

ORIGINAL

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING  
File No. 3-16554

In the Matter of

GRAY FINANCIAL GROUP, INC.,  
LAURENCE O. GRAY, and  
ROBERT C. HUBBARD, IV,

Respondents,

**Division of Enforcement's Reply to  
Respondents' Response to Division's Motion  
for Order Defining Extent of Attorney Client  
Waiver and Addressing Potential  
Disqualification of Counsel**

The Division of Enforcement ("Division"), in accordance with the Court's Order of January 27, 2017, hereby replies to the Respondents' Response brief.

The Respondents, by email to the Court on February 14, have declined to contest the Division's position that the Respondents waived the attorney client privilege with respect to communications to or from any counsel during the period of the conduct charged in the Order Instituting Proceedings ("OIP"), to the extent such communications relate to the relevant Georgia statute, Georgia Code Ann. § 47-20-87 (2013) (the "Georgia Act"). The Respondents instead argue that no advice regarding that statute was asked for by Respondents or given by Greenberg Traurig ("Greenberg"). However, with the privilege waived, the Division is entitled to question witnesses regarding communications and other facts relevant to that subject.<sup>1</sup> In that regard, the

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<sup>1</sup> Respondents attack the Division for not disclosing that the Division's investigative staff drafted the declarations as to reliance which, were executed by the Respondents. Respondents do not suggest why that is relevant to the issue presented.

Division requests that the Court reconsider its decision to quash trial subpoenas with respect to Genna Garver and Rachel Cohen-Deano.

Further, the Response filed by Respondents does not resolve the conflict question posed by the Court. There are aspects of the facts which are yet to be fleshed out. Potential conflicts exist which could require the disqualification of Greenberg. The Division reiterates that the prudent way forward is to allow some discovery into Respondents' communications<sup>2</sup> with Greenberg regarding the Georgia Act, including production of heretofore withheld emails on the topic, and a deposition of the Greenberg lawyer (or if necessary lawyers) involved, to resolve open factual questions before trial begins.

**I. SEGAL'S NEW TESTIMONY DOES NOT ALTER THE BASIC FACTS**

Respondents have sued Seward & Kissell ("Seward") for malpractice. Despite Respondents' herculean efforts to manufacture a distinction from the deposition testimony of Ms. Segal, there does not seem to be a meaningful distinction which would put Greenberg in a better position than Seward with regard to potential liability for failing to advise Respondents with regard to the Georgia Act. If anything, Seward alerted the Respondents (or at least Mr. Hubbard) to the potential \$100 million issue, whereas Greenberg, which was the only counsel during the entire period of the offering, claims it did not render advice on that issue.<sup>3</sup>

The essential facts of the case are not altered one iota by Segal's new deposition testimony. First, the OIP charges the Respondents, who were investment advisers to the Georgia public pension plans, with selling to the plans an unsuitable investment, the GrayCo Alternative

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<sup>2</sup> As noted below, Respondents have submitted declarations that speak to "advice" but do not foreclose the existence of communications.

<sup>3</sup> In Section II of this brief, the Division points out another potential conflict facing Respondents' counsel, who represents Respondents GFG, Gray and Hubbard. As discussed, Gray and Hubbard offer conflicting versions of key events and may have conflicting interests.

Partners II, L.P. (“Core Alts II”) offering. This investment was unsuitable because, as sold, **in the absence of other investors**, it was illegal for the Georgia public pension plans to purchase it. The OIP further alleges that Respondents misrepresented that other plans had invested when they had not. The Georgia Act provides that for a Georgia public pension plan (referred to in the Act as a large retirement system) to invest in an alternative investment, there must be at least four other investors independent of the issuer, and \$100 million committed or invested, at the time the Georgia plan invests. It also limits the investment of the Georgia plan to not more than 20 percent of the alternative investment’s assets. The intent of the law is obvious; to limit Georgia pension plans to investment in alternatives in which other investors are already in and have committed substantial sums.

As we have noted previously, Ms. Segal specifically advised Mr. Hubbard that the Georgia statute required that the fund have \$100 million invested before a Georgia plan could invest (Div. Ex. 90). She further advised that it was unclear whether the Georgia plan’s investment counted toward the \$100 million. Her subsequent communications with Mr. Hubbard included her question as to how they intended to address the issue (Ex. 91). Mr. Hubbard’s response was that the Respondents were getting a local opinion (Ex. 92). The Respondents subsequently (July 9) requested that Seward send to Respondents drafts of the offering documents, so that Respondents could speak to **unidentified** prospective clients (Ex. 103).

In this context, Ms. Segal’s deposition testimony that the drafts of the offering documents were compliant with the Georgia Act is meaningless. The offering documents say nothing about the Georgia Act. It was the Respondents’ actions in recommending the investments to their clients that were fraudulent. Had they recruited four other investors and \$100 million before inducing the Georgia plans to invest (as contemplated by the Georgia Act),

there would be no violations. Ms. Segal, in deposition pages which the Respondents neglected to attach, makes this point. She testified that compliance would have depended on when a Georgia plan invested (Segal Depo. P. 212) and that Seward's representation of the Respondents never got to the point where they discussed the facts under which a particular Georgia plan could invest, "such as timing" (Segal Dep. P. 213). In other words, Segal could not possibly opine on whether the Respondents' offer complied with the Georgia Act until Respondents identified how many investors were investing and the total amount to be invested. The facts only became knowable after Respondents ceased consulting with Seward.

For the same reason, Ms. Segal's testimony that she saw no need to advise the Respondents on what to say to clients is taken out of context. Ms. Segal made it clear that she did not address those issues because it was premature (Segal Dep. Pp. 206-7), and that the representation was terminated after Seward delivered the draft documents (Segal Dep. P. 181). Similarly, based on his investigative testimony, we expect Respondent Gray to testify that the Respondents stopped consulting with Seward after the draft documents were supplied. (Gray Test. at 366-7).

Finally, the Respondents make the ludicrous argument that because the Respondents did not advise Seward that they had retained other counsel, they were justified in assuming that Seward had concluded that the Core Alts II offering was legal for Georgia public pension plans. This argument ignores the fact that the legality of the investment was not contingent upon the offering materials or the structure of Core Alts II, but upon the number of other investors in the plan and the amount committed at the time a Georgia plan invested. It also flatly contradicts the record and Hubbard's acknowledgment that the Respondents communicated that they were seeking a local opinion on the \$100 million issue (Div. Ex. 92). It ignores the basic reality that

the Respondents knew they had other counsel (Greenberg) and, that the Respondents stopped relying on Seward, leading Ms. Segal to conclude that Seward had been terminated.

The Respondents claim that they considered the delivery of draft (clearly marked) documents by Seward to be an opinion as to the requirements of the Georgia Act, despite the following facts: (i) the documents did not address the Georgia Act; (ii) Seward had advised the Respondents that, for Georgia plans to legally invest in the fund, the fund needed \$100 million invested;<sup>4</sup> (iii) Respondents had advised Seward that they were getting a local opinion to resolve the issue; (iv) Seward was never consulted on other provisions at issue, such as the four investor rule; (v) Greenberg was counsel for the offering during the entire period of the offering; and (vi) Respondents stopped consulting with Seward after obtaining the draft documents, which occurred on July 9, 2012 (Div. Ex. 131; Gray test. 366-7).<sup>5</sup>

Nothing in the deposition testimony of Ms. Segal contradicts any of this. Respondents cite to testimony that her understanding was that the draft offering documents were compliant with the Georgia Act. In fact, the documents say nothing about the Georgia Act. Ms. Segal left the cover amount at \$75 million in brackets as a reminder that the \$100 million issue was unresolved. Compliance or non-compliance was dependent upon the number of other investors and amount invested when a Georgia plan invested, an issue for the adviser. Ms. Segal makes clear that the offering was not at the stage where they would have addressed such issues, beyond

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<sup>4</sup> The Respondents next point out that Segal only spent a few hours on the Georgia Act issue, whereas Respondents' purported expert Jessup devoted 125 hours to analyzing the Georgia Act. The Respondents mix apples and oranges. Segal's testimony is relevant because she advised the Respondents (or at least Respondent Hubbard) that the Georgia Act required that there be \$100 million in the alternative investment before a Georgia plan could invest. Her testimony is directly relevant on the scienter issue. Jessup's submission has been addressed by the Division in a separate brief, but at best, it is an after the fact opinion that adds little to the factual record.

<sup>5</sup> Respondents now claim there was one more message, on an unrelated subject, on August 6. That claim, even if true, does not change the analysis.

the specific advice that was requested and given. Greenberg, not Seward, was counsel during the periods when the offering was ongoing and Georgia plans were investing.

## II. THE RESPONDENTS HAVE NOT RESOLVED THE POTENTIAL CONFLICT

Respondents have submitted a brief filled with out of context or misleading references to Ms. Segal's testimony, all in an attempt to convince the Court that the Respondents relied on Seward with regard to the Georgia Act and that somehow, Greenberg has no responsibility or exposure (which might create a conflict).

In the Division's view, the facts are still not clarified sufficiently to determine whether a disqualifying conflict exists. As a general rule, an attorney cannot represent a client if there is a significant risk that the attorney's own interest is materially adverse to, or materially limits, the representation of the client. Ga. Rules of Prof'l Conduct, R. 1.7 (2016); Model Rules of Prof'l Conduct, R. 1.7 (2009). The Eleventh Circuit applies both, the Georgia Rules of Professional Conduct, and federal common law, in deciding motions to disqualify counsel. *Herrmann v. Gutterguard, Inc.*, 199 F.App'x 745, 752 (11<sup>th</sup> Cir. 2006).<sup>6</sup>

In determining whether a conflict of interest exists, courts assess 1) the likelihood that a conflict of interest will occur, and if so, 2) whether it will materially interfere with the attorney's

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<sup>6</sup> Although Greenberg has given assurances that the Respondents have consented to the firm's conflicts, it is unclear whether the Respondents have consented to the potential for conflict stemming from Greenberg's participation in the transactions that are the focus of this proceeding. To the extent that the conduct of any Greenberg lawyer involved in those transactions is or becomes an issue in this proceeding, there is a significant risk that the Greenberg firm's representation of the Respondents is burdened by conflict under Rules 1.7 and 1.10 of the Georgia Rules of Professional Conduct. See Rule 1.7 ("A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests . . . will materially and adversely affect the representation of the client, except as permitted in (b)"); 1.10 ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7); Comment [6] to Rule 1.7 (" If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice.").

independent professional judgement in pursuing the proper courses of action on behalf of the client. *McGriff v. Christie*, 477 F.App'x 673 (11<sup>th</sup> Cir. 2012); *see* Ga. Rules of Prof'l Conduct, R. 1.7.

An analysis of Ms. Segal's deposition testimony, the actual record in the case, and the allegations at issue, demonstrates that the Respondents have offered little to clarify these questions. Among other things, the Respondents emphasize testimony from Ms. Segal, or their interpretations of her testimony, to the effect that (i) the offering documents were compliant with the Georgia statute; (ii) the Respondents did not tell Seward that they had other lawyers and therefore were justified in relying on Seward; (iii) Segal did not consider it necessary to advise Hubbard on what to say to potential investors; and (iv) the only aspect of the agreement that she altered with respect to the Georgia statute was in bracketing the cover amount (\$75 million when she sent the drafts), to indicate that the \$100 million issue was still open.

The Respondents have also submitted numerous declarations which generally state that the Respondents did not seek or obtain "advice" from Greenberg regarding the Georgia Act.<sup>7</sup> The declarations, which deftly avoid denying communications on the topic, do not provide sufficient information to eliminate the possibility that a conflict may arise at the hearing. None of the declarations state, as claimed in the Respondents brief, that there were no "communications" on the subject. Respondents' tortured arguments to the contrary notwithstanding, Respondent Hubbard testified that he did ask Greenberg about the statute in question. All of Respondents later statements to the contrary are now material for impeachment on cross-examination, but they do not erase Hubbard's prior sworn testimony.

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<sup>7</sup> One declaration, that of Shannon Thompson, omits even this disclaimer.

Other documents imply that Greenberg was involved to some extent in the sales efforts. For example, Ex.129, a December 4, 2012 email, references Respondents' attorneys contacting the attorney for another Georgia plan (that did not invest) to advise them that they could not rely on Gray's recommendation to purchase the Fund (due to a conflict between GFG's role as a pension consultant and the proposed role as fund manager). Another example is Ex. 69, a December 5, 2012 email from a Gray employee to Garver, marked high importance, discussing the number of investors closed thus far, the target of \$100 million and the uncertainty regarding the final ownership percentages in the fund. Yet another example is Ex. 151, an October 16, email in which Respondent Hubbard tells a fund representative "We are prepared to have our counsel available to discuss any items you find in the documents...."

The Division is entitled to and intends to explore aspects of the Greenberg representation that bear on Respondents' scienter. We expect some areas of inquiry to include: (i) the circumstances of this bizarre non-reliance; (ii) what Respondents told Greenberg about Seward's vetting of the issues; (iii) the terms of Greenberg's retention; (iv) any agreement by Respondents to hold Greenberg harmless in connection with the Georgia Act issues; (v) any communications which occurred that Respondents are not construing as "advice;" and (vi) any communications that occurred after the Atlanta Journal Constitution, the primary newspaper in Atlanta, began raising questions in July 2013 about whether the investment complied with the Georgia Act, and GFG's clients reached out to Gray for explanations on some of the very provisions at issue. It might be that there were no communications regarding the Georgia Act up to a certain date, especially if the Respondents, unhappy with Seward's take on the \$100 million requirement, chose not to raise the issue with Greenberg. But on July 27, 2013, the *Atlanta Journal*



*Constitution* ran a story [Division's Exhibit 2] questioning compliance with Georgia Act.<sup>8</sup> Were there no communications regarding the Georgia Act in the wake of that news story, or in the weeks preceding it when the paper was reaching out with questions? Really?

Respondent Hubbard, in his investigative testimony, identified Ms. Garver as his primary contact at Greenberg. Production of relevant, previously withheld communications followed by a deposition of Garver may be the cleanest way to develop the pertinent facts and allow the Court to make an informed decision. If, for example, Garver testifies that Greenberg raised questions about the legality of the investments, such testimony could potentially be sufficiently adverse to Respondents so as to require disqualification, even if she and her Greenberg colleagues were not asked to provide advice on the issue.

The Division points out another potential conflict facing Respondents' counsel, who represents Respondents GFG, Gray and Hubbard (and allegedly other witnesses). Ms. Segal's communication to Mr. Hubbard clearly alerts him to the requirement that the fund have \$100 million before a Georgia plan can invest (Div. Ex. 90). His later response clearly assures her that the Respondents are getting a local opinion (Div. Ex. 92). Based on his investigative testimony, the Division expects Respondent Gray to deny that Respondent Hubbard ever advised him of these communications. (Gray Test. Pp. 401-03, 410-12). His already flimsy reliance on counsel argument would evaporate completely if it were found otherwise. Hubbard's investigative testimony contradicts Gray. A fair reading of Hubbard's testimony is that he likely did discuss Segal's understanding with Gray (See, Hubbard at pp. 224/2-225/19). Obviously, it weighs in favor of Hubbard, and against Gray, if the messages were disclosed to Gray. Thus, this may involve "circumstances rendering it reasonably unlikely that [counsel] will be able to provide

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<sup>8</sup> The AJC story appeared 20 days before the last illegal purchase charged: the August 16, 2013 additional \$5 million commitment to the Fund by MARTA APU.

adequate representation to one or more of the affected clients.” See Rule 1.7(c)(3) of the Georgia Rules of Professional Conduct. If so, the representations would run counter to Rule 1.7, even if those clients have provided consent to that conflict. *Id.* How does one counsel balance the interests of both?

### CONCLUSION

For all of the reasons stated herein, the Court should determine that Respondents’ attorney client privilege was waived as to any communications concerning the Georgia Act and should conduct or allow a factual inquiry to determine if facts exist which would require disqualification of Respondents’ counsel from further representation of the Respondents in this matter.

Respectfully submitted.

*s/ William P. Hicks* \_\_\_\_\_

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M. Graham Loomis

Kristin W. Murnahan

Michael J. Adler

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(404) 842-7675 (Hicks)

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he has served a copy of the DIVISION'S  
REPLY, by electronic mail and by United Parcel Service, addressed as follows:

Secretary Brent F. Fields  
Securities and Exchange Commission  
100 F. Street, N.E.  
Washington, D. C. 20549-1090

Hon. Cameron Elliott  
Securities and Exchange Commission  
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This 15<sup>th</sup> day of February, 2017.

*/s/ William P. Hicks*  
\_\_\_\_\_  
William P. Hicks

# TRIAL EXHIBITS



DIVISION'S  
EXHIBIT  
**069**  
File No. 3-16554

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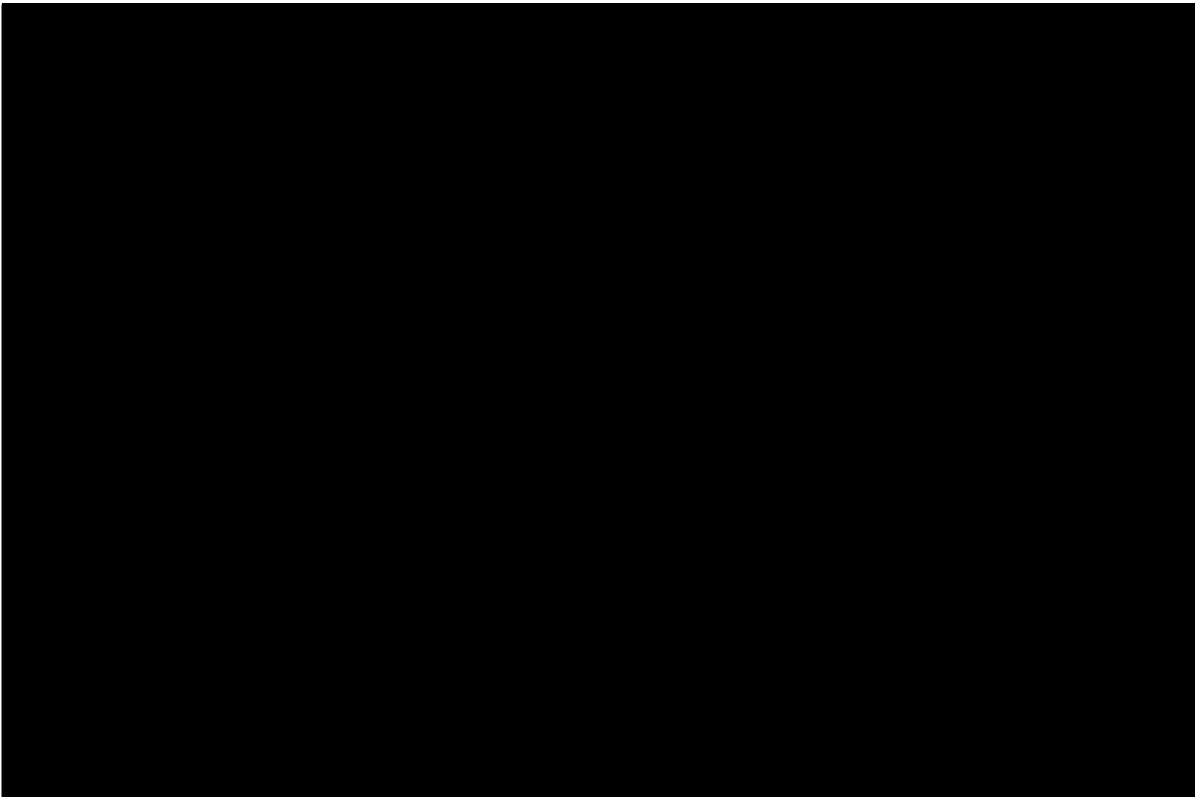
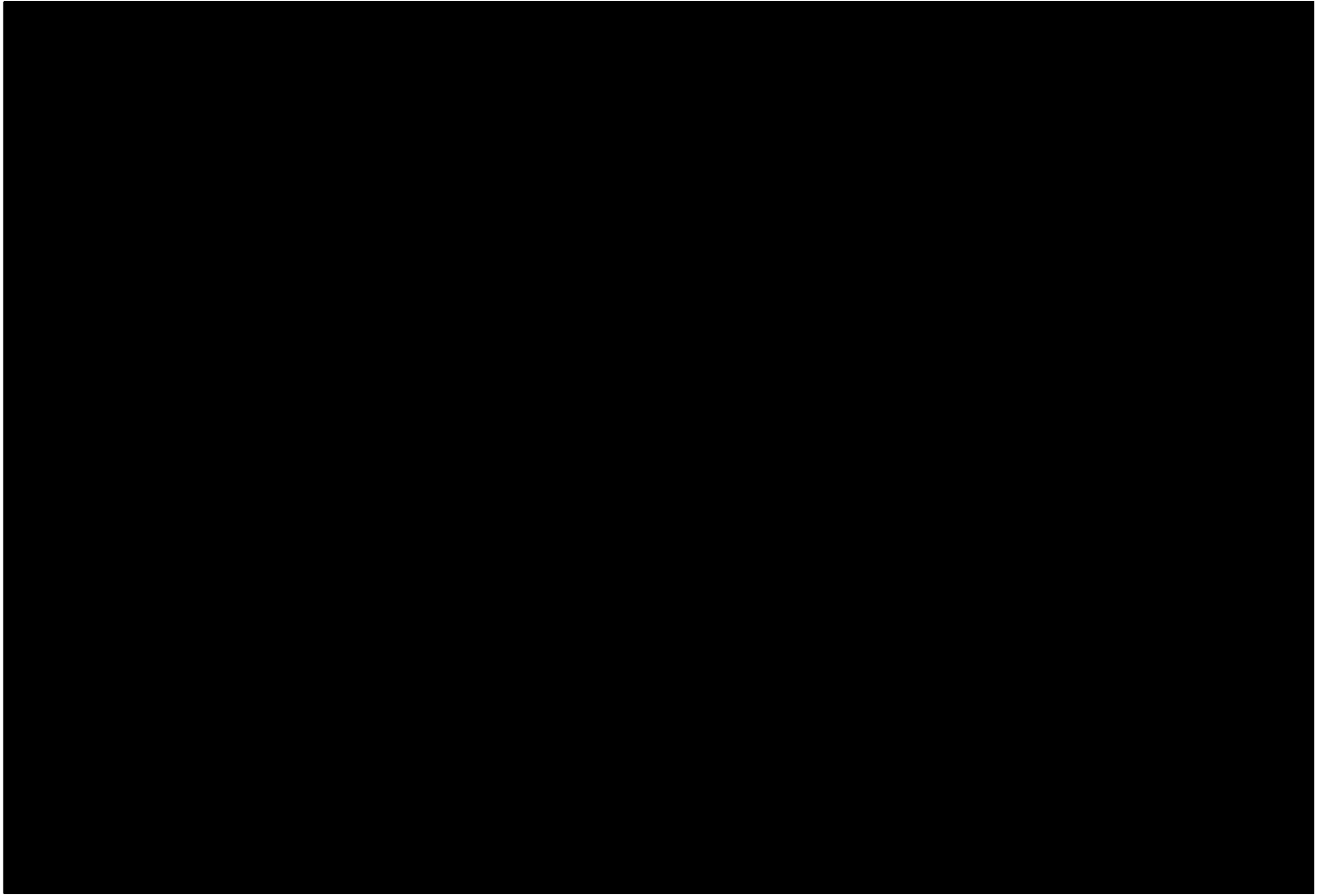
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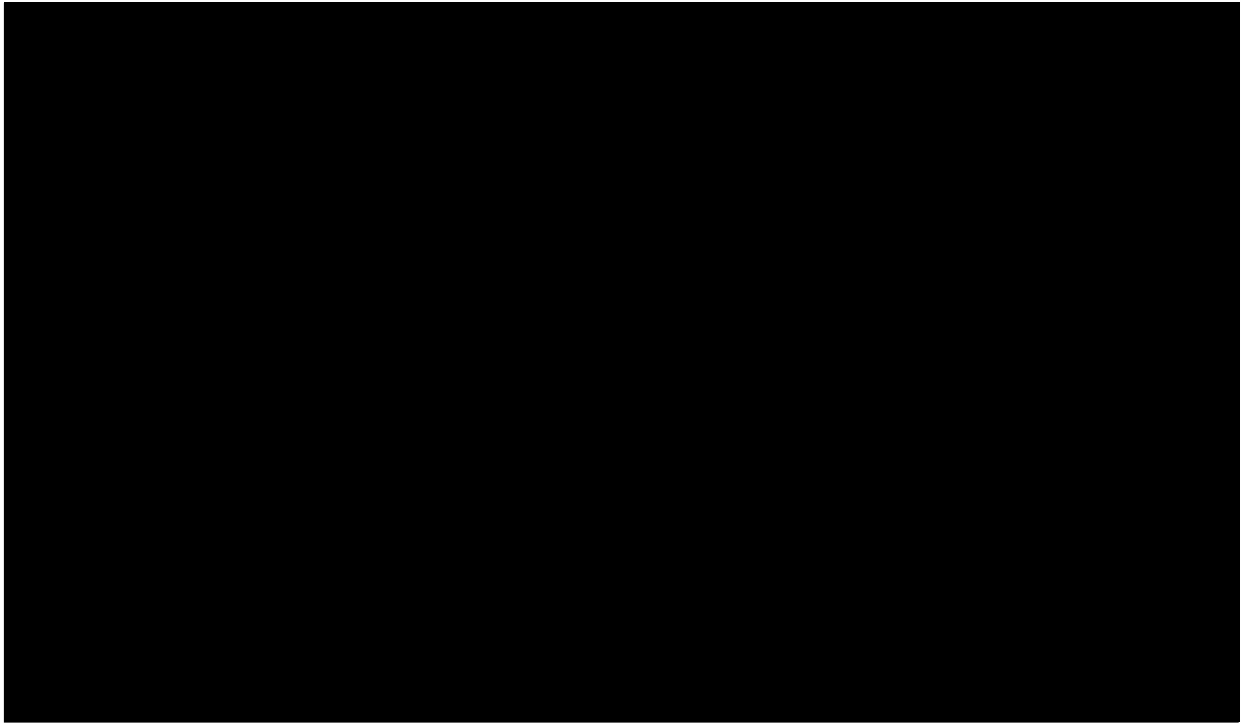
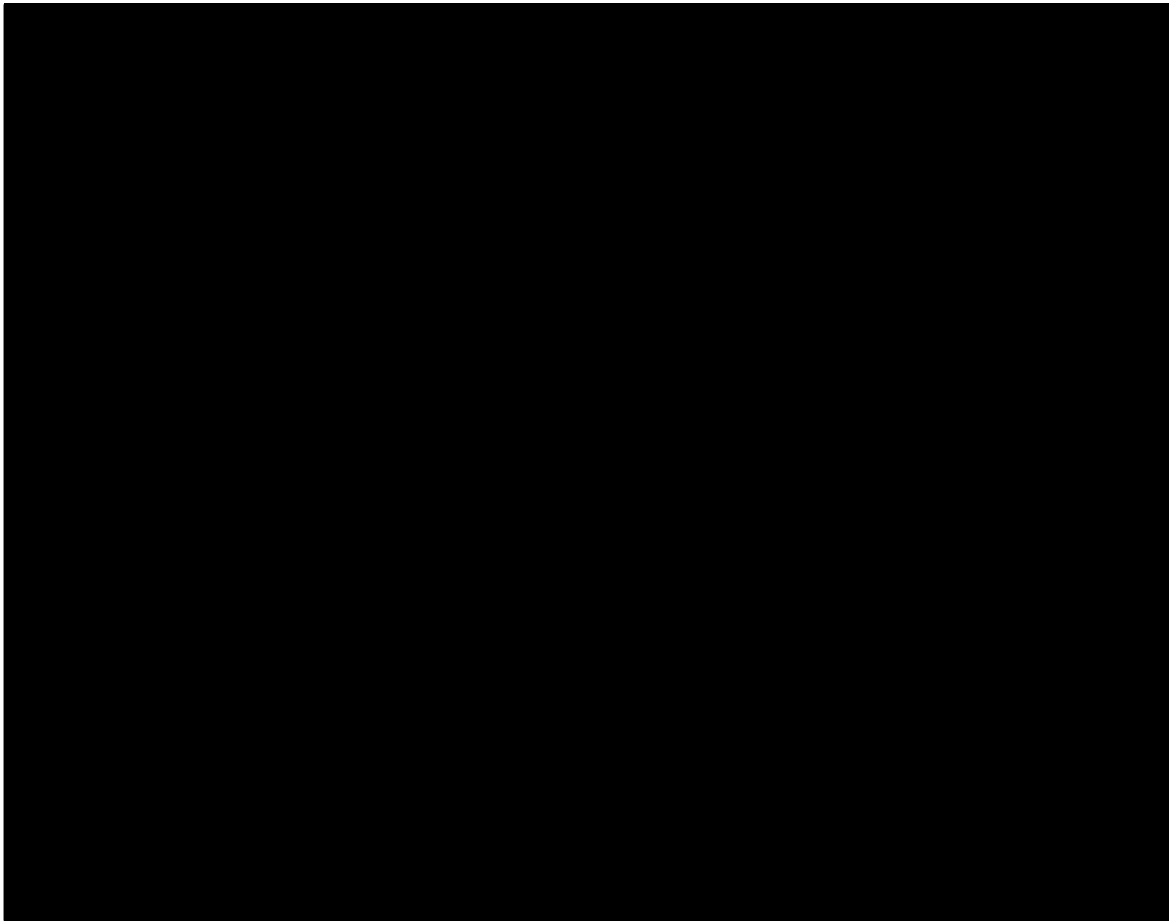
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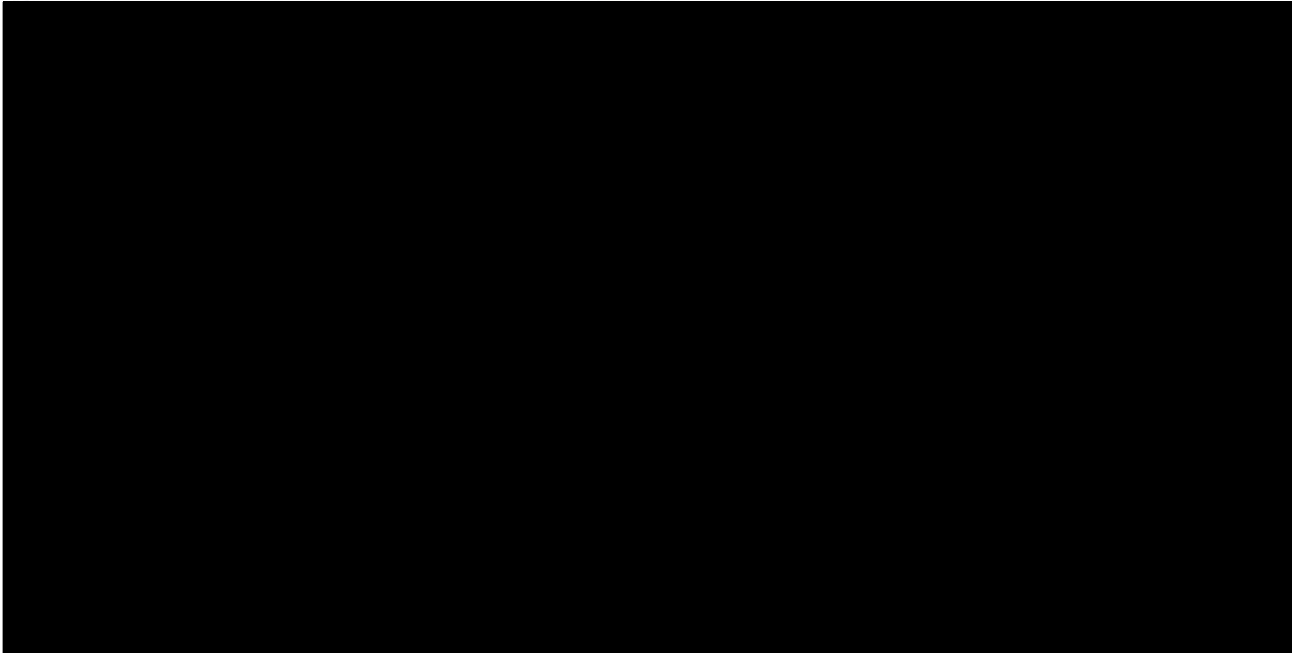
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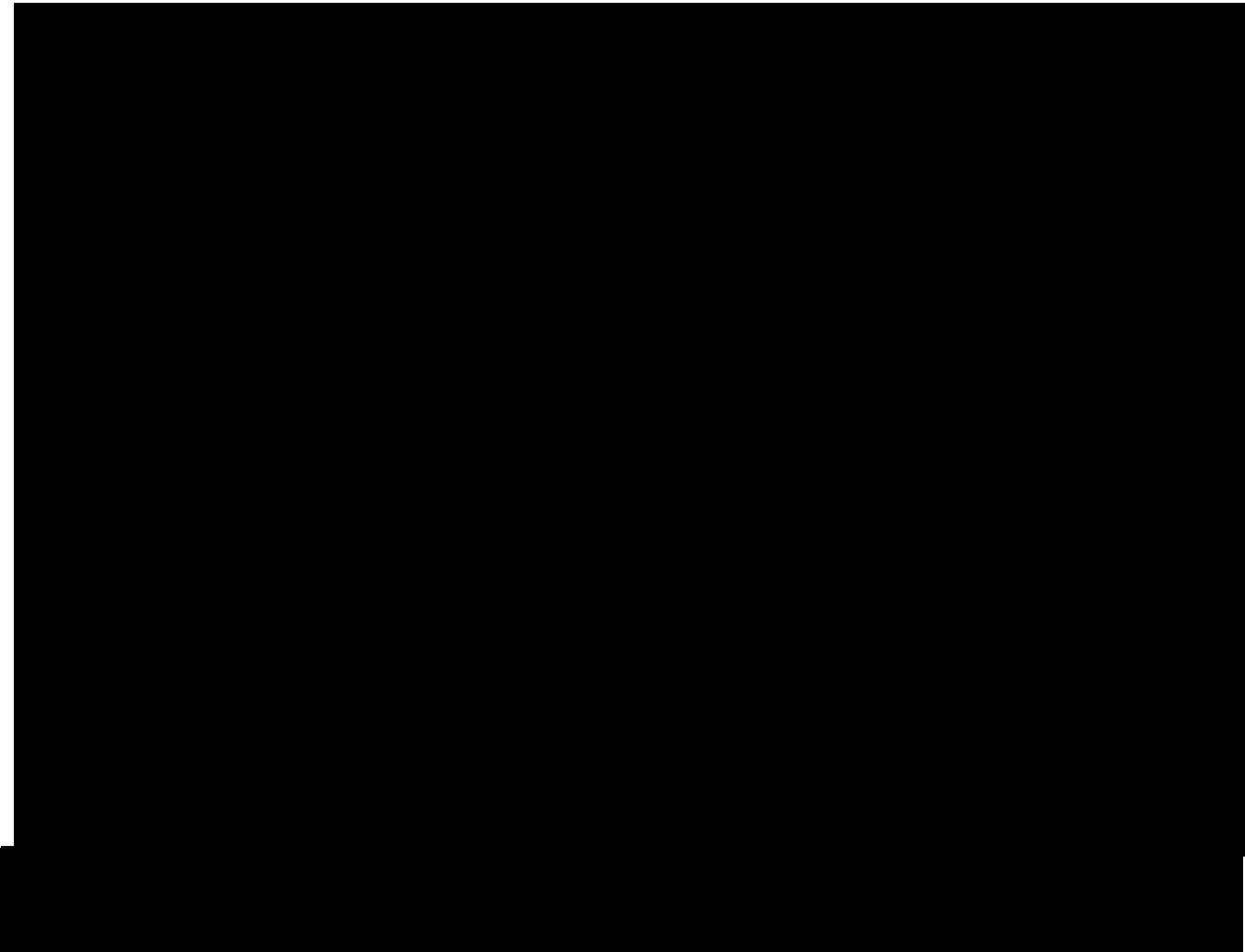
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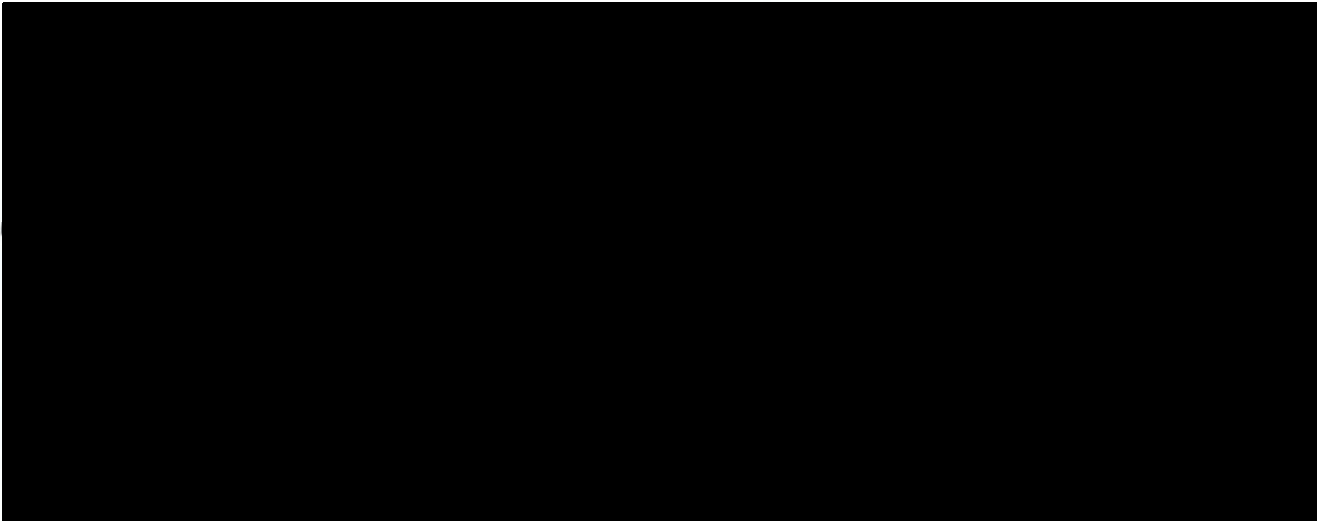
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File No. 3-16554

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File No. 3-16554

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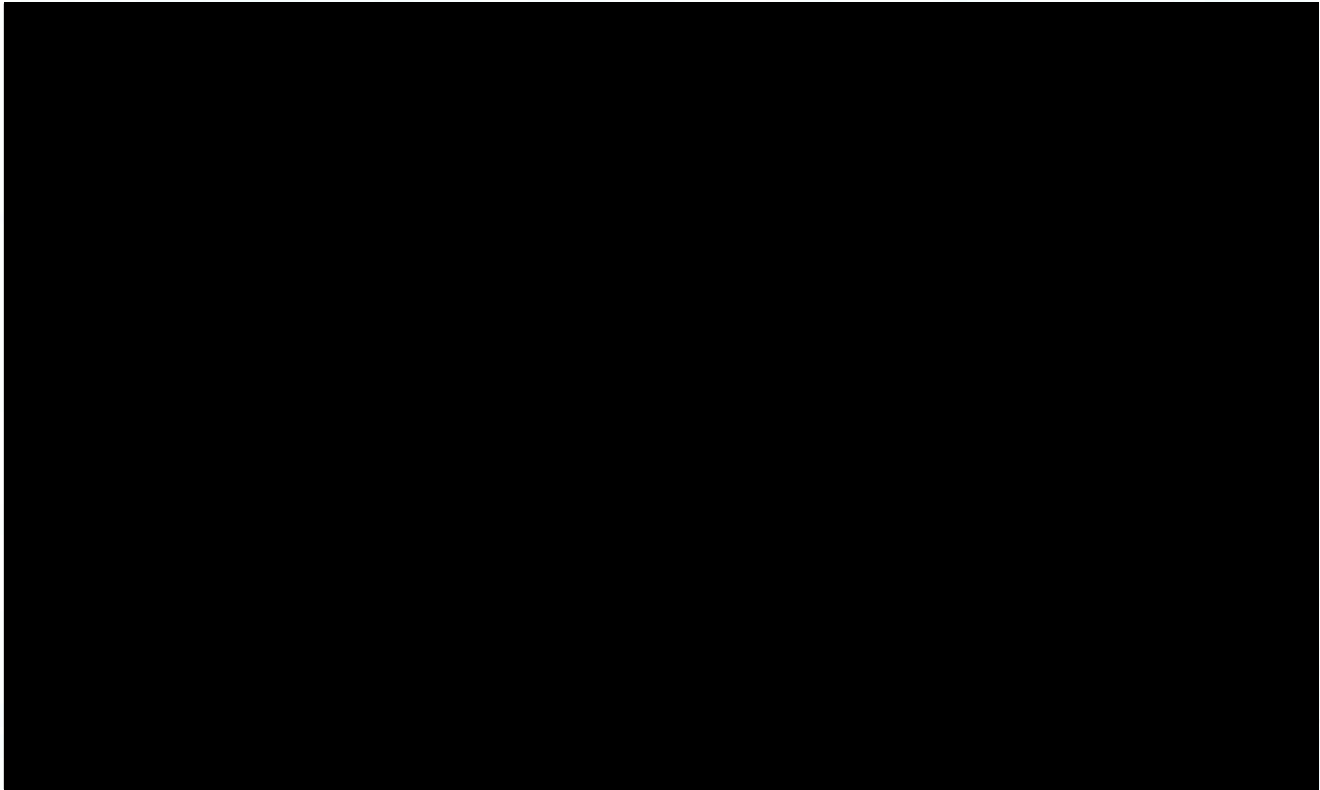
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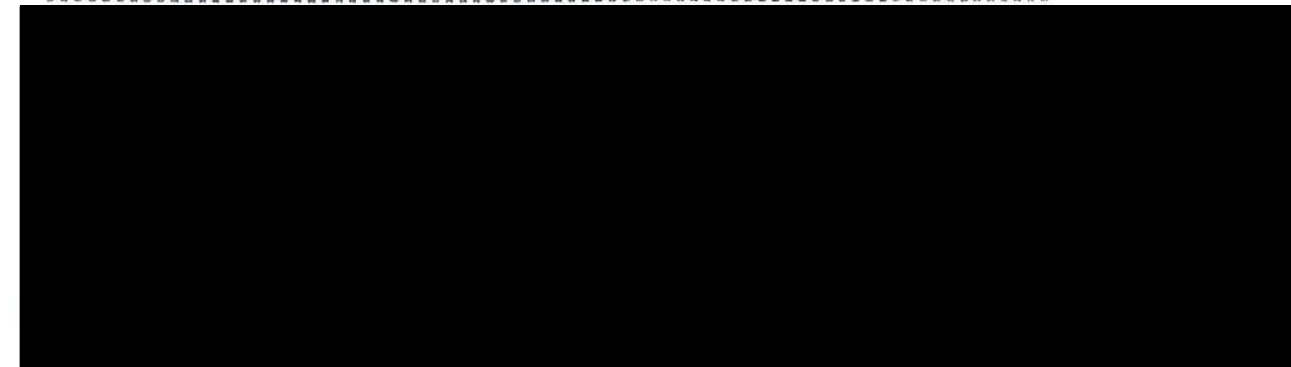
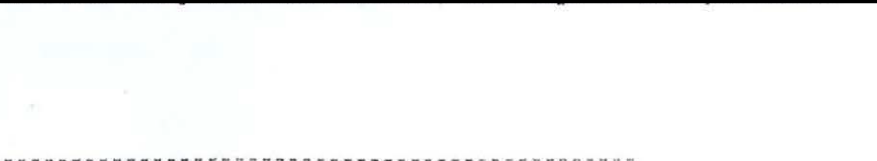
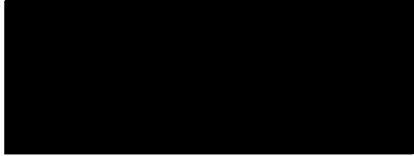
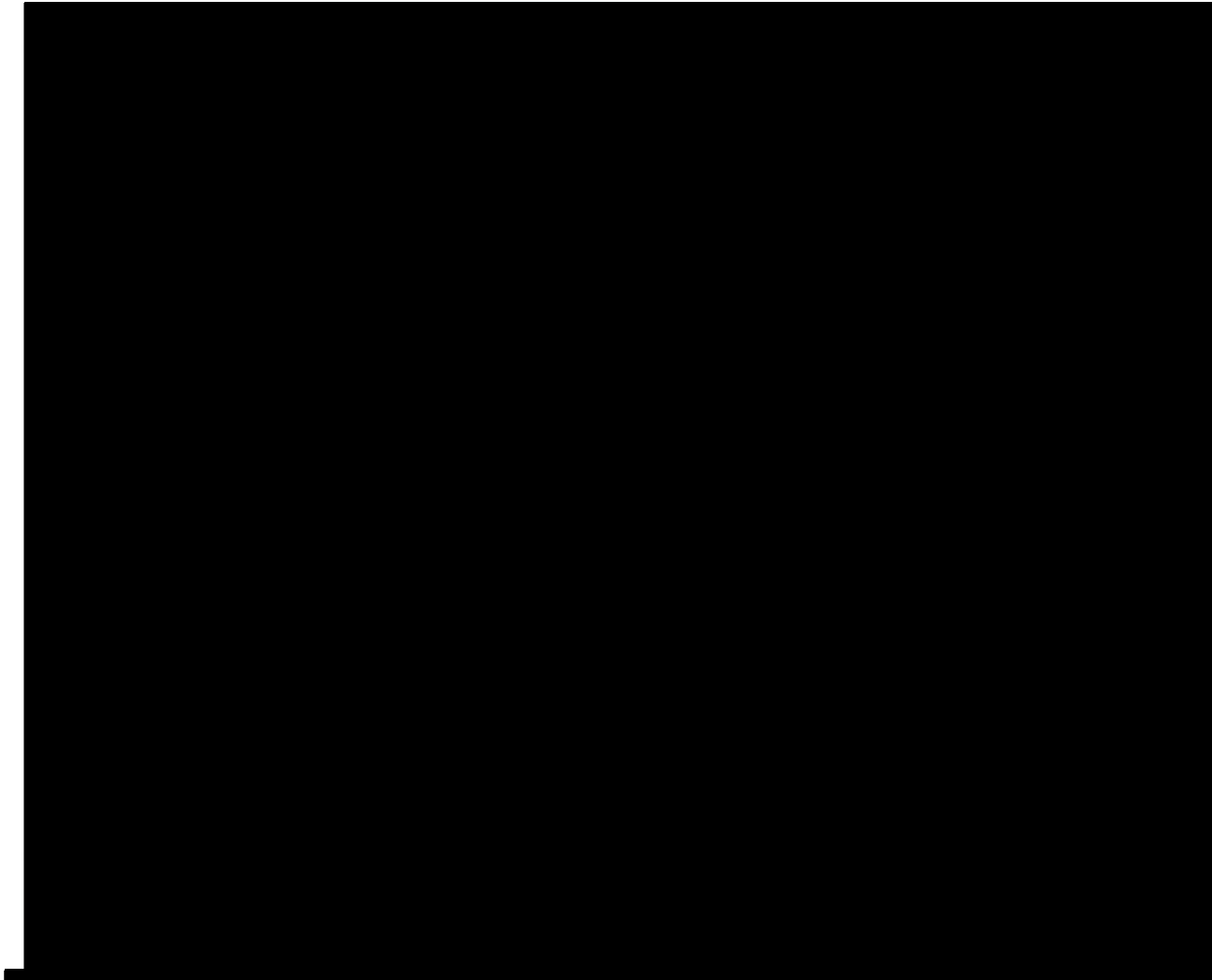
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DIVISION'S  
EXHIBIT  
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File No. 3-16554



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DIVISION'S  
EXHIBIT  
**129**  
File No. 3-16554

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DIVISION'S  
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File No. 3-16554

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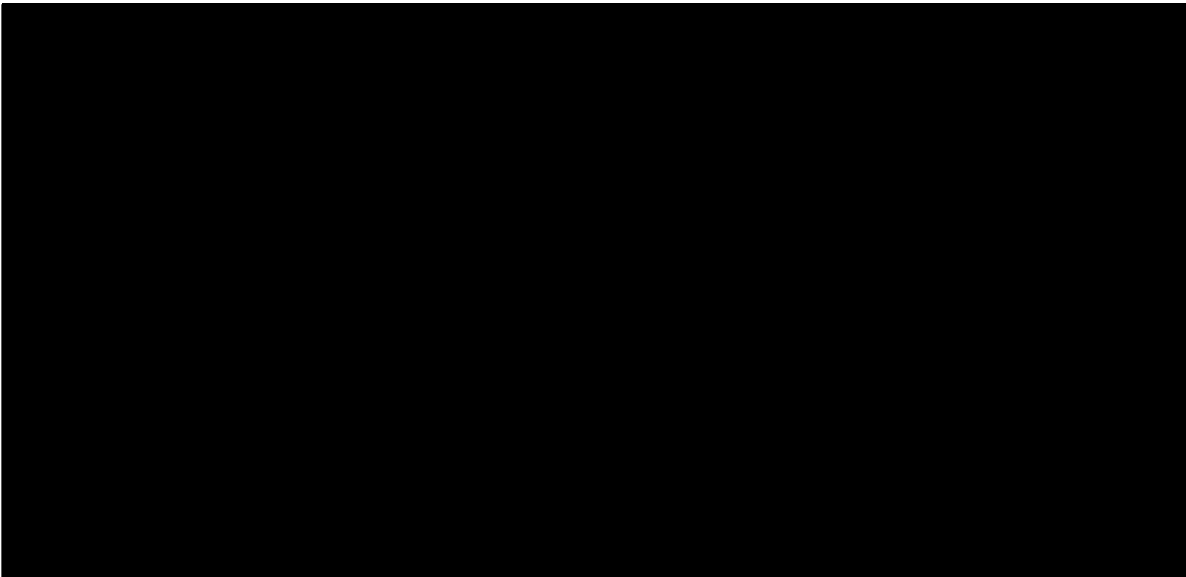
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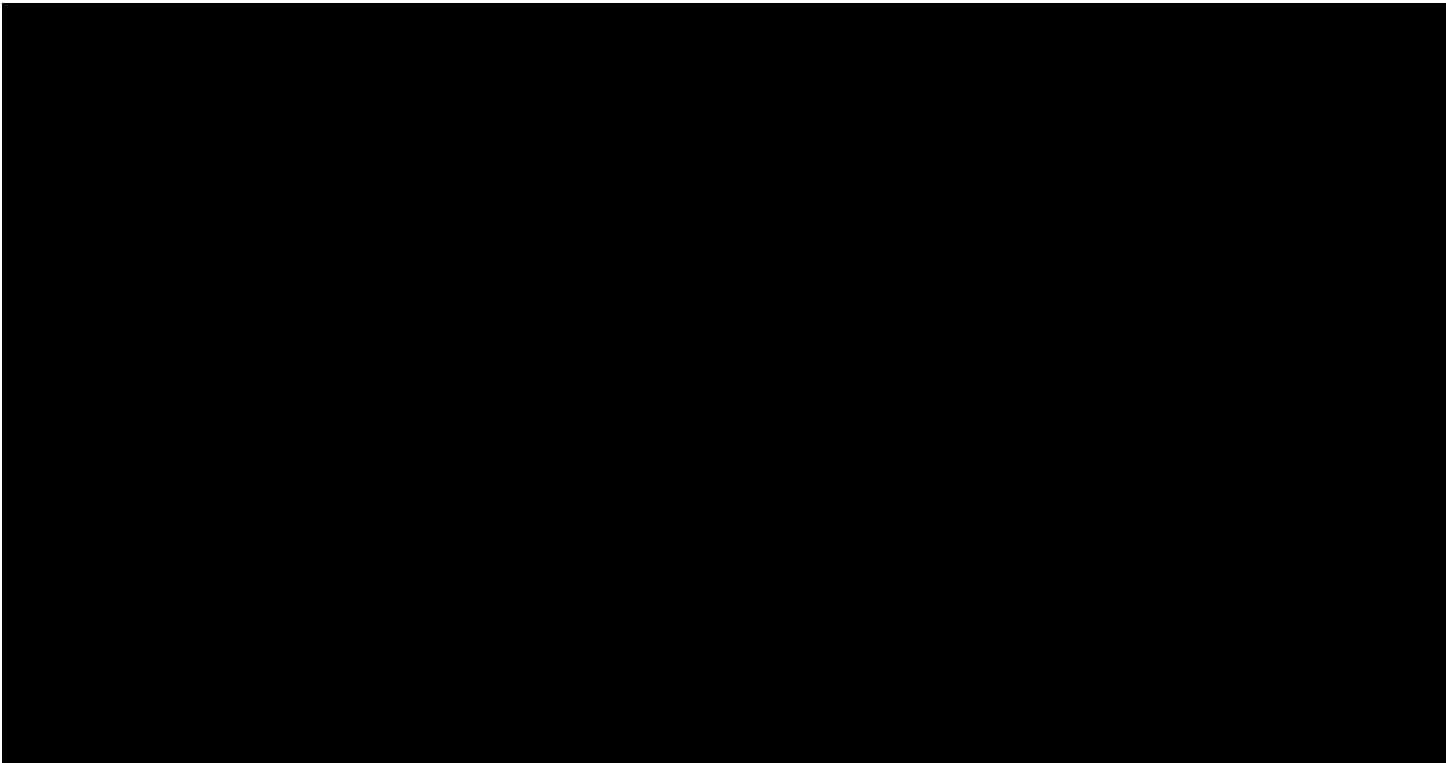
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DIVISION'S  
EXHIBIT  
**151**  
File No. 3-16554





# TESTIMONY EXHIBITS



THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:            )  
  )  
GRAY FINANCIAL                )     File No. A-03486-A  
GROUP, INC.                    )

WITNESS:    Laurence Gray  
PAGES:       325 through 503  
PLACE:       Securities Exchange Commission  
              950 East Paces Ferry Road, Suite 900  
              Atlanta, GA 30326  
DATE:        Thursday, June 24, 2014

The above-entitled matter came on for hearing,  
pursuant to notice, at 10:00 a.m.

Diversified Reporting Services, Inc.

(202) 467-9200

1 APPEARANCES:  
 2  
 3 On behalf of the Securities and Exchange Commission:  
 4 PETER DISKIN, ESQUIRE  
 5 MICHAEL ADLER, ESQUIRE  
 6 PAUL KIM, ESQUIRE  
 7 Securities and Exchange Commission  
 8 Division of Enforcement  
 9 950 East Paces Ferry Road  
 10 Suite 900  
 11 Atlanta, Georgia 30326  
 12  
 13 On behalf of the Gray Financial Group, Inc.:  
 14 TERRY R. WEISS, ESQUIRE  
 15 KATIE GOSTINGER, ESQUIRE  
 16 JASON R. EDGEcombe, ESQUIRE  
 17 GREENBERG TRaurig, LLP  
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 20 Suite 2500  
 21 Atlanta, Georgia 30305  
 22  
 23  
 24  
 25

1 PROCEEDINGS  
 2 Whereupon,  
 3 LAURENCE GRAY  
 4 was called as a witness and, having been first  
 5 duly sworn, was examined and testified as follows:  
 6 EXAMINATION  
 7 MR. DISKIN: Let's go on the record on  
 8 June 24th, 2014 at 10:25 AM. Mr. Gray, my name is  
 9 Peter Diskin, this is Michael Adler and Paul Kim,  
 10 we are officers of Commission for the purposes of  
 11 this proceeding today. We are today resuming the  
 12 examination of yourself, Laurence Gray, which had  
 13 been adjourned on October 2nd, 2013. Will counsel  
 14 please identify themselves?  
 15 MR. WEISS: Terry Weiss with Greenberg  
 16 Traurig.  
 17 MS. GOSTINGER: Katherine Gostinger with  
 18 Greenberg Traurig.  
 19 MR. EDGEcombe: Jason Edgecombe,  
 20 Greenberg Traurig.  
 21 MR. DISKIN: And that is the Atlanta  
 22 office of Greenberg, correct?  
 23 MS. GOSTINGER: Atlanta office, yes.  
 24 MR. DISKIN: The testimony today  
 25 pursuant to a Commission's subpoena which has been

1 CONTENTS  
 2  
 3 WITNESS: EXAMINATION  
 4 Laurence Gray 328  
 5  
 6 EXHIBITS: DESCRIPTION IDENTIFIED  
 7 Exhibit 87 Legal Invoice of Gray 343  
 8 Exhibit 88 Engagement Letter 347  
 9 Exhibit 89 Email 376  
 10 Exhibit 90 Email 399  
 11 Exhibit 91 Email 408  
 12 Exhibit 92 Email 410  
 13 Exhibit 93 Email 419  
 14 Exhibit 94 Email 423  
 15 Exhibit 95 Email 427  
 16 Exhibit 96 Email 432  
 17 Exhibit 97 Georgia Firefighters' Pension Fund 434  
 18 Exhibit 98 Title Agreement for Investment  
 19 Consulting Services 459  
 20 Exhibit 99 Contract Addendum, Additional  
 21 Consulting & Discretionary  
 22 Investment Management Services 465  
 23 Exhibit 100 Investment Management Agreement  
 24 October 23rd, 2012 468  
 25

1 previously marked as Exhibit 2. I will give that  
 2 to the witness.  
 3 DIRECT EXAMINATION  
 4 BY MR. DISKIN:  
 5 Q Mr. Gray, do you understand that you  
 6 will remain under oath for the purposes of this  
 7 testimony today?  
 8 A Yes.  
 9 MR. DISKIN: Let the record reflect that  
 10 a copy of the formal Order of investigation in  
 11 this matter as supplemented will be available for  
 12 examination during the course of this proceeding.  
 13 BY MR. DISKIN:  
 14 Q Mr. Gray, can you tell me about the  
 15 Grayco Alternative Partners II, LP? Are you  
 16 familiar with that limited partnership?  
 17 A I am, yes.  
 18 Q I was wondering if you can tell me about  
 19 how that fund was conceived, who was involved in  
 20 its conception, who was involved in its  
 21 development, what role did you or anyone else that  
 22 you are aware of play?  
 23 MR. WEISS: That is about five  
 24 questions. Maybe you can break it down a little  
 25 bit.

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1 MR. DISKIN: Let's move on.  
 2 -----  
 3 DIRECT EXAMINATION -----  
 4 BY MR. ADLER:  
 5 Q Was Seward & Kissel representing Gray  
 6 Financial at the time the investments were offered  
 7 to the Georgia Public Pension Funds?  
 8 A Yes.  
 9 Q The Grayco Alt II Funds. So is Seward &  
 10 Kissel identified in the offering documents of the  
 11 Grayco Alt II Funds?  
 12 A Yes.  
 13 Q When did -- well, did Seward & Kissel  
 14 represent the Grayco Alt II Funds during the  
 15 entire period that those funds were offered to  
 16 Georgia Public Pension Funds?  
 17 A Yes.  
 18 Q At any point did Seward & Kissel no  
 19 longer represent the Grayco Alt II Funds?  
 20 A I apologize. I am trying to think if I  
 21 went through it. We never formally severed the  
 22 relationship. No.  
 23 Q Okay. And do they continue to provide  
 24 -- financial -- I am sorry -- legal advice for the  
 25 Grayco Alt II Funds?

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1 A We have not had the need to call them  
 2 for the Fund after it was fully developed and they  
 3 delivered it to us.  
 4 MR. DISKIN: Let's go off the record at  
 5 11:25.  
 6 (Whereupon, a discussion was held off  
 7 the record.)  
 8 (Whereupon, proceedings were reconvened  
 9 with all counsel and the witness present.)  
 10 MR. DISKIN: Back on the record at  
 11 11:44.  
 12 BY MR. DISKIN:  
 13 Q Mr. Gray, can you tell us specifically  
 14 what is your understanding on the information  
 15 and/or opinion Seward & Kissel provided to Gray  
 16 Financial related to OCGA 472087? And I will  
 17 repeat that if you want.  
 18 A Please.  
 19 Q What is your understanding of the  
 20 specific information or opinion that Seward &  
 21 Kissel provided you and/or Gray Financial  
 22 regarding OCGA 472087?  
 23 A My specific opinion?  
 24 Q What is your understanding --  
 25 A Understanding. Okay.

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1 Q -- of the information or opinion Seward  
 2 & Kissel provided?  
 3 A Right.  
 4 MR. WEISS: Do you understand the  
 5 question?  
 6 THE WITNESS: Yes, I do.  
 7 BY MR. DISKIN:  
 8 Q Okay.  
 9 A And so, and at risk of being repetitive.  
 10 MR. WEISS: Just answer the question.  
 11 THE WITNESS: So Seward & Kissel, we  
 12 understand still to be, hands down, the best firm  
 13 in alternatives' legal work in this country. So  
 14 in going to them, because this is what they do, we  
 15 don't do this, we do investment work, in going to  
 16 them it was our understanding that they were  
 17 going, which we believe they did, delivered to us  
 18 absolutely top notch legal opinions, drafting, all  
 19 the work surrounding not only this Georgia Code  
 20 that you reference, but many other products that  
 21 we also brought to them as well for help and  
 22 development. That is my answer.  
 23 BY MR. DISKIN:  
 24 Q I am not sure that answered my question.  
 25 A Repeat it one more time.

Page 369

1 MR. WEISS: Yeah, you have got to listen  
 2 to the question.  
 3 BY MR. DISKIN:  
 4 Q And I will go slow and tell me if you  
 5 don't --  
 6 MR. WEISS: There are lots of pieces to  
 7 it.  
 8 BY MR. DISKIN:  
 9 Q What is understanding of the specific  
 10 information and/or opinion that Seward & Kissel  
 11 provided to you or to anyone at Gray Financial  
 12 regarding the Georgia Alternative Investment Law,  
 13 which is OCGA 472087?  
 14 A So my understanding is that they  
 15 thoroughly understood the law and that they  
 16 thoroughly researched and understand, based on the  
 17 long tenure of the relationship, what we were  
 18 attempting to accomplish and that they guided us  
 19 there in the most appropriate fashion to  
 20 accomplish us launching this particular Fund.  
 21 Q What did they tell you, specifically?  
 22 A Again, I am going back to having read  
 23 some emails, but the ultimate was them delivering  
 24 to us a draft that we could show to our clients  
 25 specifically here in Georgia, but that it would

Page 398

1 ask for an interpretation of this question.  
 2 BY MR. DISKIN:  
 3 Q Could you take a look at the first three  
 4 sentences of the second paragraph and read them?  
 5 A (Witness complies.) Yes.  
 6 Q Is the second sentence which starts, "we  
 7 originally targeted." Is that an accurate  
 8 statement, to your knowledge?  
 9 MR. WEISS: Yes or no.  
 10 THE WITNESS: To my knowledge, yes.  
 11 BY MR. DISKIN:  
 12 Q How about the third statement?  
 13 A That third sentence, to my knowledge,  
 14 yes.  
 15 Q Did the third -- the information in the  
 16 third sentence which is the changes in the Georgia  
 17 Law which is referenced, did that change the  
 18 direction of the Fund or the target amounts for  
 19 the Fund?  
 20 A Yes.  
 21 Q How so?  
 22 A If you recall earlier, I mentioned that  
 23 there were several questions that we had, one of  
 24 which was, was the 100,000,000 referring to the  
 25 organization, or was it referring to the sub

Page 399

1 managers, or it was referring to the actual Fund  
 2 itself. And so, what we were saying here, we were  
 3 willing to go from the 75 to a 100 if indeed that  
 4 was Seward & Kissel's interpretation. In other  
 5 words, more confidence.  
 6 Q Mr. Gray, when you originally conceived  
 7 of what the Fund that ultimately became the  
 8 Alternative Partners II Fund, did you intend to  
 9 put Georgia Public Pension clients -- or strike  
 10 that. Did you intend to offer that investment to  
 11 Georgia Public Pension clients?  
 12 A I would need help with the time line on  
 13 that.  
 14 Q And can you explain that?  
 15 A Sure. I mean, specifically Core I and  
 16 Core II allows these clients, these LPs to accept  
 17 very high quality managers. Ultimately, yes, we  
 18 would have loved to have shown this to Georgia  
 19 clients. I don't know however between the passage  
 20 of the law and our first conversations with Seward  
 21 & Kissel surrounding the development which came  
 22 first frankly.  
 23 MR. DISKIN: Can we go off the record at  
 24 12:35.  
 25 (Whereupon, a discussion was held off

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1 the record at this time.)  
 2 (Whereupon, proceedings were reconvened  
 3 with all counsel and the witness present.)  
 4 MR. DISKIN: Let's go back on the record  
 5 at 1:43.  
 6 (SEC Exhibit No. 90 was  
 7 marked for  
 8 identification.)  
 9 BY MR. DISKIN:  
 10 Q Mr. Gray, can you take a look at the  
 11 document that has been marked as Exhibit 90? For  
 12 the record, it's Bates labeled Gray SEC 17851  
 13 through 17 -- oh, excuse me. 17850 through 17851.  
 14 When you had a chance to review it, let me know.  
 15 A (Witness complies.)  
 16 Q Have you had time to review it?  
 17 A Yes.  
 18 Q Have you seen this document before, Mr.  
 19 Gray?  
 20 A The second page I do recall seeing.  
 21 Earlier as well. I don't recall the top part.  
 22 Q And when you say "the top part" --  
 23 A The first page.  
 24 Q The first page at the top appears to be  
 25 an email from Alexandra Segal to Bob Hubbard dated

Page 401

1 June 8th, 2012. And is that the section you don't  
 2 recall having seen prior to today?  
 3 A I don't recall having seen it.  
 4 MR. WEISS: Just take mine.  
 5 THE WITNESS: No.  
 6 MR. WEISS: There it is.  
 7 BY MR. DISKIN:  
 8 Q So you don't recall having seen that  
 9 before today?  
 10 A I don't.  
 11 Q Were you aware that Ms. Segal had  
 12 provided a response to Mr. Hubbard, specifically  
 13 his email on the second page which was also  
 14 Exhibit 89 to the interpretation questions that  
 15 Mr. Hubbard had posed to Ms. Segal?  
 16 A No, I don't recall her emailing back a  
 17 response to his earlier question. I don't recall  
 18 seeing that.  
 19 Q Do you recall if you were aware that she  
 20 had provided a response, either via email or any  
 21 other means?  
 22 A No.  
 23 Q Did Mr. Hubbard tell you that Ms. Segal  
 24 had provided a response to his interpretation  
 25 question?

Page 410

1 A No.

2 Q So you weren't aware of that?

3 A I would not -- no. No. And I would be

4 pretty offended she is asking us how we are going

5 to address it. That is not our job. It is her

6 job. I don't recall seeing that question.

7 Q Okay. So it's her job to what?

8 A To determine legally how we are going to

9 address whatever the question is around what Mr.

10 Hubbard had asked her earlier. That is what they

11 were hired for.

12 MR. DISKIN: Can you mark this as

13 Exhibit 92.

14 (SEC Exhibit No. 92 was

15 marked for

16 identification.)

17 BY MR. DISKIN:

18 Q Mr. Gray, Exhibit 92 is a two-page,

19 appears to be, string of emails Bates labeled Gray

20 SEC 18381 through 18382. Take your time to take a

21 look at the document and when you are ready let me

22 know if you have seen this document prior to

23 today.

24 A (Witness complies.) Okay.

25 Q Have you seen this document prior to

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1 today?

2 A The second page, yes, which is the

3 earlier one. I don't recall seeing this top

4 portion or the second portion on the first page.

5 Q Okay. So again, the second page is the

6 Mr. Hubbard email that I think was Exhibit 89?

7 A Correct.

8 Q So you recall seeing that, but any other

9 part of it you don't recall having seen?

10 A I do not recall.

11 Q So the top part appears to be an email,

12 again, it's a string of emails, but the first one

13 the first page of the exhibit appears to be an

14 email from Bob Hubbard dated June 18th, 2012 to

15 Alexandra Segal in response to earlier emails.

16 And, particularly, it's in response to Ms.

17 Segal's question on, which is posed in the middle

18 part of it of which the record of the document can

19 speak for itself. Mr. Hubbard's email says, "we

20 are still working locally to determine how best to

21 address this." And the questions have been

22 referencing the \$100,000,000.00 requirement. So I

23 am assuming that is what the "this" refers to. Do

24 you have any idea of anyone who was working

25 locally on behalf of Gray Financial to determine

Page 412

1 how to address "this," or "this" being a

2 \$100,000,000.00 requirement?

3 MR. WEISS: That is your assumption as

4 to what "this" means. Are you asking him to make

5 that assumption?

6 MR. DISKIN: If he can make that

7 assumption, if he is aware.

8 MR. WEISS: Are you aware of any?

9 THE WITNESS: No.

10 BY MR. DISKIN:

11 Q Did Mr. Hubbard inform you that he had

12 responded to -- or that he had back and forth

13 conversation via email with Ms. Segal about the

14 \$100,000,000.00 requirement issue?

15 A I don't remember back and forth

16 regarding the \$100,000,000.00 issue specifically.

17 Q Okay.

18 A He often told me that he was

19 communicating with her regarding the broad nature

20 of it.

21 Q Okay. Did he communicate -- if you look

22 at his email at the top there. It's a couple of

23 sentences. Did he communicate that information to

24 you?

25 A Again, I don't recall him mentioning

Page 413

1 this specifically to me.

2 Q So you've testified you hadn't seen the

3 email before. Now is it your testimony that even

4 the contents of Mr. Hubbard's response or email,

5 you don't recall having that been provided to you

6 either verbally or through another means?

7 A I don't recall this or still working on

8 it, whatever "it is," being communicated to me.

9 Q In any form?

10 A Not that I can recall.

11 Q I just want to make clear, if he didn't

12 forward the email, he could have told you, he

13 could have written a personal note to describe it.

14 I am just trying to rule that out.

15 A I simply don't recall.

16 Q Mr. Hubbard indicates that, in this

17 email that, or tells Ms. Segal that, we, again

18 assuming it's Gray Financial or someone on behalf

19 of the Alternative Partners II Fund, are seeking a

20 local opinion in relation to the \$100,000,000.00

21 threshold. And again, the document speaks for

22 itself. Were you aware of a local opinion being

23 sought on behalf of the Alternative Partners II?

24 A A local opinion on behalf of Alternative

25 Partners II. No.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of: )  
 ) File No. A-03486-A  
GRAY FINANCIAL GROUP, INC. )

WITNESS: Robert C. Hubbard, IV

PAGES: 190 through 316

PLACE: Securities and Exchange Commission  
950 East Paces Ferry Road, Suite 900  
Atlanta, Georgia 30326

DATE: Thursday, June 26, 2014

The above-entitled matter came on for hearing,  
pursuant to notice, at 10:15 a.m.

Diversified Reporting Services, Inc.

(202) 467-9200

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1 APPEARANCES:  
 2  
 3 On behalf of the Securities and Exchange Commission:  
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 5 PETER J. DISKIN, ESQ.  
 6 PAUL KIM, ESQ.  
 7 Securities and Exchange Commission  
 8 Division of Enforcement  
 9 950 East Paces Ferry Road, Northeast  
 10 Suite 900  
 11 Atlanta, Georgia 30326-1382  
 12  
 13 On behalf of the Witness: (cont.):  
 14 TERRY R. WEISS, ESQ.  
 15 KATIE GOSTINGER, ESQ.  
 16 JASON R. EDGECOMBE, ESQ.  
 17 Greenberg Traurig, LLP  
 18 Terminus 200  
 19 3333 Piedmont Road, NE  
 20 Suite 2500  
 21 Atlanta, Georgia 30305  
 22  
 23  
 24  
 25

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1 PROCEEDINGS  
 2 MR. ADLER: It's 10:15 on June 26,  
 3 2014. I'm Michael Adler, and this is Peter  
 4 Diskin. Paul Kim will be joining us momentarily.  
 5 We are officers of the Commission for the  
 6 purposes of this proceeding. We are today  
 7 resuming the examination of Robert C. Hubbard,  
 8 IV, which was adjourned on November 13, 2013.  
 9 Would counsel please identify  
 10 themselves for the record?  
 11 MR. WEISS: Terry Weiss with Greenberg  
 12 Traurig, representing Bob Hubbard.  
 13 MS. GOSTINGER: Kathryn Gostinger,  
 14 Greenberg Traurig.  
 15 MR. EDGECOMBE: Jason Edgcombe from  
 16 Greenberg Traurig.  
 17 MR. ADLER: And are you all with the  
 18 Atlanta office?  
 19 MR. WEISS: We are.  
 20 MS. GOSTINGER: Yes, we are.  
 21 MR. EDGECOMBE: Yes.  
 22 MR. ADLER: Thank you. Testimony  
 23 today is pursuant to a Commission subpoena,  
 24 which has previously been marked as Gray  
 25 Financial Exhibit Number 41.

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1 CONTENTS  
 2  
 3 WITNESS: EXAMINATION  
 4 Robert C. Hubbard, IV 194  
 5  
 6 EXHIBITS: DESCRIPTION IDENTIFIED  
 7 101 E-mails From Bob Hubbard to Kate 299  
 8 Tucker CC'd Michelle Wighard and  
 9 Michael Garrigan Dated March 5,  
 10 2012, Subject: GrayCo Onboarding  
 11 Open Items  
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1 Mr. Hubbard, do you understand that  
 2 you remain under oath?  
 3 THE WITNESS: Yes.  
 4 MR. ADLER: Let the record reflect  
 5 that a copy of the Formal Order of Investigation  
 6 in this matter as supplemented will be available  
 7 for examination during the course of this  
 8 proceeding.  
 9 Whereupon,  
 10 ROBERT C. HUBBARD, IV  
 11 was recalled as a witness and, having been  
 12 previously duly sworn, was examined and  
 13 testified as follows:  
 14 EXAMINATION  
 15 BY MR. ADLER:  
 16 Q Mr. Hubbard, I want to ask you some  
 17 questions about the GrayCo Alternative Partners  
 18 II, LP, and tell me how that fund was conceived.  
 19 A Would you state that one more time?  
 20 Q Sure. And tell me how GrayCo  
 21 Alternative Partners II, LP was conceived. It  
 22 was --  
 23 A Originally, in 2011, we had launched  
 24 GrayCo Alternative Partners Fund I. At the  
 25 time, our intent was to continue this in a

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1 MR. DISKIN: Let's take a break.  
 2 MR. WEISS: Thank you.  
 3 MR. ADLER: Let's go off the record.  
 4 It's 11:07.  
 5 MR. ADLER: Let's go back on the  
 6 record. It's 11:28.  
 7 We've had no substantive conversations  
 8 off the record; is that correct?  
 9 MR. WEISS: No.  
 10 BY MR. ADLER:(Resuming)  
 11 BY MR. ADLER: (Resuming)  
 12 Q Mr. Hubbard, I'm going to hand you  
 13 what has previously been marked as Gray  
 14 Financial Exhibit Number 90, and two copies for  
 15 counsel. This document is Bates-labeled  
 16 Gray/SEC/00017850 through 51. The first page is  
 17 -- this is -- this document is a series of  
 18 e-mails -- looks like two e-mails. The first  
 19 page indicates that it is sent by Alex --  
 20 Alexandra -- Alexandra Segal to Bob Hubbard, and  
 21 it's dated June 8, 2012. Do you recognize  
 22 Exhibit 90?  
 23 A Yes.  
 24 Q How do you recognize it?  
 25 A An e-mail in response to one that I

Page 224

1 sent her earlier that same day.  
 2 Q And if you could read her response and  
 3 let me know when you've had a chance to do that.  
 4 That would be the response at the top of page --  
 5 of the first page of this exhibit.  
 6 A Okay.  
 7 Q In the second paragraph of her  
 8 response, Ms. Segal provides you her  
 9 interpretation of the restriction in lines 109  
 10 through 112. Do you see that?  
 11 MR. WEISS: I think it actually says  
 12 her understanding.  
 13 BY MR. ADLER: (Resuming)  
 14 Q Her understanding.  
 15 A Yes.  
 16 Q Okay. Did you share her understanding  
 17 with Mr. Gray?  
 18 A I don't remember at that time if we  
 19 talked, you know, about this particular e-mail.  
 20 I would have likely shared with him at some  
 21 point.  
 22 Q Can you give me an approximate time  
 23 frame, meaning to explain what some point would  
 24 cover?  
 25 A I don't know that I can. We would

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1 have had several discussions along the way. So  
 2 you know, at what time we would have talked  
 3 about this particular communication, I don't  
 4 know I could tell you when that would have been.  
 5 Q Within the month of June 2012?  
 6 A Probably.  
 7 Q Do you know? Is that --  
 8 A I don't know specifically if it was  
 9 June.  
 10 Q All right. Just testify as to what  
 11 you know.  
 12 A Okay.  
 13 Q Can you narrow it down to several  
 14 months, June through September?  
 15 A I don't recall. I don't recall  
 16 specifically when we would have talked about  
 17 this. Within the range of June to September --  
 18 let's say between June and October we could have  
 19 had this discussion.  
 20 Q 2012. And you could have had this  
 21 discussion, but you don't recall having that  
 22 discussion specifically; is that correct?  
 23 A That's correct.  
 24 Q Did you communicate Ms. Segal's  
 25 understanding of that section with anyone else

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1 at Gray Financial?  
 2 A Not that I recall.  
 3 Q Did you discuss Ms. Segal's  
 4 understanding of the restriction lines 109  
 5 through 112 with anyone else outside of Gray  
 6 Financial?  
 7 A I did not.  
 8 Q Do you know if anyone else did?  
 9 A Anyone else?  
 10 Q Anyone else. For example, Mr. Gray,  
 11 anyone else at Gray Financial shared Ms. Segal's  
 12 understanding of the restriction in lines 109  
 13 through 112 with anyone else?  
 14 A (No response).  
 15 Q Do you know?  
 16 A Do I know if anybody else at Gray &  
 17 Company shared this?  
 18 Q Correct.  
 19 A I don't know. No, not -- no.  
 20 Q Okay. Also in that e-mail, in Exhibit  
 21 90, Ms. Segal indicates that she will run it by  
 22 Rob and see what his thoughts are. Do you see  
 23 that?  
 24 A Yes.  
 25 Q Okay. Who is Rob?



DEPOSITION  
EXHIBIT

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

-----  
GRAY FINANCIAL GROUP, INC., LAURENCE  
O'GRAY, and ROBERT C. HUBBARD IV,

Plaintiffs,

-against-

SEWARD & KISSEL, LLP,

Defendants.

Civil Action  
No. 1-16-CV-  
1956-LMM

-----  
January 30, 2017

Videotaped Deposition of ALEXANDRA SEGAL

Reported by:  
Joseph Danyo V

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January 30, 2017  
10:04 a.m.

Videotaped Deposition of ALEXANDRA SEGAL,  
taken by Plaintiffs, held at the offices of  
Seward & Kissel LLP, One Battery Park Plaza,  
New York, New York, before Joseph Danyo V, a  
Shorthand Reporter and Notary Public within  
and for the State of New York.



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16             TIMOTHY J. FITZMAURICE, ESQ.

17     Also Present:

18           ROBERT C. HUBBARD

19           MARK J. HYLAND

20           MICHAEL W. BROZ

21           JIM SEPULVEDA, Videographer

22                   ~oOo~



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1 THE VIDEOGRAPHER: This is disk number 1  
2 to the videotaped deposition of Alexandra  
3 Segal taken in the matter of Gray Financial  
4 Group, Inc. et al. versus Seward & Kissel  
5 LLP.

6 This deposition is being held at One  
7 Battery Park Plaza, New York City, on  
8 January 30th, 2017, and the time is 10:04.

9 My name is Jim Sepulveda and I'm the  
10 videographer. The court reporter is Joseph  
11 Danyo.

12 Counsel, please introduce yourselves,  
13 and then the court reporter will swear in the  
14 witness and we can proceed.

15 MR. ROBBINS: My name is Richard  
16 Robbins, counsel for the plaintiffs in the  
17 action in the United States District Court  
18 for the Northern District of Georgia.

19 MR. RUSSO: My name is Vincent Russo on  
20 behalf of the plaintiffs.

21 MR. LANEY: I'm Dan Laney with Rogers &  
22 Hardin. We represent the defendant Seward &  
23 Kissel.

24 MR. HYLAND: Hi. I'm Mark Hyland, a  
25 member of Seward & Kissel, and I'm here as a

1 later.

2 Q. Years later you found out for the first  
3 time that Gray & Co. had used another law firm  
4 subsequent to Seward & Kissel?

5 A. For fund -- and proceeded to launch Fund  
6 II, yes.

7 Q. Now, did you follow up with Mr. Hubbard  
8 in connection with your preparing the offering  
9 materials, what opinion, if any, he had obtained  
10 locally with respect to the 100 million threshold  
11 issue?

12 A. I did not because we had been terminated  
13 prior to the fund reaching that point.

14 Q. Before you sent offering materials and  
15 we'll get to that, but I think it was in July, does  
16 that sound right to you?

17 A. Sounds right.

18 Q. Now, before you prepared those offering  
19 materials, you hadn't been terminated by Gray & Co.,  
20 had you?

21 A. No.

22 Q. Now, did you talk with Mr. Hubbard or  
23 anyone else at Gray & Co. about what opinion, if  
24 any, they had obtained locally on the \$100 million  
25 threshold issue?

1 were actually investing yet.

2 Q. Yes, but you were at a stage where Mr.  
3 Hubbard told you he was going to be talking with  
4 prospective investors the very next day, right?

5 A. That's right.

6 Q. You were at a stage where you knew he  
7 was actually going to talk with investors about Fund  
8 II, right?

9 A. That's right.

10 Q. And you understand that the securities  
11 laws can be triggered at the time an investment  
12 advisor starts talking with prospective investors or  
13 starts providing offering materials, even in draft  
14 form, to prospective investors, correct?

15 A. Well, it depends on the particular rule.  
16 Not this rule, but yes, in theory, yes.

17 Q. Not what rule?

18 A. The Georgia statute.

19 Q. Why do you say that?

20 A. Because it was focused on facts, many of  
21 which would only be known at the time investors  
22 invested and the fund was closer to being launched.

23 Q. Generally speaking, you understand that  
24 securities laws may be triggered, whether it be  
25 federal or state, at the time an investment advisor

1           A.    I can't remember any specific  
2   discussions.  To my knowledge, it was still  
3   something that needed to be resolved, which is why  
4   it was one of the items, among others, still in  
5   brackets.

6           Q.    In any event, did you ever e-mail, call  
7   Mr. Hubbard, follow up?  You said you were going to  
8   obtain an opinion locally.  What opinion did you  
9   obtain locally, so I can work it into my drafting of  
10  the offering materials?  Did you do that?

11          A.    I can't remember.  It's possible I did.  
12  He told me that it was still unresolved, which is  
13  why, again, when I sent initial drafts, that issue  
14  was not resolved yet.  It was in brackets.

15          Q.    It's possible.  Do you have any specific  
16  recollection today before you sent him the offering  
17  materials whether you had asked him about or he  
18  conveyed to you any opinions he had obtained on the  
19  \$100 million issue?

20          A.    I can't recall either way, sitting here  
21  today.

22          Q.    Now, you said you learned later that you  
23  had been terminated.  Do you recall it being years  
24  later?

25          A.    When I learned it?



1 initial investor in the initial closing, yes, then I  
2 believe it would need to be higher.

3 Q. Assuming that Gray & Company was looking  
4 for Georgia pension plans to invest in this fund, if  
5 Gray & Company or the manager of this fund were to  
6 operate under this initial closing language, it  
7 would be non-compliant with the state law, correct?

8 A. You mean if it held its initial closing  
9 at 10 million --

10 Q. Yes.

11 A. -- and the Georgia plan invested in the  
12 initial closing?

13 Q. Yes.

14 A. Then, yes, that would be an issue under  
15 that requirement.

16 Q. Did you ever point out to Mr. Hubbard  
17 that this initial closing language that you have  
18 here would not be compliant with the state law if he  
19 was looking for Georgia pension plans to be the  
20 initial investors?

21 A. No, because we never discussed the  
22 particular facts under which the Georgia plan may  
23 invest, such as timing.

24 Q. Did you identify that as a potential  
25 issue when you sent these offering documents to him?

1 A. In this initial draft? No.

2 Q. Did you ever ask him who were the  
3 initial investors which Gray & Company intended to  
4 get in Fund II?

5 A. At that point I don't think that would  
6 have been -- I think it was too premature to know  
7 that.

8 Q. My question is did you ask him?

9 A. Did I ask him?

10 Q. Yes.

11 A. No.

12 Q. And if you had asked him and he had  
13 indicated it would be Georgia pension plans,  
14 presumably you would have revised the plan or  
15 advised him that it would be an issue with respect  
16 to the initial closing records, correct?

17 MR. LANEY: Objection. Hypothetical.

18 A. Had we continued to represent the fund  
19 and draft the offering documents and received  
20 further information regarding who was going to be  
21 investing, then yes, I believe we would have  
22 reviewed and revised the documents in light of the  
23 Georgia statute.

24 Q. And you didn't believe it was  
25 appropriate to ask those kind of questions when he



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## Dual role creates controversy for Atlanta pension adviser

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Posted: 12:00 a.m. Saturday, July 27, 2013

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BY RUSSELL GRANTHAM AND DAN KLEPAL - THE ATLANTA JOURNAL-CONSTITUTION

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**Atlanta** – The financial adviser to Atlanta's three pension systems recommended last year that they invest \$64 million in a fund his own firm had just created, raising concerns about a conflict of interest. The recommendation, approved by the city's firefighter, police and general employees pension boards, means \$640,000 every year for the Atlanta firm, Gray & Co., to manage the fund. That's on top of the approximately \$400,000 a year the pensions already pay the firm to help pick the best investments.

And if the fund performs well, Larry Gray's company stands to make a fat slice of the profits – potentially millions of dollars more.

» **DOCUMENTS:** [Disclosure agreement](#) | [Conflict of interest agreement](#)

Critics say the arrangement is a conflict of interest because the city pension system's financial adviser is profiting from his advice to the city. That conflict is compounded, experts say, because Gray & Co. also has an ownership stake in the fund. Some pension board members have complained they weren't adequately told about the firm's financial interests.

An Atlanta Journal-Constitution review of the arrangement also raises questions about whether it violated a state law enacted barely a year ago to allow public pensions to put money into so-called alternative investments, such as Gray's fund. These private funds buy long-term investments, such as distressed or start-up businesses. They are riskier but potentially more lucrative investments than stocks and bonds.

Gray and Atlanta officials say the transactions were legal. They also say it is common in the industry for investment firms to wear two hats, acting as both advisers and money managers.

"Absolutely ... it is not a conflict," Gray, 52, said during an interview Thursday at his Buckhead office.

Jim Beard, Atlanta's chief financial officer and a member of all three pension boards, said Gray's ownership stake does not impair its ability to impartially advise the pension plans. The \$2.5 billion city pension system provides retirement benefits for almost 12,000 employees and retirees and their families.

"As a matter of fact, it's a definite alignment of interests," Beard said. "He has skin in the game."

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 002  
 File No. 3-16554**

But Gray & Co. itself disclosed in an April filing with the federal Securities and Exchange Commission that the double roles created a "material" conflict of interest.

Ronald Hagan, chief executive of Roland/Criss, a Texas firm with expertise in pension trustees' legal and financial duties, said Gray & Co.'s role amounted to a "staggering" conflict.

"The economic interest the adviser has compromises pretty severely its ability to provide uncompromising investment advice," Hagan said. "At what point would individuals with economic interest at stake be comfortable recommending that the client dump the investment?"

James Meynard, executive director of the Georgia Firefighters Pension, questioned the wisdom of arrangements that allow for conflicting roles. That state pension fund, separate from Atlanta's, was the first that Georgia lawmakers allowed to invest in alternative funds, starting two years ago.

Meynard said he specifically barred his board's consultant from pitching its own alternative funds to the plan.

"How could you avoid the conflict of interest questions? There's too much money involved," he said. "I don't want to pay you to make decisions you make money on."

**'No one to watch the hen house'**

Gray & Co. created the investment fund in October.

In November, Larry Gray brought the investment recommendation to Atlanta's General Employee pension board, personally making the pitch, according to minutes from the meeting.

"Mr. Gray stated that time was of the essence in making a decision" because one of the underlying investments in the fund, which he referred to as Core Alts II, "was in fact closed to new investors," the minutes say. "The commitment needed to be made now in order to get in, but capital calls for the actual money ... would come later."

There is no indication in the minutes that Gray disclosed his firm's stake in the fund or that he referred to it by its actual name, GrayCo Alternative Partners II.

The board voted at that same meeting to approve his recommendation. The investment partnership agreement was signed that same day by Beard, Atlanta's CFO, and Alfred Berry, Jr., the board's chairman.

Shortly afterward, some board members said they didn't understand Gray's financial interest when they voted.

At the board's next meeting, in December, Berry and two other board members asked for a vote to consider reversing the decision. They were voted down.

Gregory Nash, a General Employees board member who voted against the investment, said there would have been a much longer discussion had it been clear that Gray & Co. created the fund in which it was advising the city to invest.

"I don't like the consultant being the manager – there's no one to watch the hen house," Nash said. "You can't manage our money and your money at the same time."

Angela Green, also a General Employees board member, filed a complaint with the SEC alleging that Gray & Co. violated federal disclosure regulations. The SEC declined to comment on the complaint.

"To me, I've just never known anybody to do that," Green said of Gray's dual role.

There is no reference in any of the minutes from the city's other two pension boards' public meetings in 2012 that show disclosure of Gray & Co.'s financial interest. Nor do the minutes reflect any substantive discussion of the merits of that fund or consideration of other funds.

Gray said the minutes of the General Employees meeting are inaccurate. He said he mentioned Gray & Co.'s financial interest "several times" in the meeting.

The AJC reviewed the portion of the official audiotape of the General Employees meeting where the alternative investment was discussed. During that time, Gray never mentioned the full name of his fund, GrayCo Alternative Partners II, or his firm's financial stake in it. In fact, when a board member asked how much the investment would cost the pensions, Gray referred to his own company as "they."

"They get 10 percent of any return over and above ... a target of 8 percent," he said. Earlier, asked about the expected return on the investment, Gray said it could top 20 percent.

In last week's interview, Gray said that members of the three pension boards had opportunities to learn about the firm's fund at other presentations.

"We work very hard to stay on the straight and narrow," said Gray, whose firm has advised some of Atlanta's pensions since 1996.

Given the long-term nature of alternative investments – Atlanta's pensions are locked into the private fund partnerships for 10 years – Gray also said he took the process of picking investments very seriously. Asked why he didn't recommend any other firms with more experience operating similar funds, he said he felt the investments "we were presenting were absolutely the best."

Kelen Evans, chairman of the Atlanta firefighters pension board and a captain with the fire department, said he doesn't consider the adviser profiting from city pension investment a conflict of interest. Some of his board members raised concerns, but those were soothed after they had an informal conversation, Evans said.

"We did have a meeting to make sure everybody was on the same page," he said. "It wasn't a public meeting – just a discussion among a few members. The way we see it, someone is going to get that fee. We've had a long-standing relationship with Larry Gray and we trust him. He has never steered us wrong."

In the end, Beard, Atlanta's CFO, said the fund Gray created was selected because the consultant was in the "unique position" of understanding the pension plans' needs and the various players in the world of alternative investments.

State law requires consultants to provide investors they advise with written notification of any conflict of interest. In response to an AJC request for any such disclosure, the city provided Gray & Co.'s contract for the new fund.

The 52-page document details the compensation arrangement, gives Gray the authority to purchase property and other services from its affiliates, and acknowledges the deal "may give rise to conflicts of interest" between Gray and the city pensions.

It is unclear if all board members saw the contract before voting.

#### **Law 'vague'**

Until last summer, Georgia had allowed only Georgia Firefighters Pension, in a pilot program, to use alternative investments. Many were wary that such investments were too costly, risky and secretive, and opened the door to unwise or politically-connected investments. Should the investments fail, shortfalls could come out of taxpayers' pockets or erode the pensions of tens of thousands of public employees.

To guard against some of the risks, the law put limits on how much public pensions can invest. Lawmakers also specified that money could only go to funds that have at least four investors that are not related to the manager; required that funds have a total investment of at least \$100 million; and barred public pensions from holding more than 20 percent of the total investment.

Those requirements are "one of the biggest protections," said Kelly Moody, assistant director for the state's second-largest public pension plan, the \$14.3 billion Employee Retirement System, which helped shape the law.

"This makes it virtually impossible for an investment to be made due to political pressure," she said, "as it would be impossible to find four or more investors for an investment that they would not otherwise make on the merits of the investment itself."

ERS, the Georgia Firefighters Pension and others all have the same understanding of the requirements.

By their interpretation, at the time the city pensions joined Gray & Co.'s fund it would have needed at least \$100 million and at least five to eight investors – depending on whether the Atlanta pensions are counted as one or three investors – and the pensions' stakes couldn't exceed 20 percent of the total.

Gray told general employees board members in November that five other pensions already had signed up for the fund, including a local hospital, two states and a city in Illinois.

"They've already approved, already signed the document. It's already executed," Gray said to the board, according to the audio recording.

That's not what documents that Gray & Co. filed with the SEC in April show.

On the documents, the fund is listed as having \$77.9 million in assets, including Atlanta's commitment – not \$100 million. Asked in the documents for the approximate number of investors, the firm reported four including itself, which some experts say is under the requirement. At the time, Atlanta's three pension plans accounted for a third of the investments, according to financial reports provided by the city. Some experts say that is too high.

Last week, Gray & Co. officials said the fund had enough investors to meet the law's requirements, but offered differing counts.

Initially, officials said when the city plans signed up, the fund had two other investors, a total of five.

But they had also earlier said the company's April SEC filing reporting four investors accurately reflected the size of the fund at the end of 2012 – after the Atlanta plans had joined.

Friday, Gray said he had contracts with the five investors mentioned in the General Employees meeting – besides the three city plans that were joining – but they weren't included in the SEC filings because some details were still being negotiated.

Company officials also said language in the state law is vague, but they believe they met the law's requirements.

"Our interpretation is that you can't count that number (to meet the state law's requirements) until the fund is closed" to new investors, he said. He expects the fund to have \$150 million and several more investors by the time it stops accepting new investors.

He said he also believes the state law's requirements are met by Gray & Co.'s overall size – \$850 million under management, with dozens of clients, and more \$100 million in two different alternative investment funds, with a third planned.

The city's law department also maintains the investment is legal.

Yvonne Yancy, the city's human resources commissioner who sits on all three boards, said the bottom line is that the boards' deal with Gray is a smart investment.

"Our objective is to grow our assets," Yancy said. "If our financial adviser ... or any other entity offers a vehicle that does that for us, I think we should consider it. The question comes down to the performance of the product and the performance of the manager. That's our focus. Period."

#### **About alternative investments:**

Georgia pensions used to be restricted to traditional investments, such as stocks and bonds. But last year, the Legislature loosened the rules to allow for what's known as alternative investments, such as buying stakes in private companies and employing complex trade strategies such as simultaneously buying and selling assets to profit from price differences.

The city of Atlanta's three pension boards' have agreed to invest \$64 million in an alternative investment fund created by their adviser. That money is going toward what's known as a "fund of funds," a collection of elite, private investment pools. This approach spreads investments across several underlying funds to try to reduce risk.

Here are some basics about such investments:

**How do the various funds work?** Some "private equity" funds specialize in start-up ventures. Others target mature companies for takeovers or buy distressed and bankrupt firms. Others buy real estate. Hedge fund managers may borrow to supplement investors' capital and use complex trade strategies, such as betting that a stock will fall in price, known as short-selling.

**Why invest in them?** The potential for high profits. Such funds may do well through the ups and downs of financial markets. Last year, the best funds averaged returns topping 20 percent, Bloomberg reported.

**What are their risks?** Fees and expenses are high. With a "fund of funds," the investor pays the fees and expenses of both the fund of funds manager as well as the managers of the underlying funds. There are no rules on pricing such private funds, so the actual value of the fund may not be known until assets are sold. That may not happen for years, and there are often restrictions on when investors can cash out. Hundreds of private funds closed last year due to poor returns.

**Who regulates them?** They aren't subject to some of the investor-protection regulations that apply to mutual funds. New rules require large private funds to provide the Securities and Exchange Commission with information on exposures and risks. The public can't see that information; it is only available to the government to monitor risks to the financial system. Private funds with less than \$150 million aren't required to file the new reports.

Sources: SEC, Bloomberg, staff research

#### **Where Atlanta's pensions invested**

Atlanta's three pensions had invested \$20 million in their investment adviser's "fund of funds" by the end of February, which was in turn invested in these six underlying private funds:

Fund,City,Type of fund,Amount

Millennium USA L.P.,New York,Hedge fund (arbitrage),\$5.1 million

Third Point Partners,New York,Hedge fund,\$6.3 million

Clearlake Capital,Santa Monica, Calif.,Private equity (buy-outs),\$48,882

Edgewater Growth,Chicago,Private equity (start-ups),\$2.2 million

Siris Partners II LP,New York,Private equity (buy-outs),\$2.5 million

5 Stone Green Capital,Scotch Plains, N.J., "Green" real estate,\$3.0 million

Source: City of Atlanta, Bloomberg, staff research

#### **Gray & Co.'s alternative fund**

Atlanta-based Gray & Co., which has 37 employees, provides investment advice on \$9.6 billion worth of assets to pension funds and other clients. It also directly manages about \$742 million in investments for similar clients, according to regulatory

filings. Here's how it got into managing alternative investments, which promises to become one of its most lucrative businesses:

July 1, 2011: New pilot state law allows Georgia Firefighters Pension to become the state's first public pension to invest in alternative funds.

Oct. 21, 2011: Gray & Co. launches its first private investment fund, GrayCo Alternative Partners I.

July 1, 2012: New state law allows most of Georgia's large public pensions to invest in alternatives.

Sept. 11, 2012: Atlanta fire and police pensions agree to invest \$15 million and \$21 million, respectively, in Gray & Co.'s alternatives fund, to be called GrayCo Alternative Partners II. Gray & Co. is also the investment advisor for the city's three pensions.

Oct. 4, 2012: Gray & Co. creates GrayCo Alternative Partners II.

Late October, 2012: Gray & Co. buys hedge fund manager Tiburon Capital Management, whose CEO becomes head of Gray & Co.'s alternative investment unit.

Nov. 7, 2012: Atlanta's largest pension plan, its \$1.1 billion General Employees plan, agrees to invest \$28 million in GrayCo Alternative Partners II.

Dec. 5, 2012: Some board members at the General Employees pension question the adequacy of Gray & Co.'s disclosure of its financial interests in its alternatives fund. Move to reconsider decision is voted down. One member files complaint with the U.S. Securities and Exchange Commission.

April 1, 2013: Gray & Co. reports assets of \$26 million in its first alternative fund and \$77.9 million in its second fund.

July 18, 2013: Gray & Co. announces that founder Larry Gray is giving up CEO role but will remain president. To improve management and "support the continued growth of the firm," Gray & Co. names co-CEOs and promotes Tiburon's former CEO to be in charge of all investments.

Sources: SEC, Atlanta pension board meeting minutes and other documents, Delaware Division of Corporations, company statements, staff research

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**Lochness**

[Report](#)

This reminds me of when George W. Bush hired Dick Cheney to find a suitable Vice-President candidate...and after a nation-wide search Dick decided that the best candidate was Dick Cheney.

7:12 a.m. Jul. 28, 2013



**Dcwalden**

Report

This will not end well for the Atlanta pensioners. Just the fact that the fee is 10 percent should raise all kinds of red flags.

9:19 a.m. Jul. 28, 2013

**Ellethebug**

Report

Wait until the fingerprinting starts...

10:00 a.m. Jul. 28, 2013

**JG7**

Report

It's pretty obvious from this story that Gray & Company had to know about all the required Disclosure Rules and the ethical prohibitions against Conflicts of Interest. All the Securities licensing and enforcement agencies are laser-focused on these concepts. Anyone who is Securities licensed is routinely examined and must pass the testing requiring specific awareness of such basic guidelines as The Securities Acts of 1933 & 1934, as well as the current heavy focus on good ethical practice. This case smacks of the kind of disregard for proper and legal behavior that routinely besmirches the reputation of Atlanta and makes our citizens despair of fair & balanced government in the ATL.

10:54 a.m. Jul. 28, 2013

**whitestar1**

Report

An Investment Advisor, unlike a Stock Broker, comes within the ambit of the Federal 1940 Investment Advisor Act and is held to have a Fiduciary Duty to its clients. It is highly questionable whether such a Fiduciary Duty can be waived simply by including general language in a contract that apparently wasn't even seen by all the Pension Fund Trustees. This Investment Advisor should have sought a written Waiver from the Pension Fund Trustees after complete disclosure of the Conflict was made in writing to all the Trustees and the Trustees had the opportunity to get independent legal advice.

1:59 p.m. Jul. 28, 2013

**WE81**

Report

Great -- if disheartening -- story. Thanks for spending the time to bring it to us. This is self-dealing and system-gaming of the most blatant sort: "Hi, I'm your financial advisor. I suggest that you invest in this new fund me and my associates have created. That'll be 400k a year for the advice and another 640k a year for 'managing' the investment I just suggested." Of course they didn't put it that way -- that would be honest -- but it's exactly what it boils down to. I dunno if this is legal or not but it's scuzzy and unethical at a minimum. These money guys are the real moochers in our society.

2:16 p.m. Jul. 28, 2013

**WE81**

Report

Please follow this up. It's one thing for Mr. "straight and narrow" Gray to be disingenuous, but the real scandal is that the Atlanta CFO and human resources commissioner apparently think this is OK. If so neither one of

them belongs anywhere near a public dollar. I'd also like to know what connections got Mr. Gray this advisor contract to begin with.

2:22 p.m. Jul. 28, 2013



**Starik**

Report

Maybe the AJC will present an end of the year report summarizing the astonishing number of scandals, general mismanagement, criminal activity and general ineptitude that has occurred during the past year in Atlanta and Fulton County...just in time for the General Assembly.

If the folks currently in charge want to continue running these governments perhaps they need to get behind the Milton County movement and get rid of their unhappiest constituents. Then a combined South Fulton and City of Atlanta could be run their way.

3:17 p.m. Jul. 28, 2013



**FirstDoNoHarm**

Report

So is this illegal activity on the part of Larry Gray and Gray and Company, or just crafty, self-serving profiteering on his/the company's part? Have the city workers lost money with this, or is it the failure to disclose? SEC violation/State violation or not? If violation, then what? jail?

9:05 p.m. Jul. 28, 2013

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(Left: Amy Glennon, AJC Publisher)

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