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 POST-HEARING BRIEF

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INTRODUCTION

The "fundamental purpose" of the antifraud provisions of each of the statutes charged in this matter – the Securities Act of 1933 ("Securities Act"), the Securities Exchange Act of 1934 ("Exchange Act"), and the Investment Advisers Act of 1940 ("Advisers Act") – is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). As the Supreme Court rightly recognized over 50 years ago, it is "essential" to this country that "'the highest ethical standards prevail' in every facet of the securities industry." *Id.* (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 366 (1963)). And these long-standing antifraud statutes are designed to eliminate a "philosophy of caveat emptor" regardless of whether the transaction in question was "conducted in the organized markets or face to face." *Superintendent of Ins. of State of N.Y. v. Bankers Life and Cas. Co.*, 404 U.S. 6, 12 (1971).

At the hearing, the Division of Enforcement ("Division") conclusively demonstrated that Respondent Stanley Jonathan Fortenberry's ("Fortenberry") conduct in soliciting investors for his Premier Investment Fund, L.P. ("Premier") and in operating the fund was anything but "ethical" or consistent with a "philosophy of full disclosure." The Division demonstrated that Fortenberry withheld material information from investors. He repeatedly lied regarding Premier's risks, Premier's investments, and his compensation for running the fund. He simply ignored his promises as to how Premier would operate. And he rewarded his investors' trust by looting the fund, secretly spending on himself approximately half of the $300,000 in proceeds from his sales of Premier units and all of a $170,000 loan he took from an investor.

Fortenberry does not dispute much of the Division's evidence, nor could he. He concedes that he invested only about half of the money invested in Premier, spending the rest on his friends,

family and personal living expenses. [*See, e.g.*, Tr. 234:11-16, 287:19-288:12, 301:8-14; ENF-149.][1] He does not contest that he intentionally failed to advise investors about his prior securities laws violations. [Tr. at 42:15-43:3.] He acknowledges that he sent one investor monthly account statements that described "monthly Premier Investment Fund earnings," even though Premier had no earnings and, after March 31, 2011, a negative bank account balance. [*See, e.g.*, ENF-153; Tr. 399:2-400:25.] And he agrees that he kept almost no financial records for Premier, despite his express commitment that he would operate the fund in a businesslike manner and keep records in accordance with generally accepted accounting principles ("GAAP"). [Tr. 296:11-297:16, 302:21-303:10; ENF-56 at MN-000189.] Instead, Fortenberry's chief response to the evidence appears to be that the limited partnership agreements he prepared somehow cure his misstatements and omissions and authorized his self-dealing. In addition to being wholly unsupported by both the record and a plain reading of the documents, Fortenberry's argument is exactly the sort of unethical "philosophy of caveat emptor" the securities laws were designed to eradicate.

This is neither a complicated nor a close case. The Division has demonstrated by a preponderance of the evidence that Fortenberry violated the antifraud provisions of the Securities Act, the Exchange Act, and the Advisers Act. The Division has further demonstrated that Fortenberry's violations of these antifraud provisions were nothing short of egregious. Consequently, the Court should find him liable and impose (a) a cease-and-desist order for each violation alleged against Fortenberry, (b) an order of disgorgement and prejudgment interest, (c) monetary penalties for each of Fortenberry's violations, and (d) a permanent collateral bar.

[1] "Tr." refers to the transcript of the October 20-22, 2014 hearing in this matter. "ENF" refers to the exhibits offered by the Division during the hearing.

THE EVIDENCE

I. RESPONDENT FORTENBERRY

Respondent lives in San Angelo, Texas. [Tr. 200:7-10.] His legal name is Stanley Jonathan Fortenberry, but he also uses several aliases, including "S.J. Fortenberry," "John Fortenberry," and "Johnny Fortenberry." [Tr. 195:23-196:21, 198:19-199:5.] In the past, Fortenberry also claimed to have a PhD – and used the name "Dr. Fortenberry" – although he did not graduate from high school. [Tr. 219:10-19, 220:9-15.] The Division presented circumstantial evidence that Fortenberry also solicited investors under the penname "Paula Corona." [Tr. 265:20-266:9; ENF-64; Tr. 601:12-603:7; ENF-159.]

Fortenberry has been self-employed as a stock promoter or investment "lead generator" for at least the last 14 years [Tr. 497:19-499:11], and he has had several brushes with the Commission and at least two state securities regulators as a result of his activities in this regard. [Tr. 196:8-197:2, 215:15-217:25; ENF-116 at ¶ 20; ENF-9; ENF-10.] Notably, in 2004, both the Pennsylvania Securities Commission and the Texas State Securities Board ordered Fortenberry to cease and desist from selling unregistered securities. [Tr. 221:16-228:14; ENF-9; ENF-10.] Specifically, the Texas regulator found, and Fortenberry consented, that Fortenberry had committed securities fraud by "intentionally fail[ing]" to disclose material facts regarding his past criminal convictions[2] and bankruptcies and information regarding the investment's "assets, liabilities, profits, losses, cash flow, [] operating history," and "risks." [Tr. 225:23-226:16; ENF-10.] The Texas regulator also expressly found, and Fortenberry agreed, that Fortenberry had "engaged in fraud in connection with the offer for sale of securities." [Tr. 196:8-197:2; ENF-10 at 3.]

[2] Fortenberry has several prior criminal convictions for, in his words, passing "hot checks." [Tr. 196:20-198:7, 226:21-24.]

Tellingly, Fortenberry has tried to stymie the Division's investigation of his activities at every turn. For example, he refused to produce documents or sit for investigative testimony pursuant to subpoena, claiming that to do so would violate his Fifth Amendment right against self-incrimination. [Tr. 202:20-206:3; ENF-99 at ¶¶ 3-7, 17.] While Fortenberry ultimately sat for testimony, he did so only when a federal judge threatened to "have marshals come get [him]" if he did not. [Tr. 414:21-416:14.] Despite the order, Fortenberry refused to produce some documents and claimed to have lost others [ENF-3 at 52:1-56:12, 61:25-63:23], some of which he later provided to his accountant [*see, e.g.*, ENF-64] and marked as hearing exhibits [*see, e.g.*, RES-2; RES-4].

Since the conclusion of the Premier fraud, Fortenberry has continued to act as a securities promoter and to sell "investor leads." [Tr. 493:8-496:8.] Though he denied being a promoter at the hearing, in 2012, Fortenberry posted on the Internet a promotional video for First Choice Energy, an oil and gas company, wherein he dubiously guaranteed investors "no dry holes." [Tr. 506:25-508:6; ENF-110; ENF-150.] Following the apparent demise of First Choice, Fortenberry went to work for a related company called Wattenberg Energy Partners. Even though this company is being run out of his personal residence, Fortenberry denies having any role in the company's management, contending instead that Wattenberg is controlled by his hospitalized, 22-year-old son. [Tr. 500:7-501:20, 503:4-13; ENF-122.]

II. AN OVERVIEW OF THE PREMIER INVESTMENT FUND FRAUD

Fortenberry's Premier fund fraud began in early 2010 when Fortenberry contacted Jim Halsey, a prominent manager of country music talent. [Tr. 245:5-247:24.] Fortenberry told Jim Halsey that he "specialize[d] in private funding for worthwhile endeavors" and "handle[d] transactions ranging from one million up to twenty-five million." [ENF-19; Tr. 592:16-593:17.] The representation was false; Fortenberry had never handled a transaction of that magnitude. [Tr. 253:22-25, 593:13-17.] Jim Halsey put Fortenberry in contact with his son, Sherman Halsey, and Fortenberry offered to raise

money for the Halseys' new entertainment business called Halsey Management Company, LLC ("HMC"). [Tr. 254:14-255:21; ENF-5 at 25:4-28:7.]

HMC 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. [ENF-5 at 81:10-82:11; ENF-39 at § 15.] In June 2010, HMC and Premier entered into an agreement. [Tr. 258:20-259:10.] Pursuant to the agreement, Premier was able to invest in some, but not all of, the Halsey family's various business ventures. [ENF-39; Tr. 259:11-261:3.] The agreement provided, however, that Premier would have no involvement with the Halseys' most famous clients, the Oak Ridge Boys. [Tr. 259:11-261:3; ENF-5 at 29:9-12, 38:19-39:10; ENF-38; ENF-39 at § 11.]

Following this initial contact, in April 2010, Fortenberry formed Premier, installed himself as Premier's general partner, and prepared offering materials, limited partnership agreements, and other marketing papers. [Tr. 200:24-202:19, 277:20-278:4.] As the general partner of Premier, Fortenberry held responsibility for soliciting investments, communicating with investors, and making all investment decisions. [Tr. 202:11-13.] 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. [ENF-135 at SEC-SJF-0000135; *see also* ENF-56 at MN-000189.] Premier's investors were limited partners; they had no control over the fund's operation but shared in Premier's profits, if any. [Tr. 202:1-10.]

Fortenberry also created and disseminated with Premier's offering materials what he claimed was a business plan for HMC's social media website, StarMaker Central. [Tr. 276:10-277:10; ENF-56 at MN-000183-MN-000188.] Fortenberry used this business plan to inform prospective limited partners of one of the ways that they would make money on their investment in Premier. Fortenberry also created materials describing as Premier's "showcase investment" an animated film called "The

Littlest Christmas Tree" that was, supposedly, being made by Tony Bongiovi, a famous record producer and uncle of Jon Bon Jovi. [*See, e.g.*, Tr. 92:9-93:18, 267:13-268:9; ENF-64; ENF-82.]

Sherman Halsey, however, never authorized the StarMaker Central business plan's inclusion in the Premier offering documents. [ENF-5 at 114:15-133:21.] Fortenberry prepared these documents without Halsey's knowledge. [*Id.*] Upon learning of the materials, Halsey told Fortenberry not to use the materials because they were "not realistic" and "not correct." [ENF-5 at 116:4-13, 131:14-132:9.] Fortenberry's representations regarding Bongiovi were also false. Premier never invested in an animated Christmas film owned by Bongiovi or otherwise. [Tr. 238:21-239:1.]

Fortenberry ultimately secured two investors in Premier, Michael Nasti and Allen Anderson, who collectively purchased $300,000 of limited partnership "units." [Tr. 237:10-17.] Fortenberry also secured a loan of $170,000 from Anderson, which he contends was for Premier's benefit and transferred to Premier as a liability. [Tr. 345:14-347:6; ENF-137; ENF-135 at SEC-SJF-0000144.] Of the $470,000 invested in and loaned to Premier, only $151,500 was ultimately invested in HMC. [ENF-149 at Exhibit D; Tr. 286:10-19.] The balance was dissipated by Fortenberry, who spent the money on himself. [ENF-149 at Exhibit D.]

As a practical matter, Premier has been out of business since March 2011, when Anderson made his last investment and Fortenberry drew down Premier's bank account to a negative balance. [ENF-41 at BOA-0002959; Tr. 242:1-15.] Currently, Premier has no assets, other than its ownership interest in HMC, which is not a going concern. [Tr. 242:1-7; ENF-3 at 212:4-8] Premier's limited partners have never received a single dollar of return on Premier's investments. [Tr. 239:15-241:3.] Fortenberry is the only person to receive any benefit whatsoever from Premier. [*See generally*, ENF-149 at Exhibit D.]

III. FORTENBERRY'S MISREPRESENTATIONS AND OMISSIONS TO MICHAEL NASTI

Michael Nasti invested $200,000 in Premier in two payments of $100,000, one on September 13, 2010 and another on November 16, 2010. [Tr. 64:8-99:5, 81:24-83:7; ENF-55, ENF-41.] Nasti first spoke to Fortenberry in August or September 2010, when a Breadstreet.com[3] employee cold-called him and, after a short conversation, passed the telephone to Fortenberry.[4] [Tr. 48:4-50:18.] Fortenberry described to Nasti the Premier fund and the potential investment in HMC. [*Id.*] During this call, Fortenberry introduced himself to Nasti as "John Fortenberry," and "John" is the only name by which Nasti has known him. [Tr. 47:17-48:3.]

A. The StarMaker Central Business Plan

Between Fortenberry's initial call and September 13, 2010, Fortenberry and Nasti spoke several more times about Premier, HMC, and the animated Christmas film. [Tr. 49:24-55:18; ENF-54.] Fortenberry also provided Nasti with the StarMaker Central business plan he created, which contained the following representation:

> 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....

[Tr. 67:20-69:3; ENF-56 at MN-000183.] This promise was critical to Nasti's interest in the investment. [Tr. 58:5-59:6.] Nasti described the 12% guaranteed returns as "everything." [Tr. 59:1.] Fortenberry also knew the importance of the misrepresentation to Nasti; Fortenberry confirmed *in his own handwriting* that he understood that the business plan was "the basis for investment by Mike Nasti in Premier Investment Fund, L.P." [ENF-56 at MN-000183; Tr. 70:1-71:21.]

But the very representation which first drew Nasti's interest in investing in Premier – HMC's guaranteed of "twelve percent (12%) per annum" returns – was a fabrication. Fortenberry, not HMC,

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[3] Breadstreet.com found "investment leads" for companies needing capital. [ENF-3 at 177:15-182:21.]

[4] At the time of this call, Nasti was in his office in New York [Tr. 48:9-19]; Fortenberry was in Breadstreet.com's office in San Angelo, Texas [Tr. 262:5-22].

prepared the StarMaker Central business plan that Fortenberry gave to Nasti. [ENF-5 at 114:14-133:21; Tr. 236:20-22; ENF-56.] And Fortenberry knew HMC made no such guarantee. Nothing in Premier's agreement with HMC guaranteed any returns, and, in signing the agreement, Fortenberry expressly acknowledged that the investment in HMC was "speculative and involve[d] a high degree of risk of loss." [ENF-39 at § 7(h).] Halsey also specifically told Fortenberry that the representations in the business plan were "not realistic" and "not correct." [ENF-5 at 116:4-13, 131:14-132:9.][5]

B. The Limited Partnership Agreement

On September 13, 2010, Nasti met Fortenberry, Jim Halsey and Sherman Halsey at Jim Halsey's office in Tulsa, Oklahoma. [Tr. 56:20-57:14.] After discussing HMC and the StarMaker Central website with the Halseys, Fortenberry and Nasti were left alone to discuss Nasti's investment in Premier, which Nasti understood from Fortenberry to be the vehicle for his investment in HMC and StarMaker. [Tr. 57:15-62:2.] During this meeting, Fortenberry presented to Nasti a copy of Premier's limited partnership agreement for the first time. [Tr. 63:12-64:7; ENF-56 at MN-000189-MN-000206.] Nasti testified that he read the first several pages of the agreement but stopped when he came to the last several pages, which Fortenberry dismissed as "legal stuff" and "mumbo jumbo." [Tr. 63:22-64:7, 125:10-126:21.]

1. Fortenberry's Compensation

A portion of the limited partnership agreement Nasti reviewed described Fortenberry's compensation as general partner, and 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

[5] Fortenberry counters that Nasti knew Premier was risky, but Fortenberry ignores the unequivocal language of his promise and the fact that the business plan was, supposedly, a guarantee made *by HMC*.

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.

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

[ENF-56 at MN-000189.]

Nasti specifically asked Fortenberry about his compensation, and Fortenberry assured him that he would receive *only* Premier units and a concomitant percentage of the fund's profits, if any:

Q Okay. Did you and Mr. Fortenberry discuss at all how he was going to be compensated for what he was doing?

....

A That he -- that he -- How John Fortenberry was getting compensated was he was receiving -- he was not buying units into the actual Halsey Management. He was actually receiving a percentage of Halsey Management himself for putting together the investors. And his percentage of the profits that came out of Halsey Management, as they came out, whatever the amount in units that was in the contract, I am not exactly sure what his percentage was, that he -- he takes out his investment just as I would. If I had two units of -- of the Premiere and whatever his was, whatever the percentage was, he was going to have – get his money that way.

Q Did he say whether or not he was going to receive any other form of compensation?

A No, he did not.

Q Did you specifically ask him?

A I did.

Q And -- and tell me what he said.

A Well, I had asked him, I said, you know, John, how exactly are you involved in this and how are you getting compensated. And his response was that I am getting compensated by stocks in the company. I get the percentage, and which he showed me, you know, in the breakdown of everything one of the papers that there was -- this is how I get compensated. I am getting so many shares. So as it becomes profitable, I get, you know, I am getting a percentage of the pie, which it was a significant amount. So it was if and when it was profitable.

[Tr. 59:23-61:14.] Fortenberry did not tell Nasti that he had already spent a significant amount of investment proceeds on personal expenses. Based on Fortenberry's representations, Nasti did not expect Fortenberry to do the same with his investment:

> Q Of this hundred thousand dollars [you invested in September 2010], did Mr. Fortenberry tell you that he intended to use any of it personally?
>
> A No, he did not.
>
> Q Would that have been important information for you?
>
> A Of course.
>
> Q Why is that?
>
> A Because I am not investing in John Fortenberry. I am investing in Halsey Management. That's not – that's not for personal use.
>
> ....
>
> ... We didn't invest in John Fortenberry's, you know, way of life. We invested in Halsey Management.

[Tr. 66:17-25, 171:23-25.]

After lying to Nasti, Fortenberry looted the fund. Fortenberry wrote tens of thousands of dollars' worth of checks to himself for "management fees" and "cash," and used Nasti's investment to pay other personal expenses. [Tr. 424:8-437:24; ENF-42; ENF-149.] Fortenberry also never disclosed these expenditures after the fact, despite Nasti's request for an accounting. [Tr. 95:1-13, 101:8-14.]

2. Premier's Operation And Books And Records

The limited partnership agreement also represented that the fund did and would operate in a professional manner by, *inter alia*, observing corporate formalities and keeping accurate financial records:

> 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....

[ENF-56 at MN-00189-MN-000191.] Such representations were designed to give investors the impression that Fortenberry would operate Premier as a legitimate investment fund, with accounting, tax, and other organizational protections and formalities in place. [Tr. 235:1-7.]

The representations, however, were again false. Premier observed no corporate formalities. Fortenberry used Premier's money as his own, paid expenses incurred by his other businesses [*see, e.g.*, Tr. 426:10-436:17], and kept no meaningful books and records [Tr. 296:11-297:16]. Indeed, Fortenberry testified that he "lost" scores of records and stored the few records he preserved in the trunk of his car. [ENF-3 at 52:6-17, 61:25-63:23; Tr. 299:3-8.] Even the financial compilations Fortenberry commissioned in August 2013 – after receiving a Wells notice – were wholly unreliable and not GAAP-compliant. [*See, e.g.*, Tr. 450:21-474:7; ENF-78; ENF-129; ENF-130; ENF-149 at ¶¶ 23-34.]

C. Fortenberry's Prior Cease-And-Desist Orders

During the Tulsa meeting and otherwise, Fortenberry never told Nasti that he was subject to two cease-and-desist orders, one of which expressly found he had committed securities fraud:

> Q Did [Fortenberry] tell you at any time whether it was in Tulsa or on the phone or in any of your conversations or e-mails with him, did he ever tell you that he was subject to a cease and desist order from the Texas State Securities Board?
>
> A No, he did not.
>
> Q Or that he was subject to a cease and desist order from the Pennsylvania Securities Commission?
>
> A No, he did not.

Q Or that in connection with the Texas order, that he had actually been found liable for securities fraud? Did he tell you that?

A No, he did not.

Q Would any of those things have been important to you?

A Oh, of course.

Q Why?

A Well, I wouldn't want to invest in something that was, you know, you know, if he had a history like that, I would not feel comfortable putting my money in that avenue.

[Tr. 62:18-63:11.]

Contradicting his recent contention that he had no obligation to disclose the information, Fortenberry took steps to conceal the existence of the orders from investors, while at the same time seeking to create an argument that they should have known. Buried on the tenth page of the limited partnership agreement, after pages of "mumbo jumbo," Fortenberry slipped in the following:

> 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.[6]

[ENF-56 at MN-000198.] Notwithstanding this "acknowledgement," Nasti had no idea that Fortenberry had "engaged in fraud in connection with the offer for sale of securities" and was subject to two cease-and-desist orders.

D. Diversion Of Money To John Nimmer

At the Tulsa meeting, Nasti wrote a check for a $100,000 to invest in Premier. At Fortenberry's direction, Nasti made the check payable to Fortenberry's lawyer, John Nimmer, and wrote the words "(Halsey Mgmt LLC) Premier Investment Fund" on the memo line "to make sure

[6] Fortenberry admits that this oblique provision was designed to address his prior convictions and cease-and-desist orders. [ENF-3 at 373:12-25.]

that it was earmarked for Halsey Management LLC." [Tr. 64:25-65:11.] Nasti expected the entire amount would be invested in HMC. [Tr. 66:2-8.]

Despite Nasti's notation and expectations, Fortenberry allowed Nimmer to skim $5,000 from the investment. [Tr. 322:13-326:19.] Only $95,000 was deposited into the Premier bank account, and far less went to HMC.

E. The Second Unit

In November 2010, Fortenberry sold a second Premier unit to Nasti, and on November 16, 2010, Nasti wired $100,000 to Fortenberry. [Tr. 82:13-83:7.] Prior to Nasti's investment, Fortenberry did not tell Nasti how much Premier had actually invested in HMC, correct his prior misrepresentations, or tell Nasti how much of Premier's money he had spent on himself. [Tr. 83:8-84:5.] Fortenberry also did not tell Nasti that he had used Nasti's first investment to pay approximately $10,000 in "bonuses" to employees of another, unrelated business [Tr. 426:10-436:17; ENF-42 at BOA-0003016-BOA-0003021] and to pay himself $20,000 in what Fortenberry called "management fees." [Tr. 429:1-435:20; ENF-149.]

Immediately after receiving Nasti's second investment, Fortenberry emailed Nasti a second limited partnership agreement, which Nasti did not read but signed and returned. [ENF-70; Tr. 81:24-85:18.] The second agreement contained the same misrepresentations about Fortenberry's compensation and operation of the fund as the first. [*Compare* ENF-56 and ENF-70.]

F. Other Misrepresentations

After Nasti invested, Fortenberry provided him with periodic updates about Premier. For example, Fortenberry informed Nasti that, as an investor in Premier, Nasti would be entitled to a "percentage of the ticket sales" from any Oak Ridge Boys concert. [Tr. 86:4-88:6; *see also* ENF-72.] And, in January 2011, Fortenberry sent a report to Nasti which advised him that Premier was "partnering with . . . Bongiovi Entertainment, Inc./Little Tree Productions," regarding the animated

Christmas film. [Tr. 92:12-93:13, ENF-80, ENF-81, ENF-82.] Nasti understood the report to indicate that Premier had invested in the film and that the film's producers had themselves invested in Premier. [Tr. 92:12-93:13.]

Both of these representations, however, were false. Premier had no entitlement to any revenue from Oak Ridge Boys ticket sales because Fortenberry had expressly agreed that Premier would not share in any profits derived from the Oak Ridge Boys. [ENF-38; ENF-39.] And again, Premier never invested in any movies. [Tr. 238:21-239:1]

Following his receipt of the January 2011 report, Nasti requested financial reports from Premier, but Fortenberry never provided them. [Tr. 95:1-13, 101:8-14.]

In 2012, Fortenberry acknowledged an obligation to "plunk down a couple hundred thousand dollars and some interest to pay [Nasti] back."[7] [Tr. 96:1-101:4; ENF-113B; ENF-151.] As is his custom, however, Fortenberry never paid Nasti. [Tr. 101:15-19.]

IV. FORTENBERRY'S MISREPRESENTATIONS AND OMISSIONS TO ALLEN ANDERSON

Dr. Allen Anderson invested approximately $100,000 in Premier between August 2010 and March 2011. He invested $35,000 on August 3, 2010,[8] $10,000 on September 10, 2010, $7,800 on October 26, 2010, $10,000 on November 22, 2010, $10,000 on December 10, 2010, $10,000 on January 10, 2011, $10,100 on February 14, 2011, $5,000 on March 8, 2011, and $100 on March 13, 2011. [Tr. 695:19-701:23; ENF-46.] Anderson is a retired medical doctor and suffers from chronic

[7] Fortenberry's offer to repay Nasti was not borne of an altruistic desire to "make amends." Fortenberry's call to Nasti was made *the day after* a federal judge denied his motion to dismiss the Division's subpoena enforcement action and ordered Fortenberry to appear for a show cause hearing. [ENF 113-A; *SEC v. Fortenberry*, D.D.C. Case No. 1:11-mc-00671-RLW, Minute Order (9/20/2012).] The Court may take judicial notice of the show cause order. *See* Rule of Practice 323; Fed. R. Evid. 201; *Opoka v. INS*, 94 F.3d 392, 394 (7th Cir. 1996) ("the decision of another court or agency . . . is a proper subject of judicial notice."). Fortenberry's testimony that the correlation of the two events was "just uncanny" is not credible. [Tr. 208:9-21.]

[8] Fortenberry never transferred any of Anderson's first investment to Premier. [Tr. 362:8-364:25.]

Lyme disease, which causes "fatigue," "impairment in [his] thinking processes," and "confusion." He has suffered from Lyme disease since at least 2005. [Tr. 672:23-673:25.]

Fortenberry has known Anderson for several years, as they both live in San Angelo, Texas, and attend the same AA meeting. [Tr. 341:14-342:1.] Based on Fortenberry's claim of sobriety and participation in AA, Anderson assumed that Fortenberry was "rigorously honest," which is a central tenet of AA. [Tr. 677:10-20.]

A. Anderson's Loan To Fortenberry/Premier

In early 2010, Fortenberry borrowed $170,000 from Anderson and gave Anderson a lien on an office condominium Fortenberry owned. [Tr. 342:2-343:3; ENF-43.] According to Fortenberry, this loan was for the benefit of Premier, and "[a]fter the creation of Premier Investment Fund LP, [he] and Allen Anderson both agreed that the initial payment of $208,000 from Allen Anderson to Stanley Fortenberry was to be transferred to Premier Investment Fund LP." [ENF-137; Tr. 343:11-347:3.] Also according to Fortenberry, the "$208,000 from Allen Anderson to Stanley Fortenberry" included the $170,000 loan and an additional $38,000 "capital contribution from Allen Anderson," the latter of which appears to have no documentary support. [ENF-137.] Based on the financial compilations Fortenberry submitted during the Wells process, Fortenberry transferred to Premier the $170,000 note payable to Anderson so that the loan is now a liability of the fund. [ENF-135 at SEC-SJF-0000144.]

In 2012, Fortenberry duped Anderson into releasing the lien and acknowledging that Fortenberry had paid him in full, even though Fortenberry made only a few, "token" payments. [Tr. 687:6-690:2; ENF-114.]

B. The Limited Partnership Agreement

In August 2010, Fortenberry asked Anderson to invest in Premier. [Tr. 690:3-692:16.] Anderson invested and executed a limited partnership agreement either at the same time as or shortly after his initial investment. [Tr. 703:4-705:11; ENF-45.] The limited partnership agreement was

substantially identical to the version executed by Nasti, but Anderson's agreement permitted him to purchase partial units over a seven-month period. [ENF-45 at AA-8.] The agreement contained the same representations about Fortenberry's compensation, his use of the investment proceeds, his operation of the fund, and Premier's books and records. [*Compare* ENF-45 and ENF-56.] Like Nasti, Anderson understood that Fortenberry's only compensation for running Premier were units and a share of any profits:

> Q And how, if at all, did you expect Mr. Fortenberry to be compensated for his role?
>
> A My understanding was that he would share in the profits of the venture along with investors.
>
> Q So if Premier Investment Fund took in profits, Mr. Fortenberry would share in those profits. That was the basis of his compensation?
>
> A That was my understanding.
>
> ....
>
> Q ... Did Mr. Fortenberry ever disclose that you that he would use Premier's cash and your investment to pay for his personal expenses?
>
> A No.

[Tr. 695:7-14, 718:20-24.]

As with Nasti's investment, however, Fortenberry spent huge portions of Anderson's investments on himself. [ENF-149.]

C. Fortenberry's Prior Cease-And-Desist Orders

Fortenberry also concealed his prior securities laws violations from Anderson, who testified that such information would have been critically important to his investment decision:

> Q Did Mr. Fortenberry ever disclose to you that he was sanctioned by the Texas State Securities Board for violations of securities laws?
>
> A No. If I had known that, I'd have never invested with him.
>
> Q How about if he had been sanctioned by the Pennsylvania Securities Commission?

A No, I did not know that.

Q How would that have impacted your decision to invest in Premier?

A I would not have invested in Premier or loaned him the money for the building.

[Tr. 720:1-12, *see also* 767:12-768:2.] Anderson's agreement also contained the provision stating that Anderson had the opportunity to query "Stanley Jonathan Fortenberry" on the Internet, which again bolsters the conclusion that Fortenberry understood the information was important yet tried to hide it. [ENF-45 at AA-17.]

D. Monthly Account Statements

Unlike Nasti, Anderson purchased fractional units over time, and Fortenberry sent him monthly – or later, quarterly – account statements relating to Anderson's growing investment. Starting with a statement dated November 15, 2010, Fortenberry reported to Anderson his "monthly Premier Investment fund earnings," which Fortenberry asked Anderson to "reinvest" into an HMC "promotional campaign." [ENF-69.] Fortenberry repeated his representations regarding Anderson's purported "monthly Premier Investment Fund earnings" in each of the months that Anderson made investments (December 2010, January 2011, February 2011, and March 2011). Anderson understood these statements to mean that his investments were earning a profit:

Q [ENF-69] says: In this respect we would like to propose reinvesting monthly Premier Investment Fund earnings for October in the amount of $550. When you read this with respect to whether your investment was earning a profit, what did you understand Mr. Fortenberry to be telling you?

A I understood that the investment had earned that amount of money so far.

Q And if you turn to the second page of [ENF-69], can you identify that for the record?

A It's a subscription invoice.

Q And how, if at all, did a subscription invoice such as this impact your view of the types of books and records that Mr. Fortenberry was keeping?

A Well, it appeared that there was accurate records being taken and that the money invested was actually making money.

[Tr. 706:22-708:4; *see also* Tr. 709:14-716:7; ENF-73; ENF-79; ENF-84; ENF-89.] But the statements regarding Premier's monthly "earnings" were fraudulent. Fortenberry knew Premier had no returns whatsoever. [Tr. 239:12-24.]

Fortenberry's misstatements in this regard were clearly designed to induce Anderson into continuing to purchase partial Premier units each month. Indeed, Fortenberry sent no such statements – and offered no opportunity to "reinvest" earnings – to Nasti, who invested in two lump sums. [Tr. 799:1-14.] For Nasti, the lie was simply unnecessary.

In his August 2010 statement, Fortenberry also advised Anderson that Premier had invested in Bongiovi's animated Christmas film. Specifically, Fortenberry wrote that Premier had "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." [Tr. 705:12-706:7; ENF-53.] In November of that year, Fortenberry repeated the representation, informing Anderson that Premier would "enjoy being part of the Bongiovi Christmas film to be released in 2012." [ENF-69 at AA_SEC_000035.] Anderson took Fortenberry at his word:

Q Do you see that [in ENF-69]? Additionally, investors participating with Premier Investment Fund, L.P. will enjoy being part of the Bongiovi Christmas film to be released in 2010. Twelve. Excuse me. Did you have any understanding as to whether Premier had invested in Bongiovi and the Littlest Christmas Tree?

A My understanding was from this that they had invested in it.

[Tr. 709:5-13.] But again, the statements were false. [Tr. 238:21-239:1.]

E. Post-December 2010 Misrepresentations

Premier's last investment was a December 16, 2010 investment in HMC. [Tr. 785:18-21; ENF-149.] But, upon receiving Fortenberry's monthly "invoices," Anderson continued to buy partial

units every month, from August 2010 until March 2011. Fortenberry never advised Anderson that he spent on himself all of Anderson's investments for January, February and March 2010:

> Q ... Between December 16th, 2010, if you look at Exhibit 46 with the checks and March 13th, 2011, you wrote five checks to Dr. -- to Premier Investment Fund totaling $25,200. Were you aware that Mr. Fortenberry never invested a dime of Premier Investment Fund's money after December 16th, 2010?
>
> A No, I was not.
>
> Q Would that surprise you?
>
> A Yes, it would.

[Tr. 715:21-716:7.]

Even though Premier stopped investing in HMC in December 2010 and was completely out of money by March 2011, Fortenberry continued to send optimistic reports to Anderson regarding Premier's supposed "monthly Premier Investment fund earnings." [Tr. 716:8-718:19; ENF-153; ENF-154; ENF-155, ENF-156, ENF-112.]

V. FORTENBERRY'S SELF-DEALING AND LOOTING OF PREMIER

Four hundred and seventy thousand dollars was invested in or loaned to Premier. Of this amount, Fortenberry invested only $151,500 in HMC. [ENF-149 at ¶ 18(b)(ii).] The balance of the money was used on an *ad hoc* basis to pay for Fortenberry's lifestyle and living expenses. [*Id.* at Exhibit D.] Fortenberry also withdrew for himself massive amounts of Premier's cash, usually within hours of receiving an investment from Nasti or Anderson. [*Id.* at Exhibit E.] Because he kept no contemporaneous receipts [ENF-3 at 148:24-149:3, 259:10-260:8], Fortenberry simply cannot account for much of his dissipation of Premier's assets. And his long-after-the-fact effort to recreate financial records – designating expenditures as "Ps" or "Bs"[9] – is highly inaccurate and misleading. [Tr. 450:21-474:7; ENF-78.] Fortenberry's sole basis for the reasonableness of his spending is his *ipse dixit.*

[9] In August 2013, in connection with his Wells response, Fortenberry took Premier's bank statements for 2010 and 2011 and labeled each line-item as either a "B," for business expenditures,

Fortenberry argues that because the limited partnership agreement authorized him to incur "reasonable administrative expenses ... including but not limited to salaries – inclusive of the general partner," he was authorized to spend Premier's money however he wanted. [*See, e.g.*, Tr. 280:24-286:7.] The argument fails under its own weight, for it presupposes that Fortenberry's expenses were "reasonable." Simply put, Fortenberry used the fund as his personal piggybank. Such disregard for Premier's best interests is inherently unreasonable, and his intentional failure to maintain any records of such expenditures only further evidences this conclusion. And, even assuming that such remuneration was authorized, the amount here ($318,500, or 68% of the funds invested in or loaned to Premier) far exceeded any reasonable or foreseeable management fee, especially considering that his "management" resulted in the complete dissipation of all of Premier's assets. [ENF-149 at ¶ 40.]

Fortenberry also never disclosed that he intended to and did use investment money for his unfettered personal use and benefit. And Fortenberry's argument that he could use Premier's assets to pay his personal living expenses, willy-nilly, ignores his unequivocal statements to Nasti and Anderson that he would receive only Premier units. [*See, e.g.*, Tr. 59:23-61:14.]

VI. FORTENBERRY'S TESTIMONY IS NOT CREDIBLE

Fortenberry's hearing testimony on key points was often inconsistent with the testimony of other witnesses and the documentary record. Indeed, at times his testimony appeared to be an outright, self-serving lie that was unequivocally contradicted by other evidence. For example, as to his use of the $148,500 of investor proceeds not invested in HMC, Fortenberry testified as follows:

> Q And the rest of that money which is 148,500 you spent on yourself, correct?
>
> A No .... A vast majority of that money was spent on travel to visit with the various management parties from Sherman Halsey to -- at their request, Sherman Halsey, Jim Halsey, Bon Jovi, all the parties

---

or a "P," for personal (*i.e.*, non-Premier) expenditures. [Tr. 450:21-454:21; ENF-78.] Fortenberry's accountant then used the designations to prepare financial compilations for Premier. [Tr. 612:7-616:22.]

that were involved. So a vast majority of that money was spent out of town on legitimate business expenses, which would be recognized by the IRS as legitimate business expenses.

Q When you say -- I am not sure I understand what you mean by vast majority.

A I think probably close to 80 thousand dollars of it.

[Tr. 286:20-287:15.] Kevin Pierce's analysis, which Fortenberry did not contest, shows that the "vast majority" of Premier's assets went directly into Fortenberry's pocket. [ENF-149 at Exhibit D.] And the financial compilations that Fortenberry submitted to the Division during the Wells process showed only $7005.79 in "travel expenses" and over $110,000 in "distributions" directly to Fortenberry [ENF-135 at SEC-SJF-0000145, SEC-SJF-0000148.]

Fortenberry also denied having any control over Breadstreet.com, the entity through which he first contacted Nasti:

Q ...I believe your testimony was that you were a cheerleader for Breadstreet, correct, nothing more?

A I was -- I stood back while David Kent made the final decisions. I was active in the company in the fact that I did show up, I did basically put on some meetings, and like a cheerleader kind of pushed everybody along, that kind of thing. But by and large, David Kent made the final decisions on what was to happen ultimately and what was not happen. We would have some discussions from time to time, but at the final analysis, he was the president of the company, as he had been since the beginning. He was the signor on the bank account and he was a pretty solid businessperson, making the final decision under any situation.

[Tr. 337:10-338:1.] Yet, within minutes of so testifying, Fortenberry conceded that he had the authority to bind Breadstreet.com for $150,000. [Tr. 340:5-20; ENF-26.] He also testified that he used Premier's money to pay "bonuses" to Breadstreet.com's employees, including David Kent. [Tr. 426:10-436:17; ENF-42 at BOA-0003016-BOA-0003021.]

Fortenberry's justifications for his conduct were also frequently nonsensical, and his explanations of his statements often contorted the plain meaning of words past their breaking point.

For example, his efforts to explain away his misstatements regarding Premier's "showcase investment" in Bongiovi's movie and Bongiovi's addition to Premier's "portfolio" tortures the English language:

> Q And [ENF-64] indicates here, I will actually quote it, it says our show case investment is owned and managed by Tony [Bongiovi], along with his partners, Ralph Guggenheim and Robert Spiotta. Did I read that right?
>
> A Yeah. That was our show case.
>
> Q But you'd actually never invested in Mr. [Bongiovi]'s business, correct?
>
> A Well, that's why we referred to it as our show case. It is a show case. It is not something that's invested in yet, according to my terminology, but it is something yet to be invested in. A show case is an example. Now I perhaps could be wrong on that definition, but that's why that word is in there. And it was something we were very proud of as a show case investment.
>
> ....
>
> Q And in [ENF-53] you informed Dr. Anderson that -- I will -- I will read it: We have recently added to our portfolio Bongiovi Entertainment, Inc., a company that has a scheduled production of the Littlest Christmas Tree, a Christmas story by Tony Bongiovi. Did you not?
>
> ....
>
> Q But Premiere had not it actually added to its portfolio any investment with Bongiovi Entertainment, correct?
>
> A I think we had. I mean, maybe your definition of portfolio and mine are two different definitions, because portfolio covers a broad range of things, but it certainly was an investment that upon the Halseys having such an interest in managing and providing music for it that we had added to our portfolio company.

[Tr. 267:21-25, 372:19-373:13.]

And, Fortenberry's purported rationale for providing Anderson (but not Nasti) with fictitious earnings statements makes no sense given the documentary evidence in this case:

> Q You only sent them to Dr. Anderson?
>
> A Dr. Anderson is the only individual that signed the subscription agreement that included a commitment of 12 percent interest per annum, which by the way, I had a commitment from Sherman

Halsey and Jim Halsey for 12 percent interest being paid on any money I provided to them.

Q My question to you was: You only sent these monthly statements which indicated that Premiere had earnings to Dr. Anderson?

A Yes, I have answered that.

Q Did you not send them to Mr. Nasti, correct?

A That is correct.

Q And the reason why you sent them to Dr. Anderson and not Mr. Nasti is because you wanted Dr. Anderson to keep giving you money, correct?

A No, I did want Dr. Anderson to keep giving me money, but that was not why these earnings were discussed. Because the subscription agreement Dr. Anderson had signed clearly identified a 12 percent interest whereas as subscription agreement Michael Nasti signed did not.

[Tr. 388:7-389:3.] In actuality, Fortenberry promised Nasti 12% returns, not Anderson. [ENF-45; ENF-56.]

In sum, the Division submits that Fortenberry's testimony in this matter is not credible, and the Court should give no weight to his denials, explanations, and justifications.

LAW AND ARGUMENT

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

A. The Premier Units Are Securities

The Premier limited partnership interests Fortenberry sold to Anderson and Nasti were "securities" for purposes of Exchange Act Section 10(b) and Securities Act Section 17(a). 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)). Securities Act Section 2(a)(1) and Exchange Act Section 3(a)(10) provide that a "security" includes any "investment contract," which is 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 set up so that purchasers of limited partnership units could share in a "common enterprise" and the fruits of Fortenberry's supposed investing acumen. Indeed, the limited partnership agreement used by Fortenberry awarded Fortenberry, as general partner, "exclusive control over the partnership business." [ENF-56 at MN-000189; *see also* ENF-135 at SEC-SJF-0000135; Tr. 234:14-16.] 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 complaint based upon 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) (limited partnership interests "are routinely treated as investment contracts"); *Williamson v. Tucker*, 645 F.2d 404, 423 (5th Cir. 1981) (limited partnership interest "has long been held to be an investment contract"). Accordingly, Fortenberry's conduct is subject to the antifraud provisions of the Securities Act and the Exchange Act.

B. Fortenberry Violated Exchange Act Section 10(b) And Securities Act Section 17(a)

Exchange Act Section 10(b) and Rule 10b-5 thereunder and Securities Act Section 17(a) 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). To prove fraud under Exchange Act Section 10(b) and Rule 10b-5 thereunder, the Division 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

Even though Premier had only two investors, it cannot be reasonably disputed that Fortenberry utilized the instrumentalities of interstate commerce when conducting his fraud. Nasti is a resident of another state (New York), and Fortenberry frequently used e-mail [ENF-54],the telephone [Tr. 48:9-19], and the U.S. mails [ENF-69] in conducting his fraud, and he regularly wired money to, from and between various bank accounts [ENF-42]. *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 Grp., 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).

Fortenberry made numerous material misrepresentations and omissions. He falsely told Nasti that HMC guaranteed Premier investors a 12% return on investment. [Tr. 58:5-59:6; ENF-56.] Fortenberry also told both Anderson and Nasti that his only compensation would be in the form of an equity stake in Premier. [Tr. 59:23-61:14, 695:7-14.] *Janus*, 131 S.Ct. at 2302 ("One 'makes' a statement by stating it.... Even when a speechwriter 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 signed and provided Nasti and Anderson with written material stating falsely that Fortenberry operated Premier in a businesslike fashion and maintained accurate books and records. [*See, e.g.*, ENF-45; ENF-56; ENF-70.] *SEC v. Brown*, 878 F. Supp. 2d 109, 116 (D.D.C. 2012) ("the signer of a corporate filing is its 'maker.'"). The monthly account statements prepared by Fortenberry and provided to Anderson also stated, falsely, that Premier had invested in the production of an animated film and was generating earnings. [*See, e.g.*, ENF-53, ENF-69.] *Red River Res., Inc. v. Mariner Sys., Inc.*, 2012 WL 2507517, *6 (D. Ariz., Jun. 29, 2012) (author of e-mail is its "maker").

Fortenberry denies that he affirmatively lied to Nasti and Anderson about his compensation, but concedes that he did not expressly tell them he intended to and did use Premier's money for his own personal benefit. [*See, e.g.*, Tr. 290:3-7, 324:20-24, 328:23-329:7] Even under Fortenberry's version of events this half-truth renders him liable. *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. 3d 240, 254-254 (N.D.N.Y. 2014). And, "[i]n cases involving a fiduciary relationship, ... 'silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b).'" *In the Matter of Thomas C. Gonnella*, Initial Decision Release No. 706, p. 15 (Nov. 13, 2014) (quoting *Chiarella v. United States*, 445 U.S. 222, 230 (1980)). Clearly, Fortenberry is the "maker" of numerous misrepresentations and omissions.

No investor knew that Fortenberry was using their investment for his own personal living expenses and entertainment [Tr. 66:17-25, 718:20-24], but the truth was clearly material. *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."). As explained in *SEC v. Bravata*, any investor would want to know that only half of their money was actually invested as promised:

> There was no disclosure of the true manner in which the funds were used, and certainly no representation that less than half the money invested actually went to the acquisition of assets. There can be little doubt that if the complete story were told, any reasonable investor would have had a different picture of the company, which likely would have altered his or her investment decision. Therefore, the evidence has established misrepresentations that were material.

763 F. Supp. 2d 891, 916 (E.D. Mich. 2011).

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"). And, 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.").

Fortenberry's failure to disclose his extant cease-and-desist orders is also actionable 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. Grp., 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 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 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) (defendant's failure to disclose cease and desist orders entered by federal and state courts against similar predecessor interests was material). Fortenberry's omission of the prior securities fraud findings and cease-and-desist orders is material and is, even standing alone, enough to find him liable.

At the hearing, Fortenberry argued that he had no obligation to disclose his prior fraud and the resulting cease-and-desist orders because they occurred over five years before he founded Premier. [Tr. 228:15-229:3; 565:12-22.] Presumably, Fortenberry is referring to Item 401(f) of Regulation S-K, which required for certain forms filed with the Commission (*e.g.*, Forms 10-K and 10-Q) disclosure of injunctions and/or criminal convictions "that occurred during the past five years and that are material to an evaluation of the ability of any director ... or executive officer." 17 C.F.R. § 229.401(f) (2009). However, Item 401(f) was amended, effective December 23, 2009, "to require disclosure of injunctions and/or criminal proceedings or convictions that occurred during the ***past ten, as opposed to five, years.***" *SEC v. Brown*, 740 F. Supp. 2d 148, 159, n.4 (D.D.C. 2010) (emphasis added; citing 17 C.F.R. §229.401(f)(2010)). Thus, the underlying legal premise of Fortenberry's argument is mistaken.

Fortenberry's argument also misses the point. Even if he was not affirmatively required to disclose his prior crimes, frauds and orders, their concealment is nevertheless material, because the information clearly affects the "total mix of information" regarding the Premier investment. *Id.* at 159-160 ("[N]o authority suggests that Regulation S-K is preemptive of the materiality requirement.") (quoting *Degulis v. LXR Biotechnology, Inc.*, 928 F. Supp. 1301, 1314 (S.D.N.Y. 1996)); *cf. In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 689 (S.D.N.Y. 2004) ("[N]on-disclosure of an underwriter or issuer's conflicts of interest can constitute material omissions, even where no regulation expressly compels the disclosure of such conflicts.").

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 "highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *SEC v. Espuelas*, 579 F. Supp. 2d 461, 470 (S.D.N.Y. 2008) (citing *Novak v. Kasaks*, 2016 F.3d 300, 308 (2d Cir. 2000)).

Here, Fortenberry acted with scienter. Even though he had previously been censured for failing to provide information regarding an investment's "assets, liabilities, profits, losses, cash flow, [] operating history," and "risks" [ENF-10], Fortenberry lied to Premier's investors and failed to keep any meaningful business records relating to the money with which he had been entrusted. He told Nasti that HMC guaranteed returns, even though it was contradicted by Premier's contract with HMC and Sherman Halsey told him the promise was "not correct." [ENF-39 at § 7(h); ENF-5 at 116:4-13, 131:14-132:9.] He falsely informed Anderson that Premier was generating returns on its investments, even though he knew that Premier was flat broke. [*See, e.g.*, Tr. 398:20-401:10; ENF-153.] He told Anderson that Premier had invested in a movie production company, when he knew the statement was untrue and controlled all of Premier's investment decisions. [ENF-53; Tr. 238:21-239:1.] And he intentionally, and unapologetically, spent on himself hundreds of thousands of dollars entrusted to him, while telling investors that his compensation would be solely in the form of an equity stake in Premier. [ENF-78; ENF-149.] *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, Fortenberry's 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. *Levine*, 671 F. Supp. 2d at 31 (citing *Superintendent of Ins.*, 404 U.S. at 12-13). 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"). Here, Fortenberry convinced investors to purchase Premier securities, and he promised to use those investment proceeds to purchase the securities of HMC. The "in connection with" requirement is, therefore, easily met here.

C. Fortenberry Engaged In A Scheme To Defraud

Fortenberry also orchestrated a fraudulent scheme in violation of Securities Act Sections 17(a)(1) and (3) and Exchange Act Section 10(b) and Rules 10b-5(a) and 10b-5(c) thereunder. Exchange Act Section 10(b) 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. Securities Act Sections 17(a)(1) and (3) 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. *Zandford*, 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 difference between failure to disclose and scheme to conceal that failure to disclose). 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). In sum, "[w]hen, in the course of exercising his delegated authority to trade, a fiduciary acts 'for his own benefit," the fiduciary commits fraud." *In the Matter of Thomas C. Gonnella*, Initial Decision Release No. 706, p. 15 (quoting *Zandford*, 535 U.S. at 821).

At its core, Fortenberry's fraudulent scheme involved misappropriating investor funds for his own use, and the evidence referenced above regarding his misstatements and omissions also supports his scheme liability. Fortenberry's destruction of and failure to maintain financial records, which would immediately reveal his misappropriation, is also evidence of a fraudulent scheme, as is his dissemination to Anderson of account statements showing fictitious profits on prior Premier

investments. Thus, in addition to violating Section 17(a)(2) and Rule 10b-5(b) through misstatements and omissions, Fortenberry also engaged in a fraudulent scheme in violation of Securities Act Sections 17(a)(1) and (3) and Exchange Act Section 10(b) and Rule 10b-5(a) and (c) thereunder.

II. FORTENBERRY VIOLATED THE ANTIFRAUD PROVISIONS OF THE ADVISERS ACT

A. Fortenberry Was An Investment Adviser

Fortenberry acted as an investment adviser to Premier. An "investment adviser" is defined in Advisers Act Section 202(a)(11) 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) (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 had "sole discretion in determining which investments Premier would make." [ENF-135 at SEC-SJS-0000135.] Fortenberry's role of investment adviser is confirmed in the limited partnership agreements, which details Fortenberry's role as general partner and authorizes him to invest in the entertainment industry via "equity, debt, investment contracts, or any other investment form" that Fortenberry, in his "sole discretion," deems to be in the best interests and for the benefit of Premier. [ENF-45 at AA-8-AA-9; ENF-56 at MN-000189-MN-000190.]

Fortenberry also received compensation for acting as an investment adviser. Compensation is "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. [ENF-45 at AA-8; ENF-56 at MN-000189.] Fortenberry's misappropriation of fund assets through management fees and the payment of his personal expenses [ENF 78; ENF 149 at Exhibit D] also constitutes "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) ("compensation" includes funds fraudulently diverted for personal use). Accordingly, Fortenberry is an investment adviser and subject to the Advisers Act.

B. Fortenberry Violated Advisers Act Sections 206(1) And 206(2)

By misappropriating Premier's assets, Fortenberry committed fraud and contravened the high standards required of him by Advisers Act Section 206, which "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." *Capital Gains Research Bureau*, 375 U.S. at 194; *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 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.").

Advisers Act Sections 206(1) and 206(2) 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). 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 both Sections 206(1) and 206(2) by misappropriating Premier's capital and otherwise favoring himself over his client. Indeed, Fortenberry turned Premier's bank account into his own piggybank. *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. Sep. 25, 2012) (Ponzi fund manager 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, groceries, cable bills, utilities, Netflix, car repair and maintenance, gasoline, convenience and liquor store purchases, and restaurant bills. [Tr. 450:21-474:7; ENF 78; ENF-149 at Exhibit D.] *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.

[Tr. 424:8-437:24; ENF-42 at BOA-0003015-BOA-0003026; ENF-149 at Exhibit E.] All told, Fortenberry misappropriated and dissipated $318,500 of Premier's assets.

Fortenberry argued that nothing in the partnership agreement forbade his diversion of Premier's assets for personal use, but such an argument is unavailing:

> [I]t is not necessary for the Fund's governing documents to expressly prohibit using Fund assets for personal gain, because the Advisers Act obligates [the adviser] to act for the benefit of the Fund rather than diverting Fund 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. Fortenberry Violated Advisers Act Section 206(4) And Rules 206(4)-8(a)(1) And (a)(2) Thereunder

Fortenberry also violated Advisers Act Section 206(4), which 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)(l) 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. *See* Advisers Act Rel. No. 2628, 2007 WL 2239114.

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." Premier is clearly a "pooled investment vehicle." Indeed, Fortenberry himself repeatedly described Premier as an "investment company." [*See, e.g.*, ENF-69.]

Section 206(4) and Rule 206(4)-8 thereunder can be violated by mere negligence. *See* Advisers Act Rel. No. 2628, 2007 WL 2239114, at *5 (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 Exchange Act Section 10(b). *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 [Securities Act] Section 17(a) or [Exchange Act] 10(b) 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 Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder. Fortenberry defrauded Premier investors by, *inter alia*, making false and misleading statements relating to how contributions would be invested, omitting material information, issuing false investor statements showing inaccurate account values and profits, falsely guaranteeing returns, and 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, failing to maintain any books and records, and issuing false account statements

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

A. Fortenberry Should Be Ordered To Cease And Desist

Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) empower the Commission to order a person who has been found 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 similar to the factors for when an injunction is appropriate set forth in *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), albeit with added emphasis on the possibility of future violations. *KPMG Peat Marwick LLP,* File No. 3-9500 (Jan. 19, 2001), *aff'd sub nom KPMG v. SEC,* 289 F.3d 109 (D.C. Cir. 2002). The 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 (2d 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 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 the money invested in Premier; (2) Fortenberry has previously been sanctioned by at least two state securities regulators for similar misconduct (3) Fortenberry's conduct was willful, (4) Fortenberry abused his position of trust by misusing fund assets; (5) Fortenberry continues to engage in securities offerings

subsequent to the Premier offerings; and (6) Fortenberry has refused to acknowledge any wrongdoing whatsoever. A cease-and-desist order is appropriate here on each of the claims brought by the Division.

B. A Permanent Collateral Bar Is Appropriate

Advisers Act Section 203(f) 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 acting as an investment adviser and performing advisory-related services with respect to Premier. Investment Company Act Section 9(b) 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.

Given Fortenberry's willful violation of each of these Acts, the egregious nature of the violations, and Fortenberry's continuing work in the securities industry, the Court should permanently bar Fortenberry from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO and from serving or acting in any position listed in Investment Company Act Section 9(b).

C. Fortenberry Should Be Ordered To Disgorge His Ill-Gotten Gains

Disgorgement is an equitable remedy designed both to deprive a wrongdoer of his unjust enrichment and, just as importantly, 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 Ctrs., Inc.*, 458 F.2d 1082, 1103-1104 (2d Cir. 1972) ("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 need only show 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).

Fortenberry profited from his illegal conduct by using at least $318,500 of Premier's assets for his unfettered personal use, and it would be inequitable to allow him to keep that money. Here, $318,500 is a "reasonable approximation of [his] ill-gotten gains," because the amount includes (a) $148,500 of the $300,000 in investment proceeds that Fortenberry admits he failed to invest and (b) the $170,000 loan from Anderson, which obligation Fortenberry unilaterally transferred to Premier in an attempt to avoid liability. Fortenberry took for himself all of the cash from Anderson's loan and assigned the debt to Premier, and he has unjustly benefited in this amount.

The Division presented evidence reasonably approximating respondent's ill-gotten gains, and the burden of proof now shifts to Fortenberry. *See 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). Fortenberry is "obliged clearly to demonstrate that the disgorgement figure [is] not a reasonable approximation," *First City,* 890 F.2d at 1232, but he has no such evidence, primarily due to his own record-keeping practices and obfuscation. 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.'"). Fortenberry admitted failing to comply with GAAP and not keeping proper books and records. Even when trying to fabricate Premier's financials after-the-fact, he could not keep his story straight. Fortenberry labeled "management fees" as both business expense and personal expenses, charged family gas, travel, entertainment, and meals to the fund, and even claimed his child's school fees were Premier's business expenses. [*See, e.g.,* ENF-78 at SEC-ABC-0000096.] Fortenberry failed to provide any credible support for how he spent any of the $148,500 he decided not to invest, or the $170,000 that he obligated Premier to repay but spent entirely on himself.

Regardless, any "general business expenses, such as [the] overhead expenses" now claimed by Fortenberry "should not reduce the disgorgement amount." *Universal Express*, 646 F. Supp. 2d at 564. "[I]t 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." *Id.* None of the $318,500 disgorgement should be offset.

Pre-judgment interest is also equitable in these circumstances. Fortenberry has enjoyed his ill-gotten gains for over three-and-a-half years now. To order Fortenberry to pay prejudgment interest is consistent with the purpose of disgorgement. *Hughes Capital,* 917 F. Supp. at 1090. Prejudgment 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. *First Jersey,* 101 F.3d at 1476 (IRS rate "reflects what it would have cost to borrow money from the government and therefore reasonably approximates one of the benefits the defendant received").

D. Fortenberry Should Be Ordered To Pay A Monetary Penalty

Under Securities Act Section 8A, Exchange Act Section 21B, Advisers Act Section 203(i), and Investment Company Act Section 9(d), the Commission may impose a monetary penalty if a respondent has willfully violated provisions of these Acts or the rules thereunder, so long as such a penalty is in the public interest. Pursuant to Exchange Act Section 21B(c), Advisers Act Section 203(i)(3), and Investment Company Act Section 9(d)(3), in considering whether a penalty is in the public interest, the Commission may consider the following 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* Securities Act Section 8A(g).

Here, the Division has shown that: (1) Fortenberry committed fraud in willful violation of Securities Act Section 17(a), Exchange Act Section l0(b) and Rule 10b-5 thereunder, and Advisers Act Sections 206(1), 206(2), and 206(4) and Rule 206(4)-8 thereunder; (2) his conduct harmed Nasti and Anderson; (3) Fortenberry was unjustly enriched by his embezzlement of Premier's assets; (4) Fortenberry has previously been sanctioned by two state securities regulators for similar conduct; (5) there is a clear need for deterrence, as Fortenberry continues to engage in securities offerings subsequent to the Premier fraud; (6) Fortenberry has refused to acknowledge any wrongdoing in this matter; (7) Fortenberry refused to comply with the Division's investigative subpoenas; and (8) penalties are appropriate to send a message that conduct like Fortenberry's cannot be tolerated.

Moreover, because the misconduct (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 Court may impose a "third-tier" penalty of $150,000 for *each* act or omission occurring after March 3, 2009 and on or before March 5, 2013. *See* 17 C.F.R. §201.1001-.1005.

For purposes of monetary penalties, a distinct violation occurs *each time* a respondent violates the securities laws. *See SEC v. Lazare Indus., Inc.*, 294 Fed. Appx. 711, 715 (3d Cir. 2008) (each sale of unregistered stock was a separate violation); *SEC v. Coates*, 137 F. Supp. 2d 413, 430 (S.D.N.Y. 2001) (calculating penalty by multiplying number of misrepresentations by penalty amount); *SEC v. Tourre*, 4 F. Supp. 2d 579, 593-494 (S.D.N.Y. 2014) (calculating $650,000 penalty based on each misstatement). Consequently, the Court may and should impose a penalty of $150,000 for *each* violation that occurred in this case. And here, Fortenberry violated the securities laws at least *ten times*, including:

1. the false oral and written statements and material omissions made to Anderson prior to and contemporaneously with Anderson's initial investment, including the limited partnership agreement Fortenberry prepared and provided to Anderson [*see, e.g.*, ENF-45];

2. the false representations regarding Premier's purported investment in Bongiovi Entertainment, Inc. and material omissions included in Fortenberry's August 31, 2010 letter to Anderson, which preceded Anderson's September 9, 2010 investment [ENF-53];

3. the false oral and written statements and material omissions made to Nasti prior to and contemporaneously with Nasti's initial investment, including the business plan and limited partnership agreement Fortenberry prepared and provided to Nasti [*see, e.g.*, ENF-56];

4. the false representations regarding Anderson's purported "monthly Premier Investment Fund earnings," investment in "The Littlest Christmas Tree" movie, and material omissions included in Fortenberry's November 15, 2010 letter to Anderson, which preceded Anderson's November 22, 2010 investment [ENF-69];

5. the false oral and written statements and material omissions Fortenberry made to Nasti prior to and contemporaneously with Nasti's second investment, including the limited partnership agreement Fortenberry prepared and provided to Nasti [*see, e.g.*, ENF-70];

6. the false representations regarding Anderson's purported "monthly Premier Investment Fund earnings" and material omissions included in Fortenberry's December 10, 2010 letter to Anderson, which preceded Anderson's December 10, 2010 investment [ENF-73];

7. the false representations regarding Anderson's purported "monthly Premier Investment Fund earnings" and material omissions included in Fortenberry's January

6, 2011 letter to Anderson, which preceded Anderson's January 10, 2011 investment [ENF-79];

8. the false representations regarding Anderson's purported "monthly Premier Investment Fund earnings" and material omissions included in Fortenberry's February 3, 2011 letter to Anderson, which preceded Anderson's February 14, 2011 investment [ENF-84];

9. the false representations regarding Anderson's purported "monthly Premier Investment Fund earnings" and material omissions included in Fortenberry's March 7, 2011 letter to Anderson, which preceded Anderson's March 8, 2011 investment [ENF-89]; and

10. Fortenberry's misappropriation of Premier's assets [*see, e.g.*, ENF-78; ENF-149 at Exhibit D].

Consequently, given the number and severity of Fortenberry's violations, the Court should impose a monetary penalty of $1,500,000.

CONCLUSION

In misleading investors and looting Premier, Fortenberry has violated the antifraud provisions of the Securities Act, the Exchange Act, and the Advisers Act. The Court should find him so liable and impose a cease-and-desist order for each of the violations alleged against Fortenberry, a permanent collateral bar, an order of disgorgement of $318,500, prejudgment interest, and monetary penalties of $1,500,000.

Dated: November 24, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
Rule of Practice 450(d)

I hereby certify that the foregoing brief complies with the requirements of Commission Rule of Practice 450(c) because this brief contains 13,980 words, exclusive of pages containing the table of contents, table of authorities, certificates of service and compliance, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits, but inclusive of pleadings incorporated by reference.

Counsel for Division of Enforcement

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were served on the following, this 24th day of November, 2014, in the manner indicated below:

By hand:

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
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