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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.

RESPONDENT'S BRIEF REGARDING NEW EVIDENCE AND CHALLENGED RULINGS, FINDINGS, AND CONCLUSIONS

February 14, 2018

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INTRODUCTION

On November 29, 2017, the Solicitor General of the United States filed a brief with the Supreme Court on behalf of the Securities and Exchange Commission in *Lucia v. Securities and Exchange Commission,* Case No. 17-130 (the "SEC Brief"). The Solicitor, in the SEC Brief, stated "In prior stages of this case, the government argued that the Commission's ALJs are mere employees rather than "Officers" within the meaning of the Appointments Clause. Upon further consideration, and in light of the implications for the exercise of executive power under Article II, the government is now of the view that such ALJs are Officers because they exercise 'significant authority pursuant to laws of the United States.' *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)." In *Lucia,* the Commission acknowledged that its ALJs have not been appointed in accordance with Art. II, § 2 Cl. 2.[1] In light of the foregoing, administrative proceedings pending before or presided over by Commission ALJs are violative of the Appointments Clause.

In an effort to forestall the consequences of the untenable position the Commission had adopted regarding its ALJs in numerous administrative proceedings, the Commission, on November 30, 2017, entered an order regarding pending administrative proceedings (the "Ratification Order").[2] In the Ratification Order, the Commission stated: "To put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause, the Commission-in its capacity as head of a department-hereby ratifies the agency's prior appointment" of its administrative law

[1] ("The Commission's ALJs are selected by its Chief ALJ, subject to approval by the Commission's Office of Human Resources on the exercise of authority delegated by the Commission." SEC Brief at 3.)

[2] *In re: Pending Administrative Proceedings,* Securities Act Release No. 10440 (November 30, 2017).

judges. The Ratification Order also remanded matters pending before the Commission to the ALJ who had issued an initial decision.[3] The Commission's Ratification Order further directed ALJs to (i) reconsider the record; (ii) issue an order granting parties an opportunity to submit new evidence; (iii) determine whether to ratify or revise all of his or her prior actions; and (iv) issue an order stating that he or she has completed the reconsideration and setting forth his or her determination regarding ratification. On December 12, 2017, an order was entered in this matter directing the parties to file any new evidence, as well as a brief explaining the relevance of such new evidence and identify any challenged rulings, findings and conclusions.[4]

CHALLENGES TO RULINGS, FINDINGS AND CONCLUSIONS

Respondent challenges each of the rulings, findings and conclusions made by the ALJ who presided over this proceeding. Challenges to each of the rulings, findings and conclusions are based upon the improper delegation of appointment power by the Commission with the result that the ALJ who presided over this proceeding was not appointed in accordance with the Appointments Clause of the U.S. Constitution. Further, the Commission's Ratification Order does not constitute an appointment of Commission ALJs in accordance with the Constitution. Challenges are also based upon the unconstitutional statutory scheme which provides the Commission's ALJs with two levels of protection from removal. In addition to the constitutional challenges to each and every ruling, finding and conclusion made by the ALJ, Respondent sets

[3] The Ratification Order attached as Exhibit A, a list of such matters which included this matter.
[4] *Order Regarding the Securities and Exchange Commission's Order on Pending Administrative Proceedings,* Administrative Proceedings Rulings Release No. 5371, December 12, 2017. On January 2, 2018, Chief Administrative Law Judge Brenda P. Murray entered an *Order on Motion to Extend Time,* which extended the time for the parties in this matter to submit new evidence and identify challenged rulings, findings and conclusions. Administrative Proceedings Rulings, Release No. 5429 (January 2, 2018).

forth specific challenges to rulings, findings and conclusions and includes explanations of the relevance of new evidence that is filed with this brief.

APPOINTMENTS CLAUSE

The U. S. Constitution, in relevant part, provides that "the Congress may by law vest the Appointment of such inferior Offices, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments." Art. II, § 2 Cl. 2. The Supreme Court has construed the Appointments Clause as preserving the Constitution's structural integrity by preventing the diffusion of the appointment power. *Freytag v. Commissioner,* 501 U.S. 868, 878 (1991). The Supreme Court underscored the importance of the Appointments Clause to structural integrity in *Edmond v. United States,* 520 U.S. 651 (1997). ("the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Id.* at 659. And the SEC Brief acknowledges the significance of the Appointments Clause: "The requirements of the Appointments Clause are 'among the significant structural safeguards of the constitutional scheme' and are 'designed to preserve political accountability relative to important Government assignments.' *Edmond v. United States,* 520 U.S. 651, 659, 663 (1997)." (SEC Brief at 11).

With respect to the determination of whether a person is serving as an "officer" as the term is used in the Appointments Clause, the Supreme Court, in *Buckley v. Valeo,* 424 U.S.1, 126 (1976), stated "We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl.2, of that Article." And in *Freytag*, the Supreme Court addressed the line between constitutional officers and employees. The Supreme Court, in *Freytag,* determined that the Tax Court's special trial judges occupy an office

established by law, and that their duties, salary and means of appointment are specified by statute. *Id.* at 881. The Supreme Court noted that the Tax Court's special trial judges take testimony, conduct trials, rule on the admissibility of evidence and have the power to enforce compliance with discovery orders. *Id.* at 881-882. The Court concluded that special trial judges exercise "significant discretion." *Id.* at 882. The Supreme Court has also addressed a litigant's rights with respect to a failure to comply with the Appointments Clause. In *Ryder v. United States,* 515 U.S. 177 (1995), the Supreme Court held that a petitioner whose conviction had been upheld by an appellate panel which included two judges who had been appointed in violation of the Appointments Clause was "entitled to a hearing before a properly appointed panel of that court." *Id.* at 188.[5] The Tenth Circuit, in *Bandimere v. Securities and Exchange Commission,* 844 F.3d 1168 (10th Cir. 2016), followed *Freytag* and concluded that the SEC's ALJs were inferior officers who had not been appointed in accordance with the Appointments Clause and, as in *Ryder,* stated that the resolution of the constitutional issue "relieved Mr. Bandimere of all liability." *Id.* at 1172.

The SEC Brief states that "*Freytag* demonstrates that the Commission's ALJs are 'inferior officers' rather than 'mere employees.' 501 U.S. at 882." (SEC Brief at 14). The SEC Brief also acknowledges that the Commission's ALJs were not appointed in accordance with Art. II, § 2 Cl. 2. ("The Commission's ALJs are selected by its Chief ALJ, subject to approval by the Commission's Office of Human Resources on the exercise of authority delegated by the Commission." (SEC Brief at 3.) As prescribed by the Supreme Court, an order of the Commission instituting an administrative proceeding and ordering a hearing before an

[5] *See also, Nguyen v. United States,* 539 U.S. 69 (2003), (rejecting the *de facto* officer doctrine and vacating the judgments based upon a determination that a panel of the Ninth Circuit comprised of two Article III judges and one Article IV judge lacked authority to decide appeals.)

REMOVAL OF OFFICERS

In addition to construing the Constitution's provision regarding the appointment of officers, the Supreme Court has construed the constitutional standards regarding the removal of officers. In *Free Enterprise Fund v. PCAOB,* 561 U.S. 477 (2010), the Supreme Court stated that "The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President 'the general administrative control of those executing the laws.'" *Id.* at 492. The Court, citing *Myers,* further stated that "the President must have some 'power of removing those for whom he cannot continue to be responsible.'" *Id.* at 493. The Court, in *Free Enterprise Fund,* invalidated the statutory scheme that provided for two levels of protection against presidential removal authority. *Id.* at 495 ("Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. . . That arrangement is contrary to Article II's vesting of the executive power in the President.").

The SEC Brief acknowledged that the statutory scheme regarding the Commission's ALJs provides for at least two and potentially three levels of protection against presidential removal authority. The SEC Brief states: "The Commission's ALJs may be removed by the Commission 'only for good cause established and determined by the Merit Systems Protection Board,' 5 U.S.C. 7521(a), and members of that Board in turn 'may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office,' 5 U.S.C. 1202(d). And the Commissioners likewise may be insulated from removal (as the Court assumed in *Free Enterprise Fund*)." (SEC Brief at 20).

The statutory scheme for removal of Commission ALJs is similar to (and likely more problematic than) the statutory scheme regarding members of the PCAOB, which was

determined to be impermissible in *Free Enterprise Fund.* Accordingly, the statutory scheme for removal of the Commission's ALJs impairs the President's ability to ensure that the laws are faithfully executed, and violates the Constitution. As the limitations imposed on the President by the statutory scheme are impermissible, administrative proceedings presided over by the Commission's present ALJs violate the Constitution.

CHALLENGES TO SPECIFIC RULINGS, FINDINGS, AND CONCLUSIONS

The ALJ made findings and conclusions that Respondent acted as an investment adviser to a private fund and that Respondent violated the Investment Advisers Act and the Securities Exchange Act and rules thereunder by engaging in front running, favoring an investor in a fund, and by making misrepresentations to fund investors or failing to disclose information to fund investors. In the Decision, the ALJ makes findings of fact that are not supported by the record, fails to make findings of fact that are clearly supported by the record, fails to observe controlling precedent and fails to apply legal standards that the ALJ sets forth in the Decision. As demonstrated below, the ALJ's errors were material and not harmless, and the Decision should be set aside.

RESPONDENT DID NOT ACT AS AN INVESTMENT ADVISER TO THE FUND

The ALJ erroneously concluded that Respondent acted as the investment adviser to Geier International Strategies Fund, LLC (the "Fund") during the period when the acts alleged to have violated the Advisers Act and the Exchange Act occurred. In support of this conclusion, the ALJ merely cites the definition of the term "investment adviser" contained in Section 202(a)(11) of the Advisers Act,[6] recites activities in which Respondent allegedly

[6] 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. . .

engaged, and notes compensation which Respondent allegedly received from a third party. The ALJ does not cite any authority for the proposition that the activities in which Respondent allegedly engaged and the compensation that Respondent received from a third party are sufficient to establish that Respondent acted as an investment adviser. Further, the ALJ ignores the relevant provisions of the Operating Agreement of Geier International Strategies Fund, LLC (the "Operating Agreement"), which vested discretion in Geier Capital, LLC ("Geier Capital") to make investments on behalf of the Fund and which provided for the payment of fees to Geier Capital. Further, the ALJ does not cite any authority for the proposition that the elements of the advisory relationship between the Fund and Geier Capital reflected in the Operating Agreement may be disregarded. Finally, the ALJ does not address the standard articulated by the Commission regarding when an individual associated with an investment adviser may be exposed to primary liability for violations of Section 206 of the Advisers Act.

The ALJ erroneously focused upon certain "activities" or "functions" in which Respondent engaged and based solely upon such activities and compensation from a third party concluded that Respondent acted as the Fund's adviser. Moreover, many of the activities that the ALJ cited do not involve "advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities."

The Decision states that "Gibson came up with the plan for organizing the Fund and worked on the documents creating the Fund," and that "Gibson created two entities in

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as to the value of securities or as to the advisability of investing in, purchasing, or selling securities."

connection with the Fund: one to receive the management fee and another to 'receive the performance allocation in order to position the managing member to capitalize on the potential for carried interest.'" (Decision at 23). The ALJ's findings regarding the creation of two entities are incorrect. The evidence admitted in this matter establishes that the two entities, Geier Capital and Geier Group, were formed at a time when Respondent and James Hull were involved with the Gibson Fund and the Hull Fund. (See Resp. Exs. 2 and 6). Moreover, neither formulating a plan for organizing a fund and working on organizational documents, nor creating entities in connection with the formation of a fund constitute engaging in the business of advising others as to the value of securities or as to the advisability of investing in securities.

The ALJ states that the Fund, Geier Capital and Geier Group had no employees. (Decision at p. 24). Whether Geier Capital or Geier Group had any employees is irrelevant to a determination regarding the investment adviser to the Fund. Further, this finding and conclusion is at odds with another finding and conclusion made by the ALJ: "The POM described Gibson as Geier Capital's managing director," and " as Geier Group's managing member." (Decision at 23). Further, the Fund, Geier Capital, and Geier Group were organized as limited liability companies and, as such, had members; Hull and Respondent were members of 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 24). The ALJ's finding regarding office space is irrelevant to a determination regarding a person's status as an investment adviser.

The ALJ also describes certain "functions" which Respondent performed.[7] The "functions" included 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. The functions that the ALJ cited do not establish that Respondent acted as an investment adviser to the Fund.[8] Rather, the functions that the Decision references are commonly performed at investment advisers by supervised persons and persons associated with investment advisers.

With respect to compensation, 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 25). The record in this matter established 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.

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[7] In identifying the "functions," the Decision references an expert report tendered by the Division of Enforcement, Div. Ex. 185, Expert Report of Dr. Gary Gibbons. The ALJ's reliance on the Expert Report of Dr. Gary Gibbons is wholly misplaced. The issue of whether Respondent acted as an investment adviser is a legal issue and Dr. Gibbons, who is a professor at a school of management and associated with a state registered investment adviser, is not qualified to express an opinion on a legal issue.

[8] The Decision states that "Gibson tracked general market conditions, monitored macroeconomic trends that impacted the market, tracked the daily performance of the Fund's portfolio, negotiated fund transactions, corresponded with investors, dealt with brokers, and communicated with managers of companies whose stock the Fund owned. Gibson was the authorized signatory of Fund accounts, he reported to investors, he met with potential investors, promoted Fund investments, answered questions, sent out reports and statements, and decided on investments with Hull. Gibson signed the Form D, Notice of Exempt Offering of Securities with the Commission on February 11, 2010, as managing director of the managing member." (Decision at 24) (Citations omitted).

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 as that term is defined in Section 202(a)(11). However, Section 202(a)(11) does not define an investment adviser in terms of activities in which a person engages. Rather, Section 202(a)(11) defines an investment adviser in terms of being in the business of providing advisory services "to others" for compensation. Thus, the definition of the term "investment adviser" involves a contractual relationship between an investment adviser and "others".[9] The Decision does not contain findings or conclusions regarding the formation of an advisory contract or relationship between the Fund and Respondent. In particular, the Decision does not contain findings regarding the advisory services that the Fund engaged Respondent to perform and the Decision does not contain findings regarding the compensation that Respondent would receive for the services which he performed for the Fund. Moreover, the Decision does not provide authority for the proposition that the Division of Enforcement or an administrative law judge can terminate a contract that the parties entered into and replace it with a contract envisioned by the government which has been agreed to or executed by no one.

The Fund Engaged Geier Capital to Provide Investment Advice

Although the ALJ found that "[t]he Fund's operating agreement provided that the Fund would be managed by the managing member," (Decision at 5), and that "Geier Capital was the

[9] *See,* Section 202(a)(1) "Assignment" includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor"; *see, also,* Section 205(d) "Investment Advisory Contract " Defined. As used in paragraphs (2) and (3) of subsection (a), "investment advisory contract" means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person.")

Fund's managing member and Gibson was managing director of the managing member." (Decision at 4), the ALJ proceeds to ignore the existence and terms of the Operating Agreement when determining that Respondent acted as the Fund's investment adviser. In fact, the Fund's Operating Agreement was more than explicit in establishing an advisory relationship between the Fund and Geier Capital. The Fund's Operating Agreement provided, among other things, that (i) 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."[10] (Resp. Ex. 13). The Operating Agreement further provided that Geier Capital was authorized to retain Geier Group as Investment Manager; and provided for the payment of management fees and an incentive allocation to Geier Capital and Geier Group. (Resp. Ex. 13). The Decision does not cite authority for its disregard of the Fund's Operating Agreement which is binding upon the Fund and its Members, including Fund investors, or its disregard of Hull's and Respondent's status as members of Geier Capital and Geier Group.

The record in this matter establishes that Geier Capital and Geier Group, rather than Respondent, acted as investment advisers to the Fund. 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 James Hull and Respondent were members of Geier Capital and Geier Group and in that capacity were involved in the

[10] Section 3.02 provided, among other things, that the Managing Member shall have the power to purchase, hold, sell and otherwise deal in securities of any sort and rights therein, on margin or otherwise; and to write, purchase, hold, sell and otherwise deal in put and call options of any sort and in any combination thereof.

management of the Fund.[11] In light of the services they performed, Hull and Respondent acted as persons associated with an investment adviser and supervised persons.[12]

Thus, the record in this matter reflects an advisory relationship between the Fund and Geier Capital. That advisory relationship encompassed the services that were to be performed and the compensation to be paid. In particular, the Fund's Operating Agreement indicated that Geier Capital would exercise investment discretion on behalf of the Fund and indicated the compensation that would be paid by the Fund to Geier Capital. The record also establishes that Respondent performed advisory services in his capacity as a person associated with Geier Capital.

The ALJ's conclusion that "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) is clearly erroneous as the ALJ failed to apply the legal standard articulated by the Commission for determining the circumstances under which an associated person may be liable for primary violations of Section 206.

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

[11] John Gibson, Respondent's father, was a member of both Geier Capital and Geier Group, but did not participate in the management of the Fund.
[12] 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.

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 under 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 ALJ continued "The Ultra Short Fund had an agreement with Evergreen and it paid Evergreen for the advisory services it provided. Premo was not Evergreen's alter ego, and she did not own or control Evergreen."

As in *Premo,* the Fund was bound by the Operating Agreement which provided that Geier Capital shall exercise investment discretion on behalf of the Fund and shall receive fees for managing the Fund. And as in *Premo,* 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 and friends 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, principally gold and silver, 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 Geier 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 so at good prices."

That Respondent did not control the Fund is confirmed in the Affidavit of James M. Hull. (Resp. Ex. 178). In his affidavit, Hull states "Christopher Gibson could not have known on September 26, 2011, that the Geier Fund was going to sell 3.7 million shares of TRX stock on September 27, 2011, because that was not a decision he alone had the authority to make."

Hull also exercised economic control over Respondent. At Hull's suggestion, Respondent, in order to demonstrate his commitment to their undertaking, accepted a loan from Hull and invested the proceeds in the Fund.[13] Further, Hull's interest in the Fund was approximately 80% and Hull's friends and 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 Respondent, the Fund, and Geier Capital. Thus, the evidence admitted in this matter conclusively

[13] The loan was memorialized by a demand note that bore interest at a rate of 8% per year. Similarly, Hull suggested that Respondent's father accept additional funds from Hull and invest them in the Geier Fund. Such funds were also subject to a demand note that bore interest at a rate of 8% per year.

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

RESPONDENT DID NOT BREACH FIDUCIARY DUTIES

The ALJ made numerous errors regarding disclosures in contained in the Private Offering Memorandum of Geier International Strategies Fund, LLC (the "Offering Memorandum") and the provisions in the Fund's Operating Agreement concerning conflicts of interest. Initially, the ALJ erroneously states that "the validity of the Fund's basic conflicts of interest protections is not the issue." (Decision at 28). Then, the Decision sets forth a contradictory and incorrect statement that "The Fund's *basic documents allowed sales in privately held accounts that were contrary to the Fund's position,* however, this sale by Gibson of his privately owned and controlled shares contradicted the information he was withholding and providing to Fund investors." (emphasis supplied) (Decision at 33). Similarly, the Decision is erroneous when it states "The law is clear that an investment adviser is obliged to put the Fund before his or her personal benefit. The conflicts of interest provision in the Fund's documents did not abrogate this responsibility. Investors who testified were knowledgeable about, and comfortable with, the conflicts of interest language in the documentation, but this is irrelevant because none of them thought they were relinquishing their right to fair treatment and agreeing to material misstatements and material omissions." (Decision at 34).

The ALJ's statement that the Fund's disclosures regarding conflicts of interest are not the issue is inconsistent with the Supreme Court's construction of the Advisers Act, the Commission's pronouncements regarding disclosure of, and consent to, conflicts of interest

and recent amendments to the Advisers Act that specifically address disclosure of and consent to conflicts of interest.

While Sections 206(1) and 206(2) of the Advisers Act proscribe certain fraudulent and deceptive acts and practices[14] and have been construed as imposing fiduciary duties on investment advisers, including a duty of loyalty, these 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. 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 holding that the Advisers Act empowers the courts to require an adviser to make full and frank disclosure regarding a practice of trading on the effect of its recommendations, the Court noted that an investor seeking the advice of a registered investment adviser must, if the legislative purpose is

[14] Section 206(1) prohibits an investment adviser from employing "any device scheme or artifice to defraud any client or prospective client" and Section 206(2) prohibits an investment adviser from engaging in "any transaction, practice or course of business which operates as a fraud or deceit on any client or prospective client."

to be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure. *Id.* at 196.

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 ("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.[15] 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.[16] Further, Section 913 of

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[15] Section 211(g), Standard of Conduct, provides, in relevant part, as follows:
(1) In General. – The Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment adviser, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer or investment adviser providing the advice. In accordance with such rules, any material conflict of interests shall be disclosed and may be consented to by the customer.

[16] Section 211(h), Other Matters, provides as follows: "The Commission shall – (1) Facilitate the provision of simple and clear disclosures to investors regarding the terms of their

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 Act 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 that "While the duty of loyalty requires a firm to eliminate or disclose material conflicts of interest, it does not mandate absolute elimination of any particular conflicts, 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.

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relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and (2) Examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors."

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.[17] 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 each of its members.[18]

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

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[17] Section 3.01 of the Operating Agreement, in relevant part, 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. Without limiting the generality of the foregoing, the Managing Member (or any of its affiliates or employees) may act as investment adviser or investment manager for others, may manage funds or capital for others, and may serve as an officer, director, consultant, partner, stockholder of one or more investment funds, partnerships, securities firms or advisory firms. 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."

[18] Del. Code Ann. Tit. 6, § 1101(b).

securities and purchase put contracts on TRX securities. Similarly, Respondent could not be exposed to liability in connection with Hull's sale of TRX securities to the Fund as the Operating Agreement permitted the Managing Member to enter into contracts which it deemed advisable. Specifically, Section 3.02(h) of the Operating Agreement provides that Geier Capital, the Managing Member of the Fund, 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 ALJ found that the "Fund's basic documents allowed sales in privately held accounts that were contrary to the Fund's position." (Decision at p. 33).[19] 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 113).

However, the ALJ erroneously tries 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

[19] 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. (Initial Decision at p. 28).

false representations, 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."[20] (Decision at p. 33). Second, whatever thoughts a particular investor 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.[21]

ERRONEOUS FINDINGS AND CONCLUSIONS REGARDING VIOLATIONS OF THE ADVISERS ACT AND THE EXCHANGE ACT

The ALJ erroneously found and concluded that Respondent violated the Advisers Act and the Exchange Act by engaging in and recommending transactions in the securities of Tanzanian Royalty Exploration Corporation ("TRX") in advance of transactions in TRX

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[20] 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).

[21] 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.

securities by the Fund, by favoring a Fund investor over the Fund, and by making misrepresentations to Fund investors statements and failing to disclose information to Fund investors.

Erroneous Findings And Conclusions Regarding Front Running

The ALJ erroneously concluded that Respondent engaged in front running in connection with sales of TRX securities and the purchase of put contracts on the securities of TRX. On September 26, 2011, Respondent sold TRX securities held in his personal account, the account of a personal friend and the account of Geier Group. The sales of TRX securities occurred a day prior to the Fund's sale of TRX securities. The ALJ also erroneously concluded that Respondent engaged in front running when he purchased put contracts on the securities of TRX for his personal account and the account of a friend and when he recommended that his father purchase put contracts in connection with his liquidation of a position in TRX securities held in his IRA account.

The Sales of TRX Securities. The ALJ's findings and conclusions regarding sales of TRX securities on September 26, 2011 are erroneous. In particular, the definition of front running adopted by the ALJ is not supported by relevant authority; the ALJ's reliance on findings related to Respondent's credibility is erroneous; the ALJ's findings and conclusions regarding the Respondent's use of material, non-public information are erroneous; the ALJ's findings and conclusions regarding Respondent's mental state are erroneous; and the ALJ's disregard of the disclosure of and consent to conflicts of interest is erroneous.

Definition of Front Running. Neither the Advisers Act nor the Exchange Act contains a provision proscribing front running. And to date, the SEC has not adopted a rule that defines and prohibits front running. Notwithstanding the absence of a statutory provision or a rule, the

ALJ 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 28). 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.[22] 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). ("Due process requires that 'laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. Although the Commission's construction of its own regulations is entitled to 'substantial deference,' we cannot defer to the Commission's interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation.") (citations omitted).

Credibility Determinations. The ALJ erroneously relies upon findings and conclusions regarding Respondent's credibility in determining that Respondent engaged in front running

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[22] The authorities cited by the ALJ do not support the standard that the ALJ sets forth regarding front running. The Supreme Court's decision in *Capital Gains* concerned an investment adviser who failed to disclose his practice of acquiring particular securities, circulating a newsletter that recommended the securities and which resulted in an increase in the price of the stocks following his recommendations and selling the securities he had recommended at a profit. *Capital Gains* did not involve front running as defined in the Decision. The decision entered by the court in *SEC v. Yang* denied a motion for summary judgment and has no precedential value. *See Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966) ("the denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of a claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial."). And the treatise cited by the ALJ defines front running differently than the ALJ has in the Decision.

and violated the federal securities laws. However, Respondent's credibility has no bearing on and is not relevant to a determination whether Respondent knew material, non-public information regarding a sale of the Fund's TRX shares at the time he sold TRX shares on September 26, 2011, which findings and conclusions were required by the definition of front running formulated by the ALJ. Moreover, many of the ALJ's findings and conclusions regarding credibility are not supported by the evidence admitted in this matter.

The ALJ's credibility finding based upon a comparison of Respondent's opinion regarding the CEO of TRX and the statements he made to Fund investors 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.

The ALJ's statement that Respondent's representations that there were "numerous large holders who owned substantial positions in TRX and they had substantial amounts of cash to allocate and were interested in purchasing the Fund's position at the market-are highly questionable" is not supported by the record in this matter. The record reflects that another hedge fund, Platinum Partners, had paid $30,000,000 to acquire TRX shares at $5.75 per share in August 2011 and that a Sheik represented by Roheryn Investments, S.A. 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's credibility determination based upon the absence of documents to support Respondent's testimony about what Sands told him or what a trader at Casimir told him about interest in the Fund's TRX shares is contrary to the evidence admitted in this matter as well as evidence submitted with this brief. On August 22, 2011, Respondent exchanged emails with Richard Sands at Casimir Capital regarding a sale of the Fund's TRX shares. During the

exchange of emails Respondent asked "Is there a bid for a block of TRX shares?" Sands responded "Yah, I have to check, but I think I have a size buyer for whatever you have." *See,* Resp. Ex. 177 (Email from R. Sands to C. Gibson dated August 22, 2011 at 9:08 PM). Later in that same email Sands inquired about the amount of TRX stock Respondent was interested in selling and Respondent indicated 9,000,000 shares. After Sands asked about the price Respondent was seeking and Respondent indicated that the price would depend upon the amount, Sands stated "Give me an offer and I will put a deal together. I don't know about a short, but I have buyers."

The ALJ's credibility determination based upon an assertion 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 is contrary to the evidence admitted in this matter. 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). Further, in his affidavit, Hull states: "Christopher Gibson and I repeatedly discussed that we did not ever have to sell. In fact, we did not make the final decision to liquidate the TRX position until late in the evening of November 9, 2011, after a deliberative process and after receiving an unacceptable offer from Platinum Partners. . . We were always open to maintaining, increasing, or decreasing the Geier fund's TRX position as the situation evolved each day and as we determined the course of action that was in the Geier fund's best interest." (Resp. Ex 178 at paragraph 15).

Similarly, the ALJ's credibility determination based upon Respondent's testimony regarding 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.

Material Non-Public Information. 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 (Decision at 29), 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 ALJ 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 the following as evidence of materiality: "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 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.[23] Moreover, the affidavit from Hull confirms that Respondent and Hull shared a positive attitude regarding TRX during 2011, notwithstanding their efforts to spur the CEO of TRX to further the company's interests. Hull stated: "In fact, Christopher Gibson and I shared a very positive view at all times in 2011 of the fundamental value of TRX's extensive mining deposit assets." (Resp. Ex. 178).

Further, the ALJ failed to apply the materiality standards articulated by the Supreme Court to the relevant facts and to conclude that Respondent did not possess material information regarding a sale of TRX securities by the Fund. The Court has held in unequivocal terms that materiality is an objective rather than a subjective standard and, thus, the materiality of information which Respondent possessed regarding the possibility of a sale of the Fund's TRX must be determined based upon the evidence relating to the possibility of a sale of TRX shares by the Fund. *See, TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976) ("The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.") Further, the ALJ improperly failed to apply the materiality standard established by the Supreme Court In *Basic, Inc. v. Levinson,* 485 U. S. 224 (1988), in which Court held that information is deemed "material" if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of available information. *Id.* at 231-32. The Court further stated that with respect to contingent or speculative information, materiality will depend at any given time upon

[23] 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 33-34).

the balancing of both indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of relevant activity. *Id.* at 238.

An application of the standards articulated by the Supreme Court to the evidence admitted in this matter results in findings and conclusions that Respondent did not possess material information relating to a sale of the Fund's shares at the time he sold TRX securities on September 26, 2011. The evidence is uncontroverted that at the time Respondent sold TRX shares on September 26th he was exploring the possibility of the sale of TRX shares on behalf of the Fund through a negotiated transaction in the upstairs market.[24] Specifically, he had engaged in communications with two firms with connections to holders of TRX shares and had inquired concerning their interest in a negotiated transaction. At the time he sold TRX shares on September 26th, neither firm had indicated that their clients were interested in a particular amount of the Fund's shares, neither firm indicated a price or prices at which they would be interested in purchasing the Fund's shares and neither firm indicated when their clients might be interested in consummating a transaction involving the Fund's shares. (*See,* Resp. Exs. 61 and 62). Thus, Respondent did not know whether another party would express an interest in purchasing any or all of the Fund's TRX shares, did not know a price at which another party would offer to purchase the Fund's shares and did not know when a transaction involving the Fund's shares would be consummated.[25]

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[24] The upstairs market is discussed in the Expert Report of Garrick Tsui. In his report, Mr. Tsui states: "Although orders may be deemed as firm by both parties, there are no obligations to buy or sell stock until a trade is executed." (Resp. Ex. 182).

[25] 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.

Respondent's lack of knowledge regarding a sale of the Fund's TRX shares when he sold TRX Shares on September 26, 2011 is confirmed in Hull's Affidavit. Hull states: "Before we made any decision involving the first sale of a significant number of TRX shares, I wanted to know at a minimum the price and quantity of shares the buyer was proposing to purchase, and that information was not available until the afternoon of September 27, 2011." (Resp. Ex. 178 at 12).

Thus, the ALJ's conclusion that Respondent used material information at the time of his sales of TRX securities is also erroneous. In particular, the ALJ statement that "My conclusion is that Gibson's sale of 21,900 shares of TRX when he was almost simultaneously seeking to sell millions of Fund shares of TRX as soon as he could was a material fact that as an investment adviser he was required to disclose, and his failure to do so was a fraudulent act," is erroneous (Decision at 33). A reasonable investor would not conclude that information that Respondent "was ***almost simultaneously seeking*** to sell millions of shares of TRX as soon as he could" was material. (emphasis supplied). Further, information that Respondent was seeking to sell TRX shares through a negotiated transaction would not be deemed material when the *Basic* probability/magnitude test is applied as there is no information regarding another party who has agreed to the essential terms of the transaction.

The ALJ failed to set forth a standard for determining whether the information possessed by Respondent regarding a sale of the Fund's TRX securities was non-public. The ALJ also fails to analyze whether the information possessed by Respondent regarding a sale of the Fund's TRX securities was non-public. Further, the ALJ improperly failed to make findings and conclusions that the information Respondent had regarding a sale of the Fund's TRX securities at the time he sold TRX securities was not non-public.

The preponderance of the evidence 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 Sands at Casimir Capital in August 2011 regarding a sale of 9,000,000 shares. Subsequently, 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.

Requisite Mental State. The ALJ's Decision erroneously concludes that Respondent acted with "scienter and knowingly violated his fiduciary duty when he sold privately held shares on September 26, 2011 . . . Yet, Gibson did not disclose the sale of all his privately held TRX shares to any investors." (Decision at 34). First, scienter as defined in the Decision includes recklessness which is a lesser standard than knowing conduct, which the Decision states is an element of front running. In any event, Respondent could not be found to have acted with scienter with respect to the sales of TRX securities on September 26, 2011 as he did not possess material, non-public information regarding a sale of securities by the Fund. Second, the Decision states that Respondent knowingly violated his fiduciary duties when he sold his privately held TRX shares on September 26, 2011, but whatever fiduciary duties he may have had were modified as a result of the disclosures in the Fund's Offering Memorandum and the Operating Agreement. Third, the Decision finds and concludes that Respondent failed to disclose his transactions to "investors"; however, Respondent did not have a fiduciary duty to disclose information to investors as they were not clients of the

Managing member of the Fund nor were they Respondent's clients. *See, Goldstein v. Securities and Exchange Commission,* 451 F.3d 873 (D.C. Cir. 2006) (an investment adviser's fiduciary duties are owed to its client, which in this context is the Fund, and not to investors in the Fund.).

Moreover, the ALJ improperly failed to apply the standard that she formulated regarding the requisite mental state. The ALJ states 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." (Decision at 29). However, the Decision improperly proceeds to find and conclude that Respondent's mental state was less than knowing. 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 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 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 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 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."). Moreover, none of the formulations find or conclude that Respondent knew material

information regarding a sale of the Fund's shares. In that regard, none of the different formulations find or conclude that Respondent knew the number of shares that would be sold, the price at which the shares would be sold, or the date and time when the sale would occur. Similarly, none of the formulations regarding Respondent's mental state contain findings or conclusions regarding Respondent's knowledge concerning the non-public nature of information that he possessed regarding a sale of the Fund's shares. [26]

Disclosure of, and Consent to, Conflicts of Interest. The ALJ erroneously concluded that "the validity of the Fund's basic conflicts of interest protections is not the issue". In finding and concluding that Respondent violated the Advisers Act and Exchange Act by selling securities on September 26, 2011, the ALJ improperly and without authority disregarded the disclosures regarding conflicts of interest in the Fund's Offering Memorandum (Resp. Ex. 8) and the Fund's Operating Agreement (Resp. Ex. 13).

The ALJ failed to make findings and conclusions that the Fund's Operating Agreement disclosed that the Managing Member and its affiliates and employees and other Members may conduct any other business, including any business in the securities industry whether or not such business was in competition with the Fund. Members of the Fund were permitted to manage accounts for themselves and others, were permitted to purchase or sell securities in which the Fund invested and to purchase or sell securities in which the Fund did not invest.

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[26] *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).

Further, the Operating Agreement specifically stated 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 is binding upon the Fund and its Members and, thus, the Fund and its Members consented to the conflicts disclosed in the Operating Agreement.

The Purchase of Put Contracts on TRX Securities. The ALJ made erroneous findings and conclusions that Respondent knew material, non-public information regarding sales of TRX securities by the Fund when he purchased and recommended the purchase of TRX put contracts.[27] In particular, the definition of front running adopted by the ALJ is not supported by relevant authority; the Decision's findings and conclusions regarding the Respondent's use of material, non-public information are erroneous; the ALJ's findings and conclusions regarding Respondent's mental state are erroneous; and the ALJ's disregard of the disclosure of and consent to conflicts of interest are erroneous.

Definition of Front Running. As noted above, the ALJ 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

[27] Respondent's initial purchase of $4.00 TRX put contracts followed his receipt of an email from Hull's assistant regarding the loan that Hull had extended to Respondent. As the proceeds of the loan from Hull had been invested in the Fund and as the value of Respondent's investment in the Fund had experienced a significant decline, Respondent became concerned regarding his ability to repay Hull. On October 27, 2011, the day after he received the spreadsheet and the demand promissory note, Respondent began placing orders to purchase $4.00 put contracts on TRX shares. Respondent ultimately purchased 565 TRX $4.00 put contracts in his personal brokerage account and purchased 1,604 TRX $4.00 put contracts in the account of Francesca Marzullo, a close personal friend which Respondent viewed as a proxy for her father who was a Member of the Geier Fund.

or a close friend or relative, to be front running." (Decision at 28). And as discussed above, 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.[28]

Material Non-Public Information. Although the ALJ states 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 Decision does not identify or discuss a materiality standard. Nor does the Decision analyze the materiality of the information that Respondent possessed at the time of the purchases of put contracts on TRX securities in October and November 2011. The ALJ's erroneous conclusion regarding materiality is premised upon (i) certain events and communications that preceded the Fund's sale of shares on September 27, 2011; (ii) an email Respondent sent to the CEO of TRX; and (iii) a purported communication with Luis Sequeira, a representative of a financial institution that acted on behalf of a large holder of TRX securities.

According to the ALJ, the events and communications that preceded the Fund's sale of TRX shares on September 27th were as follows: "Gibson believed TRX's stock price was dropping under Sinclair's leadership since early August 2011; Gibson had begun negotiations to sell the Fund's TRX position and he thought a sale would occur in late September; on

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[28] *See Upton v. Securities and Exchange Commission,* 75 F.3d 92, 98 (2d Cir. 1996). ("Due process requires that 'laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. Although the Commission's construction of its own regulations is entitled to 'substantial deference,' we cannot defer to the Commission's interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation.") (citations omitted).

September 25, Hull told Gibson he could not tolerate losses and wanted to sell TRX; and on the evening of September 25, Gibson asked Sands to find a buyer for all the Fund's shares."

The email which Respondent sent to the CEO of TRX inquired about the CEO's plans for progress for the company.

During the communication with Sequeira, which occurred after the Fund sold TRX shares in November, Respondent expressed his thoughts regarding the CEO of TRX.

None of the events or communications cited by the ALJ constitute evidence regarding material information possessed by Respondent concerning a sale of the Fund's TRX shares in November 2011. The events and communications cited by the ALJ do not reflect information concerning the number of shares that would be sold, the price at which the shares would be sold, or the date and time when the shares would be sold, and, thus, are not material. *See, Basic Inc. v. Levinson* 485 U.S. 224 (1988) (materiality depends on the significance a reasonable investor would place on the withheld or misrepresented information).

The ALJ also failed to make findings and conclusions that when Respondent purchased or recommended the purchase of $4.00 TRX put contracts in late October, and early November 2011, he was continuing to explore the possibility of sales of the Fund's TRX securities through negotiated transactions with Roheryn, and Platinum, but that his 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.

The ALJ also failed to make findings and conclusions 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 9, 2011. 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 TRX 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.

The ALJ fails to set forth a standard for determining whether the information possessed by Respondent regarding a sale of the Fund's TRX securities was non-public when he purchased and recommended the purchase of put contracts on TRX securities. Further, the Decision fails to analyze whether the information possessed by Respondent regarding a sale of the Fund's TRX securities was non-public. Rather, the ALJ merely concludes that the events and communications she listed were non-public (Decision at 37).

The ALJ improperly failed to make findings and conclusions that the information Respondent had regarding a sale of the Fund's TRX securities at the time he sold TRX securities was not non-public. The preponderance of the evidence 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 purchased and recommended the purchase of put contracts on TRX securities. As the Fund had sought offers for its stock in August 2011, the marketplace had been alerted to the possibility of a sale of the fund's TRX shares. (Resp. Ex. 177). Also, 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 information that related to the actual sale of TRX securities by the Fund on November 10, 2011 did not exist until after Respondent's meeting with Platinum Partners immediately prior to the sales of the Fund's TRX securities. Also, Respondent purchased put contracts on TRX securities in order to signal to the market that the Fund was about to sell its TRX securities. Accordingly, Respondent could not have known non-public information at the time he purchased and recommended the purchase of put contracts as it did not exist at that time.

Requisite Mental State. The ALJ erroneously concluded that Respondent acted with "scienter and knowingly violated his fiduciary duty when he bought TRX puts for himself and his girlfriend, and advised his father likewise." (Decision at 38). First, scienter as defined in the Decision includes recklessness which is a lesser standard than knowing conduct, which the Decision states is an element of front running. Second, the ALJ states that Respondent violated his fiduciary duties when he purchased put contracts and recommended the purchase of put contracts, but whatever fiduciary duties he may have had were modified as a result of the disclosures in the Fund's Offering Memorandum and the Operating Agreement.

Third, the ALJ found and concluded that Respondent failed to disclose his transactions to "investors"; however, Respondent did not have a fiduciary duty to disclose information to investors as they were not clients of the Managing Member of the Fund nor were they Respondent's clients. *See, Goldstein v. Securities and Exchange Commission,* 451 F.3d 873 (D.C. Cir. 2006).

Moreover, the ALJ improperly failed to apply the standard she articulated regarding the requisite mental state. The Decision states 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." (Decision at 29). However, the Decision improperly proceeds to find and conclude that Respondent's mental state was less than knowing. The ALJ initially states that "Gibson knew with reasonable certainty when he bought or advised others to buy the TRX puts that the Fund was going to sell its TRX shares." The ALJ then states "The following is additional evidence that in late October and early November Gibson believed with reasonable certainty that a sale of the Fund's remaining shares was going to occur because he no longer believed in the company." Finally, the ALJ states "This evidence and Gibson's unvarnished opinion of TRX shares set out immediately above are persuasive that Gibson knew with reasonable certainty in late October and early November 2011 that the fund was going to liquidate its remaining TRX shares which it did on November 10."

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.") Moreover, none of the formulations find or conclude that Respondent knew material information regarding a sale of the Fund's shares. In that regard, none of the different

formulations find or conclude that Respondent knew the number of shares that would be sold, the price at which the shares would be sold, or the date and time when the sale would occur. Similarly, none of the formulations regarding Respondent's mental state contain findings or conclusions regarding Respondent's knowledge concerning the non-public nature of information that he possessed regarding a sale of the Fund's shares.

Disclosure and Consent to Conflicts of Interest. The ALJ erroneously concluded that "the validity of the Fund's basic conflicts of interest protections is not the issue". In finding and concluding that Respondent violated the Advisers Act and the Exchange Act by purchasing and recommending the purchase of put contracts on TRX securities, the ALJ improperly and without authority disregarded the disclosures regarding conflicts of interest in the Fund's Offering Memorandum (Resp. Ex. 8) and the Fund's Operating Agreement (Resp. Ex. 13).

The ALJ failed to make findings and conclusions that the Fund's Operating Agreement disclosed that the Managing Member and its affiliates and employees and other Members may conduct any other business, including any business in the securities industry whether or not such business was in competition with the Fund. Members of the Fund were permitted to manage accounts for themselves and others, were permitted to purchase or sell securities in which the Fund invested and to purchase or sell securities in which the Fund did not invest. The Operating Agreement is binding upon the Fund and its Members and, thus, the Fund and its Members consented to the conflicts disclosed in the Operating Agreement.[29]

[29] Del. Code Ann. Tit. 6, § 1101(b).

Erroneous Findings and Conclusions Regarding the Favoring of a Fund Investor

The ALJ's findings and conclusions that Respondent "violated the fiduciary duty he owed the Fund and that acting with scienter he violated the antifraud provisions because he entered an undisclosed, sweetheart deal - no application of a block discount and no commission paid by seller – to the fund's largest investor" are clearly erroneous.

The ALJ's findings and conclusions regarding an impermissible "sweetheart deal" are erroneously premised upon a provision in the Fund's Offering Memorandum. The provision, which was included in the Offering Memorandum's disclosures regarding conflicts of interest, provided as follows:

> In addition, purchase and sale transactions (including swaps) may be effected between the Company and the 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 this excerpt from the conflicts of interest disclosures contained in the Offering Memorandum was applicable to and prohibited the Hull transaction. The ALJ stated: "I do not consider the Fund's purchase of Hull's TRX shares to be a transaction allowed by the POM. . . This transaction violated the POM's terms that allowed transactions at current market prices but disallowed extraordinary brokerage commissions." (Decision at 39).

The ALJ's findings and conclusions regarding the applicability of this provision to the Hull transaction are actually precluded by the ALJ's prior pronouncement regarding the entirety of the Fund's conflicts of interest disclosures. As noted above, the ALJ stated "The validity of the Fund's basic conflicts of interest protections is not the issue." (Decision at 28) and proceeded to conclude that Respondent violated the securities laws without regard for the

Fund's conflicts of interest disclosures. The ALJ failed to cite any authority for the proposition that every other disclosure regarding conflicts of interest in the Offering Memorandum was irrelevant and did not afford Respondent protection from the front running allegations, but this one provision not only survived the ALJ's sweeping dismissal of the conflicts of interest disclosures contained in the Offering Memorandum, but could also be the predicate for imposing liability upon Respondent with respect to the Hull transaction.

In any event, the ALJ's application of the excerpt from the conflicts of interest disclosures is erroneous. The provision, if it were applicable, clearly states that it is a "guideline." The provision does not purport to establish a requirement. The Law Dictionary defines the term "guideline" as "a practice that allows leeway in its interpretation."[30] Accordingly, the Decision's attempt to elevate a "guideline" to a "requirement" is erroneous.

Also, the ALJ's findings and conclusions that the Hull transaction involved a "sweetheart deal" are clearly erroneous. The ALJ's finding and conclusion that "it is questionable whether the closing price of the Hull transaction was the 'current market price' and whether there was 'no extraordinary brokerage commission' paid" does not constitute a finding and conclusion sufficient to establish a preponderance of the evidence. A preponderance of the evidence establishes that during mid-October 2011 Hull was contemplating the sale of 680,636 shares of TRX stock and during that same period Respondent was continuing his efforts to sell TRX securities held by the Fund through a negotiated transaction in the upstairs market. A preponderance of the evidence also establishes that Respondent was concerned that a sale of TRX securities in securities markets might

[30] The Law Dictionary: Featuring Black's Law Dictionary, Free Online Legal Dictionary 2nd Ed., http://thelawdictionary.org/guideline/ (last visited Nov. 21, 2016).

adversely affect the Fund's ability to consummate a negotiated transaction in the upstairs market and, as a result, Respondent asked Hull, and he agreed, to sell his TRX shares to the Fund. The record further establishes that on October 18, 2011 Hull sold 680,636 shares at $3.60 per share, the closing price of TRX on October 18, 2011. (Resp. Ex. 113).

The ALJ's findings and conclusions that the transaction was impermissible because the price paid to Hull by the Fund did not reflect a block discount are erroneous. The excerpt from the Fund's conflicts of interest provision references a transaction at the "current market price" without further discussion . The price at which a security closes on an exchange is an objective and verifiable price that parties engaged in negotiated transaction may rely upon. The provision did not mandate the application of a unspecified block discount and the ALJ cites no authority for reading such a requirement into the term.

Moreover, the application of a block discount would not result in a significantly different price. According to the Division's expert witness, Dr. Carmen A. Taveras, the discount on the Fund's sale of 3,734,395 shares on September 27, 2011 was 5.3%. ("The large GISF sales reported at 3:01 pm and 3:02 pm brought down the weighted average price of TRX shares to $3.50 which is a 5.3% drop from the price in the prior two minutes." Expert Report of Carmen A. Taveras, Ph.D. at 9 and 10). As the Hull transaction involved 680,636 shares (or less than 20% of the amount sold on September 27th) the application of a block discount to the Hull transaction would result in a discount of an immaterial amount.

The ALJ's finding that the Hull transaction was impermissible because the seller did not pay a commission is erroneous. Neither the Fund nor Hull paid a commission on the transaction. The commission the Fund paid on the TRX shares it purchased from Hull when it sold those shares more than three weeks later were paid on a separate transaction.

Further, the ALJ erroneously links the Hull transaction with the Fund's liquidation of its TRX securities. The Fund's purchase of TRX shares from Hull in mid-October and the Fund's sale of its TRX shares in early November are separate transactions. Between the time of the Hull transaction and the Fund's sales of its TRX shares, Respondent continued his efforts to sell the Fund's TRX shares in negotiated transactions, which may not have involved the payment of a commission. In that regard, the record in this matter establishes that Respondent completed such a transaction on or about November 8, 2011, in which it sold 500,000 TRX shares at $3.35 per share without a commission. (Resp. Ex.121). The evidence in the record also establishes that Respondent did not place an order to sell TRX shares with the Fund's broker until after Respondent learned that Platinum Partners was not interested in purchasing the Fund's TRX shares.

In any event, a preponderance of the evidence establishes that "no extraordinary brokerage commissions or fees (i.e., except for customary transfer fees or commissions)" were paid. The Fund paid a commission of $.01 per share on the ultimate sale of the TRX shares acquired from Hull, which was not extraordinary. Finally, the ALJ's findings and conclusions ignore the evidence in the record that Hull's ownership of the Fund at the time of the Fund's liquidation of its TRX position was more than 80%; accordingly Hull effectively paid more than 80% of the commissions paid by the Fund, and Respondent and his friends and family paid approximately 10% of the commissions charged on the Fund's sales of its TRX securities. And the ALJ's findings and conclusions that the Fund's normal practice "did not involve acquiring private shares of an individual investor and then selling those shares into the market shortly thereafter, effectively paying the commissions for that investor, as it did here" does not establish that the commission paid subsequently by the Fund was extraordinary.

Finally, the ALJ erroneously concluded that the Hull transaction constituted a "sweetheart deal," as the record in this matter does not establish by a preponderance of the evidence that Respondent "favored Investor A over the Fund by enabling Investor A to sell his entire TRX position at prices favorable to Investor A," (OIP at paragraph 34). The evidence admitted in this matter demonstrates that Respondent requested Hull to sell his TRX stock to the Fund rather than in the market in order to avoid any adverse impact that a sale in the market would have on Respondent's efforts to sell the Fund's stock in negotiated transactions. The record also demonstrates that the transaction was not favorable to Hull. During the period from the Fund's purchase of Hull's TRX shares through the day prior to the Fund's liquidation of its TRX position, there were sixteen trading days and the price of TRX traded between a low of $3.39 and a high of $4.09 and TRX closed higher than the $3.60 that Hull received from the Fund on thirteen of the sixteen trading days. Also, the volume ranged from 206,697 shares to 1,901,168 shares. Had Hull not sold his shares to the Fund and sold them in the market he could have sold his shares at prices greater than the $3.60 he received from the Fund. When the Fund liquidated its TRX shares, it received a weighted average price of $2.41 per share and losses of $807,692 were realized on the 680,636 TRX shares attributable to the Hull shares according to Dr. Carmen A. Taveras, the Division of Enforcement's expert witness. As Hull owned more than 80% of the Fund, he experienced more than 80% percent of such losses or more than $545,000.

And the Supplemental Expert Report of James A. Overdahl, Ph.D. provides further additional evidence that Hull's sale of TRX securities to the Fund did not constitute a favor for Hull. Dr. Overdahl states that "Given Mr. Hull's ownership stake in GISF, he ultimately

would have been better off selling his shares in the open market even if he had received a price considerably below the $3.60 per share he received from GISF. (Resp. Ex. 179)

Moreover, Hull's affidavit confirms that his sale of TRX shares did not constitute a sweetheart deal designed to provide an exit from his TRX at favorable prices and without a commission. In his affidavit, Hull states " The transaction that occurred was a consolidation of my TRX position inside the Geier fund and instead netted me less than $500,000 cash. The sale of the shares to the Geier fund was in the best interest of the Geier Fund. . . The suggestion that I would enter into a transaction unfavorable to the Geier fund(of which I owned more than 80% and of which Christopher Gibson and his family and friends owned another 10% and the remainder of which was owned by my lifelong friend) is simply nonsense. (Resp. Ex. 178 at 19).

The ALJ also failed to make findings and conclusions that the Fund document that governed the Hull transaction was the Fund's Operating Agreement which permitted the Hull transaction. 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.

Requisite State of Mind. The ALJ failed to articulate the standard she applied in determining that Respondent acted with scienter when he participated in the Hull transaction. The ALJ merely states that she concludes "that Gibson violated the fiduciary duty he owed the Fund and that acting with scienter he violated the antifraud provisions because he entered an undisclosed, sweetheart deal-no application of a block discount and no commission paid by seller-to the Fund's largest investor. . ." And the ALJ failed to enter findings and conclusions supporting her conclusion regarding Respondent's scienter. In light of the fact that at the time that the Hull transaction was consummated, TRX had closed at $3.60 per share, which was the only objective, verifiable price available to the parties to the transaction and the fact that no commission was paid by either party, a conclusion that Respondent was acting with "a mental state embracing an intent to deceive, manipulate or defraud" is untenable. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976). Such a finding is even more difficult when one considers that the Fund's Operating Agreement expressly authorized the Managing member to engage in transactions that it deemed appropriate and that the Offering Memorandum merely provided a guideline, but did not establish requirements for such a transaction.

Similarly, the record does not support findings or 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 10, 2011, including the losses and 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.

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

The ALJ made erroneous findings and conclusions regarding violations of Section 206(4) and Rule 206(4)-8.[31] 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 Order Instituting Administrative and Cease-and-Desist Proceedings ('OIP") and/or are not material.

The OIP alleges that Respondent failed to disclose to the Fund or other clients information relating to his sales and recommendations to sell securities,[32] his purchase and recommendation to purchase put contracts on TRX securities[33] and his favoring of a Fund

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[31] Section 206(4) prohibits an investment adviser from engaging in any act, practice, or course of business which is fraudulent, deceptive or manipulative. Rule 206(4)-8 prohibits an adviser to a pooled investment vehicle from (1) making any untrue statement of material fact or omitting to state a material fact necessary to make the statements made, not misleading, to any investor or prospective investor in a pooled investment vehicle; or (2) otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

[32] Paragraph 31 of the OIP provides as follows: With respect to the above-referenced conduct, Gibson knew, was reckless in not knowing, and should have known that without disclosing to the Fund his conflict of interest and obtaining the fund's consent, he was improperly exploiting the fact that the Fund would be selling a substantial portion of its TRX position to benefit himself and his-then girlfriend.

[33] Paragraph 53 of the OIP provides as follows: With respect to the above-referenced conduct, Gibson knew, was reckless in not knowing, and should have known that front running the Fund by trading on the market impact of his advice to the Fund without disclosure t, and

investor over the Fund.[34] The OIP alleged that Respondent failed to disclose 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 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.").

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.

Notwithstanding the foregoing, 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 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.

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consent by, the Fund improperly benefitted himself and persons close to him, and was contrary to fund disclosures that said that investment opportunities would be allocated fairly and equitably among all clients.

[34] Paragraph 41 of the OIP provides as follows: With respect to the above-referenced conduct, Gibson knew, was reckless in not knowing, and should have known that his conduct created an undisclosed conflict of interest that benefitted himself and Investor A over his other clients, including the Fund.

For a number of additional reasons, Respondent cannot be found to have violated Section 206(4) and Rule 206(4)-8. 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. *See* Investment Advisers Act Release No. 2628 (August 3, 2007). Further, Rule 206(4)-8 proscribes 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 investor over the Fund, he could not have an obligation to disclose that he engaged in such conduct.

As a result, the ALJ's findings and conclusions relating to Section 206(4) and Rule 206(4)-8 must be set aside.

SANCTIONS

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.[35]

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 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 seven 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. Additional evidence regarding Respondent's inability to pay a civil penalty or pay disgorgement is provided by the Affidavit of John Douglas Cates. Mr. Cates states: "The Respondent is insolvent." (Resp. Ex. 180)

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[35] 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).

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. Additional evidence that Respondent, his family and his friends suffered losses rather than profits is provided by Dr. Overdahl's Supplemental Expert Report in which he stated "the Gibson Group only recorded losses on their portfolio and the trading records show no profits illicit or otherwise.' (Resp. Ex. 179). Similarly, Mr. Cates, an accountant who prepared Respondent's tax returns states: "The Initial Decision selects certain liquidating transactions and characterizes the proceeds of sale as being 'profits' while ignoring preceding, simultaneous and immediately following transactions that resulting in far greater losses." (Resp. Ex. 180)

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.

Further, the Decision inappropriately references John William Gibson's financial circumstances. The Decision states: "The Division raises doubts about Gibson's representations regarding his financial condition and notes his father's considerable financial support." (Decision at 44). The reference to John Gibson's financial circumstances in the context of Respondent's ability to pay a penalty is inappropriate as John Gibson is not a party to this proceeding. The Affidavit of John William Gibson indicates that the reference to his financial circumstances in a published order has had an adverse impact on John Gibson. (Resp. Ex. 181).

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.

PROCEDURAL ERRORS

The ALJ made a number of procedural errors in this matter.

During the proceeding, the ALJ improperly admitted into evidence Div. Exs. 183, 183A, 184, 185, 187 and 188 over Respondent's objections. 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." Division Exhibits 183, 183A, 184, 185, 187, and 188 were irrelevant, immaterial and unreliable and should not have been admitted into evidence.

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, the ALJ who presided over the hearing in this matter was not appointed in accordance with the Appointments Clause of the Constitution and the Commission's Ratification Order does not constitute an appointment in accordance with constitutional requirements. Further, ALJ is impermissibly shielded by two layers of removal protection that has not and cannot be remedied by the Commission. As a result, the OIP in this matter must be vacated. Moreover, the ALJ made numerous erroneous rulings, findings and conclusions. In particular, 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. In light of the foregoing, this proceeding must be set aside.

Dated: February 14, 2018

Respectfully submitted,

Thomas A. Ferrigno
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Telephone 202 689 2964
Facsimile 202 689 2887
tom.ferrigno@nelsonmullins.com

BY: Thomas A. Ferrigno
Thomas A. Ferrigno

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2018:

(i) an original and three copies of the foregoing Brief Regarding New Evidence and Challenged Rulings, Findings and Conclusions were filed by hand-delivery to the following address:

Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.,
Washington, D.C. 20549

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

From: Richard Sands [rsands@casimircapital.com]
Sent: Tuesday, August 23, 2011 8:55 AM
To: cg@geierfund.com
Cc: Dov Wiener
Subject: Re: Re:

I have no idea what you are talking about! What junior exploration companies are running? If you could sell now at 6.25, why not buy at 585 and sell it to them?
I will go out to investors and try to find a buyer for 9mm shares today, ok?

From: Chris Gibson [mailto:cg@geierfund.com]
Sent: Tuesday, August 23, 2011 08:51 AM
To: Richard Sands
Cc: Dov Wiener
Subject: Re: Re:

It is a firm order, but I also do not think you can get it from a long. I can get a few cents less than that for 7,000,000 shares from a short in the company, which I do not desire to take, but might if other gold stocks continue to run and TRX stalls.

On Tue, Aug 23, 2011 at 2:43 PM, Richard Sands <rsands@casimircapital.com> wrote:
Is that a firm offer for 9mm shares? I don't think it is doable with the stk at 5.85, but I wll check

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From: Chris Gibson [mailto:cg@geierfund.com]
Sent: Tuesday, August 23, 2011 08:39 AM

To: Richard Sands
Subject: Re: Re:

6.25

On Mon, Aug 22, 2011 at 9:08 PM, Richard Sands <rsands@casimircapital.com> wrote:

Give me an offer and I will put a deal together.Ã I donã€™t know about a short, but I have buyers

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Richard F. Sands

Chief Executive Officer

Ã

Casimir Capital L.P.

RESPONDENT'S EXHIBIT

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546 Fifth Avenue

New York, NY 10036

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Direct Line:Ā Ā Ā 212-798-1333

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From: Chris Gibson [mailto:cg@geierfund.com]
Sent: Monday, August 22, 2011 3:04 PM

To: Richard Sands
Subject: Re: Re:

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hold off then, the short is offering me a premium

On Mon, Aug 22, 2011 at 8:25 PM, Richard Sands <rsands@casimircapital.com> wrote:

It will be a discounted price. And we will aggregate a block..it is literally twice the amount of the public offering

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Richard F. Sands

Chief Executive Officer

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Casimir Capital L.P.

546 Fifth Avenue

New York, NY 10036

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Direct Line:Ā Ā Ā 212-798-1333

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From: Chris Gibson [mailto:cg@geierfund.com]
Sent: Monday, August 22, 2011 2:05 PM
To: Richard Sands
Subject: Re: Re:

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it depends on the price, give me a ballpark

On Mon, Aug 22, 2011 at 6:53 PM, Richard Sands <rsands@casimircapital.com> wrote:

Is that a firm order?Ā what price?

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Richard F. Sands

Chief Executive Officer

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Casimir Capital L.P.

546 Fifth Avenue

New York, NY 10036

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Direct Line:Ā Ā Ā 212-798-1333

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From: Chris Gibson [mailto:cg@geierfund.com]
Sent: Monday, August 22, 2011 12:51 PM
To: Richard Sands
Subject: Re:

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9,000,000 shares

On Mon, Aug 22, 2011 at 6:41 PM, Richard Sands <rsands@casimircapital.com> wrote:

Yah, I have to check, but I think I have a size buyer for whatever you have..Ā everybody is talking about how the equities have lagged the goldā€¦how much do you have for sale?

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Richard F. Sands

Chief Executive Officer

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Casimir Capital L.P.

546 Fifth Avenue

New York, NY 10036

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Direct Line:Ā Ā Ā 212-798-1333

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From: Chris Gibson [mailto:cg@geierfund.com]
Sent: Monday, August 22, 2011 12:12 PM
To: Richard Sands
Subject:

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Is there a bid for a block of TRX shares?

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Chris Gibson

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In the Matter of Geier International Strategies Fund – (HO-12361)

Affidavit of James M. Hull

I, James M. Hull, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is James M. Hull.

2. I am a United States citizen.

3. I currently reside in Augusta, Georgia.

4. I am over the age of 18 and am competent to swear to the matters set forth herein.

5. I have personal knowledge of the information contained in this affidavit.

6. On February 25, 2015, in a deposition pursuant to an Order Directing Private Investigation and Designating Officers to Take Testimony (the "Investigative Order") issued by the United States Securities and Exchange Commission (the "Commission") in the matter of Geier International Strategies Fund ("Geier Fund"), was told by enforcement division lawyers that John Gibson and Christopher Gibson had taken "short positions" in TRX stock.

7. The enforcement division lawyers specifically defined "short positions" for the clarity of the record, "[t]o be borrowing stock and selling stock in the hope that the stock's price will decline." I was shown sheets of trading records which purported to show that John Gibson and Christopher Gibson had taken a short position in the hope that TRX' stock price would decline and then cashed out that short position.

8. I was so shocked and angry by this report of selling TRX stock short that I directed my attorney to seek a tolling agreement from John Gibson and Christopher Gibson so I could later file a legal action against them.

9. I shared this report from enforcement division lawyers that John Gibson and Christopher Gibson had taken a short position with other Geier Fund investors because the enforcement division lawyers had convinced me that their statements were accurate.

10. I have now learned that the enforcement division's expert and the former chief economist of the Commission both agree that neither John Gibson nor Christopher Gibson took a short position with respect to TRX, and the statements made to me about "short positions" by the enforcement division's lawyers on February 25, 2015, were inaccurate.

RESPONDENT'S EXHIBIT

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11. I have reviewed the Initial Decision dated January 25, 2017, in the matter of Christopher M. Gibson (the "Initial Decision"), and I have identified a number of factual inaccuracies.

12. On pages 28, 29, 33, and 38 of the Initial Decision, the tribunal reaches an inaccurate conclusion. Christopher Gibson could not have known on September 26, 2011, that the Geier Fund was going to sell 3.7 million shares of TRX stock on September 27, 2011, because that was not a decision he alone had the authority to make. We did not make a decision to sell until moments before the shares were sold on the afternoon of September 27, 2011. The decision to sell was made only after an extended and deliberate process of information gathering, reviewing available alternatives, receiving Christopher Gibson's recommendation and assessing what would be in the best interests of the Geier Fund (the "deliberative process"). Before we made any decision involving the first sale of a significant number of TRX shares, I wanted to know at a minimum the price and quantity of shares the buyer was proposing to purchase, and that information was not available until the afternoon of September 27, 2011.

13. On page 29 and again on page 32 of the Initial Decision, the tribunal erroneously questions Christopher Gibson's testimony that he had a positive view of the value of TRX. In fact, Christopher Gibson and I shared a very positive view at all times in 2011 of the fundamental value of TRX' extensive mining deposit assets. Christopher Gibson and I shared a frustration about Jim Sinclair's failure to execute the strategy of completing the industry standard survey of mineral reserves with a view toward putting the mining assets into production and generating an income stream. I agreed with and encouraged Christopher Gibson to aggressively challenge Jim Sinclair for this failure to execute the agreed strategy to unlock the value of TRX' underlying mining asset value. I continued to have a positive view of the underlying mining asset value of TRX notwithstanding independent negative reports I received about Jim Sinclair as described in section 18 below.

14. On page 29 of the Initial Decision, the tribunal inaccurately questions whether there were other large holders of TRX interested in purchasing the Geier Fund's TRX position. Between September 27, 2011, and November 9, 2011, the Geier Fund sold almost 6,000,000 shares of TRX in multiple, privately negotiated sales to other large holders of TRX which well demonstrates the interest other investors had in purchasing blocks of TRX stock. Each and every sale was made only after a separate deliberative process.

15. On pages 29 and 34 of the Initial Decision, the tribunal inaccurately questions whether the Geier Fund was a patient holder of the TRX position and whether the Geier Fund was willing to maintain its position over a long period of time, including over a number of years. The Geier Fund had no debt and had the financial capacity and willingness to hold the TRX position indefinitely. Christopher Gibson and I repeatedly discussed that we did not ever have to sell. In fact, we did not make the final decision to liquidate the TRX position until late in the evening of November 9, 2011, after a deliberative process

and after receiving an unacceptable offer from Platinum Partners. Christopher Gibson and I had expected that Platinum Partners would propose a purchase of our remaining TRX position on November 9, 2011. After receiving an unacceptable offer from Platinum Partners, it became apparent that other large holders of TRX might in fact be considering the sale of their own TRX positions. The suggestion that a final and irreversible decision to liquidate TRX was made in September, 2011, is inaccurate. We were always open to maintaining, increasing, or decreasing the Geier Fund's TRX position as the situation evolved each day and as we determined the course of action that was in the Geier Fund's best interest.

16. The tribunal questions Christopher Gibson's credibility when he did not expect the price of TRX to decline on November 10, 2011, when the final decision to liquidate the Geier Fund's remaining TRX position was made. We carefully considered the situation, and after a deliberative process concluded that the Geier Fund was in a better position than the other large holders of TRX because we had already liquidated half of our position in TRX. We believed that the other large holders of TRX would feel forced to buy the 4.87 million shares of TRX then owned by the Geier Fund to protect the price of TRX and the value of their positions.

17. Instead of buying the Geier Fund's TRX position, the other large holders elected to sell their position. We had feared this possible outcome after the conversation with Platinum Partners. The worldwide volume of TRX shares sold on November 10, 2011, exceeded 21,500,000 shares with over 17,100,000 TRX shares sold on the NASDAQ. In retrospect, the decision to sell the Geier Fund's 4.87 million shares of TRX on November 10, 2011 (less than 23% of the worldwide volume sold on that day) was a good decision. The other large holders of TRX positions had made the decision on November 10, 2011, to sell rather than to buy, and if the Geier Fund had not sold on November 10, 2011, the Geier Fund would have been left holding its TRX position after that date at a lower market value.

18. On page 29 of the Initial Decision, the tribunal questions Christopher Gibson's candor when he attributed the low price of TRX in the fall of 2011 to the rumors spread by short sellers. In fact, I received a call in August, 2011, from Bill Snellings. Bill Snellings' son was a manager at a long and short hedge fund and was a close friend of John Engler, an investor in the Geier Fund. Bill Snellings provided a negative report about Jim Sinclair and, in effect, advised me to sell the TRX position. Notwithstanding this report and our own frustration with Jim Sinclair, we continued to hold a positive view of TRX because of the value of its underlying mining assets. I still believe that the value of the net income that could be derived from TRX' mining assets far exceed its market capitalization. John Engler redeemed one-half of his investment in the Geier Fund at the end of August, 2011. Although gold climbed to a new high price in August, 2011, and other gold mining stocks were increasing in price, TRX came under the attack of short sellers in September, 2011, and declined in price. Christopher Gibson and I were both concerned about the

potential information flow from John Engler to potential short sellers and the rumors they might be disseminating in the market. These were in fact concerns we had in the fall of 2011 and guided us in the communications with the Geier Fund investors as we pursued the best interests of the Geier Fund.

19. On page 39 of the Initial Decision, the tribunal describes my transfer of 680,636 shares of TRX to the Geier Fund as an "undisclosed, sweetheart deal." Nothing could be more inaccurate. On page 40 of the Initial Decision, the tribunal's finding that my creditor was seeking an increase in liquid assets and that I only had my TRX shares available is inaccurate. My creditor, Wells Fargo, required the quarterly reporting of liquidity from my partners and me, and Wells Fargo regularly scrutinized the TRX investment and its liquidity. I was never in violation of any liquidity requirement, never received any demand from Wells Fargo, and I had no unmanageable liquidity crisis in October, 2011. If there had been a liquidity demand and requirement, then a program of selling the 680,636 shares into the market over a number of days would have yielded me $2.45 million in personal cash. The transaction that occurred was a consolidation of my TRX positions inside the Geier Fund and instead netted me less than $500,000 cash. The sale of the shares to the Geier Fund was in the best interests of the Geier Fund. No decision to sell any further TRX shares had been made at that time, and we remained in a position to hold the TRX shares indefinitely. If further sales of TRX stock were to take place, it would have been easier to do so within the Geier Fund, but no such decision to sell had been made at that time. My outside position in TRX stock was no secret to the Geier Fund investors in that I told them often that I believed in the TRX position so much that in addition to my ownership of more than 80% of the Geier Fund, I had also bought TRX stock in my personal accounts. I encouraged others to invest in TRX, and I viewed outside investments in TRX by Christopher Gibson and John Gibson to demonstrate their further commitment to the TRX position and to demonstrate their deeper alignment with the interests of the Geier Fund. The suggestion that I would enter into a transaction unfavorable to the Geier Fund (of which I owned more than 80% and of which Christopher Gibson and his family and friends owned another 10% and the remainder of which was owned by my lifelong friends) is simply nonsense.

JAMES M. HULL

2/13/18
Date

Signed before me this 13 day of February, 2018, in the city of Augusta, Georgia, State of Georgia, by James M. Hull.

Notary Signature
My commission expires: 7/6/2021

LAURIE UNDERWOOD NOTARY PUBLIC COLUMBIA COUNTY, GA

[NOTARIAL SEAL]

SUPPLEMENTAL EXPERT REPORT OF

James A. Overdahl, Ph.D.

In the Matter of Christopher M. Gibson, Administrative Proceeding No. 3-17184

February 14, 2018

I filed an expert report on this matter on August 5, 2016. My qualifications and compensation are included in that report. I have attached to this supplemental report an updated resume that includes additional publications and testimony experience. For this supplemental expert report I have been asked by counsel to Mr. Christopher M. Gibson ("the Respondent") to address the portfolio holdings related to the common stock of Tanzanian Royalty Exploration Company ("TRX"), beneficially owned by the Respondent, his father John William Gibson, his mother Martha Gibson, his then girlfriend Francesca Marzullo and her father Giovanni Marzullo (collectively, the "Gibson Group" as also defined in my previously filed expert report) during the latter part of 2011 (the "Relevant Period"). Specifically, I have been asked to address the accuracy of the characterization contained in the SEC Order of the Respondent's purchase of put options on TRX stock as representing "In effect"..."a short position, *i.e.*, a bet that TRX shares would decline..."[1]

An investor has a "short position" when the investor has sold more securities than the investor owns (a "short sale"). I understand that the term was developed to distinguish a short sale from a sale of securities held in current inventory (a "long sale").[2] The short seller with a "short position" does not hold in his current portfolio the securities necessary to meet (or "cover") the short seller's future delivery obligations. The short seller with a "short position," therefore, will need to go into the market to purchase the required securities at the prevailing

[1] Order Instituting Administrative and Cease-and-Desist Proceedings, paragraph 9 (hereafter the "SEC Order" dated March 29, 2016 and issued as Release No. 77466).
[2] From the web site *English Language and Usage*: https://english.stackexchange.com/questions/145376/what-is-the-origin-of-long-and-short-in-finance which cites *The Bryant and Stratton Business Arithmetic*, 1872 and *The Merchant's Magazine, and Commercial Review*, Vol. XXVI, Jan-Jun 1852.

market price to cover and deliver the promised securities to the purchaser of the securities sold. Maintaining a short position places the short seller in a position of high risk exposure to market prices. The short seller seeks to profit from a decline in the market price of the stock decline and seeks to avoid losses from an increase in the market price of the stock because the short seller could incur potentially unlimited losses with such a rise. The short seller has a conflict of interest with investors who hold long positions in the stock and who benefit from a rise in the stock price and are harmed by a fall in the stock price.

A well-known textbook that is used as a standard for teaching financial economics is *Options, Futures, and other Derivatives*, by John C. Hull (9th Edition) (the "Hull Textbook") which defines the term "Short Position" on page 871 as "A position assumed when traders sell shares they do not own."

I have carefully reviewed the trading records of the Gibson Group and at no time during the Relevant Period did members of the Group, or the Group collectively, hold a "short position" in TRX shares or any other security. The SEC's Division of Enforcement (the Division") characterizes the Gibson Group portfolios as representing "in effect...a short position" or representing "a bet that TRX shares would decline..." In my view, the Division's characterization is inaccurate and misleading.

The Division's characterization of the Respondent's purchase of TRX put options as "in effect...a short position" is inconsistent with the trading records in this matter. The Gibson Group's use of put options when combined with broader portfolio holdings can be described as a "protective put," which is defined by the Hull Textbook (page 252) as a "put option <u>combined with</u> a long position in the underlying asset." (Emphasis added). The purchase of protective put

options are customary tools of risk management. Kolb and Overdahl (2007) describe the combination of stock plus a long put as a form of portfolio insurance designed to protect a portfolio from a severe drop in value.[3] Chief financial officers ("CFO's"), portfolio managers and risk managers purchase protective put options on a daily basis as a form of insurance to adjust the risk exposure to certain securities held in their portfolios.

The Gibson Group held long positions at all times in the underlying asset of TRX stock. The Division alleges that the Gibson Group's use of put options gave rise to "illicit profits" when the price of TRX stock declined and all of the positions were liquidated.[4] As I described in my prior expert report, the Gibson Group only recorded losses on their portfolio and the trading records show no profits (illicit or otherwise).

In my view, the SEC Order mischaracterizes the Gibson Group's exposure to the price of TRX shares. The SEC Order does not reference the overall long TRX positions held by the Gibson Group. The Division's theory isolates the Gibson's Group's holding of protective put options on TRX shares and creates the inaccurate and misleading impression that the Gibson Group would have benefitted from a decline in the price of TRX shares. The Division's theory to characterize the entire position as "in effect...a short position" by isolating a single instrument making up a portion of the overall portfolio is inaccurate and inconsistent with the underlying trading records.

The holder of a short position only profits if the stock price falls and can potentially suffer unlimited losses if the stock price rises. The Division's characterization is misleading

[3] See *Futures, Options, and Swaps*, Fifth Edition (With Robert Kolb), Blackwell Publishers, Oxford: 2007, page 390.
[4] SEC Order, paragraph 10.

because it implies that members of the Gibson Group had a conflict of interest with the holders of long positions in the stock. However, the trading records show that members of the Gibson Group maintained positions that had long exposure to TRX shares, meaning that there was no conflict of interest with other holders of TRX stock.

When one looks at the Respondent's and the Gibson's Group's entire portfolio holdings, one sees that the Respondent and the Gibson Group would benefit only if the price of TRX shares increased and would incur losses if the price of TRX shares decreased. That is, the Respondent's portfolio, when properly characterized, held long exposure to the TRX share price and this exposure was at all times consistent with the interests of GISF with respect to its exposure to the price of TRX shares – each would profit if the price of TRX shares were to rise-- – not fall.

The SEC Order attributes a motive to the Respondent's purchase of protective put options on TRX shares as "a bet that TRX shares would decline." The Division, in the SEC Order, ignores a more compelling motive, that is, the desire of the Respondent to manage downside risk in a broader portfolio with a net overall position that had consistent long exposure to the price of TRX shares. The purchase of put options to manage portfolio risk is entirely customary and appropriate.

I understand that the Respondent has testified that he purchased put options in one instance to manage risk due to excess indebtedness and in another instance due to excess exposure to TRX based on the age and lack of liquidity of an elderly investor. These are entirely appropriate and customary reasons to purchase put options. Put options are not always appropriate and it is a matter of judgment for an investor to make that decision. Any finding

that there were "profits" associated with these transactions would require the analysis of the purchased put option transactions out of the context of the long positions held by the investor.

In my prior expert opinion in this matter, I found no evidence that the put options purchased during the Relevant Period had an effect on the stock prices at which TRX shares were liquidated. I also found that TRX put options were readily available in the market for purchase. In my opinion, if the Respondent had determined that put options were an appropriate additional investment for other clients he could have readily purchased them in the market.

In fact, the Respondent did purchase $3 and $2 put options for GISF at a later date, demonstrating that the Respondent purchased put options when he deemed it appropriate.

The Respondent also advised his father, John William Gibson, to purchase put options in a liquidating transaction which was an entirely customary and appropriate use of put options. I find no evidence in the record suggesting a motive to purchase options with a view toward receiving a benefit from any declining price of TRX, contrary to the Division's characterization of the evidence. Put options were purchased by the Respondent's father in his IRA account in a liquidating transaction (that was, according to testimony, not executed by PNC Bank as directed). The directed sequence was the purchase of puts for 35,000 shares, then the sale of 46,000 shares of TRX and finally the sale of the puts for 35,000 shares of TRX. Had the transaction been executed as directed the puts would have been purchased and sold on the same day in all likelihood at approximately the same price, but likely at a loss due the commissions paid on the purchase and then the sale of the put options. Once the put options were purchased, the Respondent's father would have been indifferent with respect to any price

decline in TRX for 35,000 shares. The use of put options in a liquidating transaction was appropriate and customary. Any finding that the Respondent's father had profited from these put transactions would require isolating the put transactions from the portfolio of TRX shares the Respondent's father beneficially owned (with his wife) in GISF (over 200,000) but also the 46,000 TRX shares owned in the IRA itself

To summarize, I find that at all times during the Relevant Period (i.e., covering all of the relevant transactions):

- The Respondent, Francesca Marzullo, Giovanni Marzullo, Martha Gibson and John William Gibson– considering both personal and GISF accounts – always had long exposure to TRX. This means that, all else equal, they would benefit from an increase in the stock price of TRX, and would suffer if the price of TRX declined.
- The Respondent's personal incentives were aligned with those of GISF. This follows from the fact that the Respondent always was long TRX, because GISF also always was long TRX. In other words, from a purely economic perspective, the Respondent would always have been motivated to obtain the highest possible price for TRX stock in any GISF-related exit strategy. This result is not surprising, given that a significant portion of the Respondent's net worth stemmed from his partial ownership of GISF.
- The Gibson Group's collective 9.87 percent ownership in GISF completely dwarfs any put option positions taken by all members of the Gibson Group in

their personal accounts.[5] In other words, the observations described above as they applied to the Respondent as an individual, apply equally to the Gibson Group as a whole.

I have also been asked to opine on whether the Hull transaction favored Mr. Hull over GISF by enabling Mr. Hull to sell his entire TRX position at prices favorable to him. The SEC Order alleges that the Respondent "favored [Mr. Hull] at the expense of his other clients, including [GISF]," because the Respondent caused GISF to buy 680,636 shares that Mr. Hull held in his personal account at a "favorable" price (the October 18, 2011 closing exchange price of $3.60 per share), while allowing Mr. Hull to avoid paying a sales commission. In addition, the SEC Order alleges that the transaction harmed GISF by causing it to buy shares at $3.60, only to sell them approximately two to three weeks later at a loss (while also paying commissions on the sale).

Had Mr. Hull sold his shares in the open market, he would have reduced his exposure by 680,636 TRX shares. However, by selling his shares to GISF, Mr. Hull retained exposure to 544,509 TRX shares that GISF purchased from him because of Mr. Hull's 80 percent ownership stake in GISF. As a result, the alternative paths of selling Mr. Hull's TRX shares are not precisely comparable. Given Mr. Hull's ownership stake in GISF, he ultimately would have been better off selling his shares in the open market even if he had received a price considerably below the $3.60 per share he received from GISF. I cannot conclude that the price Mr. Hull received from

[5] This is again assuming an option delta of -1 for the put options. Anything greater than -1 would suggest an even larger net long position in TRX for the Gibson Group.

GISF for his TRX shares was necessarily "favorable" given the risk he retained relative to the alternative.

I have also been asked to opine on the view of the Division's expert, Dr. Taveras with respect to whether the Respondent and others in the Gibson Group benefitted from selling TRX shares on September 26, 2011, the day before GISF sold a large number of TRX shares. Dr. Taveras finds that the Respondent and other members of the Gibson Group benefited from the September 26 transactions on the order of $0.54 per share (roughly the average price received by the Respondent for TRX shares On September 26, 2011, $4.04, minus the September 27 negotiated transaction price of $3.50 per share received by GISF).

In my view, this determination of benefit is not supportable because it relies on ex-post pricing information and therefore assumes that the Respondent had perfect foresight as to the future price of TRX shares. Rather, the benefit of the alleged front running conduct, if any, to the Respondent / Gibson Group must be based on what was known or reasonably knowable at the time of the September 26 Transaction. At the time of transaction on September 26, the "benefit" Mr. Gibson and the Gibson Group could have expected from selling their shares prior to GISF exiting its position in TRX would have been unknowable. Because the "benefit" would have been unknowable also makes it immaterial because only known (or reasonably known) information can be beneficial. This is due to at least three reasons: (i) the significant uncertainty that would have existed in the absence of a known "imminent" order to sell GISF's position, (ii) uncertainty with respect to the impact of and duration of any price impact due to a possible GISF exit, and (iii) uncertainty regarding potential changes in the TRX prices due to the

arrival of new fundamental information regarding TRX after the time of Mr. Gibson's sales of TRX shares, but prior to the time of the GISF's exit from its TRX position.

DATED: February 14, 2018

James A. Overdahl

James A. Overdahl, PhD

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JAMES A. OVERDAHL, PH.D.
PARTNER

Dr. Overdahl is a specialist in financial markets and the U.S. regulatory environment. Prior to joining Delta Strategy Group as a partner in August 2013, Dr. Overdahl provided advisory and expert witness services through NERA Economic Consulting. Dr. Overdahl's financial regulatory experience includes three years as Chief Economist for the US Securities and Exchange Commission (SEC) and five years as Chief Economist for the US Commodity Futures Trading Commission (CFTC). He is experienced in preparing expert reports and in serving as a testifying expert in matters involving complex financial litigation. In his positions at the SEC and CFTC, Dr. Overdahl testified before each Commission. He also testified before Congress on behalf of the SEC and CFTC, and provided staff support and briefings for members of the President's Working Group on Financial Markets.

While serving as Chief Economist of the SEC from 2007 to 2010, Dr. Overdahl directed the SEC's Office of Economic Analysis where he served as principal economic advisor on policy, rulemaking, and litigation support and supervised the SEC's economics program. He advised the Commission on a wide range of policy matters, including, credit default swaps and other OTC derivatives, OTC clearing, algorithmic trading and related market structure issues, securities lending, short selling, and new products. In addition, he advised the Commission and other government agencies on several matters related to the financial crisis of 2008. He also advised the Commission on investigation matters, enforcement proceedings, civil monetary penalties, disgorgement, and fair-fund distribution plans.

While serving as Chief Economist of the CFTC from 2002 to 2007, Dr. Overdahl directed the CFTC's Office of the Chief Economist. He advised the Commission on policy matters related to exchange-traded futures and options, OTC derivatives (particularly energy derivatives), commodity price speculation, risk management and hedging, new products and markets, algorithmic trading, position limits, clearing, commodity index investing, hedge funds, and error trade policies. He also advised the Commission on enforcement matters related to commodity price manipulation and the alleged false reporting of natural gas transactions by several entities. In addition, he advised the Commission on restitution and civil monetary penalties.

Dr. Overdahl has also served as a Senior Financial Economist for the Risk Analysis Division of the US Office of the Comptroller of the Currency (OCC). He performed on-site assessments of risk measurement models employed by Tier 1 dealer banks, and assessments of model validation procedures within the risk management units of money center banks, of compliance with the Value-at-Risk requirements of the Basel Market Risk Capital Rule, and of the effectiveness of hedging and risk measurement techniques used to manage market risk in securitization conduits.

Prior to joining the OCC, Dr. Overdahl served as a Financial Economist in the CFTC's Division of Economic Analysis and the SEC's Office of Economic Analysis. He has taught as an Adjunct Professor of Finance at George Washington University, the University of Maryland, Johns Hopkins University, Georgetown University, Virginia Tech, and George Mason University. Dr. Overdahl also served as Assistant Professor of Finance at the University of Texas at Dallas School of Management.

Dr. Overdahl has published extensively in leading economics and finance journals, including the *Journal of Business, Journal of Law and Economics, Journal of Financial and Quantitative Analysis*, *Journal of Futures Markets*, *Journal of Derivatives,* and *Journal of Alternative Investments,* and has contributed numerous chapters to published volumes on finance and economics. In addition, he has co-edited and co-authored, with Robert Kolb, four books in multiple editions including *Financial Derivatives: Pricing and Risk Management* and *Futures, Options, and Swaps*.

EDUCATION

Ph.D., Economics, Iowa State University, Ames, IA, 1984.

B.A., Economics, St. Olaf College, Northfield, MN, 1980.

CURRENT POSITION

Partner, Delta Strategy Group, Washington, DC, August 2013–Present.

PRIOR POSITION

Vice President, Securities and Finance Practice, National Economic Research Associates, Inc., April 2010 – August 2013, and Affiliated Industry Expert, August 2013–Present.

GOVERNMENT POSITIONS

Chief Economist and Director of the Office of Economic Analysis, U.S. Securities and Exchange Commission, Washington, D.C. 2007-2010.

Served as principal economic advisor on policy, rulemaking, and litigation support. Supervised the economics program with a professional staff of approximately 40 Ph.D. economists, analysts, and consultants. Testified before the Commission and before Congress on behalf of the Commission. Provided staff support for President's Working Group on Financial Markets and for other interagency groups related to financial market reform and market developments.

Chief Economist and Director of the Office of the Chief Economist, U.S. Commodity Futures Trading Commission, Washington, D.C. 2002-2007.

Director of the CFTC's Office of the Chief Economist. Supervised the CFTC's economics program utilizing a staff of professional economists and support personnel performing economic research, policy analysis, expert testimony, education, and outreach (including congressional briefings). Served on the Commission's Executive Management Council. Testified before the Commission and before Congress on behalf of Commission. Provided staff support and briefings for members of the President's Working Group on Financial Markets on issues related to derivative markets and hedge funds.

Senior Financial Economist, Risk Analysis Division, Office of the Comptroller of the Currency, Washington D.C. 1995-2002.

Performed assessments of risk measurement models, valuation models, model validation procedures, and compliance with the Value-at-Risk requirements of the Basel Market Risk Capital Rule.

Senior Financial Economist, Research Section, Division of Economic Analysis, Commodity Futures Trading Commission, Washington D.C. 1992-1995.

Conducted empirical research on policy issues before the Commission relating to exchange-traded and privately-negotiated derivative instruments. Assisted the CFTC's Division of Enforcement both in developing economic evidence and in devising civil monetary penalties for use in CFTC enforcement proceedings. Assisted the Commission's Administrative Law Judges in devising sanctions.

Senior Financial Economist, Office of Economic Analysis, U.S. Securities and Exchange Commission, Washington D.C. 1989-1992.

Served as in-house economic consultant to the SEC's Division of Market Regulation on issues involving derivative instruments and capital markets. Assisted the SEC's Division of Enforcement in the development of economic evidence for use in civil cases brought before the Commission. Assisted U.S. Attorney's Office in developing evidence for criminal cases resulting from SEC referrals to the Justice Department.

ACADEMIC POSITIONS

Adjunct Professor, University of Maryland, 2003-2007.

Adjunct Professor, George Washington University, 2002-2007.

Adjunct Professor, Johns Hopkins University, 2001.

Adjunct Professor, School of Business, Georgetown University, 1994-1995.

Adjunct Professor, School of Business Administration, George Mason University, Fairfax, Virginia, 1991-1994.

Adjunct Professor, Pamplin College of Business, Virginia Polytechnic Institute, Falls Church Virginia, 1990.

Assistant Professor of Finance, School of Management, The University of Texas at Dallas, 1984 - 1989.

PRIVATE POSITIONS

Consultant, Strategic Petroleum, Inc., Dallas, TX (a joint venture between the principals of Chicago Research and Trading and Tradelink, LLC). 1988-1989.

Applied option pricing theory to valuation decisions concerning drilling and abandonment of operating wells. Validated models used to analyze arbitrage strategies involving spot crude oil and exchange-traded crude oil futures and options.

LITIGATION AND ENFORCEMENT MATTERS

Dr. Overdahl has consulted on more than 50 enforcement matters before the CFTC and SEC over a 20-year period. He has performed work on establishing materiality of misstatements or omissions in disclosures surrounding the issuance of securities, estimating damages in issuer penalty cases, 10b-5 cases, insider trading, and commodity price manipulation. He has worked on matters involving the alleged false reporting of transactions to index providers in the natural gas industry, price manipulation in thinly traded cash markets with related futures markets, bidding misbehavior surrounding auctions of treasury debt, counterparty duties in over-the-counter derivatives transactions, alleged manipulation of propane and gasoline products, mutual fund late trading, valuation of swap contracts, calculation of margin amounts, dilution of mutual fund and hedge fund assets. He also assisted the U.S. Attorney's Office in developing evidence for criminal cases resulting from SEC referrals to the Justice Department, and he assisted the Division of Enforcement at both the SEC and CFTC in devising sanctions and evaluating settlement terms. He also has worked on evaluating fair-fund distribution plans. In private practice he has worked on matters involving alleged short-sale price manipulation, swap valuation, insider trading, futures block transactions, and market manipulation.

BOARD AND ADVISORY POSITIONS

Board of Directors, Futures Industry Association (Public Director). 2016-present.

American Bar Association, Antitrust Section, Insurance and Financial Services Committee Advisory Board. 2010-present.

Center for the Study of Financial Regulation, Mendoza College of Business, University of Notre Dame. 2011-present.

SEC Historical Society Advisory Board (2013-2016)

CONGRESSIONAL TESTIMONY

"Implementing Dodd-Frank: A Review of the CFTC's Rulemaking Process," United States House of Representatives, Committee on Agriculture, Subcommittee on General Farm Commodities and Risk Management, April 13, 2011.

"The Costs of Implementing the Dodd-Frank Act: Budgetary and Economic," United States House of Representatives, Committee on Financial Services, Oversight and Investigations Subcommittee, March 30, 2011.

"Reducing Risks and Improving Oversight in the OTC Credit Derivatives Market," United States Senate, Committee on Banking, Housing, and Urban Affairs, Subcommittee on Securities, Insurance, and Investment, July 9, 2008.

"Hedge Funds and Systemic Risk: Perspectives of the President's Working Group on Financial Markets," United States House of Representatives Committee on Financial Services. July 11, 2007.

"The Role of Hedge Funds in our Capital Markets," United States Senate, Committee on Banking, Housing, and urban Affairs, Subcommittee on Securities, Insurance, and Investment. May 16, 2006.

"Global Oil Demand and Gasoline Prices," United States Senate Committee on Energy and Natural Resources, Full Committee Hearing. September 6, 2005.

EXPERT WITNESS TESTIMONY

In the matter of *Fairfax Financial Holdings Limited and Crum & Foster Holdings Corp.* v. *S.A.C Capital Management, LLC*, et. al. (July, 2011).

Motors Liquidation Company GUC Trust v. *Appaloosa Investment Limited Partnership I, et. al.* (summer and fall 2012).

CME Group Inc. Market Regulation Department, v. DRW Commodities, LLC, NYMEX Docket No. 11-08379. Before the New York Mercantile Exchange Business Conduct Committee (January, 2014).

In the Matter of Christopher M. Gibson, Securities and Exchange Commission Administrative Proceeding No. 3-17184. (September, 2016).

In the Matter of William Tirrell, Securities and Exchange Commission Administrative Proceeding No. 3-17313. (September, 2017).

SELECTED PUBLICATIONS

A. Books

Financial Derivatives: Pricing and Risk Management (With Robert Kolb), Wiley-Blackwell Publishers, 2010.

Futures, Options, and Swaps, Fifth Edition (With Robert Kolb), Blackwell Publishers, Oxford: 2007.

Understanding Futures Markets, Sixth Edition (With Robert Kolb), Blackwell Publishers, Oxford: 2006.

Financial Derivatives, Third Edition (With Robert Kolb), Wiley Publishers, New York: 2003.

B. Journal Articles and Book Chapters

"Automated Trading Systems and the Current Regulatory Framework," with Kwon Park, forthcoming, *Algorithmic Finance*, 2016.

"The Exercise of Anti-Spoofing Authority in U.S. Futures Markets: Policy and Compliance Consequences," with Kwon Park, *Futures and Derivatives Law Report*, Volume 36, Issue 5, May, 2016.

"Implied Matching Functionality in Futures Markets," *Futures Industry Magazine*, November, 2011.

"Derivative Contracts and Their Regulation," (with Robert Zwirb), in *Financial Product Fundamentals*, Clifford E. Kirsch, editor, Practicing Law Institute: New York, 2015.

"Evidence-Based Regulatory Policy Making for Financial Markets," (with Frederick H. DEB Harris, Michael J. Aitken, Alfred R. Berkeley, and Kumar Venkataraman), *Journal of Trading*, Institutional Investor Journals, Spring, 2011.

"Derivative Contracts: Futures, Options, and Swaps," in *Finance Ethics: Critical Issues in Financial Theory and Practice,* John Boatright, editor, Wiley-Blackwell Publishers, Spring 2010.

"Counterparty Credit Risk," in *Financial Derivatives: Insights and Analysis on Modern*

Risk Management and Pricing, Wiley-Blackwell Publishers, Fall 2009.

"Hedge Funds, Volatility and Liquidity Provision in Energy Futures Market" (with Michael Haigh and Jana Hranaiova), *Journal of Alternative Investments,* Spring, 2007.

Encyclopedia of Business, Ethics, and Society, Sage Publishing Company. Articles in the *Encyclopedia*: "Ronald H. Coase," "Coase Theorem," "Market Transparency," "Barings Bank," "Metallgesellschaft," "Bankers Trust," "Comptroller of the Currency," and "Securities and Exchange Commission," 2008.

"Derivatives Market Innovation and the Commodity Futures Modernization Act," with Sharon Brown-Hruska, *The Euromoney Derivatives and Risk Management Handbook, 2005/2006.*

"Do Block Trades Harm Markets?" (with Jana Hranaiova and Michael Haigh), Futures Industry Magazine, (2004).

"Another Day, Another Collar: An Evaluation of the Effects of NYSE's Rule 80A on Trading Costs and Intermarket Arbitrage," (with Henry McMillan), *Journal of Business*, January, 1998.

"The Licensing of Financial Indexes: Implications for the Development of New Index-Linked Products," in *Indexing for Maximum Investment Management Results*, Albert S. Neubert, editor, Glenlake Publishing Co., 1997.

"The Mechanics of Zero-Coupon Yield Curve Construction," (with Barry Schachter and Ian Lang), in *Controlling and Managing Interest Rate Risk*, Klein, Cornyn, and Lederman editors, New York Institute of Finance, 1997.

"Overview of Derivatives: Their Mechanics, Participants, Scope of Activity, and Benefits," (with Christopher Culp), in *The Financial Services Revolution: Understanding the Changing Roles of Banks, Mutual Funds and Insurance Companies,* Clifford Kirsch, editor, Irwin Professional Publishing, 1997.

"Derivatives Regulation and Financial Management," (with Barry Schachter), *Financial Management*, Spring, 1995, reprinted in *The Yearbook of Fixed Income Investing 1995*, Finnerty and Fridson, editors, Irwin Professional Publishing, 1996.

"The Exercise of Equity Options: Theory and Empirical Evidence," (with Peter Martin), *Journal of Derivatives*, Fall, 1994.

"Using Finance Theory to Measure Damages in Fraudulent Trade Allocation Schemes," (with Jeffry Davis and William Dale), *The Business Lawyer*, February, 1994.

"Prices Are Property: The Organization of Financial Exchanges From a Transaction Cost Perspective," (with J. Harold Mulherin and Jeffry Netter), *Journal of Law and*

Economics, October, 1991.

"A Researcher's Guide to the Contracts of Firms Filing with the SEC," *Journal of Law and Economics*, October, 1991.

"Who Owns the Quotes: A Case Study into the Definition and Enforcement of Property Rights at The Chicago Board of Trade," (with J. Harold Mulherin and Jeffry Netter), *The Review of Futures Markets*, 1991.

"Option Exercises: Evidence From the Treasury Bond Futures Option Market," (with Jin Choi), *Advances in Futures and Options Research*, 1991.

"The Exercise of Options on Agricultural Commodity Futures," (with Andrew Chen), T*he Review of Futures Markets*, 1991.

"The Early Exercise of Options on Treasury Bond Futures," *Journal of Financial and Quantitative Analysis*, December 1988.

"The Use of NYMEX Options to Forecast Crude Oil Prices," *The Energy Journal*, Fall 1988.

"The Use of Crude Oil Futures by the Governments of Oil-Producing States," *Journal of Futures Markets*, Winter, 1987.

"The Hedging Performance of the CD Futures Markets," (with Dennis Starleaf), *Journal of Futures Markets*, Spring 1986.

"An Empirical Examination of the T-Bond Futures (Call) Options Market," (with Larry Merville), *Advances in Futures and Options Research*, 1986.

C. Working Papers

"Fundamentals, Trader Activity, and Derivatives Pricing" (with Michael Haigh, Bahattin Buyuksahin, Jeffrey Harris, and Michel Robe), 2012.

"Corporate Hedging and Financial Contracting," (with M. Ferguson and B. Qiu), 2011.

D. Other

"SEC Settlements Trends: 1H10 Update," with Jan Larsen and Elaine Buckberg. NERA publication, May 14, 2010.

"Economic Analysis in the Federal Rule-Making Process to Implement the Dodd-Frank Wall Street Reform and Consumer Protection Act," NERA Publication. August 30, 2010.

"SEC Settlements Trends: 2H10 Update," with Jan Larsen and Elaine Buckberg. NERA publication, December 7, 2010.

"SEC Settlements Trends: 1H11 Update," with Jan Larsen and Elaine Buckberg. NERA publication, June 27, 2011.

"SEC Settlements Trends: 2H11 Update," with Elaine Buckberg and Max Gulker. NERA publication, January 23, 2012.

"SEC Settlements Trends: 1H12 Update," with Elaine Buckberg. NERA publication, June 27, 2012.

"SEC Settlements Trends: 2H12 Update," with Elaine Buckberg and Jorge Bias. NERA publication, January 14, 2013.

"Will court short-circuit Dodd Frank?" With Jonathan Macey and Elaine Buckberg, *Politico*, August 15, 2011.

"ETFs: Overview and Recent Issues" NERA publication, October 3, 2011.

"SEC Settlements Trends: 2H11," with Max Gulker and Elaine Buckberg. NERA publication, January 23, 2012.

"Economist Debates: High-Frequency Trading," *The Economist* online edition, March 18, 2012.

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

File No. 3-17184

In the matter of

CHRISTOPHER M. GIBSON

AFFIDAVIT OF JOHN DOUGLASS CATES

John Douglass Cates, states that:

1. I have previously testified in the subject case and offer this affidavit as additional evidence.
2. I have reviewed the initial Decision dated January 25, 2017 (the "Initial decision").
3. My accounting firm prepared the income tax returns for Christopher Gibson, John & Martha Gibson, Geier International Strategies Fund, LLC, Geier Capital, LLC and Geier Group, LLC. Thus, I have had access to a full view of the activity in these persons and entities' accounts relating to purchases and sales of Tanzanian Royalty Exploration (TRX) stock and options.
4. Evidence and testimony by the SEC in this proceeding reference that Mr. Christopher Gibson "shorted" TRX stock with the intent of defrauding the fund he was managing. My reading of the documents in the case reveals that other investors in the fund were told by SEC attorneys that Mr. Christopher Gibson "shorted" TRX stock. My review of the transactions in Mr. Christopher Gibson's Charles Schwab account does not find any "short" transactions. I believe the information provided to investors in the fund by the SEC attorneys was inaccurate and misleading.
5. The SEC asserts that Mr. Christopher Gibson made profits in TRX personally while the fund lost money on TRX. A review of the transactions in Mr. Christopher Gibson's personal account in conjunction with the shares Mr. Christopher Gibson beneficially owned in the fund, reveal his net loss on TRX transactions on or about November 10, 2011 were $720,0834 ($82,989 - $803,072). Mr. Gibson only benefited from an increase in TRX stock value in the same manner that the fund benefited. Both Mr. Gibson and the Fund's interest were aligned.

RESPONDENT'S EXHIBIT

6. The Initial Decision selects certain liquidating transactions and characterizes the proceeds of sale as being "profits" while ignoring preceding, simultaneous and immediately following transactions that resulting in far greater losses. The assertion that Mr. Christopher Gibson profited from the liquidation of TRX shares is misleading, in that to isolate his personal transaction aside from his share of the fund is like showing the score at halftime of a football game, without included the second half activity.
7. I have reviewed page 44 of the Initial Decision in which it is suggested the Division has doubts about the Respondent's financial situation without citing any facts. The Initial Decision concludes there is a lack of clarity about the Respondent's financial situation without citing any facts. The Respondent is insolvent and had adjusted gross income of [redacted] in 2016. I have no facts or information which would lead me to have any doubts, uncertainty or lack of clarity about his insolvency or lack of income.

Executed on the 13 day of February, 2018.

John Douglass Cates

State of Georgia
County of Richmond

Subscribed and sworn to before me, in my presence, this 13th day of February, 2018

By Sharon L Key Notary Public

My Commission Expires: June 11, 2018

Sharon L Key Notary Public Richmond County, Georgia

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING

File No. 3-17184

In the matter of

CHRISTOPHER M. GIBSON

AFFIDAVIT OF JOHN WILLIAM GIBSON

John William Gibson, states that:

General.

1. My name is John William Gibson. I attended Johns Hopkins University on an ROTC Scholarship and graduated as a Distinguished Military Graduate. I graduated with a JD *cum laude* from the University of Georgia Law School, was an Honor Graduate of the Basic Course of the United States Army Judge Advocate General's School and served four years on active duty with the United States Army. In 1981 I joined the Hull Barrett law firm in Augusta, Georgia practicing securities and real estate law for fifteen years and eventually served as the managing partner. I left the law firm in 1996 to become an executive officer of a publicly traded real estate company which later merged with a larger company.
2. In 1999 I joined James M. Hull ("Mr. Hull") and Barry L. Storey in their existing real estate business that later became known as Hull Storey Gibson Companies. For the following fifteen years until my retirement in 2014 I generally worked seven days a week excepting family vacations. I had known Mr. Hull since I was fifteen years old and I invested all of my available capital (excluding an IRA) in the business. When my own available capital was exhausted Mr. Hull provided me with additional capital to invest in the form of full recourse, personally guaranteed

RESPONDENT'S EXHIBIT

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loans secured by all of my assets and were *payable upon demand*. These loans totaled over $10 million in 2011 and would eventually total over $14 million.

3. Mr. Hull and I grew the business by purchasing properties and starting construction and site work companies and at one time had almost 300 employees and annual revenues in excess of $100 million. Mr. Hull set the strategic parameters and goals for our companies and I ran all of them to include signing all checks, but with Mr. Hull making, confirming and reversing all material and very often minor decisions. For well over 10 years Mr. Hull and I worked and met daily and reviewed each and every decision. Over time Mr. Hull devoted more of his time to civic and philanthropic duties leaving more and more of the day to day business operations to me.
4. Mr. Hull and I had an *extraordinary* relationship of mutual trust. I operated all of Mr. Hull's businesses and wrote all the checks and he had complete and total confidence and trust in me and my integrity. Mr. Hull in turn held my personal notes secured by everything I owned all *payable upon demand* and I had compete confidence and trust in Mr. Hull and his integrity. In my opinion, as demonstrated by my willingness to have him hold a demand note secured by everything I owned, Mr. Hull possesses the highest level of business integrity of anyone I have ever known. His reputation in the community for business integrity is unquestioned.
5. Mr. Hull and Christopher M. Gibson, the Respondent and my son, managed the Geier International Strategies Fund (the "Geier Fund" or the "fund"). Mr. Hull invested over $26 million in and beneficially owned over 80% of the Geier Fund. Over the period of time that I was in business with Mr. Hull the expectation always was that I would invest in all businesses Mr. Hull engaged in and I would be fully committed to all such businesses. Although I had no active management role in the Geier Fund, I recognized that Mr. Hull had made a significant investment and that I would be expected to do so as well.
6. Having no additional available capital of my own, as was customary with a new venture I borrowed over $500,000 from Mr. Hull to invest in the Geier Fund on a full recourse, demand note basis secured by all of my assets. My wife had recently inherited approximately [redacted] from her mother and I reminded her that with my business relationship with Mr. Hull I would be expected to invest in all businesses Mr. Hull invested in. Our son, Christopher M. Gibson, was managing the Geier Fund with Mr. Hull and after my son had invested all of his own capital my son additionally borrowed money from Mr. Hull to invest in the fund. Mr. Hull was aware that my wife had inherited money and I felt we needed to demonstrate our full commitment and I pushed her to invest all of her money in the Geier Fund for that reason. Mr. Hull did not ever require my wife's investment, but I personally felt that obligation based upon my loyalty, commitment and dedication to Mr. Hull.
7. Mr. Hull structured all of his business relationships with a specific view toward an alignment of interests and emphasized an alignment of interests on a near daily basis. Mr. Hull emphasized his strict alignment of interest with all investors in the Geier Fund. Mr. Hull emphasized repeatedly to everyone we would meet that not only had he invested $26 million in the fund itself, but that in addition to that he was *investing in the same positions outside the Geier Fund.* He emphasized this on innumerable occasions in my presence to other Geier Fund investors and viewed the additional investments outside the Geier Fund as a demonstration of a deeper and more severe alignment with the Geier Fund investors and commitment to the same positions the Geier Fund held. Mr. Hull did not view the outside investments as a conflict of interest and to the contrary viewed them as a demonstration of additional commitment.

8. Mr. Hull continued to emphasize the need to support the positions held by the Geier Fund, so in the spring of 2011 I invested an additional $288,000 in 46,000 shares of TRX stock in my IRA account at PNC Wealth Management (the "IRA Position"). I first attempted to invest directly in the Geier Fund, but because my capital was in an IRA that was not feasible. This TRX investment was in addition to the almost 400,000 TRX shares my wife and I beneficially owned though the Geier Fund
9. My family, including the Respondent, my wife and I, had an extraordinary alignment of interest with the Geier Fund and a relative financial commitment that far surpassed any other fund investor
10. These outside accounts holding TRX shares were liquidated along with the fund's TRX shares and are now the subject of this inquiry. These liquidating transactions are addressed in relevant part in the following section of the Operating Agreement of the Geier Fund:

> 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.*** (Emphasis Added)
> Operating Agreement Section 3.01

On November 8, 2011 I communicated instructions to PNC to immediately liquidate my TRX shares in my IRA which PNC failed to timely execute and the sale of put options on November 10, 2011 was contrary to my instructions and the direction of the Respondent and should never have taken place.

11. On or about November 8, 2011 I was at lunch with Mr. Hull when he vaguely said the Geier Fund was probably going to engage in some form of transaction. I had no active management role in the Geier Fund and at that time I had no idea or understanding about any of the transactions of the Geier Fund. I reminded Mr. Hull that I had a TRX position outside of the Geier Fund in my IRA and asked what I should do. Mr. Hull directed me to follow Christopher M. Gibson's advice. I wanted to be sure that I was directionally consistent with the fund in terms of buying, selling or holding.
12. Christopher M. Gibson gave me liquidating instructions which were to sequentially and immediately *purchase with additional capital* a put option for 35,000 TRX shares (covering 10,000 fewer TRX shares than were held in the IRA account) (the "TRX Put Option"), sell the IRA Position and sell the TRX Put Option. These orders were all to be executed immediately and sequentially. If the order had been executed as directed the put option would have been bought and sold within minutes at approximately the same price less commissions. I called my relationship manager at PNC on or about November 8, 2011 and communicated this order and had no subsequent communication whatsoever with PNC thereafter until over two weeks later when PNC sent me a trade confirmation. Positive documentary evidence that my phone call took place on November 8, 2011 is contained in Division Exhibit 104 which is a statement of my IRA account as of November **8th**, 2011 with PNC's notes. I have attached a copy of Division Exhibit 104 as Exhibit A".

13. When I received a request to confirm the trade from PNC on November 28, 2011 I sent it to Christopher M. Gibson who responded 50 minutes later at 6:54 pm:

> Pnc (sic) is awful they did not execute your trades in a timely manner at all for what it's worth. Buy SLV with cash. (Parenthetical added)
> See attached Exhibit "B"

Division Exhibits 119 (See attached Exhibit "C") and 120 (See attached Exhibit "D) also contain the subject email chain, but omit the Respondent's reply contained in the attached Exhibit "B". The Respondent's reply was also read verbatim into the record on November 19, 2015, in a hearing pursuant to the Investigative Order (the "John William Gibson Hearing") at page 279 (the transcription is garbled but clear in relevant part).

14. The Division has copies of all of my trading records and emails and phone records and those of PNC as well and all demonstrate I had no communication whatsoever with PNC about this trade after I gave PNC liquidating instructions on November **8th**, 2011 other than the later trade confirmation on November 28, 2011. I did not have any ability to trade directly in my IRA account at PNC. I had no internet access whatsoever to my PNC account. I only received quarterly statements from PNC by US mail and this was not an active trading account. The relationship manager alone then selected the trader and directed the liquidating trades, but PNC did not follow my instructions to execute immediately and actually effected the trades over the next two or three days. All trade executions and the timing of the executions was entirely within the control of PNC and the brokers and traders selected by PNC and I had no control whatsoever over the execution or timing of these liquidating transactions.
15. Documentary evidence that the put options were to be sold on or before November **9th**, 2011 is contained in Respondent's Exhibit 32 on pages 10, 12 and 14 which all unambiguously confirm that the trade date for *both the purchase and the sale* of the put options was November **9th**, 2011. I have attached these as Exhibit "E".
16. The following statement contained in paragraph 48 of the Order Instituting Administrative Proceedings (the "Order Instituting Proceedings") is both misleading and inaccurate, "At 11:40 AM that day, with TRX's weighted average share price at $2.30, Gibson's father likewise sold all his $4 TRX put contracts". The implication is that I timed or controlled the timing of this sale when the timing was contrary to my specific instructions. Also inaccurate is the statement in relevant part on page 10 of the Initial Decision, "Gibson sold the TRX put options in his ... father's account ... resulting in profits for all three accounts." The sale of the put options in my PNC account was made by PNC contrary to my specific instructions as documented by PNC's own records. The timing of the sales of the put options on November 10, 2011 had nothing to do with me or Christopher M. Gibson and were entirely within the control of PNC. I did not give any direction to sell the put options on November 10, 2011 and any allegation to the contrary is inaccurate.
17. The Geier Fund sold 119,971 shares of TRX for $3.60 per share on November 9, 2011 and had PNC executed my order as directed I would have sold on the same day for a loss of $122,000 without accounting for the likely loss and commissions paid for the purchase and sale of the put options on the same day. Instead, PNC failed to follow my instructions and the resulting loss was $128,000 as set forth on page 13 of my fourth quarter 2011 account statement from PNC

attached hereto as Exhibit "F" which once again confirms that the sale date of the put option was supposed to be November **9th,** 2011.

18. I am not a sophisticated securities investor and I do not routinely trade stocks and had never bought or sold any options before or after this transaction. I had no idea that the timing of the trades that took place in November 2011 were significant when PNC asked me to approve the trades. I did not approve of the timing of the trades which were not executed by PNC as directed and documented.

The continuing allegations of "short positions" are inaccurate, misleading and prejudicial.

19. On April 16, 2014 the United States Securities and Exchange Commission (the "Commission") entered an Order Directing Private Investigation and Designating Officers to Take Testimony (the "Investigative Order") in the matter of Geier International Strategies Fund ("Geier Fund").
20. The Commission designated Paul Bohr and George Bagnall as officers of the Commission to perform duties in connection with the Investigative Order.
21. On February 25, 2015, in a hearing (the "Hull Hearing") pursuant to the Investigative Order, Mr. Hull was placed under oath and examined *ex parte* by Paul Bohr and George Bagnall.
22. The definitive academic text Options, Futures, and other Derivatives , John C. Hull[1] (9th Edition) (the "Hull Textbook") defines a "Short Position" on page 871:

> A position assumed when traders sell shares they do not own.

23. Earlier editions of the Hull Textbook define a short position with precisely the same words.
24. Paul Bohr joined George Bagnall's examination of Mr. Hull at the Hull Hearing where the following exchange occurred:

> Q And for the clarity of the record, George (Bagnall) had thrown out the terms "short position" and "long position." And I think it's pretty clear from your testimony, but I just want to make sure, you understand a long position to be buying and holding a stock; correct?
> A Yes.
> Q Okay.
> MR. GROVENSTEIN: And a short position to be?
> MR. BOHR: To be borrowing stock and selling stock in the hope that the stock's price will decline.
> (Emphasis and parenthetical added) (Mr. Grovenstein is Mr. Hull's general counsel) (Hull Hearing Transcript, p. 37:3-12)

25. Paul Bohr and George Bagnall repeatedly told Mr. Hull during the Hull Hearing that I, John William Gibson, and Christopher M. Gibson, had "short positions" in TRX stock. Paul Bohr and

[1] No relationship exists between James M. Hull and John C. Hull.

George Bagnall presented trading records to Mr. Hull purportedly demonstrating that I, John William Gibson, and Christopher M. Gibson, had "short positions" in TRX stock.

26. The interests of a person holding a "short position" in TRX stock (the "Short Seller") would be *diametrically opposed* to the interests of a person holding a *long position* in TRX stock because the Short Seller can only realize a *gain* or *"profit"* if the price of TRX stock *goes down* and can suffer *unlimited losses* if the price of TRX stock *goes up*. A "short position" is insanely risky and an incalculable bet against those with long positions in the same stock. A "short position" would have been particularly insane for Christopher M. Gibson or me or my family to take because it would have been diametrically opposite to the interests of Jim Hull who held demand notes for well over $10 million secured by all of our family's assets all for immaterial gains. The theory is preposterous. If these allegations that I had a "short position" as defined ***for the clarity of the record*** by Paul Bohr were true, I would not have had an alignment of interests with Mr. Hull which was absolutely fundamental and critical and the *sine qua non* to our history of mutual trust and integrity.
27. Paul Bohr and George Bagnall are officers of the Commission and the Hull Hearing took place in the Commission's offices. The public presumption is that in the area of securities laws the Commission and its officers are "experts" and therefore Mr. Hull believed Mr. Bohr and Mr. Bagnall when they alleged that Christopher M. Gibson and I had "short positions" in TRX stock. Mr. Hull's decades long complete confidence and trust in me was irreparably shattered. Immediately following the Hull Hearing he directed Mr. Wayne Grovenstein, his general counsel, to seek a tolling agreement from Christopher M. Gibson and me so that he could later personally file an action against Christopher M. Gibson and me.
28. Short sellers, those persons holding "short positions", are held in fear and contempt by the general investing public.
29. The allegation that Christopher M. Gibson and I had "short positions" was made directly to at least one other Geier Fund investor. See the attached Affidavit from Tim Strelitz which is attached as Exhibit "G".
30. In March of 2016 the Commission entered an Order Instituting Administrative and Cease and Desist Proceedings in the matter of Christopher M. Gibson (the "Administrate Proceedings Order") in which the Division again made allegations that Christopher M. Gibson and I had "short positions" in TRX stock. The Administrative Proceedings Order was published by the Commission as a Release and was available worldwide over the internet and "confirmed" to all Geier Fund investors and the public that Christopher M. Gibson and I had "short positions" in TRX stock.
31. These inaccurate allegations that Christopher M. Gibson and I had "short positions" have been published and communicated to the investors and witnesses in this case and have poisoned and prejudiced them against Christopher M. Gibson and me. These inaccurate allegations of "short positions" have not been corrected for the clarity of the record.
32. Mr. Hull and the other Geier Fund investors accepted their Geier Fund substantial losses as a consequence and risk of a highly speculative investment. In 2014 as I approached age 62 and in part for health reasons Mr. Hull and I negotiated my retirement while continuing our decades long relationship of trust and integrity.
33. The allegations that Christopher M. Gibson and I had "short positions" in TRX is not only inaccurate, there is no evidence to support that allegation. I did not have a "short position" in my PNC Account, I have never had a "short position" in TRX stock or any other stock or any other

account at any time in my entire life. The inaccurate and prejudicial allegations made by Mr. Bohr and Mr. Bagnall have no factual support and have prejudiced Geier Fund investors as witnesses. The factually unsupported allegations of Mr. Bohr and Mr. Bagnall have irretrievably tainted these proceedings because the Geier Fund investors have been irretrievably prejudiced and compromised.

34. At the hearing pursuant to the Administrative Proceedings Order (the "Administrative Proceedings Hearing") the Division presented the economic expert testimony of Dr. Carmen Taveras and Christopher M. Gibson presented the economic expert testimony of Dr. James Overdahl, the former chief economist of the Commission. Both of these experts cited the definitive academic text Options, Futures, and other Derivatives, John C. Hull[2] (9th Edition) (the "Hull Textbook") in their expert reports and both agreed there were no "short positions".
35. The determination of whether a trader or investor has a short position can be readily determined with absolute and mathematical precision and certainty. The determination of whether there is a short position is mathematical and absolute and not subjective.
36. The purchase of the TRX Put Option was a long position because it represented an additional investment in the inventory of TRX related securities as is definitively set forth in the Hull Textbook:

> Buyers of puts ... are referred to as having *long positions*... (Emphasis in original)
> Hull Textbook, p. 10

37. The following exchanges, although referring to Christopher M. Gibson, are equally applicable to the inaccurate statements and allegations made by Mr. Bohr and Mr. Bagnall that John William Gibson had a "short position" in TRX stock. Dr. Taveras never used the term "short position" in her two expert reports and testified as follows:

> Q So it's not accurate to say, then, that Christopher Gibson took a short position on TRX's stock in late October or November of 2011?
> A It's not the words I would use.
> ...
> Q ... Long and short refers to inventory ..., right?
> A The way I'm using it, yes.
> Q Short means I have less stock in my possession than I have obligations to do something with, right? My inventory is short?
> ...
> A ... So I sold 100 shares and I only bought 50. That is shorting the stock, yes.
> ...
> Q ... Mr. Hull's book, which you cite ... defines a short position as "A position assumed when traders sell shares they do not own."
> A I'm not looking at it, but that sounds correct, yes.
> Q ... So adopting that definition of a short position, did Mr. Gibson have a short position in TRX in late October 2011 as a result of the puts he bought?
> A Not in that definition.

[2] No relationship exists between James M. Hull and John C. Hull.

Dr. Taveras: Administrative Proceedings Hearing Tr. 397: 17-20; 398:20 -399:5; 403; 1-10

38. Dr. Overdahl agreed with Dr. Taveras that there was never a short position:

> Q So if the Division told anyone that Mr. Gibson had taken a short position on TRX at any point, would that be accurate?
> A It would not be accurate. He had long exposure throughout this time.
> Q If they told that to Mr. Hull, it wouldn't be accurate?
> A If the told it to Mr. – it would not be accurate.
> Q If they told that to the Commission?
> JUDGE MURRAY: If it's inaccurate, it's inaccurate. It doesn't matter who they told. If the statement is inaccurate, it's inaccurate.
>
> Dr. Overdahl: Administrative Proceeding Hearing Tr. 1133: 23 – 1134: 10

39. The Division's expert, the Commission's former chief economist and this tribunal have all concluded and confirmed that there were no "short positions" at all and that these highly prejudicial allegations are inaccurate. This tribunal in its Initial Decision makes no reference to the completely discredited "short positions" allegations.

The Division has not corrected for the clarity of the record the now discredited, inaccurate, misleading and prejudicial allegations of "short positions" and these allegations continue to poison the potential witnesses who have not been advised that these allegations are discredited and inaccurate.

40. Mr. Bohr and Mr. Bagnall have not, *for the clarity of the record,* corrected, withdrawn or amended in any form or fashion their inaccurate allegations that Christopher M. Gibson and I had "short positions" in TRX. The Commission has not published a release over the internet retracting these prejudicial and inaccurate allegations. The prejudicial effect of these factually unsupported and inaccurate and misleading allegations continues to this moment. The Geier Fund investors remain poisoned as potential witnesses in this Administrative Proceedings Hearing where the Respondent's rights to examine witnesses and due process protections are already much abbreviated relative to a proceeding in a United States District Court. These witnesses could corroborate the Respondent's' testimony and credibility.

The long positions held in TRX stock as well as the millions of dollars in secured demand debt are material facts omitted from the Administrative Proceedings Order and are critical in evaluating the trading and intent of the Respondent and me.

41. The Administrative Proceedings Order omits detailed reference to the long positions in TRX funded by secured demand notes of over $11 million and the omission of these material facts

alone makes the Administrative Proceedings Order inaccurate and misleading. In fact, my family and I had a far greater financial commitment to the Geier Fund and the TRX position relative to our net worth and liquidity than any other investor and suffered far greater relative losses. My wife, son and I had all of our liquid assets invested in the Geier Fund and my wife and son had their entire net worth invested in the Geier Fund. The Administrative Proceedings Order alleges the exact opposite and is not only inaccurate and misleading, it is highly prejudicial.

My financial capacity is not relevant in this case and its disclosure by the Division and publication in an SEC release violates my expectations of privacy and confidentiality.

42. I, John William Gibson, was placed under oath on November 19,2015 pursuant to the Investigative order (the "John William Gibson Hearing") and while being questioned about the Geier Fund was asked repeatedly both on and off the record for my financial statement and to state my approximate net worth with my counsel questioning its purpose as follows:

> MR. FERRIGNO: ...If you can point to us the part of the formal order that makes the net worth relevant... we can't see what the connection is between Mr. Gibson's net worth and of the things we have been talking about today...
> John William Gibson Hearing Transcript, p.184:21-25.

43. After I agreed off the record to provide a financial statement the following exchange took place at the close of the John William Gibson Hearing:

> MR. BOHR: I think that's it. ***Other than the ultimate question***.
> MR. FERRIGNO: Oh, yes, we'll get you something. It doesn't exist as we speak.
> MR. BOHR: What do you envision as a format?
> MR. FERRIGNO: Like I say, it doesn't exist. I'll have to figure it out. What do you want?
> MR. BOHR: Well, a balance sheet, assets, liabilities, net worth and an affidavit attesting to it. Does that sound right?
> MR. BAGNALL: When do you think you could have it to us?
> ...
> THE WITNESS: In short order.
> MR. BOHR: It's fine if you put all of your requests for confidentiality FOIA on it, all that sort of thing.
> John William Gibson Hearing Transcript, p. 289:21 – 290:17. (Emphasis added)

44. I provided my financial statement to the Division with the understanding and expectation that my financial privacy and confidentiality would be respected. My son Christopher M. Gibson is insolvent as demonstrated by Respondent's Exhibit 145, tax returns, banking statements, brokerage statements, the review by the CPA Doug Cates and the Respondent's Form D-A.. The Division has taken the testimony of Christopher M. Gibson twice pursuant to the Investigative Order and then again in the Administrative Proceedings Hearing. The Division has subpoenaed all

of Christopher M. Gibson's financial and tax returns as well as all of his correspondence and texts and any other possible documents relevant to his financial condition and has had all of these documents in their possession literally for years. Christopher M. Gibson has been consistent in stating that he became insolvent on November 10, 2011 and remains insolvent. Respondent's Exhibit 145 summarizes his insolvency and lack of financial capacity and the Division had every opportunity at the Administrative Proceedings Hearing to ask any questions they belatedly raise in their Reply Brief. Virtually every professional school asks whether an applicant has been the subject of any disciplinary action by any other professional governing organization. The application for virtually every licensed occupation asks the same question and almost every skilled occupation requires a license. https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices/amp/ The collateral consequences of the industry bar imposed severely limit Christopher M. Gibson's future earnings capacity.

45. The Division in its Reply Brief references the Respondent's ability to draw on an "apparently unlimited 'line of credit'" from me, John William Gibson and that the Respondent has "ready access to substantial funds" again referring to me, John William Gibson. The Initial Decision references the Division's Reply Brief and "notes his father's considerable financial support" which presumes my considerable financial capacity to provide such support. My personal financial capacity is irrelevant in assessing civil penalties against my son. The reference to my financial capacity by the Division in its Reply Brief and reference in the Initial Decision published as a Commission Release over the internet violates my expectations of privacy and confidentiality in having submitted my financial statement to the Division under pressure. Mr. Bohr suggested that all of this is about the "ultimate question" which would appear to be about finding someone with the financial capacity to pay civil fines.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 21st day of February, 2018.

John William Gibson

State of Georgia
County of Richmond

Subscribed and sworn to before me, in my presence, this 13th day of February, 2018

By _____ Notary Public

My Commission Expires: 05/10/2021

SUZANNE S. WEST NOTARY PUBLIC COLUMBIA COUNTY

Exhibit A

DIVISION EXHIBIT 104

Corp 87600U0WD
11/19/11 BY

JOHN GIBSON IRA CUST

Portfolio Holdings by Asset Class and Sector — *As of November 8, 2011*

SHARES / UNITS	TICKER	SECURITY DESCRIPTION	MAT DATE / COUPON	MARKET VALUE	TAX COST	PRICE/ $ PRICE	ANNUAL DIVIDEND	ANNUAL INCOME	YIELD	% ASSET CLASS	% OF PORTFOLIO
CASH											
MONEY MARKET FUNDS											
1,690.11		FIDELITY MONEY MARKET - Principal INSTITUTIONAL CLASS		1,690	1,690	1.00	0.00	2	0.1%	100.0%	0.7%
TOTAL MONEY MARKET FUNDS				1,690	1,690			2	0.1%	100.0%	0.7%
TOTAL CASH				1,690	1,690			2	0.1%	100.0%	0.7%
STOCKS											
FOREIGN ORDINARY DOMESTICALLY TRADED											
MATERIALS											
1,500 Da Alex		HARRICK GOLD CORP SEDOL 7024677		78,000	43,779	52.00	0.60	900	1.2%	31.5%	31.3%
46,000.00 TRE		TANZANIAN ROYALTY EXPLORATIO IS in CA87600U1049 SEDOL BOHDZK5		169,740	288,054	3.69	0.00	0	0.0%	68.5%	68.0%
TOTAL MATERIALS				247,830	331,833			900	0.4%	100.0%	99.3%
TOTAL FOREIGN ORDINARY DOMESTICALLY TRA				247,830	331,833			900	0.4%	100.0%	99.3%
TOTAL STOCKS				247,830	331,833			900	0.4%	100.0%	99.3%
GRAND TOTAL				249,520	333,523			902	0.4%		100.0%

Sell 10K

* includes ADR Assets

JIM
[redacted]
ALERT SET UP

Marc
[redacted]
TRADE

Buy 350 PUTS
NOV @ STRIKE
VWAT order

[redacted]

46K sold
30K
16K

[redacted]2477

Page 1 of 1

PNC We all achieve when everyone wins

PNC WEALTH MANAGEMENT

Exhibit B

DIVISION EXHIBIT 119

RE: Directed Trades
John Gibson
to:
christopher.young
11/28/2011 06:03 PM
Show Details

Thanks Chris ! I approve of the trades. So do I have the $41,448 in cash available to purchase? Best regards!

From: christopher.young@pnc.com [mailto:christopher.young@pnc.com]
Sent: Monday, November 28, 2011 4:12 PM
To: John Gibson
Subject: Directed Trades

John,

Attached, please find the directed trade details in your custody account and a current portfolio holdings list for your review.

So that my records may be complete, please send a confirmation response to this e-mail indicating your approval of trades as directed by you.

Chris--

T. Chris Young
PNC Wealth Management
Investment Advisor / Vice President
(410) 237-5612
(800) 475-1036 Ext. 5612
Fax (410) 237-5888

Exhibit C

To: Chris Gibson[cg@gelerfund.com]
From: John Gibson
Sent: Mon 11/28/2011 6:04:05 PM
Importance: Normal
Subject: FW: Directed Trades
John Gibson Trades.xls
GibsonPortfolio.pdf

Fyi

What should I buy with the $41,558?

From: christopher.young@pnc.com [mailto:christopher.young@pnc.com]
Sent: Monday, November 28, 2011 4:12 PM
To: John Gibson
Subject: Directed Trades

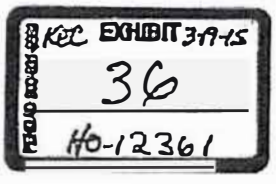
John,

Attached, please find the directed trade details in your custody account and a current portfolio holdings list for your review.

So that my records may be complete, please send a confirmation response to this e-mail indicating your approval of trades as directed by you.

Chris–

T. Chris Young
PNC Wealth Management
Investment Advisor / Vice President
(410) 237-5612
(800) 475-1036 Ext. 5612
Fax (410) 237-5888



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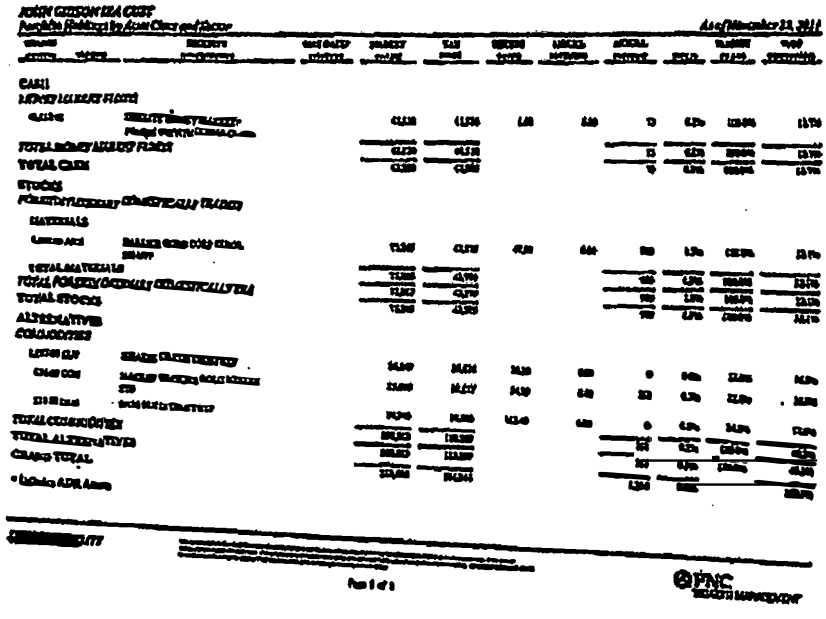

PNC WEALTH MANAGEMENT

Account No. [redacted]2477 John Gibson IRA Cust

Date	Shares	Ticker	Description	Price	Cost	Commissions	Total
PURCHASED:							
11/9/2011	35,000		Tanzanian Royalty Put @ 4 Expires 11/19/11	$0.52	$18,359.99	$357.88	$18,717.87
11/16/2011	1,197	SLV	iShares Silver Trust ETF	$33.25	$39,800.25	$23.94	$39,824.19
11/16/2011	651	GDX	Market Vectors Gold Miners ETF	$61.24	$39,864.25	$13.02	$39,877.27
11/16/2011	231	GLD	SPDR Gold Trust ETF	$172.30	$39,800.61	$4.62	$39,805.23
SOLD:							
11/9/2011	10,000	TRX	Tanzanian Royalty Exploration	$3.61	$36,052.00	$200.70	$35,851.30
11/10/2011	35,000		Tanzanian Royalty Put @ 4 Expires 11/19/11	$1.76	$61,600.00	$1,059.07	$60,540.93
11/10/2011	10,000	TRX	Tanzanian Royalty Exploration	$2.18	$21,814.00	$200.42	$21,613.58
11/10/2011	10,000	TRX	Tanzanian Royalty Explocation	$2.13	$21,261.00	$200.41	$21,060.59
11/10/2011	10,000	TRX	Tanzanian Royalty Exploration	$2.43	$24,300.00	$200.47	$24,099.53
11/10/2011	6,000	TRX	Tanzanian Royalty Exploration	$2.51	$15,046.80	$120.29	$14,926.51

Exhibit D

To: Chris Gibson (Geierfund)[cg@geierfund.com]
From: John Gibson
Sent: Mon 11/28/2011 7:01:20 PM
Importance: Normal
Subject: RE: Directed Trades

I will do it tomorrow at the open?

From: Chris Gibson [mailto:cg@geierfund.com]
Sent: Monday, November 28, 2011 6:54 PM
To: John Gibson
Subject: Re: Directed Trades

Pnc is awful they did not execute your trades in a timely manner at all for what it's worth. Buy SLV with cash

On Nov 28, 2011, at 6:04 PM, John Gibson <jgibson@hullstoreygibson.com> wrote:

> Fyi
>
> What should I buy with the $41,558?
>
> **From:** christopher.young@pnc.com [mailto:christopher.young@pnc.com]
> **Sent:** Monday, November 28, 2011 4:12 PM
> **To:** John Gibson
> **Subject:** Directed Trades
>
> John,
>
> Attached, please find the directed trade details in your custody account and a current portfolio holdings list for your review.
>
> So that my records may be complete, please send a confirmation response to this e-mail indicating your approval of trades as directed by you.

Chris–

T. Chris Young
PNC Wealth Management
Investment Advisor / Vice President
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(800) 475-1036 Ext. 5612
Fax (410) 237-5888

<John Gibson Trades.xls>

<GibsonPortfolio.pdf>

Exhibit E

RESPONDENT'S EXHIBIT

32

PNC WEALTH MANAGEMENT

JOHN GIBSON IRA CUST
IRA DIRECTED STATEMENT

Account number [redacted] Page 1 of 15
January 1, 2011 -

Total portfolio value

Total portfolio value on December 30	$204,419.30
Total portfolio value on January 1	312,569.42
Total change in value	-$108,150.12

Bulletin board

Enclosed is an insert addressing expense ratios on mutual funds available through PNC Bank, N.A. This disclosure provides important information on fund level compensation paid to PNC and its affiliates. Additional information on these fees is available in each fund's prospectus. To obtain a copy of a prospectus, contact your account officer.

Despite a sluggish economy and a weak demand, the 2011 PNC Christmas Price Index increased 3.5 percent in the whimsical economic analysis by PNC Wealth Management based on the gifts in the holiday classic "The Twelve Days of Christmas." According to the 28th annual survey, the price tag for the PNC CPI is $24,253.18 in 2011, $822.80 more than last year and less than half the increase seen in 2010. Still, that comes on the heels of a more modest 1.3 percent increase two years ago at the end of the recession. For more detail about this year's index, please visit our site at www.pnc.com/christmaspriceindex.com

www.pnc.com

PNC BANK NA CUSTODIAN FOR JOHN GIBSON UNDER IRA ADOPTION AGREEMENT DATED 04/20/09

Your Relationship Managers

Marcia M Etheridge
PNC
Two Hopkins Plaza
Baltimore, MD 21201
(410) 237-5720
marcia.etheridge@pnc.com

Thomas Young
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Two Hopkins Plaza
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kathleen.beck@pnc.com

Detail

Investment income

Activity	Description	Payable date	Post date	Quantity	Amount per unit	Cash
Dividend		03/31/11	04/01/11	224.970		0.02
Dividend		04/29/11	05/02/11	2,181.920		0.05
Dividend		05/31/11	06/01/11	2,044.150		0.33
Dividend		06/22/11	07/01/11	2,050.770		0.24
Dividend		07/31/11	08/01/11	1,925.240		0.13
Dividend		08/31/11	09/01/11	1,818.220		0.18
Dividend		09/30/11	10/03/11	1,853.270		0.16
Dividend		10/31/11	11/01/11	1,774.440		0.33
Dividend		11/30/11	12/01/11	41,537.900		6.15
						$7.53
Total investment income						$7[illegible]

Sales and maturities

Activity	Description	Trade date	Settle date	Quantity	Amount per unit	Charges	Cash	Original value at PNC
Sale	ISHARES SILVER TRUST STF BROKER: INSTINET	04/28/11	05/03/11	1,215	$[illegible].1612	$	$[illegible],571.91	- $30,310.29
Sale	POWERSHARES DB COMMODITY INDEX TRACKING FUND STF BROKER: MERRILL LYNCH PIERC FENN & SMITH	04/22/11	04/28/11	1,000	31.5900	20.61	31,569.39	- 20,002.00
Sale	SPDR GOLD TRUST STF BROKER: MERRILL LYNCH PIERC FENN & SMITH	04/28/11	04/28/11	410	148.9000	11.18	72,009.02	- 64,[illegible].59
Sale	TANZANIAN ROYALTY EXPLORATIO PUT @ 4 EXPIRES 11/19/11 TRX: 1111TP00004000	11/09/11	11/14/11	35,000	1.7600	1,059.07	60,940.93	- 18,717.89
Sale	TANZANIAN ROYALTY EXPLORATIO [illegible] BROKER: INSTINET	11/09/11	11/18/11	10,000	3.4052	200.76	33,851.20	- 42,[illegible].59
Sale	BROKER: MERRILL LYNCH PIERC FENN & SMITH	11/10/11	11/16/11	10,000	2.1814	200.42	21,613.58	- 42,[illegible].38
Sale	BROKER: MERRILL LYNCH PIERC FENN & SMITH	11/10/11	11/16/11	10,000	2.1761	200.41	21,[illegible].59	- 42,[illegible].25
Sale	BROKER: MERRILL LYNCH PIERC FENN & SMITH	11/10/11	11/16/11	10,000	2.4300	200.47	24,099.53	- 42,[illegible].34
Sale	BROKER: MERRILL LYNCH PIERC FENN & SMITH	11/10/11	11/16/11	6,000	2.8078	120.89	16,[illegible].81	37,[illegible].21

Detail

Disbursements

Purchases

Activity	Description	Trade date	Settle date	Quantity	Amount per unit	Charges	Cash	Original value of PNC
Purchase	ISHARES SILVER TRUST ETF BROKER: INSTINET	11/16/11	11/21/11	1,197	$32.2900	$	- $39,024.19	$39,024.19
Purchase	BROKER: DAY CONVERGEX	11/29/11	12/02/11	1,220	31.3199	26.40	- 41,248.67	41,248.67
							- $81,272.86	$81,272.86
Purchase	MARKET VECTORS GOLD MINERS ETF BROKER: BARCLAYS CAPITAL LE	11/16/11	11/21/11	481	81.2354	13.02	- 39,077.27	39,077.27
Purchase	SPDR GOLD TRUST ETF BROKER: BARCLAYS CAPITAL LE	11/16/11	11/21/11	231	172.2979	4.62	- 39,809.23	39,809.23
Purchase	TANZANIAN ROYALTY EXPLORATIO PUT @ 4 EXPIRES 11/19/11 TRX 111119P00004000 BROKER: MKM PARTNERS LLC	11/09/11	11/10/11	35,000	0.5246	$37.68	- 18,717.68	18,717.68
Purchase	TANZANIAN ROYALTY EXPLORATIO LMH CALL 00047 SEDOL 5011203 BROKER: MERRILL LYNCH PIERC FENN & SMITH	04/25/11	04/29/11	10,000	6.2777	200.00	- 62,977.00	62,977.00
Purchase	BROKER: MERRILL LYNCH PIERC FENN & SMITH	04/26/11	04/29/11	10,000	6.2013	200.00	- 62,211.00	62,211.00
Purchase	BROKER: MERRILL LYNCH PIERC FENN & SMITH	04/26/11	04/29/11	10,000	6.2081	200.00	- 62,281.00	62,281.00
Purchase	BROKER: MERRILL LYNCH PIERC FENN & SMITH	04/28/11	05/02/11	10,000	6.2447	200.00	- 62,647.00	62,647.00
Purchase	BROKER: MERRILL LYNCH PIERC FENN & SMITH	04/28/11	05/02/11	6,000	6.2695	120.00	- 37,737.00	37,737.00
							- $289,053.00	$289,053.00
Purchase	FIDELITY MONEY MARKET INSTITUTIONAL CLASS FD #059 NET INVESTMENT - PURCHASE	03/31/11	03/31/11	49.350	1.0000		- 49.35	49.35
Purchase	FIDELITY MONEY MARKET INSTITUTIONAL CLASS FD #059 NET INVESTMENT - PURCHASE	04/30/11	04/30/11	1,957.050	1.0000		- 1,957.05	1,957.05
Purchase	FIDELITY MONEY MARKET INSTITUTIONAL CLASS FD #059 NET INVESTMENT - PURCHASE	05/31/11	05/31/11	14.350	1.0000		- 14.35	14.35

Detail

Fees and charges

Activity	Description	Post date	Quantity	Amount per unit	Cash
Asset value fee	PNC BANK PRINCIPAL COMPENSATION THRU 09/30/11	10/05/11			-79.99
Asset value fee	PNC BANK PRINCIPAL COMPENSATION THRU 10/31/11	11/03/11			-84.33
Asset value fee	PNC BANK PRINCIPAL COMPENSATION THRU 11/30/11	12/05/11			-79.27
Total fees and charges					-$1,312.14
Total					-$510,794.33
Ending cash balance					$0.00
Change in cash					

Realized gain/loss detail

Description	Quantity	Avg. original value at PNC per unit	Total original value at PNC	Sale date	Sale price per unit	Total proceeds	Net realized gain/loss
ISHARES SILVER TRUST ETF	1,445	$18.43000	-$26,639.25	04/25/11	$48.96	$74,671.81	$48,221.56
POWERSHARES DB COMMODITY INDEX TRACKING FUND ETF	1,000	20.40200	-20,402.00	04/25/11	31.57	31,559.39	10,962.39
SPDR GOLD TRUST ETF	490	114.45000	-56,080.50	04/25/11	144.78	72,009.02	15,928.52
TANZANIAN ROYALTY EXPLORATIO PUT Q 6 EXPIRES 11/19/11 TRK 111119P00004000	35,000	0.33460	-10,717.29	11/09/11	1.76	60,540.93	41,823.65
TANZANIAN ROYALTY EXPLORATIO ISIN CA87600U1049 SEDOL B01DZX5	10,000	6.26204	-62,620.25	11/09/11	2.61	25,851.20	-36,769.05
TANZANIAN ROYALTY EXPLORATIO ISIN CA87600U1049 SEDOL B01DZX5	10,000	6.26204	-62,620.35	11/10/11	2.18	21,612.58	-41,034.77

Exhibit F

Detail

Realized gain/loss detail

Description	Quantity	Avg. original value at PNC per unit	Total original value at PNC	Sale date	Sale price per unit	Total proceeds	Net realize gain/lo
TANZANIAN ROYALTY EXPLORATIO PUT @ 4 EXPIRES 11/19/11 TRX 111119P00004000	35.000	$0.53480	- $18,717.88	11/09/11	$1 76	$60,540 93	$41,823.(
TANZANIAN ROYALTY EXPLORATIO ISIN CA87600U1049 SEDOL B01DZX5	10,000	6.26204	- 62,620.35	11/09/11	3 61	35,851 30	- 26,769 (
TANZANIAN ROYALTY EXPLORATIO ISIN CA87600U1049 SEDOL B01DZX5	10,000	6.26204	- 62,620.35	11/10/11	2 18	21,613 58	- 41,006 7
TANZANIAN ROYALTY EXPLORATIO ISIN CA87600U1049 SEDOL B01DZX5	10,000	6.26204	- 62,620 35	11/10/11	2 13	21,060.59	- 41,559.7
TANZANIAN ROYALTY EXPLORATIO ISIN CA87600U1049 SEDOL B01DZX5	10,000	6.26203	- 62,620.34	11/10/11	2.43	24,099.53	- 38,520 8
TANZANIAN ROYALTY EXPLORATIO ISIN CA87600U1049 SEDOL B01DZX5	6,000	6.26204	- 37,572.21	11/10/11	2.51	14,926.51	- 22,645 7
Total			- $306,771.48			$178,092.44	- $128,679.0

PNC
WEALTH MANAGEMENT

Exhibit G

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F STREET, N.E.
WASHINGTON, D.C. 20549-5720

DIVISION OF
ENFORCEMENT

In the Matter of Geier International Strategies Fund – (HO-12361)

Affidavit of Timothy F. Strelitz

I, Timothy F. Strelitz, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is Timothy F. Strelitz.

2. I am a United States citizen.

3. I currently reside in Long Beach, California.

4. I am over the age of eighteen and competent to swear to the matters set forth herein.

5. I have personal knowledge of the information contained in this Affidavit.

6. I invested $150,000 in, and became a limited partner of, Geier International Strategies Fund ("GISF") on or about February 1, 2010.

7. I was a GISF limited partner through approximately April 2013.

8. During the entire time I was a limited partner in GISF, the fund was managed by Christopher M. Gibson ("Gibson").

9. In 2010, my GISF investment approximately doubled, but because of the type of assets held by the fund at that time, I incurred a large capital gains tax liability.

10. GISF suffered significant losses in 2011 and 2012.

11. My GISF investment ended in or around April 2013 and my remaining capital in the fund, approximately $35,000, was returned to me at that time.

12. In total, I estimate that I lost $250,000 by investing in GISF.

13. I understood in 2011 that virtually all of GISF's assets were invested long in the common stock of Tanzanian Royalty Exploration Company ("TRX").

14. I did not know that, in October and November 2011, while GISF held the long TRX position, Gibson took a short TRX position in two personal investment accounts he controlled—one in his name and one in the name of his then-girlfriend.

15. I never received any of the proceeds from the short TRX positions Gibson took in his and his girlfriend's personal accounts.

16. As a GISF investor losing money on a long TRX investment, I would have wanted to know about the short TRX positions Gibson took in the two personal accounts.

17. If I had known at the time that Gibson was taking, or was planning to take, short TRX positions in the personal accounts, I would have considered it material and I would have withdrawn my money from GISF.

Timothy F. Strelitz

2/2/15
Date

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy or validity of that document.

Signed before me this 2nd day of February, 2015, in the city of Long Beach, State of California, by Timothy F. Strelitz.

Notary Signature

RAJ MANCHANDA
COMM. #1990523
Notary Public - California
Los Angeles County
My Comm. Expires Oct. 5, 2016

Notary Stamp

In the Matter of:

CHRISTOPHER M. GIBSON

File No. 3-17184

Expert Report of Garrick Tsui

February 14, 2018

Garrick Tsui

North Bethesda, Maryland

RESPONDENT'S EXHIBIT

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1. I am the Senior Vice President of Risk Solutions & Investigations based in the firm's Washington, DC office. I have over 35 years of experience as a federal and regulatory investigator and securities trading analyst and a consultant in the private sector. My expertise includes internal investigations, fraud investigations including securities trading matters, due diligence inquiries, opposition research matters, and corruption cases. My government experience includes nine years as an investigator for the Securities and Exchange Commission ("SEC") during which I worked as a Market Surveillance Specialist in the Enforcement Division investigating numerous insider-trading cases, market manipulation cases, and penny-stock frauds. In addition, I worked as a Principal Investigator for the Financial Industry Regulatory Authority ("FINRA"). Prior to the SEC, I worked as a trader for a firm making markets in over-the- counter stocks. Attached to this Declaration as **Exhibit A** is a true and correct copy of my curriculum vitae.

2. I was retained by Nelson Mullins Riley & Scarborough LLP on behalf of the Respondent, Christopher M. Gibson ("Gibson"), to review and analyze trading directed by Gibson on behalf of Geier International Strategies Fund LLC ("GISF" of the "Fund") and to provide expert opinions regarding Gibson's trading in the common shares and options of Tanzanian Royalty Exploration ("TRX"), a gold exploration company, during 2011.

3. The documents that I have reviewed in detail include, but are not limited to, the following: (a) Order Instituting Administrative and Cease-And-Desist Proceedings dated March 29, 2016; (b) Initial Decision dated January 25, 2017; (c) transcript of the hearing conducted September 12, 2016, to Sept 16, 2016 and exhibits admitted into evidence; (d) monthly account statements in the name of Geier International Strategies Fund LLC at GarWood Securities LLC

and Casimir Capital LP showing trading activity in publicly traded securities conducted from September 1, 2011 through November 31, 2011; (e) monthly account statements in the name of Christopher Myles Gibson at Charles Schwab showing trading activity in publicly traded securities conducted from September 1, 2011 through November 31, 2011; (f) monthly account statements in the name of Francesca Marzullo at Charles Schwab showing trading activity in publicly traded securities conducted from September 1, 2011 through November 31, 2011; (g) monthly account statements in the name of Geier Group LLC at Charles Schwab showing trading activity in publicly traded securities conducted from August 1, 2011 through November 31, 2011; (h) Expert Report of Carmen A. Taveras, Ph.D dated July 14, 2016; (i) historical stock prices and volumes for Tanzanian Royalty Exploration Corporation on Yahoo Finance;

Negotiated Block Transactions

4. Negotiated block transactions for securities traded on an exchange are often conducted in the Over-the-Counter or upstairs market. Buyers or sellers of blocks of exchange listed stocks contact brokers who attempt to locate counterparties. The terms of the transactions are negotiated generally with reference to the price and volume of transactions on the relevant exchanges. Trades are arranged off the exchange to avoid the impact of buying or selling large amounts of stock on the market. After being shown an indication of interest, a broker approaches buyers or sellers to identify potential counterparties. A broker in an upstairs transaction acts as the agent for both counterparties. All terms including price and volume are negotiable until the trade is executed. Although orders may be deemed as firm by both parties, there are no obligations to buy or sell stock until a trade is executed, consummating the transaction.

Trading by the Fund

5. At some point in 2011, Gibson began contacting potential buyers for the Fund's TRX shares. For example, on August 22, 2011, Gibson emailed Richard Sands ("Sands"), a broker at Casimir Capital L.P. asking if Sands had a buyer for a block of TRX. As part of the negotiations, Gibson gave Sands a "firm order" of 9,000,000 shares of TRX for sale at $6.25. Sands indicated the price was high but maintained he would find a buyer. (SEC-Lit- Prod-000144170).

6. During the negotiations with Sands, Gibson indicated that another potential buyer had been contacted. Gibson identified the other potential buyer as a short seller willing to pay a premium for a block. (SEC-Lit- Prod-000144171).

7. The negotiations with Sands failed to produce a transaction. In addition, Gibson did not sell a block of the Fund's TRX shares to a short seller at or around this time. (Respondent's Exhibit 17).

8. By September 24, 2011, Gibson had negotiated a potential block sale of TRX shares with a third potential buyer. On that day, he emailed Dennis Gerecke ("Gerecke"), his broker at GarWood Securities, LLC. He informed Gerecke of ongoing negotiations for the sale of up to 5,000,000 shares of TRX with a potential buyer in Abu Dhabi who already owned 11 percent of the stock. (Respondent's Exhibit 61).

9. Due to the uncertainty inherent in negotiated block transactions and despite already informing at least three representatives for major buyers of the Fund's intention to sell TRX, Gibson again contacted Sands. On September 25, 2011, Gibson asked Sands if Platinum Partners ("Platinum"), a large hedge fund holding a significant position in TRX was interested in buying TRX at "current prices." (Respondent Exhibit 62).

10. As part of these negotiations with Sands, on September 26, 2011, Gibson informed Sands the Fund could sell up to 10,250,000 shares of TRX. (Respondent's Exhibit 62).

11. From September 25, 2011, through the afternoon of September 27, 2011, neither Gibson nor Sands identified a specific price for the sale of TRX. In his initial email, Gibson indicated he was interested in selling at "current prices." (Respondent Exhibit 62). Platinum had purchased 30,000,000 shares of TRX at $5.75 in August 2011, and Gibson understood it was interested in more. (Tr.at 139 and 198). Gibson thought if Platinum bought as recently as August at $5.75, then it would be a buyer at $4.00, which was the current price of TRX during the negotiations. (Tr. at 146).

12. Gibson repeatedly asked Sands for a firm price but he did not receive a price from Sands until shortly before the trade was executed. (Respondent Exhibit 62). Even late in the trading day of September 27, 2011, Gibson still did not know what price Sands was bidding. (Respondent's Exhibit 63). At this point, Gibson remained uncertain of a price and therefore uncertain if a sale would be completed.

13. Late in the afternoon of September 27, 2011, Sands gave Gibson a price of $3.50 per share for the block sale of TRX stock. (Tr. at 144-145). Based on statements by Sands, up until the point Sands bid $3.50, Gibson thought the purchase would be the current market for TRX during the negotiations or $4.00. Gibson sought to sell the Fund's position through negotiated block sales to avoid putting downward pressure on the price of TRX. Because Gibson had already informed potential buyers that the Fund was a seller, Gibson and Hull decided to sell TRX shares at $3.50 because they felt they had no other choice. (Tr. at 144-145). Even though Gibson had offered the Fund's entire position, Sands only arranged for purchases of 3,734,395 shares of TRX. (Respondent's Exhibit 64).

14. By September 30, 2011, Gibson had negotiated the sale of the remaining shares of TRX held by the Fund with Luis Sequeira ("Sequeira"), a representative at Roheryn Investments who located a buyer of TRX in Abu Dhabi. Sequeira agreed to buy 5,900,000 share of TRX from the Fund at $4.50 per share and signed a document entitled "Share Sale Agreement" with those terms. Respondent's Exhibit 92. Also on September 30, 2011, Gibson signed a document entitled "Confirmation of Share Sale", agreeing to the terms with Sequeira. (Respondent's Exhibit 94).

15. On October 2, 2011, during the negotiations with Sequeira, Sands told Gibson to stop shopping the TRX to the market and that Sands would find him a buyer. (Respondent's Exhibit 95).

16. The negotiated block sale of 5,900,000 shares of TRX at $4.50, agreed to by Gibson and Sequeira was never consummated. The two parties continued negotiations. (Respondent's Exhibits 95, 98, 99, 100). Despite having signed agreements, Gibson sold less than 400,000 shares of TRX through Sequeira. (Tr. at 173-174, Respondent's Exhibit 18.)

17. On October 18, 2011, the Fund bought 680,636 shares of TRX from Hull in a private transaction at $3.60 per share. (Tr. at 182). The purchase by the Fund helped Hull's personal liquidity situation while keeping Hull aligned with the other investors in the Fund. (Tr. at 181-197). At the time of the trade, Gibson was still negotiating with potential buyers but had no firm knowledge of any block sales by the Fund.

18. The Hull shares were purchased by the Fund at $3.60 which was the closing price of TRX on October 18, 2011. (Tr. at 182). On that day, TRX opened at $3.51. The stock traded at a high of $3.67 and low of $3.40 before closing at $3.60. (Yahoo Finance TRX History).

19. On or around November 7, 2011, Gibson received a call from Sands seeking a

meeting with Gibson and David Levy ("Levy") of Platinum. Gibson Tr. at 209. Based on representations by Sands, Gibson thought the purpose of the meeting was to discuss Platinum's buying the balance of the Fund's position in TRX. Gibson Tr. at 209-210. Until that time, Gibson had been unable to negotiate the sale of most the TRX shares held by the Fund.

20. On November 9, 2011, Gibson met with Levy to discuss the TRX shares. Instead of bidding for the stock, Levy offered Gibson a standstill agreement whereby the Fund would not sell any TRX share for six month in exchange for $10,000 per month. (Tr. at 212).

21. After the meeting with Levy, Gibson believed Platinum intended to sell TRX shares. After consulting with Hull, they decided to sell TRX shares immediately. Prior to selling the TRX shares, in an attempt to signal potential buyers that the Fund intended to sell TRX, Gibson purchased for the Fund 500 TRX November 19 $2 Puts and 500 TRX November 19 $3 Puts. (Respondent's Exhibit 19) (Respondent's Exhibit 175).

22. On November 10, 2011, the Fund sold 4,878,772 shares of TRX on the exchange at an approximate price of $2.00 per share. (Tr. at 212-214).

Analysis of Gibson's Sales on September 26, 2011

23. On September 26, 2011, Gibson sold 2,000 TRX at $4.05 per share from his personal account netting $8,092.53. (Respondent's Exhibit 23). Gibson placed an order on behalf of Francesca Marzullo ("Marzullo"), at the time Gibson's girlfriend, selling 18,900 shares of at approximately $4.04 netting $76,334.71. (Respondent's Exhibit 26). Gibson also sold 1,000 shares at 4.05, held by the Grier Group, earning $4,041.88. (Respondent's Exhibit 29).

24. Gibson was shopping blocks of the Fund's TRX holdings well before September

26, 2011. For example, on August 24, 2011, he told Sands he could sell 9,000,000 shares of TRX. (SEC-Lit- Prod-000144173). Despite knowing the Fund was looking to sell TRX as early as August 24, 2011, Gibson did not sell TRX shares he personally controlled until September 26, 2011. By the date of his personal sales, Gibson had contacted numerous market professionals including but not limited to Sands and Platinum twice, Sequeira and his client in Abu Dhabi, Gerecke at GarWood, and at least one short seller. (SEC-Lit- Prod-000144173, SEC-Lit- Prod-000144171, Respondent Exhibit 61). By the time he sold shares from his personal account, the Fund's intention to sell up to 10 million shares of TRX was known in the market place.

25. In addition, by September 26, 2011, Gibson had entered into at least three separate negotiations for the block sale of TRX without completing any block sales. As demonstrated by communication between Gibson and potential buyers, no firm orders existed during the negotiations. For example, during ongoing negotiations that lasted three days, Sands never indicated a price for the block of TRX until immediately prior to executing the trade. (Tr. at 144-145). Despite having a signed agreement with Sequeira specifying price and volume, the block trade was never consummated. Instead of 5.9 million shares, Gibson was able to sell less than 400,000 shares through Sequeira, and that trade was completed well after an agreement was signed. (Tr. at 173-174, Respondent's Exhibit 18, Respondent's Exhibit 121).

26. In the negotiating of block trades, there are no firm orders. There are inherent uncertainties with these transactions. When Gibson sold TRX shares from his personal account, he had no clear knowledge as to price, volume or timing in regards to sale of TRX shares by the Fund.

Analysis of Hull's Sale on October 18, 2011

27. On October 18, 2011, the Fund bought 680,636 shares of TRX from Hull in a private transaction at $3.60 per share, for a total of $$2,456,289.60. (Tr. at 182, Respondent's Exhibit 18). These shares were included in 4,878,772 shares of TRX sold by the Fund on November 10, 2011. On that day, the average price received by the Fund for the 680,636 TRX shares previously purchased directly from Hull was $2.02. (Division Exhibit 184 at 11). The resulting loss was $1,074,902. (Division Exhibit 184 at 11). Given that Hull owned 80 percent of the Fund, he suffered a direct loss of $859,921.60, when the Fund sold the 680,636 shares of TRX it had previously purchased from him.[1]

28. Hull would have been better served if, On October 18, 2011, he had sold the 680,636 shares of TRX he personally owned, to the market. Over the next 16 trading days, TRX closed above $3.60 on 13 of those days and traded consistently over $3.60. (Yahoo Finance TRX History). Instead of selling to the Fund, Hull could have sold his shares gradually to the market over the next two weeks and not suffered the $859,921.60 loss.

29. It also would have been more profitable for Hull if he had sold the 680,636 shares in a negotiated block transaction at a discount. On September 27, 2011, when the Fund sold 3,734,395 shares of TRX at $3.50, the block discount was approximately $.20 per share. (SEC-Lit-Prod-000140815). Sands at Casimir was the broker for the transaction. He sold 116,000 shares on the exchange from $3.70 down to $3.51. (SEC-Lit-Prod-000140815). The balance of the stock, 3,618,395 shares, was sold at $3.50, the negotiated price. (SEC-Lit-Prod-000140815). The difference between the price where Sands began hitting the market bid, $3.70, and the negotiated price where the block was crossed, $3.50, was $.20.

30. Given that Hull's block of TRX was substantially smaller than the block sold by

[1] $1,074,902 x .80 = $859,921.60.

the Fund on September 27, 2011 - - 680,636 shares compared to 3,737,395 shares - - a discount for Hull's block would have been less than $.20 per share. Even applying a $.20 per share discount, Hull would have earned more selling his shares in a negotiated block transaction at a $.20 per share discount than selling to the Fund.[2]

31. On November 10, 2011, when the Fund sold 4,878,772 shares of TRX, the balance of its position, it paid a commission of $.01 per share. (Respondent's Exhibit 19). From September 1, 2011, through November 30, 2011, the Fund paid a $.01 commission per share on all block trades at GarWood. (Respondent's Exhibits 17, 18, 19). If Hull had paid a $.01 per share commission on his sale of 680,636 TRX shares to the Fund, it would have amounted to $6,806.36 and 80% of that amount would represent Hull's interest in the Fund.

Analysis of Gibson's Trades in October and November 2011

32. October 27-31, 2011, Gibson bought $4 puts on TRX in his personal account. He also bought puts in his girlfriend's account. Gibson continued to buy puts in his own account in early November and on November 8-9, told his father to sell TRX shares and buy puts. Gibson effected these transactions as insurance against the further decline in value of the Fund. (Tr. at 200 – 205).

33. On September 23, 2011, Gibson told investors in the Fund that he was waiving his management fee due to the poor performance of TRX. (Respondent Exhibit 57). Gibson had no income after that date.

34. On October 23, 2011, Gibson was notified that the revised amount of his loan from Hull was $645,000. On that day, the value of his position in the Fund was $715,000. (Tr. at 203).

35. Gibson's financial position differed from other investors in the Fund. He borrowed money to invest in the Fund, and almost his entire net worth was dependent on the performance of TRX. Marzullo was similarly situated. No other investor in the Fund had the amount of risk undertaken by Gibson and Marzullo. (Tr. at 203-204).

36. Gibson purchased the puts prior to the November 9, 2011, meeting with Levy. Prior to that meeting, Gibson thought Platinum would make a bid for the balance of the Fund's TRX shares. Only after the meeting, when he believed Platinum intended to sell its shares of TRX did he determine that the Fund would sell shares on the market. (Tr. At 212).

GARRICK TSUI

[redacted] [redacted] [redacted]@gmail.com

EXPERIENCE

More than 30 years of experience conducting complex financial fraud investigations, securities inquiries, internal corporate investigations, FCPA investigations, and corruption cases in the private sector and for the US Government.

Partner — **Risk Solutions & Investigations, Washington, DC** — **2007 to 2011 and 2017**

- Developed new business on a national level and managed the performance of the Washington, DC office of corporate investigative firm.
- Maintained a national client base, conducted investigations, and managed staff of professional investigators.
- Lead investigator on cases involving corporate fraud, securities fraud, Ponzi schemes, FCPA violations, and pre-transaction due diligence for private equity firms.

Principal Investigator — **Financial Industry Regulatory Authority, Rockville, MD** — **2011 to 2017**

- Conduct investigations for FINRA, a self-regulatory organization with jurisdiction over the brokerage industry.
- Gather and analyze information and data from relevant parties, plan and implement investigative strategy, take on-the-record testimony from witnesses, write sufficiency of evidence memorandum, participate in settlement negotiations, and assist with hearings (equivalent to trials.)
- Lead investigator on cases involving securities fraud, structured products including collateralized debt obligations, money laundering and broker malfeasance.

Partner — **Marlin Global Holdings, Washington, DC** — **2005 to 2007**

- Co-founded risk management consulting firm.
- Developed and maintained a national client base conducting internal investigations for corporations and pre-transaction due diligence for hedge funds and private equity firms.
- Conducted pre-transaction due diligence on a Mexican gaming company that entailed analysis of complex criminal and civil litigation in both the United States and Mexico.

Managing Director — **Citigate/Diligence, Reston, VA** — **2000 to 2005**

- Managed Washington, DC area practice for this corporate investigative firm.
- Turned office profitable in year one. Expanded staff from five to twenty-five investigators.
- Developed and maintained a national client base.
- Lead investigator on cases involving corporate fraud, securities fraud, corruption and due diligence.

Director — **PricewaterhouseCoopers, Washington, DC** — **1998 to 2000**

- Senior investigator in the fraud practice in the Washington, DC office.
- Developed and maintained a national client base. Managed staff of 10 consultants.
- Lead investigator on cases involving corporate fraud, accounting fraud, litigation support, and due diligence.
- On behalf of the World Bank, investigated vendor fraud as part of an anti-corruption initiative.

Managing Director — **The Investigative Group, Inc., Washington, DC** — **1989 to 1998**

- Managed the Washington, DC office for this international investigative firm.
- Developed and maintained a national client base.
- Managed staff of 15 investigators.
- Lead investigator on cases involving corporate fraud, hostile takeovers, opposition research, litigation support and due diligence.

Investigator — **United States Securities and Exchange Commission, Washington, DC** — **1981 to 1989**

- Market Surveillance Specialist in the Enforcement Division of the SEC.
- Investigated cases involving insider trading, manipulation, penny stock fraud and accounting fraud.
- Worked for two years exclusively on the Drexel Burnham Lambert investigation.

Trader — **Amswiss International** — **1977 to 1979**

- Trader for this Over-the-Counter market maker.
- Made markets in OTC stocks.

EDUCATION

Master of Business Administration — **Degree 1981**

Concentration in Finance
Boston University, Boston. MA

Bachelor of Arts — **Degree 1977**

Concentration in Economics
Tufts University, Medford, MA

REFERENCES UPON REQUEST