UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-20801

In the Matter of

DF GROWTH REIT II, LLC,
Respondent.

DIVISION OF ENFORCEMENT'S REPLY TO DF GROWTH REIT II, LLC'S OPPOSITION TO THE DIVISION'S MOTION FOR SUMMARY DISPOSITION

September 28, 2022

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The Division of Enforcement ("Division") submits this Reply in response to Respondent DF Growth REIT II's (the "Respondent" or "REIT II") Opposition to the Division's Motion for Summary Disposition, served on September 19, 2022.

I. INTRODUCTION

On June 3, 2022, the Division moved, pursuant to Rule 250(a) of the Commission's Rules of Practice, for summary disposition (the "Motion") against REIT II in this proceeding and provided overwhelming evidence that REIT II not only violated multiple requirements of Regulation A, but also used offering and solicitation materials that contained numerous untrue or misleading statements of fact. REIT II filed an Opposition to the Division's Motion for Summary Disposition (the "Opposition") on September 19, 2021. As set forth below, the Division's Motion should be granted and a permanent order of suspension should be issued.

Despite REIT II's contentions to the contrary, this Court has the authority under Rule 258 of Regulation A to grant the Division's Motion and permanently suspend REIT II from relying on the Regulation A exemption to raise further funds from investors. Substantively, REIT II is required to present specific facts demonstrating a genuine dispute that is material to the issues in this proceeding. REIT II's bare assertions and denials without any citation to specific facts are insufficient.

Knowing that the weight of the evidence should result in its permanent suspension, REIT II's Opposition attempts to reverse and retract its position on key pieces of evidence, including (1) arguing that the representations it made to the Ninth Circuit Court of Appeals cannot be trusted and that any attempt by the Division to hold it accountable for those representations somehow infringes upon its "constitutional right to petition," (2) urging the Court to find that the unequivocal testimony provided by its chief executive officer ("CEO") and chief investment officer ("CIO") is not credible, (3) changing its CIO's testimony by offering a supplemental

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declaration in which he now claims to recall certain previously undisclosed conversations with unspecified investors during one weekend almost two years ago in January 2021, and (4) distancing itself from representations made in its own offering materials by stating that those materials were prepared by "lower-level employees." The Court should reject REIT II's efforts to walk back its own factual admissions.

REIT II also argues in its Opposition that even if there were violations of Regulation A's provisions, it did not intend to commit those violations. It further argues that even if its offering documents did contain material misrepresentations or omissions, certain investors did not rely on them. However, as discussed below, while there is ample evidence demonstrating that REIT II did intentionally violate Regulation A's requirements, and ample evidence that investors – including John Travis, Ankit Shah, and Paul Calo – did rely on REIT II's misrepresentations and omissions, Rule 258 does not require that the violations be committed intentionally or that investors relied on those violations. Rather, the Division need only prove that (1) REIT II did not comply with any of the terms, conditions or requirements of Regulation A or (2) REIT II's offering materials contained any untrue statement of a material fact or omitted to state a material fact. *See* 17 C.F.R. § 201.258(a). Therefore, REIT II's attempts to raise these arguments throughout its Opposition, both of which are unsupported by the evidence, do not raise genuine issues of material fact.

The Division respectfully requests that the Court grant its Motion for Summary Disposition and issue an order permanently suspending REIT II under Rule 258 of Regulation A.

II. THE COURT HAS THE AUTHORITY TO GRANT THE DIVISION'S MOTION FOR SUMMARY DISPOSITION

REIT II claims that this Court should not consider the Division's Motion for three reasons: (1) the Division is imposing a "sanction" for seeking to suspend REIT II's ability to

rely on an exemption from the requirement that it must register its securities offering, (2) the Court is not mandated to permanently suspend REIT II, and (3) based on the "*Gateway* factors," a motion for summary disposition is not appropriate. For the reasons articulated below, REIT II is wrong on all three bases.

Under Rule 250(b), a hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law. 17 C.F .R. § 20 l .250(b). A party opposing the summary disposition motion may not make bare allegations or denials, but must present specific facts demonstrating that there is a genuine issue of material fact. *See In the Matter of Gary L. Mcduff*, 112 S.E.C. Docket 3167, Release No. 31, 90, 2015 WL 13449919, *2 (Oct. 2, 2015) (holding that "once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials, but instead must present specific facts showing a genuine issue of material fact"); *In the Matter of Jaycee James,* 98 S.E.C. Docket 868, Release No. 649, 2010 WL 3246170 at *3 (Apr. 2, 2010) (holding that a "factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material" and "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."

As the Division demonstrates below, REIT II does not present any specific facts in its opposition demonstrating a genuine issue of material fact. Rather, it relies on conclusory denials which are unsupported by any evidence that has been developed in the record.

A. The Privilege of Relying on Regulation A is Not a Protected Property Right

REIT II starts its brief by misstating the standard of the summary disposition, relying on a non-binding academic journal opining that the Administrative Procedure Act does not permit

summary disposition in this proceeding because it may involve a "sanction" – in its words a "taking of its property rights."[1] Opp. at 6. Setting aside the fact that the only authority REIT II cites to support its position is a non-binding academic opinion article, REIT II is wrong about the subject of this proceeding.

This proceeding does not involve a sanction as it does not involve the taking of REIT II's property rights. As discussed in the Motion, Regulation A is an exemption to the longstanding requirement under Section 5 of the Securities Act of 1933 (the "Securities Act") that a company must have a registration statement in effect as to a security before it can sell the security. REIT II sought to utilize Regulation A's privileges but violated multiple of the requirements that were put in place for investor protection. Not only did it violate Regulation A's requirements, but it also used offering and solicitation materials containing numerous untrue or misleading statements of facts that investors deemed so material they sought to withdraw their investments once they learned of the misstatements.

Losing the ability to rely on an exemption to a requirement that it must register its securities to conduct an offering is not akin to the taking of REIT II's property rights. REIT II has no absolute right to offer its unregistered securities. In fact, courts have specifically held that a benefit that requires compliance with a set of processes that can be granted or denied by government officials is not a protected entitlement. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion."); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) ([A] statute that grants the reviewing body unfettered discretion to approve or deny an

[1] REIT II took a similar position in its Ninth Circuit petition for review filed on February 15, 2022. In that petition, REIT II argued that it had a protected property interest under the Due Process Clause to continue to offer and sell unregistered securities pursuant to Regulation A. REIT II subsequently withdrew its petition on April 20, 2022.

application does not create a property right").

B. REIT II Misstates the Division's Position in its Motion

In another attempt to confuse the Court, REIT II argues that "[t]he Division's Motion cites no case or other authority requiring this Court to view a permanent suspension as mandatory." Opp. at 7. This misstates the Division's position, which is that this Court *should* permanently suspend REIT II's use of the Regulation A exemption based on the magnitude of REIT II's violations, the sheer number of those violations, the egregious material misrepresentations included in its offering and solicitation materials, the ongoing nature of those misrepresentations and the continuing risk of harm to investors.

The issues presented to this Court are simple: Is there any genuine issue of material fact that (1) REIT II failed to comply with any of the terms, conditions or requirements of Regulation A, or (2), any of REIT II's offering materials contained any untrue statement of a material fact or omitted to state a material fact. The answer is no: as the Division demonstrates below, REIT II's Opposition offered no evidence disputing any material fact supporting these violations. The Division is accordingly entitled to summary disposition.

C. REIT II Erroneously Relies on the "*Gateway* factors"

Last, REIT II cites to *Gateway Int'l Holding, Inc*. to suggest that the instant proceeding is not appropriate for determination at the summary disposition stage. 88 S.E.C. Docket 334, Release No. 53907, 2006 WL 1506286, *4 (May 31, 2006). However, in *Gateway*, the Court was faced with the issue of whether to impose sanctions during the course of a cease-and-desist proceeding following a public company issuer's failure to file seven straight required periodic reports. This case did not involve the Court's consideration of a summary disposition motion.

Even more confusingly, REIT II cites a string of cases involving claims for trademark infringement involving private litigants (not involving the SEC), considerations of whether an

individual broker dealer acted with scienter when he violated provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), and issues of crafting appropriate remedies for sanctions on broker dealers. *See* Opp. at 9-10. The Opposition proffers that these cases illustrate that "[c]onsideration of the *Gateway* factors involves factual disputes not appropriate for determination at the summary disposition stage." *Id.* at 9. However, none of these cases actually refer to the purported "*Gateway* factors," and in any event, involved issues completely unrelated to the Regulation A violations committed by REIT II.

III. THERE IS NO GENUINE DISPUTE THAT REIT II VIOLATED RULE 251(d)

Turning to the facts, REIT II argues that it did not violate Rule 251(d) of Regulation A because: (1) contrary to his prior sworn testimony, Lewis now recalls having some discussions with investors regarding the Regulation A offering and (2) even if REIT II did violate Rule 251(d), it did not intend to do so and the violation was "not so serious." *See* Opp. at 11-12. Neither contention is supported by the record.

A. REIT II Violated Rule 251(d)

Rule 251(d) of Regulation A requires that an issuer must commence its offering within two days of qualification. Despite being qualified on January 29, 2021, on September 29, 2021, REIT II filed a Form 1-SA Semi-Annual Report, stating that "[a]s of June 30, 2021, the Company *has not yet commenced its operations but plans to begin raising money* and making investments starting in the second half of the year." Mot. Ex. 2 at p. 2 (emphasis added). DiversyFund's CEO Craig Cecilio testified that REIT II did not begin soliciting investors until August or September 2021. *Id.* Ex 21 at pp. 75:18-76:10. Cecilio admitted that the reason for the delay was that DiversyFund needed to gather the relevant documents, meet internally with its tech team, and prepare a business plan on how to market REIT II's securities. *Id.* Ex 21 at pp. 76:19-77:5. Similarly, DiversyFund's CIO Alan Lewis testified that REIT II had not purchased

any properties or sold any securities by June 30, 2021. *Id.* Ex. 22 at 106:6-10. In addition, REIT II has not produced any documents to the Division indicating that investors were contacted prior to the second half of 2021.

Months after giving this testimony under oath, Lewis now claims that he had previously undisclosed calls with unspecified investors the weekend of January 2021, but does not offer any description of those conversations or any explanation as to why he suddenly is changing his story now. Opp. at 11. But it is well-established that new, contradictory evidence cannot be considered at this stage of the proceeding. *Torres v. E.I. Dupont De Nemours & Co*., 219 F.3d 13, 20 (1st Cir.2000) ("It is settled that [w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.") (internal quotations and citations omitted); *Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004) (permitting a trial court to "disregard[ ] an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony"); *Raskin v. Wyatt Co*., 125 F.3d 55, 63 (2d Cir.1997) ("a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony.")

Even if this new evidence could be considered, it is irrelevant. As discussed in the Motion, REIT II was required under Regulation A to stand ready and willing to sell its securities within two days of qualification or else it would be conducting an impermissible delayed

offering.[2] Mot. at 12. However, REIT II did not have a signed escrow agreement in place until August 2021 and did not even have an active bank account until September 2021, and therefore had no practical ability to process any attempt by investors to purchase securities from REIT II. *Id.* Ex 29. And by its CEO's own admission, by June 30, 2021 REIT II had not even prepared a business plan on how to market REIT II's securities.[3] Mot. Ex. 2 at 2. Therefore, REIT II does not raise any genuine issue of material fact that REIT II failed to comply with Rule 251(d).

B. REIT II's Failure to Comply with Rule 251(d) Warrants a Rule 258 Suspension

REIT II then argues that its violation of Rule 251(d) was neither intentional nor serious. As stated above, while there is ample evidence supporting that REIT II intended to violate numerous Regulation A requirements, the Division is not required to prove that REIT II intentionally violated Regulation A. Moreover, the Commission has specifically recognized that violations of Rule 251(d) *are* serious.

When it adopted Regulation A, the Commission recognized the possibility of inadvertent failures in complying with the regulation's requirements. Solely as it relates to Securities Act Section 5 requirements, the Commission indicated that issuers could establish certain failures as insignificant. 17 C.F.R. § 230.260(a). However, that rule also states that, even where an issuer can establish an exemption through reliance on this rule, "the failure to comply shall nonetheless be actionable by the Commission" and "this provision provides no relief or protection from a proceeding under Rule 258." Rule 260(b) and (c).

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[2] REIT II mischaracterizes the Division's position, saying that the Division is arguing that REIT II's "offering should have started over a weekend." Opp. at 32. This is not accurate and is misleading. Instead, the Division argues that REIT II engaged in an impermissible delayed offering by admitting *seven months* after being qualified that the company was still in the planning phase and would begin raising money later in the year.

[3] As further evidence, in its Reply in support of its Application to Quash the July 18, 2022 subpoenas filed on September 23, 2022, REIT II concedes that "the Offering commenced without re-qualification in late August 2021."

And even assuming that Rule 260 did apply to a Rule 258 suspension proceeding, Rule 260 of Regulation A provides that "any failure" to comply with certain requirements of Rule 251(d) "shall be deemed to be significant to the offering as a whole" – meaning that REIT II's failure to comply with Rule 251(d) has been explicitly carved out of Rule 260's insignificant deviation provision. Rule 260(a)(2). The Commission also stated in the Regulation A adopting release that the final Rules "explicitly classify as significant those deviations that are related to issuer eligibility, aggregate offering price, offers and continuous or delayed offerings. This provision benefits investors by providing certainty about the provisions from which the issuer may not deviate without losing the exemption." SEC Amendments for Small and Additional Issues Exemptions under the Jobs Act, Release No. 33-9741, at 310-11 (June 19, 2015), available at https://www.sec.gov/rules/final/2015/33-9741.pdf. Accordingly, REIT II's effort to downplay its regulatory failures to comply with the required terms of the exemption as unserious and of no consequence in a Rule 258 proceeding is not persuasive.

IV. THERE IS NO GENUINE DISPUTE THAT REIT II FAILED TO COMPLY WITH RULE 253(b)

With respect to REIT II's failure to comply with Rule 253(b), REIT II proffers the following arguments: (1) even if it did violate Rule 253(b), the violation was not intentional and was rectified by subsequently filing a supplement lowering the offering amount to $50 million and (2) relying on the *Med-X* decision, a single filing error should not justify a permanent suspension. *See* Opp. at 13-14.

First, as discussed in detail in the Division's Motion, Rule 253(b) prohibits increasing the amount of securities being offered through the use of an offering circular supplement. Therefore, even if the issuer does not actually sell up to the increased amount, the simple filing of an offering circular supplement seeking to increase the volume of securities being offered is not in

compliance with Rule 253(b). Because those additional securities were offered using an offering circular supplement, any subsequent attempt to remedy the improper offering is irrelevant and does not change the fact that a violation of Rule 253(b) occurred. Put another way, RETI II's increase of its offering to $75 million was a new offering, and the Commission has stated clearly this new offering must be qualified by the Commission, either through a post-qualification amendment or a new Form 1-A. By increasing the amount of securities being offered from $50 million to $75 million, REIT II engaged in an improper, nonexempt, unregistered offering.

And as stated above, Rule 258 does not impose a requirement that the violations be committed intentionally. More importantly, because impermissible offers were made via the offering circular supplement, REIT II's purported subsequent filing of another supplement lowering the amount of the offering from $75 million to $50 million is irrelevant. Therefore, the Opposition does not raise any genuine of material fact that REIT II violated Rule 253(b).

Second, REIT II's reliance on *In the Matter of Med-X* is severely misplaced. In *Med-X*, the sole violation of Regulation A at issue was Respondent Med-X missing a deadline to file its 2015 annual report.[4] The Court found persuasive the fact that the Respondent and its counsel immediately accepted responsibility for the company's violation, and that in any event, no investors were misled by the error because all investors had received the offering document prior to investing. The Court also noted that there was no allegation that the company had made misleading statements. In short, there was no prejudice to the investors. This matter is different in every material respect.

Here, REIT II violated *multiple* of the requirements that were put in place for investor

[4] The Division in *Med-X* did not file a motion for summary disposition.

protection. And not only did it violate multiple Regulation A requirements, but it also used offering and solicitation materials that contained numerous untrue or misleading statements of facts. Worse still, investors – including John Travis, Ankit Shah, and Paul Calo – were deceived by those misleading statements and deemed the misleading statements so material that they sought to withdraw their investments.

Finally, contrary to REIT II's baseless representation that it "offered voluntary access to evidence and immediate cure of any problems," in reality it did no such thing. After receiving an investigatory subpoena on December 2, 2021, REIT II immediately filed a notice of intent to petition on December 6, 2021, requesting that the Commission vacate the formal order of investigation. Therefore, any attempt to draw any comparisons to *Med-X* is disingenuous.

V. THERE IS NO GENUINE DISPUTE THAT REIT II'S OFFERING MATERIALS CONTAINED MATERIALLY FALSE OR MISLEADING STATEMENTS

As explained in the Motion, the record clearly establishes that REIT II's offering materials contained materially false or misleading statements or omissions, which provides an independent basis for its suspension under Rule 258(a)(2). These materially false or misleading statements relate to (1) the separation of REIT I and REIT II, (2) the minimum amount it needed to raise in its offering, and (3) the fees that its investors would be charged.

As demonstrated below, REIT II fails to demonstrate that there is a genuine issue of material fact as to any of these issues.

A. REIT II′s Offering Materials Contained Material Misrepresentations and Omissions Relating to its Separation From REIT I

REIT II's brief avoids substantively responding to the Division's evidence that DiversyFund's CEO testified that REIT I and REIT II were dependent upon each other and that he admitted that DiversyFund and its investor funds were reliant on how much money REIT II

raised. *Id.* Ex 21 at pp. 137:3-139:15. Nor does REIT II substantively respond to the evidence set forth in the Division's Motion regarding DiversyFund's representations to the Ninth Circuit that REIT I investors would suffer losses if REIT II lost access to Regulation A. Ex. 7 at pg. 12. Instead, REIT II only advances the following arguments in its Opposition: (1) investor Paul Calo completed an online questionnaire which DiversyFund used to create an electronic agreement and (2) REIT I and REIT II have separate bank accounts and separate titles. *See* Opp. at 16, 20, 24-25. These narrow arguments are unavailing and do not refute the evidence presented in the Division's Motion.

As explained in the Division's Motion, REIT II's offering documents represented that REIT I and REIT II "operate[d] as separate investment vehicles" and that "REIT I will not be impacted by REIT II in any way." However, these documents omitted disclosing to investors that, without their consent, DiversyFund was authorizing itself to act as their investment adviser and moving their investments between REIT I and REIT II. *See* Mot. at 22.

As support, the Motion cites to sworn declarations provided by investors John Travis, Ankit Shah, and Paul Calo explaining that they found DiversyFund advisory services agreements in their DiversyFund accounts apparently authorizing DiversyFund to act as their investment adviser, but they had never agreed for DiversyFund to act as their investment adviser. *Id.* In addition, both John Travis and Paul Calo observed that DiversyFund had affixed their electronic signatures to the advisory services agreements without their consent. *Id.* The Motion then details how investor funds were transferred without investor knowledge from REIT I into REIT II and how investors were confused by the conflicting information they received relating to REIT II's independence from REIT I. *Id.* Finally, the Motion explains that these investors sought to withdraw their investments to no avail. *Id.*

REIT II does not, because it cannot, dispute any of the above evidence in its Opposition. Instead, it claims that these investors have "uninformed impressions," that REIT I and REIT II had separate bank accounts and legal titles, and that REIT II's offering was separate from REIT I's offering. Opp. at 24-27. None of these claims dispute the facts set forth in the Motion.

The only evidence-based argument that it offers relates solely to Paul Calo[5] and proffers that when Calo completed a check-the-box questionnaire, a DiversyFund program script was triggered to create the DiversyFund Advisory Services Agreement and affix his signature to that agreement without his knowledge. *Id.* at 22. The relevance of REIT II's argument is unclear, as it does not dispute that REIT II was creating advisory services agreements without investors' knowledge or consent; rather it explains the mechanism by which REIT II was creating the agreements. It is also well-established that parties cannot consent to circumstances of which they are unaware. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015) (consent must be knowing and voluntary); *Lim v. Helio, LLC*, 2012 WL 12884440, at *3 (C.D. Cal. Apr. 11, 2012) (As to the second element of consent, there must be knowing and mutual assent by both parties to the contract.); *Williams v. Walker–Thomas Furniture Co.*, 350 F.2d 445, 449–450 (D.C.Cir.1965) (footnotes omitted) (Where a party "signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all of the terms.")

There remains no genuine issue of material fact that REIT II's offering materials

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[5] David Legacki's declaration does not mention or address John Travis's declaration. Mr. Travis stated in his declaration that he invested $60,000 in REIT I between September 2020 and September 2021, but that when he logged into the DiversyFund website in November 2021 he found that his funds had been invested in REIT II in October and November 2021 without his consent. Mot Ex. 25.

Mr. Legacki's statement that the RIA Modal was an element of DiversyFund's website from December 9, 2021 through mid-March 2022 therefore does not, and cannot, possibly explain how Mr. Travis's funds were used in October and November 2021 to invest in REIT II.

contained material misrepresentations and omissions relating to its separation from REIT I.

B. REIT II′s Offering Materials Contained Material Misrepresentations and Omissions Regarding the Minimum Amount It Needed to Raise in Its Regulation A Offering

In response to the Division's evidence demonstrating REIT II's misrepresentations and omissions regarding the minimum amount it needed to raise, REIT II attempts to downplay or altogether avoid responding to the evidence. It instead argues that (1) Craig Cecilio did not mean what he said when he testified that REIT II needed to raise the whole $75 million in 2022 and testified that REIT II's representations may not have been accurate, (2) investors were aware of the risk to their investments if REIT II's offering was not fully consummated, and (3) the representations in its Ninth Circuit briefing that REIT II had a minimum offering amount and that a failure to raise that amount would negatively affect both REIT II and REIT I should not be relied upon. Opp. at 15-17, 22.

As demonstrated in the Division's Motion, REIT II's offering circular represented to investors that it had no minimum amount it needed to raise. *See* Mot. at 6-7. However, as also discussed in the Division's Motion, Craig Cecilio testified that REIT II in fact did have a minimum offering amount. *Id.* at 7. In addition, REIT II stated in its Motion to Stay filed in the Ninth Circuit that the approximately $10,737,607 it had raised was insufficient to meet its cash requirements, and the loss of any further ability to raise funds pursuant to Regulation A "will quickly force the closure of their business and losses to 30,000 investors." *Id.*

REIT II attempts to explain away Craig Cecilio's unequivocal testimony that REIT II had a minimum offering amount, contrary to the representations made to investors, by re-framing his testimony as explaining concepts such as "economies of scale," "business plans," and "investment flow." Opp. at 22. However, REIT II's re-characterization ignores the plain words

of Mr. Cecilio's testimony. Mr. Cecilio was asked "Does REIT II need to raise a certain amount of money?" In response, Mr. Cecilio responded "I would say it needs to raise the whole 75 million in 2022." Mot. Ex. 21 at pp. 146:8-11. And when asked whether the statement in REIT II's offering circular of "[w]hether we raise 50 million in the offering or something less, we believe the proceeds the offering will satisfy our cash requirements. If we raise less than 50 million, we will simply make fewer investments, although we might decide to raise more capital, we know of no reason we would need to" was accurate, Mr. Cecilio responded "In some forms it can be accurate, in some ways it cannot be accurate." *Id.* at p. 155:8-20.

Then, in an attempt to reframe the allegations set forth in the Order Instituting Proceedings ("OIP"), REIT II suggests that its offering circular disclosed the risks posed by its inability to consummate the Regulation A offering "many times over." Opp. at 15. This argument is irrelevant. The OIP does not make any allegations regarding whether investors were unaware of the risks involved if Regulation A offering was not consummated, only that REIT's representation that it had no minimum offering amount was misleading. *See* OIP at 3. Moreover, as discussed above, whether investors relied on such statements is factually irrelevant to any issue in this proceeding.

However, even if it were relevant, contrary to the Opposition's argument that risks were disclosed "many times over," the Opposition is only able to identify two out-of-context fragments of boilerplate disclosures from the January 19, 2021 offering circular. The first is cautionary language that there was an unspecified, general "greater risk" to investors if REIT II were only able to raise 1%, or $500,000, of the $50 million offering amount.[6] Mot. Ex. 8 at 8.

[6] In fact, REIT II raised $10,737,607, over twenty times this amount. *See* Mot. at 6.

The second is a disclosure that "our operations and prospects could be negatively affected" in the event that REIT II was unable to conduct *additional* offerings after the conclusion of the Regulation A offering. *Id.*

REIT II concludes its arguments on this issue by making an obvious attempt to backtrack from the representations it made to the Ninth Circuit Court of Appeals that REIT II had a minimum offering amount and that the failure to raise that offering amount "will quickly force the closure of their business" and result in losses to both REIT II and REIT I (emphasis added). REIT II takes the unsustainable position that the representations it made to the Ninth Circuit were "incorrect" and exaggerated, and therefore the Division should not rely on them. *See* Opp. at 16. REIT II also argues that any attempt by the Division to hold it accountable for these representations is "unconstitutional retaliation against REIT II for its exercise of its constitutional right to petition." *Id.* at 15.

REIT II cannot make factual representations to a federal appeals court, and then when those representations do not continue to serve it, instruct this Court to disregard them. Courts have uniformly found such conduct to be improper. *See e.g., Redd v. DePuy Orthopaedics, Inc*., 700 F. App'x 551, 554 (8th Cir. 2017) (affirming the district court granting summary judgment upon a ruling that "a party cannot change testimony just to avoid summary judgment") (internal quotations omitted); *Magilton v. Tocco*, 379 F. Supp. 2d 495, 507 (S.D.N.Y. 2005) (holding that a plaintiff cannot supplement or change the record in response to a summary judgment).

In short, contrary to the representations it made to its investors in its offering documents, REIT II had a minimum offering amount it needed to raise as evidenced by the testimony of its CEO and representations it made to the Ninth Circuit Court of Appeals. The record is clear, and REIT II's arguments to manufacture a genuine issue of material fact fall flat.

C. There Is No Dispute that REIT II's Offering Materials Contained Misleading Statements Regarding the Fees Its Investors Would be Charged

Finally, REIT II makes a number of arguments in an attempt to create the appearance of disputed facts as to the Division's evidence that its offering materials contained misleading statements regarding the fees its investors would be charged. These arguments appear to be as follows: (1) even if investors did not receive any financial statements reflecting the actual fees they were being charged, they had access to REIT II's offering documents, (2) it should not be held accountable for misrepresentations relating to its fees as those misrepresentations "were prepared by lower-level employees," and (3) any misrepresentations relating to its fees were immaterial. Opp. at 28-31.

REIT II's first argument – admitting that it never provided investors with any financial statements reflecting the actual fees they were being charged, but that investors had access to REIT II's publicly available offering documents – attempts to confuse the Court regarding what is at issue in this proceeding. The OIP alleges that "REIT II made conflicting representations about whether fund management fees will be charged" and that REIT II's offering documents and website made "conflicting representations regarding several other fees." OIP at 3-4. There is no allegation, and the Division is not required to demonstrate, that investors were actually confused by these conflicting representations, even though investors – including John Travis, Ankit Shah, and Paul Calo – have sworn that they were misled by the conflicting representations. Mot. Exs. 25-27. Therefore, REIT II's argument does not raise a genuine issue of material fact with respect to this issue. But even if REIT II's argument was relevant, the fact that investors had access to REIT II's publicly available offering documents does not contradict the facts and arguments set forth in the Division's Motion, namely that REIT II's representations in its offering documents regarding the fees it was charging investors conflicted with the

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representations made on its website.

Second, REIT II cannot absolve itself of accountability for misrepresentations on its website by stating, without providing any supporting evidence, that the conflicting statements made on its website and to investors "were prepared by lower-level employees." Opp. at 28. As an initial note, this argument is irrelevant as REIT II as an entity is the subject of this Rule 258 proceeding, not any specific employees at the company. REIT II also does not, because it cannot, assert that its management did not review or approve the statements on its website, only that the content was "prepared" by lower-level employees. Moreover, it is well-established that a company is responsible for the content it posts to its own website. *Fair Hous. Council of San Fernando Valley v. Roommates.Com,* LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) (holding that if a company creates the content for its own website, then it is responsible for that content); *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1123 (9th Cir.2003) (same).[7] Therefore, REIT II's argument does not raise a genuine issue of material fact.

Even assuming this argument is relevant to a material issue, it is not consistent with the facts. DiversyFund's CEO and CFO both testified that DiversyFund is a small company with only 18-20 employees and that its marketing department has only three employees. Mot. Ex. 21

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[7] REIT II's argument that the May 21, 2021 "no fee" representation made by DiversyFund employee Kari Hassey to Paul Calo only applied to REIT I is irrelevant. The Division alleges that REIT II's offering documents and website made conflicting representations regarding the fees it was charging, to which this argument is not responsive.

However, even if it were responsive, it misrepresents the actual facts. The May 21, 2021 representation made by the DiversyFund employee to investor Paul Calo that no fees were being charged was not in any way limited to REIT I, but was represented as being the policy for all DiversyFund-managed funds. The full representation states "At DiversyFund, we are vertically integrated and do everything in house, we basically eliminated the middle man and middle man fees (broker fees, management fee, etc.) . . . This allows us to have a no-fee platform and provide our investors with more transparency." Mot. Ex. 28. This statement was also made after REIT II's qualification and a few months before investors began discovering that their recurring investments in REIT I were being funneled into REIT II without their consent.

at pp. 49:21-15 and 81:4-82:15; Ex. 22 at p. 55:8-1. Moreover, its CEO testified that he was involved in decision-making for "anything that really affects the customer," that he is the direct supervisor of DiversyFund's chief marketing officer, and that he reviews DiversyFund's website approximately once a month. *Id.* Ex. 21 at pp. 66:8-12 and 81:12-21. Finally, both admitted to having weekly meetings with the marketing team and testified that they were kept informed as to any unique aspects relating to REIT II. Ex. 21 at pp. 95:12-22; Ex. 22 at pp. 113:2-12 and 176:3-14.

Nowhere in its brief does REIT II dispute that its offering materials contained misleading statements relating to REIT II's fee structure. In fact, REIT II concedes that some misrepresentations relating to its fees were "left [on its website] beyond its expiration date," "one statement on the Website did not disclose potential fees," and its website was not "modified when the fee structure changed from REIT I to REIT II." Opp. at 30-31. However, it argues that these misrepresentations were not material because it did not believe there was a "negative impact on overall fees." *Id.* at 30.

The Opposition fails to address or even mention that multiple investors – including John Travis, Ankit Shah, and Paul Calo – were so confused by the misleading statements relating to the fees that they were being charged that they sought refunds of their investments from DiversyFund. Mot. at Exs. 25-27. In addition, courts have long held that Respondent's misrepresentations regarding the fees investors might be charged are presumptively material, as a reasonable investor would find it important to know what fees they would be charged by the sponsor. *See SEC v. All. Leasing Corp*., 28 Fed.Appx. 648, 652 (9th Cir. 2002) (defendant's failure to disclose a commission was material to the investor's assessment of the strength of the potential investment because "reasonable minds cannot differ on the question of materiality");

United States v. Laurienti, 611 F.3d 530, 541 (9th Cir. 2010) (noting "[i]n deciding whether to buy a given stock, a reasonable investor would consider it important that, in contrast to the purchase of most stocks, the broker would receive a 5% commission from the purchase of this particular (house) stock," and therefore "reject[ing] Defendants' argument that the bonus commissions are immaterial as a matter of law"); *Schaffer Family Inv'rs LLC v. Sonnier*, 2016 WL 6917269, at *6 (C.D. Cal. July 5, 2016) (finding defendant's misrepresentation that he did not have any financial benefit in connection with investments were material misrepresentations as a matter of law where defendant admitted "he did in fact receive 'finder's fees' and commissions ... in connection with the investments").

VI. REIT II SHOULD BE PERMANENTLY SUSPENDED

REIT II misstates the purpose of these proceedings. The Division is not engaged in a "campaign to brand REIT II's management as bad actors." Opp. at 31. To the contrary, the Division has absolutely no discretion or authority on whether REIT II's management, its predecessors, or its successors will receive a "bad actor" designation. The Division's sole purpose in this proceeding is to demonstrate to this Court that a permanent suspension of REIT II's continued use of Regulation A is warranted based on REIT II's violation of requirements that were central to its Regulation A offering.

Again, an opposition to a summary disposition motion is not permitted to make bare allegations or denials, but must present specific facts demonstrating that there is a genuine issue of material fact. *See In the Matter of Gary L. Mcduff,* 112 S.E.C. Docket 3167, Release No. 31, 90, 2015 WL 13449919, *2 (Oct. 2, 2015). Yet REIT II's opposition does exactly that, and offers no evidence creating a genuine dispute of fact as to any of REIT II's violations.

But most importantly, REIT II presents an ongoing threat to investors. Investors in both REIT I and REIT II are continuing to discover that their signatures have been affixed to

electronic agreements without their knowledge, authorizing DiversyFund to invest their money as it sees fit without their consent. In addition, investors are continuing to discover that their recurring investments have been transferred without their approval between REIT I and REIT II.

Instead of resolving these issues, DiversyFund purported to terminate REIT II's offering in June 2022 and asked the Court to dismiss the hearing and vacate these proceedings without consequence. However, without notifying the Court, it created Value Add Growth REIT III LLC ("REIT III") to continue to raise funds from investors. Worse still, and as explained to the Court in the Division's filing on June 28, 2022, DiversyFund informed investors that it had transferred REIT II investor funds into REIT III without their knowledge or consent, using the DiversyFund Advisory Services Agreement that investors were unaware of and that DiversyFund had signed on their behalf.

A permanent suspension of REIT II is therefore warranted and necessary to put investors on notice to prevent continued exposure to these practices.

VII. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court grant its Motion for Summary Disposition and permanently suspend REIT II from its continued use of Regulation A.

Dated: September 28, 2022

Respectfully submitted,
DIVISION OF ENFORCEMENT

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-20801

In the Matter of

DF GROWTH REIT II, LLC,
Respondent.

The Division certifies that this document complies with the word limitation set forth in Rule 201.154(c). As of filing, the total number of words in this document is 6,505.

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OS Received 09/28/2022

In the Matter of DF Growth REIT II, LLC

Administrative Proceeding File No. 3-20801

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Reply in support of its Motion for Summary Disposition was served on the following on the 28th day of September, 2022, in the manner indicated below:

The Honorable Carol Fox Foelak (By electronic email only)
Administrative Law Judge
U.S. Securities and Exchange Commission
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