UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 13, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20801

In the Matter of

DF Growth REIT II, LLC,

Respondent.

DF GROWTH REIT II, LLC'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR AN ORDER INSTITUTING PROCEEDINGS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases and Decisions

OS Received 04/13/2022

Statutes

Other Authorities

Respondent DF Growth REIT II, LLC, ("REIT II"), respectfully moves to dismiss (as a form of ruling on the pleadings pursuant to 17 C.F.R § 201.250(a)) or, in the alternative, for an order requiring dismissal within a fixed period if the Commission fails to issue an Order Instituting Proceedings ("OIP"), as required by law before this proceeding can continue. REIT II also asks that the schedules set in Your Honor's April 1, 2022 Order Scheduling Hearing and Directing Prehearing Conference and April 12, 2022 Order Setting Prehearing Schedule be vacated and reset after the Commission issues an OIP.

Your Honor's April 12, 2022 Order Setting Prehearing Schedule was issued without the benefit of briefing or a hearing on the issues pertinent to the dispute between the parties regarding the initiation of these proceedings. To that end, while respectfully acknowledging Your Honor's order, REIT II brings this motion to highlight the significant procedural and substantively prejudicial issues at play that can be easily cured through the issuance of an OIP and resetting of the hearing and prehearing schedule. Given the jurisdiction and due process concerns at play, REIT II also seeks to preserve its objections detailed herein.

REIT II brings this motion because, quite simply, there are no pleadings in this matter, and no jurisdictional basis for a hearing. As explained herein, the Commission has not issued a document consistent with the requirements of an OIP, as required under 17 C.F.R. § 201.200. Absent an OIP, REIT II has no definite statement of the basis of these proceedings and Your Honor has been placed in the untenable position of being asked to rule over a proceeding for which the Commission has not properly delegated authority to Your Honor. The Enforcement Division's attempt to move forward with these proceedings applying the Commission's Rules of Practice only to REIT II and not to themselves constitutes a considerable deprivation of REIT II's due process rights and a continuation of its questionable tactics to interfere with the interests of REIT II's

investors in the simultaneous proceedings currently underway in the Ninth Circuit. Your Honor should dismiss these proceedings until such time as the Enforcement Division brings them about properly.

I. RELEVANT BACKGROUND

A. The Issuer

Issuer REIT II is a limited liability company affiliated with DiversyFund, Inc. DiversyFund is a financial technology ("FinTech") company focused on bringing wealth-building investment tools traditionally used by the wealthy, such as Real Estate Investment Trusts ("REITs"), to the everyday investor. Over the past several years, DiversyFund has built a business model focused on diversified participation in REITs by non-accredited investors through exempt offerings under Regulation A, including REIT II and its predecessor, DF Growth REIT I, LLC ("REIT I"). REIT II and REIT I focus on "value-add" investments, which provide the potential for higher yield to investors through repairs or other capital investment, but require continuing investment over a lengthy period to make the necessary improvements before gains can be realized. Like all value-add investors, REIT II's investors require additional capital investments over the life of their projects in order for them to execute on their business model.

REIT II was qualified by the Commission under Regulation A on January 29, 2021, and includes well over 3,000 individual investors. REIT I and REIT II together include approximately 30,000 individual investors. For the period ending December 13, 2021, REIT II had raised $8,032,282.00, and invested $5,230,404.00 in multifamily property. Before the actions of the Enforcement Division discussed below, REIT I and II were on track to deliver returns to investors that were well above the returns they had projected. As a result of the Enforcement Division's actions, REIT I and REIT II's investors have been irreparably harmed in an amount that continues to grow, but is already well over seven figures.

B. The Enforcement Division's Refusal to Consider the Interests of Investors

On November 29, 2021, during the first telephone call between counsel for REIT II and counsel for the Enforcement Division (Victoria Levin), Ms. Levin informed REIT II that because an investigation had begun, pursuant to Rule 262(a)(7) of the Securities Act of 1933, REIT II must stop offering or selling securities. REIT II promptly notified Ms. Levin that such an unforeseeable, complete and indefinite stop to its ability to fund continuing capital needs would cause significant harm to investors. Then, and repeatedly thereafter, REIT II offered total cooperation, including providing DiversyFund's founders for informal interviews and immediate remedying of any issues noted by the Enforcement Division. However, all the way through its refusal to even consider settlement in its Rule 221(c) submission to this Court (*see Joint Prehearing Conference Statement* (April 8, 2022), at 5), the Enforcement Division has shown no interest in investors' interests, focusing solely on punitive enforcement against REIT II and its affiliates. Indeed, when as part of the Ninth Circuit Court of Appeals' required meet and confer process, REIT II informed the Enforcement Division of its intent to seek judicial review of the Commission's actions if a compromise protecting investors' interest could not be reached, rather than engaging on REIT II's proposal of a compromise, the Enforcement Division issued a Wells Notice of its intent to begin this Rule 258 proceeding.

C. The Enforcement Division's Pattern of Overreaching

Only as of January 2021 was Rule 262(a)(7) amended to create the power to disqualify a Regulation A offering on the basis of a mere investigation, with no required notice or opportunity to oppose. 86 Fed. Reg. 3496 (Jan. 14, 2021). This is incompatible with the Constitution's guarantee of due process, which the Supreme Court has repeatedly stressed requires pre-deprivation process in all but extraordinary cases. *United States v. James Daniel Good Prop.*, 510

U.S. 43, 53, 114 S. Ct. 492, 501 (1993) ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'") (citation omitted).

In November 2021 and repeatedly thereafter, REIT II informed the Enforcement Division that it had no quarrel with an investigation (DiversyFund was previously investigated and cleared by Ms. Levin and her staff in 2019–20), but only with the deprivation of REIT II and its investors' settled expectation in their Regulation A offering without notice and an opportunity to oppose. Informal attempts to compromise went nowhere. Through a December 2021 administrative petition, REIT II then asked the Commission to review Ms. Levin's decision under delegated authority to invoke Rule 262(a)(7) on the basis of an investigative order that nowhere mentioned suspension of REIT II. In January 2022, the Commission substituted a new investigative order that expressly invoked Rule 262(a)(7) suspension, and on that basis rejected the administrative petition as moot. The Enforcement Division continued to refuse to inform REIT II of the basis for its concerns, or to allow REIT II to respond to or remedy them, even though REIT II had pointed to Rule 258 as an available option to the Commission in December 2021, in arguing against the appropriateness of the Enforcement Division's November 2021 Rule 262(a)(7)-based suspension.

When REIT II sought judicial review, however, rather than continuing its months-long insistence on using Rule 262(a)(7) to disqualify REIT II without due process, within five days the Enforcement Division served a Wells Notice to invoke Rule 258, and is now arguing to the Ninth Circuit that its Rule 262(a)(7)-based actions are moot and so not judicially reviewable.. *DiversyFund, Inc. et al. v. SEC*, Case No. 22-70023, Docket No. 33 (SEC's answering brief). Thus, only as a result of REIT II's exercise of its constitutional rights did the Enforcement Division

begin this proceeding. Indeed this proceeding is so clearly a response to REIT II's exercise of its constitutional rights that REIT II's arguments to the Ninth Circuit about investor harm resulting from the Enforcement Division's actions have been invoked as a ground for REIT II's suspension. *See Order Suspending Exemption*, Rel. No. 33-11040 (Mar. 16, 2022) at 3.

D. Informal Resolution Is In Investors' Interests

As REIT II has repeatedly stated, including its March 4, 2022 response to the Wells Notice concerning this Rule 258 proceeding, it is more than willing to cooperate with the Enforcement Division. REIT II has offered voluntary interviews with company principals; it has provided financial and other information on an informal basis; and it has repeatedly made an open offer to remedy any issues identified by the Commission that could negatively impact REIT II or other DiversyFund investors. REIT II has been and continues to be open to remedial measures that could obviate the need for a Regulation A suspension and protect its innocent investors from unnecessary harm. Unfortunately, the Enforcement Division has shown no willingness to consider any resolution other than a complete cessation of REIT II's offerings, which would cause irreparable harm to REIT II's thousands of individual investors. This remains true, despite the fact that REIT II remains unaware of any allegation or evidence that allowing REIT II and its affiliates to continue with current and future offerings would pose any threat of harm to investors.

E. Procedural Predicates for this Rule 258 Proceeding

Despite REIT II's repeated pleas for an informal resolution protecting investors' interests, on March 16, 2022, the Commission moved forward with issuing an Order Temporarily Suspending Exemption (the "March 16 Order"). The March 16 Order identified only two reasons for the temporary suspension: (1) alleged technical non-compliance with Regulation A (by starting sales late (harming no one), and using the wrong form to increase the offering amount (also

harmless, and now withdrawn)), and (2) alleged misstatements or omissions in offering materials, including that REIT II failed to disclose what would happen if the SEC suddenly and without warning suspended it. (By contrast, the Wells Notice issued by the Enforcement Division listed a third ground: that the alleged misstatements or omissions were also violations of section 17 of the Securities Act of 1933.)

While REIT II respectfully acknowledges Your Honor's April 12 Order Setting Prehearing Schedule, REIT II wishes to bring Your Honor's attention to some of the failures of the March 16 Order that impact its legitimacy, and to preserve respective objections. The March 16 Order contained two specific orders and one matter of notice. The orders stated that REIT II's Regulation A offering was suspended and that REIT II would receive notice of the suspension. Those are the **only** orders found in the March 16 Order. Thereafter, the March 16 Order provided notice that a hearing could be **requested** within thirty days of the issuance of the order, and a hearing would be set within twenty days of such a request to determine whether or not the Commission's suspension should be made permanent. *See* Exhibit 1 at 4. While the March 16 Order leaves open the *possibility* of a hearing, it does not call for one. More importantly, it does not contain a timeline for the hearing pursuant to 17 C.F.R. § 201.360 (e.g., 30, 75, or 120 days), the jurisdiction for said hearing, a short and plain statement of the issues to be addressed at the hearing, or any of the other requirements of 17 C.F.R. § 201.200(b). Your Honor's April 12 Order Setting Prehearing Schedule suggests that the Commission's order to designate Your Honor as the presiding judge in this matter could also be interpreted as an OIP. This order too fails to include the necessary components of 17 C.F.R. § 201.200(b) and corollary rules.

Following the issuance of the March 16 Order, REIT II awaited the issuance of an OIP or any communication from the Enforcement Division. Neither was forthcoming. Instead, REIT II

was first informed of the impending hearing from the designation of Your Honor that was issued on April 1, 2022, and Your Honor's Order Scheduling Hearing of the same date. The Enforcement Division scheduled a preconference hearing for April 7, during which counsel for REIT II questioned how to move forward with the conference in the absence of an OIP. In particular, counsel for REIT II noted that the issuance of the OIP is the triggering event for a number of events under the Rules of Practice, including the timeframe for filing an answer (17 C.F.R. § 201.220(b)) and the deadline for discovery from the Enforcement Division (17 C.F.R. § 201.230(d)). The Enforcement Division stated that they viewed the March 16 Order as acting in the place of an OIP. When counsel for REIT II pointed out that the March 16 Order does not contain the information required to be in an OIP and that, if the March 16 Order operated as an OIP, then the Enforcement Division was delinquent in complying with its discovery obligations, the Enforcement Division stated, in essence, that "this is not like other APs [administrative proceedings]."

On April 8, the parties to this matter filed a Joint Prehearing Statement wherein REIT II repeatedly took the position that the lack of an OIP prejudiced REIT II in their ability to file an answer, receive timely discovery, or make any efforts towards resolution of this matter in absence of a defined set of claims. *See Joint Prehearing Conference Statement* (April 8, 2022), *passim*. As if to highlight the problem, the Enforcement Division's language in the Joint Prehearing Statement offers a *third* iteration of the issues in this matter, deviating again from both the Wells Notice and the March 16th Order. *Id*. at 1. The Enforcement Division repeatedly noted the "expedited nature" of these proceedings, exacerbating the issues raised by the failure to issue an OIP. In the first instance, supposing that March 16th is the triggering date for items tied to the issuance of the OIP, REIT II's opportunity to file an answer in this matter expired on April 6—the day *before* the Enforcement Division scheduled the prehearing conference wherein they informed

REIT II that they should interpret the *opportunity to request* proceedings in the March 16 Order as an order *instituting* those proceedings. Further, the "expedited nature" of these proceedings only amplifies the importance of the Enforcement Division complying with discovery deadlines. If the March 16 Order was to operate as an OIP, then REIT II should have received a copy of the investigatory file in this matter no later than March 23. The Enforcement Division has now taken the position that it will provide discovery by *April 18*—nearly a month after it was required to do is if its position regarding the OIP was correct.

Your Honor's April 12 Order Setting Prehearing Conference states that the April 18 date for discovery could proceed "[i]n light of the atypical way in which this proceeding was instituted." *See Order Setting Prehearing Schedule*, Rel. No. 33-6842 (April 12, 2022) at 2 n.1. The manner in which the proceedings were instituted were, in fact, "atypical"—but more importantly, not provided for within the Rules of Practice. The resulting schedule would force REIT II to file any motions for summary disposition only 25 days after the receipt of any discovery and any answer only 2 days after the receipt of any discovery, while the Enforcement Division has had the benefit of discovery for months. This is strongly in opposition to the timelines dictated by the Rules of Practice. Similarly, REIT II would have only 28 days between access to any discovery and the required deadline for filing of expert reports.

REIT II raised each of the above issues with the Enforcement Division during the April 7 preconference hearing, and again in its written positions regarding drafting a joint statement on April 7 and 8. The Enforcement Division did not move from its position or propose any solutions. As Your Honor ruled on the issues raised in the April 8 Joint Statement without the benefit of briefing or a hearing, REIT II feels compelled to bring the present motion.

II. LEGAL STANDARD

"An enforcement action before the SEC is initiated by the issuance of an order instituting proceedings." *Pierce v. S.E.C.*, 786 F.3d 1027, 1031 (D.C. Cir. 2015). Rule of Practice 201(b) requires that an Order Instituting Proceedings:

> "(1) State the nature of any hearing; (2) State the legal authority and jurisdiction under which the hearing is to be held; (3) Contain a short and plain statement of the matters of fact and law to be considered and determined, unless the order directs an answer pursuant to § 201.220 in which case the order shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto; and (4) State the nature of any relief or action sought or taken."[1]

(17 C.F.R. § 201.200(b)).

Rule of Practice 250(a) provides that "any party may move for a ruling on the pleadings . . . asserting that . . . the movant is entitled to a ruling as a matter of law." 17 C.F.R. § 201.250(a). "[W]hen it retained the short-and-plain formulation, the Commission also chose to allow for motions for a ruling on the pleadings under Rule 250(a)—a procedural device it has termed 'analogous to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure." *In the Matter of David Pruitt, CPA*, 2019 SEC LEXIS 666, *19, Rel. No. 6528 (March 28, 2019). When considering a motion for a ruling on the pleadings, the "focus is necessarily on the pleadings; matters outside them are not properly before" the ALJ. *In the Matter of Healthway Shopping Network, Monetiva, Inc., & Unity Glob. Holdings Ltd., Respondents*, 2020 SEC LEXIS 2893, *4, Rel. No. 89374 (July 22, 2020). "This is because a motion for a ruling on the pleading addresses only the sufficiency of the pleadings and does not implicate the underlying factual record. Pleadings clarify what is in dispute." *Id*.

[1] Crucially, an OIP should establish whether an answer is required or not. If an answer is required, the pleading standard for the OIP is even higher, as it must "set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto." In the absence of an OIP, it is impossible for Your Honor to even know which pleading standard ought to apply.

III. ARGUMENT

A. The March 16 Order is Not an OIP

In light of Your Honor's April 12 Order Setting Preconference Schedule, REIT II notes that additional briefing on the requirements of an OIP would be useful, and seeks to preserve its objections herein. An OIP "must state: the nature of the hearing; the legal authority for holding the hearing; 'the factual and legal basis alleged . . . in such detail as will permit a specific response; . . . and the nature of any relief sought." *In the Matter of Lynn Tilton*, 27 SEC LEXIS 3051, *6, Rel. No. 1182 (Sept. 27, 2017) (*citing* 17 C.F.R. § 201.200(b)). REIT II has been unable to locate a single instance of the Commission instituting proceedings in the absence of an OIP. In fact, in the many exemplar OIPs that REIT II has reviewed, it appears universally the case in recent years that (a) the order is *titled* "Order Instituting Proceedings", (b) the order does, in fact *order* rather than *suggest* a hearing, usually including language similar or identical to the following:

> IT IS ORDERED that a public hearing before the Commission for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

(*see* Exhibit Nos. 2–4), and, (c) that the order describes the timeline associated with filing an answer. Further, pursuant to Rule 360(a)(2)(i), the OIP "will specify a time period in which the hearing officer's initial decision must be filed with the Secretary." 17 C.F.R. § 201.360(a)(2)(i). The March 16 Order contains none of these elements that could have reasonably put REIT II on notice that the proceeding had started and that the timeframe for filing an answer had begun.

Moreover, the March 16 Order contains none of the more substantive requirements of Rule 200(b). There is no statement of the legal authority and jurisdiction giving rise to the matter, and more importantly, no short and plain statement of the legal and factual issues to be decided. For reasons described herein, these failures give rise to issues of jurisdiction, due process, and

pleading insufficiencies. However, in the first instance, as a procedural matter the Enforcement Division is seeking to proceed with a hearing that, by its own rules, has not yet been instituted.

Your Honor's April 12, 2022 Order Setting Prehearing Schedule provides for REIT II to file an answer by April 20, 2022. However, this is not curative of the issues created by the absence of a proper OIP. The substantive requirements of an OIP remain unfulfilled (as described herein), REIT II is prejudiced by the lack of procedural information within the OIP that triggers a large number of other timetables in the Rules of Practice, REIT II has only two days between the production of discovery and the filing of an answer (as opposed to the 13 imagined in the rules), and the rest of the expedited schedule is compressed even further for REIT II as a result. Most importantly, the issuance of an OIP is explicitly called for in the rules and operates as a governing document for the rest of the calendar. Any reasonable target of an investigation must be able to rely on the Rules of Practice as a guideline for the process and procedure of the Commission's enforcement and administrative proceedings to avoid a hearing by surprise and deprivation of due process. As the OIP is the governing pleading in an enforcement proceeding, in its absence, the matter should be dismissed.

B. By Failing to Issue an OIP, the Commission has Failed to Confer Jurisdiction on Your Honor to Decide this Matter

Until the Commission properly issues an OIP, compliant with the Rules of Practice, Your Honor is in the untenable position of being asked to rule on a matter for which Your Honor has not been delegated jurisdiction. It is "well settled that an administrative adjudication extending beyond the issues defined in a notice of hearing is void for lack of jurisdiction." *Dep't of Educ. of State of Cal. v. Bennett*, 864 F.2d 655, 658–59 (9th Cir. 1988). "Moreover, the SEC's Rules of Procedure make it clear that **the OIP—and not any motion, brief, or other filing by the**

Division—establishes the scope of the charges in SEC enforcement proceedings." *Pierce*, 786 F.3d at 1036 (emphasis added). In the absence of an OIP, the confines of the authority delegated to Your Honor are unknowable. As "[t]he Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original OIP," such a document serves far greater purpose than mere notice—it is the sole source of jurisdiction for this proceeding. *In the Matter of Lexington Res., Inc., Grant Atkins, & Gordon Brent Pierce*, 2009 SEC LEXIS 2099, *58, Rel. No. 379 (June 5, 2009) (*citing* 17 C.F.R. § 201.200(d)); *accord J. Stephen Stout*, 52 S.E.C. 1162, 1163 n.2 (1996).

The failure to define such jurisdiction is betrayed by the March 16 Order's own failure to designate the jurisdiction for this proceeding as required by Rule 201(b)(2). Such an omission is not merely formulaic—the confines of the issues of law and fact must be established at the outset within the OIP, as "only the Commission may amend an OIP to include new matters of fact or law beyond the scope of the original OIP." *Id*. Because there is no OIP, quite literally any consideration by Your Honor of the law or facts at issue here is, by definition, "beyond the scope of the original OIP," and therefore beyond the powers delegated by the Commission. And while Your Honor's April 12 Order Setting Prehearing Schedule suggests that the Commission's March 31 Order designating a presiding judge could operate as an OIP, *nothing* in that document could arguably set the confines of jurisdiction. Therefore, this matter must be dismissed on the pleadings as, in the absence of pleadings, there can be no jurisdiction.

C. In Absence of an OIP, REIT II is Deprived of Due Process

The requirements of Rule 201(b) plainly mirror the requirements of the Federal Rules of Civil Procedure ("FRCP") in their attempts to ensure adequate notice and procedure through a comprehensive pleading standard and opportunity to be heard. The current iteration of the Rules

of Practice specifically includes such requirements to cure prior versions of the rules wherein mere notice was sufficient. *See In the Matter of David Pruitt, CPA*, 2019 SEC LEXIS 666 at *12 ("Although Commission administrative proceedings are now initiated under Rule of Practice 200 by the issuance of an OIP, they were originally initiated through the issuance of a notice of hearing.") The inclusion of the same language as FRCP 8(a)(2) requiring a "short and plain statement" of the matters of fact and law to be considered "strongly suggest[s] the intent to emulate district court pleading standards." *Id*. at 9.

"Adequacy of notice is necessary not only for jurisdictional but also for due process reasons." *Bennett*, 864 F.2d at 659. Inherent in the pleading standards of the Rules is the "elementary and fundamental requirement of due process . . . [of] notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [P]rocess which is a mere gesture is not due process." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314–15, 70 S. Ct. 652, 657 (1950). Here, the March 16 Order was, at most, a gesture. It did not inform REIT II of a pendant action—it merely afforded them notice of the *possibility* of an action. The March 16 Order does not actually *institute* any proceeding, and does not follow the notice requirements of Rule 201(b), leaving it well outside the bounds of what is required by due process, by Rule 201(b), by Rule 250(a), and by the corollary FRCP 8(a)(2) and corresponding case law.

Importantly, even if the March 16 Order contained information that would give sufficient notice—which it does not—it is not the only document that the Commission and the Enforcement Division have proffered which lays out supposed allegations. And no two of the documents are the same. The Wells Notice, the March 16 Order, and the position of the Enforcement Division in the April 8 Joint Prehearing Statement all articulate different bases for the proceeding. In absence

of a charging document that adheres to the requirements of Rule 201(b), REIT II can never be sure of the scope of the proceeding, just as Your Honor can never be sure of the scope of Your Honor's jurisdiction.

Moreover, in addition to failures of notice, there are significant and practical deprivations of process that result from the Commission's failure to issue an OIP. First, the Rules of Practice provide that the issuance of the OIP triggers the timeline in which an answer can be promulgated. 17 C.F.R. § 201.220(b). If the proceedings continued using the March 16 Order as an OIP, then the time for REIT II to file a responsive pleading expired on April 6—a day *before* the Enforcement Division informed REIT II that it intended to treat the March 16 *opportunity to request* a proceeding as an order *instituting* proceedings. The lack of notice is not only obvious, but had the natural and damaging result of depriving REIT II of the opportunity to respond to the initial pleading.

As described above, the stipulation in Your Honor's April 12, 2022 Order Setting Prehearing Schedule that an answer can be filed by April 20 is not curative. The additional compression of the expedited calendar that results and the lack of discovery prior to filing the answer are prejudicial. Yet more important, due to the vague pronouncements of the issues to be considered in the March 16 Order, the allegations remain too amorphous to allow for a proper answer that adequately responds to the charges, preserves defenses, and makes clear that certain of the Enforcement Division's claims are without merit. If the Enforcement Division is not required to establish a definitive statement of its claims with the detail required by the Rules of Practice and the FRCP, then there is no mechanism for dismissal of clearly improper claims as the Enforcement Division can consistently restate the basis of their claims and allegations. Such prejudice cannot be cured in absence of an OIP, as the moving target of the Enforcement Division's

claims can persist right up to and through the hearing and even in an appeal to the Commission of any initial decision.

Similarly, the Rules of Practice provide that the issuance of the OIP triggers the deadline for discovery from the Enforcement Division. 17 C.F.R. § 201.230(d). If the March 16 Order was to operate as the OIP, then REIT II should have received a production of the Enforcement Division's investigative file no later than March 23, 2022. Not only does the failure of the Enforcement Division to provide discovery in a timely manner substantially prejudice REIT II, it shows a one-sided application of the Rules of Practice. According to the Enforcement Division, REIT II should have known that the March 16 Order acted as an OIP, even though it included none of the things it was required to include by the Rules, and even though it only offered an opportunity to *request* proceedings, but the Enforcement Division was entitled to ignore their own obligations following issuance of an OIP because "this is not like other APs." This is nonsensical and far removed from due process. Additional timelines throughout the rules are directly tied to the date that the OIP is issued, requiring that it, in fact, be issued. *See, e.g.*, 17 C.F.R. § 201.360(a)(2) (setting the timeframe for the filing of an initial decision by the hearing officer based on the date of service of the OIP).

There is great irony in the Commission suspending REIT II's rights under Regulation A for largely technical issues, while the Enforcement Division has already in this matter violated their own Rules of Practice multiple times. Proceeding with this matter using the Enforcement Division's unfair approach to its own rules risks even greater future deprivation of REIT II's due process rights as it establishes a proceeding wherein the Enforcement Division can pick and choose when the rules apply to them, but apply them with unyielding fervor upon REIT II.

D. The March 16 Order Fails to State with Sufficient Particularity its Allegations of Misrepresentation

Even if Your Honor's position regarding the March 16 Order's status remain unchanged from the April 12, 2022 Order Setting Prehearing Schedule, the Enforcement Division's claims of misrepresentations should still be dismissed based on the pleadings. The vague allegations in the March 16 Order amount to allegations of negligent or reckless misrepresentation, but fail to provide adequate specificity to sustain any such claim. In the absence of caselaw specific to the misrepresentation requirements of Rule 258, the pleading requirements applied to negligent misrepresentations and claims under sections 11 and 14 of the Securities Act of 1933 offer meaningful corollaries. The heightened pleading standards required for allegations of fraud "appl[y] to . . . claim[s] of negligent misrepresentation. Rule 9(b) requires plaintiffs to 'state with particularity the circumstances constituting fraud or mistake.' To satisfy this standard, plaintiffs must identify 'the time, place, and content of the [the] alleged misrepresentation[s],' as well as the 'circumstances indicating falseness' or 'manner in which the representations at issue were false or misleading.'" *Hofer v. Wright Med. Tech., Inc.*, No. 318CV01991AJBBLM, 2019 WL 3936130, at *2 (S.D. Cal. Aug. 20, 2019) (*citing In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547–48 (9th Cir. 1994), *superseded by statute on other grounds as stated in SEC v. Todd*, 642 F.3d 1207 (9th Cir. 2011)).

Similarly, in the section 11 context, courts have held that "plaintiffs are required to allege their claims with increased particularity under Federal Rule of Civil Procedure 9(b) if their complaint 'sounds in fraud.'" *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1161 (9th Cir. 2009) (*quoting In re Daio Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005)). Whether a complaint "sounds in fraud" is determined by whether "the complaint 'allege[s] a unified course of fraudulent

conduct' and 'rel[ies] entirely on that course of conduct as the basis of a claim.'" *Id*. (*quoting Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003). In *Rubke*, where claims were made under section 11 alleging that statements were "either affirmatively misleading or were misleading by omission", the court found that the complaint must "allege[] with particularity that the statements were both objectively and subjectively false or misleading." *Id*. at 1161–62. Such requirement has been extended to cases involving section 14 claims that do not have a scienter requirement, analogous to the present case. *See In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1266 (N.D. Cal. 2000) ("Requiring that a non-fraud claim be stated with particularity under Rule 9(b) does not import a scienter requirement into the pleadings; it simply requires factual specificity regarding the 'neutral circumstances' of the alleged misstatement (the 'who, what, where, when, and how') and the reasons why the misstatements were in fact false.").

Here, the March 16 Order relies on the Rule 258(a)(2) grounds that suspension of a Regulation A exemption may be available where the offering statement or sales or solicitation of interest material "contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." 17 C.F.R. § 230.258(a)(2). The grounds thus enumerated directly correlate to the grounds for establishing negligent misrepresentation, which require establishment of "a misrepresentation of a material fact . . . made without reasonable grounds for believing it to be true." *Hofer*, 2019 WL 3936130, at *3. The grounds are similarly analogous to those of a section 11 or 14 violation which arises upon publication of a registration statement in connection with a security that "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Substantively, the meager facts of the March 16 Order that give rise to the

claim for misrepresentation are the same as those which gave rise to allegations of a violation of section 17 in the Wells Notice issued on February 11, 2022. Accordingly, the allegations of the March 16 Order clearly "sound in fraud", necessitating the application of the heightened pleading standard of FRCP 9(b).

The March 16 Order, if treated as a charging document, fails to meet that standard. Rather, the Order only posits the *possibility* that certain statements may have been misleading, and, more importantly, fails in any way to establish why the alleged misrepresentations were material. The allegations regarding misrepresentations pertain to two categories of information: (1) details relating to the involvement of REIT I investors in the REIT II offering, and (2) details in the REIT II circular and website relating to fees. Neither is properly pled.

With respect to the first category, the only allegations in the pleading are poorly made misrepresentations of statements in DiversyFund's emergency motion for stay filed in the Ninth Circuit.[2] There, DiversyFund established that the SEC's arbitrary decision to suspend REIT II's offerings would preclude DiversyFund from continuing operations. As such, all of its investors would be affected—an inescapable and obvious conclusion. Nothing in the March 16 Order explains why a decision *by the Commission* to halt REIT II's operations causes anything previously on the DiversyFund website or in its offering circular to be misleading. The Order's allegations that nonspecifically identified statements are inconsistent is, in addition to being factually untrue, not sufficient to allege "with particularity that the statements were both objectively and subjectively false or misleading." *Rubke*, 551 F.3d at 1162. Not a single allegation in the March 16 Order posits that any investor found the statements false or misleading, or, in fact, even that the statements *are* false or misleading at the time that they were made. Rather, the March 16 Order

[2] Filed in *DiversyFund, Inc., et al. v. S.E.C.*, Case No. 22-70023.

states only that the Commission "has reason to believe" that the statements are misleading. This is simply not enough.

Similarly, the second category of information that the March 16 Order alleges is misleading pertains to the application of management fees. The March 16 Order does nothing more that list a number of fees on REIT II's circular and website, and claim that they are "conflicting". This is plainly insufficient to plead that they are false or misleading.

Most importantly, the March 16 Order relies on a formulaic statement of whether a misstatement is material, citing to the generally held proposition that an omitted fact "is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" in securities litigation. *Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S. Ct. 978, 983 (1988). Yet, even in *Basic's* description of the materiality standard, they noted that "the Court was careful not to set too low a standard of materiality", adding that "to fulfill the materiality requirement 'there must be 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.'" *Id*. (*quoting TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. (1976)).

Even if conclusory statements of the required elements were sufficient for a pleading, which they are not, the March 16 Order does not make so much as a conclusory allegation regarding the effect of the alleged misstatements on the total mix of information available. In fact, they have failed to allege a single instance of anyone being misled or a description of how the alleged misstatements could be misleading. If Your Honor were to take the March 16 Order as the pleadings in this matter, as the Enforcement Division claims, then the claims pertaining to alleged misrepresentations should be dismissed for failing to meet the proper pleading standard.

E. In the Alternative, Your Honor Should Order Dismissal if the Commission Fails to Issue an OIP, or Order a More Definite Statement

In the event that Your Honor does not dismiss this matter for lack of pleadings, Your Honor should dismiss this matter if the Enforcement Division fails to issue an OIP within a fixed time period, *or*, should direct the Enforcement Division to issue a more definite statement pursuant to 17 C.F.R. § 202.220(d). Your Honor should further vacate the schedules set in Your Honor's April 1, 2022 Order Scheduling Hearing and Directing Prehearing Conference and April 12, 2022 Order Setting Prehearing Schedule and reset after the Commission issues an OIP. To proceed in the absence of an OIP is not only damaging to REIT II's various rights as outlined above, but would be damaging to overall economy of resources of Your Honor, the Commission, REIT II, and the Ninth Circuit. Proceeding without a basis for jurisdiction alone would necessitate timely and costly appellate litigation, which would not only tie up the respective parties and courts, but would certainly not be in the interests of REIT II's innocent investors. In the event that this matter is not dismissed, a proper OIP should be issued, and the respective timelines established in the Rules should be reset.

Alternatively, an order for a more definite statement is called for by the arguments identified herein pertaining to due process and pleading requirements. It is the policy of the Commission "to encourage . . . the exchange of relevant information where practical and reasonable to expedite proceedings, arrive at settlements or simplification of the issues and assure fairness to respondents." *Misc. Amendments*, 37 Fed. Reg. 23, 827, Rel. No. 33-5309 (Sept. 27, 1972). As such, the Rules specifically provide for the request of a more definite statement "of specified matters of fact or law to be considered or determined." 17 C.F.R. § 201.220(d). The matters of fact or law identified above pertaining to the claims of misrepresentation are ripe for a

more definite statement, and demand greater specificity in order to provide for an effective answer as envisioned by Rule 220(d). In the event that this matter is not dismissed and an OIP is not issued, Your Honor should direct the Enforcement Division to file a more definite statement.

IV. CONCLUSION

For the reasons discussed herein, REIT II respectfully requests that Your Honor dismiss this action on the pleadings or, in the alternative, direct the Enforcement Division to issue an OIP within a fixed time period and vacate and reset the hearing set in Your Honor's April 1, 2022 Order Scheduling Hearing and Directing Prehearing Conference, *or* direct the Enforcement Division to file a more definite statement.

DATED: April 13, 2022

BUCHALTER
A Professional Corporation

By: /s/ Arielle Seidman

Sanjay Bhandari (619) 219-5376
Arielle Seidman (949) 224-6207
Buchalter
655 W. Broadway
Suite 1625
San Diego, CA 92101
COUNSEL FOR RESPONDENT,
DF GROWTH REIT II, LLC

OS Received 04/13/2022

In the Matter of DF Growth REIT II, LLC
Administrative Proceeding File No. 3-20801
SERVICE LIST

Pursuant to Commission Rule of Practice 151 (17 C.F.R. §201.151), I certify that the attached:

DF GROWTH REIT II, LLC'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR AN ORDER INSTITUTING PROCEEDINGS

was served on April 13, 2022, upon the following parties as follows:

Vanessa Countryman, Secretary (By electronic email only)
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop
1090Washington, DC 20549-1090
Vanessac@sec.gov

Jennifer C. Barry (By electronic email only)
Securities and Exchange Commission
444 S. Flower Street, Suite 900
Los Angeles, CA 90071
Email: barryj@sec.gov
(323) 965-3878

Dated: April 13, 2022

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 13, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20801

In the Matter of

DF Growth REIT II, LLC,

Respondent.

DF GROWTH REIT II, LLC'S INDEX OF ATTACHMENTS TO MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR AN ORDER INSTITUTING PROCEEDINGS

Attachment	**Description**
1	File No. 3-20801 March 16, 2022 Order Temporarily Suspending Exemption
2	File No. 3-20678 Order Instituting Administrative Proceedings
3	File No. 3-19343 Order Instituting Administrative Proceedings
4	File No. 3-20659 Order Instituting Administrative Proceedings

OS Received 04/13/2022

Exhibit 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

March 16, 2022

SECURITIES ACT OF 1933
Release No. 11040 / March 16, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20801

In the Matter of **DF Growth REIT II, LLC,** **Respondent.**	**ORDER TEMPORARILY SUSPENDING EXEMPTION PURSUANT TO SECTION 3(b) OF THE SECURITIES ACT OF 1933 AND RULE 258 OF REGULATION A THEREUNDER, STATEMENT OF REASONS FOR ENTRY OF ORDER, AND NOTICE OF OPPORTUNITY FOR HEARING**

I.

The public official files of the Securities and Exchange Commission ("Commission") show that:

Respondent DF Growth REIT II, LLC ("REIT II" or "Respondent"), a Delaware limited liability company with its principal place of business in San Diego, California, filed a Regulation A offering statement on Form 1-A under the Securities Act of 1933 ("Securities Act") with the Commission on December 23, 2020, and filed an amendment to the offering statement on Form 1-A/A under the Securities Act on January 21, 2021 (the "Offering Statement"). The Offering Statement was filed to obtain an exemption from the registration requirements of the Securities Act, as amended, pursuant to Section 3(b) of the Securities Act and Regulation A thereunder. The Offering Statement offered $50 million of limited liability company interests, designated as Class A Investor Shares, on a purportedly continuous basis in a Tier 2 offering under Regulation A, and was qualified on January 29, 2021.

II.

Rule 258 of Regulation A promulgated under the Securities Act, 17 C.F.R. § 230.258, provides that the Commission may, at any time, enter an order temporarily suspending a Regulation A exemption if it has "reason to believe" that one of six enumerated factors are present. 17 C.F.R. § 230.258. Each factor provides an independent basis upon which to

OS Received 04/13/2022

temporarily suspend an exemption from Regulation A. Two of these factors are:

- "any of the terms, conditions or requirements of Regulation A have not been complied with" (17 C.F.R. § 230.258(a)(1)); or

- "[t]he offering statement, [or] any sales or solicitation of interest material . . . contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading" (17 C.F.R. § 230.258(a)(2)).

The Commission, on the basis of information reported to it by its staff, has reason to believe that (1) REIT II failed to comply with the terms, conditions and requirements of Regulation A; and (2) REIT II's offering documents and the website it uses to solicit investors contain untrue statements of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. The Commission's decision to issue this temporary suspension under the "reason to believe" standard is not a final determination about the availability of the exemption.

A. Non-Compliance with Regulation A

The Commission has reason to believe that REIT II failed to comply with two of the terms, conditions, or requirements of Regulation A.

First, REIT II was required to commence its qualified continuous offering within two days after its January 29, 2021 qualification pursuant to Rule 251(d)(3)(i)(F) under Regulation A: "Continuous . . . offerings may be made under this Regulation A, so long as the offering statement pertains only to . . . [s]ecurities the offering of which will be commenced within two calendar days after the qualification date . . . ." REIT II's September 29, 2021 semi-annual report states that, as of June 30, 2021, it had not yet commenced its operations or sold any LLC interests under Regulation A, but that it "plans to begin raising money . . . starting in the second half of the year."

Here, there is a reason to believe that REIT II's failure to commence the offering within two days of qualification constituted a failure to comply with Rule 251(d)(3). Notably, violations of Rule 251(d)(3) are "deemed to be significant to the offering as a whole" for purposes of the insignificant deviation provisions of Rule 260, 17 C.F.R. § 230.260(a)(2), although Rule 260(c) specifically states that Rule 260(a) "provides no relief or protection from a [suspension] proceeding under Rule 258."

Second, REIT II raised its maximum offering amount from $50 million to $75 million through the filing of an August 26, 2021 offering circular supplement rather than a new offering statement or post-qualification amendment as required by the note to Rule 253(b) under Regulation A: "An offering circular supplement may not be used to increase the volume of securities being offered. Additional securities may only be offered pursuant to a new offering statement or post-qualification amendment qualified by the Commission." Based on this failure to file an offering statement or post-qualification amendment as required, both of which must be qualified, there is a reason to believe that REIT II avoided review by Division of Corporation Finance staff and sold in contravention of the requirement that qualification is a necessary

OS Received 04/13/2022

component for Regulation A sales. *See* Rule 251(d)(2). After Division of Enforcement staff notified REIT II of this failure, it reduced its offering amount back to $50 million.

B. Materially Misleading Representations

The Commission has reason to believe that DiversyFund, Inc.'s ("DiversyFund") website, used to solicit REIT II investors, REIT II's January 2021 offering circular ("Offering Circular"), and REIT II's August 26, 2021 offering circular supplement make materially misleading representations regarding REIT II being a separate investment vehicle from REIT I, and regarding how much capital REIT II needs to raise from investors, its plan of operation based on the amount of capital raised, and its fees.[1]

First, REIT II argued in its emergency motion for stay filed with the Ninth Circuit,[2] that a temporary disqualification from REIT II's Regulation A exemption will result in harm to thousands of investors in both REIT I and REIT II. If we accept REIT II's argument regarding investor harm as true, then there is reason to believe that the website's representations regarding the separation of REIT II and REIT I are misleading. In November 2021, REIT II's website[3] stated that REIT I and REIT II's offerings are "separate investment vehicles." The website further explained the separation between the two offerings as follows:

> "Will launching REIT 2 impact my original REIT investment in any way?
>
> No, REIT I will not be impacted by REIT II in any way. The assets in REIT I will continue to be owned and operated by REIT I."

Similarly, if we accept REIT II's argument regarding investor harm as true – *i.e.,* that stopping REIT II sales of securities will harm both REIT I and REIT II investors – then there is reason to believe that representations in the Offering Circular regarding how much capital it needs to raise from investors and its plan of operation, which is based on the amount of capital raised, are both misleading. REIT II's Offering Circular states on its cover page that "The Offering has no minimum amount. Thus, we will begin to deploy (spend) the money we raise right away, no matter how much or little we raise." (emphasis added). In addition, under its "Plan of Operation," REIT II's Offering Circular states: "Whether we raise $50,000,000 in the Offering or something less, we believe the proceeds of the Offering will satisfy our cash requirements. If we raise less than $50,000,000, we will simply make fewer investments." (emphasis added).

Second, there is reason to believe that REIT II made conflicting representations about whether fund management fees will be charged. Specifically, REIT II's August 2021 offering

---

[1] DiversyFund is the 100% owner of DF Manager, LLC, the manager of both the DF Growth REIT, LLC ("REIT I") and REIT II securities offerings.

[2] The Ninth Circuit denied the emergency motion for stay. *See* DiversyFund, Inc., et al. v. U.S. Securities and Exchange Commission, Case No. 22-70023 (9th Cir. Feb. 28, 2022).

[3] We refer to different versions of the website because DiversyFund has revised it several times and continues to do so.

OS Received 04/13/2022

circular supplement describes an "Asset Management Fee" "equal to 2% of the capital raised," but the September 2021 version of DiversyFund's website states that there are "no management fees." There is reason to believe that these conflicting representations are misleading.

There is also reason to believe that REIT II made conflicting representations regarding several other fees. REIT II's Offering Circular represents that DF Manager will charge a substantial "Sponsor Fee," and may charge a "Property Disposition Fee," a "Construction Management Fee," a "Guaranty Fee" and "Other Fees." REIT II's August 2021 offering circular supplement, which states that it revises the fee structure in its entirety, does not mention the "Sponsor Fee," but discusses the possible "Property Disposition Fee," "Construction Management Fee," "Guaranty Fee" and "Other Fees." None of these fees appear under the website headings "What Are Your Fees?," or "REIT 2: Fee Structure," both of which state that they describe the "new fee structure." These fees are not discussed in the November 2021 version of DiversyFund's website. There is reason to believe that these conflicting representations are misleading.

In these circumstances, the Commission has reason to believe that these representations are materially misleading. A reasonable REIT II investor would consider it important to know if their investment's success or failure was contingent upon REIT I or on how much money REIT II raised. A reasonable REIT II investor would also find it important to know what fees might be charged. *See Basic v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

III.

IT IS ORDERED, pursuant to Rule 258(a) of the General Rules and Regulations under the Securities Act, that the exemption of REIT II under Regulation A be, and hereby is, temporarily suspended.

IT IS FURTHER ORDERED that notice of this Order shall be delivered by personal service, registered mail, or certified mail to the addresses given by the issuer, any underwriter, and any selling security holder in the Offering Statement.

NOTICE IS HEREBY GIVEN that any person having an interest in this matter may, within thirty calendar days after the entry of this Order, file with the Secretary of the Commission pursuant to the Commission's Rules of Practice a request for a hearing; that within twenty days after the receipt of such request the Commission will, or at any time upon its own motion the Commission may, set the matter for hearing at a place to be designated by the Commission, for the purpose of determining whether this order should be vacated or made permanent, without prejudice, however, to the presentation and consideration of additional matters at the hearing; and that notice of the time and place of the hearing will be promptly given by the Commission. If no hearing is requested and none is ordered by the Commission, this Order shall become permanent on the thirtieth day after its entry, and will remain in effect unless and until it is modified or vacated by the Commission.

Attention is called to Rule 151(a), (b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(a), (b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the preceding paragraph) shall be filed

OS Received 04/13/2022

electronically in administrative proceedings using the Commission's Electronic Filings in Administrative Proceedings (eFAP) system access through the Commission's website, www.sec.gov, at http://www.sec.gov/eFAP. Respondent also must serve and accept service of documents electronically. All motions, objections, or applications will be decided by the Commission.

By the Commission.

Vanessa A. Countryman
Secretary

BY: Eduardo A. Aleman
Deputy Secretary

OS Received 04/13/2022

Exhibit 2

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93781 / December 14, 2021

INVESTMENT ADVISERS ACT OF 1940
Release No. 5926 / December 14, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20678

In the Matter of **DAVID MICHAEL,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against David Michael (a/k/a David Michael Newman, Jr.; David Washington) ("Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

1. Respondent, age 50, is believed to be a resident of Encino, California, or Oak Park, California. Between at least June 2018 and December 2019, Respondent was engaged in the business of effecting transactions in, or inducing or attempting to induce the purchase and sale of, securities and received transaction-based compensation. During the period relevant to this action, Respondent was neither registered with the Commission as either a broker or a dealer nor was he associated with a broker or dealer registered with the Commission. In addition, beginning in early 2019, Respondent, acting as an investment advisor, employed devices, schemes, and artifice to

OS Received 04/13/2022

defraud investor clients and prospective clients, made untrue statements of material fact and material omissions to investors, and misappropriated investor funds.

2. On November 23, 2021, a final judgment was entered against Respondent, permanently enjoining him from future violations of Sections 5 and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 15(a)(1) of the Exchange Act, and Sections 206(1), 206(2), and 206(4) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Stephen Scott Moleski et al., Civil Action No. 2:21-cv-01065-SVW-E, in the United States District Court for the Central District of California (the "Moleski Civil Action").

3. The Commission's complaint in the Moleski Civil Action alleged that, between at least June 2018 and December 2019, Respondent, using the mails or other means or instrumentalities of interstate commerce, solicited numerous investors to purchase securities in connection with two unregistered securities offerings in exchange for transaction-based compensation that was paid to Respondent and to entites controlled by Respondent. The complaint further alleged that during the time Respondent was inducing or attempting to induce the purchase of these securities, Respondent was not registered with the Commission as a broker or dealer nor while he was associated with an entity registered with the Commission as a broker or dealer.

4. The Commission's complaint in the Moleski Civil Action also alleged that Respondent, in early 2019, created a private investment fund, Austin Partners I, LLC, and began, both directly and indirectly (through hired securities solicitors) to solicit investors to invest in the fund. Respondent was a managing member, co-CEO, and advisor of Austin Partners I, LLC. Despite that Respondent solicited investment in Austin Partners I, LLC by falsely representing, among other things, that the fund would "create an investment grade portfolio of high-quality Investments," the fund held only a single investment, and the money invested in Austin Partners I, LLC was misappropriated by Respondent to pay personal or business expenses or to repay other investors.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act; and

C. Where, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act.

OS Received 04/13/2022

IV.

IT IS ORDERED that a public hearing before the Commission for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.220(b).

IT IS FURTHER ORDERED that the Division of Enforcement and Respondent shall conduct a prehearing conference pursuant to Rule 221 of the Commission's Rules of Practice, 17 C.F.R. § 201.221, within fourteen (14) days of service of the Answer. The parties may meet in person or participate by telephone or other remote means; following the conference, they shall file a statement with the Office of the Secretary advising the Commission of any agreements reached at said conference. If a prehearing conference was not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer.

If Respondent fails to file the directed Answer, or fails to appear at a hearing or conference after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

This Order shall be served forthwith upon Respondent by any means permitted by the Commission's Rules of Practice.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to service of paper copies, service to the Division of Enforcement of all opinions, orders, and decisions described in Rule 141, 17 C.F.R. § 201.141, and all papers described in Rule 150(a), 17 C.F.R. § 201.150(a), in these proceedings shall be by email to the attorneys who enter an appearance on behalf of the Division, and not by paper service.

Attention is called to Rule 151(a), (b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(a), (b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the following paragraph) shall be filed electronically in administrative proceedings using the Commission's Electronic Filings in Administrative Proceedings (eFAP) system access through the Commission's website, www.sec.gov, at http://www.sec.gov/eFAP. Respondent also must serve and accept service of documents electronically. All motions, objections, or applications will be decided by the Commission.

OS Received 04/13/2022

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to filing with or disposition by a hearing officer, all filings, including those under Rules 210, 221, 222, 230, 231, 232, 233, and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.210, 221, 222, 230, 231, 232, 233, and 250, shall be directed to and, as appropriate, decided by the Commission. This proceeding shall be deemed to be one under the 75-day timeframe specified in Rule of Practice 360(a)(2)(i), 17 C.F.R. § 201.360(a)(2)(i), for the purposes of applying Rules of Practice 233 and 250, 17 C.F.R. §§ 201.233 and 250.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that the Commission shall issue a decision on the basis of the record in this proceeding, which shall consist of the items listed at Rule 350(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.350(a), and any other document or item filed with the Office of the Secretary and accepted into the record by the Commission. The provisions of Rule 351 of the Commission's Rules of Practice, 17 C.F.R. § 201.351, relating to preparation and certification of a record index by the Office of the Secretary or the hearing officer are not applicable to this proceeding.

The Commission will issue a final order resolving the proceeding after one of the following: (A) The completion of post-hearing briefing in a proceeding where the public hearing has been completed; (B) The completion of briefing on a motion for a ruling on the pleadings or a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, where the Commission has determined that no public hearing is necessary; or (C) The determination that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155, and no public hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

For the Commission, by its Secretary, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

OS Received 04/13/2022

Exhibit 3

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 86654 / August 14, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19343

In the Matter of **Healthway Shopping Network, Monetiva, Inc., and Unity Global Holdings Ltd.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the respondents named in the caption (together, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Healthway Shopping Network ("Healthway") (CIK No. 1479014) is a dissolved Florida corporation located in West Palm Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Healthway is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2017, which reported a net income of $157,149 for the prior three months. As of July 22, 2019, the common stock of Healthway was not publicly quoted or traded.

2. Monetiva, Inc. ("Monetiva") (CIK No. 1681309) is a Delaware corporation located in Newport Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Monetiva is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2017, which reported a net loss of $45,850 for the prior year. As of July 22, 2019, the common stock of Monetiva was not publicly quoted or traded.

OS Received 04/13/2022

3. Unity Global Holdings Ltd. ("Unity Global") (CIK No. 1662669) is a void Delaware corporation located in Kowloon, Hong Kong with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Unity Global is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2017, which reported a net loss of $8,900 for the prior six months. As of July 22, 2019, the common stock of Unity Global was not publicly quoted or traded.

B. DELINQUENT PERIODIC FILINGS

4. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

5. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports.

6. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors that public administrative proceedings be instituted to determine:

A. Whether the allegations contained in Section II hereof are true and, in connection therewith, to afford the Respondents an opportunity to establish any defenses to such allegations; and,

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

OS Received 04/13/2022

IV.

IT IS ORDERED that a public hearing before the Commission for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.220(b).

IT IS FURTHER ORDERED that the Division of Enforcement and Respondents shall conduct a prehearing conference pursuant to Rule 221 of the Commission's Rules of Practice, 17 C.F.R. § 201.221, within fourteen (14) days of service of the Answer. The parties may meet in person or participate by telephone or other remote means; following the conference, they shall file a statement with the Office of the Secretary advising the Commission of any agreements reached at said conference. If a prehearing conference was not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer.

If Respondents fail to file the directed Answers, or fail to appear at a hearing or conference after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

This Order shall be served forthwith upon Respondents by any means permitted by the Commission's Rules of Practice.

Attention is called to Rule 151(b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the following paragraph) shall be filed with the Office of the Secretary and all motions, objections, or applications will be decided by the Commission. The Commission requests that an electronic courtesy copy of each filing should be emailed to APFilings@sec.gov in PDF text-searchable format. Any exhibits should be sent as separate attachments, not a combined PDF.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to filing with or disposition by a hearing officer, all filings, including those under Rules 210, 221, 222, 230, 231, 232, 233, and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.210, 221, 222, 230, 231, 232, 233, and 250, shall be directed to and, as appropriate, decided by the Commission. This proceeding shall be deemed to be one under the 30-day timeframe specified

OS Received 04/13/2022

in Rule of Practice 360(a)(2)(i), 17 C.F.R. § 201.360(a)(2)(i), for the purposes of applying Rules of Practice 233 and 250, 17 C.F.R. §§ 201.233 and 250.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that the Commission shall issue a decision on the basis of the record in this proceeding, which shall consist of the items listed at Rule 350(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.350(a), and any other document or item filed with the Office of the Secretary and accepted into the record by the Commission. The provisions of Rule 351 of the Commission's Rules of Practice, 17 C.F.R. § 201.351, relating to preparation and certification of a record index by the Office of the Secretary or the hearing officer are not applicable to this proceeding.

The Commission will issue a final order resolving the proceeding after one of the following: (A) the completion of post-hearing briefing in a proceeding where the public hearing has been completed; (B) the completion of briefing on a motion for a ruling on the pleadings or a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17 C.F.R. § 201.250, where the Commission has determined that no public hearing is necessary; or (C) the determination that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155, and no public hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Vanessa A. Countryman
Secretary

OS Received 04/13/2022

Exhibit 4

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93619 / November 19, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20659

In the Matter of **HUGHE DUWAYNE GRAHAM,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Hughe Duwayne Graham ("Respondent" or "Graham").

II.

After an investigation, the Division of Enforcement alleges that:

1. Respondent, age 62, is last known to reside in Riverside, California. From at least October 2017 to May 2019, Respondent was engaged in the business of effecting transactions in, or inducing or attempting to induce the purchase and sale of, securities and received transaction-based compensation. During the period relevant to this action, Respondent was neither registered with the Commission as either a broker or a dealer nor was he associated with a broker or dealer registered with the Commission.

2. On November 12, 2021, a final judgment was entered against Respondent, permanently enjoining him from future violations of Section 15(a)(1) of the Exchange Act in the civil action entitled Securities and Exchange Commission v. Hughe Duwayne Graham, et al., Civil

OS Received 04/13/2022

Action Number 1:20-CV-02505, in the United States District Court for the Northern District of Ohio.

3. The Commission's complaint alleged that, from at least October 2017 to May 2019, Respondent, using the mails or other means or instrumentalities of interstate commerce, effected transactions in, or induced or attempted to induce the purchase and sale of, securities and received commissions while he was not registered with the Commission as a broker or dealer nor while he was associated with an entity registered with the Commission as a broker or dealer.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

IV.

IT IS ORDERED that a public hearing before the Commission for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.220(b).

IT IS FURTHER ORDERED that the Division of Enforcement and Respondent shall conduct a prehearing conference pursuant to Rule 221 of the Commission's Rules of Practice, 17 C.F.R. § 201.221, within fourteen (14) days of service of the Answer. The parties may meet in person or participate by telephone or other remote means; following the conference, they shall file a statement with the Office of the Secretary advising the Commission of any agreements reached at said conference. If a prehearing conference was not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer.

If Respondent fails to file the directed Answer, or fails to appear at a hearing or conference after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

OS Received 04/13/2022

This Order shall be served forthwith upon Respondent by any means permitted by the Commission's Rules of Practice.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to service of paper copies, service to the Division of Enforcement of all opinions, orders, and decisions described in Rule 141, 17 C.F.R. § 201.141, and all papers described in Rule 150(a), 17 C.F.R. § 201.150(a), in these proceedings shall be by email to the attorneys who enter an appearance on behalf of the Division, and not by paper service.

Attention is called to Rule 151(a), (b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(a), (b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the following paragraph) shall be filed electronically in administrative proceedings using the Commission's Electronic Filings in Administrative Proceedings (eFAP) system access through the Commission's website, www.sec.gov, at http://www.sec.gov/eFAP. Respondent also must serve and accept service of documents electronically. All motions, objections, or applications will be decided by the Commission.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to filing with or disposition by a hearing officer, all filings, including those under Rules 210, 221, 222, 230, 231, 232, 233, and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.210, 221, 222, 230, 231, 232, 233, and 250, shall be directed to and, as appropriate, decided by the Commission. This proceeding shall be deemed to be one under the 75-day timeframe specified in Rule of Practice 360(a)(2)(i), 17 C.F.R. § 201.360(a)(2)(i), for the purposes of applying Rules of Practice 233 and 250, 17 C.F.R. §§ 201.233 and 250.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that the Commission shall issue a decision on the basis of the record in this proceeding, which shall consist of the items listed at Rule 350(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.350(a), and any other document or item filed with the Office of the Secretary and accepted into the record by the Commission. The provisions of Rule 351 of the Commission's Rules of Practice, 17 C.F.R. § 201.351, relating to preparation and certification of a record index by the Office of the Secretary or the hearing officer are not applicable to this proceeding.

The Commission will issue a final order resolving the proceeding after one of the following: (A) The completion of post-hearing briefing in a proceeding where the public hearing has been completed; (B) The completion of briefing on a motion for a ruling on the pleadings or a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17

OS Received 04/13/2022

C.F.R. § 201.250, where the Commission has determined that no public hearing is necessary; or (C) The determination that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155, and no public hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

For the Commission, by its Secretary, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

OS Received 04/13/2022