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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

REPLY BRIEF OF RESPONDENT CHRISTOPHER M. GIBSON

July 3, 2017

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INTRODUCTION

The Opening Brief of Respondent Christopher M. Gibson ("Opening Brief") demonstrates that the Initial Decision[1] ("Decision") in this proceeding was fatally flawed, and that the evidence admitted in this matter does not support findings and conclusions that Respondent Christopher M. Gibson ("Respondent") violated provisions of the Investment Advisers Act ("Advisers Act"), the Securities Exchange Act ("Exchange Act") or the rules thereunder. The Division of Enforcement's Opposition Brief ("Opposition Brief") does not demonstrate otherwise.

ENFORCEMENT FAILED TO PROVE THAT RESPONDENT ACTED AS AN INVESTMENT ADVISER TO THE FUND

In arguing that Respondent violated Section 206 of the Advisers Act, Enforcement initially asserts that Respondent acted as an investment adviser to the Fund. Enforcement relies primarily upon the definition of the term "investment adviser," statements in the Fund's offering memorandum, and Respondent's performance of tasks on behalf of the Fund. In attempting to prove by a preponderance of the evidence that Respondent acted as an investment adviser to the Fund, Enforcement ignores both relevant documentary evidence and controlling precedent.

Enforcement attempts to establish that Respondent acted as an investment adviser by arguing that the definition of the term "investment adviser" is broad. Enforcement asserts that "the term 'investment adviser' includes, inter alia, any person not exempted by statute 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." And then states "Anyone

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

whose activities fall within this broad definition is an investment adviser subject to primary liability under Section 206." Opposition Brief at 13. Enforcement next references statements in the Confidential Private Offering Memorandum of Geier International Strategies Fund, LLC ('Offering Memorandum") that Respondent was the managing member of the Fund's investment manager and that the Fund was dependent upon Respondent's expertise. Resp. Ex. 8[2] Enforcement then cites a number of functions that Respondent performed on behalf of the Fund, including selecting the Fund's brokers, opening brokerage accounts and tracking the performance of the Fund's investments.

Enforcement's argument that Respondent acted as an investment adviser to the Fund neglects relevant and dispositive evidence that was admitted in this matter. While acknowledging that the Offering Memorandum states that "Gibson was the Managing Director of Geier Capital, which was responsible for managing the Fund," and that he was also "the managing member of Geier Group, the Fund's 'Investment Manager," Opposition Brief at 14, Enforcement completely ignores the Operating Agreement of Geier International Strategies Fund, LLC ("Operating Agreement"). The Fund's Operating Agreement provides that Geier Capital shall be the Managing Member of the Fund. The Fund's Operating Agreement further provides that the Fund "shall be managed by the Managing Member, who shall have the discretion of making investments on behalf of the Company and of exercising the powers set forth in Section 3.02." Accordingly, Geier Capital, rather than Respondent, possessed the authority to provide investment advice to the Fund and, thus, acted as the Fund's investment adviser. Further, Section 3.02(l) provides that Geier Capital shall have the power to retain Geier

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[2] The Respondent's exhibits are cited as "Resp. Ex. __." The Division of Enforcement's exhibits are cited as "Div. Ex. __."

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." Resp. Ex. 13.

As the Fund was formed as a Delaware limited liability company, it is governed by the Delaware Limited Liability Company Act ("DLLCA"). The DLLCA provides that a fund's operating agreement is binding upon managers, members and the limited liability company.[3] As the Court of Appeals for the District of Columbia Circuit, in a matter involving a rule adopted by the Commission concerning hedge funds, stated "form matters in this area of the law because it dictates to whom fiduciary duties are owed. " *Goldstein v. Securities and Exchange Commission,* 451 F.3d 873, 882 (D.C. Cir. 2006). Neither Enforcement nor the administrative law judge ("ALJ") who issued the Decision cited any authority for the proposition that the Operating Agreement which vests discretionary authority regarding investments in Geier Capital may be disregarded and supplanted with the notion that Respondent was acting as the investment adviser to the Fund.

Further, the functions that Enforcement asserts that Respondent performed on behalf of the Fund establish no more than that Respondent acted as a "person associated with an investment adviser" and/or a "supervised person," as those terms are defined in the Advisers Act. Specifically, Section 202(a)(25) defines the term "supervised Person" as "any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an investment adviser, or other person who provides advice on behalf of the investment adviser and is subject to the supervision or control of the investment adviser."

In light of the foregoing, it is clear that Enforcement is attempting to conflate the analysis of whether a person comes within the definition of the term "investment adviser" with the

[3] Del. Code Ann. tit. 6, § 18-1101(b).

analysis of whether a person who is associated with an investment adviser may be liable for a primary violation of Section 206. The Commission has addressed the issue of whether and under what circumstances an associated person may be liable for primary violations of Section 206 in clear and unequivocal terms. In *Harding Advisory LLC,* Securities Act Release No. 10277 (Jan. 6, 2017), the Commission stated "An associated person may be liable as a primary violator where, as here, the associated person controlled the investment adviser."

Rather than address the standard that the Commission has articulated in *Harding Advisory,* Enforcement embarks on an attempt to dismiss the role of Geier Capital with respect to the Fund and Respondent's status as a person associated with an investment adviser and a supervised person. Initially, Enforcement asserts that Respondent's position that Geier Capital acted as the investment adviser to the Fund ignores statutory language and Commission precedent. Opposition Brief at 15. Enforcement then states "pursuant to Section 202(a)(11) of the Adviser's (sic) Act, 'any person' who provides investment advice for compensation (and is not within a statutory exemption) is an investment adviser. The fact that the advisory services are provided in the name of a partnership, limited liability company, or other legal entity does not shield the individual adviser from Section 206 liability." Opposition Brief at 15-16. However, the cases that Enforcement cites did not involve individuals who merely provided investment advice and received compensation; the cases involved associated persons who controlled the investment adviser through ownership or position. Enforcement next asserts that "whether an individual is subject to Section 206 turns on the functions the individual performs, not whether the individual controls the advisory firm. Enforcement's assertion is inconsistent with the Commission's pronouncement in *Harding Advisory* and is not supported by the cases that it cites.

Enforcement's argument that Respondent controlled Geier Capital fails or received compensation for advisory services from someone other than the Fund. fail.. With respect to control, Enforcement reverts to the notion that the performance of tasks is equivalent to ownership of an advisory firm, or occupying a control position, but such is not the case. Similarly, the notion that Respondent controlled Geier Capital because his father had an ownership interest in Geier Capital is a baseless assertion. Further, Respondent's Opening Brief demonstrates that James Hull controlled the Fund, Geier Capital and Geier Group. Hull also exercised economic control over Respondent. Opening Brief at 18-20. Accordingly, Respondent does not meet the test set forth by the Commission regarding the circumstances under which an associated person may be deemed to be liable for primary violations of Section 206 of the Advisers Act. In any event, the OIP does not allege that Geier Capital acted as the investment adviser to the Fund or that Respondent controlled Geier Capital. With respect to compensation from another source, that contention is addressed in Respondent's Opening Brief at 19.

ENFORCEMENT FAILED TO PROVE THAT RESPONDENT WAS SUBJECT TO AND BREACHED FIDUCIARY DUTIES

In its Opposition Brief, Enforcement purports to address Respondent's arguments regarding the Advisers Act and fiduciary duties, but misstates Respondent's argument, misstates or fails to address relevant legal principles, and fails to address disclosures of conflicts of interest in the Fund's Offering Documents.

Enforcement asserts that Respondent is arguing that obligations imposed by Section 206 of the Advisers Act were eliminated by the Fund's offering documents. In its Opposition Brief, Enforcement asserts that "Gibson contends that whatever his obligations under Section 206 might otherwise have been, they were eliminated by the Fund's offering documents." Opposition Brief at 20. Enforcement also asserts that "ALJ Murray was correct in concluding that the

offering documents did not eliminate Gibson's Section 206 obligations, including the obligation to disclose material conflicts of interest." Opposition Brief at 20.

In his Opening Brief, Respondent did not assert that obligations imposed by Section 206 of the Advisers Act, including obligations to disclose material conflicts of interest, were eliminated. Rather, Respondent argues that (i) Sections 206(1) and 206(2) have 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;" (ii) the Fund's Offering Memorandum and Operating Agreement (collectively, "the Offering Documents") disclosed material conflicts of interest and the Fund and Fund investors consented to such conflicts; and (iii) Respondent was permitted to engage in the transactions that are at issue in this proceeding. Opening Brief at 20-24.

In support of its contention that obligations under Section 206 cannot be nullified, Enforcement cites several cases that mention the construction of Section 206 as imposing fiduciary duties upon investment advisers, but such general statements do not address disclosure of and consent to conflicts of interest by investment advisers. Specifically, Enforcement does not address Commission pronouncements regarding disclosure of and consent to conflicts of interest and does not address amendments to the Advisers Act that specifically cover disclosure of and consents to conflicts of interest.

In proposing amendments to Form ADV, the Commission, in Investment Advisers Act Release No. IA-2711, stated:

> Unlike the laws of many other countries, the U.S. federal securities laws do not prescribe minimum experience or qualification requirements for persons providing investment advice. They do not establish maximum fees that advisers may charge. Nor do they preclude advisers from having substantial conflicts of interest that might adversely affect the objectivity of the advice they provide. Rather, investors have the responsibility, based on disclosures they receive, for selecting their own advisers, negotiating their own

fee arrangements, and evaluating their advisers conflicts. Amendments to Form ADV, Investment Advisers Act Release No. IA-2711, 92 SEC Docket 2278 (March 3, 2008).

Further, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[4] 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,

[4] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

absent another requirement to do so." *Id.* at 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 114-17.

Enforcement also misstates the disclosures contained in the Fund's Offering Memorandum and Operating Agreement. Enforcement asserts that "the offering documents stated only that Gibson and affiliated parties 'may have conflicts of interest' with the Fund. Div. Ex 24 at 19 (third paragraph). No specifics were provided." Opposition Brief at 22. Contrary to Enforcement's assertion that no specifics were provided, the Fund's Offering Memorandum and Operating Agreement contained extensive disclosures that address the transactions that are the subject of this proceeding. The Operating Agreement provided that the Managing Member and as well as other Members were permitted to engage in any other business in the securities industry and were permitted to compete with the Fund. The Operating Agreement also provided that the Managing Member and its affiliates and employees may act as investment advisers for others and may manage funds and capital for others. The Operating Agreement further 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 and entities described above and of the Company to take or liquidate the same investment positions at the same time and at the same prices." In addition, the Operating Agreement, at Section 3.02(h), provided that the Managing Member shall have the power "to enter into, make and perform any other contracts, agreements or other undertakings that 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 is affiliated." Resp. Ex. 13.

The Offering Memorandum contained similar disclosures and also stated that other entities and accounts with which members of the Managing Member were associated may implement investment strategies similar to or different than those of the Fund, and may have interests in securities in which the Fund invests and interests in securities in which the Fund does not invest. Most importantly, the Offering Memorandum stated that persons affiliated with the Managing Member may give advice or take action with respect to or on behalf of other entities and accounts that differs from the advice given with respect to the Fund. (Resp. Ex. 8 at 19).

In light of the foregoing, it is manifestly clear that the Offering Documents contained disclosures that addressed the transactions at issue in this proceeding and that Respondent was permitted to engage in securities transactions for his own account and for the accounts of others.

Enforcement's remaining contention that notwithstanding the disclosures of and consent to the conflicts of interest in the Operating Agreement, Respondent was obligated to make the same disclosures at the time of the transactions at issue is spurious. As authority for this proposition Enforcement cites the Expert Report of Dr. Gary Gibbons, a professor at a school of management and a principal in an investment adviser that was, but is no longer, registered with the Commission. Div. Ex. 185. In his report, Dr. Gibbons asserted that "it is widely understood in the investment advisory community that an adviser's federal fiduciary duties cannot be abrogated, delegated, transferred or in any other way eliminated or reduced, unilaterally or by agreement." Div. Ex. 185 at 18. Dr. Gibbons' assertion is directly contradicted by Section 211(g) of the Advisers Act, which specifically provides that an investment adviser may disclose and clients may consent to material conflicts of interest. Dr. Gibbons also asserted that "it is

well understood by industry professionals that "before-the-fact" disclosure of potential conflicts does not remove or satisfy the obligation to disclose actual conflicts whenever possible. Dr. Gibbons' assertion is contradicted by report prepared by the Staff pursuant to Section 913 of the Dodd-Frank Act.[5] In the Study, the Staff 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. Study at 114-17.

ENFORCEMENT FAILED TO PROVE THAT RESPONDENT ENGAGED IN FRONT RUNNING OR FAVORED A FUND INVESTOR OVER THE FUND

FRONT RUNNING

Enforcement has the burden to prove, by a preponderance of the evidence, that Respondent, as a fiduciary and without disclosure, used material, non-public information about a client to conduct transactions ahead of the client's transactions to secure a personal advantage for himself or a close friend or relative and thereby violated the antifraud provisions of the Advisers Act and the Exchange Act. In its Opposition Brief, Enforcement asserts that Respondent knew on September 26, 2011 that the Fund planned to sell a large block of TRX shares. (Opposition Brief at 25). And further asserts that the information regarding the Fund's intention to sell its TRX shares was material. (Opposition Brief at 25). However, Enforcement fails to carry its burden regarding the materiality and non-public nature of the information that Respondent possessed at the time of the relevant transactions.

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[5] U.S. SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS (2011)

In *Basic Inc. Levinson,* 485 U.S. 224, 231-32 (1988), the Supreme Court articulated the test for determining whether a fact is material: "There must [have been] a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having altered the "total mix" of information made available." The Court stated that when the fact involves a contingent or speculative event, materiality depends on "a balancing of both the probability and magnitude of the event in light of the totality of the company activity," and added that "no particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material" *Id.* at 239.

In applying the materiality standard articulated by the Supreme Court, lower courts have clearly stated that the materiality of information must be measured at the time of the relevant transaction. In determining the probability of the occurrence of a transaction, the court, in *Panfil v. ACC Corp.,*768 F. Supp. 54, 58-59 (W.D.N.Y. 1991), indicated that probability must be considered in light of the facts as they then existed, not with the hindsight knowledge that the transaction was or was not completed. As demonstrated in Respondent's Opening Brief, at the time that Respondent sold or recommended the sale of TRX securities, he did not possess material information regarding sales by the Fund of its TRX securities, rather he was aware only that the Fund was willing to sell its TRX shares at "good prices."

Further, in its Opposition Brief, Enforcement both mischaracterizes Respondent's argument and fails to address the totality of Respondent's argument regarding whether information that Respondent possessed was non-public. In a footnote in its Opposition Brief, Enforcement asserts that Respondent's argument regarding the dissemination of information concerning the Fund's TRX shares is predicated on a disclosure to a broker at Casimir that the Fund was seeking to sell its TRX shares. Enforcement then states that there is no evidence that

Casimir disclosed to anyone that the Fund (rather than another person or entity) was seeking to sell TRX shares." Opposition Brief at 27.

Respondent has argued 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 26,2011 as Respondent's inquiries on behalf of the Fund were directed to multiple firms. Evidence admitted in this matter establishes that, prior to the sales of TRX shares on September 26, 2011, Respondent advised a broker at GarWood Securities, where the Fund had maintained its brokerage account, that he would be hearing back later in the week regarding a potential sale of between 1,000,000 and 5,000,000 TRX shares. Resp. Ex 61. In a later email in the same email chain, Respondent indicates that the potential buyer is Reem Investments, which is the investment vehicle for an individual located in Abu Dhabi. A subsequent email, indicates that Respondent had not heard back from Luis Sequeira who was associated with Roheryn Investments and acted on behalf of Reem Investments. Resp. Ex. 89. Acccordingly, at least three firms and their associated persons that had dealt with TRX securities were aware that the Fund was inquiring whether there was interest in the Fund's TRX shares 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.

Similarly, Respondent did not know material 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 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 Sands and Casimir, Luis Sequeira and Roheryn

Investments, S. A., and Platinum Partners. 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, it is clear from the foregoing that Enforcement has failed to prove by a preponderance of the evidence that Respondent possessed non-public information concerning sales of TRX shares when he purchased or recommended the purchase of TRX put contracts.

FAVORING A FUND INVESTOR OVER THE FUND

As indicated in Respondent's Opening Brief, in addressing James Hull's sale of TRX securities to the Fund (the "Hull Transaction"), the ALJ inexplicably failed to address the relevant provision in the Fund's Operating Agreement. Section 3.02(h) of the Operating Agreement specifically authorized the Managing Member of the Fund to enter into transactions that it deemed advisable in conducting the business of the Fund. The Decision does not set forth a single statute, rule or decision by a judicial authority as a basis for ignoring the terms of the Operating Agreement, which is binding upon the Fund and its Members pursuant to Delaware law.

Enforcement attempts to salvage the ALJ's decision by stating that "Gibson fails to show that the general language of Section 3.02(h) of the operating agreement was understood at the time, or should be understood now, to supersede the more targeted provision in the offering memorandum." Opposition Brief at 29. In support of its argument, Enforcement cites *In re G-1 Holdings, Inc.*, 755 F.3d 751 (3rd Cir.1997) and includes a parenthetical which states "specific

provisions in a contract trump the general provisions." Enforcement erroneously tries to extend a principle regarding general and specific provisions in a contract to provisions in different documents. Specifically, Enforcement tries to argue that a provision in the Offering Memorandum is a specific provision that overtakes a general provision in the Operating Agreement. But the *G-1 Holdings* decision does not support Enforcement's argument. Rather, in *G-1 Holdings*, the Third Circuit stated that, in construing the terms of an agreement governed by the law of the state of Delaware, "we must heed the guidance of the Delaware courts and 'give priority to *the parties' intentions as reflected in the four corners of the agreement.*'" (citations omitted; emphasis supplied).[6] The court continued, "'[C]lear and unambiguous terms' in a contract are interpreted according to their ordinary meaning." *Id* at 202. Thus, the Division misstates the pronouncement by the Third Circuit. The court specifically stated that the parties' intentions as reflected in the four corners of the agreement govern. The court did not state that a provision in an agreement is trumped by a provision in another document. Thus, the Division's argument that a provision in the Offering Memorandum controls a provision in the Operating Agreement must fail. As the terms of Section 3.02 are clear and unambiguous, the Operating Agreement clearly permitted the sale of TRX shares by Hull to the Fund.[7]

Further, Enforcement's attempt to transform a guideline in the Offering Memorandum into a requirement that is binding upon the Fund, its Managing Member and its Members also fails. Enforcement asserts that because the "guideline" contained in the Offering Memorandum included the word "shall" it should be construed as a mandatory requirement. But a guideline which is defined as "a practice that allows leeway in interpretation" cannot be transformed into a

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[6] The Fund is a Delaware limited liability company and the Delaware Limited Liability Company Act provides that a limited liability company and its members are bound by the terms of its operating agreement. Del. Code Ann. tit. 6, § 18-1101(b).

[7] The other decisions Enforcement relies upon are equally unpersuasive..

requirement.[8] Not surprisingly, Enforcement offers no authority for this proposition. Thus, Enforcement has failed to carry its burden that the guideline contained in the Offering Memorandum governs the transaction in which Hull sold his shares to the Fund.

Enforcement's arguments that that the Fund acquired shares from Hull at other than current market prices is unpersuasive. The transaction was completed at the closing price of the stock on the day of the transaction. In the absence of a definition of the term "current market price" as used in the Offering Memorandum, the closing price of the stock appears appropriate. Similarly, Enforcement failed to prove that the Fund paid an extraordinary commission. The transaction between Hull and the Fund did not result in a commission being imposed on either party. Resp. Ex. 113.

ENFORCEMENT FAILED TO PROVE THAT RESPONDENT VIOLATED ADVISERS ACT SECTION 206(4) AND RULE 206(4)-8

In its Opposition Brief, Enforcement argues that Respondent made certain affirmative misrepresentations to Fund investors and engaged in conduct that rendered disclosures in Offering Documents false and misleading. Enforcement's assertions suffer from a number of infirmities.

With respect to affirmative misrepresentations, Enforcement asserts that Respondent, on September 23, 2011, informed investors that the Fund would not sell its TRX holdings and that it was a material omission for Respondent to fail to notify investors that the Fund had reversed position and decided to liquidate its TRX holdings. Enforcement also asserts that Respondent affirmatively misrepresented his evaluation of TRX, its management, and the likelihood that the TRX share price would increase. Opposition Brief at 33.

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

As indicated in Respondent's Opening Brief, the OIP does not contain any allegations regarding statements to investors on September 23, 2011 concerning the Fund's intention to retain its TRX securities and any subsequent change in the Fund's position regarding its TRX securities. Similarly, the OIP does not contain an allegation that Respondent misrepresented to investors his evaluation of TRX, its management or the likelihood that the TRX share price would increase. As the OIP does not contain allegations regarding the affirmative misrepresentations that Enforcement now asserts, Respondent was not provided notice and an opportunity to defend against such allegations. As the Court of Appeals for the Second Circuit stated in *Securities and Exchange Commission v. Jaffee,* 446 F.2d 387, 394 (2d Cir. 1971),

> As in other similar contexts, a primary purpose of the notice requirement in this case is to permit the respondent a reasonable opportunity to prepare a defense against the theory of liability invoked by those who institute the proceedings against it. A respondent may not reasonably be expected to defend itself against every theory of liability or punishment that might theoretically be extrapolated from a complaint or order if one were to explore every permutation of fact and law there alluded to or asserted.

With respect to conduct that rendered the Fund's Offering Documents misleading, Enforcement asserts that "Gibson's front running made the offering documents misleading because they did not disclose that he could or would engage in front running" and that "Gibson's purchase of Hull's TRX shares in October 2011, on terms inconsistent with the offering memorandum, rendered the offering memorandum misleading." Again, the OIP does not allege that the Offering Documents were rendered misleading because of conduct in which Respondent subsequently engaged. Moreover, the record in this matter establishes that the last investments in the Fund occurred on or before March 1, 2011. (Div. Ex. 57 and Div. Ex. 58). As the OIP

was entered on March 29, 2016 any cause of action relating to the Offering Documents is barred by the applicable statute of limitations.[9]

Finally, Enforcement's contention that a reference in the OIP to unspecified provisions in the offering documents which purportedly stated that investors "would be treated fairly and equitably," is an insufficient predicate for liability for violations of Section 206(4) and Rule 206(4)-8. Such an approach was rejected by the Second Circuit in *Jaffee*. The Second Circuit stated:

> The Commission argues that notice is always sufficient whenever an order for hearing includes somewhere within its four corners a reference, however veiled and indistinct, to the facts and law which together would support the liability ultimately imposed. But such a mechanistic approach to the notice and hearing requirements of Section 15(b)(5) ignores the interrelationship between those two requirements and thus elevates form over function. *Id.* at 394.

ENFORCEMENT FAILED TO DEMONSTRATE THAT RESPONDENT ACTED WITH THE REQUISITE MENTAL STATE

With respect the allegation that Respondent engaged in front running in September 2011, Enforcement contends that the Decision found that Respondent acted with scienter and knowingly when he engaged in front running on September 26, 2011 and that Respondent does not address that finding.

Contrary to Enforcement's assertion, Respondent argued that the question of whether a person acted with the requisite intent in failing to disclose a material, non-public fact is inextricably connected to the materiality and non-public nature of such fact.[10] Respondent further argued that the Decision failed to articulate standards for analyzing the materiality and

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[9] *See Gabelli v. Securities and Exchange Commission, 568 U.S. 133 (2013).*

[10] *See, City of Dearborn Heights Act 345 Police & Fire Retirement System v. Waters Corporation,* 632 F.3d 751 (1st Cir. 2011).

non-public nature of the information that Respondent allegedly failed to disclose and that an analysis of such information supports a conclusion that the information was not material and was not non-public. Opening Brief at 27. Respondent made a similar argument with respect to alleged front running in connection with put transactions, but Enforcement did not address the issue of Respondent's mental state in connection with the put transactions.

With respect to the Hull Transaction, Enforcement merely states that the Decision correctly determined that Respondent violated Sections 206(1) and (2). Enforcement describes that determination as "Gibson, 'acting with scienter,' engaged in an 'undisclosed, sweetheart deal' that favored Hull over the Fund." Opposition Brief at 31. However, as with the alleged failure to disclose material, non-public information in connection with sales of TRX shares and the purchase of TRX put contracts, the evidentiary record establishes that the transaction was expressly permitted by the Fund's Operating Agreement which was binding on the Fund and its Members, as Respondent argued in his Opening brief.

As the findings and conclusions concerning violations of Section 206(4) and Rule 206(4)-8 concern matters that were not alleged in the OIP and/or are barred by the applicable statute of limitations, Respondent's mental state regarding such matters is not relevant to this matter. Moreover, Enforcement does not address the requisite state of mind with respect to the alleged violations of Section 206(4) and Rule 206(4)-8.

ENFORCEMENT FAILED TO DEMONSTRATE THAT THE SANCTIONS IMPOSED ARE APPROPRIATE

In its Opposition Brief, Enforcement asserts that Respondent argued that an associational bar and a cease-and-desist order were inappropriate because Respondent did not harm the Fund

and because the purchase of securities from Hull was for the benefit of the Fund. Enforcement has not addressed or contested Respondent's argument regarding an associational bar.

In his Opening Brief, Respondent argued that this proceeding was instituted pursuant to Section 203(f) of the Advisers Act. In *George Charles Cody Price,* Investment Advisers Act Release No. 4631 (Jan. 30, 2017), the Commission stated that

> Advisers Act Section 203(f) authorizes us to impose an industry bar if (1) a person has been, among other things, enjoined from any conduct or practice in connection with the purchase or sale of a security; (2) at the time of the alleged misconduct, the person was associated with an investment adviser; and (3) a bar is in the public interest.

The OIP in this matter does not allege that Respondent was associated with an investment adviser at the time of the alleged misconduct. Rather, the OIP alleges that Respondent acted as an investment adviser.[11] As the OIP does not allege the existence of an investment adviser with which Respondent could have been associated at the time of the alleged misconduct, the OIP has failed to provide notice and an opportunity to defend against allegations that could support the imposition of an associational bar. *See, Securities and Exchange Commission v. Jaffee,* 446, F.2d 387 (2d Cir. 1971).[12] In light of the foregoing, the proceeding that has been instituted pursuant to Section 203(f) should be dismissed and any sanctions or relief that is premised upon a proceeding pursuant to Section 203(f) should also be dismissed, including any monetary penalty pursuant to Section 203(i) of the Advisers Act.

With respect to a cease-and-desist order, Respondent has argued that the factors that the Commission has considered in determining whether to enter cease-and-desist orders weigh

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[11] *See* OIP at Paragraphs 1 and 19.

[12] Although Enforcement is precluded from now asserting that Respondent was associated with Geier Capital at the time of the alleged misconduct, such an effort would be unavailing as Geier Capital ceased to meet the definition of the term "investment adviser" once the payment of management fees was suspended and not resumed before it was terminated as a limited liability company in December 2011.

against the entry of such an order in this matter. As discussed above, the evidentiary record in this matter demonstrates that the Fund's Offering Documents clearly addressed the conduct at issue in this matter; accordingly, Respondent could not be found to have acted in an egregious manner and there has been no allegation of misconduct either prior or subsequent to the conduct at issue.

With respect to disgorgement, Enforcement contends only that "profits" from Respondent's transactions in put contracts are separate from Respondent's losses through his investment in the Fund. Not only does Enforcement fail to provide any authority for such a proposition, but it is not supported by the evidentiary record in this matter. At the time that Respondent sold TRX shares and purchased TRX put contracts, his assets and proceeds from a loan extended to him by Hull were invested in the Fund and the Fund held TRX securities. In particular, the TRX put contracts that Respondent purchased were protective puts which were acquired because of the decline in the value of TRX securities held by the Fund and the prospect that he would be unable to repay his loan from Hull if the price of TRX continued to decline. Respondent's transactions in TRX securities and TRX-related securities are inextricably linked to his role with the Fund and his beneficial ownership of TRX securities through the Fund. Accordingly, Enforcement has failed to demonstrate that the transactions in Respondent's brokerage account are separate from his investment in the Fund and that proceeds from such transactions are subject to disgorgement.

CONSTITUTIONAL CHALLENGE

In its Opposition Brief, Enforcement contends that the Commission has consistently held that the requirements of the Appointments Clause[13] apply only to officers of the United States, not employees, and that ALJs are employees. Enforcement adds that the Commission has reiterated its holdings in decisions issued after the Tenth Circuit issued its decision in *Bandimere v. Securities and Exchange Commission,* 844 F.3d 1168 (10th Cir. 2016) and that the Commission's position remains correct.

While Enforcement may be precluded from asserting a position contrary to the Commission's regarding the Appointments Clause issue, the Commission may adopt a position that differs from the positions it has taken to date. As the Tenth Circuit's opinion in *Bandimere* is persuasive, the Commission should follow the Tenth Circuit in this matter.[14]

PROCEDURAL ERRORS

During the hearing in this matter and in his Opening Brief, Respondent objected to the admission of Division Exhibit 183, purportedly a recording of a conversation between

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[13] 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.

[14] 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. 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). On June 26, 2017, the D.C. Circuit issued an order in which it stated that the court had divided evenly and that the petition for review filed by Raymond J. Lucia Cos., Inc. had been denied. *Raymond J. Lucia Cos., Inc. v. Securities and Exchange Commission,* No. 15-1345 (June 26, 2017).

Respondent and Luis Sequeira, and Division Exhibit 183A, a transcript of the recording on multiple grounds. Enforcement merely asserts that Respondent argued that the recording and the transcript should not have been admitted because they were inadequately identified and are therefore unreliable. Enforcement also asserts that Respondent identified the recording, described the circumstances surrounding the conversation, and never contended that the recording was inaccurate. Contrary to Enforcement's assertions, Respondent objected to the admission of the recording and transcript on multiple grounds, including that Enforcement had not established how the recording was made, by whom the recording was made, whether it had been altered, where the recording was made, by whom the recording was made and each of the persons who possessed the recording before it was provided to Enforcement. As Enforcement has not addressed such matters, Exhibits 183 and 183A should be stricken from the record in this matter.

Enforcement also argues that Division Exhibits 184 and 187, the report and rebuttal report of Dr. Taveras, were properly admitted because the reports involved the application of specialized knowledge grounded in Dr. Taveras' professional training as an economist. However, Respondent's objection was not directed at Dr. Taveras' "specialized knowledge," but rather was directed at the absence of the application of specialized knowledge in her reports because the reports reflected simple mathematical calculations. Accordingly, Division Exhibits 184 and 187 should not have been admitted into evidence.

In its Opposition Brief, Enforcement asserts that Division Exhibits 185 and 188, the report and rebuttal report of Dr. Gary Gibbons, did not reflect legal opinions, but rather the understanding in the investment advisory community regarding the fiduciary duties of investment advisers, the interpretation of advisory agreements, and the nature of front running.

The matters identified by Enforcement are unquestionably legal issues and Dr. Gibbons' report and rebuttal report either constitute legal conclusions (which Dr. Gibbons is not qualified to offer) or constitute the understanding of the investment community regarding legal issues which is irrelevant to a judicial forum's determination of legal issues.

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 3rd day of July, 2017

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CERTIFICATE OF COMPLIANCE

This brief complies with SEC Rule 450 in that it contains 6,981 words.

Thomas A. Ferrigno

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2017:

(i) the foregoing Reply 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 A. Ferrigno