UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of	
EDGAR R. PAGE AND PAGEONE FINANCIAL INC.	
Respondents.	

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REVIEW OF INITIAL DECISION OF RESPONDENTS EDGAR R. PAGE AND PAGEONE FINANCIAL INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

I. INTRODUCTION

Petitioners Edgar R. Page and PageOne Financial Inc. ("PageOne") seek to have the initial decision in this matter dated June 25, 2015 (the "Initial Decision") vacated. The Initial Decision found that the Respondents had violated the Investment Advisers Act of 1940 (the "Advisers Act") because, among other things, there was inadequate disclosure of a conflict of interest in that Page advised a handful of his clients to invest in three private investment funds (the "Private Funds") without telling the clients that the manager of the Private Funds was in the process of acquiring a minority interest in PageOne. The Initial Decision is deficient for a number of reasons including that:

(i) the revocation of PageOne's registration as an investment adviser and the imposition of a five year collateral bar against Edgar R. Page ("Page") are significantly out of line with Commission precedent for similar conduct and are not consistent with the *Steadman* factors;

(ii) there is no legal authority to support the order of over $2.1 million in disgorgement from Petitioners because the $2.1 million was borrowed by PageOne from a third party pursuant to a series of legally binding promissory notes with commercially reasonable terms and, therefore, the funds are not ill gotten gains or profits; and

(iii) there is no legal basis to find Page was the alter-ego of PageOne or to hold him jointly and severally liable for disgorgement when the funds were received by Page.

The revocation of PageOne's advisory license is a death sentence for a company that has been in business for almost thirty years, had approximately $215 million in assets under management as of March 31, 2014 and 8 employees. The Initial Decision also recognized that the imposition of a five year bar on Page -- given his advanced age and health concerns -- would likely mean he will never again work in the field in which he has spent his entire professional career. Moreover, the Respondents on their own had voluntarily stopped recommending that their clients

invest in the Private Funds approximately two years *before* the Order Instituting Proceedings was filed.

For the reasons set forth herein the Initial Decision should be vacated and the Commission should find that no additional remedial action, beyond the censure and cease-and-desist order that was imposed on Respondents on consent, is appropriate or in the public interest.

II. PROCEDURAL HISTORY

A. The Order Instituting Proceedings

The Order Instituting Proceedings ("OIP") in this matter was filed on August 26, 2014. The OIP alleged that Respondents failed to adequately disclose on PageOne's Form ADV a conflict of interest in violation of its advisory obligations and charged Respondents with primary violations of aiding and abetting and causing PageOne's violations of Sections 206(1), 206(2) and 207 of the Investment Advisers Act of 1940 (the "Advisers Act") and Page with aiding and abetting and causing PageOne's violations of the same provisions of the Advisers Act. Specifically, the OIP alleged that Respondents should have disclosed on PageOne's Form ADV that Page was negotiating for the sale of PageOne stock to the United Group of Companies, Inc. ("United"), and receiving earnest money payments from United, when Respondents recommended that a small number of their clients (15 client out of approximately 1800 total clients) invest in three private investment funds administered by United.

B. Respondents Agree to a Partial Settlement

On January 31, 2015, Respondents submitted an Offer of Settlement, which was accepted by the Commission. Pursuant to the terms of the Offer of Settlement, Respondents consented to the entry of an Order in which the Commission found that Respondents violated the Advisers Act provisions at issue, but Respondents neither admitted nor denied the findings

contained in the Order. Respondents also consented to a censure by the Commission, to being ordered to cease and desist from committing any future violations of the Advisers Act provisions at issue, and to the bifurcation of the administrative proceedings so as to provide for a hearing to determine what, *if any*, additional remedial action beyond the remedies in the Consent Order were appropriate and in the public interest pursuant to Section 203 of the Advisers Act and Section 9 of the Investment Company Act of 1940. The Order was entered on March 10, 2015 (the "Consent Order").

C. The Administrative Hearing and the Initial Decision

Under the terms of the Consent Order a hearing was held in this matter on April 20, 2015 to determine what, if any, additional remedial action was appropriate in this matter. Solely for purposes of determining whether any additional remedial action was appropriate the terms of the Consent Order allowed the administrative law judge to accept as true that Respondents willfully violated Advisers Act Sections 206(1), 206(2) and 207 of the Advisers Act and that Page had aided and abetted and caused PageOne's violations of the same provisions of the Advisers Act.

On April 20, 2015, the hearing regarding remedies took place (the "April 20 Hearing"). At the April 20 Hearing, the Division called Page to testify. Page answered all of the Division's questions, taking full responsibility for the Advisers Act violations for which he had previously conceded liability, and expressing remorse for not having been more vigilant with respect to his obligations. Page also testified regarding the confusing and uncertain progression of the transactional negotiations with United, the extensive involvement in the preparation and evolution of the Form ADV disclosures by Mr. Sean Burke, a compliance officer at PageOne Financial with ten years of experience who in turn consulted with National Regulatory Services ("NRS"), a nationally known compliance consulting firm and Michael Xifaras, an

attorney/consultant with NRS . As part of his due diligence Page also sought guidance from the attorney for Millennium LLC, the broker-dealer working with United on the sale of the Private Funds. After the Division rested, Page testified on his own behalf regarding his advanced age, his personal and professional background, [redacted], [redacted], PageOne's poor financial condition, and the tremendous impact that even relatively limited sanction would have on the rest of his life.

The Initial Decision imposing additional sanctions was issued on June 25, 2015. The Initial Decision revoked the registration of PageOne, imposed a five year collateral bar on Page, ordered the payment of disgorgement of $2,184,859.30 against Page and PageOne, with prejudgment interest, jointly and severally. The Initial Decision expressly declined to impose any civil penalty because, among other reasons, it found that "Respondents' disclosure infractions were not the result of intent to harm clients or ignore regulatory responsibilities" (Initial Decision at 8) and that Respondents had demonstrated an inability to pay (Initial Decision at 12). The Initial Decision also listed as a mitigating factor the fact that the Respondents had retained NRS, a nationally known compliance consulting firm to advise on the disclosure issues and that Page relied heavily on NRS and Mr. Burke, a PageOne Financial compliance officer with ten years of experience, to prepare the disclosure language (Initial Decision at 8). This Petition for Review followed.

III. LEGAL ARGUMENT

A. The Initial Decision Should be Vacated Because Its Revocation of PageOne's Registration and Its Imposition of a Collateral Bar Against Page are Not Consistent With Commission Precedent for Similar Conduct

Courts of Appeals have often held that the SEC has an obligation to be consistent with its own precedent when imposing sanctions for similar misconduct. *See e.g. Collins v. SEC*, 12-1241

(DC Circuit 2013). The Court of Appeals will overturn a Commission decision as being arbitrary and capricious when the sanction is out of line with the agency's decisions in other similar cases. *Friedman v. Sebelius*, 686 F.3d 813, 827-28 (D.C. Cir. 2012).

On several recent occasions the Commission has sanctioned advisers like Page and PageOne for failing to disclose conflicts of interest and for failing to disclose payments the advisers received from third parties in exchange for referring clients. In none of these cases was the registration of an advisory firm permanently revoked, which is essentially a death sentence for an advisor. In addition, the Initial Decision itself acknowledges that the five year collateral bar for Page will, in effect, be a permanent bar due to Page's age and poor health. Moreover, in majority of cases no bar or suspension was imposed at all – even though the conduct at issue was substantially more egregious than the conduct of the Respondents.

In the Matter of Focus Point Solutions, Inc. et al., Investment Adviser Act Rel. 3458 (September 6, 2012) involved an advisor that failed to disclose multiple conflicts of interest, including the receipt of undisclosed compensation from a third party. No revocation, bar or suspension of the adviser's license was imposed either on the firm or any individuals associated with the firm. The settlement terms involved a cease-and-desist order, a censure, disgorgement, a civil penalty and the retention of an independent compliance consultant. Neither the firm nor any of its employees were put out of business (or even suspended for any length of time) even though there was a failure to disclose *multiple* conflicts of interest. In contrast, the Respondents in this matter failed to disclose one conflict of interest that impacted 15 of their 1800 clients)of their clients and was put out of business.[1]

[1] It is important to note that inadequate disclosures of conflicts of interest are a very common issue among many investment advisers. Julie M. Riewe, the Co-Chief of the SEC's Asset Management Unit, Division of Enforcement has stated "[i]n reality, conflicts of interest is the risk area into which nearly all of the more granular priorities I just mentioned fall. In nearly every ongoing matter in the Asset Management Unit, we are examining, at least in part, whether the adviser in

Similarly, *In the Matter of Paradigm Capital Management Inc.*, Investment Advisers Act Rel. 3857 (June 16, 2014) involved an advisor's failure to disclose its conflicts of interest and its business arrangements with an affiliated broker-dealer. The *Paradigm Capital* matter also involved *egregious retaliation* against a whistle blower who uncovered the advisor's violative conduct. The *Paradigm Capital* case also involved actual out of pocket losses to their customer of $1.7 million due to undisclosed overcharges. Nevertheless, the Commission did not put the Paradigm Capital firm or any of its personnel out of business. In fact, there was not even a suspension for the firm or any of its personnel. Paradigm Capital resolved their case with a cease-and-desist order, payment of disgorgement, payment of a civil penalty and an undertaking to retain a compliance consultant. In contrast, the Respondents in this matter acknowledged their error in judgment both at the hearing in this matter and in agreeing to the Consent Order. No retaliatory action of any kind was taken by the respondents in this matter.

In the Matter of Shelton Financial Group, Inc., Advisers Act Rel. 3993 (January 13, 2015) involved an adviser's failure to disclose a conflict of interest and compensation it received from a broker-dealer for client referrals. In that matter too no suspensions of any type were imposed on the adviser or any of its employees. *Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003) was a *fully litigated case* that involved an adviser who failed to disclose conflicts of interest and also falsely stated in its Form ADV filing and engagement letters with clients that it would not receive referral fees as a result of any investments its clients made. The *Vernazza* case is the only precedential case where a suspension was imposed, which was only 6 months long for the adviser and the individual respondents. The conduct involved in the *Vernazza* case is significantly more egregious

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question has discharged its fiduciary obligation to identify its conflicts of interest and either (1) eliminate them, or (2) mitigate them and disclose their existence to boards or investors. Over and over again we see advisers failing properly to identify and then address their conflicts." *Conflicts, Conflicts Everywhere – Remarks to the IA Watch 17th Annual IA Compliance Conference: The Full 360 View,* Julie M. Riewe, Co-Chief, Asset Management Unit, Division of Enforcement.

than the conduct at issue in this proceeding because: (i) the respondents in *Vernazza* made affirmative misrepresentations (as opposed to the inadequate disclosures at issue in this case); (ii) these false statements were repeated not only in the Form ADV but also in the clients' engagement letters; and (iii) the *Vernazza* case was fully litigated and not partially settled on consent like this proceeding was.

In short, without explanation for the dramatic departure from precedent, the Initial Decision revoked the registration of PageOne Financial and imposed a 5 year collateral bar on Page – even though the respondents in this matter partially settled the matter; acknowledged and took responsibility for their misconduct and the misconduct was nowhere near as egregious as the cases cited above where generally no revocations or suspensions of any type were imposed – and in the one case where a 6 month suspension was imposed the conduct at issue was much more egregious than the Respondents' conduct in this matter. Revocation of PageOne's registration and the imposition of a 5 year collateral bar on Page is even more arbitrary and capricious given that the Initial Decision specifically found that "Respondents disclosure infractions were not the result of intent to harm clients or ignore regulatory responsibilities" (Initial Decision at 8) that Respondents had relied on NRS, a nationally known compliance consulting firm, and Sean Burke a compliance officer with ten years of experience, to assist them in drafting the disclosure language at issue (*Id.*) and that the Administrative Law Judge was "impressed by Page's sincerity in accepting responsibility and expressing remorse for his actions." (Initial Decision at 9) Moreover, no PageOne client lost money or was overcharged as a result of the violations at issue.

B. The Initial Decision Should be Vacated Because Its Revocation of PageOne's Registration and Its Imposition of a Collateral Bar Against Page are Not Consistent With the Statutory Factors Governing Sanctions or the *Steadman* Factors

Advisers Act Section 203(f) authorizes an industry bar if the respondent was associated with an investment adviser at the time of the alleged misconduct; such sanction is in

the public interest; and the respondent (1) has willfully made or caused to be made a materially false or misleading statement, or omitted any material fact, in a report required to be filed with the Commission; or (2) has willfully violated, or willfully aided and abetted violations of, certain provisions of the securities laws.

In determining whether a bar is in the public interest, the six factors outlined in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) must be considered: (i) the egregiousness of Respondents' actions; (ii) the isolated or recurrent nature of the infraction; (iii) the degree of scienter involved; (iv) the sincerity of Respondents' assurances against future violations; (v) Respondents' recognition of the wrongful nature of their conduct; and (vi) the likelihood that Respondents' occupation will present opportunities for future violations.

1. Respondents' Actions Were Not Egregious

The Initial Decision found that "Respondents disclosure infractions were not the result of intent to harm clients or ignore regulatory responsibilities" (Initial Decision at 8)and that Respondents had relied on a nationally known compliance consulting firm to assist them in drafting the disclosure language at issue. (*Id.*) The Division's enforcement action, as alleged in the OIP, is focused on the narrow question of whether the disclosures made in PageOne's Form ADV were adequate. There are no allegations in the OIP, or findings in the Initial Decision, that the investors at issue were not properly accredited or qualified to invest in the Private Funds, that any of the investment transactions involving the Private Funds were unsuitable, or that any of Respondents ' clients suffered actual financial harm. Nor are there findings or allegations of misappropriation, conversion, or misuse of monies invested in the Private Funds - factors that are commonly indicative of egregious conduct.

The Initial Decision also fails to give adequate weight to the fact that Respondents did

disclose in PageOne Financial's Form ADV a serious conflict of interest regarding their dealings with United. Also, the Initial Decision fails to give adequate weight to the fact that there was uncertainty among the Respondents and their compliance consulting firm as to how to accurately describe the financial relationship between Page and United. For example, Page understood that United was authorized to pay up to 7% of all amounts invested in the Private Funds, to cover marketing and solicitation expenses. Accordingly, the proposal from NRS to disclose the arrangement as a 7% referral fee appeared to be a reasonable statement consistent with the Private Fund Private Placement Memoranda, which also explicitly disclosed a direct financial relationship between Page/PageOne and United.

When PageOne's Form ADV was amended in September 2010 to remove reference to the referral fee and adding reference to Page's employment as a consultant to United, NRS was again consulted and developed the Form ADV language. Given the involvement of Mr. Burke and NRS, Page believed that the disclosure language was sufficient to meet PageOne's disclosure obligations. Finally, when PageOne's Form ADV was amended in April 2011, removing all references to the Private Funds, Page once again believed that the disclosure language was sufficient to meet PageOne' s compliance requirements, since he no longer planned to recommend the Private Funds to his clients. Moreover, the Respondents on their own had voluntarily stopped recommending the Private Funds approximately two years before the filing of the OIP in this matter.

PageOne's Form ADV filings were prepared by these outside experts based upon information provided to them by PageOne's compliance staff. Page erroneously believed that the disclosure language recommended by outside experts and counsel - as recognized by the Initial Decision (Initial Decision at 8) - was acceptable, particularly since these experts had full knowledge of the potential business relationship with United and it was disclosed to NRS that Page would receive earnest money deposits from United.

While the steps Respondents took to disclose their relationship with United were flawed, Page has accepted responsibility (Initial Decision at 9) and now knows that he should have relied less upon Mr. Burke and NRS. Nevertheless, Respondents' conduct cannot be characterized as egregious. Also, Respondents took affirmative steps to put their clients on notice of Respondents' relationship with United and actually disclosed a significant conflict scenario in which clients invested money in the Private Funds knowing that Respondents ' recommendations could have been influenced by the fact that they stood to earn 49% of the funds invested in "referral fees." Given this disclosure of outright cash payments from United, it cannot be said that Respondents ' disclosures were egregiously inadequate.

In finding that the Respondents' conduct was "to some degree egregious" (Initial Decision at 4) the Initial Decision relied on an erroneous interpretation of the statements that Page made in his investigative testimony that disclosure of the United negotiations would be "too dangerous" and make the few clients who invested in the United Funds "extremely nervous" In fact, Page's concerns related to the general disclosure of the negotiations concerning the sale of a minority interest in PageOne (which negotiations were covered by a non-disclosure agreement) and whether all of PageOne's investors would understand that Page would have a continuing ongoing role at the firm after the sale. Page's concerns regarding the disclosure of the negotiations did not relate to the investment in the United Funds by a handful of PageOne investors as the Initial decision erroneously found.

Moreover, the Initial Decision erroneously excluded the investigative testimony of Sean Burke, a compliance officer at PageOne worked closely with NRS advising them of how the arrangement with United should be disclosed and preparing the disclosure language. The Initial Decision rejected a number of important proposed findings of fact that would have

further established the Respondents' reliance on the compliance advice provided by Burke and NRS. The basis for the exclusion of Burke's investigative testimony is the erroneous conclusion that Respondents elected not to present Burke's testimony at the hearing and did not move to use his testimony under Rule 235(a). This reasoning is flawed because the settlement reached between the Respondents and the SEC expressly permitted the ALJ to consider Burke's investigative transcript because it was part of the record on the date of the settlement. The exclusion of Burke's testimony was both erroneous and prejudicial.

Finally, to support its conclusion that Page's conduct was to some extent egregious the Initial Decision relies improperly on the notion that the investments Page recommended involved a high degree of risk and Page's clients ran the risk of substantial losses. (Initial Decision at 5) However, it is undisputed that the risks of the investments were fully disclosed to the investors and there is no evidence in the record that investors will suffer harm, which is a key factor in determining whether sanctions should be imposed. Moreover, all of the investors that PageOne introduced to the United funds were sophisticated, high net worth accredited investors who were all well qualified to invest in the United funds, whose interests were being privately offered under SEC Regulation D. Moreover, the Private Funds also had a relationship with Millennium LLC, a registered broker-dealer, which also independently performed due diligence on the investors to make sure they were accredited and properly qualified. In addition, whether an investment is risky or not is totally unrelated to the conflict of interest disclosure issues in this proceeding. The Initial Decision erroneously and unconvincingly attempts to connect the inadequate disclosure allegations with investor harm.

2. The Violations Were Isolated

The Advisers Act violations at issue in this proceeding relate to the adequacy of

Respondents' disclosure of Page's financial relationship with United in PageOne's Forms ADV while Respondents were recommending that their clients invest in the Private Funds. Respondents ceased recommending investments in the Private Funds years ago - and before any Division action began - and the only remaining financial relationship between Page and United is that of a debtor and a lender with respect to the loans made against the abandoned transaction. The referrals to the Private Funds were the first time that Respondents worked on a private offering and the Respondents on their own had stopped referring clients to the Private Funds long before this proceeding was brought. Thus, the violations at issue in this case were isolated and have no chance of recurring.

3. Respondents Did Not Intend to Defraud Anyone

As discussed above, Respondents did not act with an intent to defraud. Respondents consented to the entry of an Order finding that Respondents violated the Advisers Act, but they nowhere admitted that they intended to defraud anyone. On the contrary, it was Respondents ' actionable but merely negligent or reckless reliance upon Mr. Burke and NRS that forms the basis of Respondents' liability in this case. Moreover, during the time that the Respondents clients were invested in the Private Funds they fulfilled their fiduciary obligations to monitor the investments by, among other things, reviewing the Private Fund's quarterly financial statements, meeting with United personnel and reviewing the account statements with their clients.

4. Respondents Recognize the Wrongful Nature of Their Conduct and Similar Infractions Will Not Recur in the Future

With the benefit of hindsight, Respondents accepted responsibility and recognized why the Form ADV disclosures at issue were insufficient to provide their clients with the information they needed to make informed investment decisions when considering investing in the Private

Funds. At the time, the transactional negotiations were highly confidential and Respondents did not fully understand the legal nuances of their disclosure obligations under the nondisclosure agreement, and though they made an effort to apprise their clients of a potential conflict of interest, Respondents now understand that such efforts were insufficient. And while Respondents cannot rewrite the past, Respondents truly regret that they were not more vigilant, and will not repeat their mistakes in the future.

C. There is No Basis to Revoke PageOne's Registration as an Investment Adviser

Revocation of an adviser's registration is also governed by the same *Steadman* factors set forth above. For the reasons set forth above relating to the Division's request for an associational bar against Page, the revocation of PageOne's registration as an investment adviser is likewise not warranted.

D. The Draconian Sanctions Imposed on Page One also Violate the Spirit of the Commission's Statement Concerning Financial Penalties on Corporate Entities.

In 2006 the Commission issued a Statement Concerning Financial Penalties on corporate entities. In that statement the Commission recognized that there are additional considerations that should be analyzed before a civil penalty is imposed on a corporate entity such as PageOne. The concerns behind the statement were that the impact of the civil penalties would be felt by innocent parties such as employees and shareholders and not just the company. These same concerns are equally applicable when the Commission is deciding whether to revoke or suspend the license of an advisory firm. Virtually all of the factors the SEC set forth in its statement weigh against imposing a civil penalty on PageOne. These factors include harm to innocent third parties (such as employees), the need for deterrence, the lack of harm to any investors, the level intent of the respondents, the presence of remedial measures and the cooperation of the respondents. PageOne Financial is an adviser that has been in business for approximately 35 years, works with almost

150 advisors at 19 broker-dealers and services about 1800 clients. Revoking the advisory license of PageOne Financial will have a devastating impact on many innocent third parties, the vast majority of whom had nothing to do with the Private Fund investments.

E. It Was Error for the Initial Decision to Order Disgorgement

1. **No Reported Cases Support the Initial Decision's Imposition of Disgorgement When the Alleged Ill Gotten Gains are Loans that Must Be Repaid.**

The Initial Decision erroneously imposed disgorgement because the funds that the Initial Decision held should be disgorged were not profits nor were they ill-gotten gains. The funds were in fact borrowed by PageOne Financial and this loan was evidenced by a promissory note with commercially reasonable terms. Loan payments to a party are not a gain for purposes of disgorgement. *F.T.C. v. LoanPointe, LLC.* 525 Fed.Appx. 696, (10th Cir. 2013).

Nor have Respondents been unjustly enriched. In fact, for the reasons described below, Respondents have not been enriched at all. Although the Form ADV disclosures would have allowed Respondents to take a referral fee of up to 49% of the amounts invested in the Private Funds, what Page actually received were loans with commercially reasonable terms for which United is now demanding repayment in full. Accordingly, there has been no enrichment whatsoever. Even if the proposed transaction had closed - which it did not and never will - Page would not have been *unjustly* enriched, because although the approximately $2.7 million in loans he received from United would have been forgiven, he would have given up 49% of PageOne's equity in consideration.

Disgorgement of ill-gotten gains is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws."[2] The Division

[2] *In re Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, *94 (May 2,

bears the burden of showing that Respondents profited from ill-gotten gains, and that there exists a "causal nexus" between the amount to be disgorged and the alleged violation.[3] Because the purpose of disgorgement is to prevent unjust enrichment, the amount of disgorgement must be "approximately equal to the unjust enrichment."[4]

Principles of equity guide the determination of the proper amount to be disgorged. In this case, the balance of the equities counsels against disgorgement of the monies paid to Respondents by United for at least three reasons: (i) Respondents were not unjustly enriched by any of the United payments; (ii) Respondents did not intend to defraud anyone; and (iii) even if disgorgement were proper, the amount of disgorgement should be reduced by the amount of legitimate business expenses paid by Respondents out of the United loans.

2. Respondents Were Not Enriched At All By the Earnest Money Payments

It is well settled that "[t]he purpose of disgorgement is to deprive a person of 'ill-gotten gains' and prevent unjust enrichment."[5]

2014) (quoting *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)); *see SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011).

[3] *SEC v. Todd*, No. 03 CV2230, 2007 WL 1574756, al *18 (S.D. Cal. May 30, 2007).

[4] *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993) (holding that only commissions that were kept by defendant were subject to disgorgement); *Todd*, 2007 WL 1574756, at *18 (holding that "[d]isgorgement is intended to force a defendant to surrender his unjust enrichment" and that the SEC therefore must be able to show unjust enrichment"); *SEC* v. *Unioil*, 951 F.2d 1304, 1306 (D.C. Cir. 1992) (noting that "disgorgement primarily serves to prevent unjust enrichment ... and may not be us *SEC* v. *Church Extension of the Church of God, Inc.*, 429 F. Supp. 2d 1045, 1049-50 (S.D. Ind. 2005) (noting that disgorgement is an equitable remedy and applying principles of equity to reduce the amount to be disgorged).

[5] *Hateley*, 8 F.3d at 655; *SEC v. Breed*, No. 01 Civ. 7798, 2004 WL 909170 (S.D.N.Y. Apr. 29, 2004) (noting that the "primary purpose of disgorgement to the SEC] is to force 'a defendant to give up the amount by which he was unjustly enriched'"); *SEC* v. *McCaskey*, No. 98 Civ. 6153, 2001 WL 1029053, at *7 (Sept. 6, 2001) (holding that "[t]he proper measure of disgorgement is the amount of the wrongdoer's unjust enrichment").

As mentioned above, Respondents have not been enriched in any way as a result of the disclosure infractions alleged in the OIP. On the contrary, Page has merely become indebted to United. The payments received by Page from United are now subject to repayment, together with accrued interest, at a rate that exceeds the IRS penalty rate. It would be inequitable to require disgorgement of such amounts because Page would remain liable to United in contract for the same amounts following disgorgement to the Commission. Even if the transaction had closed - which it did not and never will - Respondents would not have been unjustly enriched. Page would have exchanged 49% of PageOne's equity for forgiveness of the United loans, a reasonable exchange following his arm's-length negotiations for the sale of a portion of PageOne with United. Moreover, Page testified that Walter Uccellini told Page that the moneys were paid to induce Page to continue the negotiations, to compensate Page for the lost alternative business opportunity he had forgone to negotiate with United, and to compensate Page for the time and trouble he had invested in the ultimately fruitless negotiations. [6] Because such moneys would serve only as compensation for injuries, they would not confer a benefit to Page.[7]

A person is not unjustly enriched by borrowing money from somebody else that has to be repaid, nor is a person unjustly enriched by selling his business for a fair price. The Initial Decision's holding to the contrary is conclusionary and not supported by any case law. The Initial Decision seems to imply that the loans to Page were sham transactions but there is nothing in the record to support this conclusion particularly given that the loans are documented by

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[6] Investigative Testimony Transcript of Edgar R. Page, dated August 29, 2013 (Page Tr.) at 142:20-143:17.

[7] *See* RESTATEMENT (SECOND) OF TORTS, Section 903 (1977) ("When there has been harm only to the pecuniary interest of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that in which he would have occupied had no tort been committed.")

promissory notes and United has indicated it intends to collect on the notes.

3. Respondents Did Not Act With a "High Degree of Scienter"

The absence of intent to defraud has been held to be a "mitigating factor" in reducing the amount to be disgorged.[8] Generally, disgorgement has been applied only where there is also a finding of a high degree of scienter.[9]

As discussed above, Respondents did not act with a high degree of scienter. Respondents acknowledge they should have relied less on Mr. Burke PageOne Financial's compliance officer, NRS (a nationally known compliance consulting firm) and counsel's joint efforts to draft the disclosure language in PageOne's Form ADV. PageOne's Form ADV disclosures should have been crafted differently to disclose the actual financial relationship that existed between Page and United, it is indisputable that Respondents took affirmative steps to alert their investment clients that a financial relationship in fact existed with United. Moreover, Page recommended the Private Funds to his accredited investor clients not out of self-interest, but because he believed , in good faith, that the Private Funds were sound investment opportunities. These facts counsel against disgorgement.

4. The Division Does Not Account for Business Expenditures

Even assuming that the earnest money payments could be viewed as unjust enrichment to Respondents, the amount to be disgorged should be reduced by a sum equal to the legitimate business expenses Respondents paid using such funds. Should the Commission be inclined to

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[8] *See SEC v. Church Extension of the Church of God, Inc.*, 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005)

[9] *See. e.g.. SEC v. Martino,* 255 F. Supp. 2d 268, 288-89 (S.D.N.Y. 2003) (requiring an unregistered broker-dealer, described as a "recidivist securities law violator," to disgorge profits obtained through a fraudulent scheme to manipulate stock price); *SEC v. Thorn,* 2:01 CV 290, 2002 WL 31412439 (S.D. Ohio Sept. 30, 2002) (requiring disgorgement of ill-gotten gains where a broker-dealer failed to register and engaged in a series of fraudulent investment schemes).

order disgorgement, the amount ordered should be reduced by legitimate business expenditures that were paid from the monies received from United and loss of the 2% annual management fee income associated with the transfer of PageOne Financial assets to United over seven years.

5. Page Did Not Receive Any Ill-Gotten Gains

Page did not receive any ill-gotten gains. What Page actually received were deposits against the proposed transaction, secured by promissory notes with commercially reasonable terms and market rates of interest. Stated differently, Page received loans from United, the forgiveness of which would take place only upon the improbable closing of the proposed transaction, at which point Page was required to tender 49% of his business to United. In the end, Page has received nothing, since repayment of the promissory notes has been demanded by United's counsel in full, and litigation has been threatened.

6. The Initial Decision Erroneously Imposed Disgorgement on PageOne by Holding Page the Alter Ego of PageOne.

A determination of whether an individual is an alter ego of a corporation involves analyzing a number of factors including whether the individual commingled his personal assets with the corporation's assets and whether he used the corporation to advance solely his own personal interests. *Passalacqua Builders, Inc. v. Resnick Developers South Inc. et al.*, 933 F. 2d 131 (2nd Cir. 1991). None of these factors is present in this case and the ALJ erred in holding that Page was the alter ego of PageOne and erred in ordering disgorgement be paid jointly and severally between Page and PageOne.

F. The Initial Decision Erroneously Gave Little Weight to Respondents' Inability to Pay When Deciding to Impose Disgorgement.

Pursuant to Rule 630, "the Commission may, in its discretion, or the hearing Officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether

disgorgement, interest or a penalty is *in* the public interest." A copy of Respondents' sworn financial statements is submitted with this Memorandum. The Initial Decision found that Respondents had demonstrated they were in a precarious financial position and had demonstrated an inability to pay. Among other things the Initial Decision found that "Page has total liabilities outweighing his total assets, owes PageOne a large sum, and has expenses exceeding his current income." (Initial Decision at 12). The cause of the substantial decrease in Page's income is directly attributed to this Administrative Proceeding and the devastating impact it had on Respondents' business. The Initial Decision further found that once Page is barred from the securities industry. The Initial Decision also found that "[o]nce Page is barred from the securities industry, given his ongoing expenses and liabilities, in the absence of finding different, well-paying work, he will be swallowed by debts." (*Id.*)

However, the Initial Decision, without citing to any legal support, held that ability to pay "should be less relevant to disgorgement compared to civil penalties." This distinction is not recognized in the SEC's rules. The Initial Decision's holding is without merit and a proper consideration of the Respondents' ability to pay would have resulted in no order of disgorgement – just like a proper consideration lead the Initial Decision to conclude that the imposition of civil penalties would not be appropriate due to inability to pay.

Prior to the April 20 Hearing, Page had forensic accountants review his and PageOne's financials and also fill in Statements of Financial Condition provided by the Division with respect to both Respondents that were later admitted at the hearing.[10] Page's accountants determined that he had total assets of $518,516.68 (including, e.g., real estate jointly owned with Page's ex-wife, and a $20,000 receivable from· NextPage LLC, representing an outstanding loan

[10] *See* Resp. Exs. 214, 215.

Page testified that he made to his daughter so that she could renovate her first home)[11] as opposed to total liabilities of $1,885,267.4 1 (including about $1.4 million owed to PageOne from officer loans), giving Page a net liability of $1,366,750.73.[12] This figure does not include the nearly $4 million that Page is alleged by United to owe for principal and interest of the earnest money deposits United made against the proposed purchase of 49% of PageOne, which if counted as a liability would balloon Page's personal liabilities to well over $5 million.[13] Page's Statement of Financial Condition also shows that his expenses exceed his income.[14]

PageOne's balance sheet showed total assets of $1,824,350.61 (including the approximately $1.4 million officer loan owed by Page) and total liabilities of $771,364.65 , giving PageOne net assets of $1,052,985.96.[15] If PageOne is to take Page's officer loan as a loss, PageOne would instead have a net liability, and Page would have assets of less than $40,000.

At the April 20 Hearing, Page testified that he has spent essentially all of the $2.7 million that he had received in earnest money deposits from United towards, [redacted] The Initial Decision erroneously implies that Page wasted the money he received from United, which is simply not true. The Initial Decision cites a few examples of what it considered extravagant spending but, even assuming the specific examples cited were extravagant, these examples were only a very tiny fraction of the total amount ordered to be disgorged. Moreover, Page's car was financed and his daughter has since returned the car that the Initial Decision cites as an example of extravagant spending (Initial Decision at 13).

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[11] Hearing Tr. 221:18-225:13.
[12] Resp. Ex. 214.
[13] *Id.*
[14] *Id.*
[15] Resp. Ex. 215.

The Commission's inability to pay procedures serve two important purposes, both of which are present here. First, government resources are wasted making fruitless efforts to collect money from a person who cannot pay. Second, it is unfairly punitive to seek to collect large sums from a person whose financial condition precludes payment. Both of these wise policies are implicated here. There is no prospect that Respondents will ever be able to pay the almost $6 million sought by the Division. Indeed, it is impossible that they will ever be able to pay even a small fraction of this amount. As such, it would clearly waste government resources, as well as create vindictive embarrassment and anxiety for Page, for the Commission to order Respondents to pay an enormous sum that they can never possibly pay.

Moreover, since the time the Initial Decision was released there has been a substantial deterioration in the financial condition of the Respondents due to clients and individual advisors leaving PageOne due to the Initial Decision. PageOne anticipates having only $60 million to $80 million in AUM by September 30, 2015.

Accordingly, Respondents respectfully request that the Commission take Respondents' poor financial conditions into account when determining whether an order of disgorgement is appropriate and equitable.

G. The Initial Decision Must be Overturned Because the Administrative Proceeding is Unconstitutional

The Initial Decision in this matter should be vacated and the administrative proceeding dismissed because it was conducted in violation of the Appointments Clause of the US Constitution. The Appointments Clause of Article II of the Constitution provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by

[16] Hearing Tr. 194:17-197:1

> Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause therefore creates two classes of officers: (i) principal officers, who are selected by the President with the advice and consent of the Senate, and (ii) inferior officers, whom "Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976); *Charles Hill v.SEC*, 15-cv-01801 (N.D. Ga. June 8, 2015); (*Duka v. SEC*, 15-cv-00357 (SDNY August 12, 2015). The Appointments Clause applies to all agency officers including those whose functions are "predominately quasi judicial and quasi legislative" and regardless of whether the agency officers are "independent of the Executive in their day-to-day operations." *Buckley v. Valeo*, 424 U.S. 1, 133 (1976) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 625-26 (1935)). *See also Charles Hill* and *Free Enterprise Fund. V. Public Co. Accounting Oversight Board*, 561 U.S. 477, 130 S. Ct. 3138 (2010).

In the *Charles Hill* case the court found that SEC ALJ's are "inferior officers" for purposes of the Appointments Clause. The *Charles Hill* court found SEC ALJs exercise "significant authority" and that they are permanent employees take testimony, conduct trial, rule on the admissibility of evidence, and can issue sanctions, up to and including excluding people (including attorneys) from hearings and entering default rulings. 17 C.F.R. §§ 200.14 (powers); 201.180 (sanctions). *Charles Hill* at 35. *See also Duka v. SEC* (finding that SEC ALJ's are inferior officers who must be appointed by a Commissioner).

Inferior officers such as ALJ's, therefore, must be appointed by the President, department heads, or courts of law. U.S. Const. Art. II § 2, cl. 2. Otherwise, their appointment violates the Appointments Clause. (*Charles Hill* at 41; *Duka* at 4). Accordingly SEC ALJ's must be appointed by a Commissioner, who constitutes the department head for appointment purposes. In this matter, SEC ALJ Jason S. Patil was not appointed by a Commissioners of the SEC and, therefore his

appointment is unconstitutional and in violation of the Appointments Clause. On the same facts, district courts have recently granted preliminary injunctions against the SEC from continuing administrative proceedings when the ALJs overseeing the administrative proceedings were appointed unconstitutionally. (*See Charles Hill* at 44 *and Duka* at 4). For similar reasons the Commission should find the administrative proceeding below to be invalid, suspend any further administrative proceedings in this matter and overturn the sanctions issued by ALJ Patil in the Initial Decision.

Violations of the Appointment Clause are not mere technicalities. The Supreme Court has stressed that the Appointments Clause guards Congressional encroachment on the Executive and "preserves the Constitution's structural integrity by preventing the diffusion of appointment power." (*Charles Hill* at 44 *citing Freytag*, 501 U.S. at 878). Accordingly the issue is "neither frivolous or disingenuous." *Freytag* at 879. The Article II is an important part of the Constitution's separation of powers framework. (*Charles Hill* at 44). Moreover, violations of the Appointments Clause may not be waived, *Freytag* at 880.

IV. CONCLUSION

For the foregoing reasons, Respondents request that the Initial Decision be vacated and that no additional sanctions be imposed on them over and above what has already been imposed through the Consent Order.

Dated: September 4, 2015
New York, NY

Respectfully submitted,

/s/ Robert G. Heim
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Attorney for Petitioners Edgar R. Page and PageOne Financial, Inc

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of	
EDGAR R. PAGE AND PAGEONE FINANCIAL INC.	
Respondents.	

Certificate of Service

I hereby certify that on the 4th day of September 2015 that I caused true and correct copies of Respondent's Memorandum of Law in Support of Petition to Review and Respondents Financial Disclosure Forms to be filed and served in the matter indicated on the following:

Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E. Mail Stop 20549
Washington, DC 20549
(By Facsimile 202-772-9324 and Overnight Delivery – original and three copies)

Alexander Janghorbani, Esq.
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U.S. Securities and Exchange Commission
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New York, NY 10281
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The Honorable Jason S. Patil
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E. Mail Stop 20549
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/s/ Robert G. Heim
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September 4, 2015

Via FedEx

Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E. Mail Stop 20549
Washington, DC 20549

Re: In the Matter of Edgar R. Page and PageOne Financial Inc.
AP File No. 3-16037

Dear Mr. Fields:

On behalf of the Respondents Edgar R. Page and PageOne Financial Inc., enclosed please find and original and three copies of: (i) the Memorandum of Law in Support of Respondents' Petition for Review of the Initial Decision (including the Respondents' sworn financial statements); and (ii) Motion for Oral Argument. Should you have any questions please contact me at (212) 355-7188 ext. 1. Thank you.

Very truly yours,

Robert G. Heim

cc. Alexander Janghorbani, Esq.
Counsel for the Division of Enforcement