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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.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION *IN LIMINE* NO. 2 TO PRECLUDE THE REPORT OR TESTIMONY OF PROFESSOR STEVE THEL

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I. INTRODUCTION

The Division of Enforcement ("Staff") moves to strike the Expert Report of Steve Thel (the "Thel Report"), and to preclude Edgar Page and PageOne Financial, Inc. ("PageOne") (together, the "Respondents") from offering any related testimony by Professor Thel at the hearing in the above-captioned proceeding. The Staff argues that the Thel Report is inadmissible — in its entirety — because, according to the Staff, Professor Thel 1) has misinterpretations of the law that make his testimony unreliable, and 2) inappropriately makes factual and legal conclusions to elucidate his opinions.[1]

Fundamentally, the Staff argues two erroneous premises about the relevant law, which it attempts to force this Court to decide in great haste. First, Staff Motion No. 2 is based upon the premise that materiality is not an issue in this case. Since Professor Thel's reports are devoted to the issue of materiality, a conclusion that materiality is not an issue would necessarily lead to the conclusion that the Thel Report is irrelevant. Second, the motion claims that because Professor Thel refers to cases, rules, and interpretations involving a public company's obligations to disclose preliminary merger negotiations to its shareholders, the Thel Report is wholly unreliable because the duty a public company owes to its shareholders is irrelevant to the duty an investment adviser owes to its clients.

The Staff is wrong with respect to both of these legal arguments. As explained below, materiality is an essential element of the Staff's case and Professor Thel presents relevant and admissible opinions on this issue. In addition, a public company owes a fiduciary duty to its shareholders, just as an investment adviser does to its clients, and cases involving a public company's obligation to disclose preliminary merger negotiations — which are the only relevant

[1] *See* Staff's Motion *in Limine* No. 2 to Preclude the Report or Testimony of Professor Steve Thel (hereinafter, "Staff Motion No. 2") at 5, 10, 11, and 12.

cases either side cites on this issue — are indeed relevant and properly referenced by Professor Thel.

The Staff's argument that the Thel Report should be excluded also suffers from three further deficiencies.

First, the Thel Report is wholly within the permissive evidentiary standard set forth by the Commission's Rules of Practice ("Commission's Rules"), which are far more permissive than the Federal Rules of Evidence ("Federal Rules") and give judges broad latitude to consider any relevant evidence.

Second, the Staff's arguments that Professor Thel's legal opinions are misguided go to the weight of evidence Professor Thel offers, not to its admissibility, and are therefore inappropriate in a motion to exclude. Even assuming, for the sake of argument, that the Thel Report contains misinterpretations of the law — which it does not — it is admissible, even under the Federal Rules of Evidence. Where, as here, the expert opinion is presented in the context of a bench trial, any misinterpretation would pose no risk of confusing a jury and does not therefore implicate the concerns underlying the general ban on such evidence.

Third, the Staff's argument that the Thel Report is inadmissible because it makes factual and legal conclusions is unpersuasive. To the extent Professor Thel makes factual conclusions, experts are permitted to do so under established case law. And while federal law precludes expert testimony consisting solely of legal conclusions, it admits opinions that touch upon legal issues in the course of elucidating factual evidence. To the extent that the Thel Report invokes any law, it does so in the context of clarifying the evidence before the Court on industry practice and the standard of conduct to which the Respondents should be held, and is therefore admissible even under the Federal Rules.

II. THE THEL REPORT CORRECTLY APPLIES THE LAW GOVERNING MATERIALITY

In its Motion No. 2, Prehearing Brief, and the Rebuttal Report of Arthur B. Laby (the "Laby Rebuttal Report"), the Staff attempts to establish that materiality is not an issue in this case.[2] This argument is the Staff's primary basis for seeking to exclude the Thel Report, in which Professor Thel opines on the issue of materiality — based on industry custom and relevant interpretations by courts and regulators — and attempts to apply those interpretations under various factual scenarios since many of the facts are in dispute, all while taking care to avoid applying the law other than when necessary to provide background for his analysis.[3]

Materiality is one of Respondents' key defenses in this case. Respondents argue that the difference between the conflict they disclosed and the conflict the Staff alleges existed was not material. The purpose of conflict of interest disclosures is to alert clients to the possible motivations of the adviser that may cause the adviser to make recommendations that are contrary to clients' interests. Here, Respondents' clients were fully apprised that the Respondents had strong financial incentives to recommend the United funds and that their recommendations of the United funds may therefore be biased. Thus, the difference between what was disclosed and what the Staff alleges should have been disclosed was immaterial.

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[2] *See* Staff Motion No. 2 at 9 ("Professor Thel's opinion that Respondents' conflict of interest disclosures were not materially misleading . . .is likewise foreclosed by Capital Gains. As discussed above, all conflicts of interest are material under Capital Gains and its progeny. . . . [The law] clearly states that an adviser must disclose all conflicts and that all such conflicts (whether actual or potential) are material."); Staff Prehearing Brief at 23 ("an investment adviser cannot choose what conflicts to disclose – he must disclose them all, entirely and unreservedly."); Laby Rebuttal Report at 8 ("Investment advisers must disclose all conflicts or potential conflicts exactly so that the clients can evaluate which conflicts matter to them.").

[3] *See* Thel Report ¶ 10 ("Materiality is a mixed question of law and fact about which courts routinely rely upon experts for guidance. My opinions on the questions of materiality in this case are not presented as an opinion on the law, but rather are presented to elucidate industry practices and custom that provide an important context in which to evaluate the determination of materiality.").

Consider an example to illustrate this point. In the Thel Report, Professor Thel cites an example where an adviser discloses that it will charge a two percent advisory fee with respect to a particular investment, but in fact only charges a one percent fee.[4] This disclosure, although a misrepresentation, does not mislead clients since the conflict is disclosed — indeed, overdisclosed. No one would claim that the adviser's disclosures, although incorrect, are therefore materially misleading and actionable under the securities laws, because the disclosures provided the client with information sufficient to apprise the client that the adviser's recommendation was potentially motivated by self-interest.[5]

As a threshold matter, it is well-established that materiality is an essential element of each of the provisions of the Advisers Act which Respondents are alleged to have violated.[6] The Staff nowhere actually quotes the relevant provisions, and never cites any case holding that materiality is not an essential element of those provisions, as they cannot.

Moreover, what the Staff cites instead — as does Professor Laby in the Laby Rebuttal Report — is dictum from *Capital Gains*,[7] which the Staff embellishes and emphasizes in an attempt to persuade the Court not to make the required materiality analysis. While the dictum cited does in fact state that an investment adviser must disclose "all conflicts of interest," this statement omits relevant context which, when considered, demonstrates that *Capital Gains* is not inconsistent with the Respondents' defenses and/or the Thel Report.

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[4] Rebuttal Expert Report of Steve Thel (hereinafter, "Thel Rebuttal Report") ¶ 13.
[5] Consider another example. No one would argue that if United provided Mr. Page with a cup of coffee during his due diligence visits to United that this created a conflict of interest that was required to be disclosed. This is an immaterial conflict, and therefore does not need to be disclosed.
[6] To prove a violation of the anti-fraud provisions of the securities laws, including Sections 206 and 207 of the Advisers Act, the Commission must establish that an alleged misrepresentation or omission was "material." *SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992).
[7] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

Capital Gains involved a practice known as "scalping," which the Supreme Court defined as when " an investment adviser . . . trade[s] on the market effect of his own recommendations without fully and fairly revealing his personal interests in those recommendations to his clients."[8] In *Capital Gains*, the adviser made no disclosure of its scalping activities, but argued that those activities did not create an actual conflict of interest because its recommendations to its clients were good ones which benefited the clients.[9] The Supreme Court rejected this defense and held that potential as well as actual conflicts of interest need to be disclosed. Thus, the dictum from *Capital Gains* did not read materiality out of the Advisers Act, or create a rule that any conflict of interest is *per se* material, but merely recognized that potential — as well as actual — conflicts of interest can be material. Indeed, the Court in *Capital Gains* pointed out that the Commission in that case was seeking to require "disclosure of a conflict of interest *with significantly greater potential for abuse*" than another scenario advocated by certain investment counsel representatives who testified before the Commission; i.e., the Commission sought in *Capital Gains* to require disclosure of potential conflicts that are material, but not immaterial ones.[10]

Accordingly, it is not true, as the Staff alleges, that the "only questions that are relevant in this Advisers Act case are: (1) did the adviser's relationship present a potential for conflict with the interest of his clients; (2) did the adviser fail to fully and openly describe those conflicts; and (3) did the adviser do so knowingly, recklessly or merely negligently."[11] In fact, the central issue in this case is whether the conflict of interest disclosed — and the Staff nowhere disputes

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[8] *Capital Gains*, 375 U.S. at 201. *See also* Bines & Thel, INVESTMENT MANAGEMENT LAW AND REGULATION 806–16 (2d ed. 2014).
[9] *Capital Gains*, 375 U.S. at 201.
[10] *Id.* at 196 (emphasis supplied).
[11] Staff Motion No. 2 at 6.

that Respondents disclosed a serious conflict of interest with respect to the United funds to their clients — is materially weaker than the alleged conflict of interest that existed.

Professor Thel therefore applies the correct legal standard in his reports. Professor Thel compares the conflict of interest the Respondents undisputedly disclosed with the conflict of interest the Staff alleges existed and opines as to whether the difference is material, based upon his experience with industry practice and relevant interpretations by courts and regulators. Professor Thel also —without assuming any facts in dispute — analyzes relevant facts, opining that 1) contrary to the Staff's assertions, sales of the United funds were not correlated with earnest money payments by United, and 2) a pattern of declining sales efforts by the Respondents is inconsistent with the Staff's claim that Respondents agreed that the contemplated sale of PageOne stock (the "Proposed Transaction") would not close until Respondents raised $20 million for the United funds. All of this is admissible and relevant unless, as the Staff alleges, materiality is irrelevant in this case. That is clearly not true.

III. THE STAFF'S ATTEMPT TO DISTINGUISH *BASIC* AND OTHER CASES INVOLVING PUBLIC COMPANIES' DISCLOSURE OBLIGATIONS TO SHAREHOLDERS IS MISGUIDED

In its motion, the Staff — like Mr. Laby in the Laby Rebuttal Report — also criticizes Professor Thel for citing cases and regulatory interpretations of a public company's obligations to disclose preliminary merger negotiations to its shareholders.[12] Indeed, it is suggested that Professor Thel's reference to these authorities is so misguided that it calls into question the value

[12] Staff Motion No. 2 at 10 n.14 (arguing *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), is inapposite in this case), 8 ("Page was an investment adviser – not a public company with stock trading on the public markets – and, he, was required to be fully open about his conflicts."); Laby Rebuttal Report 4–5 ("The presence of the adviser's conflict of interest sets the adviser's situation worlds apart from the typical Securities Exchange Act company deciding whether to disclose merger negotiations.").

of all of his work. In fact, nothing could be farther from the truth; *Basic* and other similar cases are fully applicable in this case.[13]

Public companies owe a fiduciary duty to their shareholders.[14] The Commission relies upon this fact when it prosecutes corporate officers and directors for trading in their company's stock.[15] Neither the Staff nor Mr. Laby explain how the fiduciary duty a public company owes to its shareholders is different from (or lesser than[16]) the fiduciary duty an adviser owes to its clients. No difference is obvious, and the Staff and Mr. Laby cite no cases involving an investment adviser's negotiations to sell its company that are more relevant authorities than those noted by Professor Thel. It therefore makes sense why the Staff and Mr. Laby object so strenuously to Professor Thel's references to the regulatory interpretations and practices governing a public company's duty to disclose preliminary merger negotiations: these authorities discuss scenarios that are essentially identical to the facts of this case and consistently and strongly endorse conduct such as the Respondents' conduct here at issue.

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[13] *See SEC v. Nutmeg Group, LLC*, 2011 U.S. Dist. LEXIS 122485, at *15 (N.D. Ill. Oct. 19, 2011) (applying *Basic* in Advisers Act context). *See also Finnerty v. Stiefel Labs., Inc.*, 756 F.3d 1310 (11th Cir. 2014) (applying *Basic* test to adjudge materiality of nondisclosure of preliminary transactional negotiations by a privately-held company).

[14] *Smith v. Van Gorkom,* 488 A.2d 858 (Del. 1985), *Moran v. Household Int'l, Inc.,* 500 A.2d 1346 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings,* 506 A.2d 173 (Del. 1986); *ConAgra v. Cargill,* 382 N.W.2d 576 (1986).

[15] *SEC v. Happ*, 392 F.3d 12 (1st Cir. 2004).

[16] Indeed, it is worth noting that preliminary transactional talks being negotiated by a public company's managers are much *more* important to the company's shareholders — who have equity in the company negotiating — than are preliminary transactional negotiations by an investment adviser to his clients, who, as with Respondents' clients who invested in *funds administered by — but not owned by — United*, have no equity in the company negotiating. Accordingly, if public company managers may withhold disclosure of preliminary transactional negotiations from the shareholders whose pecuniary interest is directly at stake, it stands to reason that investment advisers in Respondents' position should be afforded even more leeway in withholding such speculative information from clients with virtually nothing at stake.

In sum, the Thel Report does not misguidedly apply the law of materiality, which is central to this case; the Staff does.

IV. THE THEL REPORT IS CONSISTENT WITH THE BROAD STANDARD OF ADMISSIBILITY SET FORTH IN THE COMMISSION'S RULES OF PRACTICE

But even if the Staff's arguments had merit — and they do not — these arguments are inappropriate in a motion to exclude expert testimony. Such legal arguments and conclusions as those forwarded by the Staff in Staff Motion No. 2 do not speak to the admissibility of the Thel Report, but rather to the weight the Court should afford it.[17] All that matters is whether the Thel Report is admissible, and, under the relevant standard, it is clear that it is.

Commission Rule of Practice 320 ("Rule 320") provides that "the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious." Within this framework, administrative law judges "have broad discretion in determining whether to admit . . . evidence, and this is particularly true in the case of expert testimony."[18] Despite the Staff's extensive reliance on federal court cases throughout Staff Motion No. 2, the wide latitude given to administrative judges is not circumscribed by the Federal Rules, which "do not apply in administrative proceedings."[19] Thus, in assessing the

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[17] As the Eighth Circuit noted in a recent case denying a similar motion to strike, "[a]n expert's opinions are not inadmissible simply because an underlying assumption may be contestable." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 615 (8th Cir. 2011). *See also Laurie Jones Canady*, AP File No. 3-8531 (July 6, 1995) (noting that any challenges to the evidence "would go toward the weight, not the admissibility of the testimony" (citing *Catholic Medical Center of Brooklyn & Queens v. NLRB*, 589 F.2d 1166, 1170 (2d Cir. 1978) (noting that administrative policy provides for "the exclusion of irrelevant, immaterial or unduly repetitious evidence" and that, "*[b]y negative implication an agency thus may not provide for the exclusion of relevant evidence . . . .*"))) (emphasis added).

[18] *Pagel, Inc.*, AP File No. 3-6142 (Aug. 12, 1985) (collecting cases) (internal quotation marks omitted), *aff'd*, 803 F.2d 942 (8th Cir. 1986).

[19] *Kaur v. Holder*, 561 F.3d 957, 962 (9th Cir. 2009). *See also Tyra v. Sec. of Health & Human Servs.*, 896 F.2d 1024, 1030 (6th Cir. 1990) ("Evidence not admissible in court, including hearsay, is admissible at an administrative hearing."). For the reasons set forth below, *see infra*

admissibility of the Thel Report under Rule 320, the Court need only answer two basic questions: first, whether the report is relevant to the dispute at hand, and second, whether the report is immaterial or unduly repetitious.

Relevance. With respect to the first inquiry, there can be no dispute that the Thel Report speaks to issues at the heart of this proceeding. The charges against the Respondents require the Staff to establish that Respondents made material misrepresentations to their clients, which may be established by showing that Respondents, with a culpable mental state,[20] made misrepresentations or omissions that a reasonable investor would likely consider important when deciding to invest.[21] The Thel Report seeks to demonstrate that Respondents' disclosures were made in accordance with industry practice[22] and were not materially inaccurate based on Professor Thel's understanding of the securities laws.[23] Expert testimony regarding industry

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Section VI, it is the Respondents' position that the Thel Report would be admissible under the Federal Rules as well.

[20] *See* Respondents' Prehearing Brief Section III(B)(2).

[21] *SEC v. ABS Manager, LLC*, 2014 WL 2605476, at *7 (S.D. Cal. June 11, 2014).

[22] In asserting that Respondents complied with industry practices, Professor Thel draws on his extensive experience and qualifications as a securities lawyer. As stated in his expert report, Professor Thel has been involved in the field of securities law for over thirty years, during which time he has practiced both in private practice and for the SEC's Office of the General Counsel doing enforcement work, taught securities regulation at the law schools of the University of Mississippi, Cornell University, New York University, Columbia University, and Fordham University, and written extensively on the subject of securities regulation and investment management in various law reviews and other publications. Professor Thel has also served on committees of the American Bar Association ("ABA") relating to securities regulation and is a prolific speaker and writer on regulatory issues impacting investment managers. In short, Professor Thel is well-qualified to speak to matters of industry practice and, specifically, whether Respondents adequately disclosed conflicts of interest to their clients.

[23] *See, e.g.,* Thel Report at ¶ 16 (indicating that, "[i]n my opinion, and based upon industry custom and practice, I do not believe that the acquisition, if consummated, would have materially increased the Respondents' conflict of interest in recommending investment in the Private Funds to their clients"); *id.* at ¶ 21 ("Based on my experience with conflict of interest disclosures by investment advisers and my understanding of industry practices and customs, I conclude that disclosure of the negotiations would not have changed the total mix of information available to PageOne clients.").

practice is relevant to elucidate liability under the securities laws.[24]

Immateriality & Undue Repetition. The Thel Report also satisfies the second prong of the admissibility inquiry under the Commission's Rules — namely, it is neither immaterial nor unduly repetitious. The Thel Report discusses issues that could impact a reasonable investor's decision to invest in the United funds, and is therefore indisputably material. In addition, the Thel Report concerns subject areas that are not addressed by any of Respondents' other proffered witnesses, and thus is not unduly repetitious. As such, the opinions set forth in the Thel Report provide additional probative value.

Because the Thel Report satisfies both prongs of the Commission's admissibility test, it may be properly introduced as evidence.[25]

V. THE STAFF'S ARGUMENTS THAT THE THEL REPORT CONTAINS INADMISSIBLE FACTUAL AND LEGAL CONCLUSIONS ARE UNPERSUASIVE

The Staff's arguments that the Thel Report makes inadmissible factual and legal conclusions are contradicted by established precedent.

First, the Staff's argument that the Thel Report makes an inadmissible factual conclusion about what Mr. Page meant during his own testimony[26] is contradicted by well-established case

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[24] *See Vernazza v. SEC*, 327 F.3d 851, 861 (9th Cir. 2003).

[25] To the extent that there is any concern about the admissibility of the Thel Report, "the Commission has expressed a preference for inclusiveness in doubtful cases." *WSF Corp.*, AP File No. 3-10668 (May 8, 2002) (admitting expert testimony, despite Staff's contention that the expert "lacked any special knowledge concerning the subject on which he opined" and proffered testimony that "was not the product of any reliable principles or methods" (citing *City of Anaheim*, AP File No. 3-9739 (Nov. 16, 1999))).

[26] It is worth noting that the "factual conclusion" to which the Staff objects is the Staff's own conclusion, not Professor Thel's. The Staff argues in its Prehearing Brief that Mr. Page made statements during his deposition indicating that Mr. Page was concerned that investors would overreact to disclosure of transactional negotiations, and therefore that Mr. Page knew the negotiations were material. Staff Prehearing Brief at 1–2 (citing Investigative Testimony Transcript of Edgar Page at 118:17–19). Professor Thel merely argues that such a concern —

law. It is well-established that experts may make factual conclusions in order to provide their opinions, and that such conclusions go to the weight the factfinder should afford the testimony, not its admissibility.[27]

Second, the Staff's argument that the Thel Report makes an inadmissible legal conclusion about the statutory definition of "affiliate" is contradicted by precedent in which the Commission has admitted expert testimony that offers much more significant legal conclusions than that to which the Staff now objects. Indeed, the Staff has itself relied on expert testimony — that of Professor Thel himself — including legal conclusions much more dispositive than the kind it objects to here. For example, in *Scott G. Monson*, a case cited in the Court's January 14 Order, the administrative law judge allowed the Staff to use Professor Thel's expert opinion that the respondent was liable under the Investment Company Act of 1940 since his actions "fell far short of what a reasonable lawyer would have done," based on what both the Staff and the Court characterized as Professor Thel's "extensive professional experience practicing in the securities industry."[28] In that case, the Staff submitted and relied upon Professor Thel's legal conclusions even though they were required to abandon two other expert witnesses at the judge's instance in order to do so.[29]

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which existed according to the Staff's own interpretation of the deposition transcript — does not establish materiality.

[27] *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) ("Questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration."). *See also SEC v. Johnson*, 525 F. Supp. 2d 70, 76 (D.C. Cir. 2007) ("It is for the jury, not the Court, to determine whether [an expert's] opinions are suspect because facts upon which he relied were shown to be inaccurate or unproven."); *In re Zurn Pex*, 644 F.3d at 615 ("An expert's opinions are not inadmissible simply because an underlying assumption may be contestable.").

[28] *In the Matter of Scott G. Monson*, AP File No. 3-12429, 2007 WL 1725777, at *6 (June 15, 2007), *aff'd*, 2008 WL 2574441 (June 30, 2008).

[29] *See Scott G. Monson*, 2008 WL 2574441, at *6 n.27 (June 30, 2008).

Furthermore, to the extent that the Staff argues that the Thel Report contains inadmissible factual and legal conclusions, its argument must extend to the factual and legal conclusions made by its own expert. In his report, the Staff's expert Arthur Laby offers a litany of factual conclusions going to the very heart of the allegations here at issue, including whether a $20 million fundraising condition existed and whether Mr. Page agreed to it,[30] whether the deposits made by United to Mr. Page were "tied" to PageOne clients' investments in the United funds,[31] and whether Mr. Page understood United's financial well-being.[32] Additionally, Mr. Laby makes a number of legal conclusions which are much more directly relevant to the ultimate legal question here at issue than that which the Staff seeks to exclude, including the public significance of the conflict of interest allegedly created by the Proposed Transaction negotiations,[33] the severity of the conflict of interest allegedly created by the Proposed Transaction negotiations relative to the conflict of interest disclosed in PageOne's Forms ADV,[34] and the ultimate legal sufficiency of the disclosures.[35]

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[30] *See* Laby Report at 21 ("As part of the [Proposed Transaction], Page further committed to raise approximately $18 million for the Funds. Once he completed raising $18 million for the Funds, United would complete its purchase of 49 percent of PageOne."), 26 (Page "committed to raise $18–$20 million from clients for the Funds as part of United's acquisition of PageOne stock").

[31] *See id.* at 26 ("Documentary evidence shows that United's payments were tied to Page's clients investments in the Funds.").

[32] *See id.* at 27 ("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.").

[33] *See id.* at 31 ("Page's conflict of interest is the kind of conflict investors would want to know and, therefore, industry professionals would consider it important."). Here, Professor Laby simply applies the wrong legal standard. The test is not what an "industry professional" might think; it is what a reasonable person might think.

[34] *Id.* at 30–31 (opining that the conflict of interest allegedly created by the Proposed Transaction negotiations was "more complex," "more tangible," and "more severe" than the conflict of interest disclosed in PageOne's Forms ADV).

[35] *Id.* at 3 ("the disclosures [Page] made were insufficient").

Accordingly, if Professor Thel's testimony is excluded, Professor Laby's testimony should be excluded as well. Since Respondents' Motion *in Limine* to Exclude the Expert Report of Arthur B. Laby ("Respondents' Motion *in Limine*") — which objects to the factual and legal conclusions Mr. Laby makes in the Laby Report in detail — was denied, Staff Motion No. 2 should be denied as well.

VI. THE THEL REPORT IS ADMISSIBLE EVEN UNDER THE FEDERAL RULES

Not only is the Thel Report admissible under Rule 320, but it would also be admissible under the more stringent Federal Rules. Notwithstanding their general prohibition on legal opinion evidence, even federal courts acknowledge that "the distinction between permissible fact-based conclusions and impermissible ultimate legal conclusions is often a fine one, highly dependent upon the circumstances of the case."[36] In other words, the fact that expert testimony implicates legal issues is not dispositive of its admissibility, or lack thereof, in district court. Because the Thel Report — while arguably touching on legal issues — does not encroach into the adjudicator's prerogative to apply and interpret the law, it would be admissible in any forum.

Under the Federal Rules, an expert "may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied . . . ."[37] For example, in *U.S. v.*

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[36] *AUSA Life Ins. Co. v. Dwyer*, 899 F. Supp. 1200, 1202 (S.D.N.Y. 1995). *See also Kennedy v. U.S. Postal Serv.*, 2013 WL 1281798, at *3 (N.D. Ind. March 25, 2013) ("[W]hile the law is clear that legal opinions are not permissible, there is nevertheless a fine line between legal conclusions and factual conclusions, and *a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible.*") (internal quotation marks omitted) (emphasis added); *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1212 (D.C. Cir. 1997) ("The line between an inadmissible legal conclusion and admissible assistance to the trier of fact in understanding the evidence or in determining a fact in issue is not always bright." (citing Michael H. Graham, Federal Practice and Procedure: Evidence § 6661, at 327 (Interim ed. 1992)).

[37] *Burkhart*, 112 F.3d at 1212-13. *See also U.S. v. Davis*, 471 F.3d 783, 789 (7th Cir. 2006) ("Experts are permitted to testify regarding how their government agency applies rules as long as the testimony does not incorrectly state the law or opine on certain ultimate legal issues in the case."); *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F. 3d 998, 1016 (9th Cir. 2004)

Naegele, the court rejected the government's attempt to exclude testimony from two bankruptcy attorneys on the issue of where a contingent fee agreement belongs on bankruptcy forms.[38] Specifically, the court allowed the experts to testify about the bankruptcy forms generally, as well as how these forms and contingent fee agreements "should have applied in this case in view of the specific terms of the fee agreement and addendum."[39] In doing so, the court acknowledged that the experts' testimony was based on "their years of experience representing debtors and serving as Panel trustee. That experience necessarily involves their knowledge and understanding of bankruptcy law and, so far as relevant, state statutory and common law."[40]

Similarly, in his expert report, Professor Thel invokes his thirty-plus years experience in the securities industry to clarify the standard approach employed by investment advisers with respect to Form ADV disclosures. To the extent that Professor Thel implicates any law in his testimony, he does so in the course of applying his intimate knowledge of the industry to opine about the general purpose of regulatory filings and whether Respondents made sufficient disclosures to provide investors with meaningful information. These subjects are comparable to those discussed by the expert in *Naegele*, and would be permissible in a district court. Where expert testimony touches on legal issues for the purpose of offering guidance on industry practice in a particular area of law, it is permissible.[41]

("[A] witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms.").

[38] *United States v. Naegele*, 471 F. Supp. 2d 152 (D.D.C. 2007).

[39] *Id.* at 161.

[40] *Id.*

[41] *See 259 CDX Liquidating Trust ex rel. CDX Liquidating Trustee v. Venrock Assocs.*, 411 B.R. 571, 588 (7th Cir. 2009) (noting that expert witness "may testify about Defendants' conduct in light of industry practices and standards"). *See also Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 509 (2d Cir. 1977) ("Testimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the

Even assuming, for the sake of argument, that the Thel Report contains legal conclusions, this Court should admit it into evidence because much of the rationale behind the Federal Rules' preclusion of such testimony is inapplicable in an administrative context. Federal courts do not allow witnesses to give opinions on questions of law for two main reasons.[42] First, the jury may "simply adopt[]the expert's conclusions rather than making its own decision" due to its perception that the witness — "who is presented to them imbued with all the mystique inherent in the title 'expert'" — is more knowledgeable in the law than the judge.[43] Second, the jury may be "confused" by the competing definitions of the law offered by each side's expert witnesses, and "that confusion may be compounded by different instructions given by the court."[44]

Both of the proffered justifications for excluding expert legal testimony pertain to the harmful impact of such testimony in relation to the factfinder and assume that this factfinding role is distinct from that of the presiding judge.[45] Yet where, as here, the presiding judge serves as factfinder, the danger that the deliberations will be unduly prejudiced by expert testimony regarding legal conclusions is obviated.[46] As explained by SEC Administrative Judge James T.

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standards of ordinary practice in the industry."); *Pereira v. Cogan*, 281 B.R. 194, 198 (S.D.N.Y. 2002) (allowing expert testimony about good corporate practice based on industry custom, because "an expert may . . . include factual conclusions and opinions embodying legal conclusions that encroach upon the court's duty to instruct upon the law").

[42] *See Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988).

[43] *Id.* (quotation marks omitted).

[44] *Id. See also Pozez, et al. v. Ethanol Capital Mgmt.*, No. 07-cv-00319, 2009 WL 2176574, at *12 (D. Ariz. July 21, 2009) ("[I]t is improper for an expert witness to testify regarding legal conclusions because it has the effect of allowing the witness to instruct the jury on the law rather than the judge.").

[45] *See Harris v. Rivera*, 45 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions").

[46] *See, e.g., CFM Commc'n, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1234 (E.D. Cal. 2005) ("The concerns about admitting expert legal opinion may be lessened where . . . a court sits as trier of fact."); *Martin v. Indiana Michigan Power Co.*, 292 F. Supp. 2d 947, 959 (W.D. Mich. 2002) ("[W]here the court is acting as the trier of fact, the dangers which can be presented by . . . [legal expert] testimony are minimal if not nonexistent.").

Kelly, "[a]gencies relax the rules of evidence because they believe they have the skill needed to handle evidence that might mislead a jury."[47]

Because the reasons for excluding expert legal testimony are not present in this context, the Thel Report should be admitted in its entirety.

[47] *WSF Corp.*, AP File No. 3-10668 (May 8, 2002) (denying the Division's motion to strike expert testimony).

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, Staff Motion No. 2 should be denied and the Thel Report should be accepted by the Court in its entirety. Additionally, Professor Thel should be permitted to testify regarding all of the matters discussed in his report.

Dated: January 20, 2015
New York, New York

Respectfully submitted,

Richard Marshall /jmm

By: Richard D. Marshall

Richard D. Marshall
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036
Phone: 212-596-9000
Fax: 212-596-9090
Email: richard.marshall@ropesgray.com

Robert Iseman /jmm

Robert H. Iseman

Robert H. Iseman
Iseman, Cunningham, Riester & Hyde, LLP
9 Thurlow Terrace
Albany, NY 12203
Phone: 518-462-3000
Fax: 518-463-9217
Email: riseman@icrh.com

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

ROPES & GRAY LLP
1211 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-8704
WWW.ROPESGRAY.COM

HARD COPY

January 20, 2015

Richard D. Marshall
T +1 212 596 9006
F +1 646 728 1770
richard.marshall@ropesgray.com

BY FACSIMILE AND FEDEX

The Honorable Brent J. Fields
Secretary of the Commission
Securities & Exchange Commission
Office of the Secretary
100 F Street N.E.
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 1) Respondents' Memorandum in Opposition to the Division of Enforcement's Motion *in Limine* No. 2 to Preclude the Report or Testimony of Professor Steve Thel, and 2) Respondents' Offer of Proof in Opposition to the Division of Enforcement's Motion *in Limine* No. 3 to Preclude Irrelevant Evidence of Transactions Not At Issue in This Case, on behalf of Edgar R. Page and PageOne Financial, Inc., per Judge Patil's January 14, 2015 Order on Motions *in Limine* in the Matter of Edgar R. Page and PageOne Financial, Inc., Administrative Proceeding File No. 3-16037.

Respectfully submitted,

Richard Marshall/sm

Richard D. Marshall

Enclosures