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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of **EDGAR R. PAGE and PAGEONE FINANCIAL, INC.,** **Respondents.**	**MOTION *IN LIMINE* TO EXCLUDE CERTAIN TESTIMONY OF ARTHUR B. LABY**

Pursuant to Rules 320 and 321 of the Rules of Practice, Respondents Edgar R. Page and PageOne Financial, Inc. ("PageOne") respectfully move this Court for an Order (a) striking the portions of the Staff's Expert Report of Arthur B. Laby which consist of irrelevant and/or immaterial factual and/or legal conclusions, and (b) precluding Mr. Laby from offering testimony consisting of irrelevant and/or immaterial factual and/or legal conclusions at the anticipated hearing.

The grounds in support of this Motion are set forth in the accompanying Memorandum in Support of Respondents' Motion *in Limine* to Exclude Certain Testimony of Arthur B. Laby.

Respectfully submitted,

Dated: January 12, 2015
New York, New York

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ATTORNEYS FOR RESPONDENTS
EDGAR R. PAGE AND PAGEONE
FINANCIAL, INC.

UNITED STATES OF AMERICA
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ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of **EDGAR R. PAGE and PAGEONE FINANCIAL, INC.,** **Respondents.**	**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE CERTAIN TESTIMONY OF ARTHUR B. LABY**

Respondents Edgar R. Page and PageOne Financial, Inc. ("PageOne") file this Memorandum in support of their motion *in limine* to exclude inadmissible portions of the proffered testimony of Staff expert witness Arthur B. Laby. In particular, Respondents seek to exclude those portions of Mr. Laby's testimony that:

(1) make conclusions regarding the facts in dispute between the parties, thereby usurping the role of the factfinder;

(2) speculate regarding what the facts may be or may have been; and

(3) make conclusions regarding the law, thereby usurping the role of the judge.

Testimony within such areas must be precluded because Mr. Laby is not the judge. Mr. Laby's proferred testimony would therefore be inadmissible because it invades the province of the judge.

I. Mr. Laby's Report Primarily Consists of Inadmissible Conclusions of Fact and Law

On January 5, 2015, the Staff submitted an expert report on behalf of Arthur B. Laby, a copy of which is attached hereto as Exhibit A. Mr. Laby is a professor at Rutgers School of

Law-Camden. Mr. Laby's report addresses the central factual and legal disputes in this case: (a) whether there existed a $20 million fundraising condition precedent to the closing of the contemplated acquisition of PageOne stock for $2.4 million (the "Proposed Transaction") by the United Group of Companies ("United") to which the parties agreed, (b) whether the deposits Mr. Page received from United were linked to Respondents' clients' investments in certain private funds managed by United (the "United funds") (and whether Mr. Page was aware of this disputed "fact"), and (c) whether Respondents made legally sufficient disclosures of the financial relationship between Mr. Page and United in PageOne's Form ADV disclosures. Mr. Laby's report reads like a legal brief, and is essentially a piece of advocacy containing the Staff's chief factual and legal arguments in support of its claims that Respondents violated the Advisers Act.

In addition to a section containing factual "background information" regarding the parties and the Proposed Transaction,[1] Mr. Laby's report offers a litany of factual conclusions, including:

- Whether a $20 million fundraising condition existed and whether Mr. Page agreed to it;[2]
- Whether the deposits made by United to Mr. Page were "tied" to PageOne clients' investments in the United funds,[3] and whether United was able to close the Proposed Transaction without said investments;[4]
- The roles played by various parties in developing PageOne's Form ADV amendments;[5]
- What Mr. Page "might have been" tempted to do in particular situations;[6] and
- Mr. Page's understanding of United's financial health.[7]

Such factual conclusions and speculations are inadmissible in Commission hearings.

[1] Exhibit A (hereinafter, "Ex. A") at 17–21.
[2] *Id.* at 21, 23, 25–26, 30, 34.
[3] *Id.* at 26, 35.
[4] *Id.* at 34.
[5] *Id.* at 18, 24–25, 34.
[6] *See, e.g.*, *id.* at 23.
[7] *Id.* at 27.

In addition to his inappropriate factual conclusions, Mr. Laby offers a recitation of unhelpful legal platitudes and hollow legal conclusions, all of which are equally inadmissible, including:

- A recitation of the standards of conduct for investment advisers, including the applicable fiduciary duties under which investment advisers conduct their businesses;[8]
- A recitation of the structure of Forms ADV and the purpose for which Forms ADV are used;[9]
- Legal conclusions regarding:
  - Whether PageOne's Form ADV disclosures were legally sufficient;[10]
  - The severity of various conflicts of interest relative to one another;[11]
  - The "significan[ce]" of the Proposed Transaction;[12] and
  - Whether "investors" and "reasonable client[s]" "would want to know" about the Proposed Transaction;[13] and
- An opinion regarding whether the Proposed Transaction and the potential conflict of interest it created was a "speculative" event for purposes of determining the legal calculus to apply in this case.[14]

Accordingly, Respondents respectfully submit that such conclusions should be stricken from the record, and the Court should preclude the Staff from calling Mr. Laby to offer any such testimony at the hearing.

II. Mr. Laby's Factual Conclusions Are Not Admissible

A. Standard

Commission Rule of Practice 320 provides that the hearing officer "may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious."[15] As

[8] *Id.* at 10–16.
[9] *Id.* at 13–14.
[10] *Id.* at 3.
[11] *Id.* at 30.
[12] *Id.* at 30.
[13] *Id.* at 31, 34.
[14] *Id.* at 33.

explained by the Supreme Court in its opinion in *Daubert*, the Court must act as a gatekeeper to ensure that expert testimony — made by an expert with expertise in the field about which his testimony is offered — is "not only relevant, but reliable."[16]

Where an expert witness is making factual conclusions, those conclusions must be based upon his expertise in order to be relevant, i.e., helpful for the factfinder.[17] Further, expert testimony consisting of or based upon mere speculation is not reliable.[18] Expert testimony that is either irrelevant or unreliable is not admissible under *Daubert*.

The party offering the expert testimony bears the burden of establishing admissibility by a preponderance of the evidence.[19]

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[15] SEC Rules of Practice, Rule 320.

[16] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). *Daubert* applied only to scientific testimony, but the Supreme Court's subsequent decision in *Kumho Tire* extended *Daubert* to apply to virtually all expert testimony, saying that the ultimate objective of *Daubert* is "to make certain that an expert[] . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Although *Daubert* does not directly apply in SEC proceedings because it is based on Federal Rule of Evidence 702, Administrative Law Judges accord *Daubert* (and the federal court decisions interpreting *Daubert*) substantial weight in determining whether a proffer of expert testimony is sufficient under SEC Rule 320. *See Elliott v. CFTC*, 202 F.3d 926, 934 (7th Cir. 2000) ("*Daubert* and *Kumho Tire* were decided in the context of admissibility, but the principle for which they stand — that all expert testimony must be reliable — should apply with equal force to the weight a[n agency] factfinder accords expert testimony."); *see also In re H.J. Myers & Co., Inc., et al.*, AP File No. 3-10140, 2002 SEC LEXIS 2075, at *142–43 (Aug. 9, 2002) (citing *Elliott* and *Daubert* in holding a proffer of expert testimony to be unreliable under Rule 320).

[17] *See Arjangrad v. JPMorgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 71745, at *20–21 (D. Ore. May 23, 2012) (noting that "[e]xpert testimony is not helpful to a jury, and thus not relevant, when it addresses an issue that is within "the common knowledge of the average layman"" (citing *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001)).

[18] *See In re Albert Glenn Yesner, CPA*, File No. 3-9856, Release No. ID-184, 75 SEC Docket 220, at n.46 (May 22, 2011) (no weight given to testimony of auditing expert based on unsupported assumptions and speculation).

[19] *Daubert*, 509 U.S. at 592–93.

B. Mr. Laby's Factual Conclusions Are Not Admissible

Mr. Laby's expert report is predominantly comprised of his conclusions regarding the facts of the case, based upon Mr. Laby's personal interpretation of 1) the investigative testimony of various parties and 2) various documents provided to him by the Staff. Such testimony is a paradigm of the unhelpful and unreliable expert testimony that both Rule 320 and *Daubert* were promulgated to exclude.

For example, Mr. Laby offers his conclusion that a $20 million fundraising condition was in fact agreed to by the parties to the Proposed Transaction,[20] a conclusion that is strenuously disputed by the Respondents.[21] Mr. Laby bases his conclusion that the parties agreed to a $20 million fundraising condition upon the investigative testimony of Sean Burke and Mr. Laby's personal interpretation of correspondence between the parties that were provided to him by the Staff.[22] However, Mr. Laby nowhere claims any expertise in interpreting testimonial transcripts and/or correspondence. Indeed, Mr. Laby's conclusion is simply his interpretation of the evidence, and in offering such factual conclusions, Mr. Laby inappropriately usurps the role of the factfinder. Since Mr. Laby's conclusion is in no way supported by any expertise, it is accordingly unhelpful to the factfinder.[23] Such testimony is not relevant under Rule 320 and *Daubert*, and is therefore not admissible.

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[20] Ex. A at 21, 23, 25–26, 30, 34. It is noteworthy that Mr. Laby's conclusion is not supported by any of the documentary evidence to which he cites, none of which mention the Proposed Transaction.

[21] This inappropriate factual conclusion underpins Mr. Laby's subsequent — and similarly inadmissible — legal conclusions. *See infra* Section III.

[22] *See, e.g.*, Ex A at 21 (basing his conclusion that the $20 million fundraising condition existed upon Burke's testimony, two emails in which Mr. Page did not speak, and a letter from Mr. Page to Jim Quinn that nowhere mentions the Proposed Transaction).

[23] *See Arjangrad, supra.*

Mr. Laby also offers factual conclusions with respect to, among other things: 1) whether the deposits made by United to Mr. Page were "tied" to PageOne clients' investments in the United funds,[24] and whether United was able to close the Proposed Transaction without said investments;[25] 2) the roles played by various parties in developing PageOne's Form ADV amendments;[26] and 3) Mr. Page's understanding of United's financial health.[27] Like Mr. Laby's conclusion regarding the disputed $20 million fundraising condition, each of these factual conclusions is based entirely upon Mr. Laby's interpretation of investigative testimony transcripts and documentary evidence,[28] and are in no way supported by any relevant expertise.

Finally, in supporting some of his other factual and legal conclusions, Mr. Laby speculates regarding what Mr. Page "might have been" tempted to do when faced with the disputed $20 million fundraising condition.[29] Such speculation is as unhelpful and unreliable as Mr. Laby's other factual conclusions.[30]

Accordingly, Respondents respectfully submit that Mr. Laby's factual conclusions are not admissible under Rule 320.

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[24] Ex. A at 26, 35.
[25] *Id.* at 34.
[26] *Id.* at 18, 24–25, 34.
[27] *Id.* at 27.
[28] *See, e.g., id.* at 26 ("Documentary evidence shows that United's payments were tied to Page's clients investments in the Funds.").
[29] *Id.* at 23 (speculating that Mr. Page "was or might have been tempted to recommend the Funds" for improper reasons based on the disputed $20 million fundraising condition).
[30] *CFTC v. Moncada et al.*, 2014 U.S. Dist. LEXIS 88884, at *13 (S.D.N.Y. June 30, 2014) ("Expert testimony is admissible only when it would be helpful to the trier of fact; it is not helpful to have an expert, even one highly qualified, who opines about what a defendant's motives 'might' have been when the defendant himself has testified about what his motives in fact 'were.'").

III. Legal Conclusions Are Not Admissible

A. Standard

The Commission has repeatedly held that expert testimony that consists of legal conclusions is not admissible, as such testimony usurps the role of the judge.[31] The Commission's established stance that expert witnesses may not offer legal conclusions is in keeping with the holdings of the federal courts.[32] In addition to precluding experts from offering legal conclusions generally, the federal courts have specifically and routinely held an expert witness' interpretation of federal regulatory requirements to be inadmissible.[33]

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[31] *In re IMS/CPAs & Assocs.*, AP File No. 3-9042, 55 S.E.C. 436, 459–461 (Nov. 5, 2001) (affirming preclusion of expert testimony of whether respondent's Form ADV disclosures were legally sufficient); *In re Robert D. Potts*, AP File No. 3-7998, 53 S.E.C. 187, 208 (Sept. 24, 1997) (affirming preclusion of expert testimony regarding Commission's interpretation of roles and responsibility of concurring audit partner, because such"[m]ere opinion of the law" is inadmissible); *In re Pagel, Inc.*, AP File No. 3-6142, 1985 S.E.C. 223, 229–30 (Aug. 1, 1985) (affirming exclusion of expert testimony on issue of whether the respondents engaged in market manipulation, because such a determination was the province of the judge), *aff'd, Pagel v. SEC*, 803 F.2d 942, 947 (8th Cir. 1986).

[32] *See Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212–13 (D.C. Cir. 1997) (noting that "[e]xpert testimony that consists of legal conclusions cannot properly assist the trier of fact . . . and thus it is not 'otherwise admissible'"); *Kinder v. Acceptance Ins. Co.*, 423 F.3d 899, 905 (8th Cir. 2005) ("The opinions themselves were more or less legal conclusions about the facts of the case as presented to the experts [and therefore] the expert opinions were merely opinions meant to substitute the judgment of the district court. When the expert opinions are little more than legal conclusions, a district court should not be held to have abused its discretion by excluding such statements.") (citations omitted).

[33] *See Mola Dev. Corp. v. U.S.*, 516 F.3d 1370, 1739 (Fed. Cir. 2008) ("Because the proper interpretation of [federal] regulations is an issue of law, expert testimony relating to this question, such as the affidavit of a former government official, should not be received, much less considered.") (quotations omitted); *CFM Commc'n LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1234–37 (E.D. Cal. 2005) (noting that "[t]he meaning of federal regulations is a question of law, not a question of fact" in excluding an expert report that "read[s] like a legal brief" regarding FCC regulations); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042–46 (D. Ariz. 2005) (holding an expert "precluded from offering his opinion regarding the law that governs this case").

B. Mr. Laby's Legal Conclusions Are Not Admissible

Mr. Laby's report begins with a recitation of the standards of conduct for investment advisers, including the contours of the applicable fiduciary duties under which investment advisers conduct their businesses, as well an explanation of the structure of Forms ADV and the purpose for which Forms ADV are used.[34] Such a lecture, while perhaps appropriate background material for Mr. Laby's students, is superfluous and unhelpful as expert testimony submitted to this Court, which is fully knowledgeable about both Form ADV and the applicable standards of conduct at issue in this case.

In addition to his unhelpful background lecturing, Mr. Laby's report contains a number of legal arguments calculated to support the Staff's position that Respondents' disclosures were insufficient under the Advisers Act.

Mr. Laby frames his report with the conclusion that PageOne's Form ADV disclosures were "insufficient."[35] Mr. Laby says that one of the reasons he concludes the disclosures are insufficient is because the potential conflict of interest that existed by virtue of the Proposed Transaction was, in his opinion, "more complex, "more tangible," and "more severe" than the conflict(s) of interest disclosed in PageOne's Forms ADV.[36] Mr. Laby later concludes that the Proposed Transaction was "significant" and speculates that "investors" and "reasonable clients" "would want to know" about it, in an attempt to buttress the Staff's argument that PageOne's Forms ADV included material misrepresentations.[37] Finally, Mr. Laby argues that the Proposed Transaction giving rise to the potential conflict of interest alleged is not a "speculative" event, in

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[34] Ex. A at 10–16.
[35] *Id.* at 3.
[36] *Id.* at 30–31.
[37] *Id.* at 31, 34.

an attempt to dissuade the Court from applying the *Basic*[38] probability/magnitude calculus for speculative events when pondering the materiality of the Proposed Transaction's nondisclosure.[39]

Regarding Mr. Laby's conclusion that PageOne's Forms ADV were insufficient, the case law is clear that experts may not comment on the legal sufficiency of a respondent's Form ADV.[40] Mr. Laby's other legal conclusions are similarly unhelpful and inappropriate, as is Mr. Laby's attempt to persuade the Court to apply case law in a particular fashion.[41]

In addition to being unhelpful, Mr. Laby's legal conclusions are not supported by meaningful analysis tending to demonstrate the application of his professed expertise, which further counsels towards inadmissibility.[42]

Accordingly, Respondents respectfully submit that Mr. Laby's legal conclusions are not admissible under Rule 320.

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[38] *See Basic, Inc. v. Levinson*, 485 U.S. 224 (1985) (applying a probability/magnitude test in pondering the materiality of the nondisclosure of speculative and/or contingent events such as preliminary transactional negotiations).
[39] Ex. A at 33.
[40] *See In re IMS*, 55 S.E.C. at 459–61.
[41] *Moncada*, 2014 U.S. Dist. LEXIS 88884, at *15–16 (holding that the proffered expert "cannot testify about legal conclusions" because a judge "need[s] no held from a witness in order to decide issues of law").
[42] *See, e.g.*, Ex. A at 31 (arguing that "Page's conflict of interest is the kind of conflict investors would want to know and, therefore, industry professionals would consider it important" without citation or any explanation).

IV. Conclusion

WHEREFORE, for the foregoing reasons, Respondents respectfully request that the Court issue an Order (a) striking the portions of the Staff's Expert Report of Arthur B. Laby which consist of irrelevant and/or immaterial factual and/or legal conclusions, and (b) precluding Mr. Laby from offering testimony consisting of irrelevant and/or immaterial factual and/or legal conclusions at the anticipated hearing.

Dated: January 12, 2015
New York, New York

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS
EDGAR R. PAGE AND PAGEONE
FINANCIAL, INC.

EXHIBIT A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

File No. 3-16037

In the Matter of	:
	:
EDGAR R. PAGE and PAGEONE FINANCIAL, INC.	:
Respondents.	:

EXPERT REPORT OF ARTHUR B. LABY

I. Introduction and Summary of Opinions

I have been retained as an expert in *In the Matter of Edgar R. Page and PageOne Financial, Inc.*, File No. 3-16037, by the Division of Enforcement ("Division") of the Securities and Exchange Commission ("SEC" or "Commission"). This action is an Administrative Proceeding brought by the Division against Edgar R. Page ("Page") and PageOne Financial, Inc. ("PageOne"). In this action, the Division alleges that Page and PageOne breached their fiduciary duties and violated the federal securities laws when they recommended and sold interests in private funds sponsored by The United Group of Companies, Inc. ("United") without disclosing conflicts of interest to clients.

From at least 2009 to 2011, Page and PageOne recommended that certain clients invest in three private funds promoted and managed by United (the "Funds").[1] In 2008 and into early 2009, Page and Walter Uccellini, United's Chairman and owner, agreed that United – either directly or through an entity affiliated with United – would acquire PageOne or a significant part of PageOne, either through United or another entity affiliated with Uccellini.[2] I understand that the exact details of the acquisition, including the amount of stock United intended to acquire, the purchase price, and the timing of the transaction, changed over time. For example, I understand that United initially intended to acquire 100 percent of PageOne stock for a price of approximately $3 million, later agreed to purchase 49 percent for approximately $2.4 million, and later increased the purchase price to $3 million.[3]

[1] The Funds were DCG/UGOC Equity Fund, LLC; DCG/UGOC Income Fund, LLC; and United Group Income Fund II, LLC. *See* Div. Exs. 1-2, 57.

[2] All payments to Edgar Page were made by United. *See* Div. Ex. 102. However, at various times, the parties contemplated having Millennium-Page, a different entity, also controlled by Walter Uccellini, acquire shares of PageOne Financial, Inc. *See* Div. Exs. 32, 131. For convenience, all references herein to the acquisition of PageOne shares by United should be understood as references to Uccellini and Millenium-Page.

[3] *See* Div. Exs. 34, 38, and Page Testimony at 99-105, 116-17.

United began paying for this acquisition in approximately April 2009, by making a series of down payments on the purchase of PageOne. As part of this transaction, Page committed to raise between $18 and $20 million for the United Funds.[4] In addition, Page understood that United could not afford to make the down payments to Page without his continuing to raise investments for the Funds. Indeed, Uccellini repeatedly told Page that United and the Funds were in desperate need of cash infusions.[5] Page, therefore, had a conflict of interest – he had an incentive to sell the Funds to clients because, when he sold those Funds, it was more likely that he would receive additional down payments toward the purchase of his firm. Moreover, if Page's clients made a sufficient number of investments in the Funds, Page and United would conclude the sale of PageOne to United, thereby benefitting Page. In addition, United memorialized virtually all of the payments to Page with promissory notes, obligating Page to repay these down payments if the acquisition did not close. These conflicts of interest were not disclosed. Although at times Page made certain disclosures to investors about arrangements with United and the Funds, the disclosures he made were insufficient or false.

Part II of this Report summarizes my background, qualifications, and experience. Part III provides the basis for my Report, including material I reviewed. Part IV provides background information on investment advisers and their applicable standards of conduct. Part V contains background information on Page, PageOne, United, and the acquisition agreement between Page and United. Part VI contains my opinions regarding the standards of conduct expected of Page and PageOne. My opinions can be summarized as follows:

- Page and PageOne acted as investment advisers with respect to each of their clients.

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[4] *See* Div. Exs. 53, 62, 128.

[5] *See* Page Testimony at 108-109; *see also* Div. Exs. 35, 40, 41, 64, 67, 77, 129, 130, 133, 134, 145, 149, 158, 160.

- Page and PageOne owed significant duties to their advisory clients.
- Page and PageOne failed to act in accordance with standards applicable to investment advisers when advising clients and investing client funds:
    - They failed to disclose that they advised clients to invest in the Funds while United was in the process of acquiring all or part of PageOne, thereby creating a conflict of interest;
    - They failed to disclose that Page committed to invest a specific amount of his clients' assets in the Funds while United was in the process of acquiring all or part of PageOne, thereby exacerbating the conflict of interest;
    - They failed to disclose that United's payments to acquire PageOne were timed to Page's ability to invest his clients' assets in the Funds;
    - They failed to disclose that United had very limited liquidity and repeatedly expressed its desperation for cash to Page;
    - The structure of United's payments as loans to Page evidenced by promissory notes exacerbated the conflict of interest because Page was obligated to repay the money that United had advanced to him in the event that the United acquisition of PageOne was not consummated
    - Page's claimed "over disclosure" of the conflict of interest is inconsistent with industry practice
    - Page's and PageOne's conflict of interest that arose from recommending that clients invest in the Funds while United was in the process of acquiring all or part of PageOne was a conflict that most investors would consider significant; and
    - PageOne's Form ADV disclosures about Page's relationship with United show that Page acted inconsistently with the standards imposed on advisers, regardless of whether Page knew of the disclosures.

II. Qualifications, Experience, and Compensation

A. General Background

I am employed as Professor of Law by Rutgers University School of Law, where I have been a full time member of the faculty since 2006. Courses I have taught include Securities Regulation, Business Organizations, Fiduciary Law, Regulation of Mutual Funds, and Introduction to Business Concepts. The Securities Regulation and Mutual Fund courses include

discussion of the definition, functions, and duties of investment advisers under the federal securities laws. I also have taught at the George Mason University School of Law in Arlington, Virginia; the George Washington University Law School in Washington, DC; the Friedrich Schiller University Jena, in Germany; and the University of Augsburg, in Germany. My academic research focuses on securities regulation and the fiduciary relationship, including the standard of conduct expected of investment advisers.

I received a B.A., *magna cum laude*, from the University of Pittsburgh, where I was elected to Phi Beta Kappa. I received my J.D., *magna cum laude*, from Boston University School of Law, where I was an editor of the *Law Review*. After law school, I clerked for the Honorable J. Frederick Motz, United States District Court for the District of Maryland. From 1994 to 1996, I was a Fulbright Scholar in Germany, teaching and researching at two German law schools, mentioned above. I am licensed to practice law in Pennsylvania and in the District of Columbia.

B. Academic and Professional Experience

Before joining the Rutgers faculty, I served from 1996 until 2005 on the Securities and Exchange Commission staff in several capacities, most recently as Assistant General Counsel. In that position, I supervised lawyers responsible for advising the Commissioners, the SEC's General Counsel, and senior SEC staff on regulatory and enforcement matters including rule proposals, exemptive applications, and enforcement investigations and recommendations. In my role as Assistant General Counsel, I specialized in investment management. I advised the SEC on enforcement cases against investment advisers and investment companies, and on agency rulemaking related to investment advisers and investment companies. Serving in the Office of General Counsel provided broad and deep exposure to investment advisory practices, and to a variety of regulatory and compliance matters for advisers and investment companies. While

serving in the Office of General Counsel, I received the SEC Capital Markets Award and the SEC Chairman's Award for Excellence.

Before joining the Office of General Counsel, I worked in the SEC's Division of Investment Management, the Division that specializes in investment adviser regulation. I served as the supervisor of the Task Force on Investment Adviser Regulation and was responsible for rulemaking and other regulatory matters specific to the regulation of investment advisers. I have practiced law in Washington, D.C. at the law firms of Wilmer, Cutler & Pickering (now Wilmer Cutler Pickering Hale and Dorr), from 1991 to 1994; Pillsbury Winthrop Shaw Pittman, from 2005 to 2006; and Mayer Brown, from 2006 to 2009 (the Pillsbury practice group moved to Mayer Brown). My practice was in the securities law area and focused on investment adviser and broker-dealer regulation.

I regularly attend meetings, institutes, and conferences designed to address business law subjects at an advanced level. I am a member of the American Law Institute, the Business Law Section of the American Bar Association, and the Philadelphia Bar Association. Since 2013, I have served on the Board of Directors of the Certified Financial Planner Board of Standards, Inc. ("CFP Board") as a public member. The CFP Board is responsible for the certification and self-regulation of over 70,000 Certified Financial Planners. In my board position, I regularly come into contact with professionals in the investment advisory industry and discuss the standards of conduct that apply to investment advisory professionals. In 2011 and 2012, I served on the CFP Board Public Policy Council, advising the CFP Board on matters of public policy, including the application of the fiduciary standard to financial services providers. Since 2009, I have been a member of the Philadelphia Compliance Roundtable, and was past leader from 2011 to 2012. The Philadelphia Compliance Roundtable gathers regularly to discuss industry practice and member questions with regard to how the law applies to their firms on a day-to-day basis.

I recently concluded a three-year term on the Investment Management Regulation Committee of the New York City Bar Association. The Committee meets monthly to share information about how courts and regulators apply the law to investment companies and investment advisers. On occasion, the Committee submits comment letters to regulators to explain how a proposed rule would affect the industry. I am a member of the Business Associations and Securities Regulation Sections of the Association of American Law Schools ("AALS"). I am also a member, and past Chair, of the AALS Section on Scholarship. I belong to the SEC Historical Society and serve on its Board of Advisors and Museum Committee.

I have authored a number of publications and given presentations on topics relating to investment advisers, investment companies, and broker-dealers, the Investment Advisers Act of 1940 ("Advisers Act"), the Securities Exchange Act of 1934 ("Exchange Act"), the obligations imposed on advisers and brokers, and SEC rulemaking in the investment adviser and broker-dealer areas. My scholarship has appeared, among other places, as chapters in books published by Oxford University Press, Edward Elgar Publishing, and Sellier European Law Publishers, and as articles in the *Washington Law Review*, the *Boston University Law Review*, the *Villanova Law Review*, the *Review of Banking & Financial Law*, *The Business Lawyer*, the *American University Law Review*, the *Buffalo Law Review*, and the *Brooklyn Journal of Corporate, Financial and Commercial Law*. My work has been cited by the United States Court of Appeals for the Tenth Circuit, the *Restatement (Third) of Agency*, and the SEC, as well as in numerous academic and practitioner-oriented journals. A more complete list of my publications and presentations is included in my *curriculum vitae*, attached as Appendix 1.

I have spoken to many audiences in the United States on business law topics, including conferences and symposia sponsored by The Wharton School, Boston University School of Law, Brooklyn Law School, University of Pennsylvania Law School, Villanova University School of

Law, Temple University School of Law, and the University of Notre Dame College of Business. I have presented papers at the U.S. Department of the Treasury, the U.S. Department of Labor, and the SEC regarding the duties imposed on investment advisers and broker-dealers. I have spoken to overseas audiences on business and securities law matters, including talks sponsored by the Graduate School on Global Financial Markets at the Martin Luther University of Halle-Wittenberg in Germany; the International Working Group on the Liability of Asset Managers at Radboud University in Nijmegen, The Netherlands; the Düsseldorf Symposium on Economic Law in Düsseldorf, Germany; the Jagiellonian University in Krakow, Poland; and the Center for International Legal Studies, in Cape Town, South Africa.

I am also regularly asked to speak to industry and trade audiences about the application of relevant laws and rules to securities professionals. I have given such talks at the Practising Law Institute, the Financial Planning Association, TD Ameritrade, the German-American Lawyers Association, the Pennsylvania Public School Employees' Retirement System Board of Trustees, the Institute for the Fiduciary Standard, and the Institutional Investor Educational Foundation.

C. Expert Experience

I am regularly retained as an expert witness and legal consultant in securities and corporate law matters. I serve as a consultant to financial firms and financial services providers seeking to better understand the standards of conduct governing investment advisers. I was also engaged as an Independent Compliance Consultant on a matter related to compliance responsibilities of investment advisers and private funds. A list of matters in which I have testified or been deposed in the past four years is attached as Appendix 2.

D. Terms of Engagement

I have been engaged by the Division to provide expert services in *In the Matter of Edgar R. Page and PageOne Financial, Inc.*, File No. 3-16037. I am being compensated at the rate of $600 per hour. My compensation is not dependent on the outcome of this proceeding.

III. Basis for Statement of Opinions

I base this Report on my review of certain documents, records, filings, and other information related to this proceeding that were provided to me by counsel for the Division or publicly available. The documents on which I primarily rely include testimony transcripts and exhibits thereto, and certain of the Division's hearing exhibits ("Div. Ex."), such as the Amended Order Instituting Proceedings ("OIP"), the Answer to the Amended Order Instituting Proceedings ("Answer"), the Respondents' Wells Submission, and the Respondents' Supplemental Wells Submission. A list of these documents is set forth in Appendix 3. I also base this Report on my education, training, and experience in the financial services industry, and my background in the field of securities regulation and the regulation of investment advisers and broker-dealers.

IV. Background on Investment Advisers

A. Description of Investment Advisers

An investment adviser is a person or firm in the business of providing advice for compensation about investing in financial assets, such as stocks, bonds, mutual funds, private funds, or other assets. An adviser's activities can include recommending particular investments, monitoring the investments, discussing a client's financial objectives, assessing a client's financial situation, and providing financial planning services. Advisers are regulated on the federal level under the Investment Advisers Act of 1940 and on the state level by state statutes that vary across states.

Investment advisers can be either natural persons or firms. In the case of firms, the firm itself is typically considered an investment adviser, which contracts with advisory clients and registers as an adviser with the SEC. The firms' principals are also considered investment advisers, assuming they meet the description of investment adviser above. Thus, in an advisory firm, both the entity and certain individuals who work there are considered investment advisers. If registration is required, individual principals at the firm are not required to register. For administrative convenience, SEC registration by the firm suffices, although individuals may face registration requirements on the state level.

Every SEC-registered adviser must establish compliance policies and procedures and designate a chief compliance officer ("CCO"). The CCO administers the policies and procedures and oversees regulatory compliance. The CCO should be competent and knowledgeable about the Advisers Act and should be empowered with full responsibility and authority to develop and enforce the adviser's policies and procedures. The CCO also should have authority to compel others to follow the policies and procedures.[6] The CCO must review the adviser's policies and procedures at least annually to assess their effectiveness and consider compliance issues that have arisen over the past year.[7]

B. Standard of Conduct Applicable to Investment Advisers

1. Fiduciary obligation

Investment advisers are subject to strict standards of conduct by statute and under the common law. The primary federal statute regulating advisers is the Investment Advisers Act of 1940. Investment advisers are also governed by industry standards of practice, which both derive

[6] *See* Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003).

[7] *See* THOMAS P. LEMKE AND GERALD T. LINS, REG. OF INVESTMENT ADVISERS § 2:170 (Feb. 2014).

from and influence the law. There is a symbiotic relationship between legal standards and industry standards of conduct. Best practices and guidelines followed by responsible investment advisers inform courts and regulatory authorities. They also inform industry participants on how to comply with the law and satisfy obligations to clients and potential clients.[8]

Under both the law and recognized standards of conduct, investment advisers must operate under a fiduciary standard toward clients.[9] In practice, this means that advisers must act with a high degree of honesty and loyalty toward clients. The fiduciary obligation is often described as a "best interest" standard, meaning that an adviser must act in good faith toward the client and in the client's best interest. Acting in the client's best interest means subordinating the adviser's own interests to the client's interests.

The fiduciary standard of conduct requires advisers to provide disinterested advice. An adviser must make complete, full, and honest disclosure of all material facts. This disclosure includes a duty to disclose all material information to eliminate or disclose conflicts of interest.[10] The test of materiality is objective – the test is whether the information would "significantly alter the 'total mix' of information available" to a reasonable investor.[11] An adviser, however, must

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[8] In this Report, references to the obligations an adviser owes to clients should be read to include obligations owed to potential clients as well. *See* Investment Advisers Act §§ 206(1) and 206(2).

[9] SEC v. Capital Gains Research Bur., Inc., 375 U.S. 180, 191 (1963); TAMAR FRANKEL & ANN TAYLOR SCHWING, THE REGULATION OF MONEY MANAGERS: MUTUAL FUNDS AND ADVISERS 13-3 (2d ed. 2001 & Supp. 2013); Investment Adviser Association, Standards of Practice, "Fiduciary Duty and Other Responsibility," available at https://www.investmentadviser.org/eweb/dynamicpage.aspx?webcode=StandardsPractice.

[10] *Capital Gains*, 375 U.S. at 191-92, 194.

[11] *See* In the Matter of Montford and Co., Inc., Investment Advisers Act Release No. 3829, 2014 WL 1744130 at *14 (May 2, 2014), quoting Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).

disclose potential conflicts as well as actual conflicts.[12] And an adviser must disclose a conflict even if the adviser believes it will not result in harm.[13]

The client, not the adviser, is entitled to decide whether to waive a conflict after full disclosure.[14] An investor seeking investment advice must be permitted, through appropriate disclosure, to evaluate the adviser's "overlapping motivations" in deciding whether the adviser is serving "two masters," especially when one of them is the adviser's own self interest.[15]

The two primary categories of an adviser's fiduciary obligation are the duty of loyalty and the duty of care. Although the scope of an adviser's duty depends on the particular relationship, such as the degree of an adviser's control over a client's funds, all advisers must comply with the fundamental duties of loyalty and care.[16] The duty of loyalty is a duty not to profit at the principal's expense,[17] and not to deal adversely with the client.[18] The adviser's duty to avoid conflicts of interest, or at least to disclose them, fits neatly under the fiduciary duty of loyalty. The concern about conflicts is that an adviser might place its own interest before the client's interest. Addressing conflicts of interest, therefore, should always be "front and center" for every investment adviser.

The duty of care is the second component of the fiduciary obligation. The standard of care applied to many fiduciaries, including investment advisers, is the prudent person standard.[19]

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[12] Vernazza v. SEC, 327 F.3d 851, 859 (9th Cir. 2003).

[13] Monetta Financial Serv., Inc. v. SEC 390 F.3d 952, 955-56 (7th Cir. 2004).

[14] In the Matter of Freeley & Wilcox Asset Mgt. Corp., Investment Advisers Act Release No. 2143, 80 SEC Docket 1730, 2003 WL 22680907 (July 10, 2003).

[15] *Capital Gains*, 375 U.S. at 191-92, 196.

[16] FRANKEL & SCHWING, at 13-3 to 13-4, 16-15.

[17] RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. a (1959).

[18] RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006).

[19] FRANKEL & SCHWING, at 16-5 to 16-10.

Under the prudent person standard, an adviser must act with the care, competence, and diligence normally exercised by agents in similar circumstances.[20]

2. Form ADV

Form ADV is the uniform form investment advisers use to register with the SEC and the state securities authorities. The form has two parts, Part 1 and Part 2. Part 1 requires an adviser to complete information about, among other things, its business, ownership, clients, employees, business practices, affiliations, and any disciplinary problems of the adviser or its employees. Part 1 is organized as a check-the-box or fill-in-the-blank format. Although Part 1 is designed primarily for use by the SEC, it is available to the public on the SEC's website.[21] Form ADV Part 2 requires an adviser to prepare a brochure that contains information, such as the variety of advisory services offered, the adviser's fee schedule, disciplinary information, conflicts of interest, and educational and business background of key employees. Part 2 is designed for clients and must be delivered to them.[22] Before 2011, advisers had a choice when completing Part 2. They could either complete a check-the-box and fill-in-the-blank form provided by the SEC or they could prepare a narrative brochure containing the required information. After 2011, advisers no longer have a choice. After 2011, every adviser must complete a narrative brochure in plain English.

Form ADV, especially Part 2, is the primary disclosure document advisers provide to clients. When filed with the SEC, the disclosures are available to the public on the SEC's

[20] RESTATEMENT (THIRD) OF AGENCY § 8.08.

[21] SEC, Form ADV, available at http://www.sec.gov/answers/formadv.htm.

[22] SEC, Form ADV, available at http://www.sec.gov/answers/formadv.htm.

website.[23] The SEC encourages investors always to ask for, and review, both parts of Form ADV before hiring an investment adviser.[24]

Investment advisers use Form ADV to disclose to the SEC and investors a significant amount of information about the adviser. As discussed, the ADV calls for information about advisory services, fees, disciplinary information, conflicts of interest, and employee backgrounds. As explained more below, Page used the Form ADV not to make full disclosure about PageOne's advisory business, but rather to depart from the standard of care required of advisers. As will become clear, instead of honestly and fully disclosing conflicts of interest, Page failed to disclose conflicts he actually had and, instead, he fabricated information about his role and his conflicts of interest, which could mislead investors about his actual conflicts.

3. Well established standards of conduct

Certain standards of conduct are well established and well known among investment advisory professionals. Every adviser, and especially every CCO, know or should know that an adviser owes a fiduciary duty to clients. Every adviser knows, or should know, that advisers must disclose conflicts of interest, and how to disclose them, such as in the Form ADV or by another client communication. These requirements are regularly repeated in industry guidelines, which typically refer to an adviser's fiduciary obligation. The Investment Adviser Association, the trade association for SEC-registered investment advisers, like PageOne, has published Standards of Practice for the investment advisory profession. The standards state that "an investment adviser stands in a special relationship of trust and confidence with, and therefore is a fiduciary to, its

[23] SEC, Form ADV, available at http://www.sec.gov/answers/formadv.htm.

[24] SEC, Form ADV, available at http://www.sec.gov/answers/formadv.htm.

clients." The guidelines also state that an adviser has "an affirmative duty of care, loyalty, honesty, and good faith to act in the best interests of its clients."[25]

Similarly, the North American Securities Administrators Association, the umbrella organization for state securities regulators, has publicized information about investment advisers' fiduciary obligation. NASAA explained that the Advisers Act, NASAA's model rules, and most state laws impose an obligation on advisers to act as fiduciaries. According to NASAA, this requires an adviser to hold the client's interest above the adviser's own interest and to avoid conflicts of interest. If conflicts cannot be avoided, an adviser must clearly describe the conflict and how the adviser will address it.[26]

It was known at PageOne that these standards are well understood in the industry. Sean Burke, who worked for Page, was asked during his testimony why he believed that the acquisition arrangement between Page and United, discussed below, should be disclosed to clients. Burke stated that if an adviser is receiving money for an investment, the conflict must be disclosed. When pressed on why he believed that, Burke responded by saying, "It's common knowledge in our industry . . . ."[27] In addition, PageOne's Policies and Procedures, dated March 12, 2010, stated that "[o]ur firm's Disclosure Document provides information about . . . any actual and potential conflicts of interest, among other things."[28]

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[25] *See* IAA Standards of Practice, available at http://www.investmentadviser.org/eweb/dynamicpage.aspx?webcode=StandardsPractice.

[26] *See* NASAA, Investment Adviser Guide, available at http://www.nasaa.org/industry-resources/investment-advisers/investment-adviser-guide.

[27] Burke Testimony at 120.

[28] Div. Ex. 154 at SEC-PageOne-E-0095042.

4. Implementing advisers' duties in practice

It is an adviser's responsibility to determine whether and when it has a conflict and what to do about it. Most advisers have policies and procedures to help determine whether a conflict exists. Many firms, for example, require employees to avoid outside activities, interests, or relationships that can lead to a conflict or create the appearance of a conflict. In some cases, determination of whether a conflict exists is made by the CCO. In addition, many firms provide that if an employee notices a potential conflict, the employee must alert the CCO, who will review the matter, conduct any necessary investigation, and determine what steps must be taken. Typically, the CCO maintains records of potential conflicts, including the ultimate resolution.

When an unavoidable conflict arises, an adviser must determine how to disclose the conflict to clients. This requires determining the substance and timing of the disclosure and whether it will be oral or in writing. These decisions typically are made by the CCO and the relevant business or operational employees familiar with the conduct giving rise to the conflict. In any case, disclosure must be clear, simple, and easy to understand.

In sum, standards applicable to and practiced by investment advisers derive from the law, as securities industry and compliance professionals seek to ensure compliance with the law. Applicable standards also derive from custom and practice. Advisers seeking to determine what constitutes a conflict and how it must be disclosed look to custom and practice. As discussed below, an example of a conflict of interest that must be disclosed is an adviser's relationship with managers of a private fund when the adviser is recommending the private fund to clients. As I explain, if an adviser does not make such disclosure, the adviser would not be acting in accordance with industry practice.

V. Background on Edgar Page, PageOne Financial, United Group of Companies, and the Acquisition Agreement

In this section of the Report, I provide background information on Page, PageOne, United, and the acquisition agreement whereby United agreed to acquire at least a portion of PageOne. Unless otherwise clear from the context, references in this Report to Page or PageOne should be read to include Both Page and PageOne.

A. Edgar Page

Page has significant experience in the securities industry. He began his career in 1982 with First Investors Corporation as a broker-dealer registered representative and moved to American General, also as a registered representative. From 1982 to 1991, he managed client funds on a discretionary basis. In the mid-1980s, Page registered with New York State as an investment adviser.[29] Page has a history of disciplinary actions brought against him by regulators. FINRA materials I reviewed indicate eight disciplinary matters brought against Page from 1987 to 2008.[30]

B. PageOne Financial

PageOne Financial is a New York corporation headquartered in Malta, NY.[31] PageOne is an SEC-registered investment adviser; its predecessor has been registered since 1986.[32] Formerly, PageOne was called North American Capital Timing ("NACT").[33] In September 2002, Page purchased NACT from Gordon D'Angelo for approximately $2 million. In 2003, Page changed

[29] Page Testimony at 10-12.

[30] Div. Ex. 115.

[31] OIP ¶7, Answer ¶7.

[32] OIP ¶1, ¶7, Answer ¶1, ¶7.

[33] Burke Testimony at 9.

NACT's name to PageOne Financial.[34] By 2009, PageOne was an SEC-registered investment adviser and Page was sole owner. He also acts as PageOne's Chairman, CEO, COO, lead portfolio manager, and Chair of the Investment Committee. During the period January 2009 through September 2011 (as well as at other times), he acted as the firm's CCO as well.[35] At PageOne, Page had ultimately responsibility for clients' investment decisions.[36] He also had ultimate responsibility for the Form ADV, approving final changes to the filing.[37]

Starting in early 2009 and ending in September 2011, Page recommended that certain clients invest in the Funds co-managed United.[38] Clients invested a total of approximately $12 to $15 million in the Funds.[39]

PageOne disclosed certain information about fees it received in connection with clients' investments in the Funds.[40] From July 31, 2009 to September 14, 2010, PageOne's disclosure read, in part, as follows: "PageOne Financial does not directly charge the client a fee for this service. PageOne Financial is compensated by a referral fee paid by the Manager of the Private Fund(s) in which its clients invest . . . . PageOne Financial will typically receive, on an annual basis, a referral fee of between 7.0% and 0.75% of the amount invested by the client in the applicable Private Fund(s)."[41] PageOne's investment advisory agreements with clients contained similar disclosure.[42]

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[34] Burke Testimony at 11; Page Testimony at 17-20.

[35] *See* Div. Exs. 4, 162; Page Testimony at 24-25; OIP ¶6, Answer ¶6; *see also* Burke Testimony at 24.

[36] Burke Testimony at 15.

[37] Burke Testimony at 19.

[38] OIP ¶12, ¶37, Answer ¶12, ¶37; Burke Testimony at 85-87.

[39] Burke Testimony at 95; Page Testimony at 47-48.

[40] Burke Testimony at 151-52; Div. Ex. 14 at 10.

[41] Div. Ex. 14 at 10.

[42] Div. Ex. 107 at § 15.

In 2010, PageOne revised its Form ADV disclosure and eliminated the reference to receiving a 7 percent referral fee.[43] The Form ADV continued to state that "Registrant is compensated in the Alternative Investment Program by a referral fee paid by the private investment fund in which the client is invested."[44] The revised disclosure stated that the annual fee charged to clients investing in the Funds would be a 1 percent annual fee. Also in 2010, PageOne's Form ADV contained a disclosure stating, "PageOne Financial will act as a solicitor for certain private investment funds, and for doing so will receive a referral fee."[45] PageOne's September 2010 Form ADV also stated that Page was a paid consultant to United.[46]

C. United Group of Companies

United Group of Companies is a real estate firm founded in 1972. United is involved in several phases of the real estate business, such as development, finance, acquisition, and management. Its properties include senior living facilities, student housing, commercial properties, and others. Among its finance-related activities, United manages private funds.[47] A private fund is an entity that holds a pool of securities or other assets but that neither registers its offerings of securities with the SEC nor registers as an investment company with the SEC.[48] Private funds can be contrasted with public funds, such as mutual funds, which register with the SEC as investment companies and sell shares to the public.

From 2008, United co-managed two private Funds, which provided funding for the building of college housing and senior housing facilities. One fund was the DCG/UGOC Income

[43] Div. Ex. 48, Schedule F at 11.

[44] Div. Ex. 48, Schedule F at 3.

[45] Div. Ex. 48, Schedule F at 17.

[46] Div. Ex. 48, Schedule F at 13.

[47] Div. Exs. 1, 2, 57; *see* Peterson Testimony at 12-13.

[48] SEC STAFF, STUDY ON IMPLICATIONS OF THE GROWTH OF HEDGE FUNDS ("HEDGE FUND STUDY") 3 (Sept. 2003).

Fund, LLC ("Income Fund").[49] The Income Fund raised money through a private placement of securities and paid a nine percent dividend.[50] Another United private fund was the DCG/UGOC Equity Fund, LLC ("Equity Fund").[51] This fund also raised money through a private placement.[52] It paid no dividend but provided an opportunity for greater return.[53] During the relevant time period for this matter, United was run by two individuals, Walter Uccellini and James Quinn.[54] Uccellini owned the majority of the Funds.[55] In January 2011, United also established the United Group Income Fund II, LLC ("Income Fund II").[56]

D. The Acquisition Agreement

In early 2009, Page and Uccellini agreed that United would acquire some portion of PageOne.[57] Although the precise terms of the acquisition appear to have fluctuated, by January 2009, United agreed to pay Page approximately $3 million for 100 percent of PageOne.[58] By March 2010, the price had increased and United agreed to acquire 49 percent of PageOne for approximately $2.4 million.[59] Later, the acquisition price again increased, this time to $3 million for 49 percent of the firm.[60]

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[49] Div. Exs. 1-2; *see* Page Testimony at 37-38, 43-44.

[50] Div. Exs. 1-2.

[51] Div. Exs. 1-2; *see* Page Testimony at 37-38, 43-44.

[52] Div. Exs. 1-2.

[53] Burke Testimony at 50-51.

[54] Burke Testimony at 50-51.

[55] Page Testimony at 43; *see also* Div. Ex. 1 at 13

[56] Div. Ex. 57.

[57] Burke Testimony at 54-55; OIP ¶2, Answer ¶2.

[58] Page Testimony at 99-105, 139; Div. Ex. 9.

[59] Div. Exs. 34, 38.

[60] Page Testimony at 116-17.

In addition, United agreed to pay make down payments for United's acquisition of PageOne.[61] These payments often, but not always, were 7 percent of the amount PageOne clients invested into the Funds.[62] As part of the acquisition, Page further committed to raise approximately $18 million for the Funds.[63] Once he completed raising $18 million for the Funds, United would complete its purchase of 49 percent of PageOne.[64] The parties later increased the amount that Page agreed to raise to $20 million.[65]

United and Page documented United's down payments for the 49 percent interest in PageOne through a series of promissory notes.[66] The payments, therefore, appeared to be loans from United to Page. This arrangement was intended to protect United. If Page and United did not complete their transaction, Page would repay the notes.[67] If the parties completed the transaction, United would cancel the notes, Page would keep the funds, and United would acquire 49 percent of PageOne.[68] In the end, the acquisition never occurred and, as expected, United has sought repayment of the promissory notes in the amount of $2,751,345 in principal and $933,486 in interest.[69]

VI. Expert opinions

This Part of the Report discusses ways in which the conduct of Page and PageOne departed from generally acceptable conduct of investment advisers. The conduct departed from

[61] Burke Testimony at 56, 156.

[62] *See, e.g.*, Div. Ex. 21.

[63] Div. Exs. 53, 62, 128.

[64] Burke Testimony at 57-58; Div. Ex. 128.

[65] Div. Exs. 53, 62.

[66] Div. Ex. 102; OIP ¶2, ¶16, Answer ¶2, ¶16; Burke Testimony at 114-15.

[67] *See* Div. Ex. 94 at 5; Page Testimony at 140-41; Burke Testimony at 115.

[68] *See* Page Testimony at 140-41, 142-43; OIP ¶16, Answer ¶16.

[69] Div. Ex. 91; OIP ¶38, ¶39, Answer ¶38, ¶39.

generally acceptable conduct when Page and PageOne failed to disclose the arrangement whereby Page was attempting to sell 49 percent of his advisory firm to United while, at the same time, recommending that his clients invest in the Funds.

A. Page and PageOne Were Acting as Investment Advisers and Owed Duties Applicable to Investment Advisers

PageOne was an SEC-registered investment adviser and conducted investment advisory activities. Thus, there can be no question that the firm was an investment adviser. Page was PageOne's Chairman, CEO, COO, lead portfolio manager, and Chair of the Investment Committee. He regularly provided investment advice to clients and was ultimately responsible for investment recommendations. As a result, Page was an investment adviser as well. As investment advisers, Page and PageOne owed significant duties to clients outlined above. Each was a fiduciary to clients and each owed duties, among others, of full and fair disclosure of all material facts to clients.

B. Page and PageOne Failed to Act in Accordance with Standards Applicable to Investment Advisers when Advising Clients and Investing Client Funds

1. Page and PageOne failed to disclose that they advised clients to invest in the Funds while United was acquiring 49 percent of PageOne, thereby creating a conflict of interest

Page had a conflict of interest because he advised his clients to invest in the Funds while United was in the process of acquiring 49 percent of PageOne. As an investment adviser, Page had a duty to recommend securities that were in his clients' best interest. Page advised his clients to invest in the Funds. At the same time, however, Page was trying to complete the sale of 49 percent of his firm to United. Moreover, Page had committed to raising $18-20 million for the Funds and United would complete the sale if Page satisfied his commitment. Thus, the more Page's clients invested in the Funds, the closer Page was to selling 49 percent of his firm.

This situation presented a classic conflict of interest for Page. Page had a duty to recommend securities in his clients' best interest. At the same time, he was trying to sell 49 percent of his firm to United and he knew that the sale would only occur if a sufficient number of his clients invested a sufficient amount in the Funds. Consequently, Page was or might have been tempted to recommend the Funds not because the Funds were the best investment for clients, but rather because investing in the Funds increased the likelihood that Page would complete the sale of 49 percent of his firm to United, which would result in a personal benefit for Page.

Page did not disclose this conflict. In fact, Page insisted that he need not disclose the impending sale of his firm.[70] Page testified that he believed information about the transaction was confidential; he refused to tell clients about what he said was a private contractual arrangement to sell the firm.[71] A careful look at Page's disclosures shows that Page either made no disclosure with regard to United's impending acquisition of PageOne, or Page disclosed that he received referral fees from United, or he disclosed that he was a consultant to United. He did not disclose – in the Form ADV or elsewhere – that he recommended that clients invest in the Funds while United was attempting to purchase 49 percent of PageOne.

In 2009 and in the first half of 2010, Page disclosed that PageOne will receive "a referral fee" of between 7.0% and 0.75% of the amount invested in the applicable private Fund.[72] This same disclosure appeared in PageOne's investment advisory agreements with clients.[73] According to Page, however, the payments he received were not fees for referring clients to the Funds; they

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[70] Burke Testimony at 121.

[71] Page Testimony at 118; *see also* Div. Ex. 87 (Response to Item 6).

[72] *See* Div. Exs. 14, 39, and 47.

[73] Div. Ex. 107 at § 15.

were down payments on the acquisition of 49 percent of PageOne.[74] Similarly, according to Burke, payments received were not referral fees, they were down payments on the purchase price of 49 percent of PageOne.[75]

In September 2010, Page revised his Form ADV disclosure to state that he was acting as a consultant to United. According to Page, however, he never served as a consultant to United.[76] Any such disclosure was erroneous. Also, according to United, the company had no consulting arrangement with Page and never paid consulting fees to him.[77] As discussed above, the Form ADV disclosures (or lack of them) were ultimately Page's responsibility. For most or all of the relevant time, Page was CCO and gave final verbal approval of changes made to the firm's Form ADV.[78]

Apparently, Page was aware of PageOne's Form ADV disclosure. PageOne received assistance in preparing and filing its Form ADV from National Regulatory Services ("NRS"), a compliance consulting firm. To arrive at language for the Form ADV, Burke testified that he discussed with NRS the arrangement between Page and United.[79] Burke recalls telling NRS that payments United made to Page were down payments on the purchase of PageOne.[80] After NRS prepared disclosure language, Burke reviewed the language with Page. In addition, Page

[74] *See* Page Testimony at 65; Wells at 10 (stating that PageOne did not receive referral fees); OIP ¶22, Answer ¶22.

[75] Burke Testimony at 152.

[76] Page Testimony at 82.

[77] Div. Ex. 86.

[78] Burke Testimony at 24, 30.

[79] Burke Testimony at 42-43.

[80] Burke Testimony at 145.

participated on phone calls with NRS when the language was finalized.[81] Page testified that it was standard practice for him to review the language in the Form ADV.[82]

Page did not disclose the conflict of interest that arose from recommending investments in the Funds while United was attempting to purchase 49 percent of PageOne. The disclosures that Page made with regard to his relationship with United were untrue and did not inform investors of Page's actual conflict. As the leader of an investment advisory firm, Page is responsible for the statements in the Form ADV. Thus, even if Burke disclosed the relevant facts to NRS, and NRS suggested or provided disclosure language, if the Form ADV disclosures were false, Page, like any prudent adviser, had a responsibility to revise the disclosure so that it was honest and correct.

2. Page failed to disclose that he committed to invest a specific amount of his clients' assets in the Funds while United was acquiring 49 percent of PageOne, thereby exacerbating the conflict of interest

As discussed, Page faced a conflict because he advised clients to invest in the Funds while United was in the process of acquiring 49 percent of PageOne. Moreover, the conflict was exacerbated because Page committed to invest a specific amount of assets, $18-20 million, in the Funds. This commitment worsened the conflict because Page had an undisclosed incentive to invest his clients' assets in the Funds so that Page could reach his specific goal of raising $18 million for the Funds. Once Page satisfied his commitment, United would complete the purchase of 49 percent of PageOne.

The commitment to raise $18-20 million exacerbated the conflict. The concern is that Page was investing his clients' assets in the Funds because Page had to meet his commitment to raise money for the Funds, not because the investment was in his clients' best interest. Page did

[81] Burke Testimony at 42-43.

[82] Page Testimony at 63.

not disclose that he committed to raise $18-20 million from clients for the Funds as part of United's acquisition of PageOne stock.[83]

3. Page failed to disclose that United's payments to acquire 49 percent of PageOne were timed to Page's ability to invest client assets with the Funds

Not only did Page fail to disclose that he advised his clients to invest in the Funds when United was acquiring PageOne, he also failed to disclose that the payments he received from United were tied closely to his ability to raise money for the United private placements. In other words, Page would often receive funds from United only after Page was able to secure an investment in the Funds. This too exacerbated Page's conflict because he was receiving a tangible undisclosed benefit from United each time a client invested in the Funds.

Documentary evidence shows that United's payments to Page were tied to Page's clients' investments in the Funds. An email dated September 22, 2009 from Tim Quinn to Walter Quinn, with Page in the subject line, provides amounts invested by Page's clients and corresponding amounts, based on a 7 percent calculation, owed to Page.[84] The email indicates that United "collected" $212,000 and that a "commission" was paid of 7 percent of $212,000, or $14,840. A contemporaneous promissory note, dated September 14, 2009, reflects a loan to Page of $14,840.[85] Additional documentation in the record shows a pattern of investments in the Funds and payments shortly thereafter to Page.[86]

Uccellini confirmed the arrangement whereby United would make payments to Page after Page's clients invested in the Funds. Uccellini's October 2, 2010 email to John Mineaux, copied

[83] Burke Testimony at 133.

[84] Div. Ex. 21.

[85] Div. Ex. 102.

[86] *See* Div. Ex. 22 and a promissory note, dated October 14, for $55,000 in Div. Ex. 102; *see also* Div. Ex. 24 and promissory note, dated Dec. 4, 2009 for $58,100 in Div. Ex. 102. (The individuals named in the Div. Ex. 24 email were Page clients.) Page Testimony at 156.

to Page, confirms that Uccellini would not complete the acquisition of 49 percent of PageOne until Page raised additional funds for United.[87] Uccellini wrote, "I would like to complete the acquisition of the entity as soon as Ed is able to raise the necessary funds to finalize it . . . ."[88] Moreover, Burke testified that money Page raised for the Funds was tied directly to payments United made to Page as down payments on the purchase of 49 percent of PageOne.[89]

In addition, Page understood that United was having a liquidity crises. Page testified to this. Moreover, from 2009 through 2011, Uccellini repeatedly emailed Page explicitly about his desperation to raise money.[90] Thus, Page understood – but failed to tell his clients – that unless his clients invested in the Funds, United was unlikely to have the cash on hand to make the acquisition down payments to Page.

4. The structure of United's payments as loans evidenced by promissory notes exacerbated Page's conflict

As discussed, United's payments to Page were documented by a series of promissory notes Page gave to United. Accordingly, if the acquisition did not close, Page would be personally liable to repay the funds to United. Page, therefore, had a significant incentive to raise the full $18 million, later $20 million, for United; if he failed to raise this full amount, the acquisition may not close and Page would be faced with a significant outstanding debt owed to United. The fact that Page would have to repay the significant sums set forth in the promissory notes gave him additional incentive to ensure that his clients invested in the Funds. Yet none of these incentives was disclosed to clients. Perhaps this conflict would have been less severe if

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[87] Div. Ex. 53.

[88] Div. Ex. 53.

[89] Burke Testimony at 73.

[90] *See* Page Testimony at 108-109; *see also* Div. Exs. 35, 40, 41, 64, 67, 77, 129, 130, 133, 134, 145, 149, 158, 160.

Page disclosed the arrangement, including the existence of the promissory notes, to his investors. According to Page, however his clients were not told of the promissory notes.[91]

5. Page's claimed "over disclosure" of the conflict of interest is inconsistent with industry practice

Page claims that although he did not disclose the conflict of interest discussed in this Report, he disclosed a different conflict of interest, which, he claims, is more severe than his actual conflict. Thus, Page claims that he "over disclosed" his conflict to his investors.[92] But disclosure of a conflict of interest, which does not exist, does not eliminate the obligation to disclose a real conflict of interest, which does exist. An adviser has an obligation to be truthful to clients.[93] It is inconsistent with this obligation to make disclosures, which are falsehoods, regardless of the adviser's motivations for making the false disclosures.

Page's motivations are not relevant to the obligation to act in accordance with professional customs and practices. As the Supreme Court has explained, the intent that must be established to demonstrate that an adviser acted wrongly is not an intent to cause injury. The fact that the adviser had "the best of motives" and believed he was doing right by a client will not absolve the adviser of the need to make full disclosure, if he intended to mislead the client.[94] Page's motive is irrelevant. His acts were inconsistent with industry norms even if he undertook them in an attempt to serve his investors' interests.[95]

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[91] OIP ¶33, Answer ¶33.

[92] Div. Ex. 94 at 5 (Page's Wells submission noting that "[u]nderstanding that United's earnest money payments could be misconstrued, PageOne followed the commonly used approach of 'over-disclosing' on Form ADV, first by saying that PageOne would be receiving 'referral fees' from United, and later by amending the Form to say that Mr. Page was being paid as a consultant to United.").

[93] Evan's v. Union Bank of Switzerland, 2003 WL 23109774 (E.D. La. Dec. 29, 2003); Jones v. Dana, 2006 WL 1153358 (S.D.N.Y. May 2, 2006).

[94] SEC v. Capital Gain Research Bur., Inc., 375 U.S. 180, 192 n.39.

[95] SEC v. Koenig, 557 F.3d 736, 740 (7th Cir. 2009).

In addition, Page's own testimony contradicts the claim that he "over disclosed" his conflict of interest. Page testified that the statement in the Form ADV that he was a consultant was an error and the statement was removed from the disclosure. The Form ADV, dated September 14, 2010, stated that Page was employed as a consultant to United.[96] Page, however, testified that he was "never" a consultant to United.[97] He testified that this disclosure was an oversight and inaccurate, and that Burke failed to remove the language. He stated that he was questioned by the SEC staff and was "surprised to find it in there."[98] Page also testified that "referral fee" was a business term he and United had discussed but ultimately avoided because receiving referral fees would require Page to renew his securities license and associate with a broker-dealer.[99] This account was confirmed by United. United told the SEC by letter, dated November 3, 2011, that United "does not have and has not had any consulting arrangement with Edgar R. Page and has not paid any consulting fees to Mr. Page in connection with any consulting services."[100] Furthermore, in my opinion, it is not generally accepted industry practice for an investment adviser to "over disclose" a conflict by disclosing a different conflict that the adviser does not actually face.[101]

Thus, although Page disclosed at one point that he was receiving referral fees from United, and at another point that he was a consultant to United, both of these statements were false. Page did not disclose his actual conflict, namely that he was recommending the Funds at the same time that United was attempting to purchase PageOne. Moreover, Page had an ongoing

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[96] Div. Ex. 48 at 13.

[97] Page Testimony at 82.

[98] Page Testimony at 82-83.

[99] Page Testimony at 56-57, 68-70, 80-81.

[100] Div. Ex. 86.

[101] Such a practice would be contrary to the requirement that an adviser disclose all actual and potential conflicts.

obligation to tell the truth. An adviser's obligation does not cease the moment the adviser recommends a particular security. In many cases, a client may deliberate for days or weeks about an investment recommendation. It is during this deliberation period that an adviser's disclosures can be most significant to the client, particularly if the investor, during this period, is doing his or her due diligence on the adviser. Thus, after a specific investment has been made, an adviser has an ongoing duty to disclose all actual and potential conflicts to clients. An adviser has an ongoing duty to ensure its disclosures are accurate.

Finally, in my opinion, Page's actual conflict was different than the conflict that arises when one receives a referral fee. Referral fees represent a conflict as well, but the conflict created by a referral fee is qualitatively different from the conflict posed in Page's case. A referral fee, much like a commission, is a simple economic benefit, a particular dollar payment to an adviser when a client makes a purchase. In Page's case, the conflict was more complex and more severe. Page was seeking to sell 49 percent of his firm. This sale was a significant transaction. Moreover, Page had committed to raise $18-20 million as part of the acquisition. Thus, if a sufficient number of Page's clients invested enough money in the Funds, the transaction would close (or would be more likely to close). The conflict, therefore, was more severe than the conflict that arises from the payment of a referral fee. The payment of a referral fee is linear in the sense that one additional sale yields one additional referral fee payment. In Page's case, investments in the Funds would build until they were sufficient to tip the scales and lead United to close the transaction. The pressure on Page to sell interests in the Funds, therefore, was greater than if he were merely receiving commissions.

Moreover, because of the promissory notes, if United did not complete its acquisition of PageOne shares, Page was responsible to repay the amounts he had already received. Thus, Page

faced additional pressure, not just to gain additional future payments, but also to avoid having to repay the monies he had already received.

The same is true with respect to the disclosure that Page was a consultant. Although acting as a consultant can lead to a conflict of interest, the conflict is qualitatively different than the conflict in Page's case. If a client is told that an adviser acts as a consultant to a fund manager, the client may be on notice that the adviser has a relationship with the fund manager, and perhaps would be predisposed to recommend the fund manager's funds over other investments. The conflict in Page's case, however, is more tangible and more severe because Page would receive a large economic benefit (the sale of 49 percent of this firm) as long as a sufficient number of Page's clients invested in the Funds. Page's disclosure, therefore, was inconsistent with the standard of full and honest disclosure that is accepted in the advisory profession.

6. Page's conflict of interest when recommending that clients invest in the Funds while selling 49 percent of his firm to United was a conflict that most industry investors would consider significant

Page's conflict of interest is the kind of conflict investors would want to know and, therefore, industry professionals would consider it important. Investment advisers know that, as fiduciaries, they must disclose conflicts to clients. Advisers understand that advisory clients expect honest, unbiased advice. If an adviser has a secret motive or the appearance of a secret motive – a reason for a recommendation other than the client's best interest – the adviser must be forthright and disclose it. Without disclosure, advisers know that clients will assume the adviser is acting in the client's best interest.

In Page's case, there was a clear motivation for recommending the Funds that went beyond the clients' best interest. If a sufficient number of clients invested a sufficient amount of assets in the Funds, Page would receive a personal benefit; he could sell 49 percent of his

advisory firm to United and he would be absolved from his obligation to repay the promissory notes. That personal benefit to Page gives him a reason, or a potential reason, to recommend the Funds. This conflict is a typical conflict a reasonable client would want to know about. The client should be able to evaluate the adviser's "overlapping motivations" when deciding whether to invest.[102] As a result, for this reason, and others in this Report, Page's conduct was inconsistent with the conduct of a prudent investment adviser acting with the care, competence, and diligence normally exercised by investment advisers.

By Page's own admission, he disclosed to a very few clients, who invested in the Funds, that he was selling an interest in his advisory firm to United.[103] This demonstrates that some investors were interested in the information. The disclosure to some clients and not others is also evidence of an independent breach of fiduciary duty. An adviser has an obligation to treat clients equitably and not to advantage some over others, absent disclosure. By making disclosure to select clients – if he actually made the disclosure – Page favored some over others.

In addition, Page owed a duty to prospective clients as well as actual clients. Thus, even if Page disclosed his conflict to certain clients, the Form ADV was shorn of any reference to Page's actual conflict. Page intended the Form ADV to be used by potential clients. The failure to make honest and accurate disclosure in the Form ADV, therefore, means that he was not acting consistently with his duties to potential clients, who also are entitled to full and fair disclosure of all potential and actual conflicts.

[102] *Capital Gains*, 375 U.S. at 191-92, 196.

[103] *See* Page Testimony at 122.

I have seen Page's argument that he was not required to disclose the sale of 49 percent of his firm because preliminary merger negotiations need not be disclosed.[104] The point about disclosure of preliminary merger negotiations, however, is not relevant to Page's situation. The general point about merger negotiations is that an operating company is not necessarily required to disclose preliminary merger negotiations to investors, who are investing in the securities of a company that is the subject of a merger. Page's situation, however, is different. In the preliminary merger context, the potential merger is speculative. The need to disclose a speculative event turns on balancing the probability that the event will occur and the magnitude of the event in the context of the size of the overall company.[105] Thus, although a merger might be an event of great magnitude for a company, if the probability that the merger will occur is slim, a "probability times magnitude" approach could suggest that disclosure is not required.

In Page's case, however, the conflict of interest to be disclosed was not speculative. The conflict already existed and it was palpable and tangible for Page. Page recommended that his clients invest in the Funds at the same time that Page was motivated to make this recommendation for his own personal reasons rather than the clients' best interest. In addition, Page owed a duty of total candor to his advisory clients. He could have eliminated the conflict simply by not recommending the Funds to his clients.

As explained above, the question for Page was not simply whether to disclose that 49 percent of PageOne would be purchased by a buyer. The key point is that Page was recommending that his clients invest in private Funds managed by the very same people, who were planning to purchase 49 percent of PageOne and were in the process of paying Page for

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[104] *See* Div. Ex. 94 at 11-12; Div. Ex. 97 at 2.

[105] *See* Basic, Inc. v. Levenson, 485 U.S. 224, 238 (1988).

those shares. Moreover, the ability of United to complete the purchase of PageOne depended on whether a sufficient number of PageOne clients invested in the Funds. Page's conflict of interest had little or nothing to do with whether an operating company must disclose potential merger negotiations.

7. Regardless of whether Page knew about the ADV disclosure, he acted inconsistently with the standards imposed on advisers

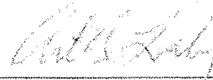
If Page was aware of PageOne's Form ADV disclosures, then Page also was aware that the disclosures were false. He testified that he did not receive "referral fees" from United and was not a consultant to United. Thus, if he was aware that the Form ADV contained those falsehoods, his actions were not consistent with the conduct expected of investment advisers. If Page did *not* know about the disclosures, then he and his firm suffered a significant compliance failure. Page, as the head of the firm, was ultimately responsible for the Form ADV disclosures. If Page claims that he was unaware of the disclosures, then he was not acting as an honest, diligent, and prudent investment adviser.

VII. Conclusion

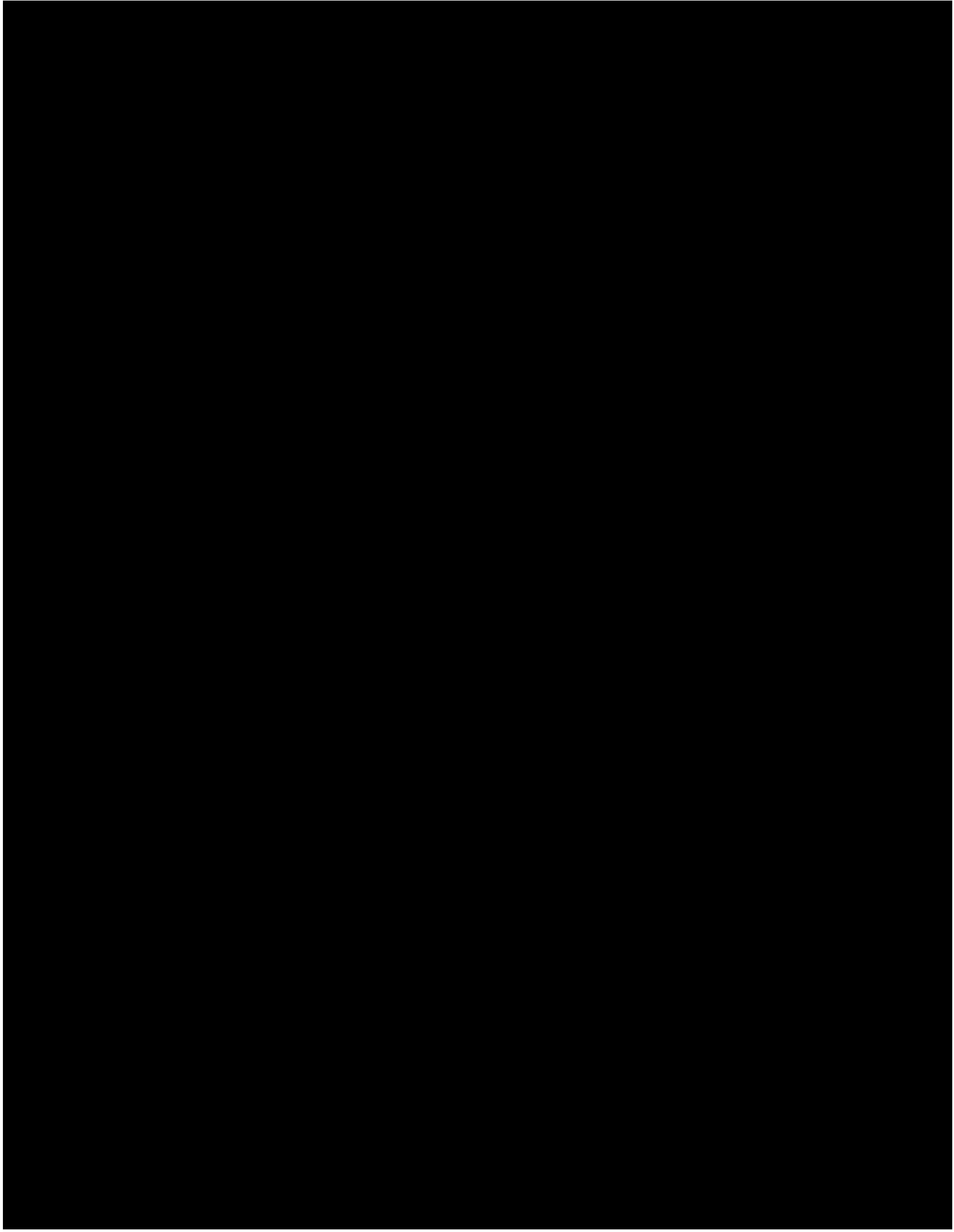
Page and PageOne were investment advisers subject to all of the duties and obligations attendant to investment advisory professionals. As advisers, they owed a fiduciary duty, including a duty to act in clients' best interest, to act in utmost good faith, to make full and fair disclosure of all material facts, and to avoid, or at least disclose, conflicts of interest.

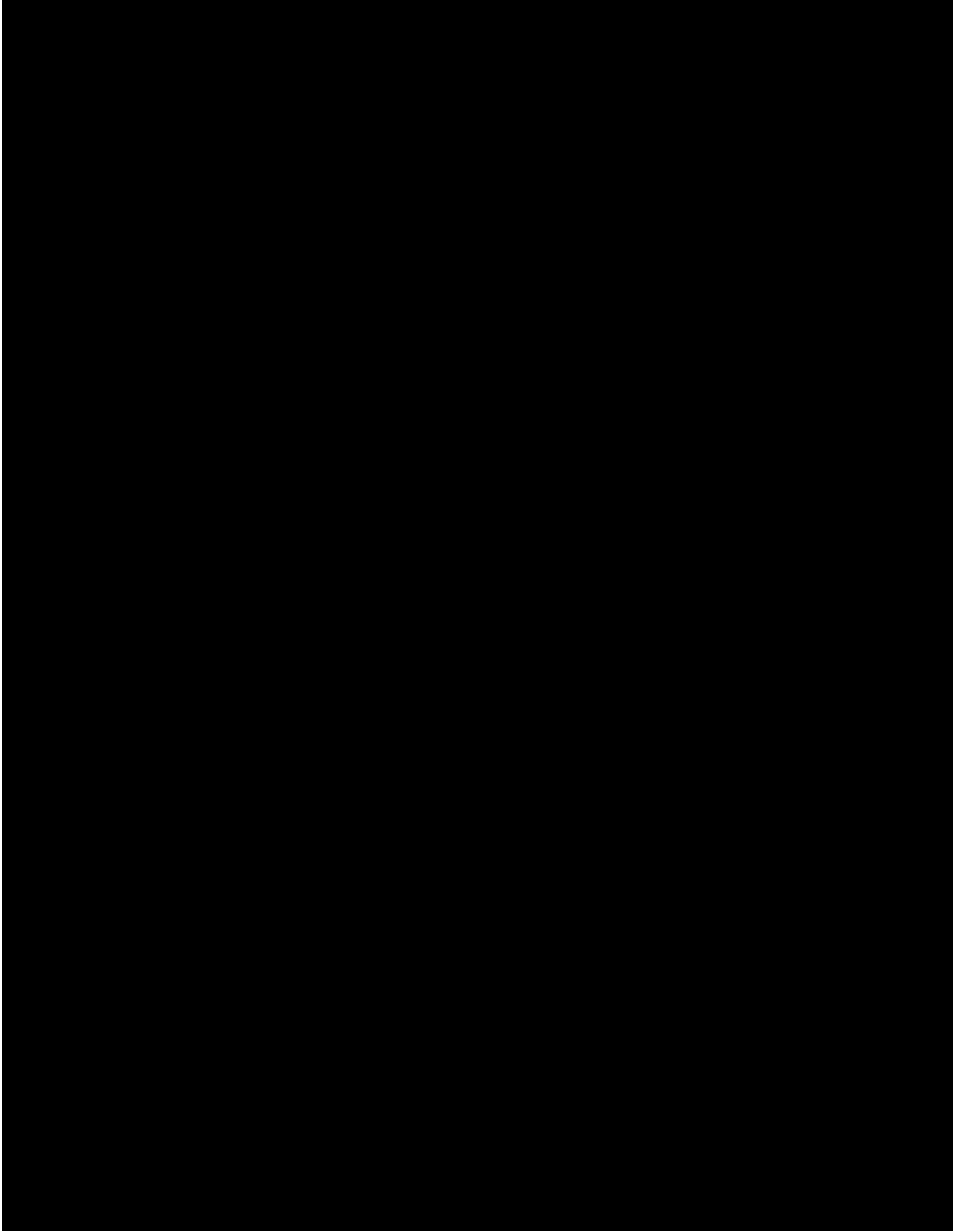
Page did not act consistently with the customs and practices of investment advisers when advising clients to purchase the Funds. He did not disclose that he advised clients to purchase the Funds while United was in the process of purchasing 49 percent of PageOne. This conflict was one that investors would want to know. To make matters worse, Page did not disclose that he had committed to invest a specific amount of his clients' assets in the Funds while United was in the

process of purchasing PageOne or that United's down payments to Page on the purchase price for the acquisition of PageOne were timed to the investments Page's clients were making in the Funds. United's payments to Page were structured as loans evidenced by promissory notes, which made Page's conflict more severe; if the acquisition did not close, United would require Page to repay the amounts given to Page as down payments. Page's claim that he made sufficient disclosure to put his investors on notice of a conflict of interest is not consistent with the way the advisory profession operates. Disclosures must be honest and accurate. Disclosure of one conflict, which does not exist, does not exonerate an adviser from making disclosure of another conflict, which does exist.



Arthur B. Laby
January 5, 2015





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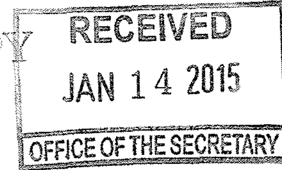

January 12, 2015

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BY FACSIMILE

The Honorable Brent J. Fields
Secretary of the Commission
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Office of the Secretary
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Washington, D.C. 20549-1090

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

Secretary Fields,

Please find enclosed a Motion *in Limine* seeking to exclude the Expert Report of Arthur B. Laby submitted on behalf 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 D. Marshall

Enclosures