UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16182

In the Matter of

PAUL EDWARD "ED" LLOYD, JR., CPA

Respondent.

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RESPONDENT'S PETITION FOR REVIEW OF INITIAL DECISION

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Pursuant to Securities Exchange Commission Rule of Practice 410, Respondent Paul Edward "Ed" Lloyd, Jr., CPA petitions the Commission for review of the Initial Decision ("ID") rendered by Administrative Law Judge Cameron Elliot on July 27, 2015. Respondent seeks review under Rule of Practice 411(b)(2) of several factual findings, the conclusion that Respondent was an investment adviser and committed a primary violation of Section 206(4) of the Investment Advisers Act of 1940, and the resulting sanctions. Respondent also seeks review of several procedural issues including the failure to take official notice of statistics requested by Respondent, numerous due process violations, and the status of the ALJ as an "officer" commissioned by the Commission.

I. PROCEDURAL BACKGROUND

On September 30, 2014, the Securities and Exchange Commission ("SEC") filed an Order Instituting Proceedings ("OIP") against Respondent alleging violations of Section 17(a) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934; and Sections 206(1), 206(2), 206(4), and Rule 206(4)-8 of the Investment Advisers Act of 1940 ("IAA"). The OIP provided that a public hearing would be convened

before an administrative law judge "to be designated by further order as provided by Rule 110 of the Commission's Rules of Practices, 17 C.F.R. § 201.110." (OIP Section IV.)

On February 27, 2014, Administrative Law Judge Carol Fox Foelak ("ALJ Foelak") partially granted Respondent's Motion for Summary Disposition and ordered that the hearing would not address the Division's allegations of violations of Securities Act Section 17(a); Exchange Act Sections 10(b) and 15(a) and Rule 10b-5; and Advisers Act Rule 206(4) in connection with any of the Forest Conservation entities. *Paul Edward "Ed" Lloyd, Jr., CPA*, Admin. Proc. Rulings Release No. 2366, 2015 SEC (Feb. 27, 2015). The only allegations to be examined at hearing were Respondent's alleged violations of Sections 206(1), 206(2), and 206(4) of the IAA and only in connection with the Forest Conservation 2012, LLC transaction ("FC 2012"). The Order specifically found that the underlying transaction did not involve the purchase or sale of a "security."

After the Order on Summary Disposition and a later Order dated March 12, 2015, allowing Respondent's expert report to be received in evidence and providing that cross examination of the expert could be accomplished by videoconference or telephone, the Commission, with no explanation and on the day the hearing was to begin (March 16, 2015), caused an unsigned "Order" of Brenda Murray, Chief Administrative Law Judge, to be recorded. The Order, without explanation, removed ALJ Foelak from the case and designated Cameron Elliot in her stead. ALJ Elliot presided over the hearing on March 19-20 and 23-25, 2015 in Charlotte, North Carolina ("Hearing").

II. FACTUAL BACKGROUND

The following facts were established during the Hearing in this matter.

A. Events Prior to Forest Conservation 2012

Respondent is a certified public accountant and, as a CPA, provides tax guidance to his clients. (Lloyd 692:23-24; 694:15-695:8.) He owns and operates Ed Lloyd & Associates, PLLC where he offers tax planning and preparation services. (Lloyd 692:25-695:4.)

Respondent learned of the conservation easement tax planning technique at a tax seminar and contacted a conservation easement specialist, Nancy Zak, in 2011 to learn more about the process. (Lloyd 767:2-769:12.) Ms. Zak was a registered representative for Strategic Financial Alliance, Inc. ("SFA") (Zak 98:11-23), which was in the business of offering ownership units in entities owning real estate that planned to donate a conservation easement in order to secure a large tax deduction. *See* Admin. Proc. Rulings Release No. 2366. Respondent first offered a conservation easement to his clients in 2011; this transaction is not at issue here. In 2012, Respondent offered another conservation easement to his clients. (Lloyd 761:18-762:8.)

When a conservation easement opportunity became available, Ms. Zak notified Respondent. (Zak 220:4-12.) Respondent testified that, as a CPA and tax adviser, he explained the process of conservation easements to clients who might benefit from such a tax vehicle. (Lloyd 832:15-833:3; 833:15-834:8; 762:9-763:21.) Respondent described the total amount that must be contributed by each participant, his fee for performing the service, and the net tax benefit for each client. As noted by ALJ Foelak in her Order, there was no investment intent in the transaction, only a desire to secure a

tax benefit. (Powell 618:10-15; Lloyd 755:25-758:6; 767:14-22; 832:22-835:9; Losby 939:1-13; Brown 964:18-965:12; Hooks 1060:1-16; 1063:13-1064:3; 1066:8-1067:2, 1073:17-1074:9; Branch 1088:10-1090:7; Price 1107:1-1108:11; 1116:19-1117:14; Goss 1129:11-1132:14; 1156:17-1157:6; 1163:20-1165:4; Hall 1171:1-1173:23.) The factual issues surrounding the fee are discussed *infra.*

B. Forest Conversation 2012 Transaction

In 2012, Ms. Zak made Respondent aware of Piney Cumberland Holdings, LLC ("PCH"), a conservation easement opportunity. (Zak 154:9-22; 238:10-15.) An Offering Summary prepared for PCH, dated October 15, 2012, offered common units of membership interest in PCH at a price of $2,384 per unit. (DOE Ex. 56B.) The minimum subscription per participant was 20 common units, requiring a minimum investment of $47,680. *Id.* PCH acquired ownership units in Piney Cumberland Resources, LLC ("PCR") which owned the underlying land. *Id.* PCR's sole purpose was the donation of a conservation easement. *Id.* The donation of the conservation easement then provided the members of PCH with a flow-through tax benefit. (DOE Ex. 56; Zak 156:17-157:4.)

As an accountant and tax planner, Respondent created Forest Conservation 2012, LLC, a Wyoming limited liability company ("FC 2012"). (Lloyd 761:20-762:4.) Respondent testified that the purpose of FC 2012 was to combine the contributions of his clients into one entity which would then purchase ownership interests in PCR through PCH. (Lloyd 766:10-15.) Respondent grouped his clients' contributions together in order to tailor their contribution amounts to the specific tax needs of each client (which might be greater or less than the unit amount). The LLC structure also

allowed each client to deduct the cost of his or her tax planning fee because the fee was considered to be an ordinary business expense for the LLC and was therefore deductible. (Lloyd 845:20-846:5; 776:1-15.)

FC 2012 amassed $649,302.00 from a total of 18 members, including Respondent who contributed $16,802.00. Respondent received $105,750.00 from the $649,302.00 as payment of the tax planning fee. (Lloyd 876:16-878:12.) Respondent wired the $543,552.00 balance from the FC 2012 bank account to PCH on December 7, 2012, and FC 2012 purchased 228 units in PCH. (Lloyd 857:5-857:12, DOE Ex. 123.) PCH, in turn, purchased membership interests in the real estate entity PCR, and PCR donated a conservation easement to a qualifying land trust. FC 2012 received a Schedule K-1 for its portion of the contribution easement deduction, and Respondent (on behalf of FC 2012) issued individual K-1's to all 18 participants indicating their respective percentages of the deduction. (*See* Resp. Ex. 24; Resp. Ex. 25; Lloyd 887:10-888:6.) Every participant received tax benefits substantially greater than their cash contribution. (*See* Resp. Ex. 25.)

1. Forest Conservation 2012 Operating Agreement

Respondent prepared the Operating Agreement ("OA") for FC 2012 without the assistance of counsel. (*See* Resp. Ex.15.) He prepared the initial draft in March 2012, before any client contributed funds, and listed himself as the sole member. *Id.* The OA defined a "member" to be "each person designated as a member of the Company on Schedule I hereto *or any other persons admitted as a member of the Company in accordance with this agreement or the Act*" (emphasis added). Respondent first revised

the OA in December 2012, and Schedule I then listed certain individual members of the LLC and their respective ownership percentages. (Resp. Ex. 16.)

Three of the participants in the FC 2012 transaction with PCH were not listed on the December 2012 Schedule I: [redacted] Brown ("Brown"), [redacted] Carson ("Carson"), and [redacted] Malloy ("Malloy"). (*See* Lloyd 880:24-881:23; Resp. Ex. 16.) All of these participants, however, had made contributions to FC 2012 and were admitted as members by Respondent, the organizer of the LLC. (*See* Resp. Ex. 40; Lloyd 132:15-17.) Pursuant to Wyoming LLC law, no writing was required to do this. *Id. See also* Resp. Ex. 40. In the spring of 2013, all 18 members, including the three omitted from the December 2012 Schedule I, received K-1's correctly reflecting their original contribution and showing the expected tax benefit. (Resp. Ex. 24; Resp. Ex. 25.)

In the summer of 2014, all 18 members of FC 2012 signed an amendment to the OA stating the correct membership contributions, fees paid, and ownership percentages (which matched the K-1's) for each member of FC 2012, LLC and ratifying all of Respondent's actions. (Resp. Ex.16; Powell 626:22-627:18.)

Of the 18 clients who participated in FC 2012, only four were investment advisory clients: [redacted] Branch, [redacted] Goss, [redacted] Powell, and [redacted] Price. (Lloyd 710:19-711:2.) Their participation was as follows:

Name	Total	Contribution	Fee	Percent	Date	Bates	Exhibit
Branch	$40,000.00	$33,500.00	$6,500.00	6.163164%	11/12/12	ELA_002224	R17
Goss	$35,000.00	$29,000.00	$6,000.00	5.335276%	11/19/12	ELA_002227	R17
Powell	$60,000.00	$51,500.00	$8,500.00	9.474714%	9/25/12	ELA_002234	R17
Price	$40,000.00	$33,500.00	$6,500.00	6.163164%	11/12/12	ELA_002234A	R17

2. Respondent's Fee

A substantial portion of the Division's alleged violations of Sections 206(1), (2), and (4) of the Advisers Act was the allegation that Respondent misappropriated funds, either by "misappropriating" the funds of three tax planning clients, Brown, Carson, and Malloy, or by "misappropriating" the funds of all of the participants in the FC 2012 transaction. (OIP ¶ 47.) The evidence showed that the difference between the total amount paid by participants into FC 2012 ($649,302.00) and the amount transferred to PCH ($543,552.00) was the aggregate of the tax service fees agreed to by the participants ($105,750.00) for Respondent's tax work.

Every client who testified or provided an affidavit stated that he or she had knowledge that there was a fee involved for Respondent's tax planning services for FC 2012. (Powell 618:10-15; Lloyd 755:25-758:6; 767:14-22; 832:22-835:9; Losby 939:1-13; Brown 964:18-965:12; Hooks 1060:1-16; 1063:13-1064:3; 1066:8-1067:2; 1073:17-1074:9; Branch 1088:10-1090:7; Price 1107:1-1108:11; 1116:19-1117:14; Goss 1129:11-1132:14; 1156:17-1157:6; 1163:20-1165:4; Hall 1171:1-1173:23.) There was no evidence to the contrary. The fees were disclosed in the amended and corrected OA which ratified Respondent's actions and was signed by every participant. (*See* Resp. Ex. 16.) The Division presented no evidence supporting the contentions that Respondent stole money from any of his clients under any of the theories described above.

3. Respondent's Statements to Nancy Zak

The evidence at the Hearing showed that the Division's assertion that ". . . Respondent willfully violated Section 206(1), 206(2) and 206(4) of the Advisers Act . . .

which prohibit fraudulent conduct by investment advisers with regard to any client or prospective client . . ." is false. (OIP ¶ 58.) Ms. Zak testified that Respondent informed her via email that tax planning client Carson was no longer participating in FC 2012. (Zak 179:1-11.) Respondent testified that he made a statement *to Ms. Zak* regarding the involvement of Carson in the FC 2012 transaction. (Lloyd 805:24-806:23; DOE Ex. 84.)

Although Respondent's testimony reflected that he made a misrepresentation to Ms. Zak and SFA, neither SFA nor Ms. Zak was a client or prospective client of Respondent. The Division presented no evidence that supported its contention that Respondent made any misrepresentations or false statements to any client or prospective client. (OIP ¶ 58.)

III. ISSUES FOR REVIEW

A. REVIEW OF THE ID IS REQUIRED TO CORRECT THE FOLLOWING ERRONEOUS FINDINGS OF FACT.

1. **The finding that the membership units in the Maple Equestrian, Piney Cumberland Holdings, and Meadow Creek Holdings LLC's were issued pursuant to regulation D.**

2. **The finding that Respondent's failure to inform LPL of the conservation easement transactions was inconsistent with LPL's compliance policies relating to selling away, outside business activities, and providing tax advice.**

3. **The finding that Respondent did not provide OCIE with the revised Schedule I listing 15 members of FC 2012, LLC.**

4. **The finding that [redacted] Branch and Respondent's attorneys discussed Respondent's fees.**

5. **The finding that Respondent had the opportunity to influence Mark Losby's memory of his FC 2012 participation.**

6. The finding that Respondent had the opportunity to influence [redacted]Price's member of his FC 2012 participation.

7. The finding that Respondent may have "stolen $130,000.00 from his clients outright" had he not been examined by LPL and OCIE.

8. The finding that Respondent possessed independent contractor-like autonomy while associated with LPL making him more like a controlling person of an investment adviser rather than an employee of same.

9. The finding that Respondent should not be able to avoid primary liability by selling away.

10. The finding that Respondent's failure to inform SFA and PCH of the identities of the ultimate consumers undermined those entities' compliance efforts and created the potential for a conflict of interest.

11. The finding that but for his deceit of SFA, none of Respondent's clients could have participated in FC 2012, and he would not have been entitled to any of his fees.

12. The finding that Respondent created a risk that SFA and PCH would violate the securities laws.

B. REVIEW OF THE ID IS REQUIRED TO CORRECT THE FOLLOWING ERRONEOUS CONCLUSIONS OF LAW.

1. The finding that Respondent was an investment adviser and subject to the IAA.

2. The finding that Respondent did not qualify for the accountant's exception to the definition of investment adviser under the IAA.

3. The finding that Respondent committed a primary violation of Section 206(4) of the IAA.

C. REVIEW OF THE ID IS REQUIRED TO CORRECT THE ERRONEOUS FAILURE TO TAKE OFFICIAL NOTICE OF STATISTICS AS REQUESTED BY RESPONDENT.

D. REVIEW OF THE ID IS REQUIRED TO CORRECT DUE PROCESS VIOLATIONS OCCURRING IN THIS MATTER.

E. REVIEW OF THE ID IS REQUIRED BECAUSE THE ALJ IS NOT A PROPER "OFFICER."

F. REVIEW OF THE ID IS REQUIRED TO CORRECT ERRORS IN THE IMPOSITION OF SANCTIONS.

1. A cease-and-desist order was moot and inappropriate.

2. The associational bar was inappropriate.

3. The calculation of disgorgement was erroneous.

4. The civil penalty assessed was excessive and unsupported by the evidence.

IV. REVIEW OF THE ID IS REQUIRED TO CORRECT THE FOLLOWING ERRONEOUS FINDINGS OF FACT.

The ID rendered on July 27, 2015 made conclusions of material fact that were clearly erroneous based upon the evidence and testimony presented during the Hearing. The erroneous findings discussed *infra* remain part of the ID after ALJ Elliot issued his Order on Motion to Correct Manifest Errors of Fact on August 18, 2015.

A. The finding that the membership units in the Maple Equestrian, Piney Cumberland Holdings, and Meadow Creek Holdings LLC's were issued pursuant to regulation D.

Erroneous Finding: "Each of the three conservation easements in suit involved a property owner who created a limited liability company which issued membership units pursuant to Reg D. Tr. 99-100, 445-46; Div. Exs. 151, 152, 153. The three limited liability companies/issuers and their associated Reg D offerings were named Maple Equestrian, LLC (Maple Equestrian), Piney Cumberland Holdings, LLC (Piney Cumberland), and Meadow Creek Holdings, LLC (Meadow Creek)." (ID at 6.)

The erroneous finding, as amended, still states that membership units were issued "pursuant to regulation D" and that the offerings were "Reg D offerings." In light

of the determination that the membership units were not securities, they could not have been offered "pursuant to Regulation D," which exempts from registration only certain qualified offerings of *securities*. *See* 15 U.S.C. 77d(a)(5); 15 U.S.C. 77e. Consequently, any reference to Regulation D is manifest error as it allows irrelevant evidence into the pool for consideration by the ALJ.

B. The finding that Respondent's failure to inform LPL of the conservation easement transactions was inconsistent with LPL's compliance policies relating to selling away, outside business activities, and providing tax advice.

Erroneous Finding: "The participation in SFA-Broker private offerings by his clients and himself and Lloyd's failure to inform LPL of them, were inconsistent with LPL's compliance policies relating to selling away, outside business activities and providing tax advice." (ID at 19.)

LPL's compliance policies are entirely irrelevant to the issue of whether or not Respondent violated the IAA because he was not acting in his capacity as an investment adviser, and the conservation easements at issue were not securities, as determined by ALJ Foelak. *See Paul Edward "Ed" Lloyd, Jr., CPA*, Admin. Proc. Rulings Release No. 2366, 2015 SEC (Feb. 27, 2015). The LPL compliance policies (DOE Ex. 154-155) should not have been admitted into evidence nor should they have been examined. That they were is erroneous.

Because the transaction was part of Respondent's disclosed CPA practice, it was not an "outside business activity" that he failed to disclose. LPL and its policies had no place in the hearing, and they have no place in the ID. Their inclusion clouded the

issues at hand, gave the ALJ the opportunity to consider irrelevant issues that should have been excluded, and was erroneous.

C. The finding that Respondent did not provide OCIE with the revised Schedule I listing 15 members of FC 2012, LLC.

Erroneous Finding: "Lloyd did not provide OCIE with the revised Schedule I, listing 15 members, that he had provided to SFA and the Piney Cumberland issuer on both December 10 and 11 of 2012." (ID at 20.)

The ID, as amended, insinuates that Respondent never provided OCIE with the revised Schedule I which listed the 15 members. ALJ Elliot is correct in his Order on Motion to Correct Manifest Errors of Fact that Respondent did not provide the revised Schedule I in the March 14, 2013 production, but to state only that Respondent "did not provide OCIE with the revised Schedule I . . ." is erroneous and misleading. Respondent provided the subject document in his April 5, 2013 production. To omit that fact was erroneous because it only tells half of the story.

D. The finding that [redacted] Branch and Respondent's attorneys discussed Respondent's fees.

Erroneous Finding: "Branch and Lloyd's attorneys discussed fees Lloyd charged, among other things. Tr. 1102." (ID at 22.)

The finding omits relevant information required to make it not a misrepresentation: Branch's uncontested testimony that his discussions with Respondent's counsel occurred *after* he responded to the subpoena (Tr. 1097, 1102) and that he knew the fee *at the time he wrote the check* (Tr. 1089-90). Moreover, several clients testified specifically that Respondent did not help them draft their letters

or suggest language to include. (Losby 942:5; Hooks 1080:16-1081:1; Price 1110:7-12; Goss 1133:20-1134:12.)

In the Order on Motion to Correct Manifest Errors of Fact, ALJ Elliot stated that this sentence is supported by the cited evidence. However, the testimony speaks for itself. The finding to the contrary is a patently false fabrication that blatantly ignored the actual testimony.

E. The finding that Respondent had the opportunity to influence [redacted] Losby's memory of his FC 2012 participation.

Erroneous Finding: "However, Losby testified that he turned to Lloyd when he first received the document subpoena from commission staff, meaning Lloyd had the opportunity to influence Losby's memory of his FC12 participation. Tr. 937-38, 942-43." (ID at 24.)

The ID selectively recounts facts to suggest an improper influence on the testimony of several witnesses by Respondent or his counsel when, in fact, the witness confirmed his independent and uninfluenced recollection. *See* Tr. 938-39, 941; Division Ex. 134. This skewed recitation of the testimony clearly shows that the ALJ either had an erroneous understanding of what was said or that he simply twisted the testimony to suit his purpose.

F. The finding that Respondent had the opportunity to influence [redacted] Price's member of his FC 2012 participation.

Erroneous Finding: "Like Losby, however, Price was in contact with Lloyd just after receiving a document subpoena from the Commission staff. Tr. 1117-19." (ID at 24.)

Again, the finding suggests improper influence and conduct thorough a selective and incomplete recitation of the evidence. *See* Tr. 1109-1110; 1118; Division Ex. 140. It is clear after many incorrect summaries of the trial testimony that the ALJ heard what he wanted to hear, despite the fact that the testimony was at his disposal, in black and white, for review prior to issuing the ID.

G. The finding that Respondent may have stolen $130,000.00 from his clients outright had he not been examined by LPL and OCIE.

Erroneous Finding: "Make no mistake, Lloyd may not have issued true and correct K-1s absent the focus on him in early 2013 by LPL and OCIE. *See* Resp. Reply at 9-10. It is entirely possible that, had LPL and OCIE never examined Lloyd, he would have stolen $130,000.00 from his clients outright." (ID at 28.)

ALJ Elliot made an excellent point in his Order on Motion to Correct Manifest Orders: This finding is "not factual." That is precisely Respondent's point. This sentence is hypothetical, gratuitous speculation, unsupported by any evidence and indicative of ALJ Elliot's biased mindset towards Respondent. It was erroneous to even consider this hypothetical, much less to include it in the ID.

H. The finding that Respondent possessed independent contractor-like autonomy while associated with LPL making him more like a controlling person of an investment adviser rather than an employee of same.

Erroneous Finding: "The independent contractor-like autonomy he possessed while associated with LPL made him much more like a controlling person of an investment advisor than an employee of an investment advisor..., further with respect to his advisory clients, Lloyd engaged in conduct virtually indistinguishable from that than of an unregistered investment advisor. It would be anomalous if Lloyd could only be

held secondarily liable for conduct that would warrant primary liability for an unregistered investment advisor" (citations omitted). (ID at 29.)

There is no *factual* support for a conclusion concerning Respondent's supposed autonomy, authority, or ability to influence, and none was cited in the ID. The nature of his relationship with LPL and his autonomy (or lack thereof) was never discussed, nor was the nature of any investment advisory service he provided to a very small number of clients ever explored. LPL's knowledge (or not) of Respondent's practice was not explored, except it was clear that LPL was aware of his accounting practice (see § IV. B. *supra*).

On a number of occasions in the ID and at the Hearing, the Court stated that Respondent was an "associated person" with a Registered Investment Advisor, LPL. By definition, he was at most an "associated person." 15 U.S.C. § 80b-2(a)(17) (2014). There is simply no factual predicate for the finding that he was "like" an independent contractor, or that he had any "control" over LPL. Moreover, a finding that Respondent was an independent contractor and yet in "control" of the Investment Advisor, LPL, is fundamentally inconsistent, anyway.

In short, Respondent's level of autonomy with respect to his work with LPL was not explored during the hearing, and no finding as to his status as an investment adviser is appropriate. Most importantly, because Respondent's liability under the IAA turns *specifically* on whether or not he was an "investment adviser," it is manifest error to rule on Respondent's status as such without examining the issue fully.

I. The finding that Respondent should not be able to avoid primary liability by selling away.

Erroneous Finding: "It would be particularly anomalous if he could avoid primary liability by the simple expedient of selling away." (ID at 29.)

There is no evidence that Respondent was "selling away" because the interests in FC 2012 were not "securities," nor were they even investments. To be "selling away" Respondent would have to be selling *securities*, and he was not.

Again, this finding has no place in the ID nor did it have a place in the Hearing. ALJ Foelak's Order on Motion for Summary Disposition was quite clear that the interests at issue were not securities, and any discussion or hypothetical regarding securities was irrelevant and therefore manifest error. ALJ Elliot allowed the Division to present its case as it would have if ALJ Foelak had not granted summary disposition, and that in and of itself is reason to review this case.

J. The finding that Respondent's failure to inform SFA and PCH of the identities of the ultimate consumers undermined those entities' compliance efforts and created the potential for a conflict of interest.

Erroneous Finding: "More specifically, Lloyd's failure to inform SFA and Piney Cumberland of the identities of the ultimate customers undermined those entities' compliance efforts, created a risk that they may violate the suitability and disclosure provisions of the securities laws, and, in Carson's case, potentially created a conflict of interest between SFA and Merrill Lynch." (ID at 33-34.)

Because neither the participation in PCH nor FC 2012 constituted the purchase of the "security," there was no risk of interfering with SFA or PCH's efforts at compliance with regulation D or securities laws and no risk that they would violate suitability or

disclosure provisions or create any conflict of interest. There is no evidence whatsoever in the record showing how such a violation or conflict of interest might occur.

Once again, the ALJ references hypothetical problems regarding issues already decided by ALJ Foelak and ignores the fact that these transactions did not involve the purchase or sale of a security, rendering discussions about securities laws and disclosure requirements completely irrelevant. In any event, the finding is entirely speculative because there is not one iota of evidence to support the potential compliance problem. Based on the language of the ID, it appears as though ALJ Elliot gave due consideration to the hypothetical compliance issues that could have arisen, had securities been in play, and this was clearly in error.

K. The finding that but for his deceit of SFA, none of Respondent's clients could have participated in FC 2012, and he would not have been entitled to any of his fees.

Erroneous Finding: "Lloyd's own testimony establishes, but for his deceit of the SFA, his clients could not have participated in FC12 and he would not have been entitled to his fees. Tr. 809, 812-13. Thus, the amount he was enriched as a result of his deceit, $105,750.00 should be disgorged. Div. Exs. 67, 102, 109, 110, 187." (ID at 35.)

This finding, and the resulting finding regarding disgorgement, rests upon a speculative premise that had Carson, Brown, and Malloy not participated in the FC 2012 entity, the entire transaction between FC 2012 and PCH, LLC would not have occurred. The testimony cited in the ID does not support this conclusion.

Respondent would still have received fees from the other 15 participants, and he would have forgone only the fees from Carson, Brown, and Malloy, a total of $20,500.

(*See* Division Ex. 187.) It is entirely erroneous and contradicts the evidence and testimony presented at the hearing to hold that *none* of Respondent's clients could have participated in the PCH transaction without the inclusion of Carson, Brown, and Malloy.

L. The finding that Respondent created a risk that SFA and PCH would violate the securities laws.

Erroneous Finding: "On the other hand, although there was no demonstrated harm to Lloyd's clients, and the Piney Cumberland interests were not securities, by circumventing the compliance processes at SFA and Piney Cumberland, Lloyd created a risk that those entities would violate the securities laws." (ID at 36.)

Because neither the participation in PCH nor FC 2012 constituted the purchase of a "security," there was no risk of interfering with SFA or PCH's efforts at compliance with regulation D or securities laws, and the ID cited no evidence in the record showing how such a violation or conflict of interest might occur absent a security at issue. The ALJ appears to have weighed a completely irrelevant and hypothetical situation rather than examining only the actual evidence presented during the hearing, making this finding erroneous.

V. REVIEW OF THE ID IS REQUIRED TO CORRECT THE FOLLOWING ERRONEOUS CONCLUSIONS OF LAW.

The ALJ erred in finding that Respondent was an investment adviser who acted in his investment advisory capacity during the FC 2012 transaction. The ALJ also erred in finding that Respondent committed a primary violation of Section 206(4) of the IAA.

The ID initially, and correctly, noted that there is a definitional difference between an investment adviser and a person associated with an investment adviser. (*See* ID at 25.) The Definitions section of the IAA defines an "investment adviser" as:

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

15 U.S.C. 80b-2(11). A "person associated with an investment adviser," includes ". . . any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser." 15 U.S.C. § 80b-2(a)(17) (2014).

"Section 206 is an anti-fraud provision and applies only to 'investment advisers.'" *Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528, 537 (D. Md. 1978); *Hall v. Paine, Webber, Jackson & Curtis, Inc.*, No. 82 CIV. 2840 (DNE), 1984 WL 812, at *2 (S.D.N.Y. Aug. 27, 1984). In order to be charged with a primary violation of Section 206, the individual must be an "investment adviser." *Russell W. Stein*, Securities Exchange Act of 1934 Release No. 47504, 2003 WL 1125746, at *3 (Mar. 14, 2003). "'Persons associated with investment advisers' must be charged as aiders and abettors." *Id.*

In *Stein*, the Commission noted that "Section 206 applies by its terms only to investment advisers, rather than associated persons of investment advisers." *Id.* Therefore, "[o]nly investment advisers can be charged with primary liability pursuant to Section 206, and 'persons associated with investment advisers' must be charged as aiders and abettors." *Id.*

The ID found that Respondent violated Section 206(4) of the IAA based on the misrepresentations he made to SFA and PCH. In 2012, at the time of the conservation easement transaction, Respondent was a registered representative of LPL Financial. By definition, he was a "person associated with an investment adviser." 15 U.S.C. §

80b-2(a)(17) (2014). He quite literally could not be an "investment adviser" for purposes of the IAA both based on the definitions above as well as the *Stein* holding, and he could not commit a primary violation of Section 206.

Stein makes it clear that Section 206 is only applicable to investment advisers, and Respondent was not an investment adviser; he was an associated person of an investment adviser. For that reason, Respondent could not, and did not, commit a primary violation of Sections 206(4), and the ID's finding as to this issue was erroneous.

In the alternative, even if Respondent was deemed to be an investment adviser, he did not violate Section 206 because he was not acting as an investment adviser during the FC 2012 transaction, and he fell within the accountant's exception under the IAA. Respondent, and the participants who testified, noted that this transaction was a tax saving technique used with Respondent's tax clients. That four of them were also investment advisory clients does not change the nature of the transaction. This technique used to obtain a charitable deduction is no different than donating money to Goodwill. That is precisely why all communications utilized Respondent's Ed Lloyd & Associates email address and letterhead, instead of Lloyd Wealth Management. Respondent provided this service with his tax planning "hat" on, not his investment advisor hat.

Furthermore, absent evidence that Respondent received compensation specifically in return for providing investment advice to investors, he was not acting as an investment adviser within the meaning of the IAA. *See Luzerne Cnty. Ret. Bd. v. Makowski*, 627 F. Supp. 2d 506, 573 (M.D. Pa. 2007).

Moreover, the definitions section of the IAA specifically creates an exception to the "investment adviser" definition for "any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession." 15 U.S.C. 80b-2(11). *See Abrahamson v. Fleschner,* C.A.2 (N.Y.) 1977, 568 F.2d 862, *cert. denied* 98 S.Ct. 2236, 436 U.S. 905, 56 L.Ed.2d 403, *cert. denied* 98 S.Ct. 2253, 436 U.S. 913, 56 L.Ed.2d 414; *see also Kaufman*, 464 F. Supp. at 537.

During the FC 2012 transaction, Respondent acted as a CPA, researching and preparing a tax planning transaction, putting him squarely within the accountant exception. Respondent concedes that work performed under Lloyd Wealth Management is not "solely incidental to the practice of his profession" as a CPA; to argue anything to the contrary would be illogical. However, the FC 2012 transaction was not performed under Lloyd Wealth Management; it was done under Ed Lloyd & Associates, PLLC. The conservation easement transaction was a tax planning technique which was evaluated and did indeed provide tax savings for Respondent's tax clients, and ALJ Foelak determined that it did not involve the purchase or sale of a security. Again, the fact that four of Respondent's clients also happened to be advisory clients does not change the nature of the transaction for them or any of the others. Thus, even if Respondent were deemed to be an "investment adviser" for purposes of the Act, the accountant's exception applies because the work was solely incidental to the provision of tax planning services. Respondent was not subject to the IAA and therefore could not commit a primary violation of Section 206(4).

The Division was required to establish by more than conclusory allegations that Respondent was an investment adviser, and it failed to do so. *Polera v. Altorfer,*

Podesta, Woolard and Co., 503 F. Supp. 116, 119 (N.D. Ill. 1980). The ID's holding that Respondent was an investment adviser and that he committed a primary violation of Section 206(4) of the IAA was erroneous.

VI. REVIEW OF THE ID IS REQUIRED TO CORRECT THE ERRONEOUS FAILURE TO TAKE OFFICIAL NOTICE OF STATISTICS AS REQUESTED BY RESPONDENT.

The Court failed to rule upon Respondent's Request for Judicial Notice of Statistics which was submitted in support of Respondent's Post-Hearing Brief and asked the Court to take judicial notice of the following information:

1. The number of cases that the SEC's Enforcement Division has brought as administrative proceedings before an administrative law judge in the past two years (years ending September 30, 2014 and 2013).
2. Of the cases noticed in (1), the number of cases in which there has been a finding in favor of the Respondent.
3. Of the cases noticed in (1), the number of cases in which there has been a finding in favor of the Division, in whole or in part, in the past two years.
4. The number of initial decisions by ALJ Cameron Elliot from October 1, 2012 to the present in favor of the Respondent.
5. The number of initial decisions by ALJ Cameron Elliot from October 1, 2012 to the present in which the initial decision found for the Division, in whole or in part.

ALJ Elliot failed to rule upon the request and instead cited the absence of evidence of partiality that official notice of such statistics would reveal and later stated that he considered the statistics and found them irrelevant. No privilege or statutory confidentiality protects the information for which Respondent requested the ALJ take official notice. It is improper procedure to simply fail to rule on the motion.[1]

VII. REVIEW OF THE ID IS REQUIRED TO CORRECT DUE PROCESS VIOLATIONS OCCURRING IN THIS MATTER.

ALJ Elliot's bias towards the Division was evident from the first day of the hearing, and it continued each day, until the issuance of the ID. From refusing to allow Respondent's expert to testify to allowing the Division to examine wholly irrelevant issues to sustaining practically every objection the Division made and overruling almost all of Respondent's, ALJ Elliot's bias permeated throughout the courtroom. In short, the Hearing was quite obviously one-sided.

Additionally, this action took place without the benefit of a neutral and disinterested fact finder, the Federal Rules of Evidence, discovery, or other safeguards. Because ALJs are employees of the Commission, there are significant issues of due process, including the basic tenets of a fair trial and the likelihood of bias, which were evident in the Hearing. Due process not only requires actual fairness but also the appearance of fairness. *See In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955); *see also Amos Treat & Co. Inc. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962).

[1] Respondent notes that ALJ Elliot also refused to provide an affidavit in the *Timbervest* matter regarding communications and other matters concerning his evident bias and partiality. *See* Order Concerning Additional Submission, June 4, 2015, "In the Matter of Timbervest, LLC, et. al."

"The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S. 411, 424 (1969). At the Hearing, the ALJ consistently favored the position of the Division. Respondent's counsel made various objections to the admission of evidence on the basis that it was irrelevant or prejudicial to the inquiry. (*See, e.g.* Tr. 99:15-25; 100:24-101:4; 133:20-139:23; 197:14-24; 261:2-17; 299:25-304:8, 311:15-312:5; 312:8-314:2; 317:7-14; 443:21-445:12; 463:1-10; 486:23-487:12; 523:17-525:4; 583:1-24; 611:20-24; 631: 21-25; 650:13-22; 662:18-24; 665:6-13; 735:15-736:3; 760:18-22; 771:4-8; 912:19-25; 922:2-10; 971:25-975:11; 983:12-22; 997:22-998:5; 1010:24-1011:3; 1011:23-1012:3; 1016:23-1017:5; 1032:8-14; 1065:12-16; 1075:1-8; 1099:1-8; 1115:6-10; 1149:5-11.) Furthermore, statements made by ALJ Elliot regarding the Respondent are clear evidence of his bias. (Tr. 697:1-14; 713:9-15; 723:14-724:13; 815:15-823:23.)

ALJ Elliot's bias toward the Respondent was palpable at the hearing, and it is evident in the ID as well. This issue is important to the fairness and viability of the administrative proceeding process, which is currently enduring multiple attacks from various sources, and therefore the Commission should grant Respondent's Petition for Review.

VIII. REVIEW OF THE ID IS REQUIRED BECAUSE THE ALJ IS NOT A PROPER "OFFICER" DESIGNATED BY THE COMMISSION.

The ALJ had no authority to conduct a hearing. He is not an officer designated by the Commission. The IAA states: "Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the

Commission designated by it, and appropriate records thereof shall be kept." 15 U.S.C. § 80b-12.

The Hearing in this matter is void because ALJ Elliot is not an appropriately appointed officer; he is an employee of the Commission. *See* Mem. of Law in Opp'n to PL's Mot. for TRO and a Prelim. Inj. at 11-19, *Duke v. SEC*, No. 15-357 (S.D.N.Y. Jan 28, 2015), ECF No. 13; Div of Enforcement's Mem.of Law in Respon. To the Commission's Order Req. Supp. Briefing at 4-13, *In re Timbervest, LLC*, File No. 3-15519 (Feb. 12, 2015). An improperly constituted hearing is void and cannot be ratified. *Ryder v. United States*, 515 U.S. 177, 182-83, 115 S. Ct. 2031, 2035, 132 L. Ed. 2d 136 (1995). Therefore, the hearing and the ID are improper and invalid.

IX. REVIEW OF THE ID IS REQUIRED TO CORRECT ERRORS IN THE IMPOSITION OF SANCTIONS.

Should the Commission determine that the findings regarding Respondent's status as an investment adviser and the violations of Section 206(4) of the IAA were not in error, the Commission should grant Respondent's Petition for Review because the sanctions imposed on Respondent are erroneous.

A. A Cease-and-Desist Order was inappropriate.

The ALJ erred in finding that a cease-and-desist order was warranted because the need for same is moot as Respondent is no longer an associated person of an investment adviser, and all of his securities licenses have since expired. In the alternative, the language of the order is overly broad and puts Respondent at risk for contempt for acts that are not related to the alleged harm to be prevented and/or deterred. Thus, the cease-and-desist order against all future violations of Sections

206(1), (2), and (4) is erroneous, and Respondent's Petition for Review should be granted.

B. An associational bar was inappropriate.

The imposition of an associational bar is entirely excessive, inappropriate, and erroneous. Given that none of Respondent's clients were harmed, that the hypothetical "compliance" issues created for SFA and PCH were just that, hypothetical, and that Respondent is no longer licensed to work in the securities industry, an associational bar is erroneous.

C. The calculation of disgorgement was erroneous.

The ALJ erred in calculating the amount of disgorgement. The ALJ found that Respondent was enriched to the tune of $105,750.00 as a result of his deceit of SFA. The ALJ reasoned that Respondent's "own testimony establishes that, but for his deceit of SFA, his clients could not have participated in FC12 and he would not have been entitled to his fees." (*See* ID at 35.)

This incorrectly assumes that the FC 2012 transaction would have failed had SFA known that Carson, Brown, and Malloy were participating in the purchase of interests in PCH. The testimony cited in the ID does not support this proposition in any way, and it contradicts the evidence and testimony presented to hold that *none* of Respondent's clients could have participated in the PCH transaction without the inclusion of Carson, Brown, and Malloy. Thus, the calculation of disgorgement is erroneous and warrants review.

D. The civil penalty assessed was excessive and unsupported by the evidence.

The ID bafflingly states that even though there was no harm to Respondent's clients, and even though the PCH interests were not securities, Respondent "created a risk that [SFA and PCH] would violate the securities laws." (*See* ID at 36.) The ALJ also noted that Respondent received "substantial," unjust fees and that civil penalties are en effective deterrent "particularly because Lloyd is no longer a regulated person." *Id.* The $100,000.00 civil penalty is both absurdly high and inaccurately calculated.

The ALJ provided no support for his contention that Respondent created a risk that SFA and PCH would violate the securities laws, especially since there was no security. Additionally, the ALJ based the $100,000.00 civil penalty on the fees received from all 18 clients, not the three at issue. Thus, the $100,000.00 civil penalty is calculated incorrectly, excessive, and therefore erroneous.

X. CONCLUSION

For the reasons stated above, Respondent respectfully requests that his Petition for Review of Initial Decision be GRANTED.

This the 8th day of September, 2015.

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Attorney for Respondent

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CERTIFICATE OF COMPLIANCE

The signature of respondent's attorney below certifies that, in compliance with the requirements of Securities Exchange Commission Rule 154(c), the word count for the RESPONDENT'S PETITION FOR REVIEW OF INITIAL DECISION filed with the Securities and Exchange Commission on September 8, 2015, contains a total of 6,999 words, as reported by the word processing program used to prepare the respondent's petition.

This the 8th day of September, 2015.

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CERTIFICATE OF SERVICE

I certify that the RESPONDENT'S PETITION FOR REVIEW OF INITIAL DECISION was served upon the parties to this action by mailing a copy thereof by first-class, postage pre-paid mail to the following counsel of record:

Honorable Cameron Elliot
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This the 8th day of September, 2015.

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September 8, 2015

Sent via fax (202) 772-9324 and US mail
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Washington, DC 20549

Re: In the Matter of Paul Edward "Ed" Lloyd, Jr., CPA;
Administrative Proceeding File No. 3-16182; Our File No. 10965

Dear Mr. Fields:

I enclose an original and three copies of Respondent's Petition for Review of Initial Decision.

Sincerely yours,

Frederick K Sharpless (By FKS)
Frederick K. Sharpless

FKS:drc
Encls.
cc: Honorable Cameron Elliot (via email and US mail)
Mr. Robert F. Schroeder/Mr. Brian Basinger (via email and US mail)
Mr. Alex Rue (via email and US mail)
Mr. Woody Webb (via email and US mail)
Mr. Ed Lloyd (via email)