SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Release No. 10326 / March 24, 2017

SECURITIES EXCHANGE ACT OF 1934
Release No. 80306 / March 24, 2017

INVESTMENT ADVISERS ACT OF 1940
Release No. 4671 / March 24, 2017

INVESTMENT COMPANY ACT OF 1940
Release No. 32575 / March 24, 2017

Admin. Proc. File No. 3-16311

In the Matter of

TIMOTHY S. DEMBSKI

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

INVESTMENT COMPANY PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Aiding and Abetting and Causing Antifraud Violations

Respondent, an owner and managing partner of a registered investment adviser, committed fraud by making oral and written material misrepresentations to advisory clients when recommending and selling highly speculative investments in a private hedge fund he formed. He also aided and abetted and caused related antifraud violations by the hedge fund's general partner. *Held*, it is in the public interest to bar Respondent from the securities industry and impose a cease-and-desist order, disgorgement plus prejudgment interest, and a civil money penalty.

APPEARANCES:

Paul Batista, of Paul Batista, P.C., for Timothy S. Dembski.

Michael D. Birnbaum for the Division of Enforcement.

Appeal filed: January 29, 2016
Last brief received: May 12, 2016

Timothy S. Dembski, an owner and managing partner of former registered investment adviser Reliance Financial Advisors, LLC ("Reliance"), and an associated person of registered broker-dealers, appeals from the initial decision of an administrative law judge finding that he violated, and aided and abetted and caused violations of, the federal securities laws.[1] Based on our independent, de novo review of the record, we find, as did the law judge, that Dembski fraudulently induced clients of Reliance to purchase limited partnership interests (the "Partnership Interests") in the Prestige Wealth Management Fund, LP (the "Fund"), a private hedge fund he founded with his close friend, Scott M. Stephan. Dembski perpetrated the fraud by making material misrepresentations in oral communications with client-investors and in the Fund's written private placement memorandum ("PPM"). Accordingly, we find that Dembski violated the antifraud provisions of the federal securities laws. We also find that Dembski aided and abetted and caused antifraud violations committed by the Fund's general partner, Prestige Wealth Management, LLC ("Prestige"). As did the law judge, we bar Dembski from the securities industry, order him to cease and desist from further securities law violations, and impose disgorgement plus prejudgment interest and a third-tier civil money penalty.

I. Facts

Dembski, who has worked in the securities industry since 1995, founded Reliance Financial Group ("RFG"), an unregistered investment adviser, with Walter F. Grenda, Jr., in 1998. In 2007, Dembski hired Stephan to work as a telemarketer for RFG. After Dembski and Grenda founded Reliance, RFG's successor firm, with Dembski and Grenda as joint owners and its managing partners, Stephan continued in his role as a telemarketer. Stephan was a high school graduate who had been dishonorably discharged from the U.S. Air Force after two years of service. Other than the military, Stephan's professional experience prior to RFG had been collecting on, and managing others who collected on, delinquent automobile loans. Dembski was familiar with Stephan's employment background before hiring him and knew that Stephan had no experience trading securities, investing in securities, or providing investment advice to others. Nonetheless, Stephan persuaded Dembski that they should form a hedge fund.

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[1] *Reliance Fin. Advisors, LLC, Timothy S. Dembski, and Walter F. Grenda, Jr.,* Initial Decision Release No. 941, 2016 WL 123127 (Jan. 11, 2016).

A. The Fund's Formation

In the summer of 2010, Stephan suggested to Dembski that they start a hedge fund. Stephan's idea was to have a computer program trade at specific times during each day, taking long and short positions based on the momentum of certain stocks' share prices at designated times. Neither Dembski nor Stephan had any prior experience running a hedge fund or engaging in algorithmic or other automated trading strategies. In fact, Dembski admitted that he "really didn't know what a hedge fund was" before creating the Fund.

With Dembski's support, Stephan hired a computer programmer to help translate his idea into an algorithm (the "Algorithm") that would allow him to conduct automated trades. Stephan "backtest[ed]" the Algorithm—he looked at certain securities trading in the past to see how the Algorithm would have performed had it actually placed trades in those securities over those periods—but his analysis relied on hypothetical rather than actual trades. As a result, Stephan was concerned that, in actual operation, orders would not get filled at the price points necessary to make the Algorithm as profitable as he projected. Stephan shared his concerns with Dembski.

In late October or early November 2010, Dembski and Stephan hired Holland & Knight LLP ("H&K") to advise them on the process of setting up their hedge fund. H&K's "Terms of Engagement" letter stated: "You will provide us with the factual information and materials we require to perform the services identified in the letter, and you will make such business and technical decisions and determinations as are appropriate." H&K also told Dembski and Stephan orally that it would rely on them to provide the factual information required to discharge its responsibilities.

Based on discussions with H&K, Dembski agreed to structure the Fund so that Stephan had sole responsibility for managing the Fund and making investment decisions. The Fund's operational documents did not permit Dembski to have any involvement in the Fund's investment strategy or observe its daily performance. Dembski believed that structuring the Fund with this restriction would allow him to collect performance fees on Fund investments.

Also in late October or early November 2010, H&K assisted Dembski and Stephan in forming Prestige. Dembski and Stephan each owned a 50% stake. Prestige charged the Fund a 2% management fee and 20% performance fee on an annualized basis. Based on an agreement with Stephan, Dembski received two-thirds of those fees because he had advanced $1,000 in seed money to open the Fund's trading account and was supplying clients to invest in the Fund.

B. The Fund's PPM

In December 2010, H&K associate Amy R. Rigdon asked Dembski and Stephan to submit their professional biographies to be included in the Fund's PPM. Dembski and Stephan wrote their own biographies, and Stephan gave his biography to Dembski for review. After reviewing Stephan's biography, Dembski forwarded it, along with his biography, to Rigdon. The language in Stephan's biography was almost identical to that used in the final PPM. Stephan's biography in the final PPM stated:

> Scott M. Stephan is a co-founder and Chief Investment Officer of the General Partner. He has the exclusive responsibility to make the Fund's investment decisions on behalf of the General Partner. Mr. Stephan has worked in the financial services industry for over 14 years. The first half of his career he co-

> managed a portfolio of over $500 million for First Investors Financial Services. Afterwards, Mr. Stephan took a position as Vice President of Investments for a New York based investment company in which he was responsible for portfolio management and analysis.

At the hearing, Stephan admitted that his biography was "highly misleading." He never managed a securities portfolio of any size, let alone one over $500 million. He never served as Vice President of Investments for any investment company, in New York or elsewhere. And he never was responsible for "portfolio management and analysis."

Dembski testified that, when he first read Stephan's biography, he understood it to be factually inaccurate. In particular, he found the reference to Stephan managing $500 million in securities to be incorrect. He also did not understand the reference to Stephan having 14 years of experience in the financial services industry in light of what he knew about Stephan's actual work experience collecting on delinquent automobile loans. He further knew that Stephan did not serve as Vice President of Investments for Reliance or any other New York-based investment company. However, Dembski did not tell H&K about the factual inaccuracies in Stephan's biography or otherwise seek to correct them before transmitting his and Stephan's biography to Rigdon for inclusion in the PPM.

Upon receipt, Rigdon read the biographies, made grammatical edits, and incorporated them into the PPM. Rigdon testified that she did not fact-check Dembski's or Stephan's biography because H&K had informed them, both orally and in writing, that it relied on the factual information they provided and expected it to be accurate. Scott R. MacLeod, Rigdon's supervising partner, similarly testified that H&K "played no role in generating" the biographies beyond reviewing them "at a very high level for outrageous puffery that would seem incredibly misleading."

H&K sent Dembski the final version of the PPM on January 28, 2011. Although H&K provided Dembski with drafts of the PPM for review and comment, Dembski did not make any comments, as was the case when he received Stephan's biography for review before sending it to Rigdon. Apart from the biographies, Dembski testified that he did not review the entire PPM before using it to sell the Partnership Interests.

Rigdon and MacLeod testified that neither Dembski nor Stephan asked for legal advice concerning the contents of Stephan's biography, and that they did not provide any such advice before the PPM was finalized on February 1, 2011. It was not until two years later, in 2013, in connection with a Commission audit, that Dembski first asked H&K for advice about the factual statements in Stephan's biography. But even then, Dembski did not disclose Stephan's actual work experience to Rigdon and MacLeod.

C. The Fund's Operations

Dembski used the PPM when recommending that clients purchase the Partnership Interests, although not all clients received the PPM prior to their decision to invest. Stephan and Dembski had discussed that Dembski would solicit his clients as potential investors in part because of the trust relationship that Dembski had with them. Dembski testified that he serviced many of these clients for years prior to their purchasing the Partnership Interests and was familiar with their financial conditions. Many of Dembski's clients were retired and financially unsophisticated investors, lived on fixed incomes, and were concerned about their exposure to investment risk.

Approximately 19 of Dembski's clients purchased around $4 million in the Partnership Interests. The PPM set the minimum investment at $250,000, unless Prestige authorized otherwise. Some clients used retirement assets or surrendered variable annuities (and incurred fees) to pay for the $250,000, a fact of which Dembski was aware. An additional 24 or 25 clients of Grenda purchased approximately $8 million in the Partnership Interests, bringing the total amount invested in the Fund to more than $12 million between 2011 and 2012.

Beginning in or about April 2011, the Fund used the Algorithm to trade a small number of stocks that Stephan selected. Dembski initially understood that the trading would be driven by the Algorithm with Stephan's day-to-day role limited to turning the Algorithm on and off and monitoring the Fund. Dembski testified that he felt "comfortable" granting Stephan exclusive responsibility to manage the Fund's portfolio because he "trusted" Stephan and knew that Stephan could rely on the Algorithm. Dembski also testified that, based on the results of the backtesting, he had confidence in the Algorithm and believed that the Fund would be "successful."

The Fund traded automatically for only several months. Stephan realized early on that the Algorithm did not work as well as he had hoped. Stephan told Dembski about the problems with the Algorithm, explaining that he was not "able to fill orders when [he] wanted pursuant to the [A]lgorithm" and that he had to "make some tweaks" to see if he could improve results. While Stephan tried to "tweak" the Algorithm, during the summer of 2011, he traded manually, a fact he shared with Dembski. Stephan testified that Dembski, despite his asserted confidence in the Algorithm, never expressed concerns to him about the problems he was having with the Algorithm or his determination to trade manually.

Ultimately, Stephan's attempts to fix the Algorithm failed. By September 2011, Stephan abandoned the Algorithm entirely and only traded manually. Stephan testified that he never told Dembski that the "tweaks" had worked, that he had stopped trading manually, or that he had started using the Algorithm again, and Dembski did not follow up with him.

D. Dembski's misrepresentations about the Fund

At the hearing, in testimony the law judge found credible, eight of Dembski's client-investors described the numerous misrepresentations and omissions Dembski made, both orally and in the PPM, when offering and selling the Partnership Interests.

1. The Fund's risks and returns

Dembski told clients that the Fund was a "low risk" investment and would trade based solely on the Algorithm. At least two clients testified that these statements were important to them because they would not have invested in the Fund had they known that it was a high risk investment. Dembski never told clients that the Fund stopped using the Algorithm because it did not work and was being traded manually by Stephan. To the contrary, Dembski continued to market the Fund to prospective investors as if the Algorithm was still being used, touting it to one client as a "tested and proven" formula that had been "used and tweaked over the last couple of years." This client purchased the Partnership Interests in May 2012.

Dembski also told clients that, based on the results of the backtesting that had been done, the Fund would gain about 20% in value annually and losses would be limited to 1%. But Dembski did not disclose Stephan's concerns about the predictive value of the backtesting or that Stephan encountered problems in using the Algorithm. Dembski further told at least one client that she could withdraw her investment at any time if the Fund started to lose money, contrary to a provision in the PPM that required a 90-day waiting period for withdrawals.

2. The Fund's management

Dembski told clients that he would play an active role in running and managing the Fund and would monitor the Fund on a regular basis to ensure it remained an appropriate investment. Clients testified that these statements were reassuring because they had known and trusted Dembski for years. In practice, Dembski had no involvement in the portfolio management of the Fund—that was Stephan's responsibility. But Dembski did not disclose that he did not intend, and was not permitted by the Fund's operational documents, to play any role in the Fund; that Stephan had complete discretion over the Fund's investment strategy; that Stephan's biography in the PPM was inaccurate and misleading; and that Stephan had no experience in running a fund. It was not until after the Fund collapsed that many of Dembski's clients first heard of Stephan or learned that he was the sole portfolio manager of the Fund.

3. The Fund as a sought-after investment

Dembski told clients that a "big bank" was interested in either investing in the Fund or purchasing the Algorithm and that he had met with attorneys about patenting the Algorithm. One client testified that these statements gave him "encouragement that this was a good fund [because] other people saw it as something good." However, Stephan testified that none of these statements was true and that he never told Dembski otherwise. And Dembski admitted that he made no effort to patent the Algorithm and was unaware of anyone else undertaking such efforts. Dembski also told clients that the Fund was insured by the Federal Deposit Insurance Corporation ("FDIC"), contrary to a disclosure in the PPM that "[i]nvestments in the Fund are not bank deposits and are not covered by FDIC Insurance."

Finally, Dembski told some clients that he invested his own and his family's money in the Fund. One client testified that these statements made him feel "very comfortable" and "secure." However, Dembski admitted at the hearing that the only money he invested was the $1,000 in seed money and that he never invested his family's money in the Fund.

E. The Fund's Collapse

Contrary to Dembski's positive representations, the Fund suffered negative returns in 11 of the 19 months between April 2011 and October 2012. Grenda withdrew his clients from the Fund in October 2012, and they incurred collective losses of $320,000, or 4% of their original $8 million investment.[2] With only Dembski's clients' investments remaining, Stephan continued to

[2] Grenda and Reliance, who originally were charged along with Dembski, entered into a settlement with the Commission. *See Reliance Fin. Advisors, LLC*, Exchange Act Release No. 75577, 2015 WL 4597605 (July 31, 2015). Dembski and Grenda subsequently consented to

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trade in stocks and options manually. Around this same time, some of Dembski's clients contacted him and asked that he withdraw their investments from the Fund. Dembski sought to reassure them that their money was secure, telling at least one client that "there was a glitch" and "if you just stay in, we're going to make it up."

In December 2012, the Fund collapsed after it lost over 80% of its value as a result of Stephan's manual options trading. Dembski's clients incurred total losses of nearly $4 million. Dembski collected a total of $363,784.66 in Fund management and performance fees from July 11, 2011 to December 7, 2012.

In January 2013, Dembski wrote a letter to his client-investors informing them of the Fund's collapse. A client testified that after receiving the letter he called Dembski to find out what went wrong. Dembski told him that "he didn't have any information as to what happened"—he "was still digging into it," and that "some sort of rogue trader [was] involved." The client testified that the "rogue trader" was a reference to Stephan.[3]

II. Analysis

A. Dembski violated Section 17(a)(2) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5(b).

A respondent is liable under Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder if the Division of Enforcement establishes by a preponderance of the evidence that he made a misrepresentation, that such misrepresentation was material, that he acted with scienter, and that the conduct was in connection with the purchase or sale of securities.[4] The respondent is liable under Section 17(a)(2) of the Securities Act if, in the offer or sale of securities, he

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FINRA orders finding that they engaged in fraud in connection with the sales of the Partnership Interests and barring them from association with a FINRA member in any capacity. *See Dep't of Enforcement v. Timothy Stephen Dembski and Walter Francis Grenda, Jr.*, Discip. Proc. No. 2013036168701, Order Accepting Dembski's Offer of Settlement dated Feb. 3, 2016, *available at* https://www.finra.org/sites/default /files/ order_accepting_offer_ dembski.pdf, and Order Accepting Grenda's Offer of Settlement dated Feb. 11, 2016, *available at* https://www.finra.org/sites/default/files/order_accepting_offer_grenda.pdf.

[3] Stephan entered into a settlement with the Commission in which he agreed to a cease-and-desist order and an industry bar based on findings that he willfully violated, and willfully aided, abetted, and caused violations of, Securities Act Section 17(a), Exchange Act Section 10(b) and Exchange Act Rule 10b-5, and Advisers Act Section 206(4) and Advisers Act Rule 206(4)-8. *See Scott M. Stephan*, Exchange Act Release No. 73803, 2014 WL 6967372, at *7-8 (Dec. 10, 2014); *see also Scott M. Stephan*, Initial Decision Release No. 888, 2015 WL 5637557, at *1, 6-7 (Sept. 25, 2015), *declared final*, Exchange Act Release No. 76515, 2015 WL 7450390 (Nov. 24, 2015).

[4] *S.W. Hatfield, CPA, and Scott W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *4 (Dec. 5, 2014) (citing 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5).

obtained money or property by means of the untrue statement of material fact.[5] A violation of Section 17(a)(2) does not require scienter; negligence is sufficient.[6] Section 17(a), Section 10(b), and Rule 10b-5 all require the use of interstate commerce.[7] We find that Dembski violated Exchange Act Section 10(b) and Rule 10b-5(b) thereunder when, acting with scienter, he repeatedly made oral and written untrue statements of material fact, and violated Securities Act Section 17(a)(2) when he obtained money or property by means of those material misstatements.[8]

1. Dembski made untrue statements of fact.

In oral communications with clients, Dembski made false statements that: (a) the Fund was a "low risk" investment and would trade based on a computer formula; (b) the backtesting of the Algorithm involved real trades and orders, and, based on the results of that backtesting, the Fund would gain 20% in value annually and losses would be limited to 1%; (c) an investment in the Fund could be withdrawn at any time; (d) Dembski would play an active role in running, managing, and monitoring the Fund; (e) a "big bank" was interested in investing in the Fund or purchasing the Algorithm; (f) he was engaged in efforts to patent the Algorithm; (g) the Fund was FDIC-insured; and (h) he invested his family's money in the Fund.

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[5] *Johnny Clifton*, Securites Act Release No. 9417, 2013 WL 3487076, at *8 (July 12, 2013) (citing 15 U.S.C. § 77q(a)(2)) .

[6] *Id*.

[7] 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

[8] There is no dispute that the statements and omissions at issue were made "in the offer or sale" and "in connection with the purchase or sale" of securities. *See, e.g., SEC v. Zandford*, 535 U.S. 813, 819-20 (2002) (stating that Exchange Act Rule 10b-5's nexus requirement is to be construed flexibly and that the Commission's "broad reading" of the nexus requirement "is entitled to deference"); *United States v. Naftalin*, 441 U.S. 768, 778 (1979) (stating that Securities Act Section 17(a) "was intended to cover any fraudulent scheme in an offer or sale of securities"). The record establishes, and Dembski does not dispute, that the Partnership Interests constituted "securities" because they involved investments in a common enterprise in which profits were derived from the efforts of others. *See, e.g., SEC v. Holschuh*, 694 F.2d 130, 137 (7th Cir. 1982) (stating that "[t]here is no dispute that the limited partnership interests constituted securities") (citations omitted). The record further establishes that Dembski's use of the telephone, mail, and wires to communicate with client-investors satisfies the requisite nexus to interstate commerce for purposes of the Securities Act and Exchange Act. *See generally* T. Hazen, *Treatise on the Law of Securities Regulation* § 17.2 (noting that the jurisdictional requirements of the Securities Act and the Exchange Act are easily satisfied and that "[i]t is very difficult to imagine a securities transaction that does not in some respect involve an instrumentality of interstate commerce"); *see also, e.g., SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997) (finding that intrastate telephone calls and even the most ancillary mailings satisfy the interstate commerce requirement), *aff'd*, 159 F.3d 1348 (2d Cir. 1998).

These statements were false because: (a) investments in the Fund involved a substantial degree of risk; (b) the claimed backtesting did not involve real trades or orders, Stephan had concerns about the Algorithm's predictive value (in fact, the Fund came nowhere near to gaining 20% in value annually), and Stephan stopped using the Algorithm in September 2011 because it did not work; (c); the PPM provided that there was a 90-day waiting period for withdrawals; (d) Dembski was not permitted to play any role in the Fund's management; (e) no "big bank" was interested in the Fund or the Algorithm; (f) there were no efforts to patent the Algorithm; (g) the Fund was not FDIC-insured; and (h) his only investment in the Fund was $1,000 in seed money.

Through the disclosures he approved in the PPM, Dembski also made the false representation about Stephan's biography that were contained in the PPM, including that he had substantial experience in running a fund. In *Janus Capital Group v. First Derivative Traders*, the Supreme Court held that the "maker" of a misstatement is the person with ultimate authority over it.[9] Dembski reviewed and approved those statements and was the one who transmitted the biographies to H&K for inclusion in the PPM. He was the one with ultimate authority. Indeed, Dembski does not dispute that he was the "maker" of these misstatements.[10]

The statements in the PPM about Stephan's professional background were unquestionably false. Stephan did not have substantial experience running a fund. To the contrary, Stephan worked in the collections business for almost his entire career, never managed an investment portfolio before the Fund, and never served as an officer for an investment company. Dembski claims that none of his clients relied on Stephan's misleading biography in the PPM when purchasing the Partnership Interests. But "[u]nlike litigants in private causes of action," the Division of Enforcement was not required to prove reliance.[11]

2. Dembski's untrue statements of fact were material.

Dembski's untrue statements of fact were material. "The question of materiality . . . is an objective one."[12] A misstatement or omission is material if "there is a substantial likelihood that it would be perceived as important by a reasonable investor."[13]

A reasonable investor would have considered it significant that Stephan managed the Fund yet had no hedge fund or other relevant experience; that Stephan had concerns about the results of the backtesting; and that Stephan had abandoned the Algorithm, which was the Fund's

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9 564 U.S. 135, 142-43 (2011).

10 *See SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 286-87 (2d Cir. 2013) (stating that a person need not be "responsible for the act of communication" to be the maker of a misstatement so long as he or she has ultimate control), *cert. denied*, 134 S. Ct. 2896 (2014).

11 *Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 WL 4026291, at *10 & n.46 (citing authority) (Nov. 20, 2009), *petition denied*, 653 F.3d 130 (2d Cir. 2011).

12 *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976).

13 *SEC v. Research Automation Corp.*, 585 F.2d 31, 35 (2d Cir. 1978).

selling point, in favor of manual trading. A reasonable investor also would have considered it significant that Dembski was not permitted to manage or monitor the Fund's investments—as one client testified, "if [Dembski] wasn't the guy . . . [he] wouldn't have dealt with [Stephan] at all." Further, a reasonable investor would have considered it significant that rather than being a low risk, FDIC-insured investment, the Fund was a risky and highly speculative investment. Finally, a reasonable investor would have considered it significant that the Algorithm was not being patented and that Dembski did not invest his family's money in the Fund.

In his reply brief, Dembski relies on the First Circuit's decision in *Flannery v. SEC* to argue that his misstatements and omissions were not material.[14] However, prior to his reply brief, Dembski did not raise this argument. Arguments first developed in a reply brief are generally deemed waived.[15] But even if not waived, Dembski's argument fails because *Flannery* found that the misstatements at issue were not material based on facts specific to that case. Materiality is a "fact-specific inquiry."[16] *Flannery* has no bearing on the materiality of the specific misrepresentations that Dembski made.

3. Dembski acted with scienter.

Dembski acted with scienter. Scienter is defined as "a mental state embracing [an] intent to deceive, manipulate, or defraud."[17] Knowing misconduct satisfies the scienter requirement.[18] Dembski knew before recommending and selling the Partnership Interests that he was not permitted to be involved in the Fund's management or trading strategy. In fact, he intentionally established the Fund with this restriction because he believed that such a restriction would allow him to earn fees on Fund investments that he otherwise could not collect. Nonetheless, for investors seeking assurances that their trusted investment adviser would be intimately involved with the Fund, Dembski described a fictitious role in running, managing, and monitoring the Fund. Dembski also knew of Stephan's problems with using the Algorithm, as well as Stephan's abandonment of the Algorithm in September 2011. Nevertheless, Dembski knowingly continued to solicit new investments as if the Algorithm was still being used, even boasting about its "tested and proven formula" to a client who invested in May 2012.

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[14] 810 F.3d 1 (1st Cir. 2015).

[15] *See, e.g.*, *Damani v. Simer SP, Inc.*, 650 F. App'x 897, 899 (7th Cir. 2016) (finding that appellant waived arguments "by not developing them and by raising them for the first time only in his reply brief"); *Board of Regents v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) ("To prevent this sort of sandbagging of appellees and respondents, we have generally held that issues not raised until the reply brief are waived."); *Fields*, 2015 WL 728005, at *19 & n.115 (holding that arguments are waived if first raised in a reply brief).

[16] *SEC v. DiBella*, 587 F.3d 553, 565 (2d Cir. 2009).

[17] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

[18] *SEC v. First Jersey Secs.*, 101 F.3d 1450, 1467 (2d Cir. 1996).

Dembski knew further that his statements about personally investing in the Fund were false. The truth was that he never invested any money in the Fund beyond the $1,000 in seed money. Similarly, Dembski knew that his claim that he was meeting with New York City attorneys to patent the Algorithm was false because he knew that he never made any efforts to patent the formula, let alone meet with attorneys about such patents. And when Dembski told his clients that a "big bank" had expressed interest in investing in the Fund or its trading formula, he did so knowing that no bank had expressed any such interest.

Dembski also knew that Stephan's biography in the PPM was inaccurate. Yet he knowingly misled his clients by using the PPM to sell the Partnership Interests. Dembski compounded the misleading representations in Stephan's biography when, in oral communications with at least one client, he falsely stated that Stephan "had many years in the financial industry" and was "a manager of . . . a half billion dollar portfolio at some time."

Dembski continued to lie to clients even after he secured their investments, and these additional misstatements made to conceal the fraud further support a finding of scienter.[19] When, in October 2012, at least one client sought to withdraw his money from the Fund, Dembski persuaded him to remain in the fund by falsely assuring him that "there was a glitch" and "if you just stay in, we're going to make it up." And after the Fund collapsed in December 2012, Dembski attributed the Fund's losses to the activities of a "rogue trader" when he knew that only Stephan—and not a "rogue"—had authority to trade for the Fund. Dembski also stood to gain financially from the fraud through his receipt of two-thirds of the total management and performance fees from the Fund. This personal financial gain reinforces our finding that he acted with scienter.[20]

*   *   *   *

By virtue of making material misrepresentations with scienter, Dembski violated Exchange Act Section 10(b) and Rule 10b-5(b). Dembski further violated Securities Act Section 17(a)(2) because Dembski used the false statements to obtain money as they led his clients to purchase the Partnership Interests and resulted in Dembski receiving substantial fees.[21]

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19 *See, e.g., SEC v. Seghers*, 298 F. App'x 319, 334 (5th Cir. 2008) (motive to conceal problems with investments "is relevant to showing scienter"); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *11 n.56 (Nov. 9, 2012) (efforts to conceal violative conduct demonstrate scienter); *Phillip J. Milligan*, Exchange Act Release No. 61790 (Mar. 26, 2010) (attempts to conceal misconduct support a finding of scienter).

20 *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325 (2007) (stating that "personal financial gain may weigh heavily in favor of a scienter inference").

21 Because we find that Dembski violated Rule 10b-5(b) by making the material misrepresentations with scienter and Section 17(a)(2) by using the material misrepresentations to obtain money or property, it is not necessary to find, as did the law judge, that Dembski also violated Rule 10b-5(a) and (c) and Section 17(a)(1) and (3).

B. Dembski violated Advisers Act Sections 206(1) and (2) and aided and abetted and caused Prestige's violations of Advisers Act Section 206(4) and Rule 206(4)-8.

Section 206(1) and 206(2) of the Investment Advisers Act of 1940[22] prohibit fraudulent misstatements by investment advisers to their clients.[23] Scienter is required to establish a violation of Advisers Act Section 206(1), but not a violation of Advisers Act Section 206(2).[24] "'Facts showing a violation of Securities Act Section 17(a) or Exchange Act Section 10(b) by an investment advisor will also support a showing of a Section 206 violation.'"[25] Because Dembski, "for compensation, engage[d] in the business of advising others . . . as to the advisability of investing in, purchasing or selling securities . . .," he was an "investment adviser."[26] Indeed, Dembski stipulated that he was an "investment adviser" within the meaning of the Advisors Act. We therefore find, based on the fraudulent misrepresentations Dembski made to his clients with scienter, that Dembski violated Advisers Act Sections 206(1) and (2).

To establish aiding and abetting liability, the Commission must find: (1) a primary violation of the federal securities laws; (2) Dembski's knowledge or recklessness as to the violation; and (3) Dembski's substantial assistance in the achievement of the primary violation.[27] One who aids and abets a violation is also a cause of the violation.[28]

We find that Dembski aided and abetted and caused Prestige's violations of Advisers Act Section 206(4) and Advisers Act Rule 206(4)-8.[29] Scienter is not required for finding a violation

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22 15 U.S.C. § 80b-6(1), (2).

23 *Zion Cap. Mgmt. LLC and Ricky A. Lang*, Investment Advisers Act Release No. 2200A, 2003 WL 25596513, at *5-7 (Dec. 11, 2003). Unlike Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, Advisers Act Section 206 does not require that the fraudulent conduct occur "in the offer or sale" or "in connection with the purchase or sale" of securities. *See SEC v. Lauer*, No. 03-80612-CIV, 2008 WL 4372896, at *24 (S.D. Fla. Sept. 24, 2008), *aff'd*, 478 F. App'x 550 (11th Cir.), *cert. denied*, 133 S.Ct. 545 (2012) (citation omitted).

24 *See Steadman v. SEC*, 603 F.2d 1126, 1133-34 (5th Cir. 1979), *aff'd*, 450 U.S. 91 (1981).

25 *See, e.g., David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *8 (Dec. 21, 2007)) (quoting *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007)), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1008 (2010).

26 *See* 15 U.S.C. § 80b-2(a)(11) (defining an "investment adviser" as one who is compensated to "advis[e] others . . . as to the value of securities or as to the advisability of investing in, purchasing or selling securities").

27 *See, e.g., Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000); *Brendan E. Murray*, Advisers Act Release No. 2809, 2008 WL 4964110, at *5 (Nov. 21, 2008).

28 *See, e.g., Sharon M. Graham*, Exchange Act Release No. 40727, 1998 WL 823072, at *7 n.35 (Nov. 30, 1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000).

29 In light of our conclusion that Dembksi violated Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5, and Advisers Act Section 206(1) and (2), we do not address whether, as a result of the same misrepresentations that form the basis of his primary liability, he aided and abetted and caused Reliance's and Prestige's violations of those same provisions. *See*

continued . . .

of Advisers Act Section 206(4) or the rules promulgated thereunder.[30] Advisers Act Section 206(4) makes it unlawful for "any investment adviser," "by use of the mails or any means or instrumentality of interstate commerce," "to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative."[31] Advisers Act Rule 206(4)-8 provides that it shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business for "any investment adviser" to a "pooled investment vehicle," such as a hedge fund, to "[m]ake any untrue statement of a material fact . . . to any investor or prospective investor in the pooled investment vehicle."[32] It is undisputed that Prestige, as the general partner of the Fund, was an "investment adviser" to the Fund and owed a duty to the Fund's limited partners.[33] Prestige therefore committed primary violations of Advisers Act Section 206(4) and Advisers Act Rule 206(4)-8 because the oral and written material misstatements made by Dembski, as co-owner of Prestige, are imputed to it based on agency principles.[34] Dembski knowingly provided substantial assistance in Prestige's violations because he was responsible for the oral and written material misrepresentations.[35]

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Irfan Mohammed Amanat, Exchange Act Release No. 54708, 2006 WL 3199181, at *10 n.55 (Nov. 3, 2006) (declining to address secondary liability where respondent found primarily liable), *petition denied*, 269 F. App'x 271 (3d Cir. 2008).

30 *See SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992) ("Scienter is not required under [Advisers Act] [S]ection 206(4)"); *Disraeli*, 2007 WL 4481515, at *9 ("Scienter is not required for violation of a rule promulgated under [Advisers Act] Section 206(4).").

31 15 U.S.C. § 80b-6(4).

32 17 C.F.R. § 275.206(4)-8.

33 *See, e.g.*, *Goldstein v. SEC*, 451 F.3d 873, 876 (D.C. Cir. 2006) (stating that "[h]edge fund general partners meet the definition of 'investment adviser' in the Advisers Act"); *James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *3 n.11 (July 23, 2010) ("The general partner of a hedge fund is an investment adviser who owes a duty to his or her limited partners."); *see generally* 15 U.S.C. § 80b-2(a)(11) (defining an "investment adviser").

34 *See, e.g.*, *A.J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977) (holding that a firm "can act only through its agents, and is accountable for the actions of its responsible officers"); *see also Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 427 (7th Cir. 2015) (stating that "[n]othing in *Janus* precludes a single statement from having multiple makers" and finding that both the company and its CEO made the false statements in the company's SEC filings).

35 *See, e.g.*, *Warwick Capital Mgmt.*, Advisers Act Release No. 2694, 2008 WL 149127, at *9 (Jan. 16, 2008) (finding president of an investment adviser primarily liable under Advisers Act Sections 206(1) and (2) and secondarily liable under Advisers Act Section 206(4)); *see also United States v. Sain*, 141 F.3d 463, 474 (3d Cir. 1998) (finding that a corporation "is a separate legal entity" that "has the capacity to be aided and abetted" by a controlling shareholder whose actions create the corporation's primary liability because otherwise the controlling stockholder would "enjoy the benefits of the corporate form, protection from personal liability for [the] corporation's debts, without accepting the burden of assuming criminal responsibility when the individual causes the corporation to commit a crime"); *SEC v. Koenig*, No. 02-C-2180, 2007 WL
continued . . .

C. Dembski's arguments against liability lack merit.

1. Dembski's assertions that he did not make oral misrepresentations were not credible and were contradicted by his clients' credible testimony.

Dembski denies making any oral misrepresentations to clients and contends that the testimony of the eight client-investors was "vague," "inconsistent," "well-rehearsed," and "blatantly self-interested . . . in view of the litigations and arbitrations each of them has already privately initiated or intends to initiate against him." The law judge, who observed their demeanor, determined to credit what he described as the client-investors' "undivided" and "consistent" version of events.[36] We defer to a law judge's demeanor-based credibility findings absent a showing that the substantial weight of the evidence warrants a different finding.[37] We conclude that the weight of the evidence does not warrant a different finding.

Addressing the law judge's credibility findings, Dembski cites to a statement in the initial decision in which, he claims, the law judge conceded "that all of the testifying investor-witnesses [may have] conspired to commit perjury." But that statement reads in full: "While it is not impossible that all of the testifying investor-witnesses conspired to commit perjury, I find it more plausible that they testified truthfully concerning what Dembski told them about the Fund."[38] Thus, the law judge actually rejected Dembski's claim.

Any deference aside, we agree with the law judge that "Dembski's theory that all of the investors and lawyers conspired to lie under oath is simply incredible and not supported by the evidence."[39] Dembski claims that his clients were "coaxed" into taking a position against him based on "greed," but this claim is not based on any evidence in the record. The record also belies Dembski's claim that his clients' testimony "lined up" according to which attorney represented them in their private litigation or arbitration proceeding against him because clients with different attorneys recalled that Dembski made many of the same misstatements. Finally, although Dembski told the law judge there were clients who could support his version of events, and although the law judge granted Dembski "the right to call as many investor witnesses as he needed to establish that he did not make oral misrepresentations," Dembski declined to call any

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107491, at *7 (N.D. Ill. Apr. 5, 2007) (rejecting defendant's argument that it is 'logically inconsistent' to find an agent's actions to be both proof of a company's primary violations and proof of the agent's aiding and abetting violations because a corporation "can act only through the actions of natural persons" and therefore a natural person's actions may render both the corporation primarily liable and the natural person secondarily liable) (citing *Sain*).

[36] *Reliance Fin. Advisors*, 2016 WL 123127, at *2, 13.

[37] *See, e.g., Steven Altman, Esq.*, Exchange Act Release No. 63306, 2010 WL 5092725, at *4 n.10, 10 (Nov. 10, 2010) (citation omitted), *petition denied*, 666 F.3d 1322 (D.C. Cir. 2011).

[38] *Reliance Fin. Advisors*, 2016 WL 123127, at *2.

[39] *Id.* at *26.

clients to testify on his behalf.[40] Indeed, at the hearing, Dembski "voluntarily waived" his right to call his clients.[41]

2. Dembski did not establish a reliance on counsel defense.

Dembski argues that he cannot be held liable for the misrepresentations in Stephan's biography because the biography was prepared and "approved" by H&K on whom he relied. To establish an advice-of-counsel defense to a scienter-based violation, a respondent must prove that he: "(1) made a complete disclosure to counsel; (2) requested counsel's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice."[42] Dembski fails to satisfy these elements.

First, Dembski did not make a complete disclosure to counsel because neither he nor Stephan provided H&K with full and accurate information about Stephan's background. Second, neither Dembski nor Stephan requested an opinion from H&K about the factual statements in Stephan's biography before the PPM was finalized; the only purported request by Dembski occurred in 2013, well after the events at issue. Third, Dembski did not receive any legal advice from H&K about Stephan's biography. While Dembski testified that H&K provided legal advice to Stephan, who then relayed the legal advice to him, the law judge credited the attorneys' and Stephan's testimony that no such advice was provided.[43] Fourth, at all relevant times, Dembski was aware of the facts that rendered Stephan's biography incorrect. Thus, even if Dembski had sought and received legal advice from H&K he could not have relied on it in good faith.[44]

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40 *Id.* at *2.

41 During the pendency of this appeal, Dembski filed a letter requesting that a May 2016 FINRA arbitration panel decision be added to the record. The panel decision dismissed claims brought against Dembski and others by Thomas Krajewski, one of the client-investors who testified in this proceeding. According to Dembski, this decision supports his argument that "the testimony of the investors was neither credible nor persuasive" because they had lawsuits pending against him. Rule of Practice 452 sets forth the circumstances under which a party may seek leave to adduce additional evidence, and requires that the party "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. Dembski has not made the requisite showing of materiality. The FINRA arbitration panel decision does not contain a discussion of the facts the panel considered or even the legal basis upon which the panel made its decision, and Dembski's letter fails to provide any such discussion. We therefore deny Dembski's request.

42 *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981).

43 *See Reliance Fin. Advisors*, 2016 WL 123127, at *19.

44 *Cf. SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 467 (9th Cir. 1985) ("'If a company officer knows that the financial statements are false or misleading and yet proceeds to file them, the willingness of an accountant to give an unqualified opinion with respect to them does not negate the existence of the requisite intent or establish good faith reliance.'") (quoting *United States v. Erickson*, 601 F.2d 296, 305 (7th Cir.), *cert. denied*, 444 U.S. 979 (1979)).

3. The PPM did not contain adequate disclaimers.

Dembski argues that disclaimers in the PPM foreclose his liability because they placed investors on notice of the potential risks involved in investing in the Fund. For example, Dembski points to the PPM's disclosure that "investments in the Fund may result in the loss of principal investments in the Fund [and] may be risky and subject to total loss." He also points to the disclosure that "neither the Fund, the general partner [Prestige], nor any of their representatives or agents is making any representation to any offeree or purchaser of the interests regarding the legality of any investment therein."

For cautionary statements in a PPM to be "meaningful," they must "discredit the alleged misrepresentations to such an extent that the real risk of deception drops to nil."[45] "[A] vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation."[46] The vague and blanket disclaimers in the PPM were clearly insufficient to counter the multiple specific and false statements that Dembski made in recommending the Fund.[47] Indeed, Dembski admitted that he did not read the entire PPM, found parts of it difficult to understand, and believed his clients likewise would be unable to understand its contents. Moreover, evidence shows that he discouraged investors from attaching significance to the disclaimers, dismissing them as "boilerplate" or "legalese."

4. The law judge did not err in admitting the Division's expert's testimony and report.

Dembski argues that the law judge made a "fatally flawed evidentiary decision" in admitting the Division's expert's testimony and report on the applicable standard of care for investment advisers. We disagree. "Law judges have broad discretion in deciding whether to admit evidence, including expert testimony," and "we conclude that the law judge did not abuse [his] broad discretion in admitting" the testimony and the expert's report.[48] Although Dembski claims that the admission of the expert's testimony and report "prejudiced" him, he fails to

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[45] *In re Bear Stearns Companies, Inc.*, 763 F. Supp. 2d 423, 495 (S.D.N.Y. 2011) (internal quotations and citation omitted); *see also In re Prudential Sec. Ltd. P'ships Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) ("Cautionary language . . . must precisely address the substance of the specific statement or omission that is challenged.") (citation omitted).

[46] *In re Donald J. Trump Casino Secs. Litig.—Taj Mahal Litig.*, 7 F.3d 357, 371 (3d Cir. 1993); *see also, e.g., In re Vivendi, S.A. Secs. Litig.*, 838 F.3d 223, 247 (2d Cir. 2016) ("'Vague' disclaimers are inadequate."); *In re Am. Int'l Grp., Inc. 2008 Secs. Litig.*, 741 F. Supp. 2d 511, 531 (S.D.N.Y. 2010) ("[G]eneric risk disclosures are inadequate to shield defendants from liability for failing to disclose known specific risks.").

[47] *See, e.g., Kenneth R. Ward*, Exchange Act Release No. 47535, 2003 WL 1447865, at *10 n.47 (Mar. 19, 2003) (holding that boilerplate disclosures in promotional materials disclaiming any accuracy of the information concerning securities "in no way overrode" broker's unqualified recommendations about such securities), *aff'd*, 75 F. App'x 320 (5th Cir. 2003).

[48] *Altman*, 2010 WL 5092725, at *18.

substantiate that claim, and we find no evidence of prejudice based on our independent review of the record.[49] In any event, we do not rely on the expert's testimony and report in reaching our findings and conclusions as to Dembski's antifraud liability.

5. Dembski was not denied due process.

Dembski argues generally that "the administrative proceeding was conducted in a manner that unfairly denied Mr. Dembski his constitutional rights to Due Process and fundamental principles of fairness." Based on our independent review of the record, we find nothing to suggest that the proceeding below deprived Dembski of due process or fundamental fairness. Dembski also argues that the order instituting this proceeding was "sweeping" and "overstated" the charges against him, but we conclude that the allegations in that order sufficiently informed him of the underlying antifraud charges "in enough detail to allow [him] to prepare a defense."[50]

III. Sanctions

Dembski challenges the remedial sanctions the law judge imposed as "disproportionate, unfair, and draconian." Based on our independent, de novo review, we conclude that those sanctions are necessary to protect the public and deter future misconduct by Dembski and others.

A. Bars

Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) authorize us to bar Dembski from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in a penny stock offering if we find: (1) that he was associated with, respectively, a broker-dealer or investment adviser at the time of his misconduct; (2) that he violated the provisions of the federal securities laws willfully; and (3) that a bar is in the public interest.[51] Investment Company Act Section 9(b) similarly authorizes a bar from certain associations with an investment company based on the public interest.[52]

At nearly all relevant times, Dembski was registered as a general securities representative through his associations with Wall Street Financial Group, Inc. and Mid Atlantic Capital Corporation, broker-dealers that were members of FINRA. As discussed above, he was also associated with investment advisers RFG, Reliance, and Prestige. Dembski was therefore associated with a broker-dealer and an investment adviser at the time of his misconduct.

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49 *See, e.g.*, *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *18 & n.129 (Nov. 4, 2013) (failure to substantiate claim of prejudice).

50 *Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *14 (June 30, 2005), *petition denied*, 465 F.3d 780 (7th Cir. 2006).

51 15 U.S.C. §§ 78*o*(b)(6), 80b-3(f).

52 15 U.S.C. § 80a-9(b).

A person acts willfully when he intends to commit the act which constitutes a violation; willfulness does not require that the actor "'also be aware that he is violating one of the Rules or Acts.'"[53] A finding of scienter is sufficient to demonstrate willfulness.[54] We find that Dembski acted willfully when he violated, and aided and abetted violations of, the securities laws.

In determining whether a bar is in the public interest, we consider the factors set forth in *Steadman v. SEC*: the egregiousness of the misconduct; whether it was isolated or recurrent; the degree of scienter involved; whether the respondent acknowledges his misconduct and the sincerity of any assurances against future misconduct; and the likelihood that his occupation will present opportunities for future violations.[55] These factors support a bar here.

Dembski's misconduct was egregious and recurrent. He lied repeatedly to multiple clients for close to two years about the risks inherent in the Fund, an investment that was patently inappropriate for them given their ages, financial conditions, and investment goals; his own involvement in the Fund, which he knew was virtually nil; and the qualifications of the portfolio manager, who never managed a fund before and was uniquely unqualified for the position. His actions were done knowingly and in order to increase investments in the Fund and the fees generated therefrom, his share of which was substantial, and resulted in significant losses to his victims, especially those who lost part or all of their life savings and have limited ability to recover their losses. His efforts to conceal his fraud further demonstrate a high degree of scienter.[56] Dembski's misconduct was all the more reprehensible because it occurred in his capacity as an investment adviser. His fraud exploited the trust of his clients and demonstrates his unfitness to continue working as a professional in any aspect of the securities industry.

Dembski has not acknowledged the wrongful nature of his conduct and therefore cannot claim mitigation on this basis. Nor has he offered any assurances against future misconduct. To the contrary, he contends that all eight of the clients who testified against him were lying, that H&K engaged in "corrupt" practices and "urged" the misleading language in Stephan's biography, and that Division staff has sought to "ruin" him. Dembski's assertions lack support in the record, and his "attempts to deflect blame increase the likelihood that he would engage in similar misconduct in the future."[57] Given Dembski's stated desire to continue to work in the securities industry, his occupation would present opportunities for future violations.[58]

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53 *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (citation omitted).

54 *See Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *13 n.139 (May 16, 2014), *rev'd in part on other grounds*, 793 F.3d 147 (D.C. Cir. 2015).

55 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91, (1981).

56 *See, e.g.*, *Michael C. Pattison*, Exchange Act Release No. 67900, 2012 WL 4320146, at *9 & n.52 (Sept. 20, 2012) (concluding that respondent's "repeated efforts to conceal improper backdating further demonstrate that he acted with a high degree of scienter").

57 *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 5571634, at *6 (May 27, 2015).

58 *See, e.g.*, *Fundamental Portfolio Advisors, Inc.*, Exchange Act Release No. 48177, 2003 WL 21658248, at *17 (July 15, 2003) (noting the "likelihood that [the respondent's] occupation

continued . . .

Dembski provides no basis for imposing a sanction other than a bar from the securities industry. Although Dembski contends that "[u]nqualified permanent bar orders are disfavored" in cases such as his and that his conduct was not egregious, he committed antifraud violations and is therefore "subject to the severest of sanctions under the securities laws."[59] Dembski also contends that he previously had an unblemished disciplinary record. But Dembski's "lack of previous securities law violations does not outweigh our concern that he will pose a continued threat to investors if permitted to remain in the industry."[60] Dembski additionally claims that some clients remained with him even after the Fund collapsed. This claim is not supported by the record, and even if it were, "we look beyond the interests of particular investors in assessing the need for sanctions, to the protection of investors generally."[61] We conclude that the record amply establishes Dembski's unfitness to participate in the securities industry in any capacity.[62]

B. Cease-and-desist order

Securities Act Section 8A(a), Exchange Act Section 21C(a), and Advisers Act Section 203(k) authorize us to impose cease-and-desist orders on any person who has violated those acts.[63] In determining whether a cease-and-desist order is appropriate, we consider the *Steadman* factors as well as "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-

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. . . continued
will present opportunities for future violations" in light of his "expressed goal of resuming his career as a mutual fund portfolio manager"), *petition denied*, 167 F. App'x 836 (2d Cir. 2006).

59 *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003); *see also, e.g., Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *18 (May 2, 2014) (imposing bar from the securities industry after finding antifraud violations), *petition denied*, 793 F.3d 76 (D.C. Cir. 2015). Dembski argues that the sanctions the law judge imposed "far exceed those imposed recently" in other cases, but the cases he relies on are inapposite. For example, he cites to *Steven R. Tomlinson*, Exchange Act Release No. 73825, 2014 WL 6985131 (Dec. 11, 2014), *petition denied*, 637 F. App'x 49 (2d Cir. 2016), where we concluded that a 90-day suspension FINRA imposed for breaching and failing to safeguard confidential customer information was not excessive or oppressive. That case provides no support for imposing anything less than an industry-wide bar here.

60 *Montford & Co.*, 2014 WL 1744130, at *19.

61 *Dawson*, 2010 WL 2886183, at *4 (citations omitted).

62 *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *11-13 (Dec. 13, 2012).

63 15 U.S.C. §§ 77h-1(a), 78u-3(a), 80b-3(k)(1).

and-desist order in the context of any other sanctions being sought in the same proceedings."[64] We also consider whether there is a reasonable likelihood of future violations.[65]

We find that the risk of future violations is high because Dembski's misconduct was egregious, recurrent, and involved a high degree of scienter. We also find that his misconduct is recent and that he profited substantially from the misconduct at the expense of his clients, many of whose retirement savings were nearly depleted. And although we bar Dembski from acting as a securities professional in any capacity, ordering him to cease-and-desist from violating the antifraud provisions he was found to have violated "will serve the remedial purpose of encouraging him to take his responsibilities more seriously in the future should he be allowed to re-enter the securities industry or should he act in a capacity that does not require registration."[66]

C. Disgorgement

Securities Act Section 8A(e), Exchange Act Sections 21B(e) and 21C(e), Investment Company Act Section 9(e), and Advisers Act Sections 203(j) and (k)(5) authorize us to order disgorgement of ill-gotten gains plus prejudgment interest.[67] Dembski's share of the total management and performance fees the Fund received was $363,784.66. Although Dembski argues that there is "no legitimate basis for [the] order of disgorgement," he does not provide any evidence that $363,784.66 does not reflect the profits he received as a result of his fraudulent conduct. Because "the amount of disgorgement should include all gains flowing from the illegal activities,"[68] we find disgorgement of this amount to be appropriate. Dembski should also pay prejudgment interest on that amount from January 1, 2013, the first day of the month following his receipt of his last share of performance and management fees on December 7, 2012.

D. Civil penalties

Securities Act Section 8A(g), Exchange Act Section 21B(a), Advisers Act Section 203(i), and Investment Company Act Section 9(d) authorize us to impose civil penalties.[69] In deciding whether a civil penalty is in the public interest, we consider whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; the resulting harm, directly or indirectly, to other persons; any unjust enrichment and prior restitution; the respondent's prior regulatory record; the need for deterrence; and such other matters as justice

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[64] *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *26 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

[65] *Id.*

[66] *Gregory O. Trautman*, Exchange Act Release No. 9088A, 2009 WL 6761741, at *21 (Dec. 15, 2009).

[67] 15 U.S.C. §§ 77h-1(e), 78u-2(e), 78u-3(e), 80a-9(e), 80b-3(j), (k)(5).

[68] *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006) (internal quotations and citation omitted).

[69] 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i), 80a-9(d).

may require.[70] Penalties may be imposed for each violative "act or omission," and third-tier penalties are authorized where the violations "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and the misconduct "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission."[71]

Third-tier penalties are authorized here. As discussed above, Dembski's misconduct involved fraud and caused substantial losses. These factors along with Dembski's unjust enrichment and the need for deterrence militate in favor of a substantial civil penalty.

The maximum third-tier penalty that may be imposed for each violative act or omission by an individual between March 3, 2009 and March 5, 2013 is $150,000. The law judge found that one penalty of $125,000 for Dembski's oral misrepresentations and one penalty of $125,000 for Dembki's written misrepresentations in the PPM was appropriate for a total third-tier penalty of $250,000. Although he recognized that a $150,000 penalty for each set of misrepresentations was authorized, the law judge "discounted the amount in consideration of Dembski's prior clean record and the deterrence that will be served by ordering that amount, in combination with the other sanctions ordered."[72] We agree with the law judge that a one third-tier penalty for Dembski's oral misrepresentations and a one third-tier penalty for Dembski's written misrepresentations is appropriate. We disagree with the law judge's decision to order a discount.

We find, under the facts and circumstances of this case, that the egregiousness of Dembski's misconduct and the need for appropriate deterrence outweigh any consideration of the lack of a prior disciplinary history.[73] Moreover, the law judge did not explain why a discount was warranted due to the other sanctions ordered or why the discount should be $25,000. In our view, no such discount is appropriate in light of Dembski's betrayal of his clients' trust and the significant losses that his antifraud violations caused to his vulnerable victims. We therefore impose one maximum $150,000 third-tier penalty for the oral misrepresentations and one maximum $150,000 third-tier penalty for the written misrepresentation. These penalties are less than we are authorized to impose: a maximum third-tier penalty of $150,000 for each fraudulent misrepresentation that Dembski made.[74]

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70 15 U.S.C. §§ 78u-2(c), 80a-9(d)(3), 80b-3(i)(3).

71 15 U.S.C. §§ 77h-1(g)(2)(c), 78u-2(b)(3), 80b-3(i)(2)(c), 80a-9(d)(2)(c).

72 *Reliance Fin. Advisors*, 2016 WL 123127, at *27.

73 *See, e.g., Montford & Co.*, 2014 WL 1744130, at *24 (rejecting respondents' argument for a lesser penalty since they "lack[ed] disciplinary histories" because this factor was "outweighed by the other public interest factors supporting a significant civil money penalty").

74 *Cf. Pentagon Capital Mgmt.*, 725 F.3d at 288 n.7 (finding "no error in the district court's methodology for calculating the maximum penalty by counting each late trade as a separate violation" where the statute authorized a penalty for "each such violation").

E. Fair Fund

The law judge ordered that the disgorgement, prejudgment interest, and civil penalty amounts be used to create a Fair Fund for the benefit of investors harmed by Dembski's violations.[75] The Sarbanes-Oxley Act's Fair Fund provision "provides the [Commission] with flexibility by permitting it to distribute civil penalties among defrauded investors by adding the civil penalties to the disgorgement fund."[76] We direct that the disgorgement, prejudgment interest, and civil penalty amounts be paid into such a fund.

An appropriate order will issue.[77]

By the Commission (Acting Chairman PIWOWAR and Commissioner STEIN).

Brent J. Fields
Secretary

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75 17 C.F. R. § 201.1100.

76 *Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *22 (Dec. 11, 2009) (internal quotation marks and citation omitted), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010).

77 We have considered all of the parties' contentions and have rejected or sustained them to the extent they are inconsistent, or in accord with, the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10326 / March 24, 2017

SECURITIES EXCHANGE ACT OF 1934
Release No. 80306 / March 24, 2017

INVESTMENT ADVISERS ACT OF 1940
Release No. 4671 / March 24, 2017

INVESTMENT COMPANY ACT OF 1940
Release No. 32575 / March 24, 2017

Admin. Proc. File No. 3-16311

In the Matter of

TIMOTHY S. DEMBSKI

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Timothy S. Dembski be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that Timothy S. Dembski be barred from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and it is further

ORDERED that Timothy S. Dembski be barred from participating in any offering of penny stock; and it is further

ORDERED that Timothy S. Dembski cease and desist from committing or causing any violations or future violations of Sections 17(a)(2) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5(b), and Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940 and Advisers Act Rule 206(4)-8; and it is further

ORDERED that Timothy S. Dembski disgorge $363,784.66, plus prejudgment interest of $51,933.53, such prejudgment interest calculated beginning from January 1, 2013, with such interest continuing to accrue on funds owed until they are paid, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Timothy S. Dembski pay $300,000 in civil money penalties; and it is further

ORDERED that the disgorgement, prejudgment interest, and civil penalty amounts be used to create a "Fair Fund" for the benefit of investors harmed by Dembski's violations pursuant to Commission Rules of Practice 1100-1106.

Payment of the disgorgement, prejudgment interest, and civil penalty amounts shall be made not later than twenty-one days after service of this order. Payment shall be: (i) made by United States postal money order, wire transfer, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary