INITIAL DECISION RELEASE NO. 328
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12288

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

In the Matter of	:	
	:	
DAVID HENRY DISRAELI and	:	INITIAL DECISION
LIFEPLAN ASSOCIATES, INC.	:	March 5, 2007
	:	

APPEARANCES: Marshall Gandy for the Division of Enforcement, Securities and Exchange Commission

J. Randle Henderson for David Henry Disraeli and Lifeplan Associates, Inc.

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

BACKGROUND

The Securities and Exchange Commission (SEC or Commission) initiated this proceeding on May 5, 2006, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Sections 15(b)(6) and 21C of the Securities Exchange Act of 1934 (Exchange Act), and Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act). The Order Instituting Proceedings (OIP) alleged that from about September 2003, to about December 2003, and also from about December 2004 to about March 2005 (Offering Period), Respondents David Henry Disraeli (Disraeli) willfully violated, and Lifeplan Associates, Inc. (Lifeplan[1]), violated Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder. Additionally, the OIP charges Disraeli with willfully violating Advisers Act Sections 203A, 204, 206(1), 206(2), 206(4), and 207 and several rules thereunder by failing to make required disclosures to his advisory clients and failing to maintain required books and records regarding his investment advisory business. Respondents filed an Answer to the OIP on May 26, 2006.

Respondent Disraeli and three additional witnesses testified at a public hearing held in Austin, Texas, on August 15-16, 2006. At the hearing, I admitted into evidence a joint stipulation

[1] The short cite "Lifeplan" also includes any unincorporated entity that Disraeli used to conduct business.

and seventy-five exhibits offered by the Division of Enforcement (Division) and Respondents. The final brief was submitted on November 6, 2006.[2]

ISSUES

Did Disraeli and Lifeplan violate the antifraud provisions of the securities statutes and Exchange Act Rule 10b-5?

Did Disraeli violate the registration provisions and the recordkeeping provisions of the Advisers Act and Advisers Act rules?

If violations did occur, what, if any, sanctions are appropriate in the public interest?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

My findings and conclusions are based on the entire record and my observation of the witnesses' demeanor. I have applied preponderance of the evidence to determine whether the Division has proven the allegations in the OIP. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered all the arguments and proposed findings and conclusions raised by the parties and reject those inconsistent with this Initial Decision.

Disraeli

Disraeli, a 43-year-old resident of Austin, Texas, attended a junior college for one year before entering the securities industry as a registered representative in 1985. (Tr. 33, 195; Stips. ¶¶ I.A, II.4.) I take official notice that the Central Registration Depository (CRD) at the National Association of Securities Dealers' (NASD) Web site shows the following employment history for Disraeli: August 2003 to April 2004, First Discount Brokerage, Inc.; August 2002 to November 2002, Venture Interests, Inc.; March 2001 to November 2002, James Wheeler & Co.; February 1999 to September 2001, Zisto.com/Trading Technologies; May 1998 to February 1999, James Wheeler & Co., Investments, Inc.; February 1996 to January 1998, Securities Service Network, Inc.; January 1992 to September 2003, Disraeli & Associates; April 2006 to the present, David Henry Disraeli DBA Lifeplan.[3] 17 C.F.R. § 201.323. Disraeli holds Series 6, 7, 22, 24, and 63 licenses from the NASD. (Tr. 11; Stips. ¶¶ I.A, II.4.) Disraeli earned the

[2] The parties filed a Joint Statement of Admitted and Stipulated Facts (Stipulations) on August 11, 2006. See 17 C.F.R. § 201.324. Citations to the Stipulations are referred to as (Stip. ___.). Citations to Respondents' Answer are noted as (Answer __.). Citations to the hearing transcript are noted as (Tr. ___.). Citations to the Division's and Respondents' exhibits are noted as (Div. Ex. ___ at ___.) and (Resp. Ex. __ at __.), respectively. Citations to the Division's and Respondents' posthearing briefs are noted as (Div. Brief at ___.) and (Resp. Brief at ___.), respectively.

[3] Disraeli testified that he was associated with broker-dealers Dean Witter in 1985-86, Merrill Lynch in 1992, and James Wheeler & Company (James Wheeler) in 2000. (Tr. 33, 42, 127.)

designation Certified Financial Planner in 1994 following studies at the College of Financial Planning in Denver, Colorado, from 1989 to 1994. (Tr. 34; Div. Exs. 14 at 10, 62 at 8.)

Disraeli was registered with the Commission as an investment adviser from November 1993 until June 1997, when he no longer qualified for Commission registration as an investment adviser under the National Securities Market Improvement Act of 1996 (NSMIA), Pub. L. No. 104-290, 110 Stat. 3416. (Tr. 34; Stips. ¶¶ I.A, II.5.) NSMIA added Section 203A to the Advisers Act. (Tr. 34-35.) Following NSMIA's federal-state regulatory framework, Disraeli registered as an investment adviser with the Texas State Securities Board (TSSB) within ninety days of when he was no longer eligible for federal registration. (Tr. 35.) The State of Texas requires an annual registration renewal by December 31 of each year. Disraeli received a registration renewal slip but chose not to renew his registration with the TSSB on December 31, 2000.[4] (Tr. 36, 42-43; Stip. ¶ I.A.) Disraeli conducted an unregistered investment advisory business in the State of Texas from January 1, 2001, through November 2002.[5] (Tr. 36-37.)

On August 2, 2002, the United States Department of Treasury, Internal Revenue Service (IRS), filed a Notice of Federal Tax Lien (Tax Lien) in Travis County, Texas, placing a lien on all property and rights belonging to Disraeli for unpaid taxes, additional penalties, and costs that may accrue. (Div. Exs. 1, 3 at 1-2.) The Tax Lien stated that Disraeli failed to pay federal income tax in the amount of $39,384.93 for the tax years 1999 and 2000. (Tr. 40; Div. Exs. 1, 3 at 1-2). The IRS released the Tax Lien on November 4, 2003, after Disraeli paid $9,364 in a "negotiated compromise." (Tr. 55; Div. Ex. 1 at 3.)

Section 12(B) of the Texas Securities Act requires that a person acting as an advisory representative of an investment adviser with clients in Texas register as an advisory representative with the TSSB. (Tr. 54; Stip. ¶ I.F.) Section 12(A) of the Texas Securities Act makes a similar requirement for persons offering and selling securities. On November 6, 2002, the TSSB issued an Emergency Cease-and-Desist Order (Emergency Order), against Disraeli for conduct relating to his offer and sale of unregistered securities in the State of Texas. David Henry Disraeli d/b/a Disraeli and Associates, Order No. CDO-1483. (Tr. 40; Div. Ex. 2.) The Emergency Order found that Disraeli engaged in fraud in the offer and sale of securities where he misrepresented that he was an investment adviser when Disraeli was neither registered nor "notice-filed in Texas" at the time. (Tr. 40; Div. Ex. 2 at 4.)

On April 2, 2003, the TSSB converted the Emergency Order to a Cease-and-Desist Order, No. CDO-1504, to which Disraeli consented on a neither-admit-nor-deny basis. (Answer; Tr. 41, 98; Stip. ¶ I.C; Div. Ex. 3). The Cease-and-Desist Order required Disraeli to cease and

[4] Disraeli claims that: (1) he was in a period of family crisis; and (2) he intended to transfer the assets he was managing to a fee-only wrap program at James Wheeler, where he was a registered principal, that would have eliminated the need for him to register as an investment adviser, but he failed to act. (Tr. 42-44.)

[5] Disraeli estimates that he had less than twenty clients, about $4 million under management, and investment advisory earnings of approximately $90,000 during the time period he operated as an unregistered investment adviser. (Tr. 37.)

desist from: (1) offering unregistered retirement community securities;[6] (2) conducting fraudulent offerings; and (3) rendering services as an investment adviser without registering as such.

Disraeli believed that violating the Cease-and-Desist Order would be a felony. (Tr. 82.) Disraeli obtained a power of attorney from each of his advisory clients for T.D. Waterhouse, where he had a custodial account, and continued to manage twenty accounts with $3.5 to $4 million in assets. However, in September 2002, he stopped charging his clients a management fee, and for almost a year, Disraeli's only sources of income were life insurance, annuities, and long-term care insurance. (Tr. 82-84.)

To continue managing accounts, Disraeli used his principal's license and became affiliated with a broker-dealer where he moved his accounts. (Tr. 85-86.) He believed that as a registered representative he could conduct a "fee-only wrap program"; the client would pay him a flat fee for managing the assets in the account and the commissions would go to the broker-dealer. (Tr. 86.) Disraeli filed a Form U-4 to become a registered principal and claims he was preparing to also file a Form ADV with the Commission.[7] (Tr. 86.) On August 13, 2003, Disraeli applied to re-register with the TSSB to become the registered representative of First Discount Brokerage, Inc., a Florida-based broker-dealer. The TSSB indicated in a letter dated November 12, 2003, that it would oppose his application based on his disciplinary history. (Stips. ¶¶ I.D., II.8, 10; Div. Ex. 6.) Disraeli requested a hearing on the matter on September 19, 2003, but later withdrew the application. (Answer; Tr. 45-46; Stips. ¶¶ I.H., II.8, 10; Div. Ex. 6.)

Lifeplan

Disraeli incorporated Lifeplan in Texas on September 30, 2003, as the successor to Disraeli & Associates. (Stips. ¶¶ I.B, II.9; Div. Ex. 13 at 2.) Disraeli holds eighty percent of Lifeplan's outstanding stock and approximately eleven of Disraeli's advisory clients hold the remaining twenty percent. (Tr. 46; Stips. ¶¶ I.B, II.3.) Lifeplan's address is the same as Disraeli's home address in Austin, Texas, and Disraeli is the sole officer, board member, and

[6] Charterhouse at Horseshoe Bay (Charterhouse) was purportedly "a proposed retirement community consisting of ten residential buildings that would be leased to senior citizens or other retired persons." (Div. Ex. 3 at 2.) Specifically, the TSSB ordered Disraeli to cease and desist from: (1) offering Charterhouse Interests until the securities were registered with the Securities Commissioner or deemed to be exempt; (2) offering Charterhouse Interests by statements that are materially misleading or otherwise likely to deceive the public; and (3) rendering investment advisory services in Texas until he was registered or "notice-filed with the Securities Commission" or an available exemption was utilized. (Div. Ex. 3 at 5.)

[7] Form ADV Part 1 is used to register investment advisers with the Commission. Form ADV Part 2 is used to disclose their practices to clients and prospective clients. Clarke T. Blizzard, 85 SEC Docket 4499, 4502 n.9 (July 29, 2005).

employee.[8] (Tr. 46-47, 54, 158; Stips. ¶¶ I.B, II.9.) Lifeplan never held shareholder meetings but Disraeli represents that Lifeplan shareholders had access to the books and records. (Tr. 158.)

On October 8, 2003, Disraeli filed a Form ADV with the Commission by which he registered Lifeplan as an investment adviser.[9] (Answer; Tr. 50; Stips. ¶¶ I.E, II.11; Div. Ex. 5.) Item 2 of the Form ADV provides a number of questions to determine whether an applicant is eligible to register with the Commission. Disraeli checked the statement that the applicant was "a newly formed adviser relying on rule 203A-2(d) because [he expected] to be eligible for SEC registration within 120 days." (Div. Ex. 5, Item 2.) Disraeli indicated in the Form ADV that Lifeplan had twenty-five accounts and managed $4 million in assets. (Div. Ex. 5, Item 5(f).)

On October 21, 2003, Disraeli filed with the TSSB to register as an advisory representative with Lifeplan. (Tr. 54; Stips. ¶¶ I.F, II.12.) By letter dated, November 12, 2003, the TSSB informed Disraeli that based on his disciplinary history it would oppose his application to register as Lifeplan's representative. (Answer; Tr. 54-55; Stips. ¶¶ I.F, II.12; Div. Ex. 6.)

On November 13, 2003, Disraeli filed a Form ADV amendment for Lifeplan to substitute Disraeli, operating as a sole proprietorship, as the registered adviser.[10] (Tr. 60; Stip. ¶ I.G; Div. Ex. 7.) Disraeli represented again that the applicant was "a newly formed adviser relying on rule 203A-2(d) because [he expected] to be eligible for SEC registration within 120 days," and the applicant had twenty-five accounts and managed $4 million in assets. (Div. Ex. 5, Items 2, 5(f).) The name and corresponding organization form are the only changes that the amendment, filed November 13, 2003, made to the original Form ADV, filed on October 8, 2003. (Div. Exs. 5, 7.) Disraeli believed that the 120-day period began to run anew when he filed the amendment. (Tr. 66.)

On February 11, 2004, Disraeli entered a written undertaking with the TSSB that resolved TSSB's opposition to Disraeli's: (1) August 13, 2003, registration to act as an agent of First Discount Brokerage, Inc.; and (2) October 21, 2003, registration to act as an investment adviser representative of Lifeplan. (Answer; Tr. 62-63; Stips. ¶¶ I.H, II.14; Div. Ex. 8.) The written undertaking required Disraeli to withdraw all his applications pending before the TSSB, refrain from re-applying for eighteen months, and cease offering advisory services or acting as a

[8] Lifeplan's Form ADV filed March 31, 2005, shows 609 The High Road, Austin, Texas, a private residence, as its principal place of business. (Div. Ex. 11.) This address is Disraeli's address on the OIP Service List.

[9] Lifeplan's Form ADV is dated October 8, 2003; the Stipulation states October 13, 2003. (Stip. ¶ II.11; Div. Ex. 5.)

[10] Disraeli believed that he could operate in Texas without registering with the TSSB by changing the registrant from a corporation to a sole proprietorship, which he did in the November 13, 2003, amended Form ADV. (Tr. 61-62.)

registered representative until he was registered or deemed exempt from registration.[11] (Tr. 63; Stips. ¶¶ I.H, II.14.) After he entered the written undertaking, the only way Disraeli could continue operating as an investment adviser in Texas was to be properly registered federally with the Commission. (Tr. 64, 67.)

On February 13, 2004, Disraeli filed an amended Form ADV, which represented in the section that dealt with the ability to register that "David Henry Disraeli DBA Lifeplan Associsates (sic)" was "a multi-state adviser relying on rule 203A-2(e)" and that:

> I have reviewed the applicable state and federal laws and have concluded that I am required by the laws of 30 or more states to register as an investment adviser with the securities authorities in those states.
>
> I undertake to withdraw from SEC registration if I file an amendment to this registration indicating that I would be required by the laws of fewer than 25 states to register as an investment adviser with the securities authorities of those states.

(Stips. ¶¶ I.I, II.15; Div. Ex. 9, Items 2, Section 2.A at 4, 24.) Disraeli made the same representations in Form ADV amendments he filed on July 1, 2004, March 31, 2005, and November 9, 2005. (Stips. ¶¶ I.I, II.15; Div. Exs. 10, 11.)

In September 2005, after the TSSB's eighteen-month suspension expired, Disraeli filed a second application with the TSSB to become associated with First Discount Brokerage, which the TSSB is opposing. That application was pending as of August 2006.[12] (Tr. 59; Stips. ¶¶ II.8, 10; Div. Ex. 8.) In August 2006, Disraeli held NASD licenses: Series 6, Investment Company Products/Variable Contracts Limited Representative; 7, General Securities Representative; 22, Direct Participation Programs Limited Representative; 24, General Securities Principal; and 63, Uniform Securities Agent State Law Licenses.[13] (Stips. ¶¶ I.A, II.4.)

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[11] Disraeli understood that the TSSB would not consider any prior disciplinary history after August 2005, if he withdrew both applications and agreed not to reapply for eighteen months. (Tr. 63.) The written undertaking provided that after eighteen months the TSSB would not consider adversely any of the allegations in the contested case. (Div. Ex. 8.)

[12] Respondents' counsel acknowledged that "it is very clear that" the State of Texas does not want Disraeli doing business as an investment adviser or a registered representative in that state. (Tr. 24.) Respondents' counsel opined that the State of Texas only restricts applications for eighteen months. After that, it opposes re-registration, which is in effect a denial. (Tr. 24-27.)

[13] I take official notice of information located at the NASD's Web site at: http://www.nasd.com/RegistrationQualifications/BrokerGuidanceResponsibility/Qualifications. 17 C.F.R. § 201.323.

Pursuant to written agreements, Lifeplan receives a fee equal to 1.5 percent of a client's assets under management. (Stip. ¶ II.25.) Disraeli received more than $500 in fees more than six months in advance. (Stip. ¶ I.Q.)

Lifeplan's Private Offering

During the Offering Period, Disraeli offered and sold 220,000 shares of Lifeplan common stock at $0.50 per share in a private offering (Offering) to nine to eleven of his investment advisory clients.[14] (Stips. ¶¶ I.K, II.16) Disraeli had these clients for at least ten years; they were friends and family members. (Tr. 101-03.) The Offering, which had a stated minimum of $50,000 and a minimum subscription of $5,000, raised a total of $105,000.[15] (Answer; Tr. 100; Stips. ¶¶ I.K, II.16; Div. Ex. 13.) According to Disraeli, he agreed to give his shareholders who invested in the Offering "twenty percent of their investment in cash each year." (Tr. 196-97.) At least one investor believed the Offering had a dividend feature. (Tr. 221.) The first purchase in the Offering occurred on September 30, 2003, and consisted of 60,000 shares for $30,000. (Div. Exs. 17, 20 at BAC000001.)

The Offering proceeds were deposited in Lifeplan's business checking account at Bank of America (Lifeplan account). (Div. Exs. 17, 20 at BAC 000001.) Disraeli and William H. Sellstrom, III, Lifeplan's executive vice president, opened the Lifeplan account on October 2, 2003. (Div. Ex. 20 at BAC 000108.) The account received the first wire transfer deposit of $30,000 on October 8, 2003. (Div. Ex. 20.) Disraeli immediately began using the offering proceeds for his personal needs with a "loan" of $12,000 on October 9, 2003, that he used, in part, to pay the Tax Lien. (Stip. ¶ I.O; Div. Exs. 19, 20.) As of December 31, 2003, Disraeli had transferred $90,000 of Offering proceeds from Lifeplan's account, including $83,500 directly transferred into his personal bank account. (Answer; Stip. ¶ I.P.) Disraeli drafted a document on January 9, 2005, the day before a scheduled books-and-records examination by OCIE that shows loans to him from Lifeplan beginning on October 9, 2003, through January 5, 2004, totaling $84,550.[16] (Tr. 58, 71; Div. Ex. 19.)

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[14] The Stipulations show eleven advisory clients invested in the Offering. (Stips. ¶¶ I.K, II.16.) The list of Lifeplan shareholders has nine names. (Div. Ex. 17.) Disraeli testified that twelve people were solicited and eleven subscribed. (Tr. 100.) The Commission's Office of Compliance Inspections and Examinations (OCIE) examiners found that nine advisory clients had invested in the Offering. (Tr. 188-89; Resp. Ex. 5 at 9.)

[15] $105,000 is less than 220,000 shares at $0.50, a stipulated fact. (Stips. ¶¶ I.K, II.16.) And more than $100,000, which the Offering memoranda stated was the maximum amount to be raised, another stipulated fact. (Stips. ¶¶ I.M, II.18.) In addition, an exhibit states that the Offering raised $95,000. (Div. Ex. 32.)

[16] On July 13, 2005, Disraeli informed the Division that $70,961 of the loan was for working capital, and $13,339 was for management fees. He also stated that he had approximately $48,000 in un-reimbursed expenses, that he had paid off $14,429 on the loan, and that he had taken salary from "inception to December 31, 2004." (Div. Ex. 23.)

An undated personal promissory note to Lifeplan in the sum of $84,300 signed by Disraeli states that interest began to accrue on November 10, 2003 (Disraeli Loan). (Tr. 71; Div. Ex. 18.) The principal, plus eight percent annual interest accruing from November 10, 2003, was payable on November 9, 2006, in a single balloon payment of $106,193.[17] (Answer; Tr. 157; Stip. ¶ I.R.) Disraeli claimed in July 2005, and at the hearing on August 15, 2006, that he had repaid approximately $20,000 on the loan. (Tr. 73-74; Div. Ex. 23.)

As part of his efforts to offer and sell securities in the Offering, Disraeli made disclosure in two written documents. (Answer; Stips. ¶¶ I.L, II.17; Div. Exs. 13-14.) Disraeli prepared the Summary Memorandum dated October 21, 2003, which is two double-sided pages. (Div. Ex. 13.) A law firm prepared the Final Memorandum dated December 9, 2003, which is eighteen pages and four appendices of five pages. (Tr. 109-10; Div. Ex. 14.)

Both memoranda outlined essentially the same business plan—that "Lifeplan would apply the Offering proceeds to the operation of various wealth management services and ventures, including the operation of the advisory business and the creation of a limited partnership that would purchase and collect distressed consumer debt." (Stips. ¶¶ I.L, II.17.) Both memoranda stated that a maximum of $100,000 would be raised and that Lifeplan would apply the Offering proceeds to administrative and start-up expenses and working capital. (Stips. ¶¶ I.M, II.18.)

Disraeli issued the Final Memorandum on the advice of a law firm because he was concerned that regulatory authorities might decide that he had not fully informed investors about the use of Offering proceeds. (Tr. 106-10.) The Final Memorandum stated that (1) the business would be "limited to a single small geographic region around metropolitan Austin, Texas"; and (2) Disraeli's investment adviser registration with the Commission would be "initially for 120 days, at which time Mr. Disraeli [would] meet one of six criteria for registration. Otherwise he [would be required to] withdraw his registrations and transition to the states in which he operates." (Div. Ex. 14 at 2, 14.) The Final Memorandum stated that Disraeli fully expected "to meet one or more of the criteria set by the SEC" and listed the following applicable criteria:

1. Advisor has at least $25,000,000 in assets.
2. Advisor advises a mutual fund (Registered Investment Company).
3. Advisor would otherwise be required to register in at least 30 states.
4. Advisor is a statistical rating service (Standard & Poor's, Moody's).
5. Advisor has pension clients with a total of $50,000 in assets.
6. Advisor is under common control of another advisory that is registered with the Commission.

(Div. Ex. 14 at 5.)

[17] Nothing was submitted post hearing to show that Disraeli paid the note and interest due November 9, 2006.

Both memoranda disclosed that Disraeli was the subject of the April 2, 2003, TSSB Cease-and-Desist Order.[18] (Stip. ¶ II.17; Div. Exs. 13 at 3, 14 at 12.) The Final Memorandum also acknowledged some risk that Disraeli might not qualify for Commission registration as an investment adviser on a long-term basis and that in such an event, Disraeli would be forced to register the company with the State of Texas, which would likely oppose the registration. (Stip. ¶ II.17; Div. Exs. 14 at 5, 12.) The Final Memorandum further warned that if Disraeli could not continue his Commission registration, the Lifeplan investors would "lose all the start-up costs and lose the opportunity to participate in [Lifeplan's] business plans." (Stip. ¶ II.17; Div. Ex. 14 at 17.)

Both memoranda represented that Disraeli would receive no salary from Lifeplan for his services[19] and that Disraeli's compensation would be calculated based on net profit, split pro-rata, between Disraeli and other Lifeplan shareholders, according to their ownership of Lifeplan.[20] (Answer; Stips. ¶¶ I.N, II.19; Div. Ex. 13 at 2; Div. Ex. 14 at 2.) The Summary Memorandum further stated that the profits would be calculated and paid quarterly. (Answer; Stips. ¶¶ I.N, II.19; Div. Exs. 13 at 2, 14 at 2.)

The Final Memorandum further specified that Lifeplan would hold and segregate the Offering proceeds, for return to investors, until reaching a $50,000 minimum, which had been reached at the delivery of the Final Memorandum. (Answer; Stips. ¶¶ I.M, II.18.) Disraeli believed that the Offering required no written disclosure. (Tr. 108.) He provided the Summary Memorandum as "an extra layer of safety." (Tr. 108-09.) Disraeli did not consider it fraudulent to omit informing investors that the funds were being used for his personal use because investors "expected, through conversations and discussions, that . . . some of the money, perhaps not all of it, but some of the money was going to flow directly to me, and so there was no need in including any kind of such statement in the [Summary Memorandum]." (Tr. 109.)

After consulting with an attorney, Disraeli attached a Rescission Agreement to the Final Memorandum, offering those who had invested rescission rights and reimbursement of their investment (plus interest) for Lifeplan's failure "to provide such information to Subscriber to

[18] The Cease-and-Desist Order mentions the Tax Lien. (Tr. 116; Div. Ex. 3.)

[19] In November 2003, Disraeli also individually executed an Assignment and Employment Agreement irrevocably assigning all future income and benefits from his investment advisory clients to Lifeplan. (Div. Ex. 15.) In exchange, Lifeplan, executed by Disraeli, agreed to "provide Mr. Disraeli with office space, administrative support, equipment, or any other business need as may be deemed appropriate." (Div. Ex. 15.) The agreement again stated that Disraeli would not be receiving any salary from Lifeplan. (Div. Ex. 15.)

[20] By way of example, the Final Memorandum explains: "if [Lifeplan] distributes $80,000 in a given year, the profits will be split between Mr. Disraeli and the shareholders. Based on the current capitalization, Mr. Disraeli would receive $64,000 in distributions and the minority shareholders would receive $16,000." (Div. Ex. 14 at 2.)

enable Subscriber to become a 'well-informed' purchaser of Shares."[21] (Tr. 114, 219; Resp. Ex. 7.) The Rescission Agreement did not describe what information was misleading or omitted, but stated that previous information was incomplete and that the Final Memorandum now "does not contain an untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." (Resp. Ex. 7.) There is no evidence that any investor requested rescission. (Tr. 111; Div. Exs. 45, 47-48, 52, 55, 57, 60.)

Five investors expected that Disraeli would use the Offering proceeds in any way he saw fit,[22] while three investors, Frank B. Cross, Ronnie Gene Marek (Marek), and Marek's wife, would not have invested in Lifeplan if they had known that Disraeli was going to use the Offering proceeds for his personal expenses and a loan to himself. (Div. Exs. 44, 46, 49, 51, 54, 56, 58-59.)

Two investors testified at the hearing: Marek and Mallouf, a resident of Arlington, Texas, who owns MRC Consulting, which conducts regulatory compliance in the insurance industry.[23] (Tr. 209.) Mallouf began investing with Disraeli ten to twelve years ago when he rolled his 401(k) plan with about $250,000 into an IRA account and gave Disraeli discretionary authority over that account. (Tr. 209.)

Mallouf's IRA account purchased 20,000 Lifeplan shares on October 3, 2003, for $10,000. (Tr. 217-18; Div. Ex. 17.) Mallouf became aware of the Disraeli Loan after the fact; however, he was not disturbed that Disraeli loaned himself $84,300 from the Offering proceeds without notifying investors. Mallouf expected Disraeli would use the Offering proceeds for personal operating expenses. (Tr. 228; Div. Ex. 56.)

In his investigative testimony, Mallouf stated: "Am I going to say categorically that I would not have invested in Lifeplan if I had known this? I can't say that, because it . . . that wasn't the way it happened. Okay? Can I say this disturbs me? Yes. Okay? But that's as much as I can say." (Tr. 230; Div. Ex. 66 at 121-22.) Later, Mallouf testified that he would have probably loaned Disraeli $10,000, if Disraeli had asked him; instead, he "was willing to invest in Lifeplan because . . . [he] was willing to say, Okay, I can see where the risks are going on this, and I'm willing to risk $10,000 of my money to help him. And that's really the way I looked at it. So . . and if it goes in a hole, then I've only lost $10,000." (Tr. 234; Div. Ex. 66 at 123.) Mallouf believes that he has been paid dividends and they have been applied to Disraeli's management fee. (Tr. 221, 226.) Mallouf signed an affidavit on August 11, 2005, and a

[21] All but two people, who invested much later, received the rescission offer. (Tr. 113-14.)

[22] These investors were Richard D. Bass, E. William Behrens, Allan S. Disraeli, M.D., Nicholas R. Mallouf (Mallouf), and Johnnie L. Reynolds.

[23] Mallouf has business and accounting degrees from the University of Texas at Arlington. He has been a certified public accountant (CPA) for twenty years, and in addition, he is a certified information systems auditor. (Tr. 232.)

"Ratification and Release" on September 7, 2005, in support of Disraeli. (Div. Exs. 56-57.) Mallouf continues to own shares in Lifeplan. (Tr. 221.)

Marek, a senior engineer at Lockheed Aircraft and a resident of Benbrook, Texas, and his wife have used Disraeli as their investment adviser from about 1985 or 1986. (Tr. 126-28.) Disraeli approached the Mareks to become shareholders of Lifeplan. The Mareks purchased 20,000 Lifeplan shares for $10,000 on October 16, 2003. (Tr. 128-29; Div. Ex. 17.) When he purchased shares of Lifeplan, Marek did not know that Disraeli had already used $21,300 of the Offering proceeds for his personal expenses. (Tr. 129; Div. Ex. 19.)

Marek learned from the Commission's staff in the Spring 2005 that by January 5, 2004, Disraeli had loaned himself $84,300 from the Offering proceeds. (Tr. 129, 147.) Marek considered Disraeli's borrowings from the Offering proceeds important information. Marek thought his Lifeplan investment would be going toward "growing the business, which would be just typical things like renting office space, advertising, computers . . . and not for major personal effects."[24] (Tr. 129-30.) Marek would not have invested in Lifeplan if he had known of the Disraeli Loan. (Tr. 129.) Marek is no longer a client of Disraeli and does not want Disraeli involved with his "financial affairs in any respect." (Tr. 144, 146.)

Marek testified that he and his wife have not received a return of their $10,000 investment or any return on the investment. (Tr. 130.) According to Respondents' counsel, investors received "approximately fifty percent return in the form of a dividend, credited against management fees payable," and the Mareks' dividend was suspended because they were no longer Disraeli clients. (Tr. 195-96.) According to Disraeli, the Mareks "instead of me writing the Mareks a $2,000 check," they "had accumulated $3,700 in offsets against their management fees, which is 100 percent identical to me writing them a check and them turning around and writing me a check." (Tr. 197.) No investor has received any return in the form of cash or check because Disraeli claims the management fees offset the return for each investor and no one has requested a check. (Tr. 197.)

Lifeplan's Books and Records

The Commission's OCIE in Fort Worth, Texas, reviewed all the Forms ADV filed in its district in 2004 and concluded that Lifeplan posed a high risk to investors. (Tr. 155, 175-76.) Linda Yoder (Yoder), a staff accountant in OCIE, conducted an on-site cause examination of Lifeplan in Austin, Texas, from January 10 to January 14, 2005.[25] (Tr. 153, 155, 175.) Disraeli

[24] In his investigative deposition testimony, Marek stated that he would "probably not" have invested in Lifeplan if he knew of Disraeli's personal loan from the Offering proceeds. (Tr. 136-39.) Marek is a cautious, thoughtful person. Based on my observation of Marek's demeanor and his responses given under oath, I find him to be a credible witness who presented consistent testimony.

[25] Yoder and another OCIE staff accountant conducted the examination in three days. (Tr. 169, 193.) Only Yoder testified at the hearing. Yoder, a CPA since 2000, has bachelor's and master's degrees in accounting. (Tr. 154.)

operates Lifeplan out of his home so the examination was conducted at a "rent-an-office" site. (Tr. 160-61.) Approximately one week prior to the examination, OCIE provided Disraeli with notice of the documents that it wanted to review. (Tr. 156.) The requested documents included Lifeplan's most current financial statement, which would have been Lifeplan's quarterly report for the quarter ended September 30, 2004, and any private securities transactions that the investment adviser was involved in that would not appear in a brokerage account. (Tr. 156, 163-64, 185.)

Disraeli could not produce Lifeplan's most current financial statement and did not have all the books and records that an investment adviser is required to maintain and make available to the Commission on request. (Tr. 155-56, 159, 164.) Specifically, during the examination, Disraeli could not produce any required financial records or trial balances for 2004, which he claimed were with the person who prepared his taxes. (Tr. 160, 162, 166; Div. Ex. 27.) At the hearing, Disraeli did not contest OCIE's position that he could only provide some records and these "records were not true and accurate, and they were not kept up to date." (Tr. 159, 164, 179.)

Disraeli produced financial statements and financial records for 2003. OCIE found Lifeplan's annual financial statements and records for 2003 unreliable and inaccurate. (Tr. 159-60, 165-66.) Lifeplan's records were also not up to date as Disraeli only updated his books and records once a year. (Tr. 159-60.) The recorded figures did not have back-up documentation. (Tr. 167.) Absent from Lifeplan's books and records were many entries for business expenses that Disraeli claimed he paid with his personal funds.[26]

The examination also revealed that Disraeli used funds from Lifeplan's account to pay his personal expenses. Disraeli intermingled his personal finances with those of the company, such that he paid bills indiscriminately out of both his personal account and Lifeplan's business account, no matter the nature of the expense, without making journal entries reflecting those transactions. (Tr. 167-68.) OCIE found Lifeplan's journal entry for goodwill to be clearly erroneous. (Tr. 159, 179.) OCIE's examination discovered that Disraeli had loaned himself $84,300 from the Lifeplan Offering proceeds for his personal use.[27] (Tr. 157; Stip. ¶ I.R.)

The two disclosure memoranda for the Lifeplan Offering did not disclose the Disraeli Loan and Lifeplan shareholders did not approve it. Disraeli informed Lifeplan investors that he had borrowed $84,300 from the proceeds of the Lifeplan Offering only after the Commission staff began its examination of Lifeplan and Disraeli in January 2005. (Answer; Tr. 76-77, 157-58; Stip. ¶ I.R; Div. Exs. 13-14, 24.)

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[26] Disraeli maintained a personal checking account and, as has been noted, a checking account for Lifeplan. (Tr. 167.)

[27] OCIE completed its examination report in March 2005, and referred its findings to the Division for further action. (Tr. 170, 190; Resp. Ex. 5 at 18.)

Sometime after OCIE's examination, Disraeli sent Lifeplan "Fellow Shareholders" an undated letter representing that "[f]rom October 1 of 2002 until December of 2004, [he] received a grand total of $54,779 in total compensation and/or loans (less than $2000/mo). This figure accounts for all cash received by [Disraeli] minus what [he] paid back in cash and corporate expenses paid out of [his] pocket. (and will continue to pay)."[28] (Tr. 75; Div. Ex. 24.) Disraeli's undated letter stated that, by the time Lifeplan was operational, he had "personally absorbed approximately $25,000 in cash expenses attributable to the formation of the business while receiving no compensation for managing accounts during the preceding 12 months." (Div. Ex. 24.)

Disraeli Violated Sections 203A and 207 of the Advisers Act in Connection With Adviser Registrations

On October 8, 2003, and on November 13, 2003, Disraeli claimed on the Forms ADV that the applicant was allowed to register with the Commission as a newly formed adviser relying on Rule 203A-2(d) because it had a reasonable expectation that it would be eligible to register with the Commission within 120 days.[29] (Stips. ¶¶ I.E, II.11, 13; Div. Ex. 5 at 3-4, 23.) Disraeli represents that when he filed the Forms ADV on these dates that:

> As a newly formed advisor, [he] reasonably believed that within 90 days [he] would either have the required $30,000,000 under management, be an advisor to a mutual fund, or be required to register in 30 states. [He] ultimately chose the multi-state exemption as the basis for [his] registration ...

(Div. Ex. 12.)

The initial issues in determining whether Disraeli filed a false Form ADV in October and November 2003 and thus violated Sections 203A and 207 are whether: (1) Lifeplan was a newly formed investment adviser, and (2) Disraeli had "a reasonable expectation" that Lifeplan would meet the requirements of Rule 203A-2(d)(1) within 120 days of when he filed the Forms ADV.

Under the statutory framework put in place by NSMIA, investment advisers with less than $25 million in assets under management must register with the state in which they maintain their principal place of business.[30] Section 203A of the Advisers Act prohibits investment advisers

[28] Disraeli arrived at the sum of $54,779 by deducting $29,521 (Salary-Expenses+Loan Repayment) from "Total Amount of Loan $84,300." (Div. Ex. 24.)

[29] Disraeli agreed that when he filed the Forms ADV in October and November 2003, he expected to either have $25 million under management or come within one of the exceptions within 120 days. (Tr. 48-49, 66.)

[30] Rule 203A-1 provides that an investment adviser must register with the Commission if it has assets under management of at least $30 million. If the state where the investment adviser maintains its principal office and place of business has enacted an investment adviser statute, an

from registering with the Commission unless they manage assets of at least $25 million or qualify for an exemption set forth in Advisers Act Rule 203A-2.[31] (Tr. 49; Stip. ¶ II.20.) Lifeplan did not have at least $25 million under management, so it was prohibited from registering with the Commission unless it qualified under an exemption. (Tr. 66-68; Stips. ¶¶ I.E, II.11; Div. Ex. 5.) Disraeli relied on the following two Rule 203A-2 exemptions in his Form ADV filings:

> Rule 203A-2(d)(1) applies to an investment adviser that:
>
> Immediately before it registers with the Commission, is not registered or required to be registered with the Commission or a securities commissioner . . . of any State and has a reasonable expectation that it would be eligible to register with the Commission within 120 days after the date the investment adviser's registration with the Commission becomes effective.[32]
>
> Rule 203A-2(e) applies to an investment adviser that:
>
> (1) Upon submission of its application for registration with the Commission, is required by the laws of 30 or more States to register as an investment adviser with the securities commissioners . . . in the respective States, and thereafter would, but for this [Rule 203A-2(e)], be required by the laws of at least 25 States to register as an investment adviser with the securities commissioners . . . in the respective States;
>
> (2) Indicates on Schedule D of its Form ADV that the investment adviser has reviewed the applicable State and federal laws and has concluded that, in the case of an application for registration with the Commission, it is required by the laws of 30 or more States to register as an investment adviser with the State securities authorities in the respective States or, in the case of an amendment to Form ADV, it would be required by the laws of at least 25 States to register as an investment adviser with the State securities authorities in the respective States, within 90 days prior to the date of filing Form ADV.
>
> * * * *
>
> (4) Maintains in an easily accessible place a record of the States in which the investment adviser has determined it would, but for the exemption, be required to

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investment adviser with assets of at least $25 million, but less than $30 million, may register with the Commission. The parties use at least $25 million as the relevant figure. (Stip. ¶ II.20.)

[31] Section 203A(a)(2) of the Advisers Act defines "assets under management" to mean "the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services."

[32] The adviser is required to state that it will withdraw from registration if within 120 days it does not meet the requirements of Section 203A of the Advisers Act.

register for a period not less than five years from the filing of a Form ADV that includes a representation based on such record.

The Division maintains that Disraeli filed a false investment adviser application with the Commission when he was forestalled from registering with the TSSB. (Tr. 14.) The Division argues that Disraeli willfully violated Sections 203A and 207 of the Advisers Act by improperly registering with the Commission and making material misstatements on his October and November 2003 Forms ADV claiming that he met the newly formed adviser exemption allowing him to register with the Commission. (Div. Brief at 9-10.)

For the Division: (1) Disraeli was not a "newly formed investment adviser" when he filed his Form ADV; (2) he was required to register in Texas because he did not have $25 million in assets under management; and (3) no activities on his part or on the part of prospective clients gave him any reasonable basis for expecting to meet the $25 million threshold for Commission registration within 120 days. Further, the Division argues that Disraeli continued to violate Advisers Act Sections 203A and 207 by falsely representing on successive amended Forms ADV that he met the multi-state exemption because he was required to register as an adviser in thirty or more states and later was required to register by at least twenty-five states. (Div. Brief at 9-10.) The Division also argues that Disraeli further violated Section 207 of the Advisers Act because his Form ADV filings failed to disclose the Cease-and-Desist Order against him. (Div. Brief at 10, 15-16.)

Disraeli insists that he was preparing to file a Form ADV "long before there was any word from the State [of Texas] that [he] wouldn't [be allowed to] be registered with them." (Tr. 87.) Disraeli denies that he filed with the Commission on October 8, 2003, because he expected the TSSB would not allow him to register as an investment adviser: "When I made the determination to file with the SEC, I had no notion what the State's reaction would be to my eventual attempt to be registered." (Tr. 98.) Disraeli considers that he filed investment adviser registrations "simultaneously" in 2003 with the Commission and the TSSB. (Tr. 99.)

Disraeli contends that the policy concerns voiced by the Commission when proposing Rule 203A-2(f) of the Advisers Act to offset the unique burdens faced by "Internet Investment Advisers" without $25 million in assets is applicable to his situation. (Resp. Brief at 14-15.) Disraeli states that he conducted an enormous amount of research on the multi-state exemption and that his registration with the Commission was done in good faith. (Tr. 19-20, 100; Resp. Brief at 14, 19.)

Disraeli refutes the Division's claim that he violated Section 207 of the Advisers Act by not disclosing the Cease-and-Desist Order on his Form ADV. (Resp. Brief at 13.) According to Disraeli, a Commission registration examiner in Washington, D.C., informed him that the Cease-and-Desist Order was not required to be disclosed on his Form ADV if "the same event has been reported through a DRP on the CRD system." (Resp. Brief at 13.)

Legal Conclusions

Disraeli's claim that Lifeplan was a newly formed adviser because Lifeplan was incorporated on September 30, 2003, and had no advisory clients when the first Form ADV was filed, and Lifeplan did not assume the assets of any other adviser, including Disraeli & Associates, is false. (Resp. Brief at 13.) Although Disraeli incorporated Lifeplan eight days before the Form ADV was filed, it was simply a continuation of the same activities that Disraeli had been performing for years as Disraeli & Associates. Disraeli became a fee-only investment adviser registered with the Commission in 1993. (Tr. 33.) Several of Disraeli's advisory clients acknowledged that they had been his clients for ten years or more. (Div. Exs. 44, 46, 49, 52-53.) Disraeli's claim that Lifeplan was a newly formed adviser because it did not assume the assets of another adviser is not credible. Lifeplan was the successor entity to a sole proprietorship, Disraeli & Associates, and it assumed its predecessor's only asset, its clients. (Tr. 52-53.) Lifeplan's address in Austin, Texas, its clients, its operations, and its management are the same as the investment adviser operation that Disraeli had been conducting as a sole proprietor since 1993. (Stip. ¶ I; Div. Exs. 2, 13.) Lifeplan, in an incorporated status, was the adviser registrant for only thirty-six days before the registrant became Disraeli as a sole proprietorship.[33] The evidence compels the conclusion that Disraeli created Lifeplan and registered it with the Commission so that he could continue to do business as an investment adviser without approval from the TSSB.

The next issue is whether Disraeli had a reasonable expectation on October 8, 2003, and November 13, 2003, that Lifeplan would meet the requirements of Rule 203A-2(d)(1) within 120 days. In the notice proposing Rule 203A-2(d), the Commission commented:

> A newly formed adviser may not be eligible to register with the Commission at the time of its formation, but may have a reasonable expectation that within a short period of time it will become eligible to register. For example, an adviser may not initially have assets under management, but may anticipate an inflow of assets shortly after commencing operations. The Commission recognizes that requiring a newly formed adviser to register with the states, only to de-register and register with the Commission shortly thereafter, would be unfair, burdensome, and inconsistent with the purposes of section 203A.

63 SEC Docket 1491, 1496-97 (Dec. 20, 1996).

Footnote 68 of the Commission's Final Rule clarified what was meant by "reasonable expectation":

> Some commenters also asked for clarification as to what constitutes a "reasonable expectation." In proposing the exemption, the Commission anticipated that it would be

[33] The applicant on October 8, 2003, was Lifeplan. Disraeli changed the applicant's name on November 13, 2003, to David Henry Disraeli DBA Lifeplan. This name was used on all subsequent amendments.

> used primarily by persons who start their own advisory firms after having been employed by or affiliated with other advisers, and that have received an indication from clients with substantial assets that they will transfer those assets to the management of the newly formed adviser.[34] In such a case, an adviser would have a "reasonable expectation" that it would become eligible for Commission registration in the prescribed time. Other circumstances, however, also could support an adviser's reasonable expectation of becoming eligible.

64 SEC Docket 1525, 1531 n.68 (May 15, 1997).

The evidence and the Commission's expectation when it enacted Rule 203A-2(d) do not support Disraeli's representation that he reasonably expected on October 8, 2003, and November 13, 2003, that he would have $25 million in assets under management or be eligible for one of the exemptions under Rule 203A-2(d)(1) within 120 days. (Div. Ex. 12.) Prior to October 8, 2003, Disraeli had operated an investment adviser for ten years. From 1993 to October 2003, Disraeli had, at most, $11 million, less than half the assets required, under management. (Tr. 38-39.) At the time of these filings, Lifeplan's only office was located in Texas and all but one of its clients resided in Texas. (Answer; Stip ¶ I.J.) The Final Memorandum described the business as limited to a single small geographic region around metropolitan Austin, Texas. (Div. Ex. 14 at 14.)

In addition, Disraeli knew in October and November 2003, that he lacked the financial resources to support a marketing effort to obtain new customers. Disraeli knew on October 8, 2003, when he filed the Form ADV that he would be using most of the Offering proceeds to pay his personal expenses, and that Lifeplan would have little capital left to develop new business. The uncontested evidence is that Disraeli was in severe financial distress in October and November 2003. For example, on October 9, 2003, the day after he filed the Form ADV, Disraeli transferred $12,000 from the Lifeplan account to his personal bank account to purchase a $9,300 cashier's check payable to the IRS for releasing the Tax Lien on his assets for unpaid federal income taxes totaling $39,384.93. (Answer; Stip. ¶ I.O; Div. Ex. 19.) Among other personal expenses, Disraeli used the Offering proceeds to pay the rent on his family's home.[35] The record has no evidence to support Disraeli's position that he reasonably believed that he would grow his investment advisory business within 120 days to be eligible for Commission registration as an adviser with $25 million in assets under management. There is nothing in the record to support: (1) Disraeli's claim that he advertised nationwide or that he had the financial means of doing so, or (2) any rational belief that Disraeli was going to be "a national manager of money" with clients in thirty states within 120 days. (Tr. 100.)

Looking beyond the October and November 2003 filings, Disraeli also did not have a reasonable expectation that he would meet the requirements of Advisers Act Rule 203A-2(e) when

[34] Disraeli did not have a reasonable expectation because the applicant would not have $25 million even with the transfer of assets.

[35] In the period October 1, 2003, through May 30, 2005, Disraeli used over $114,000 of Lifeplan's total revenue of $142,327 for his personal expenses. (Div. Ex. 32.)

he amended his Form ADV on February 13, 2004, and relied on the multi-state exemption. On February 13, 2004, David Henry Disraeli DBA Lifeplan was not required by the laws of thirty or more states to register as an investment adviser in those states. In addition, when Disraeli subsequently filed Forms ADV on July 1, 2004, March 31, 2005, and November 9, 2005, David Henry Disraeli DBA Lifeplan was not required by the laws of at least twenty-five states to register as an investment adviser in those twenty-five states. The record does not indicate any basis for concluding, after reviewing the applicable state and federal laws, that David Henry Disraeli DBA Lifeplan was required by the laws of thirty or more states to register as an investment adviser in those states.

Disraeli asserts that the nature of Lifeplan's business and his reliance on nationwide advertising and the Internet required him to register with at least thirty states, thus meeting the multi-state exemption under Section 203A of the Advisers Act. Disraeli testified that he intended to use the Internet to solicit clients by advertising his experience and "track record," which he claims "at that point was at the top 1 or 2 or 3 percentile of all money-managers in the country, to gather assets from all over the place." (Tr. 88.)

According to Disraeli, the meaning of Rule 203A-2(e) is unclear because it does not define the phrase "but for the exemption would otherwise be required to register in 30 or more states," or the terms "client" or "required." (Resp. Brief at 16.) As I understand Disraeli's position, he believes it is contradictory for the Commission to interpret Rule 203A-2(e) as requiring that the registrant be required to register, or have a good faith belief that it would be required to register, in thirty states to be eligible for the multi-state exemption because many states, such as Virginia and Oklahoma, require that an adviser be registered in those states to solicit clients there. Disraeli maintains then that the only way an adviser can "safely launch a nationwide advisory business using the Internet as the advertising medium is to rely on the 30 state exemption." (Resp. Brief at 19.) As another difficulty, Disraeli argues that:

> NSMIA created a Federal mandate that says the states can't require registration unless the advisor has six clients. Therefore, if a person is required (has six clients), but not yet registered in any state-he is in violation. This violation is a felony in Texas.

(Resp. Brief at 19.)

Disraeli provided the following explanation why he could rely on the multi-state exemption provided by Rule 203A-2(e).

> I formed a new business. The new business had a new business plan. The new business was a way of capitalizing on my expertise on a national scale, using the Internet as an advertising medium, and the way I understood and still to this day understand the 30-state exemption, I would be required to register in all 48 states, not just 30 states, because I am actively soliciting their residents, and because I don't know if and when I will reach the sixth client [in any of the 48 states], which would require state registration.

> So if I have federal registration, I don't have to worry about state registration... I took the position that soliciting the residents of 48 states, which is more than 30, required that I be registered with each state or utilize the exemption, which was clearly less onerous. That's my testimony.

(Tr. 93-94.)

Advisers Act Rule 203A-2(e) was inapplicable to Lifeplan and Disraeli on October 8, 2003, on November 13, 2003, on February 13, 2004, on July 1, 2004, on March 31, 2005, and on November 9, 2005, as: (1) Lifeplan was never required to register in thirty or more states or even twenty-five states; and (2) it was never reasonable to believe on any of these dates that Lifeplan would obtain a sufficient number of clients in thirty states, or twenty-five states, that would necessitate state registration within 90 days. See Pierce v. Underwood, 487 U.S. 552, 556-57 (1988) (defining reasonable as "not absurd" or "not ridiculous," having "some but not necessarily much merit").

At the hearing, two years and ten months after Disraeli filed a Form ADV on October 8, 2003, and two and a half years after he filed an amended Form ADV on February 13, 2004, Lifeplan was still not required to register in thirty states as only one of its approximately twenty investment adviser clients resided outside of Texas.[36] (Tr. 78; Stips. ¶¶ I.A, II.6.) Since NSMIA was enacted in 1997, but for his federal investment adviser registration, Disraeli would be required to register in only the State of Texas, and Texas has continually opposed Disraeli's registration. (Tr. 24-28.) Disraeli knew from the following findings in the Cease-and-Desist Order issued on April 2, 2003, that the TSSB was not going to permit him to operate in Texas. The TSSB found that Disraeli:

- violated Section 7 of the Texas Securities Act by offering for sale [Charterhouse Interests] in Texas at a time when the securities were not registered with the [Texas] Securities Commissioner.

- made an offer for sale of securities in Texas that contains a statement that is materially misleading or otherwise likely to deceive the public by failing to disclose [the Tax Lien].

- made an offer for sale of securities in Texas that contains a statement that is materially misleading or otherwise likely to deceive the public through statements by representing that [he] was an investment adviser at a time when [he] was neither registered nor notice-filed with the [Texas] Securities Commissioner pursuant to Section 12 or 12-1 of the Texas Securities Act.

[36] Disraeli's list of clients for whom he exercises discretionary authority has twenty-six names; however, it appears he has fewer clients as four surnames appear more than once. Also, the Mareks, who are listed with six accounts, are no longer Disraeli clients. The approximate net worth in the accounts, including the Mareks, was $5 million. (Div. Ex. 4.)

- rendered services as an "investment adviser" in Texas as that term is defined in Section 4.N of the Texas Securities Act.

- violated Section 12 of the Texas Securities Act by rendering services as an investment adviser when [he] was neither registered nor notice-filed with the [Texas] Securities Commissioner pursuant to Section 12 or Section 12-1 of the Texas Securities Act.

(Answer; Stip. ¶ I.C.; Div. Ex. 3 at 4.)[37]

Disraeli compares his situation to an exemption available in Rule 203A-2(f), for an Internet investment adviser, which is an adviser that:

> (i) Provides investment advice to all its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding twelve months.
>
> (ii) Maintains . . . for a period of not less than five years from the filing of the Form ADV that includes a representation that the adviser is eligible to register with the Commission under paragraph (f) of this Rule 203A-2, a record demonstrating that it provides investment advice to its clients exclusively through an interactive website...
>
> * * * *
>
> (2) . . . *interactive website* means a website in which computer software-based models or applications provide investment advice to clients based on personal information each client supplies through the website.

Disraeli admits, however, that Rule 203A-2(f) was inapplicable to him: "The problem with [the Internet Investment Adviser exemption] is that you have to invest in an interactive Web site, and you have to have no more than twelve or fifteen real clients, and I had twenty, so I knew that wasn't going to be available." (Tr. 88.) Furthermore, there is nothing in the record that supports Disraeli's argument that Rule 203A-2(f) is applicable to him by analogy.[38]

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[37] The OIP does not rely on the TSSB Emergency Order and the TSSB Cease-and-Desist Order to support the allegations in the OIP. (Tr. 9-10.) The Commission did not take any enforcement action against Disraeli based on the Cease-and-Desist Order. (Tr. 10-11.) The NASD issued Disraeli a "letter of caution" on October 10, 2003, following an investigation of Disraeli's activities involving Charterhouse. (Tr. 11, 22, 114-15.)

[38] In fact, the Adopting Release for Rule 203A-2(f) highlighted key differences between it and Rule 203A-2(e) in stating that an Internet Investment Adviser would not be eligible for the multi-state exemption until obtaining the requisite number of clients in thirty states. 79 SEC Docket at 435, n.13.

The Forms ADV that Disraeli filed on October 8, 2003, and November 13, 2003, provided that the adviser would "withdraw from SEC registration if, on the 120th day after [its] registration with the SEC becomes effective, [it] would be prohibited by Section 203A(a) of the Advisers Act from registering with the SEC." (Div. Exs. 5 at 23, 7 at 24.) At the end of 120 days, Disraeli DBA Lifeplan neither had $25 million of assets under management nor did it come within one of the exemptions enumerated in Rule 203A-2 of the Advisers Act. (Tr. 66-67.) The February 13, 2004, amendment was filed close to the 120-day deadline. It is undisputed that on February 13, 2004, July 1, 2004, March 31, 2005, and November 9, 2005, Disraeli did not have $25 million under management. (Tr. 68.) Disraeli knew that the TSSB would not authorize him to operate in Texas. (Tr. 24-27.) The evidence is persuasive that in order to continue to operate as a registered investment adviser, Disraeli, on each of these occasions, filed Forms ADV claiming the exemption provided by Rule 203A-2(e) when he knew, or was reckless in not knowing, that he was not required to register as an investment adviser in thirty or more states under any reasonable interpretation of state law. (Tr. 68; Div. Ex. 9.)

I have not given any weight to the Division's claim that Disraeli violated Section 207 by failing to report the Cease-and-Desist Order in his Forms ADV. The Form ADV states that if an advisory affiliate is registered through the CRD and has submitted a Disclosure Reporting Page (DRP) for the event to the CRD, no other information need be provided. The evidence does not show that Disraeli has not submitted a DRP to the CRD showing the Cease-and-Desist Order, as he claims to have done. (Div. Ex. 7 at 27.)

Based on the evidence set forth above, I find that Disraeli willfully[39] violated Section 203A of the Advisers Act because the totality of the evidence shows that, from 2003 to the present, when the State of Texas would not allow Disraeli to register as an investment adviser, Disraeli used Section 203 of the Advisers Act to achieve and maintain the status of a Commission registered investment adviser when he was never eligible for Commission registration.

Disraeli's conduct underlying his violations of Section 203A violated Section 207 of the Advisers Act, which makes it unlawful for any person to willfully make any material misstatements or omissions in registration applications or reports, such as a Form ADV, filed with the Commission.[40] Zion Capital Mgmt. LLC, 81 SEC Docket 3063, 3076 (Dec. 11, 2003). A showing of scienter is not required for a Section 207 violation; simple negligence suffices. IMS/CPAs & Assocs., 55 S.E.C. 436, 455 (2001). I find that Disraeli willfully violated Section

[39] Willfulness is shown where a person intends to commit an act that constitutes a violation. There is no requirement that the actor must also be aware that he or she is violating any statutes or regulations. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

[40] A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision and would view disclosure of the omitted fact as having significantly altered the total mix of information made available. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

207 of the Advisers Act by filing successive Forms ADV that he knew, or at a minimum was reckless in not knowing, contained misstatements and omissions of material information.[41]

Lifeplan and Disraeli Violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, and Disraeli Violated Section 206 of the Advisers Act and Advisers Act Rule 206(4)-4(a)(1) in Connection With the Lifeplan Offering

The Lifeplan Offering was for under $1 million, and under Rule 504 of Regulation D, a private placement memorandum was not required; however, if one is furnished to investors, its disclosures must not be materially misleading:

> Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required [under Regulation D], in light of the circumstances under which it is furnished, not misleading.

Regulation D, Preliminary Note 1, 17 C.F.R. §§ 230.501-.508.

Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5 prohibit fraudulent conduct in the public or private offer, purchase, or sale of securities by use of the means of interstate commerce. United States v. Naftalin, 441 U.S. 768, 773 n.4 & 778 (1979). To establish a violation of Sections 17(a)(1), 10(b), and Rule 10b-5, the Division must show: (1) misrepresentations or omissions of material facts, or other fraudulent devices; (2) made in connection with the offer, sale, or purchase of securities; and (3) that respondent acted with scienter, a mental state embracing intent to deceive, manipulate, or defraud.[42]

Section 206(1) of the Advisers Act prohibits an investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client. Section 206(2) prohibits an investment adviser from engaging in any transaction, practice, or course of business, which

[41] Recklessness is defined as "an extreme departure from the standards of ordinary care . . . present[ing] a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the [respondent] must have been aware of it." Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1044-45 (7th Cir. 1977) (citation omitted).

[42] The OIP alleges violations of Securities Act Section 17(a). Scienter is not required for violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act; rather, mere negligence suffices. Aaron v. SEC, 446 U.S. 680, 697 & 701-02 (1980); SEC v. PIMCO Advisors Fund Mgmt. LLC, 341 F. Supp. 2d 454, 458 (S.D.N.Y. 2004). Scienter may be established by a showing of recklessness. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990); David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997). Proof of scienter may be demonstrated by circumstantial evidence. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983).

operates as a fraud or deceit upon any client or prospective client. Section 206(4) of the Advisers Act prohibits investment advisers from engaging in acts, practices, or courses of business that are fraudulent, deceptive, or manipulative as the Commission, by rules and regulations, may define and prescribe. Advisers Act Rule 206(4)-4(a)(1) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business, for an registered adviser to fail to disclose to any client all material facts with respect to a financial condition reasonably likely to impair the ability of the adviser to meet contractual commitments, if the adviser has discretionary authority or requires prepayment of fees of more than $500, six months or more in advance.

The Division alleges that: (1) Disraeli willfully violated and Lifeplan committed violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5; and (2) Disraeli willfully violated Sections 206(1), 206(2), and 206(4) of the Advisers Act and Advisers Act Rule 206(4)-4(a)(1). (Div. Brief at 11-15.)

Specifically, the Division charges Disraeli and Lifeplan with falsely representing that Lifeplan would hold the Offering proceeds until they reached a $50,000 minimum and then they would primarily apply the funds to working capital. The Division further alleges that Respondents failed to disclose during the Offering that Disraeli's misappropriation of funds left Lifeplan unable to pursue its business plan and the ventures outlined in the Offering memoranda. (Div. Brief at 12.) The Division charges further that this same conduct caused Disraeli to violate the antifraud provisions of the Advisers Act, Sections 206(1) and 206(2), by knowingly making fraudulent misrepresentations and omitting material information to his advisory clients to whom he owed a fiduciary duty. (Div. Brief at 13-14.) The Division also maintains that Disraeli violated Section 206(4) of the Advisers Act and Rule 206(4)-4(a)(1) because Disraeli had discretionary authority over the accounts and received $500 in prepaid adviser fees more than six months in advance, yet he failed to inform his clients of his precarious financial condition. (Div. Brief at 14-15.) The Division cites the Tax Lien on Disraeli's property, Disraeli's inability to pay rent on his personal residence for several months, and Disraeli's $84,300 loan from Lifeplan, as events Disraeli was required to disclose because these facts were reasonably likely to impair Disraeli's "ability to meet his contractual commitment to his clients to implement and manage the Lifeplan business plan." (Div. Brief at 14-15.)

Respondents claim that Disraeli "was immediately entitled" to a portion of the start-up expenses, working capital, and personnel costs that he had paid for with his own funds. (Resp. Brief at 10.) Respondents argue that the Division has not made clear when Disraeli should have disclosed the alleged misappropriations and that Lifeplan has pursued some aspects of the business plan outlined in the Offering memorandum. (Resp. Brief at 11.) According to Respondents, the Offering documents indicate that Lifeplan intended to accomplish three goals: grow the investment adviser business; launch two hedge funds; and purchase delinquent charge accounts. They claim to have abandoned the last goal, postponed the second goal, and to have accomplished the first goal in that Respondents have more than doubled the assets Lifeplan and Disraeli have under management. (Resp. Brief 11).

Respondents assert that Disraeli did not violate Advisers Act Section 206(4) and Rule 206(4)-4(a)(1). They claim that: (1) the Division has misquoted the law; (2) Disraeli did not require prepayment of advisory fees six months in advance; and (3) there is no evidence that

Disraeli's financial condition needed to be disclosed because it could have impaired his ability to fulfill his contractual obligations to his clients. (Resp. Brief 12).

Respondents contend that the Division has failed to meet its burden of showing that the allegedly omitted facts in the Offering disclosures were material to what "a 'reasonable' investor would consider important in the total mix of facts regarding the purchase of Lifeplan stock." (Resp. Brief at 20.) Respondents argue that Lifeplan investors were reasonable investors and that all Lifeplan investors would have purchased Lifeplan securities if they had "known all the Division claims they did not know." (Resp. Brief at 20.) Respondents contend that Marek was the only investor that "provided an inkling of regret" and he did so only after being asked the same question six times by Commission staff and his own attorney. (Resp. Brief at 20.) Respondents contend that all Lifeplan shareholders have been made aware of the transfer of the Offering proceeds to Disraeli and have ratified those transactions. (Resp. Brief at 10, 20; Div. Exs. 44-60.) Respondents stress that the OCIE examination did not reveal problems with other aspects of Lifeplan's conduct as an investment adviser. (Tr. 178-81.)

Respondents also contend that the Division has failed to meet its burden of showing scienter by proving Respondents made material misrepresentations either intentionally or acting with severe recklessness. Respondents claim the evidence shows that "when Respondents became concerned about the adequacy of disclosure in the [Offering], Respondents engaged securities counsel from the firm of Jackson & Walker, a well-established law firm in Texas, to assist in preparing a rescission document that was sent to all purchasers." Respondents represent that the law firm of Jackson & Walker received a copy of the Cease-and-Desist Order, which referred to the Tax Lien, and that the law firm did not consider the payment of $9,300 by Disraeli as material. (Resp. Brief at 21.)

Legal Conclusions

Disraeli's conduct in the offer and sale of shares in the Offering consisted of several knowing or reckless violations of the antifraud provisions of the federal securities statutes. Disraeli's effort to remedy unspecified deficiencies in the Summary Memorandum by issuing a Final Memorandum fails because the Final Memorandum contained material errors, omissions, and misrepresentations and because Disraeli issued the Final Memorandum after he had solicited and received most of the Offering proceeds. By December 9, 2003, the Offering had raised $95,000 of the $105,000 total. (Tr. 105-06, 123; Div. Ex. 17.)

Disraeli issued the Final Memorandum after he had borrowed for his personal use $84,300 of the $85,000 in Offering proceeds that had been raised as of December 8, 2003. (Tr. 123.) A reasonable investor looking for a return on his or her investment would consider it material that Disraeli used nearly all the Offering proceeds for his personal expenses because this diversion of funds made it impossible, or highly unlikely, that Lifeplan would achieve its business plan. With fifteen years of industry experience and several securities licenses, Disraeli knew, or was reckless in not knowing, that misrepresenting or failing to disclose the following

information in the Summary Memorandum and the Final Memorandum was fraudulent conduct.[43] (Div. Exs. 13-14.)

1. Disraeli knew, or was reckless in not knowing, that he committed material omissions by failing to disclose in both the Summary Memorandum and Final Memorandum his personal use of Offering proceeds, including that on or about October 9, 2003, he used $9,300 of the Offering proceeds to satisfy the Tax Lien on his property. (Stip. ¶ I.O.) The use of Offering proceeds to pay off Disraeli's Tax Lien was the first of many personal transactions, including payments for church, groceries, rent, pharmacy, utilities, dance/Taekwondo, movies, medical, etc., that Disraeli did not disclose to investors. (Div. Ex. 35.)

2. Disraeli knew, or was reckless in not knowing, that it was materially false and misleading not to disclose to investors and persons to whom he was promoting Lifeplan in Offering Memoranda issued on October 21, 2003, and December 9, 2003, that he had already begun to use Offering proceeds for his personal benefit.

3. Disraeli knew, or was reckless in not knowing, that it was materially false and misleading to represent in the Final Memorandum that Lifeplan "would hold and segregate the Offering proceeds, for return to investors, until reaching a $50,000 minimum," because Disraeli misappropriated the Offering proceeds for his personal living expenses well before the $50,000 minimum was reached. (Stip. ¶ I.M; Div. Ex. 19.) Lifeplan's bank account received the first Offering proceeds of $30,000 on October 8, 2003. (Div. Ex. 20 at BAC000001.) Disraeli transferred $12,000 to his personal account on October 9, 2003, and used $9,300 to release the Tax Lien. (Stip. ¶ I.O; Div. Ex. 20 at BAC000002.)

4. The Final Memorandum specified that, assuming $100,000 was raised, Lifeplan would apply the funds accordingly:

Personnel:	$18,000
Legal, Other Professional Expenses:	$10,000
Capital Expenditures:	$2,000
Management Fee Credits:	$12,000
Working Capital:	$58,000
	$100,000

(Answer; Stips. ¶¶ I.M, II.18; Div. Ex. 14 at 7.) The use of funds information in the Final Memoranda was false and misleading because by end of the day on December 9, 2003, Disraeli had borrowed $78,500, from the Offering proceeds. (Div. Ex. 19.) The caveat in the Final Memorandum that there could be changes in the estimated use of funds or that actual use of the funds could result in material differences is not exculpatory given that almost all the Offering proceeds went for Disraeli's personal use.

5. As described in the Summary and Final Memoranda, Lifeplan's business plan was to increase assets under management by $300,000 per month and to launch a market-neutral hedge

[43] This is not an exhaustive list, but rather some glaring examples.

fund and a fund to purchase charge-off consumer debt. (Div. Exs. 13 at 2, 14 at 2-4.) Both memoranda represented that the Offering proceeds would be used for administrative and start-up expenses and working capital, and as noted above, the Final Memorandum stated that if the Offering raised $100,000 then approximately $58,000 would be applied to working capital. Disraeli did not follow either the use of funds or the business plan in the Offering memoranda. As late as August 2006, Disraeli had not proceeded on any aspect of Lifeplan's business plan. Moreover, the reasons offered for not doing so: Lifeplan "*did not guarantee*, that it would attempt to accomplish three goals," and that Lifeplan determined that purchasing delinquent charge accounts was not a good investment strategy, are not plausible explanations when, in fact, it had no funds. (Resp. Brief at 11.)

6. Disraeli knew, or was reckless in not knowing, that it was materially false and misleading for him not to disclose in the Summary Memorandum issued October 21, 2003, and in the Final Memorandum dated December 9, 2003, that he had borrowed from the Offering proceeds. (Div. Exs. 13, 14, 19.) The Disraeli Loan document states that interest began on November 10, 2003, presumably the document was created on or around that date. (Div. Ex. 18.) Disraeli began using the Offering proceeds for his personal needs on October 9, 2003, and when the Final Memorandum was issued he had borrowed over seventy-five percent of the total Offering proceeds, but he did not disclose this information in either memorandum. (Tr. 156-58; Div. Exs. 14, 19.)

Disraeli's activities that violated the antifraud provisions of the Securities Act and Exchange Act also violated Section 206 of the Advisers Act that establishes "federal fiduciary standards" for investment advisers and Advisers Act Rule 206(4)-4(a)(1).[44] See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 16-17 (1979). As a fiduciary, Disraeli owed his clients an affirmative duty of good faith and full and fair disclosure of all material facts. SEC v. Capital Gains Research Bureau, 375 U.S. 180, 194 (1963). Disraeli failed to disclose the material information described above to at least nine advisory clients who invested in the Lifeplan Offering. (Tr. 124, 157-58, 188.) Disraeli knowingly or recklessly put his interests before those of his clients and thus violated his fiduciary duty when he took most of the Offering proceeds to pay personal expenses without permission or disclosure, until after the Commission began its investigation. This disposition of the Offering proceeds was material to investors as it was fundamental to Lifeplan's viability. This and other omitted information would have significantly altered the total mix of information made available to Lifeplan investors, almost all of whom were Disraeli's advisory clients, and potential investors. (Tr. 124.) "The disposition of proceeds of a securities offering is material information, and issuers must adhere strictly to the uses for the proceeds described in the [private placement memorandum]." Brian Prendergast, 55 SEC 289, 303 & n.21 (2001); see also Riedel v. Acutote of Colorado LLP, 773 F. Supp. 1055, 1068 (S.D. Ohio 1991) ("Income flow and other matters affecting the financial situation of an investment are obviously important to an investor."); SEC v. Murphy, 626 F.2d 633, 653 (9th

[44] Section 206(1) of the Advisers Act requires a showing of scienter to establish a violation while violations of Sections 206(2) and 206(4) may be established by simple negligence. Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); SEC v. Steadman, 967 F.2d 636, 641-43 & nn.3 & 5, 647 (D.C. Cir. 1992).

Cir. 1980) (stating information relating to an entity's "financial condition, solvency, and profitability" is material).

Respondents' defenses to the antifraud charges are unpersuasive. Disraeli's belief that his conduct satisfies the reasonable investor standard because all but one of Lifeplan's investors would not have rescinded his or her investment even after learning all material information is incorrect in theory and in fact. (Resp. Brief at 20.)

Three investors, the Mareks and Cross, would not have invested had they known the information that was omitted or misrepresented. One investor, John Gauthier, contradicts himself on whether he would or would not have invested. The remaining investors who support Disraeli include his father, who cannot be considered objective, and Mallouf, who viewed his Lifeplan investment as some sort of $10,000 loan to Disraeli. (Tr. 234; Div. Ex. 66 at 123.) Mallouf and Disraeli's father are not representative of reasonable investors, who are profit motivated. Some of the six investors who continue to support Disraeli believe that he used the Offering proceeds as reimbursement for Lifeplan expenses; however, there is no evidence that this is true. Rather, Disraeli's admission and cancelled checks tell a different story. Disraeli and his wife used funds from the Lifeplan's account to pay the rent on their home, restaurant dining, groceries, gas and automobile expenses, cable, movies, home improvements, legal fees, dance/Taekwondo lessons, medical fees, and other personal expenditures. (Div. Ex. 20 at BAC000084, BAC000155, BAC000160, Div. Exs. 32, 35, 42.) Furthermore, it is not clear what information Disraeli gave the investors when he had them sign "ratifications" of his management decisions. (Div. Exs. 45, 47-48, 52, 57, 60.) And investor ratifications do not absolve someone of fraudulently departing from an issuer's stated use of proceeds. See Christopher A. Lowry, 55 S.E.C. 1133, 1140 & n.1140 (2002); Wilshire Discount Secs., Inc., 51 S.E.C. 547, 551 n.15 (1993).

Respondents' defense that "there is no evidence that the 'omitted facts' in the offering would have significantly altered the total mix of information made available to that investor" is false. (Resp. Brief at 20.) Disraeli is also incorrect that it was unnecessary to disclose in the Final Memorandum that he borrowed $78,500 from the Offering proceeds by December 9, 2003. (Div. Exs. 14, 19.) Disraeli's admission that he knew the Offering memoranda should have disclosed his personal use of the Offering proceeds, but there was no disclosure requirement under a Regulation D offering or a limited offering in Texas is unpersuasive. (Tr. 107-08.) As has been noted, disclosure in a private placement memorandum in an offering under Rule 504 of Regulation D, if furnished to investors, must not be materially misleading. Further, as an investment adviser, Disraeli had an ongoing duty to his advisory clients to make full and fair disclosure of material information.

Disraeli's insistence in the face of all the evidence that a significant amount of the Offering proceeds was used for business expenses is also false. (Tr. 123-24.) From October 1, 2003, to May 30, 2005, Lifeplan had revenue of $142,327, including $95,000 from the Offering. (Div. Ex. 32.) In this period, the Lifeplan account paid out a total of $114,267.63 for Disraeli's personal expenses, only $20,154.83 for business expenses, and $8,500 in "undefined" and "mixed use" expenses. (Div. Ex. 32.)

For all the reasons stated above, I find that during the Offering Period Disraeli, acting knowingly or recklessly, willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5. I impute Disraeli's conduct to Lifeplan.[45] SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1992). In addition, because Disraeli was an investment adviser, or a person associated with an investment adviser, who had discretionary authority and who required prepayment of $500 more than six months in advance, his conduct violated Section 206 of the Advisers Act and Advisers Act Rule 206(4)-4(a)(1).

Disraeli Violated Section 204 of the Advisers Act and Advisers Act Rules 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6) in Connection With the Investment Adviser's Books and Records

Section 204 of the Advisers Act requires registered investment advisers to file reports with the Commission, maintain books and records, and make those books and records available to Commission personnel for examination. Collectively, Advisers Act Rules 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6) require registered investment advisers to make and keep true, accurate, and current: (1) journal or journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger; (2) general and auxiliary ledgers (or other comparable records) reflecting assets, liability, reserve, capital, income and expense accounts; and (3) trial balances, financial statements, and internal audit work papers relating to the business of such investment adviser.

Rule 204-3(a) requires registered investment advisers to furnish each client with a written disclosure statement that is either Part 2 of Form ADV or contains at least the information required therein (such as in a brochure). Advisers Act Rule 204-3(c)(1) requires registered investment advisers to annually deliver, or offer in writing to deliver, the information required in Part 2 of Form ADV.[46] Scienter is not required to establish a violation of Section 204 or Advisers Act Rule 204-3(c)(1). See SEC v. World Wide Coin Inv., Ltd., 567 F.Supp. 724, 749, 751 (N.D. Ga. 1983) (holding scienter is not required for books-and-records violations.)

The Division charges that Disraeli violated Section 204 of the Advisers Act and Advisers Act Rules 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6) by failing to make, keep, and produce for the Commission required books and records that were accurate and could be substantiated with documentation. (Tr. 16; Div. Brief at 16-17.) The Division believes that Disraeli violated Advisers Act Rule 204-3(a) because he did not furnish each client with Form ADV Part 2 or

[45] Disraeli was named as the control person of the investment adviser in the Forms ADV filed with the Commission. (Div. Exs. 5 at 20, 7 at 20, 9 at 20, 10 at 21.)

[46] In September 2000, new Advisers Act rules and rule amendments required electronic filing of Part 1 of Form ADV with the Commission beginning in January 2001. Advisers are not required to submit Part 2 of the ADV, or its functional equivalent in the form of a brochure, with the Commission. Advisers must maintain a current copy of Part 2 of the Form ADV, or a brochure with the same information, in its files for Commission inspection and must furnish that information to its clients annually. Electronic Filing by Investment Advisers; Amendments to Form ADV; Final Rule, 73 SEC Docket 807, 811, 820 (Sept. 22, 2000).

written disclosure statement of certain specific information, and that he violated Advisers Act Rule 204-3(c)(1) because he did not supply, or offer to supply, information in writing annually to each of his clients since November 2003. (Div. Brief at 16-17.)

Disraeli claims that he did not violate Advisers Act Section 204 and Rules thereunder because he "kept true and accurate records," and that the OCIE examiners were confused because Lifeplan is a sole proprietorship. (Resp. Brief at 7-8.) However, Disraeli did not challenge testimony that: (1) he produced only some of the books and records that the OCIE examiners gave notice they would request; (2) the 2003 records that Disraeli produced were not true and accurate and were not kept up to date; and (3) no records for 2004 were available for an examination conducted in January 2005. (Tr. 159, 179.) In his brief, however, Disraeli: (1) argues that he "kept true and accurate records"; and (2) denies that he failed to "maintain" the required documentation, but concedes it was not readily accessible. (Resp. Br. at 7, 23.)

Disraeli also argues that the Division has failed to support charges that he violated Advisers Act Section 204 and Advisers Act Rules 204-3(a) and 204-3(c)(1) by failing to furnish clients with required information. (Resp. Brief at 13-14.)

Legal Conclusions

The evidence, especially the sworn testimony of Commission examiner Yoder, shows that Disraeli did not maintain the required books and records, and make those books and records available to Commission personnel for examination. See Roman S. Gorski, 43 S.E.C. 618, 622 (1967) (holding that failure to produce requested books and records alone is a violation). Disraeli provided the Division with information following the OCIE examination, but he never produced the books and records for 2004 that he claimed, at the time of the examination, were with the person who prepared his taxes.[47] (Tr. 160-66; Div. Ex. 27.) Respondents' counsel also admitted that there was "some books-and-records sloppiness." (Tr. 19.)

For these reasons, I find that Disraeli violated Section 204 of the Advisers Act and Advisers Act Rules 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6). See The Barr Fin. Group, Inc., 81 SEC Docket 828, 829 n.4 (Oct. 2, 2003).

On the alleged violations of Advisers Act Rules 204-3(a) and 204-3(c)(1), there is no evidence in the record that shows Disraeli failed to send Part 2 of Form ADV or comparable information to his adviser clients, or prospective clients and that he failed to offer to provide such information annually.[48] The Division's exhibits, pleadings, and citations to the record do not show that:

[47] Disraeli was unable to provide OCIE with his 2004 financial records on February 10, 2005. (Resp. Ex. 5 at 11 n.9.)

[48] Part 2 of the Form ADV includes information such as: (1) adviser services and fees; (2) types of clients; (3) types of investments; (4) methods of analysis, sources of information and investment strategies; (5) education and business standards; (6) education and business background; (7) other business activities; (8) other financial industry activities or affiliations; (9)

> Disraeli only gave Form ADV Part II disclosures to his advisory clients in November 2003. At no point thereafter did Disraeli deliver (or offer to deliver) updated ADV Part II disclosures to his clients, annually or otherwise.

(Division's Proposed Findings of Fact and Conclusions of Law at 22 (citing Answer ¶ B8; Stipulation ¶¶ I.I; II.15; Div. Exs. 9, 10, 11).) Moreover, Disraeli denied the allegations in his Answer. (Answer at 3.) Accordingly, I find that the Division has failed to show that Disraeli violated Advisers Act Rules 204-3(a) and 204-3(c)(1).

SANCTIONS

The Division requests that I issue Orders:

1. Barring Disraeli from association with any investment adviser, broker, or dealer;

2. Requiring Disraeli to cease and desist from committing or causing violations of Section 17(a) of the Securities Act; Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5; Sections 203A, 204, 206(1), 206(2), 206(4), and 207 of the Advisers Act, and Advisers Act Rules 204-2(a)(1), 204-2(a)(2), 204-2(a)(6), 204-3(a), 204-3(c)(1), and 206(4)-4(a)(1);

3. Requiring Lifeplan to cease and desist from committing or causing violations of and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5;

4. Requiring Disraeli to disgorge $84,300, plus prejudgment interest of $15,676;

5. Requiring Disraeli to pay a civil money penalty at the third-tier level; and

6. Revoking Disraeli's investment adviser registration.

(Div. Brief at 21-22.)

The Division characterizes Disraeli as a recidivist securities violator who, when found pursuing a fraudulent offering by state regulators, engaged in a "ludicrous scheme to justify registration with the Commission." (Tr. 16; Div. Brief at 19.) The Division notes Disraeli's testimony that following the TSSB's Cease-and-Desist Order "it was imperative that [Disraeli] find a way to get back into the [investment adviser] business." (Tr. 81; Div. Brief at 19.) The Division characterizes Disraeli's explanation of why he believed he was eligible for Commission registration as convoluted and his explanation of his treatment of Lifeplan proceeds and claimed loan repayment as further deception. (Div. Brief at 19-20.)

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participation or interest in client transactions; (10) conditions for managing accounts; (11) review of accounts; (12) investment or brokerage discretion; (13) additional compensation; and (14) balance sheet.

Respondents contend that the sanctions sought require a finding that Disraeli's violations were recurrent and raise the likelihood of future violations. (Resp. Brief at 25 (citing IFG Network Sec., Inc., Advisers Act Release No. 2533 at 19-20 (July 11, 2006).) Respondents maintain that there is no basis for revoking Disraeli's investment adviser registration given that the OCIE examiners did not find evidence of improper activity regarding any client account. (Resp. Brief at 25.)

Respondents argue that the Division has failed to show that their actions were of such a willful nature as to merit the requested sanctions, and that Lifeplan's alleged books and records violations do not justify a bar from association. (Tr. 23; Resp. Brief at 25.) Respondents believe they "recognized and admitted that the information was not readily available, and that they would comply with the recordkeeping requirements immediately and for as long as Respondents were registered." (Resp. Brief at 26.) Respondents also take issue with the Division's claim that Disraeli has failed to acknowledge any wrongful conduct and has given no assurances against future violations. (Resp. Brief at 26; Div. Brief at 19.)

Revocation of Registration and Bar from Association

Section 203(e) of the Advisers Act authorizes the Commission to censure, place limitations on the activities, functions, or operations of, suspend for up to twelve months, or revoke the registration of an investment adviser where it is in the public interest to do so and the investment adviser has, among other things, committed specified violations of the securities statutes. Sections 15(b)(6) of the Exchange Act and 203(f) of the Advisers Act contain similar authority as to persons associated with a broker-dealer or an investment adviser at the time of the illegal conduct.

In making a public interest determination, the Commission considers:

> [T]he egregiousness of the [respondent's] actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the [respondent's] assurances against future violations; the [respondent's] recognition of the wrongful nature of his conduct; and the likelihood that the [respondent's] occupation will present opportunities to commit future violations.

Steadman, 603 F.2d at 1140; Orlando Joseph Jett, 82 SEC Docket 1211, 1260-61 (Mar. 5, 2004); KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-84 (2001), reh'g denied, 55 S.E.C. 1 (2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002).

Disraeli's actions were egregious and involved a high degree of scienter in that: (1) Disraeli, acting knowingly or recklessly, committed several blatant violations of the antifraud provisions of the Securities Act, the Exchange Act, and the Advisers Act in connection with the Lifeplan Offering; and (2) Disraeli failed to keep and make available for Commission examiners the books and records required of a registered investment adviser and then he denied doing so.

The antifraud violations, the registration violations, and the books and records violations were straightforward. They did not occur because of extenuating circumstances or complex

transactions. Disraeli's years of industry experience, the large number of securities licenses he holds, and his testimony, all support a conclusion that Disraeli acted at all times deliberately and with scienter. Disraeli gave no persuasive assurances against future violations or any indication that he recognizes that he committed serious violations. In fact, all indications are that Disraeli considers he did nothing wrong. For example, even though he admitted that he did not disclose to investors his personal use of the Offering proceeds, he questioned: "Basically I loan [Lifeplan] money, it loans me money, you know, what's all the fuss ..." (Tr. 124; Div. Ex. 68 at 333.)

Disraeli's many inconsistent and contradictory positions and my observation of his demeanor cause me to conclude Disraeli's testimony was not credible. For example:

1. The evidence strongly suggests that Disraeli created the promissory note much later than November 10, 2003. Disraeli produced an undated, un-notarized promissory note to Lifeplan for $84,300, in early January 2005, when OCIE noticed loans to Disraeli on Lifeplan's balance sheet and income statement for 2003. (Tr. 71, 158; Div. Ex. 18.) Disraeli admits he did not inform the Lifeplan investors that he had borrowed funds from Lifeplan until after OCIE's examination. (Tr. 75.) Similarly, it appears that Disraeli first prepared a list of loans to himself from the Offering proceeds on January 9, 2005, the day before the OCIE examination began. (Tr. 58, 71; Div. Ex. 19.)

2. Disraeli told Mallouf that he took the loan as opposed to salary or repayment of business expenses on the advice of his CPA, but there is no evidence that Disraeli acted on the advice of an accountant and there are no documents showing a relationship between these items. (Tr. 225, 228, 230-31.) Also, Disraeli was not supposed to receive a salary from Lifeplan.

3. Respondents contend they have complied with the terms of the Offering and have returned fifty or fifty-seven percent "of the shareholders' investment from revenues generated by the corporation." (Resp. Brief at 26.) Disraeli testified that he agreed to pay Lifeplan investors twenty percent of their original investment in cash per year. (Tr. 197; Resp. Brief at 8.) He testified further that he had paid investors, except for the Mareks, that return because he offset their management fees against this amount. Disraeli also claims to have offset some of the $84,300 he borrowed from the Offering proceeds by management credits. However, Disraeli's claims are undocumented and Lifeplan's earnings, the promissory note owed to Lifeplan, and Disraeli's management fees are not fungible items so the setoffs and repayments that Disraeli claims are highly questionable.

4. When pressed to support his testimony that his "track record was at the top 1 or 2 or 3 percentile of all money-managers in the country," Disraeli could cite no objective, third-party source. He prepared a calculation overnight that was introduced in evidence the following day. Respondents' counsel found an error in the calculation when he questioned a witness about the calculation.[49] (Tr. 204-08, 210-13; Resp. Ex. 6.)

[49] Disraeli's eight-page exhibit purportedly shows that from 1999 through 2006, Lifeplan's nineteen accounts realized a cumulative return of 84.46 percent as compared with a 3.33 percent return for the S&P 500 and a -0.94 percent return for NASDAQ. (Tr. 204-05; Resp. Ex. 6.)

5. Disraeli's sworn testimony at the hearing was often contradictory. He testified he did not tell people that he was going to use the Offering proceeds for personal expenses. (Tr. 105.) "I didn't tell them anything. I have since found out that they all assumed it." (Tr. 105.) After his counsel expressed some concern with this answer, Disraeli testified he "absolutely" had conversations with people about using the proceeds for reimbursement of personal expenses. (Tr. 105.)

The persuasive evidence is that Disraeli's and Lifeplan's violations of the securities statutes in the period 2003 through 2005, harmed specific investors and his investment adviser clients to whom he owed a fiduciary duty. Individual violations have an adverse impact on the general investing public's confidence in the securities markets. There is a high probability that, if allowed to remain in the securities industry, Disraeli will commit future violations given the factors just enumerated, his regulatory history, his lack of credibility under oath, and his total lack of remorse for his actions. For all these reasons, it is in the public interest to revoke Disraeli's investment adviser registration, and to bar Disraeli from association with a broker, dealer, and investment adviser.[50] See Lowry, 55 S.E.C. at 1144.

Cease-and-Desist Order

Section 8A(a) of the Securities Act, Section 21C(a) of the Exchange Act, and Section 203(k) of the Advisers Act authorize the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Securities Act, the Exchange Act, the Advisers Act or the rules and regulations thereunder. In considering whether to issue a cease-and-desist order, the Commission considers the Steadman factors and the risk of future violations, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings. KPMG, 54 S.E.C. at 1192.

The severity of sanctions depends of the facts of each case and the value of the sanctions in preventing a recurrence of the violative conduct. See Berko v. SEC, 316 F.2d 137, 141-43 (2d Cir. 1963); Richard C. Spangler, Inc., 46 S.E.C. 238, 254 n.67 (1976); Leo Glassman, 46 S.E.C. 209, 211-12 (1975). "[C]onduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions." Marshall E. Melton, 80 SEC Docket 2812, 2825 (July 25, 2003). An investment adviser is a fiduciary in whom clients must be able to put their trust. See Edward J. Moschetti, 41 S.E.C. 942, 943 (1964).

I find it is in the public interest to order Disraeli and Lifeplan to cease-and-desist from future violations given the previous findings, especially the high probability that, if allowed to remain in the securities industry, Disraeli will commit future violations.

[50] Disraeli's fraudulent conduct occurred while he was a registered investment adviser and from October 2003 until April 2004, while he was also associated with a broker-dealer. He currently holds several securities licenses. (Tr. 11; Stips. ¶¶ I.A, II.4.) The Commission has the authority to bar him from association with an investment adviser and a broker dealer. See Michael Batterman, 84 SEC Docket 1349, 1358 (Dec. 3, 2004); Alexander V. Stein, 52 S.E.C. 296, 298-300 (1995).

Disgorgement

Section 8A(e) of the Securities Act, Section 21C(e) of the Exchange Act, and Section 203(k)(5) of the Advisers Act authorize the Commission to enter an order requiring an accounting and disgorgement, including reasonable interest, in any cease-and-desist proceeding.

The Division requests that Disraeli be ordered to disgorge all Offering proceeds that Disraeli applied toward his personal expenses, plus prejudgment interest. (Div. Brief at 20.) According to the Division, these amounts are $84,300, and prejudgment interest of $15,676. (Div. Proposed Findings of Fact and Conclusions of Law at 24-25.) Respondents deny that they received any ill-gotten gains. They argue that Disraeli accounted for what the Division considers ill-gotten gains by a promissory note and that he disclosed his actions to investors. (Resp. Brief at 26.)

Disgorgement is defined as "an equitable remedy designed to deprive [respondents] of all gains flowing from their wrong." SEC v. AMX, Int'l, Inc., 872 F. Supp. 1541, 1544 (N.D. Tex. 1994). A violator is returned to where he or she would have been absent the misconduct. Disgorgement deprives a wrongdoer of his or her ill-gotten gains and deters others from violating the securities laws. SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989.) "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement would be greatly undermined if securities law violators were not required to disgorge illicit profits." Manor Nursing, 458 F.2d at 1104.

The funds that Disraeli surreptiously took from the Offering proceeds for his personal benefit are "ill-gotten gains." Disraeli had no legitimate claim to these funds and he received them through actions that were fraudulent. Disraeli incorrectly claims that the character of these gains is not ill-gotten because he produced an undated promissory note and made disclosure to Lifeplan's investors only after he knew OCIE discovered he had borrowed most of the Offering proceeds.

I find $84,300, the amount of the promissory note, to be the best evidence of Disraeli's ill-gotten gains. Disraeli claims that the loan figure has been reduced by "loan repayments," "dividends paid," and "salary." (Div. Ex. 24.) I will not reduce the disgorgement figure by these amounts because: (1) the only evidence of repayment is self-serving representations by Disraeli and his counsel regarding management fees; (2) if Disraeli made repayments, it is highly probable that he earned the funds as a result of the registration and antifraud violations found in this proceeding; and (3) Disraeli agreed not to take a salary from Lifeplan. (Tr. 195-97; Div. Ex. 24.) See SEC v. Great Lakes Equities, Co., 775 F.Supp. 211, 214-15 (E.D. Mich. 1991) aff'd, 12 F.3d 214 (6th Cir. 1993); SEC v. World Gambling Corp., 555 F. Supp. 930, 935 (S.D.N.Y. 1983), aff'd, 742 F.2d 1440 (2d Cir. 1983).

The reasonableness of the $84,300 figure is shown by evidence that unauthorized transfers between Lifeplan and Disraeli between October 9, 2003, and December 27, 2004, resulted in

Disraeli owing Lifeplan a balance of $86,081.[51] (Div. Ex. 40.) Also, Disraeli acknowledged borrowing $84,550 from Lifeplan from October 19, 2003, through January 5, 2004. (Div. Ex. 19.) An order to disgorge a certain amount need only be a reasonable approximation of the profits causally connected to the violation. First City, 890 F.2d at 1231-32. Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to the respondent to demonstrate clearly that the Division's disgorgement figure is not reasonable. SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995). Any risk of uncertainty as to the disgorgement amount falls on the wrongdoer whose misconduct created that uncertainty. First City, 890 F.2d at 1232. Disraeli did not offer a specific alternative to the Division's disgorgement amount.

Civil Penalty

Section 21B(a) of the Exchange Act and Section 203(i) of the Advisers Act authorize the Commission to impose a civil money penalty in a proceeding instituted under Section 15(b)(6) of the Exchange Act, or Sections 203(e) and 203(f) of the Advisers Act, where it is in the public interest to do so, if a respondent has willfully violated any provision of the Securities Act, the Exchange Act, or Advisers Act, or the rules and regulations thereunder. The statutes specify the following as public interest considerations: (1) whether the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm caused to others; (3) the unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require.

Section 21B(b) of the Exchange Act and Section 203(i) of the Advisers Act specify a three-tiered system for determining the maximum civil penalty for each "act or omission." See Mark David Anderson, 80 SEC Docket 3250, 3270 (Aug. 15, 2003) (imposing a civil penalty for each of the respondent's ninety-six violations). Violations committed by a natural person after February 2, 2001, but before February 14, 2005, have a maximum penalty of $6,500 in the first tier; $60,000 in the second tier; and $120,000 in the third tier.[52] See the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, and 17 C.F.R. § 201.1002. A second-tier penalty is permissible if the

[51] The exhibits show varying amounts of unauthorized transfers. For example, a list of mainly personal expenses of Disraeli paid from the Lifeplan bank account in 2004 totals $32,508.17. (Div. Ex. 25.) A list of Disraeli's "Personal Expenses paid with business account" includes a few withdrawals in 2003, many withdrawals in 2004, some withdrawals in 2005, and a net figure of $114,267.63. (Div. Ex. 42.) The Lifeplan bank summary from December 16, 2003, through December 31, 2004, shows $127,817.41 as "Disraeli Personal Totals." (Div. Ex. 43.) "Disraeli's Personal Use of the Remaining Funds from the Lifeplan Account" indicates that Lifeplan paid $101,546.55 of Disraeli's personal expenses. (Div. Ex. 35.) A "Summary of Business Revenues and Expenses for Lifeplan" shows a net figure of $114,836.56. (Div. Ex. 34.) I will not order an accounting given the amount of disgorgement ordered and the several exhibits on the subject in the record, which unfortunately are not described in detail.

[52] The amounts increase to a maximum penalty of $65,000 in the second tier; and $130,000 in the third tier for violations committed after February 14, 2005. 17 C.F.R. § 201.1003. The prior schedule applies to this case as almost all violations occurred before February 14, 2005.

violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. A third-tier penalty is permissible for violations that, in addition, "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission."

The Division does not quantify the amount of the third-tier civil penalty it requests. (Div. Brief at 22.) Respondents argue that a civil money penalty is not in the public interest because the Division has failed to show knowing and repeated violations, and a third-tier penalty is inappropriate because there is no flagrant misconduct. (Resp. Brief at 27.)

Measured against the public interest criteria set out in Section 21B(c) of the Exchange Act and Section 203(i)(3) of the Advisers Act, Disraeli's conduct merits a substantial civil money penalty. The underlying violations involved fraud, deceit, a deliberate or reckless disregard for the antifraud provisions of the Securities Act, Exchange Act, Advisers Act, and rules thereunder, and a breach of fiduciary duty. Even as he was promoting Lifeplan, Disraeli knew that his unauthorized use of most of the Offering proceeds crippled Lifeplan and made it impossible to use investor funds and carry out the business plan as described in the Offering memoranda. Disraeli was enriched by his unauthorized taking of the Offering proceeds and from his use of the Commission's registration procedures for which he was, and is, ineligible. Disraeli's registration violations allowed him to operate almost exclusively in Texas as a registered investment adviser for over three years while Texas opposed his state registration. The fact that Disraeli committed multiple, serious securities violations shortly after being ordered to cease and desist by the TSSB shows his disregard for all government securities regulation. Disraeli's regulatory history, his actions in this administrative proceeding, his lack of personal credibility, and his attitude toward applicable securities laws and regulations indicate that a civil penalty is needed to deter Disraeli and others from future violations.

Based on the statutory criteria set forth above, a civil money penalty at the third level is appropriate. Rather than treat each unauthorized withdrawal as a separate violation, I will treat them collectively as a single violation and assess a third-tier penalty of $120,000.[53]

Fair Fund

Pursuant to Rule 1100 of the Commission's Rules of Practice, 17 C.F.R. § 201.1100, I will require that the amount of disgorgement and civil money penalties be used to create a fund for the benefit of Lifeplan investors who were harmed by the violations.

CERTIFICATION OF RECORD

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I hereby certify that the record includes the items set forth in the record index issued by the Commission's Office of the Secretary on February 12, 2007.

[53] Disraeli has waived his right to claim that he is unable to pay disgorgement or a civil penalty because he did not assert this claim at the hearing. See 17 C.F.R. § 201.630; Terry T. Steen, 67 SEC Docket 837, 847-48 (June 2, 1998).

ORDER

Based on the findings and conclusions set forth above:

I ORDER that the investment adviser registration of David Henry Disraeli d/b/a Lifeplan Associates, Inc., is revoked, pursuant to Section 203(e) of the Investment Advisers Act of 1940;

I FURTHER ORDER that David Henry Disraeli is barred from association with a broker, dealer, or investment adviser, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940;

I FURTHER ORDER that David Henry Disraeli shall cease and desist from committing or causing any violations or any future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, Sections 203A, 204, 206(1), 206(2), 206(4), and 207 of the Investment Advisers Act of 1940 and Rules 204-2(a)(1), 204-2(a)(2), 204-2(a)(6), and 206(4)-4(a)(1) thereunder, pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, and Section 203(k) of the Investment Advisers Act of 1940;

I FURTHER ORDER that Lifeplan Associates, Inc., shall cease and desist from committing or causing any violations or any future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934;

I FURTHER ORDER that David Henry Disraeli shall disgorge $84,300, and prejudgment interest from October 9, 2003, computed as set forth in Rule 600 of the Rules of Practice of the Securities and Exchange Commission, 17 C.F.R. § 201.600(b), pursuant to Section 8A(e) of the Securities Act of 1933, Sections 21C(e) of the Securities Exchange Act of 1934, and Section 203(i) of the Investment Advisers Act of 1940;[54]

I FURTHER ORDER that David Henry Disraeli shall pay a civil money penalty in the amount of $120,000, pursuant to Section 21B of the Securities Exchange Act of 1934 and Section 203(k)(5) of the Investment Advisers Act of 1940;

I FURTHER ORDER, pursuant to Rule 1100 of the Commission's Rules of Practice, 17 C.F.R. § 201.1100, the creation of a Fair Fund and that the amount of disgorgement and civil money penalties collected be placed in this Fair Fund and used for the benefit of Lifeplan investors who were harmed by the violations found in this decision; and

I FURTHER ORDER that the allegations that David Henry Disraeli violated Rules 204-3(a) and 204-3(c)(1) under the Investment Advisers Act of 1940 are dismissed.

[54] Disraeli's first took funds from the Offering proceeds on October 9, 2003. (Div. Ex. 19.)

Payment of the disgorgement, prejudgment interest, and civil penalty shall be made on the first day following the day this initial decision becomes final. Payment shall be made by certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the U.S. Securities and Exchange Commission. The payment, and a cover letter identifying Respondents and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Brenda P. Murray
Chief Administrative Law Judge