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.

THE DIVISION OF ENFORCEMENT'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION IN LIMINE NO. 1 TO PRECLUDE RESPONDENTS FROM OFFERING EVIDENCE OR ARGUMENT IN SUPPORT OF THEIR DEFENSE THAT THEY RELIED ON ADVICE OF COUNSEL AND OTHER EXPERTS

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The Division of Enforcement ("Division") respectfully moves the Court, and submits this memorandum of law in support of that motion, to preclude evidence and argument that Respondents Edgar R. Page ("Page") and PageOne Financial, Inc. ("PageOne") relied on advice of counsel or other experts in their conduct or communications during the period at issue in this case.

ARGUMENT

Respondents have indicated—in their Wells submissions, Answer, and many of their proposed trial exhibits—that they plan to assert defenses that they relied in good faith on both the advice of counsel and National Regulatory Services, Inc. ("NRS"), a "[c]onsulting" company PageOne hired to "work with" it "to include additional language for a new product offering to their ADV." (Div. Ex. 11 at Exhibit A.) (Respondents offer 47 exhibits in support of these purported defenses.)[1] This evidence falls into roughly three categories:

- Evidence that NRS "was engaged by PageOne to advise PageOne's compliance officer with respect to Form ADV amendments." (Div. Ex. 94 at 5 (Respondents' Wells Submission).)[2]
- Evidence that "on or about January 7, 2010, PageOne engaged attorney Richard Engel of Mackenzie Hughes, LLP," that "Mr. Engel was hired to provide PageOne general counsel-type services and to handle the United transaction." (Div. Ex. 94 at 5-6.)[3]

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[1] For purposes of this motion, the Division objects to these documents only to the extent that they are used to demonstrate good-faith reliance on counsel or other experts.

[2] The Division objects to the following documents in this category: Resp. Exs. 1, 94, 96-107, 113-15, 154-55; and the proposed testimony of Michael Xifaras.

[3] The Division objects to the following documents in this category: Resp. Exs. 10, 11, 18-21, 25-27, 31-32, 35-37,50, 52, 55-56, 58, 80, 89-93, 104-05, 110-11, 145, 157.

- Evidence that Page "looked to United and its counsel to determine what disclosures were required in connection with the payments from United." (Div. Ex. 94 at 6.)[4]

Respondents should be precluded from offering such evidence and argument. As to Page's and UGOC's attorneys, (1) Respondents cannot establish the elements of the advice of counsel defense; and (2) they have blocked (and continue to block) the Division from obtaining evidence showing what, if any, advice they actually sought and received. In addition, such a defense is not cognizable as to NRS: (1) NRS explicitly told PageOne that it was not rendering legal advice and that it was not responsible for the accuracy of PageOne's ADV disclosures; and (2) courts reject the purported defense of reliance on advice of compliance experts in this context.

1. Respondents Have Not Established (and Cannot Establish) the Elements of an Advice of Counsel Defense

To make out a good-faith reliance on advice of counsel defense, Respondents must demonstrate that they (1) made a complete disclosure of the relevant facts to counsel; (2) sought and received advice from counsel that the conduct in question was legal; and (3) relied on that advice in good faith. See Markowski v. SEC, 34 F.3d 99, 104-05 (2d Cir. 1994).[5]

First, as to Richard Engel, there is no evidence here that Respondents actually sought and received advice—let alone disclosed all the relevant facts—as to the only relevant question: was Respondents' disclosure to their advisory clients concerning UGOC's acquisition of PageOne stock and all of the terms of that acquisition adequate. Indeed, the only evidence adduced thus far shows that they did not. Thus, in their Wells

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[4] See Note 2 supra.

[5] Even then, "such reliance is not a complete defense, but only one factor for consideration." Id., at 105.

Submission, Respondents do not even claim that they sought advice about disclosure, but merely that they hired Engel to provide "general-counsel type service" and "to handle the United transaction." (Div. Ex. 94 at 6.) Tellingly, they say nothing about seeking or obtaining advice concerning their client disclosures. Moreover, the documents that Respondents seek to admit show only that Engel was involved in negotiating the terms of the transaction with UGOC, including drafting the memorandum of understanding and stock purchase agreement. [6] However, there are no documents showing Engel receiving or discussing the Forms ADV or disclosure (with the one possible exception discussed in Section 2 infra). Thus, Respondents cannot satisfy any of the elements of the defense. That Engel was never asked for, nor gave, his advice on disclosure is supported by the fact that Respondents do not intend to call him as a witness and, indeed, have blocked the Division's access to him (see Section 2 infra).

All of the same holds true for Respondents' claim that they "looked to United and its counsel to determine what disclosures were required in connection with the payments from United." (Div. Ex. 94 at 6.) First, there is no evidence that Respondents sought any disclosure advice from United's counsel, John Mineaux. Second, given that Mineaux did not represent Respondents—indeed, represented the adverse side of the transaction—Respondents could not have realistically believed they would receive such advice. Third, all documents concerning Mineaux are (as with Engel) are merely emails discussing documentation (such as the MOU and stock purchase agreement) of the acquisition, not

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[6] See, e.g., Resp. Ex. 20 (email attaching draft stock purchase agreement); Resp. Ex. 32 (email from Engel informing Mineaux that he would review the draft memorandum of understanding "with Ed"); Resp. Ex. 89 (email from Page's prior attorney, Jeremy Smith, sending a draft of the memorandum of understanding); Resp. Ex. 93 (email from Engel sending draft stock purchase agreement to UGOC's attorney, John Mineaux).

disclosure to clients. Fourth, again Respondents do not intend to call Mineaux and apparently are, therefore, interested only in being able to offer an unchallenged version of any advice he gave.

Indeed, instead of making out a good-faith reliance on counsel defense, Respondents seem to be attempting to argue that because there were attorneys involved with some facets of the UGOC transaction, Page expected that they would—unsolicited—have told him if he should have been changing PageOne's disclosure in some way. However, courts explicitly bar just such a "lawyers in the room" defense. In SEC v. Tourre, for example, defendant conceded that he was unable to "meet the four factor test for the availability of an advice of counsel defense." 950 F. Supp. 2d 666, 682 (S.D.N.Y. 2013). Nonetheless, defendant sought to adduce evidence of documents and statements that reviewed or were copies on various documents concerning the transaction at issue. Id. at 683. Just as Respondents intend to do here, defendant argued that the attorneys involved never affirmatively told him to make disclosures. Id. at 684. (noting that defendant intended to use the evidence to argue that an attorney on the transaction "never felt the need to raise the issue" of disclosure with defendant).

In finding the introduction of such evidence to be irrelevant and prejudicial, the Court rejected precisely the argument that Respondents are advocating here:

> [T]he fact that a lawyer is present at a meeting means that he or she must have implicitly "blessed" the legality of all aspects of a transaction. Likewise, the fact that lawyers saw and commented on disclosure language could be understood as "blessing" the sufficiency of that disclosure. This misunderstanding would give the defendant all of the essential benefits of an advice of counsel defense without having to bear the burden of proving any of the elements of the defense.

Id. Just as the Court in Tourre rejected this attempt to get around the elements of the advice of counsel defense, so should the Court in this case.

2. Respondents Have Blocked the Division's Access to any Evidence Concerning Advice Sought or Received from Attorneys

It is axiomatic that the reliance on advice of counsel defense cannot be claimed (or shown) unless Respondents waive the privilege so that the contours of the advice sought and given (if any) can be fully explored. In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) ("[A] party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underling communications from scrutiny by the opposing party"); see also SEC v. Wyly, 10 Civ. 5760 (SAS), 2011 WL 3366491, at *2 (S.D.N.Y. July 27, 2011) (Capra, D., Special Master) ("A client who claims that he acted on advice of counsel cannot use the privilege to prevent inquiry into the communications that the client and lawyer had about that advice"). If the rule were otherwise, a "claim of reliance on counsel would be immune from a showing that, in fact, the defendant had received overwhelming advice to the contrary," SEC v. Forma, 117 F.R.D. 516, 523 n.5 (S.D.N.Y. 1987), or that the lawyer's advice was in fact based on misinformation from the client.[7] Moreover, Respondents may not unilaterally set the scope of the privilege waiver. Glendmede Trust Co. v. Thompson, 56 F.3d 476, 486 (3d Cir. 1995) ("There is an inherent risk in permitting the party asserting a defense of its reliance on advice on counsel to define the parameters of the waiver of the

[7] This common law rule—providing for a subject matter waiver when the client interposes an advice of counsel defense—has been codified by Fed. R. Evid. 502(a) (providing for subject matter waiver when a disclosure of privileged information is intentional and the disclosed and undisclosed information "ought in fairness to be considered together").

attorney-client privilege as to that advice," because, "[t]o do so would undermine the very purpose behind the exception to the attorney-client privilege at issue here—fairness").

Here, however, Respondents have steadfastly maintained the privilege. Thus, during Page's investigative testimony, his attorney asserted the privilege.[8] Respondents again asserted the privilege in responding to the Division's investigative subpoena, producing multiple privilege logs and redacted documents. Finally, Respondents continue to assert the privilege. For example, Respondents' Exhibit 145 is an email chain showing that Sean Burke, PageOne's then-Director of Operations, is forwarding to Richard Engel communication with NRS about the time frame of preparing a Form ADV. However, Burke's email to Engel is redacted. Indeed, this is the only email on Respondents' exhibit list reflecting any communication to an attorney concerning a Form ADV—and Respondents have blocked the Division's access to it.

In fairness, Respondents should not be allowed to put on a defense—one for which there is zero evidence they satisfy the elements and which they apparently intend to put on entirely through Page—that the Division is unable to meet. In the alternative, should the Court allow Respondents to put in evidence of their good-faith reliance on counsel, the Division should be entitled to question—both before and during the Hearing—Richard Engel and any other attorneys who were involved in the disclosure issues.

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[8] Div. Ex. 166 at 58-59 ("Well, don't give the substance of the advice. You can give the names of the law firms, but, you don't want to waive the privilege); Id. at 79 ("let me caution you that we're asserting the attorney-client privilege today . . . please don't give the substance of the advice you were given").

3. Respondents Should Not Be Allowed to Put on Evidence That They Relied in Good Faith Upon the Advice of NRS

There is no question that NRS did not act as counsel to Respondents. That was not their role. Therefore, it would be inappropriate—and contrary to law—to allow Respondents to introduce evidence or argument that their scienter was somehow lessened by any advice they received from NRS.

First, there is no question that NRS was not providing legal advice. The contract between NRS and PageOne—a contract Page signed—stated explicitly that "NRS does not render any legal . . . advice relating to incorporation, the securities laws, or any other advice of a legal or financial nature." (Div. Ex. 11, ¶ 4.) Michael Xifaras, the NRS representative who worked with PageOne on their Forms ADV, re-iterated this point later in an email to Sean Burke:

> NRS is not a law firm and thus cannot provide legal advice. While I am a lawyer, I am not acting as your firm's lawyer. The recommendations I make are strictly from a regulatory/compliance perspective and should not be interpreted as legal advice.

(Div. Ex. 15 at PG0626SUPP0009424.)

Second, NRS also explicitly told Page that it did not opine on the adequacy or accuracy of PageOne's disclosure. Again, the agreement with NRS that Page signed stated that:

> NRS is responsible only for preparing the application documents and any supplementary forms for review and signature by Client . . . . Client will be solely responsible for the accuracy of the information and representations contained in any application document(s) or any other form(s) prepared and filed by NRS.

(Div. Ex. 11, ¶ 7(b).)

Third, courts often reject exactly the type of "reliance on compliance" that Respondents are here trying to assert. Thus, in Graham v. SEC, the D.C. Circuit upheld the Commission's rejection of a respondent's claim that she could not have scienter because she ran all of the violative trades by her firm's compliance officer. 222 F.3d 994, 1005-6 (D.C. Cir. 2000). In Wonsover v. SEC, the D.C. Circuit again upheld a liability finding by the Commission in the face of respondent's claim he lacked scienter because he had relied on his clearing firm's "Restricted Stock Department," counsel, and the transfer agent. 205 F.3d 408, 417 (D.C. Cir. 2000) ("Precedent will not suffer [respondent's] argument that he justifiably relied on the clearance of sale by [the clearing firm], the transfer agent, and counsel").

The case against allowing a reliance on compliance defense here is even stronger given that Page himself: (1) was his firm's Chief Compliance Officer and owner; (2) was negotiating the transaction with UGOC and was, thus, the person at PageOne with the most knowledge about the conflicts; (3) was personally recommending investment into the UGOC Funds to his clients; (4) and knew (by his own admission) that PageOne's Forms ADV did not disclose the acquisition or its features accurately. Indeed, even if NRS (or indeed counsel) had been informed of all the relevant facts and had advised Page that PageOne did not need to disclose the acquisition, Page would still have acted with the requisite scienter because he knew that the disclosure was not accurate or complete. See SEC v. Meltzer, 440 F. Supp. 2d 179, 190 (E.D.N.Y. 2006) (finding that a defendant cannot assert good-faith reliance when the defendant "knew that the disclaimers were misleading. The mere fact that his attorney willingly approved the disclaimers cannot establish a defense of good faith reliance when the knowing misrepresentations clearly

establish bad faith"); see also SEC v. DCI Telecomm., Inc., 122 F. Supp. 2d 495, 500 n.2 (S.D.N.Y. 2000) ("If a company officer knows that the financial statements are false or misleading and yet proceeds to file them, the willingness of an accountant to give an unqualified opinion with respect to them does not negate the existence of the requisite intent or establish good faith reliance.") (quotation marks and citations omitted).

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court grants its Motion in Limine No. 1 to preclude Respondents from offering any evidence or arguments that they relied on advice of counsel or NRS.

Dated: January 12, 2014
New York, New York

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