UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 19, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20801

In the Matter of

DF Growth REIT II, LLC,

Respondent.

DF GROWTH REIT II, LLC'S OPPOSITION TO DIVISION'S MOTION FOR SUMMARY DISPOSITION

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I. INTRODUCTION

The Division's Motion for Summary Disposition ("Mot.")[1] fails to show the absence of disputed factual issues on any of the four grounds raised. In fact, disputed factual issues abound.

Particularly with regard to technical grounds, precedent requires that the Court make factual determinations on several factors required to be balanced, including individual culpability, intent, investor harm resulting from any violation, remediation, and the public interest. Despite having the burden of proof on all issues, the Division presents no evidence on any of these factors, leaving unaddressed DF Growth REIT II, LLC's evidence that these factors weigh against the Division's demanded relief. Proper contextualizing of these issues alone requires a hearing.

But even on simple questions such as whether REIT II timely began its offering, there are disputes: the Division misstates the evidence it cites, and does not address known contrary evidence that REIT II timely began its offering.

The Division's showing is particularly weak on claims based on REIT II's request for relief in the Ninth Circuit Court of Appeals—a disturbing fact given the tension between the Division's claims and the bar on government retaliation for exercise of the constitutional right to petition. Not only does the Division mischaracterize evidence and fail to address contrary evidence, but it fails to establish either side of any purported misrepresentation, proving neither representation nor contrary fact. The Division's tortured argument is instead a clash of hypotheticals: if REIT II's operations were as REIT II's statements to the Ninth Circuit allegedly implied, and if REIT II's investor disclosures mean what the Division says they mean, then investors were misled. But the

[1] The Division's Motion claims that REIT II violated § 3(b) of the Securities Act of 1933 ("Securities Act") and Rule 258(a) [17 C.F.R. § 201.258(a)] thereunder, and requests that this Court suspend permanently REIT II's Tier 2 Regulation A ("Reg A") exemption for a $50 million offering ("Offering") of Class A Investor Shares ("Shares"), including in its order not only findings of technical noncompliance under Rule 258(a)(1), but also findings under Rule 258(a)(2) of material misrepresentations and omissions in various offering and promotional materials.

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Division does not actually prove anything about REIT II's operations, and its reading of REIT II's allegedly contrary disclosures is clearly contradicted by the text of the disclosures, its author's explanation of what they mean, common sense, and the undeniable facts about REIT II. The Division's proof fails both on what the disclosures say, and on what REIT II's operations were. To the extent the Division tries to prove things about REIT II's operations, such as its "commingling" claim, it does so through incorrect claims by ill-informed witnesses: it is demonstrably wrong.

Finally, as a matter of law, summary disposition is not permitted under the Administrative Procedure Act ("APA") given the sanctions sought by the Division in this case.

Though a small issuer, REIT II followed numerous formalities and acted responsibly. It retained expert SEC counsel to prepare offering documents, and to ensure its offering was compliant. Its financial statements were audited. It responsibly managed investor funds: there are no allegations that management's compensation was unreasonable, or that investments were not properly made. In fact, management achieved great results. Mot. Ex. 22 (Lewis Testimony) at 181. When the Division first approached REIT II, REIT II offered voluntary access to evidence and immediate cure of any problems. The Division repeatedly refused all such offers, and is now insisting on abusing this proceeding not for the relief the Court is authorized to provide but for a collateral purpose: to use factual findings from a less-formal administrative proceeding as collateral estoppel in forums where the Division holds less of an advantage. This is unseemly, and unjust. REIT II should not be drummed out of business for minor issues attributable to reliance on counsel, or inattention at worst. Given the stakes, the evidence proffered herein, and the APA's requirement of a live hearing, REIT II should be permitted its day in court, after which this Court should exercise its discretion to vacate REIT II's temporary suspension.

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II. STATEMENT OF FACTS

A. ISSUER AND SPONSOR

The issuer, REIT II, is a Delaware-organized, limited liability company. Its Sponsor and manager is DiversyFund, Inc., a financial technology ("FinTech") company that uses technology and Reg A to allow small investors to participate in diversified real estate investments generally not available to small investors. As co-founder Alan Lewis explained, he and co-founder Craig Cecilio "grew up in middle class families" who went "through anxiety as their [stock] portfolio would go up and down over the years with different cycles." Mot. Ex. 22 at 47. After learning about real estate's stable wealth building tools, Mr. Lewis "wanted to find a way to take these investments that really seemed limited to, you know, the top 1 percent… and bring them—make them available to the everyday investor who may not fit an accreditation qualification, and do that in an amount—an investment amount that is accessible to someone starting out like my parents…" *Id.* at 48. As of mid-December 2021, REIT II included approximately 3,712 investors and had raised $8,032,282, of which $5,230,404 had been invested in one multifamily property. See Mot. Ex. 7 (Ninth Cir. Mot. to Stay), at Ex. 1 (Lewis Decl. dated Dec. 13, 2021) thereto, ¶¶ 3–10. DiversyFund bases its business model on continued access to Reg A offerings, having developed supporting infrastructure for REIT II and its predecessor REIT I. *Id.*

B. QUALIFICATION OF OFFERING STATEMENT

On January 29, 2021, the Commission qualified REIT II's Reg A Offering based on the Offering Circular (Mot. Ex. 8) and other disclosures filed by REIT II's well-qualified securities counsel, Mark Roderick. *See generally* Affidavit of Markley S. Roderick (filed concurrently as

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Opp. Ex. 1).[2] Among other things, the Original Circular disclosed that REIT II sought to raise up to $50 million (Mot. Ex. 8 (Form 1-A) at 1); that it would "begin deploying capital (that is, investing in projects) right away," which carried the risk that "up to 100% of the Company's assets could be deployed in a single project" (*id.* at 7); that if it raised not $50 million but "only a small amount from the Offering," its "business plans would be severely curtailed, creating greater risks for Investors" (*id.*); that it would "focus primarily on multifamily value-add projects," which carried "greater risks" but also "potential for higher profits" (*id.*); that real estate's capital-intensive" nature might require REIT II to "raise more money in the future" for acquisitions, operations or to "make capital improvements," and if additional funding could not be raised, REIT II's "operations and prospects could be negatively affected" (*id.* at 8); that it was a startup whose auditors had expressed a "going concern" caution about its viability, which was "dependent upon its ability to obtain capital financing sufficient to meet current and future obligations" and effective deployment of that capital (*id.* at 3-4); and that it would "invest only in projects sponsored or co-sponsored by" Sponsor DiversyFund or its affiliates (such as REIT I), which may involve co-investment with REIT I, possibly causing sub-optimal geographic diversification (*id.* at 5, 7, 20).

C. INITIAL OFFERS AND OFFERING CIRCULAR SUPPLEMENT DATED AUGUST 26, 2021

REIT II was ready to receive investor funds immediately upon qualification, and Mr. Lewis made calls to numerous investors, including high net-worth and institutional investors, immediately. (*See infra* Section IV.A.1; Affidavit of Alan Lewis (filed concurrently as Opp. Ex.

[2] Mr. Roderick is "one of the most prominent Crowdfunding and Fintech lawyers in the United States" who represents "portals, issuers, and others across the country and around the world." https://www.lexnovalaw.com/our-attorneys/markley-s-roderick/

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2) at ¶ 2.[3] Mr. Lewis continued to solicit investors for several weeks after qualification, focusing mainly on high net worth and institutional investors. These efforts were not successful.

Combined with other business issues, the lack of institutional investor interest in REIT II prompted REIT II to modify its offering. Mot. Ex. 22 (Lewis Testimony) at 161-62. On August 26, 2021, through Mr. Roderick, REIT II filed an Offering Circular Supplement pursuant to 17 CFR §230.253(g)(2) (the "Supplement"). The Supplement reported two changes:

1) Effective on March 15, 2021, the Commission had increased the Reg A limit from $50 million to $75 million.[4] The Supplement reported that REIT II had increased the size of the Offering consistent with that change.
2) The Supplement reported a change in the fee structure of REIT II. The overall fee load to REIT II investors remained the same as for REIT I, but fees were now divided across revenue events in a way that was less "lumpy," and might appeal more to institutional investors. Mot. Ex. 22 (Lewis Testimony) at 157-61.

D. INVESTIGATION AND ORDER OF TEMPORARY SUSPENSION

The Division's first substantive contact with REIT II was on November 29, 2021, when it informed REIT II that its investigation had just begun, but that REIT II must immediately cease offers or sales of securities under Rule 262(a)(7). Mot. Ex. 7 (Ninth Circuit Mot. to Stay) at 4-7. After REIT II sought judicial relief against the Division's novel claim that Rule 262(a)(7) allows

[3] The Division's Motion cites the testimony of DiversyFund's chief executive officer, Craig Cecilio, that solicitation efforts began six months after the qualification date of January 29, 2021. Mot. at 5, 16–17. That testimony, however, referred to solicitations through the DiversyFund website. Mot. Ex. 21 at 75:18–77:7. As for pre-website solicitations, he testified that person-to-person, word-of-mouth, and social media efforts had begun earlier, though he was uncertain of the date. *Id*. at 77:8–79:2, 83:12–13.

[4] "Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets," Release Nos. 33-10884; 34-90300; IC-34082 (Nov. 2, 2020, effective March 15, 2021).

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it to indefinitely suspend Reg A exemptions without notice or a hearing, the Commission began this Rule 258 proceeding. Mot. Ex. 7 at 1-2, 4-7; SEC Sec. Act. Rel. No. 11040 (Mar. 16, 2022).

III. STANDARD FOR SUMMARY DISPOSITION

The standard for summary disposition under Rule 250(b) [17 C.F.R. § 201.250(b)] is "analogous to Federal Rule of Civil Procedure 56." Amendments to the Commission's Rules of Practice, 81 Fed. Reg. at 50,224. The "facts should be construed in the light most favorable to the non-moving party." *Id.; In the Matter of Gary L. Mcduff*, 112 S.E.C. Docket 3167, Release No. 31, 90, 2015 WL 13449919, *2 (Oct. 2, 2015). The court may not make credibility determinations, weigh evidence, or decide which inferences to draw from facts: "these are jobs for a factfinder." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003); *In the Matter of Jaycee James*, 98 S.E.C. Docket 868, Release No. 649, 2010 WL 3246170 at *3 (Apr. 2, 2010) ("At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing.")

The movant must "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant fails to carry this "initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos, Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000). The Court has no duty to scour the record beyond those exhibits called to its attention. *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001). REIT II accordingly asks that the Court disregard and/or formally strike from the record the eight (8) Division exhibits that it never cites in its Motion: Exhibits 15-20, 24, and 28.

A. APA LIMITATIONS ON SUMMARY DISPOSITION

The APA does not permit summary disposition of every administrative proceeding. Alexander I. Platt, *Is Administrative Summary Judgment Unlawful?* 43 HARV. J. L. & PUB. POL'Y

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235 (2021). As Professor Platt demonstrates, the "text of APA § 556(d) unmistakably creates an *absolute* right to a hearing for formal adjudications involving 'sanctions.'" *Id.* at 260 (emphasis in original). The APA definition of "sanction," which includes taking of property rights, suspension of a license, or other "restrictive action," clearly includes the permanent suspension sought by the Division in this case. *Id.* at 265–67. This interpretation of the APA is compelled not just by its terms, but also its legislative history, which shows that Congress stated that in proceedings such as this one, "seeing and hearing the witnesses is required…" *Id.* at 273. REIT II asserts its APA right to a live hearing where its witnesses would be seen and heard.

B. DISCRETION IN IMPOSING PERMANENT SUSPENSION

By its terms, Rule 258(d) does not require suspension even if non-compliance with a Reg A condition is proven.[5] This Court "has discretion to vacate a temporary suspension even if an issuer does not or cannot contest its legal validity." *In the Matter of Med-X, Inc.*, 116 S.E.C. 3420, Release No. 1130, 2017 WL 1831239, *9 (May 8, 2017). In exercising this discretion, the Court must "attempt to balance the equities as they affect the Commission's mission of protecting investors, maintaining efficient markets, and facilitating capital formation, the last of which was the primary emphasis of the JOBS Act." *Id*. at *10.

The Division's Motion cites no case or other authority requiring this Court to view a permanent suspension as mandatory in light of an inadvertent procedural error, or suggesting that this Court does not have discretion to consider the totality of circumstances—including anticipated

[5] Rule 258(d) provides a *permissive*, not mandatory, basis for a permanent suspension:

> (d) Permanent suspension. The Commission *may*, at any time after notice of and opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this section. Any such order shall remain in effect until vacated by the Commission.

(Emphasis added.)

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harm to investors—in determining whether vacating a temporary suspension is in the public interest.

In fact, one of the primary participants in the drafting and enacting of these and other Reg A rules, Gerald Laporte, Chief of the SEC's Office of Small Business Policy from 2002 through 2013, opined as an expert in *Med-X* that if a permanent suspension from the Reg A exemption, and therefore "'bad actor' disqualification" is "automatically triggered" by a procedural error, then "people who have already invested in an offering under the exemption may see their investment devalued as the company struggles to raise money as a 'bad actor,'" thus "unnecessarily harm[ing]" the "investors as to whom the JOBS Act encourages participation."[6] Such an interpretation of the requirements of Reg A is "entirely inconsistent with the regulatory scheme of Regulation A+ and the discretion accorded regulators"; discretion that "should be exercised to protect not only potential investors . . . but also actual investors . . . who could be significantly harmed if there is a permanent suspension . . . ."[7]

This is precisely the position that the court took in *Med-X*, drawing on the reasoning in *In the Matter of Illowata Oil Company*, Release No. 33-3999, 38 S.E.C. 720, 1958 WL 55565, *3 (Dec. 4, 1958) ("*Illowata I*"), wherein the court considered misleading statements in the filing of a Form 2-A for a Regulation A Offering. In *Illowata I*, though the court went to great lengths to emphasize that it would not "encourage a practice of irresponsible or deliberate submission of inadequate or false material followed by correction by amendment of the deficiencies found by the

[6] *See* Appendix 1 to Respondent's Pre-Hearing Brief, "Expert Report of Gerald J. Laporte" at ¶ 13, *In the Matter of MED-X, Inc.*, File No. 3-17551, January12, 2017 (available at https://www.sec.gov/litigation/apdocuments/3-17551-event-33.pdf).

[7] *Id*. Mr. Laporte went on to note that "[t]he SEC Small Business Office and securities practitioners recognize that the rules as implemented by the SEC are not always clear . . . . Indeed, it is not unusual for regulators, securities practitioners, and companies to have legitimate questions . . . [which] [a]s to the new Regulation A+ . . . are not simple questions with simple answers. *Id*. at ¶ 6.

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Division," suspension in the absence of such culpability was unwarranted. *Id*. The court found good faith and mitigating circumstances where, although the respondent had made many misleading statements on its Form 2-A filing, those misstatements were almost entirely based on (1) "the mistake of counsel who prepared the filing," and (2) geological reports prepared by a third party on which respondents relied in good faith. *Id*. at *4.[8] The court also placed weight on the respondent's willingness to take remedial steps.

The exercise of discretion described above will be incompatible with summary disposition in most cases. Even if no genuine issue of fact exists about a respondent's failure to satisfy a condition of Reg A, summary disposition is appropriate only when a party is *entitled* to disposition as a matter of law. 17 C.F.R. § 201.240(b); 17 C.F.R. § 230.258(d) (emphasis added). Entitlement to the Court's favorable exercise of discretion under an equitable multi-factor test will rarely be demonstrable on the record available on summary disposition.

C. FACTORS CONSIDERED IN IMPOSING SUSPENSION

In considering whether to impose a permanent suspension, the Commission looks to factors applied in other registered and exempted offerings. In *Gateway Int'l Holding, Inc.*, 88 S.E.C. Docket 334, Release No. 53907, 2006 WL 1506286, *4 (May 31, 2006), the Commission noted that the concern for investor protection requires consideration of:

> among other things, the seriousness of the issuer's violations, the isolated or recurrent nature of the violations, the degree of culpability involved, the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and the credibility of its assurances, if any, against further violations.

[8] After the amendment, the filing was found to still contain misstatements and further omissions. After this, the Court *then* issued a permanent suspension in *In the Matter of Illowata Oil Co.*, 39 S.E.C. 342, Release No. 33-4127, 1959 WL 59459 (Aug. 10, 1959) ("*Illowata II*").

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Id. While the Commission "cannot in any event be permitted to impair the required standards of careful and honest filings under [Regulation A]," where there is "a clear showing of a good faith and of other mitigating circumstances in connection with the deficiencies," discretion can be exercised to vacate a temporary suspension. *Illowata I*, 1958 WL 55565 at *3.

Consideration of the *Gateway* factors (or similar discretionary factors) involves factual disputes not appropriate for determination at the summary disposition stage. "Under these legal standards, a hearing is necessary to determine what sanction, if any, is in the public interest." *In the Matter of John T. Lynch, Jr.*, 117 S.E.C. Docket 1912, Release No. 4989, 2017 WL 11180603, *3 (April 5, 2017) (denying Division's motion for summary disposition where questions existed as to "the degree of scienter attributable to each of [respondent's] violations" and "the degree of egregiousness and recurrence involved in [respondent's] due diligence failures [was] unclear"). The discretionary decision of whether to impose harsh sanctions in consideration of a multi-factor test including the public interest cannot be made without a fully-developed factual record. *In the Matter of Can-Cal Res. Ltd., China Fruits Corp., & Skylar Bio-Pharm. Co.*, Release No. 6525, 2019 WL 2296498, *5 (March 28, 2019) (finding that there are "material questions of law and fact" relevant to appropriate remedies for reporting violations where "[t]he Division has not met its burden on summary disposition to show that revocation of [respondent's] securities is necessary for protection of investors" under the *Gateway* factors); *Pacific Packaging Concepts, Inc. v. Nutrisystem, Inc.*, No. 219CV04755ODWEX, 2021 WL 3511200, at *2 (C.D. Cal. Aug. 10, 2021) (holding that a "non-exhaustive, multi-factor, fact-intensive inquiry" does not lend itself to decision at the summary judgment stage).

IV. ARGUMENT

The evidence as a whole weighs strongly against the Division's Motion. Contrary to the Division's Rule 258(a)(1) claim that REIT II culpably failed to comply with Reg A's conditions,

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the evidence reflects disputes of fact both about whether any actionable non-compliance occurred and the proper response, including whether REIT II acted reasonably, following the advice of its well-qualified securities counsel. Contrary to the Division's Rule 258(a)(2) claim that REIT II and its Sponsor DiversyFund, Inc. made material misrepresentations, the evidence reflects that the statements at issue were truthful and accurate statements about states of affairs and business practices; reflected genuine, reasonable beliefs about future actions and operations; and were consistent with investor disclosures. The Division is wrong both about what REIT II told investors, and about the actual states of affairs.

A. RULE 258(a)(1) CLAIMS

The Division first argues that REIT II should be suspended and branded a "bad actor" because: (1) REIT II should have solicited investors over a weekend (having been qualified on Friday January 29, 2021 at 4:00 p.m. [Mot. Ex. 1], it should have solicited investors within "two calendar days" (by Sunday January 31, 2021) [Mot. at 11]); and (2) REIT II's securities lawyer tried to increase its offering amount using what the Division says was the wrong form [Mot. at 5, 14–15]. The Division's arguments are unfounded and unjust.

1. Rule 251 (17 C.F.R. 230.251): Weekend Offers

As discussed earlier, the Motion mischaracterizes Mr. Cecilio's testimony on when offers began and ignores contrary testimony of Mr. Lewis that he contacted potential investors "early on," very soon after qualification. Mot. Ex. 22 at 76-78, 100-101. Though not necessary, REIT II has now supplied an affidavit from Mr. Lewis clarifying that his early offers to investors included calls over the weekend of January 30-31, 2021. *See* Lewis Aff. (Opp. Ex. 2) at ¶ 2. Also, as of

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January 29, 2021, investors had access to REIT II's Offering Circular on EDGAR, and REIT II was prepared to receive capital. *Id.* There is a clear factual dispute on when offers[9] began.

Even if the Division were correct that offers began late, that would not present a sound basis for permanent suspension. The Division offers no evidence that REIT II intentionally violated the two-day rule (the record indicates that any violation was inadvertent and counsel did not provide REIT II direction that would have prevented it, Opp. Ex. 1 (Roderick Aff.) ¶ 3); that any violation was serious (it appears the 2-day rule has never before been enforced, Opp. Ex. 1 ¶ 3); that a violation is likely to recur; that investors were harmed; or that the public interest favors suspension. Instead, the record shows the opposite, including that investors would be harmed by a permanent suspension. Mot. Ex. 7 (Ninth Circuit Mot. to Stay), Ex. 1 thereto (12/13/21 Lewis Decl.) at ¶¶ 10–17, and Ex. 7 thereto (2/15/22 Lewis Decl.) at ¶ 25. Even if a Rule 251(d) violation occurred (which REIT II disputes), the *Med-X*/*Gateway* factors weigh against permanent suspension.[10] *See, e.g., In the Matter of Mid-Hudson Nat. Gas. Corp.*, 38 S.E.C. 639, 1958 WL 55561, *2–3 (Nov. 3, 1958) (misstatement of number of shares to be issued and agreements to transfer shares to controlling party of issuer was "not so serious" as to justify permanent suspension under Reg A's then corollary to Rule 258).

[9] As the Commission has frequently argued, offers are defined broadly to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." Securities Act § 2(a)(3) [15 U.S.C. § 77b(a)(3)]. This "goes well beyond the common law concept of an offer." *Diskin v. Lomasney & Co.*, 452 F.2d 871, 875 (2d Cir. 1971). An offer can be a press release, *Chris-Craft Indus., Inc.v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970), a press conference, *SEC v. Arvida Corp.*, 169 F. Supp. 211 (S.D.N.Y 1958), a letter to current investors asking for names of friends that might be interested in investing, *SEC v. Commercial Inv. & Dev. Copr. Of Florida*, 373 F. Supp. 1152, 1164 (S.D. Fla. 1974), or a brochure touting the safety, performance, and lower costs of a future security, *SEC v. Thomas D. Kienlen Corp.*, 755 F. Supp. 936, 941 (D. Or. 1991).

[10] The Division's argument regarding Rule 260(a)(2) is as confusing as it is misplaced. The Division explicitly states that Rule 260's distinctions between serious and non-serious are not applicable in the Rule 258 context, "and per Rule 258(a)(1) any violation by an issuer of Regulation A *can* form the basis of a suspension." Mot. at 13–14, n.7 (emphasis added). There remains nothing in Rule 258 that either *requires* a permanent suspension for a violation of Rule 258(a), nor that categorizes certain violations as necessitating greater penalties than others.

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2. Rule 253 (17 C.F.R. 230.253): Wrong Form

The Division's "wrong form" argument is no more convincing. The Division argues that the size of an offering may be increased only by amendment under 17 C.F.R. § 230.252, not by supplement under 17 C.F.R. § 230.253(g)(2),[11] and use of the wrong form alone requires suspension and bad actor designation. The law does not require such injustice.

The record reflects that REIT II's well-qualified securities counsel (Mr. Roderick) determined which form was used for its offering size increase, and REIT II's management reasonably relied on him for such issues. Mr. Roderick will testify that it was his decision to file a supplement rather than an amendment and that REIT II and its management relied on his advice. Opp. Ex. 1 (Roderick Aff.) ¶¶ 4-6. Far from suggesting wrongdoing, REIT II's supplement filing demonstrates the good faith intention of REIT II and its management to comply with all applicable laws. Mot. Ex. 21 (Cecilio Testimony) at 151:1–152:6, 163:4–164:15; Ex. 22 (Lewis Testimony) at 109:8–14, 147:1–23, 149:17–22, 170:20–171:16, 173:19–174:15. As soon as REIT II learned of the Division's position on this issue, Mr. Roderick filed another supplement withdrawing the first.

The supplement in issue was never effective in any offer or sale of securities: REIT II did not raise anywhere near the offering maximum. Mot. at 7. It was withdrawn on February 23, 2022 (Mot. at 5), days after REIT II learned of the Division's objection to it and before the first Order in this case was issued (on March 16, 2022, *see* SEC Rel. No. 33-11040). There is no evidence that Mr. Roderick's use of the wrong form was anything but an innocent mistake, or that it had any effect on the SEC, or on investors. Mr. Roderick's error led only to an ineffective filing, not

[11] The language the Division relies on for this position is found not in the text of the regulations under Reg A, but in a note appended to a regulation that deals with information that may be omitted from an Offering Statement.

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one that ignored the requirements of, "violated" Reg A.[12] Under these circumstances, the Division's demand for severe punishment is unjustified. The *Med-X* court could have been speaking directly to our facts when it said "[t]here is a public interest in helping small companies . . . raise capital under the exemption, and not chilling its use by establishing a rule that a single filing error accompanied by the sale of the stock could result in a permanent suspension and disqualification from other exemptions." *Med-X*, at *13. The *Med-X/Gateway* factors weigh strongly against suspension for the innocent, nonrecurring, nonharmful, technical error alleged by the Division (Mr. Roderick is unaware of the SEC ever enforcing the position it takes in this case, Opp. Ex. 1 (Roderick Aff.) ¶ 6), which does not reflect any skirting of securities laws but the opposite--an attempt to comply through counsel. This is particularly so given the investor harm that would be caused by permanent suspension.

B. RULE 258(a)(2): ALLEGED MISREPRESENTATIONS

The Division's Motion characterizes several statements of REIT II and DiversyFund as "untrue statements of material facts or material omissions that rendered statements made misleading" or outright "misrepresentations." Mot. at 15. These characterizations are not supported by evidence. In mischaracterizing these statements as false statements, the Division has

[12] Whether an amendment or a supplement was required to increase the Offering from $50 million to $75 million might be significant if REIT II had sold more than $50 million of securities. But it didn't. If the Division is right that an amendment was required to increase the size of the Offering, then the supplement was simply *ineffective*. Filing an ineffective document does not violate Reg A.

Suppose that instead of filing a supplement pursuant to 17 CFR §230.253(g)(2), REIT II had simply sent an email to the Division's general email inbox saying "We're increasing our offering to $75 million." This email would likewise have been *ineffective*. It would not have violated Reg A.

Or suppose that Company X files a Reg A offering statement with the Commission, listing its principal place of business as in Europe rather than in the U.S. or Canada. Because the Reg A exemption is available only to issuers with a principal place of business in the U.S. or Canada, the Commission declines to qualify the offering statement. Company X has not sold any securities. According to the position the Division takes in our case, Company X can be found to have "violated" Reg A, and designated a bad actor.

Or suppose Company Y has offered and sold securities under Regulation A and tries to file an annual report on Form 1-SA rather than on Form 1-K. Realizing its mistake, Company Y files Form 1-K before the deadline. According to the position the Division takes in our case, Company X has "violated" Reg A by filing the wrong form and must now be banned from Reg A forever, even though the correct form was filed before the deadline.

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had to extract sentences from their context, ignore the context from which those sentences were extracted, neglect important disclosures made in public filings, and misunderstand REIT II's operations and terminology. As the author of several of the statements in issue, Mr. Roderick authoritatively refutes the Division's incorrect reading of them as contrary to his meaning, and contrary to how a reasonable investor knowledgeable about real estate terminology would understand them. Opp. Ex. 1 ¶¶ 7-13.

It is disturbing to see the Division so grossly misrepresent evidence—in a case supposedly about truth-telling, and one that may well cross the line into unconstitutional retaliation against REIT II for its exercise of its constitutional right to petition. For example, the Division claims that REIT II "has admitted that [certain] representations were false and incomplete," Mot. at 7, but then cites REIT II statements to the Ninth Circuit that do no such thing. The Division claims "nowhere in the REIT II offering materials—in its risk factors or otherwise—did REIT II disclose" the risks posed by inability to raise capital, *id.*, without disclosing to the Court that REIT II's Offering Circular actually discloses such risks, many times over. *See supra* Section II.B; Opp. Ex. 1 (Roderick Aff.) ¶ 12. The Division claims DiversyFund's CEO "admitted that REIT II did in fact have a minimum amount of $75 million" and that any disclosure statement "that it did not have a minimum amount it needed to raise was inaccurate." Mot. at 7. But the actual testimony does no such thing—it does the opposite. *See infra* Section IV.B.4.a. The Division boldly alleges that "DiversyFund improperly co-mingled REIT I and REIT II funds," Mot. at 7, without even a perfunctory investigation into the accuracy of such charged statements, which are flat wrong. *See infra* Section IV.B.3. Finally, the Division fails to demonstrate that REIT II's operations and/or condition are contrary to what was represented to investors. Obviously, given that REIT II and its affiliates continue operations in mid-September, the imminent drastic measures that REIT II

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warned of in its February Ninth Circuit briefing have not come to pass. In other words, the allegedly undisclosed weakness on which the Division relies does not exist. Rather, the assumptions on which REIT II's prior warnings were based proved incorrect. Opp. Ex. 2 (Lewis Aff. ¶ 3). If the Division wants to prove that REIT II's financial condition was not as disclosed to investors, it will have to do the work of actually establishing what that condition was. Its Motion fails to do so. It will also have to be accurate and candid with the Court in discussing what REIT II's disclosures said, and what witnesses have said. Its Motion fails on that score as well.

1. Alleged "Misrepresentations" and "Misleading" Statements

The Division alleges that certain sentences appearing in REIT II's Original Circular of January 21, 2021, its Supplemental Circular of August 26, 2021, and the Website of its Sponsor, DiversyFund, in September 2021 and November 2021, were false statements of fact. Mot. at 6–9, 18–23. For clarity, the statements are numbered below and separated into four groups: (1) statements about then-present states of affairs; (2) statements concerning business and accounting practices; (3) statements about intended or expected future operations, actions, or states of affairs; and (4) statements about fees.

The first statements about then-present states of affairs are: (1) REIT II "does not currently have any capital commitments" (Original Circular (Mot. Ex. 8) at 58); and (2) REIT I and REIT II "operate as separate investment vehicles" (Website). The Division presents no evidence showing how or why these statements were false.

The second group consists of statements about business and accounting practices and focus on assertions that: (3) REIT I and REIT II's accounts have been kept separate. These statements are true; the Division's claims of "unauthorized actions" and "commingling," consisting of investor assertions that DiversyFund improperly created their electronic signatures, is flawed. The investors whose statements the Division relies upon either forgot or did not realize that they had

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digitally executed authorizing documents. As for purported commingling, the Division proffers no evidence—nor could they—to show any impropriety in the accounting of either REIT.

The third group of statements concerns statements about REIT II's intended or expected future operations, actions, or states of affairs. These statements were true and reasonable statements about management's intended or expected future actions and operations and reasonably expected future states of affairs. They are consistent with management's actions, and were clarified by important disclosures the Division fails to cite. These statements include: (4) "The Offering has no minimum amount. Thus, we will begin to deploy (spend) the money we raise right away, no matter how much or how little we raise." (Original Circular at 1); (5) "Whether we raise $50,000,000 in the Offering or something less, we believe the proceeds of the Offering will satisfy our cash requirements." (*Id*. at 58); (6) "If we raise less than $50,000,000, we will simply make fewer investments." (*Id*.); and (7) "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." Mot. Ex. 11 at 2.

The fourth and final group of statements are representations about fees. The Supplemental Circular, filed on August 26, 2021, modified the fee structure from the Original Circular. Despite allegedly contrary website statements (which were actually not misleading in context), the totality of the documents provided to investors at the time of their investment correctly detailed applicable fees. Moreover, the evidence is undisputed that the overall fee load was unchanged from REIT I to REIT II, and investors received profits only after all fees were assessed, so any allegedly poorly disclosed change in when fees would be assessed was immaterial.

When read as a whole, the information provided to investors was overwhelmingly accurate, and any mistakes made were inadvertent and not intended to mislead. All of the statements at issue were correct as clarified by more complete and detailed statements, including disclosures in the

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Offering Circular. To the extent that any statement was arguably incorrect, given the facts demonstrating absence of culpable intent and the public interest in continuing REIT II's offering, this Court has discretion under the *Gateway* factors to reject permanent suspension.

2. First Group of Statements—Present States of Affairs

The statement that (1) REIT II "does not currently have any capital commitments" [as of January 21, 2021 *and* as of August 26, 2021] was a true statement when made. By its terms, the statement was limited to the current date of the circular when the statement was made.

REIT II had made clear that it would invest in unspecified projects that DiversyFund sponsored and in which REIT I had invested or would be investing. No evidence, documentary or otherwise, contradicts this fact, and REIT II's seventh-month delay in selling its securities further corroborates its truthfulness.

The statement that (2) REIT I and REIT II "operate as separate investment vehicles" is also true. The actual statement made to investors was about REIT I and REIT II's 5-year terms, not an abstract statement about the two entities' separateness.[13] But even misconstruing it as the Division does, the statement is accurate. REIT II is a separate investment vehicle from REIT I. It issued its own securities and has its own title to projects and properties. These interests are fully and correctly reflected in its separate books and records. REIT II's Original Circular specifically states that owners consist only of the Sponsor, DiversyFund, and "Investors" (Original Circular at 22), defined as "anyone who purchases Class A Investor Shares [of REIT II]." *Id.* at 1. REIT II's Class A Investor shares were and always have been separate securities from those that REIT I issued and REIT I security-holders hold. As Mr. Lewis has testified, REIT I and REIT II are indeed

[13] The actual question and answer were as follows: *"Will all my investments (REIT 1 & REIT 2) be under the same 5-year term? No, REIT I and REIT II operate as separate investment vehicles. While they have similar investment strategies they operate on their own 5-year term."* Mot. Ex. 11. The question was about investment terms. The answer was that the funds were separate entities with separate 5-year terms.

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"two separate funds" that made "separate security offerings on different dates." Mot. Ex. 22 at 150. They "have their own bank accounts, they have their own QuickBook files, they have their own portfolios. Although they are co-invested in three similar properties, they still are their own funds." *Id.*

The SEC presents no evidence that REIT I and REIT II do not have separate titles or interests in projects in which they have both invested. The fact that two or more entities may jointly develop and separately own interests in a real estate project directly or through lower-tier limited partnerships or limited liability companies does not cause them to dissolve into a single entity or their separate ownership interests to fuse into one ownership interest. Nor does it convert separate securities into one security. If the status of REIT I and REIT II as separate entities is contested, that is an issue upon which there is a genuine dispute necessitating a hearing.

3. Second Group of Statements—Business Practices

The second group of implicit statements about business and accounting practices have also always been true statements. These statements include the implicit representations that (3) accounts (of REITs I and II) and of shareholders have not been commingled. These two statements are true, and because the SEC apparently uses the latter to support the former, they are addressed together.

The Division claims that REIT II's Sponsor DiversyFund has "commingle[d] REIT I and REIT II investor funds." Mot. at 24. The verb "commingle," as used in finance or business, means "to combine (funds or properties) into a common fund or stock."[14] This term has no application to DiversyFund, REIT I or REIT II. If two funds invest in a common project, that does not "commingle" those funds. The financial statements of the two REITs, which are audited and filed

[14] *See, e.g.*, https://www merriam-webster.com/dictionary/commingle.

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on EDGAR, confirm that each REIT's assets are held by each REIT separately. The Division offers no evidence that REIT II's Sponsor or any of its affiliates ever transferred cash from the account of one REIT into the account of the other, or that capital accounts for REIT I's owners were "transferred" from REIT I's equity into REIT II's equity or vice versa. Though REIT II need not, it again proffers that trial evidence will clearly establish proper accounting and safeguarding of investor funds in each REIT as a separate vehicle.

The Division's confused "commingling" claim appears to arise from uninvestigated and uninformed impressions of investors. For example, the Division cites investor John Travis, who claimed that his REIT I funds were being "funneled" into REIT II without his permission, under a DiversyFund Advisory Services Agreement ("DASA") and the Investment Agreement with REIT II that he says he never signed. Mot. at 7, 24, Ex. 25, ¶¶ 2–4. The Division also proffers declarations from REIT II investors such as Paul Calo who claimed that DiversyFund had affixed unauthorized electronic signatures to backdated DASAs without their consent (*Id*. at 8, Ex. 25, ¶ 3 and Ex. 14; Ex. 27, ¶ 6; Ex. 24; Ex. 26, ¶ 4; Ex. 20), to authorize DiversyFund to act as their investment advisor and "withdraw funds . . . in order to purchase securities directly into a DA [DiversyFund Advisory] Services-affiliated issuer." Mot. at 8, Ex. 25, ¶ 4.

Had the Division conducted even a perfunctory investigation of such claims, it could have easily found them to be misinformed. The Declaration of David Legacki (filed July 15, 2022), addresses these confused assertions, using the example of one of the Division's investor declarants, Paul Calo. Mr. Legacki explains that DiversyFund's Website has an information-technology ("IT") function called the "RIA Modal" which generates an electronically executed version of the DASA after a user executes the DASA by electronic confirmation. Legacki Dec. at ¶ 5. An electronic confirmation produces an electronic signature on the DASA. Mr. Legacki accessed the Database

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and confirmed that the complainant, Mr. Calo, had executed the DASA electronically, which caused his electronic signature to be affixed to the DASA. *Id.* at ¶¶ 8, 10.

Execution of the DASA enabled the RIA Modal to execute the Investment Agreement and investment into REIT II. Mr. Calo, Mr. Travis and the other investor complainants will be shown to have executed authorizing agreements. As for the "funneling" of *new* cash investments from REIT I to REIT II, the Division disregards the fact that REIT I had closed in November 2021. The fact that *new* investment amounts were moving by ACH transfers from Mr. Calo's bank account into REIT II is *not a transfer from REIT I to REIT II*. Mr. Calo's investment in REIT I did not diminish whatsoever. Rather, his preauthorized automated investment was made into the only offering then available, as fully disclosed. In no way were any of the electronic executions of documents by investors, or movements of their funds, unauthorized, inadvertent, or erroneous.

4. Third Group of Statements—Future Actions

The third group of statements reflect intended or expected future operations, actions, or states of affairs. They are: (4) "The Offering has no minimum amount. Thus, we will begin to deploy (spend) the money we raise right away, no matter how much or how little we raise." (Original Circular at 1); (5) "Whether we raise $50,000,000 in the Offering or something less, we believe the proceeds of the Offering will satisfy our cash requirements." (*Id*. at 58); (6) "If we raise less than $50,000,000, we will simply make fewer investments." (*Id*. at 58); and (7) "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." Mot., Ex. 11 at 2. These are all related statements. The first three (4–6) are addressed together, while (7) is addressed separately.

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a) Future statements about needs and investments represented genuine and reasonable expectations

As noted above, the Division's Motion mischaracterizes, misinterprets, and fails to inform on its claims concerning the three Offering Circular statements (4-6 above) it takes out of context on the "no minimum amount" concept. The author of those statements, Mr. Roderick, has given sworn evidence that those statements have a common understanding in the real estate industry, and meant only that REIT II would not wait for any fixed threshold to be reached before starting investing. Opp. Ex. 1 ¶¶ 7-13. Indeed, the Offering Circular expressly contradicts the Division's incorrect reading of his statements, in several places. Opp. Ex. 1 ¶ 12; *supra* section II.B.

The Motion misrepresents Mr. Cecilio's testimony, claiming that he "admitted that REIT II did in fact have a minimum amount of $75 million," and "that REIT II's representation to investors that it did not have a minimum amount was inaccurate." Mot. at 7. Not so – in fact he testified to the *opposite*, that these statements were *accurate*, refusing to adopt the Division's interpretation despite lengthy SEC badgering on this issue. Mot. Ex. 21 at 150:18–151:2; 150-58. In the testimony cited by the Division, Mr. Cecilio explained only that investors would benefit from "economies of scale" if REIT II raised the maximum Tier 2 amount (Mot. Ex. 21 at 146), and that REIT II would have to adjust its business plans if actual investment flow differed from expectations (Mot. Ex. 21 at 154-58).[15] Mr. Cecilio's comments about economies of scale and the need to adjust business plans were both disclosed (Opp. Ex. 1 ¶ 12; *supra* section II.B) and self-evident: any reasonable investor would understand that investments generate lower per capita costs the larger the investment pool. Far from proving the absence of disputed issues of fact, this exchange alone shows the existence of one, even setting aside Mr. Lewis' on-point testimony also

[15] The transcript shows that Mr. Cecilio asked the SEC questioner to clarify what he was driving at with a conclusory question concerning "minimum amount"; the questioner did not. *Id.* at 146. Mr. Cecilio then explained that an investor would do better with the lower per capita costs that can be generated by a larger investment pool. *Id.*

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contradicting the Division's interpretations (*e.g.*, Mot. Ex. 22 (Lewis Testimony) at 146–47, 152–53), which testimony the Division fails to address in its Motion.

The Division's argument also fails on a conceptual level. A statement or omission is misleading "if it would give a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists.'" *City of Royal Oak Retirement System v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045 (N.D. Cal. 2012) (citations and internal quotation marks omitted). Statements of genuine belief regarding future affairs "do not constitute misrepresentations, even though the statements may turn out to be wrong." *Coleman v. Sears, Roebuck Co.*, 319 F. Supp. 2d 345, 551 (W.D. Pa. 2003).[16]

The Original Circular clearly stated that REIT II at the outset would "invest only in the Sponsor's [DiversyFund's] Projects" as listed on DiversyFund's Website and noted that, "[i]n the future, it is possible that the Company would also invest in real estate projects other than those managed by the Sponsor." Original Circular at 1, 15.[17] Thus, investors were told from the outset that they would invest in DiversyFund's existing projects, such as those being pursued by REIT I.

The statements identified by the Division in their Motion reflected DiversyFund's management's genuine expectations of REIT I or REIT II's future activities when made in early 2021, before REIT II had actually committed to invest in any particular project. Management also followed through on its anticipated future actions. From August 26, 2021, when REIT II began selling Class A Investor shares, through mid-December 2021, it raised about $8 million in offering

[16] *See also Alexander v. CIGNA Corp.*, 991 F. Supp. 427, 436 (D.N.J. 1998) (statements about agents' lifetime tenure did not create binding obligation by company to retain agents); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989) (a forward-looking projection or statement of belief is not misleading where "(1) that statement is genuinely believed, (2) [ ] there is a reasonable basis for that belief, and (3) [ ] the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement.").

[17] The Original Circular also stated, "Growth REIT I is focused on real estate assets in the United States, primarily multi-family residential properties. The scope of [REIT II] is broader, but there could nevertheless be instances where the same project fits the investment strategy of both the Company and Growth REIT I. In that case we will evaluate the project seeking to balance both portfolios." *Id*. at 20.

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proceeds, far short of the offering amount of $50 million. Although the Division's temporary suspensions of REIT II interrupted management's plans, the record shows that while in operation, REIT II: (4) *did deploy* offering proceeds quickly; (5) *did satisfy* cash requirements with capital flow into the REIT; and (6) *did make* investments tied to actual capital flow into the REIT. *See* Mot. Ex. 22 (Lewis Testimony) at 144–47, 152–54.

The Division interprets conditional (if-then) statements, *made after* investment decisions and in light of an unexpected suspension of REIT II's offering, as evidence that the earlier expectations and anticipations were false or misleading, ignoring the disclosures REIT II made in its Original Circular, and its follow through on those intentions. The Division also fails to proffer any evidence, direct or inferential, that management's actual state of mind as of January 21, 2021, differed from its represented state of mind as of that date. When these representations were made, REIT II anticipated co-investing in projects with REIT I, but the amounts and specific projects into which REIT II would invest—and later "needed to invest"—were either then non-existent, unknown, or undeveloped.

One year after these statements, REIT II was raising capital and making commitments and co-investments with REIT I, as it had stated it would do, but with the expectation that REIT II's offering would continue generating capital for deployment into such investments. Based on the actual investment flow experienced, REIT II's management reasonably planned a diversified portfolio of capital investments that flow could fund. Mot. Ex. 22 (Lewis Testimony) at 145–46, 155–56. That expectation, of course, abruptly changed when the Division caused the offering to be suspended.[18] *Id.* The suspension completely interrupted REIT II commitments, which had not

[18] REIT II sold its securities primarily through its website and Sponsor contacts with investors; it did not use brokers. Mot. Ex. 22 (Lewis Testimony) at 72.

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existed as of January 21, 2021. Management had not anticipated, of course, this serious business interruption. *Id.*

If REIT II investors are harmed it is not because REIT II failed to disclose truthfully its plan of operations—with which it complied fully—but because of events and circumstances, including errors by experienced securities counsel, that REIT II and its management bear no culpability for not anticipating. Even so, this risk was disclosed in the Original Circular:

> **Risk of Failure To Comply With Securities Laws:** . . . In all cases, we have relied on the advice of securities lawyers and believe we qualify for the [Regulation A] exemption. If we did not qualify, we could be liable to penalties imposed by the Federal government and State regulators, as well as to lawsuits from investors. Original Circular (Mot. Ex. 8) at 12.

This disclosure comes alongside other robust disclosures regarding the risk of failing to obtain sufficient financing from investors, capital formation, and the ongoing need to raise more money in the future. *Id.* at 3–14. The financing and capital raising requirements included in these disclosures necessarily depend on the availability of access to the Reg A exemption, as identified in the disclosure copied above.

The Division asserts that because "cessation of the REIT II offering [in January 2022] would" [1] "decrease [REIT II's] ability to [continue to] participate in such investments;" and [2] "reduce investor returns for both REIT I and REIT II," statements made on January 21, 2021, were intentionally false or misleading. Mot. at 7. Of course it is true that if DiversyFund's management had known, as of January 21, 2021, that REIT II's offering would have been a fraction of the Tier 2 maximum, it would have invested differently. But management is no more capable of anticipating the unanticipated than anyone else; in this matter, it did not foresee the SEC's abrupt suspension of REIT II's offering before doing even a rudimentary investigation, and *almost immediately after capital began to flow*. A reasonable investor considers projections "in light of

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[all] of the surrounding text, including hedges, disclaimers, and apparently conflicting information," specific to the "customs and practices of the relevant industry." *Tongue v. Sanofi*, 816 F.3d 199, 211–12 (2d Cir. 2016) (holding that investors in a clinical trial drug should have considered the possibility that the FDA would not approve the drug when investing) (internal citations omitted). Management's recent statements about the suspension of REIT II's offering address the current state of affairs in light of the temporary suspension, rather than in the context of all information available at the time of the qualification. The Division's use of those recent statements as evidence that the statements made in January 2021 were misleading is simply erroneous.

b) Statements about impact of REIT II on REIT I are irrelevant, but in any case, not misleading

As a preliminary matter, REIT II objects to the Division's attempt to use alleged confusing statements to REIT I investors as relevant to whether REIT II's offering should be suspended. This limited proceeding concerns only REIT II's technical Reg A compliance and its sales material, Rule 258(a)(1)-(2), not whether the closed offering of REIT I involved any deficiency. REIT I's closed offering could not be put in issue for suspension even if the Commission's Order Instituting Proceedings had authorized it. Although as explained below there is no basis for concern regarding REIT I investors, if the Division believes otherwise, it has the ability to pursue that elsewhere. It cannot do so in this limited proceeding.

Turning to the merits, the Division argues that the following Q&A statement on DiversyFund's Website was misleading: "Will launching REIT II 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." Mot. Ex. 11 at 2. The Division attempts to construe the FAQ as asserting that the two REITs could have no economic relationship

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whatsoever. Mot. at 7. This is an unwarranted and unfair interpretation,[19] and hardly one that squares with the context, which includes REIT II's offering disclosures, and their express reference to common management with REIT I and emphasis on investing in REIT I projects.[20]

The Division's interpretation also makes no sense on the face of the FAQ. The FAQ related to the "launching" of REIT II, and simply explained that REIT I's assets would not be affected thereby. This was explained in two sentences, the second of which explains the first. The second sentence reveals that the first sentence is about the *legal impact* of REIT II's launch on REIT I: REIT II will not hold or obtain *any legal interest in REIT I's assets or income generated by such assets*.

The Division fails to even mention sworn testimony contrary to its strained interpretation. Mr. Lewis explained that the FAQ in question was "very qualified and narrow"—"narrowly tailored to this qualifier of 'launching.'" Mot. Ex. 22 (Lewis Testimony) at 148–149. Mr. Lewis also explained that the FAQ was drafted because "REIT I customers were confused and concerned about would REIT II be buying them out, would REIT II be taking over REIT I assets." *Id.* at 149. He reasonably explained that the FAQ merely reassured REIT I customers that REIT II's launch would not do those things, and REIT I investors would remain in control of their assets. *Id.*

[19] Even if one insists on reading only one of the two sentences in the FAQ answer, it is not clear that REIT II would necessarily impact REIT I even economically. Any investor's concern is net income (earned capital) and retaining value in the principal (contributed capital). REIT II is not the sole source of equity financing for a property or project, and a project in which REIT I invests may also obtain equity financing from another, unrelated entity. The identity of the second (or the identities of the third or fourth) investing entities, whether affiliated with REIT I or not, would not *impact* the *rental revenue* the property generates for REIT I investors. It would not have any necessary bearing on the percentage return on investment (ROI). Moreover, REIT II could demand the same terms as an "outside" investor. To the extent that REIT I's ongoing projects and properties used debt financing, the revenue would not change, but the increased leverage would create debt-servicing expenses that would impact net income. The synergies of having REIT II participate as an equity partner in a project could provide greater returns (as in total amounts and as percentage of investment) for both REITs. Finally, REIT I was originally formed as the only fund, and it anticipated use of debt financing for its projects and properties.

[20] In its Original Circular of January 21, 2021, before REIT II had raised any funds, made any commitments, made any purchases into projects or properties, or undertaken any operations, management was explicit that REIT I and REIT II would invest in the same projects, run by the same management team.

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Again, the Division has failed to engage with the evidence, and failed to carry its burden as movant. To the extent the FAQ statement to REIT I investors is even relevant in this Rule 258 proceeding about REIT II investors, the record demonstrates the need for a hearing to determine the context and meaning of statements in dispute.

5. Fourth Group of Statements—Fees

The Division argues that REIT II and its management misled investors concerning fees that would be charged. It is true that REIT II changed its fee structure from its January 2021 Original Circular to the August 2021 Supplemental Circular, [21] but the Division does not argue that this was improper. Nor could it: the change was properly disclosed before any investor funds were obtained. The Division also does not argue that REIT II took more in fees than it disclosed in its August 2021 Supplement Circular, or more in fees than investors expected: the total fee load was the same as before. Rather, the Division argues that three promotional statements—two blurbs on DiversyFund's Website, and a single email to an investor—should be treated as evidence that REIT II deliberately deceived investors into thinking that no fees at all would be charged, or that no asset management fees would be charged. Mot. at 9. Again, the Division is far from candid with the Court, and far from fair with the facts.

First, the Division fails to note that the "no fee" statement was in an email dated May 21, 2021, from DiversyFund customer service employee Kari Hassey to a single REIT I investor, who

[21] In the "Compensation of Management" section of the Original Circular, the stated fees included: (1) an asset management fee of 2% of the real estate project's gross operating income (typically gross rental revenue) charged to each Project Entity; and (2) a sponsor fee of 6% to 8% of the total project costs, which covered "both 'hard' costs (e.g., the cost of property) and 'soft' costs (e.g., professional fees)" charged to the REIT, if it owns real estate directly, or the Project Entity, if it is the owner. Original Circular at 29. REIT II modified its fee structure in its Supplemental Circular of August 26, 2021, before any securities had been sold. REIT II expressly revised the section entitled, "Compensation of Management," which had appeared in the Original Circular. As revised, the disclosure stated that "the Sponsor will charge the Company an annual asset management fee equal to 2% of the capital raised from the sale of Class A Investor Shares." Management did not characterize this fee as a "sponsor fee" and included no separate sponsor fee. The fee terms identified in the Supplemental Circular were the terms to which investors agreed and with which REIT II complied.

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said he had some questions relevant to whether to invest more into REIT I (the only REIT then active on DiversyFund's Website). *See* Mot. Ex. 27 at Ex. 3 thereto (May 21, 2021 8:03 AM email question from Mr. Calo and 9:52 AM response from Ms. Hassey). Ms. Hassey's statement was a completely accurate response to that REIT I investor. Mr. Lewis has testified that asset management fees were not taken from REIT I investors, Mot. Ex. 22 (Lewis Testimony) at 174–175, and the Division has never argued otherwise. Further, for the reasons discussed in the previous section, this statement to a potential REIT I investor cannot be used by the Division to seek suspension of REIT II.

Second, the Division is wrong in claiming that "DiversyFund never provided investors with any financial statements or documents reflecting the fees that they were being charged for their investments." Mot. at 22–23. To the contrary, every REIT II investor was provided access to REIT II's Supplemental Circular fee disclosures before they invested, as part of the automated investment "checkout process." Mot. Ex. 22 (Lewis Testimony) at 186:22–187:1 ("I mean, our offering circular lists all the fees accurately and our checkout process ensures that no investor is investing without having access to the offering statement and its description of all fees before they finally purchase a security."); Mot. Ex. 21 (Cecilio Testimony) at 100–101 (same).

Third, the Division incorrectly construes the November 2021 Website FAQ statement about fees. The Division takes issue with what they consider a discrepancy between the Supplemental Circular fee disclosure and an FAQ response on the DiversyFund website regarding the new fee structure. Mot. at 20. The webpage in question, entitled "*REIT 2: Fee Structure*" described the new fee structure for REIT 2 conceptually, giving details to illustrate the conceptual point that the "*new fee structure has several components that help us be more competitive in acquiring multifamily properties*." Mot. Ex. 11 at 4. It does not purport to be a comprehensive

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listing of all possible fees. In attempting to make an issue out of this, the Division also ignores the first paragraph of the webpage, which states: "*The new fee structure was designed to have no negative impact on overall fees charged to the REIT. It simply breaks up fees into different buckets to allow for greater flexibility for our management team and enhance the real estate team's effectiveness*." *Id.* If the overall fees are the same, and investors receive profits only after all fees are charged, why would it matter to an investor which fee is taken at what point? The Division supplies evidence on which the Court could conclude that the November 2021 website FAQ was either misleading, or material, particularly given the lack of evidence that any fees have been charged contrary to investor disclosures.[22]

Fourth, the Division fails to inform the Court that there is no evidence that REIT II or its Sponsor intended any investor confusion. Rather, the evidence is undisputed that both the September 2021 and November 2021 Website statements and the May 2021 email were prepared by lower-level employees (Mot. Ex. 22 (Lewis Testimony) at 177; Mot. Ex. 27 at Ex. 3 thereto (May 21, 2021 email stream)) acting in good faith, and making accurate statements at the time they made them. Although the September 2021 Website statement should have been modified when the fee structure changed from REIT I to REIT II, management promptly took remedial action upon learning it was still up. Mot. Ex. 22 (Lewis Testimony) at 182. REIT II and its Sponsor would be happy to grant rescission to anyone claiming confusion about fees, and stands ready to

[22] Mot. Ex. 22 (Lewis Testimony) at 185. The Division notes that the Supplemental Circular also lists *potential* fees for property disposition, construction management, and guaranty. Mot. at 20. However, the construction management and guaranty fees were never charged and need not be if an issue would be presented thereby. The property disposition fee was not a regularly imposed fee, but rather an event-specific fee charged upon sale of property, which had not happened yet for REIT II. Further, this was a fee that was charged under REIT I, meaning it was not part of a "new" fee structure as the FAQ seeks to address. As Mr. Lewis testified, the Supplemental Circular sought to identify any and all fees that could potentially be charged given the static nature of an offering circular. *Id.* at 187. REIT I and REIT II also disclosed a broad "other" fee. The only fee that was actually charged under this umbrella was a property-level asset management fee equivalent to 2% of collected rents. This was a cost-saving mechanism to bring the process in-house and reduce costs to investors of third-party property managers. This too was a fee charged under REIT I, and therefore not a difference to be included in the FAQ response.

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do so as soon as the Division (or this Court) confirms that it will not suffer punishment for this action.

Further, as a legal matter, even if one statement on the Website was left beyond its expiration date or one statement on the Website did not disclose potential fees that were never charged, that is "immaterial in light of the robust disclosures in the Offering Circulars" that each investor received. *Pino v. Cardone Cap., LLC*, No. CV 20-8499-JFW(KSX), 2021 WL 3502493, at *14 (C.D. Cal. Apr. 27, 2021) (holding that misstatements on a social media post, even if misleading, were cured by the correct statements in the Offering Circulars provided to all investors); *DeMaria v. Andersen*, 318 F.3d 170, 180 (2d Cir. 2003), overruled on other grounds by *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 US __, 137 S. Ct. 2042 (2017) ("Our inquiry does not focus on whether 'particular statements, taken separately, were literally true, but whether defendants' representations, taken together and in context, would have misl[ed] a reasonable investor about the nature of the [securities].'") (citation omitted).

In sum, as with the Division's first two grounds, there is ample room for an exercise of discretion. The inadvertent error on the DiversyFund website has been rectified, the Supplemental Circular fully disclosed the fee structure, REIT II took curative steps and stands ready to take more. To the extent any of these facts are in dispute, a hearing is required.

V. CONCLUSION

Despite all of the negative publicity and overheated rhetoric from the Division, the vast majority of REIT II and other DiversyFund investors are happy. When DiversyFund recently surveyed its investors, 87% of respondents asked to have their investments invested by DiversyFund, with only 13% opting for a return of capital.

None of the grounds raised by the Division presents a convincing basis for its campaign to brand REIT II's management as bad actors. The first two grounds—that the offering should have

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started over a weekend, and that REIT II's veteran securities lawyer used a wrong form he later withdrew, injuring no one—are unreasonable on their face. The second two grounds—the Division's taking umbrage at the self-evident truth that its overzealousness can disrupt business plans and harm investors, and accurate statements by customer service and other employees—also fail to convince of the need for a permanent sanction that would harm thousands of investors. REIT II and its management have taken significant remedial measures on their own and are willing to allow rescission and refund of any investor agreements or fees deemed problematic. REIT II's management has no interest in retaining investors who do not want to be in REIT II, or retaining any fees deemed insufficiently or confusingly disclosed. Nonetheless, REIT II submits that no reasonable investor would be misled by the stray webpages the Division relies upon, in light of the expansive disclosures made available to investors.

The Division submits no evidence of anything other than minor inattention about immaterial matters, and no evidence at all of fraudulent intent. Given the strong public interest in allowing REIT II's management to continue doing the fine job it has been doing for investors, the remedial measures already undertaken and committed to, and the other discretionary factors noted above, to the extent any Reg A violation is found, the Court should exercise its discretion to not impose permanent suspension and the bad actor designation that might ensue.[23]

[23] Applying the factors the *Med-X* court found justified lifting temporary suspension:

1. REIT II immediately offered voluntary cooperation and remedial action.
2. REIT II relied on a highly knowledgeable and respected lawyer with decades of experience, demonstrating intent to comply, by REIT II
3. Any violations are not serious, and investor harm is non-existent;
4. REIT II has shown willingness to promptly address any errors, including filing a new supplement to its circular and taking down its website. Mot. Ex. 22 (Lewis Testimony) at 182 ("Q. And is this statement about the no management fees, is it still on DiversyFund's website? A. No. As soon as you brought it to our attention we took it down."). It has repeatedly offered to take any appropriate remedial action, but cannot return any disputed fees or offer rescission without Division cooperation. 2 Loss & Seligman, Securities Regulation 1138.20 n.522 (3d ed. rev. 1999), citing SEC Release No. 33-6653 (1986) (noting SEC position that a rescission offer would be an offer of securities requiring registration or an exemption).

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For the foregoing reasons, including REIT II's assertion of its APA right to a live hearing, REIT II respectfully requests that the Court deny the Division's Motion for Summary Disposition.

DATED: September 19, 2022

By: /s/ Sanjay Bhandari

Sanjay Bhandari (619) 219-5376
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COUNSEL FOR RESPONDENT REIT II

DATED: September 19, 2022

By: /s/ Adriaen M. Morse

Adriaen M. Morse Jr. (571) 314-5469
Cory C. Kirchert (703) 405-7974
SECIL Law PLLC
1701 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006

COUNSEL FOR RESPONDENT REIT II

5. The public interest is in favor of vacating the suspension as REIT II has already been punished by the temporary suspension, and the economic interests of REIT II's investors are harmed by a permanent suspension.

Cf. Med-X, 2017 WL 1831239, *11–13. The *Med-X* court specifically emphasized that the public interest "would also be served by calibrating a penalty to a violation, and avoiding an overly harsh penalty that could irreparably harm not only the company, but also several hundred current shareholders." *Id*. at *13.

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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 OPPOSITION TO DIVISION'S MOTION FOR SUMMARY DISPOSITION

was served on September 19, 2022, upon the following parties as follows:

The Honorable Carol Fox Foelak (By electronic email only)
Administrative Law Judge
Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549
Email: alj@sec.gov

Stephen Kam (By electronic email only)
Securities and Exchange Commission
444 S. Flower Street, Suite 900
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Dated: September 19, 2022

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COUNSEL FOR RESPONDENT,
DF GROWTH REIT II, LLC

OS Received 09/19/2022

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 19, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20801

In the Matter of

DF Growth REIT II, LLC,

Respondent.

DF GROWTH REIT II, LLC'S EXHIBITS IN SUPPORT OF OPPOSITION TO DIVISION'S MOTION FOR SUMMARY DISPOSITION

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TABLE OF EXHIBITS

Exhibit Number

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OPPOSITION EXHIBIT 1

(Ex. 1 to REIT II's Opp. to Division's MSD)

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AFFIDAVIT OF MARKLEY S. RODERICK

I, Markley S. Roderick, declare as follows:

1. I am an attorney licensed in New Jersey and Pennsylvania. I served as securities counsel to DF Growth REIT II, LLC ("REIT II") and DF Growth REIT, LLC ("REIT I"), including preparing their Offering Statements under Regulation A and many of their other filings with the Securities and Exchange Commission ("SEC"). I have personal knowledge of the facts stated herein, and if called upon to testify to those facts I could and would competently do so.

2. I have over three decades of experience in federal securities work, including securities registration exemptions. In recent years I have focused on Crowdfunding and Fintech work, including offerings under Regulation A, Rule 506(c), and Regulation CF, and related filings and reports.

3. The Regulation A offering of REIT II was qualified by the SEC on Friday, January 29, 2021, at 4:00 p.m. I do not recall telling REIT II's management that they needed to make offers (or certainly formalized offers) within two calendar days, *i.e.*, before Monday morning, nor do I have any record of doing so. Although I was and am aware of the requirements of 17 C.F.R. §230.251(d)(3)(i)(F), I have never before heard of the SEC strictly enforcing a "two days, even over a weekend" rule in the manner it seeks to do in this case.

4. On August 26, 2021, I filed a supplement for REIT II under 17 C.F.R. §230.253(g)(2), changing the fee structure and stating that the company would seek to raise up to $75 million (the new cap under Regulation A, effective on March 16, 2021) rather than $50 million. I am aware that in this case, the SEC cites a note to 17 C.F.R. §230.253(b) (which deals with information that may be omitted from an offering circular) for the proposition that an increase

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in the size of an offering can be effected only *via* amendment, not supplement, a position that would render the supplement ineffective. As soon as I became aware of the SEC's position in this case I filed a second supplement, on February 23, 2022, withdrawing the first. It is my understanding that in the meantime, REIT II had not sold securities in excess of $50 million.

5. In any case, it was my decision to use the §235(g)(2) supplement. The management of REIT II were trying to comply with applicable rules and regulations.

6. I am not aware of any other situation where the SEC has sought to permanently disqualify an offering based on an alleged use of an improper form.

7. In its Order, the Commission quotes these two statements from REIT II's Offering Circular, suggesting they are misleading:

> "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."
>
> "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."

8. I wrote both statements and believe the Commission is misinterpreting them.

9. Many real estate offerings have a minimum offering amount. For example, if a company needs to raise $2 million to buy a property, it might provide for a $2 million minimum offering, meaning that if the offering raises less than $2 million then it will be canceled and all invested funds returned to investors. The Regulation A offering of REIT II was not like that. It had no minimum offering amount. Instead, the company would begin to deploy investor capital from the first dollar raised. I believed this was important to disclose to investors.

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10. That is all the statement means. It was 100% true. It has nothing to do with how much money the company would need to operate.

11. The second statement is found in the section of the Offering Circular captioned "Management Discussion - Plan of Operation." It simply means that the amount raised in the offering will be sufficient to meet the company's cash requirements. This statement was also 100% true.

12. Contrary to the implication made by the Commission, the business risk of failing to raise capital is disclosed directly and clearly in the Offering Circular:

> "No Offering Minimum: Although the Company hopes to raise as much as $50,000,000 from the Offering, it will begin deploying capital (that is, investing in projects) from the first dollar. If the company raised only a small amount from the Offering - say, $500,000 just to use an example - its business plans would be severely curtailed, creating greater risks for Investors."

13. Cherry-picking individual words or statements from a disclosure document can itself be misleading. In my opinion, a reasonable investor who reads REIT II's Offering Circular could not be misled as to the risks associate with the investment, including but not limited to the risk of failing to raise capital.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on September 19, 2022, in Merchantville, New Jersey.

Mark Roderick

MARKLEY S. RODERICK

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OPPOSITION EXHIBIT 2

(Ex. 2 to REIT II's Opp. to Division's MSD)

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AFFIDAVIT OF ALAN LEWIS

I, Alan Lewis, declare as follows:

1. I am an officer of DiversyFund, Inc., DF Manager, LLC, DF Growth REIT, LLC, and DF Growth REIT II, LLC ("REIT II"). I have personal knowledge of the facts stated herein, and if called to testify to those facts I could and would competently do so.

2. *Prompt Commencement of Offering*. Having refreshed myself, I recall that during the weekend of January 29-30, 2021, I had calls with potential investors that likely constituted offers of REIT II securities. REIT II's bank account was open, and we were ready to receive funds from investors. As I testified on April 21, 2022, I made several sales calls to high net-worth and institutional investors soon after January 29, 2021.

3. *Ninth Circuit Stay Briefing*. Earlier this year, including when I submitted an affidavit in support of a motion in the Ninth Circuit Court of Appeals to stay the SEC's temporary suspension of REIT II, I was under the impression that DiversyFund and its affiliates faced an imminent threat of needing to take drastic measures, including discharging employees, halting business expenses, and winding down operations. That has not come to pass, so I was clearly mistaken. Among other things, I had misunderstood the scope and consequences of the SEC's action, and I did not fully appreciate the options available to DiversyFund and its affiliates to generate revenues.

I declare under penalty of perjury that the foregoing is true and correct. Signed on September 19, 2022, in San Diego, California.

ALAN LEWIS

OS Received 09/19/2022

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 EXHIBITS IN SUPPORT OF OPPOSITION TO DIVISION'S MOTION FOR SUMMARY DISPOSITION

was served on September 19, 2022, upon the following parties as follows:

The Honorable Carol Fox Foelak (By electronic email only)
Administrative Law Judge
Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549
Email: alj@sec.gov

Stephen Kam (By electronic email only)
Securities and Exchange Commission
444 S. Flower Street, Suite 900
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Dated: September 19, 2022

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