U.S. SECURITIES AND EXCHANGE COMMISSION

Matter of

A.P. No. 3-16554

GRAY FINANCIAL GROUP, INC., *et al.*

RESPONDENTS' RESTATED PREHEARING BRIEF

Successor counsel for Respondents Gray Financial Group, Inc. ("GFG"), Laurence O. Gray ("Larry Gray") and Robert C. Hubbard, IV ("Bob Hubbard") restate Respondents' Prehearing Brief in order to inform the Court and the Division in advance of the hearing of Respondents' arguments and positions, some of which differ from those asserted by prior counsel and arise in part from the additional recent discovery permitted by the Court.[1] While this restatement is not required by the Rules of Practice or the scheduling order, successor counsel believe that it will prevent unfair surprise and streamline the hearing.

Background

This matter involves GFG's 2012 offer and sale of limited partnership interests in GrayCo Alternative Partners, II, LP ("Fund II"), a fund-of-funds "alternative" or "alt" investment product, to six Georgia-based public pension plans (the "Plans"): **(i)** the City of Atlanta Police Officers' Pension Fund ("Atlanta Police"); **(ii)** the City of Atlanta Firefighters' Pension Fund ("Atlanta Fire"); **(iii)** the City of Atlanta General Employees' Pension Fund ("Atlanta General"); **(iv)** the MARTA/ATU Local 732 Employees Retirement Plan ("MARTA"); **(v)** the Fulton DeKalb Hospital Authority Employee Retirement Plan ("FDHA"); and **(vi)** the Fulton County Schools Employees' Pension Plan ("Fulton Schools").

All six of the Plans signed binding subscription agreements committing them to invest in Fund II. Four of the Plans – Atlanta Police, Atlanta Fire, Atlanta General, and MARTA – continue to the present as Fund II investors, and they have earned positive cumulative returns from Fund II's diversified portfolio of alt investments. A fifth Plan, FDHA, formally "committed" to investing in Fund II by executing a binding subscription agreement, and was thus among the five committed investors that Fund II's counsel Greenberg Traurig, LLP disclosed in Fund II's Form D on the SEC's publicly available EDGAR system, as discussed below. The

[1] In its 2/22/2017 order, the Court raised questions concerning possible conflicts and suggested that "separate hearing counsel would have no reason to avoid relying on the silence of both Seward and Greenberg to support Respondents' advice of counsel defense" (p.9). Noting the Court's suggestion, Respondents retained the undersigned successor counsel, who entered their appearance on 3/23/2017, and Greenberg Traurig filed its withdrawal as counsel for Respondents the same day.

Form D also disclosed that Fund II targeted raising $100 million, and that these five subscribed Plans brought Fund II to $83 million in committed capital.

The evidence will show that, with this strong start, Respondents expected Fund II to easily exceed its targeted $100 million, and to raise as much as $150 million, with more than the original six Plans as investors. However, while still contractually obligated and interested in proceeding as late as its 5/21/2013 board meeting, FDHA never ultimately moved to the closing stage of its investment. The sixth Plan, Fulton Schools, initially committed to Fund II but soon thereafter asked to withdraw, and GFG agreed to allow Fulton Schools to cancel its binding subscription agreement (which GFG had no legal obligation to do). And although Fund II's documentation allowed 18 months to raise the remaining $17 million to reach its disclosed $100 million target, additional capital raising became no longer feasible after public disclosure of the Division's investigation of the Fund II offering.

The Division has charged that in 2012-13 Respondents fraudulently recommended, offered and sold investments in Fund II to Atlanta Police, Atlanta Fire, Atlanta General and MARTA while knowing, or recklessly not knowing, that the investments did not comply with a recently enacted Georgia Code provision authorizing and regulating alternative investments by public pension plans. As the Court noted in its 2/22/2017 order (p. 4), during the offer and sale of Fund II, the Georgia office of Greenberg Traurig served as counsel for Respondents and for Fund II, following preliminary work by Seward & Kissel. Both Greenberg Traurig and Seward & Kissel are major law firms with sophisticated securities law practices.

The Division will not carry its burden of proving its fraud charges. The evidence at the hearing will show the following:

- Fund II was a good investment that produced positive returns for the Plans. As a "fund-of-funds" (a fund investing in other funds), Fund II offered a diversified portfolio of underlying "alternative" investments – principally hedge and private equity funds – as promised. (**Point A**, p. 3 below)

- Through subscription agreements drafted by experienced fund lawyers at Greenberg Traurig, Respondents – non-lawyers with no in-house counsel – expressly stipulated that they were not providing the Plans with legal advice or a suitability determination in offering Fund II. (**Point B**, p. 4)

- As applied to a fund-of-funds structure like Fund II, the Georgia Code alt investment provision at issue here should be read as controlling risk in Fund II's underlying alt investments, which themselves complied with the statute's requirements. And on its face, this new statute was subject to multiple reasonable interpretations, particularly by non-lawyers. Over the last four years, the Georgia state authorities have appropriately not contended that the Plans violated the Georgia Code by investing in Fund II, despite related Atlanta press coverage since 2013. (**Point C**, p. 9)

- Sophisticated representatives of the Plans, principally Georgia attorneys, reviewed the Georgia statute and correctly understood the material facts concerning Fund II. Yet appropriately neither the Plans nor their counsel have sought to liquidate or modify the terms of their Fund II investments. Nor have they invoked the Georgia Code provision that afforded them a two-year window to cure any supposed violation. (**Point D**, p. 13)

- Larry Gray did not make material misrepresentations at a single board meeting of one of the six Plans, the 11/7/2012 Atlanta General meeting, one of dozens of meetings with the Plans' boards that he attended during the relevant period. (**Point E**, p. 15)

- Respondents reasonably relied on Seward & Kissel at the outset. They then moved their legal work from New York-based Seward to the Georgia office of Greenberg Traurig for reasons unrelated to interpretation of the Georgia statute. (**Point F**, p. 17)

- Respondents reasonably relied on multiple specialists at Greenberg Traurig throughout the creation, offer, sale and operation of Fund II. They looked to Greenberg for advice on complying with applicable legal requirements, including establishing the scope of their duties to investors, and compliance with the applicable securities laws, including the antifraud provisions of the federal securities laws charged here. (**Point G**, p. 19)

A. Fund II Was a Good Investment

The evidence will show that Fund II's investors have received, inception to date, the positive alternative investment returns they desired when they entered into the investment. Fund II's audited financial statements show that its internal rate of return was 7.45% (inception to 12/31/2012) (RX-1586, p.12); 7.67% (inception to 12/31/2013) (RX-1587, p.13); 6.75% (inception to 12/31/2014) (RX-1588, p. 14); and 5.19% (inception to 12/31/2015) (RX-1589, p. 14). As with any portfolio, not every underlying investment produced positive returns, and some did better than others, but the overall audited returns for Fund II were appropriate, as indicated.

The evidence will further show that, thanks to its fund-of-funds structure, Fund II's investors also got the diversification of alt investments they hoped for, including access to premier hedge and private equity fund managers. Fund II's hedge fund investments with substantial assets under management included, among other investments, Millennium USA, LP ($20B Fund Size at 12/31/2013), Third Point Partners Qualified, LP ($2.5B), Davidson Kempner Distressed Opportunities Fund, LP ($690M), and River Birch Partners, LP ($427M). And Fund II's private equity fund investments included Edgewater Growth Capital Partners III, LP ($713M), Siris Partners II, LP ($640M), Clearlake Capital Partners III, LP ($789M), TA Atlantic and Pacific VII-B, LP ($884M), and WL Ross Transportation Recovery Fund, LP ($460M). (RX-1647, p.6)

The evidence will also show that, in addition to its regular annual audit, Fund II's activities were subjected to a special independent forensic audit. After the 7/2013 Atlanta Journal-Constitution news article that appears to have led to the present proceeding, Atlanta General's board commissioned an independent forensic accounting firm, GlassRatner Advisory & Capital Group LLC, to audit Fund II for the period covering its first 9 months of operations, 12/2012 to 9/2013. Following this independent audit (RX-1646), Atlanta General's 2/5/2014 minutes show its board accepting GlassRatner's findings that Fund II's "[s]election of underlying investments complies with ... stated investment policies with respect to allocation among fund types"; that all of Fund II's cash inflows and outflows were "accounted for"; that fees and expenses were appropriate; and that Fund II "in general is doing what they said they would do with respect to the types of funds in which they would invest." (RX-1648)

GlassRatner then did a 3/5/2014 update that did an analysis of the underlying hedge and private equity fund investments that Fund II had made, the total current values for each of the underlying investments, and the amounts invested by Fund II in each. It also analyzed two smaller direct investments made by Fund II about which Atlanta General had questions. (RX-1647) Atlanta General's 3/5/2014 minutes show its board accepting GlassRatner's additional findings on Fund II's underlying investments. (RX-1657)

GFG offered proven ability to form and operate such an alternative investment fund-of-funds. Fund II followed GFG's successful 2011-12 launch of GrayCo Alternative Partners, I, LP ("Fund I"), also a fund-of-funds alt investment product, which had raised in excess of its target amount of $25 million from four public pension plans outside Georgia. (DX-62) The New York law firm Seward & Kissel had represented GFG for Fund I, and in early 7/2012 marked up the Fund I documents as drafts for the then-proposed Fund II. But GFG then switched its legal representation to the Georgia office of Greenberg Traurig, and a team of attorneys from that firm revised the offering documents and advised GFG on how to comply with the federal securities and Georgia law issues that arose during the offering process.

Fund II was a sound investment decision for a pension plan or other investor seeking to put a portion of its portfolio into alt investments that would be managed by a diversified group of underlying fund managers with excellent track records. There is no fraud when investors get positive returns, and get underlying fund-of-funds participation in recognized and highly regarded alternative investments like the hedge and private equity funds here.

B. Fund II's Express Disclaimers and Disclosures

The Division charges these non-lawyer Respondents with misrepresenting Georgia state law. It charges them with "a fiduciary duty breach related to their unsuitable recommendation of" Fund II because "these investments did not comply with" the new Georgia Code provision on alt investments. The Division further charges a misrepresentation to one Plan "concerning the investment's compliance with the Georgia law." (OIP ¶¶1-4) The Division specifies that Fund II investments "were unsuitable for the Georgia-based public pension clients because, as sold,

the investments violate the Georgia Investment Act." (OIP ¶18) The Division says that the alleged misrepresentation was that Fund II "was consistent with Georgia law," when "the three relevant limitations of the Georgia Investment Act were not met." (OIP ¶¶22-23)

The Division's charge that these non-lawyer Respondents misrepresented Georgia law cannot succeed because, as discussed below: **(i)** Fund II's offering materials, prepared by Greenberg Traurig, stated expressly and in clear terms that Respondents were not providing advice to investors on federal or state law. **(ii)** Fund II's offering materials also stated that Respondents were not offering any determination as to the suitability of Fund II for any prospective investor. **(iii)** Earlier agreements between the Plans and GFG concerning other matters did not impose such duties on the persons involved in the Fund II offering. **(iv)** Fund II provided clear EDGAR and other disclosure of the facts relevant to this proceeding.

(1) Express Disclaimer of Legal Advice. The Private Offering Memorandum that Greenberg Traurig prepared for Fund II provided in bold capitals in its introduction and elsewhere that no legal advice was being given to prospective investors:

> GREENBERG TRAURIG, LLP WILL BE ENGAGED TO ACT AS SPECIAL COUNSEL TO THE FUND, THE FUND'S GENERAL PARTNER AND THE FUND'S MANAGER IN CONNECTION WITH THE FUND'S ORGANIZATION. ... LIMITED PARTNERS OF THE FUND AND PROSPECTIVE INVESTORS SHOULD CONSULT WITH AND RELY UPON THEIR OWN COUNSEL CONCERNING INVESTMENT IN THE FUND.... (DX-1 (introduction under "LEGAL COUNSEL" heading, capitals in original, underscoring supplied, with similar language at pp. 21, 28, 39-40))

Additionally, as each Plan committed to Fund II, it executed a binding Subscription Agreement, again prepared by Greenberg Traurig. These Subscription Agreements likewise represented that the Plan "understands that it has the right to retain independent counsel and has made the independent decision whether or not to hire independent counsel." If the Plan "has not hired independent counsel," the Plan "represents that it understands and is capable of analyzing the risk of reviewing" the subscription agreement, the limited partnership agreement and private offering memorandum "without the advice of counsel." (p. 17 in DX-25 (Atlanta Fire), DX-20 (Atlanta General), DX-30 (Atlanta Police), and DX-75 and DX-76 (MARTA))

Greenberg Traurig's documentation for Fund II – both the Private Offering Memorandum and the Subscription Agreement – thus established a clean definition of responsibility. The Plans would look to their own "independent counsel" for legal advice. And by expressly adding this clean definition to the offering documents, Greenberg was also clearly advising its own clients – Respondents – that they were not being looked to for legal advice on the Georgia alt statute or any other provision of state or federal law. This was express legal advice from Greenberg on which Respondents could reasonably rely.

Additionally, as a practical matter, Respondents were prohibited by law from providing legal advice to the Plans and the Plans' counsel. Like laws in all other U.S. jurisdictions, the Georgia Code states that it is "unlawful for any person other than a duly licensed attorney at law ... [t]o render or furnish legal services or advice," and "it shall be unlawful for any corporation ... or company" to do the same. OCGA §15-19-51. (RX-1649)

Larry Gray and Bob Hubbard were non-lawyers, and GFG never had in-house counsel. Figuring out the language of the new Georgia alt law (not a model of clarity, as discussed below) was challenging for lawyers and not within the capabilities of lay persons like Respondents. Knowing that Georgia had adopted a new alt law – much discussed in the Atlanta investment community – was very different from having the ability and qualifications to parse through its complexities, particularly as applied in the fund-of-funds context, as discussed below.

(2) Express Disclaimer As to Suitability. Greenberg Traurig's Private Offering Memorandum for Fund II likewise provided in bold capitals at the beginning that no suitability determination was being made for Fund II's prospective investors, thus including the six Georgia public pension plans that actually committed to invest in Fund II:

> ... NEITHER THE FUND, THE MANAGER, THE GENERAL PARTNER OF THE FUND NOR ANY OF THEIR RESPECTIVE AFFILIATES MAKES ANY RECOMMENDATION AS TO THE MERITS OR SUITABILITY OF AN INVESTMENT IN THE FUND FOR ANY PARTICULAR ... ENTITY. (DX-1 (introduction under "LEGAL CONSIDERATIONS" heading, capitals in original, underscoring supplied))

Additionally, each Plan's Subscription Agreement represented (in language specifically added by Greenberg Traurig) that the Plan had made its own determinations as to the merits of the investment and as to its authority to invest:

- The Plan represented and agreed that the Plan "has such knowledge and experience in financial and business matters" as to be "capable of evaluating the merits and risks of an investment in" Fund II, and the Plan "has made an investigation of the pertinent facts" and reviewed Fund II's documentation, and "is capable of bearing the economic risk related to" investing in Fund II. (p. 15 in DX-25 (Atlanta Fire), DX-20 (Atlanta General), DX-30 (Atlanta Police), and DX-75 and DX-76 (MARTA))

- The Plan and its signatories "represent that ... the execution and delivery of this Subscription Agreement" and the limited partnership agreement "do not violate, or conflict with, the terms of any ... statute ... applicable to the" Plan, and that the Plan "has the full power and authority under its governing instruments to become a" limited partner of Fund II. (*Id.*, p. 17)

Again, in thus spelling out responsibilities in the Fund II documents, Greenberg was telling its own clients – Respondents – that they were not being looked to for a suitability determination, and particularly a suitability determination requiring interpretation of a complicated Georgia state law.

(3) Earlier Agreements Inapplicable. The Plans each entered into their respective Fund II Subscription Agreement after the Plans' earlier consulting agreements with GFG, which the Division has marked as hearing exhibits. And by its terms, the later Subscription Agreement specifically governed each Plan's rights and obligations respecting Fund II. For these reasons alone, the Fund II Subscription Agreement, with the express disclaimers noted above, takes precedence over the earlier agreements, demonstrating that Respondents did not have the obligations to the Plans that form the premise of the Division's claims.

Moreover, the earlier agreements are also inapplicable by their own terms. With respect to GFG's pre-existing Investment Consulting Services Agreements with the Plans, those agreements did not require GFG to give legal advice to a Plan on any matter, or to assess the Plan's compliance with the new Georgia Code alt investment provision in particular. Instead, these short agreements simply required GFG to perform certain basic tasks, including:

- Provide quarterly performance reports, attend plan board meetings to present on performance, and perform requested research. Also to "assist the Board/or develop asset allocation, investment policy and procedures, and manager guidelines and procedures."

- Advise the Plan's board on "evaluation of investment performance, benchmarking comparisons, portfolio characteristics, risk assessment and the placement on underperformance watch in relation to the total portfolio, asset class composites and/or individual investment managers for the fund's assets." (DX-125 (agreement with Atlanta General)).

GFG also entered into certain Discretionary Investment Advisor Agreements allowing it to manage a defined portion of a Plan's overall assets, for example the US Domestic Midcap Equity asset class. These agreements specified that GFG "shall not be considered a fiduciary to the extent that it does not have investment discretion under this Agreement." (DX-41 (agreement with Atlanta Police, §X), DX-127 (Atlanta Firefighters), DX-67 (MARTA)) None of these agreements applied to or in any way even allowed "alt" investments by the Plans, and again none required GFG to provide legal advice to the Plans on any matter (nor could GFG, as non-attorneys, provide such advice).

(4) Disclosures Concerning Fund II. Fund II's Private Offering Memorandum, which was prepared by Greenberg Traurig, disclosed to each prospective investor that:

- Fund II Did Not Yet Have Its Planned $100 Million: "The Fund is targeting aggregate capital commitments of $100M." (DX-1, p. 1) Fund II's general partner has discretion to

increase or decrease the targeted $100 million aggregate. (DX-1, p. 11) Fund II will "continue to accept subscriptions" until its "final closing," which will be 18 months after its "initial closing" (with the initial closing to be permitted when Fund II reached $25 million in commitments). (DX-1, p. 12) (emphasis supplied)

- Respondents Were Sponsoring the "GrayCo" Fund II: GFG's CEO Larry Gray was "the controlling principal of both the General Partner and the Manager." (DX-1, pp. 1, 6, 10) Larry Gray's involvement in the eponymous "GrayCo" Fund II was sufficiently critical that his withdrawal could trigger a "key person event" for Fund II. (DX-1, pp. 14, 26-27) And Larry Gray personally signed each Plan's Subscription Agreement alongside the signature of the respective Plan's representative, except for FDHA's agreement that Bob Hubbard signed for the "GrayCo" entity. (DX-20, DX-25, DX-30, DX-75, DX-76, RX-1598)

Greenberg Traurig then prepared and filed additional disclosure for Fund II on the SEC's EDGAR system. Greenberg filed Fund II's SEC Form D, required for private placements, on EDGAR on 12/20/2012, after Fund II had received signed Subscription Agreements from each of the Plans (DX-20, DX-25, DX-30, DX-75, DX-76, RX-1598), but before it disbursed a substantial portion of their money into underlying investments – *i.e.* at a time when Fund II could easily have been unwound if Greenberg as Respondents' counsel, or the Plans' own counsel, or anyone else saw a problem with compliance with the new Georgia statute. Of particular relevance here, Fund II's Form D publicly disclosed the following on EDGAR:

- Fund II was planning to raise $100 million in capital, but it had not yet done so. At the time of filing the Form D, it stated that it had $83 million in committed capital ("Total Amount Sold $83,000,000 USD" and "Total Remaining to be Sold $17,000,000"). (RX-1650, Form D Item 13)

- At the Form D's filing date, Fund II had 5 investors ("total number of investors who already have invested in the offering – 5"). (RX-1650, Form D Item 14) Greenberg Traurig determined to count all of the Plans that had signed binding Subscription Agreements except for Fulton Schools, which the week before had obtained GFG's consent to withdraw from its binding subscription agreement. (RX-1188)

- Simply dividing Form D's disclosed 5 investors into Form D's disclosed $83 million committed capital showed that any investor committing more than $16.6 million would represent over 20% of the capital then committed specifically to Fund II at the fund-of-funds level – though still only a small percentage of the total amounts held by Fund II's underlying investments.

- Likewise, as to GFG's sponsorship of Fund II, the Form D identified Larry Gray of GFG as the "President & CEO" and "Director of the sole member" of the "GrayCo" Fund II's

General Partner. And Bob Hubbard of GFG as "Chief Operating Officer" of Fund II's General Partner. (RX-1650, Form D Item 3)

C. Requirements of Georgia's New Alt Statute

The Division must carry its burden of proving that the Plans were not authorized to invest in Fund II under Georgia's new "alt" investment law, OCGA §47-20-87, that became effective just months earlier. (DX-21) If these Georgia Plans were authorized to invest in Fund II under Georgia law, there is simply no case here.

(1) Georgia Interpretation. The Division charges that Respondents violated the federal securities laws by recommending an investment that would cause the Plans to violate a Georgia state law, Georgia's new alt statute. Yet in the more than four years that the Plans have invested in Fund II, the Georgia state authorities appropriately have never to our knowledge contended that the Plans were not authorized to invest in Fund II – despite the extensive publicity that this matter has received in the Atlanta Journal-Constitution, the city's major newspaper, and elsewhere. Nor and also appropriately, as discussed in Point D below, have the Plans or their counsel concluded that the alt statute barred their investments in Fund II.

Additionally, the Georgia Attorney General has appropriately never issued an opinion advising that investments like those here would violate the Georgia alt statute.[2] And the Georgia State Auditor's biennial report on noncompliance with Georgia investment management laws has likewise appropriately never included the Georgia plan investments in Fund II and similar alt funds. (RX-1654, RX-1655, RX-1656)

Separately, the huge Atlanta-based investment management firm Invesco Ltd. has appropriately sponsored a similar alt fund that it sold to some of the same Georgia Plans without any charge by Georgia state authorities that the investments violated the Georgia alt statute. The Invesco Partnership Fund VI LP ("Invesco Fund VI") was likewise a fund-of-funds structure that funneled public pension plan money into underlying hedge and private equity funds. (RX-1607) At the time of its first closing, it had raised only $16 million from four public plan investors – MARTA and Fulton Schools, plus plans in Massachusetts and California. (RX-1603) MARTA's Georgia lawyers specifically and appropriately acknowledged in 6/19/2013 emails that MARTA's investment in Invesco Fund VI was made as allowed by the Georgia alt statute, and also appropriately neither MARTA's lawyers nor Invesco's lawyers expressed any concern that the investment was prohibited by the alt statute. (RX-1602)

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[2] The Georgia Office of the Attorney General issues legal Opinions under certain circumstances explained at https://law.georgia.gov/opinions. The Opinions are "Official" when issued to the Governor and the heads of the executive departments, and "Unofficial" when issued to other state officers. To our knowledge, the only Opinion involving alternative investments was an Official Opinion issued on February 7, 2012, related to the "five percent limitation on alternative investments for the Georgia Firefighters' Pension Fund" that is contained within O.G.C.A. § 47-7-127(d), a statute that closely resembles §47-20-87 but only applies to the Georgia Firefighters' Pension Fund. *See* Official Opinion 2012-2, available at: https://law.georgia.gov/opinion/2012-2. The Opinion does not contain information helpful to the resolution of this matter.

And following the Atlanta Journal-Constitution article raising questions about the Georgia alt statute in 7/2013, Invesco Fund VI appropriately added FDHA as another Georgia public pension plan investor. (RX-1606) GFG recommended Invesco Fund VI as a sound alt investment with Invesco, a prominent and highly regarded sponsor. But GFG itself had no involvement in Invesco Fund VI, and GFG's staff of non-lawyers certainly did not opine on whether the investment in this Invesco product complied with the Georgia Code (which it did).

(2) Georgia Alt Statute's Provisions. The statute states that an "eligible large retirement system" like each of the Plans "is authorized to invest in alternative investments," subject to certain stated requirements that limit which alt investments are and are not permitted under the statute. (§47-20-87(b)) The difficulty that the Division will face in trying to prove a violation of Georgia law is that each of the three stated requirements relevant to the present case is vague and subject to multiple interpretations – particularly when applied to a so-called fund-of-funds structure, like that here formed by Greenberg Traurig for Fund II:

- The 20% investment limit: The statute provides that "An alternative investment shall not exceed in any case 20 percent of the aggregate amount of ... [t]he capital to be invested in the applicable private pool, including all parallel pools and other related investment vehicles established as part of the investment program of the applicable private pool...." (§47-20-87(c)(1) (emphasis added))

    - Does this mean that a particular Plan's investment cannot exceed 20% of the aggregate assets in Fund II's underlying investment funds – large hedge and private equity funds with assets totaling in the tens of billions – as these are "parallel pools" or "other related investment vehicles"? This makes the most sense because the requirement appears intended to limit risk by focusing on the pool(s) that the Plan's money actually goes into, here totaling tens of billions. A fund-of-funds like Fund II is itself nothing more than a "conduit" to its underlying investments. There is little or no risk at the fund-of-funds conduit level – the investor holds its own money until it is called for a downstream investment, and the money is then escrowed pending transfer to the underlying investment, where any actual investment risk may exist.

    - Or does this provision instead look at the intermediary conduit vehicle, here Fund II? If so, does it mean that a Plan's investment cannot exceed 20% of the assets of GFG's Fund I and Fund II combined – together totaling well over $100 million – as Funds I and II were "related investment vehicles established as part of the investment program" at GFG, which was also then planning for a new "Fund III" and beyond?[3]

[3] Fund I was a fund-of-funds with four non-Georgia pension plan investors that subscribed between November 10, 2011 and March 6, 2012. Fund I succeeded in raising in excess of its full target or cover amount of $25 million. Fund I's investors were City of Pontiac (Michigan) General Employees Retirement System; District 1199J New

- Or does this provision instead look solely at the single conduit fund-of-funds, Fund II, and then measure the 20% against the "capital to be invested in" Fund II, which here was $100 million, Fund II's disclosed "target" amount "to be invested," as discussed below? Or does the 20% get measured against the amount Fund II would actually raise at the point when it closed to new investors 18 months out – an amount that the evidence will show was likely to be as much as $150 million until the well publicized investigation of Fund II, beginning in 2013, unsurprisingly chilled further investor interest.

- The four-investor requirement: The statute provides that "Each alternative investment by an eligible large retirement system [such as the Plans] shall have previously been or shall be concurrently made or committed to be made by at least four other investors not affiliated with the issuer." (§47-20-87(c) (emphasis added))

  - Again focusing on the statute's apparent concern with limiting actual risk, does "each alternative investment" refer to each of the large hedge and private equity funds that were mostly where Fund II placed the Plans' money? Here each such underlying hedge and private equity fund had at least dozens of very substantial investors – providing a further cushion against risk. Or does it look to Fund I and Fund II combined, totaling 8 or more investors at different times, as "parallel pools" in the same "investment program"?

  - Or does "each alternative investment" instead refer just to the conduit fund-of-funds, here Fund II? In that event, it should include all six Plans – then including FDHA and Fulton Schools – that signed binding subscription agreements for Fund II. Or at least FDHA, which was specifically included as the fifth investor by Fund II's Form D, prepared and filed with the SEC by Fund II's counsel Greenberg. Either way, "each" of these five or six Plans were committing to invest in Fund II with "four other" investors "concurrently" (an undefined term).

- The $100 million asset requirement: The statute provides that "Alternative investments shall only be made in private pools and issuers that have at least $100 million in assets, including committed capital, at the time the investment is initially made or committed to be made by an eligible large retirement system." (§47-20-87(c) (emphasis added))

  - Do the "private pools and issuers" refer to the underlying investments – the hedge and private equity funds that are the real "issuers" that pose an investment risk for the Plans, as discussed above? These private equity and hedge funds had substantial assets far exceeding $100 million.

Jersey Health Care Employers Pension Fund; City of New Haven Policemen and Firemen's Pension Fund; and Alabama A&M University Foundation, Inc. (DX-62)

- Or is the "issuer" (another undefined term) GFG itself, which then had well over $100 million in assets under management, and indeed closer to $1 billion? Or does the provision refer to Fund I and Fund II together as "parallel pools" in an "investment program" that already exceeded $100 million in commitments?

- If the conduit Fund II is the pool or issuer referred to, should the $100 million refer to Fund II's publicly disclosed "target" amount "to be invested," or the higher amount actually "to be invested" when the fund closed to new investors after 18 months, as discussed above?

(3) Georgia Alt Statute's Flexible Cure Provision. There is no guidance in the statutory definitions or legislative history as to what the George Code provisions at issue mean, nor (given the recency of the statute) are there any judicial or other interpretations of its provisions. Whatever these provisions mean, the statute does not impose any penalties on a plan that is not in compliance and expressly permits a plan that is not in compliance to continue (without penalty) with the investments it committed to make. The Code offers a two-plus year cure period in the event any particular alternative investment turns out not to be in compliance with the statutory provisions. The language thus indicates that an investment that does not meet a particular statutory requirement, certainly the 5% provision and likely the other provisions, is not a "violation" of the Georgia Code, but merely a trigger for the plan to make a good faith effort to bring itself into compliance. The statute provides:

> ... If the eligible large retirement system is not in compliance with the limitations imposed by this subsection, it shall make a good faith effort to come into compliance within two years and in any event as soon as practicable thereafter; provided however that during any period of noncompliance, the eligible large retirement system shall not increase the percentage of its assets committed to be invested in alternative investments but shall be permitted during such period to continue to make investments as required by the then existing commitments of the eligible large retirement system to alternative investments made before the period of noncompliance. (§47-20-87(d) (emphasis added))

(4) No Georgia Code Violation. The evidence will show that Larry Gray and Bob Hubbard have no legal training and that GFG never had an in-house lawyer. But they stood in what was literally a forest of lawyers – their own outside lawyers, first at Seward & Kissel and for most of the relevant period at Greenberg Traurig, and additionally the array of Georgia lawyers representing each of the Plans. Given that, appropriately, not one of the many lawyers involved here said to Respondents that the Plans were violating the Georgia Code by investing in Fund II, given that the Georgia state authorities have appropriately not charged a violation despite this issue having been raised publicly more than four years ago, given that no lawyer involved has taken the position over four plus years that the statute's cure provision has been triggered so as to require steps to come into compliance, and given that the statute's language is

unclear on its face and particularly as applied to a conduit fund-of-funds structure, the Division will not succeed in carrying its burden of proving a violation of the Georgia Code.

D. Correct Understanding of Plan Representatives

Sophisticated representatives of each of the Plans, principally Georgia attorneys, reviewed the statute and correctly concluded that their respective Plans' investments in Fund II were not in violation of the law. And appropriately, none of these sophisticated representatives raised a concern about compliance with the statute. These included representatives of Atlanta Police, Atlanta Fire, Atlanta General, MARTA, FDHA and Fulton Schools.

Six months after the Plans invested in Fund II, the Atlanta Journal-Constitution began an investigation into, among other things, whether the investment complied with the new Georgia Code provision for alt investments by public pension plans. On 7/2/2013, its investigative reporter asked the Atlanta Mayor's Office for "the city's response on whether you guys did violate the new state alternative investments law, and what you plan to do about it. (The language requiring at least $100 million and four other investors in the fund when the city joins it.)" (DX-82) On 7/3/2013, the Mayor's Office asked for responsive legal advice from Kristen Denius, the city lawyer who had for years advised three of the Plans (Atlanta Police, Atlanta Fire and Atlanta General), attaching a copy of the Georgia Code provision for reference. (DX-82)

Having been told explicitly that the Mayor's Office would use her advice to respond to the reporter, Denius provided her correct legal analysis two days later in a 7/5/2013 email she sent to the Mayor's Office and also to Atlanta Chief Financial Officer Jim Beard and Atlanta Human Resources Commissioner Yvonne Yancy, both of whom were board members of all three Plans she represented. (DX-82) Denius' correct legal opinion was that the Plans' investment in Fund II did not violate the Georgia Code:

> I have looked at the statute (in particular at the lines indicated) and do not see where the GEPP [Atlanta General] or either of the other pension plans [Atlanta Police and Atlanta Fire] would have violated it. The size and asset restrictions appear to be directed at the issuer as a whole and not at the specific investment product. Mr. Grantham's [the reporter's] vague allegation of a violation does not really point toward where he thinks the violation may have occurred, but from my understanding of the investment and my reading of the law, I do not see a violation. (DX-82) (emphasis added)

The Mayor's Office then used Denius' correct legal opinion to provide a largely verbatim response to the reporter on 7/8/2013 (RX-970), and later forwarded the response to Denius. (RX-21) And Denius appropriately adhered to her views during ensuing discussions. (RX-953)

Denius had initially become involved with the alt investment provision back on 2/20/2012, when the chairman of Atlanta General, her Plan client, emailed her and others to say

that the bill proposing the Georgia Code alt provision was "legislation we are hoping the legislature will pass," and asking them to "talk it up [as] we need all the support we can get." (DX-37) That 2/20/2012 email attached a short article that specifically referenced the bill's 20% and $100 million provisions. (RX-1590) When her Plan clients actually decided to invest in Fund II in the Fall of 2012 and sought her "legal review," she appropriately responded on 10/19/2012 that she was "fine with their execution of these documents." (RX-90) And when a single board member raised a question shortly after the investment, Denius reviewed "pertinent" statutes and appropriately concluded on 12/5/2012 that there was "no violation of any policy." (RX-819, p. 3) Denius then adhered to this correct view in helping the Mayor's Office respond to the Atlanta Journal-Constitution in 7/2013, as noted above. (RX-930)

The evidence will show that Atlanta's Chief Financial Officer Jim Beard – a board member of Atlanta Police, Atlanta Fire and Atlanta General – is financially sophisticated. He holds an MBA from the Kellogg School of Management (Northwestern University), worked in the securities industry, and then had a leadership career in public finance. He read the new Georgia alt statute after it passed to see what the final version said, and he correctly understood that Fund II's "cover" amount of $100 million was simply the amount it was "targeting" to raise. While a board member for three of the Plans, Beard personally signed the Fund II Subscription Agreement on behalf of Atlanta General, which invested $28 million – representing 28% of Fund II's $100 million targeted cover amount, and 33.7% of the $83 million in committed capital disclosed in its 12/2012 Form D.

Counsel for the fourth Plan, MARTA, was Norman Slawsky. The evidence will show that Slawsky had been on a Georgia Governor's task force to consider an alt investment statute a decade earlier. On 3/19/2012, Slawsky emailed Larry Gray "as a follow up to your comment at the 3/16 meeting" of the MARTA plan's board. Slawsky said he had reviewed the bill soon to become the Georgia Code provision on alt investments, and found it a "laundry list of alternative investments which have been considered for at least ten years." (RX-25) The evidence will show that Slawsky continued to correctly advise MARTA through the period it evaluated (RX-811) and committed (RX-769) to invest in Fund II; that he personally attended two education sessions GFG presented on Fund II before MARTA invested; that he reviewed the Fund II documentation at the time MARTA committed to the investment (RX-715); and that appropriately his only concern regarding the new Georgia alt statute was that it required MARTA to adopt a new ethics code (RX-671), which it did. In 8/2013, following the 7/2013 Atlanta Journal Constitution article mentioned above, Slawsky and his co-counsel Ed Emerson of Morris Manning reviewed the documentation for and appropriately did not object to MARTA's commitment of an additional $5 million to Fund II on 8/16/2013. (RX-720)

Counsel for the fifth and sixth Plans, FDHA and Fulton Schools, were Lou Horne and Kristina Jones of Schiff Hardin's Atlanta office. The Schiff lawyers raised a conflict-of-interest concern that GFG's lawyers at Greenberg Traurig believed was addressed by Greenberg's own strong disclaimer language in the offering documents but, "as belt and suspenders," attempted to further address through the drafting of a side letter. (RX-1561) But the Atlanta-based Schiff

lawyers appropriately never raised a concern over the possibility that investing in Fund II would violate the new Georgia alt statute. And two of the three FDHA board members that unanimously approved its investment in Fund II were Georgia lawyers, Lemuel Hewes and Robert Miller. (RX-822) As late as 5/21/2013, the FDHA board was still asking its Schiff lawyers to explore ways around the conflict issue so that FDHA could invest in Fund II, appropriately with still no concern expressed about the requirements of the Georgia alt statute. (RX-1001)

Finally, the evidence will show that many of the same attorneys and board members appropriately authorized these Plans to invest in Invesco's similar alt fund-of-funds – Invesco Fund VI discussed above – that at the time had raised well under $100 million, and that had a lower amount of committed capital than Fund II. Slawsky and Emerson appropriately authorized MARTA to invest in Invesco Fund VI, which it did. (RX-1610, RX-1611) The Schiff lawyers appropriately authorized FDHA and Fulton Schools to invest in Invesco Fund VI, which they did. (RX-1000, RX-1001, RX-1604, RX-1606, RX-1607) And Denius appropriately authorized Atlanta Police and Atlanta Fire to invest in Invesco Fund VI, but they did not for other reasons. (RX-1653)

E. Atlanta General's 11/7/2012 Board Meeting

Larry Gray attended multiple board meetings of each of the six Plans that signed subscription agreements for Fund II in Fall 2012. The Division charges that he made two misrepresentations at one meeting of one Plan – the 11/7/2012 meeting of Atlanta General. The evidence does not support this charge.

The transcript of the meeting shows that Gray told board member Yolanda Johnson that "the change of law" – plainly referring to the new Georgia alt statute – allowed the Plan to make alt investments, which it did. He did not purport to give Johnson legal advice on particular provisions of the statute. That was the job of the Plan's legal counsel Kristen Denius, who the minutes show was present at the meeting and heard Gray's answer to Johnson's question. (DX-19) The full text of the relevant portion of the meeting transcript is as follows:

> MS. JOHNSON: ... Okay. The second thing is, is this consistent with the law in terms of –
>
> MR. GRAY: Absolutely.
>
> MS. JOHNSON: - what we're allowed to do?
>
> MR. GRAY: Yes. The only reason you can do this now is because of the change of law.
>
> MS. JOHNSON: The law changes. Okay.

MR. GRAY: All right. (RX-1358, pp. 242-43)

That was it. The meeting transcript shows that the Atlanta General board members then voted 7-to-2 in favor of investing in Fund II: "Been properly moved and second[ed]. Any unreadiness, any questions? (No response.) All those in favor signal saying "aye." (Members signify.) ... Any opposes? Two?" (RX-1358, pp. 247-48)

After the vote was taken, one of the two dissenters, board member Dr. Gregory Nash, asked Gray who else had invested in "them." As Nash used the plural, it appears that he was referring to alternatives. But the Division would change the "them" to an "it" and argue that Nash was really asking who else had invested in Fund II. The text of Nash's inquiry and Gray's response is as follows:

> DR. NASH: I have a problem with not ... being ... able to get a view and knowing ... who they are. ...
>
> MR. GRAY: Well, Mr. Nash, there are other companies that we want to bring to you. I will tell you who they are. ...
>
> DR. NASH: I mean, even if you would just tell me what other companies are invested in them. ... I mean ... it's like it's a big secret. ... Tell us what other companies or what other firms are invested in them.
>
> MR. GRAY: Oh, police and fire. They've already – your attorneys ... approved the legal documents, therefore, we simply need a signature. But they've already approved. They've already signed the documents, it's already executed. Grady Hospital [a/k/a FDHA] is already executed. MARTA is already done. And tomorrow we meet with Fulton County Schools locally. Now, there are Michigan, New York, Chicago, those plans are already executed as well.
>
> DR. NASH: Okay.
>
> MR. BEARD [board member, and CFO of the City of Atlanta]: This is a good thing, guys. ... I would tell you if it wasn't.
>
> CHAIRMAN BERRY: And this is something we ... lobbied for last year ... to be able to do this. ... (RX-1358, pp. 248-50 (emphasis added))[4]

[4] Again, this discussion with Dr. Nash was after the vote had been taken. Following this interchange with Dr. Nash, it was noted that the motion to approve Atlanta General's commitment to Fund II had previously "carried," and board chairman Alfred Berry repeated that the vote "was 7-2," which was then also confirmed by board member Jim Beard (the Atlanta CFO). (RX-1358, pp. 251-52)

In fact, Atlanta Police had previously executed on 10/20/2012, and Atlanta Fire had executed on 10/22/2012. Listening to Gray's 11/7/2012 statements were Kristen Denius (lawyer for Atlanta Police, Atlanta Fire and Atlanta General), and Jim Beard and Yvonne Yancy (both board members for all of the same three Plans). FDHA had in fact executed the day before, 11/6/2012. MARTA was "already done" as it strongly supported investing, and formally approved the investment on 11/30/2012. Gray was in fact meeting "tomorrow," 11/8/2012, with the Fulton Schools board. All this was just on Fund II. Beyond this, Gray knew that a Michigan plan and a New York area plan had both invested in Fund I, and that a Chicago client had also made alternative investments, among others. (RX-1057, RX-1058, RX-1059)

After some further discussion, Atlanta General board member Jim Beard – the Kellogg MBA and CFO of the City of Atlanta, as noted above – told Gray to "[c]ome to my office as soon as you finish," so the Fund II documents could be signed. (RX-1358, pp. 252-53) Following the meeting, Beard co-signed the Fund II documents on behalf of Atlanta General. Beard signed next to Gray's signature on behalf of the Fund's general partner, so Beard had no doubt that Gray was affiliated with "GrayCo" Fund II.

The Court will have the full transcript of the 11/7/2012 Atlanta General board meeting available (RX-1358), as well as the audiotape (RX-1358-A) and a clip of the relevant portion of the audiotape (RX-1358-B), and will note the exceptionally chaotic nature of this board's proceedings, with board members repeatedly cutting each other off and talking over each other throughout the meeting. Plainly this was not an environment where precise questions were asked or in which measured responses could be given.

What is significant is that the memorialization of what was considered important from the meeting – the meeting minutes – do not record Gray's comment that alt investments were "allowed," and the minutes certainly do not indicate that Gray gave a legal interpretation of particular portions of the new Georgia alt statute. Nor do the minutes refer to other investors beyond correctly reporting that Gray had stated that Atlanta Police and Atlanta Fire had "already authorized investments" in Fund II. (DX-19)

F. Representation by Seward & Kissel

The evidence will show that New York law firm Seward & Kissel represented GFG during the formation, offer and sale of the predecessor Fund I, beginning in 2011. When GFG began to think in Spring 2012 about creating Fund II, to be largely modeled after Fund I, GFG again turned to Seward & Kissel. On 6/8/2012, Bob Hubbard emailed Alexandra Segal, an associate at Seward & Kissel, asking if she could mark up her Fund I documentation to provide drafts of documentation for the new Fund II by 6/15/2012. (DX-90)

In his 6/8/2012 email, Hubbard explained to Segal that GFG had wanted Fund II's target or "cover" amount to raise to be $75 million, and that having a $75 million cover continued to be GFG's "preference." But Hubbard noted that the new Georgia statute allowing alt investments

by public pension plans talked about eligible investments having to be $100 million. Hubbard said that GFG wanted Georgia plans as investors in Fund II, and he wondered whether a Georgia plan could invest before the $100 million target amount was reached. He asked for Segal's interpretation, but said that GFG had also reached out to an individual involved in "crafting the bill" to try to learn its intent. (DX-90)

Segal responded the same day that it was "unclear" to her whether a fund needed that amount "prior to" a pension plan's investment. (DX-90) Time entries show that she then examined the Georgia bill and discussed it with Seward & Kissel partner Robert Van Grover. (DX-87) On 6/14/2012, she got back to Hubbard and asked whether he, a non-lawyer, had determined the meaning of this $100 million clause in the statute. In so doing, Segal did not challenge GFG's proposal for a $75 million cover for Fund II, did not say the cover had to be $100 million, did not express a view whether a Georgia plan could invest before the cover amount was reached, and did not raise any concern as to any of the other provisions of the Georgia statute. (DX-92) Hubbard replied on 6/18/2012 that GFG was "still working locally" and "also seeking an opinion locally" on the $100 million clause. He did not specify whether GFG was speaking with the previously mentioned individual involved in "crafting the bill," or whether the "local" person was a lawyer, legislator, regulator or financial adviser. (DX-92) The Georgia statute became effective two weeks later, on 7/1/2012. (DX-21)

On 7/9/2012, copying Seward partner Van Grover, Segal emailed "initial drafts of the offering documents for" Fund II that were, as Hubbard had requested, markups of her earlier Fund I documentation. (DX-131) Significantly, in modifying Fund I's $25 million cover amount in the revised documentation, Segal set the cover amount for Fund II at the $75 million that GFG had said it preferred, and not at the $100 million amount Hubbard had asked about. (DX-132) Segal sent the drafts that day in response to Hubbard's email advising that "we are meeting with two prospective investors tomorrow and I was hoping to already have these in presentable form." (RX-564) While thus explicitly aware that GFG was about to speak with potential investors in Fund II and would likely show them this documentation, Segal's transmittal in no way cautioned against the use of the Fund II documentation with the $75 million cover she had inserted. Nor did she alert him to any issue or restriction imposed by the Georgia statute. She simply asked him to "let us know if you have any questions or comments." (DX-131)

Seeing Seward & Kissel deliver draft Fund II documentation with a $75 million cover amount (DX-132), as well as Seward's 7/31/2012 invoice that billed GFG time for Seward's consideration of the Georgia statute ("Looked into GA statutes regarding restrictions on alternative investments by eligible large retirement systems") (DX-87), GFG reasonably considered any questions regarding the appropriateness of a $75 million cover for Fund II resolved. And if Fund II could take Georgia pension plan investments with a $75 million cover or ultimate "target" amount, it obviously did not have to raise $100 million before taking such investments. Though as a fund-of-funds, its underlying investments would be in funds with AUMs far in excess of $100 million, as discussed above.

Although Seward thus provided Fund II documentation containing a $75 million cover, the Division's theory is that "Seward's interpretation ... appears to have prompted Respondents to change lawyers. ... Having gotten a clear message from Seward in July 2012 that '$100 million' really meant '$100 million,' GFG went looking for another law firm." (Div. Prehearing Brief, 1/23/2017, p. 6) The Division's theory is demonstrably false. Seward said no such thing. And if GFG were really trying to evade what its New York lawyers at Seward said about a Georgia statute, GFG certainly would not have moved its legal work to Greenberg's large Georgia office with dozens of Georgia-barred lawyers qualified to accurately interpret and apply Georgia law. Notably, in moving the Fund II work to Greenberg, as discussed below, GFG initially suggested keeping Seward involved, with Greenberg to "transition in" later in the project, but Greenberg pushed to take over the Fund II work immediately. (RX-1500, RX-1501)

The reason for the move to Greenberg Traurig had nothing to do with Seward's interpretation of the Georgia statute. The head of Greenberg's Georgia office, Ernest Greer, said in his declaration in this matter that he had known GFG's Larry Gray and Marc Hardy each for about 15 years, and that when Hardy joined GFG in 3/2012, they discussed moving its legal work to Greenberg. As the "relationship" partner for GFG, Greer explained that GFG's goal in switching to Greenberg was "to consolidate its legal business at one law firm and provide the company access to a law firm located in the same physical location as Gray's headquarters in Atlanta, Georgia," where Greenberg and GFG shared the same office building, just a few floors apart. (Greer Decln., 2/6/2017, ¶3) As noted above, GFG never had an in-house lawyer.

G. Representation by Greenberg Traurig

In 8/2012, GFG moved its legal representation to the Georgia office of Greenberg Traurig. The scope of Greenberg's engagement was unlimited, as it had no signed engagement letter with GFG. Its unsigned 10/9/2012 draft engagement letter broadly provided for representation "in connection with general corporate and securities matters and such other projects you may ask us to work on from time to time." (RX-1506) It repeated the same broad scope of representation in its unsigned 10/29/2012 draft that had been revised for signature by Ernest Greer. (RX-1514) In an internal email dated 12/12/2012, the Greenberg Traurig attorney with primary responsibility for the Gray work confirmed to Greenberg Traurig's CEO Richard Rosenbaum that the firm represented GFG "on all of their securities matters, including ... regulation/compliance and fund formation." (RX-1524, RX-1612)

(1) Greenberg's Advice of Counsel. As previously indicated in Respondents' 3/27/2017 memorandum to the Court, Respondents agree with the Court's comments in its 2/22/2017 order that: **(i)** "Greenberg was ... much better situated than Seward to provide advice on the ... requirements of the Georgia Act, because it represented Respondents during most of the time the pension fund clients were actually investing in or committing to invest in GrayCo Alt II, while Seward's work on the fund ended in August 2012, before any commitments" (Order, p. 4). **(ii)** Respondents "relied on Greenberg's work in essentially the same way they had previously

relied on Seward's" (Order, p. 4). **(iii)** Respondents' advice-of-counsel defense is based on a "failure to explicitly provide advice" (Order, p. 8). **(iv)** Greenberg's "advice (or lack thereof) is at issue because of the advice of counsel defense" (Order, p. 9).

The D.C. Circuit holds that, for an advice-of-counsel defense: **(i)** it is sufficient that the lawyer learns relevant facts simply by working on the matter; **(ii)** it is not necessary for the lawyer to issue a formal written opinion letter; **(iii)** a client with an already formulated proposal is still looking to the lawyer to advise how to execute it in a legal manner; and **(iv)** a lawyer's caution that a proposal has some risk and may be challenged does not mean that the lawyer is advising it is unlawful. *US v DeFries*, 129 F.3d 1293, 1308-09 (D.C. Cir. 1997). *Accord SEC v Prince*, 942 F. Supp. 2d 108, 126, 141-42 (D.D.C. 2013). The D.C. Circuit further holds that "reliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter." *Howard v. SEC*, 376 F.3d 1136, 1147-48 (D.C. Cir. 2004) (no scienter where individual observed that large securities law firm Rogers & Wells "drafted the documents," "oversaw the closing," and the next year prepared relevant disclosure documents). Involvement of counsel is also a defense to a negligence charge where the representation or omission related to legal matters – here the application of a new and confusing statute to facts the lawyers obtained through their work. *Matter of Flannery*, 2014 WL 7145625, at *33 (Dec. 15, 2014) (Commission dicta that "involvement of counsel" can negate negligence where statements involved a "legal judgment" that should be made by an attorney), *vacated on other grounds*, *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2015).

While still litigation counsel in this matter, Greenberg drafted and had Respondents sign self-serving declarations stating that they had not asked Greenberg for an opinion on the new Georgia alt statute. The Court has already noted the potential conflict that Greenberg faced, and the circumstances of the signing of the declarations will be addressed at the hearing. Most significantly, as non-lawyers, Respondents expected their counsel Greenberg to spot legal issues and provide comprehensive advice on how to comply with all applicable federal and state laws, not just some of them. Throughout Greenberg's representation of Respondents in connection with the Fund II offering, Greenberg gave Respondents advice concerning various Georgia law issues and compliance with the federal securities laws. Respondents believed that, with Greenberg documenting and advising on Fund II, they were in compliance with their obligations to the investors and all applicable federal and state laws. Respondents expected Greenberg to spot and advise on anything that could in any way be construed as a violation of Georgia law or the antifraud provisions of the federal securities laws charged here. However, at no time did Greenberg even remotely suggest the possibility of such a violation.

(2) Greenberg Comprehensively Took Over Representation. In addition to its Georgia office leader Ernest Greer, Greenberg Traurig staffed its Fund II work with, among others, Ted Blum (the head of its corporate and securities practice in Atlanta), Genna Garver and Rachel Cohen-Deano (fund specialists in New York), Steve Malina (a former SEC enforcement lawyer in Chicago), and tax, ERISA and other specialists at the firm. Greenberg began by learning information about its new client GFG:

- At the outset, on 8/29/2012, Greenberg spent 2.5 hours reviewing GFG's Form ADV that showed that it was a Georgia-based investment adviser, that 51-75% of its clients were pension and profit sharing plans; and that GFG may recommend that its clients invest in private funds with which GFG was affiliated. These facts alone should have alerted Greenberg to the need to consult Georgia law applicable to pension plan investments in Fund II. (RX-1591, p. 1)

- Greenberg undertook not just to review the ADV but to revise it. On 9/10/2012, Greenberg asked for GFG's login credentials for the Investment Adviser Registration Depository, "so we can go ahead and start working on [GFG's] Form ADV amendment." GFG immediately gave Greenberg the credentials. (RX-1554)

Greenberg took over all legal work relating to Fund II on 9/14/2012, when GFG sent Seward & Kissel's draft documentation to Greenberg with the cover amount increased from $75 million to $100 million. (DX-85) Greenberg proceeded to prepare Fund II's documentation and advise on all legal aspects of the offer and sale of the investment to the Georgia Plans:

- At the outset, GFG offered Greenberg the option of leaving the Fund II work with Seward & Kissel and having Greenberg "transition in afterwards." GFG explained that it already had "several clients waiting to approve them for funding," and needed the draft Fund II documents by 9/24/2012. (RX-1500) But Greenberg wanted the Fund II work immediately, and an internal Greenberg email instructed its team to get the work done in the timeframe needed, "or they will give the new fund to seward and kissel who did the first fund." (RX-1501)

- On 9/24/2012, Greenberg Traurig sent GFG its revised versions of the full array of Fund II documentation. (DX-86) Greenberg's redlined changes were extensive, and the Greenberg additions included both the legal advice disclaimer and suitability disclaimer discussed above. (RX-1555) Greenberg also inserted prominently into its revised draft of the Private Offering Memorandum for Fund II that "GREENBERG TRAURIG, LLP WILL BE ENGAGED TO ACT AS SPECIAL COUNSEL TO THE FUND, THE FUND'S GENERAL PARTNER AND THE FUND'S MANAGER." (DX-1, RX-1555 (introduction and pp. 21, 28, 39-40), capitals in original)

- On 10/2/2012, Greenberg sent a "closing checklist" to GFG that confirmed that Greenberg would provide comprehensive representation on Fund II, including its state blue sky filing, its SEC Form D filing, the actual formation of Fund II and its general partner in Delaware, further preparation of Fund II documentation, and dealing with third-party service providers. (RX-1504) On 10/5/2012, Greenberg prepared and sent the Fund II and general partner formation documents to GFG. (RX-1505)

By 10/10/2012, Bob Hubbard of GFG had gone through all of Greenberg's revised drafts for Fund II. He commented back to Greenberg that there was "quite a bit more documentation here that wasn't part of the S&K [Seward & Kissel] process when Fund I was formed," and that he liked what Greenberg had produced, which he found "definitely more comprehensive." He said he needed "guidance on how to move forward." Greenberg responded that it would have a call to "go through the [closing] checklist and each document" and "explain everything, hammer out all open items and finalize them." (RX-1507) Greenberg's detailed work on Fund II continued, including the following:

- On 10/14 and 10/15/2012, Greenberg sent GFG a revised closing checklist, which specified that Greenberg had Georgia blue sky exemption "research in progress" – thus further confirming to GFG that Greenberg was then fully aware that Fund II would be soliciting investors in Georgia. (As noted above, Greenberg already knew from reviewing GFG's ADV that up to 75% of Georgia-based GFG's clients were pension and profit sharing plans, and that GFG might recommend to those investors the private funds with which it was affiliated). Greenberg also sent its further revisions of all of Fund II's documentation, including the private offering memorandum, the subscription book, the limited partnership agreement, the general partnership agreement, and resolutions. (RX-1558, RX-1508)

- On 10/16/2012, Greenberg advised on requirements for custodians for Fund II. GFG's Bob Hubbard took the opportunity to stress to Greenberg that "we want to make sure our [SEC Form] ADV is correct." (RX-1510) Shortly after, in asking Greenberg about hiring Concept Capital as Fund II's administrator, Hubbard told Greenberg that "I may be making a bigger deal of this than necessary, but I just want to be safe." (RX-1513)

- On 10/16/2012, Greenberg also sent GFG yet more revisions of the Fund II documentation. (RX-1511) On 10/18/2012, GFG told Greenberg that it needed to complete work on the Fund II documentation because Fund II needed to be ready to commit to an underlying private equity alt investment, Siris Partners II, LP, that was about to close to additional investors. (RX-1512)

(3) Greenberg Had the Facts to Provide Advice. Emails in 10/2012 and 11/2012 show that Greenberg contemporaneously knew: **(i)** that the documents Greenberg prepared for Fund II were then being actively used to sell Fund II to investors; **(ii)** that the investors being solicited were based in Georgia; and **(iii)** that the prospective investors included GFG's investment consulting clients, which were Georgia public pension funds. In addition to the disclosures in the ADV, which Greenberg had reviewed, the evidence will show the following:

- On 10/22/2012, GFG told Greenberg that it had "received two formal commitments and executed subscription docs over the weekend" – so Greenberg knew that GFG was using Greenberg's documents and that Fund II sales were underway. (RX-1513, RX-1613)

Greenberg later provided track-numbered documentation for GFG to send to another prospective Fund II investor. (DX-71)

- On 10/15/2012, Greenberg did an analysis regarding Georgia state law exemptions for Fund II with citations to Georgia state securities law provisions. Greenberg also prepared a letter to the Georgia Securities and Business Regulation Division relating to Fund II's Georgia blue sky registration. (RX-1509) GFG later confirmed that Greenberg had "already" done a Georgia blue sky filing for solicitation of Georgia investors for Fund II. (RX-1515)

- By 11/9/2012, Greenberg had prepared a draft Form ADV for GFG that disclosed that its clients were being solicited to invest in Fund II. (RX-1559, RX-1560, Question 19)

- Greenberg emails on 11/14/2012 noted that GFG was "telling [its] pension fund 'consulting' clients to invest in" Fund II. Greenberg knew these consulting clients were Georgia public pension plans because the emails say that this information came from the Georgia lawyer that Greenberg dealt with on FDHA and Fulton Schools, both Georgia plans. (RX-1561)

- Greenberg further noted on 11/14/2012 that any potential conflict arising from GFG recommending Fund II to its own clients should be covered by the "no reliance" disclaimer language that Greenberg had inserted in the Fund II documentation, but Greenberg questioned "whether we need to have a separate letter that says we're not acting as the investment adviser in recommending that they invest in the fund (or something to that effect) as belt and suspenders." (RX-1561)

During this time period, the egg could easily have been unscrambled. By 10/22/2012 only two of the six Plans had actually signed subscription agreements (Atlanta Police and Atlanta Fire). By 11/14/2012, only four had done so (these plus FDHA and Fulton Schools), and Fund II had only begun the process of calling capital. Indeed, when Fulton Schools raised concerns about addressing the conflict issues concerning GFG recommending Fund II after Fulton Schools had signed a subscription agreement binding it to invest in Fund II, GFG agreed to Fulton Schools' withdrawal from the investment though it had no legal obligation to do so. But despite knowing that GFG was using Greenberg's documents to solicit Georgia-based public pension plans as investors for Fund II, including GFG's consulting clients, Greenberg did not advise GFG that there was a problem or, in particular, that it needed to be mindful of any restrictions potentially imposed by Georgia state law. All Greenberg did was to ask GFG whether its consulting clients would "be charged both consulting fees and fund fees," to which GFG quickly responded that it was "very careful and deliberate about not 'double-dipping' on fees," as that would be "against our core DNA as a firm." (RX-1562)

Greenberg then proceeded to act on GFG's behalf in direct discussions, including on Georgia state law issues, with counsel at the Atlanta office of Schiff Hardin who represented two of the Georgia-based Plans, FDHA and Fulton Schools:

- Beginning in early 12/2012, Greenberg discussed with these two Plans' counsel how the Georgia open records law applied to the Plans, as well as potential conflict-of-interest questions under Georgia state law. (RX-1518, RX-1519, RX-1520, RX-1521)

- Based on concerns that Fund II investments by Fulton Schools or FDHA could jeopardize their tax status, Greenberg attorneys analyzed provisions of the Georgia Code, as well as pertinent ERISA and Internal Revenue Code provisions. Greenberg prepared a detailed memorandum delivered to GFG on December 13, 2012, with attached provisions of the relevant Georgia Code. (RX -1526)

- By 12/13/2012, Greenberg told GFG that, based on discussions with Schiff Hardin, Greenberg "believe[d] we can move forward with FDHA's investment" in Fund II, subject to drafting a "side letter." (RX-1525) Between 12/13 and 12/17/2012, Greenberg had further discussions with Schiff Hardin, on behalf of both FDHA and Fulton Schools. Greenberg prepared side letters for both Plans and confirmed Greenberg had "reviewed ... applicable Georgia law" and federal tax law with the "assumption" that the "full disclosure" in Greenberg's draft side letters would address the pending conflict-of-interest questions under Georgia law. (DX-83, RX-1527)

As Greenberg prepared to file SEC Form D for Fund II, it advised GFG on what should be counted as a "sale" for purposes of the filing, and based on this advice GFG specified the names of each of the Georgia-based public pension plans investing in Fund II, the amount committed by each Plan, and the total amount committed, then $83 million:

- On 12/17/2012, GFG summarized for Greenberg that the Fund II investors would be Atlanta Police ($21 million), Atlanta Fire ($15 million), Atlanta General ($28 million), MARTA ($13 million), and "hopefully" FDHA ($6 million) – for a total amount of $83 million committed to Fund II as of that date. (DX-157) (At that point, Greenberg knew from its own direct discussions with their counsel at Schiff Hardin that Fulton Schools was dropping out of Fund II but that FDHA "hopefully" remained.)

- On 12/19/2012, Greenberg advised GFG that it could count a "sale" when it received a signed subscription agreement for Fund II, "even though you still have the right to reject them." With this advice, GFG confirmed that its 12/17/2012 list above were the "sales" of Fund II to date. (RX-1528) GFG then had signed subscription agreements from each of these 5 Plans. (DX-20, DX-25, DX-30, DX-76, RX-1598)

- On 12/20/2012, Greenberg filed Fund II's Form D on the SEC's EDGAR system. The Form D indicated that Fund II had raised committed capital of $83 million from 5

investors, and that it planned to raise an additional $17 million to reach its targeted cover amount of $100 million. (RX-1530)

(4) Greenberg Looked at the Georgia Alt Statute. GFG's communications with Greenberg in January and February 2013 specifically referenced the Georgia alt statute, including one email that sent Greenberg the full text of the statute:

- On 1/14/2013, GFG conferred with Greenberg litigation and fund lawyers on how to respond to Atlanta General board member Angela Green, who had raised conflict-of-interest questions. (RX-1533) Greenberg then drafted and revised a response letter for GFG to send to Green. (RX-1534, RX-1536, DX-154)

- Greenberg's notes of this 1/14/2013 consultation show that GFG specifically referred to the new Georgia alt statute, even though Green's questions did not involve the statute's particular requirements for alt investments. (RX-1533)

- On 2/12/2013, in asking a question about client confidentiality, GFG actually pasted the full text of the Georgia alt statute into an email to a Greenberg lawyer. (DX-160) A minute later, she forwarded the email containing the full statutory text to two other Greenberg lawyers, one of them a former SEC enforcement lawyer who had been advising on Fund II questions and who had drafted GFG's response letter to Atlanta General board member Angela Green. (RX-1541)

Thus, as of 2/12/2013, Greenberg was providing Respondents with comprehensive advice regarding the federal and state securities law issues surrounding Fund II, and had full knowledge of the Plan investors in Fund II. Greenberg even had the full text of the Georgia alt statute presented to it in an email. At this point, the egg could still have been unscrambled – or the statute's two-year cure provision triggered, if necessary – but again Greenberg did not advise Respondents of any legal concerns relating to Fund II and the Georgia statute. Over the ensuing months, Greenberg continued to advise Respondents on their Fund II responsibilities:

- During the first half of 2013, Greenberg advised GFG on possible Fund II investments by the Birmingham, Alabama plan and the Roseville, Michigan plan, as well as a possible additional investment by the MARTA plan. (RX-1543, RX-1544, RX-1546) Such additional investments would likely have taken Fund II from the $83 million Greenberg had disclosed in the 12/2012 Form D to well over $100 million.

- In order to keep track of the many matters Greenberg was then handling for GFG, Greenberg furnished a weekly "Project Management Checklist" detailing the status of Fund II and all other legal projects on which Greenberg was advising GFG. (RX-1539)

- In 5/2013, Greenberg prepared and circulated to GFG another memorandum analyzing ERISA issues relating to GFG's funds, including specifically researching and analyzing

the laws of Georgia (as well as Connecticut and Michigan) "to determine the fiduciary obligations, duties and requirements that apply to Gray and its affiliates in regard to investment services provided." (RX-1633). Notably, when a Greenberg attorney summarized the contents of the memorandum for another Greenberg attorney, she explained that the memorandum had concluded that the signature of the trustee of the applicable Plan on the subscription documents had waived any conflicting language in the applicable GFG consulting agreement relating to that Plan. (RX-1645)

(5) Greenberg Involvement in Response to News Reporter. In early 7/2013, GFG sought legal advice from Greenberg when the investigative reporter from the Atlanta Journal-Constitution posed questions about compliance with the new Georgia alt statute (DX-155, DX-158, RX-1547, RX-1550, RX-1584):

- Although, as noted above, GFG had pasted the full text of the Georgia statute into a 2/12/2013 email to its Greenberg lawyers, Greenberg claimed that it had not seen the statute before. Even if this were hypothetically true, which the 2/12/2013 email shows it was not, Greenberg offered no explanation why its large Georgia office would not without prompting have thought to research Georgia law and advise its Georgia client GFG about a new Georgia statute applicable to Georgia sales of a Georgia fund to Georgia public pension investors.

- One Greenberg lawyer commented in a 7/7/2013 internal Greenberg email that "[o]n it's [sic] face it looks like" Fund II "didn't meet the requirement of the law – didnt [sic] have 4 investors nor $100M." (DX-186) But that same Greenberg lawyer, who worked on the Fund II offering at least through the second MARTA investment on 8/16/2013, swore in a 2/9/2017 declaration Greenberg filed in this case that she "did not provide the clients any legal advice, opinion, interpretation, or analysis of the provisions of the Georgia Act provisions at issue at any time through August 16, 2013." (DX-159)

- In an Atlanta Journal-Constitution article published on 7/29/2013 – under a subheading "Law 'vague'" – the newspaper reported that its investigation "raises questions about whether" the Plans' investment in Fund II "violated a state law enacted barely a year ago to allow public pensions to put money into so-called alternative investments, such as Gray's fund." The story described the state law as limiting plans to investments in funds "that have at least four investors" and "a total investment of at least $100 million," and as prohibiting plans "from holding more than 20 percent of the total investment." But the article went on to say that the lawyer for the Atlanta Police, Atlanta Fire, and Atlanta General Plans "maintains the investment is legal." (DX-2)

- The same day, GFG asked Greenberg to review and advise on GFG's proposed public statement responding to the Atlanta Journal-Constitution article. Greenberg approved GFG's draft statement, which reaffirmed that Fund II was "an outstanding investment option" that was "designed with the investment goals of our clients in mind." (RX-1565)

- At the same time, Greenberg continued to advise on the Fund II offering. In particular, beginning on 7/18/2013 (RX-1564), Greenberg advised GFG on what disclosure was appropriate in connection with MARTA's upcoming investment of an additional $5 million in Fund II on 8/16/2013. This boosted MARTA's total investment in Fund II from $13 million to $18 million, which also boosted the overall percentage of its investment from 15.7% (of the $83 million capital originally disclosed in Fund II's 12/2012 Form D) to 22% (of the $82 million committed to Fund II as of 8/16/2013, including MARTA's additional investment but deleting the FDHA commitment after it failed to close). (RX-1549, DX-62)

The character of Respondents' comments in their contemporaneous emails with Greenberg Traurig reviewed above is telling. Nowhere in this lengthy and detailed interchange do Respondents push back against Greenberg's legal guidance. And in multiple places we see Respondents stressing their desire to be compliant. For example, seeing that Greenberg provided a "definitely more comprehensive" approach to Fund II and "quite a bit more documentation" than Seward's legal work on Fund I, GFG's comment was "I like what I see." (RX-1507) Discussing Fund II custodians with Greenberg, GFG instructed "we want to make sure our ADV is correct." (RX-1510) Discussing the technicalities of hiring a Fund II administrator, GFG told Greenberg "I may be making a bigger deal of this than necessary, but I just want to be safe." (RX-1513). Notably, the principal Greenberg attorney responsible for the GFG matters, including Fund II work, testified at her deposition that she never experienced any willingness by anyone at GFG to violate the federal securities or Georgia law and that in her experience GFG was trying to comply with the applicable regulatory requirements relating to the fund and their business.

Testimony at the hearing will amplify this documentary record and show that Greenberg Traurig's involvement in the formation, offer and sale of Fund II was pervasive. Respondents certainly looked in good faith to Greenberg Traurig for guidance on whatever was needed to avoid liability under the antifraud provisions of the federal securities laws.

Conclusion

For the reasons above, and based on the evidence to be offered at the hearing, the initial decision should dismiss this proceeding as to all Respondents.

Dated: August 15, 2017

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CERTIFICATE OF SERVICE AND FILING

Pursuant to Rule 150(c)(2), I certify that on August 15, 2017, I caused the foregoing to be sent: **(1)** By **US Mail (original and 3 copies)** directed to the Office of the Secretary, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-1090. **(2)** By **email and US Mail** directed to Honorable Cameron Elliot, Administrative Law Judge, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-2557, and alj@sec.gov. **(3)** By **email and US Mail** directed to William P. Hicks, Pat Huddleston and M. Graham Loomis, Atlanta Regional Office, Securities and Exchange Commission, 950 East Paces Ferry Road, Suite 900, Atlanta GA 30326, and HicksW@sec.gov, HuddlestonP@sec.gov and LoomisM@sec.gov.

/s/ Brian M. Walsh
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