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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17342

In the Matter of

RD LEGAL CAPITAL, LLC and
RONI DERSOVITZ,

Respondents.

DIVISION OF ENFORCEMENT'S POSTHEARING BRIEF

DIVISION OF ENFORCEMENT
Michael D. Birnbaum
Jorge G. Tenreiro
Victor Suthammanont
Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
(212) 336-0523 (Birnbaum)

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PRELIMINARY STATEMENT

Respondents Roni Dersovitz ("Dersovitz") and the entity he controlled, RD Legal Capital, LLC ("RDLC") committed securities fraud when they marketed and sold investments in two RDLC-branded funds (the "Flagship Funds") by fundamentally misrepresenting the nature of those Funds in marketing materials, offering memoranda, emails, and oral conversations. At the core of this case is the chasm between the "post-settlement," "no litigation risk" strategy Dersovitz sold to investors, and the Flagship Funds' actual investments. Those portfolios consisted increasingly of cases Dersovitz acknowledges were unresolved, either because defendants were still contesting liability—as was the case in the unsettled Osborn jaw cases—or plaintiffs were still litigating actions in pursuit of recoveries from defendants unwilling to pay, as was the case in the Peterson matter and certain of the Funds' Cohen-related investments.

The thrust of these lies—consistent across oral statements Dersovitz made and the marketing materials and offering memoranda he edited, authorized, and distributed—was that the Funds were different from other funds that bet on whether litigation would be successful because all of the Funds' cases were settled or otherwise finalized against large corporations and their insurers, and that the Funds would pursue a "diversified" investment strategy.

But the truth is that while Dersovitz was selling investors on a low-risk, post-settlement "factoring" strategy, he was concentrating the Funds' investments in the very kind of higher risk, higher reward legal matters his investors told him they wanted to avoid, in particular the Peterson matter and investments in ongoing pharmaceutical cases (the "ONJ Cases"). Investors understood that the risks relating to settled cases differed significantly from the risks relating to ongoing litigation, so Respondents tailored their risk disclosures accordingly, repeatedly telling investors that the risks inherent in the Flagship Funds' investments related only to "duration" (i.e., that

settlements might take longer than expected to pay) and obligor credit (i.e., that a settling defendant might face bankruptcy), emphasizing that whatever court proceeding stood in between settlement and collection was pro forma. Meanwhile, Dersovitz assiduously avoided mentioning the kinds of litigation and political risks to which the Flagship Funds were exposed due to their concentration in the Peterson matter and the other unsettled cases, risks the record shows Dersovitz understood existed with respect to those investments not only because his attorney advisers told him as much but also because he disclosed them prominently in documents Dersovitz employed in marketing a special purpose vehicle (the "Iran SPV") he launched to invest even more in Peterson.

Respondents acknowledge making most of the foregoing statements and omissions, about which seventeen investors testified at the twenty-four-day hearing. And they must, because many of the misrepresentations are captured on a recorded call Dersovitz described as "typical" of his pitch or memorialized in the documents and emails Respondents distributed to potential investors. And for those lies that were not caught on tape, the Court has the luxury of a chorus of consistent testimony from more than a dozen of Dersovitz's investors on the one hand—many of whom have never met each other and most of whom have no financial stake in the outcome of this dispute—to weigh against Dersovitz's uncorroborated, ever-shifting, and self-serving denials.

The Court also has the benefit of investors' testimony as to the materiality of Respondents' misrepresentations and omissions. These witnesses—including those called by Respondents—consistently emphasized the importance of the "settled" or otherwise resolved nature of the Funds' advertised strategy and of the fact that the Funds were supposedly not exposed to litigation risk or anything other than routine court proceedings before collection. Investors were surprised to learn that certain receivables listed as "settlements" were actually advances to a law firm actively litigating the ONJ Cases. And investors who had no interest in funding the Peterson matter—some

of whom had previously expressed their negative views about that case directly to Dersovitz—were similarly shocked and angry to find the Flagship Funds were heavily invested in that case.

Finally, the record includes overwhelming evidence of Dersovitz's clear intent to deceive. Dersovitz admits he understood the true unsettled nature of most of the Funds' investments and admits he edited and authorized the very documents that deceived investors. And when investors, after reading the Funds' documents, contacted Dersovitz with questions, the deception continued. Dersovitz continued to portray the Peterson matter as "separate" from the Flagship Funds, gave false and evasive answers when suspecting investors asked him about concentrations in that matter and exposure to the Osborn ONJ Cases, and disseminated statements that cemented the false notion that the Flagship Funds held a diversified portfolio of settled cases. Incredibly, having been taken to task for their deceitful conduct, Respondents spent much of the hearing questioning why investors did not do more to figure out the truth about how the Funds invested their money. But the questions before this Court are not about what investors should or should not have done upon reading or hearing Respondents' false and misleading disclosures, but about Respondents' fraudulent conduct in soliciting those investors' money.

Respondents have thus violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Dersovitz willfully caused and aided and abetted RDLC's violations of these provisions. Through those violations, Respondents collected millions in gains they would not have obtained but for their fraud. Accordingly, and both to punish Respondents for their misconduct and to deter them and others from future violations, the Division respectfully requests an order disgorging all profits, requiring payment of civil monetary penalties, barring Respondents from continuing to work in the securities industry, and ordering them to cease and desist their violations.

ARGUMENT

I. RESPONDENTS VIOLATED SECTION 10(b) OF THE EXCHANGE ACT, RULE 10b-5 THEREUNDER, AND SECTION 17(a) OF THE SECURITIES ACT

Respondents violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by (1) making material misrepresentations and omissions and using fraudulent devices; (2) with scienter; (3) in connection with the purchase or sale of securities.[1] Respondents likewise violated Section 17(a) of the Securities Act, which requires the Division to demonstrate "[e]ssentially the same elements," though Sections 17(a)(2) and (3) require a showing of negligence, not scienter.[2]

A. Respondents Made False and Misleading Statements to Potential Flagship Fund Investors and Omitted Facts Necessary to Render Statements Made Not Misleading

The Supreme Court "repeatedly has described the 'fundamental purpose' of the [Exchange] Act as implementing a 'philosophy of full disclosure.'"[3] As the Commission and countless courts have reaffirmed, the law prohibits misrepresentations ranging from the kinds of flat-out lies detailed in the evidentiary record here to the "half-truths" and omissions of material facts Respondents also utilized to mislead potential investors in the Flagship Funds.[4]

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1 SEC v. Monarch Funding Corp., 192 F.3d 295, 308 (2d Cir. 1999); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

2 Id. (citing Aaron v. SEC, 446 U.S. 680, 701-02 (1980)); see also Aaron, 446 U.S. at 697; 15 U.S.C. § 77q(a).

3 Basic v. Levinson, 485 U.S. 224, 230 (1988) (citations omitted).

4 See, e.g., SEC v. Gabelli, 653 F.3d 49, 57 (2d Cir. 2011), rev'd on other grounds sub nom. Gabelli v. SEC, 568 U.S. 442 (2013) (antifraud provisions prohibit not just direct falsehoods but also "'half-truths'—literally true statements that create a materially misleading impression." (citation omitted)); Bernerd E. Young, Rel. No. 4358, 2016 WL 1168564, at *12, n.41 (S.E.C. Mar. 24, 2016) ("[i]t is well settled that a literally true statement may nevertheless be fraudulent based on the context in which that statement is made." See Kleinman v. Elan Cor., plc, 706 F.3d 145, 153 (2d Cir. 2013) ("Statements of literal truth 'can become, through their context and manner of presentation, devices which mislead investors' ...." (internal citations omitted))"); Operating

Such misrepresentations are actionable whether they appear in marketing materials, oral sales pitches, offering memoranda, emails, or, as here, throughout all of the above.[5] Indeed, as the Commission explained in Bernerd E. Young, marketing materials often play an important role in introducing potential investors to new opportunities and, as such, heighten a speaker's duty to fully and fairly disclose facts to those potential investors.[6]

1. Respondents' Marketing Materials and Offering Memoranda Were False and Misleading

The record of Respondents' misrepresentations to potential Flagship Fund investors is overwhelming, beginning with the very first written statements Respondents provided to potential investors in the Flagship Funds and continuing through the many more detailed materials shared as individuals made their investment decisions. These marketing documents included a one-page sheet describing the Funds' "Opportunity and Strategy," another titled "Executive Summary," one titled an "Overview," a longer "Alpha Generation" presentation, a writing titled "Frequently Asked

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Local 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt., LLC, 595 F.3d 86, 92 (2d Cir. 2010) (the "veracity of a statement or omission is measured not by its literal truth, but by its ability to accurately inform rather than mislead prospective buyers.").

[5] Young, 2016 WL 1168564, at *12 (holding respondents were liable for misrepresentations in brochures and other marketing materials); see also Harding Advisory LLC, Rel. No. ID-734, 2015 WL 137642, *58, *59 (S.E.C. Jan. 12, 2015) (collecting cases for the proposition that "pre-offering circular marketing materials, including pitch books with ... disclaimers, have been found actionable" under Section 17(a) of the Securities Act, particularly where there was no specific "language in the offering circular that would have negated or clarified questionable representations in the pitch book") vacated in part on other grounds by Harding Advisory, LLC, Rel. No. 10277, 2017 WL 66592 (S.E.C. Jan. 6, 2017) (assuming arguendo that marketing materials are actionable). Cf. SEC v. True N. Fin. Corporation, 909 F. Supp. 2d 1073, 1096-97 (D. Minn. 2012) (rejecting contention that investors signing agreements explicitly stating they did not rely on any statements outside of the signed document rendered the oral and marketing materials' statements immaterial).

[6] Young, 2016 WL 1168564, at *12 ("Having chosen to use [marketing] materials that extensively discussed insurance, [respondent's company] had a duty to fully and fairly disclose its significance"); see also Mohammed Riad and Kevin Timothy Swanson, Rel. No. 4420A, 2016 WL 3627183, at *8 (S.E.C. July 7, 2016) (looking not only at language in a fund's prospectus, but also in "pamphlets" shared with investors describing how the fund would invest its money).

Questions" ("FAQ"), and a ten to fifteen page Due Diligence Questionnaire ("DDQ"). They all consistently described the Flagship Funds as engaged in a ***post-litigation*** strategy and distinguished the Flagship Funds from riskier strategies offering investments in ongoing litigation. For example:

- The Funds' FAQ, which Dersovitz found "crystallized" for investors how the Funds invested their money (FOF ¶ 487), described Respondents' "basic strategy" as "one in which receivables arising from settled law suits are purchased at a discount" and reiterated that the Funds' "primary focus is on purchasing the aforementioned receivables of settled cases, or non-appealable judgments." (FOF ¶ 181.)

- The FAQ also explicitly distinguished Respondents' strategy from those employed by other litigation funding firms. "There are many groups doing pre-settlement funding to various degrees of success," Respondents explained, but unlike such "competitors," Respondents represented that they employed a "post settlement" strategy. (FOF ¶ 183.)

- The DDQ made the same distinction, informing investors that Respondents' strategy was "unique" because Respondents had "not identified any other registered entities that traffic ***solely*** in post-settlement legal fee receivables." The DDQ continued: "There are entities that lend money to contingency fee attorneys, but they take litigation risk, which we don't." (FOF ¶ 167 (emphasis added).)

- The DDQ prompted Respondents to describe to investors the Funds' strategy "in as much detail as possible," to which Respondents represented that the Funds' "portfolio consists of two investment products": "Fee Acceleration (Factoring)" and lines of credit. The DDQ described fee acceleration as "the purchase of a legal fee at a discount from a law firm ***once a settlement has been reached*** and the legal fee is earned," and stated that such investments constitute approximately ninety-five percent of assets under management, with the balance of the fund largely invested in lines of credit. (FOF ¶ 166 (emphasis added).)

- The "Opportunity and Strategy" and the "Overview" documents stated: "RD Legal purchases legal fee receivables from law firms once cases have settled." (FOF ¶¶ 155, 157.) The Executive Summary similarly explained: "legal fees which arise only from settled litigation are past the point of any potential appeals or other disputes." (FOF ¶ 156.)

- The Alpha Generation presentation conveyed the same false message, claiming "[t]he Fund portfolio is principally comprised of purchased legal fees associated with settled litigation," and, like the Overview document, stated that "legal fees which arise from settled litigation are past the point of any potential appeals or other disputes." (FOF ¶¶ 158, 161, 163.)

The Funds' offering memoranda, which Respondents describe as the most important document an investor could read, unambiguously repeated the same message of finality with respect to the cases in which the Flagship Funds actually invested. After defining "Legal Fee

Receivables" to be "accounts receivable representing legal fees derived from Law Firms from litigation, judgments and settlements," the offering memoranda announced: "*All* of the Legal Fee Receivables purchased by the Partnership arise out of litigation in which a binding settlement agreement or memorandum of understanding among the parties have been reached." (FOF ¶¶ 192-93 (emphasis added).) Later versions of this language included cases in which "a judgment has been entered against a judgment debtor." (FOF ¶ 193.)

The foregoing materials also conveyed that Respondents would endeavor to create a diversified portfolio. Specifically, they represented that a "[p]ortfolio obligor investment matrix is designed to create a diversified portfolio in investment positions" (FOF ¶ 202); advertised the Flagship Funds as providing "a diversified approach to the standard legal fee receivable strategy" (FOF ¶ 207); and claimed that "diversification is managed by limiting the level of portfolio exposure based on the obligor's ... credit worthiness." (FOF ¶ 203.)

Moreover, Respondents disclosed only risks—and purported mitigants—that told the same story, that of a portfolio of settled or otherwise resolved cases, omitting reference to the risks most germane to the overwhelming majority of the Flagship Funds' positions: litigation risk. For example, Respondents did not disclose the existence of any unresolved matter, let alone the possibility that it might not settle or might settle for an amount insufficient to cover the Flagship Funds' advances (as in the ONJ Cases). Nor did the Funds' materials discuss the very specific risks associated with the Peterson matter that Respondents saw fit to disclose in connection with its separate special fund established just for Peterson investments—namely, the possibility that the Iranian defendants who "vigorously litigated" the Peterson Turnover Litigation would succeed in blocking the enforceability of the Reparation Litigation default judgment against the assets from

which the Flagship Funds hoped to collect on those advances, or that other external risks such as political risks would lead to the same unfavorable result. (FOF ¶¶ 308-13.)

Instead, the risk disclosures were sterilized to mention only "credit risk" (i.e., the risk of an "obligor" bankruptcy), duration, and theft. The FAQ, for example, stated the "greatest overall risk in [the Funds'] strategy is duration and its effect on risk/reward." (FOF ¶ 188.) Similarly, the Alpha Generation presentation identified three "Potential Risks": (1) obligor or seller default; (2) attorney theft; and (3) duration, or time value of money. (FOF ¶ 164.)

The Funds' offering memoranda told the same story, describing risks as including "credit risk of the counterparty and the risk of settlement default," but avoiding any mention of litigation risk. (FOF ¶ 199.) In fact, the offering memoranda repeated in their risk disclosure section language from the Memoranda strategy description, reiterating that "[a]ll of the Legal Fee Receivables ... arise out of litigation in which a binding settlement agreement or memorandum of understanding ... has been reached or a judgment has been entered against a judgment debtor," (FOF ¶ 195), and stating that as a result, "one form of credit risk to the Fund is dependent primarily upon the financial capacity of the defendant in the settled lawsuit to pay the stipulated settlement amount." (FOF ¶ 195(b).) The document then discounted even that risk, because "the defendants in these lawsuits are either large corporations or due to the defendant having been insured, an insurance company, the defendant generally has significant financial resources[.]" (Id.)

2. *Respondents Oral and Other Written Misstatements and Omissions Echoed the Same Misrepresentations as Their Written Disclosures*

Respondents did not limit their misrepresentations and omissions to their marketing and offering documents. Rather, they reinforced the misleading message contained therein with additional written and oral misstatements, creating for investors a drumbeat that the Flagship Funds invested in cases beyond the point of litigation risk or disputes. (See generally FOF ¶¶ 357(a)

(Burrow); 480 (Sinensky); 485 (presentation to Tiger Group 5); 623-25 (Wils, Levenbaum, Furgatch); 567, 570, 575 (Schaffer).)

In a recorded call with a prospective investor from Cobblestone Advisors that Respondents called the "typical" pitch made to investors (FOF ¶ 459), Dersovitz said that "what we are dealing with primarily, 100 percent, are settled cases," later noting that the strategy also included judgments. (FOF ¶¶ 461, 466.) According to Dersovitz, those kinds of purchases meant "***there is no litigation risk in the strategy***." (FOF ¶ 461.) Dersovitz also summarized the Funds' risks on the call as "two-fold: duration and theft" (FOF ¶ 469), but assured investors that theft "has not been a real issue" and duration-related risks had historically "been an insignificant issue." (FOF ¶¶ 470-71.) Katarina Markovic, Respondents' head of Investor Relations, echoed Dersovitz's misleading descriptions, telling Cobblestone that the Funds' "focus is very, very specific," working "with those that are ***only settled claims***" and that the Funds' "niche" is "post-settlement." (FOF ¶ 465.)

As Respondents' experts and other witnesses explained, speaking directly to the manager, as Cobblestone did, is a crucial part of the investment process. (FOF ¶¶ 413, 626-27.) Accordingly, investors paid particular attention to Respondents' oral representations. (FOF ¶ 626.) But investors' interactions with Respondents and their personnel, oral and otherwise, painted the same inaccurate picture of how Respondents were investing Fund money as the Funds' marketing and offering memoranda did.

First, numerous investors testified that Respondents orally told them that the Funds invested in finalized cases where there was no litigation risk, consistent with what they had read in the written materials. (See, e.g., FOF ¶¶ 357(a-d), 359, 379, 404, 461, 482(a), 484, 485(b-c), 486, 493, 540, 565(a), 568.) Mr. Burrow, for example, explained that he first developed an

understanding that the Funds invested only in settled cases after reviewing the marketing materials (FOF ¶ 357(a)), that such understanding was reinforced by the offering memorandum's language that stated that "all" of the receivables arise out of "litigation in which a binding settlement agreement" has been reached (FOF ¶ 194), and that when he asked Dersovitz to confirm that the Funds were only financing "non-appealable cases," Dersovitz replied "absolutely." (FOF ¶ 357(c).) Mr. Levenbaum had the same experience of Dersovitz describing the strategy to him orally in the same way as the language in the offering memorandum spoke of binding settlement agreements. (FOF ¶¶ 196, 623(a).) Mr. Schaffer likewise recalled—and his contemporaneous notes confirmed—that Respondents told him the Funds invested only in "already settled" cases. (FOF ¶ 565(a).)

Second, consistent with the foregoing, Respondents persistently distinguished the Flagship Funds' investments from those of litigation financing funds. For example, they told Mr. Schaffer they were different from Burford and Juridica because those funds took on litigation risk (FOF ¶ 572), and when Mr. Sinensky emailed Dersovitz an article about a litigation funding firm Dersovitz responded that the article "deals with pre-settlement funding which is very distinct from what we're doing." (FOF ¶ 488(a-b).) Mr. Sinensky described this as an "affirmation" of what Dersovitz had said to him orally at the Tiger 21 meeting Mr. Sinensky attended. (FOF ¶ 488.)

Third, relatedly, Respondents offered certain examples of reasons why the cases in which the Flagship Funds invested had a delay between settlement and collection. In a representative email Dersovitz sent to Ms. Ishimaru, echoes of which were years later repeated in the Cobblestone call, Dersovitz explained that settlements with entities such as the City of New York have a statutorily built-in settlement payment delay, that settlements with infants or those involving wrongful deaths require court vetting, and that class actions have fairness hearings after feuding

parties reach an agreement. (FOF ¶¶ 397-99; see also FOF ¶¶ 467 (Cobblestone call), 400 (Dersovitz giving same examples in Court).) Respondents similarly told Messrs. Burrow, Condon, Levenbaum, Furgatch, and Schaffer that the reasons for payment delays were "administrative." (FOF ¶¶ 357(a) & 358, 370, 388, 565(b) & 568; see also FOF ¶ 185 (FAQ describing similar reasons for delay in payment).) Indeed, when investors asked specific questions to confirm that the cases in which the Funds invested did not present litigation risks, Respondents re-emphasized that the court proceedings at issue did not involve feuding litigants but at most objections from third-parties, the resolution of which, if anything, would lead to better results for the plaintiffs. (FOF ¶¶ 371, 371(a) (Condon); 468 (Garlock); 499(c) (Ashcraft); see also FOF ¶ 187 (FAQ describing similar outcome resulting from purported remaining court procedures).)

These examples deceived investors into thinking that whatever court proceedings stood between funding and collecting were not adversarial in nature. But the remaining steps before the Flagship Funds could collect on its Peterson investments were, as described further below, precisely that: vigorous court battles, not pro forma hearings, and no one told investors those risks existed in the Flagship Funds. (FOF ¶¶ 362 (Burrow); 388 (Levenbaum); 401 & 419 (Ishimaru); 490(c) (Sinensky); 492(f) (Mantell); 554 (Furgatch); 584 (Geraci); 591 (Hutchinson).)

Finally, Respondents repeatedly told investors—consistent with the written materials described above—that the Flagship Funds were diversified. For example, they told: (1) Mr. Demby that the largest position would be no more than 5% of the Flagship Funds (FOF ¶ 482(a)); (2) Mr. Burrow that the Funds were diversified because there were many different "notes" to preserve a certain level of liquidity by "laddering" the time for repayment on the investments (FOF ¶¶ 352, 357(e)); (3) Mr. Levenbaum that the Funds were diversified (FOF ¶ 381); (4) Ms. Ishimaru that Dersovitz managed a "well-diversified portfolio" (FOF ¶ 393); (5) Mr. Furgatch that

the Flagship Funds were diversified within concentration limits such that no one obligor was responsible for paying more than 15% of the Funds' investments (FOF ¶¶ 545, 550); and (6) Mr. Schaffer, at various meetings, that the Flagship Funds were well-diversified (FOF ¶¶ 565(e), 569.)

3. Respondents' Misstatements and Omissions Misled Investors

After reading and listening to the foregoing cacophony of lies and omissions, investors naturally believed that the Flagship Funds consisted of a diversified portfolio wherein 95 to 100% of investments were in finalized cases with no litigation risk. And while some disclosures spoke only of "settlements" while others mentioned "judgments," investors understood both terms through the prism of "finality" through which Respondents had colored their understanding of the Funds. (FOF ¶¶ 196 (Hutchinson & Levenbaum); 379-380, 382 (Levenbaum); 394, 430 (Ishimaru); 438 (Gumins); 492(c) (Mantell); 634 (Burrow); 623(b), 635 (Condon); 486, 637 (Sinensky); 636 (Furgatch).)

Mr. Burrow, for example, understood Respondents' representation that matters were "past the point of any potential appeals or other disputes" to be the "linchpin" of the Funds' strategy. (FOF ¶ 157.) Mr. Garlock explained that Dersovitz's words meant "there is no litigation risk in the strategy. These are all settled cases." (FOF ¶ 462; see also FOF ¶ 159 (Mantell).)

Mr. Mantell noted the importance of the offering memoranda's language regarding credit risk in driving home the message that what the Funds were purchasing was nothing like the Peterson assets. He explained that by mentioning "credit risk" immediately after describing the Funds' investments, the documents made clear they were not investing in something like Peterson because "there is an insanely different" risk question in that case compared to the risk in the settled cases Respondents had described. (FOF ¶ 197.) Specifically, unlike cases against highly rated companies, the important question in the Peterson case was not "[d]oes Iran have money," but

"[c]an we get at it," which Mr. Mantell explained was not a risk disclosed "anywhere in [the Funds'] documents in any way you could fantasize about." (FOF ¶ 643.)

Tellingly, senior RD Legal personnel arrived at the same misimpressions regarding Respondents' strategy upon reviewing the Funds' disclosures and communicating with Dersovitz.[7] Scott Gottlieb, Respondents' Chief Compliance Officer, testified that he believed the Funds invested only in settled cases, in part because Dersovitz told him exactly that, and Gottlieb further believed that only RD Legal's "special opportunity funds"—i.e., not the Flagship Funds—invested in the Peterson receivables. (FOF ¶¶ 331(a), 624.) Markovic, likewise, was under the impression that the Flagship Funds invested in resolved cases, and was surprised to find out, after over 18 months as RDLC's head of Investor Relations, that the concentration of the Funds in the Peterson receivables was over fifty percent, believing the concentration to be around thirty percent (a number that was exceeded before her tenure at RDLC even began). (FOF ¶¶ 700, 701.) Markovic's learning curve regarding the Funds' ONJ Cases investments is also revealing. Soon after starting at RDLC, she asked Dersovitz if those cases involved litigation risk (FOF ¶ 677), only to have Dersovitz assure her that the Osborn investments were "no different than a credit facility advance." (FOF ¶ 677(a).)

4. The Overwhelming Majority of the Flagship Funds' Investments Were in Non-Settled or Otherwise Unresolved Cases

Investors and Respondents' employees alike were misled because the foregoing statements were all lies. The gulf between what Respondents said the Funds were purchasing and their actual investments is striking. By July 2011, nearly half of the Flagship Funds' portfolio—whether measured by the total value of the Funds' portfolio or by the total dollars deployed into investments—was invested in the cases described below, non-settled matters or cases over which

[7] Young, 2016 WL 1168564, at *12 (noting respondent's own financial advisers' confusion as "confirm[ing]" the opacity of the information provided in investor communications).

collection was subject to adversarial collection proceedings with litigation risk. (FOF ¶ 151(a).) By the end of 2015, over 90% of the value of the Flagship Funds was so invested. (FOF ¶ 151(g).)

a) The ONJ Cases

Since at least August of 2008, Respondents began advancing Flagship Fund assets to Daniel Osborn to purchase fees Osborn hoped to earn through representation of plaintiffs in multi-district litigations against three drug companies, Procter & Gamble, Merck Sharpe & Dohme, and Novartis Pharmaceuticals (the "ONJ Cases"). (FOF ¶ 34.) As Respondents now admit, the ONJ Cases were not settled in 2008 or for most of the time Respondents were advancing millions of Fund dollars to Osborn. (FOF ¶¶ 35, 38, 40.)

By the end of June of 2011, Respondents had advanced 9.59% of the total dollars deployed by the Flagship Funds to the ONJ Cases, or 10.57% of the Funds' stated value. (FOF ¶ 158(a), (i).) Given the continued advances, the proportion of the Funds' value and dollars deployed tied to the ONJ Cases stayed around 10% even as the Flagship Funds' value grew over the relevant period (FOF ¶ 151(b)(i); 151(d)(i); 151(e)(i); 151(f)(i); 151(g)(i)), and by the end of 2015, over $11 million had been advanced to Osborn with respect to unsettled cases. (FOF ¶ 151(f)(i).)

Osborn tried, lost, and earned no fees on two of his ONJ Cases. (FOF ¶ 39.) The bulk of those cases did not settle until approximately early 2015, and the amounts he recovered were insufficient to pay back what the Flagship Funds had advanced to him, let alone any interest Respondents hoped to receive. (FOF ¶¶ 41-44.) Nevertheless, Respondents continued to advance Funds to Osborn in the hope that other matters in his litigation portfolio—consisting entirely of unsettled cases—would one day net sufficient victories to repay them. (FOF ¶¶ 45-47.)

b) The Cohen Cases

By June 2011, over 11% of Fund assets and 16% of their value had been advanced to Barry Cohen and his law firm. (FOF ¶ 151(a)(ii).) Until late 2015, the stated value of the Flagship

Funds' portfolio tied to these advances remained above 10%. (FOF ¶ 151(b)(ii); 151(c)(ii); 151(d)(ii); 151(e)(ii); 151(f)(ii); 151(g)(ii).) The Cohen advances related to matters fundamentally different from the investment strategy Respondents described to potential Fund investors.

First, between 2007 and 2009, Respondents advanced to Cohen over $3.5 million to buy $4.8 million of fees that James Licata, a criminal defendant, owed Mr. Cohen. (FOF ¶¶ 50, 52, 53.) Dersovitz acknowledged that the Licata case did not involve a settlement. (FOF ¶ 54.) When Dersovitz advanced those funds, he knew collection was not a matter of a simple procedural court hearing, but rather that Licata could not remit those fees to Cohen and that to collect his fee Cohen would have to litigate against adversaries laying claims to the same mortgage, insurance policy, and real estate Licata had used to "pay" Cohen. (FOF ¶¶ 55-59.) Accordingly, as Cohen's financial planner explained, Dersovitz's advances in this regard where not to "purchase" the Licata fees, but to finance the litigation over the turnover of the collateral Cohen obtained in their stead, (FOF ¶¶ 57-58), a litigation Cohen eventually lost. (FOF ¶ 60.)

Second, in 2008, Respondents advanced Cohen $3 million to purchase $4.2 million supposedly due to him for his representation of a whistleblower in a civil *qui tam* action against Wellcare Health Plans. (FOF ¶¶ 64, 65, 68.) But when Respondents made these advances they knew Cohen was not actually owed any fees because, while a settlement agreement had been reached between Wellcare and the United States in a related criminal matter, Cohen's client was not a party to that settlement or to that award. (FOF ¶¶ 69-76.) Moreover, as Respondents knew, the United States told Cohen he was not entitled to an award from the criminal settlement. (FOF ¶ 74.) In other words, Respondents knew that far from simply stretching out his hand to collect when Wellcare paid the settlement, Cohen would have to litigate (against an adversary, the United States) to establish an entitlement to a fee. Cohen also lost this litigation. (FOF ¶ 77.)

Third, in 2008, Respondents advanced over $5 million to purchase legal fees purportedly due to Mr. Cohen from his representations of the plaintiff in Chau v. Southstar Equity, at a time when they knew that action was still pending before the Florida Supreme Court. (FOF ¶¶ 61-63.)

Since Respondents lost their bets on Cohen's recoveries, in late 2015 they wrote-down these assets, resulting in over $8 million in losses to the Funds. (FOF ¶¶ 78-80, 82.)

c) The Peterson Case

Respondents also invested heavily in assets relating to cases collectively known as Peterson v. Islamic Republic of Iran, brought to recover financial redress for victims of the terrorist bombing of the Marine Barracks in Beirut, Lebanon in 1983. (FOF ¶ 89.) In May 2010, Respondents agreed to advance $10 million to the lead attorney in the case, Steven Perles, to purchase fees he hoped to earn if Perles successfully convinced a court to force Iran to turnover assets in satisfaction of a default judgment. (FOF ¶ 94.) In September 2010, Respondents advanced Perles his first $2.5 million. (FOF ¶ 95.) Starting in May 2011, Respondents also began advancing Flagship Fund money to Thomas Fay, Perles's co-counsel. (FOF ¶ 98.) By the end of August of 2012, Respondents had advanced $28.5 million to Perles and Fay, 34.10% of the Funds' dollars deployed and 37.47% of their value. (FOF ¶¶ 96, 97, 151(c)(iii).) Through the end of 2015, Respondents also advanced an additional $4 million to purchase fees from Fay. (FOF ¶ 99.)

Starting in September 2012, Respondents also began purchasing claims directly from Peterson plaintiffs, who were also hoping to turn their default judgments into cash via the Peterson turnover litigations. (FOF ¶ 100.) By the end of 2012, 46.48% of the Flagship Funds' value was tied to Peterson, and for the subsequent three year-ends those numbers grew to 62.19%, 66.41%, and 71.72% respectively. (FOF ¶¶ 151(c)-(g)(iii).) At its peak, the Peterson position was nearly $59 million of $107 million in Fund assets. (FOF ¶ 151(g)(iii).)

Peterson proceeded in two phases: the Reparation Cases and the Turnover Litigations as defined below. (FOF ¶¶ 90-91.) The "Reparation Cases" began in 2001 in the United States District Court for the District of Columbia and resulted in the entry of a default judgment against Iran, originally for approximately $2.6 billion, but later reaching over $4 billion in damages around 2008. (FOF ¶ 102.) Perles, experienced in litigating terrorism cases against Iran, described obtaining the default judgment as the "beginning of the case," given that Iran's typical litigation strategy is to ignore the liability phase (i.e., the Reparation Cases) and then "vigorously defend" at the judgment execution stage (i.e., the subsequent turnover litigations). (FOF ¶¶ 85, 87-88, 103.)

After obtaining the default judgment in Peterson, Perles began another series of lawsuits seeking to enforce (or execute on) that judgment. (FOF ¶¶ 90-91.) The "Peterson Turnover Litigations" are the three separate lawsuits against three separate pools of assets. (FOF ¶ 91.) The first was a lawsuit filed in 2008 against a building in Manhattan (the "650 5th Ave Case"). Judge Katherine Forrest of the Southern District of New York ordered the building forfeited to the United States and to certain plaintiffs in the Reparation Cases and other Iranian judgment creditors in satisfaction of their judgments, but the Second Circuit held reversed her ruling and the true ownership of the building is now the subject of a jury trial. (FOF ¶ 92.)

Another turnover case was filed in 2013 against $6 billion in restrained funds held in an account in the name of a securities intermediary, Clearstream, at J.P. Morgan. Judge Forrest dismissed that lawsuit and it is currently on appeal ("Clearstream II"). (FOF ¶ 93.)

The third Peterson Turnover Litigation had its origin with the filing, in 2008, of restraints served on Citibank against an account in the name of Clearstream holding over $2 billion in securities entitlements. (FOF ¶ 104.) Subsequent to the filing of the restraints, approximately $250 million was returned to Iran. (Id.) The remaining $1.75 billion were the subject of a turnover

action commenced in the summer of 2010 ("Clearstream I"). (FOF ¶ 105.) In February of 2013, Judge Forrest ordered those assets turned over to Iranian judgment creditors, including the Reparation Case plaintiffs. (FOF ¶ 113; see also FOF ¶¶ 106-12 (procedural history of Clearstream I).) The Supreme Court eventually heard the case and affirmed Judge Forrest in April 2016 by a vote of 6-2. (FOF ¶ 117; see also FOF ¶¶ 115-16 (appellate history of Clearstream I).)

Respondents' attempt to pigeonhole the proceedings involved in the Peterson Turnover Litigations as the type of pro forma hearings they described to investors in resolved matters awaiting collection is absurd on its face. The record (consistent with common sense) shows that the Peterson Turnover Litigations involved not simply credit and duration risks Respondents' described as the only risks of the Flagship Funds' investments, but litigation risks arising from adversarial court proceedings fundamentally unlike the "administrative" circumstances Dersovitz described as the final hurdles to eclipse while awaiting payment.

As one attorney Respondents hired to examine certain Peterson-related investments told Respondents, "[a]lthough ... a judgment [against Iran in the Reparation Cases] (including damage awards to the individual [plaintiffs]) ha[d] already been entered, there is no certainty that any [Peterson plaintiff] will be able to collect on that judgment ...The ability of [Peterson plaintiffs] to levy on [the Citibank Clearstream] account is the subject of the Turnover Litigation," and is "therefore uncertain." (FOF ¶ 137(a).) He also advised Dersovitz: "if that litigation should be decided in favor of Clearstream, there is a very real possibility that Assignors will be unable to recover any part of their Awards." (FOF ¶ 137(b); see also FOF ¶ 137(c)-(i).)

Investors expressed the same understanding, overwhelmingly testifying that the risks relating to Peterson—not only litigation risks, but also "political risks" owing to the United States'

relationship with Iran—were not consistent with the pro forma court proceedings Respondents described as remaining for the resolved cases in which the Funds invested. (FOF ¶ 142.)

Perles and James Martin, the attorney Respondents hired to handicap the merits of Clearstream I, were unwilling to testify that the case was as risk-free as Dersovitz wanted the Court to believe. (FOF ¶¶ 87-88 (Perles), 127-29, 135-36 (Martin).) Perles explained that it wasn't until after the Supreme Court's ruling that there was a final non-appealable judgment in the matter. (FOF ¶ 121.) Indeed, Perles and Fay refinanced their Peterson-related debt at lower rates after the Supreme Court's ruling because after that decision the market understood "the attendant litigation risk" had evaporated. (FOF ¶ 122.)

B. Respondents' False and Misleading Statements Were Material

Misleading statements are material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[8] Materiality turns on "the significance of an omitted or misrepresented fact to a reasonable investor."[9]

1. *The Record Evidence Plainly Establishes Materiality*

The "best proof" of materiality is what "experienced investors[] found ... to be sufficiently material."[10] Here, the Court need not speculate as to what reasonable investors would consider significant, as 17 investors (or their advisers) made clear that Respondents' representations about the Funds' investment strategy and portfolios were important to them regardless of how they were

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8 Basic, 485 U.S. at 231-32 (citation omitted); see also In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 267-68 (2d Cir. 1993).

9 Riad, 2016 WL 3627183, at *26 (citation omitted).

10 Rothberg v. Rosenbloom, 771 F.2d 818, 821 (3d Cir.1985); see also SEC v. Wyly, 788 F. Supp. 2d 92, 118 (S.D.N.Y. 2011) ("where there is a question of whether certain information is material, courts often look to the actions of those who were privy to the information in determining materiality" (citation omitted)) (collecting cases); Riad, 2016 WL 3627183, at *26 (finding materiality "confirmed by investor testimony").

communicated. Indeed, notwithstanding Respondents' attempts to minimize the importance of their marketing materials, even their own proffered expert conceded he "would certainly call [the Funds' marketing materials] material." (FOF ¶ 628(c).)

First and foremost, the testifying investors emphasized the critical importance of Respondents' representations disclaiming any litigation risk. (See, e.g., FOF ¶¶ 631(a-e) (Mantell, Schaffer, Furgatch, Geraci and Gumins), 637(Sinensky).) For example, asked if he would have wanted to know if Respondents were funding unsettled cases, Respondents' witness Mr. Young captured what many other investors explained: "The whole issue to me, when you look at this investment, is that the case has settled, right? So you want – you know that your risk is Johnson & Johnson paying the lawyers for Merck or whoever." (FOF ¶ 632(d).) That some of Respondents' later documents and oral statements included the word "judgments" did not change in investors' minds the nature or materiality of Respondents' representations: the distinction investors cared most about was not whether there was a judgment or a settlement, but whether there was litigation risk. Investors were aware of other funds that offered the opportunity to invest in "contingent cases that have not yet been brought to judgment or settlement," but, as Mr. Mantell explained, those funds offered greater returns in exchange for taking on the kind of "litigation risk" Dersovitz "insisted he was not taking," and the Funds' investors were not interested in those riskier litigation funding opportunities. (FOF ¶¶ (631(a) (Mantell); 631(c) (Furgatch), 631(d) (Geraci).)

Respondents' representations, or lack thereof, regarding the Funds' continued advances to Osborn struck investors as particularly important. Mr. Mantell explained that had he known approximately ten percent of the Funds were invested in the unsettled ONJ Cases, "that fact alone" would probably have led him to avoid investing in the Funds. (FOF ¶ 632.) Mr. Condon likewise testified that he might have made a different investment decision had he known "there was

anything other than a settled case in the portfolio," which is why, Condon explained, he was "clear to ask" Respondents whether the Funds invested in such matters. (FOF ¶ 632(c); see also FOF ¶ 632(b) (Furgatch); 632(d) (Young).).

Investors also found critically important Respondents' statements describing obligor exposure limits and efforts to achieve a diversified portfolio. (FOF ¶¶ 639(a-h).) Those investors rejected any suggestion that concentration is acceptable as long as the Funds were concentrated in "lower risk" investments. (E.g., FOF ¶ 640 (Wils explaining false comfort one might gain from concentrations in highly-rated Enron-related assets).)

And, of course, investors also found Respondents' representations about the Funds' investments in Peterson receivables (or lack thereof) particularly significant because they perceived that case to be different in the nature of the risks from the cases Respondents told them the Flagship Funds invested in (FOF ¶ 640), and, for some investors, because they had personal aversions to the type of investment Peterson entailed. (FOF ¶¶ 441, 557.) Investors testified that when they discovered that the Funds' had invested so heavily in Peterson they felt "duped," "floored," and "shocked and appalled" about the existence of Peterson receivables in their funds. (FOF ¶¶ 364, 509, 581.) Some, in fact, chose to redeem immediately. (See, e.g., FOF ¶¶ 373, 518.)

As if more were needed, Respondents' actions further confirm the materiality of their representations. Their decision to emphasize to potential investors time and again the resolved nature of cases in the Funds' portfolio, described repeatedly as lacking any litigation risk (FOF ¶ 623(a-d)), highlights what Respondents knew to be important to investors.[11]

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[11] United States v. Phillip Morris, USA, Inc., 566 F.3d 1095, 1122 (D.C. Cir. 2009) (per curiam) ("The fact that Defendants continually denied [the same facts] suggests they themselves considered the matter material."); SEC v. Nadel, 97 F. Supp. 3d 117, 124 (E.D.N.Y. 2015) (Defendants "demonstrated the importance they attached to the information by [, inter alia,]

2. *Boilerplate Disclaimers and Hidden Disclosures Do Not Render Misleading Statements and Omissions Immaterial*

In the face of overwhelming evidence of the materiality of their misstatements and omissions, Respondents turn to the offering memoranda's boilerplate "flexibility" clause and to supposed hints at the truth scattered throughout certain documents to absolve themselves of liability. These arguments ignore well-settled law and the record evidence, and should be rejected.

a) The Flexibility Clause

The "flexibility" clause in the Funds' memoranda read, in part, that each Fund "will not be limited with respect to the types of investment strategies it may employ or the markets or instruments in which it may invest ...[and] may pursue other objectives ... it considers appropriate and in the best interest of the Partnership." (FOF ¶ 653.) Investors were nearly uniform in explaining that this is the kind of boilerplate disclosure they routinely see in offering documents. (FOF ¶ 653(a), (b).)

But it is settled law that "[f]or cautionary statements to be 'meaningful,' they must 'discredit the alleged misrepresentations to such an extent that the real risk of deception drops to nil.'"[12] Boilerplate disclosures like the flexibility clause do not operate to render meaningless all other of Respondents' representations about the Funds' investment strategy, and they certainly cannot overcome contemporaneous representations to investors about what the then-current investment strategy was. As Mr. Mantell, who reviews approximately 100 offering memoranda every year, explained: "[S]ponsors don't utilize [flexibility clauses] to tell us they're going to do

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admitting they sent marketing materials containing such misstatements" to potential investors and by "highlighting" the misleading facts within them.).

[12] Reliance Financial Advisors, et al., Rel. No. ID-941, 2016 WL 123127, at *18 (S.E.C. Jan. 11, 2016), aff'd sub nom. Timothy S. Dembski, Rel. No. 4671, 2017 WL 1103685 (S.E.C. Mar. 24, 2017) (quoting In re Bear Stearns Cos., Inc., Sec., Derivative & ERISA Litig., 763 F. Supp. 2d 423, 495 (S.D.N.Y. 2011)).

one thing and do [something] completely different." (FOF ¶ 653(b).) Otherwise, "the entire securities disclosure system in the country just wouldn't mean anything, it would be useless, because these provisions are put into so many of the operating documents." (Id.)

Respondents' appeal to this one clause in the offering memoranda is particularly unavailing given Dersovitz's assurances that no matter what he believed the Funds' documents permitted him to do, he would not pursue particular investments without consulting with investors first. (FOF ¶ 664(e).) Indeed, the Funds' DDQ offered similar assurances, stating investors "would be notified of any major change to the methodology used to manage the portfolio, any new investment idea, or any major negative event." (FOF ¶ 177.)

Critically, Dersovitz did not disclose to investors before their investment that Respondents had already purported to invoke the flexibility clause to invest beyond the limits set forth in the Funds' documents to invest in, for example, Osborn's unsettled portfolio. (FOF ¶¶ 585, 655.) Investors testified that this omission regarding the Funds' Osborn investment was a fact they would have wanted to know before they made their investment decisions. (Id.) Mr. Young further explained that he understands flexibility clauses to operate within certain "guardrails" informed by the kinds of investments discussed elsewhere in the offering documents, and that he viewed the Funds' Peterson investments as outside those guardrails, "a red flag" that prompted him to redeem his investment. (FOF ¶ 654.) In a moment of candor at the hearing, Dersovitz testified that he thought of his business as including "pre-settlement" and "appellate" funding (FOF ¶ 630)—the very kinds of cases his marketing materials claimed the Funds avoided.

b) Investor Due Diligence

Well-settled law also precludes Respondents from hiding behind what investors might have figured out had they asked for and studied the right pages of the right documents. Rule 10b-5 requires stating "all material facts necessary to make other statements not misleading. Such a duty

is not discharged merely by giving the purchaser access to company records and letting him piece together the material facts if he can."[13] Respondents may not "excuse themselves from liability on the basis that they did not provide the right answers because they were not asked the right questions."[14] As the Supreme Court has explained: "If it would take a financial analyst to spot the tension between [the true and the deceptive], whatever is misleading will remain materially so, and liability should follow."[15]

Moreover, in SEC enforcement actions, "omissions ... are not rendered immaterial ... simply because the omitted facts were available to the public elsewhere" and the law does not require investors to "pore through," or otherwise "connect the dots" in, various documents.[16] In "contrast to private parties ... the Commission need not show reliance as an element of its claims."[17] Accordingly, Courts have held routinely that "[in] the context of securities regulation, "'[a]vailability elsewhere of truthful information cannot excuse untruths'."[18] Courts have so held even where defendants have pointed, in defense of misleading disclosures in marketing materials, to "accurate information ... set forth elsewhere in publicly available documents."[19]

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13 Metro-Goldwyn Mayer, Inc. v. Ross, 509 F.2d 930, 933 (2d Cir. 1975) (citation omitted).

14 Stier v. Smith, 473 F.2d 1205, 1208 (5th Cir. 1973).

15 Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1097 (1991) (citation omitted) (discussing materiality in the context under Section 14(a) of the Exchange Act).

16 SEC v. Mozilo, No. 09-Civ-3994 (JFW), 2010 WL 3656068, *9 (C.D. Cal. Sept. 16, 2010) (quoting Miller v. Thane Int'l, Inc., 519 F.3d 879, 887 (9th Cir. 2008)).

17 Dennis J. Malouf, Rel. No. 4463, 2016 WL 4035575, at *10 (S.E.C. July 27, 2016) (citations omitted), pet. filed, No. 16-9546 (10th Cir. Sept. 8, 2016); see also SEC v. Morgan Keegan & Co., 678 F.3d 1233, 1244 (11th Cir. 2012) (collecting cases).

18 Nadel, 97 F. Supp. 3d at 124 (quoting Dale v. Rosenfeld, 229 F.2d 855, 858 (2d Cir.1956)); see also Miller, 519 F.3d at 887 ("investors are not generally required to look beyond a given document to discover what is true and what is not."); Stanley Jonathan Fortenberry, Rel. No. ID-748, 2015 WL 860715, *27 n.24 (S.E.C. Mar. 2, 2015) (rejecting respondent's argument that "victims are to blame for not researching his background").

19 See, e.g., Nadel, 97 F. Supp. 3d at 124.

The record in this case illustrates why the Court should be wary of ignoring settled precedent in favor of Respondents' novel theory in defense of liability. The maze of documents and materials Respondents insist investors should have scrutinized is ever-changing, and the documents are themselves opaque at best and at times outright misleading.

For example, to figure out the truth about diversification and concentrations, Respondents ask the Court to consider the Funds' financial statements, though their schedule of investments list exposures not by cases but by payors (sometimes listing payors, i.e., obligors, that are not the actual obligors for a particular case). This left investors to guess whether a given percentage identifying, for example, "Merck" as the payor related to one case against the company or many unrelated cases with different law firms, as was the case for numerous positions listed in the financial statements. (FOF ¶¶ 233, 234, 236, 243.) In fact, Dersovitz, though he directed investors who could not determine concentrations from marketing and offering documents to the financial statements (see, e.g., FOF ¶¶ 524(a), 664(c)), acknowledged that even he could not discern concentrations from those financials without more information. (FOF ¶ 243.)

For lies about the existence of the Peterson investments in the Funds, Respondents point to the marketing materials (the same ones they insist reasonable investors should not rely on), which in turn point to a website that required a NDA (FOF ¶ 298), on which Respondents posted a memorandum that describes exposure to "Citibank" in non-specified funds (the "Citibank Memorandum"). (FOF ¶ 315.) This Citibank Memorandum was published while the Flagship Funds' financial statements began referring to the "payor" for Peterson investments as "U.S. Government," rather than "Citibank," as had been done previously, without explaining the "U.S. Government" listing referred to the same investment as the old Citibank reference, or that either payor referred to Iran or Peterson. (FOF ¶¶ 236, 237, 321.) And as Dersovitz admits, Respondents

never published any additional information—even on their website—alerting investors that the Funds' Peterson concentration far exceeded the 30 percent threshold identified in the Citibank Memorandum. (FOF ¶ 320.)

For omissions and misstatements about the ONJ Cases, Respondents protest that potential investors could have again logged on to the company's website, where they might have reviewed the Funds' Agreed Upon Procedures ("AUPs"), and perhaps if those investors ignored the fact that the AUPs often falsely labeled the ONJ Cases "settled" (FOF ¶ 222)—just as the financial statements did (FOF ¶ 245)—then they might have figured out that the ONJ Cases were "workout situations" that did not fit into any category of investments described in the marketing and offering materials that Respondents distributed to investors.

Finally, as a catchall to understanding the unsettled nature of the positions in the Funds, Respondents point to their Lotus Notes database, which required another NDA, and which led investors either to (1) an abyss containing hundreds of thousands of pages of documents in an essentially unsearchable library lacking even a list of Flagship Fund positions, let alone any useful disclosures regarding the Funds' "workout" positions (FOF ¶ 278-79), or (2) a scrubbed "Demo Library" that conveniently contained no trace of the positions at issue in this case. (FOF ¶ 264.) Worse, this is the same Lotus Notes database Respondents' current CCO Amy Hirsch described as containing inaccurate information about the Peterson positions. (FOF ¶ 294.) But Respondents may not "present prospective investors with a mountain of information which they cannot possibly digest [to] excuse themselves from liability."[20]

[20] Stier, 473 F. 2d at 1208.

In any event, to go down the road of what investors might have divined had they been more skeptical of Respondents' representations is not an endeavor with which this Court is tasked. Investors' due diligence is not properly considered in an action instituted by the Commission.[21]

C. Respondents Acted with Scienter

Scienter is a mental state embracing an intent to deceive, manipulate, or defraud.[22] "Knowing misconduct satisfies the scienter requirement,"[23] as does recklessness, defined as "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it."[24] Dersovitz's scienter is properly attributable to RDLC given his ownership and control of that entity.[25] As the following demonstrates, the evidence of Dersovitz's dishonesty and deceptive state of mind is overwhelming.

1. Dersovitz Knew His Misrepresentations Were False and Misleading

As a threshold matter, there can be no doubt Dersovitz knew of the statements he and his employees were making to potential investors and knew they were false. As Joseph Genovesi, the Funds' head of originations, explained, the company name began with "RD" for a reason: "Ron had authority over everything." (FOF ¶ 698.) Respondents' Chief Compliance Officer agreed, explaining that "nothing really happened without [Dersovitz] knowing about it or approving it." (Id.) Furthermore, Dersovitz was directly or indirectly responsible for all of the Funds' investment decisions (FOF ¶¶ 1, 696), and he had available to him company records reflecting how the Funds'

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21 See, e.g., Morgan Keegan, 678 F.3d at 1253 (citation omitted).

22 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

23 Dembski, 2017 WL 1103685, at *8 (citation omitted).

24 Joseph P. Doxey, Rel. No. 10077, 2016 WL 2593988, at *2 (S.E.C. May 5, 2016) (citation omitted).

25 SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1089 n.3 (2d Cir. 1972).

money was invested at any particular time. (FOF ¶¶ 528(c), 666(a-c), 667.) Dersovitz even vetted and approved all emails that his head of marketing disseminated to investors. (FOF ¶¶ 697, 704.) In short, Dersovitz understood fully the true nature of the Funds' investments such that when he told investors how the Funds invested their money, his falsehoods were not uninformed mistakes.

a) Respondents Understood and Purposefully Hid the Funds' Exposure to the ONJ and Cohen Cases

While examples of Respondents' deception can be found in virtually all of their communications, the language Dersovitz approved regarding the description of the Funds' strategy, viewed in light of what Dersovitz admits to knowing when he approved that language, offers particularly compelling evidence of his scienter.

As set forth above, in the DDQ Respondents represented that 95% of the Funds' investments were purchases of "a legal fee at a discount from a law firm, once a settlement has been reached and the legal fee is earned" and that the balance is largely in lines of credit extended to law firms. (See supra at I.A.1.) These statements reinforced representations Respondents made in their marketing materials, such as an August 31, 2011 presentation giving the fee acceleration and line of credit numbers as 94.99% and 5.01%, respectively. (FOF ¶ 173.)

But Dersovitz admits that he knew that the Funds' 10% commitment to the ONJ Cases did not fit into either category described in the DDQ. (FOF ¶¶ 35, 172, 174.) Indeed, Dersovitz knew as early as 2009 the ONJ Cases went beyond even his broad reading of the investment strategy described in the Funds' offering memoranda, as contemporaneous communications show him invoking the memoranda's flexibility clause to justify the Funds' advances to Osborn. (FOF ¶ 35.) In other words, Dersovitz approved language for the Funds' DDQs and other marketing materials that he knew misrepresented how the Funds invested their money, and he continued to employ

(and approve new iterations of) offering memoranda he knew described a strategy from which he had already deviated.

And Dersovitz did this despite knowing that Osborn was not unique in falling outside of the Funds' announced strategy. Indeed, Dersovitz testified that he knew the Cohen Licata matter also did not involve a settlement; that receivable related to an ongoing dispute about a fee in a criminal case. (FOF ¶¶ 54-55.) And Respondents plainly knew by 2013 that the Cohen matters had become, at best, additional "workout situations," as they filed an action against the Cohen firm pursuing the return of monies advanced to Cohen's unsettled matters. (FOF ¶ 78.)

As Ms. Hirsch acknowledged, if potential investors had known that ten percent of the Funds' stated value was tied to the Osborn workout situations (to say nothing of the Cohen receivables), they might have had questions. (FOF ¶ 633.) Indeed, when Ms. Markovic learned of the existence of the ONJ Cases in the Funds' portfolios, she cautioned that Respondents should "be careful not to put in writing that [they] do not take litigation risk." (FOF ¶ 677.) Of course, this all explains perfectly not only why Dersovitz failed to mention such positions in marketing the Funds, but also why he approved language describing a factoring and line of credit portfolio that excluded such investments.

b) Respondents Understood *Peterson's* Risks and Wrote Flagship Fund Risk Disclosures that Omitted Them

Respondents likewise were well-aware that their disclosures hid from investors the kinds of risks Respondents knew existed for the Funds' Peterson investments.

The record makes abundantly clear Respondents understood that Peterson presented risks other than those described in the Flagship Funds' documents, either because someone explained those risks to them (e.g., FOF ¶¶ 137 (attorney advisors), 142 (investors)), or because Respondents themselves explained them to others. (See, e.g., FOF ¶¶ 694-95 (Dersovitz emails commenting on

risks in Clearstream I); 141, 601, 619-20, 684-85 (underwriting materials and Peterson investment projections reflecting risks); 130, 682-83 (Respondents' pitch to Peterson plaintiffs); see generally supra Section I.A.4.c.)

Indeed, in marketing their Iran SPV, Respondents specifically highlighted in its offering memorandum the risk of "failure, in whole or in part, of the Turnover Litigation" for reasons including that one of the statutes the Peterson plaintiffs were relying upon might be held unconstitutional. (FOF ¶¶ 308-12.) The same SPV document explained that recovering money relating to Peterson involved geopolitical risk, given that normalization of U.S.-Iran relations could result in U.S.-based Iranian assets being returned to the Islamic Republic. (FOF ¶ 312.) Financial statements for the Iran SPV contained similar disclosures, flagging in the "Notes" both the risk that the Peterson litigation "may be unsuccessful" and risks relating to "relations between the U.S. federal government and Iran." (FOF ¶¶ 251-52.)

But critically, these risks were conspicuously absent from the Flagship Funds' marketing materials, offering memoranda and financial statements (FOF ¶¶ 313, 253-54), and investors were clear that no one ever disclosed to them that the Flagship Funds' investments would be subject to those types of risks; those disclosures spoke of "duration" and "theft" risks and the steps Respondents took to mitigate those, while disclaiming litigation risk. Moreover, as Respondents were marketing their increasingly Peterson-filled Flagship Fund portfolios as lacking in any litigation risk, Respondents were trying to capitalize on the existence of such risks by telling Peterson plaintiffs to sell their awards to the Flagship Funds because there is "no guarantee [the case] is going to settle," promising that RD Legal would take the risk off the plaintiffs' hands. (FOF ¶¶ 130, 682-83.) As set forth above, investors could not have been clearer that they were not purchasing the Flagship Funds to be exposed to cases that might not settle. (Supra at I.B.1.)

2. *Respondents' Scheme to Deceive Investors About the Flagship Funds' Peterson Exposure Betrays Their Scienter*

The lengths to which Respondents went to deceive investors about the Funds' growing Peterson exposure, after learning from investors that most wanted to avoid exposure to Peterson precisely because of the foregoing litigation and political risks, also underscores their scienter.

From the beginning, Respondents were careful to avoid calling attention to the Flagship Funds' Peterson investments. Rather than identify the Peterson assets as "Iran," "Bank Markazi," or even "Peterson Fund" in their financial statements, they opted, in different years, to label them "U.S. Government," "Citibank," and "Qualified Settlement Trust." (FOF ¶¶ 235-41, 602-04.) And when Respondents created the Citibank Memorandum in February 2012—according to Dersovitz, to "connect the dots" for investors who might not understand that references to "Citibank" referred to the Peterson case—they decided against sending that document to investors. (FOF ¶¶ 315, 318(a).)

Respondents, no doubt aware of how that decision highlights their scienter, initially attempted to convince the Court that they circulated the Citibank Memorandum to investors. (See Respondents' Mar. 8, 2017 Prehearing Br. at 8 (claiming "RD Legal wrote to its investors" to convey the information contained in the Citibank Memorandum); FOF ¶ 318(a) (Respondents' counsel telling Mr. Burrow the Citibank Memorandum was "sent out" "to investors.") But Dersovitz later admitted the truth: Respondents chose not to send it to any existing or potential investors and instead only posted it on Respondents' password-protected website, unlike virtually every other communication with existing investors placed before the Court in this case (which were emailed). (FOF ¶¶ 315, 318(a)).[26] Moreover, while the Citibank Memorandum stated that the

[26] Lawrence M. Labine, Rel. No. ID-973, 2016 WL 824588, *33 (S.E.C. Mar. 2, 2016) (courts "must consider not only the content of the written disclosures but also the way in which the disclosures were made") (quoting Morgan Keegan, 678 F.3d at 1250).

"Citibank" exposure related to the Peterson matter (FOF ¶ 318), the Memorandum—published at approximately the same time Respondents' financials stopped referring to the Peterson exposure as relating to Citibank (FOF ¶¶ 316, 321)—deceptively called the Peterson matter a "settlement" (FOF¶315), and did not specify whether Respondents' investment in Peterson was through the Flagship Funds or some other means. (FOF ¶ 318(h).)

More generally, although Dersovitz committed millions to the Peterson Turnover Litigations in May 2010 (FOF ¶ 94), the first written communication to any investor about the case occurred in February 2012 (FOF ¶ 440), when Dersovitz began considering advances to Peterson plaintiffs. (FOF ¶ 319.) In April 2012, Dersovitz communicated to certain individuals about the possibility of investing in Peterson through the Iran SPV. (FOF ¶ 443.) But these individuals expressed nearly uniform disinterest even when Dersovitz offered better terms than the Flagship Funds did, and voiced to Dersovitz the reasons they were not comfortable investing in Peterson. (FOF ¶¶ 612, 614-15, 619-20.) When some of these individuals realized the Flagship Funds were already exposed to Peterson, they redeemed their investments. (FOF ¶ 613 (Kessenich, Gumins, Craig, Young, and Ishimaru).)

Dersovitz in fact found most investors simply did not want exposure to Peterson, whether through the Iran SPV Respondents struggled to sell, or the Flagship Funds, for those investors who, like Cobblestone, learned of those Funds' exposure to the Iran case. (FOF ¶¶ 473, 612(a-b), 615, 620).) Indeed, Dersovitz admits investors told him they did not like the Peterson case precisely because of that matter's "political risk" and "litigation risk." (FOF ¶¶ 688.)

Armed with this knowledge, Dersovitz learned, when pitching the Flagship Funds, to avoid mentioning those Funds' heavy Peterson concentrations. (FOF ¶ 621.) Starting in 2013, his efforts to mislead investors about that exposure took several forms, including: not speaking of Peterson at

all when he presented the Funds at a Tiger 21 meeting that Messrs. Mantell, Demby, and Sinensky attended (FOF ¶¶ 483, 485(f)); mentioning Peterson solely in the context of what he called the "separate" Iran SPV, as he did during the separate meetings that Messrs. Wils and Ashcraft attended, and to Mr. Schaffer (FOF ¶¶ 493(c), 499(e-f), 566); and affirmatively misstating that the Flagship Funds were not invested beyond any de minimis amounts in Peterson, as he did to Mr. Furgatch. (FOF ¶¶ 547-48.) More generally, Respondents provided potential Flagship Fund investors with marketing materials that carefully distinguished between the Flagship Funds and the Iran SPV, calling them "separate" vehicles (FOF ¶¶ 363 (Burrow); 499(f) (Ashcraft); 511 (Demby); 515(a) (Mantell); 548 (Furgatch); 566, 570, 576 (Shaffer)), even revising the Alpha presentation to distinguish the Flagship Funds' strategy from those of Respondents' SPVs. (FOF ¶ 162.)

Respondents' decision in advance of the April 2013 Tiger 21 meeting to omit materials relating to the Iran SPV is consistent with their movement away from mentioning Peterson to what they found to be increasingly unreceptive audiences. (FOF ¶ 481.) In fact, Markovic candidly explained that after Judge Forrest granted turnover in Clearstream I in late February of 2013, she "stopped talking" about the investment. (FOF ¶ 347.) The same is true of Respondents' communications with Kyle Schaffer, whose office, in late November 2013, emailed Respondents, just as Schaffer began his due diligence, that he had no interest in the Iran SPV. (FOF ¶ 564.) A few weeks later, and over the course of a half a dozen or so meetings, Respondents were careful to tell Schaffer that the Peterson investments were "separate" and that purchasing plaintiff receivables was something they were "considering doing." (FOF ¶¶ 566, 570, 574, 576.)

The deception worked. Thirteen testifying investors explained they did not know about the Peterson investments being in the Flagship Funds' portfolio before the invested (with at least half of those having not even heard of the case before they invested). (FOF ¶¶ 361-62, 364 (Burrow);

373 (Condon); 387-89 (Levenbaum); 401, 405, 410 (Ishimaru & Craig); 439 (Gumins); 489(a) Demby; 490(a, c) Sinensky; 492(f) (Mantell); 493(c), 494(c), 495(b) (Wils); 507(a) Ashcraft; 549-50, 554-55 (Furgatch); 574, 579 (Schaffer); 594 (Young).)[27]

Dersovitz, plainly aware that omitting information about the Flagship Funds' enormous concentration in a vigorously contested matter like Peterson is damning evidence of his fraudulent intent, testified that his marketing presentation for the Flagship Funds absolutely, every single time mentioned the case and specifically explained that the Flagship Funds had already invested in it. (FOF ¶ 344.) But crediting Dersovitz's testimony as true necessarily requires the Court to find that investor after investor—including some called by Dersovitz himself and others with no financial stake in this dispute—perjured themselves (FOF ¶ 546), and to disregard the indisputable fact that years ago some of these investors sent contemporaneous emails expressing shock when they found out that Peterson was, in fact, part of the Flagship Funds. (See, e.g., FOF ¶¶ 510-512.)

Dersovitz's last line of defense appears to be that whatever he may have told, or hidden from, investors, he sincerely believed the Peterson investments were wise. But whatever Dersovitz believed personally about the chances of success in Peterson (his testimony ran the gamut from insisting there was "zero" litigation risk in Peterson to testifying that no attorney would ever say there was "zero" litigation risk in any litigation, but that Respondents could "manage" the Peterson risk (FOF ¶¶ 144(g), 145)), he recognized that the litigation and political risks relating to Peterson warranted disclosure. (See supra at Section I.C.1.b.) Just as Respondents disclosed such risks in marketing the Peterson specific Iran SPV, they should have disclosed the same material facts to potential investors in the Flagship Funds as these Funds quickly became full of the same exposure.

27 See United States v. Thomas, 377 F.3d 232, 241 (2d Cir. 2004) ("evidence that the statements would have deceived a person of ordinary prudence and comprehension is evidence that defendant actually intended to deceive.").

And Dersovitz's self-avowed belief that Peterson would succeed does not diminish his scienter as a matter of law. Chief ALJ Murray recently considered a very similar argument in Lawrence M. Labine, and, even after crediting respondent's testimony that "he believed [his] company could succeed, and [he did not seek] to harm his clients," found respondent Labine violated several anti-fraud provisions with scienter given that he, like Dersovitz here, trumpeted an investment's safety "while not discussing known risk factors."[28]

3. Respondents' False and Evasive Answers to Investor Questions After They Invested, Including After They Discovered the Funds Invested in Peterson, Betrays Their Scienter

Given the foregoing, it should come as no surprise that when investors found out the truth about the Flagship Funds' investments in Peterson—including in March 2014, when the Wall Street Journal published an article suggesting RDLC and/or the Flagship Funds had invested heavily—they reacted with uniform anger, dismay, and surprise. (FOF ¶¶ 364, 664(a) (Burrow); 316, 410 (Ishimaru); 373 (Condon); 509 (Demby); 513 (Sinensky); 514(a) Wils; 515(a) (Mantell); 519 (Ashcraft); 558 (Furgatch); 581 (Schaffer); see also FOF ¶ 594 (Young testifying that he believed any Peterson investment in the Funds' portfolio if it existed at all, was de minimis).)

Dersovitz's response to this nearly uniform investor reaction further underscores his scienter.[29] When Mr. Furgatch asked what percentage of the Funds was invested in Peterson, Dersovitz answered 10-20% (first orally, then confirming that representation in writing), at a time when over 60% of the Funds was so-invested. (FOF ¶¶ 665(d); 670(a).) When certain Tiger 21 investors asked the same questions, he told them it was around 30% when the investment was much greater. (FOF ¶ 665(a).) To two other audiences he falsely claimed the amount was 10%.

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[28] Labine, 2016 WL 824588, *34.

[29] Dembski, 2017 WL 1103685, at *8 ("additional misstatements made to conceal [Respondents'] fraud further support a finding of scienter." (citation omitted)).

(FOF ¶¶ 670(b-c).) To Mr. Geraci he was similarly deceptive, telling them he only had a "$6 million" loan in Peterson. (FOF ¶ 670(d).)

Several other investors also testified that when they asked Dersovitz whether, and to what extent, the Funds had exposure to Peterson, Dersovitz was often evasive or non-responsive. (FOF ¶¶ 664(a-i).) Dersovitz also persistently tried to downplay the exposure, either by outright lying, as above, by citing numbers that gave the impression that the concentration was lower than it was (FOF ¶¶ 665(a-c), 665(e-f); 670(e-f)), or by assuring investors that he was dialing down the concentrations when he was doing the opposite. (FOF ¶¶ 669(a-d).)

When asked at the hearing about the foregoing deceptive and evasive answers about Peterson concentrations, Dersovitz offered an array of tortured and conflicting answers. He began by stating that he preferred to direct questions to his CFO or Markovic, but when pressed acknowledged that Markovic would have no such information. (FOF ¶ 667(b).) It was Markovic who frequently turned to Dersovitz for answers. (FOF ¶ 676.) Dersovitz also stated that he did not like to rely on the RD Legal "dashboards" to give answers because they were created with a six-week time lag (FOF ¶ 667(d))—yet Dersovitz, despite having access to monthly position sheets created by Pluris (FOF ¶¶ 528(c), 666(a-c)), sometimes directed investors to information that was much older than the Pluris sheets and dashboards available to him. (FOF ¶ 531.) Remarkably, Dersovitz attempted to justify pointing investors to months-old financial statements by claiming that because the position was constantly in flux, only stale information could be accurate. (FOF ¶¶ 667(c-e).) Finally, after acknowledging that the "concentrations weren't changing that much" in November of 2014 (FOF ¶ 667(f))—a time when Dersovitz was still directing an investor to look at financials from year-end 2013 (FOF ¶ 531)—Dersovitz admitted he "could have" provided investors with answers but that it "wasn't [his] role" (FOF ¶ 667(g)), a remarkable about

face that contradicts a flood of emails showing that it is he, not anyone else at RD Legal, who routinely answered those questions. (See, e.g., FOF ¶¶ 449, 526, 529, 531, 665(a-e), 670(a-f).)

Finally, even after these questions arose, Respondents continued to disseminate to current investors documents that used much of the same language as their misleading marketing materials, calling unsettled cases "settled" (FOF ¶¶ 201(a), 386, 553), describing the Funds' strategy as having no litigation risk, describing the Iran SPV as "separate," and listing Fund investments to give the appearance of diversification (FOF ¶¶ 365, 599, 677-79).)[30]

4. Respondents Are Not Saved by the Half-Truths They Argue Are Exculpatory

Respondents' argument that clues about their true investments were available in materials other than their marketing and offering documents, or could have been obtained through additional conversations with Dersovitz, even if accepted, does nothing to rebut the overwhelming evidence of Respondents' scienter, just as it does not diminish the materiality of their misrepresentations. The same is true of Respondents' contention that the Court should not make a finding of scienter because Respondents occasionally were forthcoming with some inquiring investors.

First, these arguments fail as a factual matter. When potential investors asked Dersovitz questions about his strategy, he simply fed them more lies. His scienter was fully evident when, for example, in response to a question from Mr. Sinensky about litigation in which Respondents were engaged to collect on advances made on the unsettled ONJ Cases, Dersovitz told his friend that the litigation concerned "non-fund" attorneys even though Dersovitz knew that the suit was about Flagship Funds' advances to those attorneys. (FOF ¶¶ 660-61; see also supra at Section I.C.3). Moreover, the documents Respondents argue investors should have perused more

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[30] Young, 2016 WL 1168564, at *12 (noting, in support of finding of fraud, that respondent misled investors by emphasizing insurance features of certain investments, and "continued this emphasis after it was aware that such statements fostered confusion.").

thoroughly painted the same picture of resolved cases with no litigation risk that Respondents marketing documents described. (Supra at Section I.B.2.)

These arguments also fail as a matter of law. The Commission rejected similar defenses in Dolphin and Bradbury, Inc., where respondents argued the Division had not demonstrated scienter because they (i) "did not attempt to restrict the flow of information, but rather helped investors get information by referring them to others" and (ii) disclosed certain information to "one investor and would have disclosed it to others if they had asked about it." [31] But the Commission held that even if respondents "enabled or facilitated[] access by specific investors to certain information... [that] does not contradict ... that they acted recklessly in ... fail[ing] to disclose a particular, and critical, piece of information." [32] And in Dolphin and Bradbury, as here, the "OIP does not charge Respondents with having withheld information from investors who requested it; it charges them with having failed to present the information to investors who would have considered it significant in light of the other information provided."[33] Thus, even if the Court were to find that Dersovitz, when pressed, occasionally provided select investors with information that helped them figure out the truth about the Funds' investments, such disclosures would not absolve him of liability for defrauding the many investors who took Respondents' earlier representations at face value.

5. The Actions of Individuals on Whom Dersovitz Claims to Have Relied Offer Dersovitz No Defense

Dersovitz also attempts to evade liability by blaming others for the lies contained in Respondents' marketing materials. Initially, Dersovitz denied any role in drafting or generating materials for the Funds, denying that he even collaborated with others at RDLC. (Respondents'

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[31] Dolphin and Bradbury, Inc., Rel. No. 8721, 2006 WL 1976000, at *11 (S.E.C. July 13, 2006), aff'd sub nom. Dolphin and Bradbury, Inc. v. SEC, 512 F.3d 634 (D.C. Cir. 2008).

[32] Id. at *12.

[33] Id.

Aug. 5, 2016 Answer at 8, ¶13.) Dersovitz subsequently changed his story, seeking to hide behind a "collaborative process" to distance himself from the Funds' marketing materials. (FOF ¶ 696(a).) Ultimately, Dersovitz acknowledged that he had final approval authority over the Funds' marketing materials, and in fact regularly edited such documents. (FOF ¶¶ 697.)

In any event, even if this Court were to indulge Respondents' questionable suggestion that there exists some legally cognizable reliance on non-legal professionals defense,[34] the professionals in this matter do not support Dersovitz claim.

As a threshold matter, Respondents tellingly declined to present the testimony of many of the individuals Dersovitz claims were part of the collaborative process. The numerous lawyers Respondents claim advised them regarding various marketing materials did not testify. Respondents also hesitated to call to testify their Chief Compliance Officer, Gottlieb (doing so only after the Division indicated it would call him if Respondents declined), and Gottlieb quickly demonstrated why this was so. Gottlieb, who did not even have an office, phone, or access to documents at RD Legal (FOF ¶ 702(a)), testified that his role was not to review marketing materials to determine whether they accurately described whether the Funds' investments related to "settled" cases (FOF ¶ 702), and, as noted above, based on information provided to him by Dersovitz, he astonishingly left RD Legal believing only the Iran SPV invested in Peterson. (FOF ¶ 331(a).)

Markovic was also conspicuously absent, but testified through investigative testimony admitted as evidence under Rule 235 that her role in reviewing Respondents' disclosures was similarly limited. (FOF ¶ 704.) That leaves Ms. Hirsch as the only witness other than Dersovitz to testify as to any role regarding the generation of any marketing materials, but she testified that her

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[34] See Robare Group, Ltd., Rel. No. 4566, 2016 WL 6596009, at *10 (S.E.C. Nov. 7, 2016) (questioning existence of "reliance on compliance consultants" as a defense).

role was predominantly "changing formatting" and getting the documents to look "institutional quality." (FOF ¶ 703; see also FOF ¶ 705 (describing limited comments by other employees).)

II. RESPONDENTS ARE LIABLE UNDER THE "SCHEME" LIABILITY PROVISIONS OF THE SECURITIES ACT AND THE EXCHANGE ACT

While the misrepresentations and omissions described herein establish liability under the "misstatement" prongs of Exchange Act Rule 10b-5 and Securities Act Section 17(a), Respondents' deceptive conduct—including, but not limited to, their misstatements—support "scheme" liability under the statutes as well. For example, as set forth above, Respondents marketed the SPV alongside the Flagship Funds even after they understood investors were, at best, confused about which funds invested in Peterson; found myriad ways to describe investments in Peterson that avoided reference to Iran or the name "Peterson" itself; and chose not to disseminate the Citibank Memorandum Dersovitz claimed would "connect the dots" for confused investors. As the "architect" of this scheme and the one who "took a series of actions over several years to implement" it, Dersovitz should be found liable for violating all three prongs of Rule 10b-5.[35]

III. DERSOVITZ KNOWINGLY CAUSED AND AIDED AND ABETTED RDLC'S VIOLATIONS

To establish Dersovitz's liability for aiding and abetting RDLC's violations of the antifraud provisions, the Division must establish: (1) a primary violation of those provisions; (2) that Dersovitz substantially assisted in the violations; and (3) that Dersovitz provided that assistance with the requisite scienter—knowing of, or recklessly disregarding, the wrongdoing and his role in furthering it.[36] "[T]o satisfy the 'substantial assistance' component of aiding and abetting, the [Division] must show that the defendant 'in some sort associate[d] himself with the

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[35] See VanCook v. SEC, 653 F.3d 130, 139, 140 (2d Cir. 2011).

[36] See Joseph John VanCook, Rel. No. 61039A, 2009 WL 4026291, at *14 (S.E.C. Nov. 20, 2009) aff'd VanCook, 653 F.3d at 130.

venture, that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed.'"[37] Similarly, under Section 21C(a) of the Exchange Act, to establish causing liability, the Division must establish (1) a primary violation of the provisions; (2) the respondent's act or omission contributed to the violation; and (3) the respondent knew or should have known that the act or omission would contribute to the violation.[38] In an administrative proceeding, a respondent who aids and abets a violation also is a cause of the violation, but only negligence is required to establish that a respondent caused a violation of a provision that does not require scienter.[39]

Here, the same facts supporting primary liability against Respondents also establish that (1) primary violations occurred; (2) Dersovitz provided substantial assistance for and contributed to the violations by making most of the misleading statements at issue himself; and (3) Dersovitz, as the principal officer of RDLC and the ultimate beneficiary of RDLC's profits, willfully associated himself with the venture as something that he wished to bring about and was well aware of his role in the entity, and of the fact that his statements were misleading.

RELIEF REQUESTED

I. RESPONDENTS SHOULD BE ORDERED TO DISGORGE THEIR ILL-GOTTEN GAINS AND PAY PREJUDGMENT INTEREST

"The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws."[40] Moreover, "effective enforcement of the federal securities laws requires that the

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37 SEC v. Apuzzo, 689 F.3d 204, 207 (2d Cir. 2012) (citation omitted) (alterations in original).

38 15 U.S.C. § 78u-3(a).

39 VanCook, 2009 WL 4026291, at *14 n.65.

40 SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1474 (2d Cir. 1996) (citations omitted).

SEC be able to make violations unprofitable."[41] To achieve such a result in this matter, Respondents should be ordered to disgorge all profits earned through the fraudulent sale of interests in the Flagship Funds in the five years preceding the July 14, 2016 filing of the OIP.[42]

Respondents profited considerably from their fraud. From the relevant period in 2011 through the end of 2015, Respondents withdrew $56,768,384 from the Flagship Funds, of which $8,312,891 went to Dersovitz alone.[43] (FOF ¶¶ 735, 737.) Respondents have pointed previously to costs incurred in their business, but "[i]t is well established that defendants in a disgorgement action are not entitled to deduct costs associated with committing their illegal acts."[44] The Commission "appl[ies] the rule that 'how a defendant chooses to spend his ill-gotten gains, whether it be for business expenses, personal use, or otherwise is immaterial to disgorgement'."[45]

As this Court explained in its recent Initial Decision in Matter of Peterson, to the extent Respondents argue their disgorgement figure should be reduced by certain legitimate costs that should be deducted from the reasonable approximation of Respondents' gains presented by the Division, it is their burden to show why some other disgorgement figure would be more

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41 Id. (citation omitted).

42 See Thomas Capital Mgmt. Group LLC, et al., Rel. No. ID-693, 2014 WL 5304908, at *30 (S.E.C. Oct. 17, 2014) ("Management fees and incentive fees are appropriately disgorged where they constitute ill-gotten gains earned during the course of violative activities"), review granted, 2014 WL 6985130 (Dec. 11, 2014).

43 Pursuant to this Court's May 2, 2017 Order, the Division set forth its contentions concerning Respondents' valuation of the Funds' portfolio and how those valuations facilitated the accelerated withdrawal of Fund assets while many investors await payments without the ability to claw back Respondents' gains. As set forth in the Division's May 5, 2017 submission, the Court need not find the valuations to be improper to hold that Respondents should not be permitted to retain the profits from the fraudulent misrepresentations addressed herein.

44 FTC v. Bronson Partners, LLC, 654 F.3d 359, 375 (2d Cir. 2011) (internal quotation marks and citation omitted).

45 Edgar R. Page, Rel. No. 4400, 2016 WL 3030845, at *12 n.68 (S.E.C. May 27, 2016) (citation omitted).

appropriate.[46] To the extent RDLC's "costs" include payments to Dersovitz, however, the Division cannot imagine any reason why those sums should not be disgorged as *his* ill-gotten gains. Similarly, that Dersovitz may have spent his profits to make purchases such as a second home (albeit in his wife's name), would not change the character of those gains any more than expenditures on less luxurious personal expenditures.[47]

Finally, holding Respondents jointly and severally liable is also appropriate as the fraud was committed by Respondents together.[48] Prejudgment interest is necessary to deprive Respondents of an interest-free loan in the amount of their ill-gotten gains.[49]

II. RESPONDENTS SHOULD PAY SUBSTANTIAL THIRD-TIER CIVIL PENALTIES

Securities Act Section 8A(g), Exchange Act Section 21B, and Advisers Act Section 203(i) permit civil monetary penalties where Respondents willfully violated, aided and abetted, or caused a violation of, the provisions of the respective Acts, if such penalties are in the public interest.[50] Six factors are relevant to this determination: (1) deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require.

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46 Curtis A. Peterson, Rel. No. ID-1124, 2017 WL 1397544, at *4 (S.E.C. Apr. 19, 2017) (explaining that once the Division demonstrates a reasonable approximation of Respondents' ill-gotten gains, the burden "'shifts to respondent to demonstrate the Division's estimate is not a reasonable approximation'") (citations omitted).

47 Peterson, 2017 WL 1397544, at *8 (refusing to discount disgorgement by amount spent for treatment of special needs son and home repair).

48 SEC v. Pentagon Capital Mgmt. PLC, 725 F.3d 279, 288 (2d Cir. 2013) (affirming decision to hold all "collaborating" parties, including relief defendants, jointly and severally liable for disgorgement).

49 SEC v. Grossman, No. 87-Civ-1031 (SWK), 1997 WL 231167, at *11 (S.D.N.Y. May 6, 1997), aff'd in part and vacated in part on other grounds sub nom. SEC v. Hirshberg, 173 F.3d 846 (2d Cir. 1999) (unpublished opinion).

50 See 15 U.S.C. § 77h-1(g); id. § 78u-2; id. § 80b-3(i).

Section 21B(b) of the Exchange Act specifies a three-tier system identifying the maximum amount of civil penalties, depending on the severity of the respondent's conduct. Second tier penalties are awarded in cases involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. Third-tier penalties are awarded in cases where such state of mind is present, and where, in addition, as here, the conduct in question created a significant risk of substantial losses to other persons, or resulted in substantial pecuniary gain to the person who committed the act or omission.

In this case, the Division respectfully submits that third-tier penalties are appropriate and necessary. Violations of the anti-fraud provisions of the federal securities laws presumptively involve the kind of fraud, deceit, manipulation or reckless disregard of a regulatory requirement contemplated by the relevant penalty provisions of the Exchange Act and Advisers Act.[51] And while many investors profited from their investments, some are still waiting for hundreds of thousands of dollars of the principal they invested. (FOF ¶¶ 366 (Burrow); 536 (Ashcraft); 582 (Schaffer).) Moreover, as Respondents' lawyers advised him, investments in the Peterson Turnover Litigation involved a real risk of loss. (FOF ¶ 137.) Absent significant penalties, Respondents and others in the industry will be presented with the opposite of deterrence—namely, that investing money contrary to clear disclosures may be worth the risk.

During the period at issue here, third tier penalties for each act or omission by Dersovitz range from a maximum of $150,000 for the earliest part of the misconduct to $181,071 for violations occurring after November 2, 2015, and for RDLC, the range is from $725,000 to

[51] See Walter V. Gerasimowicz, et al., Rel. No. 496, 2013 WL 3487073, at *6 (S.E.C. July 12, 2013) (respondents "violated the antifraud provisions, so their violative actions 'involved fraud [and] reckless disregard of a regulatory requirement' within the meaning of Sections 21B(b)(3) of the Exchange Act. . . .").

$905,353.[52] The Court should exercise its authority to penalize "each" of Respondents' acts and omissions.[53] At the very least, to have a meaningful impact, a penalty should be imposed for each defrauded investor who testified at the hearing in this matter.

III. DERSOVITZ SHOULD BE BARRED FROM SERVING IN THE SECURITIES INDUSTRY

Exchange Act Section 15(b)(6)(A), Advisers Act Section 203(f) and Investment Company Act Section 9(b), all authorize the Commission to permanently bar from the industry any person associated with an investment adviser at the time of the alleged misconduct if the sanction is in the public interest and the adviser or associated person has (i) willfully violated any provision of the Securities Act or the Exchange Act or its rules or regulations,[54] or (ii) willfully aided or abetted another person's violation of the Securities Act or the Exchange Act or its rules or regulations.[55] A "willful violation of the securities laws means intentionally committing the act which constitutes the violation and does not require that the actor 'also be aware that he is violating one of the Rules or Acts.'"[56]

Because Respondents violated Securities Act Section 17(a) and Exchange Act Section 10(b), and because Dersovitz—who served as President and Chief Executive Officer of RDLC, an entity registered with the Commission as an investment adviser for most of the period of the misconduct described above(FOF¶¶1-2)—willfully aided and abetted and caused RDLC's violations of these provisions, the Division need only show that a permanent industry bar against

52 See Adjustments to Civil Monetary Penalty Amounts, 2017 WL 66588, at *3 (Jan. 6, 2017).

53 See 15 U.S.C. § 77h-1(g); id. § 78u-2; id. § 80b-3(i).

54 See id. § 78o(b)(6)(A); id. § 80b-3(f), (e)(5); id. § 80a-9(b)(2).

55 Id. § 78o(b)(6)(A); § 80b-3(f), (e)(6); id. § 80a-9(b)(3).

56 S.W. Hatfield, CPA and Scott W. Hatfield, CPA, Rel. No. 3602, 2014 WL 6850921, at *9 (S.E.C. Dec. 5, 2014) (citation omitted).

Dersovitz is in the public interest. In assessing the public interest, the Commission considers:

> the egregiousness of [the respondent's] actions (including his aiding and abetting of [his entity]'s fraudulent conduct), the isolated or recurrent nature of the infraction, the degree of scienter involved, his recognition of the wrongful nature of his conduct, the sincerity of his assurances against future violations, and the likelihood that his occupation will present opportunities for future violations.[57]

As set forth above, this is not a case about an isolated reckless misstatement, but a fraud conducted over the course of several years involving brazen lies about the very assets in which Respondents were putting investors' money. Respondents knew that investors did not want to invest in a Fund capping returns at 13.5% that exposed them to a real risk that litigation might not end favorably, so they peppered virtually every document provided to potential investors with assurances that the Flagship Funds were not like such litigation financing funds. (Supra at Section I.A.1.) Then, when investors called upon Respondents to confirm the Funds did not take on litigation risk, Dersovitz repeated the same false assurances. (Supra at Section I.A.2.)

Rather than take any responsibility for his misconduct, Dersovitz incredibly insisted that several investor witnesses had "selective amnesia" (FOF ¶ 474(a)), and he accused another investor of perjury. (FOF ¶ 546.) Dersovitz himself found few witnesses willing to testify on his behalf: not only did Markovic decline to testify, but apparently so too did his CFO, and a person he paid to help him market the Funds to large investors, Randy Slifka.

Dersovitz's aversion to telling the truth shone through at the hearing as well. For example, in an effort to advance an "inability to pay" argument, Dersovitz assured the Court that he never moved assets out of his name while the Commission was investigating him, only to recast his sworn testimony as a "mistake" when confronted with documents proving otherwise. (FOF ¶ 738.)

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[57] Page, 2016 WL 3030845, at *5 (citing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981)) (the "Steadman factors")).

Finally, contrary to any assurances that Dersovitz will conduct his business differently in the future, Dersovitz reflected on his communications with investors and wondered aloud how he could possibly have been more transparent. (FOF ¶ 414.) With that mindset, Dersovitz's testimony that he wants to continue working in the industry (FOF ¶ 19) is particularly troubling, as it would present him with opportunities for future violations without having been chastened by any consequences for his misconduct.[58]

IV. RESPONDENTS SHOULD BE ORDERED TO CEASE AND DESIST FROM VIOLATIONS OF THE SECURITIES LAWS

Respondents also should be ordered to cease and desist from committing (and Dersovitz, from causing) future violations of Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, respectively.[59]

A cease-and-desist order is warranted by the same facts relevant to the Steadman factors set forth above, as well as consideration of "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions."[60] A "single past violation ordinarily suffices to establish a risk of future violations" required to support a cease-and-desist order.[61]

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58 The Court has asked the parties to consider how a bar might impact investors. In light of Dersovitz's testimony that the Funds are essentially "self-liquidating" (FOF ¶ 15), the Division believes a bar would not have any negative impact on the Funds' investors.

59 15 U.S.C. § 77h-1; id. § 78u-3.

60 Hatfield, 2014 WL 6850921, at *10 (citation omitted).

61 optionsXpress, Inc. and Jonathan Feldman, Rel. No. 10125, 2016 WL 4413227, at *34 (S.E.C. Aug. 18, 2016) (citation omitted), order corrected on other grounds, Rel. No. 10206, 2016 WL 4761083 (S.E.C. Sept. 13, 2016).

CONCLUSION

Based on the record evidence, the Division respectfully requests that this Court find that Respondents violated Exchange Act Section 10(b) and Rule 10b-5 thereunder and Securities Act Section 17(a), and impose on Respondents the sanctions described above.

Dated: New York, N.Y.
June 23, 2017

Respectfully submitted,

DIVISION OF ENFORCEMENT

Michael D. Birnbaum
Jorge G. Tenreiro
Victor Suthammanont
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street, Suite 400
Brookfield Place
New York, NY 10281
(212) 336-0523 (Birnbaum)