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January 28, 2016

VIA TELECOPIER ([202] 772-9324)
AND FIRST-CLASS MAIL

Securities and Exchange Commission
Office of the Secretary
100 F Street, N.W.
Washington, DC 20549

Attention: Ms. Melissa Katz

RE: Petition for Review of Initial Decision 3-16311
in *In re Timothy S. Dembski*, File No. ~~3-16331~~

Ladies and Gentlemen:

I represent respondent Timothy S. Dembski in the above-entitled proceedings.

Enclosed for filing are the original and three (3) copies of Mr. Dembski's Petition for Review of the January 12, 2016 Initial Decision.

The enclosed petition is also concurrently being served and filed electronically.

Sincerely yours,

Paul Batista

PB/wg

Encls.

cc: Michael Birnbaum, Esq.
Division of Enforcement

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ORIGINAL

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
RELIANCE FINANCIAL ADVISORS, LLC, TIMOTHY S. DEMBSKI and WALTER F. GRENDA, Jr.

Respondents.

3-16311
File. No. ~~3-16331~~

RESPONDENT TIMOTHY S. DEMBSKI'S PETITION FOR REVIEW

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Statutes, Rules and Regulations

Respondent Timothy S. Dembski submits this Petition for Review of the Initial Decision served January 12, 2016, File No. 3-16311 ("Initial Decision").

Standard for Petition

Like any respondent, Mr. Dembski may file a Petition for Review in a proceeding in which an Initial Decision is made by a hearing officer. SEC Rules of Practice, 17 C.F.R. § 201.410(a) (2004). The petition for review "shall set forth the specific findings and conclusions of the initial decision as to which exception is taken, together with the supporting reasons for exception. Supporting reasons may be stated in summary form." *Id.* at § 201.410(b). The SEC exercises discretionary review to consider whether "(i) a prejudicial error was committed in the conduct of the proceeding; or (ii) the decision embodies: (A) a finding or conclusion of material fact that is clearly erroneous; or (B) a conclusion of law that is erroneous; or (C) an exercise of discretion of law or policy that is important and that the Commission should review." *Id.* at § 201.411(b)(2). On the appeal of an Initial Decision, the Commission "performs a *de novo* review and can affirm, reverse, modify, set aside, or remand for further proceedings." *Office of Administrative Law Judges, About the Office*, SEC, http://www.sec.gov/alj#.VFhqE_nF98E (last visited Jan. 27, 2016).

Points of Error

The SEC should reverse the Initial Decision in its entirety because, *inter alia*, (i) the administrative proceeding was conducted in a manner that unfairly denied Mr. Dembski his constitutional rights to Due Process and fundamental principles of fairness, (ii) the hearing officer made numerous fatally flawed evidentiary decisions, findings of fact and conclusions of law, and (iii) the remedies are not supported by evidence, are disproportionate, unfair, and draconian.

A. The Core Evidence of Fraud Was Utterly Baseless: Every aspect of the charges advanced by the SEC and the results reached by the ALJ in the Initial Decision was grounded in allegations of fraud. Yet, as the hearing evidence revealed, *Mr. Dembski defrauded no one*. The hearing conducted from May 11 through May 15, 2015 and on May 18, 2015, demonstrated, among other things, no credible evidence that Mr. Dembski misled a single self-interested "investor" in Prestige Wealth Management Fund LP (the "Prestige Fund").

Far more important, the hearing evidence *negated* any claim that Mr. Dembski acted with the *scienter* – the intent to deceive – that is central to any claim to defraud. *See Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 473-474 (1977). Crucially, then, the Initial Decision's draconian conclusions of law and the extraordinarily punitive and blatantly disproportionate penalties the ALJ imposed involved crippling Due Process flaws. The seven witnesses called to the stand by the Commission were not only vague, inconsistent and well-rehearsed, but all of them were blatantly self-interested in their obvious bias against Mr. Dembski in view of the litigations and arbitrations each of them has already initiated or intends to initiate against him.

The Order initiating those proceedings was sweeping. It was also disturbingly overstated in the charges which were advanced by the SEC against Mr. Dembski and which he was required, after an unblemished two-decade career, to defend. Entitled "Order Instituting Administrative and Cease and Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company

Act of 1940" dated December 10, 2014 (the "Order"),[1] the title merely recites the procedural statutory bases on which these proceedings are premised. It was only until the SEC filed its May 3, 2015 "Division of Enforcement's Prehearing Brief" that the agency made crystal clear that the core of *all* of its claims against Mr. Dembski is grounded on alleged violations of the antifraud provisions of Section 10(b) of the 1934 Act and Section 17(a) of the 1933 Act.[2]

Significantly, Mr. Dembski did not defraud anyone – and the Initial Decision was plainly wrong in concluding that the SEC proved that he had – but Mr. Dembski also established as a defense his complete reliance on advice of counsel in all aspects of the establishment, operation and management of the Prestige Fund.

Indeed, the Initial Decision not only misapplied the defense of reliance on advice of counsel *but* sustained corrupt practices by Holland & Knight, a self-proclaimed national law firm. On this vital issue, as well as on the issue of liability, the Initial Decision was flatly incorrect. In a stunning development, the evidence revealed that Holland & Knight paid a shadowy non-lawyer, non-law firm Internet site to advertise Holland & Knight's allegedly extraordinary "hedge fund" capabilities. The payment was, as the evidence in effect disclosed, an act of bribery by Holland & Knight, yet the ALJ, in the Initial Decision, approvingly gave his

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[1] None of the specific statutory references in the Order creates substantive liability. For example, Section 8A of the Securities Act of 1933 (the "1933 Act") authorizes the SEC to initiate "cease-and-desist" proceedings that allow the agency, after an opportunity for a hearing, to enter cease and desist orders if "any person is violating, has violated, or is about to violate any provision of this title [the 1933 Act], or any rule or regulation [under the 1933 Act]." Likewise, Section 15(b) of the Securities Exchange Act of 1934 (the "1934 Act") grants the SEC permission to register a "broker dealer," while Section 21C of the 1934 Act makes provision for "cease-and-desist" proceedings under that statute. Similarly, Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 regulate the conduct of investment advisers and, among other things, provide for bars, while Section 203(k) contains procedures for "cease-and-desist" orders. Finally, Section 9(b) of the Investment Company Act of 1940 sets forth procedures for prohibiting a person from serving with a registered investment company.

[2] The 12-page, single-spaced, 58-paragraph Order contained three brief paragraphs that refer to the antifraud provisions of Section 10(b) of the 1934 Act and Section 17(a) of the 1933 Act as the liability-creating bases for all the claims to relief. *See* Order ¶¶56-58.

sanction to the bribery by which that firm snared Mr. Dembski as a victim and then evaded the defense of reliance on advice of counsel despite that fact that the law firm exercised complete control of the structure and operational aspects of the fund after the law firm itself initiated contact with Mr. Dembski and his only partner in the fund, Scott Stephan ("Stephan").

And, as the hearing evidence also established, there is no credible doubt about Holland & Knight's authorship – and Mr. Dembski's reasonable and lawful reliance on that authorship – of the grievance that was primarily at the heart of the SEC's charges and the Initial Decision: the terse biography of Stephan that appears in the single-spaced, 85-page Private Placement Memorandum dated January 1, 2011 ("PPM") of the fund. Indeed, even when the SEC preliminarily and tentatively challenged the Stephan biography long after it was prepared by Holland & Knight, that firm advised Mr. Dembski and Stephan that it was "no big problem" and did not require modification.

B. The Issues Specifically Posed by the ALJ: Approximately seven of Mr. Dembski's 19 long-term investment advisory clients who invested in the Prestige Fund testified against Mr. Dembski at the hearing. A significant majority of his other clients who invested in the fund has *never* sued or threatened to sue him, and most remain as his clients. Although the testimony of the complaining witnesses, all of whom have either sued Mr. Dembski or started or announced their intention to start arbitration proceedings against him, was vague, rehearsed in advance with SEC trial counsel, and contradictory, the most important testimony, for purposes of the central fraud allegations on which the proceeding entirely rests, came from Mr. Dembski and Stephan. Even though Stephan had consented before the hearing to liability, he gave important testimony about the absence of any intent, scheme, plan or artifice to defraud by himself or Mr.

Dembski. Indeed, Stephan readily conceded that he and Mr. Dembski never had any intent to cheat anybody and did *not* do so.

Before reaching in detail the failure of the Initial Decision to determine by a preponderance of the evidence that Mr. Dembski defrauded the investors in the Prestige Fund, it is essential to turn to the central issues. There is no need for speculation or guesswork in this connection, because the ALJ, after hearing more than 400 pages of testimony primarily from the disgruntled investors, specifically delineated on the record the central issues as to which he desired to hear Mr. Dembski testify. The issues posed by the ALJ are essential to the core fraud allegations – all of which Mr. Dembski thoroughly and convincingly answered and all of which the ALJ ignored in the Initial Decision:

> THE COURT: I have – I just want to make a direction or an instruction to counsel . . . .
>
> In Mr. Dembski's [prospective] testimony . . . I need him to have an opportunity posed through your questions so I don't have to question him about all of these different what I would call representations by various investor witnesses about particular things that Mr. Dembski told them.
>
> For example, some of the witnesses make a representation regarding the fund being insured or subject to FDIC insurance. Some of the witnesses make a representation with respect to prospective returns, 20 percent, 10 to 25 percent. Some of the witnesses without respect to insurance make the representation that the fund was guaranteed in some way or couldn't lose. Some witnesses made representations with respect to statements and information being available on the website . . . . In other words, to benefit my understanding, I need to hear from the respondent, Mr. Dembski, in his own words as to how people got this understanding of these things and precisely what was said to lead them to the sort of impressions with regard to various things.
>
> I appreciate the fact that counsel . . . have been very efficient in the manner of questioning, focusing on key points and key aspects, but with regard to Mr. Dembski's testimony, unless collectively you're very fulsome with regard to these particular issues, in fact, I would list them all out and make sure Mr. Dembski has a chance for my benefit to explain

this . . . . I really need to hear that to understand the whole picture . . . . [*See* Tr. at 406-08.][3]

C. Mr. Dembski's Response to the Issues Raised by the ALJ: Mr. Dembski, in clear and unequivocal testimony, confronted each of the ALJ-identified issues regarding the seven investors called by the SEC. Because of the importance of these issues, it is essential to stress Mr. Dembski's testimony:

> Q. . . . I'm going to ask you this question based on a suggestion of the court.
>
> Did you ever tell the Blaszaiewiczes[4] at any point on the phone or face to face that a big bank was going to invest in the Prestige Fund?
>
> A. No.
>
> Q. Did you ever tell the Blaszaiewiczes at any point . . . that you were guaranteeing them through the fund a 10 to 20 percent return?
>
> A. No.
>
> Q. Did you ever tell the Blaszaiewiczes that by investing in the fund that they could not lose?
>
> A. No.
>
> Q. Ever?
>
> A. Never.
>
> Q. Did you ever tell the Blaszaiewiczes that the Prestige Fund was insured by the Federal Deposit Insurance Corporation?
>
> A. No, absolutely not . . . .
>
> Q. Did you tell the Blaszaiewiczes that statements for this account would be generated by G&S?

[3] References to "Tr ____" are to the hearing transcript.

[4] Both [redacted] Blaszaiewcz, who are married, were witnesses called by the SEC.

A. Yes.

Q. And that it was independent of you?

A. Yes.

Q. Did you tell [them] that you had put $250,000 of your own money into the fund?

A. No.

Q. Did you tell [them] that you had put your children's money into the fund?

A. No.

Q. Did you tell [them] how much money you had paid in expenses to set up the fund[?]

A. Dick [Richard Blaszaiewicz] was very close to us, so he knew I was spending the money to set up the fund. He knew that I was putting in money up front to start the fund.

Q. . . . . What did you tell the Blaszaiewiczes about the Prestige Fund[?]

A. I had a very consistent message when I had the fund for my clients. If I thought somebody was interested or thought that they might be someone that could get into the fund, I went through it very specifically and told them this is first the algorithm, all right, this is that algorithm that Scott [Stephan] came up with, and this is how it works . . . .

I showed them that binder that [Stephan] had gone through to show we did backtesting, let people talk to [Stephan], explain the fund to them and how it was structured. [Stephan] would be the manager. I made sure I handed everyone the PPM. They all had the PPM prior to signing it. They all did.

Q. Including the Blaszaiewiczes?

A. Yes. I encouraged them to read it. I never used a term like legalese when [redacted] Mr. Krajewski [another SEC witness] said it. I never heard that term before. I never told anyone that it is not important to read the PPM and what's in it isn't important. I made it very apparent that they should read it and Scott [Stephan] is the manager. [*See* Tr. at 558-62.]

Moreover, as in the case with the SEC's other investor-witnesses, it was the Blaszaiewiczes themselves who made the decision to invest in the Prestige Fund. *See* Tr. at 565.[5] Indeed, Richard Blaszaiewicz had the "run of the house" at the Prestige Fund's offices. As Mr. Dembski testified, [redacted] Blaszaiewicz "walked around our office like he owned it, which was fine. He was a long-term client [of Mr. Dembski]. I felt very comfortable with [redacted] There were times when he would come in and talk to [Stephan] before, and Vicky, Vicky is an insurance auditor." *Id.* at 563.

Similarly detailed and direct were Mr. Dembski's responses to the central questions proposed by the ALJ regarding [redacted] Skop ("Skop"), another investor-witness called by the SEC. As Mr. Dembski testified:

> Q. You were here earlier this week for the testimony of Mr. Skop, correct?
>
> A. Correct.
>
> Q. And, again, pursuant to the Judge's suggestion yesterday, let me ask you these questions . . . . Did you ever tell either of the Skops when you were discussing the Prestige Fund with them that a big bank was going to invest in or had invested in the Prestige Fund?
>
> A. No.
>
> Q. Did you ever tell either of the Skops at any point that they were guaranteed if they invested in the fund a 10 percent to 20 percent return on their investment?
>
> A. No.
>
> Q. Did you ever tell either of the Skops . . . that they couldn't lose if they they made an investment in the fund?
>
> A. No.

[5] On a collateral issue, [redacted] Blaszaiewicz testified that she had allegedly composed "notes" during her conversations with Mr. Dembski. *Id.* Mr. Dembski confronted that assertion as well: "She never had notes at any time that I was ever with her." *Id.*

Q. Did you ever tell either of the Skops that the fund was insured by the FDIC?

A. No.

Q. Did you tell the Skops that they could expect to regularly receive statements of their account from an independent company, G&S?

A. Yes.

Q. Did you ever avoid the Skops in terms of not returning telephone calls?

A. I am very thorough on returning phone calls. I made sure I'm readily available and everyone knows that. All of my clients know that . . . .

Q. . . . [L]et me ask you this: Did you give the Skops the [PPM]?

A. Yes, I did . . . .

Q. What else did you say to the Skops?

A. . . . And I mentioned that if you're looking for that type of risk . . . you might want to look at [the Prestige Fund]. That's the only thing I have to offer that you might be interested in. Why don't you read the PPM and get back to me and tell me what you think.

Q. Did [the Skops] get back to you?

A. They did.

Q. What did they say?

A. They said they were interested in getting into it.

Q. And they did?

A. And they did.

Q. And they also brought a lawsuit against you; is that correct?

A. Correct. [*See* Tr. at 566-571.]

Another witness-investor, [redacted] Broderick ("Broderick"), likewise was *not* told by Mr. Dembski that a "big bank was going to invest in the Prestige Fund." *Id.* at 571. Nor did he

tell Broderick that (i) he "could guarantee her a 10 to 20 percent return on her investment" in the fund (*id.* at 572), nor that (ii) "by investing in the Prestige Fund she could not lose" (*id.*), nor that (iii) her investment was insured by the FDIC (*id.*). Moreover, Mr. Dembski "advised" Broderick "that she could expect regularly from G&S statements of her account." *Id.* As was the case with *all* the other SEC-summoned witnesses, it was Broderick who, after Mr. Dembski provided her with the PPM (*id.* at 575), made the decision to invest in the fund (*id.* at 572, 576). She, too, threatened to file a "lawsuit" against Mr. Dembski. *Id.* at 577.

Similarly, in directly confronting the issues identified by the ALJ, Mr. Dembski testified regarding his dealings with another SEC witness, [redacted] Haubrick ("Haubrick"). *See* Tr. at 578. Mr. Dembski did *not* tell Haubrick "that one of the investors in the Prestige Fund would be a big bank." *Id.* at 579. Mr. Dembski did *not* advise Haubrick that Mr. Dembski "could guarantee . . . [Haubrick] . . . a 10 to 20 percent return." *Id.* Nor did Mr. Dembski tell Haubrick that the funds were "guaranteed" by the FDIC (*id.* at 580). Likewise, Mr. Dembski gave Haubrick the PPM and said that Haubrick could "regularly expect to receive statements of his account from G&S . . . ." *Id.* at 580.[6] Mr. Dembski did not "tell Haubrick that the funds . . . were guaranteed by the FDIC" (*id.* at 580). Mr. Dembski also introduced Haubrick to Stephan (*id.* at 581) and provided Haubrick the "same routine" (*id.* at 581), "explained it, talked about it . . . ." (*id.*) Haubrick "felt very comfortable" about the Prestige Fund. *Id.* Finally, Haubrick, like every other SEC witness, has sued Mr. Dembski. *Id.*

Another SEC witness, [redacted] Barrett ("Barrett"), a woman with a net worth of $1.5 million (*id.* at 582), was never informed by Mr. Dembski that a "big bank had either invested in the fund or was going to invest in the fund." *Id.* at 589. Mr. Dembski never said that Barrett was

[6] Mr. Dembski provided further insight with respect to Haubrick. "There is no doubt [of his] investing for quite a while. He has experience in things like other limited partnerships, buying direct bonds, trading stock . . . [H]e definitely read the [PPM]." *Id.*

"guaranteed a return of 10 to 20 percent." *Id.* Nor did Mr. Dembski suggest that the fund was insured by the FDIC. *Id.* at 584. In addition, he provided her with the PPM (*id.*) and Barrett had the PPM for "two to three weeks." *Id.* Mr. Dembski described Barrett as "a bright woman" who "knew about investments . . . [and] what a hedge fund was. She was very comfortable with it. She read the PPM. I introduced her to [Stephan] and told her how it was going to work." *See* Tr. at 585.

With respect to Stephan and Barrett, Mr. Dembski further testified:

> Q. In that connection, what did you tell her [about] the relationship between you and [Stephan] and the operation of the fund, how it was going to work[?]
>
> A. The fund, I told her [Stephan] is the one that is actively managing the fund. I cannot have access to it. I cannot see it. My monitoring the fund is strictly to what [Stephan] will tell me and how it is doing and to the [G&S] statements. So I told her specifically [Stephan] will be the one turning on or turning off the fund algorithm in the computer traded program on a daily basis.
>
> Q. And you said that to her because that was the advice you had received from Holland & Knight, correct?
>
> A. Correct. [*See* Tr. at 585.][7]

Indeed, Mr. Dembski described the role of Holland & Knight's advice regarding Stephan's complete control of the investments to the Blaszaiewiczes, Haubrick and the Skops. *Id.* at 586.

Yet another SEC witness, [redacted] Krajewski ("Krajewski"), was given the PPM by Mr. Dembski (*id.* at 588). Krajewski was, according to Mr. Dembski, "very comfortable at my office . . . [and] I talked to him about the fund and the structure of the fund and how

[7] Like all the other SEC witnesses, Barrett has brought either a lawsuit or filed an arbitration proceeding against Mr. Dembski. *Id.* at 586. All of the legal or arbitral proceedings against Mr. Dembski were being handled by two Buffalo lawyers, Scott Atwater ("Atwater") and Joanne Schultz ("Schultz"). *See* Tr. at 586.

[Stephan] came up with the formula and [Krajewski] was very excited about it . . . . He was looking up what hedge funds do . . . . He was very excited about the [Prestige Fund]." *Id.* at 590. At this point, Krajewski, represented by Atwater, also has a "lawsuit pending against" Mr. Dembski. *Id.* at 590.

[redacted] Thuman ("Thuman"), another SEC witness, was given the PPM by Mr. Dembski. *See* Tr. at 592. Thuman was one of the later investors. *Id.* Thuman "started talking about the fund, and he want[ed] to learn more about it and I handed him the PPM . . . ." *Id.* at 592-93. Eventually, "Greg sent me the email saying . . . I have read through everything. I feel like I understand it. I want to invest in the fund." *Id.* at 593.

Mr. Dembski also gave this summary testimony:

> Q. With respect to the people we've covered, Thuman, Broderick, Krajewski, Barrett, Skop, Haubrick, the Blaszaiewiczes, did you tell any of them that you had put your own money into the fund?
>
> A. No, I did not.
>
> Q. Did you tell any of them that you had put your children's savings into the fund?
>
> A. No, I did not . . . .
>
> Q. How many of your clients made investments in the Prestige Fund?
>
> A. 19. [*See* Tr. at 594.][8]

Significantly, the majority of Mr. Dembski's clients who sustained losses in the Prestige Fund either remain his clients or have not filed claims against him. *See* Tr. at 598-601.

D. The Court's Questioning of Mr. Dembski: The Court itself examined Mr. Dembski as to the central issues. *First*, the ALJ explored the use of "real money" in the testing of

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[redacted] James ("James"), who did not testify, also made an investment in the fund. *Id.* at 594. Although James was given the same information as the other investors by Mr. Dembski, James, who is represented by Atwater, has also filed a lawsuit or initiated an arbitration against Mr. Dembski. *See* Tr. at 596.

the algorithm. *See* Tr. at 617. Mr. Dembski explained that [redacted] Anderson ("Anderson"), the adult son of one of Mr. Dembski's clients, used $40,000 "to put into the algorithm prior to [our] launching anything . . . [Anderson] made a very good return with the algorithm prior to [our] ever launching it." *Id.* at 618.

Second, the Court asked, "How was it that the losses in the fund or its collapse . . . sort of [took] you by surprise in late 2012?" *See* Tr. at 620. Mr. Dembski replied:

> I believed in the fund. I know that if the formula was being used . . . the formula showed consistent returns. There weren't any drastic returns or a blow out. And . . . I trusted [Stephan's] numbers that he told me before, they did relate to the statements. Everything was consistent. I never had a reason to think anything other than that. But all of a sudden [I] get a call to say it's down 80 percent, I'm not one to get enraged and I did. [*Id.* at 620-21.]

Third, the ALJ focused on Mr. Dembski's views on "to how you think the investors that testified came to certain understandings and the way your counsel asked it was fine, but I want to ask a little bit of different questioning with regard to some of these topics. I want to take the FDIC issue. What, if anything, did you tell anyone about the FDIC?" *See* Tr. at 621.

Mr. Dembski's response was candid and straightforward:

> I never ever used the FDIC. Never used [those] words. This is throughout my career, not just this fund, guaranteed FDIC. I certainly never said anything was safe by any stretch.
>
> So those things surprised me . . . . I have no idea because I never said it.
>
> . . . [T]hose terms [safe or guarantee] were never used.
>
> THE COURT: How do you think investor witnesses got the idea that there was going to be a 10 percent or 20 percent or 25 percent return from the fund?
>
> A. Some of them saw backtesting. So they saw that. Again, it wasn't guaranteed. They saw the fluctuations . . . .

THE COURT: How do you think investor witnesses got the idea that you were putting your kids' college money in the fund?

A. As I was sitting there listening . . . I'm not saying anyone is a liar, but the witnesses' consistent way they were conveying their message was lined up exactly with whom their attorney was. Where all of a sudden every one of Joanne Schultz's clients came up here and said they never read the PPM. Every one of them. I said wow, that's pretty amazing, they are all Joanne Schultz's clients. And all of a sudden Atwater's clients came up and they are saying the same thing. That's kind of ironic.

THE COURT: When you say Atwater's clients were saying the same thing, you weren't referring to not having read the PPM?

A. No, no, I was referring to that it was a safe investment and it was going to earn 20 percent. I believe that was the message from . . . Atwater's clients.

THE COURT: How do you think people got the idea you had your own money invested in the fund?

A. I never told anyone I was invested in the fund. I told people I had money that I put into the makeup of the fund . . . . When people came out and asked me specifically do you have money invested in this algorithm, I told them specifically no, I did not . . . .

THE COURT: How do you think the investor witnesses I've heard got the impression that you were conducting day-to-day oversight of the fund's performance?

A. My comment was I'm going to monitor the fund based on seeing [Stephan] on a daily basis, how is the fund doing, and through the [G&S] statements. And it was consistent. What [Stephan] was telling me is exactly what I saw on the statements. Monitoring can be construed in a number of different ways. It doesn't mean I had to have access to it.

THE COURT: Now, this may be a tough one to answer, but why do you think it is that none of the investor witnesses' testimony regarding what you said to them about the fund matches up exactly with what you have told me you told consistently all investor witnesses about the fund?

A. I'm pretty shocked to be honest with you. I did everything very consistently . . . I did the same thing for each person. *I had a step-by-step process that I followed based on Holland & Knight saying you need to read the PPM, they need to read it, make sure they read through the*

fund document . . . . I did the same thing over and over. [*See* Tr. at 621-625; emphasis supplied.][9]

E. The PPM's Warnings: Significantly, the PPM that was given to every investor began with the bold-face, capitalized warning:

> **PROSPECTIVE INVESTORS SHOULD READ THIS CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM (THE "MEMORANDUM") CAREFULLY BEFORE DECIDING WHETHER TO PURCHASE INTERESTS (THE "INTERESTS") IN PRESTIGE WEALTH MANAGEMENT FUND, LP (THE "FUND") AND SHOULD PAY PARTICULAR ATTENTION TO THE INFORMATION UNDER THE HEADING "CERTAIN RISK FACTORS."**
>
> * * *
>
> **INVESTMENTS IN THE FUND ARE NOT BANK DEPOSITS AND ARE NOT COVERED BY FDIC INSURANCE. INVESTMENTS IN THE FUND MAY RESULT IN THE LOSS OF PRINCIPAL INVESTMENTS IN THE FUND [AND] MAY BE RISKY AND SUBJECT TO TOTAL LOSS.**
>
> * * *
>
> **NEITHER THE FUND, THE GENERAL PARTNER, NOR ANY OF THEIR REPRESENTATIVES OR AGENTS IS MAKING ANY REPRESENTATION TO ANY OFFEREE OR PURCHASER OF THE INTERESTS REGARDING THE LEGALITY OF ANY INVESTMENT THEREIN BY SUCH OFFEREE OR PURCHASER.** [*See* Exhibit 90 at (i) – (ii).]

Even the SEC stressed in its opening statement at the hearing that the PPM Mr. Dembski provided to each investor or potential investor in the Prestige Fund described it in "the most dramatically negative, cautionary terms that a hedge fund could utilize." *See* Tr. at 35.

F. The Evolution of Stephan's Crucial Role: Stephan became an employee of Reliance Financial Advisors, LLC ("Reliance"), an investment firm, in 2007. *See* Tr. at 55. At

[9] Without describing Atwater, Schultz or other attorneys as "ambulance-chasers" or testimony-coaches. Mr. Dembski did, in answer to a question from the Court, explain his belief that it was a group of self-interested lawyers who solicited investor-witnesses to file legal or arbitration proceedings against him and others to "go[] after deep pockets . . ."*Id.* 628. Mr. Dembski commented, "So I think people got coaxed into it." *Id.* at 628-29.

the time he was hired by Mr. Dembski, Stephan was "interested" in learning the "investment business." *Id.* at 58. After his hiring by Reliance, Stephan obtained securities licenses from the Financial Industry Regulatory Authority, including a Series 7 license in August 2009, a Series 63 license in August 2009 and a Series 66 license in October 2009. *Id.* at 66.

(i) Stephan's Private Development of the Algorithm and the Hedge Fund

It was Stephan who originated on his own the concept of a hedge fund based on "a lot of market research [Stephan did] on stocks," such as "looking at charts, [and] running through certain scenarios on the fluctuation of certain stocks on a daily basis . . ." *See* Tr. at 69.

Stephan, without informing Mr. Dembski that he was doing so, created a formula – also referred to as an "algorithm" – by "[taking] roughly 100 stocks and I used specific times during the day to set a trigger to – my example would be at 9:45, if 'X' stock goes up one percent or down one percent, if it goes down . . . one percent to go and short the stock. If it goes up one percent after that 9:45 price point to go long with the stock." *See* Tr. at 68.

Stephan's "formula" or "algorithm" also involved the following: "Once the position was entered, then it would be – if the stock made a three percent return that day to exit it out of it. If it took a one percent loss, if it was down one percent to take a loss at one percent." *See* Tr. at 69. Stephan alone selected the stocks for the algorithm, *id.* at 69, and it was Stephan's idea to place his trading strategy into a hedge fund. *Id.* at 69-70.

Before actively establishing the Prestige Fund, Stephan tested the formula he alone had developed by means of "MultiCharts," a software program for "backtesting where I could go back as far as seven years, put in the formula, and run through on a daily basis." *Id.* Although Stephan, who spent a year beginning in 2010 privately developing the algorithm before first mentioning it to Mr. Dembski, was the algorithm's architect, he did retain assistance

through Anthony Casino ("Casino"), an engineer tasked by Stephan to put the formula or algorithm "into a mathematical equation in computer language." *See* Tr. at 101. Stephan was satisfied with Casino's work. *Id.* at 102.

(ii) Stephan's Disclosure of the Algorithm to Mr. Dembski

After approximately a year of privately developing the algorithm, Stephan finally discussed it, as well as the backtesting, with Mr. Dembski. *See* Tr. at 72. Mr. Dembski had never asked Stephan to develop the algorithm or a hedge fund. *Id.* at 137.

Once Stephan brought to Mr. Dembski's attention the algorithm and the potential of a "hedge fund" based on it, Mr. Dembski insisted that Stephan had to "prove" the algorithm to Mr. Dembski. *See* Tr. at 519. Mr. Dembski "stay[s] very far away from any lying, and everyone knows that about me, being close to any type of risk." *Id.* at 516. He insisted that Stephan with respect to the algorithm "prove things to me. Show me what you're saying works." *Id.* at 516.

As a result of Mr. Dembski's insistence on "proof," Stephan displayed the "backtesting by utilizing independent programs such as 'DTNIQ' (*id.* at 519). The backtesting of the algorithm, as confirmed by the independent programs, revealed "solid performance," and Mr. Dembski was satisfied with the algorithm. *Id.* at 521.

Stephan developed the formula in "good faith" and had no intent "to cheat anyone in developing that formula." *Id.* at 137-138. Nor, he testified, did Mr. Dembski have any intent "to cheat anyone" with respect to the algorithm or the Prestige Fund. *Id.*

G. The Central Role of Holland & Knight: The evolution of the Prestige Fund starkly reveals the *noir* role played by law firms – in this case, Holland & Knight – in the often irresponsible and dangerous game of hedge funds, their creation, and their operation.

As Stephan and Mr. Dembski in late 2010 embarked on the process of a hedge fund's creation and operations, Stephan learned of "Holland & Knight for the first time through HedgeCo.," a firm which Holland & Knight had paid to advertise Holland & Knight – certainly a form of bribery since both Hedge Co. and the law firm expected a *quid pro quo* – and Stephan spoke to Holland & Knight attorneys approximately 20 to 30 times. *See* Tr. at 140.

During Mr. Dembski's and Stephan's initial conversations with Holland & Knight, Mr. Dembski and Stephan explained that they "needed guidance because this was our [Stephan's and Mr. Dembski's] first experience setting up a hedge fund." *Id.* at 141.

Scott MacLeod ("MacLeod"), a partner of Holland & Knight, assured Mr. Dembski and Stephan that Holland & Knight "can set the hedge fund up for you . . . ." *Id.* It was Mr. Dembski's and Stephan's "intention to rely on Holland & Knight for legal advice in terms of setting up and operating the hedge fund." *See* Tr. at 142. Stephan and Mr. Dembski expressly desired to have what they were led to believe were the "best people" – specifically, Holland & Knight – establish the fund and provide guidance and assistance. *Id.* at 142. The PPM and all other crucial documents "were written entirely by Holland & Knight." *Id.* As Stephan himself conceded, Mr. Dembski did not prepare the biographical description of Stephan that appears in the PPM. *See* Tr. at 143. It was Stephan who provided information about himself to Holland & Knight. *Id.* Indeed, Stephan advised Holland & Knight that he had experienced two prior bankruptcies before the biographical description of Stephan was included by Holland & Knight in the PPM. *Id.*

Ultimately, after the SEC raised issues about Stephan's biographical information, Stephan contacted Holland & Knight to discuss the SEC's concerns *and* was told by Holland & Knight that the description was "not a problem." *Id.* at 144. In this as in all other instances,

Stephan, like Mr. Dembski, "relied on Holland & Knight's advice." *Id.* at 144. Stephan and Mr. Dembski, throughout the process of establishing and operating the Prestige Fund, had the "objective" of being "fair and helpful to the clients of the fund." *Id.* at 145.

Mr. Dembski participated in a conference call with HedgeCo. in which HedgeCo. executives, who were not lawyers, told him and Stephan that HedgeCo. was "going to make sure you're connected to the right people, people that will take care of the administration, people that will take care of the accounting for it." *See* Tr. at 525. During the conference call with HedgeCo. executives, Mr. Dembski was advised by HedgeCo. that "the attorney was the most important part. They will give you the guidance on what needs to be done." *Id.* at 527. Mr. Dembski, with respect to his establishing a hedge fund, "wanted everything to be the best they could be . . . . I wanted the best attorney . . . ." *Id.* at 530.

Mr. Dembski was advised by HedgeCo. that Holland & Knight was the "best" law firm in the field of establishing, advising and operating a hedge fund. *See* Tr. at 533. MacLeod of Holland & Knight called Mr. Dembski, who described MacLeod as a "very knowledgeable, very powerful speaker. He enlightened us . . . . He went top to bottom with what needs to be done, how it needs to be done . . . ." *Id.* at 534. MacLeod told Mr. Dembski that non-accredited investors "could get in the fund." *Id.* at 535.

As Mr. Dembski testified, Holland & Knight "really held our hand throughout the process. [MacLeod] told us that this is the way it should be set up. This is how it should be done. If we're talking about not having accredited investors, and, Tim, how much money do you manage outside, I told him – was it in excess of $25 million, and I said yes, and he said because of that, you can't be a part of the management of the fund, your role can only be the owner of the fund. There needs to be that separation." *See* Tr. at 536.

Mr. Dembski and Stephan "asked [MacLeod] if it was okay that we remain in the same office. He said that shouldn't be a problem so long as you [Mr. Dembski] don't have access to the investment itself." *Id.* at 537.

Mr. Dembski's reaction to his conversation with MacLeod of Holland & Knight was as follows: "[I]t was one of those things, wow, this guy knows what he is talking about. He really does. And there was no question who we were going to use." *Id.* at 538. MacLeod said that the legal fee would be at least $25,000 for Holland & Knight's services. *Id.* at 539. Holland & Knight, after receiving payment of legal fees directly from Mr. Dembski, then sent him and Stephan a questionnaire. *Id.* at 541. Mr. Dembski and Stephan were put in contact with Amy Rigdon of Holland & Knight with respect to multiple questions they had about the questionnaire. *Id.* at 543.

Insofar as Stephan's biography for the PPM was concerned, Stephan was "having issues with his" biography. "Just like anything else, [he] told me he went and talked to somebody at Holland & Knight to help him with it." *Id.* at 551. Mr. Dembski looked at Stephan's proposed biography for the PPM, and "that's when I questioned him, and I said how did you come up with this, and he said from Holland & Knight." *Id.* at 552. Holland & Knight advised that the "500 million dollar book or portfolio that can be construed as a debt, and that debt could be a portfolio or a security . . . . And I [Mr. Dembski] said that's what [Holland & Knight] are telling you that it should say, and he said yeah. Even the verbiage of the bio, I could clearly see that's not something Scott Stephan would write. It looked very much like an attorney wrote it." *Id.* at 552.

For Mr. Dembski, "I did not think above and beyond what Holland & Knight's opinion was. I felt that Holland & Knight gave it the stamp, they said it was good, it was okay,

and that's what they helped him do, so I agreed with it." *Id.* at 553. Mr. Dembski "trusted Holland & Knight's advice. That was it." *Id.* at 554.

Without ever providing an explanation, Holland & Knight, after approximately a year of providing extensive advice to the fund, Stephan and Mr. Dembski, sent a "disengagement letter" to Mr. Dembski. Mr. Dembski had one last conversation with MacLeod of Holland & Knight, a conversation which Mr. Dembski recorded and about which Mr. Dembski testified as follows:

> Q Did there come a time when you separately had a [last] conversation with Scott MacLeod?
>
> A. . . . And out of nowhere, I received a disengagement letter from Holland & Knight and I was floored by it. They had everything that we needed for the fund, the RIA, tied it all together, and here we are in an SEC audit and you just pick up and leave and call it a day. So I called them immediately and I said you can't just leave.
>
> And I said I need you guys to at least help me with a couple of questions before we end our relationship, and understand you probably have the wording in your contract that say this, and I'm not going to fight you on it, but I have paid you for certain things and you know I'm in the middle of an audit, I don't know the answer to these things, please help me with these two things, three things. Sure. So I sent the actual document that the SEC had sent about the three things, registered, paying back the fees to get accredited, and Scott's bio.
>
> I talked to Scott MacLeod and Amy [Rigdon]. . . . I told him exactly what the conversation was about. They made it very clear they are not charging me, but this is our last conversation.
>
> Q And MacLeod said what?
>
> * * *
>
> A He started first about the being registered, unregistered, saying that there wasn't a problem with it as long as we did have that separation. He said there might be issues in the office based on creep. I think he used the word creep. That we might hear conversations or that and the other and it might have creep, I remember that word specifically, in the office and it is probably not a bad idea to think about moving Scott

> out of the building, if that's what the SEC is recommending or it that's the way they are saying.
>
> The second part had to do with if this, in fact, should have been registered, then all of the people that were charged a fee that were unaccredited, those fees should be paid back which at that time I think it might have been 40,000 or 60,000. I don't remember the specific amount. They are saying those fees should be paid back.
>
> *And then finally I said what about the bio. I have no idea why you did what you did or why you guys wrote what you wrote, and he clearly stated exactly what Scott had told me the first time I had seen the bio, that it is not, it is not a big deal, you can change it. And things can be construed like debt. The debt on those cars is considered a security and that is a book of business that the owner of that business needed Scott to manage.* And he went through the entire thing. That was the last time I talked to him.
>
> Q And you recorded that conversation?
>
> A I did. [*See* Tr. at 612-615; emphasis supplied.]

H. The Absence of Fraud: Central to the alleged violations are the fraud provisions of Section 10(b) of the 1934 Act, Rule 10(b)(5), and Section 17(a) of the 1933 Act. The standards under these provisions are familiar ones. The SEC itself recently summarized the conduct that may violate Section 17(a), Section 10(b), and Rule 10b-5 in *Matter of John P. Flannery*, Exchange Act Rel. No. 73840, 2014 WL 7145625 (S.E.C. Dec. 15, 2014). "Section 10(b) makes it 'unlawful for any person directly or indirectly . . . to use of employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of' Commission rules. *Id.*, at *10 (quoting 15 U.S.C. § 78j(b)).

Under *Flannery*, as under many other decisions, Rule 10b-5 implements the SEC's authority under Section 10(b) of the 1934 Act in three "mutually supporting" ways:

> Rule 10b-5(a) prohibits 'directly or indirectly . . . employ[ing] any device, scheme, or artifice to defraud." Rule 10b-5(b) prohibits "directly or indirectly . . . mak[ing] any untrue statement of a material fact or [omitting] to state a material fact necessary in order to make the statements made . . . not misleading." And Rule 10b-5(c) prohibits

> "directly or indirectly . . . engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." Liability under all three subsections requires a showing of scienter. [*Id.* (citations omitted).]

"Scienter is an 'intent to deceive, manipulate, or defraud.'" *Id.*, at *10 n.24, quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193, n.12 (1976). A finding of *scienter* is an essential ingredient of any finding of a violation. *Id.* And, in this case, there was *no* basis in the Initial Decision's determination that Mr. Dembski acted with the *scienter* that is the *sine qua non* of actionable fraud.

Section 17(a) of the 1933 Act prohibits conduct similar to that proscribed by Rule 10b-5, although Rule 17(a) has no "in connection with" requirement and extends to "offers" of securities.

> Like Rule 10b-5, Section 17(a) expresses its prohibitions in three "mutually supporting" subsections. Section 17(a)(1) prohibits "employ[ing] any device, scheme, or artifice to defraud." Section 17(a)(2) prohibits "obtain[ing] money or property by means of any untrue statement of a material fact or any [material] omission." And Section 17(a)(3) prohibits 'engag[ing[in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." A showing of scienter is required under Section 17(a)(1), but a showing of negligence suffices under subsections (a)(2) and (a)(3). [*Flannery*, 2014 WL 7145625, at *10 (citations omitted).]

Given these standards, Mr. Dembski was not guilty of fraud, as the hearing evidence, taken in its totality, reveals. Among other things, he did not act with the *scienter* that is the crux of any fraud claim based on either or both of the antifraud provisions of the 1933 Act or the 1934 Act.

I. Mr. Dembski's Reliance on Advice of Counsel: Moreover, Mr. Dembski was entitled to rely on Holland & Knight to pass on the veracity of statements about Stephan in the PPM and in all other respects. Specifically, and among many other things, Mr. Dembski was not responsible for the Stephan biography because attorneys at Holland & Knight wrote,

approved and urged the propriety of that language. Mr. Dembski relied entirely on advice of counsel with respect to the quoted language and with respect to *all* other material issues relating to the Prestige Fund.

In this case, Mr. Dembski has met the burden of asserting the advice of counsel defense, and the Initial Decision was plainly incorrect that the defense did not apply. He has "show[n] that he made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith." *SEC* v. *Markowski*, 34 F.3d 99, 104-105 (2d Cir. 1994).

The Impropriety of the Sanctions

The Initial Decision's sanctions defy common sense *and* the treatment of adjudicated securities offenders whose misconduct far exceeds anything Mr. Dembski did or said, assuming that he committed any offenses, which he did not.

I. Absence of Any Basis for a Bar: Equal treatment of adjudicated offenders is essential. In other words, the sanctions imposed by the Initial Decision – both in terms of the lifetime bar, the immense scope of the financial penalties, and the permanent cease-and-desist order – far exceed those imposed recently in *In the Matter of Mitchell H. Fillett*, Securities Exchange Act of 1934, Release No. 75054/May 25, 2015, Admin. Proc. File No. 3-15601. The SEC, after reviewing a FINRA proceeding that revealed multiple violations of FINRA rules identical to the antifraud provisions of the federal securities laws, set aside an 8-month suspension and a $10,000 fine. In another recent ruling – *In the Matter of Patrick Lehnert*, Securities Exchange Act of 1934, Release No. 75417/July 9, 2015, Admin. Proc. File No. 3-16682 – the SEC required disgorgement of $31,506, pre-judgment interest of $470 and a civil

money penalty of $15,753 in a case in which the respondent engaged in egregious insider trading; no suspension or bar was imposed in *Lehnert*.

2. *No Basis for Financial Penalties:* No financial sanctions such as restitution and disgorgement at all are warranted. The relevant statutes create a three-tier system of civil penalties, with each tier corresponding to increasingly serious misconduct. *See* §21B of the 1934 Act, 15 U.S.C.§78(u)-2(b); Investment Company Act of 1940 §9(d)(2), 15 U.S.C. §80a-9(d)(2). First-tier penalties are irrelevant where, as here, there are no substantive offenses. Second-tier penalties require a showing that the act or omission on which the penalty is based "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." *See* §21B(2) of the 1934 Act, 15 U.S.C. §78(u)2(b)(2); Investment Company Act of 1940, 15 U.S.C. §80a-9(d)(2)(B). Third-tier penalties such as those demanded by the SEC from Mr. Dembski require an additional showing that the violation "directly or indirectly resulted in substantial losses to other persons or resulted in substantial pecuniary gain" for the violator. *See* 21B(b)(3), 15 U.S.C. 78u2(b)(3); Investment Company Act of 1940 §9(d)(2)(c), 15 U.S.C. §80a-9(d)(2)(c). Not a single one of these tiers can be derived from the actual evidence.

Erroneous Findings and Conclusions

In light of the multiple deficiencies identified in this Petition, the Initial Decision is replete with errors that require review and reversal by the Commission. These include the following, among others:

- The ALJ erroneously concluded that the self-interested, carefully rehearsed witnesses called by the SEC were "more credible than Mr. Dembski" (*see* Initial Dec. at 2), even though "it is not impossible that all of the testifying investor-witnesses conspired to commit perjury"

(*id.*). In light of the ALJ's own comments on the possible perjury of all the investor-witnesses (*id.*), the ALJ's conclusion that they were "more credible" than Mr. Dembski was not supported by the evidence and ignores contradictory evidence.

- The ALJ incorrectly concluded that the self-serving testimony of Holland & Knight invalidated Mr. Dembski's defense of reliance on advice of counsel. *Id.* 2-3. This conclusion was not supported by the evidence and ignored contradictory evidence, such as that provided by Stephan.

- The ALJ erroneously concluded that Mr. Dembski had never spoken to MacLeod, a Holland & Knight partner. MacLeod self-servingly denied the conversations despite the existence of a tape recording of a conversation between MacLeod and Mr. Dembski that plainly revealed a series of earlier conversations. The ALJ's conclusions were not supported by the evidence and ignored plainly contradictory evidence.

- The ALJ erroneously determined that it was deceptive and fraudulent for Mr. Dembski to permit Holland & Knight to prepare and publish a partially misleading biography of Stephan in the PPM. This finding is not supported by the credible evidence and ignores contradictory evidence.

- The ALJ erroneously accepted Holland & Knight's assurance that it would not "fact-check" the information in the Stephan biography.

This finding mischaracterizes the evidence and ignores contradictory evidence.

- The ALJ incorrectly accepted the assertions that Holland & Knight "never discussed" Stephan's professional background with Stephan. *Id.* at 6. This finding mischaracterizes the evidence and ignores contradictory evidence.

- The ALJ erroneously concluded that Stephan had never discussed with Mr. Dembski the Stephan biography before or after it appeared in the PPM. This finding ignores evidence and utterly neglects the contradictory evidence. Among other things, Mr. Dembski advised Stephan to follow Holland & Knight's advice in this and all other respects

- The ALJ erroneously concluded that Mr. Dembski hid or shielded Stephan and Stephan's background from investors and potential investors. *Id.* at 6. This finding wholly mischaracterizes the evidence.

- The ALJ incorrectly concluded that Mr. Dembski was not ever concerned that Stephan was not consistently trading according to the algorithm. In fact, Mr. Dembski believed that, with certain limited exceptions, Stephan was consistently utilizing the algorithm. The ALJ's findings mischaracterize and distort the testimony.

- The ALJ concluded that Mr. Dembski should not have received $363,784.66 in "total management and performance from the Prestige Fund from July 11, 2011 to December 7, 2012" (*id.* at 7). In fact,

Mr. Dembski received precisely the amount to which the fund documents entitled him and not one dime more. There was no suggestion, and certainly no evidence, that Mr. Dembski surreptitiously or improperly diverted money from the Prestige Fund.

- The ALJ erroneously concluded that Mr. Dembski advised investors to ignore the dire warnings about the risks of investing in the Prestige Fund that appeared in the PPM. In fact, Mr. Dembski insisted that each of the complaining witnesses read the PPM and focus fully on the document's descriptions of severe risks of loss of principal and interest.

- With respect to each of the seven complaining witnesses, the ALJ accepted their oral representations as to what Mr. Dembski told them, despite the ALJ's own statement that it was impossible to rule out the possibility that they all "perjur[ed]" (*id.* at 2) themselves because they were all plaintiffs or claimants in lawsuits or arbitrations against Mr. Dembski and that they were all represented by the same lawyers.

- Despite the ALJ's acknowledgment that all of the SEC's witnesses may have possibly committed "perjury" (*id.*), the ALJ nevertheless determined that their testimony was "more plausible than that of Dembski, and . . . finds that Dembski sold Fund investments using false and misleading oral and written representations." *Id.* at 14. This finding mischaracterizes the evidence.

- The ALJ erroneously relied on the expert report and expert testimony of Arthur Laby, a former long-term SEC staff employee. That reliance was impermissible and prejudicial to Mr. Dembski, and should never have been accepted for any purpose.

- The ALJ erroneously found Mr. Dembski liable under the antifraud provisions of Section 10(b) of the 1934 Act, SEC Rule 10b-5, and Section 17(a) or the 1933 Act. These conclusions are not supported by the record and should be set aside.

- The ALJ erroneously concluded that Mr. Dembski violated Section 206(1) and (2) of the Investment Advisers Act, utilizing the same rationale on which he based the alleged violations of the antifraud provisions of the 1934 Act and 1933 Act. As is the case with the conclusions under the 1933 Act and the 1934 Act, the ALJ's conclusion under the Advisors Act misapplies the statute, relies on unreliable evidence and ignores material other evidence.

- The ALJ erroneously concluded that Mr. Dembski aided, abetted and caused Prestige's and Reliance Financial Advisor's violations of the 1934 Act, the 1933 Act and the Advisors Act. There was no evidence of Mr. Dembski's aiding, abetting and causation.

- As to sanctions, the ALJ ordered Mr. Dembski, under the rubric of "disgorgement" (*id.* at 24) to pay $363,784.66, plus a substantial amount of prejudgment interest (*id.*). There was no legitimate basis for this order of disgorgement.

- As an additional sanction, the ALJ erroneously imposed "third-tier penalties" (*id.* at 25) on Mr. Dembski of $250,000. This penalty is unauthorized, punitive, and excessive, and should be set aside, particularly in light of Mr. Dembski's unblemished two-decade long history in the industry.

- The ALJ erroneously imposed "full, permanent industry bars" on Mr. Dembski. This penalty was not justified and not supported by the evidence, and should be set aside.

- Finally, the ALJ erroneously imposed a permanent "cease-and-desist" order on Mr. Dembski. This order is not supported by the evidence and should be set aside.

Conclusion

For the foregoing reasons, respondent Timothy S. Dembski respectfully requests that the Commission grant this Petition.

Dated: New York, New York
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By _____

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