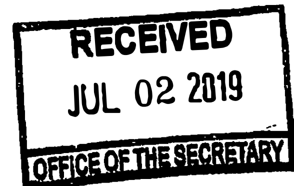


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent

RESPONDENT'S PREHEARING BRIEF

July 1, 2019

David E. Hudson
Hull Barrett, PC
Augusta, GA

*01265126-3

I. INTRODUCTION.

The Order Instituting Administrative and Cease-And-Desist Proceedings (the "OIP") against Christopher M. Gibson ("Mr. Gibson or the Respondent") is a deliberate and methodical false narrative of material misrepresentations and omissions. The OIP alleges that the Respondent held and advised others to hold, in effect, short positions. No evidence supports the allegation and the opposite is true. The Respondent and those he advised all held long positions at all times relevant to the OIP. The OIP alleges the Respondent and those he advised made profits upon the liquidation of their holdings of Tanzanian Royalty Exploration stock ("TRX"). The opposite is true with the Respondent and those he advised suffering losses greater than other investors in the Geier International Strategies Fund ("Geier" or the Fund") relative to their net worth and liquidity. The OIP alleges that the Respondent and those he advised had a conflict of interest with the Fund. The opposite is true with the Respondent and those he advised having so extreme an alignment of interest that the Respondent became insolvent upon the liquidation of TRX. The material misrepresentations and omissions were made directly to two Fund investors, disseminated to other Fund investors and are part of the OIP published daily over the internet. These material misrepresentations and omissions in the OIP were long discredited by October 10, 2018 when the OIP was served on the Respondent *without amendment.* Whatever justification, if any, that may have existed in 2016 for including these material misrepresentations and omissions in the OIP was certainly no longer in place in October 2018. Almost eight years have now passed from the events described in the OIP and the statute of limitations has expired.

II. STATEMENT OF FACTS.

A. Summary.

The transactions described in the OIP all took place in the six-week period between September 26 and November 10, 2011 as the Fund reduced its exposure to TRX and eventually liquidated its 10% position in TRX. The Fund had been formed in January 2010 with approximately $32 million in capital and returned a 100% gain to its investors that year employing a trading strategy. James M. Hull, the 80.7% investor that controlled[1] the Fund ("Mr. Hull"), was surprised by the short-term capital gains taxes payable for 2010 as a result of the trading strategy and drove the decision to invest in a single stock[2] for 2011 with a view toward achieving favorable long-term capital gains tax treatment. Given the single stock guideline, the Respondent recommended and the Fund invested all of Geier's capital in TRX based upon a fundamental analysis of TRX and TRX's past stock performance relative to its peer group and the price of gold. Mr. Hull encouraged the purchase of TRX in outside accounts as well which he viewed as a demonstration of further alignment of interest with the Fund and a conviction in TRX.[3] Following Geier's acquisition of the 10% position, TRX attracted the attention of short sellers and TRX began to underperform its peer group and the price of gold. The stock price of TRX continued to decline under pressure until Mr. Hull said he had no further tolerance for losses and that he was prepared to reduce exposure to and exit the TRX position at good prices.

B. The False Representation of Short Positions in TRX and the Hope for a Price Decline of TRX in Order to Profit.

---

[1] Securities Act Rule 405 defines "Control." "The term *control* (including the terms *controlling, controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." See further discussion in Section II.J. below.

[2] See Respondent's Exhibit 59.

[3] See Respondent Exhibit 178, Affidavit of James. M Hull, (the "Hull Affidavit"), paragraph 19

The record is both clear and inescapable. On February 15, 2015 the Division by subpoena summoned Mr. Hull to the Securities and Exchange Commission ("SEC") headquarters in Washington, D.C. where Mr. Paul Bohr and Mr. George Bagnall (the "SEC Lawyers") conducted an ex parte examination of Mr. Hull:

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 (Mr. Hull's general counsel): 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 parentheticals added)

(Ex parte Examination of James Hull, February 25, 2015, pp. 15-16)[4]

The SEC is presumed to have expertise in the area of securities and the SEC Lawyers were presumed securities experts upon whose representations one might reasonably rely. The definition of a "short position" by Mr. Bohr tracks the definition provided by the leading treatise on options cited by the Division's economic expert, "A position assumed when traders sell shares they do not own."[5]

---

[4] Division Exhibit 174, Transcript of Investigative Testimony of James Hull ("the "Hull Testimony")

[5] John C. Hull, Options, Futures, and other Derivatives (Seventh Edition 2008) (hereafter "Hull on Options") p.789

The record of the examination by the SEC Lawyers of Mr. Hull makes no reference to the long positions held by the Respondent, the Respondent's parents and Giovanni, Suejin and Francesca Marzullo (the "Marzullos"[6]) (hereafter the Respondent, his parents and the Marzullos are collectively called the "Gibson Group"). The SEC lawyers "in effect" represented that the Gibson Group borrowed and sold enough TRX stock "short" that the Gibson Group "hoped" that the TRX price would decline and when it did the Gibson Group made "profits". The only possible reason the Gibson Group would want the TRX price to decline would be if they had a net "short position". The only way the Gibson Group could make "profits" is if they held a net "short position".

A "short position" has a very precise meaning and is the very opposite of a long position.[7] The Fund held a long position of 9.7 million shares in TRX stock and for the Gibson Group to take a "short position" opposite the Fund would represent a shocking conflict of interest. Mr. Hull clearly relied upon and reasonably believed the SEC Lawyers when they represented that the Gibson Group held net short positions.[8]

The SEC attorneys went on to represent to Mr. Hull:

> ... We understand that the *short positions* that were taken in the Charles Schwab accounts and Chris Gibson's Schwab account and Francesca Marzullo's Schwab accounts *gilded* proceeds of approximately $400,000. Not profits, proceeds. The *profits* were I believe close to 300,000.

---

[6] The Respondent was living with Francesca Marzullo, the sole child and heir of her parents Giovanni and Suejin Marzullo. Francesca Marzullo was a graduate student at Columbia University and living at home. See Respondent Exhibit 208. The Respondent treated the Marzullos as one economic unit. *See* Investment Adviser Act Rule 203(b)(3)-1(a)(1)(ii) providing any natural person and a relative of the natural person with the same principal residence may be deemed a single client. See further discussion at Section III.M infra.

[7] The SEC's own website states with clarity, "The opposite of a "long" position is a "short" position." (Emphasis added). https://www.investor.gov/introduction-investing/basics/how-market-works/stock-purchases-sales-long-short.

[8] Hull Affidavit, paragraphs 7-9.

(Emphasis added)

(Ex parte Examination of James Hull, February 25, 2015, p. 20)[9]

Mr. Hull reacted to the allegations of short positions and profits as follows:

> You know, I don't know what was the reasons for those positions...
>
> Yeah. I'm very upset about that.[10]

Immediately following the examination Mr. Hull directed his counsel to obtain tolling agreements from the Respondent and his father so that Mr. Hull might later pursue them in a private action.[11]

The SEC Lawyers, presumed securities experts, were simultaneously making the same representations about "short positions" to another fund investor.[12] Mr. Hull in turn advised other fund investors of the shocking representation that the Gibson Group held net short positions and made profits.[13] The representations about net short positions and profits and a shocking conflict of interest were rapidly disseminated to and poisoned the investors and potential witnesses in this case.

The OIP, published daily over the internet since March 29, 2016, develops a sensationalized narrative with hyperbolic descriptive language that by, "in effect", holding a "short position" the Respondent and the Gibson Group made "profits" when the price of TRX declined, e.g. "reaping total illicit profits", "highly profitable" and "total profits".[14] The Division's crystal clear theory of

---

[9] Hull Testimony, p.20.
[10] Hull Testimony, p.48:21.
[11] Hull Affidavit, paragraph 4.
[12] See Respondent Exhibits 185 and 186.
[13] Hull Affidavit, paragraph 9.
[14] OIP paragraphs 9,10, 45 ,49 and 50.

the case as outlined for the clarity of the record to Mr. Hull, the other witnesses in the case and in the OIP was well summarized by Mr. Bohr in 2015, "To be borrowing stock and selling stock in the hope that the stock's price will decline." [15] The Division's theory of the case is grounded upon the allegation that the Gibson Group held net short positions and therefore hoped the stock price would decline[16] to generate profits and that placed the Respondent and the Gibson Group in direct conflict with the interests of the Fund.

In fact, there is no evidence whatsoever to support the fictionalized narrative that the Gibson Group ever held, or that the Respondent ever directed anyone to take any short position of any kind whatsoever in TRX stock. A short position is not a matter of opinion, rather it can be determined with mathematical precision and certainty. The economic expert called by the Division agreed by testimony that there were no short positions.[17]

C. The Omission of Reference to the Long Positions of TRX

Not only were there no short positions, the OIP omits any reference to the long positions held by Mr. Hull, the Respondent, the Respondent's mother and the Marzullos. The OIP does reference the 46,000 shares of TRX held by Mr. Gibson's father in an outside account, but omits reference to the hundreds of thousands of TRX shares beneficially owned by Mr. Gibson's father and mother. These omissions of the unquestionably material facts of the "beneficial ownership"[18]

---

[15] Hull Testimony, p. 16.
[16] The OIP repeatedly implies that the Respondent knew the price of TRX would decline and took specific action to drive down the price of TRX in order to make profits from the "short positions" held by the Gibson Group.
[17] Division Exhibit 159, Transcript of Hearing Testimony of Carmen Taveras, Ph.D. pp. 399-403.
[18] Securities Exchange Act Rule **13d-3** **Determination of beneficial owner** provides in relevant part, "a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares… Voting power…or Investment power… **All securities** of the same class beneficially owned by a person, regardless of the form which such beneficial ownership takes, **shall be aggregated in calculating the number of shares beneficially owned by such person."** (Emphasis added). This is a directive not an option.

of millions of shares of TRX stock are necessary to support the various false narratives contained in the OIP that Respondent was net short in TRX stock and made net profits.

Mr. Hull owned 80.7% of the Fund and beneficially owned over 8.5 million TRX shares and the Gibson Group owned 10.28% of the Fund and beneficially owned over 1 million TRX shares. The OIP contains a very detailed account of the alleged "fraudulent" conduct to include the precise number of put contracts to the last digit and the time to the minute of the trades, but omits reference to the beneficial ownership of over 9.5 million shares of TRX.

D. The Extreme Alignment of Interest Between the Fund and the Respondent and the Gibson Group.

The overriding factor in this case is perhaps the most severe alignment of interest ever constructed between fund managers and a hedge fund. Mr. Hull always insisted on an alignment of interest with all of his partners in any business. Mr. Hull drove an extreme alignment of interest so that a conflict of interest between the "managers" of the Fund and the Fund would simply be impossible. Mr. Hull methodically designed and structured this extraordinary alignment of interest with an overwhelming financial commitment as follows:

- Mr. Hull personally invested over $26 million in the Fund and owned 80.7% of the Fund.
- The charging of fees one half those customarily charged in the industry.
- The ***reinvestment of all incentive fees*** earned in 2010 by the three owners of the management company, net of the Respondent's taxes, in the Fund and not taking *any* of those fees in cash.
- The only investors Mr. Hull brought into the Fund were his *personal friends and business associates* with whom he had *an independent bond* and to whom he

felt an *extraordinary sense of loyalty* – Mr. Hull viewed the Fund as a unique opportunity he wanted to share with his friends and business associates.

In order to include the Respondent in that extraordinary alignment of interest between the Fund and Mr. Hull's friends and business associates who were investing and the Fund's managers:

- Mr. Hull made available to the Respondent and the Respondent's father loans to invest additional capital in the Fund under full recourse, 8% payable upon demand notes secured by all assets owned by the Respondent and the Respondent's father. The Respondent and the Respondent's father agreed to borrow over $1.1 million in additional capital to invest in the Fund to demonstrate their total commitment to the Fund and leaving their Fund investments highly leveraged and Mr. Hull in full and complete "control". The Respondent's debt was over $636,000 and the Respondent's father borrowed approximately $500,000 to invest in the Fund bringing the Respondent's father's total debt to Mr. Hull under his payable upon demand note to over $10 million.[19]

The Respondent and the Respondent's father took additional steps to demonstrate their overwhelming commitment to the Fund and the extraordinary alignment of interest Mr. Hull expected as follows:

- The investment of the complete liquidity and complete net worth of the Respondent of $250,000 in the Fund and TRX stock.

---

[19] **Mr. Hull and the Respondent's father were business partners and the Respondent's father borrowed from Mr. Hull to invest in their real estate business.**

- The investment of the complete liquidity and net worth of $675,000 of *the Respondent's mother* in the Fund who with the Respondent's father were the second largest investors in the Fund.
- The investment of the complete liquidity of the Respondent's father in the Fund and TRX stock including $288,000 in TRX stock in his IRA managed by the Trust Division of PNC Bank ("PNC Trust Division").
- The investment in the Fund of almost the complete liquidity of the Respondent's prospective in laws (the Marzullos) of approximately $1.3 million who were elderly and retired – they were the third largest investor in the Fund behind Mr. Hull and the Respondent's parents.
- The Gibson Group owned <u>10.28%</u> of the Fund.
- Mr. Hull and the Gibson Group owned almost <u>90.98%</u> of the Fund.

In 2011 Mr. Hull also encouraged the investment in TRX in accounts outside the Fund as well. <u>*Mr. Hull viewed these additional outside investments in TRX stock as further demonstration of the commitment of the Fund's managers and their affiliates to the TRX position.*</u>[20] The additional outside investment was also encouraged by the Respondent and Mr. Hull to counter the short sellers of TRX stock and to help support the TRX stock price by purchasing and holding TRX stock. The additional investment in TRX stock by Mr. Hull, the Respondent, the Respondent's father and the Marzullos <u>*in accounts held outside the Fund*</u> included:

- ✓ 680,636 shares of TRX held by Mr. Hull in a personal account outside the Fund,

[20] Hull Affidavit, paragraph 19.

- ✓ 2,000 shares of TRX held by the Respondent in a personal account outside the Fund,
- ✓ 1,000 shares of TRX held by Geier Group (500 of these shares were beneficially owned by the Respondent),
- ✓ 46,000 shares of TRX held in an IRA owned by the Respondent's father and managed by the PNC Trust Division outside the Fund by as described above.
- ✓ 18,900 shares of TRX in an account nominally held by Francesca Marzullo for the benefit of the Marzullos.

The OIP alleges that the liquidation of every one of these outside accounts, which were viewed by Mr. Hull, the Respondent and the Respondent's father as a positive demonstration of commitment to the Fund and the TRX position, was fraudulent.

III. ARGUMENT.

A. The Sale of TRX Stock on September 26, 2011.

The OIP alleges in paragraphs 28 and 31:

> On Monday September 26, 2011, *before beginning to liquidate GISF's (the Fund's) TRX position*, as described below, Gibson sold all of his personal TRX shares ... for approximately $4.04 per share.[21]... without disclosing to the Fund his conflict of interest... (Parenthetical and emphasis added)

The OIP's "front running" theory is that the Respondent "knew" on Monday that the Fund would sell a large block of shares at a lower price on Tuesday September 27, 2011. The Respondent had solicited market price offers for the Fund's TRX shares after speaking with Mr. Hull over the

---

[21] The OIP makes the same allegations in paragraph 5 of the OIP," ...Gibson **sold all** of the TRX shares he held in his personal brokerage account..." (Emphasis added).

weekend of September 24-25, 2011 following the short seller driven dramatic declines in the TRX price on the preceding Thursday and Friday. The value of the Fund had fallen over $15 million between April 2011 and September 21, 2011[22]. The price of TRX fell 17.8% from $5.57 to $4.58 on volume of 1.24 million shares on Thursday, September 22, 2011 (the Fund value declined $9 million) and fell 11.1% from $4.58 to $4.07 on volume of 1.26 million shares on Friday, September 23, 2011 (the Fund value declined $5 million). On Friday, September 23, 2011 the Respondent recommended, and Mr. Hull agreed, that the Fund would suspend the further collection of fees.[23] Mr. Hull stated he had no tolerance for further losses which the Respondent understood to be a change in bias to considering a sale of TRX at good prices. The Respondent solicited only market price offers and expected only market price offers but had not received any offers on Monday September 26, 2011. The Respondent solicited offers from Casimir Capital, an investment bank at which the Fund did not have an account and there was no offer to sell in place. Once the Respondent solicited Casimir the Fund's willingness to sell at market prices was no longer nonpublic information. The short seller attacks appeared over on Monday with volume of 476,600 and an opening price of $4.07 and a rising closing price of $4.11. The Respondent sold the 2,000 TRX shares in his personal account and the 1,000 TRX shares in the Geier Group account to achieve greater liquidity for immediate personal living needs and operating liquidity for Geier Group in view of revenue uncertainty following the suspension of fees from the Fund.

The OIP inaccurately states that the Respondent sold "all" of his personal shares of TRX, implying that his interests were no longer aligned with the Fund which still beneficially owned over

---

[22] The price of TRX closed at $7.46 on June 1, 2011 and had fallen to $ 5.57 on September 21, 2011.
[23] Division Exhibit 81.

9.6 million[24] TRX shares and the Respondent therefore had a conflict of interest[25]. The OIP omits any reference whatsoever to the long positions of TRX beneficially owned by the Respondent. On September 26, 2011 the Respondent owned 2.393%[26] of the Fund and beneficially owned 234,663 TRX[27] shares before his sale of 2,500 TRX shares and beneficially owned 232,163 TRX shares after the sale of his 2,500 TRX shares. The value of the Respondent's TRX shares was $955,078 at the opening price of $4.07 and $954,189[28] at the closing price of $4.11. The 2000 TRX shares in the Respondent's personal account[29] had a tax basis of $7.26 per share and were sold for $4.05 per share for a $3.21 loss per share. The total balance of the Respondent's brokerage account on September 26, 2011 was less than $10,000. The 1000 TRX shares in the Geier Group's account[30] had a tax basis of $6.27 per share and were sold for $4.04 per share for a $2.23 loss per share. The total balance of the Geier Group's brokerage account on September 26, 2011 was less than $4,500. The subject sales were *de minimus* relative to the Respondent's beneficial ownership of TRX.

The OIP inaccurately states the Fund's first sale of TRX took place on Tuesday September 27, 2011 and omits any reference to the Fund's sale of 78,000 shares of TRX on the preceding Friday. The Fund sold 78,000 shares of TRX at $4.04 at the 4 pm close of the trading day

---

[24] 9.6 million TRX shares after the sale of 78,000 shares of TRX on Friday, September 23, 2011.
[25] OIP paragraphs 5,28 and 31.

[26] All references to percentage of ownership are set forth in Respondent's Exhibit 206.
[27] On September 26, 2011 the Fund owned 9,201,791 shares of TRX and beneficially owned an additional 500,000 TRX shares under an option position for a total of 9,701,791 TRX shares.
[28] The Respondent owed Mr. Hull $636,000 under an 8% interest demand note secured by all of the Respondent's assets leaving equity of approximately $250,000 at the close on September 26, 2011.
[29] This does not include the 500 shares of TRX beneficially owned by the Respondent in the Geier Group account. See Respondent's Exhibit 23.
[30] Only 500 shares of TRX were beneficially owned by the Respondent in the Geier Group account. See Respondent's Exhibit 29.

on Friday, September 23, 2011 and represented .8% of the TRX shares beneficially owned by the Fund. The sale of the 2,500 TRX shares beneficially owned by the Respondent took place after noon on the next trading day, Monday, September 26, 2011, and represented just over 1% of the TRX shares beneficially owned by the Respondent. The Respondent's reduction in exposure to TRX was consistent with and mirrored the Fund's reduction in TRX exposure and at the same price.

The OIP alleges that the Respondent sold "all of his personal TRX shares" and this created an undisclosed "conflict of interest". To the extent there might be any ambiguity about this material misrepresentation, the OIP omits any reference whatsoever to the hundreds of thousands of TRX shares beneficially owned by the Respondent. These material misrepresentations and omissions form a basis for the allegation there was a conflict of interest with the Fund which is the opposite of the truth. The Respondent's interests were always severely aligned with the interests of the Fund.

The OIP strains further to link the Respondent's sale of a *de minimus* number of TRX shares on Monday to the Fund's sale of TRX at 3 pm on Tuesday:

> The next day, on September 27, 2011, Gibson began liquidating GISF's large TRX position, selling over 3.7 million shares on that day alone at an average price of $3.50 per share. These sales accounted for over 59% of the over 6.3 million shares traded that day. On this day, TRX's share price opened at $4.24 and dropped 16%, closing at $3.54 per share.

The OIP misleads the reader into believing that the Respondent triggered the decline in the price of TRX by immediately beginning the next day by selling TRX stock after the Respondent had sold all of his personal TRX shares and would presumably no longer care about the price of TRX. In fact, the Fund only sold TRX shares at 3 pm at which point in time the market price of TRX was $3.70 pursuant to earlier trading in which neither the Fund nor the Respondent had any part. The

Fund's sale of 3.7 million TRX shares was pursuant to a privately negotiated block sale executed through market trades that were completed in just a few minutes after 3 pm after an offer was received.

"Front running" takes place when:

> ...a person...shall...sell a security...when such...person...has material, non-public market information concerning an imminent block transaction in that security...may include transactions that are executed based upon knowledge of less than all of the terms of the block transaction, so long as there is knowledge that all of the material terms of the transaction have been or will be agreed upon **imminently**. (Emphasis added)[31]

The block sale of 3.7 million shares on Tuesday September 27, 2011 at 3 pm was not "imminent" on Monday when the Respondent sold a small inconsequential number of TRX shares. The Respondent had solicited offers for the Fund but there were no offers and the Fund placed no sell orders. The volume and price for any sale were unknown. The price action and volume of TRX as well as third party short selling all intervened and disintermediated between the above described sales which were independent, disconnected actions.

The price of TRX rose after the Respondent's sale and closed up 1.7% to $4.11. The price of TRX continued to rise the next day opening at $4.24 and rising to $4.34 or 7% higher than the price received by the Respondent. The high-volume, short selling that characterized the preceding Thursday and Friday appeared again on Tuesday on double the volume to 2.5 million shares (exclusive of the 3.7 million shares traded later at 3 pm by the Fund) and the price of TRX then declined 14.7% to $3.70 at 3 pm. Contrary to the misleading narrative of the OIP, neither the Fund not the Respondent had any role in this volatile rise of 7% and then decline of 14.7% in the price

[31] FINRA Rule 5270. Front Running of Block Transactions; .01 Knowledge of Block Transactions.

of TRX. The Fund received a private offer near 3 pm to purchase 3.7 million TRX shares at $3.50 when the market price was $3.70. Mr. Hull, who controlled the Fund, agreed to accept this offer.[32]

The Respondent's shares of TRX declined in value on Tuesday by $116,058. By selling 2,500 TRX shares on Monday the Respondent avoided an additional decline of $1,250 in the value of his TRX holdings. If the Respondent actually "knew" the TRX price was going to fall and was intent on engaging in fraudulent action to avoid that decline in value, why would he not have taken more dramatic action? The Respondent's actions are not consistent with someone who knew the TRX price was going to decline when all of the material facts are considered and not omitted.

The OIP makes parallel allegations with respect to the September 26, 2011 sale of 18,900 shares of TRX nominally held in the account of Francesca Marzullo but funded by and held for the account of the Marzullo family. The OIP omits any reference whatsoever to the long positions of TRX beneficially owned by the Marzullos. On September 26, 2011 the Marzullos owned 3.918% of the Fund and beneficially owned 399,016 TRX shares before the sale of 18,900 TRX shares. On Monday, the value of the Marzullos' TRX shares was $1,623,995 at the opening price of $4.07 and $1,562,277 at the closing price of $4.11. The sale of these shares reduced the Marzullos' exposure to TRX by 4.7% and was not material to their large exposure to TRX especially relative to their age and liquidity. The Tuesday decline of 50 cents in the TRX price to $3.54 reduced the value of the Marzullos' TRX shares by $190,058. By selling 18,900 TRX shares on Monday the Marzullos avoided an additional decline of $9,450 in the value of their TRX holdings. These actions are not consistent

---

[32] Hull Affidavit, paragraph 12. The Respondent did not have the authority to sell the 3.7 million shares which required Mr. Hull's decision and approval and further undermines the OIP theory.

with someone who knew the TRX price was going to decline when all of the material facts are considered and not omitted.

The Respondent's actions are not consistent with someone who ***"knew"*** the price of TRX was going to decline. The OIP in effect concedes this by omitting the material facts of the Respondent's and the Marzullos' stock ownership and their severe alignment of interest with the Fund, the Friday sale of 78,00 shares, the rising price after the Monday sales, the action by a third party driving down the stock price on Tuesday and that Mr. Hull's decision and approval was necessary for any such large sale. By omitting these material facts, the OIP effectively concedes that an accurate narrative including all of the material facts would not have been good enough to allege "front running" and a false narrative was necessary.

B. The Hull Transaction on October 18, 2011.

The OIP identifies Mr. Hull merely as "GISF's largest investor ('Investor A')"[33] and that the Respondent "engaged in an improper transaction...favoring one investor (Investor A) over his other clients[34] including the Fund" (Emphasis added).[35] The reader of the OIP is led to believe Mr. Hull's level of Fund ownership and beneficial ownership of TRX must be immaterial for the purpose of analyzing the alleged improper transaction. The OIP omits any reference to Mr. Hull's ownership of 80.7% of the Fund and his beneficial ownership of over 8.5 million shares of TRX and his control of the Fund. This omission is the more remarkable in light of the specificity used in the OIP to detail

---

[33] OIP Paragraph 2.
[34] Geier Capital, the Fund's investment adviser, had only one client, the Fund. See Section II.N. below.
[35] OIP Paragraph 7.

the price per share to the penny, the number of TRX shares sold the day prior to the last digit (364,495),[36] the time of trades to the minute,[37] and the number of put contracts to the last digit.[38]

The OIP then alleges:

> On October 18, 2011, despite the fact that he planned to liquidate GISF's large TRX holdings, Gibson purchased on GISF's behalf more than 680,000 additional TRX shares from Investor A ...costing the Fund over $2.45 million. Through this transaction, Gibson favored Investor A over the Fund... This transaction also **benefitted Gibson by furthering his** relationship with Investor A (whose company was paying Gibson a salary). This created an undisclosed conflict of interest... GISF lost approximately $1.58 per share, for a total loss of approximately $1.1 million, as a result of the transaction with Investor A.[39] (Emphasis added).

The OIP would lead the reader to believe that Mr. Hull's beneficial ownership in the Fund would have to be less than 680,000 shares if Mr. Hull and the Respondent engineered a transaction "favorable to Mr. Hull" that resulted in a loss to the Fund. When Mr. Hull's 80.7% Fund ownership and the Gibson Group's 10.28% Fund ownership is considered (and not omitted) the allegation that Mr. Hull and the Respondent would structure an unfavorable transaction for the Fund where they would suffer 90.98% of the losses is patently *preposterous*[40].

Once again, the Respondent's actions are not consistent with someone who ***"knew"*** the price of TRX was going to decline. If the Respondent and Mr. Hull **"knew"** the TRX price was going to decline *three weeks later* on November 10, 2011, they would have sold Mr. Hull's shares in market transactions over that period of time. By consolidating Mr. Hull's TRX ownership in the Fund the goal was to facilitate block sales from one account which was in the best interest of the

---

[36] OIP Paragraph 35.
[37] OIP Paragraphs 47 and 48.
[38] OIP Paragraph 43.
[39] OIP Paragraphs 33,34 and 38.
[40] Defined as, "contrary to nature, reason, or common sense." https://www.merriam-webster.com/dictionary/preposterous.

Fund. Once again, by omitting these material facts, the OIP effectively concedes that an accurate narrative including all of the material facts would not have been good enough to allege a conflict of interest[41] and a false narrative was necessary.

C. The Acquisition of Put Options by the Respondent and the Marzullos.

The OIP alleges the Respondent engaged in a series of "front running" transactions by purchasing put contracts in his personal account and in Francesca Marzullo's account[42]. As discussed above, the Respondent treated the Marzullos as a single economic unit. As described above, the OIP alleged that the Respondent had sold "all" of his personal TRX shares and implied he had sold all of the TRX shares held by the Marzullos. The OIP omits any reference to the hundreds of thousands of TRX shares beneficially owned by the Respondent and the Marzullos. The OIP then details the specific dates of purchase and the specific number of put contracts to the last digit. The OIP then segues to the following allegations:

> In effect, the put contracts <u>represented a short position</u>, i.e., a bet that TRX's share price would decline...
>
> As a result of the substantial decline in TRX's share price, these <u>put positions were highly profitable</u>... the <u>total profits</u> from these sales were ...over $254,000 coming from the put positions in Gibson's then-girlfriend's account (the Marzullo's account); approximately $82,000 coming from the put positions in Gibson's personal account. (Emphasis and parenthetical added)[43]

A put option is either a naked put option or a protective put option. This is a binary, mathematical classification, either one or the other. "A <u>*naked*</u> option is an option that is <u>*not combined with an offsetting position in the underlying stock.*</u>" [44]By omitting reference to the long

[41] The OIP in paragraph 41 again ambiguously references the Respondent's "other clients." The OIP appears to be referring to the investors in the Fund who would not be clients through their Fund investments. *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).
[42] OIP paragraph 42.
[43] OIP Paragraphs 45 and 49.
[44] Hull on Options, p. 190.

positions held by the Respondent and the Marzullos, by alleging they had sold all of their TRX shares and by alleging they made profits, the OIP repeated for the record with the same clarity given Mr. Hull at his examination, that the Respondent and the Marzullos, in effect, held short positions with naked put options. There is no evidence to support this allegation. Naked put contracts and short positions generate profits when the underlying stock price declines.

The put options purchased by the Respondent and the Marzullos were in fact combined with their extensive holdings of TRX stock. "Protective Put. A put option combined with a long position in the underlying asset." [45] Once again, the OIP alleges the very opposite of the truth.[46] Neither the Respondent nor the Marzullos made any "profits" from their purchase of protective put options and suffered losses greater than the other Fund investors relative to their liquidity, net worth, income and age. The protective put options served as hedges that only modestly offset those losses.[47] A hedge is defined as, "A trade designed to reduce risk."[48] A farmer who hedges does not hope for a disaster.

The Respondent exercised his good faith judgment in purchasing protective put options for his account to offset the risk of default under his demand note to Mr. Hull. The Respondent first bought protective put options after receiving a request from Mr. Hull's assistant to execute the demand note with a balance of $642,000 when his equity had fallen to less than $100,000 and the risk of default had risen.[49]The Respondent purchased protective put options for the Marzullos at the same time because of their advanced age, retirement status, lack of liquidity and lack of

---

[45] Hull on Options, p. 787.
[46] See Attachment A comparing a Short Position and a Protective Put Option.
[47] See Respondent Exhibit 205 for a Schedule of Losses.
[48] Hull on Options, p. 782.
[49] See Respondent Exhibit 117.

income. The Respondent also purchased protective put options for the Fund in such amounts and at such strike prices as he deemed appropriate for the Fund which had a different risk profile from the Respondent and the Marzullos.[50]

D. The Respondent's Father's Liquidation of TRX shares Held in an IRA Account outside the Fund.

As described above, the Respondent's father purchased 46,000 shares of TRX outside the Fund in an IRA Account (the "PNC Trust Account") managed by PNC Bank Trust Division (the "PNC Trust Division") as a demonstration of further alignment of interest with the Fund after being unable to invest the IRA funds directly in the Fund. The TRX shares were purchased in April 2011 for $288,054 and liquidated in November 2011 for a loss of $128,679.[51] The OIP alleges that the Respondent's father made "profits" of $43,000 in this transaction.[52] The OIP alleges that the Respondent's father held, in effect, a short position in TRX stock.[53] The purchase of a put option is a long position[54] and represents a capital investment and there is no evidence of any short position. Mr. Gibson's father has never held a short position in any stock or in any security in any account at any time in his life. The allegation that Mr. Gibson's father held, in effect, a short position in TRX stock is a complete fabrication.

The PNC Trust Division failed to timely execute, as instructed by phone call on November 8, 2011, the liquidating order of the TRX shares in the PNC Trust Account. The liquidating order directed the trades to take place immediately and sequentially after the phone call and should

---

[50] See Respondent's Exhibit 204.
[51] See Respondent's Exhibit 190. See also Respondent's Exhibit 205 detailing the Respondent's parent's overall losses of almost $1.4 million in TRX.
[52] OIP paragraph 49.
[53] OIP paragraph 45.
[54] Hull on Options, p. 8.

have taken place no later than November 9, 2011 within a matter of minutes on the same day the Fund also sold 119,970 shares at $3.60. The subject protective put options should have been purchased and sold on November 9, 2011 within a matter of minutes which is supported by the statements from the PNC Trust Division and an email from the Respondent. The Respondent's father's two means of communication with the PNC Trust Division were by telephone and email and he had no further communication with the PNC Trust Division from November 8, 2011 until after the trades were executed. The Respondent's father had no internet access to the PNC Trust Account and only received quarterly statements by U.S. mail. The execution of any order was within the sole and exclusive control of the PNC Trust Division which selected the broker and controlled the timing. The OIP alleges that the Respondent's father timed the sale of the subject protective put option contracts to take place, "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."[55] This allegation is false.

E. The Material Omission in the OIP's Account of November 10, 2011.

The Respondent and Mr. Hull determined it was in the best interest of the Fund to sell the remaining 4,878,772 shares of TRX held by the Fund on November 10, 2011 to force the hands of other large holders of TRX stock. The Respondent had met with an investment bank on November 9, 2011 where he had expected to receive an offer to purchase the Fund's remaining TRX shares. Instead, the investment bank proposed a "lock up" where the Fund would not be able to sell its TRX position for six months in exchange for $10,000 a month while the investment bank sought a buyer. The Respondent and Mr. Hull were concerned that the other large holders might try to sell

[55] OIP paragraph 48.

their TRX shares during that time and the Fund was in a better position than they were because the Fund was already more than halfway out of the TRX position. The Respondent and Mr. Hull expected the other large holders to enter the market and purchase the Fund's TRX stock on November 10, 2011.

The OIP employs hyperbole in describing the sale of the Fund's remaining 4,878,772 shares of TRX on November 10, 2011 while omitting a material fact rendering the account misleading. The OIP suggests Gibson alone caused the decline in the price of TRX that day:

> On the morning of November 10, 2011, Gibson sold approximately 4.9 million TRX shares GISF still held, and the price of TRX stock declined precipitously.... At the opening of the market at 9:30 AM on November 10, 2011, Gibson immediately began selling... TRX's share price... immediately began to plummet... At 9:52 AM, the New York Stock Exchange halted trading for five minutes due to the dramatic drop in TRX's share price.[56]

The Fund's sale of TRX only represented 22.5% of world volume on November 10, 2011 and only 28.5% on the NYSE.[57] The Fund's sale of TRX contributed to the decline in the TRX price, but contrary to the allegations of the OIP the greater cause was the sale by traders other than the Respondent. The volume of trading on November 10, 2011 confirmed the concerns of the Respondent and Mr. Hull that the other large holders were planning to sell their TRX stock. 77.5% of the volume (16,631,432 shares) sold on November 10, 2011 was by the other large holders of TRX stock and not the Fund, contrary to the misleading allegations of the OIP.

F. These Proceedings have Not Been Properly Instituted Due to the Deliberate Material Misrepresentations and Omissions.

1. The Sheer Number of Material Omissions and Misrepresentations Demonstrate a Deliberate Effort to Deceive the Commissioners.

---

[56] OIP, paragraph 46 and 47.

[57] Division Exhibit 184, Expert Report of Carmen A. Taveras, Ph.D., May 3, 2019, p.12, n.21.

The omission of material facts and the misrepresentations contained in the OIP are too numerous to be anything other than a deliberate effort to mislead. The examination of the Respondent by the SEC Lawyers demonstrates their befuddlement with the concepts and terms of short and long positions for puts, calls and strike prices and when those positions are bullish or bearish[58]culminating in the Respondent stating, "I was confused with the terminology."[59]The Respondent then described his positions using the the SEC Lawyers' confused terminology[60], but consistently made clear "... the amount by which I reduced my long positions still left me exceptionally long and far longer than anyone else in the Fund." [61] The Division also suggests that the term "short position", which has a well-known and specific meaning, be conflated with the term "short exposure" used in the Respondent's 2016 expert's report.[62] A brown dog and a brown bird share a color and are both animals, but a dog cannot fly and is by no means a bird. Likewise, the term "short exposure" in the subject report does not remotely suggest there was a "short position" and in fact the term "long exposure" is also used and well demonstrates that there no short positions at any time for any member of the Gibson Group. The Division is desperately avoiding the necessary confession of error.

2. The SEC Lawyers Have a Professional Duty to Correct these Misrepresentations to the Commissioners and to the Witnesses

---

[58] Gibson Inv. Test. Tr. At 98-126.
[59] Gibson Inv. Test. Tr. At 106.
[60] Gibson Inv. Test. Tr. At 119. The term "short bet" was a term used by the SEC Lawyers that only served to confuse the distinctions between a long and a short position and that both long and short positions can be bullish or bearish depending upon strike prices and whether they are naked or protective. See explanation at Ex. "A" attached.
[61] Gibson Inv. Test. Tr. At 120
[62] The Division of Enforcement's Motion to Preclude Testimony of Current and Former Division Counsel dated May 24, 2019 (the "Division's Motion to Preclude Testimony") at footnote 7 .

The Expert Report of Jeffrey M. Smith outlines the SEC Lawyers' professional duties to correct the misrepresentations made to the witnesses in the investigation of this case and in the OIP and due process requires such corrections be made before any hearing.

3. The Service of the OIP Without Corrective Amendments Violates the Procedures and Standards Outlined in the Enforcement Manual and the Professional Standards of Conduct to Which the SEC lawyers are Subject

Section 2.5.1 of the Enforcement Manual[63]provides:

> The filing or institution of any enforcement action must be authorized by the Commission... Commission authorization is sought by submitting an action memorandum to the Commission that sets forth a Division recommendation and provides a comprehensive explanation of the recommendation's factual and legal foundation. (Emphasis added).

The material omissions and misrepresentations contained in the OIP cannot meet the required standard of a comprehensive factual foundation.

4. The Division of Enforcement Cannot Now Change Their Theory of the Case Without Correcting the OIP and advising the Witnesses and the Commissioners of the Omissions and Misrepresentations

The Division of Enforcement's belated effort to now change their theory of the case to "mitigation of losses" cannot be made without correcting the misrepresentations made directly to the witnesses and contained in the OIP[64] which uniformly allege "profits", omit any reference to the long positions held by Mr. Hull and the Gibson Group and never use the words mitigation of losses or reference the losses suffered by Mr. Hull and the Gibson Group. The Commissioners

[63]Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, November 28, 2017.

[64] The "Division's Motion to Preclude Testimony" at page 5 alleges a new theory of the case that the put options were purchased "in order to mitigate his own losses", and in footnote 6 "profits enabling him to mitigate his losses" apparently abandoning the discredited and inaccurate "illicit profits" theory.

should have an opportunity to reconsider whether these proceedings should be instituted after the omissions and misrepresentations have been corrected.

G. The Due Process Rights of the Respondent have been Violated by the Deliberate Material Misrepresentations and Omissions.

The known and uncorrected misrepresentations and omissions envelop these proceedings in a cloud of manifest injustice. The judicial deference and presumption of expertise granted the SEC is founded upon the bedrock of the agency's integrity. The public's support of the administrative process likewise rests upon confidence in the SEC's integrity. The actions in this case undermine such confidence. The SEC Lawyers have had three years to confess error to the witnesses and the Commissioners. In *U.S. vs. Tweel*, 550 F.2d 297 (5th Cir. 1977) an IRS agent materially deceived a taxpayer and Judge Fay observed:

> We cannot condone this shocking conduct by the IRS. Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities.

550.F.2d at 300. See, also, *SEC v. ESM Securities, Inc.*, 645 F. 2d 310 at 316-317 (5th Cir. 1981). The conduct in this case is more surprising yet, having been carried out by staff attorneys subject to professional standards of conduct and having been specifically appointed by the SEC as "officers of the Commission" in Commission Order HO- 12361 dated April 16,2014.

The United States Supreme Court has stated a long-standing principle of equity:

> [T]he equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise . . .

Gumble v. Pitkin, 8 S. Ct. 379 at 384 (1888). These proceedings should be stayed to allow the Division an opportunity to correct the misrepresentations and omission to the witnesses and to

the Commissioners and to allow the Commissioners to reconsider whether it remains appropriate to continue these proceedings.

H. The Appointment of the ALJ Violates the Removal Provisions.

In *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), the Supreme Court held that SEC Administrative Law Judges are "officers of the United States" and that they were unconstitutionally appointed. In *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), the Supreme Court held that inferior officers protected from removal by "dual for-cause limitations on the removal of [SEC appointed] board members contravene the constitutional separation of powers." *Id.* at 492. That constitutional infirmity applies to the current ALJs of the SEC.

An ALJ can only be removed from office for good cause by the Merit System Protection Board. 5 U.S.C. § 7521. Members of that Board can only be removed by the President for good cause. 5 U.S.C. § 1202. Even members of the Commission are not subject to the President's direct control as they serve terms of five years. 15 U.S.C. § 78d. Thus, the removal status of serving ALJs make their continued service unconstitutional under *Free Enter. Fund.* Pursuant to these authorities, the current OIP that directs trial before such an ALJ is constitutionally void, and the case against the Respondent should be dismissed.

I. The Statute of Limitations Has Run.

The underlying events stated in the OIP all occurred in 2011. The OIP was served on October 10, 2018 - seven years after the underlying events. See Exhibit "B" attached. The statute of limitations for securities violations is five years. 28 U.S.C. § 2462. Accordingly, the OIP against the Respondent should be dismissed because the statute of limitations has run.

J. Mr. Hull Controlled the Fund.

Mr. Hull owned 80.7% of the Fund, but more importantly held demand notes accruing 8% interest and secured by all of the assets of the Respondent and his father. The Respondent and the Respondent's parents had invested all of their liquid assets in the Fund. The Gibson family had no available liquidity and had pledged all of their assets to secure over $10 million of demand notes held by Mr. Hull. This arrangement not only served to severely align their interests with those of the Fund, it also placed Mr. Hull in complete control of the Fund and the Gibson family. The allegations of the OIP that the Respondent and his father would engage in fraudulent transactions against their own financial interest and place themselves in a conflict of interest with Mr. Hull who held these demand notes is as implausible as it is inaccurate. Likewise, the various allegations of the OIP to the effect that it was within the power of the Respondent to unilaterally make decisions for the Fund[65] is equally implausible and inaccurate.

K. The Respondent's Provision of Particularized Advice to Different Clients with Different Circumstances is Conflated by the OIP with a Conflict of Interest.

The advice and actions taken by the Respondent reflected the Respondent's reasonable belief that the advice and actions were in the respective best interests of the Fund, the Marzullos, Mr. Hull, the Respondent's father and for the Respondent himself. Each of their circumstances differed and the advice given and actions taken necessarily reflected those differences in circumstances. The 2011 decline in the price of TRX changed those circumstances again. The OIP suggests that providing different advice or taking different actions for different persons, even as circumstances change, represents a *per se* conflict of interest. The OIP's position contradicts the

[65] E.g. OIP paragraph 4 states "After a conversation with Investor A... Gibson **determined** to sell GISF's entire holdings of TRX." (Emphasis added).

SEC's own guidance to investment advisers that different investments may be appropriate for different clients.[66] The Fund's Offering Memorandum specifically provided that it was, "A HIGHLY SPECULATIVE INVESTMENT"[67] and had a decidedly unique risk profile.

L. The Governing Documents Specifically Authorize the Execution of Each of the Liquidating Trades Challenged in the OIP.

1. *The Outside Accounts.*

The establishment and liquidation of each of these outside accounts was authorized by the Fund's governing documents. The Confidential Private Offering Memorandum[68] (the "Offering Memorandum") provides in relevant part that the "Affiliated Parties"[69] :

> ...may manage...separate accounts ... for others, may have, make and maintain investments in their own name ... may have investment objectives ... similar or different to those of the Company (the Fund) <u>... may have interests in the securities and futures in which the Company invests</u> as well as interests in investments in which the Company does not invest... [70](Emphasis added).

2. *The Liquidation of the TRX positions in the Outside Accounts.*

With respect to the September 26, 2011 sales by the Respondent and the Marzullos and the Respondent's father's liquidation of his TRX position in his IRA managed by the PNC Trust Division, the Offering Memorandum specifically provides:

> ... it may not always be possible or consistent with the investment objectives of the various persons or entities described above and of the Company for the same investment positions to be taken <u>*or liquidated at the same time or at the same price...*</u> (emphasis added).[71]

---

[66] SEC Release No. IA-5248, Commission Interpretation Regrading Standard of Conduct for Investment Advisers, June 5. 2019 ("the Release"). The Release states an adviser must make reasonable inquiry into each client's financial situation and notes the difference in advising in a retail client as opposed to a sophisticated client such as a fund and that one investment might be appropriate for one and not for the other. pp. 12-16.
[67] Offering Memorandum, p. 7 <u>"General".</u>
[68] Respondent Exhibit 8.
[69] The Affiliated Parties would include the Respondent, the Respondent's father and Mr. Hull.
[70] Offering Memorandum, p.19 "Potential Conflicts of Interest".
[71] Offering Memorandum, p. 19 "Potential Conflicts of Interest".

Section of 3.01 of the Operating Agreement of the Fund[72] also authorized the liquidation of these outside accounts with nearly identical language.

The liquidation of both the Fund TRX positions and the outside positions of TRX were made in good faith by the Respondent, and Mr. Hull and the Gibson Group all maintained long exposure to TRX until the final liquidation.

3. *The October 18, 2011 Transaction with Mr. Hull.*

The Offering Memorandum specifically provides in relevant part:

> - ... purchase and sale transactions... may be affected between the Company and... other accounts subject to the following guidelines: (i) such transactions shall be effected for cash consideration at the current market price ... and (ii) no extraordinary brokerage commissions... shall be paid... (emphasis added).

Offering Memorandum, p. 19. The Enforcement Division suggests that a "block price" would be appropriate, but that is not the price specified in the Offering Memorandum and is not what the investors agreed to. A block price would invite endless debate about what an appropriate block discount or block premium might be. The parties elected to use a market price and that provides a published certainty to the price.

4. *The Fund and Its Investors - The Scope of Duty.*

In *Securities and Exchange Commission v. Capital Gains Research Bureau, Incorporated*, 375 U.S. 180 (1963), the Supreme Court addressed an 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 this practice. The Court held

---

[72] Respondents Exhibit 13.

an adviser must make a full and frank disclosure regarding such a practice so an investor can decide whether to agree to permit such a practice.

Section 913 of the Dodd-Frank Act added subsection (g) to Section 211 of the Advisers Act, which provides in relevant part:

> ***[A]ny material conflict of interests shall be disclosed and may be consented to by the customer.***

Section 913 also adds subsection (h) to Section 211:

> The Commission shall—(1) Facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; ...

The recent Release states "the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent." SEC Release No. 5248, 2019 WL 241 715, *9.

Notably, the Commission goes on to state in relevant part:

> Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, *that fiduciary duty must be viewed in the context of the agreed-upon scope of the relationship and the client... [*t]he obligations of an adviser providing...advice in an ongoing relationship with a retail client...will be significantly different from the obligations of an adviser to a registered investment company or *private fund where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity...*

Id., at pp. 9-10 (emphasis added). As outlined above, the Fund investors specifically authorized the establishment and trading in the outside accounts and defined the scope of the relationship between the investors and Respondent and the other Fund affiliates.

5. Respondent did not engage in frontrunning.

The OIP alleges that Respondent violated Sections 206(1) and (2) of the Investment Advisers Act, Section 10(b) of the Securities Exchange Act, and Rule 10b-5 by "front running" in the sale of TRX securities and purchasing put contracts prior to sales of TRX securities by the Fund.

Neither the Investment Advisers Act nor the Securities Exchange Act contains a provision proscribing frontrunning. 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." Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder prohibit a person from engaging in certain fraudulent or deceptive practices in connection with the purchase or sale of any security.

To establish violations of these subject Acts, there must be proof of a manipulative or deceptive act. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 471 (1977) (Section 10b "makes it 'unlawful for any person . . . to use or employ . . . any manipulative or deceptive device or contrivance; Rule 10b-5, promulgated by the SEC under section 10(b), prohibits, in addition to nondisclosure and misrepresentation, any 'artifice to defraud' or any act 'which operates or would operate as a fraud or deceit.'"). *See SEC v. Lee*, 720 F. Supp.2d 305, 324 (S.D.N.Y. 2010) ("To state a claim under Sections 10(b) of the Exchange Act and 17(a) of the Securities Act, the plaintiff must successfully allege that each defendant. . . committed a deceptive or manipulative act....") (citations omitted). Thus, without a requisite deceptive act there can be no violation. As further explained by the Court in *United States v. O'Hagan*, 521 U.S. 642, 655 (1997), full disclosure of the relevant conduct negates any deception or manipulation, and thus negates liability.

As detailed above, the establishment of outside accounts and the purchase, sale and liquidation of securities also held by the Fund was fully disclosed, exposed and authorized in both the Offering Agreement and the Offering Memorandum. All of the investors in the Fund had the ability to make an informed decision whether to participate in the Fund that permitted Respondent, as well as others, explicitly to make the trades now being questioned. In short, there is no evidence that Respondent sought to engage in a manipulative or deceptive act or damage the Fund, and thus there was no violation of the anti-fraud provisions of the securities laws.

M. The Respondent's Treatment of the Marzullos as a Single Economic Unit is in Accord with SEC and NYSE rules as well Common Sense.

Investment Adviser Act Rule 203(b)(3)-1(a)(1)(ii) provides that an investment adviser may deem any natural person and a relative of the natural person with the same principal residence as a single client (the "Single Client Rule"). The Single Client Rule is consistent with other SEC rules in deeming the parents as the owners of accounts of adult children living at home. Section 16a-1(a)(2), incorporated by reference in Advisers Act Rule 104A-1(e)(3), provides in relevant part:

> ...the term beneficial owner shall mean any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares a direct or indirect pecuniary interest in the equity securities, subject to the following:
>
> ...
>
> (ii) The term indirect pecuniary interest in any class of equity securities shall include, but not be limited to:
>
> (A) Securities held by members of a person's immediate family sharing the same household; (Emphasis added)

The NYSE in the general commentary to Section 3034.02(b) establishes a similar standard directive, not optional.[73]

N. The Fund was Geier Capital's Only Client.

The OIP suggests the Fund's investors were clients through their investment in the Fund. Geier Capital's only "investment adviser" client within the meaning of and subject to the Advisers Act was the Fund. The OIP suggests that the other investors in the Fund were clients which is not supported by the facts or the law. Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006) settled this question of law long ago:

> The adviser owes fiduciary duties only to the fund, not to the fund's investors... If the investors are owed a fiduciary duty, then the advisor will inevitably face conflicts of interest... The Commission points to its finding that a hedge fund adviser sometimes 'may not treat all of its fund investors the same'... Even if it did, the Commission has not justified treating *all* investors in hedge funds as clients...

451 F.3d at 881 -883.

The facts do not support the establishment of an "investment adviser" relationship under the criteria of Advisers Act Section 202(a)(11) with anyone other than the Fund.

O. Geier Capital Was Never Required to Register as an "Investment Adviser" under the Advisers Act.

Geier Capital was never required to register as an "investment adviser" because it was exempt from registration under Advisers Act Section 203(b)(3) because it had fewer than 15 clients during the course of the preceding 12 months. It had only one "investment adviser" client which was the Fund.

P. Respondent Acted as an Associated Person and Did Not Act as an Investment Adviser to the Fund.

---

[73] NYSE Information Memo 89-17, Clarification of "Family Member" Definition and Report Filing Reminder

Section 202(a)(11) of the Advisers Act, in relevant part, defines the term "investment adviser" as "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." The evidence will show that Geier Capital, not Respondent, acted as the investment adviser to the Fund for a period and ceased acting as an investment adviser to the Fund in September 2011.

The Operating Agreement was binding upon the Fund and the Members of the Fund, and conclusively established that Geier Capital and Geier Group acted as investment advisers to the Fund. The Investment Advisers Act distinguishes between an investment adviser, who has primary liability for violations of Section 206, and an associated person, who can be charged with aiding and abetting or causing an adviser's violation of Section 206. Section 203(f) was added to the Investment Advisers Act in 1970 so that enforcement actions could be instituted against associated persons precisely because they did not meet the definition of investment adviser and could not therefore be charged under Section 203(e). The Commission has observed the distinction between an investment adviser and associated persons. See, in *Russell W. Stein*, SEC Release No. 2114, 2003 WL 1125746 (Mar. 14, 2003).

To the extent the Commission has charged persons associated with an investment adviser with violations of Sections 206(1) or 206(2), such associated persons have controlled the adviser. *See e.g., Warwick Cap. Mgmt., Inc.*, SEC Release No. 2694, 2008 WL 149127 (Jan. 16, 2008); *Harding Advisory LLC,* SEC Release No. 4600, 2017 WL 66592 (Jan. 6, 2017) (concluding that associated person that controlled investment adviser was liable as primary violator). But when an individual does not control an adviser, as is the case here, charging an associated person as an adviser eviscerates the distinction between an adviser and an associated person and thus, there

would be no meaning to the term "associated person." When an individual like Respondent does not demonstrably control the investment adviser, he cannot meet the definition of an investment adviser.

Q. Jury trial.

Because the SEC elected to proceed against Respondent in front of its own appointed ALJ, Respondent is deprived of his Seventh Amendment constitutional right to have a jury determine whether he violated the federal securities laws. Had this proceeding been brought in federal court, Respondent would be constitutionally entitled to a jury trial. The Seventh Amendment of the U.S. Constitution guarantees defendants the right to a jury trial on the merits in those actions that "are analogous to '[s]uits at common law[,]'" like civil enforcement actions. *Tull v. United States*, 481 U.S. 412, 417 (1987). The Supreme Court reversed and held that, while the defendant was not entitled to a jury determination of the penalty, the defendant had a "constitutional right to a jury trial to determine his liability on the legal claims." *Id.* at 425.

The right to a jury determination of liability for civil penalties has been applied to SEC enforcement actions by several Circuit Courts of Appeal. *See, e.g., SEC v. Life Partners Hldgs., Inc.*, 854 F.3d 765, 781-82 (5th Cir. 2017); *SEC v. Cap. Sols. Monthly Income Fund, LP*, 818 F.3d 346, 354-55 (8th Cir. 2016); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002). In this administrative proceeding, however, Respondent is not afforded the right to a jury trial.

R. Respondent did not violate Section 206(4) and Rule 206(4)-8.

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, adopted pursuant to Section 206(4) of the Advisers Act, prohibits an adviser to a pooled investment vehicle

from making any untrue statement of a material fact or otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative.

The OIP alleges the Respondent violated these rules by failing to disclose the later termination of Geier Group and Geier Capital as limited liability companies, and Geier Group's termination as an investment adviser registered with the State of Georgia. By its terms, Rule 206(4)-8 applies to investment advisers, and as the evidence will show, Respondent was an associated person and did not act as an investment adviser. Further, Rule 206(4)-8 does not impose an affirmative duty to continuously provide information to investors and prospective investors. The subject terminations were not required to be disclosed by Section 206(4) and Rule 206(4)-8, and are time barred by the statute of limitations.

S. Respondent did not act with the requisite mental state.

To establish that Respondent violated the Investment Advisers Act, the Securities Exchange Act, or the rules thereunder, the Division must prove that Respondent acted with the requisite mental state. Section 206(1), Section 10(b), and Rule 10b-5 all require proof of scienter,[74] while Section 202(2), Section 206(4) and Rule 206(4)-8 require proof of negligence.[75] As detailed above, Respondent had a reasonable and legitimate basis for engaging in each of the questioned transactions. The OIP employs the bias of hindsight as well as material misrepresentations and omissions to question Respondent's good faith.

---

[74] Scienter is shown by facts demonstrating "a mental state embracing intent to deceive, manipulate, or defraud." *SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003) (citations omitted). It may also be established by recklessness, which represents an extreme departure from the standards of ordinary care. *See id.* To establish negligence, the Commission must prove that Respondent had no reasonable basis for his actions. "Negligence is not a strict liability standard[,] but "requires the absence of a reasonable basis." *SEC v. Morris*, No. CIV.A. H-04-3096, 2007 WL 614210, at *3 (S.D. Tex. Feb. 26, 2007) (citing *Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006); *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 854 (9th Cir. 2001).

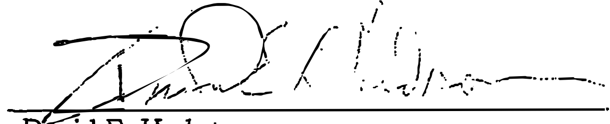
IV. CONCLUSION.

For the reasons stated herein, Respondent respectfully requests that these proceedings be dismissed.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that the proceedings be dismissed.

Dated this 1st day of July, 2019.



David E. Hudson
Hull Barrett, P.C.
801 Broad Street, 7th Floor
Augusta, GA 30901
(706) 722-4481
dhudson@hullbarrett.com

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2019:

(i) the foregoing *Respondent's Prehearing Brief* was transmitted to the Office of the Secretary of the Securities and Exchange Commission by facsimile, and an original and three copies of the foregoing *Respondent's Prehearing Brief* were delivered by courier to the following address:

Office of the Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-9303

(ii) a copy was sent via email to Gregory Bockin, Assistant Chief Litigation Counsel at Bocking@SEC.gov;

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

(iv) a copy was sent via email to Jason E. Grimes, Administrative Law Judge, at ALJ@sec.gov.

David E. Hudson

HULL BARRETT, P.C.
801 Broad Street, 7th Floor
Augusta, GA 30901
(706) 722-4481

Perspective	Protective Put [1]	Short Position	Differentiation	Comment
Accounting	Capital Asset	Liability	Opposite	
Brokerage Statement	Positive Number	Negative Number	Opposite	
Investment Community Classificaton	Long Position	Short Position	Opposite	2
Cash at Inception	Cash Disbursed to Purchase	Cash Received Upon Sale	Opposite	
Investment Bias	Bullish	Bearish	Opposite	
Underlying Stock Price Rises 10%	Favorable	Unfavorable	Opposite	
Underlying Stock Price Rises 50%	Very Favorable	Very Unfavorable	Opposite	
Underlying Stock Price Rises 200%	Exceptionally Positive	Catastrophic	Opposite	
Underlying Stock Price Falls 10%	Indifferent	Favorable	Different	
Underlying Stock Price Falls 50%	Indifferent	Very Favorable	Different	
Underlying Stock Price Falls 200%	Indifferent	Exceptionally Positive	Very Different	
Risk Proflie	Risk Averse	Highly Risky	Opposite	

1 A Protective Put is also called a "Covered Put" and is defined by John C. Hull, Options, Futures and other Derivatives, p. 787 (Seventh Edition 2009)("Hull on Options")as "A put option combined with a long position in the underlying asset."

2 A "short position" is not a "security" and it is not a capital asset. A short position simply describes the "position" of someone having sold a stock that one no longer owns, but has now incurred a liability to replace that stock in kind in the future at whatever the market price might be. The etymology of being "short" is an inventory concept derived from a grain dealer having a "shortage" of grain in the warehouse to meet future delivery obligations and being subject to the market price rising rapidly and bankrupting him. A short position is highly risky.
Having a “long” position in a security means that you own the security. Investors maintain “long” security positions in the expectation that the stock will rise in
A "short" position is generally the sale of a stock you do not ownhttps://www.investor.gov/introduction-investing/basics/how-market-works/stock-purchases-sales-long-short

EXHIBIT "A"

Tom Ferrigno

From:	Tom Ferrigno
Sent:	Wednesday, October 10, 2018 6:49 PM
To:	'john gibson'; 'John Gibson'
Subject:	FW: Service of OIP - Gibson
Attachments:	2016--03--29 OIP as issued March 29.pdf

Tom Ferrigno

From: Bockin, Gregory [mailto:bocking@SEC.GOV]
Sent: Wednesday, October 10, 2018 4:39 PM
To: Tom Ferrigno <tom.ferrigno@nelsonmullins.com>
Cc: Bohr, Paul <BohrP@sec.gov>; Margida, Nicholas <margidan@SEC.GOV>; Bagnall, George <BagnallG@SEC.GOV>
Subject: Service of OIP - Gibson

Tom,
Per our conversation of earlier today, thank you for agreeing to accept service of the OIP via e-mail. Attached please find the OIP.
Greg

Gregory R. Bockin
Trial Attorney, Division of Enforcement
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549
Direct: (202) 551-5684
Mobile: (202) 802-4916
bocking@sec.gov

RESPONDENT'S
EXHIBIT

201

EXHIBIT "B"