-7(c)(4). Rather than taking responsibility for such violations, however, in their brief they blame Maria De Nicolo for having misunderstood the rule: “[S]he 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.” (Brief at 26; emphasis in original) As established in the Division’s opening brief, however, these efforts to shift responsibility are unavailing since: (a) it was ACM, not Ms. De Nicolo, who served as the Fund’s adviser and made the Fund’s investment decisions; and (b) at the time of the 2009 breaches, Ms. De Nicolo wasn’t acting on her own behalf, but rather was acting in her capacity as the CCO for both the Fund *and* Respondent ACM. (Division’s Post-Hearing Brief, pp. 22-23) The law imputes the negligence of ACM’s CCO to ACM itself. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1089 n. 3 (2d Cir. 1972) (“we hold that Glendale and Atlantic are corporate embodiments of Ezrine and his awareness of the securities laws violations are imputed to them”);

*SEC v. Platforms Wireless Intern. Corp.*, 559 F. Supp. 2d 1091, 1096 (S.D. Cal. 2008) (“The scienter of a corporation can be imputed from that of its officers”).

Notably, Respondents do not try to defend Ms. De Nicolo’s misunderstanding about the workings of the diversification rule. This stands to reason, since the relevant “safe harbor” is clearly limited to “one issuer”:

Taxable and National Funds. Immediately after the Acquisition of any security, a money market fund other than a Single State Fund shall not have invested more than five percent of its Total Assets in securities issued by the issuer of the security; provided, however, that such a fund may invest up to twenty-five percent of its Total Assets in the First Tier Securities of a single issuer for a period of up to three Business Days after the Acquisition thereof; provided, further, that the fund may not invest in the securities of more than *one issuer* in accordance with the foregoing proviso in this paragraph at any time.

(Rule 2a-7(c)(4)(i)(A); emphasis added)

Respondents also blame the SEC, intimating that it waited too long to identify the violations and even when it did so, it failed to do so with sufficient forcefulness. The Commission has routinely rejected “blame the regulator” arguments of this variety. *See J. Kenneth Alderman, CPA*, File No. 3-15127, Administrative Proceedings Rulings Release No. 743 at 5 (Feb. 1, 2013) (“The Commission is under no general obligation to inform potential targets of investigation that they are under suspicion, or that a person they supervise is under suspicion, prior to initiation of an investigation.”); *Newbridge Securities Corp.*, File 3-13099, Initial Decision Release 380 at 63 (June 9, 2009) (“it is well settled that respondents cannot shift responsibility for compliance to the NASD or the Commission. A regulatory authority’s failure to take early action neither operates as an estoppel against later action nor cures a violation.”) (citations and internal quotation marks omitted); *In the Matter of Stephen J. Horning*, File No. 3-12156, Exchange Act Rel. No. 56886 at 15 (Dec. 3, 2007) (“ We have held that persons in the

securities industry cannot shift their responsibility for compliance with applicable requirements to NASD or to the Commission. A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation.") (citations and internal quotation marks omitted). *See also Graham v. SEC*, 222 F.3d 994, 1007-08 (D.C. Cir. 2000) (holding that "the SEC's failure to prosecute at an earlier stage does not estop the agency from proceeding once it finally accumulated sufficient evidence to do so").

## **VI. RESPONDENTS' DEFICIENT INITIAL STRESS TESTING**

Both Rule 2a-7 and the Fund's procedures require stress-testing for certain hypothetical events. The hypothetical events to be stress-tested include "an increase in shareholder redemptions." (Rule 2a-7(c)(10)(v); Ex. 468 at 5) Rule 2a-7 also requires the stress-testing of concurrent occurrences of the codified hypothetical events.

There can be no dispute that Respondents' first stress test included neither of these components. (*See* Tr. 1397:18-1401:13) Respondents, while neither conceding nor denying this point, argue that the Fund maintained a healthy cash position, which obviated the need for the Fund to stress test for increased shareholder redemptions.<sup>5</sup> This position ignores the express terms of Rule 2a-7's stress-testing requirement.

Moreover, it was imprudent to forego such stress testing. Professor Wermers opined – in un rebutted testimony – that given the unique characteristics of the Fund, including the heavy concentration of the shareholder base among Michigan municipalities, the Fund's liquidity may have been insufficient to meet significant redemption requests. (Tr. 969:7-971:4) In this regard, when there was an uncharacteristically large and unexpected \$25 million redemption, Mr. Oglesby wrote that they opted not to sell any of the Fund's holdings because "any attempt at a

---

<sup>5</sup> "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." (Brief at 32)

sale to comply with the 5% issuer rule could have resulted in unnecessary stress to the Fund and unwarranted losses.” (Ex. 54) Mr. Oglesby’s concession reinforces that it was imprudent for Respondents to ignore Rule 2a-7’s requirement to stress test for an increase in shareholder redemptions – in particular for the possibility of liquidating the Fund’s holdings to honor such redemptions.<sup>6</sup>

## VII. THE CAUSING VIOLATIONS ALLEGED IN THIS CASE ONLY REQUIRE A FINDING OF NEGLIGENCE.

The Division alleges that the Respondents “caused” certain violations of the Investment Company Act by the Fund, including:

- Rule 22c-1 (pricing rule)
- Rule 38a-1 (compliance rule)
- Section 34(b) (prohibiting untrue statements in SEC filings)
- Section 35(d) (prohibiting a misleading name for a fund)
- Section 31(a) and Rule 31(a)-1 thereunder (books and records rule)

(See OIP at 9-10, Violations 2-6) During their closing argument, Respondent’s counsel incorrectly claimed that to establish liability for a “causing” violation the Division must show that Respondents had “knowledge” that their conduct would cause a violation. (Tr. 1865:1-1866:20 (“I’m saying that in order to cause a violation, to be liable for causing a violation, you have to *know* that there is a violation.”) (emphasis added)). In their Posthearing brief, the Respondents make the same mistaken claim:

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

---

<sup>6</sup> The Fund did engage in stress testing that contemplated a modest 5% discount to the Fund’s holdings. But as Professor Wermers explained – and as reinforced by Oglesby’s reference to “unnecessary stress” and “unwarranted losses” – a 5% discount was by no means a reasonable approximation of the haircuts the Fund conceivably faced in times of macroeconomic stress. (Wermers Expert Report, Ex. 112, pp. 5-8; Tr. 890:12-892:12)

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).

(Brief at 27 (emphasis added)). This is not a correct statement of the law.

Rather, all three of the cases cited by the Respondents hold that a causing violation is present if the respondent either “knew *or should have known*” that conduct would contribute to a violation.<sup>7</sup> See *Fuller*, 2003 SEC LEXIS at \*13-14; *Howard*, 376 F.3d at 1141-1142; *KPMG Peat Marwick LLP*, 2001 SEC LEXIS at 82-83 (emphasis added). In other words, Respondents need only act negligently to cause such violations. The Division has proven that the Respondents acted at least negligently when they caused the Fund’s various violations.

#### **VIII. SIGNIFICANT SANCTIONS SHOULD BE IMPOSED AGAINST THE RESPONDENTS.**

The Division respectfully submits that Respondents are deserving of sanctions, including cease-and-desist orders, disgorgement plus prejudgment interest, civil penalties, and associational bars. As outlined in the Division’s initial brief, the Commission considers the following *Steadman* factors when determining appropriate sanctions, including: (1) the egregiousness of the actions; (2) the isolated or recurrent nature of the infractions; (3) the degree of *scienter* involved; (4) the sincerity of a respondent’s assurances against future violations; (5) a respondent’s recognition of the wrongful nature of his or her conduct; and (6) the likelihood that a respondent’s occupation will present opportunities for future violations. See *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)).

---

<sup>7</sup> These cases specify that this is the standard when the primary violations do not require scienter – as is the case here. (See Division Brief at 38-40)

Respondents' brief largely ignores the *Steadman* factors. Instead of applying these factors, Respondents spent a large portion of the testimony of Oglesby, Jeffries, and Prost, as well as three pages of their Brief, discussing the contributions they have made to their community. (See Brief at 39-41) As made clear in *Steadman* and its progeny, such contributions do not excuse Respondents' violations of the federal securities laws, or their breaches of fiduciary duties to the Trustees.

A. Monetary Sanctions

Respondents claim that “a penalty of any kind, *however small*,” will *bankrupt* both ACM and Oglesby and cause all ACM employees to be laid off. (Brief at 36; emphasis added) This is simply not credible, nor is it supported by any evidence in the record. In this regard, the Respondents had every opportunity – while Derek Oglesby, Brian Jeffries, and Greg Prost were on the stand – to introduce evidence in support of this assertion. Instead, Respondents waited until their closing arguments to make this claim for the first time. The Division had no opportunity to cross examine Oglesby, Jeffries, or Prost on this issue.

Rule 630 of the SEC Rules of Practice provides a means by which evidence can be considered on this very issue in the form of a sworn financial disclosure statement. See SEC Rules of Practice 630(b). For whatever reason, Respondents declined to submit any such sworn statements. Having failed to do so, they should be precluded from asserting an “inability to pay” argument.

B. Associational Bars

Respondents urge the Court to not consider *any* associational bar against Oglesby because it would damage his career. Although such a sanction clearly could be a career limiting event, it is entirely consistent with sanctions imposed by the Commission under similar




circumstances. *See, e.g., In re Fundamental Portfolio Advisors, Inc. et al.*, Securities Act Rel. No. 8251 (July 15, 2003), 80 SEC Docket 1851 (permanent associational bar ordered against portfolio manager who misled investors about a risky investment strategy); *In the Matter of Riad and Swanson*, Initial Decisions Release No. 590, 2014 SEC LEXIS 1375 at \*99-100 (April 21, 2014). Respondents even claim that even if no bar is imposed against Oglesby, any findings against him would ensure that “he will never again be able to find work in the securities industry.” (Brief at 36) Many SEC Respondents who are industry professionals face setbacks to their careers as a result of having violated the federal securities laws – and Mr. Oglesby is no different.

#### **IX. CONCLUSION**

For all of the foregoing reasons, as well as the reasons stated in its initial brief, the Division of Enforcement respectfully requests that the Court accept all of the documentary and testimonial evidence presented at the hearing, and issue an Initial Decision: (1) finding that Respondents Ambassador Capital Management, LLC and Derek H. Oglesby committed all of the violations described in the Order Instituting Proceedings; and (2) imposing appropriate sanctions against each Respondent, as set forth in the Division’s Posthearing brief.

Dated: July 11, 2014.

By:   
Robert M. Moyer ([moyer@sec.gov](mailto:moyer@sec.gov))  
Jonathan S. Polish ([polishj@sec.gov](mailto:polishj@sec.gov))  
Amy S. Cotter ([cottera@sec.gov](mailto:cottera@sec.gov))  
Robin Andrews ([andrewsr@sec.gov](mailto:andrewsr@sec.gov))  
Securities and Exchange Commission  
Chicago Regional Office  
175 West Jackson Boulevard, Suite 900  
Chicago, Illinois 60604  
Phone: (312) 353-7390  
Fax: (312) 353-7398  
*Counsel for the Division of Enforcement*