UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15858

In the Matter of

STANLEY JONATHAN FORTENBERRY,

Respondent.

DIVISION OF ENFORCEMENT'S PRE-HEARING BRIEF

Stephan J. Schlegelmilch (202) 551-4935
Corey A. Schuster (202) 551-4745
Michael C. Baker (202) 551-4471
U.S. SECURITIES AND EXCHANGE COMMISSION
Division of Enforcement
100 F Street, N.E.
Washington, DC 20549
SchlegelmilchS@SEC.gov
SchusterC@SEC.gov
BakerMic@SEC.gov

Counsel for Division of Enforcement

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL RULES AND STATUTES

SEC RELEASES

Pursuant to Rule of Practice 222 and the Court's September 12, 2014 Order, the Division of Enforcement (the "Division") respectfully submits the following Pre-Hearing Brief.

INTRODUCTION

In early 2010, Respondent Stanley Jonathan Fortenberry ("Fortenberry") created a limited partnership called Premier Investment Fund, L.P. ("Premier") and set himself up as Premier's general partner and sole investment adviser. He advertised Premier as an extraordinarily profitable way to invest in the entertainment industry, he guaranteed returns, and he touted his investing acumen as well as his access to some of the most famous names in the country music industry. Fortenberry sold three shares of Premier to two investors, and in so doing he raised over $300,000 and received additional money through a loan from one of the investors.

But Fortenberry's representations about Premier, its prospects, its performance and how it would be operated were lies. And instead of investing the money with which he was entrusted, he looted the fund, spending on himself hundreds of thousands of dollars in money invested in and loaned to Premier. In marketing and operating the fund as he did, Fortenberry committed at least five distinct frauds, each of which are sufficient to find him liable for violating the antifraud provisions of the securities laws:

1. Fortenberry lied about Premier's prospects and performance, promising astronomical returns and a guarantee of at least a "twelve percent (12%) return per annum";
2. Fortenberry misrepresented how Premier was and would be operated, falsely stating that Premier would keep GAAP-compliant books and records – when, in fact, Fortenberry kept almost no books and records whatsoever;
3. Fortenberry misled investors regarding his compensation, stating that his only payment would be in the form of an equity interest in Premier;

4. Fortenberry failed to disclose to his investors that he was subject to two cease-and-desist orders, one issued by the Pennsylvania Securities Commission and one issued by the Texas State Securities Board, in connection with a prior securities fraud in 2004; and
5. Fortenberry looted the fund, writing over $68,500 in checks to himself for "management fees" and spending in excess of an additional $88,000 on himself, his children, and his personal debts and living expenses. By his own records, Fortenberry also stole another $208,000 that had been loaned to Premier, never even bothering to deposit the money into Premier's account.

In lying to investors and looting the fund, Fortenberry violated the antifraud provisions of the Securities Act of 1933 ("Securities Act"), the Exchange Act of 1934 ("Exchange Act"), and the Investment Advisers Act of 1940 ("Advisers Act"). Consequently, the Division seeks a cease-and-desist order for the violations alleged against Fortenberry, an order of disgorgement, civil money penalties, a permanent collateral bar, and other equitable relief. As explained below and as will be demonstrated at the October 20, 2014 hearing, the Division is entitled to the relief it seeks.

BACKGROUND

I. RESPONDENT FORTENBERRY

Respondent Stanley Jonathan Fortenberry is the founder and general partner of Premier Investment Fund, L.P., a Tennessee limited partnership and pooled investment vehicle. As the general partner of Premier, Fortenberry held responsibility for soliciting investments, communicating with investors, and making all investment decisions on behalf of Premier. In his own words, Fortenberry had "exclusive control over the partnership business" and "sole discretion" over how the partnership invested the money with which he was entrusted.[1]

[1] *See* Premier Investment Fund, L.P. "Subscription and Limited Partnership Agreement," Division Hearing Exhibit No. ("ENF") 56.

Fortenberry has three prior felony convictions and has twice previously been subject to cease-and-desist orders in connection with securities fraud. In 2004, both the Pennsylvania Securities Commission and the Texas State Securities Board ordered Fortenberry to cease and desist from selling unregistered securities. Specifically, the Texas regulator found in its order, and Fortenberry consented, that Fortenberry had committed securities fraud by "intentionally fail[ing]" to disclose the following material facts:

> (A) Information regarding the assets, liabilities, profits, losses, cash flow, and operating history of the issuer sufficient to enable a prospective investor to make an informed decision regarding the risks associated with the offering.
>
> (B) The specific risks associated with [the] investment . . ., including the risk that a working interest owner may be liable for costs or claims in excess of the amount of his or her investment.
>
> (C) Respondent Fortenberry was convicted of theft in cause [sic] number 309,091 in the County Court at Law No. 7, Travis County, Texas on February 2, 1990.
>
> (D) Respondent Fortenberry filed for Chapter 13 bankruptcy in the United States Bankruptcy Court, Northern District of Texas, Lubbock Division, on August 3, 1992, in case number 92-50525, and said bankruptcy was dismissed on March 21, 1994 by motion of the Trustee.
>
> (E) Respondent Fortenberry filed for Chapter 13 bankruptcy in the United States Bankruptcy Court, Northern District of Texas, Lubbock Division, on December 16, 1993, in case number 93-50785, and said bankruptcy was dismissed on September 30, 1994 by motion of the Trustee.[2]

As a result of this and other conduct, the Texas State Securities Board found that Fortenberry had "engaged in fraud in connection with the offer for sale of securities," and issued an order against him

[2] *See* ENF 10.

to, *inter alia*, "CEASE AND DESIST from engaging in any fraud in connection with the offer for sale of any security in Texas."[3]

Despite this order, in connection with his operation and marketing of Premier, Fortenberry engaged in much of the same conduct for which he had been sanctioned only five-and-a-half years earlier.

II. THE PREMIER INVESTMENT FUND FRAUD

The instant fraud began in early 2010 when Fortenberry contacted a prominent manager of country music talent, Jim Halsey, who put Fortenberry in contact with his son, Sherman Halsey. Fortenberry offered to raise money for Sherman Halsey's new entertainment and social media company called Halsey Management Company, LLC. Halsey Management Company planned to create, among other things, a country music-themed social media website called "StarMaker Central" and to operate an on-line songwriting contest licensed from *Billboard* magazine.

Following this initial contact, in April 2010, Fortenberry formed Premier, set himself up as Premier's general partner, and began to prepare offering materials, subscription agreements, and other marketing papers.[4] Fortenberry also created and included in Premier's offering materials what he purported to be a business plan for StarMaker Central.[5] Fortenberry used this business plan to inform prospective limited partners of one of the ways that they would make money on investments in Premier. He then began contacting potential investors and encouraged them to invest in Premier, which he represented would invest in StarMaker Central via Halsey Management Company. In marketing Premier, Fortenberry repeatedly touted his ability to invest in the entertainment and country music industries, and he arranged for potential investors to meet Halsey and the Halsey family's long-time clients, the Oak Ridge Boys and Roy Clark.

---

[3] *Id.*

[4] A timeline of the Premier fraud is attached hereto as **Exhibit A.**

[5] *See, e.g.*, "StarMaker Central Executive Summary," ENF 56.

Sherman Halsey, however, never authorized the StarMaker Central business plan's inclusion in the Premier offering documents. Fortenberry prepared these documents without Halsey's knowledge. Upon learning of the materials, Halsey objected and instructed Fortenberry to stop using the materials because they were misleading.

Fortenberry ultimately secured two investors in Premier, who collectively invested $300,000 pursuant to these and other materially false and misleading statements by Fortenberry. In September and November 2010, Redacted purchased two shares of Premier for $200,000, and between August 2010 and March 2011, Redacted purchased, in a series of installment payments, another share of Premier for approximately $100,000. Fortenberry also obtained a loan from Redacted, which Fortenberry's records reflect was in the amount of $208,000[6] and was supposed to be used for the operation of Premier.

Of the $300,000 invested in Premier, only $151,500 was ultimately invested in Halsey Management Company.[7] The balance – including the entire loan or loans from Redacted – was quickly siphoned off by Fortenberry.[8] Even though Premier was an abject failure, Fortenberry wrote himself a number of checks for approximately $68,500 in undisclosed "management fees." He also withdrew thousands of dollars from ATMs, and otherwise used Premier's funds to pay for his personal entertainment, clothing, debts, groceries, and living expenses. By using Premier's assets for his own benefit – whether by way of exorbitant "management fees" or for the payment of his

---

[6] Redacted's records show one loan in the amount of $170,000. Fortenberry's records confirm this amount but also indicate an additional loan of $38,000, for a total of $208,000. *See* Premier Investment Fund Compiled Financial Statements (2010), ENF 129, Premier Investment Fund Compiled Financial Statements (2011), ENF 130, and Christopher Odom's August 13, 2013 Memo to File, ENF 137.

[7] *See* Written Report of Kevin M. Pierce, ENF 149.

[8] *See id.*

personal expenses – Fortenberry violated his representations to investors and put his own interests ahead of his clients'.

Premier has, for all intents and purposes, been out of business since March 2011. Currently, Premier has no assets, other than its ownership interest in Halsey Management Company, which is not currently a going concern. Despite Fortenberry's false statements to at least one investor, discussed further below, Premier and its investors have never received a single dollar of return on Premier's investments. Fortenberry is the only person to have benefited from Premier.

A. Fortenberry Misrepresented Premier's Prospects And Potential Returns On Investments.

The business plan and other offering documents that Fortenberry created and distributed for Premier contain numerous materially false and misleading statements, specifically regarding the risks associated with the enterprise and its likely return for Premier investors. For example, the business plan that Fortenberry created and distributed to Premier's potential investors states as follows:

> Star Maker Central will average thirty dollars per month per member. We are confident that we will achieve one million members by August 15, 2012. Consequently, Star Maker Central will be grossing thirty million dollars per month. We expect our cost, at that point, to remain under two million dollars monthly, leaving a profit of twenty eight million dollars monthly.[9]

The business plan and offering materials also guaranteed investors a return on their investment:

> If you invest now, we will pay you twelve percent (12%) per annum. Repayment of principal and interest will be paid back in three years, along with you keeping your equity stake in the holdings. Most importantly, our investors will receive twelve and one half percent of twenty eight million dollars, which is three and one half million dollars divided by our one hundred investors. Thus, each investor will be paid thirty five thousand dollars per month for the rest of his or her life.[10]

---

[9] "StarMaker Central Executive Summary," ENF 56.

[10] *Id.*

As intended, these false statements induced Redacted and Redacted to invest in Premier.

Additionally, to entice Redacted to continue to invest additional capital on a monthly basis, Fortenberry also sent him a series of monthly account statements falsely representing the profitability of Premier, and provided other false updates concerning Premier's investments and supposed profitability. For example, Fortenberry gave Redacted the appearance that the fund's investments were generating a profit and that Redacted's investment in Premier was, in turn, profitable. In at least November 2010, December 2010, January 2011, February 2011, and March 2011 – the period during which Redacted made monthly investments in Premier – Fortenberry informed Redacted that he was earning returns of 1% per month (approximately 12% per annum) on his investment.[11] Premier, however, never generated a profit or, for that matter, any return on its investments whatsoever.

In another monthly account statement, within a month of Redacted's initial investment, Fortenberry represented to Redacted that Premier had invested in a movie production company:

> [W]e have recently added to our portfolio Bongiovi Entertainment, Inc., a company that has a scheduled production of the "The Littlest Christmas Tree", A Christmas Story by Tony Bongiovi.

The statement, however, was untrue. Premier had not made – and has never made – any such investment. But, as intended, these false statements about Premier's investments and profits induced Redacted to continue to make monthly investments in Premier.[12]

B. Fortenberry Misrepresented How Premier Would Be And Was Operated.

In the limited partnership agreement he created, Fortenberry also misrepresented to Premier's investors and prospective investors that the fund did and would operate in a professional manner by, *inter alia*, observing corporate formalities and keeping accurate and appropriate books and records:

---

[11] Even though Redacted continued to invest in Premier on a monthly basis until March 2011, Premier's last investment in Halsey Management Company was in December 2010.

[12] Tellingly, Fortenberry never sent monthly statements to Redacted, who invested in Premier in two lump sums.

> C. . . . Each partner shall have a capital account that includes invested capital plus that partner's allocations of net income, minus that partner's allocation of net loss and share of distributions. . . .
>
> F. The Company shall use generally accepted accounting principles, as amended from time to time, in keeping its books and records, and its fiscal year shall be a calendar year. The general partner shall make any tax election necessary for completion of the partnership tax return. . . .
>
> N. The general partner shall advise limited partners as to all investments made by the Company at the time of making such investments, and annually before January 31st shall inform the limited partners as to the profit or loss with respect to each investment and the Company as a whole. . . .[13]

Such false representations gave investors the misleading impression that Fortenberry would operate Premier as a legitimate investment fund, with accounting, tax, and other organizational protections and formalities in place.

A full set of financial statements prepared in accordance with generally accepted accounting principles ("GAAP") consist of a balance sheet, income statement, statement of comprehensive income, statement of cash flows, and accompanying footnotes to the financial statements. GAAP financial statements and footnotes also require certain treatment, presentation, and disclosure relating to various transactions and account balances.[14]

In reality, Fortenberry made no attempt to comply with the recordkeeping requirements of the partnership agreement. He never kept capital accounts, balance sheets, income statements, statements of comprehensive income, statements of cash flows, or accompanying footnotes for Premier. Premier also never filed a tax return or prepared the papers necessary for Premier or its investors to prepare their returns. Fortenberry also "lost," destroyed, and otherwise failed to maintain documentation relating to Premier and his activities as general partner. During the investigation, Fortenberry testified

---

[13] *Id.*

[14] *See* Written Report of Kevin M. Pierce, ENF 149.

that he stored Premier's records in the trunk of his car.[15] Even though he now contends that many of his personal expenditures of Premier's funds were legitimate business expenses, Fortenberry kept no receipts or contemporaneous records of how such funds were spent. And Fortenberry failed to inform investors of how and when funds were invested, likely because to do so would reveal that all but $151,500 had either disappeared or went directly into his pockets.

Despite repeated requests from at least one of the investors, Fortenberry refused to provide records to investors as to how their money was spent – or, more accurately, misspent – and how their investments were performing.

C. Fortenberry Misrepresented His Compensation.

In addition to his misrepresentations regarding the fund's prospects, recordkeeping, and operations, Fortenberry also falsely told investors and prospective investors in Premier that his compensation for his work finding investors and managing Premier's investments would be *solely* in the form of an equity stake in Premier and a concomitant share in Premier's profits. Fortenberry repeated this misrepresentation to Premier's investors and prospective investors in Premier's partnership agreement, which purported to give Fortenberry 100 partnership units (out of a possible 199 units) and 50% of Premier's net income:

> A. The undersigned acknowledges that in consideration for his pre-formation and formation activities for the benefit of the Company John Fortenberry received hereby at the time of the Company's formation 100 Units of the Company, and was hereby appointed general partner of the Company. . . .
>
> D. After tax net income, net loss, and voting power of the Company shall be allocated as follows:
>
> 1. 50 percent to the general partner.

[15] November 1, 2012 Testimony of Stanley Jonathan Fortenberry, ENF 3, at p. 33:14-22.

2. 50 percent to the limited partners, allocated according to their percentage of the total limited partnership capital accounts.[16]

Here, Fortenberry told his investors he would receive 100 units in Premier and 50% of Premier's profits, but, while addressing his compensation, made no mention of any salary, management fees, payment of personal expenses, or any other form of remuneration to himself. Rather than being forthcoming on this important issue, Fortenberry concealed the extent of his actual compensation.

Moreover, while the partnership agreement authorized Fortenberry to incur, on behalf of Premier, "reasonable administrative expenses," which could include "salaries," the partnership agreement says nothing about Fortenberry's ability to arbitrarily award himself "management fees," nor does it permit Fortenberry to use Premier's assets for his unfettered personal use and benefit. And, in any event, Fortenberry never disclosed to his investors his payment of any "salary," "management fees," or "reasonable administrative expenses" to himself. Moreover, irrespective of any specific provision of the partnership agreement, as the general partner of Premier and as an investment adviser, Fortenberry owed to Premier fiduciary duties, including the duty to act at all times in the best interest of the fund.

D. Fortenberry Failed To Disclose His Two Prior Cease-And-Desist Orders.

When meeting with investors and prospective investors regarding Premier and his work as Premier's general partner, Fortenberry failed to disclose that he was subject to two cease-and-desist orders from 2004, one issued by the Pennsylvania Securities Commission and one issued by the Texas State Securities Board.[17] In connection with the order issued by the Texas regulator, Fortenberry

[16] Premier Investment Fund, L.P., "Subscription and Limited Partnership Agreement," ENF 56.

[17] *See* ENF 9 and ENF 10.

expressly consented to the Board's finding that he had "engaged in fraud in connection with the offer for sale of securities."[18]

Demonstrating that he understood that the information is material, Fortenberry took steps to conceal the existence of the orders from investors, while at the same time seeking to create an argument that he had disclosed them. Buried on the tenth page of Premier's subscription agreement, in single-spaced text, Fortenberry wrote as follows:

> The undersigned acknowledges he has reviewed any and all information of public record, inclusive of official or reliable information posted on the internet, about the Company and the general partner John Fortenberry (Stanley Jonathan Fortenberry/ Stanley J. Fortenberry), and that such information has not changed his mind with respect to an investment in the securities offered hereby.[19]

Notwithstanding this language, neither investor knew that Fortenberry had previously "engaged in fraud in connection with the offer for sale of securities" and was, as a result, subject to two state securities regulators' sanctions for his misconduct.

E. Fortenberry Looted Premier.

Notwithstanding these representations and duties, upon receiving investments from Redacted and Redacted Fortenberry proceeded to loot the fund. Against his prior representations and in contravention of Premier's best interests, he took at least $317,160 directly from Premier, and he cannot account for another $32,000 of what appear to be personal expenses that he charged to the fund.[20] Of the sums misappropriated from Premier, perhaps most emblematic are Fortenberry's payments to himself of "management fees." Between September 2010 and March 2011, Fortenberry

---

[18] *See* ENF 10.

[19] Premier Investment Fund, L.P., "Subscription and Limited Partnership Agreement," ENF 56. In testimony, Fortenberry admitted that this oblique provision was designed to address his prior convictions and cease and desist orders. *See* November 1, 2012 Testimony of Stanley Jonathan Fortenberry, ENF 3, at p. 373:12-25.

[20] *See* Written Report of Kevin M. Pierce, ENF 149, at ¶ 18(b).

wrote "management fee" checks to himself in the amount of approximately $68,550 – approximately 23% of the $300,000 invested in Premier. Even assuming, counterfactually, that such remuneration was authorized by the partnership agreement, the amount here far exceeded any reasonable or foreseeable management fee, especially considering that his "management" of Premier had resulted in the complete loss of all of his investors' proceeds.[21]

Fortenberry also never disclosed to Premier's investors that he intended to and, in fact, did use the money invested in Premier for his unfettered personal use and benefit. Yet, Fortenberry also took another approximately $32,000 of Premier and its investors' money for what appear to be entirely personal expenses.[22] This conduct contradicted his representations that Premier's assets would be used to make investments in Halsey Management Company and other entertainment industry companies. Fortenberry used Premier's funds to pay for travel and concert tickets for his family members, personal credit card payments, clothing, jewelry, groceries, cable bills, utilities, insurance, unknown expenditures via PayPal, a Netflix subscription, car repairs and maintenance, gasoline, convenience and liquor store purchases, and trips to various restaurants and coffee shops. Fortenberry's failure to maintain accurate books and records (in accordance with GAAP or otherwise) facilitated the concealment of these expenses from investors and regulators. This failure to maintain books and records for Premier exemplifies Fortenberry putting his own interests ahead of Premier. Rather than maintaining such books and records, Fortenberry chose to expend substantial sums of money on himself and his family – to the point of draining all of Premier's cash assets – rather than preparing the accounting records for his client as promised.

In all, Fortenberry misspent approximately $349,400 of Premier's funds in management fees, personal expenses, and cash withdrawals, none of which was disclosed to Premier's investors. Instead

---

[21] *See id.* at ¶ 40.

[22] *See id.* at Exhibit D.

of using these assets for investment purposes, he acted for his self-interest and misappropriated the funds for his personal benefit. Fortenberry invested the balance of the Premier money entrusted to him in Halsey Management Company so that he could continue to represent that he was associated with Halsey and continue his fraud.

Again, Fortenberry was the only person to benefit from Premier.

Redacted

Redacted

III. OTHER EVIDENTIARY ISSUES

On August 25, 2014, the Division filed a supplemental memorandum designating as relevant certain portions of the transcript of Sherman Halsey's investigative testimony and setting forth the basis for the testimony's relevance. By order dated September 12, 2014, the Court extended until October 6, 2014, "Mr. Fortenberry's deadline for responding to the Division's Memorandum in Further Support of the Admission of the Prior Sworn Testimony of Sherman Brooks Halsey." As of the date of this Pre-Hearing Brief, however, Mr. Fortenberry has not filed a response, and the issue is now ripe for disposition.

On September 3, 2014, the Division filed a motion *in limine*, which sought an order barring Fortenberry from calling two Division attorneys, Corey A. Schuster and Michael C. Baker, to testify at the hearing in this matter. On September 12, 2014, the Court granted that motion.

ARGUMENT

I. FORTENBERRY VIOLATED THE ANTIFRAUD PROVISIONS OF THE SECURITIES ACT AND THE EXCHANGE ACT.

A. The Limited Partnership Interests Sold By Fortenberry Are Securities.

As a preliminary matter, the Premier limited partnership interests Fortenberry sold to Redacted and Redacted – and attempted to sell to others – were "securities" for purposes of Section

10(b) of the Exchange Act and Section 17(a) of the Securities Act. A "security" includes "virtually any instrument that might be sold as an investment," "in whatever form they are made and by whatever name they are called." *SEC v. Edwards*, 540 U.S. 389, 391 (2004) (citing *Reves v. Ernst & Young*, 494 U.S. 56, 61 n. 1 (1990)). Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act provide that a "security" includes any "investment contract," which the Supreme Court has defined as any "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).

Here, Premier was established and marketed so that purchasers of limit partnership units could share in a "common enterprise" and the fruits of Fortenberry's supposed investing acumen. Indeed, the Subscription and Limited Partnership Agreement used by Fortenberry in this case awarded Fortenberry, as general partner, "exclusive control over the partnership business."[23] As several courts have held under similar circumstances, such limited partnership interests are "securities." *See Mayer v. Oil Fields Sys. Co.*, 721 F.2d 59, 65 (2d Cir. 1983) ("security" because owner of limited partnership interest exercises no managerial role); *SEC v. Global Telecom Services, LLC*, 325 F. Supp. 2d 94, 113 (D. Conn. 2004) ("security" because "the role of the investors was merely to provide investment funds"); *SEC v. Saltzman*, 127 F. Supp. 2d 660, 667 (E.D. Pa. 2000) (denying motion to dismiss enforcement action relating to limited partnership interests); *Miltland Raleigh-Durham v. Myers*, 807 F. Supp. 1025, 1057 (S.D.N.Y. 1992) (limited partnership interest was "security"); *cf.*, *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 756 (11th Cir. 2007) (noting that limited partnership interests "are routinely treated as investment contracts"); *Williamson v. Tucker*, 645 F.2d 404, 423 (5th Cir. 1981) (noting that a limited partnership interest "has long been held to be an

[23] Premier Investment Fund, L.P. "Subscription and Limited Partnership Agreement," ENF 56.

investment contract"). Consequently, Fortenberry's conduct is subject to the antifraud provisions of the Securities Act and the Exchange Act.

B. Fortenberry's Oral And Written Misrepresentations Violated Section 10(b) Of The Exchange Act And Section 17(a) Of The Securities Act.

At the hearing in this matter, the Division will show that Fortenberry violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 17(a) of the Securities Act. These antifraud provisions are "to be construed 'not technically and restrictively' but flexibly to effectuate their remedial purposes." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

In order to prove fraud under Exchange Act Section 10(b) and Rule 10b-5 thereunder, the Commission must prove by a preponderance of the evidence that a defendant "(1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999). Essentially the same elements are required under Securities Act Section 17(a)(1)-(3), "though no showing of scienter is required for the SEC to obtain an injunction under subsections (a)(2) or (a)(3)." *Id.; see also SEC v. Better Life Club of America, Inc.*, 995 F. Supp. 167, 175 (D.D.C. 1998) (citing *Aaron v. SEC*, 446 U.S. 680, 691, 701 (1980)).

1. Fortenberry Utilized The Instrumentalities Of Interstate Commerce.

As a preliminary matter, even though Premier had only two investors, it cannot be reasonably disputed that Fortenberry utilized the instrumentalities of interstate commerce when conducting his fraud. Redacted is a resident of another state (New York), and Fortenberry frequently contacted investors and prospective investors using the Internet,[24] e-mail,[25] the telephone,[26] and the

---

[24] *See, e.g.*, ENF 108.

[25] *See, e.g.*, ENF 70.

[26] *See, e.g.*, ENF 54, 113-A, and 113-B.

U.S. mails,[27] and he regularly wired money to, from and between various bank accounts.[28] *SEC v. Huff*, 758 F. Supp. 2d 1288, 1353, 1354 (S.D. Fla. 2010) (telephone calls, facsimiles, interstate wire transfers, and the negotiation of checks in other states all sufficient evidence of interstate commerce); *Lopes v. Vieira*, 543 F. Supp. 2d 1149, 1175 (E.D. Ca. 2008) (use of telephone sufficient).

2. Fortenberry Made Material Misstatements And Omitted Material Facts.

Under Rule 10b-5(b), "the maker of the statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). A defendant is liable for his or her own oral misstatements and omissions. *See In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 472-73 (S.D.N.Y. 2012) (defendant may be "maker" of statement by either "stating it," by "approving it," or by having the statement "attributed to" the defendant). Information is considered material when there is a substantial likelihood that a reasonable investor would consider it important in determining whether to buy or sell securities. *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988). And for omissions, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus. v. Northway*, 426 U.S. 438, 449 (1976).

As set forth above and as will be demonstrated during the hearing, Fortenberry made numerous material misrepresentations and omissions. Fortenberry met personally with Redacted and Redacted before they invested and told them that they would be guaranteed a 12% return on investment and that Fortenberry's only compensation would be in the form of an equity stake in Premier. *Janus*, 131 S.Ct. at 2302 ("One 'makes' a statement by stating it. . . . This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when a speechwriter

---

[27] *See, e.g.*, ENF 73.

[28] *See, e.g.*, ENF 78.

drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said."). Fortenberry also personally provided Redacted and Redacted with written material repeating the foregoing misrepresentations and stating that Fortenberry would operate Premier in a businesslike fashion and maintain accurate books and records. *SEC v. Brown*, 878 F. Supp. 2d 109, 116 (D.D.C. 2012) ("courts have consistently held that the signer of a corporate filing is its 'maker.'"). The monthly account statements prepared by Fortenberry and provided to Redacted also stated, falsely, that Premier had invested in the production of an animated film and was generating a profit. *Red River Resources, Inc. v. Mariner Sys., Inc.*, 2012 WL 2507517, *6 (D. Ariz., Jun. 29, 2012) (author of e-mail is "maker" under *Janus*). While disclosing that he would take equity as his compensation, Fortenberry misleadingly omitted that he intended to and did use nearly half of Redacted's and Redacted's investment in Premier (as well as the entirety of Redacted's loan to Premier) for his own personal benefit. *SEC v. Gabelli*, 653 F.3d 49, 57 (2d Cir. 2011), *rev'd on other grounds sub nom., Gabelli v. SEC*, 133 S.Ct. 126 (2013)("'[H]alf truths' – literally true statements that create a materially misleading impression – will support claims for securities fraud."); *SEC v. Syron*, 934 F. Supp. 2d 609, 629 (S.D.N.Y. 2013) ("once a party chooses to discuss material issues, it ha[s] a duty to be both accurate and complete so as to avoid rendering statements misleading") (quotations omitted); *SEC v. StratoComm Corp.*, 2 F. Supp. 2d 240 (N.D.N.Y. 2014). Clearly, Fortenberry is the "maker" of numerous misrepresentations and material omissions in this case.

Fortenberry's misrepresentations and omissions were also clearly material. No investor knew that Fortenberry was using their investment for his own personal living expenses and entertainment. *SEC v. Smart*, 678 F.3d 850, 856 (10th Cir. 2012) ("[I]t would be material to a reasonable investor that his or her money was not being used as represented in safe investment strategies, but rather . . . for the payment of personal expenses."). And misrepresentations and

omissions about the nature of the investment, the use of the investor funds, safety, and control of the funds are necessarily material. *SEC v. Research Automation Corp.*, 585 F.2d 31, 35-36 (2d Cir. 1978) (misleading statements and omissions about the use of investor funds were material as a matter of law); *SEC v. Smith*, 2005 WL 2373849 at *5 (S.D. Oh., Sep. 27, 2005) ("Certainly a reasonable investor would consider how the Defendants would actually spend his money were he to invest to be an important factor when determining whether to invest in the offering."); *SEC v. Montana*, 464 F. Supp. 2d 772, 783-84 (S.D. Ind. 2006) ("representations and assurances . . . in particular with regard to the use, safety, rate of return and control of the funds they were investing were important in terms of the investors' decisions to invest"). Any reasonable investor would consider information that his funds were being misappropriated to be significant. *See Better Life Club*, 995 F. Supp. at 177 ("[N]o rational investor would knowingly invest in a project which never distributed profits and which were diverted substantial funds to the personal use of its promoter. Therefore, there is no question that the defendants' frequent misrepresentations and misleading omissions were material.").

Moreover, Fortenberry's failure to disclose the prior findings that he had engaged in securities fraud is also clearly fraudulent and material. Any reasonable investor would want to know that the individual behind the promotion of a security had previously been found to have committed fraud. *See, e.g., SEC v. Levine*, 671 F. Supp. 2d 14, 27-28 (D.D.C. 2009) ("It cannot be disputed that a reasonable investor would want to know whether the person they are sending their money to in order to purchase a stock has been previously found to have violated the securities laws."); *Merchant Capital*, 483 F.3d at 771-72 ("The existence of a state cease and desist order against identical instruments is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing the securities."); *SEC v. Empire Develop. Group, LLC*, 2008 WL 2276629, *11 (S.D.N.Y. May 30, 2008) (granting the SEC summary judgment and holding

that "an investor would want to know" of a defendant's prior securities lawsuits "when considering whether to invest"); *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1303 (M.D. Fla. 2007) (granting the SEC summary judgment and finding that information regarding a person's prior disciplinary history would assist investors in judging a defendant's "veracity and whether [the] businesses were legitimate and sound"); *SEC v. Alliance Leasing Corp.*, 2000 WL 35612001, *8-9 (S.D. Cal. Mar. 20, 2000) ("previous cease-and-desist orders" material) *SEC v. Elec. Warehouse, Inc.*, 689 F. Supp. 53, 65-67 (D. Conn. 1988) (granting the SEC summary judgment and holding that failure to disclose a principal's indictment for fraud was material); *SEC v. Paro*, 468 F. Supp. 635, 646 (N.D.N.Y. 1979) (material omission when defendant failed to disclose cease and desist orders entered by federal and state courts against similar predecessor interests). Fortenberry's omission of the prior securities fraud findings and cease-and-desist orders is material and is, even standing alone, actionable.

3. Fortenberry Acted With Scienter.

Scienter is the mental state embracing intent to deceive, manipulate, or defraud. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976). Scienter includes recklessness, defined as conduct that is "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the 'respondent' or so obvious that the [respondent] must have been aware of it." *Gregory O. Trautman*, Exchange Act. Rel. No. 61167 (Dec. 15, 2009), 98 SEC Docket 26534, 26563.

Fortenberry acted with scienter. Even though he had previously been censured for failing to provide investment information to investors, Fortenberry lied to Premier's investors and failed to keep any meaningful business records relating to the hundreds of thousands of dollars of other people's money with which he had been entrusted. When Fortenberry received investments for Premier from Redacted and Redacted he often diverted substantial portions of such investments to

himself – often within hours of depositing their money.[29] He falsely informed Redacted that Premier was generating returns on its investments, even though he knew that Premier was flat broke. Likewise, he told Redacted that Premier had invested in a movie production company, when he knew that was untrue given that he controlled all of Premier's investment decisions. And he intentionally, and unapologetically, spent on himself hundreds of thousands of dollars of the investments entrusted to him, while telling investors that his compensation would be solely in the form of an equity stake in Premier. *See SEC v. Brown*, 658 F.3d 858, 863 (8th Cir. 2011) (diversion of funds for defendant's "personal expenses" necessarily done with scienter); *SEC v. Lyttle*, 538 F.3d 601, 604 (7th Cir. 2008) (defendants' "pocket[ing of] several million dollars of the invested money for their personal use" necessarily done with scienter); *SEC v. Milan Grp., Inc.*, 962 F. Supp. 2d 182, 197 (D.D.C. 2013) (scienter present when defendant "knowingly allowed investors' monies—placed for safekeeping in her firm's IOLTA account—to be dispersed to [employer] and then back to her").

4. Fortenberry's Conduct Was "In Connection With the Purchase Or Sale Of Securities."

Finally, the fraud was in connection with the purchase and sale of securities. The "in connection with" requirement of Section 10(b) of the Exchange Act is a broad and flexible standard and *any* activity "touching [the] sale of securities" will suffice. *SEC v. Levine*, 671 F. Supp. 2d at 31 (citing *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971)). The Supreme Court has consistently embraced an expansive reading of the "in connection with" requirement. *See SEC v. Zandford*, 535 U .S. 813, 819 (2002); *SEC v. Gorsek*, 222 F. Supp. 2d 1099, 1111 (C.D. Ill. 2001) ("[T]he meaning of [in connection with] in SEC actions remains as broad and flexible as is necessary to accomplish the statue's purpose of protecting investors . . . essentially the Defendants' actions must merely 'touch' the sale of securities or in some way influence an investment decision").

[29] *See* Written Report of Kevin M. Pierce, ENF 149, at Exhibit E.

Here, Fortenberry convinced investors to purchase Premier securities, and he promised to use those investment proceeds to purchase the securities of Halsey Management Company. The "in connection with" requirement is easily met here.

C. Fortenberry Engaged In A Scheme To Defraud Investors.

Fortenberry also orchestrated a fraudulent scheme in violation of Sections 17(a)(1) and (3) of the Securities Act and Section 10(b) of the Exchange Act and Rules 10b-5(a) and 10b-5(c) thereunder. Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder, make it unlawful, in connection with the purchase or sale of securities to, "employ any device, scheme, or artifice to defraud" or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," with scienter. Sections 17(a)(1) and (3) of the Securities Act prohibit the same conduct in the offer or sale of securities. Courts have interpreted these provisions to create what is known as "scheme liability." *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). Rules 10b-5(a) and (c) are "aimed at broader fraudulent schemes" and make it unlawful to, either directly or indirectly, engage in a course of business or employ a device in furtherance of a scheme to defraud in connection with the sale or exchange of securities. *Zanford*, 535 U.S. at 819.

"[P]rimary liability may arise out of the same set of facts under all three subsections [of Rule 10b-5] 'where the plaintiffs allege both that the defendants made misrepresentations in violation of Rule 10b-5(b), as well as that the defendants undertook a deceptive scheme or course of conduct that went well beyond the misrepresentations.'" *Brown*, 878 F. Supp.2d at 117 (noting a difference between a failure to disclose and a scheme to conceal that failure to disclose). And, in *SEC v. Zandford*, the Supreme Court held that the sale of a security with the intent to misappropriate the proceeds constitutes a deceptive act in furtherance of a fraudulent scheme. 535 U.S. at 819 ("[The SEC] has maintained that a broker who . . . sells customer securities with intent to misappropriate

the proceeds violates Section 10(b) and Rule 10b-5. . . . This interpretation of the ambiguous text of Section 10(b) . . . is entitled to deference if it is reasonable. . . . [W]e think it is."). For example, Ponzi schemes where investor funds are utilized for personal benefit or to pay other investors are a form of a scheme to defraud, even though they may also involve misstatements that are independently actionable under Rule 10b-5(b) or Section 17(a)(2). *See SEC v. Infinity Grp. Co.*, 212 F.3d 180, 193-94 (3d Cir. 2000).

At its core, Fortenberry's fraudulent scheme involved misappropriating investor funds for his own use, and the same evidence referenced above regarding his misstatements and omissions supports Respondent's scheme liability. In an effort to conceal the scheme, he destroyed or failed to maintain evidence of his so-called expenses and chose not to keep any books and records, which would immediately reveal his misappropriation. Fortenberry also circulated misleading offering materials, and he created and provided an investor with account statements showing fictitious profits on prior Premier investments, with the intent to induce the investor to continue to entrust Fortenberry with the investor's money. Thus, as a result of the misappropriation of investor money and his concealment of this abuse of fund assets, Fortenberry also engaged in a fraudulent scheme in violation of Sections 17(a)(1) and (3) and Section 10(b) and Rule 10b-5(a) and (c) thereunder.

II. FORTENBERRY VIOLATED THE ANTIFRAUD PROVISIONS OF THE INVESTMENT ADVISERS ACT.

A. As The General Partner Of Premier, Fortenberry Was An Investment Adviser.

Fortenberry acted as an investment adviser to Premier. An "investment adviser" is defined in Section 202(a)(11) of the Investment Advisers Act as any person who, for compensation, is in the business of advising others as to the value or advisability of investing in securities. "[G]eneral partners as persons who manage[] the funds of others for compensation are 'investment advisers' within the meaning of the statute." *See, e.g., Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1977)

(holding that general partners of investment partnerships are investment advisers). Advising a client includes exercising control over what purchases and sales are made with client funds. *See id.*

Here, Fortenberry served as the general partner of Premier and its sole investment adviser. In his Wells submission, Fortenberry specifically admitted that he held exclusive responsibility for advising Premier on its investments in securities.[30] Fortenberry's role of investment adviser is also confirmed in the limited partnership agreements, which details Fortenberry's role as general partner and authorized him to invest in the entertainment industry via "equity, debt, investment contracts, or any other investment form" that Fortenberry, in his "sole discretion," deemed to be in the best interests and for the benefit of Premier.[31]

Fortenberry also received compensation for acting as an investment adviser. Compensation is broadly defined as "the receipt of any economic benefit, whether in the form of an advisory fee or some other fee related to the total services rendered, commissions, or some combination of the foregoing." *United States v. Elliott*, 62 F.3d 1304, 1311 n.8 (11th Cir. 1995). Fortenberry was compensated for his investment advisory services in the limited partnership agreements, which provided that he would receive an equity stake in Premier and 50% of Premier's net profits. Fortenberry's misappropriation of fund assets through management fees and the payment of his personal expenses also constituted compensation sufficient to satisfy the definition of investment adviser. *See, e.g., In the Matter of Alexander V. Stein*, Investment Advisers Act Release No. 1497 (June 8, 1995) (a person received "compensation" when he fraudulently diverted funds for his personal use). Accordingly, Fortenberry is an investment adviser to Premier and subject to the Advisers Act.

---

[30] *See* ENF 135 ("In the case of Premier, Mr. Fortenberry as general partner had sole discretion in determining which investments Premier would make.").

[31] *See* ENF 56.

B. By Misappropriating Premier's Assets, Fortenberry Defrauded The Fund And Its Investors And Violated Sections 206(1) And 206(2) Of The Advisers Act.

By misappropriating Premier's assets, Fortenberry committed fraud and contravened the standards required of him by the Advisers Act. As the Supreme Court has recognized, Section 206 of the Advisers Act "establishes federal fiduciary standards to govern the conduct of investment advisers." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("Congress intended to impose enforceable fiduciary obligations"). Given the "delicate fiduciary nature of . . . [the] investment advisory relationship," Section 206 places "an affirmative duty" on investment advisers of "utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *see also SEC v. Moran*, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996) (investment advisers must "act for the benefit of their clients" and with "utmost good faith"); *In re Parmalat Sec. Litig.*, 684 F. Supp.2d 453, 478 (S.D.N.Y. 2010) (investment adviser owed a duty of "[p]erfect candor, full disclosure, good faith, in fact, the utmost good faith, and strict honesty"). Under Section 206, it is "not necessary . . . to establish all the elements of fraud that would be required in a suit against a party to an arm's length transaction," *Aaron*, 446 U.S. at 693, because the Advisers Act prohibits fraud "in the 'equitable' sense of the term . . . premised on [the] recognition that Congress intended . . . to establish federal fiduciary standards for investment advisers." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 n.11 (1977); *see also SEC v. Treadway*, 430 F. Supp. 2d 293, 338 (S.D.N.Y. 2006) ("Conduct subject to liability under the Advisers Act is broad.").

Sections 206(1) and 206(2) of the Advisers Act make it unlawful for an investment adviser to employ any device, scheme, or artifice to defraud clients or prospective clients or to engage in any transaction, practice, or course of business that defrauds clients or prospective clients. *SEC v. Trabulse*, 526 F. Supp. 2d 1008, 1013 (N.D. Cal. 2007). Specifically, Section 206(1) of the Advisers Act prohibits an investment adviser from using instruments of interstate commerce to employ any

device, scheme, or artifice to defraud any client or prospective client. Section 206(2) makes it unlawful for an adviser to use instruments of interstate commerce to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Scienter is required to establish a violation of Section 206(1), but Section 206(2) can be violated by negligence. *SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992). Scienter may be established by showing extreme recklessness. *See id* at 641-42.

Fortenberry violated Sections 206(1) and 206(2) by misappropriating Premier's capital. Indeed, Fortenberry turned Premier's bank account into his own piggybank, instead of using Premier's money for investments and what limited and reasonable business expenses Premier had. *See Trabulse*, 526 F. Supp.2d at 1016-1017 ("Nothing in the partnership agreement allowed [Respondent] to commingle his personal assets with those of the fund and to use the fund as 'his own piggy bank. Rather, the partnership agreement stated that [Respondent] could 'draw expenses consistent with prudent and sound management of trading activities.'") (emphasis and internal citations omitted); *SEC v. Parrish*, 2012 U.S. Dist. Lexis 137544, at **11-12 (D. Col. Sept. 25, 2012) (finding fund manager operating Ponzi scheme liable for violating Sections 206(1), 206(2), 206(4) and Rule 206(4)-8). Fortenberry depleted Premier's bank account by paying for numerous personal expenses, including travel for family members, credit card invoices, clothing, grocery store purchases, cable bills, home energy bills, insurance, PayPal costs, car repair and maintenance services, gasoline, convenience and liquor store purchases, and restaurant bills. *See Trabulse*, 526 F. Supp.2d at 1017 ("It is difficult to see, for example, how allowing one's daughter to honeymoon adheres to [the partnership agreement]."). He further looted the fund by repeatedly taking unauthorized "management fees," often shortly after Premier received an investment, and, on occasion, multiple times in a single week. All told, Fortenberry misappropriated at least $317,160

through so-called management fees and other direct payments, which amounted to approximately 63% of Premier's assets.

The Division anticipates that Fortenberry will argue that nothing in the partnership agreement forbade him from diverting Premier's assets for personal use, but such an argument is unavailing. "[I]t is not necessary for the [f]und's governing documents to expressly prohibit using [f]und assets for personal gain, because the Advisers Act obligates [the adviser] to act for the benefit of the [f]und rather than diverting [f]und assets for personal use." *SEC v. Mannion*, 789 F. Supp. 2d 1321, 1341 (N.D. Ga. 2012). Fortenberry's misappropriation of Premier's assets violated Sections 206(1) and 206(2) of the Advisers Act.

C. By Making Material Misrepresentations And Engaging In Fraudulent Conduct, Fortenberry Violated Section 206(4) Of The Advisers Act And Rules 206(4)-8(a)(1) And (a)(2) Thereunder.

Fortenberry also violated the Advisers Act by defrauding Premier's investors. Section 206(4) of the Advisers Act prohibits an investment adviser from, directly or indirectly, engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. Rule 206(4)-8 prohibits investment advisers to pooled investment vehicles (including hedge funds) from defrauding investors or prospective investors in those funds. 17 C.F.R. § 275.206(4)-8; *see also* Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Advisers Act Rel. No. 2628, 2007 WL 2239114, at *3 (Aug. 3, 2007). Specifically, Rule 206(4)-8(a)(1) prohibits an investment adviser to "pooled investment vehicles," such as hedge funds, from making an untrue statement of material fact or omitting to state a material fact necessary to make the statements made not misleading to investors or prospective investors in those pools. Rule 206(4)-8(a)(2) provides that it is a fraudulent practice for an investment adviser to a pooled investment vehicle to engage in "fraudulent, deceptive, or manipulative" conduct with respect to any investor or prospective

investor in the pooled vehicle. Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Advisers Act Rel. No. 2628, 2007 WL 2239114 (Aug. 3, 2007).

Under Rule 206(4)-8, a "pooled investment vehicle" is defined, *inter alia*, as "any company that would be an investment company under section 3(a) [of the Investment Company Act of 1940] . . . but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act." The exclusion under Section 3(c)(1) extends to an "issuer whose outstanding securities . . . are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities." Pooled investment vehicles include investment funds and hedge funds. *Id.* at 13. Premier is clearly a "pooled investment vehicle." Indeed, Fortenberry himself repeatedly described Premier as an "investment company."[32]

Section 206(4) and Rule 206(4)-8 thereunder can be violated by mere negligence. *See* Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Advisers Act Rel. No. 2628, 2007 WL 2239114, at *5 (Aug. 3, 2007) (adopting release for Rule 206(4)-8). The standard of materiality under the Advisers Act is the same as that applied in the context of Section 10(b) of the Exchange Act. *SEC v. Blavin*, 760 F.2d 706, 710-713 (6th Cir. 1985). Thus, misrepresentations or omissions are material under Section 206 if a reasonable investor or prospective investor would consider them important. *Basic*, 485 U.S. at 231-232.

"Facts showing a violation of Section 17(a) [of the Securities Act] or 10(b) [of the Exchange Act] by an investment adviser will also support a showing of a Section 206 violation." *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007). The violations of Rules 206(4)-8(a)(i) and 206(4)-8(a)(ii) are based primarily on the same material misstatements and conduct described above in connection with his violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Fortenberry defrauded Premier investors by making false

[32] *See, e.g.*, ENF 69.

and misleading statements relating to how investor proceeds would be invested, by issuing false investor statements showing inaccurate account values and profits, by falsely representing to investors the returns they should expect, and by representing that Premier would comply with GAAP. As a result, Fortenberry violated Section 206(4) of the Advisers Act and Rule 206(4)-8(a)(1) thereunder. Fortenberry also orchestrated a fraudulent scheme in violation of Advisers Act Rule 206(4)-8(a)(2) by misappropriating investor capital and concealing the scheme through the destruction of expense records, a failure to maintain any books and records, and the issuance of false account statements.

III. THE COURT SHOULD ISSUE A CEASE-AND-DESIST ORDER AND ORDER DISGORGEMENT, PENALTIES AND OTHER EQUITABLE RELIEF.

Given the foregoing, the Division seeks a cease-and-desist order for the violations alleged against Fortenberry, an order of disgorgement, civil money penalties, and other equitable relief.

A. Fortenberry Should Be Ordered To Cease And Desist.

Section 8A of the Securities Act, Section 21C of the Exchange Act, and Section 203(k) of the Advisers Act empower the Commission to order a person who has been found, after notice and hearing, to have violated or caused any violation of those Acts, to cease and desist from committing or causing such violations and any future violations.

The factors for considering whether a cease-and-desist order is warranted are very similar to the factors for when an injunction is appropriate set forth in *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), with added emphasis on the possibility of future violations. *KPMG Peat Marwick LLP,* Exchange Act Release No. 34-43862 (Jan. 19, 2001), *aff'd sub nom KPMG v. SEC,* 289 F.3d 109 (D.C. Cir. 2002). The *Steadman* factors are: (1) the egregiousness of a respondent's actions; (2) the isolated or recurrent nature of his securities law infractions; (3) the degree of scienter involved; (4) the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood the respondent's occupation will present

opportunities for future violations. *Steadman,* 603 F.2d at 1140. No one factor controls. *SEC v. Fehn,* 97 F.3d 1276, 1295-96 (9th Cir. 1996). The severity of the sanction appropriate in a particular case depends on the facts of the case and the value of the sanction in preventing recurrence. *Berko v. SEC,* 316 F.2d 137, 141 (2nd Cir. 1963); *In the Matter of Leo Glassman,* File No. 3-3758, 1975 WL 160534 at *2 (Dec. 16, 1975).

The following factors, among others, weigh in favor of the Court imposing a cease-and-desist order against Fortenberry: (1) his actions were highly egregious and his misrepresentations, omissions and deceptive conduct ensured that the Premier investors lost a significant amount of their money invested in Premier; (2) Respondent has previously been sanctioned by the Pennsylvania Securities Commission in 2004 and the Texas State Securities Board in 2004; (3) Respondent willfully made material misstatements and omissions and willfully took cash from Premier and used Premier assets to pay personal expenses; (4) Respondent has continued to engage in securities offerings subsequent to the Premier offerings; and (5) Respondent has refused to acknowledge any wrongdoing in this matter. A cease-and-desist order is appropriate here.

B. An Industry Bar Is Appropriate.

Section 203(f) of the Advisers Act authorizes the Commission to bar or suspend a person from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO") for willful violations of the Securities Act, Exchange Act, or Advisers Act. At the time Fortenberry made material misstatements and omissions, he was Premier's general partner, and such, acting as an investment adviser, and was performing advisory related services with respect to Premier. Section 9(b) of the Investment Company Act also authorizes the Commission to bar or suspend a person from serving in a variety of positions with a registered investment company as a sanction for willful

violations of the Securities Act, Exchange Act, or Advisers Act. As a result, the Division will request that the Court impose an appropriate bar.

C. Respondent Should Be Ordered to Disgorge His Ill-Gotten Gains.

As discussed above, the evidence introduced at the hearing will show Fortenberry violated the federal securities laws. The facts will also show that Fortenberry profited from his illegal conduct by using Premier capital for personal expenses and by taking money from Premier. Under the circumstances, it would be inequitable to allow him to keep that money.

Disgorgement is an equitable remedy designed both to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws. *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103-1104 (2d Cir. 1972) ("The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable."). The Court "has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *SEC v. First Jersey*, 101 F.3d 1450, 1475 (2d Cir. 1996).

The Division is entitled to disgorgement "upon producing a reasonable approximation of a defendant's ill-gotten gains." *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004). "The [Division's] burden for showing 'the amount of assets subject to disgorgement . . . is light: Exactitude is not a requirement.'" *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005). Indeed, when "a defendant's record-keeping or lack thereof has so obscured matters that calculating the exact amount of illicit gains cannot be accomplished without incurring inordinate expense, it is well within the district court's power to rule that the amount of disgorgement will be the more readily measurable proceeds received from the unlawful transactions." *Calvo*, 378 F.3d at 1218; *see also SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 563 (S.D.N.Y. 2009) ("Where this assessment cannot be made with precision, 'the risk of uncertainty ... should fall on the wrongdoer whose illegal

conduct created that uncertainty.'"). Once the Division presents evidence reasonably approximating the amount of a respondent's ill-gotten gains, the burden of proof on the amount the respondent received shifts to the respondent. *First City,* 890 F.2d at 1232; *SEC v. Hughes Capital Corp.,* 917 F. Supp. 1080, 1085 (D.N.J. 1996), *aff'd* 124 F.3d 449 (3d Cir. 1997). The respondent is then "obliged clearly to demonstrate that the disgorgement figure [is] not a reasonable approximation." *First City,* 890 F.2d at 1232. For disgorgement purposes, "it is irrelevant ... how the defendant chose to dispose of the ill-gotten gains; subsequent investment of these funds, payments to charities, and/or payment to co-conspirators are not deductible from the gross profits subject to disgorgement." *Universal Express,* 646 F. Supp.2d at 564.

The Division will present at the hearing evidence demonstrating that Respondent received ill-gotten gains in the form of management fees and use of Premier capital to pay personal expenses. An order of disgorgement in the amount of $349,400 is appropriate.[33]

In addition to disgorgement, pre-judgment interest is equitable in these circumstances. The Respondent has enjoyed access to his ill-gotten gains for an extended period of time. To require payment of prejudgment interest is consistent with the equitable purpose of the remedy of disgorgement. *Hughes Capital,* 917 F. Supp. at 1090. Pre-judgment interest should be calculated in accordance with the delinquent tax rate established by the Internal Revenue Service, 26 U.S.C. § 6621(a)(2), and assessed on a quarterly basis, from March 13, 2011, the beginning of the relevant period to the date the judgment is entered. The rate of interest "reflects what it would have cost to borrow money from the government and therefore reasonably approximates one of the benefits the defendant received." *First Jersey,* 101 F.3d at 1476.

[33] *See* Written Report of Kevin M. Pierce, ENF 149, at ¶ 18(b)(iii).

D. Respondent Should Be Ordered To Pay A Civil Penalty

Under Section 8A of the Securities Act, Section 21B of the Exchange Act, Section 203(i) of the Advisers Act and Section 9(d) of the Investment Company Act, the Commission may impose a civil monetary penalty if a respondent has willfully violated provisions of the Exchange Act, the Securities Act, the Advisers Act, or the rules and regulations thereunder. It must also find that such a penalty is in the public interest. Pursuant to Section 21B(c) of the Exchange Act, Section 203(i)(3) of the Advisers Act, and Section 9(d)(3) of the Investment Company Act, in considering whether a penalty is in the public interest, the Commission may consider the following six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) prior violations, including state securities laws violation; (5) need for deterrence; and (6) such other matters as justice may require. *See also* Section 8A(g) of the Securities Act.

Here, the Division expects to show that: (1) Fortenberry committed fraud in willful violation of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder by means of his misleading statements and omissions concerning Premier; (2) his conduct harmed Premier's investors; (3) Fortenberry was unjustly enriched by using Premier's capital for personal expenses and by withdrawing undisclosed management fees; (4) Fortenberry has previously been sanctioned by the Pennsylvania Securities Commission and the Texas State Securities Board; (5) there is a clear need for deterrence here because Fortenberry has continued to engage in securities offerings subsequent to the Premier offerings; (6) Fortenberry has refused to acknowledge any wrongdoing in this matter; and (7) penalties are appropriate to send a message that Fortenberry's conduct will not be tolerated. For all these reasons the Division will argue that a penalty is appropriate.

Where the violative act or omission at issue (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and (2) 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 of omission, the Commission may impose a "third-tier" penalty of $150,000 for a natural person for each act or omission occurring after March 3, 2009 and on or before March 5, 2013. 17 C.F.R. §201.1001-.1005. Because the violations here involved fraud and resulted in substantial losses to Premier's investors, third-tier penalties of $150,000 are appropriate for each of Respondent's violations.

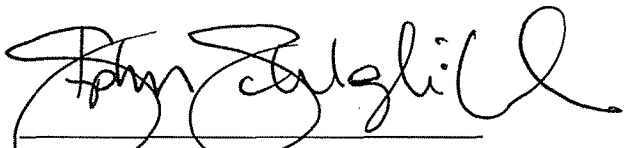
Courts have determined that a violation occurs each time a respondent has acted to violate the securities laws. *See SEC v. Lazare Indus., Inc.,* 294 Fed. Appx. 711, 715 (3d Cir. 2008) (for the purposes of assessing reasonableness of district court's assessment of $500,000 penalty, court considered each sale of unregistered stock as a separate violation); *SEC v. Coates,* 137 F. Supp. 2d 413, 430 (S.D.N.Y. 2001) (court calculated penalty by multiplying number of misrepresentations by penalty amount). Therefore, the Court may and should impose a penalty of $150,000 for *each* of the violations that occurred in this case.

CONCLUSION

In lying to investors and looting Premier, Fortenberry has violated the antifraud provisions of the Securities Act, the Exchange Act, and the Advisers Act. Consequently, the Division seeks a cease and desist order for the violations alleged against Fortenberry, an order of disgorgement, civil money penalties, prejudgment interest, and other equitable relief. As will be demonstrated at the October 20, 2014 hearing in this matter, Fortenberry is liable, and the Division is entitled to the relief it seeks.

Dated: October 14, 2014

Respectfully Submitted,



Stephan J. Schlegelmilch (202) 551-4935
Corey A. Schuster (202) 551-4745
Michael C. Baker (202) 551-4471
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Counsel for Division of Enforcement

EXHIBIT A

Timeline