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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16037

--X

In the Matter of

EDGAR R. PAGE AND
PAGEONE FINANCIAL INC.

Respondents.

--X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONSIDER AND STAY OF RESPONDENTS EDGAR R. PAGE AND PAGEONE FINANCIAL INC.

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I. INTRODUCTION

Petitioners Edgar R. Page and PageOne Financial Inc. ("PageOne") make this motion for reconsideration and for a stay of sanctions pursuant to SEC Rule of Practice 470 with respect to the Commission's May 27, 2016 Opinion and Order (the "Opinion"). As set forth below, Respondents respectfully submit that the Opinion contains manifest errors of law and fact and that the Opinion should be modified so as to withdraw the revocation of PageOne's advisory license and Page's bar from the securities industry. As set forth below, the Commission erred when it did not adequately consider the much less severe sanctions imposed by the Commission in other similar cases and, in addition, relied on a misapprehension of material facts.

PageOne is an advisory firm that has operated for over 20 years without incident in its core business of managing thousands of investors' money by selecting appropriate mutual funds and publicly traded securities for their portfolios. This case relates entirely to a miniscule part of PageOne's business involving the recommendation of a private placement investment to fifteen of its clients and the disclosures in PageOne's Form ADV related to the relationship with the funds' sponsor. Importantly, long before the SEC's investigation of this matter Respondents ceased their involvement in any private placement transactions and also took responsibility for the faulty disclosures that appeared in the Form ADV by entering into a Consent Order with the Commission on March 10, 2015.

Even though the conduct at issue related to a miniscule amount of PageOne's business and even though the Respondents have never had any compliance issues related to their core business of selecting mutual funds and securities for their investors' portfolios in their over 20 years of business, the Commission Opinion will effectively put PageOne out of business and bar Page from the securities industry. As discussed below, the Opinion erred when it found that this draconian sanction was in the public interest and consistent with Commission precedent and it

erred in its conclusions related to several material facts. Accordingly, Respondents respectfully submit that the Opinion should be modified as set forth herein and the sanctions stayed, including the revocation of PageOne's license as an advisor and Page's bar from the securities industry.

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 clients 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, his poor health, his poor financial condition, 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). A Petition for Review followed.

D. The Commission Opinion

On May 27, 2016 the Commission issued its Opinion that held it was in the public interest to bar Page under the Investment Advisers Act and to prohibit him under the Investment Company Act from certain associations with the securities industry, with a right to reapply after five years for permission to associate; revoke PageOne's adviser's registration; and order disgorgement of $2,751,345, plus prejudgment interest, jointly and severally.

III. LEGAL ARGUMENT

A. <u>The Standard of Review for a Motion for Reconsideration</u>

Under SEC Rule of Practice 470 motions for reconsideration may be granted where the Commission has made a manifest error of law or fact. *In the Matter of FCS Securities*, Securities Exchange Act of 1934 Rel. No. 65267 (September 6, 2011). Respondents respectfully submit that the Commission has made manifest errors of law with regards to its holding regarding the lack of precedential value of settled cases and in the way it distinguished the sanctions imposed in the *Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003) case. In addition, in this matter the Opinion is premised on a number of facts that weighed heavily in the Commission's analysis and conclusion that were not accurate and not supported by the record.

B. The Opinion Contains Manifest Errors of Law and Erred When it Held that <u>Settlements in Other Commission Cases are Not Precedent</u>

In its Memorandum in Support of the Petition for Review Respondents cited to four Commission cases involving similar conduct to that at issue here where dramatically lower sanctions were imposed (*See* Memorandum at 5-8), but the Opinion dismissed three of the four out of hand with the conclusion that settled cases are not precedent.[1] (Opinion at 16). However, the holding in the Opinion that settlements are not precedent is contrary to well established law that the Commission must consider whether the sanctions it imposes are "out of line with the agency's

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[1] The three cases were: (i) *In the Matter of Focus Point Solutions, Inc. et al.*, Investment Adviser Act Rel. 3458 (September 6, 2012)(involving an advisor that failed to disclose multiple conflicts of interest, including the receipt of undisclosed compensation from a third party and no revocation, bar or suspension of the adviser's license was imposed either on the firm or any individuals associated with the firm; (ii) *In the Matter of Paradigm Capital Management Inc.*, Investment Advisers Act Rel. 3857 (June 16, 2014)(involving an advisor's failure to disclose its conflicts of interest and its business arrangements with an affiliated broker-dealer, along with retaliation against a whistleblower and out of pocket losses to their customer of $1.7 million and no suspension of the firm or any of its personnel was imposed); and (iii) *In the Matter of Shelton Financial Group, Inc.*, Advisers Act Rel. 3993 (January 13, 2015)(involving an adviser's failure to disclose a conflict of interest and compensation it received from a broker-dealer for client referrals and no imposition of a suspension or bar on the firm or any of its personnel).

decisions on other cases." (*See, e.g. Collins v SEC,* 736 F.3d 521 (DC Circuit 2013)(holding that 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; and *Friedman v. Sebelius*, 86 F.3d 813, 827-28 (D.C. Cir. 2012)).[2] Moreover, in dismissing these three cases out of hand the Opinion did not adequately consider that the facts of the three cases were very similar to this matter, it only focused on what subsections of the Advisors Act of 1940 were charged.

Finally, the Opinion rejected the fourth case cited as Respondents as precedent *(Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003)) even though it 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 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.

The Opinion's reasoning for rejecting *Vernazza* (cited in the Opinion as the *IMS/CPAs* case) as a precedent was that the *Vernazza* case was not comparable because it only involved $75,000 in disgorgement whereas this matter involved over $2 million in disgorgement. (*See* Opinion at 16) However, this reasoning fatally flawed because the Opinion earlier took exactly the

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[2] It is noteworthy that the Opinion's only citation supporting the holding that settlements are not precedent is to *In the Matter of Rodney R. Schoemann*, Securities Act Release No. 2076, 2009 WL 3413043, at *13 n.55 (Oct. 23, 2009), which predates the holdings of the DC Circuit Court in Collins and Friedman discussed above.

opposite position (i.e. that actual customer harm was irrelevant) in support of revoking the registration of PageOne and barring Page. (*See* Opinion at 9 "absence from the record of evidence demonstrating any direct customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally.") In addition, the difference in the amount of disgorgement between the two cases does not justify the Commission's disregard of that case because of the overwhelming similarity of other facts including the failure to disclose conflicts of interest in the Adviser's Form ADV. For these reasons Respondents respectfully request that the Commission reconsider its Opinion in light of the more reasonably sanctions imposed in the *Vernazza* case. [3]

C. The Opinion Contains Manifest Errors of Fact

1. The Commission Opinion Misconstrued Page's Testimony that Disclosure of the United Agreement was "too Dangerous" and the Conclusion Conflicts with the Consent Order

In the Consent Order Respondents acknowledged their failure to properly disclose the nature of their relationship with United. The Opinion and Consent order both refer to Page's testimony that he did not tell his clients these things because, in his view, it was "too dangerous"; "it would cause thousands of clients to get extremely nervous if I was selling my firm." (Opinion at 7) From this piece of testimony the Opinion makes the unjustified holding that the testimony "suggests to us that Page decided not to disclose the conflict . . . because he would be unable to recruit sufficient investors for the Funds if he made the disclosure." (*Id.*) This unsupported conclusion in the Opinion concerning Page's motives improperly imposes a higher degree of scienter on Page than is warranted by anything in the record and directly contradicts the very

[3] The *Vernazza* case's more limited sanctions also supports Page's proposal that he be barred from further participation in private placement offerings.

testimony it cites, which in no way relates to any concerns Page had in recruiting additional investors for the United funds.

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. of April 20. 2015 Administrative Hearing ("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." (Initial Decision at 8)

The record also proves that Page on his own initiative stopped recommending United funds to PageOne clients long before the SEC investigation began. The Consent order demonstrates that Page recommended approximately fifteen clients to United, which was run by a 40 year veteran and experienced developer whose partner was equally accountable as a chairman of a Manhattan based broker-dealer. These facts manifestly contradict the Commission's Opinion stating that Page was motivated not to disclose the conflicts with United by a desire to recruit more investors into United's funds.

2. The Commission Also Put Misplaced Reliance on an Unrelated Settlement with a State Securities Regulator that Occurred Almost 20 Years Ago

In deciding to impose a bar on Page and a revocation on PageOne the Commission placed undue reliance on an isolated settlement Page agreed to with a state security regulator almost 20 years ago. (Opinion at 12) This old settlement with the State of New York involved registration issues that are completely unrelated to the concerns raised in this matter regarding disclosures of conflicts of interest. Moreover, the Broker Check report from which this sanction was referenced also clearly indicates that the violation was the fault of the attorneys for Mr. Page who had

committed legal malpractice in advising him he did not have to be registered to conduct the transactions at issue. There was no finding of fraud of any type associated with that settlement. The Commission placed undue reliance on the old settlement in deciding that a bar and revocation was appropriate.

The record shows that the Respondents have never had any issues with regards to investment advisor regulations outside of the area of the United private placements. PageOne's involvement with the United private placements was an aberration in its long history which has been almost entirely focused on publicly traded securities and mutual funds. The Respondents have never had any compliance issues related to matters involving its core business operations that concern publicly traded mutual funds. The approximately fifteen clients of the Respondents that invested in the United funds made up a miniscule percentage of PageOne's business and do not justify the draconian sanction of revoking PageOne's advisory license and barring Page from the securities industry. The Respondents have previously proposed that an appropriate sanction would be barring them from participating in the sale of private placements and it's respectfully submitted that this would be more than enough to prevent the same conduct from reoccurring.

3. The Opinion Erred When It Held that Respondents Reaped Ill-Gotten Gains That Are Subject to Disgorgement

When Respondents recommended the United investments to fifteen clients the money used to fund the investments was taken out of those clients' PageOne accounts. As a result, PageOne lost years of annual management fees that it would have earned on those funds had they remained with PageOne. The money that the Respondents received from United was intended to offset the lost revenue from management fees and was factored into the intended purchase and considered in the original price to sell the 49% interest in PageOne to the Manhattan based broker-dealer as outlined in the NDA prior to the attorney driven Memorandum of Understanding. The periodic down payments by the purchaser Walter Uccellini of the Manhattan based broker-dealer, where

borne out as constant contract revisions evidenced by reduction by counsel of both firms' of notes received to avoid PageOne's revenue from suffering prior to the closing. And, as a promise made the periodic payment contract reductions were not refundable as the intent of Uccellini's guarantee would dislodge a first offer from the Houston based broker-dealer of record.

Uccellini, the principal of the purchaser, perished in a private plane crash months before the acquisition and the sale was not consummated and the deposit was surrendered because, again as stated above, it replaced PageOne's lost revenue and would favor Uccellini's Manhattan based broker-dealer and damage PageOne financially. The private placement memoranda given to 15 investors (out of several thousand accounts) was to give the investors the much needed 9% annual dividend the fund bore for the investor, which is the context for how Uccellini met Page with counsel for both firms involved in the acquisition. The "non-refundable" deposit clause is now in litigation brought in the New York State Supreme Court by Uccellini's estate, which attempts to disregard PageOne's protective clause that counsel at both firms built in to the agreements,

The management fees that Respondents lost as a result of the withdrawal of these assets cannot be disputed. Therefore, Respondents' receipt of money from United did not result in any "enrichment" to Respondents (as the Opinion incorrectly concluded at page 18), rather the money from United was merely compensating the Respondents for their lost management fees. In this respect the Commission made a material error when it construed Respondents' argument as requesting an off-set of the disgorgement for opportunity costs (*See* Opinion footnote 68). In fact, the funds Respondents received from United were to compensate the Respondents for the revenue they actually lost and therefore in no way represent "enrichment" as is evidenced by Uccellini's non-refundable deposit, which agreements were initial and signed by Uccellini. In addition, the money from United was generally used to fund the operations of PageOne.

The Opinion also erred when it held that full disgorgement of all monies received from United was warranted because those clients who invested in the Funds were still charged a partial management fee of between 0.75% and 1% on those investments. (Opinion at footnote 68). However, if a client invested in PageOne's programs, the was 2.25 % annually, subject to tiers. Over a seven year period that would total a cumulative fee 15.75 %. Even with breakpoints at the very least the fees would total 14% over seven years. If $20 million was invested from PageOne's platform of managed money that translates to $ 2.8 million generated to PageOne. Therefore, PageOne's revenue was nothing more than rotated from one type of investment (mutual funds) to a private placement. There was no personal gain in revenue to Page or PageOne-- but rather a loss.

Further, additional losses occurred because Page and PageOne did not realize the expected revenue that would have grown had Page and PageOne monies been invested in mutual funds at PageOne. This is because Page and PageOne realized on all other assets a 39% gain on each dollar it managed in PageOne's bond programs where it drew the monies out. The $20 million invested in the United private placements would have grown on PageOne's normal platform over 50% as all other monies of PageOne's bond portfolio had grown in excess of that as reported to the SEC. Thus the $20 million would have grown to $30 million and the 2% management fee would have rendered $4.2 million to Page and PageOne instead of only the $ 2.1 million. Page sought to deliver a 9% return in a 1/2% interest environment to a group of individuals who desired the 9% drawdown that was offered by the United funds.

Respondents respectfully submit, therefore, that it was inequitable for the Opinion to order disgorgement of the funds received from United.

IV. INABILITY PAY AND EFFECTIVE DATE OF FUTURE COMMISSION ORDERS

A. The Respondents Have Suffered Material Financial Losses Since The Hearing in this Matter and Are Unable to Pay Disgorgement

Due to the impact of the initial decision in this matter which was issued on June 25, 2015, Respondents have lost clients, distribution agreements and significant amounts of revenue. Therefore, there has been a material worsening of their financial condition and inability to pay since March 31, 2015 when their original financial disclosure forms were prepared and submitted. The Respondents are far worse off now financially then they were only a little year ago and numerous material events have occurred. In order for the Commission to properly asses their inability to pay Respondents respectfully request the opportunity to submit updated financial disclosure forms pursuant to SEC Rule of Practice 630.[4] Moreover, the Respondents will have no resources to ever pay the disgorgement and prejudgment interest that was awarded by the Commission without a livelihood for gainful employment, particularly since Page is 64 years of age.

The Opinion also misapprehends a number of important facts with regards to Respondents' inability to pay arguments. The Opinion held that Page's inability pay disgorgement was based, in part, to "Page's spending on luxury items and other expenses." (Opinion at 25) The Opinion held that Page drove a luxury car but does not refer to the fact that it was 100% financed. Page's home, presumably also one of the other expenses the Opinion refers to, was also 100% financed. In addition, the gifts referred to in the Opinion were no luxury items or extravagant spending, they were mostly made up of financial assistance to Page's two daughters to assist with college

[4] Rule of Practice 630 provides that "[i]n any proceeding in which an order requiring payment of disgorgement, interest or penalties may be entered, a respondent may present evidence of an inability to pay disgorgement, interest or a penalty. 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."

expenses. Page also paid a half million dollars in alimony expenses through an income agreement over 7years, and Page tithed 10% of his monies to his personal two churches. There were no exotic trips for Page or secret bank accounts and, moreover, as the firm developed there were new employees and increased salaries and increased costs associated with such growth. Finally, the one percent fees that totaled 7% if paid over the funds' lifetime of seven years did not come to fruition to Page and PageOne. The Fund's dividends paid to clients were stopped three years into the seven years and Page then as a result stopped receiving his 1% fee as well. Moreover, half of the monies the clients invested in the United Funds paid no dividends or distributions ever so Page lost more (of the 1%) as the Fund paid zero dividends and distributions from inception (by design). Therefore, Page and PageOne also lost the income that would have been earned had dividends and distributions been paid in the United equity funds.

B. Request for 30 Day Effective Date of Any Subsequent Commission Orders.

PageOne currently is an institutional asset manager to hundreds of accounts. Many of these relationships extend over 38 years. These advisors and clients would suffer great harm if Page and PageOne were barred from the industry because they rely on Respondents' active management of their accounts to protect their principal with historically low-beta funds and would, in effect be, left without representation or an advisor. Therefore, to ensure orderly business operations Respondents respectfully request that the effective date of any future Commission orders be at least thirty (30) days from the date it is issued.

V. CONCLUSION

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. Moreover, the violations that occurred in this case all related to the Respondents' improper disclosures of conflicts related to United and

the private placements the Respondents' recommended to a small number of their clients. The United private placements were the only private placements that PageOne has been involved with and represented a tiny fraction of the customers and investments that PageOne has worked with over its long history as an adviser. In addition, Respondents voluntarily decided on their own volition to no longer work with United and the Manhattan based broker-dealer (Millennium) years before the SEC launched its informal inquiry in this matter and, had further reinvested all the clients' 9% distributions (if the client did not elect to receive them) in other mutual funds not related to United, thereby diversifying the clients' portfolio and keeping in good stead as historically exercised as a fiduciary rather than reinvesting the distributions back into the United funds.

For the foregoing reasons, Respondents request that the Court grant the instant motion for reconsideration of the Opinion and Order and, in light of the legal and factual issues raised herein, stay the sanctions and dissolve or modify the same in the interest of justice.

Dated: June 6, 2016
New York, NY

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 6th day of June 2016 that I caused true and correct copies of Respondent's Memorandum of Law in Support of Motion to Reconsider and Stay to be filed and served in the matter indicated on the following:

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