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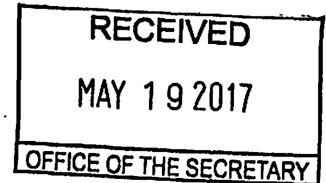

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent

OPENING BRIEF OF RESPONDENT CHRISTOPHER M. GIBSON

May 18, 2017

Thomas A. Ferrigno
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601 13th Street, N.W., Suite 600S
Washington, D.C. 20005

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INTRODUCTION

During the period relevant to this proceeding, Respondent Christopher M. Gibson ("Respondent") was a Member of the Geier International Strategies Fund, LLC ("the Fund"), a fund through which the assets of its Members were invested in commodities and securities. Respondent was also a member of Geier Capital, LLC, the Managing Member of the Fund. The Fund's Operating Agreement provided that Geier Capital shall have discretion to make investments on behalf of the Fund and, thus, to serve as the investment adviser to the Fund. The Operating Agreement further provided that the Managing Member and its associated persons were permitted, among other things, to invest in securities in which the Fund invested, to invest in securities in which the Fund did not invest, to compete with the Fund, and to purchase securities from, or sell securities to, the Fund.

Notwithstanding the provisions of the Operating Agreement, an Order Instituting Proceedings ("OIP") was entered alleging that (i) Respondent acted as an investment adviser with respect to the Fund; (ii) Respondent, as an investment adviser, owed fiduciary duties to the Fund; and (iii) Respondent engaged in front running and favored one investor in the Fund over the Fund and other investors in the Fund, without disclosing conflicts that arose from such conduct. The OIP also alleges that Respondent violated Section 206(4) of the Advisers Act and Rule 206(4)-8.[1] After a hearing, an Administrative Law Judge ("ALJ") issued an Initial Decision[2] ("Decision") which contained findings and conclusions that Respondent acted as an investment adviser and breached fiduciary duties by engaging in front running and favoring one member of the Fund over the Fund and violated Section 206(4) of the Advisers Act and Rule

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[1] *Christopher M. Gibson,* Exchange Act Release No. 77466, 2016 WL 1213259 (March 29, 2016).

[2] *Christopher M. Gibson* ,Initial Decision Release No. 1106 (Jan. 25, 2017).

206(4)-8. The Decision imposed an associational bar, and ordered Respondent to cease-and-desist from violating certain provisions of the securities laws, to pay disgorgement, and to pay monetary penalties. The Decision contains findings of fact that are not supported by the record, fails to make findings supported by the record, fails to follow controlling precedent and fails to properly apply applicable legal standards, including those articulated by the ALJ, to the facts contained in the record. As demonstrated below, the ALJ's errors were material and not harmless, and the Decision should be set aside.

RELEVANT FACTS

After graduating from college in 2006, Respondent was employed at Deutsche Bank Securities, Inc. for approximately three years. (Div. Ex. 190 16:5-16:9).[3] During 2009, Respondent participated in discussions regarding the currency markets with James Hull (Div. Ex. 190 16:22-17:7), who together with Respondent's father, managed Hull Storey Gibson Companies ("HSG") (Div. Ex. 190 17:12-17), an entity engaged in commercial real estate acquisition and management. (Div. Ex. 190 17:18-23; 887:25-888:16). In or about February 2009, Hull offered Respondent a position as a Finance Manager with HSG. (Resp. Ex. 33; Div. Ex. 190 21:4-14).

While employed by HSG, Respondent continued to discuss the financial crisis and investment strategies with Hull. (Tr. 557:5-8, 561:5 – 562:3). In particular, Respondent explained his view that increases in the money supply in response to the financial crisis would cause the value of the dollar to decline, and the value of certain commodities to increase. (Tr.

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[3] The Respondent's exhibits are cited as "Resp. Ex. __." The Division of Enforcement's exhibits are cited as "Div. Ex. __." The hearing transcript is cited as "Tr." and the pages and lines at which the cited testimony appears. Designated portions of Respondent's investigative testimony are cited by the exhibit number assigned to the transcripts containing the designations, Div. Exs 190 and 191 and Respondent's exhibits 175 and 176, and the pages and lines at which the testimony appears.

561:5-25). In response, Hull stated that they should allocate capital to take advantage of Respondent's investment thesis. (Div. Ex. 190 21:24-22:11).

During 2009, Hull and Respondent formed the Gibson Fund in order to invest funds in accordance with Respondent's investment thesis. (Div. Ex. 190 21:24-22:16). The Gibson Fund invested primarily in gold and silver. (Div. Ex. 190 23:19- 24:4). Subsequently, Hull and Respondent formed the Hull Fund, which pursued investment objectives similar to those of the Gibson Fund. (Div. Ex. 190 23:13-24:4). In order to invest in a commodities fund at preferred rates, Respondent and Hull formed Geier Group, LLC as a Georgia limited liability company and registered Geier Group as an investment adviser with the State of Georgia. (Tr. 19:1-25:14).

Respondent contributed a substantial part of his net worth to the Gibson and Hull Funds, while Hull contributed a modest percentage of his net worth to the funds. (Div. Ex. 190 24:14-23; Resp. Ex. 175 60:2-13). During 2009, the value of the Hull and Gibson Funds increased by approximately forty percent. (Tr. 566:19-567:6). In late 2009, Hull told Respondent that he wanted to increase the funds' risk profile in order to generate higher returns. (Tr. 566:19-567:11). Hull also expressed his dissatisfaction with the fact that his business associates were benefiting from their participation in the funds, but were not paying any fees. (566:19-567:6). In response, Respondent suggested that they consider the formation of an additional fund with a more formal structure. (Tr. 564:3-7, 565:3-9, 566:19-24, 615:6-18).

Also, Hull indicated to Respondent that a greater alignment of interest was imperative. Hull stated that as he would be contributing additional funds, and as he planned on soliciting investments from additional business associates, he expected Respondent to contribute additional funds and to encourage others to participate in their venture. (Div. Ex. 190 29:15-25). Ultimately, Respondent invested the proceeds of a loan from Hull, which was memorialized by a

demand note.[4] (Resp. Ex. 175 61:25- 62:7; Resp. Ex. 117). Hull further, indicated that Respondent should demonstrate his commitment to their undertaking by following the Fund's investment strategy when investing his other assets. (Tr. 587:10-14). Respondent and Hull also discussed the fact that such an approach would require a structure that permitted Respondent to pursue investment strategies that differed from the Fund's. (Tr. 587:10-591:7).

During December 2009, the Fund was formed as a Delaware limited liability company. (Resp. Ex. 1). The Operating Agreement provided that Geier Capital would have discretion to make investments on behalf of the Fund. (Resp. Ex. 13). The Operating Agreement further provided that "Nothing herein contained shall prevent the Managing Member (or any of its affiliates or employees) or any other Member from conducting any other business, including any business within the securities industry, whether or not such business is in competition with the Company." (Resp. Ex. 13). With respect to the possibility that the Managing Member or persons affiliated with it might acquire or dispose of the same securities as the Fund, the Operating Agreement provided that "It is recognized that in effecting transactions, it may not always be possible or consistent with the investment objectives of the various persons or entities described above and of the Company to take or liquidate the same investment positions at the same time or at the same prices." (Resp. Ex. 13).

The Operating Agreement set forth additional powers that the Managing Member could exercise, including the power "to enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements or other undertakings with persons, firms or

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[4] Hull encouraged Respondent to convince his Mother, Martha Gibson, to participate in the Fund (Resp. Ex. 175 28:10-17) and offered to loan funds to Respondent's father, John Gibson, so that he could invest in the Fund. (Resp. Ex. 28:25- 29:1).

corporations with which the Managing Member or any other Member is affiliated" and "to retain Geier Group, LLC, or such other entity as the Managing Member will determine from time to time in its sole discretion, to serve as the Company's investment manager (the 'Investment Manager')." (Resp. Ex. 13). The Fund's Offering Memorandum contained extensive disclosures regarding potential conflicts of interest which mirrored and amplified the provisions of the Operating Agreement. (Resp. Ex. 8).

Hull and Respondent met with potential investors and explained that the Fund would pursue a highly volatile strategy and take a high degree of risk. (Tr.39:25-40:9). Each potential investor was provided with the Offering Memorandum, the Operating Agreement, and a Subscription Agreement (collectively, the "Offering Documents"). (Tr. 36:24 – 37:11, 39:6-17, 46:15-23, 580:13 – 581:17). By executing the Operating Agreement, investors, including Hull's business associates and Respondent's mother and father as well as the father of Respondent's close personal friend, agreed to be bound by the terms of the Operating Agreement. (Tr. 581:6-582:12).

During 2010, the Fund invested primarily in commodities and achieved a favorable return. However, Hull was upset with the tax treatment accorded to gains on commodities and directed Respondent to liquidate the Fund's investments in commodities and acquire equities, the gains on which could be taxed at the rate for capital gains. (Tr. 85:9-86:18; 89:18-90:8; 622:5-624:19). Hull further directed that Respondent identify one public company which could serve as a proxy for an investment in gold, as he subscribed to the view that one company could be followed more easily than several. (Tr. 109:16-110:7; Resp. Ex. 59).

In response, Respondent researched a number of public companies (Tr. 624:20-627:3) and concluded that the stock price of companies referred to as "juniors" (i.e., companies that

focused on exploration and obtaining royalties) were most likely to track the price of gold. (Tr. 624:20-627:3; Tr. 112:9-15). Ultimately, Respondent determined that Tanzanian Royalty Exploration Corporation ("TRX") was attractive since it held royalties on a number of sites in Tanzania and James Sinclair, the Chief Executive Officer of TRX ("Sinclair"), had developed relationships with a number of Tanzanian officials. (Tr. 109:16-111:18). With Hull's concurrence, the Fund began investing in TRX and by December 2010 held approximately 8,000,000 TRX shares.[5] (Tr. 90:12-16).

During the period that the Fund acquired its TRX position, the share price was correlated with the price of gold.[6] (Tr. 640:15-25). However, during Spring 2011, the price of TRX securities began to decline while the price of gold continued to increase. (Tr. 112:21-25; 640:23-24). As they were unaware of any TRX-specific information that accounted for the deviation between the TRX share price and the price of gold, (Tr. 641:5-13), Respondent and Hull concluded that the deviation was the result of an "overhang rumor" – that a large owner of TRX stock (i.e., the Fund) could not hold its position and would be forced to sell - generated by short sellers. (Tr. 641:18 – 642:11, 644:13-17, 645:12-18).

TRX's share price, which had been over $7.00 at the beginning of June 2011, fell steadily during the summer. (Resp. Ex. 149 Expert Report of James A. Overdahl, PhD. August 5, 2016, Exhibit 1). During September 2011, the price of TRX shares continued to decline, and on September 21, 2011, the stock closed at $5.57. (Resp. Ex. 149 Ex. 9B p.3). Over the course of

[5] For 2010, the Fund paid Geier Capital an incentive allocation of more than $3,000,000 (Tr. 84:13-85:13) and management fees of over $200,000. (Div. Ex. 191 418:12-419:1). Although Respondent was entitled to fifty percent of such allocation and fees (Tr. 44:5-13; 584:15-585:6), he only withdrew an amount necessary to cover his tax liability. (Div. Ex. 191 364:4-365:7). During 2010, Respondent continued to be paid by HSG, however Geier Capital reimbursed HSG for the money it paid to Respondent.

[6] By April 2011, the Fund had increased its position in TRX securities to approximately 10,000,000 TRX shares. (Tr. 92:6-93:9; 108:21-109:7; Div. Ex. 69).

the next forty-eight hours, the price fell more than 26% and closed at $4.07. (Resp. Ex. 149 Ex. 9B p. 3). At the close of the market on September 23, 2011, the Fund sold 78,000 shares at $4.04. (Resp. Ex. 17).

Despite this decline, Respondent believed that TRX shares were more valuable than the market price suggested. (Tr. 647:17-21; 653:12-654:25). He knew that there was no news specific to TRX that accounted for the decline (Tr. 642:4-18) and he knew that during August 2011 a hedge fund, Platinum Partners, had purchased TRX shares in a private placement at $5.75 per share. (Tr. 643:9-19). Richard Sands, the investment banker at Casimir Capital LP who was involved in the private placement, told Respondent, on multiple occasions, that Platinum Partners would be "happy" to purchase the Fund's TRX securities at the private placement price. (Tr. 139:9-140:20; 660:23-662:6; Resp. Ex. 62).

With Hull's concurrence, Respondent, on September 23, 2011 sent an email to investors regarding, among other things, the decline in the price of TRX securities and the attendant impact on the Fund. (Resp. Ex. 56). Respondent advised investors that as a result of the weakness in the price of TRX securities, the value of the Fund had declined to only slightly above the amount originally contributed to the Fund. (Resp. Ex. 56). Nevertheless, he noted that in the past year, three investment funds other than the Fund had accumulated more than 7,000,000 shares of TRX at prices above the September 23, 2011 closing price, and continued to buy, "confirm[ing his] view of the tremendous value [in] the assets owned and the business operated by TRX." He also stated that the holders of 90% of the Fund[7] had confirmed their intention to remain invested in the Fund and TRX, and that he personally would remain so invested. (Resp. Ex. 56). In addition, Respondent stated that effective at the end of September

[7] The investors that held 90% of the Fund included Hull, Respondent, Respondent's mother and father and the father of Respondent's close personal friend.

2011 management fees would not be assessed until the Fund performed at an acceptable level. (Resp. Ex. 56).

Respondent and Hull spoke by telephone on September 24th and/or 25th and discussed the decline in the price of TRX securities and Hull advised Respondent that he had "no tolerance for additional losses." (Tr. 648:18-649:6). Respondent construed Hull's statement as a strategic directive to liquidate the Fund's TRX position. (Tr. 649:9-14). Ultimately, Hull and Respondent determined that they would sell TRX securities if the Fund could do so at "good prices." (Tr. 651:18-21).

On September 24th, Respondent exchanged emails with a representative of GarWood Securities LLC ("GarWood"), the Fund's brokerage firm. (Resp. Ex 61). Respondent stated that he would be hearing back on Thursday regarding a TRX trade in which the Fund might sell 1,000,000-5,000,000 shares and subsequently stated "The buyer owns 11% of TRX and is from Abu Dhabi." (Resp. Ex. 61). And on September 25, 2011, Respondent sent an email to Sands, inquiring whether a hedge fund or another buyer was interested in increasing its position in TRX securities at current prices. (Resp. Ex. 62). He indicated that the Fund believed in TRX and might retain its investment, but nevertheless would be interested in learning whether there was another buyer who believed that TRX was an attractive investment opportunity. (Resp. Ex. 62).

During the morning of September 26, 2011, Sands inquired regarding the number of TRX shares the Fund was prepared to sell, and Respondent indicated that the Fund was prepared to sell its entire position or something less. (Resp. Ex. 62). Throughout September 26th, Respondent continued to communicate with Sands regarding a potential transaction; at one point, Sands represented that he thought he had buyers for 3-5 million shares, but he did not indicate a price for the TRX shares. (Resp. Ex. 62). Sands then advised Respondent that the Fund's TRX

securities would have to be transferred from GarWood to Casimir in connection with a sale of the Fund's TRX shares. (Resp. Ex. 62).

As a determination had been made to terminate the payment of management fees by the Fund, Respondent placed an order to sell 2,000 shares of TRX from his personal brokerage account during the afternoon of September 26th in order to address his need for liquidity. (Resp. Ex. 23). He also placed orders to sell 18,900 shares from the personal brokerage account of his close personal friend; (Resp. Ex. 26) and 1000 shares from the account of Geier Group. (Resp. Ex. 29). The TRX shares were sold at an average price of $4.04, which was the price the Fund received when it sold 78,000 shares during the prior trading day. (Resp. Exs. 23, 26, and 29).

Respondent continued to communicate with Sands regarding the possibility of a transaction on September 27th. At one point, Sands stated that he had a trade set up, but again did not provide the number of shares or a price. While Respondent was waiting for information from Sands, TRX continued to trade down (Div. Ex. 84 Expert Report of Carmen A. Taveras, PhD. July 14, 2016 Ex. 3) and Respondent sent another email to Sands in which he stated "Please let me know when you can tell me the size and pricing that is available." (Resp. Ex. 63). At approximately 2:45 p.m. on September 27th, Sands advised Respondent that there was a buyer of up to 5,000,000 shares at $3.50 or better and asked Respondent to confirm the proposed transaction. (Resp. Ex. 62).

Respondent contacted Hull and indicated that the transaction that Sands proposed differed from what Sands had previously indicated he could arrange. (Tr. 674:20-676:11). Respondent and Hull also discussed the fact that Sands had apparently spoken to several firms regarding a sale of the Fund's shares and that the market was now aware of the Fund's interest in selling TRX shares. (Tr. 675:9-22). Hull and Respondent believed they had been "forced" to

sell, and determined that it was in the interest of the Fund to accept the terms proposed by Sands. (Tr. 676:12-16). Subsequently, Sands advised Respondent that he would be able to sell between three and five million TRX shares and Respondent confirmed the terms of the transaction. (Resp. Ex. 64). At approximately 3:00 p.m. on September 27, 2011, 3,734,395 of the Fund's TRX securities were sold by Casimir at an average price of $3.5018. (Resp. Ex. 20).

On or about September 29, 2011, Respondent was advised that the potential transaction with the sheik who owned 11% of the outstanding TRX shares (which Respondent had mentioned to the Fund's broker at GarWood on September 24th) would not be consummated that day. (Resp. Ex. 89). Respondent informed Hull "It is definitely not happening today ..." To which Hull responded:

> There may be others who would be interested as well? ...So the best move may be to try to play all of potential acquirers against each other and foster a bidding war for the shares. . . .also, I think all of us are well satisfied to hold the shares for the duration . . . . . (Resp. Ex. 89).

Subsequently, Respondent received documentation from Luis Sequeira, a representative with Roheryn Investments, S.A. who acted on behalf of the sheik regarding a sale the Fund's TRX shares through Roheryn, including a Share Sale Agreement which provided for the sale of 5,900,000 TRX shares at a price of $3.50 and a commission of $.04 per share payable to Roheryn (Resp. Ex. 92) and a Confirmation of Share Sale which, among other things, certified that the sale of the 5,900,000 shares would close the Fund's TRX position. (Resp. Ex. 93). Notwithstanding the execution of the documents, the transaction was not completed. Respondent advised Hull that the transaction that he had been discussing with Sequeira had not materialized as follows:

> "No deal, they want to consider longer. We're going to very likely be best served holding our position. They may come back in a few days, however, I would assume we are where we are for the next several months. . . .I will advise if I hear back in the next

few days, but I am planning on not being able to further diversify and holding out with our current positioning until European and American QE is announced in the next month or two before reviewing options again."

To which Hull responded: "No problem. 'Work" Luis on the 4 cents per share commission . . . .otherwise let's try to get a higher price for our bulk sale of our shares. . . . there may be others who are interested???" (Resp. Ex. 102). Respondent continued to discuss a possible sale of a significant amount of the Fund's remaining TRX securities through Sequeira on several occasions, but sold only 364,495 shares through him on October 17, 2011. (Resp. Exs. 104, 106, 107, 108 and 109).

In October 2011, Respondent became aware that Wells Fargo had notified Hull that it would increase the price of credit to HSG unless he improved his liquidity. (Tr. 688:15-689:12). Respondent became concerned that if Hull sold the nearly 700,000 TRX shares he held in a personal account in the market in order to increase his liquidity, TRX's share price could decline at a time when Respondent was exploring a negotiated sale of the Fund's shares. Respondent proposed that the Fund acquire Hull's shares, although he understood that by selling in the market Hull would increase his liquidity by approximately $2,500,000, while he would increase his liquidity by only $500,000 if he sold his shares to the Fund. (Tr. 689:4-24; 691:1-692:25).[8] In response, Hull executed a contract that provided for the sale of 680,636 TRX shares to the Fund at the October 18, 2011closing price of $3.60 per share. (Tr. 691:1-692:20; Resp. Ex. 113). As the share price of TRX rose after October 18, 2011, the transaction proposed by Respondent resulted in Hull's receiving less for his shares than if he sold his TRX shares over time in market transactions. (Resp. Ex. 149 Ex. 9B pp. 3-4). Further, by selling in the market, Hull would have

[8] The Managing Member of the Fund was specifically authorized to enter into the transaction by Section 302(h) of the Operating Agreement. (Tr. 694:13-695:8; Resp. Ex. 13).

avoided the risk attributable to combining his shares with the Fund's shares and receiving whatever price the Fund received when it sold its TRX shares. (Tr. 697:17-698:18).

Also, while Respondent was engaged in discussions with potential buyers, Respondent received a communication from Hull's assistant regarding the loan Hull had extended to him.[9] (Tr. 698:23-700:25). As the proceeds of the loan had been invested in the Fund and as the value of the Fund had declined, Respondent became concerned regarding his ability to repay Hull. (Tr. 698:23-700:25). Specifically, Respondent's interest in the Fund- the entirety of his assets-was worth only $720,000, just $75,000 more than his debt. (Tr. 698:23-699:7).

On October 27, 2011, the day after he received the communication regarding his loan, Respondent purchased $4.00 put contracts on TRX shares, as "insurance," in case the price of TRX declined below the point at which Respondent would remain solvent. (Tr. 701:1-6).[10] Respondent did not purchase such protective puts for the Fund because he determined that it was not a suitable investment for a high risk, high return fund where such insurance would only benefit a limited number of investors who were financially overexposed to the Fund.[11]

During the remainder of October and early November, Respondent continued his efforts to liquidate the Fund's shares, including discussions with Sands regarding the purchase of the Fund's TRX shares by Platinum Partners. On November 7th or 8th, Sands asked Respondent to attend a meeting with Platinum Partners on November 9th. (Tr. 209:2-20). Sands told Respondent that he had "great news," that they were "going to wrap this up," and that

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[9] The email from Hull's assistant included a spreadsheet which reflected the amount Respondent owed to Hull and a Demand Promissory Note to be executed by Respondent. (Resp. Ex. 117).

[10] Respondent ultimately purchased 565 TRX $4.00 put contracts in his personal brokerage account and purchased 1,604 TRX $4.00 put contracts in his close personal friend's account, which Respondent viewed as a proxy for her father who was a Member of the Fund. (Resp. Ex. 24; Resp. Ex. 27).

[11] Mr. Grovenstein and Mr. Cates, Fund investors who testified during the hearing, agreed with Respondent's judgment. (Tr. 857:20 - 858:5, 915:4, 943:22 - 944:15).

Respondent would be very pleased with Platinum's proposal. (Tr. 209:21 – 210:2, 708:10 – 709:17).[12] However, at the November 9, 2011 meeting, Platinum Partners presented Respondent with an offer to pay the Fund $10,000 per month if it would agree not to sell its TRX shares for 6 months. (Tr. 710:6-19). Respondent was "distress[ed]" by this offer, thinking that the only reason Platinum Partners would propose such a deal was because Platinum Partners planned to sell its own shares. (Tr. 710:6-712:8).

Following the disappointing November 9th meeting with Platinum, Respondent and Hull discussed strategy for the Fund. (Tr. 712:9-22). They believed that Platinum was "bluffing" because a decrease in TRX's share price would harm the Fund, but it would inflict greater harm on the other large holders of TRX stock, including Platinum. They further believed that if the Fund began selling TRX shares, and the price began to fall, other holders would step in and buy TRX shares in order to prevent a price drop. (Tr. 712:19-713:24). Therefore, Hull decided to call the bluff, so Respondent considered selling the Fund's TRX shares in a manner designed to cause Platinum or other holders to buy shares in the market in order to avoid a price decline. (Tr. 201:21-25; 212:10 – 214:14, 712:9 – 713:24).

During the morning of November 10th, Respondent emailed GarWood regarding his efforts to transfer the Fund's TRX shares from Casimir back to GarWood. And as both GarWood and Casimir cleared through Penson Financial Services ("Penson"), Respondent

[12] On November 8, 2011, Respondent's father met with Hull who indicated that the Fund might be selling its TRX shares, and that he might consider selling his TRX stock. John Gibson contacted Respondent and asked what action he should take to remain aligned with the Fund. Respondent suggested that his father liquidate the TRX position in his IRA by placing orders to purchase 350 $4.00 put contracts, sell his 46,000 shares of TRX stock, and sell the put contracts.(Tr. 214:13 – 215:9; Tr. 215:11 – 216:5, 719:5 – 721:20). On November 8, 2011, John Gibson placed the orders with his relationship manager at the entity at which he maintained a retirement account who in turn would transmit the orders for execution. John Gibson instructed the relationship manager that the protective put options were to be both purchased and sold on November 9th. (Tr. 242:5-14; Resp. Ex. 32).

instructed GarWood to "hassle Penson" regarding the transfer and further stated that "[w]e are going to potentially tank this stock." (Div. Ex. 105). Respondent did not issue these instructions because he intended the Fund's sale to "tank" TRX's share price;[13] rather, Respondent believed that, in the absence of such a communication, a broker-dealer like GarWood normally would execute the sale of a large block of shares slowly, and in increments, in order to prevent a decline in the stock price. (Tr. 232:8-233:4). This would not serve the "signaling" strategy being implemented by Respondent at Hull's direction, which was to sell aggressively, for the purpose of making the other large TRX shareholders believe a price drop would occur, and inducing them to purchase the Fund's TRX stock. (Tr. 232:8 – 233:4). However, other holders of TRX stock did not behave as Hull and Respondent believed they would, and they did not purchase the Fund's stock before the price fell. Instead, other large holders of TRX stock were not bluffing; rather, they sold their TRX stock.[14] (Resp. Ex. 175 86:4-97:11).

The sales of TRX shares by the Fund and other large holders contributed to the decline in TRX's share price, triggering losses for Respondent. While Respondent received proceeds of $80,000 from the sale of the protective puts that he had purchased[15] (Resp. Ex. 21; Resp. Ex.

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[13] By selling the Fund's TRX shares, Respondent was not attempting to profit in the form of an "insurance" payment on the protective put options he had purchased on October 27-28, 2011. (Tr. 230:8-233:8). If TRX's share price fell, Respondent would lose far more on his participation in the Fund and his beneficial interest in the Fund's TRX shares than he could possibly obtain from the "insurance" payment under the protective put options. (Tr. 717:19-718:21. Tr. 230:8 – 232:7; 713:16 – 718:21; Div. Ex. 55).

[14] Although the Fund sold 4,878,772 shares of TRX stock on November 10th, the total US volume traded was 17,111,602 shares and an additional 4,398,602 shares traded abroad. Div. Ex. 184, Expert Report of Carmen A. Taveras, Ph.D., July 14, 2016, p. 12 note 22. The Fund represented less than 29% of total US volume and less than 23 % of total volume. In describing the Fund's November 10th sale of TRX stock and the decline of TRX stock price, Dr. Taveras only uses the word "contributed" and not the word "caused" in describing the sales of TRX stock by the Fund.

[15] Respondent had also purchased 6,440 put options covering 644,400 shares of TRX stock at strike prices of $2.00 and $3.00 for the Fund. The $2.00 put option contracts added $16,965 to

22), the proceeds only served to mitigate his losses resulting from his beneficial ownership of TRX shares through the Fund. (Tr. 717:19-718:24). In fact, Respondent became insolvent as a result of the decline in the value of his TRX investment, and the amount he received from the protective put options merely offset a portion of the debt he owed Hull. (Tr. 233:9 – 234:2; 240:5 – 242:4; 718:22-24).

RESPONDENT DID NOT VIOLATE THE FEDERAL SECURITIES LAWS

The record in this matter establishes that Respondent did not act as an investment adviser to the Fund, conflicts of interest were disclosed to investors in the Fund, which they consented to by executing the Operating Agreement and becoming Members of the Fund, and Respondent did not engage in front running, favor a Member of the Fund over the Fund or other Members and did not violate Section 206(4) or Rule 206(4)-8.[16]

RESPONDENT DID NOT ACT AS AN INVESTMENT ADVISER TO THE FUND

Section 202(a)(11) of the Advisers Act, in relevant part, defines the term "investment adviser" as "any person who, for compensation, engages in the business of advising others. . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities."

The record in this matter establishes that Geier Capital and Geier Group, rather than Respondent, acted as investment advisers to the Fund. The Fund's Operating Agreement provided that Geier Capital shall be the Managing Member of the Fund and shall have the discretion of making investments on behalf of the Fund and of exercising the powers set forth in

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the Fund's losses and the $3.00 put option contracts mitigated the Fund's losses by $53,420. (Division Ex. 184, Exhibit 17a).

[16] To the extent that the ALJ found that Respondent owed fiduciary duties to and was required to disclose information regarding securities transactions to Fund investors, the ALJ erred as an investment adviser's duties are owed to its clients and investors in the a fund are not clients of an investment adviser. *Goldstein v. SEC,* 451 F.3d 873 (D.C. Cir. 2006).

Section 3.02. (Resp. Ex. 13). The Operating Agreement also provided that the Managing Member shall have the power to retain Geier Group or such other entity as the Managing Member shall determine to serve as the Fund's investment manager. The Operating Agreement further provided that the Fund would pay management fees to Geier Capital and Geier Group and would pay an incentive allocation to Geier Capital, if certain conditions were met.

During 2010, Geier Capital engaged Geier Group to serve as the Investment Manager for the Fund and investments were made by Geier Group on behalf of the Fund. After Geier Group was terminated, Geier Capital continued to act as the Fund's investment adviser. Both Hull and Respondent were members of Geier Capital and Geier Group and in that capacity were involved in the management of the Fund. In light of the services they performed, Hull and Respondent acted as persons associated with an investment adviser and supervised persons.[17]

Although the Decision acknowledges that "Geier Capital was the managing member of the Fund, which meant carrying out the duties of the Fund, including retaining Geier Group or some other entity as the Fund's investment manager," it does not address the provisions of the Operating Agreement which (i) vested Geier Capital with authority to exercise discretion on behalf of the Fund; (ii) provided that Geier Capital was authorized to retain Geier Group as Investment Manager; and (iii) provided for the payment of management fees and an incentive allocation to Geier Capital and Geier Group. The Decision does not cite authority for its disregard of the Fund's Operating Agreement which is binding upon the Fund and its Members, or its disregard of Hull's and Respondent's status as members of Geier Capital and Geier Group.

In attempting to support a conclusion that Respondent acted as an investment adviser to the Fund, the ALJ focuses upon certain "functions" which Respondent performed. Initially, the

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[17] As the payment of fees by the Fund ceased after September 2011, Geier Capital no longer met the definition of investment adviser after that date.

ALJ states that the Fund, Geier Capital and Geier Group had no employees. (Decision at p. 24). However, the Fund, Geier Capital and Geier Group were organized as limited liability companies and, as such, had members; Hull and Respondent were members of the Geier Capital and Geier Group and in that capacity acted on behalf of the Fund.

The Decision next states as support for the conclusion that Respondent acted as an investment adviser that "Hull allowed Gibson to use his office space and secretary." (Decision at p. 24). This finding by the ALJ has no bearing on the identity of the Fund's investment adviser.

The other "functions" which the ALJ finds that Respondent performed, including tracking the Fund's performance, negotiating transactions on behalf of the Fund, corresponding with investors, acting as an authorized signatory on Fund accounts, deciding on investments with Hull, and signing a Form D, do not establish that Respondent acted as an investment adviser to the Fund. Rather, the functions that the Decision references are commonly performed at investment advisers by supervised persons and persons associated with investment advisers.

In an effort to establish that Respondent received compensation within the meaning of Section 202(a)(11), the Decision states that "during the 2011 period when the alleged misconduct occurred, Gibson admittedly spent most of his time on Fund matters and was paid a salary of $148,718 from HSG's human resources service." (Decision at p. 25). The record in this matter establishes that, during 2010, HSG advanced $73,953 to Respondent and that Geier Capital reimbursed HSG for the advance. The record further establishes that HSG continued to advance funds to Respondent during 2011; however, as the Fund ceased paying management fees in September 2011, HSG was not reimbursed for the advances it made to Respondent during 2011.

Based upon findings that Respondent engaged in activities commonly performed by associated persons and supervised persons and received funds from HSG, the Decision concludes

that Respondent acted as an investment adviser to the Fund. In that regard, the ALJ states, "Gibson's effort to apply to himself only the statutory definition of 'supervised person' and 'person associated with an investment adviser' ignores the fact that a person can be both an investment adviser and a person associated with an investment adviser." (Decision at p. 26). However, the ALJ failed to address the legal standard applied by the Commission in reaching such determinations and failed to make the requisite findings.

While the Commission has held that under certain circumstances a person associated with an investment adviser may be liable as a primary violator, not every associated person who performs tasks commonly performed by advisory personnel may be liable as a primary violator. In *Harding Advisory LLC,* Securities Act Release No. 10277 (Jan. 6, 2017), the Commission concluded that an associated person that controlled an investment adviser was liable as a primary violator. And in *Lisa B. Premo,* Initial Decision Release No. 476 (ALJ Dec. 26, 2012), the ALJ issued a decision addressing the circumstances in which a person associated with an investment adviser could be found liable as an investment adviser. The ALJ stated "This situation often occurs where the investment adviser is deemed to be the alter ego of the associated person or the investment adviser is controlled by the associated person."

The record in this matter establishes that the Operating Agreement provided that Geier Capital shall exercise investment discretion on behalf of the Fund and shall receive fees for managing the Fund. The record further establishes that Respondent did not control Geier Capital or Geier Group. Rather, Hull controlled the Fund, Geier Capital and Geier Group. Specifically, the Fund was formed to accommodate Hull's desire to receive fees for managing a fund. (Div. Ex.190 26:8-19; Tr. 38:4-18; 617:10-618:2). Hull contributed 80% of the Fund's capital, solicited business associates who contributed 10% of the Fund's capital, and loaned money to

Respondent and his father who invested the loan proceeds in the Fund. And notwithstanding the success that the Fund achieved by investing in commodities, Hull determined that the Fund should shift to equities in order for the Fund's gains to be taxed as capital gains rather than as ordinary income. Hull also decreed that the Fund would identify a single stock as a proxy for investing in commodities rather than diversify its equity holdings in order to better manage investment risk. Further, notwithstanding his involvement in the preparation and dissemination of an email to the Members of the Fund indicating an intention on the part of the Fund to maintain its equity investment despite a significant decline in the price of TRX shares, Hull, after communicating with certain Members of the Fund, advised Respondent that he had "no more tolerance for losses" and that the Fund should attempt to sell its holdings if it could do at good prices.

Hull also exercised economic control over Respondent. At Hull's suggestion, Respondent accepted a loan from Hull and invested the proceeds in the Fund. Further, Hull's interest in the Fund was approximately 80% and Hull's business associates represented an additional 10% of the Fund. At any time, Hull could notify the Fund of his intent to redeem his interest, as could his colleagues, which would drastically alter the economics of the Fund. Moreover, Hull could call his demand notes and force Respondent and possibly his father to redeem their interests in the Fund. Further, Hull, through HSG, advanced funds to Respondent during the relevant period with the expectation that he would be reimbursed through fees paid by the Fund. Moreover, once the Fund ceased paying management fees, the advances from HSG constituted Respondent's source of funds, further increasing Hull's control over the Fund and Geier Capital. Thus, the evidence admitted in this matter conclusively establishes that Hull,

rather than Respondent, controlled Geier Capital and Geier Group, the Fund's investment advisers.

THE INVESTMENT ADVISERS ACT AND FIDUCIARY DUTIES

Sections 206(1) and 206(2) of the Advisers Act proscribe certain fraudulent and deceptive acts and practices and have been construed as imposing fiduciary duties on investment advisers, including a duty of loyalty. The relevant provisions have also been construed as permitting an investment adviser to disclose material conflicts of interest and, with the client's consent to such conflicts, to engage in activity that would otherwise be impermissible. Further, amendments to the Advisers Act contained in the Dodd- Frank Wall Street Reform and Consumer Protection Act confirm that investment advisers may disclose material conflicts of interest and clients may consent to an investment adviser's conflicts of interest.

In *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180 (1963), the Supreme Court construed the antifraud provisions of the Advisers Act as requiring the disclosure of the investment adviser's practice of purchasing securities, recommending the purchase of such securities in a newsletter the adviser circulated and selling the securities after the prices increased. The Supreme Court noted that the investment adviser engaged in this practice without disclosure of any aspect of it to clients or prospective clients. The Court stated that the Advisers Act reflects a Congressional intent to eliminate or to expose all conflicts of interest which might incline an investment adviser - consciously or unconsciously - to render advice that is not disinterested. *Capital Gains,* 375 U.S. at 191-92.

In the Dodd-Frank Act, Congress amended the Advisers Act and certain of the amendments explicitly provide that an investment adviser may disclose, and clients may consent to, material conflicts of interest. Section 913 of the Dodd- Frank Act added Subsection (g) to

Section 211 of the Advisers Act. Section 211(g) explicitly provides that an investment adviser may disclose material conflicts of interest, and clients may consent to such conflicts. Section 913 also adds Subsection (h) to Section 211 which provides the Commission with authority to adopt rules prohibiting or restricting, among other things, conflicts of interest. Further, Section 913 of the Dodd-Frank Act directed the Commission to conduct a study to evaluate the effectiveness of existing standards of care of brokers, dealers and investment advisers imposed by the Commission and other regulatory authorities and whether there are legal or regulatory gaps in the protection of retail customers relating to the standard of care which should be addressed by rule or statute.

The Staff conducted the study mandated by the Dodd-Frank Act and issued a report, U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers (2011) ("Study"), in which, among other things, it discussed the Commission's position regarding fiduciary duties of investment advisers. The Staff stated that Dodd-Frank Act Section 913(g) addresses the duty of loyalty in that it provides that, "[i]n accordance with such rules [that the Commission may promulgate with respect to the uniform fiduciary standard] . . . any material conflicts of interest shall be disclosed and may be consented to by the customer." Id. at 112. The Staff also stated "While the duty of loyalty requires a firm to eliminate or disclose material conflicts of interest, it does not mandate the absolute elimination of any particular conflicts, absent another requirement to do so." Id. at p. 113. The Staff further stated that the Commission could consider whether rulemaking would be appropriate to prohibit certain conflicts, or whether it might be appropriate to impose specific disclosure and consent requirements (e.g., in writing and in a specific format, and at a specific time) in order to better assure that retail customers were fully informed and can understand any material conflicts. Id. at pp. 114-17.

A prospective investor in the Fund was afforded an opportunity to review the Offering Memorandum --which contained disclosures regarding potential conflicts of interest-- and was provided with the Fund's Operating Agreement for review and execution. The relevant provisions of the Operating Agreement provided that the Managing Member and its affiliates were permitted, among other things, to invest in securities in which the Fund invested, were permitted to invest in securities in which the Fund did not invest, were permitted to compete with the Fund, and were permitted to purchase securities from, or sell securities to, the Fund. (Resp. Ex. 13). Moreover, the Operating Agreement specifically provided that "It is recognized that in effecting transactions, it may not always be possible or consistent with the investment objectives of the various persons or entities described above and of the Company to take or liquidate the same investment positions at the same time or at the same prices." The Operating Agreement was binding on the Fund and its Members.

In light of the foregoing, Respondent was permitted to engage in transactions in securities which were held by the Fund and was free to engage in transactions in securities that the Fund did not hold. Specifically, Respondent, as a result of the disclosures in the Offering Memorandum and the provisions of the Operating Agreement, was permitted to sell TRX securities and purchase put contracts on TRX securities and to recommend such transactions to others. Similarly, Respondent could not be exposed to liability in connection with Hull's sale of TRX securities to the Fund as the Operating Agreement specifically permitted the Managing Member to enter into contracts which it deemed advisable. Section 3.02(h) of the Operating Agreement provides that Geier Capital was empowered to "... enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements or other

undertakings with persons firms or corporations with which the Managing Member or any other Member is affiliated."

The OIP alleges that Respondent acted as an investment adviser and that, as a fiduciary, Respondent owed a duty of loyalty and was required to disclose conflicts of interest. Although the Decision concludes that Respondent acted as an investment adviser to the Fund, it does not discuss the duty of loyalty that an investment adviser may owe to its client as alleged in the OIP; nor does it properly address the disclosure of conflicts of interest in the Fund's Operating Agreement and Offering Memorandum and the investors consent to such conflicts by executing the Operating agreement.

The Decision finds that the "Fund's basic documents allowed sales in privately held accounts that were contrary to the Fund's position." (Decision at p. 33).[18] This conclusion is consistent with *Capital Gains* and Section 211 of the Advisers Act as amended by the Dodd – Frank Act. It is also consistent with the study mandated by Section 913 of the Dodd-Frank Act, in which the Staff stated "While the duty of loyalty requires a firm to eliminate or disclose material conflicts of interest, it does not mandate the absolute elimination of any particular conflicts, absent another requirement to do so." Study at p. 113.

The ALJ attempts to circumvent the disclosures and waivers by asserting that Respondent's sales of TRX securities "contradicted the information he was withholding and providing to Fund investors. Gibson did not disclose to Fund investors the communications he had with Sinclair on August 10 and 15, voicing concerns about Sinclair's false representations,

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[18] The Decision previously noted that the Division of Enforcement agreed that investors knew from the Offering Memorandum and the Operating Agreement that potential conflicts might occur in the future and acknowledges that the conflicts of interest language in these documents allowed Gibson and Hull to engage in outside accounts that could conflict with the Fund. (Decision at p. 28).

TRX's falling share price, and TRX's future." (Decision at p. 33). Whether Respondent provided or withheld information regarding communications with a TRX officer does not alter the disclosure of, and consent to, conflicts of interest and is irrelevant.

Similarly, the ALJ's attempt to negate the disclosure of and consent to conflicts of interest relating to securities transactions by invoking an expectation of fair treatment and an absence of consent to material misstatements and omissions on the part of Fund investors is wholly ineffective. First, the disclosure of conflicts of interest and the consent to such conflicts did abrogate an obligation to put the Fund before Respondent's personal benefit, and the ALJ acknowledges this when she stated that "the Fund's basic documents allowed sales in privately held accounts that were contrary to the Fund's position."[19] (Decision at p. 33). Second, whatever thoughts particular investors had regarding "relinquishing their right to fair treatment and agreeing to material misstatements and material omissions" (Decision at p. 34) does not operate as a revocation of their consent to the conflicts of interest disclosed in the Fund's Offering Documents. And the ALJ has cited no authority for such a proposition.[20]

RESPONDENT DID NOT FRONT RUN THE FUND OR FAVOR A FUND INVESTOR

The record in this matter does not establish, by a preponderance of the evidence, that Respondent engaged in front running or favored a Member of the Fund over the Fund.

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[19] The ALJ, thus, implicitly acknowledges that an investment adviser's duty of loyalty may be modified, amended, or abrogated through disclosure to and consent by clients. Respondent clarified his earlier testimony that the ALJ cites in the Decision on page 5 when he stated that the disclosures in the Offering Documents addressed the duty of loyalty. (Tr. 821).

[20] To the extent that the disclosures are deemed deficient, the deficiency occurred in January 2010; accordingly, any cause of action arising from such a disclosure deficiency is barred by the applicable statute of limitations.

Front Running

The OIP alleges that Respondent engaged in front running in violation of the Advisers Act and the Exchange Act when he sold or recommended the sale of TRX securities and when he purchased or recommended the purchase of put contracts on TRX securities. The Decision states that "This decision considers a fiduciary's non-disclosed use of material, non-public information about a client to conduct transactions ahead of a client's transaction to secure a personal advantage, for himself or a close friend or relative, to be front running." (Decision at p. 28).[21] The ALJ then states that in determining whether Respondent engaged in front running it is necessary to judge what material non-public information he knew. An application of the standard adopted by the ALJ to the record in this matter demonstrates that Respondent did not know material, non-public information when he sold or recommended the sale of TRX shares or when he purchased or recommended the purchase of put contracts.

In an effort to support a finding that Respondent knew material, non-public information regarding the Fund to conduct transactions ahead of a Fund transaction, the ALJ initially embarks on an analysis of Respondent's credibility as a witness. The ALJ compares Gibson's opinion regarding the CEO of TRX and the statements he made to Fund investors regarding the CEO of TRX. However, the credibility of Respondent's statements to Fund Members regarding the CEO of TRX has no bearing on whether material, non-public information about sales of TRX shares by the Fund existed when Respondent sold TRX shares and is irrelevant.

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[21] The decisions and treatise cited by the ALJ either reflect a definition of front running that differs from the one articulated by the ALJ and/or lack precedential value. In the absence of a clear articulation of the conduct that is prohibited, Respondent has not been provided with notice of what conduct is prohibited and has been denied due process. *See Upton v. Securities and Exchange Commission,* 75 F.3d 92, 98 (2d Cir. 1996).

Next, the ALJ states that Respondent's representations that there were large holders of TRX who owned substantial positions in TRX and were interested in purchasing the Fund's TRX securities are highly questionable. However, the record reflects that Platinum had paid $30,000,000 to acquire TRX shares at $5.75 per share in August 2011 and that a Sheik represented by Roheryn held over 10,000,000 shares. (Resp. Ex. 61). Moreover, the Fund was able to sell 3.7 million shares of TRX on September 27, 2011 through Sands and Casimir.

The ALJ then states that there were no documents that supported Respondent's testimony about what Sands told him or what a trader at Casimir told him about interest in the Fund's TRX shares, but the absence of documents memorializing oral communications does not establish that the discussions Respondent described did not occur.

The ALJ asserted that there was no support for Gibson's testimony that in the Fall of 2011, the Fund was a patient holder of its TRX securities and willing to sit on its position indefinitely. However, the record reflects a communication from Hull in late September 2011 in which he stated: "So the best move may be to try to play all of potential acquirers against each other and foster a bidding war for the shares. . . .also, I think all of us are well satisfied to hold the shares for the duration . . . . and to then start working with management on meeting the milestones that you suggested earlier today." (Resp. Ex. 89).

Similarly, the ALJ's focus on Respondent's credibility with respect to his use of the proceeds of the sale of his TRX shares, and his statements on a subscription agreement are irrelevant to whether material, non-public information existed regarding a sale of the Fund's TRX shares at the time Respondent sold TRX shares.

In a further attempt at supporting a finding that Respondent knew material, non-public information regarding Fund transactions, the ALJ first notes that at the time Respondent sold

TRX shares he had begun negotiations to sell the Fund's TRX shares in an off-exchange block transaction through the upstairs market, (Decision at p. 32) and then lists findings regarding "Gibson's strong critical comments to Sinclair in August, the drastic decline in TRX's price shortly after September 20, Gibson's acknowledgement that his investment thesis was invalid, Hull's intolerance for greater TRX price drops, the information Gibson conveyed to a broker on September 24, and Hull's comments on September 25" as supporting "a conclusion that Respondent knew when he sold his privately owned shares and those of others on September 26 that he believed the fund's sale of a substantial portion of its TRX shares was imminent." Decision at p. 32-33. Although the ALJ states "This information was material, non-public information known to Gibson because of his position as the Fund's investment adviser," the matters listed by the ALJ have no bearing on whether material, non-public information regarding a sale of the Fund's TRX shares existed or was material and the ALJ does not offer an analysis of the materiality of such matters.[22]

Although the ALJ stated that in determining whether front running occurred it is necessary to judge what material, non-public information Gibson knew when he sold TRX shares outside the Fund, the ALJ does not analyze the materiality or the non-public nature of the information regarding Fund transactions that existed at the time Respondent sold TRX securities on September 26, 2011. The record in this matter establishes that Respondent did not know whether the Fund would sell any TRX shares through one or more negotiated transactions, the price at which the shares would be sold, or when the transaction would occur. In that regard, it is

22 While the ALJ also states that Respondent failed to disclose information and made misstatements (which the record does not support) the purported misstatements and omissions do not establish that Respondent knew material, non-public information regarding a sale of TRX securities by the Fund when he sold TRX securities on September 26, 2011. (Decision at pp. 33-34).

important to note that Respondent was exploring sales of TRX securities through both Roheryn and Casimir. The sale of between 1,000,000 to 5,000,000 shares through Roheryn was not consummated and the terms of a sale of shares through Casimir were unknown until after Respondent sold TRX securities on September 26th. At the time Respondent placed orders to sell TRX securities on September 26, 2011, information relating to a possible sale of the Fund's TRX shares was not material.[23]

Further, the ALJ does not set forth a standard for or analyze whether information regarding a sale of the Fund's TRX securities was non-public. And the record in this matter establishes that information regarding a sale of the Fund's TRX securities could not be found to have been non-public at the time Respondent sold TRX securities on September 26th. Respondent's inquiries on behalf of the Fund were directed to firms with which the Fund did not have a relationship. In particular, Respondent communicated with representatives of Roheryn and Casimir and those representatives, in turn, communicated with potential buyers. As a result of these communications, the information regarding the Fund's interest in identifying a potential buyer for its TRX securities was not non-public information.

The absence of support in the record for a conclusion that Respondent knew material, non-public information regarding a Fund transaction is reflected in the differing formulations regarding Respondent's knowledge that the ALJ sets forth in the Decision. Initially, the ALJ states that "My review of the evidence leads me to conclude that Gibson knew with reasonable certainty on September 26 that the Fund was going to sell as much of its shares as it could as quickly as it could." (Decision at p. 29). Then the ALJ states "Gibson believed on September 26 that the Fund was soon going to sell a large amount of TRX shares." (Decision at p. 30). And

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[23] *See Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988) (materiality depends on the significance a reasonable investor would place on the withheld or misrepresented information).

then the ALJ states "Gibson knew when he sold his privately owned shares and those of others on September 26 that he believed the Fund's sale of a substantial portion of its TRX shares were imminent." (Decision at p. 33). Finally, the ALJ concludes that "Gibson knew or should have known on September 26, that the anticipated sale of a large amount of TRX stock, which occurred on September 27, would drive the stock price down, which it did." (Decision at p. 34). None of the foregoing formulations satisfy the standard that the ALJ stated would be determinative (i.e. "in determining whether front running occurred it is necessary to judge what material, non-public information Gibson knew when he sold TRX securities outside the Fund.").

Similarly, Respondent did not know material, non-public information regarding sales of TRX securities by the Fund when he purchased and recommended the purchase of TRX put contracts. When Respondent purchased or recommended the purchase of $4.00 TRX put contracts in late October, and November 2011, he was continuing to explore the possibility of sales of the Fund's TRX securities through negotiated transactions with Roheryn, and Platinum. Respondent's efforts to dispose of all of the Fund's TRX shares through negotiated transactions were unsuccessful. As a result, Respondent could not have known information regarding the number of shares to be sold through a negotiated transaction, the price at which the securities would be sold or when the sale would occur. Accordingly, Respondent could not have known material information regarding a sale of the Fund's TRX securities through a negotiated transaction. Further, as the Fund had sold more than 3,500,000 TRX shares on September 27, 2011 and continued to discuss sales of TRX securities with multiple parties for the remainder of September, October and the first part of November 2011, there is no basis for concluding that information which Respondent possessed regarding a sale of the Fund's TRX securities was non-public.

Moreover, the record in this matter establishes that the precipitating factor in the Fund's sale of its TRX securities on November 10, 2011was Respondent's meeting with Platinum during the evening of November 9th. Based upon his communications with Sands, Respondent was hopeful that Platinum would present an offer for the Fund's TRX securities at the meeting. However, rather than offering to purchase the Fund's TRX securities, Platinum offered to pay the Fund a small amount of money if the Fund would agree not to sell its TRX shares. It was only after this meeting with Platinum that Respondent and Hull concluded that other large holders of TRX were likely sellers and determined to sell the Fund's securities in market transactions with the hope that the Fund's sales would result in other holders of TRX entering the market and, in effect, buying the Fund's shares. At the time that Respondent purchased or recommended the purchase of TRX puts, information regarding the Fund's sales of securities in the market did not exist; accordingly, Respondent could not have known such information at the time of the put transactions.

Favoring a Fund Investor

The record in this matter also reflects the disclosure of, and consent to, transactions of the type in which Hull and the Fund engaged. The Fund's Operating Agreement provides, at Section 3.02(h), that the Managing Member shall have the power to enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements or other undertakings with persons, firms or corporations with which the Managing Member or any other Member is affiliated. The Operating Agreement is binding upon the Fund and its Members. Thus, the Operating Agreement authorized the Managing Member to enter into agreements that it deemed advisable, and the evidence admitted in this matter establishes that Respondent believed

that a sale by Hull of TRX securities in a market transaction could have an adverse impact on the Fund's efforts to sell TRX securities through negotiated transactions in the upstairs market. Accordingly, he proposed the transaction to Hull and although the transaction did not fully achieve Hull's objectives to increase his liquidity, he agreed to enter into the transaction.

The OIP alleges that Respondent violated the Advisers Act by favoring Hull over the Fund when it purchased TRX shares at the closing price of TRX stock on October 18, 2011 and enabled Hull to sell his TRX shares without paying a commission to a broker.

The ALJ focused upon a part of the Offering Memorandum that addresses the activities in which the Managing Member and its members (i.e., Respondent and Hull) could engage apart from the Fund. The Offering Memorandum provided that the Managing Member and its members may conduct any other business, including any business within the securities industry, whether or not such business is in competition with the Fund. The Offering Memorandum further stated the Managing Member and its members may act as general partner, managing member, investment adviser or investment manager for others, may manage funds, separate accounts or capital for others, may have, make and maintain investments in their own name or through other entities. The Offering Memorandum further provided that purchase and sale transactions may be effected between the Fund and other entities and accounts subject to the following guidelines: (i) such transactions shall be effected for cash consideration at the current market price of the particular securities, and (ii) no extraordinary brokerage commissions or fees (i.e., except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction. The ALJ concluded that the Hull transaction did not comport with the guideline contained in the Offering Memorandum.

However, the Offering Memorandum addressed transactions between the Fund and the various persons and accounts to whom the Managing Member or its members may provide investment advice, which would necessarily include persons that are not affiliates of the Managing Member or its members. As noted above, the Operating Agreement specifically provides that the Managing Member shall have the power to enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements or other undertakings with persons, firms or corporations with which the Managing Member or any other Member is affiliated. The provision of the Operating Agreement is applicable to the transaction between Hull and the Fund, and it does not include requirements that the transactions be executed at current market prices or that no extraordinary commissions be paid. Thus, Respondent would not be obligated to make the disclosures that the Hull Transaction involved above-market prices or extraordinary commissions as the Decision concludes. In any event, the provision set forth in the Offering Memorandum is a guideline rather than a condition or requirement. The Law Dictionary defines the term "guideline" as "a practice that allows leeway in its interpretation."[24] Accordingly, the Decision's attempt to elevate a "guideline" to a "requirement" must fail.

Moreover, any difference in the price at which the Hull Transaction was completed and the price at which the transaction would have been completed had a block discount been applied would not be material and would not need to be disclosed. First, the transaction was completed at the price at which the TRX stock closed on the date of the transaction. If Respondent had attempted to incorporate a block discount, based on his experience, the likely range of such a

24 The Law Dictionary: Featuring Black's Law Dictionary, Free Online Legal Dictionary 2nd Ed., http://thelawdictionary.org/guideline/ (last visited May 17, 2017).

discount would be a matter of pennies. Moreover, Hull would have borne 80% of that discount and Respondent would have borne part of that discount. The remaining investors, including Respondent's mother and father would have experienced an immaterial impact. As such, there would be no obligation to disclose this information because if the transaction were deemed to involve a conflict that was not already addressed in the governing documents it was not a material conflict and only material conflicts of interest need be disclosed.

Further, Respondent did not cause the Fund to pay an extraordinary commission in connection with the Hull Transaction. The record in this matter establishes that the Hull Transaction was handled as a private transaction and neither Hull nor the Fund paid a commission on the transaction. Also, both before and after the Hull Transaction, Respondent was exploring a sale of the Fund's TRX shares through a negotiated transaction in the upstairs market and if such a transaction were completed it may not have involved the payment of a commission. Further, the purchase of the TRX securities by the Fund and the sale of the securities by the Fund are separate transactions that were completed weeks apart. Once the Fund acquired the TRX securities from Hull, the securities were part of the Fund's portfolio rather than a discrete segment of the portfolio, and when the Fund's TRX shares were sold in November 2011 the shares acquired from Hull were sold as a part of that transaction.

RESPONDENT DID NOT VIOLATE SECTION 206(4) AND RULE 206(4)-8

Respondent cannot be found to have violated Section 206(4) and Rule 206(4)-8 for a number of reasons. First, the relevant provisions, by their terms apply to investment advisers and Respondent did not act as an investment adviser. Second, Rule 206(4)-8 does not create a fiduciary duty to investors or prospective investors.[25] Further, Rule 206(4)-8 proscribes

[25] See Investment Advisers Act Release No. 2628 (August 3, 2007).

misstatements and omissions necessary to make the statements made not misleading and fraudulent, deceptive and manipulative conduct, but does not impose an affirmative duty to continuously provide information to investors and prospective investors. Further, the Offering Documents were clear and specific and addressed the conduct at issue in this matter. Finally, as Respondent did not engage in front running or favor a Fund Member over the Fund, he could not have an obligation to disclose that he engaged in such conduct.

The OIP alleges that Respondent failed to disclose to the Fund or other clients information relating to his sales and recommendations to sell securities,[26] his purchase and recommendation to purchase put contracts on TRX securities[27] and his favoring of a Fund investor over the Fund.[28] The OIP alleged that Respondent failed to disclose such information to the Fund or other unspecified clients. The OIP did not allege that Respondent failed to disclose information to Fund investors or prospective investors, other than with respect to matters that are not material, not required to be disclosed by Section 206(4) and Rule 206(4)-8, and/or are barred by the statute of limitations (e.g. "Gibson never informed the Fund's investors that the Fund's investment manager had been terminated"; "Gibson never informed the Fund's investors that the Fund's managing member had been terminated.").

The Decision makes findings and conclusions that Respondent violated Section 206(4) and Rule 206(4)-8, but the findings and conclusions relate to matters that are not alleged in the OIP and/or are not material. For example, the Decision contains findings that Respondent made misstatements or omitted to state facts necessary to make statements made not misleading that related to Respondent's opinion of Sinclair, his communications with Sinclair, his views

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[26] *See* Paragraph 31 of the OIP.
[27] *See* Paragraph 53 of the OIP.
[28] *See* Paragraph 41 of the OIP.

regarding TRX and his interest in the Fund and TRX. However, the OIP does not contain allegations that Respondent violated Section 206(4) and Rule 206(4)-8 by making such alleged misstatements and omissions and many of such findings and conclusions are not material. As a result, the ALJ's findings and conclusions relating to Section 206(4) and Rule 206(4)-8 must be set aside.

RESPONDENT DID NOT ACT WITH THE REQUISITE MENTAL STATE

To establish that Respondent violated the Advisers Act, the Exchange Act or the rules thereunder, there must be a preponderance of the evidence that Respondent acted with the requisite mental state. Section 206(1) and Section 10(b) and Rule 10b-5 require proof of scienter,[29] while Section 206(2) and 206(4) and Rule 206(4)-8 require proof of negligence.[30]

In order for Respondent to have engaged in the front running violations alleged in the OIP, a preponderance of the evidence must support findings and conclusions that Respondent knowingly, recklessly or negligently failed to disclose his use of material, non-public information about the Fund to conduct transactions ahead of the Fund's transaction to secure an advantage.[31] The record reflects that information regarding the possible sale of the Fund's TRX

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29 Scienter is shown by facts demonstrating, "a mental state embracing intent to deceive, manipulate, or defraud." *Securities and Exchange Commission v. Rubera,* 350 F.3d 1084, 1094 n.1 (9th Cir. 2003) (citations omitted).

30 To establish negligence, the SEC must show that Respondent Gibson had no reasonable basis for his actions. "Negligence is not a strict liability standard" but "requires the absence of a reasonable basis." *Securities and Exchange Commission v. Morris,* No. CIV.A. H-04-3096, 2007 WL 614210, at *3 (S.D. Tex. Feb. 26, 2007) (citing *Weiss v. SEC,* 468 F.3d 849, 855 (D.C. Cir. 2006).

31 *See City of Dearborn Heights Act 345 Police & Fire Retirement System v. Waters Corporation,* 632 F.3d 751 (1st Cir. 2011) (stating, with respect to scienter, "[T]he question of whether Defendants knew or recklessly failed to disclose [a fact] is. . . intimately bound up with whether Defendants either actually knew or recklessly ignored that the fact was material and nevertheless failed to disclose it. . . . if it is questionable whether a fact is material or its materiality is marginal, that tends to undercut the argument that defendants acted with the requisite intent or extreme recklessness in not disclosing the fact.") (citations omitted).

shares was not material and was not non-public at the time Respondent sold or recommended the sale of TRX securities or purchased or recommended the purchase of TRX puts. At the time Respondent sold TRX securities, he had made inquiries to two different firms, Roheryn and Casimir, regarding sales of the Fund's TRX securities. The transaction through Roheryn was not consummated. And with respect to Casimir, at the time Respondent sold TRX securities, he did not know whether Casimir could locate a buyer, the number of shares the buyer would be willing to purchase, the price per share that a buyer would be willing to pay, or when the transaction would be consummated. Moreover, the Casimir transaction was consummated on terms different than Respondent was seeking. Further, as Respondent had approached two firms regarding the Fund's TRX securities and the representatives at those firms, in turn, communicated with potential buyers, any information regarding the Fund's TRX position was not non-public. With respect to transactions in TRX put contracts, the record is similar. Respondent continued to explore the possibility of negotiating a sale of the Fund's TRX securities, but the Fund never completed such a transaction. Moreover, as the Fund had sold 3.7 million TRX shares on September 27, 2011, the Fund's interest in selling the remainder of its TRX shares was known in the market and therefore was not non-public.

Similarly, the record does not support findings and conclusions that Respondent knowingly, recklessly or negligently failed to disclose that he favored an investor over the Fund. Specifically, Respondent did not favor an investor over the Fund when the Fund acquired TRX shares which Hull owned personally. The record reflects that the impetus for the transaction was Hull's need to increase his liquidity, and that Hull would have increased his liquidity much more by simply selling the TRX shares in the market. Moreover, as Hull owned approximately 80% of the Fund, he experienced the consequences of the Fund's sale of TRX shares on November

10th, including the commissions that the Fund paid on the sales that day. Also, the Hull transaction was clearly permitted by the Fund's Operating Agreement, which severely undermines any suggestion that Respondent acted knowingly, recklessly or negligently in not disclosing the Hull transaction.

SANCTIONS AND RELIEF

The Decision imposes an associational bar, a cease-and-desist order, disgorgement and monetary penalties. The sanctions are not appropriate for multiple reasons.

As the record reflects that Respondent did not violate the Exchange Act, the Advisers Act or the rules thereunder there is no basis for imposing any sanction on Respondent.

Notwithstanding that there is no basis for imposing sanctions or other relief, evidence admitted during the hearing establishes that sanctions and other relief is not appropriate in light of the factors that the Commission has considered in proceedings of this type. Those factors include (i) the egregiousness of the respondent's actions; (ii) the isolated or recurrent nature of respondent's actions; (iii) the degree of scienter; and (iv) the likelihood of future violations.[32]

With respect to the egregiousness of Respondent's conduct, the record reflects that Respondent engaged solely in activities which were permitted by the Fund's Offering Documents. Also, Respondent's transactions in TRX securities and TRX put contracts did not harm the Fund and the Hull Transaction was carried out for the benefit of the Fund. With respect to the isolated or recurrent nature of Respondent's conduct, the activities at issue in this matter were, in fact, isolated rather than recurrent in nature. The Fund commenced operations in

[32] The Decision also indicates that the ALJ considered "the respondent's recognition of the wrongful nature of his or her conduct..." *See* Decision at p.41; *see also id.* (finding that "Given Gibson's lack of appreciation and understanding of how his conduct was fraudulent..."). Courts have held that a failure to admit wrongdoing is not a legitimate consideration in determining sanctions. *See e.g. Securities and Exchange Commission v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989).

January 2010 and the activities at issue occurred in September, October and November 2011. With respect to the degree of scienter, it is important to note that Respondent undertook the actions at issue with the understanding that they were permitted by the Fund's Offering Documents and that the actions either did not harm the Fund or benefitted the Fund. With respect to the likelihood of future violations, approximately six years have passed since the conduct at issue occurred without incident. Further, evidence admitted in this matter establishes Respondent's inability to pay a civil penalty or to comply with an order requiring him to pay disgorgement.

Further, the entry of an order requiring Respondent to pay disgorgement is particularly inappropriate in this matter. Disgorgement is a remedy by which a person may be required to surrender ill-gotten gains that are causally related to violations of the federal securities laws. For disgorgement, "gains" are equivalent to "profits." *See e.g. Securities and Exchange Commission v. DiBella*, 409 F. Supp. 2d 122, 127 (D. Conn. 2006) (recognizing that disgorgement "merely dispossesses the wrongdoer of the profits earned..." and "that if there were no profits earned...disgorgement would not be an available remedy"). The record clearly shows that Respondent did not realize any "profits" which are subject to disgorgement, as Respondent's net financial outcome from his activities was a substantial loss.

With respect to penalties, some federal courts have determined that imposing a penalty which reaches the level of the disgorgement amount is excessive in cases that involve other severe sanctions, such as those present in this case. *See e.g. Securities and Exchange Commission v. Conaway*, 697 F. Supp. 2d 733, 771-72 (E.D. Mich. 2010) (finding that SEC's request for penalties to equal disgorgement were too "severe" considering the disgorgement, prejudgment interest, and injunctive relief sought). Here, the ALJ seeks to impose penalties in

the amount of $210,000 -- an amount that is more than two times the disgorgement amount of $81,008. Any penalty amount should be reduced to the amount of disgorgement or less, especially in light of the other severe sanctions being imposed.

With respect to the associational bar, Section 203(f) permits the imposition of administrative sanctions against certain persons associated or seeking to become associated with an investment adviser. However, the Decision concludes that Respondent acted as an investment adviser. The Decision does not contain findings or conclusions regarding the investment adviser with which Respondent was associated. In that regard, it is important to note that neither Geier Capital nor Geier Group received compensation after September 30, 2011 and could no longer meet the definition of investment adviser when most of the conduct at issue occurred.

CONSTITUTIONAL CHALLENGE

The Appointments Clause of the United States Constitution provides that Congress may vest the appointment of inferior officers in the President, the courts of law or the heads of the departments. U.S. Const. art. II, § 2, cl. 2. The Supreme Court, in *Freytag v. Commissioner,* 501 U.S. 868 (1991), determined that the term "inferior officer" includes government officials whose position is established by law; whose duties, salary, and means of appointment are specified by statute; and who exercise significant authority.

The Court of Appeals for the Tenth Circuit, in *Bandimere v. Securities and Exchange Commission,* 844 F.3d 1168 (10th Cir. 2016) held that the Commission's ALJs are inferior officers and appointed unconstitutionally. The Tenth Circuit began its analysis by noting that the Supreme Court, in *Buckley v. Valeo,* 424 U.S. 1, 126 (1976), defined an officer as "any appointee exercising significant authority pursuant to the laws of the United States." The Tenth Circuit then discussed the Supreme Court's opinion in *Freytag* in which the Supreme Court held

that Special Trial Judges appointed by the Tax Court were inferior officers as the position was established by law; the duties, salary and means of appointment for the office were specified by statute; and the tasks performed by the government official were not ministerial, but rather involved the exercise of significant discretion. The Tenth Circuit then stated that it must consider the creation and duties of SEC ALJs in order to determine whether they are inferior officers and stated that the ALJ position was created by the Administrative Procedure Act 5 U.S.C. § 556(b)(3); statutes enacted by Congress set forth SEC ALJs' duties, salaries and means of appointment; and SEC ALJs exercise significant discretion in performing "important functions." The Tenth Circuit held that SEC ALJs are inferior officers who must be appointed in conformity with the Appointments Clause and set aside the Commission's opinion. On May 3, 2017, the Tenth Circuit entered an order denying the SEC's petition for rehearing or rehearing *en banc. Bandimere v. Securities and Exchange Commission,* No. 15-9586, (10th Cir. May 3, 2017).

Prior to *Bandimere*, the D.C. Circuit had held that SEC ALJs are not inferior officers. *See Raymond J. Lucia Cos., Inc. v. Securities and Exchange Commission*, 832 F.3d 277 (D.C. Cir. 2016). Following *Bandimere*, the D.C. Circuit vacated the court's judgment and granted rehearing *en banc*. *See Raymond J. Lucia Cos. Inc. v. Securities and Exchange Commission*, No. 15-1345, 2017 WL 631744 (D.C. Cir. Feb. 16, 2017).

As SEC ALJs are not appointed in accordance with the Appointments Clause, *Bandimere* 844 F.3d at 1176-77, this proceeding should be set aside.

PROCEDURAL ERRORS

Rule 320, in relevant part, provides that "the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, unduly repetitious, or

unreliable." During the proceeding, the ALJ admitted into evidence Div. Exs. 183, 183A, 184, 185, 187 and 188 over Respondent's objections, notwithstanding that each exhibit was irrelevant, immaterial and unreliable.

Exhibit 183 purports to be a recording of a conversation between Respondent and an individual named Luis Sequeira, and Exhibit 183A is a transcript of the recording. The Division of Enforcement was unable to establish how the recording was made, by whom the recording was made, whether it had been altered, where the recording was made, and each of the persons who possessed the recording before it was provided to the Division of Enforcement. Accordingly, the recording and the transcript of the recording are inherently unreliable and should not have been admitted into evidence.

Exhibit 184, Expert Report of Carmen A. Taveras, PhD., reflects primarily calculations that Dr. Taveras performed regarding securities transactions at issue in this matter. An expert witness may not testify regarding "facts that people of common understanding can easily comprehend." *United States v. Lundy,* 809 F.2d 392, 395 (1987). Dr. Taveras offers several "expert opinions" in which she simply performs the basic mathematical operations of subtraction and multiplication. Accordingly, Exhibit 184 should not have been admitted into evidence.

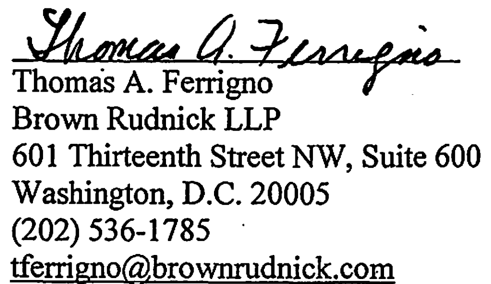
Exhibit 185, Expert Report of Dr. Gary Gibbons, reflects, among other things, opinions that Respondent acted as an investment adviser, that as an investment adviser, Respondent was subject to fiduciary duties that could not be abrogated, modified or nullified by agreement or by the operation of state law, and that Respondent engaged in front running and favored one investor over the Fund. Each of these opinions constitutes a conclusion of law and, as a non-lawyer, Dr. Gibbons was not qualified to render such legal opinions.

Exhibits 187 and 188 are the Rebuttal Expert Reports of Dr. Taveras and Dr. Gibbons. For the reasons set forth above with respect to Exhibits 184 and 185, Exhibits 187 and 188 should not have been admitted into evidence.

CONCLUSION

As the foregoing demonstrates, Respondent did not act as an investment adviser, did not have or breach fiduciary duties and did not engage in front running or favor one investor over the Fund. Further, this proceeding should be set aside as the ALJ who presided over the hearing in this matter was not appointed in accordance with the Appointments Clause of the Constitution.

Dated this 18th day of May, 2017



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2017:

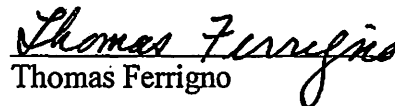
(i) the foregoing Opening Brief of Respondent Christopher M. Gibson was transmitted to the Office of Secretary of the Securities and Exchange Commission by facsimile and an original and three copies of the foregoing Opening Brief of Respondent Christopher M. Gibson were delivered by courier to the following address:

> Office of the Secretary
> Securities and Exchange Commission
> 100 F Street, NE,
> Washington, DC 20549-9303

(ii) a copy was sent via email to H. Michael Semler, Assistant Chief Litigation Counsel at SemlerH@SEC.gov;

(iii) a copy was delivered by hand to H. Michael Semler, Division of Enforcement, Securities and Exchange Commission, Room 5932, 100 F Street, N.E., Washington, D.C. 20549; and

(iv) a copy was sent via email to Brenda P. Murray, Chief Administrative Law Judge, at ALJ@sec.gov.



Thomas Ferrigno

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CERTIFICATE OF COMPLIANCE

This brief complies with SEC Rule 450 in that it contains 13,927 words.

Thomas A. Ferrigno

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