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 REPLY POSTHEARING BRIEF

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PRELIMINARY STATEMENT

Respondents do not seriously dispute that they repeatedly told investors that their Flagship Funds invested in settled cases and non-appealable judgments with no litigation risk, that these statements were material, and that the Funds' portfolio comprised mostly Peterson, ONJ, and Cohen investments.[1] Respondents also do not dispute that collecting on these assets was contingent on the outcome of legal proceedings contested by adverse parties.

To convince the Court to nonetheless absolve them of liability for fraud, Respondents spend much of their brief recasting their investment strategy. All along, they say, the Funds invested in cases where "three prongs" were present: "(1) an absolute obligation to pay the legal receivable; (2) an identifiable source of funds to make the payment; and (3) a period of time between the imposition of the obligation and the payment of the receivable." Respondents' Post-Hearing Brief ("Resp.Br.") at 9. But Respondents do not point to any offering or marketing document, email, or investor testimony that show Respondents describing their strategy in that fashion. Their ex post rationalization rests solely on Dersovitz's testimony, see Respondents' Proposed Findings of Fact ("Resp. PFOF") ¶31, and on his attorneys' PowerPoint slides.

Respondents need the Court to buy their newly minted portrayal of the strategy because what they disclosed to investors does not reflect how the Funds actually invested their money. Conspicuously absent from Respondents' new description is the feature investors testified was described as the strategy's lynchpin: the absence of continued litigation threatening recovery. By contrast, the record is full of representations distinguishing pro forma proceedings required for collection from contested proceedings Respondents assured investors that the Funds did not encounter. Now, having constructed a portfolio so dependent on disputed litigations, Respondents

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1 Capitalized terms not defined herein have the meaning ascribed to them in the Division's Post-Hearing Brief ("Div.Br.") and Response to Respondents' Brief Regarding Inability to Pay.

quibble over which cases involve "litigation risk" and which involve the supposedly distinct "collection risk." The answer, of course, is that it does not matter. Even if litigation risks at the liability and enforcement stages are assumed different, Respondents told investors the Funds would not take <u>any</u> such risks because theirs was a "post-settlement strategy" where the risks to collection stemmed from sources such as insolvency or attorney theft, not a recalcitrant defendant.

Respondents' artificial distinction between litigation and collection risks is even more illogical when viewed through the lens of the Funds' assets. It is absurd in the context of <u>Peterson,</u> which Respondents described in contemporaneous Iran SPV documents as a "Turnover <u>Litigation"</u> but now say had "no litigation risk." That the <u>Peterson</u> plaintiffs obtained a default judgment in one proceeding before commencing the vigorously contested action required to reduce that judgment into cash does not magically convert <u>Peterson</u> into the kind of case investors were told the Funds would purchase. It is precisely because <u>Peterson</u> was so different that Respondents told many concerned investors that <u>Peterson</u> was "separate" from the Funds. And the ONJ investments further underscore the fallacy of Respondents' new paradigm. Respondents concede the ONJ Cases fail to meet any iteration of their purported strategy, but nevertheless urge the Court to ignore them because they were "workouts," without offering any reason to condone telling investors that the Funds did not take on unsettled matters while <u>continuing to invest</u> in these "workouts."

Respondents' other arguments—offered with a striking dearth of supporting precedent—also fail. Try as they might to marshal evidence of buried clues they insist would have disclosed the truth to especially diligent investors, Respondents cannot overcome that, as a matter of law, breadcrumbs are insufficient to render misstatements immaterial or to preclude a finding of scienter, particularly when, instead of enlightening, these materials further misled investors. For much the same reason, reliance on the "flexibility clause," a boilerplate prospective disclaimer, cannot override specific lies and omissions about investments already made.

The creativity behind Respondents' theories should not distract from the fact that this matter is, essentially, an ordinary offering fraud case. Respondents profited by selling investments based on material representations about the Funds' portfolio they knew were false, and should now be held accountable. They should not be permitted to keep their profits or continue to work in the securities industry, and should face third-tier civil monetary penalties for exposing investors' money to precisely the kinds of risks they assured investors the Funds did not take.

ARGUMENT

I. RESPONDENTS' STATEMENTS AND OMISSIONS REGARDING THE FLAGSHIP FUNDS' INVESTMENTS WERE FALSE AND MISLEADING

Respondents no longer contest that misstatements in marketing materials are actionable. These materials, consistent with Respondents' oral representations and Offering Memoranda, specifically told investors that the Funds purchased legal fees "only from settled cases" "past the point of any potential appeals," and described the Funds' portfolio as invested in 95% "legal fee receivables," defined as relating only to settled matters. See Div.Br. at 6, 8-10. Moreover, Respondents concede they told investors that there was "no litigation risk" in the Funds' investments. See Resp.Br. at 9; see also Div.PFOF ¶¶ 167, 461, 568.

To blunt the force of the foregoing, Respondents posit that language in the Offering Memoranda about "litigation and settlements" overrides inconsistent statements in the marketing materials. Resp.Br. at 5-6. But even if Respondents' incorrect view of the law governed, it would not help them in the context of these Offering Memoranda, which, like the false marketing, unambiguously stated that "All of the Legal Fee Receivables . . . arise out of litigation in which a binding settlement agreement . . . has been reached." Div.PFOF ¶¶ 192-93.

That unavailing argument aside, Respondents devote much of their brief to arguing that their "no litigation risk" statements do not make them liable for fraud, even in light of their investments in the ONJ, Cohen, and Peterson Cases, because Respondents carved out exceptions (as they characterize the ONJ Cases) or because the Peterson and Cohen investments do not have "litigation risk," as Respondents now try to stingily reinterpret those words, but only "collection risk." Both contentions should be seen for what they are: after-the-fact rationalizations that do not relieve Respondents of liability.

A. Renaming the ONJ Cases "Workouts" Does Not Change the Falsity of Respondents' Statements

Respondents acknowledge that the ONJ Cases were not settled (or otherwise finally resolved) and "had litigation risks." Resp.Br. at 22. Given that they also concede telling investors the Funds' assets had no litigation risk, despite knowing the ONJ Cases were not settled, Div.PFOF ¶ 174, that should be the end of the matter: Respondents committed fraud.

Respondents maintain, however, that liability does not follow because (i) their marketing explained that "post-settlement" was only the "primary" strategy, which they claim disclosed the existence of non-settled cases, and (ii) the ONJ Cases were "workouts." Both arguments fail.

First, having insisted a few pages prior that Offering Memoranda govern over inconsistent statements in marketing materials, Respondents cannot now claim that select words in the marketing materials (e.g., "primary") trump specific language in the Offering Memoranda (e.g., "All Legal Fee Receivables..."). Compare Resp.Br. at 5 with id. at 23. Respondents' insistence that the Memoranda control means that, in describing all legal fee receivables as involving settled cases or non-appealable judgments, the Memoranda (together with marketing materials and oral statement disclosing "only" or "solely" settled cases, e.g., Div.PFOF ¶¶ 156-57, 167) deceived investors regarding the ONJ Cases, which involved neither a settlement nor a judgment.

Second, Respondents offer no support for reading the word "primary" as a warning to investors of the existence of receivables in unresolved cases. Katarina Markovic explained that "primary" allowed for lines of credit ("LOCs"), a small portion of the Funds she understood to be different from the "resolved" cases that constituted the balance of the portfolio. Div.PFOF ¶ 165 & n.258. That explanation is consistent with Dersovitz's statements on the recorded Cobblestone call, where he described lines of credit as the only kind of investments the Funds made that fell outside the strategy he described as all settled cases. Id. ¶ 461. In that call, Dersovitz stated: "What we're dealing with primarily, 100 percent, are settled cases." Id. Respondents ask the Court to read "primarily" as creating some other kind of exception for unresolved matters, Resp.Br. at 23, but accepting this contorted reading requires ignoring (i) Dersovitz's words that immediately follow: "So there is no litigation risk in the strategy," Div.PFOF ¶ 461; (ii) Dersovitz's explanation that risks were minimized because defendants in the underlying matters had already agreed to pay, id. ¶¶ 466-68; and (iii) Markovic's assurance that the Funds were dealing with "only settled claims." Id. ¶ 465. Cobblestone's Jason Garlock rejected Respondents' tortured interpretation of their own words, id. ¶ 462, and so should this Court.

Respondents now argue that the ONJ Cases were "akin to an attorney line of credit," Resp.Br. at 2, but that argument is untenable given Dersovitz's testimony that he understood the ONJ investments were not LOCs, Div.PFOF ¶ 174; that nothing in the record described the ONJ Cases as a LOC and the 10% investment in the ONJ Cases far exceeded Respondents' characterization of the LOCs as "de minimis" or as up to 5% of the Funds' portfolio, id. ¶¶ 37, 472; Ex. 39 at 11; and that the Financial Statements specifically list the defendants in the ONJ Cases under "Legal Fee Receivables," not in the separate section for LOCs. Id. ¶¶ 233, 244-45, 247.

Third, Respondents offer no substance behind invoking the word "workout" as some cognizable exception to the rule that one must be truthful in describing a fund's investments. The general warning in the Offering Memoranda that existing positions may go south does not purport to tell investors that the Funds will use new investor money to advance additional funds to already troubled investments. And Respondents' claim that they continued to invest Fund dollars in an effort to save nonperforming assets speaks only to why they deviated from their disclosures, but it provides no basis for continuing to misrepresent how Respondents used investor money.

It is thus peculiar that Respondents point to the AUPs to support the notion that these investments were disclosed as "workouts." The AUPs—not given to prospective investors unless they knew to ask, Div.PFOF ¶¶220—do not ever use the word "workout." See, e.g., Ex. 1431 at 5-6. They do, however, repeatedly call the ONJ Cases "settled." Div.PFOF ¶222. Nor do the AUPs or Respondents ever explain the amounts or nature of receivables that were in need of a "workout." The evidence shows that the Funds bought two receivables at $1.2 million from Beatie & Osborn before the first ONJ Case advance was made, see, e.g., Ex. 71 at 4, lines 1 & 3, but, surely, Respondents are not suggesting that investors would have known that one works out a loss of $1.2 million by advancing ten times that amount, as they did on the ONJ Cases. Div.PFOF ¶37.

B. (Respondents' Newly Minted Three-Prong Strategy Is Unsupported by the Record and Does Not Relieve Them of Liability for Lies about the *Peterson* and Cohen Investments

In their opening argument slides, Respondents' lawyers set forth the centerpiece of their defense: that all along Respondents' investment strategy consisted of funding cases where there was a "right to payment," an "identified corpus of money," and "duration [that] can be analyzed." Resp. Opening Slides 1-2. This newly constructed theory was not seen or heard from again at the hearing—it appeared in no document or communication, and Respondents could not find a single investor who recalled hearing this description—until it conveniently reappeared out of Dersovitz's mouth weeks later. Resp. PFOF ¶32.

Impervious to the fundamental lack of record support for their newfangled explanation, Respondents insist that statements about "no litigation risk" all along meant "no litigation risk with respect to securing the right to payment" (except for the ONJ Cases, which even they dare not contort into their recently conceived paradigm), whereas risks in obtaining turnover of a "corpus of money" are only "collection risks," even if collection happened to involve protracted litigation. Resp.Br. at 9-10. Thus, they conclude, because the defendants in Peterson and Cohen were obligated to pay, the statement that investing in those cases involved no "litigation risk" was accurate. Id. And while Respondents do not define "collection risk," they insist that risks associated with collection proceedings cannot be "litigation risks," because otherwise all receivables would have litigation risk. Id.

As a threshold matter, Respondents' definition of "collection risk" by reductio ad absurdum misses the mark. The Division does not complain about purchases of receivables the collection of which was still subject to any court proceeding. The Division's claims focus on cases still subject to proceedings in which the party adverse to the plaintiff was seeking to avoid payment by availing itself of the legal system—whether at the liability or the collection stage. Respondents themselves defined the proceedings that do not involve "litigation risk" in this manner, when they told investors that the proceedings remaining in the cases they did invest in were ministerial or, at most, involved a third party objector (not the defendant), the objections of whom would lead at most to a higher award. Div.Br. at 10-11. By contrast, contested proceedings, where the defendant uses the courts to fight to keep money out of the plaintiffs' hands, involve "litigation risk" in the common parlance that investors testified they understood. Those proceedings include the Peterson and

Cohen disputes, proceedings even Dersovitz slipped and called "litigation" at the hearing before quickly correcting himself. Div.PFOF ¶ 15 n.21. The artificial distinction Respondents attempt to now draw between "litigation risk" and "collection risk" is one Respondents invented for these proceedings. It was never explained to any investor while Respondents were marketing the Funds.

Respondents nevertheless insist their materials spoke of "collection risks" all along, but their documents highlighted specific kinds of collection risks to the exclusion of the risks Peterson and Cohen presented. The Alpha Presentation, FAQ, and the Offering Memoranda speak of bankruptcy and theft risks. See Resp. PFOF ¶ 36 (citing Exs. 38 at 12; 42 at 4; 66 at 18). When the Offering Memoranda speak of "collection risk" they describe it as a "form of credit risk... relating to the Law Firm." Ex. 63-13. Thus, whatever Respondents want "collection risk" to mean today, they disclosed something materially different to investors in soliciting investments. Indeed, a closer look at how Respondents' *ex post* paradigm fares when applied to the Peterson and Cohen Cases further exposes the weakness of Respondents' new argument.

1. *Collection of the* Peterson *Assets Involved Litigation Risk*

The clearest evidence that collecting on the Peterson investments involved litigation risk (and also undisclosed geopolitical risks) is that Respondents disclosed this risk to Iran SPV investors. See Div.Br. at 30. Respondents argue that the inclusion of such risks in the SPV documents does not establish the materiality of litigation and geopolitical risks. Resp.Br. at 13. But the materiality of those risks was established by the unrebutted testimony of the investors. Div.Br. at 19-21. What the Iran SPV disclosures show is that Respondents were aware that these risks existed and that they were appropriately described as litigation and geopolitical risks.

As if more were needed, the record is awash in other instances that show everyone understood the primary risk inherent in Peterson to be litigation risk. Dersovitz himself thought so, when he wrote in an agreement to purchase Peterson receivables that "collection risks are substantial, including because . . . there is ongoing litigation collateral to each Judgment." Div.PFOF ¶685. His Reed Smith attorneys also thought so, as shown by their explanation that "collection of [Peterson] funds . . . is contingent upon a successful outcome in the Turnover Litigation."[2] Div.PFOF ¶137(a), (f). Respondents' expert David Martin also thought so, testifying that the Peterson assets were "subject to litigation." Id. ¶134. And Judge Forrest, presiding over what Respondents now artfully seek to term the "collection action," described that action as "vigorously litigated." Id. ¶112; see also Div.Br. at 16, 18-19.

Stripped of crafty new trial diagrams, Respondents' defense with respect to Peterson boils down to the notion that, because the case involved a "judgment" and a subsequent court "proceeding," it fits literally within the Funds' documents (at least those that spoke of judgments in addition to settlements), whatever its litigation risks. But "literal truth" arguments have been rejected time and again by the Commission and the courts where, as here, such disclosures are misleading when considered in the context in which they are communicated. See Bernerd E. Young, Rel. No. 4358, 2016 WL 1168564, at *12, n.41 (S.E.C. Mar. 24, 2016) ("[A] literally true statement may nevertheless be fraudulent based on the context in which that statement is made.") (citation omitted); see also Division's Prehearing Brief at 4-5. Here, Respondents described the subsequent proceedings as ministerial and materially different from the Turnover Litigation, and they identified for investors only two collection risks (bankruptcy and theft) that Respondents today correctly point out were not risks that applied to Peterson. Resp.Br. at 15.

Respondents' attempt to convince the Court that the Peterson litigation risks were low or that the Division should have quantified the "magnum" of risk, id. at 19-21, is thus for naught. The question is whether they disclosed an existing material risk, not whether they accurately described

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2 Respondents' response to this argument, that Reed Smith's statements merely speak to "collection risk," Resp.Br. at 19, 21, is circular.

its magnitude. Respondents, in arguing that, over time, "political and legal developments" (the two undisclosed Peterson risks) increased the likelihood that Peterson would collect, id. at 16, admit by implication that those risks existed when they exposed investors' money to that litigation.

2. *The Cohen Assets Were Either Not Subject to a Final Obligation to Pay or Were Subject to Litigation Risk*

The only Cohen investment that involved an obligation to pay at the time of funding (though neither a settlement nor a final judgment, Div.PFOF ¶¶ 51, 54) was Licata. But collecting on that investment had litigation risk from the outset. Respondents paid Cohen's bills for contested legal proceedings needed to clear title on Licata's assets, and did not collect on those advances after Cohen lost the proceedings. Id. ¶¶ 55-60. Respondents' freshly devised three-pronged strategy is just as meaningless with respect to Licata as it is with respect to Peterson.

The WellCare investment, by contrast, involved no final obligation to pay Cohen's client. Div.PFOF ¶¶ 69-73. At best, there was an unresolved legal question as to the relator's rights to share in the amounts WellCare was obligated to pay under its criminal plea with the United States, an issue by definition involving litigation risk, yet another one not resolved in Respondents' favor. Id. Respondents' further stretching of their argument, by contending that the obligation-to-pay prong is satisfied even if the obligation inures to a third party, demonstrates the amorphous nature of Respondents' newly coined description of its investment strategy and why it should be rejected.

The Chau case was also not subject to a final obligation to pay. Div.PFOF ¶ 62. Dismissing the pending appeals in Chau as a "hail-Mary," Resp.Br. at 29, Respondents not only concede that it was not "past the point of any potential appeals or other disputes," but repeat the same misguided argument they make as to Peterson: that because the litigation risk may have been low, there was no litigation risk. That argument logically fails. There are vehicles that ask investors to trust managers to handicap the odds of prevailing in contested cases, but Respondents told investors that the Funds were not such vehicles. Id. ¶¶ 167 (DDQ); 183 (FAQ). As Mantell explained, that distinction mattered because he was willing to take the risk that a manager might misjudge duration, but not that he might be wrong about the merits of a case. Id. ¶¶ 492(c), 638.

Respondents again point to the AUPs with respect to Cohen, but the AUPs also call the Cohen cases "settled," and in fact describe the collection risks associated with Cohen as risks involving litigations (such as bankruptcy proceedings), showing once more that Respondents' recently concocted distinction between collection and litigation risk is not only unsupported by the record, it is contradicted by their own documents. See Div.PFOF ¶ 226 n.348.

Respondents' last-gasp argument, in effect asking what the big deal over the Cohen assets is given that they were purchased years before the period covered by the OIP, misses the point. Investors considering buying into the Flagship Funds cared about what was already in the Funds' portfolio, see, e.g., Div.PFOF ¶¶ 585, 632(a), as it was the risk of those investments (in addition to those the Funds would make going forward) to which their money would be exposed.

C. $ Respondents Affirmatively Misled Certain Investors into Thinking the *Peterson* Case Was "Separate" from the Flagship Funds

Respondents' new paradigm also does nothing to address the falsity of statements Respondents made to investors that the Peterson assets were "separate" from the Funds, or statements respecting the Peterson concentrations. For those, Respondents simply ask the Court to disbelieve the investor witnesses, but offer no compelling reason to do so.

Kyle Schaffer. Respondents never address Kyle Schaffer's damning testimony that, after his firm told Respondents it was interested not in the Iran SPV but only in the "diversified" fund, Respondents repeatedly told him during their very first meetings that the Peterson investments were separate from the Funds. See Div.PFOF ¶¶ 564, 566, 570, 576. Respondents seek to excuse these lies by insisting that Schaffer knew or must have known the truth because he was given access to certain information later. But false statements used to attract investments are violative even when the speaker "later provides enough information for an astute individual to detect its misstatement." ZPR Inv. Mgmt. v. SEC, 861 F.3d 1239, 1250 (11th Cir. 2017) (quoting ZPR Inv. Mgmt., Rel. No. 4417, 2016 WL 3194778, *6 (S.E.C. June 9, 2016)). "The problems caused by a false ad cannot be cured by passing along corrected information to the very customers the company attracted through the misinformation in the first place." Id. (citing SEC v. Morgan Keegan & Co., 678 F.3d 1233, 1253 (11th Cir. 2012)). Here, such materials did not accompany the marketing and offering materials, failed to disclose the truth, and further misled investors. See infra at II.B.

Respondents also cannot explain why, if he knew about the Funds' Peterson investments and sought a diversified portfolio, Schaffer caused his clients to invest in a Fund that was over 65% invested in Peterson, Div.PFOF ¶ 151(f)(iii), while rejecting a Peterson-specific SPV that offered higher returns, id. ¶¶ 690(a)-(b), why he was "floored" when he discovered the truth, id. ¶ 574 n.964, and, most importantly, why would he lie about all of this under oath.

Tiger 21. Though Respondents press the Court to consider five Tiger 21 members as a monolith, two of them—Mantell and Demby (who attended the April 2013 meeting)—testified that they never heard of Peterson before their investment, while three others—Sinensky, Ashcraft, and Wils (who attended other meetings)—testified that it was described to them as "separate." See Div.Br. at 32-33. Respondents urge the Court to discount this testimony because a different Tiger 21 member, Randy Slifka, knew Peterson was in the Funds, and because Markovic believed that Peterson was mentioned at the April 2013 meeting. But there is no evidence Slifka communicated his knowledge to any Tiger 21 investor. Respondents' wishful suggestion that Slifka was conducting due diligence on behalf of Tiger 21 is remarkable given that, unbeknownst to its members, Slifka was secretly on Respondents' payroll, Tr. 3832:14-19, in violation of Tiger 21 rules prohibiting receiving compensation from anyone soliciting Tiger 21 members' investments. See Tr. 601:7—602:4. Nor did Respondents produce Slifka or Markovic to corroborate their theories, which also require accepting that five Tiger 21 witnesses lied that they were deceived.

Respondents also argue that because they mentioned Peterson to Cobblestone, the Court should conclude they mentioned it to everyone, ignoring both that Cobblestone only knew to ask about Peterson because former marketing director Rick Rowella shared with Cobblestone (after his departure from RD Legal) concerns about the Funds' concentrations, see Div.PFOF ¶460 n.707, and that, as a matter of law, the Court need not conclude that Respondents lied to every investor to determine they lied to some of them. See SEC v. Nutmeg Group, LLC, 162 F. Supp. 3d 754, 779 (N.D. Ill. 2016) (telling the truth to two individuals does not relieve defendant of liability for breach of duty to other investors) (citing SEC v. Bolla, 401 F. Supp. 2d 43, 68 (D.D.C. 2005)).

Furgatch. Faced with Furgatch's harmful account of their misrepresentations, Respondents maintain Furgatch perjured himself, suggesting he is not credible because he "bafflingly" testified that he would never invest in matters like the ONJ Cases when he knew RD Legal was in the litigation finance business. Resp.Br. at 37. This is a disingenuous sleight of hand. Furgatch never testified he would not invest in legal receivables for resolved cases—i.e., what Dersovitz told him the Funds invested in. Rather, he explained that, as someone who made his living on the "defense" side, he opposed "actually financ[ing] lawsuits, to enable them to happen." Tr. at 2117:1-21.

In any event, the Court need not trust Furgatch's memory to determine whether Dersovitz lied to him about the Funds' Peterson concentrations: When Dersovitz told Furgatch Peterson was only 10-20% of the portfolio (when, in fact, it was over 70%) Furgatch asked that Dersovitz confirm that representation in writing, and Dersovitz did so. See Div. Resp. to Resp.' PFOF ¶ 108. That lie demonstrates Dersovitz's scienter and his understanding that investors would be displeased with the truth about Peterson concentrations. Respondents offer only that the lie was a "mistake," Resp.Br. at 37, an excuse Respondents tellingly must resort to frequently. See, e.g., id. at 38 (describing "inherent difficulties" in providing accurate concentration numbers); id. at 40 (dismissing as "stray errata" repeated false statements in the AUPs).

Finally, Respondents contend Furgatch was the only one who testified that he had been deceived about the Funds' concentration in Peterson, Resp.Br. at 36, ignoring all the witnesses who were told the Funds were diversified, including those like Demby who were given specific position limiters, see Div.PFOF ¶482(a); see also Div.Br. at 11-12, and others like Geraci who memorialized in writing Respondents' lies about the Peterson concentrations. Div.Br. at 35-36.

II. * ADDITIONAL MISLEADING DISCLOSURES AND BOILERPLATE DISCLAIMERS DO NOT PRECLUDE A FINDING OF LIABLIITY

Unable to disprove the falsity of their statements, Respondents point to materials they claim should have alerted investors to the truth, and invoke the flexibility clause of the Offering Memorandum. As a matter of securities law, both arguments are inapposite. But even if they were legally supportable, the facts of this case make the arguments particularly unavailing.

A. * Investor Due Diligence Is Not an Element of an Enforcement Action

While Respondents acknowledge that the law offers no support for a defense to fraud rooted in investors' due diligence, see Div.Br. at 23-24, they nonetheless inconsistently argue that if any investors did not know about the Funds' investment in Peterson, it was because of their own investigative failures. Resp.Br. at 30. Certain supposedly available materials, Respondents insist, preclude a finding of materiality or scienter. Id. at 7-8, 30-36.

As a threshold matter, Respondents never dispute that reliance and investor due diligence are not elements of a Commission action. See SEC v. Apuzzo, 689 F.3d 204, 213 (2d Cir. 2012);

see also Div.Br. at 24 n.17 (collecting cases). They simply make no mention of these Commission cases and rely instead on inapposite private securities suits. Resp.Br. at 5 n.5.

And Respondents' drive-by citation to Flannery v. SEC, 810 F.3d 1 (1st Cir. 2015)—a case specifically distinguished by the Eleventh Circuit in affirming the Commission's ZPR decision—also does not support their defense. In Flannery, the truth had been disclosed to investors before the misleading material was distributed. See ZPR Inv. Mgmt., 861 F.3d at 1250-51 ("Focusing on the time when misrepresentations were made is especially important where, as here, the context of the false statements is advertising to attract new investors."). Here, by contrast, Respondents' lies were communicated prior to Respondents providing any of the documents they mistakenly claim disclosed the truth to investors. Div.PFOF ¶¶ 220, 231, 265, 272, 320. And as in ZPR—and unlike Flannery—Respondents' lies about "all of the [Funds'] legal fee receivables," whether in the Offering Memoranda or documents like the DDQ, supra at 3, purported to answer the question of how the Funds invested their money, not present an example that might prompt further inquiry. ZPR, 861 F.3d at 1251. Thus, the many investors who did extensive due diligence, such as Burrow, Condon, Levenbaum, Schaffer, Hutchinson, and Young, Div.PFOF ¶¶ 349-53, 355, 357, 368, 370-72, 377-83, 564-70, 573, 590, 594, were also successfully deceived as to certain of the Funds' investments.

Respondents' claim that they made information available had the investors asked also does not negate scienter. Were this not the case, a wily respondent would always be able to bury disclosures in documents on which potential investors were unlikely to focus, then argue that he could not have meant to deceive investors because he put the information somewhere else. The Commission rejected this very argument in Dolphin and Bradbury, Inc., Rel. No. 8271, 2006 WL 1976000, at *11-12 (S.E.C. July 13, 2006), aff'd sub nom. Dolphin and Bradbury, Inc. v. SEC, 512

F.3d 634 (D.C. Cir. 2008), which Respondents also neglect to address. Respondents' argument fails because asset managers surely recognize, as courts do, that once a prospective investor is lured to invest based on lies communicated during initial interactions, even diligent investors will not detect the misstatement. ZPR, 861 F.3d at 1250. Indeed, Dersovitz admits understanding that the misleading materials he urged RDLC personnel to disseminate "crystalize[d] for many people exactly what it is [Respondents] do." Div.PFOF ¶487. To permit Respondents to skirt liability because they "could not have" meant to deceive all of the individuals they in fact deceived with the very documents they understood investors paid close attention to is another way of placing the burden to later uncover the truth on the investor.

The same goes for Respondents' statement that they were inviting inquiries, waiting for the right question to be asked. Resp.Br. at 3. "[A] willingness to disclose is a poor substitute for actual disclosure [and] the law does not put the onus on investors to seek out disclosures." Nutmeg Group, 162 F. Supp. 3d at 779-80; see also Dolphin and Bradbury, 2006 WL 1976000, at *12. This is particularly true where, as here, Respondents pummeled investors with a drumbeat of misleading statements—including the Alpha Generation presentation, FAQ, DDQ, the Offering Memoranda and oral misstatements—to cement investors' views of the Funds before they ever saw or heard the (also misleading) information Respondents now claim negates their scienter, see, e.g., Div.PFOF ¶¶623; 623(a)-(d) (explaining consistent misrepresentations across different materials received before additional inquiries), and where Respondents then affirmatively misled certain investors who asked questions. Div.Br. at 35-37.

B. Other Documents Further Misled Investors

Respondents' "due diligence" defense also fails because the additional disclosures they point to did nothing but further mislead investors in the following ways, all of which Respondents ignore in their brief:

- —The AUPs and the Financial Statements. These documents falsely called the Cohen, ONJ, and Peterson Cases "settled," the AUPs did not discuss any Peterson plaintiff position, Div.PFOF ¶¶ 222, 226-28, and the Financial Statements did not specifically identify the existence of Peterson positions in the Funds. Id. ¶¶ 237-41, 244-45.
- —Lotus Notes. No investor other than Respondents' Chief Operating Officer Hirsch testified to having been given access to the full Lotus RDLF Document Library before they invested; testifying investors were directed pre-investment to a Demo Library that did not mention the investments at issue, id. ¶¶ 264-65, 272, 275-77, and access to Lotus Notes was removed for most investors around the time the Funds' exposure to Peterson grew even larger. Id. ¶¶ 265-70.
- —The Citibank Memo. This document was not distributed to investors, referred to the Peterson Case as settled, did not specify which RD Legal fund had invested in the matter, and identified "Citibank" as the obligor when reference to Citibank as an obligor was removed from the Financial Statements. Id. ¶¶ 315-18(b), 321.
- —The two-page Iran SPV brochure. Respondents argue that this document's statement that "RD Legal had deployed" funds into Peterson should have disclosed the truth to investors, but the document did not specify which RD Legal fund had invested in Peterson. Respondents' retort—that, because the Iran SPV did not close until 2013, the brochure must have meant the Flagship Funds to investors—is untenable. Investors, most of whom were not interested in any Iran-specific opportunity, did not know when or whether the Iran SPV closed, and the brochure was marketing that very SPV. Id. ¶¶ 327, 330-32. Markovic's obliquely worded email to certain already-existing investors, which spoke vaguely of "an opportunity separate" from the Flagship Funds in marketing a separate Iran SPV, does not support any defense for that same reason. Ex. 361.

The foregoing are the kinds of misleading statements upon which fraud cases are built. That Respondents cling to them as exculpatory underscores the misleading nature of their other materials and statements.

C. The "Flexibility Clause" Does Not Cure Respondents' Affirmative Misrepresentations and Omissions

While Respondents acknowledge this case is not about what instruments they were permitted to buy as a contractual matter under their Offering Documents, Resp.Br. at 5, they nonetheless joust with that very strawman, claiming that their much-discussed flexibility clause permitted the Peterson, ONJ and Cohen investments. Id. at 6-7. But whether the clause permitted Respondents to make these investments is beside the point. The only question for the

Court is whether, as a matter of securities law, the clause precludes a finding that Respondents made actionable, materially misleading, statements. Unrebutted by Respondents is the basic proposition that, to do so, disclaimers must not be boilerplate or generic, but rather specific enough to cure the misstatements. See Div.Br. at 22. Accordingly, the Court need only decide whether the flexibility clause specifically explained to investors that the Funds had already invested in cases with the kinds of risks not disclosed to investors. The clause clearly did not do so.

Indeed, investors called by the Division and by Respondents agreed that the flexibility clause was "boilerplate" found in most offering memoranda. Id. at 22; see also Div.PFOF ¶¶ 653, 653(a)-(b). In light of the more specific statements in the Memoranda (and littered throughout other communications) that "all" of the receivables arise from settled claims, the flexibility clause hardly signaled that Dersovitz had already purchased anything other than those "all" receivables. It is thus not surprising that investors such as Respondents' witness Young, who had read the clause, were not aware when they invested that the Funds had already funded matters like Peterson. Div.PFOF ¶ 654.

Respondents are mistaken that this analysis would "expunge" the clause from the Offering Memoranda. Resp.Br. at 25. Investment managers may tell investors they previously invested in certain type of cases while disclosing that they might, later, take advantage of different opportunities. But the securities laws do not permit what Respondents are attempting to do here, to lie about investments the Funds had already purchased, and intended to continue purchasing—assets Respondents knew fell outside the rubric of their documents' asset descriptions, requiring invocation of the clause. E.g., Div.PFOF ¶¶ 35, 150, 659.

D. Respondents' Remaining Arguments Are Unavailing

Fund Returns. Early and often, Respondents point to the Funds' paper returns (while also complaining of Fund "losses") as a defense. Resp.Br. at 1, 8, 49. But the Commission need not wait until an investment has gone sour to bring a fraud suit, and investor loss is not an element of an enforcement action. Gebhart v. SEC, 595 F.3d 1034, 1040 n.8 (9th Cir. 2010).

Respondents' Supposed Good Faith in Managing the Funds. Also irrelevant are Respondents' assertions that they managed the Funds "carefully" and in good faith, Resp.Br. at 4, 5, 15, or that they viewed Peterson as the "best trade in the book" and assured themselves of sufficient collateral to collect should the litigations in which they invested not go their way. Id. at 17-18, 26. Not only was the availability of such supposed collateral questionable and subject to additional litigation risk, Div.PFOF ¶¶46, 57-58, a subjective belief that an investment will turn out well is not a defense. See Div.Br. at 35 (citing Lawrence M. Labine, Rel. No. ID-973, 2016 WL 824588 (Mar. 2, 2016)). The Division does not bring cases to second-guess the business judgment of an investment manager, but to ensure that investors receive full and accurate information for their decisions. Cf. United States v. Leonard, 529 F.3d 83, 91 (2d Cir. 2008) (no instruction given to jury that good faith belief in the scheme would be a defense where defendants "depriv[ed] investors of the 'full information' they needed").

Consulting with Professionals. Respondents argue that because they hired professionals to review the marketing materials, this diminishes their scienter. Resp.Br. at 43-44. But Respondents tellingly do not point to a single fact indicating that any professionals—let alone attorneys—provided them with any advice whatsoever concerning the accuracy or legality of their disclosures. See id. (citing only Resp. PFOF ¶49 (describing retention of professionals)). To the contrary, the professionals whom Respondents employed testified that it was not their job to pass on the adequacy of Respondents' disclosures and that Respondents never provided them with sufficient information to do so, and demonstrated a striking misunderstanding of the Funds' actual investments. See Div.PFOF ¶¶331(a), 700-01, 703-05; see generally Div.Br. at 38-40.

Respondents' Negligence. Respondents claim expert testimony is necessary for the Division to establish Respondents' duty of care to tell investors the truth. Resp.Br. at 44-45. But as this Court recently noted, while experts might be helpful where complicated fact patterns make standards of care difficult to ascertain, that is not the case in a "garden-variety securities fraud case." Donald J. Lathen, Rel. No. ID-1161, 2017 WL 3530992, at *48 (Aug. 16, 2017). Respondents also rely upon SEC v. Ginder, 752 F.3d 569 (2d Cir. 2014), see Resp.Br. at 44-45, in arguing they cannot be found negligent because the Division here focused on facts supporting Respondents' knowing misrepresentations. But Respondents are liable both for violating their duty to be truthful with investors and for their scienter-based fraud. In Ginder, the Court noted the "absence of any evidence of negligence" and explained that under the complicated facts of that case, defendant's standard of care was unclear. Id. at 575-76. That is not the case here, where Respondents' duty—to tell the truth—is unambiguous, and the evidence that they violated that duty is overwhelming. Respondents were at the very least reckless, and plainly negligent, when, after learning as early as 2012 that some investors were surprised to discover that Peterson was in the Funds, e.g. Div.PFOF ¶¶ 373, 410-16, they continued to repeat the same statements they understood had deceived investors. Div.Br. at 37.

III. RESPONDENTS' MISTATEMENTS AND OMISSIONS WERE MATERIAL

Respondents have little to say about the overwhelming evidence that the foregoing misstatements and omissions were material. See Div.Br. at 20-21. For the ONJ Cases, they argue that a 10% position is not large enough to contradict their description of the Funds, an unavailing retort given the five percent threshold often used as a "starting place" for immateriality, Litwin v. Blackstone Group, L.P., 634 F.3d 706, 713, 717 (2d Cir. 2011) (citation omitted), and given the parade of investor testimony that they cared about this investment. Div.PFOF ¶¶ 632, 632(a)-(d).

And they complain that no investor testified specifically about Cohen, even though most investors testified that taking "no litigation risk" was the key factor in their decision to invest. Div.Br. at 20.

Finally, while not disputing the materiality of Peterson, Respondents urge the Court to ignore the avalanche of investor testimony that they would not have invested had they known about Peterson concentrations, and to instead believe their expert that the concentration in Peterson reduced risk in the portfolio. Resp.Br. at 18-19. Metzger, however, acknowledged that his conclusion hinged on accepting as true Respondents' contention that Peterson involved no litigation risk, Div.PFOF ¶ 721 n.1281, and Martin conceded that the investments were correlated. Tr. 4152:3-24. Respondents' contrary position is untenable given that (i) all Peterson receivables depended on the same threshold event (success of the Turnover Litigation), (ii) Respondents reported Peterson as a unitary investment, Div.PFOF ¶¶ 236-41, and (iii) RDLC's Chief Operating Officer Hirsch warned that Dersovitz was putting the firm at risk by investing so much in Peterson because "people don't want to be in a fund that has that level of concentration." Id. ¶ 691.

IV. RESPONDENTS SHOULD PAY FULL DISGORGEMENT AND THIRD-TIER CIVIL PENALTIES AND DERSOVITZ SHOULD BE BARRED

Disgorgement. Respondents' argument that disgorgement is impermissible after Kokesh v. SEC, 137 S.Ct. 1635 (2017), is incorrect. The Supreme Court in Kokesh declined to address "whether courts possess authority to order disgorgement in SEC enforcement proceedings." Id. at 1642 n.3 (emphasis added). But the Commission unquestionably has statutory authority to order disgorgement, regardless of whether disgorgement is a penalty, pursuant to Exchange Act § 21B(e). 15 U.S.C. § 78u-2(e) ("In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission . . . may enter an order requiring accounting and disgorgement.").

Respondents do not address, and thus concede, that Dersovitz obtained over $8 million from the Funds during the time in question, see Div.Br. at 42; Div.PFOF ¶ 736, and offer no argument why the Court should not order him to pay back those ill-gotten gains beyond an appeal for a credit for family funds Dersovitz loaned various RD Legal entities hoping to keep those companies afloat. As set forth in the Division's response to Respondents' inability to pay briefing, that argument is entirely unavailing.

And Respondents are flatly wrong that a Court may only order disgorgement of proceeds from testifying investors. See, e.g., SEC v. Nadel, (WFK) (AKT) 2016 WL 639063, *4,*11 (E.D.N.Y. Feb. 11, 2016) (ordering disgorgement of all funds obtained from fraudulent enterprise including from investors who did not testify). Their plea for deductions of the Funds' expenses is equally mistaken, particularly given that they decided to structure the Funds to entice investors by the promise that RDLC would be responsible for those charges and have now failed to show which RDLC expenses are properly attributed to running the Funds and which to running Dersovitz's multiple other enterprises. See, e.g., Div.PFOF ¶¶ 739-40.

Civil Penalties. The Division has established both actual losses and risk of loss. Three investors have not received back their principal despite it being overdue. Div.PFOF ¶¶ 366, 536, 582. And as set forth above, investing in the ONJ, Cohen and Peterson matters exposed investors to the very kinds of risk of loss they were assured the Funds would not take. That Respondents, long after the ONJ and Cohen Cases were resolved, still have not collected amounts equal to their advances in those cases, highlights those risks of loss. Div.PFOF ¶¶ 44, 82. Mitigating these losses by "selling" some of the ONJ Cases to CCY does not negate the risk that existed in such unsettled cases on the day the investment was made. Finally, Respondents astoundingly argue both that their Funds—comprising, by 2015, almost entirely Peterson, Osborn, and Cohen investments—did not present any risk of loss, then undermine that argument by maintaining that Dersovitz needed to access his family's money to cover "the Funds' losses" in 2015 and 2016. Resp.Br. at 49; see also Respondents' Br. on Inability to Pay at 1, 4-5.

Associational Bars. Respondents urge the Court to permit Dersovitz to stay in the industry because he will otherwise not be able to manage the Funds, ignoring Dersovitz's testimony that the Funds' assets are self-liquidating, Div.PFOF ¶ 15, and that, as a matter of law, it is precisely against individuals who profess a desire to remain in the industry that a bar is most needed. Div.Br. at 46-47. And Respondents' admonition that they have "never been accused of misappropriating investor funds," Resp.Br. at 49, is too cute considering the bevy of investor suits against them. See, e.g., Ex. 475 at 8, 10. The egregiousness of a years-long fraud, coupled with Respondents' insistence that everybody but they—e.g., investors, the Division—are at fault, see Div. Br. at 46, further demand a bar.

CONCLUSION

Based on the record evidence, and on the arguments advanced in its opening post-hearing brief and above, 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.
August 25, 2017

Respectfully submitted,

DIVISION OF ENFORCEMENT

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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of August, 2017, the attached Division of Enforcement's (1) Reply Posthearing Brief, and (2) Response to Respondents' Proposed Findings of Fact, were served on the following counsel of record and other persons entitled to notice:

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