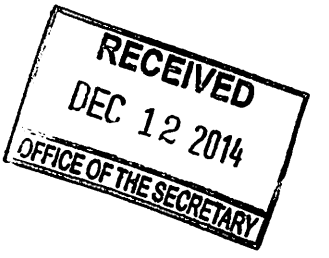
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15858

In the Matter of

STANLEY JONATHAN FORTENBERRY,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY TO THE POST-HEARING BRIEF OF RESPONDENT STANLEY JONATHAN FORTENBERRY

[redacted]
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INTRODUCTION

Respondent Stanley Jonathan Fortenberry's Post-Hearing Brief ignores the substantial evidence of his fraud that was presented by the Division of Enforcement ("Division"). Fortenberry's brief does not acknowledge his numerous misstatements and omissions, meant to induce further investments, and Fortenberry simply ignores the substantial evidence that he used Premier Investment Fund, L.P. ("Premier") as his personal piggybank without ever disclosing his expenditures to investors.

Instead, the gist of Fortenberry's brief is that the limited partnership agreement he prepared for Premier permitted him to say and do whatever he wanted without consequence. According to Fortenberry, given the intentionally-vague fine print of the agreement, Michael Nasti and Allen Anderson should not have believed the lies he told them face-to-face. [Res. Br. at 9-12.][1] Even though he verbally assured them that he would not pay himself a dime, Nasti and Anderson should have known Fortenberry was going to blow nearly half of their money on himself, his family and his friends. [*Id.* at 12-13.] Despite obligating himself to keep accurate and timely records, Fortenberry maintains that it is perfectly fine that he kept none and ignored Nasti's requests for financial statements because "there was no deadline for the preparation of books and records" in the agreement. [*Id.* at 15.] And, in light of

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[1] "Res. Br." refers to the Post-Hearing Brief of Respondent Stanley Jonathan Fortenberry. "Div. Br." refers to the Division of Enforcement's Post-Hearing Brief.

another oblique passage buried in the agreement, investors should have known Fortenberry was a crook and done a better job researching his past securities laws violations and crimes. [*Id.* at 12.] According to Fortenberry, Premier's investors made the mistake of signing his agreement and now have only themselves to blame for entrusting him with their money.

Thankfully, Fortenberry is wrong. The limited partnership agreement is not a panacea for his fraud, and he cannot foist the blame for his grift onto his victims. The well-settled law and the evidence adduced in this matter require that Fortenberry be found liable for each of his numerous lies regarding how the fund was and would be operated, each of his egregious misstatements regarding the fund's imaginary earnings and investments, and for the entirety of his secret looting of the fund.

LAW AND ARGUMENT

I. NONE OF FORTENBERRY'S ARGUMENTS HAS EVIDENTIARY SUPPORT

Fortenberry's Post-Hearing Brief does not address any of the evidence introduced during the three-day-long hearing in this matter. Six witnesses testified,[2] and the parties introduced over 70 exhibits, but none of this evidence is discussed or even referenced in Fortenberry's papers. Instead, Fortenberry simply makes broad, self-serving generalizations about what happened, while completely ignoring the substantial

[2] This number includes Sherman Halsey, whose prior, sworn testimony was introduced at the hearing pursuant to Rule of Practice 235(a)(1). [*See* ENF-5.]

contrary evidence. For example, as to his compensation for operating Premier, Fortenberry writes:

> No specific promises were made to prospective or actual investors regarding Mr. Fortenberry's remuneration as general partner, and as such any remuneration he received as general partner is not a violation of any promise to actual or prospective investors.

[Res. Br. at 13.] Fortenberry cites no evidence for this statement, and there is none. Instead, the evidence introduced at the hearing establishes the contrary, that Fortenberry specifically told both Nasti and Anderson that he would receive *only* an equity stake in Premier as compensation. Nasti's hearing testimony on this point was unequivocal:

> 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 Premier 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.

[Am. Tr. 59:23-61:14.][3] Anderson testified that he had an identical understanding of Fortenberry's remuneration:

Q And how, if at all, did you expect Mr. Fortenberry to be compensated for his role?

A My understanding was that he would share in the profits of the venture along with investors.

Q So if Premier Investment Fund took in profits, Mr. Fortenberry would share in those profits. That was the basis of his compensation?

A That was my understanding.

[Am. Tr. 695:7-14.]

Fortenberry's brief also contains unsupported and inaccurate statements regarding his obligation to keep and provide investors with accurate books and records. For instance, Fortenberry glibly opines that he met his obligations:

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

> In rare instances where further information was requested, never was such a request denied.... There was an "open book policy" regarding the investment process, and there was no evidence of "scienter" regarding the non-provision of material information.

[Res. Br. at 12.] Again, however, Fortenberry cites no evidence to support these statements and fails to acknowledge the substantial conflicting evidence. Nasti testified that his efforts to obtain financial records relating to his investments in Premier were altogether rebuffed:

> Q What I am trying to determine is sort of what happened next with your involvement in Premier after January of 2011?
>
> A After that, basically the only conversations we really kept having was about trying to get some sort of reports, P and Ls, something to see, you know, to see where the company was going....
>
> ....
>
> Q Have you ever received any account statement whatsoever from Premier?
>
> A I did not.
>
> Q Have you ever received any tax paperwork from Premier so that you could prepare your own personal income taxes?
>
> A I did not.

[Am. Tr. 95:1-7, 101:8-14.] Fortenberry's self-serving statement also ignores the evidence that he provided materially false financial information to Anderson. Anderson testified that he received unsolicited monthly account statements relating to his investment in Premier, which reported Premier's monthly "earnings." [*See, e.g.*, Am. Tr.

707:1-20, 709:15-711:23; *see also, e.g.*, ENF-69, ENF-73, ENF-79.] Premier, however, had no earnings. [Am. Tr. 239:15-24.] Fortenberry's statements in this regard were outright lies designed to induce Anderson to continue to invest on a monthly basis. And, Fortenberry's declaration that Premier had an "open book policy" ignores the undisputed evidence of his "non-provision of material information" – i.e., Fortenberry's failure to keep any books and records or to otherwise tell Premier's investors that he was spending on himself (and not investing) almost half of their money. [*See, e.g.*, Am. Tr. 66:17-25, 297:5-16, 697:20-698:4, 701:20-23.] Fortenberry's brief simply cannot be squared with the evidence.

Fortenberry makes similar, unsupported statements regarding the availability of his prior cease-and-desist orders [Res. Br. at 12], the Commission's responsibility for Premier's "undercapitalization" [*Id.* at 14], the immateriality of his "tardiness" in preparing financial records for Premier [*Id.* at 15], and his supposedly curative oral "update[s]" to investors "as to the progress and status of Premier" [*Id.*]. There is, however, no evidence in the record of *any* of these purported facts. Indeed, as detailed in the Division's Post-Hearing Brief, each of these superficial, self-serving statements are either a mischaracterization of or wholly belied by the evidence.

In sum, Fortenberry's arguments are devoid of evidentiary support. For this reason alone, Fortenberry's excuses should be rejected and he should be found liable on each of the Division's claims.

II. THE LIMITED PARTNERSHIP AGREEMENT DOES NOT CURE FORTENBERRY'S FRAUD

Fortenberry devotes nearly half of his brief to his claim that the limited partnership agreement he drafted and foisted on investors absolves him of responsibility for his fraudulent statements and conduct. He is wrong for a myriad of reasons.

A. Fortenberry's Integration Clause Argument Fails As A Matter Of Law

While not entirely clear, Fortenberry appears to pin the majority of his argument to a portion of the Premier limited partnership agreement which is, essentially, an integration or "non-reliance" clause. On the tenth page of the agreement, buried in a page-long, single-spaced paragraph, are two sentences which supposedly absolve Fortenberry:

> In the event of a conflict or inconsistency between the disclosure documents and this Agreement, the terms of this Agreement shall control and inconsistent or conflicting information shall be disregarded and of no effect. In the event of a conflict or inconsistency between oral and written information provided to the undersigned by the company or its agents and the disclosure documents, the disclosure documents shall control and inconsistent or conflicting information shall be disregarded and of no effect.

[Res. Br. at 10-11.][4] Based on this language, Fortenberry contends that the agreement "took precedence over any inconsistent or contrary statements made in disclosure documents and other oral or written information provided to prospective investors." [*Id.* at 11.] Stated another way, because of these two sentences, Fortenberry claims that he cannot be held responsible for any of the lies he told investors face-to-face, the bogus guarantees he made in the Halsey Management Company ("HMC")/StarMaker Central business plan, or for looting the fund.

In casting the defense in this way, Fortenberry essentially argues that the Division cannot prove investor reliance on his fraudulent oral and written statements because they are, he claims, contradicted by the limited partnership agreement. [*Id.* at 12-14.] Unlike private litigants, however, the Division "is not required to prove reliance or injury in enforcement actions." *SEC v. Wolfson*, 539 F.3d 1249, 1256 (10th Cir. 2008); *see also SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 490-91 (S.D.N.Y. 2002) ("The SEC does not need to prove investor reliance"). "[Division] proceedings are instituted to protect the public interest. They are not brought to redress private wrongs. That makes it unnecessary to show reliance on such representations or that the customer was in fact misled." *Wall Street West, Inc. v. SEC*, 718 F.2d 973, 975 (10th Cir. 1983) (internal quote and citations omitted). Accordingly, "the fact that the [defendant's] clients were not misled ... is legally irrelevant. The Commission's duty

[4] Fortenberry does not cite the evidentiary source of this language, but it is likely a reference to ENF-45, ENF-56, or ENF-70.

is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury." *Berko v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963) (internal cite omitted).

Even crediting Fortenberry's doubtful interpretation of the agreement, discussed below, the delivery of an offering document or limited partnership agreement does not absolve a salesman who attempts to sell securities by means of representations that are inconsistent with the document. *See SEC v. True North Fin. Corp.*, 909 F. Supp. 2d 1073, 1097 (D. Minn. 2012) ("In a private securities case where a plaintiff signed a subscription agreement, non-reliance clause, or integration clause, limiting fraud claims to those contained in offering documents may be appropriate. However, the Court declines to do so here because reliance is not a required element of any of the SEC's claims against Defendants."); *In the Matter of Ross Securities, Inc.*, 41 S.E.C. 509, 1963 WL 63660, *2 (Apr. 30, 1963) ("Those who sell securities by means of representations inconsistent with [a prospectus] do so at their peril."); *In the Matter of Robert A. Foster*, 51 S.E.C. 1121, 1994 WL 378465, *4 n.2 (July 20, 1994) ("Notwithstanding [defendant's] distribution of the prospectuses, he is liable for making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."); *cf. United States v. Ghilarducci*, 480 F.3d 542, 547 (7th Cir. 2007) ("That the contracts should have placed the [victims] on

notice of the fact that no oral representation would be honored, does not mean the oral representations were immaterial or without tendency to influence.").[5]

Here, Fortenberry made numerous false and misleading statements and omissions in an effort to sell units of his fund. That is paradigmatic securities fraud; it is precisely the type of conduct that Division enforcement actions are intended to redress. His distribution of a limited partnership agreement does not wipe the slate clean.

B. The Limited Partnership Agreement Does Not Authorize Fortenberry's Secret Looting Of Premier

Even putting aside the irrelevance of Fortenberry's "integration clause" argument, the limited partnership agreement does not say what Fortenberry claims. It does not authorize him to use Premier as his personal piggybank.

Fortenberry argues that the limited partnership agreement "provides for Mr. Fortenberry to be given a salary as general partner, for the payment of non-investment operating expenses, etc., and that such expenditures are within the sole discretion of the general partner." [Res. Br. at 13; emphasis omitted] This is a fanciful interpretation of the actual agreement, which reads:

> The Undersigned acknowledges that without limitation a portion of the proceeds from the sale of Units of the Company, as well as profits from the Company's investments, shall be allocated to reasonable administrative

[5] *Ghilarducci* is a wire-fraud case. Like the Division's claims, materiality is an element of wire-fraud, but reliance is not. 480 F.3d at 546.

> expenses in connection with the Unit offering and the day to day affairs of the Company, including but not limited to salaries – inclusive of the general partner, office space, office equipment, travel, legal, accounting costs, and any other expense recognized by the Internal Revenue Code and regulations as a business deduction or credit.

[ENF-45 at AA-2.]

As set forth in the agreement, "salaries" is a subcategory of "reasonable administrative expenses," and it is far-fetched to claim that Fortenberry's plundering of Premier's bank account is a "reasonable administrative expense." Indeed, Fortenberry's assertion that his haphazard and unfettered use of Premier's assets constituted a salary is contradicted by Fortenberry's very own definition of salary:

> [Salary has] come to mean, in our current society, a regular set pay that you would receive weekly, monthly, or annually.

[ENF-3 at 240:15-17.] Rather than take a periodic "regular set pay" from Premier, Fortenberry used Premier's money whenever he had a bill that needed paying, whenever he needed to gas up his car or buy groceries, whenever he wanted some walking around money, and in whatever increment suited his fancy. [*See, e.g.,* Am. Tr. 281:12-286:7, 328:23-329:7, 452:12-453:1; ENF-78; ENF-149.] Fortenberry has also introduced no evidence that his expenditures would be "recognized by the Internal Revenue Code and regulations as a business deduction or credit."

But Fortenberry did not just use the fund for his personal, day-to-day expenses; he also took approximately $68,000 in larger distributions of cash payable directly to

himself, which he labeled "management fees." [ENF-58 at BOA-0003018, BOA-0003017, BOA-0003022, BOA-0003023, BOA-0003024, BOA-0003025, BOA-0003026, BOA-0003028, BOA-0003029, BOA-0003030, BOA-0003031, BOA-0003032, BOA-0003034, BOA-0003035, BOA-0003037.] These "management fees," by Fortenberry's own admission, were not "salary":

> Q Mr. Fortenberry, what's the definition of a salary?
>
> A Well, it originally started out with the Romans, when they paid each other in salt; i.e., the word "sal." And salary meant any type of bonus, any type of payment whatsoever. It's come to mean, in our current society, a regular set pay that you would receive weekly, monthly, or annually.
>
> Q And when you say "regular," what do you mean by "regular"?
>
> A Well, if you receive your salary monthly, then you're receiving your salary on a monthly basis, and if you're receiving it annually, then you're receiving it annually.
>
> Q And does it include management fees?
>
> A I'm not sure I know how to answer the question.
>
> Q If someone took a management fee from Premier Investment Fund, would that be considered a salary?
>
> A Well, I think that would be more considered a fee, as opposed to salary.
>
> ....
>
> Q Did you receive any regular set pay from Premier Investment Fund?
>
> A No.

[ENF-3 at 240:9-241:17.] "Management fees" are not authorized in the limited partnership agreement, and $68,000 in such fees over a six-month period for a

spectacularly unsuccessful fund with only $470,000 in capital can hardly be described as "reasonable" in any event.

Over the course of eight months straddling 2010 and 2011, Fortenberry took in $470,000 for the benefit of Premier and, of that, invested just $151,500 in HMC. The remainder – 68% of Premier's capital, including the $68,000 in management fees – was used to pay for Fortenberry's lifestyle and living expenses, a number that far exceeds any conceivable reasonable administrative expense and was also not disclosed to investors as required by the same limited partnership agreement to which Fortenberry points. [*See* ENF-56 at MN-000189-MN-000191.] Simply put, Fortenberry's greedy self-dealing was not authorized by the limited partnership agreement or otherwise, and Fortenberry's proffered interpretation of the agreement in this regard is nonsensical.

C. The Limited Partnership Agreement Cannot Cure Fortenberry's Omissions

As Fortenberry notes, the Premier limited partnership agreement contains the following sentence, in the same paragraph as the integration clause discussed above:

> The undersigned acknowledges he has reviewed any and all information of public record, inclusive of official or reliable information posted on the internet, about the Company and the general partner John Fortenberry (Stanley Jonathan Fortenberry/Stanley J. Fortenberry), and that such

> information has not changed his mind with respect to an investment in the securities offered hereby.[6]

[Res. Br. at 10.] Based on this sentence, Fortenberry contends that he cannot be held responsible for failing to inform Premier's investors about his prior convictions, bankruptcies, securities laws violations, and cease-and-desist orders. Fortenberry does not dispute the materiality of the information, nor could he. Rather, he contends that he cannot be liable for withholding it because "[e]ach investor had access to publicly known information about Mr. Fortenberry by doing a simple search with an internet search engine."[7] [*Id.* at 12.]

First, Fortenberry's argument that his material omissions are cured by the limited partnership agreement has the same legal problems as his integration clause argument, discussed above. Fortenberry made an actionable, material omission to his investors when he failed to reveal material information about the investment – e.g., that the general partner of Premier had a criminal history, filed for bankruptcy twice, had twice been found liable for securities fraud, and was subject to two cease-and-desist orders. These actionable omissions were not cured by Fortenberry's provision of the limited partnership agreement (which, incidentally, also omitted the

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[6] The Division submits that Fortenberry's inclusion of this provision in the limited partnership agreement, which he appears to concede was expressly designed to address his prior run-ins with the law [Res. Br. at 12], is profound evidence of his culpable scienter with respect to this omission.

[7] Fortenberry cites to no evidence in the record that a "simple search with an internet search engine," during the relevant time period, would have in fact revealed his prior securities laws violations and cease-and-desist orders.

information but buried a warning that investors might want to Google him). *See True North,* 909 F. Supp. 2d at 1097; *In the Matter of Ross Securities, Inc.*, 1963 WL 63660 at *2; *In the Matter of Robert A. Foster*, 1994 WL 378465 at *4 n.2 ("[n]otwithstanding [defendant's] distribution of the prospectuses, he is liable for ... omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading").

Second, the underlying premise of Fortenberry's argument fails. Nasti and Anderson were not required "to look beyond a given document to discover what is true and what is not." *SEC v. StratoComm*, 2 F. Supp. 3d 240, 255 (N.D.N.Y. 2014) (quoting *Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 887 (9th Cir.2008)). Investors are not obligated to independently research information that Fortenberry had an affirmative obligation to disclose. "Availability elsewhere of truthful information cannot excuse untruths or misleading omissions in the prospectus." *Dale v. Rosenfeld*, 229 F.2d 855, 858 (2d Cir.1956); *see also In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1114 (9th Cir. 1989)("omissions by corporate insiders are not rendered immaterial by the fact that the omitted facts are otherwise available to the public"); *SEC v. Mozilo*, 2010 WL 3656068, *9 (C.D. Cal. Sep. 16, 2010)(applying *Apple* to enforcement action); *SEC v. Universal Express, Inc.*, 2007 WL 2469452, *7 (S.D.N.Y. Aug. 31, 2007) ("That certain materially false company filings may be contradicted by publicly available facts merely demonstrates the brazenness of defendants' mendacity; it does not absolve defendants of their reporting requirements under federal securities law."). Even "[r]eadiness and

willingness to disclose," of which there is no evidence in the record here,[8] "are not equivalent to disclosure." *Dale*, 229 F.2d at 858; *see also Barthe v. Rizzo*, 384 F. Supp. 1063, 1067 (S.D.N.Y. 1974) (defendant "not excused from his duty to disclose [a conflict of] interest merely because the client was not sufficiently suspicious to think of asking").

In short, Fortenberry's omission of material information regarding his past was not cured by his written suggestion that investors query his legal name on the Internet. Fortenberry should be held liable for these omissions.

D. Fortenberry Does Not Address The Falsehoods Contained In The Monthly Account Statements He Sent To Anderson

As set forth in the Division's opening brief, starting on November 15, 2010, Fortenberry reported to Anderson his "monthly Premier Investment fund earnings," which Fortenberry invited Anderson to "reinvest." [*See* Div. Br. at 17, discussing ENF-69.] Fortenberry sent similar monthly account statements reporting Anderson's "monthly Premier Investment Fund earnings" in each of the months that Fortenberry

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[8] It is unlikely that Fortenberry would have accurately described the Texas and Pennsylvania cease-and-desist orders, even if he had disclosed them. For instance, Fortenberry testified that the Pennsylvania regulator "posed or [acted as] a plant as an investor when indeed they know they're not investors" and somehow "entrapped" him into illegally offering for sale unregistered securities. [Am Tr. 533:1-22.] According to Fortenberry, Pennsylvania then sent its cease-and-desist order to Texas, which simply filed a copycat order based on the same Pennsylvania sale. [Am. Tr. 532:20-533:22.] Fortenberry's self-serving explanation cannot be squared with the Texas order's detailed factual findings regarding Fortenberry's fraudulent conduct, to which Fortenberry stipulated. [*See* ENF-10.]

asked him to make an additional investment. Anderson reasonably understood these statements to indicate that his investments were earning a profit:

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

[Am. Tr. 707:13-20; *see also* Am. Tr. 710:17-718:19; ENF-73; ENF-79; ENF-84; ENF-89.] The monthly account statements from Fortenberry also repeatedly advised Anderson that Premier had invested in Bongiovi's animated Christmas film. [Div. Br. at 17-18.] Anderson believed Fortenberry about this, too, and continued to purchase partial Premier units. [Am. Tr. 709:5-13.]

Of course, Fortenberry's statements were false. As Fortenberry well knew, Premier had no revenues. [*See, e.g.,* Am. Tr. 387:19-21, 391:3-5, 791:3-792:23] Premier also never invested in Bongiovi's film; Premier did not invest in anything other than HMC. [Am. Tr. 238:21-239:1.] Fortenberry's misstatements in this regard were clearly designed to induce Anderson to continue purchasing partial Premier units each month. This conclusion is corroborated by the fact that Fortenberry sent no such statements to Nasti, who invested in two lump sums, even though Fortenberry specifically guaranteed Nasti 12% returns. [Am. Tr. 388:7-389:3, 799:1-14; ENF-56.] Fortenberry can be found liable based on these monthly account statements alone.

It is unclear from Fortenberry's brief whether he contends that the falsehoods contained in his monthly account statements to Anderson were cured by the limited partnership agreement; he does not specifically address the monthly statements at all. He could not, in any event, as the defense is, again, legally irrelevant. *See True North,* 909 F. Supp. 2d at 1097; *In the Matter of Ross Securities, Inc.*, 1963 WL 63660 at *2; *In the Matter of Robert A. Foster*, 1994 WL 378465 at *4 n.2.

E. The Limited Partnership Agreement Itself Contains Affirmatively False And Misleading Statements

Far from exonerating Fortenberry, the limited partnership agreement contains additional misrepresentations and is itself a basis for his liability.

1. The Lies Contained In The HMC Business Plan

As explained in the Division's opening brief, in mid-2010 Fortenberry prepared a business plan for HMC's StarMaker Central, which he provided to investors, including Nasti. [Div. Br. at 5, 7.] The business plan guaranteed the following:

> 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.

[ENF-56 at MN-000183.] Nasti specifically relied on the business plan and asked Fortenberry to agree that the business plan was part and parcel of his investment agreement. Fortenberry did so, expressly acknowledging that the business plan was "the basis for investment by Mike Nasti in Premier." [Div. Br. at 7; *see also* ENF-56 at MN-000183.]

But Fortenberry knew, should have known, or was highly reckless in not knowing that HMC did not guarantee returns, 12% or otherwise. While Premier's agreement with HMC did contain a provision describing a 12% payment, it was a buyout provision, which permitted HMC to dilute Premier's stake in HMC if HMC paid Premier a 12% penalty. [*See* ENF-39 at § 3.] Sherman Halsey also testified that he told Fortenberry the business plan was "not correct" and "not accurate" and that HMC could not guarantee anything. [ENF-5 at 114:15-132:11.] And this conclusion is only bolstered by other terms in the HMC/Premier agreement. [*See, e.g.*, ENF-39 at § 7(h), Ex. B § 2(c) (acknowledging "speculative" nature of investment and that HMC units owned by Premier "may be subject to dilution.").]

At the hearing, Fortenberry testified that Sherman Halsey told him that HMC would guarantee returns to Premier, but his testimony only serves to highlight the disingenuous nature of Fortenberry's argument:

> Q And, Mr. Fortenberry, the executive summary [ENF-56] went one step further, did it not? It also indicates that repayment of principal and interest will be paid back in three years along with you keeping your equity stake in the holdings. His equity stake won't be diluted, isn't that what you wrote?
>
> A I am not certain that you're interpretations of the Halsey agreement is absolutely correct, because that's not what I heard verbally from the Halseys.
>
> Q Well, I thought I understood your testimony today that it's always -- always the written agreement that controls?
>
> A *It always is except when it works in your favor.*

[Am. Tr. 585:2-15, emphasis added.]

Even if Fortenberry recklessly thought the HMC/Premier agreement contained a 12% guarantee with no equity dilution, for Nasti and Anderson to receive the 12% return Fortenberry promised, Fortenberry would have needed to invest all $300,000 of Premier's money to receive the 12% return (which he obviously did not) *and* actually receive a guarantee of 24% return, because Fortenberry knew he was entitled to 50% of Premier's profits. Thus, even crediting Fortenberry's testimony, the business plan's guarantee is at least highly reckless given Fortenberry's massive self-dealing.

Fortenberry also lied in the business plan about underlying businesses in which Premier, through HMC, would be investing. The Fortenberry-created HMC business plan contained false representations that HMC owned or was partnered with a number of prominent industry businesses, including the *Billboard* World Song Contest, SonicBids, and "HalseyJobs.com." [ENF-56 at MN-000186.] But these representations were false. HMC was no longer associated with *Billboard* and would only re-obtain the license for the song contest if HMC raised enough money. [ENF-5 at 43:13-44:3, 81:10-82:11.] HMC also did not "have anything to do with [SonicBids]," and "HalseyJobs.com" simply did not exist. [ENF-5 at 121:24-122:15, 123:21-124:16.]

2. Misrepresentations Regarding Premier's Expenses

The Premier limited partnership agreement also falsely represented that any money Fortenberry spent would be related to reasonable administrative expenses. Fortenberry, however, began to squander Premier's assets in early August 2010, when Anderson made his first $35,000 investment. [ENF-31 at BOA-0002435-40; ENF-78 at SEC-ABC-P-0000126.] Consequently, by the time Nasti made his first investment in September 2010, the limited partnership agreement's representations regarding Fortenberry's "reasonable" use of investment proceeds were already patently false.[9]

3. Misrepresentations Regarding Premier's Books And Records

Fortenberry also lied in the limited partnership agreement by representing that he would keep capital accounts for each partner, GAAP-compliant books and records, and other standard business records. [ENF-45 at AA-8; ENF-56 at MN-000189.] Fortenberry testified at the hearing that he understood that GAAP required such financial reports to be issued at least once per annum [Am. Tr. 522:3-21], even though he claims in his brief that there was "no deadline." [Res. Br. at 15].

Fortenberry seeks to dismiss the Division's claims in this regard by claiming that he was only "tardy" in his preparation of "books and records" and "tax returns."

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[9] Fortenberry has argued that he used Premier's assets to directly fund HMC's operations. [*See, e.g.*, Am. Tr. at 286:20-288:3.] Such testimony should not be credited. Sherman Halsey testified that Fortenberry did not have anything to do with the operation of HMC; Premier was only a passive investor in HMC. [ENF-5 at 46:19-47:5.]

[*Id.*] He also tries to blunt the Division's evidence by conceding that he was "not a great bookkeeper ..., but I don't think there's a crime in that." [Am. Tr. 234:9-10.] But the Division's claims are not about being "tardy" or "not a great bookkeeper." Rather, the Division's claims rest upon the fact that Fortenberry kept no books and records whatsoever [Am. Tr. 296:20-297:16, 298:20-300:16], yet he made false written representations to the contrary in August 2010 [ENF-45], September 2010 [ENF-56] and November 2010 [ENF-70]. Fortenberry must be held liable for falsely stating in the limited partnership agreement that he did and would keep proper and GAAP-compliant books and records when he, in fact, never did and never had any intention of doing so.

III. FORTENBERRY'S MISSTATEMENTS AND OMISSIONS WERE MATERIAL

Fortenberry correctly cites the *TSC Industries* standard of materiality in his Post-Hearing Brief, but completely misapplies the standard. [Res. Br. at 8.] Fortenberry claims that the Division has "wholly failed to prove that Mr. Fortenberry withheld or failed to provide material information." [*Id.*] However, as discussed above, the record is littered with material misstatements and material omissions, with each misstatement and omission significantly altering the total mix of information made available to the investors. *See SEC v. Coplan*, 2014 WL 695393, *3-4 (S.D. Fla. Feb. 24, 2014) (representations about "(i) the rates of return; (ii) the investment strategy; (iii) the safety of the principal; (iv) the financial condition of the purported bail-bond investment brokers; (v) the use of investor funds; (vi) investor account balances; and

(vii) the source of investor returns" all material); *SEC v. Weintraub*, 2011 WL 6935280, *5 (S.D. Fla. Dec. 30, 2011) ("Courts have repeatedly found the failure to disclose bankruptcies and court orders-such as those entered against [defendant]-to be material omissions in securities fraud enforcement actions."); *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").

Fortenberry's half-truths and omissions regarding how he intended to and did use Premier's money for his own personal benefit were also material. No investor knew that Fortenberry was using his investment for his own personal living expenses and entertainment [Am. Tr. 66:17-25, 718:20-24], but 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).

Fortenberry argues that "[t]he total mix of information made available by Mr. Fortenberry and Premier to actual and prospective investors in Premier was <u>all information</u>." [Res. Br. at 12; emphasis in original, internal quotations omitted.] But

it is hard to see how Fortenberry's numerous misstatements and omissions described above and in the Division's opening brief, including the fraudulent account statements to Anderson with fictitious earnings, constitutes "all information." The Court should reject this and Fortenberry's other post-hoc attempts to justify his fraud.

IV. FORTENBERRY IS AN "INVESTMENT ADVISER" AND SUBJECT TO THE ADVISERS ACT

Fortenberry's sole argument in response to the Division's Advisers Act claims is that he is not an "investment adviser" because he had "sole discretion in making Premier [i]nvestments." [Res. Br. at 16.] In casting the argument in this way, Fortenberry appears to misunderstand what it means to be an "investment adviser."

Management of the fund's investments for compensation is all the Division must prove to subject Fortenberry to the Advisers Act. *See Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1977) ("general partners as persons who managed the funds of others for compensation are 'investment advisers' within the meaning of the statute"); *see also, United States v. Onsa*, 523 Fed. Appx. 63, 64-65 (2d Cir. 2013) (reaffirming *Abrahamson*'s holding that a general partner of an investment fund who managed the partnership's investments and received a portion of the firm's profits as compensation, falls within the definition of an "investment adviser"); *SEC v. Juno Mother Earth Asset Mgmt., LLC*, 2012 WL 685302, *5-6 (S.D.N.Y., Mar. 2, 2012) (the term "investment adviser" "reach[es] all persons who manage 'the funds of others for compensation.'"); *SEC v. Saltzman*, 127 F. Supp. 2d 660, 669 (E.D. Pa. 2000) ("Congress intended the Act to

cover not only those who make recommendations to their clients, but also those who wield management powers over their clients' money."). Because Fortenberry admits that he had "sole discretion with respect to investments" [Res. Br. at 15] and does not dispute that he was compensated by the fund [*Id.* at 12-14], the Division has proven that Fortenberry is an "investment adviser" and subject to the antifraud provisions of the Advisers Act.

Omitting any discussion of the relevant case law, Fortenberry simply cites *Wang v. Gordon*, 715 F.2d 1187 (7th Cir. 1983), as if the existence of the decision absolves him of liability. [Res. Br. at 16.] It does not, and *Wang* does not say want Fortenberry wants it to say. *Wang* concerned a partnership that existed to own and operate an apartment building, and the general partner was given a 5% commission on the sale of the building. 715 F.2d at 1192-1193. On those specific facts, the Seventh Circuit found that the general partner was not an "investment adviser" under the Advisers Act. *Id.* In so finding, the *Wang* Court did not rule, as Fortenberry suggests, that general partners are never "investment advisers." Indeed, the *Wang* Court went to lengths to limit its holding to the facts and to distinguish the case from *Abrahamson*, cited above, wherein the Second Circuit concluded that a general partner of a partnership formed to invest in securities *was* an "investment adviser." *Id.* at 1192; *see also Saltzman*, 127 F. Supp. 2d at 669-670 (rejecting a similar *Wang*-based argument). In sum, *Wang* is inapposite. Premier Investment Fund, L.P. was, as in *Abrahamson*, a partnership formed by Fortenberry to invest in securities.

Like the defendant in *Abrahamson*, Fortenberry admits that he advised Premier "by exercising control over what purchases and sales [were] made with [its] funds." *Abrahamson*, 568 F.2d at 871. He is, therefore, an "investment adviser" and subject to and liable under the Advisers Act.

V. THE COURT SHOULD AGAIN REJECT FORTENBERRY'S 180-DAY DEADLINE ARGUMENT

Finally, Fortenberry devotes much of his brief to rehashing an argument that the Court has already rejected – that "[t]his proceeding should be dismissed" because "the [OIP] was filed more than 180 days after the [E]nforcement [D]ivision provided Respondent a Wells Notice." [Res. Br. at 1.][10] Again, this argument fails on both the law and the facts.

A. 15 U.S.C. § 78d-5 Does Not Limit The Division's Ability To Prosecute This Action

Even assuming (counterfactually) that the Division did not comply with the 180-day time period, Fortenberry's argument fails because he has mischaracterized the statute on which the argument purports to be based. Fortenberry repeatedly refers to 15 U.S.C. § 78d-5 as a "statute of limitations," but such a description is inaccurate. As the Commission and several district courts have previously held, 15 U.S.C. § 78d-5 "prescribe[s] internal time periods for federal agency action." *In the Matter of Montford*

[10] The statute upon which Fortenberry bases this argument is alternatively referred to as Dodd-Frank Act Section 929U, Exchange Act Section 4(E), and 15 U.S.C. § 78d-5. For consistency, the Division will refer to the statute only by the latter.

& Co., Investment Advisers Act Rel. No. 3829, 2014 WL 1744130, *11 (May 2, 2014). It is not a statute of limitations. *See, e.g., id.; SEC v. NIR Group, LLC*, 2013 WL 5288962, *5 (E.D.N.Y. Mar. 24, 2013) ("Every relevant authority supports the conclusion that expiration of the 180-day deadline imposed by section 929U does not create a jurisdictional bar to SEC enforcement actions."); *SEC v. Levin*, 2013 WL 594736, *13 (S.D. Fla. Feb. 13, 2013) ("Section 4E imposes only an internal deadline on the SEC, not a private right to be free from agency action occurring beyond the internal deadline."); *cf., SEC v. Yorkville Advisors, LLC*, 2013 WL 3989054, *1 (S.D.N.Y. Aug. 2, 2013) ("Defendants also argue that the complaint must be dismissed under Rule 12(b)(1) for failure to plead compliance with Section 929U of the Dodd Frank Act. That argument is unavailing.").

Because 15 U.S.C. § 78d-5 is not a statute of limitation, it "does not create a jurisdictional bar to SEC enforcement actions." *NIR Group*, 2013 WL 5288962 at*5. The statute simply does not "impose a limit on the Commission's jurisdiction to bring these administrative proceedings." *Montford*, 2014 WL 1744130 at *9. And for this reason, Fortenberry's arguments in favor of dismissal should be rejected.

B. The OIP Was Also Timely Filed

If the Court looks beyond his argument's legal failings and considers the material submitted in response to Fortenberry's earlier (and largely verbatim) Motion for Summary Disposition, his argument still fails because its factual premise is also wrong. While more than 180 days passed between the Division's Wells notice and the

initiation of this proceeding, the 180-day deadline contained in 15 U.S.C. § 78d-5(a)(1) was extended, as is specifically authorized by the statute. *See* 15 U.S.C. § 78d-5(a)(2) ("if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex ... the Director of the Division of Enforcement of the Commission or the Director's designee may ... extend such deadline as needed for one additional 180-day period"). On December 13, 2013, the Division sought and received an extension of the deadline, until May 2, 2014.[11] While Fortenberry appears to disagree with the Director's designee's ultimate conclusion, the Director's designee found this matter "sufficiently complex such that a determination regarding the filing of an action against [Fortenberry] cannot be completed within the deadline specified in [15 U.S.C. § 78d-5(a)(1)]."[12]

The OIP was issued on April 28, 2014, well within the as-extended deadline. Because this action was timely filed, the argument should be rejected.

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[11] *See* Declaration of Corey A. Schuster in Support of the Division's Memorandum in Opposition to Respondent's Motion for Summary Disposition, filed on May 19, 2014, at ¶¶ 21-31.

[12] As the Commission recently noted, 15 U.S.C. § 78d-5 "commits the decision to extend the deadline to the sole discretion of the Division Director. There is no statutory requirement that the Director articulate the reasoning or basis for granting the extension...." *Montford*, 2014 WL 1744130 at *13.

CONCLUSION

As set forth herein and in the Division's Post-Hearing Brief, Fortenberry has violated the antifraud provisions of the Securities Act, the Exchange Act, and the Advisers Act. The Court should find him so liable and impose a cease-and-desist order for each of the violations alleged against Fortenberry, a permanent collateral bar, an order of disgorgement, prejudgment interest, and monetary penalties of $1,500,000.

Dated: December 12, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
Rule of Practice 450(d)

I hereby certify that the foregoing brief complies with the requirements of Commission Rule of Practice 450(c) because this brief contains 6,925 words, exclusive of pages containing the table of contents, table of authorities, certificates of service and compliance, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits, but inclusive of pleadings incorporated by reference.

Counsel for Division of Enforcement