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 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The Division of Enforcement (the "Division") respectfully submits its Proposed Findings of Fact and Conclusions of Law pursuant to Commission Rule of Practice 340 and the October 23, 2014 Post-Hearing Order issued in this matter.

PROPOSED FINDINGS OF FACT

I. RESPONDENT FORTENBERRY

1. Respondent Stanley Jonathan Fortenberry ("Fortenberry") is a resident of San Angelo, Texas. [Tr. 200:7-10.][1]

2. Fortenberry's 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.]

3. In the past, Fortenberry has 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.]

4. On at least one occasion, Fortenberry also solicited investors under the name "Paula Corona." [Tr. 265:20-266:9; ENF-64; Tr. 601:12-603:7; ENF-159.][2]

5. Fortenberry has been self-employed as a securities promoter or investment "lead generator" for at least the last 14 years [Tr. 497:19-499:11]. He has not held a job that has required an IRS Form W-2 since 1984. [Tr. 497:17-498:2.]

6. Fortenberry is a serial securities law violator, and he has had several brushes with the Commission and at least two state securities regulators as a result of his activities. [Tr. 196:8-197:2, 215:15-217:25; ENF-116 at ¶ 20; ENF-9; ENF-10.]

7. Fortenberry has several criminal convictions for, in his words, passing "hot checks" [Tr. 196:20-198:7, 226:21-24] and theft of services [Tr. 226:17-227:2].

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[1] "Tr." refers to the transcript of the October 20-22, 2014 hearing in this matter.

[2] "ENF" refers to the hearing exhibits introduced by the Division at the hearing.

8. 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.]

9. 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 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.]

10. The Texas State Securities Board 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.]

11. Fortenberry has a longstanding association with a company called Breadstreet.com, which, according to Fortenberry, found "investment leads" for businesses needing capital. [ENF-3 at 177:15-182:21.]

12. For reasons that are not entirely clear, Fortenberry denies controlling Breadstreet.com. [Tr. 249:2-250:11.] Based on the evidence presented at the hearing, however, including Fortenberry's testimony, the Court does not credit Fortenberry's denials in this regard.

13. In 2008, Fortenberry and Breadstreet.com were involved in another investigation by the Texas State Securities Board, which resulted in Fortenberry and Breadstreet.com being ordered to "stop accepting ads from Texas residents and [make] online ads invisible to Texas residents." [ENF-116 at ¶ 20.]

14. Fortenberry did not cooperate with the Division's investigation in this matter. He refused to produce documents or sit for investigative testimony pursuant to subpoena, claiming that the Division lacked "personal jurisdiction" over him and that providing testimony and documents in

response to the subpoena would necessarily violate his Fifth Amendment right against self-incrimination. [Tr. 202:20-206:3; ENF-99 at ¶¶ 3-7, 15, 17.]

15. The Division initiated and was required to litigate to a successful conclusion a subpoena enforcement action against Fortenberry in the United States District Court for the District of Columbia. *See SEC v. Fortenberry*, D.D.C. Case No. 1:11-mc-00671-RLW.

16. While Fortenberry ultimately sat for testimony in November 2012 [ENF-3], 18 months after his testimony was first noticed, he did so only when a federal judge rejected his excuses and defenses, ordered him to show cause as to why he would not comply with the Division's subpoena, and threatened to "have marshals come get [him]" if he did not produce documents and sit for testimony. [Tr. 414:21-416:14; *SEC v. Fortenberry*, D.D.C. Case No. 1:11-mc-00671-RLW, Transcript of Proceedings held on October 4, 2012 (05/19/2014).]

17. Despite the Court's 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].[3]

18. Notwithstanding the Division's investigation, which has been pending since at least 2011, Fortenberry continues to act as a securities promoter and sells "investor leads." [Tr. 493:8-496:8.]

19. 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.] The representations made by Fortenberry with respect to First Choice are of the same general character as the statements Fortenberry made about his Premier Investment Fund, L.P., the investment upon which the instant case is premised.

[3] "RES" refers to the hearing exhibits introduced by Fortenberry at the hearing.

20. Fortenberry now operates a related company called Wattenberg Energy Partners, which is being run out of his personal residence. [Tr. 500:7-501:20, 503:4-13; ENF-122.] Fortenberry contends that he does not control Wattenberg [Tr. 500:7-504:1], and that it is instead controlled by his hospitalized, 22-year-old son [*id.*], but the Court does not find his testimony in this regard to be credible.

II. PREMIER INVESTMENT FUND, L.P.

21. In early 2010, Fortenberry contacted Jim Halsey, a prominent manager of country music talent. [Tr. 245:5-247:24.] Fortenberry did not know Jim Halsey but had heard an interview of Halsey on the radio wherein Halsey discussed a book he had recently published. [*Id.*; ENF-5 at 22:19-23:21.]

22. 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.] This representation, however, was false; Fortenberry had never handled a transaction of that magnitude. [Tr. 253:22-25, 593:13-17.]

23. 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.]

24. 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.]

25. In June 2010, HMC and Premier entered into an agreement. [Tr. 258:20-259:10.] The agreement set forth the terms of Premier's investment in HMC and provided that 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 expressly provided 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.]

26. Following this initial contact with Jim and Sherman Halsey, in April 2010, Fortenberry formed a Tennessee Limited Partnership called Premier Investment Fund, L.P. ("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.]

27. 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.]

28. Premier's investors were to be limited partners; they would have and had no control over the fund's operation but would share in Premier's profits, if any. [Tr. 202:1-10.]

29. 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.

30. Fortenberry also created materials that described 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 rock star Jon Bon Jovi. [*See, e.g.*, Tr. 92:9-93:18, 267:13-268:9; ENF-64; ENF-82.]

31. Sherman Halsey, however, testified that he did not authorize 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 participation or knowledge. [*Id.*]

32. 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.]

33. 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.]

34. Fortenberry ultimately secured two investors in Premier, Michael Nasti and Allen Anderson, who collectively purchased $300,000 worth of limited partnership "units." [Tr. 237:10-17.]

35. Fortenberry also secured a loan of $170,000 from Anderson, which was for Premier's benefit and later transferred to Premier as a liability. [Tr. 345:14-347:6; ENF-137; ENF-135 at SEC-SJF-0000144.]

36. 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.] And HMC is the only business in which Premier invested. [Tr. 238:21-239:1.]

37. Premier has effectively been out of business since March 2011, when Premier received its last investment and Fortenberry drew down Premier's bank account to a negative balance. [ENF-41 at BOA-0002959; Tr. 242:1-15.]

38. 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 not received any return on Premier's investments. [Tr. 239:15-241:3.]

39. Fortenberry is the only person associated with Premier that received any benefit from Premier. [Tr. 101:15-19, 721:22-722:1; 781:4-15; ENF-149 at 6 and Exhibit D.]

III. MICHAEL NASTI'S INVESTMENT IN PREMIER

40. Michael Nasti purchased $200,000 of Premier limited partnership units 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.]

41. Nasti first spoke to Fortenberry in August or September 2010, when a Breadstreet.com employee cold-called him and, after a short conversation, passed the telephone to Fortenberry. [Tr. 48:4-50:18.]

42. During this first call with Nasti, Fortenberry described to Nasti the Premier fund and the potential investment in HMC. [Tr. 48:4-50:18.]

43. 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].

44. During this call, Fortenberry also introduced himself to Nasti as "John Fortenberry," and "John" is the only name by which Nasti has known Fortenberry. [Tr. 47:17-48:3.] Nasti did not know that Fortenberry's legal name – and the name under which he had been sanctioned by two state securities regulators – was Stanley Jonathan Fortenberry. [Tr. 47:22-48:3.]

A. The StarMaker Central Business Plan

45. 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.]

46. Fortenberry also mailed to Nasti the StarMaker Central business plan Fortenberry had 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.]

47. This promise of guaranteed returns was critical to Nasti's interest in the investment. [Tr. 58:5-59:6.] Nasti described the 12% guaranteed returns as "everything" to him. [Tr. 59:1.]

48. Fortenberry knew the importance to Nasti of the StarMaker Central business plan and guaranteed returns; 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.]

49. Again, however, Fortenberry, not HMC, prepared the StarMaker Central business plan that Fortenberry gave to Nasti. [ENF-5 at 114:14-133:21; Tr. 236:20-22; ENF-56.]

50. The Court finds that Fortenberry knew, was reckless in not knowing, or should have known that HMC did not guarantee any returns. Nothing in Premier's agreement with HMC guaranteed returns, and, in signing the agreement with HMC, Fortenberry expressly acknowledged that Premier's investment in HMC was "speculative and involve[d] a high degree of risk of loss." [ENF-39 at § 7(h).]

51. Halsey also testified that he 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.] The Court credits Halsey's testimony in this regard.

B. The Premier Limited Partnership Agreement

52. 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.]

53. 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 only way he could invest in HMC and StarMaker. [Tr. 57:15-62:2.]

54. During this meeting, Fortenberry presented to Nasti a copy of Premier's limited partnership agreement. [Tr. 63:12-64:7; ENF-56 at MN-000189-MN-000206.] Nasti maintains that the Tulsa meeting was the first time he saw the agreement, while Fortenberry testified that he sent it to Nasti beforehand. While it is not an essential fact, based on all the facts and circumstances, the Court does not credit Fortenberry's testimony on this point.

55. Nasti testified that he read only 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

56. 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. [ENF-56 at MN-000189.]

57. Nasti specifically asked Fortenberry about his compensation, and Fortenberry confirmed what was in the agreement – 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.] Based on Nasti's demeanor and other evidence in the record, including Anderson's very similar testimony on this issue, the Court credit's Nasti's testimony in this regard.

58. Based on Fortenberry's representations, Nasti did not expect Fortenberry to spend his investment on Fortenberry's personal living expenses. As Nasti testified, "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.]

59. Despite his statements to Nasti, as will be discussed further below, 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.]

60. Fortenberry also did not disclose his payments to himself and other personal expenditures after the fact. [Tr. 95:1-13, 101:8-14.]

2. Premier's Operation And Books And Records

61. The Premier 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, including "capital account[s] that include[d] invested capital plus that partner's allocations of net income, minus that partner's allocation of net loss and share of distributions." [ENF-56 at MN-000189.]

62. The agreement stated that Premier would use "generally accepted accounting principles" ("GAAP"), and that Fortenberry would advise the 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.]

63. 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.]

64. Premier, however, 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].

65. Fortenberry also 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.]

66. None of the financial records Fortenberry maintained for Premier were compliant with GAAP, and even the financial compilations Fortenberry commissioned in August 2013 – after receiving a Wells notice – were not reliable 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

67. During the Tulsa meeting and otherwise, Fortenberry did not tell Nasti that he was subject to two cease-and-desist orders, one of which expressly found he had committed securities fraud. [Tr. 42:15-43:3, 62:18-63:11.]

68. Fortenberry included in the limited partnership agreement a provision he contends addressed his prior cease-and-desist orders. [ENF-3 at 373:12-25.] On the tenth page of the agreement was an "acknowledgement" that the investor had "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." [ENF-56 at MN-000198.]

69. The provision suggests that Fortenberry understood the information's importance to investors and took steps to conceal it, while at the same time seeking to create an argument that investors should have known of his prior securities laws violations.

70. Nasti did not read the "acknowledgement" and did not know that Fortenberry had "engaged in fraud in connection with the offer for sale of securities" and was subject to two cease-and-desist orders. [Tr. 62:18-63:11.] Again, Nasti did not even know that Fortenberry's real first name was "Stanley," rather than "John." [Tr. 47:22-48:3.]

D. Diversion Of Money To John Nimmer

71. 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, but wrote the words "(Halsey Mgmt LLC) Premier Investment Fund" on the memo line "to make sure that it was earmarked for Halsey Management LLC." [Tr. 64:25-65:11.]

72. Nasti expected the entire amount would be invested in HMC. [Tr. 66:2-8.]

73. Notwithstanding Nasti's notation and expectation, Fortenberry allowed Nimmer to take $5,000 from the investment. [Tr. 322:13-326:19.] Only $95,000 was deposited into the Premier bank account.

74. At the hearing, Fortenberry testified that Nasti knew Fortenberry could use a portion of his investment to pay Premier's expenses, which might include attorneys' fees, but Fortenberry concedes that he did not tell Nasti that Nimmer would keep a portion of his investment before it even made it to Premier's bank account. [Tr. 322:13-323:5.]

E. The Second Unit

75. 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.]

76. Prior to Nasti's second investment, Fortenberry did not tell Nasti how much Premier had actually invested in HMC, correct any of his prior representations, or tell Nasti how he had otherwise spent Premier's money. [Tr. 83:8-84:5.]

77. For instance, Fortenberry 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] or that he had paid himself $20,000 in what Fortenberry called "management fees." [Tr. 429:1-435:20; ENF-149.]

78. Immediately after receiving Nasti's second investment, Fortenberry emailed Nasti a second limited partnership agreement, which Nasti did not read but he signed the subscription form and returned it. [ENF-70; Tr. 81:24-85:18.]

79. The second agreement contained the same false representations about Fortenberry's compensation and operation of the fund as the agreement Nasti received in Tulsa two months earlier. [*Compare* ENF-56 and ENF-70.]

F. Other Misrepresentations

80. After Nasti invested, Fortenberry provided him with periodic updates about Premier. For example, in December 2010, Fortenberry informed Nasti that, as an investor in Premier, Nasti would be entitled to "profits derived" from a video featuring the Oak Ridge Boys. [ENF-72.] Nasti also understood from Fortenberry that, as a Premier investor, he was entitled to a "percentage of the ticket sales" from any Oak Ridge Boys concert. [Tr. 86:4-88:6.]

81. In January 2011, Fortenberry also sent a report to Nasti advising 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.]

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.]

83. The representations were, however, 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; Tr. 256:18-257:22, 260:7-261:3.] And Nasti did not receive any money from the sale of Oak Ridge Boys DVDs. [Tr. 88:4-6, 240:24-241:6.]

84. Premier also did not invest in any movies, Christmas-themed or otherwise; it only invested in HMC. [Tr. 238:21-239:1.]

85. Following his receipt of the January 2011 report, Nasti requested financial reports from Premier, but Fortenberry did not provide them. [Tr. 95:1-13, 101:8-14.] Fortenberry admits that he has never provided financial reports to Premier's investors, but he appears to blame that failing on an uncertainty occasioned by the Division's investigation. [Tr. 303:3-304:25.]

86. In 2012, Fortenberry acknowledge an obligation to repay Nasti the amount of his investment. Specifically, on September 21, 2012, Fortenberry telephoned Nasti and left a voicemail. In the voicemail, Fortenberry acknowledged an obligation to "plunk down a couple hundred thousand dollars and some interest to pay [Nasti] back." [Tr. 96:1-101:4; ENF-113A; ENF-113B; ENF-151.]

87. Despite his acknowledgement, Fortenberry has not paid Nasti. [Tr. 101:15-19.]

88. Fortenberry contends that his offer to repay Nasti was an altruistic desire to "make amends," which he undertook voluntarily as a part of his participation in Alcoholics Anonymous. [Tr. 207:23-209:15.]

89. The Court does not credit Fortenberry's explanation for the September call. His 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).] It is far more likely that Fortenberry's offer was borne of an expectation that a day of reckoning for his conduct relating to Premier was fast approaching.

IV. ALLEN ANDERSON'S INVESTMENT IN PREMIER

90. Dr. Allen Anderson purchased approximately $100,000 in Premier limited partnership units between August 2010 and March 2011.

91. Anderson invested $35,000 on August 3, 2010, $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.]

92. Even though Anderson wrote "investment" on the memo line of his August 3, 2010 check, Fortenberry deposited Anderson's first $35,000 investment in Premier into his personal bank account and did not transfer any of the investment proceeds to Premier's account. [ENF-46; Tr. 362:8-364:25.]

93. Anderson is a retired medical doctor and suffers from chronic 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.]

94. 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.]

95. 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.] Fortenberry acknowledged at the hearing that he knew Anderson trusted him. [Tr. 364:15-17.]

96. The Court finds that Fortenberry was well aware of Anderson's cognitive difficulties and trusting nature and took advantage of both, to Anderson's detriment.

A. Anderson's Loan To Fortenberry/Premier

97. 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.]

98. 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.] According to Fortenberry, the $208,000 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.]

99. Fortenberry transferred to Premier the $170,000 note payable to Anderson so that the loan now appears to be a liability of the fund. [ENF-135 at SEC-SJF-0000144.]

100. In 2012, Anderson released the lien so that Fortenberry could sell the condo. In the release Fortenberry drafted, Anderson unwittingly acknowledged that Fortenberry had paid him in full, even though Fortenberry made only a few, "token" payments. [Tr. 687:6-690:2; ENF-114.]

101. Anderson testified, credibly, that he did not realize what he was signing but trusted Fortenberry. [*Id.*]

102. Notwithstanding Fortenberry's sale of the office condo, Fortenberry did not pay Anderson or transfer any of the proceeds to Premier. [Tr. 351:19-352:7, 689:20-690:2.]

B. The Premier Limited Partnership Agreement

103. In August 2010, Fortenberry asked Anderson to invest in Premier. [Tr. 690:3-692:16.]

104. Anderson invested, and he received a limited partnership agreement and executed a subscription form either at the same time as or shortly after his initial investment. [Tr. 703:4-705:11; ENF-45.]

105. Because he trusted Fortenberry, Anderson did not read the agreement. [Tr. 677:23-25, 705:3-7, 770:2-6.]

106. The limited partnership agreement was substantially identical to the version that would be executed by Nasti the following month, but Anderson's agreement permitted him to purchase partial units over a seven-month period. [ENF-45 at AA-8.]

107. Specifically, 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.]

108. Like Nasti, Anderson understood that Fortenberry's only compensation for running Premier were units and a share of any profits. [Tr. 695:7-14, 718:20-24.] He did not know or expect that Fortenberry intended to and would use his investment money to arbitrarily pay himself "management fees" and otherwise use the moneys for his personal living expenses. [Tr. 697:16-698:4, 701:16-23.]

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

109. Fortenberry did not tell Anderson about his prior securities laws violations or cease-and-desist orders. [Tr. 720:1-12, *see also* 767:12-768:2.] Fortenberry concedes this point. [Tr. 42:15-25.]

110. Fortenberry contends, however, that he confessed to Anderson his numerous, prior criminal convictions during an AA meeting, presumably to bolster an argument that undisclosed, civil

securities violations were immaterial. [Tr. 359:20-361:5.] However, Anderson testified credibly that he also did not know that Fortenberry had several criminal convictions. [Tr. 767:12-768:2.]

111. Anderson's Premier limited partnership agreement also contained an acknowledgment that Anderson had the opportunity to query "Stanley Jonathan Fortenberry" on the Internet. [ENF-45 at AA-17.]

D. Monthly Account Statements

112. Pursuant to his agreement with Premier and Fortenberry, Anderson purchased fractional Premier units over time, and Fortenberry sent Anderson monthly – or later, quarterly – account statements relating to Anderson's growing investment in Premier. [Tr. 371:22-25; *see, e.g.*, ENF-53; ENF-56; ENF-112.]

113. 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; Tr. 378:9-381:4.] Anderson did so, purchasing another partial unit and reinvesting his purported earnings on November 22, 2010. [Tr. 710:17-711:18; ENF-46.]

114. 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). [Tr. 386:23-387:21, 390:19-391:6, 392:11-392:17, 395:23-396:3; ENF-73; ENF-79; ENF-84; ENF-89.]

115. Anderson understood these statements to mean that his investments were earning a profit. [Tr. 706:22-708:4; *see also* Tr. 709:14-716:7; ENF-73; ENF-79; ENF-84; ENF-89.]

116. The statements regarding Premier's monthly "earnings," however, were false. Premier had no returns whatsoever. [Tr. 239:12-24.]

117. Fortenberry testified that the statements regarding "earnings" referred to a contractual obligation Fortenberry had to pay Anderson 12% per annum interest [Tr. 388:4-13], but the referenced subscription agreement contains no such promise [ENF-45; RES-2], and the Court finds his testimony in this regard not credible.

118. Indeed, the record establishes that Fortenberry told Nasti that Nasti should expect "12% per annum" returns [Tr. 69:10-25; ENF-56], but Fortenberry sent no such "earnings" statements to Nasti. [Tr. 388:4-6.] Fortenberry also did not offer Nasti any opportunity to "reinvest" his earnings. The only difference appears to be that Nasti invested in two lump sums, while Anderson invested over a seven-month period. [Tr. 799:1-14.] For Nasti, a misrepresentation about earnings was not required to induce him to invest; for Anderson, Fortenberry believed that such a misrepresentation was necessary.

119. In an 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.]

120. 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.]

121. Anderson took Fortenberry at his word. [Tr. 709:5-13.]

122. Fortenberry testified that he did not intend for his statement about Bongiovi's movie being "added to our portfolio" to convey that Premier had *actually* invested in the movie [Tr. 372:19-373:13], but, based on the evidence and the plain meaning of the words Fortenberry employed, the Court finds that Fortenberry's testimony in this regard is not credible.

123. Again, Premier had not invested in Bongiovi's animated Christmas film. [Tr. 238:21-239:1.]

E. Post-December 2010 Misrepresentations

124. Premier's last investment was a December 16, 2010 investment in HMC. [Tr. 785:18-21; ENF-149.]

125. Upon receiving Fortenberry's monthly "invoices," however, Anderson continued to buy partial units every month, from August 2010 until March 2011. [Tr. 715:5-716:7; ENF-46; ENF-53; ENF-69; ENF-73; ENF-79; ENF-84; ENF-89.]

126. Fortenberry did not advise Anderson that he spent on himself all of Anderson's investments for January, February and March 2010, which totaled $25,500. [Tr. 715:21-716:7; ENF-46.]

127. Premier's bank accounts were overdrawn by nearly $700 by March 2011 [ENF-41], but Fortenberry continued to send optimistic monthly or quarterly reports to Anderson regarding Premier's supposed "monthly Premier Investment fund earnings" until April 2012. [Tr. 716:8-718:19; ENF-153; ENF-154; ENF-155, ENF-156, ENF-112.] Indeed, but for Anderson's continued purchases of partial units, Premier would have overdrawn the Premier account in January 2011. [ENF-41.]

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

128. 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).] Premier did not invest in any enterprise other than HMC. [Tr. 238:21-239:1.]

129. Fortenberry misappropriated the balance of the money on an *ad hoc* basis to pay his own personal living expenses. [*Id.* at Exhibit D.]

130. Fortenberry also used Premier's assets to pay expenses and employee "bonuses" for another of his businesses. [Tr. 426:10-428:25, 436:5-17; ENF-42 at BOA-0003016, BOA-0003020-21, BOA-0003027, BOA-0003033.] For example, at the hearing Fortenberry claimed that a $2,500 payment to David Kent, a Breadstreet contractor, actually was a "finder fee" labeled as a bonus, even though Kent never found any investors. [Tr. 426:10-428:25.] But during investigative testimony, Fortenberry asserted that Kent was "never was engaged in the duty or function of ... going to get money for Premier" and the $2,500 payment was more akin to Fortenberry helping out Kent, who needed money. [ENF-3 at 183:20-184:22.]

131. Fortenberry does not appear to contest that he withdrew for himself large amounts of Premier's cash and paid himself tens of thousands of dollars in what he labeled "management fees," usually within hours of receiving an investment from Nasti or Anderson. [*Id.* at Exhibit E.]

132. Fortenberry testified that investors should have known that he planned to spend investment proceeds on his personal expenses, because the Premier limited partnership agreements permitted him to pay reasonable administrative expenses, including "salaries." [Tr. 282:19-25, 328:3-329:7, 449:20-450:20.] The Court finds that Fortenberry's reading of the limited partnership agreement is not reasonable and does not cure Fortenberry's self-dealing. It also does not even address Fortenberry's use of Premier moneys to pay "bonuses" to employees of his separate, non-Premier businesses.

133. Fortenberry kept no contemporaneous receipts [ENF-3 at 148:24-149:3, 259:10-260:8], and, as a result, the Court finds that Fortenberry simply cannot account for much of his dissipation of Premier's assets.

134. Likewise, the Court finds that Fortenberry's *post hoc* efforts to detail his use of Premier's assets fair little better. 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, or a "P," for personal (i.e., non-Premier) expenditures. [Tr. 450:21-454:21; ENF-78.]

135. Fortenberry's accountant then used the designations to prepare financial compilations for Premier. [Tr. 612:7-616:22.] The Court finds that these financial records are self-serving, highly inaccurate and misleading. [Tr. 450:21-474:7; ENF-78.]

136. Even based on Fortenberry's financial compilations, Fortenberry took $110,232.91 in "distributions" in the seven months that Premier was in operation. [ENF-135 at SEC-SJF-0000148.] Fortenberry appeared to concede during testimony that this amount was incorrect, but he could not say whether it was too high or too low. [*See, e.g.*, Tr. 459:15-460:12; 461:9-465:19; 470:21-472:19.] For example, 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.]

137. Given the foregoing, Fortenberry introduced no credible evidence of the reasonableness of his expenditures. The sole basis for the reasonableness of his spending is his *ipse dixit*. [*See, e.g.*, Tr. at 451:6-452:6.]

138. Fortenberry also did not disclose that he intended to and did use investment money for his unfettered personal use and benefit. Rather, he unequivocally informed Nasti and Anderson that he would receive only Premier units as compensation. [*See, e.g.*, Tr. 59:23-61:14.]

139. Consequently, the Court finds that Fortenberry's expenditures were not reasonable, and despite his fiduciary obligations to the fund and its investors, Fortenberry engaged in self-dealing and used the fund as his personal piggybank.

140. Finally, even assuming that such *ad hoc*, self-remuneration was authorized by the limited partnership agreement, and the Court holds it was not, the Court finds that the amount here ($318,500, or 68% of the funds invested in or loaned to Premier) far exceeded any reasonable or

foreseeable management fee (typically, one to two percent), especially considering that Fortenberry's "management" resulted in the complete dissipation of all of Premier's assets. [ENF-149 at ¶ 40.]

VI. FORTENBERRY'S HEARING TESTIMONY WAS NOT CREDIBLE

141. Fortenberry's hearing testimony on key points was frequently contradicted by the testimony of other witnesses and the documentary record.

142. For example, when defending the reasonableness of his use of Premier's funds, Fortenberry testified that a "vast majority" of the $148,500 in investor proceeds not invested in HMC "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 that were involved." [Tr. 286:20-287:15.]

143. The undisputed evidence shows, however, that the "vast majority" of Premier's assets was paid directly to Fortenberry. [ENF-149 at Exhibit D.]

144. Even the unreliable financial compilations that Fortenberry submitted to the Division during the Wells process showed only $7,005.79 in "travel expenses" and over $110,000 in "distributions" directly to Fortenberry. [ENF-135 at SEC-SJF-0000145, SEC-SJF-0000148.]

145. Fortenberry also denied having any control over Breadstreet.com, the entity through which he first contacted Nasti, describing himself as a mere "cheerleader." [Tr. 337:10-338:1.]

146. 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.]

147. Fortenberry also testified that he used Premier's money to pay "bonuses" to Breadstreet.com's employees, including David Kent, the person Fortenberry testified actually ran Breadstreet. [Tr. 426:10-436:17; ENF-42 at BOA-0003016-BOA-0003021.]

148. Fortenberry's efforts to explain away his misstatements regarding Premier's "showcase investment" in Bongiovi's movie and Bongiovi's addition to Premier's "portfolio" also appeared to be extemporaneously-created and nonsensical. [Tr. 267:21-25, 372:19-373:13.]

149. Fortenberry's purported rationale for providing Anderson (but not Nasti) with fictitious earnings statements makes no sense given the documentary evidence in this case. [Tr. 388:7-389:3.] As discussed above, in actuality, Fortenberry promised Nasti 12% returns, not Anderson. [ENF-45; ENF-56.]

150. In sum, after observing his demeanor and considering all of his testimony and the testimony of other witnesses and the documentary evidence, the Court finds that Fortenberry's testimony in this matter was generally not credible, and the Court gives very little weight to his denials, explanations, and justifications for his apparently egregious misconduct.

PROPOSED CONCLUSIONS OF LAW

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 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).

Against this backdrop, the Court considers the evidence presented by the parties.

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

A. The Premier Units Are Securities

1. 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).

2. 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).

3. 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.]

4. 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").

5. Accordingly, because the Premier units are "securities," 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)

6. 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).

7. 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).

8. 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

9. Even though Premier had only two investors, 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

10. Under Rule 10b-5(b), "the maker of the statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). A defendant is liable for his or her own oral misstatements and omissions. *See In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 472-73 (S.D.N.Y. 2012) (defendant may be "maker" of statement by either "stating it," by "approving it," or by having the statement "attributed to" the defendant).

11. 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).

12. 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).

13. Fortenberry made numerous material misrepresentations and omissions.

14. He falsely told Nasti that HMC guaranteed Premier investors a 12% return on investment. [Tr. 58:5-59:6; ENF-56.]

15. 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.").

16. 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.'").

17. 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.] An investor update Fortenberry sent to Nasti also stated, falsely, that Premier had partnered with Bongiovi and his animated Christmas movie. Fortenberry is the "maker" of all of these actionable misstatements. *Red River Resources, Inc. v. Mariner Sys., Inc.*, 2012 WL 2507517, *6 (D. Ariz., Jun. 29, 2012) (author of e-mail is its "maker").

18. 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, 253-54 (N.D.N.Y. 2014).

19. 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.").

20. 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.

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

21. 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").

22. 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.").

23. Fortenberry's failure to disclose his extant cease-and-desist orders was a material misrepresentation and/or omission. Any reasonable investor would want to know that the individual behind the promotion of a security had previously been found to have committed fraud. *See, e.g., SEC v. Levine*, 671 F. Supp. 2d 14, 27-28 (D.D.C. 2009) ("It cannot be disputed that a reasonable investor would want to know whether the person they are sending their money to in order to purchase a stock has been previously found to have violated the securities laws."); *Merchant Capital*, 483 F.3d at 771-72 ("The existence of a state cease and desist order against identical instruments is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing the securities."); *SEC v. Empire Develop. Group, LLC*, 2008 WL 2276629, *11 (S.D.N.Y. May 30, 2008) (granting the SEC summary judgment and holding that "an investor would want to know" of a defendant's prior securities lawsuits "when considering whether to invest"); *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1303 (M.D. Fla. 2007) (granting 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).

24. Fortenberry's omission of the prior securities fraud findings and cease-and-desist orders is material and is, even standing alone, enough to establish his liability under Securities Act Section 17(a) and Exchange Act Section 10(b).

25. 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.]

26. 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) the 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).

27. 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.

28. Fortenberry's argument also misses the point. Even if he was not affirmatively required to disclose his prior crimes, frauds and injunctive orders, their concealment – including through his use of aliases – is nevertheless material, as it would clearly have affected 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.").

29. The Court finds that Fortenberry made a series of materially false and misleading statements, as well as numerous material half-truths and omissions.

3. Fortenberry Acted With Scienter

30. 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)).

31. 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. His conduct with respect to Premier is remarkably similar to that for which he was sanctioned in 2004; clearly, Fortenberry knew that his conduct was wrongful.

32. Fortenberry also told Nasti that HMC guaranteed returns, even though he (not HMC) had prepared the business plan, even though the representation was contradicted by Premier's contract with HMC, and even though Sherman Halsey told him the promise was "not correct." [ENF-39 at § 7(h); ENF-5 at 116:4-13, 131:14-132:9.]

33. He falsely informed Anderson that Premier was generating returns on its investments, even though he knew that Premier had not received a single dollar in return from HMC. [Tr. 239:15-19.] In fact, at the time of one of the misstatements, Premier was overdrawn by almost $700. [*See, e.g.*, Tr. 398:20-401:10; ENF-153.]

34. Fortenberry also 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.] He repeated the false representation to Nasti in January 2011. [Tr. 92:9-94:8, 332:18-334:10; ENF-82.]

35. And Fortenberry intentionally, and unapologetically, spent on himself hundreds of thousands of dollars entrusted to him, after expressly 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"). Indeed, by the time Fortenberry made the misrepresentation to Nasti, he had already misappropriated Anderson's first investment from Premier. [Tr. 363:15-18; ENF-46; ENF-29; ENF-31;]

36. For these reasons, the Court finds that Fortenberry acted with scienter.

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

37. Finally, Fortenberry's fraud was in connection with the purchase and sale of securities.

38. 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").

39. 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, met here.

C. Fortenberry Engaged In A Scheme To Defraud

40. 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.

41. 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. Sections 17(a)(1) and (3) of the Securities Act prohibit the same conduct in the offer or sale of securities. Courts have interpreted these provisions to create what is known as "scheme liability." *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). Rules 10b-5(a) and (c) are "aimed at broader fraudulent schemes" and make it unlawful to, either directly or indirectly, engage in a course of business or employ a device in furtherance of a scheme to defraud in connection with the sale or exchange of securities. *Zandford*, 535 U.S. at 819.

42. "[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).

43. 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).

44. At its core, Fortenberry's fraudulent scheme involved misappropriating investor funds and Premier's assets for his own use, and the evidence referenced above regarding his actionable misstatements and omissions also establishes his scheme liability.

45. 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 fictitious account statements showing fictitious profits on prior Premier investments.

46. 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

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

48. 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 also confirmed in the limited partnership agreements, which details Fortenberry's role as general partner and authorized him to invest in the entertainment industry via "equity, debt, investment contracts, or any other investment form" that Fortenberry, in his "sole discretion," deemed to be in the best interests and for the benefit of Premier. [ENF-45 at AA-8-AA-9; ENF-56 at MN-000189-190.]

49. 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).

50. 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.]

51. Fortenberry's misappropriation of fund assets through management fees and the payment of his personal expenses [ENF-78; ENF-149 at Exhibit D] also constitute "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).

52. Accordingly, Fortenberry is an "investment adviser" and subject to the Advisers Act.

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

53. 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").

54. 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").

55. Under Advisers Act 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.").

56. 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.

57. 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. Sept. 25, 2012) (fund manager operating Ponzi scheme liable for violating Sections 206(1), 206(2), 206(4) and Rule 206(4)-8).

58. Fortenberry depleted Premier's bank account by paying for numerous personal expenses, including travel for family members, credit card invoices, clothing, grocery store purchases, cable bills, utilities, Netflix, car repair and maintenance services, 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.]

59. All told, Fortenberry misappropriated and dissipated $318,500 of Premier's assets, through so-called management fees, other direct payments, the payment of personal expenses, and other self-dealing.

60. Fortenberry argues 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).

61. Consequently, the Court finds that Fortenberry has 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

62. 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.

63. 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."

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

65. 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).

66. 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.

67. "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).

68. The violations of Rules 206(4)-8(a)(i) and 206(4)-8(a)(ii) here are based primarily on the same material misstatements and conduct described above in connection with Fortenberry's violations of Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder.

69. 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.

70. 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. REMEDIES

A. Fortenberry Is Ordered To Cease And Desist

71. 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).

72. 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).

73. 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).

74. 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.

75. Given the foregoing, the Court finds that a cease-and-desist order is appropriate here on each of the claims alleged in the April 28, 2014 Order Initiating Proceedings.

B. A Permanent Collateral Bar Is Appropriate

76. 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.

77. 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.

78. 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 permanently bars Fortenberry from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO, and from servicing or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

C. Fortenberry Must Disgorge His Ill-Gotten Gains

79. 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 Centers, 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").

80. 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).

81. 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).

82. 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.

83. The Division presented evidence reasonably approximating respondent's ill-gotten gains, and the burden of proof then shifted 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 was "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.

84. 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.]

85. 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.

86. 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 will be offset.

87. Pre-judgment interest is also equitable in these circumstances. Fortenberry has enjoyed access to his ill-gotten gains for over three-and-a-half years now. To require Fortenberry to pay prejudgment interest is consistent with the equitable purpose of disgorgement. *Hughes Capital*, 917 F. Supp. at 1090. Prejudgment interest shall 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 a final 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 Must Pay A Monetary Penalty

88. 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.

89. 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).

90. Here, the Division has shown that: (1) Fortenberry committed fraud in willful violation of Securities Act Section 17(a), Exchange Act Section 10(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; (8) Fortenberry's hearing testimony was untruthful and not credible; and (9) penalties are appropriate to send a message that conduct like Fortenberry's cannot be tolerated.

91. 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 concludes that a "third-tier" penalty of $150,000 is appropriate 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.

92. 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. Tourre,* 4 F. Supp. 2d 579,

593-494 (S.D.N.Y. 2014) (calculating $650,000 penalty based on each misstatement); *SEC v. Coates,* 137 F. Supp. 2d 413, 430 (S.D.N.Y. 2001) (calculating penalty by multiplying number of misrepresentations by penalty amount).

93. Consequently, the Court imposes a penalty of $150,000 for each violation that occurred in this case and concludes that 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];

The Honorable James E. Grimes
Administrative Law Judge
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By e-mail and United States mail:

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Respondent

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