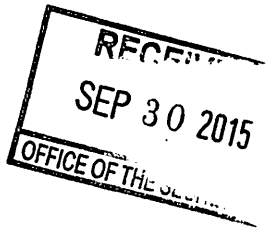
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16649

In the Matter of:

Ironridge Global Partners, LLC,
Ironridge Global IV, Ltd.

Respondents.

RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

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Pursuant to Securities and Exchange Commission Rule of Practice 250, Respondents Ironridge Global IV, Ltd., and Ironridge Global Partners, LLC, respectfully move this Court for summary disposition and dismissal of the Order Instituting Cease-and-Desist Proceedings against them. In support of that Motion, Respondents respectfully show the following.

INTRODUCTION

Respondent Ironridge Global IV, Ltd. ("Global IV") is an institutional investor. One of its investment strategies is to engage in § 3(a)(10) exchanges, in which public companies issue it common stock that is entirely exempt from the Securities Act of 1933, as amended ("Securities Act"), under Section 3(a)(10) thereof, 15 U.S.C. § 77c(a)(10). In those court-approved exchanges, Global IV pays off a publicly-traded company's debt in return for stock in the public company – but only if a court approves the exchange first. If the exchange is approved by the court, it is effected by the company issuing stock to a registered broker-dealer, which then sells certain of the stock in the open market on Global IV's behalf. Such sales typically occur over multiple years, and to this day Global IV remains a beneficial stockholder of every company it has ever invested in since its inception. Congress chose to fully exempt securities issued in court-approved exchanges from the Securities Act because the court's supervision of such transactions fully protects investors.

The exchanges at issue here were carefully designed by experienced securities counsel to ensure compliance with the procedural and substantive requirements of § 3(a)(10), following extensive legal research of the statute, its legislative history, relevant case law, Commission guidance, law review articles, and expert commentary published during the eighty-year history of the exemption. Strictly following the statutorily mandated process, in all cases the exchanges were approved by a sitting judge of the Superior Court of the State of California who authorized

the issuance of exempt shares after being advised that the parties intended to rely on the statute and being provided with SLB 3A.

In October 2013, the Division nonetheless resolved to end Global IV's court-approved exchanges by whatever means necessary. Over an investigation that spanned approximately 18 months, the Division searched for a theory to achieve that goal. The Division tried securities fraud, violation of the Securities Act's registration provision, and violation of Exchange Act § 20(a). The problem for the Division was that Global IV is compliance oriented and did everything correctly. After no established theory would stick, the Division developed a novel one: When participating in the exchanges, which are completely exempt from the Securities Act, Global IV should have registered as a "dealer" under Exchange Act § 15(a) for the *solitary* reason that Global IV is allegedly an "underwriter" under the Securities Act – a theory the Staff had previously *rejected* in public guidance. The Division is effectively trying to reduce the scope of the statutory exemption, not by seeking an amendment of the statute, not by proposing a new rule, and not even by issuing guidance. Instead, the Division is seeking to reduce the scope of the statutory exemption through an enforcement action premised on an entirely novel interpretation of the statute and an undefined standard that the Staff has invented on a post hoc basis as a means to disqualify Global IV's use of the exemption.

For several reasons, the Court should summarily dismiss the Division's attempt to create new law via an enforcement proceeding. *First*, Due Process bars the Commission from relying on novel theories to establish that Global IV is a dealer. Under the established guidance, there are *ten* factors for identifying a dealer that must register, not just one factor. And *nine out of ten* factors *undisputedly* indicate that Global IV is an investor rather than a dealer. *Second*, and in any event, Global IV is not an underwriter because, among other things, Global IV does not

promote issuers' securities, which is what an underwriter does. *Third*, even if Global IV were a dealer (which it is not), it is exempt from registration because it is a foreign dealer located in the British Virgin Islands and all of the § 3(a)(10) exchanges were effected via U.S. registered broker-dealers.

Additionally, the Division's allegation that Global IV's sole shareholder, Ironridge Global Partners, LLC ("Partners"), is vicariously liable under Exchange Act § 20(b) for Global IV's alleged violation also fails for several reasons. First, Global IV did not commit any underlying violation. Second, Partners lacks the requisite control over Global IV within the meaning of § 20(b). Third, Partners did not commit any violation "knowingly" because the Commission's legal theory is, to put it mildly, novel.

Accordingly, both Global IV and Partners are entitled to summary disposition dismissing the Enforcement Division's claims against them.

I. BACKGROUND

Partners was founded in 2011. Kirkland Tr. at 18 (attached as Ex. A[1]). It had four directors, including two registered investment advisors, Keith Coulston and Brendan O'Neil (the latter also holds a Chartered Financial Analyst designation), a registered broker-dealer, Richard Kreger, and a licensed attorney with over two decades of experience in securities law and compliance, John Kirkland. *See* O'Neil Tr. at 22 (attached as Ex. B), Kirkland Tr. at 16; Kreger at 11-19, 127-28, 176 (attached as Ex. D).

One of Partners's subsidiaries during the relevant time[2] was Global IV. Global IV is a British Virgin Island investment company with its sole place of business in the British Virgin Islands. O'Neil Tr. at 20; Kirkland Tr. at 28. Initially, Global IV's directors included David

[1] Exhibits are attached to the Declaration of Josh C. Hess.

[2] In early 2015, Partners sold its entire interest in Global IV.

Sims and Peter Cooper,[3] who resided in the British Virgin Islands, as well as Mr. O'Neil, Mr. Kreger, and Mr. Kirkland. O'Neil Tr. at 27. On November 30, 2012, however, Mr. Kirkland, Mr. O'Neil, and Mr. Kreger resigned, and on June 30, 2013, Mr. Cooper resigned. Ex. G. A registered corporate director based in the British Virgin Islands, Navigator Management Ltd., thereafter became an independent corporate director of Global IV. Ex. G; Kreger Tr. at 58-59.

Global IV invests in small public companies, using various transaction structures including, among others, a private investment in public equity (PIPE), a registered direct (RD) offering, and a § 3(a)(9) exchange of securities. O'Neil at 53-54; Kirkland Tr. at 135, 169. Part of its investment strategy (the part at issue here) involves court-approved exchanges provided for in Securities Act § 3(a)(10), commonly called "§ 3(a)(10) exchanges." Kirkland Tr. at 135.

A. Background on Global IV's Investments Through Section 3(a)(10) Exchanges

What is now § 3(a)(10) was adopted as part of the original Securities Act in 1933 and then amended and recodified to ensure broader application as part of the adoption of the Exchange Act the following year. Congress provided for an exemption by which the long-established court system – and not the newly-created Commission – would review and approve the issuance of securities in exchange for bona fide outstanding securities, claims, or property interests. Since before the Commission even existed, security exchanges that are approved by a judge following a fairness hearing are exempt from the Securities Act. In its 80-year history, the Commission has published two sets of guidance but it has never suggested that a participant in a court-approved § 3(a)(10) exchange may be required to register as a dealer.

Congress's express objective in amending the Securities Act in 1934, as stated in the legislative history, was to address "complaints that the present act is too drastic, and is

[3] Peter Cooper is no longer with the firm. Kirkland Tr. at 24.

interfering with business." 78 CONG. REC. 8668 (1934) (statement of Senator Duncan Fletcher). With regard to the § 3(a)(10) exemption in particular, the objective was to "*substantially extend* the present provisions [originally in § 4 of the Securities Act] in order to cover various forms of readjustments of the rights of holders of outstanding securities, claims and property interests, *where the holders will be protected by court supervision* of the conditions of the issuance of their new securities." *Id.* (emphasis added). Congress did not require that the Commission be named as a party in the proceeding or even be given notice of the hearing. The legislative history explains that "[b]y the requirement that securities, claims and property interests must be bona fide outstanding, the new section will provide protection against resort to the exemption for the purpose of evading the registration requirements of the act." *Id.* Moreover, "[t]he primary purpose of the amendment is to make clear that the exemptions accorded [by the new §§ 3(a)(9), (10) and (11)] extend beyond the particular transactions therein covered, to the security itself." *Id.*

In a § 3(a)(10) exchange, an issuer proposes exchanging securities in return for the security-recipient extinguishing a "bona fide outstanding claim" against the issuer. 15 U.S.C. § 77c(a)(10). Bona-fide outstanding claims include the issuer's debts, such as unpaid legal bills or auditor fees. *E.g.*, Kirkland Tr. at 39-40, 91. Before the parties may complete the debt-for-equity exchange, a court (or other approved body) must hold a hearing on the "fairness" and "conditions" of the proposed exchange. 15 U.S.C. § 77c(a)(10). If the court approves the exchange, then the issuer may transfer the securities to the claim holder without registering the securities. *Id.*

In the case of Global IV, an issuer – often represented by a registered broker-dealer, *see* Sbarra Tr. at 15, 36-41(attached as Ex. F) – typically approaches Global IV about paying certain

of the issuer's outstanding debts in return for certain of the issuer's stock. Kirkland at 63 ("They call us."); *id.* at 67 ("Well, it's almost always them coming to us."); Kreger at 160 ("We are not typically out there soliciting.").

Global IV then conducts due diligence, both because the proposed transactions are "very high-risk" for Global IV and also to ensure compliance with the law. Kirkland Tr. at 186; Schissler Tr. at 23 (attached as Ex. E). Global IV analyzes whether the issuer may be a good investment by evaluating several considerations, such as the quality of the company's management, growth potential, business plan, market capitalization, stock price, average daily trading volume, and trading history. Kirkland Tr. at 75-76; Kreger Tr. at 101-02. If Global IV determines that the issuer is a good investment, Global IV then investigates whether the claims that the issuer wants extinguished are "bona fide outstanding." In the process, Global IV examines documents related to the debts, such as invoices and sales contracts, and also speaks directly with each of the creditors. O'Neil at 80; Kirkland Tr. at 56, 93; Kreger Tr. at 106.

After evaluation and due diligence, Global IV's independent directors in BVI decide whether Global IV wants to move forward with the § 3(a)(10) exchange with the issuer. *See* Kirkland Tr. at 28, 122-23 (Global IV directors had ultimate authority over trading decisions); Kreger Tr. at 53-54 (same). Thereafter, Global IV enters into a receivable-purchase agreement with the creditor. Kirkland Tr. at 49-50. In the agreement, the creditor immediately transfers the debt to Global IV, and represents, *inter alia*, that the debt is bona fide and that the creditor "did not enter into the transaction giving rise to the [debt] in contemplation of any sale or distribution of [the issuer's] common stock or other securities." Ex. L at 4-5. For its part, Global IV promises to pay the creditor on an agreed schedule, usually for the full amount of the debt, and Global IV has always fulfilled that commitment. *Id.* at 4; Kirkland Tr. at 98-99, 105 (stating that

Global IV had never failed to pay a creditor). Global IV files an action in the Superior Court of the State of California in and for County of Los Angeles. Kirkland Tr. at 51. Global IV typically attaches to the complaint the receivable-purchase agreements and documentation supporting the debts. Kirkland Tr. at 107-08.

Litigation counsel for Global IV and litigation counsel for the issuer negotiate a stipulation, which serves as the final agreement on the terms of the proposed § 3(a)(10) exchange. Kreger Tr. at 170-71.[4] The stipulations include a standard term that prohibits the issuer from issuing Global IV a number of shares that would result in Global IV owning more than 9.99% of the issuer's outstanding shares. *E.g.*, Ex. M at IPG-005-00000015-16. Additionally, in the stipulation the issuer typically advises the court that its "board of directors has considered the proposed transaction and has resolved that its terms and conditions are fair to, and in the best interests of, Defendant and its stockholders." Ex. M at IPG-005-00000013. In addition, "[t]he parties to th[e] Stipulation represent that each of them has been advised as to the terms and legal effect of this Stipulation and the Order provided for herein ... and each attorney represents that his or her client has freely consented to and authorized this Stipulation after having been so advised." Ex. M at IPG-005-00000018-19. Finally, the defendant issuer represents that (1) Global IV is "acting solely in an arm's length capacity," (2) "has not and is not acting as a legal, financial, accounting or tax advisor to" the issuer, and (3) that "any statement made by plaintiff or any of plaintiff's representatives or attorneys is not advice or a recommendation to" the issuer. Ex. M at IPG-005-00000017.

The parties file a motion to approve the settlement agreement, attaching a copy of SEC guidance and other supporting documents. Kirkland Tr. at 51-52, 107-08; O'Neil Tr. at 81-82.

[4] In the majority of cases, the issuer is also represented by a registered broker-dealer acting as its financial advisor in the transaction. *See* Sbarra Tr. at 15, 36-41.

The court holds a fairness hearing, at which counsel for Global IV and counsel for the issuer are present to explain the proposed exchange and answer the court's questions. Kirkland at 52, 108-09; O'Neil at 82. If the judge concludes that the exchange is fair, the court issues an order approving the settlement and issuance of exempt shares. *See* O'Neil Tr. at 83; Kreger Tr. at 109. In cases where Global IV has not already paid the creditors under the receivable-purchase agreements, the approval triggers Global IV's obligation to do so (whether immediately or in installments). Kirkland Tr. at 52-53. Immediately after the approval, Global IV and Partners file with the Commission a Schedule 13G fully disclosing the terms of the exchange. Kirkland Tr. 127-28, 131-32; O'Neil Tr. at 114. Global IV also encourages the issuer to file a Form 8-K with the Commission. Kirkland Tr. at 132.

The issuer's counsel reviews the deal in order to confirm that it fully complies with applicable law and issues a legal opinion. Kirkland Tr. at 52; O'Neil Tr. at 84. As general counsel and chief compliance officer for Partners, Mr. Kirkland also reviews all elements of the exchange. The issuer makes arrangements for its transfer agent to issue the shares, and Global IV makes arrangements for a registered broker-dealer to receive the stock on Global IV's behalf, which entails providing both compliance departments with supporting documents such as the court order, legal opinion, board authorization, and so on. O'Neil Tr. at 85; *see also id.* at 32-33 (Global IV has accounts with registered broker-dealers).

In every case, shares are deposited only into a Global IV account with a registered broker-dealer, and sold in the open market by the registered broker-dealer for the benefit of Global IV, to another registered broker-dealer acting either for its own account or for its own undisclosed customer. Global IV director David Sims develops a general strategy for selling the stock. O'Neil Tr. at 37, 38-39. As even one of the Division's own attorneys acknowledged, Mr.

Sims has an "extraordinary level of control over the aggregate trading strategy." O'Neil Tr. at 46-47.

A Global IV director then sends a letter of authorization to Cahir Capital Management, LLC, which is a registered investment advisor, that has a formal advisory agreement with Global IV. O'Neil at 34-36, 40; Ex. K. In addition to being members of Partners, Mr. O'Neil and Mr. Coulston are principals of Cahir, and in that capacity act on behalf of Cahir in advising Global IV on the sale of shares. O'Neil Tr. at 34, 35. Mr. Sims or another Global IV director execute written instructions granting Cahir authority to sell Global IV's stock. *See* Ex. K. Mr. Sims directs Cahir to use that authority in order to implement the selling strategy he developed. O'Neil Tr. at 40. Then, Cahir advises registered broker-dealers when and how to sell the stock in their accounts on behalf of Global IV. O'Neil Tr. at 32-33, 33-34, 37.

Commencing days, weeks or months thereafter and continuing for a period of years, *see* Kirkland Tr. at 61, the registered broker-dealer sells shares on Global IV's behalf. It may take many years to sell enough of an issuer's stock to recover its investment in that issuer, or Global IV may never recover its investment and lose money. Ex. N. Global IV also holds at least some portion of every issuer's stock for the long term, and continues to hold a position in every investment it has ever done, including every § 3(a)(10) exchange. Kirkland Tr. at 61; *id.*at 76 ("Fundamentally the way we structure our transactions is to try and minimize our risk in the short, medium term; and therefore, make our money in the mid- and long-term on common stock appreciation."). Global IV never shorts or hedges. Kirkland Tr. at 123. Its entire investment is at risk from day one on every deal; it can lose money on every deal, and has lost hundreds of thousands of dollars on some § 3(a)(10) exchanges. *See* Kirkland Tr. at 186; Schissler Tr. at 23; Kreger Tr. at 79

B. The Division Casts About Searching for a Theory of Liability.

In October 2013, the SEC directed the Division to investigate what the SEC apparently thought was a § 3(a)(10) exchange between a single issuer (East Coast Diversified Corporation) and Partners (which has never engaged in a § 3(a)(10) exchange). *See* Order Directing Private Investigation. Specifically, the SEC directed the Division to investigate just two issues related to the ECDC deal: (1) whether there had been violations of § 17(a) of the Securities Act and § 10(b) of the Exchange Act, which prohibit securities fraud; and (2) whether Partners's supposed exchange with that issuer violated Securities Act § 5's securities-registration requirement (although it was Global IV, not Partners, that engaged in the exchange, and although § 3(a)(10) exempts securities from registration requirements).

In late 2013, Mr. Kirkland twice wrote to the Division about the investigation. He explained that Global IV's practices had been based on legal research and that multiple lawyers had given Global IV legal opinions about the transactions. Ex. P at 1. He further said that "we are always open to suggestions on how we can improve our business practices, and we would welcome any thoughts, suggestions or input [the Division] may have on how we can do better." *Id.*; *see also* Ex. Q. The Division never responded.

The Division uncovered no evidence of any fraud, because there was none. Nevertheless, on July 23, 2014, the Division issued a Wells notice that it had made a preliminary determination to recommend an enforcement action against Partners – but not for securities fraud. Ex. R. Rather, the Division had preliminarily decided to assert alleged violations of § 5 and also Exchange Act § 15(a), which requires entities to register if they are brokers or dealers. On the latter charge, the Division informed Partners that the charge was based on the Division's belief that Partners was an "underwriter" – which was purportedly enough alone to have required Partners to register as a dealer (which Partners of course had not done).

In January 2015, the Division issued new Wells notices, this time to both Global IV and Partners. Exs S & T. In the Wells notice to Global IV, the Division alleged it had violated § 5 and § 15(a). In the Wells Notice to Partners, the Division abandoned its prior theories and instead alleged that Partners was vicariously liable for Global IV's alleged § 15(a) violation. Specifically, the Division alleged that Partners had violated Exchange Act § 20(a), which makes liable any person who "controls any person liable under any provision of this chapter" unless the controller acted in "good faith." *See* Ex. S ("[T]he staff is considering charging [Partners] with liability pursuant to Section 20(a) . . . for Ironridge Global IV, Ltd.'s violations of Section 15(a) of the Exchange Act.").

In April 2015, the Division announced that it was once *again* amending the Wells notice to allege that Partners had violated Exchange Act § 20(b) for allegedly using Global IV to violate the dealer registration requirement.

On April 15, 2015, Partners's counsel met with the SEC to discuss the Wells notices. There, the Division stated (among other things) that Global IV's purported status as an underwriter was the "linchpin" in the allegation that Global IV is a dealer that must register under Exchange Act 15(a) – notwithstanding that the SEC Staff had previously issued a no-action letter to an institutional investor that admitted that it was an underwriter but nevertheless sought confirmation that it was not required to register under Section 15(a). *Acqua Wellington North Am. Equities Fund, Ltd.*, SEC No-Action Letter, 2001 WL 1230266 (Oct. 11, 2001).

C. The Order Instituting Proceedings

On June 23, 2015, the Commission issued an Order Instituting Proceedings ("OIP") against Global IV and Partners. Noticeably absent from the Order are any allegations that Respondents committed securities fraud under § 17(a) or 10(b); allegations that any Respondent violated the Securities Act's § 5 registration requirement; allegations that Partners is liable under

Exchange Act § 20(a); or allegations based on Global IV's dealings with East Coast Diversified specifically. Instead, the OIP only alleges that Global IV violated Exchange Act § 15(a) because it is a dealer that failed to register – a theory that appeared nowhere in the original order starting the investigation. To support the allegation that Global IV was a dealer, the Commission alleges three things:

- Global IV engaged in "serial underwriting activity."
- Global IV provided "related investment advice."
- Global IV "receiv[ed] and s[old] billions of shares in connection with self-described financing services for domestic microcap companies . . . explicitly designed to utilize the registration exemption contained in Section 3(a)(10) of the Securities Act of 1933."

See OIP ¶ 1.

Additionally, the Commission alleges that Partners violated § 20(b) due to Global IV's conduct – another theory that appeared nowhere in the original order starting the investigation of Partners.

For the reasons explained below, Global IV and Partners are entitled to summary disposition dismissing the Commission's claims.

II. STANDARD

The Court may grant summary disposition if there is no genuine issue with regard to any material fact. SEC Rule of Practice 250(b).

III. ARGUMENT

The Division alleges that Global IV violated Exchange Act § 15(a), which requires "brokers" or "dealers" to register with the Commission. That charge fails as a matter of law, because Global IV is not a dealer under either the existing guidance or under the Division's novel theory that underwriters are automatically dealers. The Division also alleges that Partners

is vicariously liable under § 20(b) for Global IV's purported registration violation. This claim similarly fails as a matter of law because Global IV did not commit any underlying violation and, even if it had, Partners still lacked the requisite control and knowledge of any alleged violation. Thus, the ALJ should grant Respondents' motion for summary disposition.

A. Global IV is Not a Dealer under § 15(a).

All claims in the OIP rest entirely on whether Global IV is a "dealer" that must register with the Commission under § 15(a).[5] Whether an entity is a "dealer" (rather than an investor) under § 15(a) depends on a long, established list of *ten* factors – not just one as the SEC contends here.

The SEC ignores the well-established criteria because *nine* of those ten factors demonstrate that Global IV is not a dealer under the securities law. The SEC nonetheless argues that Global IV is a dealer under the Exchange Act based merely on the *single* factor that Global IV is allegedly an "underwriter" under the Securities Act definition of that term.

This argument fails for at least three reasons. First, the Securities Act definition of underwriter cannot be used because § 3(a)(10) exchanges are purposefully exempt from the entire statute. Second, even assuming that Global IV were an underwriter (which it is not) the Staff itself has said that alone is not enough. Third, the undisputed facts demonstrate that Global IV is not an underwriter. This should end the inquiry, and the Court should grant Respondents' Motion for Summary Disposition for that reason alone.

In an attempt to use Respondents as guinea pigs and impermissibly use an ALJ to create new rules that would undermine the entire statutory scheme of § 3(a)(10), the Division also argues that Global IV is a dealer based on new factors it invented for this case that were not

[5] The Division has not alleged that Partners is a "dealer," or that either Global IV or Partners is a "broker."

previously announced to the public. Due Process forbids the Division from doing so. *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) ("The Commission may not sanction Upton pursuant to a substantial change in its enforcement policy that was not reasonably communicated to the public."). Thus, the Court should not consider Division's arguments on any factor that is not part of established guidance. Even if the Court were to entertain the Division's newly-invented factors, the undisputed facts show that Global IV would not be a dealer even under these factors.

1. Nine Out of Ten of the Existing Factors Show That Global IV Is Not a Dealer Under § 15(a).

Broker-dealers subject to § 15(a) are service providers – i.e., "intermediar[ies] between customers and the securities markets." *Registration Requirements for Foreign Broker-Dealers* ("Foreign Broker Dealer Rule"), Exchange Act Rel. No. 105, 54 Fed. Reg. 30013-01, at *3 (July 11, 1989). They make money through helping others in securities transaction, such as by handling investors' money or securities, extending credit to investors, or giving investment advice to investors. SEC, *Guide to Broker-Dealer Registration: "Who is a Dealer"* (April 2008), http://www.sec.gov/divisions/marketreg/bdguide.htm#II ("Who is a Dealer").

Broker-dealers are different from investors, who transact in securities for self-motivated reasons. *See* "Who is a Dealer," *supra* ("Individuals who buy and sell securities for themselves generally are considered traders and not dealers."); *Bronner v. Goldman,* 361 F.2d 759, 762 (1st Cir. 1966) (holding that the defendants were not brokers because they "sold or rehypothecated securities . . . in their own interest" rather than "in the interest of a client or customer").

The question here is whether Global IV is a service provider like a dealer or is instead a self-interested investor, like a hedge fund. *See generally Risks of Hedge Fund Operations, Hearing on Hedge Fund Operations Before H. Comm. on Banking*, 105th Cong. (1998) (testimony of Richard R. Lindsey, Dir., Div. of Mkt. Regulation, U.S. SEC),

http://www.sec.gov/news/testimony/testarchive/1998/tsty1498.htm ("Lindsey Testimony") (noting that hedge funds "typically" do not register as dealers); *see also id.* ("[T]he Commission does not regulate the activities of hedge funds[.]").

Whether one is a dealer, rather than an investor, depends on at least ten established factors publicly listed on the SEC's website. *See* "Who is a Dealer," *supra.* The SEC has explicitly said that one must evaluate the "totality" of those factors, based on "all the relevant facts and circumstances," to decide if one is a dealer – so no one factor controls. *Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks under Section 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934* ("Proposed Dealer Exemption Rule"), Exchange Act Rel. No. 34-46745, 67 Fed. Reg. 67,496, 67,499 (Nov. 5, 2002); *see also Nat'l Council of Savings Insts.*, SEC No-Action Letter, 1986 WL 67129, at *2 (July 27, 1986) (whether one is a dealer rather than a trader is "difficult . . . and depends substantially upon the facts of a given situation" and may not be determined on "just one portion of [one's] activities"); *Burton Securities*, SEC No-Action Letter, 1977 WL 10680, at *1-2 (Dec. 5, 1977) (same).

By that standard, no reasonable factfinder could conclude that Global IV is a dealer. Indeed, examining the "totality" of the factors here shows that at least *nine out of ten* indicate that Global IV is not a dealer. Specifically, Global IV:

- does not advertise publicly that it makes a market in securities
- does not make a market in securities or quote prices for both purchase and sale of one or more securities
- does not hold itself out as being willing to buy and sell a particular security on a continuous basis[6]

[6] In fact, Global IV neither buys nor sells any securities at all in § 3(a)(10) exchanges, let alone doing both, which itself establishes that Global IV is not a dealer. *Sci. Applications, Inc.*, SEC No-Action Letter, 1973 WL 8422, at *3 (Dec. 5, 1973) ("Since the Company is not both buying and selling securities, it does not come within the definition of the term 'dealers' contained in

- does not run a matched book of repurchase agreements
- does not issue or originate securities that it also buys and sells
- does not advertise that it is in the business of buying and selling securities
- does not do business with the public directly[7]
- does not provide services to investors, such as handling money and securities, extending credit, or giving investment advice
- does not write derivatives contracts

See generally "Who is a Dealer," *supra* (listing factors for identifying dealers).

Thus, nine out of ten of the established factors indicate that Global IV is not a dealer. The Division may not deviate from the OIP by changing positions on any of those factors now. *In the Matter of Michael Flanagan, et al.*, Exchange Act Rel. No. 160, 2000 WL 98210, at *23 (ALJ Jan. 31, 2000) (noting that the Division had been prohibited from raising an issue that the Division had not raised in the OIP).[8]

Section 3(a)(5)."). Rather, Global IV acquires stock in exchange for extinguishing debts. Kirkland Tr. at 49-53; *see also id.* at 123 ("We do not purchase stock in the open market. Period."). And Global IV itself does not sell the stock; a registered broker-dealer does, on advice from a registered investment advisor. O'Neil Tr. at 12, 27, 32-33, 33-34, 40; Kirkland Tr. at 118-19.

[7] *See* Proposed Dealer Exemption Rule, 67 Fed. Reg. at 67,499 ("buying and selling *directly* to securities customers" in certain circumstances suggests that one is a dealer (emphasis added)); *see also* Lindsey Testimony at n.2, https://www.sec.gov/news/testimony/testarchive/1998/tsty1498.htm ("[A] dealer . . . deals directly with public investors[.]"). To the contrary, stock is only sold for the benefit of Global IV by registered broker-dealers to other registered broker-dealers acting either for their own account or for the benefit of their own undisclosed customers, if any. O'Neil Tr. at 12, 27, 32-33, 33-34, 40; Kirkland Tr. at 118-19. That Global IV does not do business with the public directly, and instead relies on registered broker-dealers as intermediaries, is especially significant here. That fact, as well as that in most cases registered broker-dealers also represent the issuers in these exchanges, *see* Sbarra Tr. at 15, 36-41, means that "[a]ny broker or dealer function relating to [Global IV's] activities [is handled by] . . . [a] registered . . . broker dealer." *Sci. Applications, Inc.*, SEC No-Action Letter, 1973 WL 8422, *3 (Dec. 5, 1973). That alone indicates that Global IV is not itself a dealer. *Id.*

[8] *See also In re Ambassador Capital Mgmt., LLC, et al.,*. Exchange Act Release No. 672, 2014 WL 4656408, at *45 n.11 (ALJ Sep. 19, 2014) ("This allegation does not appear in the OIP,

Even if the Division could arguably point to *one* factor to the contrary, when such a long list of factors undisputedly indicates that an entity is not a dealer, the entity is not a dealer.

2. The Allegation That Global IV is an Underwriter under the Securities Act Is Legally Insufficient to Deem Global IV a Dealer under the Exchange Act.

The Division seizes on just one of the ten established, governing factors in alleging that Global IV is a dealer: That Global IV is allegedly an underwriter. However, under the Exchange Act an "underwriter" is defined as "any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security..."[9] A "distribution" is distinguished from ordinary trading transactions by "the presence of special selling efforts and selling methods."[10] The Commission has stated that "[a] 'distribution' must have two elements: 'magnitude' and 'special selling efforts and selling methods.'"[11] The Commission has "indicated that providing greater than normal sales compensation arrangements pertaining to the distribution of a security, delivering a sales document, such as a prospectus or

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however broadly read, and is therefore immaterial."); *In re Pub. Fin. Consultants, Inc., et al.*, Exchange Act Release No. 274, 2005 WL 464865, at* 32 (ALJ Feb. 25, 2005) (refusing to consider arguments that had not been raised in the OIP); *In the Matter of Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *8 n.39 (March 7, 2014) ("We do not reach the question of whether Bartko was an unregistered investment advisor . . . during the relevant period because the OIP did not allege this as a statutory basis and the parties have not directly addressed it."); *cf. In re Lexington Resources, Inc.*, Exchange Act Release No. 379, 2009 WL 1684743, at *21 (ALJ June 5, 2009) ("The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original OIP.")

[9] The Exchange Act, 15 U.S.C. § 78c(a)(20), adopts the definition of an "underwriter" contained in Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(20).

[10] 17 C.F.R. § 242.100(b)(iii); *see also New Jersey Carpenters Vacation Fund v. Royal Bank of Scot. Grp., PLC*, 720 F. Supp. 2d 254, 263 (S.D.N.Y. 2010) (holding that an entity was not an underwriter even under the Securities Act partly because it did not "directly participate[] in the sale or distribution of securities . . . by, for instance, marketing the securities to the public, [or] assisting in investor 'road shows'").

[11] *Review of Anti-manipulation Regulation of Securities Offerings*, Sec. Exchange Act Release No. 33924, 59 Fed. Reg. 21681-01, 21685 (Apr. 26, 1994) (internal quotation marks and citation omitted).

market letters, and conducting road shows are generally indicative of 'special selling efforts and selling methods.'"[12] Global IV does not engage in "special selling efforts and selling methods," and as such does not participate in distributions, and therefore is not an underwriter under the Exchange Act.

Likely recognizing this fatal defect, the Commission attempts to rely on the Securities Act definition of "underwriter" (and cases or regulations interpreting that definition) – which covers more entities than traditional underwriters who might be required to register as broker-dealers. *See In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 629 (S.D.N.Y. 2007); DAVID A. LIPTON, 15 BROKER-DEALER REGISTRATION § 3:2 (2015) (the definition of an underwriter includes "individuals who do not even bear the title of broker or dealer"). However, the Division cannot rely on the Securities Act here, because securities issued in § 3(a)(10) exchanges are entirely exempt from the Securities Act, as part of a deliberate Congressional decision to have such exchanges fall solely within the purview of the courts. As an initial matter, it not clear that the filing requirements of the Exchange Act were meant to apply to judicially approved settlement agreements. *See Brucker v. Thyssen-Bornemisza Eur. N.V.*, 424 F. Supp. 679, 691 (S.D.N.Y. 1976) (Exchange Act proxy rules "were not meant to apply to judicially approved settlement agreements, particularly in light of the legislative history."), *aff'd sub nom., Brucker v. Indian Head, Inc.*, 559 F.2d 1202 (2d Cir. 1977); *Gilbert v. Bagley*, 492 F. Supp. 714, 731 (M.D.N.C. 1980) ("supervision of the court afforded an extra measure of shareholder protection").

[12] Review of Anti-manipulation Regulation of Securities Offerings; Securities Exchange Act Release No. 33924, 59 Fed. Reg. 21681-01 (Apr. 26, 1994) (internal quotation marks and citation omitted).

Moreover, alleging that an entity is an underwriter is legally insufficient, alone, to make it a dealer. *Acqua Wellington North American Equities Fund, Ltd.,* SEC No-Action Letter, 2001 WL 1230266 (Oct. 11, 2001). In *Acqua Wellington*, the Staff issued a No-Action letter to a self-described underwriter that inquired whether § 15(a) required the underwriter to register as a dealer. 2001 WL 1230266, at *4; *cf.* 17 C.F.R. § 202.1(d) ("any statement by the . . . chief counsel . . . of a division can be relied upon as representing the views of that division"); *Morgan Stanley & Co., Inc.*, Securities Act Release No. 34-28990, Exchange Act Release No. 28990, 1991 WL 296498, at *3 (March 20, 1991), Separate Statement of Commissioner Fleischman ("[T]he staff does know that no-action letters are treated, inside and outside the Agency, as decisional material evidencing 'the staff's views,' that the Bar and the public do, and should be able to, rely on these decision[s] . . . .").

The Division might wish to change that position now, but must do so through the regular rulemaking process. It may not use this case to reverse course from that well-established, public guidance that Respondents were entitled to rely on. Doing so would represent a "substantial change in its enforcement policy that was not reasonably communicated to the public" and thus violate Due Process. *Upton*, 75 F.3d at 98 ("The Commission may not sanction Upton pursuant to a substantial change in its enforcement policy that was not reasonably communicated to the public.").

3. Global IV Lacks Attributes of an Underwriter.

Moreover, Global IV lacks many other attributes of an underwriter, in addition to not making special selling efforts. An underwriter's strategy is to sell all of an issuer's stock immediately so that it bears no market risk. *See Ackerberg v. Johnson*, 892 F.2d 1328, 1336 (8th Cir. 1989). For example, equity-line investors like Acqua Wellington short in advance and/or sell all stock immediately. *See* Luisa Kroll, *Toxic Stock*, FORBES (March 4, 2002)

http://www.forbes.com/forbes/2002/0304/040a.html (equity-line investors can turn a profit by selling the stock "immediately"). Global IV does not do that. Global holds at least some portion of every issuer's stock for the long term. Kirkland Tr. at 61; *id.* at 76 ("Fundamentally the way we structure our transactions is to try and minimize our risk in the short, medium term; and therefore, make our money in the mid- and long-term on common stock appreciation."); Kreger Tr. at 119; Ex. J at 2 ("The goal is to invest for the long term. We always sell some, but rarely sell all."). For some issuers, Global IV "still hold[s] a huge number of shares three years" after the exchange. Kirkland Tr. at 61. Indeed, Global IV takes years to sell enough of an issuer's stock to recover its investment in that issuer. Ex. N. This is consistent with the long-term strategy an ordinary investor adopts. Coulston Tr. at 85 (attached as Ex. B) (Global IV's strategy is "akin to any normal portfolio management."). Global IV also faces significant risks in its investments and has lost money on many. Kirkland Tr. at 186; Schissler Tr. at 23; Kreger Tr. at 79

Further, as explained above, an underwriter trades in a "magnitude" greater than is common in "ordinary trading." 17 C.F.R. § 242.100(3)(iii)(3). But here, the magnitude of Global IV's acquisitions and Global IV's sales are both restrained. When it comes to acquiring securities, Global IV limits the size of its acquisitions in § 3(a)(10) transactions. Global IV never holds more than 9.99% of an issuer's stock at any given time. Kirkland Tr. at 58. And as an investment strategy Global IV specifically attempts to ensure that the "transaction size [is] a smaller percentage of [the issuer's] market cap or smaller percentage of its liquidity," because Global IV considers it a "mistake[] to "fund[] too much capital for too small of a company." Kreger Tr. at 164-65. When it comes to selling the securities, Global IV tries to represent no more than 20% of the stock's daily trading volume so that Global IV's trades do not affect the

stock price. O'Neil Tr. at 89-90; Coulston Tr. at 25-26. In practice, Global IV's sales virtually always represent less than 10% of the trading volume of its stocks in a given day. Ex. O. The limited magnitude of Global IV's trades further demonstrate that Global IV is not an underwriter.

Global IV lacks still other attributes of an underwriter. Global IV does not assist in "capital-raising," advise issuers on market conditions and assist in preparation of marketing statements or offering documents, participate in or organize a syndicate of investment banks, or transact to provide a post-issuance secondary market and to facilitate price discovery. PROHIBITIONS AND RESTRICTIONS ON PROPRIETARY TRADING, 79 F.R. 5536, 5566 (Jan 31, 2014). Global IV also is not issuers' fiduciary. Ex. M at IPG-005-00000017 (Global IV is not a fiduciary); *see Frigitemp Corp. v. Fin. Dynamics Fund, Inc.*, 524 F.2d 275, 279 (2d Cir 1975) (stating that an underwriter is a "fiduciary of the corporation"). And Global IV does not have access to issuers' non-public information. *See Flecker v. Hollywood Entm't. Corp.*, 1997 WL 269488, at *8-9 (D. Or. Feb. 1997); *Cooper v. Hwang*, No. 86-20145, 1987 WL 16949, at *4 (N.D. Cal. Apr. 20, 1987); Kirkland Tr. at 233.

In sum, the Division concedes that all but one single factor (that Global IV is allegedly an underwriter) indicates that Global IV is not a dealer. This factor alone is not enough to conclude that Global IV is a dealer, but even if it were, the Division cannot prevail even on that single factor. Thus, this Court should grant summary disposition in Respondents' favor.

4. The Division Cites Newly-Invented Factors That Do Not Apply.

The Division apparently recognizes that it needs to create more factors beyond the ten factors that are part of established guidelines to prevail on the argument that Global IV is a dealer. As explained above, the ALJ should not consider any of these new factors that the SEC has never identified before. But even if the ALJ did consider these factors, the undisputed facts show that Global IV is not a dealer based on the two newly identified factors.

First, the Division argues that Global IV is a dealer because it supposedly provides "investment advice" to issuers during court-approved § 3(a)(10) exchanges. OIP, ¶¶ 1, 15. But the Division has it backwards. Whether someone advises *issuers* is not one of the factors for identifying a dealer. According to the SEC's established guidance, the question is whether an entity advises *investors*. *See* "Who is a Dealer," *supra* ("Do you provide *services to investors*, such as . . . giving investment advice." (emphasis added)); Proposed Dealer Exemption Rule, 67 Fed. Reg. at 67,499 (stating that "buying and selling directly to *securities customers* together with conducting any of an assortment of professional market activities such as providing investment advice" indicates dealer activity (emphasis added)). The Due Process Clause forbids the Division from proving that Global IV is a dealer based on a new standard for which Global IV could not have been on notice. *Upton*, 75 F.3d at 98. In addition, Global IV never interacts with retail *investors* at all, let alone advises them. Rather, its registered broker-dealer sells the shares to another registered broker-dealer, which may be acting on behalf of customers (which, presumably, it advises) or for its own account (e.g., as a market maker).

Moreover, Global IV does not provide advice to issuers. Global IV is the issuers' *adversary* in a lawsuit, not their advisor. Kirkland Tr. at 199 ("No, I would not say 'recommend.'"); *id.* at 201 ("I don't think it's advice. . . . We're investors. We're doing this for us. . . We're not advisors."). For example:

- During § 3(a)(10) exchanges, Global IV *sues the issuers*. *See, e.g.*, Kirkland Tr. at 107-08, 271.
- The issuer expressly represents to the court that Global IV has not provided it with any advice. Ex. M at IPG-005-00000017

- The issuer is advised by its own litigation counsel, and represents that it has relied on that advise. Ex. M at IPG-005-00000018; Kreger Tr. at 170-71.
- Even after the parties reach a settlement, Global IV sometimes litigates again with issuers in order to enforce the settlement order. Kirkland Tr. at 184-85, 271.

The Division also mischaracterizes as "advice" discussions between Global IV and issuers about what debts to extinguish. In those discussions, Global IV does what is best for Global IV. It explains to the issuers that there are only certain kinds of debts Global IV is willing to acquire for a § 3(a)(10) exchange. Kirkland Tr. at 198-201. That is negotiating at arm's length, not providing advice. *See ScripsAmerica, Inc. v. Ironridge Global LLC*, __ F. Supp. 2d __, No. 14-03962, 2015 WL 4747807, at *23 (C.D. Cal. Aug. 11, 2015) (describing Global IV's § 3(a)(10) exchanges as "arm's length transaction[s]").

Additionally, the settlement agreements between Global IV and issuers demonstrate conclusively that Global IV does not advise issuers. Specifically, the issuers represent in settlement agreements that (1) Global IV is "acting solely in an arm's length capacity," (2) "has not and is not acting as a legal, financial, accounting or tax advisor to" the issuer, and (3) "any statement made by [Global IV] or any of [Global IV's] representatives or attorneys is not advice or a recommendation to" the issuer. Ex. M at IPG-005-00000017.

Even if Global IV *did* give "advice" to issuers (which it does not), that "advice" is about the terms of Global IV's prospective investments – i.e., what debts Global IV is willing to extinguish in return for stock. Advice about "the structuring of . . . securities offerings" is not investment advice. *See* DIV. OF INV. MGMT., U.S. SEC. & EXCH. COMM'N, *Regulation of Investment Advisers* (Mar. 2013), http://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf; *see also* DIV. OF INV. MGMT., U.S. SEC. & EXCH. COMM'N, Staff Legal Bulletin No.

11, *Applicability of the Advisers Act to Financial Advisors of Municipal Securities Issuers* (Sept. 19, 2000) https://www.sec.gov/interps/legal/slbim11.htm (stating that investment advice does not include "providing advice as to whether and how a municipality should issue debt securities, including advice with respect to the structuring, timing and terms concerning such issue or issues"). Thus, even if providing advice were a part of the established guidance for determining whether one is a dealer (which it is not), Global IV is not providing the kind of investment advice that is indicative of a dealer. *See* "Who is a Dealer," *supra* ("Do you provide services to investors, such as . . . giving *investment advice*." (emphasis added)).

The second newly-created factor the Division relies upon is that Global IV supposedly "receiv[es] and sell[s] billions of shares in connect with self-described financing services for domestic microcap companies." OIP ¶ 1. Again, neither the number of shares[13] a person trades nor whether a person engages in "financing" are established, independent factors for identifying dealers. Thus, the Division may not rely on those factors here. *Upton*, 75 F.3d at 98; *see generally* "Who is a Dealer," *supra*; Proposed Dealer Exemption Rule, 67 Fed. Reg. at 67,499. Even if it could, the Division also mischaracterizes the § 3(a)(10) exchange as "financing." Kreger Tr. at 131-32 ("3(a)(10) is not a financing, it is an exchange.").

In short, these two factors do not support labeling Global IV a dealer. The factors are novel, and Due Process forbids the Division from using this case to create new standards that should be promulgated through the rulemaking process instead. Even if the Division were permitted to rely on these factors, the undisputed facts show that Global IV is not a dealer under these factors.

[13] The magnitude of trades is relevant, if at all, in deciding whether an entity is an underwriter. Magnitude is not a separate, independent factor for identifying a dealer. Moreover, the number of shares is simply a mathematical result of the relatively low price per share of most small public companies, and nothing more.

5. Even if Global IV Were a Dealer (Which it is Not), it Would Be Exempt from Registration.

For the reasons explained above, Global IV is not a dealer under § 15(a). But even if it were, the Division's allegation that Global IV is a "dealer" is insufficient to show it is liable for failing to register because if Global IV were a dealer, it would be exempt from registration as a foreign broker-dealer. 17 C.F.R. § 240.15a-6.

A "foreign broker or dealer" is exempt from registration to the extent that it "[e]ffects transactions in securities with or for . . . [a] registered broker or dealer" acting as either a principal or as an agent for others. *Id.* § (a)(4)(i). A foreign dealer is also exempt to the extent that it effects transactions with persons that have not been solicited by it. *Id.* § (a)(1).

Global IV meets all those criteria. First, it is a "foreign" "resident" under the Commission's "territorial" definition of residency, because it is a British Virgin Islands corporation. 17 C.F.R. § 240.15a-6(a), (b)(3); Foreign Broker Dealer Rule, 54 Fed. Reg. at 300016; O'Neil Tr. at 20. Its directors reside in the British Virgin Islands. O'Neil Tr. at 27; Kreger Tr. at 58-59. And Global IV's office is in Tortola, British Virgin Islands. Kirkland Tr. at 28.

Second, all of the § 3(a)(10) exchanges are effected with registered broker-dealers – which is enough alone to exempt a foreign broker-dealer. Registered broker-dealers are undisputedly the ones that execute all of Global IV's stock sales. O'Neil Tr. at 32-33, 33-34, 37. In every case, the shares of stock Global IV acquires in the § 3(a)(10) exchanges are deposited into ordinary brokerage accounts with registered broker-dealers. They are then sold in the open market by those registered broker-dealers to other registered broker-dealers. Global IV has never directly sold a single share of stock to anyone. Furthermore, registered broker-dealers represent issuers in many of the § 3(a)(10) exchanges. *See* Sbarra Tr. at 15, 36-41.

Third, Global IV rarely, if ever, solicited any of the issuers with whom it engaged in § 3(a)(10) exchanges. To the contrary, they usually come to Global IV. Kirkland at 63 ("They call us."); *id.* at 67 ("Well, it's almost always them coming to us."); Kreger at 160 ("We are not typically out there soliciting."). Moreover, Global IV does not do things that the Commission has identified as "solicitation." *See* Foreign Broker Dealer Rule, 54 Fed. Reg. at 30018.

Thus, even if it were a dealer under § 15(a), Global IV would be exempt from registration. For all these reasons, the ALJ should reject the Division's attempt to stretch § 15(a) to regulate § 3(a)(10) exchanges.

B. Partners Is Not Liable Under § 20(b).

The Division has also alleged that Partners violated Exchange Act § 20(b), which makes it "unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person." 15 U.S.C. § 78t. This claims fails because the Division cannot prove three things here that are necessary to prevail on the § 20(b) charge.

First, the Division cannot prove that Partners acted "through or by means of" Global IV. That would require proof that Partners "controlled" Global IV within the meaning of the statute. *SEC v. Coffey*, 493 F.2d 1304, 1318 (6th Cir. 1974) ("Under section 20(b), there must be shown to have been knowing use of a controlled person by a controlling person before a controlling person comes within its ambit."); *see also Podraza v. Whiting*, 790 F.3d 828, 835 (8th Cir. 2015) (observing that 20(a) and 20(b) "impose liability on control persons"); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1169-70 (D.C. Cir. 1978); *City of Pontiac Gen. Emps.' Retirement System v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 375 (S.D.N.Y. 2012); *Cohen v. Citibank, N.A.*, 954 F. Supp. 621, 630 (S.D.N.Y. 1996); *Rush v. Oppenheimer & Co., Inc.*, 628 F. Supp. 1188, 1196 n. 4 (S.D.N.Y. 1985). To show such control, the Division would need to demonstrate *at*

minimum both (1) that Partners actually exercised control over the operations of Global IV in general and (2) that Partners had the power to control the specific transaction upon which the primary violation is predicated (i.e., the failure to register). *See Metge v. Baehler*, 762 F.2d 621, 631 (8th Cir. 1985) (describing test for identifying control under § 20(a)). The Division cannot meet either requirement. Merely being a shareholder is not enough. *See Newlead Holdings Ltd. v. Ironridge Global, Ltd.*, No. 14-cv-3945, 2014 WL 2619588, *4 (S.D.N.Y. June 11, 2014) (holding that Global IV is not a "mere department" of Partners).

Concerning the first requirement, the evidence is that Partners did not actually "*exercise* control over[] the operations of Global IV in general" – i.e., that Partners did not control Global IV's "day-to-day operations." *Metge*, 762 F.2d at 631; *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 85 (1st Cir. 2002) ("To meet the control element, the alleged controlling person . . . must actually exercise control over the company . . . ."); *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1108 (10th Cir. 2003) (holding that a member of a board of directors was not a control person because he had no control over "day-to-day operations"). First, Global IV's Amended and Restated Articles of Association state that Global IV's officer and directors are the ones responsible for day-to-day operations, not Partners (which was only a shareholder). Ex. H at CCM-001-00000126, 128-29, ¶¶ 9.1-9.9, 12.1-12.5. Further, what was written on the governing papers was also true in practice. Global IV's directors, registered investment advisor, and registered broker-dealers in fact have "total operational control" over Global IV's investing activity. Kirkland Tr. at 28, 122-23 ("They have total operational control."); *id.* ("They are the director. They have total control."); O'Neil Tr. at 28-29). Indeed, it is Global IV's David Sims who has authority over Global IV's investments and trading. O'Neil Tr. at 29, 65-66, 79:12-23, 87:15-16; Kreger Tr. at 53-54. So much so that the Division's own attorney has remarked,"[I]t

seems like David Sims has an extraordinary level of control over the aggregate trading strategy." O'Neil Tr. at 46-47.

The Division points to the fact that Partners was Global IV's sole shareholder, but that is not enough. The Division cites no evidence that Partners could remove the directors anytime without cause under the applicable agreements and British Virgin Islands law. OIP ¶¶ 5-6. In addition, having the "power" to choose directors only shows that Partners might have "*potential* ability to control" Global IV, which is insufficient as a matter of law. *Aldridge*, 284 F.3d at 85 (emphasis added).

Concerning the second requirement, Partners did not have any involvement at all in, let alone control over, the specific alleged violation of § 15(a), which is the decision Global IV made as to whether it should register as a dealer to engage in the § 3(a)(10) exchanges. As explained above, David Sims made all such decisions, *e.g.*, Kreger Tr. at 53-54, and thus would have been the one to decide whether those exchanges required § 15(a) registration. Thus, Partners has no "control[] [over] the particular policies that give rise to the alleged violation[]" – i.e., the decision whether to register. *See In re Friedman's, Inc. Sec. Litig.*, 385 F. Supp. 2d 1345, 1374 (N.D. Ga. 2005) (holding that a person who had control over a company's general operations was not a control person because he did not "control[] the particular policies that g[a]ve rise to the alleged violations of the securities laws").

The Division apparently contends that Partners did control the particular transactions at issue because some of Partners' directors had trading authority over Global IV's stock. But Mr. O'Neil and Mr. Coulston exercised the "trading authority" in their role as principals of a separate legal entity, Cahir Capital Management, LLC – which is not Partners. Not only were they acting

on behalf of a separate legal entity, when doing so they received directions *from Global IV.* O'Neil Tr. at 37, 38-39, 40, 87.

Moreover, Cahir is a registered investment advisor and had an investment-advisory agreement with Global IV. O'Neil at 34-36; *see also* Kreger Tr. at 33-34 (Division attorney acknowledging that Brendan O'Neil wore "two hats"). As a result, Cahir's principals were merely Global IV's advisors, and advice is not control. *In re Fairway Group Holding Corp. Sec. Litig.*, No. 14-0950, 2015 WL 249508, at *18 (S.D.N.Y. Jan. 20, 2015) ("[T]he provision of advice and guidance does not raise a reasonable inference of the power to direct, rather than merely inform, an entity's ultimate decision."); *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 790, 810 (C.D. Cal. 2004) ("Advice does not amount to control."). Also as a result, they were Global IV's fiduciaries, which is the opposite of having control over Global IV. *See generally SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 201 (1963) (holding that investment advisors have "fiduciary relationship[s]" with clients). In short, Partners did not control Global, notwithstanding that Partners was a shareholder of Global IV. *See Newlead Holdings*, 2014 WL 2619588, *4 (holding that Global IV is not a "mere department" of Partners).

Second, the Division would need to prove that Partners used its alleged control over Global IV to cause it to commit a "separate violation of the Exchange Act." *See Podraza*, 790 F.3d at 841-42 ("Because Plaintiffs' section 20(a) and 20(b) claims are not actionable absent a separate violation of the Exchange Act, the district court correctly dismissed these claims as well."); *Shemian v. Research in Motion, Ltd.*, 570 Fed. App'x 32, 35 n.3 (2d Cir. 2014) ("[T]hose [20(a) and (b)] claims rely on a primary violation of the securities laws."); *Rush*, 628 F. Supp. at 1196 n. 4 (holding that § 20(b) imposes "[v]icarious liability"); *SEC v. Stringer*, No.

02-1341, 2013 WL 23538011, at *7 (D. Or. Sept. 3, 2003) ("Both Sections 20(a) and 20(b) create secondary liability."); *Lockheed Martin*, 875 F. Supp. 2d at 375. The Division cannot do that here, for the reasons explained above.

Third, the Division bears the burden under § 20(b) to show that Partners "knowingly" participated in Global IV's alleged § 15(a) violation. *Coffey*, 493 F.2d at 1318; *Cohen*, 954 F. Supp. at 630; *Stringer*, 2003 WL 23538011, at *6. The Division cannot possibly prove that here. Even the Division itself did not know of the alleged violation until its third shot – i.e., after the Order that began the investigation and the first Wells notice. Its theory is not only novel, but contrary to its own prior guidance. No court has ever held that § 15(a) applies in § 3(a)(10) exchanges, and the Division has never even asserted a violation of § 15(a) in any enforcement action ever brought against participants in §3(a)(10) exchanges, even in cases involving actual fraud. *See SEC v. Rocky Mountain Energy Corp.*, No. H-03-CV-1133 (S.D. Tex. filed Apr. 3, 2003); *SEC v. Lefkowitz*, No. 8:12-CV-1210T35 (M.D. Fl. filed May 30, 2012). Partners could not have known that the Division would expect Global IV to register as a dealer under the circumstances here.

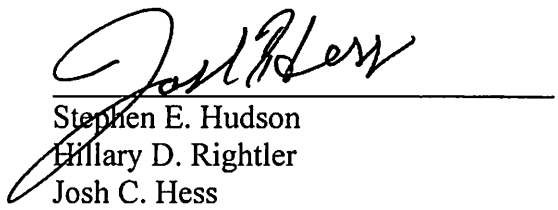
In the end, there is not a scintilla of evidence that Partners knowingly forced Global IV to violate the law. Partners even asked the Division for advice on ensuring that the exchanges complied with applicable law. Kirkland Tr. at 286; Exs. P & Q. Thus, Partners did not "knowingly" participate in any violation of § 15(a), and the Division's § 20(b) claim against Partners fails as a matter of law.

IV. CONCLUSION

For these reasons, the Court should enter summary disposition in Respondents' favor.

Dated: September 28, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015, I filed and original and three copies of the foregoing by Federal Express Overnight Mail with the Office of the Secretary, Securities and Exchange Commission, Attn: Secretary of Commission Brent J. Fields, 100 F Street NE, Mail Stop 1090, Washington, DC 20549, and by facsimile transmission to (202) 772-9324, and served a true and correct copy upon counsel of record and the hearing officer by electronic mail, as follows:

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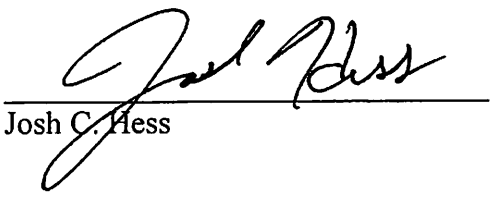

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