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.	PREHEARING BRIEF OF EDGAR R. PAGE AND PAGEONE FINANCIAL, INC.

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I. INTRODUCTION

This case presents the narrow and simple questions of whether the Respondents were required to disclose to certain of their clients the preliminary business acquisition negotiations and earnest money deposits between the Respondents and a private fund manager, and, if so, whether the disclosures that were made to the Respondents' clients were adequate. The evidence will show that although no disclosure was legally necessary, the Respondents voluntarily disclosed a conflict of interest that was more severe than the one that could have been created by the acquisition negotiations, and, therefore, the Respondents 1) did not materially misrepresent any facts upon which investment decisions would be made, and 2) did not act negligently or with the intent to mislead anyone.

The key question is whether the difference between what the Respondents disclosed and what the Staff is able to prove actually occurred was material. Thus, for example, it would not be materially false and misleading for an adviser to disclose that it would charge a two percent management fee, then to decide instead to charge a one percent management fee; even though such a disclosure would be incorrect, it is not materially misleading. In this case, the Respondents disclosed that they would receive a seven percent referral fee every year during the period when clients remained invested in certain private funds. Since these private funds had a seven-year lock up period, this meant that a client who invested $100,000 in the private funds was told that the Respondents would receive a $49,000 referral fee as a reward for recommending this investment. According to the Respondents' disclosure, this huge referral fee payment was only contingent upon the client's investment in the private funds; once that investment had been made, the Respondents would receive their referral fee. Respondents respectfully assert that this disclosure fully put their clients on notice of any conflicts of interest and that no conflicts of interest that can be proven by the Staff are materially greater than the conflict of interest that the Respondents disclosed.

* * *

In its Amended Order Instituting Proceedings ("OIP"), the Division of Enforcement ("Staff") of the Securities and Exchange Commission ("SEC") alleges that PageOne Financial, Inc. ("PageOne") and Edgar Page (together, the "Respondents") willfully violated Sections 206(1), 206(2) and 207 of the Investment Advisers Act of 1940 (the "Advisers Act"). The Staff's allegations surround purported material misrepresentations in PageOne's Forms ADV between 2009 and 2011. Specifically, the Staff alleges that Respondents should have disclosed that Mr. Page was in preliminary negotiations for a sale of PageOne stock to the United Group of Companies, Inc. ("United") when Respondents recommended that a small number of their clients invest in three private investment funds administered by United (the "United funds").

The evidence will show that there were no violations of the Advisers Act because 1) the Staff misstates several key facts and then mischaracterizes the proposed acquisition in supporting its otherwise unsustainable allegations, 2) PageOne's Forms ADV were not materially inaccurate as alleged, and 3) Respondents did not act recklessly or negligently as required to sustain the Staff's case.

II. STATEMENT OF FACTS

A. Relevant Parties

1. PageOne/Page

PageOne Financial, Inc. ("PageOne") is a registered investment adviser that was incorporated in New York in 1986, and is headquartered in Malta, New York. PageOne manages approximately $250 million on behalf of over 2,500 clients, including high net worth individuals and institutional investors.[1]

Edgar Page is the Chief Executive Officer, Chairman and 100% owner of PageOne, which he has overseen since he acquired the firm in 2002. Mr. Page has been in the investment advisory business since 1984, when he formed his own registered advisory firm. Mr. Page is an active member of the Financial Planning Association and serves as a fundraiser for several charitable organizations in the Capital District of New York.[2]

2. United/Uccellini

The United Group of Companies, Inc. ("United") is a nationally-recognized, award-winning real estate development and management company that is headquartered in Troy, New York.[3] United is particularly active in the development and management of student housing and assisted living projects. Since its founding in 1972, United has enjoyed a consistent track record of success, developing and overseeing real estate projects in California, Florida, Georgia, Massachusetts, and New York.[4] In late 2008/early 2009 — when the Respondents were first introduced to United and its principals — United had $500 million in current projects under development, $60 million in annual gross revenues, and anticipated revenues of $100 million by 2010.[5]

United was founded in 1972 by Walter Uccellini, who was the Chairman, Chief Executive Officer and principal owner of United until he tragically died in an airplane crash in

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[1] Current PageOne ADV Part 2A (last updated Sept. 18, 2014), available at http://static.squarespace.com/static/53358f3ee4b05b79d04d2171/t/54aab1bae4b0ab38feecd741/1420472762698/PageOne+ADV+Part+2A%26B+2015.01.05.pdf).
[2] Investment Team, PageOne Financial, Inc. website, available at http://www.pageonefinancial.com/investment-team/.
[3] About Us, United Group of Companies website, available at http://www.ugoc.com/company/about-us/.
[4] *Id.*
[5] *See* Respondents' Exhibit 8 (hereinafter, "Resp. Ex." ##).

August 2012 along with United Vice Chairman and Counsel James Quinn. In life, Mr. Uccellini was known as a successful and visionary entrepreneur and real estate developer who amassed a consistent track record of success. Mr. Uccellini was also active in a number of charitable organizations in the Capital District of New York, and was the inaugural recipient of the Capital Region Lifetime Achievement Award in 2012, shortly before his death.[6]

3. MCM/Del Giudice

MCM Securities, LLC ("MCM") is an SEC-registered broker-dealer that is headquartered in New York City. MCM was at all relevant times majority-owned by Millennium Credit Markets LLC, which, in turn, was controlled by Mr. Uccellini.[7]

Michael Del Giudice is a Senior Managing Director MCM, which he co-founded in 1996.[8] Long involved in government, Mr. Del Giudice served as deputy Chief of Staff to New York Governor Hugh Carey from 1979 to 1981, Chief of Staff of New York Governor Mario Cuomo from 1983 to 1985, and was more recently active in the election and reelection campaigns of New York Governor Andrew Cuomo.[9] In addition to overseeing MCM, Mr. Del Giudice is currently the Chairman of Rockland Capital Management, a private equity firm that specializes in investments in energy markets in the United States and the United Kingdom, and sits on the Boards of Directors of several large publicly-traded companies, including Barnes & Noble, Inc. and Consolidated Edison, Inc.[10]

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[6] Obituary, Walter F. Uccellini, *Albany Times Union* (Aug. 20, 2012), available at http://www.legacy.com/obituaries/timesunion-albany/obituary.aspx?pid=159259512.
[7] FINRA Broker Check Report, MCM Securities LLC, available at http://brokercheck.finra.org/Report/Download/33840083.
[8] Forbes.com Profile, Michael Del Giudice (available at forbes.com/profile/michael-del-giudice).
[9] *Id.*
[10] *Id.*

B. United funds: introductions and due diligence

In the fall of 2008, financial markets were in turmoil as the country slipped into an unprecedented recession. In that economic climate, traditional investments were no longer reliable sources for return on investment. Mr. Page began to receive calls from PageOne clients seeking stable, significant returns in an unstable market, and Mr. Page accordingly began to research alternative investments.

Around the same time, Mr. Page met Mr. James Quinn, United's Vice Chairman and Counsel, through a mutual connection. At their initial meeting, Mr. James Quinn asked Mr. Page whether he had any accredited investors who would be interested in investing in any of several private investment funds administered by United (the "United funds") that would finance the construction of several student housing projects in upstate New York.[11] Although initially hesitant, given the troubled economic climate and his clients' desire for alternative investments, Mr. Page agreed to conduct due diligence. Mr. James Quinn gave Mr. Page due diligence materials, and Mr. Page and his staff began to research the United funds as prospective investments for PageOne's clients who qualified as accredited investors.[12]

Mr. James Quinn introduced Mr. Page to Mr. Uccellini, United's Chairman and CEO, within a short period after their first meeting. Mr. Uccellini told Mr. Page that, in the very near term, United was seeking to raise approximately $18 million in order to qualify for approximately $50 million in debt financing committed by TIAA-CREF that would allow United to complete the construction of three student housing projects.[13] Mr. Uccellini accompanied Mr. Page on a tour of the partially-completed projects, near the State University of New York's

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[11] Resp. Ex. 203 (Quinn letter to Page enclosing United business plan).

[12] *See, e.g.*, Resp. Ex. 38 (late 2008 due diligence report regarding DCG/UGOC Equity Fund).

[13] *See* Resp. Ex. 75 (Uccellini tells Page that United was seeking "18.0 million" to fund "student housing complexes . . . in New York State"); Resp. Ex. 74 ($18 million sought "to match $45.9 million TIAA-CREF debt commitment").

campuses at Brockport, Cortland, and Plattsburgh, respectively. After Mr. Page visited the incomplete projects, Mr. Page and the PageOne staff completed their due diligence, and concluded that the United funds — one of which, for example, offered a 9% annual return — might be attractive investments for certain of their accredited investor clients. Mr. Page told Messrs. James Quinn and Uccellini that he would offer the United funds to a handful of his accredited investor clients, for whom he considered the investments individually suitable based on past consultations.

C. Transactional negotiations

1. NEXT transaction

Throughout the time that he was first researching the United funds as prospective alternative investments for his accredited investor clients, Mr. Page was also negotiating to sell PageOne. In mid-2008, Mr. Page was approached by Gordon D'Angelo, Chairman of NEXT Financial Group, Inc. ("NEXT"), an SEC-registered broker-dealer, who asked Mr. Page whether he would consider merging PageOne with NEXT to take advantage of the synergies potentially available by having a broker-dealer and an investment adviser under common control. Mr. Page, hoping to grow his business, told Mr. D'Angelo he was willing to explore the possibility. Negotiations began in the early fall of 2008.[14]

2. United/MCM-PageOne transaction: initial talks

Shortly thereafter, Mr. Page told Mr. Uccellini that he was negotiating for the sale of his company, which was at the time contemplated to be an outright sale of 100% of PageOne's stock to NEXT for over $3 million.[15] Mr. Uccellini counter-offered, telling Mr. Page that he would purchase PageOne on the same terms NEXT was offering, and offered to hire Mr. Page as

[14] Resp. Ex. 158.

[15] Investigative Testimony Interview Transcript of Edgar Page (hereinafter, "Page Tr.") 99:14–18.

manager of the new entity's assets.[16] Mr. Uccellini said he was also interested in the synergies potentially available by having a broker-dealer — MCM, in which United indirectly held a majority stake — and an investment adviser under common control, and envisioned creating a family of mutual funds, brokered by MCM and managed by Mr. Page, which might be a potential source of funding for future United projects.[17]

To distinguish the United acquisition proposal from NEXT's proposal, Mr. Uccellini told Mr. Page that Mr. Del Giudice, Senior Managing Director of MCM and a close business associate of Mr. Uccellini's, would use his political and business connections to introduce Mr. Page to large State, municipal, and corporate pension funds, with the intent of bringing $1 billion of assets under the new entity's (and therefore Mr. Page's) management.[18] Allured by the prospect, Mr. Page agreed to negotiate with Mr. Uccellini.[19]

3. Page attempts to broker an $18 million investment in United

Before the United transactional negotiations began — and separate from any transactional considerations — Mr. Page attempted to broker an investment of the $18 million that Mr. Uccellini told him United was seeking in the short term in order to satisfy the pending loan commitment from TIAA-CREF.

[16] Resp. Ex. 17 (PageOne Employment Agreement).
[17] *See generally* Resp. Ex. 6.
[18] *See, e.g.*, Resp. Ex. 7 (MCM "has the political and business contacts to gain introductions to late State pension funds with the intent to bring substantial assets ($1 billion) under management").
[19] Resp. Ex. 39.

(a) BONY investment

Mr. Page contacted Tony Brobbey of the Bank of New York Mellon ("BONY") in November 2008, seeking an $18 million bridge loan for United, but Mr. Brobbey responded soon thereafter saying that he failed to generate the internal support necessary for BONY to invest.[20]

(b) HOPE investment

Mr. Page also reached out to Kynaston Perreira, the Chairman and Chief Executive Officer of Kynaston & Associates, a consulting firm specializing in international financing, asking whether Mr. Perreira knew of any investors who might be interested in investing $18 million with United. Mr. Perreira recommended that Mr. Page reach out to HOPE Finance, S.A. ("HOPE"), a Swiss alternative asset and hedge fund manager, and put Mr. Page in touch with HOPE's representatives, Jean-Marie Brulhart and Bennaceur Ouallou.[21]

At the outset, there was some miscommunication about what United was seeking. After the initial conversation between Messrs. Page, Perreira, Brulhart and Ouallou in early November 2008, HOPE sent Mr. Page a term sheet offering the opportunity to purchase bonds issued by a HOPE subsidiary that held shares in hedge funds managed by HOPE affiliates.[22] Mr. Del Giudice, upon reading HOPE's initial proposal, told Messrs. Page and Uccellini that it "looks like a term sheet to invest in their funds. We need a term sheet for HOPE to invest $18 million in a united group llc that invests the funds in the college dorm properties."[23] Mr. Page reached back out to HOPE to clear up the confusion, and proposed having HOPE join in the

[20] Resp. Ex. 75.
[21] Resp. Ex. 87 (November 7, 2008 letter from HOPE to PageOne/Perreira).
[22] *Id.*
[23] *Id.*

contemplated partnership between United, MCM, and PageOne. HOPE — which was seeking a presence in the United States — expressed interest, and negotiations began.[24]

4. HOPE transaction

By November 29, 2008, an agreement-in-principle was reached by which HOPE would invest $18 million in United and purchase PageOne for $2.1 million.[25] Draft agreements were written up by United by December 1, 2008 and sent to HOPE on December 2, 2008, the terms of which included HOPE's purchase of 100 preferred shares of United stock for $18.3 million, and HOPE and/or Messrs. Brulhart and Ouallou's purchase of PageOne for $2.1 million.[26] The resulting HOPE/PageOne entity, along with United, would form a joint venture with MCM to establish and administer mutual funds which would finance dormitory-type real estate projects and target state, municipal and corporate pension funds as investors. The entity would also employ Mr. Page as the fund manager.[27]

Mr. Brulhart responded on December 3, 2008, saying that HOPE was generally amenable to the broad strokes of the transaction as proposed, and included a number of conditions — most notably including the required simultaneous investment by PageOne of at least $150 million of its assets under management into a hedge fund controlled by HOPE.[28] Importantly, Brulhart treated the United investment and the PageOne sale as two distinct transactions.[29] As the details were being ironed out days later, however, it became clear that the transaction as proposed could not be realized, because even if PageOne clients approved the transfer of their assets into the

[24] Resp. Exs. 88, 86, 69.
[25] Resp. Ex. 95.
[26] Resp. Ex. 61.
[27] *Id.*
[28] Resp. Ex. 58.
[29] Resp. Ex. 58 ("We are presently willing to proceed with either the stock purchase arrangement or both transactions on the terms set forth above").

hedge fund, such investments could not be made under the terms of the hedge fund's organizing documents.[30]

Accordingly, on December 8, 2008, HOPE made a new proposal by which PageOne would invest $55 million in a zero coupon covered bond issued by a HOPE affiliate, and HOPE would then make funds available to United in return.[31] HOPE's confusing proposal was not agreeable to either PageOne or United, and HOPE was abandoned as a potential partner.[32]

5. PageOne's abandoned commitment to purchase United fund units

The same day, United asked Mr. Page whether PageOne would be interested in acquiring the $18.3 million worth of United preferred shares, in hopes of securing the rapidly-approaching deadline for matching the aforementioned TIAA-CREF commitment.[33] Mr. Page, who was satisfied after completing due diligence that United was an attractive investment, told United he would be agreeable to making those investments on behalf of his clients.[34] On December 15, 2008, Mr. Page wrote a letter to United committing PageOne to purchasing the shares.[35]

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[30] *See id.* (email discussion of issues with investing in hedge fund).
[31] Resp. Ex. 78.
[32] HOPE is referenced in certain of the early Proposed Transaction business plans. *See* Resp. Ex. 3 (Jan. 2, 2009 email in which Harrison circulates "the business plan we developed in December" for the HOPE transaction in order to jumpstart negotiations for the Proposed Transaction). There is no record, however, of any negotiations with HOPE taking place after the circulation of the December 8, 2008 HOPE proposal, and the record shows that if HOPE was subsequently considered for any role, it was merely that of an equity investor, rather than a partner. *See* Resp. Ex. 5 (Jan. 21, 2009 business plan deleting reference to HOPE from "Strategies" section that contemplated the "business alliance" sought).
[33] The TIAA-CREF deadline was later extended, *see* Resp. Ex. 200 (mid-Jan. 2009 email in which Uccellini tells Page "TIAA-CREF this morning gave me until next week to deposit the money with them"), but it is clear that it was perceived as a mid-December 2008 deadline at the time of the PageOne commitment. *See* Resp. Ex. 201 (United counsel John Mineaux noting that "[United] is planning to issue 100 shares of preferred stock (the "Shares") to raise $18.3 million (TO BE FUNDED BY THIS THURSDAY 12/11/08!). PageOne Financial . . . is agreeable to acquiring those Shares").
[34] Resp. Ex. 201.
[35] Resp. Ex. 203. Importantly, this letter nowhere mentions the acquisition of PageOne stock. It therefore cannot be said to be connected to the Proposed Transaction, whose draft transactional

United understood that PageOne had discretionary authority over its clients' accounts and believed that this would streamline the process of transferring client investments to United. However, United soon learned that Mr. Page was obligated by TD Ameritrade to obtain written consent from each investor before investing in private placements such as United's.[36] Although United looked into asking TD Ameritrade to waive the policy,[37] such a waiver was never achieved. United therefore concluded that the investment as-contemplated could not be realized in time to avail itself of the TIAA-CREF loan, and PageOne's commitment to invest $18.3 in United was abandoned.[38]

6. United/MCM-PageOne transaction: initial talks/business plans

On January 2, 2009, United Senior Vice President Bryan Harrison sent Mr. Page an email in which Mr. Harrison said that United was interested in making a "plan for a new finance entity combining our companies," and attached a business plan building off of the negotiations with HOPE from December 2008.[39] Several iterations of the business plan were circulated, and within three weeks, a plan had emerged by which, among other things, MCM would acquire PageOne for $2.1 million, and the entity would use MCM's connections to grow into a large

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documents nowhere reference the abandoned December 15, 2008 commitment. *See* Resp. Ex. 108.

[36] Resp. Ex. 204 (email noting TD Ameritrade policy and attaching draft letter seeking to have policy waived).

[37] Resp. Ex. 202 (Mineaux emails around mentioning interest "in setting up a conversation toward waiving this inane policy").

[38] As mentioned above, *see supra* note 33 and accompanying text, the TIAA-CREF deadline was later extended, and TIAA-CREF is referenced as a financing partner in the early Proposed Transaction business plans, *see, e.g.*, Resp. Ex. 5. The terms of the proposed TIAA-CREF agreement with United — and whether the agreement ever came to fruition — are unclear, but we are not aware that United ever obtained the $18.3 million it needed to secure the TIAA-CREF commitment, nor that TIAA-CREF ever paid United anything.

[39] Resp. Ex. 3.

asset manager that would, in part, seek to finance United real estate projects (the "Proposed Transaction").[40]

7. PageOne client investments in United funds

In February 2009 — during the earliest stages of the Proposed Transaction negotiations — Respondents began recommending investments in the United funds to a small number of their accredited investor clients, based on the due diligence Respondents had satisfactorily completed in late 2008. Several of said clients invested in the United funds, beginning in February 2009. Respondents' recommendations continued until March 2011, when the Respondents no longer anticipated recommending the United funds to their clients.[41]

8. United/MCM-PageOne transaction: Memorandum of Understanding ("MOU")/Stock PurchaseAgreement ("SPA") negotiations begin

In March 2009, Mr. Uccellini sent Mr. Page a "first pass" of draft transactional documents for the Proposed Transaction, including a Memorandum of Understanding ("MOU"), a Stock Purchase Agreement ("SPA") and an Employment Agreement, soliciting Mr. Page's thoughts and edits.[42] Both the MOU and SPA contemplated that the $3.1 million acquisition price (for 100% of PageOne) would be paid in periodic installments of $500,000 every six months post-closing, with the final two installments "made in proportion equal to the equity

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[40] Resp. Ex. 6 (Jan. 21, 2009 business plan circulated between Page and United representatives, including Uccellini). It is noteworthy that the January 21, 2009 business plan also contemplates the involvement of HOPE as an $18.3 million equity investor in United to match the $50 million TIAA-CREF debt commitment. As mentioned above, *see supra* notes 32 and 38 and accompanying text, the record does not demonstrate the status/existence of any ongoing negotiations between United and HOPE and/or TIAA-CREF as of January 21, 2009, but it is clear that the subsequent transactional documents do not mention either party as part of the Proposed Transaction. *See, e.g.*, Resp. Ex. 16 (Uccellini's "first pass" of draft transactional documents for the Proposed Transaction, none of which mention either HOPE or TIAA-CREF).

[41] Certain of Respondents' clients made further "follow on" investments in the United funds after Mr. Page's recommendations ceased.

[42] Resp. Ex. 16. Notably, none of these draft transactional documents included any reference to HOPE, TIAA-CREF, or an $18.3 million commitment.

raised by Page" as of the relevant time "against the target amount of Twenty Million Dollars ($20,000,000)."[43] Mr. Page rejected this payment structure and protested the idea of the transaction being contingent upon Mr. Page satisfying a fundraising target.

9. United/MCM-PageOne transaction: negotiations stall, earnest money deposits begin

Negotiations stalled. Mr. Page was convinced that Mr. Del Giudice was unwilling to cooperate and introduce Mr. Page to his contacts — making the prospect of Mr. Page's post-closing employment therefore less secure — so in April 2009, Mr. Page sought to assure himself that Mr. Del Giudice was willing and able to cooperate as contemplated before he would negotiate further.[44] In early May 2009, Mr. Del Giudice "had a long conversation" with Mr. Page regarding the Proposed Transaction, and asked Mr. Page for information regarding PageOne's financial position in order to "[r]eview, then sit down and go over with [Mr. Page] and [Messrs. Uccellini and James Quinn]."[45]

Mr. Page also expressed frustration with the slow pace of the negotiations to Mr. Uccellini, saying that he had lost a multimillion dollar offer from NEXT for what was appearing to be a transaction that had little hope of closing.[46] Acknowledging the economic harm done to Mr. Page, and confronted with the possibility of losing the deal, United began advancing earnest money deposits on the anticipated acquisition to Mr. Page in April 2009.[47] The deposits, which were secured by promissory notes with commercially reasonable terms and market rates of interest, continued until April 2011.[48]

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[43] *See id.*
[44] Resp. Ex. 40 (April 2009 Page email to Uccellini seeking contact with Del Giudice to discuss Proposed Transaction).
[45] Resp. Ex. 85.
[46] Resp. Ex. 47.
[47] Resp. Exs. 121–41.
[48] *Id.*

10. United/MCM-PageOne transaction: MOU/SPA negotiations continue

Satisfied with the shows of goodwill on behalf of both Mr. Del Giudice and United, Mr. Page retained counsel to assist him with the Proposed Transaction negotiations, which got back on track.[49]

Mr. Page first hired attorney Keith Daniels to assist with negotiations.[50] In July 2009, Mr. Page's assistant Patricia Milkiewicz sent Mr. Daniels the draft transactional documents, including a redline of the MOU in which Mr. Page had made various edits, notably striking the $20 million fundraising requirement that Mr. Uccellini had proposed.[51] In her email, Ms. Milkiewicz pointed out that "only the M.O.U. has been modified," so that Mr. Daniels would know to harmonize the SPA accordingly.[52]

When the negotiations did not advance, Mr. Page next retained attorney Jeremy Smith to push the Proposed Transaction talks ahead.[53] On November 17, 2009, Mr. Smith sent Mr. Page a draft of the MOU in the form of a letter to Mr. Uccellini proposing negotiations towards the sale of PageOne to United/MCM (the "Proposal Letter").[54] The draft Proposal Letter contemplated as "NON-BINDING PROVISIONS" the sale of 49% of PageOne stock to United for $3.8 million.[55] As a "BINDING PROVISION[]," the draft Proposal Letter included an acknowledgement that United had already paid Mr. Page a $700,000 non-refundable deposit towards the sale of PageOne.[56] Importantly, the draft Proposal Letter did not include any mention of any fundraising requirement such as had been proposed by Mr. Uccellini in March

[49] Resp. Ex. 18.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Resp. Ex. 10.
[54] *Id.*
[55] *Id.*
[56] *Id.*

2009.[57] On December 1, 2009, Mr. Smith sent Mr. Page a revised draft Proposal Letter, which Mr. Smith said included "the revisions we discussed."[58] The December 1, 2009 draft also did not include any fundraising requirement.[59]

On December 12, 2009, Mr. Smith met with John Mineaux, outside counsel to United, regarding the Proposed Transaction.[60] Immediately after that meeting, Mr. Smith sent Mr. Mineaux a revised redline draft of the Proposal Letter based on their discussions, noting that the new draft "has not yet been reviewed by Ed, and [] is subject to his review and comment," and CC'ed Mr. Page seeking his comments and/or edits.[61] Notably, the revisions included a change to the purchase price to approximately $2.5 million — which would now be paid by the to-be-created Millennium-Page, LLC ("MCM-Page") rather than United — and left a placeholder as to the precise amount United had paid Mr. Page as a non-refundable deposit towards the sale.[62] The December 12, 2009 draft also contained no fundraising requirement.[63]

In early January 2010, again unsatisfied with the slow pace of the negotiations, Mr. Page hired Richard Engel to push the Proposed Transaction negotiations ahead.[64] On January 7, 2010, Mr. Page sent Mr. Engel a clean draft of the Proposal Letter Mr. Page had received from Mr. Smith on December 12, 2009, proposing a $2.5 million sale of 49% of PageOne to MCM-Page, with the precise amount of non-refundable deposit still to be ascertained, and without any

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[57] *Id.*; Resp. Ex. 16.
[58] Resp. Ex. 11.
[59] *Id.*
[60] Resp. Ex. 89.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Resp. Ex. 110.

fundraising requirement.[65] Mr. Engel conferred with Mr. Page, reviewed the draft Proposal Letter, and resumed the negotiations with Mr. Mineaux in short order.

Mr. Page also reached out to United to express his dissatisfaction with the progress of the negotiations at this point. On January 29, 2010, Mr. Page wrote Mr. Uccellini pleading for closure of the Proposed Transaction, stating that "on the Business Front . . . something is wrong with the manner of how I close issues" and asking "am I just too nice."[66] Several days later, on February 3, 2010, Mr. Page wrote both Messrs. Uccellini and James Quinn, stating that he was aware that "[Mr. James Quinn wa]s busy compiling a step program to creatively buy PageOne out with 10/20/30 cents on each dollar that I further raise," and that he "[could] not, in good spirit, continue to raise funds for [PageOne's] buyout every time I try to close."[67] Mr. Page demanded closure, saying "I am feeling used and abused" and that "[t]he more creative the stalls [in closing the Proposed Transaction], the more forsaken I feel."[68] When Mr. Uccellini did not immediately push the Proposed Transaction ahead by February 18, 2010, Mr. Page withdrew his offer to sell PageOne's stock to United altogether.[69]

Mr. Page's withdrawal got the attention of Mr. Uccellini, who quickly began to move towards closing the Proposed Transaction. On February 22, 2010, Mr. Mineaux sent Mr. Engel a markup of the Proposal Letter that was "redlined to reflect my, Walter's and Jim's comments."[70] The United markup of the Proposal Letter agreed to the purchase price of approximately $2.5 million for the purchase of 49% of PageOne by MCM-Page, and clarified the non-refundable

[65] *Id.*
[66] Resp. Ex. 12.
[67] Resp. Ex. 108.
[68] *Id.*
[69] Resp. Ex. 33.
[70] Resp. Ex. 92.

deposit amount to be approximately $820,000.[71] Interestingly, United also modified the terms of payment such that, upon closing, United would execute a promissory note in the amount of $2.5 million (less deposits made and any cash consideration provided), bearing five percent interest and maturing on the fifth anniversary of the closing, the principal and interest payments for which would be made "periodically in amounts equal to $.25 of each $1.00 raised by [Mr. Page] for [United and its funds]."[72]

Mr. Engel responded the same day, telling Mr. Mineaux that he would review the United markup with Mr. Page and get back to him as soon as possible.[73] Mr. Page reviewed the draft and refused to agree to the reinsertion of a fundraising requirement for closure.

On March 3, 2010, Mr. Uccellini sent Mr. Page yet another revised draft Proposal Letter and a Fee Agreement, both of which Mr. Uccellini said he was "ready to execute."[74] This draft Proposal Letter still contemplated a $2.5 million purchase of 49% of PageOne by MCM-Page, and revised the non-refundable deposit amount to be approximately $1.3 million.[75] Additionally, the March 3, 2010 United draft Proposal Letter modified the February 22, 2010 United payment-by-promissory-note regime such that the principal and interest payments on the promissory note would be paid annually rather than periodically, and "[e]ach payment under the Note would be equal to one-fifth of the principal balance of the Note plus accrued interest."[76] United further proposed that such annual payments be subject to reduction based on a "targeted amount of $20,000,000 for [United and its funds],"and that Mr. Page agree "that $.07 of each $1.00 raised

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Resp. Ex. 13.
[75] *Id.*
[76] *Id.*

by [Mr. Page] shall be a credit toward the next-succeeding Annual Payment."[77] On March 5, 2010, Mr. Mineaux sent Mr. Engel the same draft Proposal Letter.[78]

Mr. Page again refused to accept the proposed fundraising requirement for closure. On April 14, 2010, Messrs. Engel, Page, Mineaux, Uccellini and James Quinn had an all-day meeting at United's offices regarding the draft Proposal Letter and Fee Agreement.[79] Over the course of that day, a final Proposal Letter and Fee Agreement were developed and executed.[80] According to the terms of the final, executed Proposal Letter, the parties expressed an intention to consummate the Proposed Transaction on the following conditions: 1) Mr. Page would sell 49% of PageOne's stock to MCM-Page for approximately $2.5 million; 2) MCM-Page would be credited for the approximately $1.3 million in deposits it had paid Mr. Page towards the purchase of PageOne, including approximately $650,000 of non-refundable deposits; 3) as payment, MCM-Page would execute a promissory note in an amount to be determined equal to the purchase price minus deposits made at the time the Definitive Agreement was signed; and 4) PageOne would stay on post-closing as Chairman/CEO of MCM-Page for seven years at a salary of $150,000.[81] Most importantly for this case, there was no fundraising requirement included in the final, executed Proposal Letter.[82] On the evening of April 14, 2010, Mr. Mineaux emailed Mr. Engel thanking him for "working so productively on the various issues and documents," and said that he "look[ed] forward to working with [Mr. Engel] on development of the Stock Purchase Agreement and Shareholders Agreement relating to PageOne."[83]

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[77] Resp. Ex. 13.
[78] Resp. Ex. 35.
[79] Resp. Ex. 19.
[80] *Id.*, Resp. Ex. 15.
[81] Resp. Ex. 15.
[82] *Id.*
[83] Resp. Ex. 19.

On June 8, 2010, Mr. Engel reached out to Mr. Mineaux asking for the proposed SPA.[84] Mr. Mineaux responded the same day with a redline of a draft SPA revised at the April 14, 2010 meeting.[85] The June 8, 2010 redlined draft SPA sent by Mr. Mineaux shows that, although the fundraising requirement language from the March 3, 2010 draft Proposal Letter had been inserted into the draft SPA before the April 14, 2010 meeting, all fundraising requirement language was stricken from the draft SPA by June 8, 2010.[86]

Negotiation of the SPA continued until October 2010, and substantial changes to the SPA were made in the various drafts (e.g., the inclusion of Mr. Page's option to buy back PageOne shares), but the fundraising requirement language did not reappear in any iterations of the draft SPA after June 8, 2010.[87]

11. United/MCM-PageOne transaction: abandonment

Negotiations regarding the Proposed Transaction did not advance after the last draft of the SPA was circulated on October 25, 2010. In the months that followed, Mr. Page came to realize that the Proposed Transaction would never close.

In early 2011, Mr. Uccellini told Mr. Page that he was considering forming at REIT with some business associates, and asked Mr. Page to manage it.[88] Mr. Page was accordingly aware that Mr. Uccellini was actively pursuing other business interests, but it was clear he was no longer interested in pursuing the Proposed Transaction.

Around the same time, Mr. Page learned that Mr. Del Giudice had decided that he did not want to be involved with the contemplated entity, which dissuaded Mr. Page from pursuing the

[84] Resp. Ex. 90.
[85] *Id.* (attaching "04.14.10 Draft PageOne Stock Purchase Agreement.doc").
[86] *Id.*
[87] *See* Resp. Ex. 93 (June 14, 2010 draft SPA); Resp. Ex. 21 (October 3, 2010 draft SPA); Resp. Ex. 28 (October 20, 2010 draft SPA); Resp. Ex. 31 (October 25, 2010 draft SPA).
[88] Page Tr. 129:25–130:9. *See also* Resp. Ex. 205 (May 2011 email in which Mineaux circulates draft prospectus for First Page REIT).

Proposed Transaction further.[89] Mr. Page expressed his disappointment to Mr. Uccellini, and Messrs. Page and Uccellini agreed to abandon the Proposed Transaction.[90]

Mr. Uccellini told Mr. Page that, in order to make up for the fact that the Proposed Transaction had never closed, he would give Mr. Page some shares in the contemplated REIT.[91] Plans to construct the REIT went forward, and it was expected to close on October 1, 2012,[92] but Messrs. Uccellini and James Quinn tragically died on August 15, 2012.[93]

On April 12, 2013, Mr. Mineaux wrote Mr. Engel demanding repayment in full of the promissory notes that had secured the deposits advanced by United to Mr. Page during the contemplation of the Proposed Transaction.[94]

D. PageOne Form ADV disclosures

From at least 2004 until December 2010, Sean Burke served as PageOne's primary compliance professional, and was responsible for updating PageOne's Form ADV as necessary. During the time in question — from 2008 until his departure in December 2010 — Mr. Burke worked with experts to ensure that PageOne's Form ADV was materially accurate at all times.

In late 2008, Mr. Burke learned that Mr. Page and PageOne's staff were conducting due diligence on the United funds in anticipation of possibly recommending that a small number of PageOne accredited investor clients invest in them. Then in early 2009, Mr. Page informed Mr. Burke that he was in preliminary negotiations to sell PageOne stock to Mr. Uccellini. Mr. Burke understood the basic structure of the transaction — \$2–\$3 million in consideration for PageOne's

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[89] Page Tr. 133:5–21.
[90] *Id.* at 132:12–134:9.
[91] *Id.* at 130:17–22.
[92] *See* Resp. Ex. 206 (Jones Day presentation regarding the REIT).
[93] Page Tr. 137:16–23.
[94] Resp. Ex. 156.

stock — but the details were unknown, since Messrs. Page and Uccellini were in the early stages of negotiating towards a preliminary written agreement.

Accordingly, although it appeared to Mr. Burke in early 2009 that a financial relationship might emerge between Respondents and United, the precise nature of the relationship remained unclear. With respect to recommending investments in the United funds, Mr. Page and United had at various times considered various options for how Mr. Page and/or PageOne might be compensated, including e.g. annual advisory fees and consultancy arrangements. With respect to the transaction, upon closing, Mr. Page would also receive the purchase price and Mr. Uccellini would have an ownership interest in PageOne.

Although he did not fully understand the nature of the possible financial relationship between Respondents and United (in part because Mr. Page and United had not yet worked out all the details), Mr. Burke concluded that PageOne's accredited investor clients who might possibly invest in the United funds needed to be put on notice of the fact that Respondents had some financial relationship with United, and that Respondents therefore had a potential conflict of interest if and when they eventually recommended investment in the United funds.

Mr. Burke went to Mr. Page and shared his concerns. Mr. Page agreed that some form of disclosure was appropriate, but told Mr. Burke that he did not believe it was necessary to disclose that he was involved in negotiations regarding the Proposed Transaction. Mr. Page's rationale was that the Proposed Transaction negotiations were confidential[95] and highly

[95] In fact, United insisted that the Respondents sign a confidentiality agreement as a condition to the negotiations and the Respondents did so. Resp. Ex. 39.

Courts have regularly found that negotiating parties' interest in maintaining confidentiality is entitled to respect. For example, a number of the federal circuits held that the parties legitimately keep preliminary transactional negotiations confidential because revelation of negotiations might kill deals. *See, e.g.*, *Flamm v. Eberstadt*, 814 F.2d 1169, 1176 (7th Cir.

speculative, and there had not yet been any change in PageOne's ownership.[96] Furthermore, only a very small number of PageOne's clients were eligible investors in the United funds for whom the Proposed Transaction might involve a potential conflict of interest, and disclosure of transactional negotiations on PageOne's Form ADV would be unsettling to the vast majority of PageOne's clients and business partners for whom any transaction with United would be

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1987). The SEC itself has explained that, notwithstanding the requirement of Item 303 of Regulation S-K that management discuss trends likely to have a material effect on an issuer's financial condition, registrants need not disclose transactional negotiations:

> While Item 303 could be read to impose a duty to disclose otherwise nondisclosed preliminary merger negotiations, as known events or uncertainties reasonably likely to have material effects on future financial condition or results of operations, the Commission did not intend to apply, and has not applied, Item 303 in this manner. As reflected in the various disclosure requirements under the Securities Act and Exchange Act that specifically address merger transactions, the Commission historically has balanced the informational need of investors against the risk that premature disclosure of negotiations may jeopardize completion of the transaction. In general, the Commission's recognition that registrants have an interest in preserving the confidentiality of such negotiations is clearest in the context of a registrant's continuous reporting obligations under the Exchange Act, where disclosure on Form 8-K of acquisitions or dispositions of assets not in the ordinary course of business is triggered by completion of the transaction.

SEC, *Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures*, Securities Act Release No. 6835 (May 18, 1989).

The self-regulatory organizations have also recognized that the importance of keeping negotiations over corporate acquisitions confidential justify exceptions from otherwise applicable disclosure obligations. *See Flamm*, 814 F.2d at 1176 ("Both the New York and the American Stock Exchanges therefore suggest that listed firms postpone announcements [of mergers] until definitive agreements have been reached.").

[96] The possibility of investor overreaction to disclosures has long been recognized as a real and important phenomenon. The problem has been recognized as particularly pronounced when the question comes to acquisition discussions. Courts quite consciously so held in part for fear that investors told of negotiations would overestimate the likelihood that negotiations would lead to actual transactions. "Such negotiations are inherently fluid and the eventual outcome is shrouded in uncertainty. Disclosure may in fact be more misleading than secrecy so far as investment decisions are concerned." *See Reiss v. Pan American World Airways, Inc.*, 711 F.2d 11, 14 (2d Cir. 1983); *see also Greenfield v. Heublein, Inc.*, 742 F.2d 751, 756 (3d Cir. 1984); *Staffin v. Greenberg*, 672 F.2d 1196, 1206 (3d Cir. 1982)

irrelevant. Therefore, Mr. Page agreed that some disclosure was appropriate, but did not want to disclose the Proposed Transaction until the deal had closed.

1. National Regulatory Services

Recognizing the complexity of the task at hand, Mr. Burke asked Mr. Page's permission to engage National Regulatory Services ("NRS"), a respected compliance consulting firm, to give expert advice on crafting an appropriate disclosure. Mr. Page agreed to the engagement, and understood that Mr. Burke would work closely with NRS to draft the disclosures.

Mr. Burke had an initial call with Michael Xifaras of NRS in the spring of 2009, in which he described the assistance sought and requested a fee estimate. During that initial call, Mr. Burke told Mr. Xifaras that Respondents intended to recommend investments in the United funds to some of their accredited investor clients, and that Mr. Page was negotiating a sale of PageOne stock to United. Further, Mr. Burke told Mr. Xifaras that Mr. Page anticipated receiving deposits from United towards the contemplated sale price.

Therefore, from the inception of the engagement to amend PageOne's Form ADV, NRS was aware of the Proposed Transaction and the earnest money deposits that were to be made by United to Mr. Page. On July 15, 2009, NRS sent Mr. Burke a proposed consulting services agreement,[97] which PageOne executed, formally engaging NRS to draft the amended Form ADV.[98]

2. The "referral fee" disclosure

On July 17, 2009, Mr. Burke sent the United funds' private placement memoranda ("the PPMs") to Mr. Xifaras.[99] Mr. Xifaras emailed Mr. Burke on July 24, 2009, indicating that he

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[97] Resp. Ex. 96.
[98] Resp. Ex. 94.
[99] Resp. Exs. 101, 102.

was in the process of drafting the amended Form ADV and requesting detailed information regarding PageOne's existing Form ADV disclosures.[100]

On July 28, 2009, Mr. Xifaras sent a follow-up email to Mr. Burke, requesting clarification with respect to the compensation Mr. Page and/or PageOne anticipated receiving from United.[101] Mr. Burke emailed Mr. Xifaras that same day, stating that "PageOne will be paid 7% the first year by United and after the first year we will be paid our ongoing advisor fee."[102] Based upon the information supplied by Mr. Burke, NRS drafted a proposed amended Form ADV and sent a copy to Mr. Burke for review.[103] The Form ADV language proposed by NRS stated, in part, that PageOne would receive a referral fee of "between 7.0% and 0.75%" of amounts invested by PageOne clients in the United funds. The proposed Form ADV language did not mention the Proposed Transaction.

Mr. Burke reviewed the proposed amended Form ADV and called Mr. Xifaras to discuss. During their discussion, Mr. Xifaras told Mr. Burke that the Proposed Transaction negotiations did not need to be disclosed because the deal had not been completed.[104] When Mr. Burke asked how the "between 7.0% and 0.75%" referral fee language had been developed, Mr. Xifaras told Mr. Burke that the language came directly from the United fund PPMs. Summing up the referral fee disclosure, Mr. Xifaras told Mr. Burke that a Form ADV amendment including this language — which disclosed an extraordinarily high 7% annual fee — was likely to cover all possible

[100] Resp. Ex. 101.
[101] *Id.* ("How exactly will PageOne be compensated for the referral to the private fund? Will it be a flat fee, an ongoing percentage of the management fee based on the amount of money invested by the client, etc.").
[102] Resp. Ex. 106.
[103] *Id.* (Burke says "the ADV looks good but I will review entirely after these changes are made.").
[104] Mr. Xifaras's advice thus confirmed Mr. Page's visceral belief that the Proposed Transaction — being preliminary and highly speculative at that point — did not need to be disclosed.

compensation scenarios. Mr. Burke also understood that such a disclosure was likely to overdisclose any potential conflict of interest with respect to Respondents' recommendations regarding the United funds.

Following his discussion with Mr. Xifaras, Mr. Burke met with Mr. Page to discuss NRS's proposed Form ADV amendment. Mr. Page agreed with Mr. Burke that NRS's language was acceptable. Although Respondents did not contemplate receiving a referral fee, the language NRS developed put investors on notice of a significant conflict of interest — indeed, a conflict of interest more significant than the potential conflict of interest that actually existed — while maintaining the confidentiality of the preliminary Proposed Transaction negotiations.

Prior to finalizing the Form ADV amendment, Mr. Page, Mr. Burke, and Mr. Xifaras participated in a conference call to discuss NRS's proposed disclosures. During this telephone call, Mr. Page discussed the details of the PageOne acquisition, including the possibility of Mr. Page working as an employee or consultant to United following the closing of the Proposed Transaction. Mr. Burke also confirmed his and Mr. Page's understanding that NRS's "between 7.0% and 0.75%" referral fee language had been drafted to disclose the deposits towards the Proposed Transaction that Mr. Page anticipated receiving from United. Guided by NRS's confirmation that the amended Form ADV would appropriately disclose the contemplated financial relationship between Respondents and United, both Mr. Page and Mr. Burke expressed their acceptance of the proposed ADV language.

Mr. Burke then signed[105] and filed the Form ADV prepared by NRS without making any changes. The amended Form ADV, dated July 31, 2009, made the following statements related to the private funds:

> PageOne Financial does not directly charge the client a fee for this service [investments in the Funds]. PageOne Financial is compensated by a referral fee paid by the Manager of the Private Fund(s) in which its clients invest. The management and other fees the client pays to the Private Funds are not increased as a result of Registrant's referral of clients to the Private Funds. PageOne Financial will typically receive, **<u>on an annual basis</u>**, a referral fee of between 7.0% and 0.75% of the amount invested by the client in the applicable Private Fund(s).[106]

The amended Form ADV also stated that "PageOne Financial will act as a solicitor for certain private investment funds, and for doing so will receive a referral fee."[107]

PageOne's Form ADV was again revised in April 2010 and June 2010.[108] No changes were made to any disclosures regarding the United funds.

3. The "consultant" disclosure

In the summer of 2010, Mr. Page told Mr. Burke that he was considering charging advisory fees with respect to the United investments, and authorized Mr. Burke to engage NRS to draft an appropriate amendment to PageOne's Form ADV. Once again, Mr. Page understood that Mr. Burke would work closely with NRS to appropriately amend PageOne's Form ADV.

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[105] Form ADV, PageOne Financial, Inc. (July 31, 2009); Investigative Testimony Interview Transcript of Sean Burke (hereinafter, "Burke Tr.") 30:1–31:5. In signing the Form ADV amendment, Mr. Burke certified to the following:

> I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

[106] Resp. Ex. 112 (emphasis added).
[107] *Id.*
[108] Resp. Exs. 159, 160.

On September 14, 2010, Mr. Burke reached out to Mr. Xifaras requesting advice with respect to the contemplated Form ADV amendment, saying "[w]e will now be charging 1% annually going forward to new clients . . . I also need to list that Ed page will be compensated as a consultant to the United Group. Was not sure how to word it. Can you help me with this?"[109] On September 19, 2010, Mr. Xifaras responded with specific Form ADV language related to the United funds and Mr. Page's role as a "consultant" to United.

Mr. Burke reviewed, signed,[110] and filed the amended Form ADV, adopting the language proposed by NRS. The amended Form ADV, dated September 14, 2010, deleted the "between 7.0% and 0.75%" referral fee language used in previous versions,[111] and also stated:

> Edgar R. Page, Chairman and Chief Financial Officer of PageOne Financial, is also employed as a consultant to The United Group of Companies, Inc. ("UGOC"). UGOC is a real estate investment and development firm. Mr. Page is compensated for the consulting services he provides to UGOC. As disclosed above, PageOne Financial recommends private funds that are managed by the UGOC to PageOne's advisory clients for which PageOne Financial receives an advisory fee. Advisory clients are under no obligation to participate in such investments.[112]

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[109] Resp. Ex. 97.

[110] Form ADV, PageOne Financial, Inc. (Sept. 14, 2010); Burke Tr. 30:1–31:5. In signing the Form ADV amendment, Mr. Burke certified to the following:

> I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

[111] Resp. Ex. 34. The "between 7.0% and 0.75%" referral fee language was deleted from Item 1D of Schedule F in the September 14, 2010 Form ADV, but the Form ADV said, "as disclosed in Item 1D of this Schedule F, PageOne Financial will act as a solicitor for certain private investment funds, and for doing so will receive a referral fee." *Id.*

[112] *Id.*

4. Removal of disclosures regarding United

On March 1, 2011, PageOne amended its Form ADV to remove all references to United and the United funds. This was appropriate because Respondents anticipated that Mr. Page would cease recommending that PageOne clients invest in the United funds at that time, and there was therefore no longer any potential conflict of interest to disclose.[113]

[113] The purpose of the Advisers Act's disclosure requirement is to "expose all conflicts of interest which might incline an investment advisor — consciously or unconsciously — to render advice which is not disinterested." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). Armed with the disclosed information, investors are then "well-positioned to evaluate their investment opportunities" because they will understand that the adviser might have a bias in recommending particular investments. Troy A. Paredes, Commissioner, U.S. Sec. & Exch. Comm'n, Remarks at The SEC Speaks in 2013 (Feb. 22, 2013) available at http://www.sec.gov/News/Speech/Detail/Speech/1365171492408#.UxYt7PldV8E. Central to the disclosure requirement is that the adviser must actually offer advice. If there is no recommendation of a particular investment, there is no need to disclose any potential conflict of interest because there is no advice to be tainted. PageOne therefore had no reason to disclose any conflict of interest with United after PageOne stopped recommending the United Funds to its clients in March 2011.

The instructions for completing Part 2 of the Form ADV expressly state that a "brochure should discuss only conflicts the advisor <u>has</u> or is <u>reasonably likely to have</u>." (emphasis added). Implicit from these instructions is that past conflicts of interest should not be disclosed unless the conflict is ongoing or reasonably likely to reoccur. Indeed, it is significant that, prior to its amendment in March 2011, Form ADV required an adviser to disclose whether it had "recommend[ed] securities to clients during its last fiscal year in which the applicant . . . had any ownership or sales interest." Form ADV (pre-March 2011 version). The Commission removed this question upon the March 2011 amendment, providing that only existing conflicts of interest need to be disclosed. *Compare id., with* Form ADV, Part 1A, Item 8 (post-March 2011 version asking about applicant's "Participation or Interest in Client Transactions" entirely in the present tense). The instructions for completing Part 2 of the Form ADV expressly state that a "brochure should discuss only conflicts the advisor <u>has</u> or is <u>reasonably likely to have</u>." (emphasis added). Implicit from these instructions is that past conflicts of interest should not be disclosed unless the conflict is ongoing or reasonably likely to reoccur.

Assuming that PageOne ever had a potential conflict of interest in recommending the Funds while Mr. Page was receiving earnest money from United, that conflict was adequately disclosed while PageOne continued to make such recommendations. When PageOne stopped recommending the Funds, the potential United conflict was no longer current or reasonably likely to occur in the future, and therefore no longer needed to be disclosed. Instead, such a conflict was properly removed from the disclosure, following Rule 204-1's requirement that Form ADV must disclose information existing at the time of its filing.

III. ARGUMENT

As will be described below, the Staff's allegations turn entirely upon misstatements of key facts, mischaracterizations of the Proposed Transaction, and misapplications of the law.

A. The Staff's factual allegations mischaracterize the Proposed Transaction

The Staff supports its theory of the case with mischaracterizations of the facts surrounding the Proposed Transaction that are not supported by the evidence. The truth — supported by the evidence as described below — supports Respondents' defenses.

1. There was no $20 million fundraising condition precedent to closing the Proposed Transaction

Despite clear evidence to the contrary, the Staff alleges in the OIP that Messrs. Page and Uccellini agreed that the Proposed Transaction "would not close — and [United] would not make the final payments of the purchase price — until E. Page raised approximately $20 million

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In a very close analogy of disclosure, the Solicitation Rule expressly requires that a third-party solicitor deliver to clients and prospective clients, again <u>at the time of solicitation</u>, a separate written disclosure statement that sets forth the solicitor's compensation for his or her solicitation activities. Advisers Act, Rule 206(4)-3. The Rule "requires that the solicitor, at the time of any solicitation activities for which compensation is paid or to be paid by the investment adviser, provide the client with a . . . separate written disclosure document . . . [disclosing] a statement that the solicitor will be compensated for his solicitation services by the investment adviser [and] the terms of such compensation arrangement, including a description of the compensation paid or to be paid to the solicitor." *Id.* The Solicitation Rule does not require any disclosure at the time a prospective client acts on the solicitor's recommendation.

Finding that PageOne was required to continue disclosing a former potential conflict would lead to misleading and unreadable Form ADV disclosures. An investment adviser would need to continue to disclose any former potential conflict indefinitely on the off chance that one of its clients might eventually invest in the security previously subject to the potential conflict, whether based on the adviser's recommendation or as a total coincidence. With ever-increasing amounts of stale information, investors would be unable to separate the wheat from the chaff in the list of potential conflicts past and present, thereby rendering disclosures thereof ever-increasingly ineffective.

for the [United] funds."[114] This mischaracterization of the Proposed Transaction — which is contradicted by the sole transactional document executed by the parties — is unsupported by the evidence.

As described above,[115] in December 2008 Mr. Page committed PageOne to purchasing $18.3 million of United fund units, in a letter that nowhere contemplates any sale and/or purchase of PageOne stock.[116] Mr. Page was confident after completing due diligence that the United funds would be attractive investments for certain PageOne clients, and United needed investment quickly to meet an imminent deadline from TIAA-CREF, which would be making a debt investment of $50 million in the properties the United funds sought to construct. Mr. Page agreed to purchase the United fund units on behalf of his clients but abandoned the $18.3 million commitment after he and United determined that client investment authorizations could not be collected before expiration of the TIAA-CREF deadline.

Mr. Page and United did not begin to negotiate the Proposed Transaction in earnest until early 2009.[117] The $18.3 million commitment is never referenced in the post-January 2009 Proposed Transaction documents,[118] because the commitment was separate from the Proposed Transaction,[119] and had been abandoned in December 2008.

The first reference to a $20 million fundraising requirement, on the other hand, comes several months later, in the "first pass" Proposed Transaction documents Mr. Uccellini sent to

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[114] OIP at ¶ 10(b).
[115] *See supra* section II(c)(v).
[116] Resp. Ex. 203.
[117] Resp. Ex. 3.
[118] The TIAA-CREF commitment to which the $18.3 million figure is relevant is last mentioned in January 2009. *See supra* notes 38, 40 and accompanying text.
[119] Indeed, if the $18.3 million commitment were not separate and apart from the Proposed Transaction, there would have been no reason for Mr. Uccellini to propose the $20 million fundraising requirement into the transactional documents as he did on multiple occasions.

Mr. Page in March 2009.[120] Mr. Uccellini's draft is the source of the Staff's $20 million fundraising requirement allegation — i.e., that the final payments from United would be made only when Mr. Page raised $20 million for the United funds.[121]

The $20 million fundraising requirement, however, was rejected by Mr. Page in his subsequent revisions of the draft documents.[122] Mr. Uccellini reinserted the $20 million fundraising requirement into later drafts of the documents,[123] but Mr. Page consistently rejected it.[124] Indeed, the final, executed Proposal Letter — the only document that was ever executed regarding the Proposed Transaction — contains no mention of any fundraising requirement whatsoever.[125] This alone demonstrates that the Staff's $20 million fundraising requirement allegation is a mischaracterization of the Proposed Transaction.

Cognizant of this fact, the Staff may argue that there was a secret $20 million fundraising requirement to the Proposed Transaction that was negotiated in the background between Messrs. Page and Uccellini. The Staff may introduce documents in which United's fundraising goals/targets are mentioned.[126] But an aspired-to fundraising goal — even if Mr. Page fully understood that United sought $20 million and agreed to try to raise it — is crucially different from an agreement that the attainment of said goal is a condition precedent to the closing of the Proposed Transaction. The latter — and not the former — is the Staff's allegation, and

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[120] Resp. Ex. 16. These documents mention neither TIAA-CREF nor any $18.3 million commitment, indicating that the $20 million commitment Mr. Uccellini sought in 2009 was wholly different.
[121] *Id.*
[122] Resp. Ex. 18 (Page strikes $20 million fundraising requirement in draft MOU supplied to Daniels); Resp. Ex. 89. (Dec. 12, 2009 redline of draft Proposal Letter sent to Mineaux with no fundraising requirement).
[123] Resp. Ex. 13 (Mar. 1, 2010 Uccellini draft Proposal Letter).
[124] Resp. Ex. 15 (Apr. 14, 2010 final, executed Proposal Letter).
[125] *Id.* (Apr. 14, 2010 final, executed Proposal Letter).
[126] *See, e.g.*, Resp. Ex. 21 (Uccellini email noting "20 million targeted goal for the student housing").

Respondents respectfully submit that there is simply no evidence that any secret condition existed.[127]

In sum, the Staff's allegation regarding the $20 million fundraising requirement is a mischaracterization of the Proposed Transaction that finds no support in the evidence, and should be disregarded.

2. Mr. Page did not know or recklessly disregard that United's payment of the earnest money deposits was linked to PageOne client investments

The Staff further alleges — again, without persuasive evidentiary support — that "Respondents knew (or recklessly disregarded) that the timing of [United's] acquisition payments — which often followed very closely in time behind PageOne client investments in the [United funds] — was linked to those investments," and that "E. Page understood that [Mr. Uccellini] and [United] did not have sufficient liquidity of their own to complete the acquisition of PageOne."[128] This allegation suggests that Respondents recommended investment in the United funds to their clients for Mr. Page's profit alone.

The truth, however, is that Respondents' recommendations were bona fide, and that Mr. Page never had any understanding that Mr. Uccellini/United was unable to make the earnest money deposits. Indeed, knowing that United had $60 million in annual gross revenues and anticipated revenues of $100 million by 2010, Mr. Page reasonably believed that Mr. Uccellini/United had at any given point sufficient capital to close the Proposed Transaction.[129] This is evidenced by Mr. Page's repeated correspondence highlighting his frustration and lack of

[127] Mr. Page's repeated pleas to Mr. Uccellini to close the transaction at times well before PageOne investors had invested $20 million counsel that no agreement about a $20 million fundraising requirement existed. *See, e.g.*, Resp. Ex. 108 (Feb. 3, 2010 Page email to Uccellini and Quinn arguing "I am not respected for the nearly 10 million I have raised as I have not closed my firm's deal").
[128] OIP ¶ 15.
[129] *See* Resp. Ex. 8.

understanding for why United was not completing the transaction. As mentioned above, when Mr. Page met with Mr. Uccellini in the fall of 2008, he had an offer on the table from NEXT to purchase PageOne outright for over $3 million.[130] Mr. Page told Mr. Uccellini about the NEXT offer, and Mr. Uccellini counter-offered, offering the same terms plus post-closing employment and the potential for leveraging the political connections of MCM and Mr. Del Giudice to bring new assets under management.[131] After completing due diligence on United and concluding that United was healthy,[132] and allured by the prospect of growing the new entity, Mr. Page abandoned the NEXT offer and began negotiating with United in 2009.[133]

In order to support the Staff's theory of the case, it must be believed that Mr. Page, after reviewing United's financials, abandoned a $3 million offer from NEXT — an entity with billions in assets[134] — in order to negotiate instead with an entity that he understood to be unable to complete the counter-offered transaction. Respondents respectfully submit that such a theory is not reasonable.

The Staff's theory is also not supported by the evidence.[135] The evidence shows that Mr. Page entered the Proposed Transaction negotiations with full confidence that United was a

[130] Page Tr. 99:14–18.
[131] *See* Resp. Ex. 8 (early business plan contemplating Proposed Transaction).
[132] Resp. Ex. 38 (late 2008 due diligence report regarding DCG/UGOC Equity Fund).
[133] Resp. Ex. 108 (later Page email in which he laments to Uccellini that "I could have been emancipated [from debt] with Next Financial's offer" he abandoned). It is unclear when Mr. Page abandoned the NEXT transaction in favor of the Proposed Transaction, but the documents evidence that he did so at some point in 2009. *See id.*
[134] NEXT Financial Group, Inc., U.S. News & World Report website, available at http://money.usnews.com/financial-advisors/firm/next-financial-group-inc-46214.
[135] The fact that United/Mr. Uccellini were in the process of seeking new financing does not mean that United was a financially troubled company. On the contrary, successful real estate developers such as United are always seeking investment, which enables them to realize new projects. Profits for previous projects are not reinvested into new projects, but remitted to the investors that made the projects possible.

healthy company, fully (and easily) capable of realizing the Proposed Transaction, and with whom Mr. Page looked forward to working after the closing.[136]

Further, despite the fact that he had no insight into United's internal accounting, Mr. Page was vigilant with respect to the deposits he received from United. More than a year after negotiations started — and after the global recession had deepened and it occurred to Mr. Page to ask about United's financial well-being — Mr. Page wrote Messrs. Uccellini and James Quinn and voiced his frustration that the Proposed Transaction had not closed, and said he was unwilling to proceed unless reassured that the earnest money deposits were not linked to the PageOne client investments.[137] Shortly thereafter, unconvinced with Mr. Uccellini's explanation that he was mistaken,[138] Mr. Page actually called the Proposed Transaction off entirely.[139] But Mr. Uccellini convinced Mr. Page that his suspicions were unfounded, and Mr. Page came back to the negotiating table.

Mr. Page believed Mr. Uccellini, a widely-respected businessman with real estate projects in varying phases of development all over the country and an unblemished track record of success, when he told Mr. Page that United was indeed healthy.[140] In spite of any suspicions

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[136] *See* Resp. Ex. 8 (Jan. 22, 2009 Page email to contact at TD Ameritrade noting that United, who Page is "proud to have . . . as [a] partner[] . . . ranks as number 13 as per the Albany Business Review [from] January of 2009," attaching a business plan contemplating the Proposed Transaction noting that United has $500 million in current projects under development, $60 million in annual gross revenues, and an expectation of revenues of $100 million by 2010).
[137] *See, e.g.*, Resp. Ex. 108 (Feb. 3, 2010 Page email in which he tells Uccellini, "I can not, in good spirit, continue to raise funds for my buyout every time I try to close . . . To contract a buyout in the manner in which [Quinn] is doing so makes me feel foolish and compromises my business judgement [sic] to my counselors").
[138] *Id.* (Uccellini responding to Page, saying that his suspicions were illogical).
[139] Resp. Ex. 33 (Feb. 18, 2010 email saying Page "respectfully withdraw[s] PageOne Financial, Inc. and my offer to convey any interest and shares to" United).
[140] *See* Resp. Ex. 8 (Proposed Transaction business plan describing Uccellini's accomplishments (e.g., having underwritten over $2 billion in real estate transactions over t30 years) and noting United projects in development in Florida, Illinois, and New York).

he may have had, Mr. Page simply had no way of knowing United's financial health during the time the Proposed Transaction was being negotiated, as suggested by the Staff. Again, Mr. Page never had access to United's internal accounting figures.[141] And the only perceptible benchmark available — United's distributions to PageOne clients, which were made constantly throughout the term of the negotiations — reinforced Mr. Uccellini's position.

Nor did the manner in which United paid the earnest money deposits to Mr. Page suggest that these deposits were "at least partially tied"[142] to PageOne client investments in the United funds. The deposits were paid at irregular intervals, in varying amounts, from various United bank accounts, and with no perceptible symmetry with the investments.[143]

Accordingly, as with its allegation regarding a $20 million fundraising requirement, the Staff's allegations regarding what Mr. Page knew or should have known about United and the deposits he received are meritless.

B. The Staff misapplies the law in reaching its legal conclusions

In the OIP, the Staff concludes that Respondents willfully violated Sections 206(1), 206(2), and 207 of the Advisers Act by allegedly failing to adequately disclose the details of Respondents' financial relationship with United.[144] In coming to this conclusion, however, the

[141] Page Tr. 115:6–9.
[142] OIP ¶ 2(c). The Staff's attempt to hold Mr. Page liable for not disclosing that United payments were "at least partially tied" to the deposits he received functions as a tacit admission that the Staff's theory of liability is legally bankrupt. Any investment in the United funds, it could be argued, is "at least partially tied" to the deposits received by Mr. Page, insofar as every investment provides United with fees and therefore liquidity. Respondents respectfully submit that to hold Mr. Page liable under the Staff's theory as-alleged would unduly extend the reach of the Advisers Act.
[143] *See* Rebuttal Expert Report of Steve Thel (hereinafter, "Thel Reb.") at Exhibit 2 (Staff chart noting alleged deposits to Page).
[144] OIP ¶¶ 40–42.

Staff misapplies the law of materiality[145] and scienter, the proper application of which support Respondents' defenses.

1. Respondents did not make material misrepresentations in PageOne's Forms ADV

As described above, the Staff cannot prove the facts upon which it bases its theory of the case. Even if the Staff could establish such facts, however, the proceedings should still be dismissed, because the Staff cannot establish that disclosure of their alleged set of facts would have been materially different than the disclosure Respondents made in PageOne's Forms ADV.

(a) Standard for materiality

As the Staff points out in the OIP,[146] an alleged misrepresentation is only actionable under the Advisers Act if it is material. A misrepresentation is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."[147] Put another way, "a misrepresentation, misstatement, or omission is material if there is a substantial likelihood that a reasonable investor would consider the true or complete information important in making an investment decision."[148]

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[145] To prove a violation of the anti-fraud provisions of the securities laws, including Sections 206 and 207 of the Advisers Act, the Commission must establish that an alleged misrepresentation or omission was "material." *SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992) ("*Steadman II*").

[146] OIP ¶ 3 (alleging that PageOne's Form ADV disclosures "*materially* misrepresented both the nature and amounts of [United's] payments to E. Page." (emphasis added)).

[147] *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988). *See also SEC v. Nutmeg Group, LLC*, 2011 U.S. Dist. LEXIS 122485, at *15 (N.D. Ill. Oct. 19, 2011) (applying *Basic* test in Advisers Act context).

[148] *SEC v. ABS Manager, LLC*, 2014 U.S. Dist. LEXIS 80542, at *19 (S.D. Cal. June 11, 2014) (citing *Basic*).

Materiality is a mixed question of law and fact[149] about which courts routinely rely upon experts for guidance.[150] The standard applicable to determine whether the acquisition negotiations were material is whether a reasonable person would consider them material, not whether a client of PageOne actually believed that the negotiations would have been important to his or her decision of whether to invest in the Private Funds.[151] Thus, the importance of the acquisition negotiations cannot be demonstrated by asking Respondents' clients whether they wish they had known of the negotiations, or whether they would have acted differently had they known. In addition, the materiality of the acquisition negotiations cannot be judged based upon "hindsight bias" — i.e., by judging disclosures that were made in the past based upon information that is now known.[152] Thus, it would be improper to say that the unimportance of the negotiations is demonstrated by the fact that the acquisition never occurred. The importance of the negotiations has to be judged at the time at which they occur, not in hindsight.

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[149] *TSC Industries, Inc. v. Northway*, 426 U.S. 438 (1976) ("The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts.").

[150] *SEC v. Cuban*, 2013 U.S. Dist. LEXIS 37167 (N.D. Tex. July 23, 2013).

[151] *TSC Industries, supra*; *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011) ("In *Basic* [*v. Levinson*, 485 U.S. 224 (1988)], we held that this materiality requirement is satisfied when there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.' [485 U.S.] at 231-232 . . . (*quoting* [*TSC Industries*, 426 U.S. at 449]. We were 'careful not to set too low a standard of materiality,' for fear that management would 'bury the shareholders in an avalanche of trivial information.' 485 U.S. at 231 . . . (*quoting TSC Industries*, 426 U.S. at 448-449.").

[152] *City of Pontiac Policemen's and Firemen's Retirement Sys. v. UBS AG, et al.*, 752 F.3d 173 (2d Cir. 2014) ("We do not recognize allegations of fraud by hindsight"); *Special Situations Fund III QP, LP v. Deloitte Touche Tohmatsu CPA, Ltd.*, 2014 U.S. Dist. LEXIS 99861 (S.D.N.Y. July 21, 2014) ("To the extent that Plaintiffs argue that new management quickly unearthed the fraud, and thus it was easily discoverable, this argument suffers from hindsight bias"); *In re PUDA Coal Sec. Inc. Litig.*, 2014 U.S. Dist. LEXIS 83138 (S.D.N.Y. June 25, 2014) ("Facts merely supporting an inference that an audit could have been done better constitute 'fraud by hindsight' and do not support the requisite scienter").

In the context of an imprecisely disclosed conflict of interest, the essence of the materiality question is therefore whether disclosure of the actual conflict of interest would have been considered important to a reasonable investor when making the decision to invest. Where, as here, a disclosure of a conflict of interest has been made, and the disclosed conflict of interest is more serious — i.e., would reasonably be expected to more strongly incentivize the conflicted party to act in his self-interest — than the actual conflict of interest, disclosure of the actual conflict of interest would not have been considered important to a reasonable investor, who believed that the conflict of interest was more serious than it actually was when he decided to invest.[153]

(b) What was not disclosed: the actual conflict of interest

Respondents and the Staff agree that, at the time Mr. Page was recommending that PageOne's accredited investor clients invest in the United funds, 1) Mr. Page was negotiating the Proposed Transaction with United, and 2) United was paying Mr. Page deposits against the Proposed Transaction.[154] This is the undisputed set of facts.

The Staff further contends — and Respondents strenuously dispute — that as a condition precedent to the Proposed Transaction's closing, Mr. Page was required to raise $20 million for the United funds.[155] This allegation creates the disputed set of facts.

(c) What was disclosed: PageOne's Form ADV disclosures

In PageOne's Forms ADV, Respondents disclosed that, when a PageOne client invested in one of the United funds, PageOne would "typically receive, on an annual basis, a referral fee

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[153] Courts have noted that where a defendant "erred on the side of over disclosure [the disclosure] was therefore not misleading." *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1417 (9th Cir. 1994).
[154] OIP ¶¶ 12–13; Answer of Respondents to Amended OIP (hereinafter "Answer") ¶¶ 12–13.
[155] OIP ¶ 10(b); Answer ¶ 10.

of between 7.0% and 0.75% of the amount invested by the client" in the funds.[156] That is to say, Respondents disclosed that they could receive up to 7% of the amount the clients invested — in outright cash payments, and *repeated annually*[157] — from United.[158] Accordingly, a PageOne client who invested in the United funds — an investment which by the terms of the United fund PPMs had a mandatory lock-up period of 7 years[159] — made that investment on notice that Mr. Page *could receive outright cash payments from United of up 49% of the amount the client invested.*

Accordingly, in order to find that the above disclosure amounted to a material misrepresentation (and is therefore actionable under the Advisers Act), the Staff bears the burden of proving that, even though investors were told that Mr. Page stood to receive 49% of the amounts they invested in the United funds, disclosure of the alleged conflict of interest instead would have somehow changed the calculus for a reasonable investor who was considering Mr. Page's recommendation to invest in the United funds.

(d) Discussion

Under either the undisputed facts or the disputed set of facts alleged by the Staff, Respondents respectfully submit that a reasonable investor would not have considered the alleged conflict of interest to be more serious than the conflict of interest that was actually disclosed in PageOne's Forms ADV.

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[156] *See, e.g.*, Resp. Ex. 112 (PageOne Form ADV Part II, July 31, 2009).
[157] *See* Expert Report of Steve Thel (hereinafter, "Thel Rep.") at ¶ 21.
[158] Later, PageOne's Form ADV was amended, removing the "between 7.0% and 0.75%" figures, but maintaining language indicating that Respondents would receive a referral and/or advisory fee, i.e., an outright payment, for recommending investments in the United funds to their clients. *See, e.g.*, Resp. Ex. 34.
[159] *See* Resp. Exs. 119, 207 (Private Placement Memoranda for United Group Income Funds noting that the "Investment Period" is seven years). The Equity Fund had a five-year lock-up period, with a two-year extension at United's option. Resp. Ex. 208.

(i) Undisputed facts

The Staff contends that 1) the Proposed Transaction negotiations were taking place, and 2) that Mr. Page was receiving deposits towards the Proposed Transaction.

(1) Proposed Transaction negotiations

The Staff's argument that the Proposed Transaction negotiations should have been disclosed runs contrary to established case law.

It is well-established that there is no requirement that speculative events such as preliminary transactional negotiations must be disclosed.[160] Rather, "[u]nder such circumstances, materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of company activity'" (the "*Basic* test"), the event being the Proposed Transaction's closing.[161] Here, both the probability and magnitude prongs of the *Basic* test support nondisclosure of the preliminary negotiations.

First, the Proposed Transaction never had a high likelihood of closing, evidenced by the fact that the negotiations were slow, erratic, and eventually one-sided.[162] Such improbability supports nondisclosure.[163]

Second, the Proposed Transaction's closing would have had little impact upon the United funds that were the subject of the allegedly false Form ADV disclosures, and thus on PageOne's clients who invested in the United funds, to whom the Staff argues disclosure should have been

[160] *Basic*, 485 U.S. at 239.
[161] *Id.* at 238.
[162] *See, e.g.*, Resp. Ex. 12 (Page expressing frustration at realization that closing is unlikely to take place).
[163] To the extent the Staff argues that Mr. Page understood that United lacked sufficient liquidity to finance the Proposed Transaction, *see* OIP ¶ 15, the Staff buttresses Respondents' materiality argument under *Basic*: the less able the purchaser is to make the contemplated purchase, the more improbable the purchase.

made. In *Basic*, former shareholders of a company who sold their shares before the company announced that they were in transactional negotiations sued, saying that had the negotiations been disclosed, they would not have sold their shares at what they argued were therefore artificially deflated prices.[164] Applying the *Basic* probability/magnitude test in adjudging the materiality of the nondisclosure, the Supreme Court said that the proper magnitude inquiry was to "[t]o assess the magnitude of the transaction *to the issuer of the securities allegedly manipulated* [in terms of, e.g.,] size of the two corporate entities and of the potential premiums over market value" the plaintiffs stood to receive had they held onto their shares.[165] Essentially, then, the question is the magnitude of the proposed transaction from the perspective of the entity in which the allegedly manipulated investor invested: here, the United funds.

In this case, upon the Proposed Transaction's closing, an affiliate of United — not the United funds — would have acquired 49% of PageOne's stock, and Mr. Page would have acquired $2.4 million.[166] The impact of such a transaction on the United funds (and thus the United fund investors) would have been negligible.[167] As such, the magnitude prong of the *Basic* test therefore also supports nondisclosure of the Proposed Transaction negotiations.

The difference between the conflict of interest that PageOne disclosed to its clients and the potential conflict of interest that would have been disclosed if the acquisition negotiations were revealed was not material.[168] The investors were informed that PageOne had substantial conflicts of interest in recommending the Funds. Further disclosure of the negotiations would

[164] *Basic*, 485 U.S. at 228.
[165] *Id.* at 239 (emphasis added).
[166] Resp. Ex. 15.
[167] Indeed, even if United itself went totally bankrupt, it is not clear how such an event would affect the funds *they administered*, and therefore PageOne's clients who invested in the United funds, at all.
[168] The General Instructions for Form ADV instruct registrants to amend their brochure supplements (Part 2 of Form ADV) "if any information in them becomes materially inaccurate."

not have led reasonable investors to conclude that the conflict was greater than the conflict that the Respondents disclosed. There is no substantial likelihood that a reasonable client who invested in the Private Funds in the face of the statements the Respondents made would not have invested if the Respondents had disclosed the negotiations.[169]

Respondents' nondisclosure of the Proposed Transaction negotiations was accordingly not a material misrepresentation as alleged.

(2) Earnest money deposits

The Staff's argument that Respondents should have disclosed that Mr. Page was receiving earnest money deposits from United against the Proposed Transaction's sale price is defeated by the fact that the PageOne Form ADV disclosed a conflict of interest much more serious than the potential conflict of interest created by the receipt of the earnest money deposits. As such, the existing disclosures did not amount to a material misrepresentation.

As noted above, PageOne disclosed in its Forms ADV that PageOne could receive outright cash payments from United of up 49% of the amount each PageOne client invested in the United funds. PageOne could therefore receive $490,000 on an investment of $1,000,000 — a rate of return equal to nearly half of client investment amounts over a period of seven years.

What Mr. Page actually received, on the other hand, were deposits against the Proposed Transaction, secured by promissory notes with commercially reasonable terms and market rates of interest.[170] Put another way, Mr. Page received loans from United, the forgiveness of which would take place only upon the improbable closing of the Proposed Transaction, at which point Mr. Page was required to tender 49% of his business to United. Furthermore, since Mr. Uccellini died before the Proposed Transaction closed, in the end Mr. Page essentially received nothing —

[169] *See TSC Industries*, 426 U.S. at 446.
[170] *See* Resp. Exs. 121–141.

repayment of the promissory notes have been demanded by United's counsel, in full, and litigation has been threatened.[171]

Respondents respectfully submit that the disclosure of the extraordinary 7% per year[172] outright fee arrangement put PageOne's clients on notice of a potential conflict of interest that was much more serious than that created by the loans that were in fact made to Mr. Page in the form of earnest money deposits towards the Proposed Transaction.[173] There exists no substantial likelihood that any reasonable PageOne investor, had they been informed that Mr. Page was receiving earnest money deposits rather than collecting the exorbitant fee disclosed, would have considered the information important in deciding whether to invest,[174] because they were already on notice of a much more serious conflict of interest than actually existed when they made the decision to invest.[175]

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[171] *See* Resp. Ex. 156.

[172] Logically, any outright fee arrangement — such as those disclosed in post-September 14, 2010 PageOne ADVs — poses a conflict of interest more serious than the conflict of interest caused by the loans here at issue. Respondents accordingly submit that their overdisclosure argument applies with equal force to the ADVs where the "between 7.0% and 0.75%" language was removed.

[173] Respondents' position would be the same had the Proposed Transaction closed and the loans been forgiven. In that scenario, Mr. Page would have had to tender half of his business and would have received $2.4 million. But Mr. Page stood to make far more than $2.4 million — and would not have had to tender 49% of PageOne's stock — if he had collected the referral fees on the investments as-disclosed for the seven-year lock-up period mandated by the United fund PPMs.

[174] *See TSC Industries*, 426 U.S. at 449 (noting that, in the proxy solicitation context, "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important *in deciding how to vote*" (emphasis added)).

[175] In *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1417 (9th Cir. 1994), plaintiffs who were purchasers of toy manufacturer debentures brought a class action alleging securities fraud in connection with the debenture offering. They claimed, in part, that the debenture prospectus was materially misleading with respect to its description of the company's internal controls. The Court found, as a matter of law, that plaintiffs could not have been misled by the description because the prospectus sufficiently warned that the company's internal controls could be inadequate to keep up with the fast-growing company. The court noted that the prospectus

Respondents' overdisclosure of the referral fee arrangement therefore also did not amount to a material misrepresentation as alleged.

(ii) Disputed facts

(1) $20 million fundraising requirement

The Staff contends that, as a condition precedent to the Proposed Transaction's closing, Respondents were required to raise $20 million for the United funds.[176] As explained above, Respondents dispute this allegation, which is not supported by the evidence.[177] Even if the Staff's allegation were true, however, PageOne's Forms ADV disclosed a conflict of interest more serious than the potential conflict of interest created by the $20 million fundraising condition.

If a $20 million fundraising requirement were in place as a condition precedent to the closing of the Proposed Transaction, then Mr. Page faced a high risk that he would not make any money for successfully recommending that his clients invest in the United funds. The conflict of interest to which Mr. Page's recommendations to invest in the United funds were subject at the outset would therefore have been substantially less serious than the conflict of interest that was disclosed, which would have definitely provided Mr. Page an outright fee in the amount of 49% of the amount invested.

As Respondents' clients' investments in the United funds grew in volume, the risk of noncompensation would decline, and the conflict would increase. But since Mr. Page's clients invested less than $14 million of the alleged $20 million required to close the Proposed Transaction — in declining numbers each year, indicating decreased sales efforts that it is

"clearly erred on the side of over disclosure and was therefore not misleading." *Id. See also* Thel Rep. ¶ 22.
[176] OIP ¶ 10(b).
[177] Answer ¶ 10. *See supra* Section III(A)(1).

undisputed were eventually abandoned altogether[178] — Respondents respectfully submit that, had the $20 million fundraising condition existed, the improbability of achieving the required goal kept the conflict of interest in Mr. Page's recommendations at all times significantly less serious than the conflict of interest that was disclosed in PageOne's Forms ADV (by which Mr. Page, had he hit the alleged $20 million threshold, would have been guaranteed to receive $9.8 million in fees, as opposed to $2.4 million in consideration for surrendering 49% of his business).

Respondents therefore respectfully submit that, even if the Staff's $20 million fundraising condition were true — and the evidence demonstrates that it is not — PageOne's Form ADV disclosures were never materially inaccurate.

2. Respondents did not act with a culpable mental state

Even if the Staff could establish that Respondents made a material misrepresentation, the Respondents did not violate the Advisers Act because they did not act with the requisite mental state required for liability.

(a) The alleged Section 206(1) violations cannot be proven because PageOne lacked scienter

In order to sustain its charges under Section 206(1) of the Advisers Act, the Staff must prove that the PageOne acted with scienter.[179]

Under the federal securities laws, scienter means a "mental state embracing *intent to deceive, manipulate, or defraud*."[180] Scienter can also be proven by a showing of

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[178] *See* Thel Reb. ¶ 16.
[179] *Steadman II*, 967 F.2d at 641 & n.3.
[180] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *see also Aaron v. SEC*, 446 U.S. 680, 686 n.5, 695–97 (1980); *Steadman II*, 967 F.2d at 641 (emphasis added.).

recklessness.[181] Reckless conduct is that which is "'highly unreasonable' and . . . represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'"[182]

In cases like this one, where a corporation is charged with violating Section 206(1) of the Advisers Act, scienter may be imputed to the corporation from the conduct of the individual(s) controlling it.[183] Although negligence is sufficient to establish liability for causing a primary violation that does not require scienter (i.e., Section 207 of the Adviser Act), it is assumed that scienter is required to establish secondary liability for causing a primary violation that requires scienter (i.e., Section 206(1)).[184]

There is no evidence indicating that PageOne acted with the requisite scienter. It is axiomatic that investment advisers are fiduciaries and are duty-bound to act in complete good faith and to disclose all material facts concerning conflicts of interest which could materially impact client decision-making.[185] A registered investment adviser, discharging its fiduciary duties in good faith for the benefit of clients, cannot be said to possess scienter within the meaning of the federal securities laws.[186]

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[181] *See David Disner*, 52 S.E.C. 1217, 1222 & n.20 (1997); *see also Steadman II*, 967 F.2d at 641–42; *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568–69 (9th Cir. 1990).
[182] *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978) (*quoting Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977).
[183] *See SEC v. Blinder, Robinson & Co.*, 542 F. Supp. 468, 476 n.3 (D. Colo. 1982) (*citing SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096–97 nn.16–18 (2d Cir. 1972)).
[184] *See KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175 (2001), *recon. denied*, 74 SEC Docket 1351 (Mar. 8, 2001), *pet. denied sub nom. KPMG, LLP*, 289 F.3d 109 (D.C. Cir. 2002).
[185] *See Capital Gains Research*, 375 U.S. at 191–92, 194, 201.
[186] *SEC v. Saltzman*, 127 F. Supp. 2d 660, 666 (E.D. Pa. 2001) ("To prove scienter, the SEC must show that [Respondent] lacked a genuine belief that the information disclosed was accurate and complete in all material respects.") (internal quotation marks omitted); *Dirks v. SEC*, 463 U.S. 646, 664 n.23 (1983) ("Motivation is not irrelevant to the issue of scienter . . . a [10b-5] violation may be found only where there is intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities") (internal

The record clearly demonstrates that the Respondents did not intend to deceive, manipulate, or defraud anyone. Nor did the Respondents act in a "highly unreasonable" manner or follow a course of conduct that represented an "extreme departure from the standards of ordinary care."[187] As discussed above, Mr. Page correctly concluded that no disclosure of the Proposed Transaction negotiations was appropriate or legally required. This was confirmed by NRS, the compliance experts retained by PageOne for the specific purpose of advising Respondents on their disclosure obligations.

While no disclosure was necessary in light of the preliminary nature of the proposed acquisition, Respondents wanted to avoid any intimation of a concealed conflict of interest. The Respondents followed the good faith approach of overdisclosing, to be certain that Respondents' clients knew to take into account a financial relationship between United and Mr. Page when making a decision about whether to invest in the United funds. The Respondents wanted to alert clients of a financial relationship with United and decided to follow the approach suggested by NRS of disclosing so-called "referral fees" and consultant payments as a means of accomplishing that, even though no such fees or payments were received. Clearly, Respondents' disclosures of referral fees and consultant payments notified potential investors of a conflict of interest that was more serious than the conflict of interest created by preliminary discussions regarding a potential sale secured by earnest money deposits which, in turn, was secured with promissory notes containing commercially reasonable terms and rates.

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quotation marks omitted); *SEC v. Commonwealth*, 574 F.2d 90, 102 (2d Cir. 1978) ("There can be no doubt from the trial court's findings that these defendants were aware of the circumstances in which they operated and that they acted purposefully and in bad faith. Their behavior comes precisely within the Court's definition of scienter as referring to a mental state embracing intent to deceive, manipulate, or defraud."); *see also In re Merrill Lynch*, 272 F. Supp. 2d 243, 262 (S.D.N.Y. 2003); *Roth v. Bank of the Commonwealth*, 1981 U.S. Dist. LEXIS 14406, *24 (W.D.N.Y. Aug. 17, 1981).

[187] *Rolf*, 570 F.2d at 47.

Stated differently, the Respondents went above and beyond what would be legally required of a fiduciary, and chose to overdisclose a potential conflict of interest. This was done not for the Respondents' protection or self-interest, but for the benefit of Respondents' clients. The disclosures made by the Respondents were made in good faith, and were reasonable and consistent with standards of ordinary care.

(b) The alleged Section 206(2) and Section 207 violations cannot be proven because the Respondents did not act negligently

Unlike violations of Section 206(1), which can be established only if scienter is proven, alleged violations of Sections 206(2) and 207 of the Advisers Act are sustainable upon a showing of negligence.[188]

Stated generally, negligence is the failure to use reasonable care, which is the degree of care that a reasonably careful person would use under similar circumstances. Negligence may consist either of doing something that a reasonably careful person would not do, or failing to do something that a reasonably careful person would do, under similar circumstances.[189]

Mr. Page did not act negligently, nor is there any legal basis to impute negligence to PageOne. As discussed above, Mr. Page delegated responsibility for Form ADV disclosures to Mr. Burke, and later to Mr. Burke's successors.[190] Mr. Page reasonably believed that Mr. Burke was competent to manage the company's Form ADV disclosure obligations and provided Mr. Burke and his successors with access to expert resources to ensure that PageOne's compliance

[188] *Steadman II*, 967 F.2d at 641–43, n.3, & n.5; *Steadman v. SEC*, 603 F.2d 1126, 1132–34 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Capital Gains Research*, 375 U.S. at 195; *Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003); *In the Matter of David Henry Disraeli & Lifeplan Assoc., Inc.*, Admin. Proc. File No. 3-12288, Opinion of the Commission (Dec. 21, 2007).
[189] *See, e.g., SEC v. Reserve Mgmt. Co., Inc.*, 2013 U.S. Dist. LEXIS 141018 (S.D.N.Y. Sept. 30, 2013).
[190] Page Tr. 63:4–11, 76:14–16.

staff was supported appropriately.[191] Indeed, Mr. Page directed his compliance staff to work with outside experts to ensure that PageOne's Form ADV disclosures were correct and appropriate.

The Form ADV filings which the Staff now contends were inadequate were prepared by these outside experts based upon information provided to them by PageOne's compliance staff. Mr. Page reasonably believed that the disclosure language recommended by outside experts was acceptable, particularly since these experts had full knowledge of the potential business relationship with United and it was disclosed that Mr. Page would receive earnest money deposits from United.[192]

Mr. Page's opinion that some form of disclosure should be made for the benefit of potential United fund investors, but that disclosure of the details of the Proposed Transaction was neither appropriate nor legally required given its highly speculative, preliminary, and confidential nature does not evidence an intent to deceive or a departure from the principles of ordinary care. Instead, this reflects Mr. Page's reasonable, good faith understanding of the applicable disclosure requirements in the context of confidentially negotiating towards the sale of a portion of his business. This belief was reinforced by NRS when it advised Mr. Burke that the Proposed Transaction negotiations and earnest money deposits did not need to be disclosed because the transaction was not completed.[193]

Although neither Mr. Page nor PageOne ever received a referral fee, there was uncertainty about how else to describe the United's financial relationship with Mr. Page in a

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[191] Burke Tr. 41:21–25, 42:1–11, 122:2–9.
[192] *Id.* at 135:1–12.
[193] *Id.* at 130:1–22.

manner calculated to get the attention of the prospective investors.[194] Mr. Page understood that United was authorized to pay up to 7% of all amounts invested in the United funds, to cover marketing and solicitation expenses.[195] Accordingly, the disclosure of the 7.0% referral fee proposed by NRS appeared to be a reasonable statement consistent with the United fund PPMs, which explicitly disclosed a direct financial relationship between Respondents and United.

As best as Mr. Page could gauge at the time, Mr. Burke and NRS appeared to have a solid understanding of the potential transaction with the Fund Manager as well as the applicable disclosure requirements. Guided by NRS's confirmation that the proposed Form ADV was appropriate to disclose the contemplated financial relationship between United, PageOne, and Mr. Page, both Mr. Page and Mr. Burke expressed their acceptance of the proposed ADV language.[196]

When PageOne's Form ADV was amended in September 2010, removing reference to the "between 7.0% and 0.75%" referral fee language and adding reference to Mr. 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, Mr. Page reasonably believed that the disclosure language was sufficient to meet PageOne's disclosure requirements.

When PageOne's Form ADV was amended in April 2011, removing all references to the United funds, Mr. Page once again reasonably believed that the disclosure language was sufficient to meet PageOne's compliance requirements.

It is clear that Mr. Page exercised a reasonable degree of care in ensuring that responsibility for PageOne's Form ADV was appropriately assigned to PageOne compliance

[194] Page Tr. 54:10–21, 72:17–25; Burke Tr. 73:1–7, 135:1–9.
[195] Page Tr. 54:1–6.
[196] Burke Tr. 136:10–16, 138:7–25, 146:15–24.

staff, and that the Respondents reasonably relied upon qualified experts who were consulted to augment PageOne's internal resources. Setting aside that disclosure of the Proposed Transaction negotiations was not required under established case law, and that disclosure of the 7.0% referral fee was not materially misleading, the Section 206(2) and 207 violations alleged by the Staff cannot be sustained because the Respondents did not act negligently.

IV. CONCLUSION

Respondents respectfully submit that the hearing will establish that the factual and legal allegations made in the OIP by the Staff are without merit. Mr. Page never agreed to any $20 million fundraising requirement as a condition of the closing of the Proposed Transaction, nor did he believe that there was any connection between his clients' investments in the United funds and the sale of a portion of PageOne to United. Mr. Page always reasonably believed that United was fully capable of closing the Proposed Transaction. Furthermore, Respondents never made any material misrepresentations in PageOne's Forms ADV as alleged, and did not act with the mental state required to sustain the Staff's allegations. Accordingly, the proceedings against Respondents should be dismissed.

Respectfully submitted,

Dated: January 12, 2015
New York, New York

By: Richard D. Marshall JRM w/ permission

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BY FACSIMILE

The Honorable Brent J. Fields
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Re: In the Matter of Edgar R. Page, et al., Admin. Proc. File No 3-16037

Secretary Fields,

Please find enclosed the Prehearing Brief of Edgar R. Page and PageOne Financial, Inc., filed pursuant to the Commission's September 29, 2014 Order Setting Prehearing Schedule in the Matter of Edgar R. Page and PageOne Financial, Inc., Administrative Proceeding File No. 3-16037.

Respectfully submitted,

Richard Marshall JWM w/ permission

Richard D. Marshall

Enclosures