Docket #9 Date Filed: 06/22/2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

LEGEND VENTURE PARTNERS, LLC,

Defendant.

23 Civ. 5326

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS EMERGENCY APPLICATION FOR AN ORDER TO SHOW CAUSE, TEMPORARY RESTRAINING ORDER, AND PRELIMINARY INJUNCTION INCLUDING AN ASSET FREEZE, RECEIVER, AND OTHER RELIEF

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June 22, 2023

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Plaintiff Securities and Exchange Commission (the "Commission") respectfully submits this memorandum of law, together with the Declarations of Melanie L. Cyganowski ("Cyganowski Decl."), Kerri L. Palen ("Palen Decl."), Gregory Buckis ("Buckis Decl."), Robert Cliatt ("Cliatt Decl."), and Joshua D. Tannen ("Tannen Decl."), as well as the Local Civil Rule 6.1(d) Declaration of Lee A. Greenwood ("Greenwood Decl."), in support of its emergency application for an order to show cause and other temporary and preliminary relief, including a temporary restraining order, an asset freeze, and a receiver, against Defendant Legend Venture Partners LLC ("Legend"). For the reasons set forth below, the Court should grant the Commission's application in its entirety.

PRELIMINARY STATEMENT

The Commission brings this emergency action to halt an ongoing fraud by Legend. Legend used a network of unregistered sales agents to engage in fraudulent, illegally unregistered offerings of securities in investment vehicles (the "Legend Funds" or "Funds") that purportedly provided access to shares ("Pre-IPO Shares") of private companies that were anticipated to undertake initial public offerings in the near future ("Pre-IPO Companies"). Legend fraudulently procured over $35 million from hundreds of investors by falsely telling them that the firm would only make money when investors made money—after the Pre-IPO Companies went public—and that the investors would pay no upfront fees or commissions. In fact, investors were charged exorbitant upfront markups on all investments—though none of the Pre-IPO companies has yet gone public—allowing Legend's principals and unregistered sales agents to pocket millions of dollars before investors made a dime. To procure investments, Legend operated two lower Manhattan boiler rooms in which more than 45 unregistered sales agents cold-called investors using lead lists purchased from third parties.

From approximately February through October 2022, Legend—which grew out of another unregistered broker-dealer that fraudulently marketed Pre-IPO Shares, StraightPath Venture

Partners LLC ("StraightPath")[1]—raised over $35 million from hundreds of investors, including many in this District. Before February 2022, Legend principals and many of its sales agents served as sales agents for StraightPath, fraudulently marketing Pre-IPO Shares in some of the same Pre-IPO Companies to many of the same investors that the Legend principals and sales agents would later target on behalf of Legend. Like StraightPath, Legend solicited investors based on the false representation it would charge only a 20% fee on profits (if any) earned after a Pre-IPO Company went public. In fact, though none of the Pre-IPO Companies in which the Legend Funds invested have gone public to date, Legend's principals and sales agents earned handsome profits—pocketing a total of approximately $12.8 million—from massive markups on the investments that ranged on average between 46% and 105% above the prices Legend had paid for the Pre-IPO Shares.

Although Legend has represented that it voluntarily discontinued soliciting new investments last year, its principals continued to purchase lead lists of prospective investors, and firm employees are boasting to investors that the firm is still actively looking for new investment opportunities. And, until just days ago, when Legend shut down its website after learning of the Commission's intention to commence this action for emergency relief, Legend's website was still touting opportunities to purchase Pre-IPO Shares in numerous Pre-IPO Companies.

The Commission first seeks a temporary and preliminary injunction against violating antifraud and other securities law provisions to prevent Legend from ensnaring any more victims. Next, further emergency relief is necessary to protect investors in the Legend Funds. In particular, an asset freeze and receiver are necessary to prevent the further dissipation of assets and to ensure

[1] StraightPath is the subject of a previously filed enforcement action and is currently under receivership. *See SEC v. StraightPath Venture Partners, LLC, et al.*, 22 Civ. 3897 (LAK) (S.D.N.Y. filed May 13, 2022) (the "StraightPath Action"). In light of the substantial factual overlap set forth herein and in the Cyganowski Declaration attached hereto, the Commission respectfully recommends that the Court consider the appointment of the same receiver in this matter.

that an independent fiduciary takes over the management of Legend and the Legend Funds, which currently hold interests in Pre-IPO Shares that Legend purchased for more than $22 million. With one of the relevant Pre-IPO Companies (Triller) reportedly having filed paperwork to allow it to go public,[2] the need for an asset freeze and a court-appointed fiduciary to remove Legend Fund assets from the control of Legend principals—who asserted their Fifth Amendment rights against self-incrimination and declined to answer questions under oath during the Commission's investigation—is all the more pressing. In addition, the Commission seeks an anti-litigation injunction that enjoins the filing of any new bankruptcy, foreclosure, receivership, or other actions by or against Legend to prevent potentially disparate actions in different courts that could affect the receivership assets subject to this Court's jurisdiction and control. Finally, the Commission seeks (1) a verified accounting to identify the Legend Funds' assets and ensure compliance with any asset freeze the Court enters and (2) a prohibition on the destruction of relevant documents to ensure that the receiver has access to the relevant books and records to conduct the necessary work and that those documents remain available to the Commission in discovery.

STATEMENT OF FACTS

I. BACKGROUND ON LEGEND

Legend is a Delaware limited liability company that was formed on September 1, 2021, with a principal place of business in New York, New York. (Tannen Decl. Ex. 1.) Legend's principals are identified in corporate documents as Steven Lacaj ("Lacaj"), Mario Gogliormella ("Gogliormella"), and Adam Ibrahim. (*Id.*) Lacaj and Gogliormella previously operated a company called L&G Capital Corp. ("L&G"), which they used to collect commission payments for investments they and their team successfully solicited for StraightPath. (Cyganowski Decl. at 2-3.) Legend serves as both the manager and investment adviser for the Legend Funds. (Tannen Decl.

[2] This statement is based on public news reports. (*See, e.g.*, Tannen Decl. Ex. 41.)

Exs. 8-15.) Pursuant to private placement memoranda ("PPMs") for the Legend Funds, Legend was responsible for the day-to-day operations of the Funds and investments of the Funds' assets, including establishing various series, *i.e.,* subdivisions, of the Funds ("Series") for the purpose of making investments in Pre-IPO Companies. (*Id.*) Legend has never been registered with the Commission either as a broker, dealer, or investment adviser.

Pre-IPO Shares are often held by early stage investors and company employees and their family members and are not typically widely available to the investing public. (*Id.* Exs. 16-17.) Pre-IPO Shares are attractive to investors given their potential for high returns if the Pre-IPO Company does make a public offering and there is high demand for its shares, allowing the shares to later be sold in the public markets above their pre-IPO price. (*See, e.g.*, *id.* Ex. 16.)

From approximately 2019 until February 2022, Legend's principals worked as sales agents for StraightPath, managing boiler rooms they used to sell interests in private pre-IPO funds managed by StraightPath. (Cyganowski Decl. at 2-3; Tannen Decl. Ex. 29.) Legend's principals ultimately raised more money for StraightPath and earned more in commissions (nearly $35 million) than any other group of StraightPath sales agents. (Cyganowski Decl. at 2-3.) StraightPath made sales pitches that were very similar to those that would later be used by Legend to solicit investors in the Legend Funds. (Cyganowski Decl. at 3-5; Tannen Decl. Exs. 19, 21; Buckis Decl. ¶¶ 7, 10; Cliatt Decl. ¶ 5.)

In or around February 2022, at approximately the same time StraightPath ceased raising money from investors and with assistance from StraightPath's principals, Legend commenced operations. (Cyganowski Decl. at 5-6; Tannen Decl. Exs. 29-31; Palen Decl. ¶ 7.) At times, Legend described itself to prospective investors as the new name for StraightPath. (Buckis Decl. ¶ 6.) But, ultimately, in a manner similar to StraightPath, Legend sold Series interests in its own pre-IPO funds (*i.e.*, the Legend Funds), which purported to invest in seven Pre-IPO Companies over time. (Palen

Decl. ¶ 7; Tannen Decl. Exs. 7-16; Cyganowski Decl. at 3-6.) From approximately February through October 2022, Legend raised investor money for five Legend Funds, each of which was formed by Legend's principals as a Delaware limited liability company. (Palen Decl. Ex. 1; Tannen Decl. Exs. 2-6.) Legend raised more than $35 million for the Legend Funds from at least 321 investors located in 48 states and Bermuda. (Palen Decl. ¶ 7, Exs. 1-2.) Of that total, Legend raised more than $24 million, or 69%, from investors who had invested previously in StraightPath's pre-IPO funds. (Palen Decl. ¶ 23.) These overlapping investors constituted almost 60% of the total number of investors in Legend. (*Id.* ¶ 22.)

II. LEGEND'S SECURITIES OFFERINGS

Legend acquired Pre-IPO Shares of seven Pre-IPO Companies, which it then sold to the Legend Funds and apportioned into different Series. (Palen Decl. Exs. 3-4; Tannen Decl. Exs. 7-15, 17.) In turn, Legend's business model was to sell Series interests to investors. (Tannen Decl. Exs.7-15, 17.)

Legend pitched investments in the Legend Funds as a way for retail investors to access limited-supply Pre-IPO Shares that were not yet available on a public stock exchange. (*Id.* Ex. 16 (touting offerings as chance to "buy into . . . exciting emerging companies, some of the hottest on the market, while they're still private and shares are only available to employees and institutions with stock options").) To procure investments, Legend operated at least two boiler rooms, located in lower Manhattan, in which more than 45 unregistered sales agents cold-called prospective investors using lead lists purchased from third parties. (Palen Decl. ¶¶ 16-17, Ex. 6 and App. A thereto; Tannen Decl. Ex. 1, 27-28, 37.)

III. LEGEND CHARGED EXORBITANT, UNDISCLOSED MARKUPS.

On sales calls with prospective investors, as well as on the firm's website, Legend sales agents touted that it profited only by taking 20% of an investor's profits when the Pre-IPO

Companies went public and did not charge any upfront fees or commissions. (Buckis Decl. ¶¶ 7, 13; Cliatt Decl. ¶¶ 5, 8; Tannen Decl. Ex. 16.) In fact, Legend's website boldly proclaimed:

> The Funds we work with DO NOT charge any upfront fees with this transaction, the only costs involved are charged on the back end of the membership holdings after there is some sort of liquidity event [a]t which time, there will be a 20% fee charged on any profitable portion of your membership holdings, after your initial principle [sic] is recouped.

(Tannen Decl. Exs. 16, 42 at 2.) The website further emphasized: "No other fees will be assessed." (*Id.*) Legend's website made no mention of markups at all. (*See id.* Ex. 16.)

In reality, Legend charged substantial fees on every investment in the Legend Funds in the form of an undisclosed markup—that is, the difference between the price Legend paid for the Pre-IPO Shares and the price at which it sold corresponding Series interests to investors. Legend's markup ranged from an average of 46% to 105% per Pre-IPO Company and averaged almost 60% overall. (Palen Decl. Exs. 7-9.) Legend used this markup to pay upfront compensation to its principals and commissions to its sales agents totaling approximately $12.8 million—all before *any* of the Pre-IPO Companies Legend marketed had gone public. (*Id.* Exs. 5-6.)

Legend's false representations that it would only make money if and when a Pre-IPO Company went public were important to investors' decisions to invest with Legend and in the Legend Funds. (Cliatt Decl. ¶ 8; Buckis Decl. ¶ 13.)

After accepting an investment, Legend would often send a "Welcome Letter" confirming that the entire amount of the investor's contribution "has been applied to an investment" in a particular number of "underlying" shares of the relevant Pre-IPO Company at a purchase price that, when multiplied by the number of shares, equaled the total investment in the applicable Legend Fund. (Tannen Decl. Exs. 19-20; Cyganowski Decl. at 3-4.) These statements in Welcome Letters were false because, as discussed above, Legend purchased the underlying Pre-IPO Shares for substantially less than the amount it charged investors for the corresponding Series interests.

Until approximately June 30, 2022, the Legend Fund PPMs stated that Legend "may" charge investors certain upfront fees—including an expense fee (of up to 1%), a due diligence fee (of up to 5%), and a "placement agent fee" of up to 10%. (Tannen Decl. Exs. 7-10.) However, in representations Legend made to investors at the point of sale—on its website, over the phone, and in Welcome Letters—Legend falsely and misleadingly stated to investors that it was not charging any upfront fees. Consistent with this practice, Legend removed reference to these upfront fees from its PPMs on or about June 30, 2022.

While the original PPMs also stated that Legend affiliates "may" charge a "mark-up," the PPMs did not indicate that Legend in fact charged a markup—let alone a massive markup—on every investment transaction. (*Id.* Exs. 7-10.) As of approximately June 30, 2022, by which time Legend had already raised around $26 million, Legend revised its PPMs to state—still without disclosing the size of any markup—that "we are charging a markup" that "will be used to pay expenses of the Fund and to provide compensation to the individuals who oversee the management of the Fund." (*Id.* Exs. 11-15.) Even after this revision to the PPMs, Legend continued to lie to prospective investors through its website and on sales calls by falsely denying that Legend received any compensation unless and until there were profits generated by an IPO of a Pre-IPO Company. (*Id.* Exs. 16-17; Buckis Decl. ¶¶ 12-13.)

IV. THE CURRENT STATUS OF LEGEND AND THE LEGEND FUNDS

In November 2022, Legend advised the Commission that it had stopped selling Series interests in the Legend Funds as of October 2022 (Tannen Decl. Ex. 43), and the bank records obtained by the Commission do not reflect any additional deposits of investor funds. (Palen Decl. Ex. 1.) Nevertheless, at least as of May 2023, Legend was telling investors that it was still actively seeking opportunities to purchase Pre-IPO Shares for clients. (Buckis Decl. ¶ 16.) Credit card records reflect that Legend's principals have also continued to purchase lead lists of prospective

investors as recently as March 2023. (Tannen Decl. ¶ 36, Ex. 39.) And, significantly, Legend's website remained active and available to the public until at least Saturday, June 17, 2023. (*Id.* Ex. 42.) Just prior to being taken offline, the Legend website was still marketing numerous Pre-IPO Companies for investment through the Legend Funds. (*Id.* Ex. 18; Cyganowski Decl. at 4, Ex. D.) But, since learning that the Commission intended to bring this emergency action this week, Legend appears to have taken down its website. And on June 19, 2023, following settlement negotiations, Legend's counsel advised the Commission that Legend would not consent to a receivership over Legend and the Legend Funds. (Greenwood Decl. ¶ 14.)

Earlier this year, a group of nine investors filed a private action alleging securities fraud against Legend, Lacaj, and others concerning the investors' investments in both the StraightPath funds and the Legend Funds. *See Meyer, et al. v. Legend Venture Partners, LLC, et al.*, 23 Civ. 960 (JPO) (S.D.N.Y. filed Feb. 6, 2023) (the "Meyer Action"). Following correspondence with the court-appointed receiver in the StraightPath Action, the plaintiffs' counsel asked Judge Oetken to stay the Meyer Action (which he did on June 6, 2023) and advised that they intended to seek relief from the stay from the court in the StraightPath Action. (Tannen Decl. Ex. 44.)

In March 2023, in response to Commission investigative testimony subpoenas issued to Legend's principals, they each asserted their Fifth Amendment rights against self-incrimination and declined to answer questions. Lacaj, Gogliormella, Adam Ibrahim, and Karim Ibrahim (another person affiliated with Legend), executed declarations stating that, if they appeared for testimony, they would invoke their Fifth Amendment privilege against self-incrimination in response to all questions concerning, among other things, Legend, the Legend Funds, and StraightPath. (*Id.* Exs.33-36.)

Meanwhile, investors have been unable to obtain information from Legend regarding the status of their investments. (*See, e.g.*, Buckis Decl. ¶ 16.) To date, more than 35 individuals who

invested in Legend have reached out to the Court-appointed receiver in the StraightPath Action regarding their investments with Legend. (Cyganowski Decl. at 6.)

Based on public reporting, one of the Pre-IPO Companies held by the Legend Funds, Triller, is currently preparing to undertake an IPO. (Tannen Dec. Ex. 41.)

ARGUMENT

I. LEGEND SHOULD BE TEMPORARILY RESTRAINED AND PRELIMINARILY ENJOINED FROM FURTHER VIOLATIONS OF THE FEDERAL SECURITIES LAWS.

Because Legend is engaged in a continuing scheme to defraud investors, the Court should grant temporary and preliminary injunctive relief to prevent Legend from continuing its scheme while this action is pending. Securities Act Section 20(b) [15 U.S.C. § 77t(b)], Exchange Act Section 21(d)(1) [15 U.S.C. § 78u(d)], and Advisers Act Section 209(d) entitle the Commission to temporary and preliminary injunctive relief against future securities law violations upon a "substantial showing of likelihood of success as to both a current violation and the risk of repetition." *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998). Because the Commission is "not . . . an ordinary litigant, but . . . a statutory guardian charged with safeguarding the public interest in enforcing the securities laws," its burden to secure temporary or preliminary relief is less than that of a private party. *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). The Commission need not show irreparable injury, a balance of equities in its favor, or the unavailability of remedies at law. *Id.*

The Commission meets this standard here. The Commission has made a substantial showing that Legend has violated the antifraud provisions of the Securities Act and Exchange Act and the registration provisions of those acts, as well as the antifraud provisions of the Advisers Act. Despite these violations, Legend still is the manager of the Legend Funds, has custody of investor assets—including interests in the Pre-IPO Shares of a Pre-IPO Company, Triller, that based on

news reports is preparing to soon go public—and will likely continue its scheme in order to ensnare new victims.

A. The Commission Has Made a Substantial Showing That Legend Is an Investment Adviser to the Legend Funds.

Advisers Act Section 202(a)(11) defines an investment adviser as a "person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11). Legend meets the definition of an investment adviser because it described itself as the investment adviser to the Legend Funds in the PPMs and it provided investment advice to the Legend Funds (*i.e.*, it picked the Pre-IPO Companies in which to invest, as well as the investment opportunities for the acquisitions of Pre-IPO Shares). In exchange for this investment advice, Legend received fees in the form of a portion of the markups it set on the sales of Series interests in the Legend Funds above the prices it paid to acquire the Pre-IPO Shares.

B. The Commission Has Made a Substantial Showing that Legend Violated the Antifraud Provisions of the Securities Act, Exchange Act, and Investment Advisers Act.

To establish a primary violation of Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5, the Commission must show that the defendant: (1) used a fraudulent device or scheme or made a material misrepresentation or omission, (2) in connection with the offer or sale (under Section 17(a)), or in the purchase or sale (under Section 10(b) and Rule 10b-5), of securities, (3) with scienter.[3] *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-53 (1972)

[3] The Commission must establish scienter to prove violations of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5. *See Aaron v. SEC,* 446 U.S. 680, 685 (1980). A showing of negligence is sufficient to establish a violation of Securities Act Sections 17(a)(2) and 17(a)(3). *Id.* at 696.

(liability under Rule 10b-5 for fraudulent schemes or devices); *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999).[4]

Advisers Act Section 206(1) prohibits an investment adviser from employing "any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Advisers Act Section 206(2) prohibits an investment adviser from engaging "in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2). These sections impose a fiduciary duty upon investment advisers to exercise the utmost good faith in dealing with their clients, to disclose to their clients all material facts, and to employ reasonable care to avoid misleading their clients. *SEC v. Capital Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 191–92 (1963). Scienter, which can be satisfied by showing knowledge or recklessness, is required for a violation of Section 206(1), but negligence is sufficient for a violation of Section 206(2). *See Nathenson v. Zonagen Inc.*, 267 F.3d 400, 408 (5th Cir. 2001). In addition, Advisers Act Section 206(4) and Rule 206(4)-8 thereunder prohibit investment advisers to pooled investment vehicles from making any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle. 15 U.S.C. § 80b-6(4); 17 CFR § 275.206(4)-8. A violation of Section 206(4) and Rule 206(4)-8 does not require proof of scienter. *See SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992).

The Commission has made a substantial showing that conduct by Legend satisfies each of these elements.

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[4] To establish violations of these antifraud provisions and the registration provisions discussed below, the Commission must also satisfy the interstate commerce element. Here, that element is satisfied through phone call and email solicitations to investors. *See SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861 (S.D.N.Y. 1997) (Sotomayor, J.) (interstate commerce requirement is "broadly construed" and is satisfied by even "tangential mailings or intrastate telephone calls").

1. The Commission Has Made a Substantial Showing That Legend Made Material Misrepresentations.

Legend made material misrepresentations to prospective investors in the Legend Funds concerning the upfront fees or commissions that Legend charged. Specifically, Legend and its sales agents told investors that Legend would not charge any upfront fees or commissions, and that Legend would only profit through a share of the investor's profits (if any) following an IPO. (Tannen Decl. Exs. 16-17; Cliatt Decl. ¶ 5; Buckis Decl. ¶¶ 7, 10.) In reality, Legend charged exorbitant, hidden upfront fees in the form of markups—averaging nearly 60% overall, or between 46% and 105% per Pre-IPO Company—that Legend used to pay its principals and its sales agents a combined total of approximately $12.8 million. (Palen Decl. ¶¶ 18-21, Exs. 5-9.)

Legend's other disclosures concerning fees and markups do not mitigate the falsity of these statements. Although the pre-June 30, 2022, PPMs stated that investors "may" be charged a markup, without identifying the size of any such possible mark-up, Legend actually charged an exorbitant markup on all sales to investors, contrary to its representations at the point of sale and on its website that it did not earn any upfront fees and would only receive fees through a share of an investor's profits following an IPO. *See In re Synchrony Fin. Sec. Litig.*, 988 F.3d 157, 168 (2d Cir. 2021) (disclosure of general possibility does not cure the alleged falsity of a defendant's narrower assertion). Moreover, these PPMs stated that Legend would only charge markups to the extent "permissible by law." (Tannen Decl. Exs. 7-10.) In reality, however, the markups Legend charged investors were not legally permitted because Legend did not disclose the terms of these markups or obtain written consent from investors in the Legend Funds, in violation of Advisers Act Section 206(3). (*See* Tannen Decl. Exs. 7-17; Buckis Decl. ¶¶ 6-7, 10, 13; Cliatt Decl. ¶¶ 5, 8.) And, even after the change to the PPMs on approximately June 30, 2022, Legend continued to mislead prospective investors through its website and on sales calls, stating that Legend did not make any upfront fees or compensation unless and until there were profits on a public offering by the Pre-

IPO Companies. (Tannen Decl. Exs. 16-17; Buckis Decl. ¶¶ 12-13.) At no time did Legend disclose the size of the markups it was charging to investors.

In making these material misrepresentations, Legend acted with scienter. Legend and its principals knew they were charging markups that they used to pay millions of dollars in upfront compensation to themselves and their sales agents before any IPOs ever took place. And Legend and its principals also knew or recklessly disregarded that investors were being told otherwise—that is, that investors were not being charged any upfront fees—through the firm's sales agents, on its website, or in other documents such as Welcome Letters. For example, Legend principal Lacaj controlled the firm's website, which falsely touted that the Legend Funds "DO NOT charge any upfront fees" and the "only costs involved are charged on the back end . . . after there is some sort of liquidity event" and that "[n]o other fees will be assessed." (Tannen Decl. Exs. 16-17, 40.) Similarly, Legend principal Gogliormella sought to conceal information regarding the actual prices that Legend paid to acquire Pre-IPO Shares. (*See* Tannen Decl. Ex. 24 at 2 (instructing source of Pre-IPO Shares not send "anything . . . regarding pricing" to email account accessible to others).)

2. The Commission Has Made a Substantial Showing That Legend Engaged in a Fraudulent Scheme.

Legend engaged in a fraudulent scheme by disseminating to prospective investors the material misrepresentations described above concerning the exorbitant, hidden markups that it charged investors. *See Lorenzo v. SEC*, 139 S. Ct. 1094, 1101–02 (2019). In addition, Legend defrauded the Legend Funds (as well as investors in the Legend Funds) by misappropriating Legend Fund assets through the undisclosed markups it charged investors, which totaled more than $12.8 million. *See SEC v. Rio Tinto PLC*, 41 F.4th 47, 53-54 (2d Cir. 2022) (scheme liability requires more than misstatement or omission alone).

C. The Commission Has Made a Substantial Showing that Legend Engaged in Illegal, Undisclosed Principal Transactions.

Advisers Act Section 206(3) prohibits an investment adviser from "directly or indirectly . . . acting as principal for his own account, knowingly to sell any security to . . . a client . . . without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction." Scienter need not be shown to establish a Section 206(3) violation. *See In re Marc N. Geman*, 54 S.E.C. 1226, 1242 (2001), *aff'd*, 334 F.3d 1183 (10th Cir. 2003); *SEC v. Westport Capital Mkts. L.L.C.*, 408 F. Supp. 3d 93, 108 (D. Conn. 2019) ("Unlike section 206(1) and (2) of the Act, section 206(3) can be violated without a showing of fraud."). Section 206(3)'s advance written disclosure and consent requirement recognizes that principal transactions create the potential for an adviser to benefit itself over its client. *Interpretation of Section 206(3) of the Advisers Act*, Advisers Act. Rel. No. 1732, 1998 WL 400409, at *2 (July 1998).

Here, Legend, as investment adviser to the Legend Funds, acted as principal in transactions with its clients by selling the Pre-IPO Shares it acquired to the Legend Funds. These sales thus were subject to the Section 206(3) prohibition. *Cf. Gintel Asset Mgmt.*, Advisers Act Release No. 2079, 2002 WL 31499839 (Nov. 8, 2002) (settled order) (sale of securities to advisory client by fund that was owned in part by principal of investment adviser was a principal transaction). Legend, however, neither gave written notice of these principal transactions nor obtained written consent for them. (Tannen Decl. Exs. 7-17; Buckis Decl. ¶¶ 6-7, 10, 13; Cliatt Decl. ¶¶ 5, 8.) Although Legend included disclosures in its PPMs that it "may, to the extent permissible by law" engage in principal transactions that included markups (prior to June 30, 2022) or that it was "charging a markup" (after June 30, 2022), neither of these disclosures satisfy Section 206(3) because the statute requires specific disclosure of each principal transaction before it is completed. *SEC v. Nadel*, 97 F. Supp. 3d 117, 128 (E.D.N.Y. 2015) ("general consents are not sufficient as a matter of law under . . . Section

206(3)"); *Interpretation of Section 206(3) of the Inv. Advisers Act of 1940*, 1998 WL 400409, at *4. Moreover, Legend did not obtain written consent to the specific transactions from the Legend Funds. Insofar as Legend was conflicted, it could not consent on behalf of the Legend Funds, and Legend was thus required to obtain consent from the investors in the Legend Funds. *Cf. SEC v. DiBella*, 587 F.3d 553, 563 (2d Cir. 2009). Accordingly, Legend engaged in illegal principal transactions in connection with its sales of Series interests to investors in the Legend Funds.

D. The Commission Has Made a Substantial Showing that Legend Sold Securities in Unregistered Offerings in Violation of Securities Act Section 5.

To establish a *prima facie* case for a violation of Section 5, the Commission need only establish: (1) that no registration statement was filed or was in effect as to the securities transactions in question; (2) that the defendant, directly or indirectly, sold or offered to sell these securities; and (3) that in connection with the offer or sale, there was a use of interstate transportation, or communication in interstate commerce, or of the mails. *SEC v. Cavanaugh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y. 1998), *aff'd*, 155 F.3d 129 (2d Cir. 1998). Section 5 is a strict-liability statute, and thus the Commission need not allege a defendant's scienter to establish a Section 5 violation. *Id.* Once the Commission has made out a *prima facie* violation of Section 5, the defendant bears the burden of proving the applicability of any claimed exemption. *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006) (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953)).

None of the three elements of the Commission's *prima facie* case can reasonably be disputed. First, none of the Series interests in the Legend Funds were offered or sold pursuant to a Commission registration statement. (Tannen Decl. Exs. 7-15.) Second, Legend offered and sold Series interests in the Legend Funds to investors. (*Id.*; Palen Decl. Exs. 1-2.) Third, Legend used interstate commerce—both telephone calls and emails—to conduct those offers and sales. (Buckis Decl. ¶¶ 6-11; Cliatt Decl. ¶¶ 4-6.)

Legend cannot meet its burden of establishing the applicability of any exemption to the registration requirements. Legend purported to rely on the exemption in Rule 506(c) of Regulation D, which requires that "all purchasers of securities sold [pursuant to this exemption] . . . are accredited investors" and, separately, that issuers "take reasonable steps to verify that the purchasers of the securities are accredited investors." 17 C.F.R. § 230.506(c). The exemption is not satisfied if reasonable steps to verify are not taken, even if all investors happen to be accredited. *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Rel. No. 33-9415, at 26 & n.101 (July 10, 2013) (adopting release) (explaining that the two requirements are separate and independent from one another). Here, Legend did not take such steps. In response to a subpoena during the Commission's investigation for all documents and communications concerning investments involving the Legend Funds (Tannen Decl. Ex. 26), Legend produced third-party documentation supporting the accredited status of investors in the Legend Funds with respect to, at most, 7% of the investors. (*Id.* ¶ 22.) For 10% of investors, Legend failed to produce investor questionnaires showing that the box an investor would check to identify himself or herself as an accredited investor had been checked at all. (*Id.* ¶ 23.) *Cf. Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A*, Rel. No. 33-9415, at 33-34 ("We do not believe that an issuer will have taken reasonable steps to verify accredited investor status if it, or those acting on its behalf, required only that a person check a box in a questionnaire or sign a form . . . ."). Accordingly, Legend cannot meet its burden of establishing that the Rule 506(c) exemption applies to its securities offerings, even if all the investors in the Legend Funds were accredited.

E. The Commission Has Made a Substantial Showing that Legend Acted as an Unregistered Broker in Violation of Exchange Act Section 15(a)(1).

Exchange Act Section 15(a)(1) makes it illegal for a broker to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or

attempt to induce the purchase or sale of, any security unless such broker is registered with the Commission or, in the case of a natural person, is associated with a registered entity. 15 U.S.C. § 78o(a)(1). This provision "ensure[s] that customers . . . receive either the regulatory protections that result from a salesman being registered himself or the protections that stem from the salesman being supervised by a registered firm." *Anthony Fields, CPA*, Exch. Act Rel. No. 31,461, 2015 WL 728005, at *17 (Feb. 20, 2015) (opinion of the Commission) (citation and internal quotes omitted). A violation of Exchange Act Section 15(a)(1) is a strict liability violation; a showing of scienter is not required. *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003) (citation omitted).

Exchange Act Section 3(a)(4) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." The terms "engaged in the business" and "effecting transactions" are not defined by statute; however, the courts and the Commission have considered a number of factors to determine whether a person is a broker. A person may be found to be acting as a broker if the person participates with a "certain regularity of participation in securities transactions at key points in the chain of distribution." *SEC v. Hansen*, No. 83 Civ 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984); s*ee also SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005); *SEC v. Bravata*, No. 09 Civ. 12950, 2009 WL 2245649, *2 (E.D. Mich. 2009); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998). Consideration of the "regularity of participation" includes the duration of participation, whether the participation is a single or repeated occurrence, the number of transactions, and the dollar amount of securities sold. *See Kenton Capital, Ltd.*, 69 F. Supp. 2d at 12-13; *Martino*, 255 F. Supp. 2d at 284.

Courts have identified various indicia of broker activity, including whether a person (i) solicits investors to purchase securities; (ii) is involved in negotiations between the issuer and the investor; (iii) makes valuations as to the merits of the investment or gives advice; and (iv) is an active rather than passive finder of investors. *See, e.g., Hansen*, 1984 WL 2413, at *10. These factors are not

exclusive in assessing whether a person is a broker, and transaction-based compensation is one of the hallmarks of being a broker. *SEC v. Benger*, 697 F.Supp.2d 932, 943-45 (N.D. Ill. 2010).

Legend acted as an unregistered broker in violation of Exchange Act Section 15(a)(1) because its operation entailed more than 45 unregistered sales agents soliciting investors on Legend's behalf. (Palen Decl. 16-17, Ex. 6 and App. A thereto; Tannen Decl. Exs. 27-28.) *See SEC v. Pension Trust Corp.*, 2010 WL 3894082, at *20–21 (S.D. Fla. Sept. 30, 2010) (concluding that corporate entities were brokers because, among other things, they actively solicited investors and advised them on the merits of investments). Where, as here, an unregistered entity runs a "boiler-room" of sales agents to solicit securities investments and pays them based on how much of the securities they sell, that entity violates Section 15(a). *SEC v. Interlink Data Network of L.A., Inc.*, 1993 WL 603274, at *11 (C.D. Cal. Nov. 15, 1993) (finding that issuer violated Section 15(a)(1) when it operated a sales force paid by commissions and virtually its entire operations were devoted to selling securities); *SEC v. Carver*, 2008 WL 11343057, at *5 (C.D. Cal. June 19, 2008) ("The solicitation of investors to purchase securities, the receipt of transaction-related compensation, and leading the sales effort are evidence of being engaged in the business of effecting transactions in securities for the accounts of others); *see also SEC v. Art Intellect, Inc.*, 2013 WL 840048 (D. Utah Mar. 6, 2013) (finding that defendants violated Section 15(a)(1) by soliciting investors through the issuer's employees, strategic partners, website, and personal interaction with investors). As in these similar cases, Legend's conduct in operating a sales force, pitching securities to prospective investors, and paying sales agents transaction-based compensation constitutes unregistered broker activity. (Palen Decl. 16-17, Ex. 6 and App. A thereto; Tannen Decl. Exs. 1, 27-28, 37-38; Buckis Decl. ¶ 6; Cliatt Decl. ¶¶ 4-5.) In fact, Legend paid its unregistered sales force a total of approximately $3.2 million in compensation that was tied to the amount of money each agent raised from investors. (*See* Palen Decl. Ex. 6 and App. A thereto.)

F. Legend Is Likely To Continue Its Illegal Conduct.

Despite Legend's representation that it stopped selling interests in the Legend Funds in October 2022, several factors point to the likelihood that Legend will continue to engage in illegal conduct. Until Legend took down its website just days ago since Saturday, June 17 (shortly after Legend learned of the Commission's intention to imminently file this emergency action), the Legend website remained available to the public and still listed Pre-IPO Shares that were allegedly available for investment. (Tannen Decl. Exs. 18, 42; Cyganowkis Decl. at 3-4.) Additionally, Legend's principals have continued to purchase lead lists of prospective investors as recently as March 2023. (Tannen Decl Ex. 39.) And just weeks ago in May 2023, a Legend representative informed an investor that the firm was still looking for opportunities to purchase Pre-IPO Shares for clients. (Buckis Decl. ¶ 16.) For all of these reasons, "there is a reasonable likelihood that the wrong[s] will be repeated," *Mgmt. Dynamics*, 515 F.2d at 807, and a temporary restraining order and preliminary injunction should be imposed to prevent Legend from inducing more investors to invest in the Legend Funds.

II. THE COURT SHOULD GRANT ADDITIONAL EQUITABLE RELIEF TO PROTECT INVESTORS.

The Court should order the requested asset freeze, appointment of a receiver, and a verified accounting in order to identify and preserve the assets of the Legend Funds for the benefit of investors. The Court should also prohibit the destruction of relevant documents to ensure both that the receiver has access to the relevant books and records to conduct the necessary work and that the Commission can obtain those documents during discovery.

A. An Asset Freeze Should Be Ordered.

Federal courts in Commission enforcement actions have the authority to impose asset freezes as an exercise of their general equitable powers. 15 U.S.C. § 78u(d)(5). The purpose of such

an asset freeze is to ensure that "any funds that may become due can be collected," *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990), and "to preserve the status quo by preventing the dissipation and diversion of assets," *SEC v. Infinity Grp.*, 212 F.3d 180, 197 (3d Cir. 2000). The Commission's burden of proof in connection with an asset freeze application is substantially lower than its burden of proof on an application for a preliminary injunction. *See Unifund SAL*, 910 F.2d at 1041. To obtain an asset freeze at this stage, the Commission need only show either a likelihood of success on the merits, or that an inference can be drawn that the party has violated the federal securities laws. *Smith v. SEC*, 653 F.3d 121, 128 (2d Cir. 2011).

Here, an asset freeze over the assets of Legend and the Legend Funds is warranted to preserve the status quo and to prevent the dissipation of assets, including the interests in Pre-IPO Shares that Legend purchased for more than $22 million (*see* Palen Decl. Ex. 3), in anticipation of the potential appointment of a receiver over Legend and the Legend Funds. As set forth above, there is a high likelihood that the Commission succeeds not only on its fraud claims, but also on its claims under Securities Act Section 5 and Exchange Act Section 15(a). Liability under any of these provisions could expose Legend to an order of disgorgement or an order imposing civil penalties. The proposed asset freeze would ensure that funds are available to satisfy any final judgment the Court might enter ordering the payment of disgorgement, *see Unifund, SAL*, 910 F.2d at 1041-42, and preserve this Court's ability to approve a fair distribution for victims of the fraud.

B. The Court Should Appoint a Receiver Over Legend and the Legend Funds.

A "district court has broad equitable power to fashion appropriate remedies for federal securities law violations." *SEC v. Whittemore*, 659 F.3d 1, 9 (D.C. Cir. 2011) (internal citations omitted). Although the Securities Act and the Exchange Act do not specifically vest the Court with the power to appoint a receiver or monitor in a civil injunction action brought by the Commission, courts have consistently held that such a power exists in order to effectuate the purpose of the

federal securities laws. *See, e.g., SEC v. Byers*, 609 F.3d 87, 92 (2d Cir. 2010) ("There is no question that district courts may appoint receivers as part of their broad power to remedy violations of federal securities laws.").

Courts appoint receivers when they are necessary to: (1) preserve the status quo while various transactions are being unraveled in order to determine an accurate picture of the fraudulent conduct, *SEC v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1105 (2d Cir. 1972); (2) protect "those who already have been injured by a violator's actions from further despoliation of their property or rights," *Esbitt v. Dutch-Am. Mercantile Corp.*, 335 F.2d 141, 143 (2d Cir. 1964) (internal quotations omitted); (3) prevent the dissipation of the defendant's assets pending further action by the court, *SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987); or (4) install a responsible officer of the court who could bring the companies into compliance with the law, *id.* at 436-37.

Receiverships are appropriate over entities owned and controlled by a defendant and used to perpetrate the fraud. *See SEC v. Byers*, 592 F. Supp. 2d 532, 534-35 (S.D.N.Y. 2008) (receiver was appointed over two individual defendants, five entity defendants, and approximately 240 entities that the defendants owned or controlled).

Here, the Court should appoint a receiver over Legend and the Legend Funds to remove their assets from the control of the very principals who operated Legend as a fraud and put in place a fiduciary to protect the interest of investors; to take possession of and prevent the dissipation of known assets, including the Pre-IPO shares that Legend purchased for more than $22 million; to identify for the benefit of investors potential additional assets of Legend and the Legend Funds that may currently be in the possession of third parties; and to field and respond to inquiries from investors, many of whom have been unable to obtain information from Legend regarding the status of their investments or have reached out to the Court-appointed receiver in the StraightPath Action for help. (Buckis Decl. ¶ 16; Cyganowski Decl. at 6.)

As discussed above, the principals who currently control Legend and the Legend Funds siphoned off approximately $12.8 million from investors by charging exorbitant undisclosed markups when investors were told they were paying no upfront fees at all. (Palen Decl. Ex. 5.) And, when the Commission staff sought on-the-record testimony from Legend principals and employees earlier this year, they each asserted their Fifth Amendment right against self-incrimination rather than answer questions about their work both for Legend and for StraightPath. (Tannen Decl. Exs. 33-36.) In light of these circumstances, there is a clear need for a fiduciary to protect assets for the benefit of investors, particularly against the backdrop of the publicly anticipated IPO of at least one of the Pre-IPO Companies, Triller, which could result in substantial cash or marketable securities in the Legend Funds in the near future.

Moreover, the Commission respectfully recommends that the Court consider the appointment of Melanie L. Cyganowski, the Court-appointed Receiver in the StraightPath Action, as the Receiver over Legend and the Legend Funds. As set forth in the Cyganowski Declaration attached hereto, there is substantial factual overlap between the StraightPath Action and this matter, including commonality regarding (i) the sales agents that solicited investors for StraightPath and Legend; (ii) the documentation sent to StraightPath and Legend investors, (iii) the Pre-IPO Companies in which the funds managed by StraightPath and Legend invested; (iv) the nature of StraightPath's and Legend's ownership interests in the Pre-IPO Companies; (v) the corporate and investment structure of StraightPath and Legend; and (vi) the identity of persons who invested through StraightPath and Legend. (Cyganowski Decl.at 2-6.) Indeed, Legend raised more than $24 million, or 69% of the total amount it raised, from investors who had invested previously in StraightPath's pre-IPO funds. (Palen Decl. ¶ 23.) For these reasons, substantial efficiencies would result from appointing Ms. Cyganowski as Receiver in this matter as well.

C. The Court Should Enjoin the Filing of New Bankruptcy, Foreclosure, Receivership, and Other Actions.

Courts may issue "anti-litigation injunctions barring bankruptcy filings as part of their broad equitable powers in the context of an SEC receivership," as such injunctions are "one of the tools available to courts to help further the goals of the receivership." *SEC v. Byers*, 609 F.3d 87, 91–92 (2d Cir. 2010).

An anti-litigation injunction that enjoins the filing of any new bankruptcy, foreclosure, receivership, or other actions by or against Legend is required here to prevent potentially disparate actions in different courts that could affect the receivership assets subject to this Court's jurisdiction and control. An anti-litigation injunction will preserve the Court's jurisdiction over the receivership assets and permit the receiver to marshal assets to prevent a race to the courthouse by different investors. Indeed, the commencement of the Meyer Action against Legend by nine investors earlier this year (while temporarily voluntarily stayed) illustrates the need for an anti-litigation injunction here, as a race to the courthouse could result in inequitable distribution of the assets, remove assets from the receivership estate, and require the receiver to spend resources defending litigation. The Commission's proposed anti-litigation injunction would stay the Meyer Action and any other similar actions that may be filed against Legend or the Legend Funds in the future.

D. The Court Should Order Legend To Produce a Verified Accounting.

Courts may impose the equitable remedy of a sworn accounting to provide an accurate measure of all funds obtained as a result of fraudulent activity, as well as a measure of unjust enrichment and a defendant's current financial resources. *See, e.g.*, *SEC v. Lybrand*, No. 00 Civ. 1387 (SHS), 2000 WL 913894, at *12 (S.D.N.Y. July 6, 2000); *SEC v. Oxford Capital Sec., Inc.*, 794 F. Supp. 104, 105-06 (S.D.N.Y. 1992). Here, an accounting will confirm the measure of investor funds obtained by Legend as a result of its fraudulent activity and the uses of such funds and is needed to

ensure compliance with the freeze requested on Legend's assets. The accounting will also aid the receiver (if appointed) to efficiently marshal investor assets.

E. The Court Should Enter An Order Prohibiting the Destruction of Relevant Documents.

The Commission respectfully requests an order prohibiting Legend from destroying or altering relevant documents in order to preserve the Legend's books and records in anticipation of the potential appointment of a receiver and to ensure that the receiver obtains as comprehensive and accurate information as possible relating to Legend's finances and business operations. A prohibition on document destruction will also ensure that relevant documents remain available for production to the Commission during discovery. *See SEC v. Spongetech Delivery Sys., Inc.*, No. 10-CV-2031 (DLI) (JMA), 2011 WL 887940, at *5 (E.D.N.Y. Mar. 14, 2011) ("[A]n order barring the alteration or destruction of documents is also appropriate where there is a need to preserve the status quo until a final resolution of the merits.") (citing *Unifund*, 910 F.2d at 1040 n. 11).

CONCLUSION

For the reasons set forth above and in the accompanying declarations and exhibits, the Commission respectfully requests that its emergency application be granted.

Dated: New York, New York
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SECURITIES AND EXCHANGE COMMISSION

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