UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19576

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In the Matter of

PORTFOLIO ADVISORS ALLIANCE, INC.,

Respondent.

ANSWER TO ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS

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Respondent Portfolio Advisors Alliance, Inc. ("Respondent" or "PAA"), by and through his attorneys, The Roth Law Firm, PLLC, hereby submits his Answer to Order Instituting Administer to the Summons and Complaint (the "Complaint") as follows:

PRELIMINARY STATEMENT

Respondent does not deny that on October 1, 2019, a final judgment was entered, enjoining Respondent from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Portfolio Advisors Alliance, Inc., Howard J. Allen III and Kerri L. Wasserman, Civil Action Number 16-CV-828, in the United States District Court for the Southern District of New York (the "Civil Action"). Nor does the Respondent deny that the Securities and Exchange Commission's ("SEC") Complaint alleged what the SEC alleges that it alleged in the Order Instituting Administrative Proceedings.

However, under the unique facts and circumstances of this case, Respondent denies that any remedial action is appropriate or in the public interest pursuant to Section 15(b) of the Exchange Act.

UNDERLYING FACTS

At all relevant times, Portfolio Advisors Alliance, Inc. ("PAA") was a registered broker-dealer. In 2010, an entity called American Growth Funding II, LLC's ("AGF II"), who was seeking to raise money from investors pursuant to a private placement memorandum (the "2011 PPM"), hired PAA in connection with the raise.

PAA Hires Corporate Securities Counsel

PAA hired corporate securities counsel to review the entire 2011 PPM before disseminating it to any potential investors. Specifically, the trial record shows that Howard Allen (PAA's owner) ("Mr. Allen") contacted Martin Kaplan, Esq., the managing partner of Gusrae, Kaplan, Bruno & Nusbaum PLLC ("GKBN") (T. 989:11-13),[1] and informed him that AGF II was PAA's "first deal" since Mr. Allen had purchased PAA, and PAA wanted "the PPM reviewed, front, back, you know, whatever you have to do to make it compliant." T. 1026:2-13.[2] Mr. Allen instructed Mr. Kaplan to "make sure there were no inconsistencies" in the PPM and that GKBN should "do whatever due diligence, whatever work that the attorney does to make sure that this is good to go out to my investors." T. 1026:14-18 (emphasis added). Mr. Allen did not limit the services that GKBN should do "in any way." T. 1026:19-21. Mr. Kaplan than assigned a securities attorney at GKBN, Andrew Russell, Esq., to perform the requested services. T. 982:17-18, 983:15-16, 989:14-16, 1026:22-25.[3]

It is indisputable, based on the record, that Mr. Russell knew that AGF II was a new company with no operating history. T. 991:18-20. It is also undisputed that Mr. Russell

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[1] All references to the trial transcripts, which will be provided at hearing, are cited as T.___.
[2] Mr. Allen considered GKBN competent to perform the legal services, as GKBN had previously provided counsel with respect to the purchase of PAA, a registered broker-dealer. T. 1025:19-1026:1.
[3] PAA paid GKBN between $40,000 and $50,000 for its services in connection with AGF II. T. 1027:8-13.

reviewed the entire AGF II PPM -- from "cover to cover" -- "at least once." T. 992:7-11. It is further indisputable based on the record that the PPM Mr. Russell reviewed and of which he provided ***numerous*** hand-written comments throughout (T. 986:8-15), specifically stated that AGF II had "no performance history to which a potential Investor may refer in determining whether to invest" (PAA Exh. 13, PPM pg. 26) (under the section entitled "***The Company and Manager have no Operating Histories***") (emphasis in original). This same language appears in every draft PPM reviewed by Mr. Russell (*see*, PAA Exhs. 13, 17, 21, 22, 25) and in the PPM that Mr. Russell approved for distribution, which he labelled, "final." PAA Exh. 23.[4]

Defendants in the Civil Action thought (as it turns out, incorrectly) that the 2011 PPM would not contain any inconsistencies.[5]

The Underlying Contents of the 2011 PPM

American Growth Funding II issued a private placement memorandum on February 11, 2011 (the "2011 PPM"). The 2011 PPM related to the sale of up to $50,000,000 in units consisting of 12% preferred limited liability company interests in the company and provided that the offering would cease on February 24, 2012, unless terminated earlier. A second PPM for the sale of the units was issued on February 25, 2012, with a termination date on or before February 25, 2017 (the "2012 PPM"). A third PPM was subsequently issued on March 21, 2014, with the offering extended to a time not later than December 31, 2014 (the "2014 PPM"). The first two

[4] Each of the drafts, and the "final" version of the PPM, also contain numerous other relevant disclosures, including that, "[t]he Offering is being made for the purpose of capitalizing the Company" (PAA Trial Exh. 13, PPM pg. 4), "[t]he Company expects to commence business as soon as possible following the initial closing..." (*Id.*, pg. 19), "[t]he Company expects to make monthly distributions..." (*Id.*, pg. 20), "[t]he Company and the Manager are newly formed and have no history of operations" (*Id.*, pg. 21), "[t]he Manager has not Identified any Advances to be Funded by the Company" (*Id.*, pg. 26).

[5] One issue that Defendants in the Civil Action will be appealing before the Second Circuit Court of Appeals, is the trial judge's refusal to give Defendants a jury charge regarding the reliance on the advice of counsel defense. In light of the evidence (including the judge's prior ruling specifically stating that such a defense was for the trier of fact to decide), Defendants believe the court's ruling was erroneous and severely prejudicial.

PPMs are substantially similar in content, although there are minor differences in one part of the PPM that have received much attention in this case. The description of the PPM that follows applies primarily to the 2011 PPM, although it is generally applicable to the 2012 PPM as well, given the similarity in their content.

The Investment and Offering Documents

Preparation of the 2011 PPM

The 2011 PPM states on the cover that it was "prepared solely by AGF II" for the use of prospective investors considering the purchase of the units being offered. Testimony from Ralph Johnson, the Chairman of AGF II, indicates that the first draft of the PPM was prepared in February 2010, almost a year before the 2011 PPM was issued. Johnson indicated that the initial draft was based on a template, and was put together by outside counsel. Johnson then forwarded the draft to Allen. Overall, the testimony of the parties makes clear that Johnson and AGF -- and not the Defendants -- had primary responsibility and ultimate authority over the contents of the 2011 PPM, with Johnson making the final determinations on its content.

The Anticipated Business of the Newly Formed AGF II

The 2011 PPM states that AGF II was formed for the primary purpose of supporting the growth of small businesses by providing them with financing through the Company's suite of factoring and other loan products.

Throughout the 2011 PPM, it is disclosed in no uncertain terms that the Company and the Manager are newly formed entities with no operating history. *See, e.g.*, pgs. 5 ("[t]he Offering is being made for the purpose of capitalizing the Company..."); 19 ("[t]he Company expects to commence business as soon as possible following the initial closing at which the Company approves the first subscription of units"); 22 ("[t]he Company and the Manager are newly formed

and have no history of operations"); 26 ("[t]he Manager has not Identified any Advances to be Funded by the Company").

In addition, under a section entitled, "***The Company and Manager Have no Operating Histories***" (emphasis in original) the 2011 PPM states:

> The Company and the Manager are newly formed entities with no operating histories, and, accordingly, no performance histories to which a potential Investor may refer in determining whether to invest in the Company. The Company's prospects must be considered in light of the risks, expenses and difficulties frequently encountered by new ventures, including the reliance of the Company on the Manager and its key personnel and other factors.[6]

The 2011 PPM further discloses in the risk and conflict of interest sections of the PPM that the Manager or its affiliates may provide financing (*i.e.*, advances) to the same borrowers as AGF II or to competitors of such borrowers, and could do so without sharing such opportunities with AGF II -- and also discloses that the Manager might pursue "co-investment, joint venture or similar arrangements" between AGF II and such other entities, implicitly as a way of mitigating such risks and conflicts of interest. *Id.*, pgs. 29, 33-34.

Finally, the 2011 PPM makes clear that AGF II's Manager has sole discretion over every and all matter concerning the company's operations and performance. *See, Id.*, pgs. 28 ("[t]he Manager will have sole discretion to identify, obtain and dispose of Advances for the Company's portfolio, subject to the terms of the Company's Operating Agreement, which grant the Manager broad discretion"); 36 ("[e]ach Investor in the Company will have a capital account maintained by the Manager..."), 43 ("[t]he Manager is responsible for all credit decisions, making, acquiring and disposing of Advances and making all business decisions overseeing all operations of the Company.").

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[6] *Id.*, pg. 27.

Eligible Investors; Reliance Solely on the PPM for Investment Decisions

The 2011 PPM states that the units were to be offered only to "accredited investors," as defined in Rule 501 of Regulation D.[7] Accompanying the PPM was a "Confidential Suitability Questionnaire and Profile" that requested information regarding investor income and net worth, and required specific representations intended to assure that the prospective purchasers of the units were in fact accredited investors. *Id.*, pg. 90. There is nothing in the trial record indicating that any of the AGF II investors were not accredited investors.

Prospective investors were also required to make several additional representations in writing, including that: they have received, read and fully understand the PPM and are basing their decision to invest "solely on the information provided in this Memorandum"; they understand that an investment in the units involves substantial risks; they are committing to investments that are not readily marketable and are not disproportionate to their individual net worth; and they are willing to accept the risk of losing their entire investment in the units.[8]

Disclosures of Risks and Conflicts of Interest

The 2011 PPM is replete with disclosures warning investors of the risks involved in investment in the units.[9] A separate, seven-page section of the PPM is devoted to a discussion of

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[7] *Id.*, pg. 3, 17-18.

[8] *Id.*, pgs. 7-8. The caution to investors to rely solely on the PPM is emphasized elsewhere in the PPM: "No person is authorized to give any information or make any representation not contained in this Memorandum and any information or representation not contained herein must not be relied on." *Id.* "The Offering is made only by means of this Memorandum. Except as described herein, neither the Company nor the Manager has authorized the use of other sales materials in connection with the Offering. No dealer, salesman or other person has been authorized to give any information or to make any representations other than those contained in this Memorandum, and, if given or made, such information or representations must not be relied on." *Id.*, pgs. 45-46.

[9] It states, among other things: "Investment in the units offered hereby involves a high degree of risk and immediate substantial dilution" (*Id.*, pg. 4). "An investment in the Units is speculative and involves a high degree of risk . . . . You should not invest in the Units unless you are in a position to lose your entire investment" (*Id.*, pg. 6); "The securities described herein are speculative and involve a high degree of risk. There is no public market for such units. Each investor will therefore be required to hold the units for an indefinite period of time and continue to bear the economic risk of a total loss of such investment." *Id.*, pg. 9.

"Risk Factors" related to investment in the units.[10] The Risk Factors section contains an extensive discussion of conflicts of interest related to the offering.[11] Information regarding the conflicts of interest involving the Manager and its affiliates, and PAA and its control person and affiliates, is further provided in a separate two-page section (*Id.*, pgs. 33-34), and these various conflicts of interest are specifically referenced in other parts of the PPM as well. *See, e.g., Id.* pgs. 6, 21,45. The PPM states that an investment in the units is intended to be a long-term investment.

The units were subject to a two-year lock-up period (*Id.*, 48-50), and could not be redeemed before the end of the lock-up. *Id.* An investor seeking to redeem units was required to provide a redemption notice between 180 and 210 days before the end of the lock-up period, and Units not redeemed were subject to a new two-year lock-up period. *Id.*, 20-21, 48-50.

Forward-Looking Statements

The PPM states that all matters it discusses "which constitute forward-looking information (generally indicated by words such as 'believes', 'anticipates', 'expects', 'intends', and words of similar import) involve risks and uncertainties, including but not limited to

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[10] *Id.*, at pgs. 26-32. Among other things, this section provides disclosures on the following matters: the manager has not identified any advances to be funded by the Company; many obligors will be small businesses with limited resources, and there may be a risk of non-collection of advances made to them; the Company and Manager have no operating histories; regulations, including usury laws, may impose various requirements, interest ceilings or penalties; advances may be secured or unsecured, and even where advances are secured, pledged collateral may be insufficient in the event of a default, or collection could be delayed or impaired. *Id.*

[11] *Id.*, pgs. 28-30. It notes that the Company is solely dependent on the Manager for its success. *Id.* It further discloses that Ralph Johnson, Chairman of the Company and a principal of the Manager, is also a principal and Board of Managers member of other American Growth Fund investment pools and entities with similar investment philosophies. *Id.* It discloses that affiliates of the Manager may provide investment banking, brokerage, financial, investment, management or other services to the Company and/or borrowers from the Company or competitors of borrowers. *Id.* In this connection, the 2011 PPM discloses that the Manager or its affiliates may enter into co-investment, joint venture or similar arrangements with AGF II. *Id.* It adds that, if they do so, those arrangements will be as near as possible on an arms' length basis. *Id.*

economic, competitive, governmental and technological factors affecting the Company's operations, markets, products, services and other factors discussed herein by the Company."[12]

The Operating Agreement and Other Investor Materials

As stated above, in several places the 2011 PPM makes it clear that investors seeking to purchase the units should rely solely on the information contained in the PPM itself. Other materials, however, were provided to prospective investors along with the PPM, including a copy of AGF II's Operating Agreement, a Confidential Suitability Questionnaire and Profile, and a Subscription Agreement. The 2011 PPM makes reference to the Subscription Agreement in describing the procedures for prospective investors to subscribe to the offering.[13] The PPM also provides a brief summary of the Operating Agreement, and urges prospective investors to review the entire Operating Agreement before subscribing so that investors could understand AGF II's obligations going forward. *Id.*, pg. 49.

Disclosures Regarding Audited Financial Statements

Much of the SEC's case against the Defendants in the Civil Action turns on ***a single sentence*** on the last page of the fifty-three (53) page PPMs. Under a section entitled "Method of Accounting," the 2011 PPM first states: "The Company will maintain its books and records and report its income tax results according to the cash method of accounting." Thereafter follows the critical sentence: "As has been policy in the past, the Company's annual financial statements will continue to be audited by an independent firm of certified public accountants." *Id.*, pg. 53. As a newly formed entity with no operating history, however, AGF II obviously did not have any

[12] *Id.*, pg. 11. It goes on to state that, "there can be no assurance that the forward looking information contained in this Memorandum will in fact transpire or prove to be accurate." *Id.*, pg. 12.
[13] *Id.*, pg. 46.

financial statements (let alone "annual" audited financial statements) prior to the 2011 PPM. Thus, this can only reasonably be viewed as forward-looking statements of intent.

In the 2012 PPM, the second sentence is revised to read as follows: "As has been policy in the past, the Company's annual financial statements will continue to be audited by an independent firm of outside accountants." *Id.*, Exh. 16, pg. 53. A third sentence is also added: "In the past, the company has used G. Carapella & Associates, conducting business in New York for over 30 years, and will likely continue to do so." *Id.*[14] The PPM does not indicate, however, whether the statement about Carapella related to the maintenance of the Company's books and records and reporting of income tax results, or to the auditing of its annual financial statements, or both. The SEC conceded at trial, however, that George Carapella had previously provided tax preparation services to AGF II. Allen, however, played no role in Carapella's inclusion in the 2012 PPM.

Neither PPM's disclosure provides any information on the timing of the audits or their delivery to investors, nor makes any references to the Operating Agreement, which contains a far more detailed covenant regarding preparation and furnishing of audited financial reports.[15]

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[14] By the time the 2012 PPM was issued on February 25, 2012, the Company had approximately a year of operating experience under its belt; however, AGF II's "annual financial statements" had not yet been completed (and certainly could not have been audited by February in any event), so the statement that the annual financial statements "will continue to be audited" "as has been the policy in the past" (2012 PPM, pg. 53) remained a forward-looking statement of intent.

[15] If AGF II had wished to incorporate the Operating Agreement's language by reference into the 2011 and 2012 PPMs, it easily could have done so. The 2011 and 2012 PPMs were followed by a third PPM in 2014 (the 2014 PPM is not the subject of the SEC's enforcement action). In sharp contrast to the 2011 and 2012 PPMs, which mentioned nothing about the accounting provisions in the Operating Agreement, the 2014 PPM's accounting disclosures are drawn almost entirely from the Operating Agreement, which is referenced explicitly. Decl. Roth, Exh. 1 pgs. 40-41. There are no separate disclosures regarding the Company's financial statements in the 2014 PPM other than the references taken from the Operating Agreement.

Ongoing Due Diligence and Assistance of Securities Counsel with Respect to Audit of Financial Statements

In connection with the representation that AGF II would have audited annual financial statements, the PPM did not contain any time frame within which the audit would be conducted.[16] However, the Operating Agreement (an obligation of AGF II on a going-forward basis) explicitly contemplated that audits would be performed within 90 days of the end of the fiscal year.[17] PAA, through Allen, pushed for the audit.

For example, the SEC conceded in the Civil Action that beginning "[i]n December 2011, Allen contacted the accounting firm Raich Ende Malter & Co. LLP regarding a potential audit for AGF II." Then, in early May 2012, Allen sent an email asking Johnson to send PAA a copy of AGF II's 2011 annual audited financial statements. Subsequently, on May 21, 2012, Johnson emailed Allen year-end financial statements, but they were not audited. From that point forward, the Civil Action record demonstrated that Allen prodded Johnson to retain the services of various accounting firms to conduct audits of AGF II's year-end financial statements. In a couple of instances, Allen himself identified potential candidates to complete the audits and directed them to Johnson. The record evidence showed, for example:

- In early May 2012, Allen had discussions with Victoria Pellegrino of Raich Ende & Malter about auditing AGF II's financials. This was a follow-on to a conversation they had on the topic of auditing AGF II held in December 2011, before AGF II's 2011 fiscal year had ended.

- In March 2013, Allen had discussions with Howard Hoff, from the accounting firm of Marks, Paneth, Shron, about auditing the financials, and put Hoff in touch with Johnson. In late March, Hoff indicated to Allen that Johnson had decided to work with another accounting firm, Citrin Cooperman.

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[16] *See,* 2011 PPM, pg. 53 and 2012 PPM, pgs. 53.

[17] At the time of the 2012 PPM (February 25, 2012), the first annual audited financials were not yet due under the Operating Agreement (*i.e.* ninety days after the end of the Company's first fiscal year).

- In May 2013, a series of email communications were made from Allen to Johnson seeking to confirm that Citrin Cooperman had in fact been engaged to audit the financial statements.

- In October 2013, Johnson informed Allen that "AFG II has engaged Frazer, Evangilista & Co as auditor" -- but after being served with a subpoena from the SEC in connection with its investigation of this matter, Frazier Evangelista determined not to proceed with the audits.

- Later in October 2013, Johnson retained Seymour Weinberg to complete the AGF II financial audits. Allen met with Seymour Weinberg and specifically asked him whether an audit of AGF II's operating company needed to be performed as a prerequisite to auditing AGF II's financials -- and Mr. Weinberg in no uncertain terms told Allen that such an additional audit of the operating company was not necessary. Weinberg instead informed Allen that he would "spot-check" all advances made by AGF LLC.

And as a result of Allen's good-faith efforts, the SEC conceded in the Civil Action that AGF II annual financial statements were in fact audited in early 2014. The evidence confirms that PAA maintained a good faith belief, ultimately borne out, that AGF II's annual financial statements would in fact be audited, consistent with the representation in the PPMs.

The PAA Defendants also retained outside securities counsel to advise them on whether PPM should be amended to reflect the fact that the completion of the audited annual financial statements was delayed. A number of factors support counsel's determination that the audit delay did not require an amendment to the 2012 PPM:

- The PPM did not commit AGF II to completion of an audit of year-end financial statements within any prescribed period of time.

- The PAA Defendants maintained a good faith belief that the annual financial statements of AGF II would in fact be audited.

- The units in AGF II held by the Limited Members were non-transferable interests and subject to a two-year lock-up period.

- Throughout this period of time, investors continued to receive monthly statements from AGF II covering their unit investments;

- Even though they did not constitute formal audits, PAA did receive quarterly financial reports from Johnson, unaudited financial statements from AGF II in 2012 (from Carapella) and a compilation of financial results in mid-2013 (from Citrin Cooperman).

Despite being aware of the 2012 PPM audit language and the fact that an audit had yet to occur, PAA's counsel did not advise any of the PAA Defendants to stop selling AGF II units; and with full disclosure of those facts, counsel viewed the issue as one of a potential breach by AGF II of its obligation under the Operating Agreement, which could be cured simply by conducting an audit.

Finally, it is important to note that throughout this time, as admitted by the SEC in the Civil Action, Johnson had been continuously misleading Respondent regarding the status of AGF II's hiring of an auditor. More specifically, under a section entitled "***Johnson Lies about the Status of AGF II's Audits***" (emphasis in original), the SEC admited in its Complaint:

> 49. During 2012 and 2013, Johnson contacted several accounting firms, but as time passed without AGF II having retained an auditor, Allen grew increasingly concerned and repeatedly asked Johnson about the status of his discussions with auditing firms. **On multiple occasions in 2013, Johnson falsely told Allen** and others that AGF II had retained an auditor.
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> 50. During 2013, Johnson told Allen that he had contacted an accounting firm ("Accounting Firm #2) about an audit. On May 15, 2013, Allen emailed Johnson to ask whether AGF II had retained Accounting Firm #2, and Johnson responded by email that same day: "I will be cutting a check this week and then [the partner at Accounting Firm #2 whom Johnson had contacted] will send back documents."
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> 51. In fact, as Johnson knew, or recklessly disregarded, AGF II never retained Accounting Firm #2 to perform an audit, and Accounting Firm #2 never agreed to do so. Indeed, prior to his May 15, 2013 reply email to Allen, Johnson had rejected the idea of retaining Accounting Firm #2 for an audit after the firm informed Johnson that an audit would cost approximately $100,000, and Johnson's discussions with Accounting Firm #2 were thereafter focused solely

on potential non-audit work – *i.e.*, a compilation of AGF II's financial statements and preparation of its tax returns.

52. On May 20, 2013, Allen again asked for an update, and Johnson responded: "Spoke to [the Accounting Firm #2 partner] and he said we have to wait a few more days. Update you later this week."

53. On May 24, 2013, responding to Allen's May 15, 2013, email asking whether AGF II had hired Account Firm #2, **Johnson again responded falsely**: "I would say yes but we haven't 'officially' gotten back his signed agreement. But verbally he said yes and we should have it any day."

54. On October 1, 2013, Johnson emailed Allen to report that "AGF has engaged [another accounting firm ("Accounting Firm #3)] as auditor." Again, Johnson knew, or recklessly disregarded, that **this statement was false**. Account Firm #3 was never engaged to provide any services, audit or otherwise, to AGF II or to any entity connected to Johnson. Although Johnson met with Accounting Firm #3 during 2013 to discuss a potential compilation and tax return preparation for AGF II, Johnson never discussed the possibility of an audit with Accounting Firm #3. Thus, contrary to Johnson's representation, Account Firm #3 never agreed to audit AGF II's financials, and never performed any audit work for AGF II.

55. Allen responded by email to Johnson's October 1, 2013, email on the same date with the question: "What years are they auditing? As soon as you get the engagement agreement could you send it [to] me?" Johnson replied by email on the same date: "Yes. I should have it in a day or so, I just left his office with a check. They are auditing 2011 and 2012, and will try and complete immediately so they can do 2013 on time as well."

56. **Yet again, every detail of Johnson's October 1 reply was false**. As Johnson knew, or recklessly disregarded, no engagement agreement for an audit by Accounting Firm #3 exited. Moreover, neither Johnson nor AGF II, nor anyone on behalf of either, ever made any payment to Accounting Firm #3. And, finally, Account Firm #3 never performed any audit work for AGF II.

57. **Johnson repeated this lie in an email discussion with AGF II's outside counsel** later that week. In response to an October 7, 2013, email from counsel to Johnson and Allen's personal assistant asking when the audit for 2011 would be ready, Johnson wrote that

Accounting Firm #3 was "working on it now and it probably will be done before year end."

58. **Johnson again misled AGF II's counsel and PAA** in an October 8, 2013, email. In response to an email from counsel asking whether Accounting Firm #3 would audit the financial statements for 2011 through 2013, Johnson wrote to counsel and Allen's assistant: "Yes, 2011-2013 and foreseeable future."

See, SEC Complaint in Civil Action (emphasis added). All of these allegations were consistent with the documents in evidence at trial – showing that Respondent was being misled by the issuer.

Beginning 2012, the PAA Defendants Informed Potential Investors that Audited Financials were Not Yet Available, and Despite AGF II Not Having Audited Financials, AGF II's Largest Investors Invested Additional Funds

Because AGF II did not yet have audited financials in 2012, Kerri Wasserman, PAA's Chief Compliance Officer, discussed with all PAA salespersons (including Allen) to inform all potential AGF II investors that an audit had not yet been performed. Wasserman testified that Allen was "in agreement" with her that "investors that are being pitched, they should be told there were no audited financials at the time of the pitch" -- and Allen communicated that information to all potential investors. As such, Respondent **denies** the second sentence contained in Section II.B.3 of the Order Instituting Administrative Proceedings.

Not once during any relevant time period did any AGF II investor ask any PAA Defendant to withdraw their investment or redeem their interests because of the late audit; nor did any AGF II investor ever allege that he or she believed they had been misled by any statement in the AGF II PPMs. To the contrary, PAA's investors, including the two witnesses

the SEC called at trial, both profited from the investments in PAA.[18] To this day, AGF II continues to operate and raise money from investors.

REMEDIAL ACTION IS NOT APPROPRIATE OR IN THE PUBLIC INTEREST UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE

1. Respondents Made a Mistake Many Years Ago of Which it has Admittedly and from which Valuable Lessons Have been Learned

This Civil Action has always been about a mistake. The PPMs contained a mistake (a new company's PPM stating, "[a]s has been policy in the past, the Company's annual financial statements will continue to be audited by an independent firm of certified public accountants"), and, Defendants admitted it was a mistake throughout the course of the Civil Action and even prior, during Defendants' on-the-record interviews in 2014.

Unfortunately for the Defendants, the facts that Defendants thought were relevant (the disclosures in the PPMs that AGF II was a new company, Mr. Allen's efforts to inform investors that the Company did not yet have audited financials, combined with their good faith belief that an audit was forthcoming as continuously stated by Johnson was the case), a jury determined, were not. The jury found that the audit language was material, and Defendants respect that decision. Defendants' lives have been forever altered as a result of their failures, and have learned tremendously from them. There is no possibility that the Defendants will repeat their errors.

2. There is No Chance of Repetition

[18] Not only is there no evidence in the record showing any investor losses, the evidence is to the contrary. Lawrence Sucharow, Esq. (the named partner of the firm Laboton Sucharow, a plaintiff's class action law firm), for example, testified at trial that to date, he has **profited** from his AGF II investment in the amount of approximately $150,000. T. 200:9-15. The only other investor to testify, John McGowan, also **profited** from his investment (testifying that, "[w]e got $15,136, based on an original investment of $12,000.").

First and foremost, the court has already issued an injunction enjoining Respondent from violating the securities laws. That is a remedial remedy that alone serves the public interest to ensure Respondents' future compliance.

Putting that aside, however, the conduct for which Respondent was found liable occurred from 2011 to 2013. Throughout that time, Defendants made mistakes that have now led to the jury verdict. Those mistakes included not ensuring that the PPMs were one-hundred percent accurate and continuing to use the PPMs once they realized there was a factual error in the book (which they did because they believed the error was not material, given all the other disclosures contained therein, and because a new company with no operating history obviously cannot already have audited annual financial statements). Although Defendants hired corporate securities counsel on two separate occasions to help them through the process, they were not focused enough on identifying the legal issues before them, and were too focused on their own views of whether the error was material and giving Johnson an opportunity to try to render the error moot by hiring an auditor. It is clear that Respondent did not understand the gravity of the error and placed far too much trust in the issuer. This is not an excuse, but it is the reality of what happened, and these are lessons that Respondent has learned. Fortunately, no investors suffered any losses as a result of the error in judgment, and for that, Respondent is extremely grateful. And in fact, **AGF II continues to this day to operate** and raise money from investors (one of which is Mr. Sucharow).

Since 2013, Respondent has been continuously engaged in the securities industry, with no complaints of any kind relating to similar allegations as those underlying the Civil Action. In other words, it has been approximately **six years** since the conduct in question and Respondent has **not** repeated the conduct.

3. No Investors Lost Money in Connection with the Conduct and One of the Investors Called by the SEC at Trial - a Plaintiff's Class Action Securities Lawyer - Testified that he did *Not* believe any Fraud Had Occurred

As stated above, this is a case where no investors lost any money, and instead, they profited. The reason for this was because the underlying fraud of which Respondent was found liable had to do with very unusual circumstances wherein a new company was said to already have annual audited financial statements (an obvious impossibility). AGF II's investors were all sophisticated and thus they well understood this was merely a mistake in the book (which is why Respondent at all times believed in good faith that the mistake was not "material").

As such, no investors were harmed by the book's misstatement, and in fact, one of the SEC's own investor witnesses, Mr. Sucharow (himself, a New York City class-action securities attorney) testified that he never believed there was a fraud, despite his actual knowledge no later than October 2013 that AGF II did not at the time of his investment have any audited financial statements. T. 197:22 – 198:3. Moreover, the trial evidence further demonstrated, through AGF II's Chief Executive Officer, that there has never been a time when AGF II was unable to comply with any redemption request nor has AGF II ever never missed an interest payment. T. 672:22-674:2.

At bottom, and after seeking the guidance of corporate securities counsel on two occasions, this was a mistake that harmed no one, but of which the SEC (solely because it did not have to prove the elements of reliance or damages at trial) was able to prove a very serious securities law violation.

4. No Public Interest Will be Served by Issuing a Draconian Remedial Penalty on Respondent

As discussed herein, and as will be demonstrated at the hearing, the public interest will not be served by issuing a remedial penalty that will serve to bar Respondent from the securities industry. Respondent has already severely paid for the mistake contained in the PPM, including now having a significant monetary judgment and permanent injunctive relief enjoining any violations of the securities laws. Respondents' principal and Chief Compliance Officer has learned from this entire experience greatly and the conduct at issue will not repeat itself; nor has it, since the conduct last occurred six years ago, all the while Respondent has continued to engage in the securities business.

CONCLUSION

For the reasons stated herein, and as will be further demonstrated at hearing, Respondent respectfully requests dismissal of this administrative proceeding without further remedial action.

DATED: New York, New York
October 25, 2019

THE ROTH LAW FIRM, PLLC

By: _____
Richard A. Roth
Jordan M. Kam
295 Madison Avenue, 22nd Floor
New York, New York 10017
Attorneys for Respondent

CERTIFICATE OF SERVICE

On October 25, 2019, I served by FedEx overnight mail, on the individuals listed on the below Service List, a copy of each of the following documents:

(i) Answer of Portfolio Advisors Alliance, Inc. (Admin. Proceeding 3-19576) (and in the case of the Commission's Secretary, the original and three copies);

(ii) Answer of Howard J. Allen III (Admin. Proceedings 3-19577) (and in the case of the Commission's Secretary, the original and three copies);

(iii) Answer of Kerri L. Wasserman (Admin. Proceeding 3-19578) (and in the case of the Commission's Secretary, the original and three copies);

(iv) Notice of Appearances for Richard A. Roth, Esq. and Jordan M. Kam, Esq. in each such Administrative Proceeding.

SERVICE LIST

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DATED: New York, New York
October 25, 2019

Jordan M. Kam