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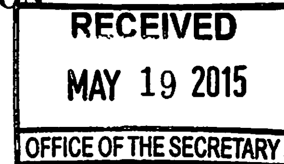
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16037

In the Matter of

EDGAR R. PAGE and PAGEONE FINANCIAL, INC.,

Respondents.

POST-REMEDIES HEARING BRIEF OF EDGAR R. PAGE AND PAGEONE FINANCIAL, INC.

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I. INTRODUCTION

Per the Offer of Settlement and March 10 Order, Respondents have already been censured and ordered to cease and desist from committing future violations of the Advisers Act. In addition, the Division now seeks additional, draconian sanctions including (1) multimillion-dollar third-tier civil monetary penalties, (2) multi-million dollar disgorgement, (3) half a million dollars in prejudgment interest, (4) a total and permanent associational bar against Mr. Page keeping him from ever working again in the financial services industry, and (5) revocation of PageOne's registration as an investment adviser. In essence, the Division is seeking to have the death penalty administered to an elderly man for a victimless crime for which he has conceded liability and expressed genuine remorse.

This Court should not accept the Division's overreaching, misguided, and merciless invitation. Respondents respectfully submit that the appropriate measure of any additional remedy should be, at most, a first-level civil monetary penalty, and that the facts of this case support neither disgorgement nor the imposition of a general associational bar or other additional sanctions.

II. PROCEDURAL BACKGROUND

On August 26, 2014, the Division of Enforcement ("Division") of the Securities and Exchange Commission ("Commission") filed an Order Instituting Administrative and Cease-and-Desist Proceedings (the "OIP") against Edgar R. Page and PageOne Financial, Inc. ("PageOne" and, together with Mr. Page, "Respondents") pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (the "Advisers Act") and Section 9(b) of the Investment Company Act of 1940. The OIP charged Respondents with violating Sections 206(1), 206(2), and 207 of the Advisers Act based on allegations that Respondents failed to disclose adequately a potential conflict of interest in PageOne's Forms ADV between 2009 and

2011. Specifically, the OIP alleged that Respondents should have disclosed that Mr. Page was negotiating for the sale of PageOne stock to the United Group of Companies, Inc. ("United"), and receiving earnest money payments from United, when Respondents recommended that a small number of their clients invest in three private investment funds administered by United (the "Private Funds").

On or about October 24, 2014, the Division moved to amend the OIP and, on October 28, 2014, the Division's motion was granted and an Amended OIP was filed.

On January 31, 2015, Respondents submitted an Offer of Settlement, which was accepted by the Commission. Pursuant to the terms of the Offer of Settlement, Respondents consented to the entry of an Order in which the Commission found that Respondents violated the Advisers Act provisions at issue, but Respondents neither admitted nor denied the findings contained in the Order. Further, Respondents consented to censure by the Commission, to being ordered to cease and desist from committing any future violations of the Advisers Act provisions at issue, and to the bifurcation of the OIP to provide for a hearing to determine what, if any, disgorgement, prejudgment interest, civil penalties and/or other remedial action beyond Respondents' censure is appropriate and in the public interest pursuant to Section 203 of the Advisers Act and Section 9 of the Investment Company Act. The Order was entered on March 10, 2015 (the "March 10 Order").

On April 20, 2015, the hearing regarding remedies took place (the "April 20 Hearing"). At the April 20 Hearing, the Division called Mr. Page to testify. Mr. Page answered all of the Division's questions, taking full responsibility for the Advisers Act violations for which he had previously conceded liability, and expressing remorse for not having been more vigilant with respect to his obligations. Mr. Page also testified regarding the confusing and uncertain

progression of transactional negotiations with United, the extensive involvement of Mr. Sean Burke and National Regulatory Services ("NRS") in the creation and evolution of PageOne's Forms ADV, and the unsatisfactory efforts Mr. Page made to apprise Respondents' clients of a conflict of interest with respect to investments in the Private Funds. After the Division rested, Mr. Page testified on his own behalf regarding his personal and professional background, his poor health, his poor financial condition, PageOne's poor financial condition, and the tremendous impact that even relatively limited sanctions would have on the rest of his life. Following Mr. Page's testimony, the Division then cross-examined Mr. Page. The Division then rested and the hearing adjourned.

III. DETERMINATION OF THE APPROPRIATE REMEDY

a. Application of Civil Monetary Penalties

Advisers Act Section 203(i) authorizes the Commission to impose civil monetary penalties in cease-and-desist proceedings. Civil monetary penalties are assessed following a three-tiered approach, with the third tier being the highest penalty level.

A first-tier penalty may be imposed against any person who has willfully (1) violated, or aided and abetted violations of, certain provisions of the securities laws or rules or regulations; or (2) made or caused to be made a materially false or misleading statement, or omitted any material fact, in a report required to be filed with the Commission, but only to the extent that such penalties are in the public interest.[1]

To determine whether a penalty is in the public interest, the statute calls for consideration of: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm caused to others; (3) unjust enrichment, taking

[1] 15 U.S.C. § 80b-3(i)(1).

into account any restitution made; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require.[2]

A second-tier penalty is permitted only if the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.[3] A maximum third-tier penalty is permitted only if (1) the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and (2) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.[4]

i. Respondents Did Not Intend to Defraud, Deceive, or Manipulate Anyone

Respondents consented to the entry of the March 10 Order, in which the Commission found that Respondents willfully violated the Advisers Act provisions at issue. Respondents and the Division agreed that by the terms of the Offer of Settlement and March 10 Order, Respondents would neither admit nor deny the findings contained in the Order, except for the Commission's jurisdiction over Respondents and the subject matter of the proceeding, which were admitted.[5]

The Division argued in its Pre-hearing Brief that Respondents had admitted to having an intent to defraud since the March 10 Order found that the Respondents' violations were "willful."[6] This argument is fallacious. As the Commission found just a few weeks ago, "[a] willful violation of the securities laws means merely that the person charged with the duty knows

[2] 15 U.S.C. § 80b-3(i)(3).
[3] 15 U.S.C. § 80b-3(i)(2)(B).
[4] 15 U.S.C. § 80b-3(i)(2)(C).
[5] March 10 Order at 2–3.
[6] Division of Enforcement's Pre-hearing Brief Seeking Relief Against Respondents (hereinafter "Div. Br.") at 12–14.

what he is doing. . . . There is no requirement that the actor also be aware that he is violating one of the Rules or Acts."[7] Similarly, in *In re Fifth Third Bancorp, et al.*, the Commission held that the "use of the word willful does not reflect a finding that [a respondent] acted with the intention to violate the law or knowledge that he was doing so. As used in the governing provisions of law, willfully means only that the actor intentionally committed the act which constitutes the violation. . . ."[8]

The Division also argues that, by consenting to the March 10 Order, the Respondents admitted to acting with a "high degree of scienter," i.e., an intent to defraud.[9] This is also fallacious. Respondents consented to findings of violations of Sections 206(2) and 207 of the Advisers Act, which require only a showing of negligence.[10] Respondents also consented to findings that they violated Section 206(1) of the Advisers Act, which requires a showing of recklessness.[11] Reckless conduct is conduct which is "'highly unreasonable' and . . . represents 'an extreme departure from the standards of ordinary care.'"[12] Again, even a finding of a violation of Section 206(1) of the Advisers Act does not evidence a "high degree of scienter."

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[7] *In re Blackrock Advisors, LLC, et al.*, Admin Pro. No. 3-16501 (Apr. 20, 2015) (internal quotations marks and citations omitted).

[8] Admin Pro. No. 3-15635 (Dec. 4, 2013) (internal quotation marks and citations omitted).

[9] Div. Br. at 14; April 20 Hearing Transcript (hereinafter, "Hearing Tr.") at 12:1–11 (arguing to the Court that Respondents' denial of "intent to defraud" ran afoul of the March 10 Order).

[10] Scienter is not required to establish a violation of Section 206(2) of the Advisers Act; a showing of negligence is adequate. *See SEC v. Capital Gains Research Bureau, Inc.* , 375 U.S. 180, 195 (1963); *see also SEC v. Steadman*, 967 F.2d 636, 641 & n.5 (D.C. Cir. 1992); *Steadman v. SEC*, 603 F.2d 1126, 1132-34 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).
Scienter is not required to establish a violation of Section 207 of the Advisers Act; a showing of negligence is adequate. *Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003); *In the Matter of David Henry Disraeli & Lifeplan Associates, Inc.*, Admin. Proc. File No. 3-12288, Opinion of the Commission (Dec. 21, 2007).

[11] *SEC v. Steadman*, 967 F.2d at 641 & n.3.

[12] *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978) (quoting *Sanders v. John Nuveen & Co.* , 554 F.2d 790, 793 (7th Cir. 1977)). Negligence has been defined as follows: "The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. . . . The term refers only to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or great. It is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like." *In re Edward T. Jones & Co.*, Admin. Pro. No. 3-9181 (April 15, 1998).

Mr. Page is alleged to have "caused" and "aided and abetted" PageOne's violations, but this establishes no more than that Mr. Page acted with simple recklessness. "Causing" liability can be based on negligence when the underlying primary violation requires a showing of negligence.[13] "Recklessness is sufficient to satisfy the scienter requirement for aiding and abetting liability."[14] As noted above, "[r]eckless conduct is . . . conduct which is 'highly unreasonable.'"[15] Further, the scienter of PageOne is imputed from the scienter of its employees and agents.[16] Thus, the alleged recklessness of PageOne arises from the recklessness of Mr. Page, Sean Burke, and PageOne's agent, NRS. Nothing in the March 10 Order is inconsistent with such conclusions.

The Division's confusion stems from its conflation of the use of the word "fraud" in §§ 206(1), 206(2) and 207, where it describes how a defendants' conduct "operates," with the word "fraud" in 15 U.S.C. § 80b-3, where it is one of several factors that courts may consider in determining, in their discretion, the applicable penalty for such a violation. By the Division's logic, one who violates Section 206(2) and 207 of the Advisers Act—with any *mens rea*, whether by negligence, recklessness, or intentional misconduct—should be automatically subjected to second-tier civil monetary penalties, regardless of the court's discretion, since that person has "committed fraud," Hearing Tr. 8:11, and all that is required for second-tier civil

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[13] *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175 & n.100 (2001), *pet. denied, KPMG Peat Marwick, LLP v. SEC*, 289 F.3d 109, 120 (D.C. Cir. 2002).
[14] *SEC v. Howard*, 376 F.3d 1136 (D.C. Cir. 2004). Where the aider and abettor is a fiduciary of the harmed party, recklessness is sufficient to establish scienter. *See IIT v. Cornfeld*, 619 F.2d 909, 923–925 (2d Cir. 1980); *Ross v. Bolton*, 904 F.2d 819, 824 (2d Cir. 1990).
[15] *Rolf*, 570 F.2d at 47.
[16] *In re S.W. Hatfield, CPA*, Admin. Pro. No. 3-15012 (Dec. 5, 2014); *Disraeli*, 2007 WL 4481515, at *5 n.25 ("The scienter of a corporation's officers and directors establishes the scienter of the corporation for purposes of the antifraud provisions." (internal quotation marks and citation omitted)); *see also A.J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977) (holding that a firm "can act only through its agents, and is accountable for the actions of its responsible officers"); *In re Brandt, Kelly & Simmons, LLC*, Admin. Pro. No. 3-11672 (June 30, 2005) ("BKS is accountable for the actions of its responsible officers"). A company's scienter is imputed from that of the individuals controlling it. *See SEC v. Blinder, Robinson & Co.*, 542 F. Supp. 468, 476 n.3 (D. Colo. 1982) (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096–97 nn.16–18 (2d Cir. 1972)).

monetary penalties is that the violation at issue "involved fraud," 15 U.S.C. § 80b-3(i)(2)(B). The Division essentially made that very argument at the April 20 Hearing.[17] Respondents respectfully submit that a better reading of the statute is that heightened penalties are only appropriate where, unlike this case, the party against whom penalties are to be applied possessed an intent to defraud others, rather than exhibited negligent or reckless behavior.

The evidentiary record demonstrates that Respondents did not intend to defraud anyone. Mr. Page believed that some form of disclosure should be made for the benefit of Respondents' clients, but that disclosure of the details of the proposed transaction was neither appropriate nor legally required given its highly speculative, preliminary, and confidential nature. NRS, the compliance experts retained by PageOne for the specific purpose of advising Respondents on their disclosure obligations, advised Mr. Burke that the transactional negotiations and earnest money deposits did not need to be disclosed because the transaction was not completed. Thus, Mr. Page erroneously concluded that disclosure of neither the preliminary and confidential transactional negotiations nor the earnest money deposits was appropriate or legally required. Rather than intent to defraud, this evidences Mr. Page's negligence or recklessness.

Furthermore, although Respondents did not disclose the confidential transactional negotiations with United in PageOne's Forms ADV, Respondents did take steps to put their clients on notice of a significant financial relationship between United and Mr. Page so that Respondents' clients would take into account a potentially serious conflict of interest when making a decision about whether to invest in the Private Funds. Respondents decided to follow the approach suggested by NRS of disclosing so-called "referral fees" and consultant payments as a means of accomplishing that, even though no such fees or payments were received.

[17] Hearing Tr. 10:24–11:3 (arguing that the effect of Respondents' taking the position that disgorgement was not warranted when disgorgement is only proper where there is a finding of fraud meant that Respondents were denying that they were liable for fraud).

Respondents disclosed that, when a PageOne client invested in one of the Private Funds, PageOne would "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 funds.[18] That is to say, Respondents disclosed that they could receive up to 7% of the amount the clients invested—in outright cash payments, and *repeated annually*[19]—from United.[20] Accordingly, a PageOne client who invested in the Private Funds—an investment which by the terms of the Private Fund PPMs had a mandatory lock-up period of 7 years[21]—made that investment on actual notice that Mr. Page could receive outright cash payments from United of up to 49% of the amount the client invested.

Respondents respectfully submit that disclosure of the 7% annual outright fee arrangement put PageOne's clients on notice of a potential conflict of interest that was *more serious* than that potentially created by the loans that were in fact made to Mr. Page in the form of earnest money deposits towards the proposed transaction. This disclosure was done not for the Respondents' protection or self-interest, but for the benefit of Respondents' clients.[22] If Respondents truly intended to defraud their clients, they would not have made disclosures regarding United at all, much less instructed Mr. Burke to hire NRS for expert assistance in crafting such disclosures.

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[18] *See, e.g.*, Resp. Ex. 112.

[19] *See* Expert Report of Steven Thel ¶ 21.

[20] Later, PageOne's Form ADV was amended, removing the "between 7.0% and 0.75%" figures, but maintaining language indicating that Respondents would receive a referral and/or advisory fee, i.e., an outright payment, for recommending investments in the Private Funds to their clients. *See, e.g.*, Resp. Ex. 34.

[21] *See* Resp. Exs. 119, 207. The Equity Fund had a five-year lock-up period, with a two-year extension at United's option. Resp. Ex. 208.

[22] The Division misleadingly suggests that Mr. Page admitted to an improper motive for nondisclosure when he testified that "[i]t's too dangerous. It would cause thousands of clients to get extremely nervous if I was selling my firm." In fact, Mr. Page testified that thousands of his clients were never suitable for investment in the Private Funds and so the Funds were never recommended to them. For these thousands of clients who were never given the opportunity to invest in the Private Funds, disclosure of a potential sale to United was irrelevant, but at the same time risked creating client confusion, a legitimate factor courts have recognized. *See Flamm v. Eberstadt*, 814 F.2d 1169, 1176 (7th Cir. 1987) ("silence during negotiations may be beneficial for investors").

But Respondents did disclose a serious conflict of interest, for their clients' benefit. The Form ADV filings were prepared by these outside experts based upon information provided to them by PageOne's compliance staff. Mr. Page erroneously believed that the disclosure language recommended by outside experts was acceptable, particularly since these experts had full knowledge of the potential business relationship with United and it was disclosed that Mr. Page would receive earnest money deposits from United.

Although neither Mr. Page nor PageOne ever received a referral fee, there was uncertainty about how else to describe Mr. Page and United's financial relationship in a manner calculated to get the attention of the prospective investors. Mr. Page understood that United was authorized to pay up to 7% of all amounts invested in the Private Funds, to cover marketing and solicitation expenses. Accordingly, disclosure of the 7% referral fee proposed by NRS appeared to be a reasonable statement consistent with the Private Fund PPMs, which explicitly disclosed a direct financial relationship between Mr. Page/PageOne and United.

When PageOne's Form ADV was amended in September 2010, removing reference to the "between 7.0% and 0.75%" annual referral fee language and adding reference to Mr. Page's employment as a consultant to United, NRS was again consulted and developed the Form ADV language. Given the involvement of Mr. Burke and NRS, Mr. Page believed that the disclosure language was sufficient to meet PageOne's disclosure obligations. And when PageOne's Form ADV was amended in April 2011, removing all references to the Private Funds, Mr. Page once again believed that the disclosure language was sufficient to meet PageOne's compliance requirements, since he no longer planned to recommend the Private Funds to his clients.

In sum, rather than Respondents' alleged intent to defraud, it was Respondents' negligent or reckless decision to rely upon Mr. Burke and NRS that resulted in the Advisers Act violations

here at issue. When Mr. Page delegated responsibility for PageOne's Form ADV disclosures to Mr. Burke, and later to Mr. Burke's successors, Mr. Page believed that his staff was equipped to manage the task. This was based, in part, upon Mr. Page's knowledge that Mr. Burke and his successors were given access to expert resources at NRS to ensure that PageOne's compliance staff was supported appropriately. In the end, Mr. Burke and NRS's collective counsel was inadequate, and Respondents' improper reliance upon them was insufficient for Respondents to meet their disclosure obligations, and as a result Respondents ran afoul of the Advisers Act. But for purposes of determining how drastic a remedy to apply, the record does not establish that Respondents ever intended to defraud anyone, or ever acted with "a high degree of scienter."

ii. The Record is Void of Any Proof of Harm to Others Caused by Respondents' Conduct

The record is also void of any evidence that anyone has been harmed by Respondents' conduct. In its Pre-hearing Brief Seeking Relief Against Respondents, the Division alleges that the Private Funds "*Face*[] Collapse"[23] and that Respondents' "clients *seem likely* to lose much—if not all—of their investments to the UGOC Funds."[24] In support of these allegations—which are wholly speculative by their very terms—the Division cites to a number of their exhibits in which United purportedly wrote investors in the Private Funds regarding the status of the Funds' respective financials.[25]

These exhibits—whose authenticity and reliability were not established in any way by any testimony, despite the ready availability of Private Fund investors on the Division's witness list—do not demonstrate that any Private Fund investors have been harmed whatsoever by

[23] Div. Br. at 11–12.
[24] *Id.* at 17 (emphasis supplied).
[25] *Id.* at 11–12.

Respondents' conduct, and the Division has offered no evidence of any harm otherwise caused by Respondents. The Division cannot offer such evidence for two reasons.

First, even if the Private Funds' investments end up underperforming—a risk clearly encompassed by the Private Fund PPMs and Subscription Agreements which the record demonstrates that Respondents' clients who invested in the Private Funds read and executed before investing[26]—said underperformance is in no way attributable to Respondents' actions. In the very documents relied upon by the Division in its brief, United describes how the Private Funds have faced difficulties with certain of their investments attributable to an unforeseen change in housing policies at New York state colleges—years after the Private Funds were offered—which drastically reduced demand for the housing which were the primary investments of the Private Funds.[27] Thus, even if the Division's speculation that the Private Funds "seem likely" to underperform turns out to be correct, said underperformance is not attributable to any action by Respondents, but rather to low demand at the Private Funds' investment properties.

But the record is clear that the Private Funds have not underperformed. On the contrary, investments in the Private Funds have performed completely as advertised. As Mr. Page testified at the hearing (and the Division's own exhibits corroborate[28]), the Income Fund—in which the vast majority of Respondents' clients invested—has consistently returned to investors the nine-percent dividend described as the Income Fund's objective in the Income Fund PPM, and in 2014 returned ten percent of principal invested to investors.[29] And the Equity Fund—in which, despite getting the lion's share of the Division's attention in their Brief and at the Hearing, only a very small minority of Respondents' clients invested, and only at their own insistence and not

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[26] *See, e.g.*, Resp. Ex. 147 (Ira Stier investor file).
[27] *See* Div. Exs. 182, 184, 186.
[28] *See* Div. Ex. 186 (Jan. 20, 2015 letter noting planned dividend payment).
[29] Resp. Ex. 207 at 16; Hearing Tr. at 174:15–21.

based on Respondents' recommendations—is a long-term investment that was designed to return funds to investors at maturity, which it has yet to reach.[30]

Accordingly, any argument that Respondents' clients have been harmed by Respondents' actions is misguided speculation at best, and contradicted by the record at worst, which the Division tellingly elected not to develop at the April 20 hearing despite the ready availability of both Income and Equity Fund investors on the Division's witness list to testify otherwise.

iii. Respondents Have Not Been Unjustly Enriched

Nor have Respondents been unjustly enriched. In fact, for the reasons described below, *see infra* Section III(b)(i), Respondents have not been enriched at all. Although the Form ADV disclosures would have allowed Respondents to take a referral fee of up to 49% of the amounts invested in the Private Funds, what Mr. Page actually received were loans with commercially reasonable terms for which United is now demanding repayment in full. Accordingly, there has been no enrichment whatsoever. Even if the proposed transaction had closed—which it did not and never will—Mr. Page would not have been *unjustly* enriched, because although the approximately $2.7 million in loans he received from United would have been forgiven, he would have given up 49% of PageOne's equity in consideration.

iv. Respondents Have No History of Prior Advisers Act Violations

Respondents have no history of prior Advisers Act violations.

v. Significant Civil Monetary Penalties Against Respondents Would Not Have a Deterrent Effect

Finally, the deterrent effect of a significant penalty would be minimal. Respondents ceased negotiating with United and recommending investments in the Private Funds well in advance of any Division action. Respondents chose to stop recommending investments in the

[30] Resp. Ex. 118 at 19; Hearing Tr. at 175:5–176:3. *See also supra* note 21 and accompanying text.

Private Funds in February 2011, well before the Staff commenced an inspection of PageOne, and Mr. Page had abandoned the proposed transaction with United months before that. Further, a significant penalty would do nothing to deter similar violations in the future because the facts and circumstances of this case are so unique that it is highly unlikely that similar events will ever recur, irrespective of any penalty assessed.

vi. At Most, a First-Tier Civil Monetary Penalty Is Appropriate

In accordance with the above, the enumerated factors do not weigh in favor of a significant penalty against Respondents being in the public interest. As described above, Respondents did not intend to defraud anyone, there is no record of any harm caused by Respondents' conduct, Respondents were not unjustly enriched, Respondents have no history of prior Advisers Act violations, and a significant penalty would not act as a deterrent to others. For those reasons, Respondents respectfully submit that, at most, a first-tier civil money penalty is appropriate, and that a heightened penalty is clearly unwarranted.

b. Disgorgement of Monies Received from United Would Be Inequitable

Disgorgement of ill-gotten gains pursuant to Advisers Act Sections 203(k)(5) and (j) "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws."[31] The Division bears the burden of showing that Respondents profited from ill-gotten gains, and that there exists a "causal nexus" between the amount to be disgorged and the alleged violation.[32] Because the purpose of disgorgement is to

[31] *In re Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, *94 (May 2, 2014) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)); *see SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011).
[32] *SEC v. Todd*, No. 03 CV2230, 2007 WL 1574756, at *18 (S.D. Cal. May 30, 2007).

prevent unjust enrichment, the amount of disgorgement must be "approximately equal to the unjust enrichment."[33]

Principles of equity guide the determination of the proper amount to be disgorged.[34] In this case, the balance of the equities counsels against disgorgement of the monies paid to Respondents by United for at least three reasons: (i) Respondents were not unjustly enriched by any of the United payments; (ii) Respondents did not intend to defraud anyone; and (iii) even if disgorgement were proper, the amount of disgorgement should be reduced by the amount of legitimate business expenses paid by Respondents out of the United loans.

i. Respondents Were Not Enriched At All By the Earnest Money Payments

It is well settled that "[t]he purpose of disgorgement is to deprive a person of 'ill-gotten gains' and prevent unjust enrichment."[35]

As mentioned above, *see supra* Section III(a)(iii), Respondents have not been enriched in any way as a result of the disclosure infractions alleged in the OIP. On the contrary, Mr. Page has merely become indebted to United. The payments received by Mr. Page from United are now subject to repayment, together with accrued interest, at a rate that exceeds the IRS penalty rate. It would be inequitable to require disgorgement of such amounts because Mr. Page would remain liable to United in contract for the same amounts following disgorgement to the Commission.

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[33] *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993) (holding that only commissions that were kept by defendant were subject to disgorgement); *Todd*, 2007 WL 1574756, at *18 (holding that "[d]isgorgement is intended to force a defendant to surrender his unjust enrichment" and that the "SEC therefore must be able to show unjust enrichment"); *SEC v. Unioil*, 951 F.2d 1304, 1306 (D.C. Cir. 1992) (noting that "disgorgement primarily serves to prevent unjust enrichment . . . and may not be used punitively.").

[34] *SEC v. Church Extension of the Church of God, Inc.*, 429 F. Supp. 2d 1045, 1049–50 (S.D. Ind. 2005) (noting that disgorgement is an equitable remedy and applying principles of equity to reduce the amount to be disgorged).

[35] *Hateley*, 8 F.3d at 655; *SEC v. Breed*, No. 01 Civ. 7798, 2004 WL 909170 (S.D.N.Y. Apr. 29, 2004) (noting that the "primary purpose of disgorgement [to the SEC] is to force 'a defendant to give up the amount by which he was unjustly enriched'"); *SEC v. McCaskey*, No. 98 Civ. 6153, 2001 WL 1029053, at *7 (Sept. 6, 2001) (holding that "[t]he proper measure of disgorgement is the amount of the wrongdoer's unjust enrichment").

Even if the transaction had closed—which did not and never will happen—Respondents would not have been unjustly enriched. Mr. Page would have exchanged 49% of PageOne's equity for forgiveness of the United loans, a reasonable exchange following his arm's-length negotiations for the sale of a portion of PageOne with United. Moreover, Mr. Page testified that Walter Uccellini told Mr. Page that the moneys were paid to induce Mr. Page to continue the negotiations, to compensate Mr. Page for the lost alternative business opportunity he had forgone to negotiate with United, and to compensate Mr. Page for the time and trouble he had invested in the ultimately fruitless negotiations.[36] Because such moneys would serve only as compensation for injuries, they would not confer a benefit to Mr. Page.[37]

ii. Respondents Did Not Act With a "High Degree of Scienter"

The absence of intent to defraud has been held to be a "mitigating factor" in reducing the amount to be disgorged.[38] Generally, disgorgement has been applied only where there is also a finding of a high degree of scienter.[39]

As discussed above, *see supra* Section III(a)(i), Respondents did not act with a high degree of scienter. Although PageOne's Form ADV disclosures should have been crafted differently to disclose the actual financial relationship that existed between Mr. Page and United, it is indisputable that Respondents took affirmative steps to alert their investment clients that a financial relationship in fact existed with United. Moreover, Mr. Page recommended the Private Funds to his accredited investor clients not out of self-interest, but because he believed, in good

[36] Investigative Testimony Transcript of Edgar R. Page, dated August 29, 2013 (Page Tr.) at 142:20–143:17.
[37] *See* RESTATEMENT (SECOND) OF TORTS, Section 903 (1977) ("When there has been harm only to the pecuniary interest of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that in which he would have occupied had no tort been committed.")
[38] *See SEC v. Church Extension of the Church of God, Inc.*, 429 F. Supp. 2d 1045, 1050 (S.D. Ind. 2005).
[39] *See, e.g., SEC v. Martino*, 255 F. Supp. 2d 268, 288–89 (S.D.N.Y. 2003) (requiring an unregistered broker-dealer, described as a "recidivist securities law violator," to disgorge profits obtained through a fraudulent scheme to manipulate stock price); *SEC v. Thorn*, 2:01 CV 290, 2002 WL 31412439 (S.D. Ohio Sept. 30, 2002) (requiring disgorgement of ill-gotten gains where a broker-dealer failed to register and engaged in a series of fraudulent investment schemes).

faith, that the Private Funds were sound investment opportunities. These facts counsel against disgorgement.

iii. The Division Does Not Account for Business Expenditures

Even assuming that the earnest money payments could be viewed as unjust enrichment to Respondents, the amount to be disgorged should be reduced by a sum equal to the legitimate business expenses Respondents paid using such funds.[40] Should this Court be inclined to order disgorgement, the amount ordered should be reduced by legitimate business expenditures that were paid from the monies received from United.

c. Imposition of an Industry Bar Against Respondents Would Be Improper

Advisers Act Section 203(f) authorizes an industry bar if the respondent was associated with an investment adviser at the time of the alleged misconduct; such sanction is in the public interest; and the respondent (1) has willfully made or caused to be made a materially false or misleading statement, or omitted any material fact, in a report required to be filed with the Commission; or (2) has willfully violated, or willfully aided and abetted violations of, certain provisions of the securities laws.[41]

In determining whether a bar is in the public interest, the six factors outlined in *Steadman v. SEC* must be considered: (i) the egregiousness of Respondents' actions; (ii) the isolated or recurrent nature of the infraction; (iii) the degree of scienter involved; (iv) the sincerity of Respondents' assurances against future violations; (v) Respondents' recognition of the wrongful

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[40] *See SEC v. Thomas James Assocs. Inc.*, 738 F. Supp. 88, 92 (W.D.N.Y. 1990) (offsetting gross profits with business expenses, including, for example, "commissions, telephone charges, underwriting expenses, and a proportionate share of overhead"); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990) (holding that to "require disgorgement of all fees and commissions without permitting a reduction for associate expenses and costs constitutes a penalty assessment and goes beyond the restitutionary purpose of the disgorgement.").

[41] *See In re John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *25 n.30, *38 (Dec. 13, 2012).

nature of their conduct; and (vi) the likelihood that Respondents' occupation will present opportunities for future violations.[42]

i. Respondents' Actions Were Not Egregious

The Division's enforcement action, as alleged in the OIP, is focused on the narrow question of whether the disclosures made in PageOne's Forms ADV were adequate. There are no allegations in the OIP that investors were not properly accredited or qualified to invest in the Private Funds, that any of the investment transactions involving the Private Funds were unsuitable, or that any of Respondents' clients suffered actual financial harm. Nor are there allegations of misappropriation, conversion, or misuse of monies invested in the Private Funds—factors that are commonly indicative of egregious conduct.

With respect to Form ADV disclosures, the steps Respondents took to disclose their relationship with United were flawed and, looking back, Mr. Page now knows that he should have relied less upon Mr. Burke and NRS. Nevertheless, Respondents' conduct cannot be characterized as egregious.

What Mr. Page actually received were deposits against the proposed transaction, secured by promissory notes with commercially reasonable terms and market rates of interest. Stated differently, Mr. Page received loans from United, the forgiveness of which would take place only upon the improbable closing of the proposed transaction, at which point Mr. Page was required to tender 49% of his business to United. In the end, Mr. Page has received nothing, since repayment of the promissory notes has been demanded by United's counsel in full, and litigation has been threatened.

As discussed above, Respondents took affirmative steps to put their clients on notice of Respondents' relationship with United and actually disclosed a significant conflict scenario in

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[42] *Steadman*, 603 F.2d at 1140.

which clients invested money in the Private Funds knowing that Respondents' recommendations could have been influenced by the fact that they stood to earn 49% of the funds invested in "referral fees." Given this disclosure of outright cash payments from United, it cannot be said that Respondents' disclosures were egregiously inadequate.

ii. The Violations Were Isolated

The Advisers Act violations in the OIP relate to the adequacy of Respondents' disclosure of Mr. Page's financial relationship with United in PageOne's Forms ADV while Respondents were recommending that their clients invest in the Private Funds. Respondents ceased recommending investments in the Private Funds years ago—and before any Division action began—and the only remaining financial relationship between Mr. Page and United is that of a debtor and a lender with respect to the loans made against the abandoned transaction. Thus, the violations at issue in this case were isolated and have no chance of recurring.

iii. Respondents Did Not Intend to Defraud Anyone

As discussed above, *see supra* Section III(a)(i), Respondents did not act with an intent to defraud. Respondents consented to the entry of an Order finding that Respondents violated the Advisers Act, but they nowhere admitted that they intended to defraud anyone. On the contrary, it was Respondents' actionable but merely negligent or reckless reliance upon Mr. Burke and NRS that forms the basis of Respondents' liability in this case.

iv. Respondents Recognize the Wrongful Nature of Their Conduct and Similar Infractions Will Not Recur in the Future

With the benefit of hindsight, Respondents recognize why the Form ADV disclosures here at issue were insufficient to provide their clients with the information they needed to make informed investment decisions when considering investing in the Private Funds. At the time, the transactional negotiations were highly confidential and Respondents did not fully understand the

legal nuances of their disclosure obligations, and though they made an effort to apprise their clients of a potential conflict of interest, Respondents now understand that such efforts were insufficient. Although this has been devastating, and Respondents would have preferred a different classroom and instructor, this has undoubtedly been a valuable learning experience nonetheless. And while Respondents cannot rewrite the past, Respondents truly regret that they were not more vigilant, and will not repeat their mistakes in the future.

d. There Is No Basis to Revoke PageOne's Registration as an Investment Adviser

Revocation of an adviser's registration is governed by the *Steadman* factors set forth above. For the reasons set forth above relating to the Division's request for an associational bar against Mr. Page, *see supra* Section III(c), the revocation of PageOne's registration as an investment adviser is not warranted.

IV. RESPONDENTS ARE UNABLE TO PAY SIGNIFICANT DISGORGEMENT, INTEREST, AND/OR PENALTIES

Pursuant to Rule 630, "the Commission may, in its discretion, or the hearing Officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest."

Prior to the April 20 Hearing, Mr. Page had forensic accountants review his and PageOne's financials, and also fill in Statements of Financial Condition provided by the Division with respect to both Respondents that were later admitted at the hearing.[43]

Mr. Page's accountants determined that he had total assets of $518,516.68 (including, e.g., real estate jointly owned with Mr. Page's ex-wife, and a $20,000 receivable from NextPage LLC, representing an outstanding loan Mr. Page testified that he made to his daughter so that she

[43] *See* Resp. Exs. 214, 215.

could renovate her first home[44]) as opposed to total liabilities of $1,885,267.41 (including about $1.4 million owed to PageOne from officer loans), giving Mr. Page a net liability of $1,366,750.73.[45] This figure does not include the nearly $4 million that Mr. Page is alleged by United to owe for principal and interest of the earnest money deposits United made against the proposed purchase of 49% of PageOne, which if counted as a liability would balloon Mr. Page's personal liabilities to well over $5 million.[46] Mr. Page's Statement of Financial Condition also shows that his expenses currently exceed his income.[47]

PageOne's balance sheet showed total assets of $1,824,350.61 (including the approximately $1.4 million officer loan owed by Mr. Page) and total liabilities of $771,364.65, giving PageOne net assets of $1,052,985.96.[48]

If PageOne is to take Mr. Page's officer loan as a loss, PageOne would instead have a net liability, and Mr. Page would have assets of less than $40,000.

At the April 20 Hearing, Mr. Page testified that he has spent essentially all of the $2.7 million that he had received in earnest money deposits from United towards, among other things, supporting his ex-wife, putting his children through college, and helping his daughter raise his two grandchildren.[49] The Division then objected to the Statements of Financial Conditions' admission, and asked the Court to require Respondents to produce additional financial records of all of their accounts dating back to the initiation of this lawsuit.[50] Respondents fully complied with the Court's instructions to accommodate the Division's requests.[51] The Division has declined to pursue further questioning of Mr. Page regarding Respondents' financial condition,

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[44] Hearing Tr. 221:18–225:13.
[45] Resp. Ex. 214.
[46] *Id.*
[47] *Id.*
[48] Resp. Ex. 215.
[49] Hearing Tr. 194:17–197:1.
[50] Hearing Tr. 200:18–208:6.
[51] *See* Resp. Ex. 216.

and as such, Respondents' inability to pay significant disgorgement, interest and/or penalties is established by the record and is effectively unimpeached by the Division.

The Commission's inability to pay procedures serve two important purposes, both of which are present here. First, government resources are wasted making fruitless efforts to collect money from a person who cannot pay. Second, it is unfairly punitive to seek to collect large sums from a person whose financial condition precludes payment. Both of these wise policies are implicated here. There is no prospect that Respondents will ever be able to pay the almost $6 million sought by the Division. Indeed, it is impossible that they will ever be able to pay even a small fraction of this amount. As such, it would clearly waste government resources, as well as create vindictive embarrassment and anxiety for Mr. Page, for this Court to order Respondents to pay an enormous sum that they can never possibly pay.

Accordingly, Respondents respectfully request that this Court take Respondents' poor financial conditions into account when determining an appropriate remedy.

V. CONCLUSION

Despite Respondents' poor financial conditions, the Division asks this Court to apply enormous penalties to Mr. Page and PageOne, seeking (1) multimillion-dollar third-tier civil monetary penalties, (2) multimillion-dollar disgorgement, (3) half a million dollars in prejudgment interest, (4) a total and permanent associational bar against Mr. Page keeping him from ever again working in the financial services industry, and (5) revocation of PageOne's registration as an investment adviser.[52] Mr. Page testified at the April 20 Hearing that the imposition of such remedies would leave him hopelessly destitute for the remainder of his life,

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[52] *See* Div. Br. at 12–20.

and that the bar would ensure that there would be no way for him to pay any judgment given his old age, poor health,[53] and the fact that the financial advisory field is the only trade he knows.[54]

Respondents propose that (1) Respondents pay a penalty of $100,000, (2) Mr. Page accept a bar keeping him from ever again recommending private placements, and (3) Mr. Page accept a bar keeping him from ever again acting as a chief compliance officer of any regulated entity. Mr. Page testified that such penalties would be meaningful to him, although he would "absolutely struggle" to pay the penalty since he does not have that much money currently, and it will be a challenge to earn the money since he has lost the confidence of many of his investor clients as a result of this lawsuit.[55]

Respondents are not aware of any settlements in cases with comparable facts where the Commission has imposed a remedy as draconian as that which the Division seeks. On the contrary, comparable cases have historically settled for less than the remedy proposed by Respondents.

For example, in one case where the respondents litigated and lost a proceeding in which the Division alleged that the respondents had failed to disclose conflicts of interest to their clients, the Commission imposed a one-year suspension and levied a $30,000 fine.[56] In another case where an investment adviser was alleged to have violated Sections 206(1), 206(2) and 207 of the Advisers Act when it failed to disclose conflicts of interest in its Form ADV—including outright cash payments—the Commission, upon accepting the respondents' offer of settlement,

[53] *See* Resp. Ex. 217.
[54] Hearing Tr. 198:2–10.
[55] Hearing Tr. 193:5–13, 197:18–20, 199:12–200:4.
[56] *See In re Russell W. Stein, et al.*, Admin. No. 3-9309 (Mar. 14, 2003). An Order granting the respondents' Motion for Reconsideration and Dismissing Proceeding was subsequently granted on August 9, 2004.

imposed monetary penalties of approximately $62,000, and did not impose any suspension or associational bar.[57]

Respondents respectfully submit that, in comparison, the remedy sought by the Division is simply unjust. Mr. Page is 63 years of age, in poor health, and both he and PageOne are in dire financial straits. He has worked in the financial advisory field his entire life, and it is the only profession he knows. He has terminated negotiations with United, and has stopped recommending investments in the Private Funds specifically and private placements generally. He has accepted responsibility for his actions and expressed sincere remorse for his actions.[58]

Given these mitigating factors, and the fact that the evidence demonstrates that, although actionable, Respondents' Advisers Act violations lie in a grey area[59] on both scienter and materiality, Respondents respectfully request that this Court instead impose a meaningful but fair remedy such as the sanctions Respondents have proposed.

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[57] *See In re Rudney Associates, Inc., et al.*, Admin. No. 3-11670 (Sept. 21, 2004).
[58] *See* Hearing Tr. 172:16–21, 191:13–24.
[59] McLucas, Litinoff and Osberghaus, "'Neither Admit Nor Deny' Settlements from the Stanly Sporkin Era, 43 Sec. Reg. L. J. 29, 36–37 (2015).

Respectfully submitted,

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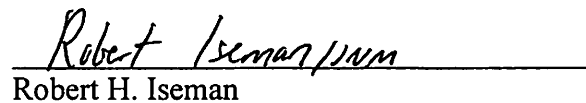

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