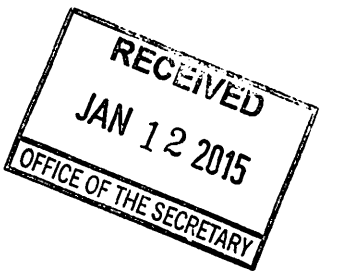
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING

File No. 3-16037

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

REBUTTAL REPORT OF ARTHUR B. LABY

I. Introduction

I have been retained as an expert by the Securities and Exchange Commission ("SEC" or "Commission") Division of Enforcement ("Division") in Edgar R. Page and PageOne Financial, Inc., File No. 3-10637. This action is an Administrative Proceeding brought by the Division against Edgar R. Page ("Page") and PageOne Financial, Inc. ("PageOne"), alleging that Page and PageOne breached their fiduciary duties and violated the federal securities laws when recommending and selling interests in private funds (the "Funds) managed by the United Group of Companies, Inc. ("United") without disclosing conflicts of interest to clients. I completed an expert Report in this matter, dated January 5, 2015. On that day, attorneys for Page and PageOne submitted an expert report prepared by Professor Steven Thel. In this Rebuttal Report, I respond to points Professor Thel makes in his report.

II. Professor Thel's Report

Professor Thel's primary claim is that Page's conflict of interest in recommending the Funds to clients, while negotiating a sale of some or all of PageOne to United, was not material because there is no need to disclose preliminary merger negotiations. This claim, which focuses on disclosure of merger negotiations, is not relevant to the Division's allegations and obscures the actual issues in the Division's action. The Division claims that Page and PageOne, as investment advisers, owe a fiduciary duty to disclose conflicts of interest to clients. Page had a conflict of interest because he recommended United Funds to clients while attempting to sell some or all of PageOne to United. As I explain more below, it is not the merger negotiations alone that the Division

maintains must be disclosed, it is Page's conflict in recommending the Funds while merger negotiations were taking place.

Before responding in more detail to Professor Thel's report, I note that Professor Thel does not address Page's conduct as an investment adviser, the duties and obligations owed by a reasonable investment adviser, or whether Page acted consistently with the customs and practices of a reasonable investment adviser. Instead, Professor Thel makes a series of legalistic arguments about whether companies must disclose preliminary merger negotiations and when they can keep merger negotiations secret. Professor Thel does not mention or otherwise address Page's conduct as an investment adviser under the Investment Advisers Act. A review of Professor Thel's report demonstrates that he nowhere discusses investment advisers' customs and practices and whether Page acted consistently with them.

A. The Secrecy of Merger Negotiations

Professor Thel begins by stating that parties negotiating an acquisition typically keep their negotiations secret.[1] I agree that many if not most businesses might seek to keep merger negotiations secret. I also agree that Page might want to keep his acquisition agreement with United secret. The context of Professor Thel's argument, and his citations, however, is when an operating company seeks to keep merger negotiations secret and refrain from disclosing the negotiations to shareholders. The operating company context is very different from the investment adviser context in the Division's action. In this action, Page's conflict of interest – and the reason his conduct is inconsistent with industry custom and practice – is not simply that Page kept negotiations

[1] Thel report at 1-2.

with United secret. The important point is that Page *also* recommended to his clients that they invest in the Funds, which were managed by the very same people negotiating to buy Page's firm.

This last point is critical. It is not the mere fact that Page did not disclose the negotiations that makes his conduct inconsistent with industry custom and practice, it is that he did not disclose the negotiations while simultaneously recommending the Funds, which were managed by the purported buyer. In addition, Page did not disclose other salient features of United's acquisition, such as the payments United made to Page, that Page needed to repay those payments if the acquisition did not go forward, and that Page had committed to raise between $18 and $20 million of his clients' money for the Funds. As I discussed in my initial Report, Page had a conflict of interest because he had a secret personal financial interest in recommending the Funds, which he did not disclose to clients.

Professor Thel writes that self-regulatory organizations have recognized that the importance of keeping negotiations confidential justifies exceptions from otherwise applicable disclosure obligations.[2] Again, the context for such exceptions is when a company is deciding whether to disclose to the company's shareholders that the company itself is the subject of merger negotiations. I would be very surprised if Professor Thel could support the proposition that secrecy about merger negotiations justifies an investment adviser withholding information from clients about recommending investments in funds managed by the purported buyer of the advisory firm. The presence

[2] Thel report at 3.

of the adviser's conflict of interest sets the adviser's situation worlds apart from a typical Securities Exchange Act company deciding whether to disclose merger negotiations.

B. Reaction to Merger Negotiations

Professor Thel discusses the problem of a potential investor's overreaction if Page disclosed the United acquisition in the Form ADV.[3] It may be true that Page did not wish to disclose his negotiations with United in PageOne's Form ADV. If Page did not want to disclose, however, then he must refrain from advising clients to invest in the United funds. There is a large universe of potential investment opportunities for Page's clients. The United Funds are a small number of investments that Page must avoid recommending if he is unwilling to disclose his merger negotiations with United.

C. The Materiality of Page's Conflict

Professor Thel next addresses whether Page's failure to disclose his conflict was materially misleading.[4] In paragraph 11, for example, he states that the applicable standard to determine whether merger negotiations are material is whether a reasonable investor would consider the negotiations material, not whether a PageOne client believed the negotiations would be important to his decision whether to invest.

Professor Thel's formulation is incorrect and inconsistent with industry practice. First, because it is well understood in the industry that all conflicts or potential conflicts of an investment adviser are material and must be disclosed, an investment advisory firm typically considers whether a business arrangement presents it with an interest (or even the appearance of an interest) other than what has already been disclosed to clients.[5] If the

[3] Thel report at 3.

[4] Thel report at 4-8.

[5] *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 187, 191-92 (1963).

answer is yes, then the advisory firm will disclose the additional interest. In addition, Professor Thel's formulation, and the cases he cites in support,[6] are not relevant in the investment advisory context. Rather, Professor Thel's materiality formulation is about whether a standard Exchange Act corporation must make disclosure to shareholders in the proxy context (in *TSC Industries*), or in the context of shareholders selling their shares (in *Basic*). However, to determine whether an adviser's conflict of interest is material, one must apply the *TSC* analysis in context. The question in the Division's action is whether the adviser's conflict would be important to a reasonable investor in the shoes of an advisory client.

Think about it this way. Imagine that some person or group of people invested their assets *in* PageOne (that is, they held PageOne equity), as opposed to investing their assets *with* PageOne (that is, they are PageOne clients). Professor Thel's arguments are about whether Page must disclose his merger negotiations to investors investing their funds *in* PageOne. But that is not what this action is about. As far as I know, the Division takes no position on whether Page must disclose merger negotiations with United to investors *in* PageOne. This action is about Page's lack of disclosure to advisory clients when Page is advising them to invest in funds managed by the purported buyer of PageOne. Professor Thel's report does not focus on the duties and obligations of investment advisers to their clients; his report focuses instead on whether and when a company must disclose merger negotiations to the company's shareholders. Thus, Professor Thel's formulation is not one that investment advisers, and their compliance officers, typically apply when considering what to disclose to clients.

[6] *E.g.*, TSC Industries, Inc. v. Northway, 426 U.S. 438 (1976); Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

Similarly, Professor Thel states that materiality in this action depends on the balance of the probability that the acquisition will occur and the magnitude, or the effect, of the conflict on investors if the acquisition occurred.[7] But that is not the proper analysis in the Investment Advisers Act context. This action does not concern whether advisory clients would consider the acquisition important on its own. Rather, the Division maintains that advisory clients would want to know about Page's conflict of interest. The important question is not simply whether the merger will occur; the question is whether Page has a secret motive when advising clients to purchase the United funds.

Thel states that he does not believe that the acquisition, if consummated, would have materially increased Page's conflict of interest.[8] However, whether the merger would in fact be consummated is not the issue. The issue is whether Page had a secret motive – a conflict of interest – when he advised clients to purchase the Funds.

Thel points to Page's disclosures (which were false) and says that disclosure of the negotiations would not have changed the total mix of information available to PageOne clients.[9] There is no basis for this assertion. As Professor Thel must know, investment advisers must tell the truth to their clients. The mantra for investment advisers is full and fair disclosure of all material facts. Disclosing a conflict, which does not exist, can be considered neither full disclosure nor fair disclosure. Otherwise, advisers would be able to avoid telling their clients the truth about their conflicts. Under Professor Thel's approach, advisers could make up a conflict out of thin air and then claim that the

[7] Thel report at 5.

[8] Thel report at 5.

[9] Thel report at 6.

fabricated conflict was similar in some respects to the actual conflict and, as a result, they are not required to disclose the actual conflict.

Thel makes the same point over and over. Later, Professor Thel says that the conflict that was disclosed put clients on notice that some conflict existed and was therefore sufficient.[10] As I explained in my initial Report, disclosure of one conflict, which does not exist, does not excuse the failure to disclose a conflict that does exist. Moreover, as I explained, in my view, Page's actual conflict was different from, and more severe, than the conflict that Page disclosed. In the end, I understand that Professor Thel and I disagree about which conflict was more severe – the false conflict that Page disclosed, or the actual conflict that Page did not disclose. A decision regarding which conflict was more severe, however, does not change Page's obligation to tell the truth. It is that simple. Investment advisers must disclose all conflicts or potential conflicts exactly so that the clients can evaluate which conflicts matter to them. In his report, Professor Thel never says that, in his opinion, advisers must tell the truth and that Page acted consistently with that standard. This is because Professor Thel's report is attempting to defend Page's disclosure of a false conflict as a substitute for telling the truth.

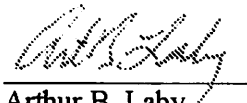
III. Conclusion

In my initial report, I gave my opinion that Page and PageOne were investment advisers and owed significant duties to clients and potential clients, including a duty to disclose actual and potential conflicts of interest. I explained that these duties are well understood by advisers and that an adviser cannot avoid this obligation by fabricating a

[10] Thel report at 8.

conflict that the adviser believes is as severe, or more severe, than the actual conflict. Fabricating a conflict would be inconsistent with the duty of full and fair disclosure advisers owe to clients.

In his report, Professor Thel tries to argue that Page was not required to disclose Page's merger negotiations with United. Professor Thel's arguments, however, appear in a different context – they are not tied to the relevant context, which is that Page is recommending that his clients invest in United's Funds. Professor Thel may be correct that an adviser can, in some cases, withhold from clients information about a merger of his advisory firm. An adviser, however, cannot withhold such information while, at the same time, advising clients to purchase Funds managed by the very same people seeking to purchase some or all of the advisory firm. Professor Thel ignores this last fact in his report and, as a result, the report is not relevant to the Division's action.



Arthur B. Laby
January 11, 2015