UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING
File No. 3-16037

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In the Matter of

EDGAR R. PAGE AND
PAGEONE FINANCIAL INC.

Respondents.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION FOR REVIEW OF INITIAL DECISION OF RESPONDENTS EDGAR R. PAGE AND PAGEONE FINANCIAL INC. AND IN OPPOSITION TO THE DIVISION'S CROSS-APPEAL

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I. INTRODUCTION[1]

Petitioners Edgar R. Page and PageOne Financial Inc. ("PageOne") submit this Reply Memorandum of Law in Further Support of the Petition For Review of Initial Decision of Respondents and In Opposition to the Division's Cross-Appeal.

In their opening brief Respondents established that the Initial Decision erred by finding that it was in the public interest to revoke the investment advisory registration of PageOne and bar Page from the securities industry for five years. Among other things, the Respondents' brief showed that the Form ADV disclosures at issue in this case resulted not from Respondents' intent to defraud their clients or their desire to ignore regulatory responsibilities but rather from "inattention to corporate compliance functions" (Initial Decision dated June 25, 2015 ("ID") page 8). The Division's arguments that Respondents acted intentionally and had consciously hid material information from their clients is contradicted by the record and these arguments were specifically rejected by Administrative Law Judge ("ALJ") Jason S. Patil.

Moreover, the record is clear that the Respondents relied on experienced counsel and compliance professionals when crafting the Form ADV disclosures at issue here, and while they acknowledge the disclosures fell short, the record does not support an inference that Respondents acted with a high degree of scienter. "If Respondents had sought to intentionally defraud their clients through fraudulent disclosures, or failures to disclose, it seems extremely unlikely that they would have retained National Regulatory Services (NRS), a clearly legitimate, national firm providing compliance services to financial firms for the particular purpose of drafting or advising on the drafting of amended Forms ADV, and equally unlikely

[1] References herein to (1) "Div. Ex." mean the Division's exhibits admitted into evidence at the Hearing; (2) "Resp. Ex." means the Respondents' exhibits entered into evidence at the Hearing; (3) "Div. Br." means the Division's Memorandum of Law in Opposition to Respondents Appeal and in Support of the Division's Cross-Appeal from the Initial Decision, October 2, 2015; (4) "Hearing Tr." mean the transcript of the Hearing, Apr. 20, 2015.

that they would disclose to NRS the arrangement with the Fund Manager." (ID at 7; see also Div Ex. 11 agreement dated July 15, 2009 between National Regulatory Services and PageOne; and Tr. 62: 17-22; 63:23-64:3 regarding Respondents' reliance on the advice of counsel.). Moreover, contrary to the Division's argument, the evidence shows that the Respondents did not hide key facts from the compliance professionals they were working with -- and the ALJ found the same (Id.)

Respondents opening brief also demonstrated that the sanctions imposed upon Respondents by the ALJ were entirely inconsistent with Commission precedent for identical conduct in other cases and, therefore, were arbitrary and capricious and should be overturned. The Division, however, requests that the Commission uphold the revocation and bar because, in the Divisions view, the precedent cited by Respondents is not relevant because some of the precedent involved settled cases and some of the precedent involved nonscienter based fraud charges. The Division makes the argument that the precedent is not applicable even thought the facts and violations in the precedent are virtually identical to this matter and involve investment advisers who were charged *with fraud* for failing to disclose material conflicts of interest.

It is ironic that the Division attempts to distinguish the Respondents' precedent on the grounds that the precedent in several cases involved settled cases when, in fact, this case involves a settlement by the Respondents of all of the Division's liability claims. Respondents have voluntarily consented to the entry of a Commission order making extensive findings of fact and the only issue that remained after the Respondents settled with the Commission was what sanctions, if any, were warranted. In addition, even the fully litigated precedent involving scienter based fraud charges only resulted in a *six month suspension* for the advisory firm and its culpable employees – far less stringent sanctions than the revocation of the advisory license of PageOne and the five year bar for Page.

The Division has also failed to overcome the Respondents' arguments that it was error for the ALJ to order disgorgement because, among other things, Page has not received ill-gotten gains and has not been enriched by his conduct. Page is legally obligated to return the alleged ill-gotten gains to the lender and the loans are documented with legitimate promissory notes drafted by the lender.

The Respondents have already suffered dramatic financial and other losses as a result of the Commission's administrative proceeding. Prior to the Order Instituting Proceedings being filed PageOne had over $300 million in assets under management, worked with over 170 advisors, 23 broker-dealers and 19 insurance companies. (Tr. 189:11 – 190:14) Since the fraud charges were filed PageOne has lost over $200 million of its assets under management, its revenues have declined dramatically and many of the selling agreements it had with broker-dealers and insurance companies have been canceled due to this enforcement action.

In sum, for the reasons stated below the Commission should vacate the disgorgement that was imposed on the Respondents as well as the revocation that was imposed on PageOne and the five year bar imposed on Page.

II. ARGUMENT

A. The Bars Imposed Against Respondents Are Entirely Inconsistent with Commission Precedent for Virtually Identical Conduct and Are Arbitrary and Capricious

In their opening brief Respondents demonstrated that the bars that were imposed upon them in the Initial Decision are entirely inconsistent with Commission precedent for identical conduct by advisors who failed to disclose serious conflicts of interest and profited from their improper conduct. (Resp. Br. 4-7). In doing so Respondents cited to four Commission cases – all of which involved antifraud charges against advisors for failing to disclose important

conflicts of interest – where three matters involved no bars or suspensions of any sort and the fourth matter (involving fully litigated scienter based fraud charges) resulted only in six month suspensions for the firm and the culpable employees.

In the Matter of Focus Point Solutions, Inc. et al., Investment Adviser Act Rel. 3458 (September 6, 2012) involved an investment adviser's failure to disclose multiple, material conflicts of interest. The undisclosed conflicts related to the adviser's receipt of undisclosed compensation through a revenue-sharing agreement with a broker-dealer concerning assets that the adviser invested in certain mutual funds. In addition, the adviser provided misleading information about its fee structure. The Commission charged the adviser with violating the antifraud provisions of the advisers act and also ordered the disgorgement of $900,000 among other things. No bar or suspension of any type was imposed on the firm or any of its personnel.

Similarly, In the Matter of Paradigm Capital Management Inc., Investment Advisers Act Rel. 3857 (June 16, 2014) also 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. Despite the fraud charges and the significant amount of disgorgement orders, the Commission did not impose bars or even suspensions of any length of time on Paradigm Capital or its personnel.

In the Matter of Shelton Financial Group, Inc., Advisers Act Rel. 3993 (January 13, 2015) involved an investment adviser's failure to disclose compensation it received through an arrangement with a registered broker-dealer and conflicts arising from that compensation The Broker agreed to pay the adviser for all client assets that were invested in certain mutual funds creating incentives for the adviser to favor particular mutual funds over other investments. The

adviser initially did not disclose the arrangement and then later inadequately disclosed all in violation of the antifraud provisions of the Investment Advisers Act of 1940 ("Advisers Act"). In the Shelton Financial matter too no suspensions or bars of any type were imposed on the adviser or any of its employees.

Finally, 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 involved scienter based fraud charges and the defendants had not taken any remedial steps to address the fraudulent conduct. Despite these aggravating factors the Commission did not bar the firm or any of its employees from the securities industry. The Commission only imposed suspensions of six months, among other relief, The conduct involved in the Vernazza case is significantly more egregious 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. PageOne, in contrast, amended its Form ADV numerous times to reflect developments in its relationship with United and consulted heavily with NRS and counsel regarding the wording of the Form ADV disclosures. (Tr. 62: 17-22; 63:23-64:3)

Now the Division responds with the argument that the cases cited by Respondents are "entirely inapposite" because: (i) three of the four cases involved settled proceedings; and (ii) three of the four cases involved non-scienter based fraud charges. The Divisions arguments are meritless because *this matter also involves a settlement by Respondents* of the liability portion of

the case only leaving the narrow issue of what, if any, sanctions are in the public interest.[2] The Division's argument ignores the fact that by consenting to the entry of an order making findings and only leaving open the question as to the appropriate sanctions the Respondents saved considerable Commission resources[3] and accepted responsibility for the inadequate disclosures (Tr. 56:14-19; 172 2-21; 191: 9-10; 191 13-14). In addition, all of the cases cited by Respondents above involve violations of the *antifraud* provisions of the securities laws and while some of the settlements involved non-scienter based fraud charges this fact alone is not enough to justify the unprecedented departure from Commission precedent in fraud based cases (i.e. going from no bars or suspensions in the applicable precedent to a complete revocation of PageOne's registration with the SEC as an investment adviser and a five year bar for Page). Even in the Vernazza case where there were fully litigated scienter based fraud charges the Commission's sanction was a six month suspension for both the advisor and the employees.

Recognizing that the bars imposed on the Respondents are a clear departure from applicable Commission precedent for similar conduct by other investment advisors the Division next argues that in imposing sanctions the Commission "need not follow some mechanical formula." (Div. Br. 16) But the Division's position not only misstates Respondents' arguments it is also directly contracted by precedent from the DC Circuit Court of Appeals, which has addressed and rejected the very same argument by the Division. The DC Court of Appeals in Collins v SEC, 12-241 (DC Circuit 2013) has stated:

> The SEC tries a very broad defense of its action, citing statements in our cases to the effect that it need not follow a "'mechanical formula'" when crafting

[2] The Respondents voluntarily consented to the entry of a Commission order on March 10, 2015 that contained extensive findings of fact that could be used for the sanctions phase of the administrative proceeding and that also provided for a censure and a cease-and-desist order. (See Rel. No. IA-4044 (SEC March 10, 2015)(the "Consent Order").

[3] The hearing on sanctions only took one afternoon, Page was the only witness who testified and the Respondents consented to the admission of all the Division's hearing exhibits.

> sanctions, PAZ Secs., Inc. v. SEC, 566 F.3d 1172, 1175 (D.C. Cir. 2009) (quoting Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1113 (D.C. Cir. 1988)), and that it is "not obligated to make its sanctions uniform," Geiger v. SEC, 363 F.3d 481, 488 (D.C. Cir. 2004). But for a court not to require uniformity or "mechanical formulae" *is not the same as for it to be oblivious to history and precedent. Review for whether an agency's sanction is "arbitrary or capricious" requires consideration of whether the sanction is out of line with the agency's decisions in other cases.* Friedman v. Sebelius, 686 F.3d 813, 827-28 (D.C. Cir. 2012)(Emphasis added).

Here the bars imposed on Respondents clearly fall far outside of established Commission precedent involving advisors who failed to disclose important conflicts of interest and, therefore, the bars are arbitrary and capricious and should be overturned.

B. Findings of Fraud Do Not Automatically Result in Associational Bars

Next the Division argues that a finding of fraud should, in most cases, result in associational bars. (Div Br. p. 17 citing to a case involving insider trading) However, nothing can be further from the truth and the parties' briefs are replete with citations to Commission precedent where investment advisors were found to have committed violations of the antifraud provisions of the federal securities laws and no associational bars were imposed. In fact, all of the cases cited involved fraud and resulted in significantly less severe sanctions than bars and license revocations.

The Division then states that the Respondents can point to no evidence as to why a bar is inappropriate. (Div Br. 17) This is simply incorrect and the Respondents have pointed to numerous pieces of evidence that demonstrate why a bar is inappropriate including the reliance on compliance professionals to draft the Form ADV disclosures at issue. (ID at 8) National Regulatory Services, a nationally known compliance consulting firm was retained by Respondents to prepare the Form ADV disclosures at issue and counsel and NRS advised Respondents that since Page and United were only in talks and a definite agreement had not been reached then it was not necessary to disclose this in the Form ADV. (Tr. 142: 19-22; 62: 17-22;

63:23-64:3)

C. The Respondents Misconduct Was Not Particularly Egregious and Not Carried Out With a High Degree of Scienter.

In its brief the Division continues to advance its unfounded arguments, without any citation to the record, that Respondents 'actually intended to deceive their clients" (Div. Br. 19), made a "conscious decision" to hide conflicts (Div. Br. 7) and that Respondents "refused" to disclose conflicts to investors (Div. Br. 7). The notions that Respondents intended to deceive their clients, made conscious decisions to hide conflicts and refused to disclose conflicts were all soundly rejected by the ALJ. In fact, Respondents worked closely with both counsel and NRS to draft the disclosures related to their relationship with United. (Div Ex. 11 agreement dated July 15, 2009 between National Regulatory Services and PageOne; and Tr. 62: 17-22; 63:23-64:3 regarding Respondents' reliance on the advice of counsel) "Although the Division maintains that the mental state underlying Page's violative conduct should be deemed intentionally fraudulent, I disagree." (ID at 7)[4]

The Division also misconstrues Page's testimony that discourse of the United negotiations would be "too dangerous." (Div Brief at 7, 9). Page's concerns regarding the dangers of disclosure related to the fact that there was a nondisclosure agreement in place with United covering the negotiations and violating the NDA by making disclosures that he believed pursuant to advice from NRS were not required would be too dangerous because United would have a claim against Page that he breached the NDA. (Tr. 74: 17-23) Further, the ALJ found that "Respondents' disclosure infractions were not the result of intent to harm clients or ignore regulatory responsibilities, but in large part due to Page's reckless inattention to corporate compliance functions for which he held ultimate responsibility." (ID at 8)

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[4] In addition, Page would have no incentive to risk the loss of his entire firm and the revocation of PageOne's registration with the SEC by referring only fifteen of his thousands of clients to the

"The record also demonstrates attempts to comply and retaining a nationally recognized firm NRS. The fact that PageOne engaged NRS, and that Page relied heavily upon NRS and Burke in attempting to fashion sufficient Form ADV disclosures." (ID at 8) Moreover, evidence of Respondent's attempts to comply with their disclosure obligations can be shown by Respondents' consultations with counsel (Tr. 62: 17-22; 63:23-64:3) the numerous Form ADV updates that were made that discuss the relationship between United and PageOne. While ultimately Respondents acknowledge their disclosures fell short the numerous updates to the Form ADV concerning United do demonstrate attempts to describe a unique and evolving relationship. The Division's argument that Respondents were trying to hide their relationship with United is not consistent with the fact that Respondents were frequently updating their Form ADV disclosures with advice and guidance from NRS.

The Division argues that Respondents are not able to rely on the advice professionals such as National Regulatory Services because respondents hid key facts from NRS. This argument was also rejected by the ALJ and is not supported by the facts. The ALJ found "[i]f Respondents had sought to intentionally defraud their clients through fraudulent disclosures, or failures to disclose, it seems extremely unlikely that they would have retained National Regulatory Services (NRS), a clearly legitimate, national firm providing compliance services to financial firms for the particular purpose of drafting or advising on the drafting of amended Forms ADV, and equally unlikely that they would disclose to NRS the arrangement with the Fund Manager. See Div. Exs. 11, 12; Resp. Exs. 94, 101, 102, 115, 155. If Page had intended to commit a fraud, he either would have not hired a legitimate compliance firm to draft the Forms ADV, *or he would have hidden key facts from them. Neither was the case here."* (ID page 7)(emphasis added) Moreover, the Division fails to acknowledge that a significant mitigating factor is Page's reliance on experienced compliance

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United funds.

professionals when drafting the Form ADV disclosures at issue, specifically NRS a nationally recognized compliance consulting firm and Sean Burke an experienced compliance officer who worked at PageOne who was delegated the responsibility to work with NRS to draft the Form ADV disclosures. Although the Division correctly maintains that Page was ultimately responsible for the final approval and issuance of PageOne's Forms ADV, as a practical matter, Page trusted Burke to develop, review, and finalize disclosure language. (Tr. 57-58, 62-65, 168-69, 171- 72, 191 (ID FN 4, page 7)

Likewise the record does not support the Division's argument that Page knew that the funds that United was using to pay the down payment were coming from investors' funds. In fact, the record demonstrates that Page did not know where United was getting the money to pay the down payment (Tr. 94: 19-20) Page testified that he was not privy to United finances and was not in any position to determine the source of funds for the down payments that he was receiving. (Tr. 103:17 – 105:13) In fact, the money United used to pay Page came from many difference sources at United (Tr. 140: 6-13). Moreover, as further evidence against the notion that Page knew that investors funds were being used to pay his down payment United had paid $350,000 to Page at the start of the transaction before any investor funds went to United from PageOne. (Tr. 104: 6-10)

To support the revocation of PageOne's license and the five year bar against Page the Division argues that Respondents have not accepted responsibility for their conduct. (Div Br. 25-26). However, the Division's argument is clearly contradicted by the evidence. The Respondents have unquestionably accepted responsibility for the conduct at issue. For example, Page acknowledged that it was his job as Chief Compliance Officer to disclose conflicts of interest (Tr. 56:14-19) and he has voluntarily expressed remorse and has taken all responsibility for everyone's misconduct (Tr. 172 2-21). Page also testified that it was a mistake to hold so much confidence in Sean Burke (who has worked at PageOne for 12 years) and to have

delegated so much responsibility to Sean Burke as compliance officer and to NRS (Tr. 191: 9-10). Page testified that he should have paid more attention to all compliance rules (Tr. 191 13-14). Page testified he also consulted with counsel for compliance advice on how to draft the Form ASDV disclosures related to the United relationship (Tr. 62: 17-22; 63:23-64:3) Respondent paid counsel $88,000 for these compliance services.

By arguing that the Respondents have not taken responsibility for their actions what the Division is really trying to do is argue that it's appropriate to penalize the Respondents for asserting their rights to have a hearing to determine the appropriate sanctions. In the Consent Order the Respondents consented to the Commission making extensive findings of fact while, at the same time, reserving their rights to vigorously defend themselves against the sanctions that the Division was seeking. Now the Division seeks to punish the Respondents for asserting their rights to challenge the sanctions, even though the Consent Order gives the Respondents these very rights. The Division's position is simply without merit and also highly inappropriate. In SEC v. First City Financial Corp. (281 U.S.App.D.C. 410, 58 USLW 2354, Fed.)(DC Court of Appeals 1989) the Court stated:

> The government's appellate brief compounds this mistake by urging us to consider, as further evidence of lack of remorse, appellants' counsel's arguments and appellants' willingness to pursue this case on appeal. The securities laws do not require defendants to behave like Uriah Heep in order to avoid injunctions. They are not to be punished because they vigorously contest the government's accusations. We think "lack of remorse" is relevant only where defendants have previously violated court orders, see SEC v. Koenig, 469 F.2d 198, 202 (2d Cir.1972), or otherwise indicate that they did not feel bound by the law, see Savoy Indus., 587 F.2d at 1168. As such, it is really only another indication as to whether it is "reasonably likely" that future violations will occur in the absence of an injunction.

Likewise here the Commission should not punish Respondents for vigorously contesting the sanctions because they have a right to do just that under the Consent Order.

D. No Other Factors Support a Revocation or Bar

While the Respondents have acknowledged their compliance failures by agreeing to the Consent Order and testifying to their lapses, the Division's brief leaves out key facts that are necessary for the Commission to place the conduct at issue in its proper context. For example, the Division fails to note that only 15 of PageOne's 3000 investors invested in the United Funds (Tr. 73 9-12) and that Page has been in the investment industry for 39 years without any regulatory issues (Tr. 50: 10-13). In addition, none of the fifteen investors ever filed a lawsuit or complaint against either of the Respondents and all are still his clients.

Likewise the Division's argument that United' e private placement United investments were risky as regards the accredited investor private placement memo is irrelevant to the disclosure violations. The risk disclosures were contained in United private placement memorandum (Div. Ex. 1), which was only available to a limited number of high net worth accredited investors. Moreover, the risk level is irrelevant to the Forms ADV disclosure violations because the risks associated with an investment in the funds were fully disclosed to the investors, all of whom were wealthy accredited investors (Div. Ex. 1 PPM). The Division's arguments regarding the losses suffered by investors also don't tell the whole story because the United Income Fund paid a 9% annual dividend quarterly and never missed a payment (Tr. 174 15-21). Further, in 2014 the Income Fund also paid 10% of its principal back to investors in addition to the 9% dividend (Tr. 174: 15-21).

In arguing that it's appropriate to revoke PageOne's adviser license and bar Page for five years the Division also ignores the assurances Respondents have given against future violations. For example, Page has specifically testified that he will not work on private placements again. (Tr. 191 19-22). In fact, the ALJ specifically found that "Page has pledged that he will not engage in future violative conduct, and judging from his demeanor, I believe his intentions to be sincere and

credible." Tr. 190 (ID at 9). The Commission should not overturn the ALJ's findings concerning Page's assurances against future violations because the ALJ had the opportunity to observe Page in person at the hearing and specifically made a judgment about Page's demeanor and credibility. The ALJ also found that "there is no evidence that Respondents have engaged in any violative conduct in the past four years, which bolsters Page's assurances." (Id.) This conclusion is buttressed by the fact that Page had voluntarily ceased recommending the United private placements two years prior to any SEC inquiry.

Finally, the overly harsh sanction of revoking PageOne's advisory license and barring page for five years is not necessary for general deterrence purposes. Respondents have argued that other less severe sanctions will adequately serve to deter others and Page has proposed that a bar from participating in private placements and acting as a compliance officer, in addition to a cease and desist order, is appropriate and in the public interest (Tr. 199 3-14).

E. The Order of Disgorgement Was Not Appropriate Because Respondents Were Not Unjustly Enriched

In their opening brief Respondents demonstrated that the Initial Decision's order of disgorgement was made in error because an individual is not unjustly enriched by borrowing money from somebody else when that has to be repaid. Nor is a person unjustly enriched by selling his business for a fair price. In this matter Page simply did not receive any ill-gotten gains. What Page received were deposits against the proposed sale of 49% of his business to United, secured by promissory notes with commercially reasonable terms and market rates of interest. The proceeds Page received from United were loans, 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. Page has, in fact, received no ill-gotten gains since repayment of the promissory notes has been demanded by United's counsel in full, and litigation has been threatened. Because the purpose of disgorgement "is to deprive a person of

'ill-gotten gains' and prevent unjust enrichment"[5] it was inappropriate for the ALJ to order Respondents to disgorgement money that they merely borrowed and have to pay back. 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.

Moreover, even if the sale transaction to United 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 to United. 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 an $18 billion investment firm called Next Financial Group), and to compensate Page for the time and trouble he had invested in the ultimately fruitless four year negotiations.[6] Because such moneys would serve only as compensation for injuries, they would not confer a benefit to Page.[7] Moreover, under the terms of the notes Page was supposed to have capital gains tax treatment for the money received under the notes, which is further evidence that the notes represented a sale of 49% of Page's equity and not unjust enrichment, however United's lengthy delay in closing the transaction was creating the risk that funds received by Page would

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[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").

[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.")

be treated as ordinary income. (Tr. 85: 14-20; 87: 4-6)

In response to the Respondents' argument that the amount ordered disgorged was borrowed money that has to be repaid and not unjust enrichment the Division argues that so far the money borrowed has not been repaid. But merely because the money has not yet been repaid does not convert the money from borrowed funds into unjust enrichment. The Division's argument that the borrowed money has not yet been repaid also does not have any impact on the fact that Page has a legal obligation to repay the money that is documented in written promissory notes, drawn up by United's counsel James Quinn and litigation has been threatened. Finally, the Division's argument that Page was unjustly enriched because he has not yet repaid the borrowed money fails because Page has already demonstrated that his financial condition is very poor and he cannot repay what he does not have.

Moreover, Page has already suffered severe financial and other consequences as a result of this proceeding. Prior to the administrative proceedings being commenced PageOne had over $300 million in assets under management, worked with over 170 advisors, 23 broker-dealers and 19 insurance companies. (Tr. 189:11 – 190:14) It took Page 35 years to build PageOne to that level. Since the fraud charged were filed PageOne has lost over $200 million of its assets under management, its revenues have declined dramatically and many of the selling agreements it had with broker-dealers and insurance companies have been canceled. (Id.) In short, the Respondents have already suffered tremendous financial harm as a result of this administrative proceeding. Ordering the Respondents to pay any additional amounts in disgorgement and/or civil penalties would be an unnecessary piling on of sanctions. The Respondents simply have no way of paying the disgorgement that was ordered.

The Division also argues that Page is disputing United's claim to the borrowed funds

and has asserted he may keep the borrowed funds. (Div. Br. 28-29). However, this argument misstates the record. The section of the transcript that the Division cites references an "ongoing litigious event" which the Division improperly tries to relate to the repayment of the promissory notes when, in fact, the very next lines of the transcript (which the Division does not cite) and several lines shortly thereafter make it clear that the "litigious event" that Page is referring to is the wrongful death litigation that Uccellini's estate filed in connection with the plane crash where Uccellini perished and *not litigation related to Page's promissory notes.*

This is the complete version of Page's testimony on this point with the parts the Division chose note to cite:

> **Q And united Group has asked you to pay back all of the money it paid to you as down payments?**
>
> A He placed his notes in the trust and the trustees are demanding repayment.
>
> **Q And you haven't paid that money?**
>
> A It is still an ongoing litigious event.
>
> **Q What is the status?**
>
> A They are settling their estate. There is wrongful death claims. . .
>
> (Tr. 141 8–18)
>
> A: I have an outstanding 4 million dollars that United is probably definitely going to levy upon me because it is incumbent upon the trustees to enforce that, and I suspect once they resolve the litigation of the company and the wrongful deaths. They are going to, as I have said and Mr. Tim Quinn has said, seek those damages back.
> (Tr. 198:19 to 199:2)

The evidence is clear that Page has to repay the money that was ordered to be disgorged

and they are subject to written promissory notes that were negotiated at arms' length. (Tr. 85 10-15; Div Exs. 94 and 102). Because Uccellini died the promissory notes are now held by a trust and the trustee has demanded repayment. (Tr. 141 11-12). Accordingly it is error to treat these funds as Page's ill-gotten gains.

F. Business Expenses and Offsets Do Represent Appropriate Reductions in the Calculation of Ill-Gotten Gains for Disgorgement Purposes

The Division next contests the Respondents' argument that even if an order of disgorgement is warranted – which it is not – appropriate offsets against the award are required. However, offsets against disgorgement awards for expenses are entirely appropriate. See SEC v. Video Without Boundaries, Inc., 2010 WL 5790684 (S.D. Fla. Dec. 8, 2010); SEC v. Berlacher, 2010 WL 3566790 at 15 (E.D. Pa. Sept. 13, 2010); SEC v. Shah, 1993 WL 288285 (S.D.N.Y. July 28, 1993); SEC v. Thomas James Assocs., Inc., 738 F. Supp. 88 (W.D.N.Y. 1990).

The ALJ also considered and rejected the Division's arguments that offsets were not applicable.

> I disagree with the Division that the full amount Respondents received from the Fund Manager is a reasonable approximation of profits causally connected to the violation. See Montford & Co., 2014 SEC LEXIS 1529, at *94; Div. Br. at 19. First, from July 31, 2009, through September 13, 2010, Respondents' clients were aware that Respondents would receive up to seven percent of funds invested in the Fund Manager. Consent Order at 2015 WL 1022503,
>
> Notwithstanding the problems with that disclosure, because disgorgement is an equitable form of relief and clients were informed Respondents could receive seven percent of the investments in the Fund Manager during that period, it is appropriate to adjust the sum Page received from the Fund Manager by seven percent of the client investments (totaling $7,999,400) during that period. Div. Ex. 179; Div. Ex. 183 at Ex. A. Likewise, the Division's proposed disgorgement should be discounted by $559,958 (7,999,400 * .07 = 559,958). (Initial Decision 13-14)

Disgorgement of ill-gotten gains is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment. Montford & Co., Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *94 (May 2, 2014) (quoting SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir.

1989)). "When calculating disgorgement, 'separating legal from illegal profits exactly may at times be a near impossible task.'" Id. (quoting First City, 890 F.2d at 1231; see SEC v. Whittemore, 659 F.3d 1,7 (D.C. Cir. 2011). "As a result, disgorgement 'need only be a reasonable approximation of profits causally connected to the violation.'" Montford & Co., 2014 SEC LEXIS 1529, at *94 (quoting SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995))." Therefore, even if the Commission was inclined to sustain the order of disgorgement – which it should not do – the ALJ's consideration of the disclosures in PageOne's ADV is a permissible and appropriate part of the disgorgement calculation.

G. The Initial Decision Erred in Imposing Joint and Several Liability For Disgorgement on PageOne

The Initial Decision erroneously imposed disgorgement on PageOne even though PageOne did not receive any payments from United. United paid Page or one of his affiliated companies – and not PageOne - a series of ernest money deposits in connection with Page's proposed sale of 49% of PageOne to United. The 49% interest that was being sold was coming from Page personally and not PageOne. PageOne was in no way unjustly enriched from the United payments because it never received any of the funds. The ALJ's decision to order disgorgement against PageOne is unduly punitive in nature and case law make clear that disgorgement is intended primarily to prevent unjust enrichment" Banner Fund, 211 F.3d at 617 (citing First City Fin. Corp., 890 F.2d at 1231) and to be punitive in nature.

In this matter, disgorgement should not have been imposed on a joint and several basis because PageOne did not receive any of the alleged ill-gotten gains and to hold PageOne jointly and severally liable for disgorgement would be punitive and not equitable in nature.

H. The Commission Should Vacate the Award of Disgorgement Based Upon Respondents' Demonstrated Inability to Pay

The Initial Decision correctly found that Respondents are in extremely poor financial

condition (ID at 12). The Division argues that Page's spending was extravagant (Div Br. At 34) however, the Division's argument fails to consider that Page's spending included paying off substantial amounts of old taxes in addition to [redacted] that he owed. Contrary to the Division's portrayal of Page as a spendthrift, in fact Page did not buy any extravagant items outright and merely purchased a home with a mortgage and a car with a car loan. In addition, the second car that was purchased and financed for Page's family member was also sold as a way to minimize Page's ongoing expenses. Page had no equity in this car. In their opening brief, the Respondents demonstrated that the Initial Decision erroneously gave little weight to Respondents' inability to pay argument when deciding to impose disgorgement, while at the same time crediting inability to pay as a reason not to impose a civil penalty. The Respondent's opening brief also noted that pursuant to SEC 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." The Initial Decision, *without citing any legal support*, held that ability to pay "should be less relevant to disgorgement compared to civil penalties." (ID at 12) The Division's brief likewise fails to offer any legal support for the notion that inability to pay should be less relevant to disgorgement compared to civil penalties. In fact, the Division's brief simply ignores this crucial error by the ALJ. In fact, considerations of inability to pay are equally applicable to whether an award of disgorgement should be made as they are to whether a civil penalty should be imposed. In this case the ALJ found that the Respondents' demonstrated inability to pay justified not imposing any civil penalty and for the same reasons the ALJ should have also held that Respondents' demonstrated inability to pay compels the conclusion that no disgorgement should be awarded.

In arguing that the ALJ's award of disgorgement against Respondents was appropriate

the Division also ignores the substantial steps that Page took to reduce his living expenses. For example, Page sold his house and both cars and since both cars were financed Page had no equity in them (Tr. 197 2-8). In addition, once the sale of Page's house is complete he will be making arrangements to find affordable living arrangements with friends or family. . (Tr. 190: 6). For these reasons the Commission should vacate the award of disgorgement.

I. The Respondents Have Stated a Valid Appointment's Clause Challenge

In their opening brief the Respondents demonstrated that this administrative proceeding violated the Appointment Clause of the Article II because ALJ Patil was not properly appointed. In arguing against this position the Division cites to two Commission decisions which addressed appoint clause challenges In the Matter of Raymond J. Lucia Cos., Inc., Rel. No IA-4190, 2015 WL 5172953, at **21-23 (SEC Sept. 3, 2015); and In the Matter of Timbervest, LLC Rel. No. IA-4197, 2015 WL 5472520 at **23-26 (SEC Sept. 17, 2015).

However, neither the Lucia case nor the Timbervest case analyze or adequately discuss the recent District Court rulings in Duka v. SEC, 15-cv-00357 (SDNY August 12, 2015 and (also finding that the way ALJ's are appointed is likely unconstitutional). Charles Hill v.SEC, 15-cv-01801 (N.D. Ga. June 8, 2015). We believe it is appropriate for the Commission to revisit its conclusions in Lucia and Timbervest in light of the Duka and Hill holdings and deem this administrative proceeding to be unconstitutional.

J. A Time Limited Bar is Consistent with Statutory Language

The Division argues that the five year bar that the Initial Decision imposed on Page is improper because, under the Division's reading, Section 203(f) of the Advisers Act and 9(b) of the Investment Company Act of 1940 ("Investment Company Act") do not provide the Commission with authority to impose a five year bar. (Div Br.36-38). In the Division's view the ALJ could only have imposed a permanent bar *with a right to reapply for association after five*

years. (Div Br. 36-37). This argument is meritless for several reasons. First, the Division's argument that a bar with a right to reapply after five years is likewise not discussed in either Section 203(f) of the Advisers Act or 9(b) of the Investment Company Act. After faulting the Initial Decision for imposing a five year bar because it is not specifically mentioned as an option in the statute, the Division goes on to propose a remedy (a bar with a right to reapply) that is also not authorized by the statutes. The Division's citation to Commission cases where bars with a right to reapply have been imposed does not change the fact that such bars are not provided for in the statutory scheme. Moreover, the Commission cites absolutely no statutory support for its argument that "[w]hen the Commission bars a respondent from association, it may also grant respondent an explicit right to reapply for association after a specified period of time – for example a bar with a right to reapply for association after five years." (Div Br. 40-41)

The Division does concedes that Section 9(b) of the Investment Company Act does give the Commission authority to impose a five year bar (Div. Br. 37) but then argues that the same authority is not granted to the Commission in Section 203(f) of the Advisers Act. This argument is without merit because Section 9(b) states that the Commission may "place limitations on the activities" if the Commission finds it is in the public interest to impose such as sanction on a person that has violated the Advisers Act. The Division's argument that if the Commission determines that a respondent's misconduct warrants a prohibition on association of more than twelve months than imposing a bar is the only option under Section 9(b)(Div Br. 37) is not consistent with the plain language of the statute and imposes far too rigid of a constraint on the Commission's ability to impose tailored sanctions.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Memorandum of Law, 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: October 19, 2015
New York, NY

Respectfully submitted,

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16037

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

Certificate of Service

I hereby certify that I served the Respondents' Reply Memorandum of Law in Further Support of Petition for Review of Initial Decision of Respondents Edgar R. Page and PageOne Financial Inc. and in Opposition to the Division's Cross-Appeal on this 19th day of October, 2015 on the parties below by UPS:

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