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

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent

OPENING BRIEF OF RESPONDENT CHRISTOPHER M. GIBSON

April 5, 2017

Thomas A. Ferrigno
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This administrative and cease-and-desist proceeding concerns the role of Respondent Christopher M. Gibson ("Respondent") with respect to the management of the Geier International Strategies Fund, LLC ("the Fund"), a Delaware limited liability company that was formed for the purpose of serving as a fund through which the assets of its Members could be invested in commodities and securities.[1] Respondent was a Member of the Fund and also served as a member of Geier Capital, LLC ("Geier Capital"), the Managing Member of the Fund.[2] The Operating Agreement of Geier International Strategies Fund, LLC (the "Operating Agreement") provided that Geier Capital shall have discretion to make investments on behalf of the Fund and, thus, to serve as the investment adviser to the Fund. The Operating Agreement further provided that the Managing Member and its associated persons were permitted, among other things, to invest in securities in which the Fund invested, to invest in securities in which the Fund did not invest, to compete with the Fund, and to purchase securities from, or sell securities to, the Fund.

Notwithstanding the provisions of the Operating Agreement, an Order Instituting Administrative and Cease-and-Desist Proceedings[3] ("OIP") was entered alleging that (i) Respondent acted as an investment adviser with respect to the Fund; (ii) Respondent, as an investment adviser, owed fiduciary duties to the Fund; and (iii) Respondent, in light of his fiduciary duties, engaged in conduct that constituted a device, scheme or artifice to defraud or operated as a fraud or deceit. Specifically, the OIP alleges that Respondent engaged in front running and favored one investor in the Fund over the Fund and other investors in the Fund, without disclosing conflicts that arose from such conduct. The OIP also alleges that Respondent

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

[2] Respondent owned fifty percent of Geier Capital; James Hull owned thirty-five percent of Geier Capital; and Respondent's father owned fifteen percent of Geier Capital. (Div. Ex. 190 36:1, Tr. 103:1-7).

[3] The proceedings were instituted pursuant to Section 21 of the Securities Exchange Act, Sections 203(f) and (k) of the Investment Advisers Act and Section 9(b) of the Investment Company Act.

violated Section 206(4) of the Advisers Act and Rule 206(4)-8. After a hearing, an Administrative Law Judge ("ALJ") issued an Initial Decision[4] ("Decision") which contained findings and conclusions that Respondent acted as an investment adviser and breached fiduciary duties by engaging in front running and favoring one member of the Fund over the Fund. The ALJ also concluded that Respondent violated Section 206(4) of the Advisers Act and Rule 206(4)-8. The Decision imposed an associational bar, and ordered Respondent to cease-and-desist from violating certain provisions of the securities laws, to pay disgorgement, and to pay monetary penalties. The Decision contains findings of fact that are not supported by the record, fails to make findings supported by the record, fails to follow controlling precedent and fails to properly apply legal standards articulated by the ALJ to the facts contained in the record. As demonstrated below, the ALJ's errors were material and not harmless, and the Decision should be set aside.

RELEVANT FACTS

After graduating from college in 2006, Respondent was employed at Deutsche Bank Securities, Inc. for approximately three years. (Div. Ex. 190 16:5-16:9).[5] In early 2009, Respondent participated in discussions regarding the currency markets with James Hull (Div. Ex. 190 16:22-17:7), who together with Respondent's father, managed Hull Storey Gibson Companies ("HSG") (Div. Ex. 190 17:12-17), an entity engaged in commercial real estate acquisition and management which was located in Augusta, Georgia. (Div. Ex. 190 17:18-23;

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

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

887:25-888:16). In or about February 2009, Hull offered Respondent a position as a Finance Manager with HSG (Resp. Ex. 33; Div. Ex. 190 21:4-14).

While employed by HSG, Respondent continued to discuss the then-ongoing financial crisis and investment strategies with Hull. (Tr. 557:5-8, 561:5 – 562:3). In particular, Respondent explained his view that increases in the money supply, which were made by the United States government in reaction to the financial crisis of 2008, would cause the value of the dollar to decline, and that the value of commodities, including gold and silver, would increase. (Tr. 561:5-25). In response, Hull stated that they should allocate capital to take advantage of Respondent's investment thesis. (Div. Ex. 190 21:24-22:11).

During 2009, Hull and Respondent formed the Gibson Fund in order to invest funds in accordance with Respondent's investment thesis. (Div. Ex. 190 21:24-22:16). The Gibson Fund invested primarily in gold and silver. (Div. Ex. 190 23:19- 24:4). Subsequently, Hull and Respondent formed the Hull Fund, which pursued investment objectives similar to those of the Gibson Fund and which also invested in commodities. (Div. Ex. 190 23:13-24:4). The investment decisions for the Gibson and Hull Funds were made by consensus. (Tr. 559:5-18). In order to invest in a commodities fund at preferred rates, Respondent and Hull formed Geier Group, LLC as a Georgia limited liability company and registered Geier Group as an investment adviser with the State of Georgia. (Tr. 19:1-25:14).

Respondent contributed a substantial part of his net worth to the Gibson and Hull Funds, while Hull contributed a modest percentage of his net worth to the funds. (Div. Ex. 190 24:14-23; Resp. Ex. 175 60:2-13).[6] During 2009, the value of the Hull and Gibson Funds increased by

[6] Respondent's father, John Gibson, participated in the Gibson Fund by investing funds that Hull had loaned to him. (Div. Ex. 190 24:23- 25:2). In addition, Hull solicited certain of his business associates and friends to participate in the Gibson and/or Hull Funds, including Wayne Grovenstein, Douglas Cates, Nick Evans, Mason McKnight III, Mason McKnight IV and Will McKnight. (Tr. 564:9-21).

approximately forty percent. (Tr. 566:19-567:6). In late 2009, Hull told Respondent that he wanted to increase the funds' risk profile in order to generate higher returns. (Tr. 566:19-567:11). Hull also expressed his dissatisfaction with the fact that other participants in the Gibson and Hull Funds (i.e. Hull's business associates and friends) were benefiting from their investment in the funds, but were not paying any fees. (566:19-567:6). In response to Hull's comments, Respondent suggested that they consider the formation of an additional fund with a more formal structure. (Tr. 564:3-7, 565:3-9, 566:19-24, 615:6-18).

During their discussions, Hull indicated to Respondent that a greater alignment of interest was imperative. In particular, Hull expressed the view that as he would be contributing additional funds, and as he planned on soliciting investments from additional business associates and friends, he expected Respondent to align his interest with the new fund and contribute additional funds to their undertaking and to encourage others to participate in the new investment vehicle. (Div. Ex. 190 29:15-25). Ultimately, Respondent invested the proceeds of a loan from Hull, which was memorialized by a demand note which bore interest at a rate of 8% per annum.[7] (Resp. Ex. 175 61:25- 62:7; Resp. Ex. 117). In addition, Hull indicated that Respondent should demonstrate his commitment to their undertaking by following the Fund's investment strategy when investing any of his other assets. (Tr. 587:10-14). Respondent and Hull also discussed the fact that such an approach would require a structure that permitted Respondent to pursue investment strategies that differed from the strategies pursued by the Fund, if necessary. (Tr. 587:10-591:7).

On or about December 16, 2009, the Fund was formed as a Delaware limited liability company. (Resp. Ex. 1). The Fund's Operating Agreement provided that Geier Capital would

[7] On several occasions, Hull pointedly encouraged Respondent to convince his Mother, Martha Gibson, to participate in the Fund. (Resp. Ex. 175 28:10-17). In addition, Hull offered to loan Respondent's father additional funds in order that he could increase his participation in the Fund. (Resp. Ex. 28:25- 29:1).

have discretion to make investments on behalf of the Fund. (Resp. Ex. 13). The Operating Agreement further provided that "Nothing herein contained shall prevent the Managing Member (or any of its affiliates or employees) or any other Member from conducting any other business, including any business within the securities industry, whether or not such business is in competition with the Company."[8] (Resp. Ex. 13). With respect to the possibility that the Managing Member or persons affiliated with it might acquire or dispose of the same securities as the Fund, the Operating Agreement provided that "It is recognized that in effecting transactions, it may not always be possible or consistent with the investment objectives of the various persons or entities described above and of the Company to take or liquidate the same investment positions at the same time or at the same prices." (Resp. Ex. 13).

The Operating Agreement set forth additional powers that the Managing Member could exercise, including the power "to enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements or other undertakings with persons, firms or corporations with which the Managing Member or any other Member is affiliated" and "to retain Geier Group, LLC, or such other entity as the Managing Member will determine from time to time in its sole discretion, to serve as the Company's investment manager (the 'Investment Manager')."[9] (Resp. Ex. 13).

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[8] The Operating Agreement also stated that "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."

[9] With respect to management fees, the Operating Agreement provided that the Investment Manager (Geier Group) will receive a management fee, in advance as of the beginning of each calendar quarter in an amount equal to 0.25% (i.e. 1.0% per annum) of each member's capital account. The Operating Agreement further provided that if in any fiscal year the net profits allocated to the capital account of a Member exceeded a non-cumulative hurdle rate equal to a 10% annual return, 10% of the total net profits allocated to such Member's capital account will be reallocated to the capital account of the Managing Member (Geier Capital), subject to a loss carryforward provision; provided, however, that such incentive allocation will be limited so that the annualized return of the capital account of a

The Fund's Offering Memorandum contained extensive disclosures regarding potential conflicts of interest which mirrored and amplified the provisions of the Operating Agreement. (Resp. Ex. 8).

In late 2009, Hull and Respondent met with potential investors in Augusta and explained that the Fund would pursue a highly volatile strategy and take a high degree of risk. (Tr.39:25-40:9). Each potential investor was provided with the Offering Memorandum, the Operating Agreement, and a Subscription Agreement (collectively, the "Offering Documents"). (Tr. 36:24 – 37:11, 39:6-17, 46:15-23, 580:13 – 581:17). By executing the Operating Agreement, investors agreed to the terms set forth therein, which included a description of the manner in which the Fund would operate.[10] (Tr. 581:6-582:12).

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

In response, Respondent researched public companies that could serve as a proxy for an investment in gold. (Tr. 624:20-627:3). Respondent concluded that the stock price of companies referred to as "juniors" (i.e., companies that focused on exploration and companies that focused

Member for that fiscal year does not fall below 10%. (Resp. Ex. 13). The members of Geier Capital and Geier Group included Respondent, Hull, and Respondent's father. (Div. 190 35:8-12; 36:1-5, Tr. 103:1-7).

[10] The investors included a number of Hull's business associates and friends and Respondent's mother (Martha Gibson), father (John Gibson), and the father of Respondent's close personal friend (Giovanni Marzullo).

on obtaining royalties) were most likely to track the price of gold in a manner that met Hull's objectives. (Tr. 624:20-627:3; Tr. 112:9-15). After analyzing a number of juniors, Respondent determined that Tanzanian Royalty Exploration Corporation ("TRX") was attractive since it held royalties to mine for gold on a number of sites in Tanzania and James Sinclair, the Chief Executive Officer of TRX ("Sinclair"), had developed relationships with a number of Tanzanian officials. (Tr. 109:16-111:18). With Hull's concurrence, the Fund began investing in TRX and by December 2010 held approximately 8,000,000 TRX shares.[11] (Tr. 90:12-16).

Throughout the period during which the Fund acquired its TRX position, the price of the stock correlated with the price of gold.[12] (Tr. 640:15-25). However, during the Spring of 2011, the price of TRX securities began to decline notwithstanding the continued increase in the price of gold. (Tr. 112:21-25; 640:23-24). As they were aware that there was no fundamental TRX-specific information that accounted for the deviation between the TRX share price and the price of gold, (Tr. 641:5-13), Respondent and Hull concluded that the deviation was the result of an "overhang rumor" – that a large owner of TRX stock (i.e., the Fund) could not hold its position and would be forced to sell - generated by short sellers. (Tr. 641:18 – 642:11, 644:13-17, 645:12-18).

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

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

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

September 21, 2011, the stock closed at $5.57. (Resp. Ex. 149 Ex. 9B p.3). Over the course of the next forty-eight hours, the price fell more than 26% and closed at $4.07. (Resp. Ex. 149 Ex. 9B p. 3). At the close of the market on September 23, 2011, the Fund sold 78,000 shares at $4.04. (Resp. Ex. 17).

Despite this decline, Respondent continued to believe that TRX was more valuable than its stock price suggested. (Tr. 647:17-21; 653:12-654:25). He knew that there was no news specific to TRX that accounted for the decline (Tr. 642:4-18) and he knew that during August 2011 a hedge fund, Platinum Partners, had purchased TRX shares in a private placement. The TRX shares were sold at $5.75 per share and Platinum Partners invested $30,000,000. (Tr. 643:9-19). Richard Sands ("Sands"), the investment banker at Casimir Capital LP ("Casimir"), which was involved in the private placement, told Respondent, on more than one occasion, that Platinum Partners would be "happy" to purchase the Fund's TRX securities at the private placement price. (Tr. 139:9-140:20; 660:23-662:6; Resp. Ex. 62).

With Hull's concurrence, Respondent, on September 23, 2011 sent an email to Members of the Fund regarding, among other things, the decline in the price of TRX securities and the attendant impact on the Fund. (Resp. Ex. 56). In particular, Respondent advised investors that as a result of the weakness in the price of TRX securities, the value of the Fund had declined to only slightly above the amount originally contributed to the Fund. (Resp. Ex. 56). Nevertheless, he noted that in the past year, three investment funds other than the Fund had accumulated more than 7,000,000 shares of TRX at prices above the September 23, 2011 closing price, and continued to buy, "confirm[ing his] view of the tremendous value [in] the assets owned and the business operated by TRX." He also stated that the holders of 90% of the Fund[13] had confirmed

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

their intention to remain invested in the Fund and TRX, and that he personally would remain so invested. (Resp. Ex. 56). In addition, Respondent stated that effective at the end of September 2011 management fees would not be assessed until the Fund performed at an acceptable level.[14] (Resp. Ex. 56). In addition to the email from Respondent, Hull communicated with Fund investors concerning the decline in the price of TRX securities. (Resp. Ex. 59).

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

On September 24th, Respondent exchanged emails with a representative of GarWood Securities LLC ("GarWood"), the brokerage firm at which the Fund maintained its brokerage account. (Resp. Ex 61). Initially, Respondent stated that he would be hearing back on Thursday regarding a large TRX trade in which the Fund might sell 1,000,000-5,000,000 shares and subsequently stated "The buyer owns 11% of TRX and is from Abu Dhabi." (Resp. Ex. 61). However, the transaction with the buyer located in Abu Dhabi did not materialize. (Resp. Ex. 89).

Also, Respondent, on September 25, 2011, sent an email to Sands, inquiring whether a hedge fund or another buyer was interested in increasing its position in TRX securities at current prices. (Resp. Ex. 62). He indicated that the Fund believed in TRX and might retain its

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[14] One investor, Douglas Cates, replied to the email from Respondent, in part, by stating "Chris: Do not be dismayed. We are all big boys. We knew it was going to be a wild ride." (Resp. Ex. 57).

investment, but nevertheless would be interested in learning whether there was another buyer who believed that TRX was an attractive investment opportunity. (Resp. Ex. 62).

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

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

Through the morning and afternoon of September 27th, Respondent continued to communicate with Sands regarding the possibility of a transaction.[15] At one point, Sands stated that he had a trade set up, but again did not provide the number of shares or the price for a

[15] Respondent also communicated with Casimir personnel regarding the steps that would need to be completed in order to proceed with a transaction (including the opening of a brokerage account at Casimir and the transferring of the Fund's TRX shares from its account at GarWood to Casimir). (Resp. Ex. 62). Respondent completed the documents necessary to establish a brokerage account at Casimir and to transfer TRX shares from GarWood to Casimir on September 27th and forwarded the shares to Casimir. (Resp. Ex. 66 – 87).

transaction. While Respondent was waiting for information from Sands, TRX continued to trade down (Div. Ex. 84 Expert Report of Carmen A. Taveras, PhD. July 14, 2016 Ex. 3) and Respondent sent another email to Sands in which he stated "Please let me know when you can tell me the size and pricing that is available. (Resp. Ex. 63). At approximately 2:45 p.m. on September 27th, Sands advised Respondent that there was a buyer of up to 5,000,000 shares at $3.50 or better and asked Respondent to confirm the proposed transaction. (Resp. Ex. 62).

Respondent contacted Hull and indicated that the transaction that Sands proposed differed from what Sands had previously indicated he could arrange. (Tr. 674:20-676:11). Respondent and Hull also discussed the fact that Sands had apparently spoken to several firms regarding the possibility of a sale of TRX shares by the Fund and that the market was now aware of the Fund's interest in selling TRX shares. (Tr. 675:9-22). Under the circumstances, Hull and Respondent believed they had been "forced" to sell, and determined that it was in the interest of the Fund to accept the terms that Sands had proposed. (Tr. 676:12-16). Subsequently, Sands advised Respondent that he would be able to sell between three and five million TRX shares and Respondent confirmed the terms of the transaction. (Resp. Ex. 64). At approximately 3:00 p.m. on September 27, 2011, 3,734,395 of the Fund's TRX securities were sold by Casimir at an average price of $3.5018. (Resp. Ex. 20).

During the period Respondent communicated with Sands regarding the Fund's TRX position, he also discussed the Fund's TRX position with Luis Sequeira ("Sequeira"), a representative with Roheryn Investments, S.A. ("Roheryn") who acted on behalf of a sheik who owned approximately 11% of the outstanding TRX shares. (Tr. 681:12-682:3; Resp. Ex. 89). On September 29, 2011, Respondent exchanged emails with Hull regarding a potential transaction involving Roheryn and the sheik. (Resp. Ex. 89). Respondent informed Hull "It is definitely not happening today ..." To which Hull responded:

> There may be others who would be interested as well? ...So the best move may be to try to play all of potential acquirers against each other and foster a bidding war for the shares. . . .also, I think all of us are well satisfied to hold the shares for the duration . . . . and to then start working with management on meeting the milestones that you suggested earlier today. Things work out for the best. . . .but at this juncture Luis and others have a vested interest in holding the shares value DOWN, and we need to be mindful of that fact. . . . particularly as lower share prices only HEIGHTEN our resolve to stay in for the duration because of the better relative value we would obtain by holding. (Resp. Ex. 89).

Respondent continued discussions with Sequeira regarding the possibility of a transaction involving the Fund's TRX shares and Sequeira did provide Respondent with documents relating to a sale of the Fund's shares, but the transaction was not completed.[16]

Subsequently, Respondent confirmed to Hull that the transaction that he had been discussing with Sequeira had not materialized. ("no deal with luis although they offered the option to sell them 200,000 shares a day beginning Monday. i told them no deal. i am

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[16] On September 30, 2011, Respondent and Sequeira continued their discussions regarding a negotiated transaction. In an email to Respondent, Sequeira stated "Everything is set to go next week, im trying to see if all block could go on Tuesday in one go or split in 2 blocks, anyway will try to do it as fast as possible (sic)." (Resp. Ex. 90). Later in the evening of September 30, 2011, Sequeira sent an email to Respondent forwarding an executed "Share Sale Agreement," which provided for the sale of 5,900,000 TRX shares at a price of $3.50 and a commission of $.04 per share payable to Roheryn. (Resp. Ex. 92). The document further provided that the agreement between the two parties for the sale of the 5,900,000 shares was for five trading days beginning Monday October 3, 2011 and ending on Friday, October 7, 2011. (Resp. Ex. 92). The next day, Sequeira sent Respondent an email and another document to be executed by Respondent in connection with the Share Sale Agreement described above. (Resp. Ex. 93). The attached "Confirmation of Share Sale" provided for (i) a certification by Respondent that the Fund owned 5,900,000 shares of TRX, (ii) a confirmation of the intention of the Fund to sell its entire shareholding of 5.9 million shares to a pre-arranged buyer on the open market during the week of October 3, 2011, and (iii) a certification that the sale of 5.9 million shares will close the Fund's position in TRX and that no further sales of TRX are planned unless they are associated with new market purchases of TRX. (Resp. Ex. 93). Respondent executed the "Confirmation of Share Sale" and returned it to Sequeira the same day. (Resp. Ex. 94). Notwithstanding the execution of "Share Sale Agreement" and the "Confirmation of Share Sale" by Respondent, the party for whom Sequeira was acting failed to complete the transaction. (Resp. Ex. 101). Respondent informed Hull that the transaction was not completed as follows: "No deal, they want to consider longer. We're going to very likely be best served holding our position. They may come back in a few days, however, I would assume we are where we are for the next several months. . . .I will advise if I hear back in the next few days, but I am planning on not being able to further diversify and holding out with our current positioning until European and American QE is announced in the next month or two before reviewing options again." To which Hull responded: "No problem. 'Work" Luis on the 4 cents per share commission . . . .otherwise let's try to get a higher price for our bulk sale of our shares. . . . there may be others who are interested???" (Resp. Ex. 102).

contemplating our options but waiting for at least a few weeks as we get kigosi resource report and closer to QE3 looks like appropriate path.") (Resp. Ex. 104). Respondent continued to discuss a possible sale of a significant amount of the Fund's remaining TRX securities through Sequeira on several occasions, but sold only 364,495 shares through him on October 17, 2011. (Resp. Exs. 106, 107, 108 and 109).

In October 2011, Respondent became aware that Hull's creditor, Wells Fargo, had notified him that it would increase the price of credit to his commercial real estate business unless he increased the level of his liquid assets. (Tr. 688:15-689:12). Respondent was concerned that if Hull determined to sell the nearly 700,000 TRX shares he held in a personal brokerage account to increase his liquidity, TRX's market price could decline at a time when Respondent was discussing a sale of the Fund's shares in the upstairs market. Accordingly, Respondent proposed that the Fund acquire Hull's TRX shares, although he understood that the sale of TRX shares to the Fund rather than in the market would limit significantly Hull's ability to achieve his objective.[17] (Tr. 689:4-24). Hull agreed to Respondent's request that he accommodate the Fund, and an agreement was executed, providing for the sale of 680,636 TRX shares to the Fund by Hull at the October 18, 2011closing price of $3.60 per share.[18] (Tr. 691:1-692:20; Resp. Ex. 113). Had Hull declined to enter into the transaction Respondent proposed, he

[17] The transaction that Respondent proposed to Hull was explicitly addressed in the Operating Agreement. (Resp. Ex. 13). Section 3.02 of the Operating Agreement, "Powers of the Managing Member." provides that "The Managing Member shall have the following powers on behalf of the Company to be exercised in accordance with Section 3.01: . . . (h) 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." Accordingly, Geier Capital was empowered to enter into a contract on behalf of the Fund with Hull, a member of Geier Capital. (Tr. 694:13-695:8; Resp. Ex. 13).

[18] Specifically, a sale of his TRX shares in the open market would likely increase Hull's liquidity by approximately $2,500,000, while a sale to the Fund, of which he owned 80%, would increase the funds in his personal account, but at the same time decrease the amount of cash held by the Fund. (Tr. 689:18-24; 691:1-692:25). Thus, by selling his shares to the Fund rather than in the market, Hull would increase his liquidity in an amount 80% less than he would obtain by selling in the market. (Tr. 689:18-24).

could have sold his TRX shares over time as the price of the stock rose after October 18, 2011 and achieved his objective of increasing his liquidity. (Resp. Ex. 149 Ex. 9B pp. 3-4). Further, by selling in the market, Hull would have avoided the risk attributable to combining his shares with the Fund's shares and receiving whatever price the Fund received when it sold its TRX shares.[19] (Tr. 697:17-698:18).

Also, during the period when Respondent was engaged in discussions with potential buyers, Respondent received a communication from Hull's assistant regarding his loan, the proceeds of which had been invested in the Fund.[20] (Tr. 698:23-700:25). 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 his loan from Hull.[21] (Tr. 698:23-700:25). TRX's share price had closed at $3.92 on October 25, 2011, and at that price, Respondent's interest in the Fund- the entirety of his assets- was worth only $720,000, just $75,000 more than his debt. (Tr. 698:23-699:7).

On October 27, 2011, the day after he received the spreadsheet and the demand promissory note, Respondent began placing orders to purchase $4.00 put contracts on TRX shares, as "insurance," in case the price of TRX declined below the point at which Respondent

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[19] As discussed below, the Fund was unsuccessful in selling its shares in large block transactions in the upstairs market and when it sold its shares in the market in November 2011 the price declined and some of its shares were sold for much less than the price(s) Hull could have realized in October 2011. (Tr. 697:17-698:18). Further, Hull did not benefit (improperly or not) by not paying a commission in connection with his sale of shares to the Fund. First, the transaction was privately negotiated and neither Hull nor the Fund paid a commission on the transaction. (Resp. Ex. 113). Second, when the shares were sold in the market November 2011 and commissions were paid on the sales, the commissions paid were not extraordinary commissions and, Hull bore 80% of the commissions for the sales of all of the Fund's shares as he continued to own 80% of the Fund. (Tr. 696:24-698:18).

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

[21] The demand promissory note was in the amount of $636,921.07 and the loan bore interest at a rate of 8%. (Resp. Ex. 117).

would remain solvent. (Tr. 701:1-6).[22] Respondent did not purchase $4 put option contracts for the Fund for the purpose of providing "insurance" because he determined that it was not a suitable investment for the Fund and it was not appropriate to purchase "insurance" for a high risk, high return fund where such insurance would only benefit a limited number of investors who were financially overexposed to the Fund.[23]

During the remainder of October and early November, Respondent continued his efforts to liquidate the Fund's position in TRX, including discussions with Sands regarding the possibility of a purchase of the Fund's TRX shares by Platinum Partners. On November 7 or 8, 2011, Sands asked Respondent to attend a meeting with Platinum Partners on November 9, 2011. (Tr. 209:2-20). Sands told Respondent that he had "great news," that they were "going to wrap this up," and that Respondent would be very pleased with Platinum's proposal. (Tr. 209:21 – 210:2, 708:10 – 709:17). However, at the November 9, 2011 meeting, Platinum Partners presented Respondent with an offer to pay the Fund $10,000 per month if it would agree not to sell its TRX shares for 6 months. (Tr. 710:6-19). Respondent was "distress[ed]" by this offer, thinking that the only reason Platinum Partners would propose such a deal was because Platinum Partners planned to sell its own shares. (Tr. 710:6-712:8).

Following the disappointing November 9, 2011 meeting with Platinum Partners, Respondent and Hull discussed strategy for the Fund. (Tr. 712:9-22). They believed that Platinum Partners was "bluffing" because they believed that while a decrease in TRX's share price would harm the Fund, it would inflict greater harm on the other large holders of TRX stock, including Platinum Partners. They further believed that if the Fund began selling TRX

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

23 Mr. Grovenstein and Mr. Cates both agreed with that judgment and would not have purchased such protective or covered puts for a highly speculative investment position. (Tr. 857:20 - 858:5, 915:4, 943:22 - 944:15).

shares, and the price of TRX shares began to fall, the large holders would step in and buy the Fund's TRX shares in order to prevent a price drop. (Tr. 712:19-713:24). Therefore, Hull decided to call the bluff, so Respondent considered the possibility of selling the Fund's TRX shares in a manner designed to cause Platinum Partners or another large holder of TRX to buy those shares from the Fund in the market in order to avoid a price drop. (Tr. 201:21-25; 212:10 – 214:14, 712:9 – 713:24).

During the morning of November 10, 2011, Respondent emailed GarWood Securities regarding his efforts to transfer the Fund's TRX shares from Casimir back to GarWood. And as both GarWood and Casimir cleared through Penson Financial Services ("Penson"), Respondent instructed GarWood to "hassle Penson" regarding the transfer and further stated that "[w]e are going to potentially tank this stock." (Div. Ex. 105). Respondent did not issue these instructions because he intended the Fund's sale to "tank" TRX's share price;[24] rather, Respondent believed that, in the absence of such a communication, a broker-dealer like GarWood normally would execute the sale of a large block of shares slowly, and piecemeal, in order to prevent a price drop by disguising the fact that a large block was being sold. (Tr. 232:8-233:4). This would not serve the "signaling" strategy being implemented by Respondent at Hull's direction, which was to sell aggressively, for the purpose of making the other large TRX shareholders believe a price drop would occur, and inducing them to purchase the Fund's TRX stock before the price fell. (Tr. 232:8 – 233:4). However, the other large holders of TRX stock did not behave as Hull and Respondent believed they would, and they did not purchase the Fund's stock before the price

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

fell. Instead, other large holders of TRX stock were not bluffing; rather they sold their TRX stock.[25] (Resp. Ex. 175 86:4-97:11).

The sales of TRX shares by the Fund and other large holders contributed to the decline in TRX's share price, triggering losses for Respondent. While Respondent received proceeds of $80,000 from the sale of the protective puts that he had purchased[26] (Resp. Ex. 21; Resp. Ex. 22), the proceeds only served to offset and mitigate his losses resulting from his beneficial ownership of TRX shares through the Fund. (Tr. 717:19-718:24). In fact, Respondent became insolvent as a result of the decline in the value of his TRX investment, and the amount he received from the protective put options merely offset a portion of the debt he owed Hull. (Tr. 233:9 – 234:2; 240:5 – 242:4; 718:22-24).

RESPONDENT DID NOT VIOLATE THE FEDERAL SECURITIES LAWS

Rule 411(a) of the Rules of Practice provides that "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. § 201.411(a). The Commission, applying a preponderance of the evidence standard,[27] reviews both findings of fact and conclusions of law of initial decisions

[25] Although the Fund sold 4,878,772 shares of TRX stock on November 10, 2011, the total US volume traded was 17,111,602 shares and an additional 4,398,602 shares traded abroad. Div. Ex. 184, Expert Report of Carmen A. Taveras, Ph.D., July 14, 2016, p. 12 note 22. The Fund represented less than 29% of total US volume and less than 23 % of total volume. In describing the Fund's November 10th sale of TRX stock and the decline of TRX stock price, Dr. Taveras only uses the word "contributed" and not the word "caused" in describing the sales of TRX stock by the Geier Fund.

[26] Respondent had also purchased 6,440 protective put options covering 644,400 shares of TRX stock at strike prices of $2.00 and $3.00 for the Fund. The $2.00 put option contracts added $16,965 to the Fund's losses and the $3.00 put option contracts mitigated the Fund's losses by $53,420. (Division Ex. 184, Exhibit 17a).

[27] *Steadman v. SEC*, 450 U.S. 91, 101-04 (1981).

de novo. See Gary Kornman, Exchange Act Rel. No. 59403, 2009 WL 367635, *9 n.44 (Feb. 13, 2009), *petition denied,* 592 F.3d 173 (D.C. Cir. 2010).[28]

The OIP alleges that Respondent acted as an investment adviser; that, as a fiduciary, Respondent owed a duty of loyalty to, and was required to disclose conflicts of interest to, the Fund; and that Respondent failed to disclose front running transactions that benefited him or persons close to him and failed to disclose a transaction that favored the Fund's largest investor.[29] The ALJ made findings and conclusions that Respondent acted as an investment adviser to the Fund and that Respondent failed to disclose the alleged front running transactions and the favoring of one fund investor over the Fund. 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

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."

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[28] The Commission's authority to review an administrative law judge's findings and conclusions extends even to credibility determinations where the evidence contains substantial evidence to do so. *See In the Matter of the Application of Warren R. Schreiber,* Exchange Act Rel. No. 40629, 1998 WL 761850, *1 (Nov. 3, 1998) (in de novo review, the Commission does not accept the law judge's credibility determinations "blindly").

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

The record in this matter establishes that Geier Capital and Geier Group, rather than Respondent, acted as investment advisers to the Fund. The Fund's Operating Agreement, which is binding upon the Fund and its Members, provided that Geier Capital shall be the Managing Member of the Fund and shall have the discretion of making investments on behalf of the Company and of exercising the powers set forth in Section 3.02.[30] (Resp. Ex. 13). The Operating Agreement also provided that the Managing Member shall have the power to retain Geier Group or such other entity as the Managing Member shall determine to serve as the Fund's investment manager. The Operating Agreement further provided that the Fund would pay management fees to Geier Capital and Geier Group and would pay an incentive allocation to Geier Capital, if certain conditions were met.

During 2010, Geier Capital engaged Geier Group to serve as the Investment Manager for the Fund and investments were made by Geier Group on behalf of the Fund. After Geier Group was terminated, Geier Capital continued to act as the Fund's investment adviser. Both Hull and Respondent were members of Geier Capital and Geier Group and in that capacity were involved in the management of the Fund.[31] In light of the services they performed, Hull and Respondent acted as persons associated with an investment adviser and supervised persons.[32]

Although the Decision acknowledges that "Geier Capital was the managing member of the Fund, which meant carrying out the duties of the Fund, including retaining Geier Group or some other entity as the Fund's investment manager," it does not address the provisions of the Operating Agreement which (i) vested Geier Capital with authority to exercise discretion on

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[30] 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.

[31] 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.

[32] 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.

behalf of the Fund; (ii) provided that Geier Capital was authorized to retain Geier Group as Investment Manager; and (iii) provided for the payment of management fees and an incentive allocation to Geier Capital and Geier Group. The Decision does not cite authority for its disregard of the Fund's Operating Agreement which is binding upon the Fund and its Members, including Fund investors, or its disregard of Hull's and Respondent's status as members of Geier Capital and Geier Group.

In attempting to support a conclusion that Respondent acted as an investment adviser to the Fund, the ALJ focuses upon certain "functions" which Respondent performed.[33] Initially, the ALJ states that the Fund, Geier Capital and Geier Group had no employees. (Decision at p. 24). However, the Fund, Geier Capital and Geier Group were organized as limited liability companies and, as such, had members; Hull and Respondent were members of the Geier Capital and Geier Group and in that capacity acted on behalf of the Fund.[34] Whether Geier Capital or Geier Group had any employees is irrelevant to a determination regarding the investment adviser to the Fund.

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

The other "functions" which the Decision finds that Respondent performed, including tracking the Fund's performance, negotiating transactions on behalf of the Fund, corresponding

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[33] 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.

[34] The Decision does note that the Fund's Offering Memorandum states that "Gibson was the managing director of Geier Capital, the Fund's managing member and he was managing member of Geier Group, the Fund's investment manager," but fails to discuss the significance of the organizational structure to which all relevant parties agreed.

with investors, acting as an authorized signatory on Fund accounts, deciding on investments with Hull, and signing a Form D, do not establish that Respondent acted as an investment adviser to the Fund.[35] Rather, the functions that the Decision references are commonly performed at investment advisers by supervised persons and persons associated with investment advisers.

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

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

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[35] 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 p. 24) (Citations omitted).

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

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.[36] 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 the Fund and Geier Capital. Thus, the evidence admitted in this matter conclusively establishes that Hull, rather than Respondent, controlled Geier Capital and Geier Group, the Fund's investment advisers.

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[36] 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.

THE INVESTMENT ADVISERS ACT AND FIDUCIARY DUTIES

Sections 206(1) and 206(2) of the Advisers Act proscribe certain fraudulent and deceptive acts and practices[37] and have been construed as imposing fiduciary duties on investment advisers, including a duty of loyalty. The relevant provisions have also been construed as permitting an investment adviser to disclose material conflicts of interest and, with the client's consent to such conflicts, to engage in activity that would otherwise be impermissible. Further, amendments to the Advisers Act contained in the Dodd- Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") confirm that investment advisers may disclose material conflicts of interest and clients may consent to an investment adviser's conflicts of interest.

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

[37] 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 the Dodd- Frank Act, Congress amended the Advisers Act and certain of the amendments explicitly provide that an investment adviser may disclose, and clients may consent to, material conflicts of interest. Section 913 of the Dodd- Frank Act added Subsection (g) to Section 211 of the Advisers Act. Section 211(g) explicitly provides that an investment adviser may disclose material conflicts of interest, and clients may consent to such conflicts.[38] 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.[39] Further, Section 913 of the Dodd-Frank Act directed the Commission to conduct a study to evaluate the effectiveness of existing standards of care of brokers, dealers and investment advisers imposed by the Commission and other regulatory authorities and whether there are legal or regulatory gaps in the protection of retail customers relating to the standard of care which should be addressed by rule or statute.[40]

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[38] 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.

[39] 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 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."

[40] The Staff of the Securities and Exchange Commission conducted the study mandated by the Dodd - Frank Act and issued a report, U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers (2011) ("Study"), in which it discussed the Commission's position regarding fiduciary duties of investment advisers and formulated a number of recommendations for rulemaking relating to a uniform fiduciary duty. The Staff set forth its view that the uniform fiduciary standard would include the duties of loyalty and care as interpreted and developed under Advisers Act Sections 206(1) and (2). *Id.* at p.108. The Staff recommended that the Commission engage in rulemaking to implement a uniform fiduciary standard of conduct for broker-dealers and investment

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.[41] 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.

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advisers when providing personalized investment advice about securities to retail customers and recommended that the standard of conduct for all brokers, dealers, and investment advisers 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. *Id.* at pp. 108-09. The Staff noted that clarification will be particularly important in applying the obligation to eliminate or disclose all material conflicts of interest, as contemplated by the Dodd-Frank Act. *Id.* at p. 111. The Staff further stated that Dodd-Frank Act Section 913(g) addresses the duty of loyalty in that it provides that, "[i]n accordance with such rules [that the Commission may promulgate with respect to the uniform fiduciary standard] . . . any material conflicts of interest shall be disclosed and may be consented to by the customer." *Id.* at 112. The Staff also stated "While the duty of loyalty requires a firm to eliminate or disclose material conflicts of interest, it does not mandate the absolute elimination of any particular conflicts, absent another requirement to do so." *Id.* at p. 113. The Staff further stated that the Commission could consider whether rulemaking would be appropriate to prohibit certain conflicts, or whether it might be appropriate to impose specific disclosure and consent requirements (e.g., in writing and in a specific format, and at a specific time) in order to better assure that retail customers were fully informed and can understand any material conflicts. *Id.* at pp. 114-17.

[41] 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."

In light of the foregoing, Respondent was permitted to engage in transactions in securities which were held by the Fund and was free to engage in transactions in securities that the Fund did not hold. Specifically, Respondent, as a result of the disclosures in the Offering Memorandum and the provisions of the Operating Agreement, was permitted to sell TRX securities and purchase put contracts on TRX securities. Similarly, Respondent could not be exposed to liability in connection with Hull's sale of TRX securities to the Fund as the Operating Agreement specifically permitted the Managing Member to enter into contracts which it deemed advisable. 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 OIP alleges that Respondent acted as an investment adviser and that, as a fiduciary, Respondent owed a duty of loyalty and was required to disclose conflicts of interest. Although the Decision concludes that Respondent acted as an investment adviser to the Fund, it does not discuss the duty of loyalty that an investment adviser may owe to its client as alleged in the OIP; nor does it properly address the disclosure of conflicts of interest in the Fund's Operating Agreement and Offering Memorandum and the consent to such conflicts, which are binding upon the Fund and Fund investors.

The Decision finds that the "Fund's basic documents allowed sales in privately held accounts that were contrary to the Fund's position." (Decision at p. 33).[42] This conclusion is

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[42] 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

consistent with *Capital Gains* and Section 211 of the Advisers Act as amended by the Dodd – Frank Act. It is also consistent with the study mandated by Section 913 of the Dodd-Frank Act, in which the Staff stated "While the duty of loyalty requires a firm to eliminate or disclose material conflicts of interest, it does not mandate the absolute elimination of any particular conflicts, absent another requirement to do so." Study at p. 113.

The ALJ attempts to circumvent the disclosures and waivers by asserting that Respondent's sales of TRX securities "contradicted the information he was withholding and providing to Fund investors. Gibson did not disclose to Fund investors the communications he had with Sinclair on August 10 and 15, voicing concerns about Sinclair's false representations, 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."[43] (Decision at p. 33). Second, whatever thoughts a particular investor had regarding "relinquishing their right to fair treatment and

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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).

[43] 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).

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.[44]

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

Notwithstanding that Respondent did not act as an investment adviser to the Fund and notwithstanding that conflicts of interest relating to securities transactions of the type at issue in this matter were disclosed and consented to, the record in this matter does not establish, by a preponderance of the evidence, that Respondent engaged in front running or favored a member of the Fund over the Fund.

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. In the absence of a statutory provision, a rule or other Commission pronouncement, Respondent has not been provided with notice of what conduct is prohibited.[45]

The OIP alleges that Respondent engaged in front running in violation of the Advisers Act and the Exchange Act when he sold or recommended the sale of TRX securities and when he purchased or recommended the purchase of put contracts on TRX securities. The Decision states that "This decision considers a fiduciary's non-disclosed use of material, non-public information about a client to conduct transactions ahead of a client's transaction to secure a personal advantage, for himself or a close friend or relative, to be front running." (Decision at p. 28). In

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[44] 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.

[45] *See Upton v. Securities and Exchange Commission*, 75 F.3d 92, 98 (2d Cir. 1996) (stating "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).

support of this proposition, the ALJ cites *Capital Gains*, 375 U.S. at 196-97; *SEC v. Yang*, 999 F. Supp. 2d 1007, 1016 (N.D. Ill. 2013); and HARVEY E. BINES & STEPHEN ,THEL, Investment Management Law and Regulation (2d ed. 2006).[46] The ALJ then states that in determining whether Respondent engaged in front running it is necessary to judge what material non-public information he knew.

An application of the standard adopted by the ALJ to the record in this matter demonstrates that Respondent did not know material, non-public information when he sold or recommended the sale of TRX shares or when he purchased or recommended the purchase of put contracts on the securities of TRX. And the ALJ's attempt to predicate findings regarding objective criteria (i.e. whether information is material and non-public) on a credibility determinations fails. Moreover, the record in this matter establishes that Respondent did not use material, non-public information regarding the Fund to conduct a transaction ahead of the Fund.

At the outset, it is important to note that the ALJ herself is inconsistent in articulating what she believed the record established regarding the materiality and non-public nature of the information that Respondent knew at the time he sold TRX shares in September 2011. Initially, the ALJ states that "My review of the evidence leads me to conclude that Gibson knew with reasonable certainty on September 26 that the Fund was going to sell as much of its shares as it could as quickly as it could." (Decision at p. 29). Then she states "Gibson believed on September 26 that the Fund was soon going to sell a large amount of TRX shares." (Decision at

[46] 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.

p. 30). And then she states "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." (Decision at p. 33). Moreover, the ALJ initially states "in determining whether front running occurred it is necessary to judge what material, non-public information Gibson knew when he sold TRX shares," but concludes only that "Gibson knew or should have known on September 26, that the anticipated sale of a large amount of TRX stock, which occurred on September 27, would drive the stock price down, which it did." (Decision at p. 34).

In an effort to support a finding that Respondent knew material, non-public information regarding the Fund to conduct transactions ahead of a client's transaction, the ALJ embarks on an analysis of Respondent's credibility as a witness. The ALJ compares Gibson's opinion regarding the CEO of TRX and the statements he made to fund investors regarding the CEO of TRX. However, the credibility of Respondent's comments 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.

Next, the ALJ states that Respondent's representations that there were large holders of TRX who owned substantial positions in TRX and were interested in purchasing the Fund's TRX securities are highly questionable. However, the record reflects that Platinum 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 held over 10,000,000 shares. (Resp. Ex. 61). Moreover, the Fund was able to sell 3.7 million shares of TRX on September 27, 2011 through Sands and Casimir.

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

The ALJ asserted that there was no support for Gibson's testimony that in the Fall of 2011, the Fund was a patient holder of its TRX securities and willing to sit on its position indefinitely. However, the record reflects a communication from Hull in late September 2011 in which he stated: "So the best move may be to try to play all of potential acquirers against each other and foster a bidding war for the shares. . . .also, I think all of us are well satisfied to hold the shares for the duration . . . . and to then start working with management on meeting the milestones that you suggested earlier today. Things work out for the best." (Resp. Ex. 89). And later in October 2011, Hull stated, "I am unclear whether I am in favor of the sale of more shares at $3.46 p/s. I would not be in favor of selling at such a low price but would like to discuss with you in greater detail." (Resp. Ex. 103).

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

The ALJ bases her conclusion that Respondent knew material non-public information on testimony by an expert that "'at the time Gibson sold his shares [on September 26], he had begun negotiations to sell [the Fund's] TRX position in an off-exchange block transaction through the 'upstairs market,' which resulted in the sale of 3.7 million shares on September 27. Gibson Ex. 149 at 26"; and several of the ALJ's findings regarding "Gibson's strong critical comments to

Sinclair in August, the drastic decline in TRX's price shortly after September 20, Gibson's acknowledgement that his investment thesis was invalid, Hull's intolerance for greater TRX price drops, the information Gibson conveyed to a broker on September 24, and Hull's comments on September 25- all support a conclusion that 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 was imminent." Decision at p. 32-33. The ALJ then states "This information was material, non-public information known to Gibson because of his position as the Fund's investment adviser."[47]

At the time Respondent placed orders to sell TRX securities on September 26, 2011, information relating to a possible sale of the Fund's TRX shares was not material.[48] Respondent had made inquiries regarding negotiated sales of TRX securities in the upstairs market, but was unaware whether a buyer would materialize, the number of TRX shares the buyer would offer to purchase, the price at which the buyer would be willing to purchase TRX securities, or when the transaction would be consummated. The record reflects that Respondent made inquiries of a representative of Roheryn and a representative of Casimir. The record also reflects that the inquiries to Roheryn did not result in a transaction of the type Respondent was seeking. The record further reflects that communications with the representative of Casimir began on Sunday, September 25, continued throughout Monday, September 26, and culminated in a transaction on

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[47] The ALJ further states "Gibson did not disclose to Fund investors the communications he had with Sinclair on August 10 and 15, voicing concerns about Sinclair's false representations , TRX's falling share price, and TRX's future. Instead, on September 23, 2011, Gibson represented that the Fund was suspending its management fee because of TRX's poor performances, but that a research report and TRX purchases by others confirmed his view of TRX and verified his analysis of TRX's underlying value and the reputation, character, and integrity of Sinclair....'Personally, I will not redeem my interest in Geier and TRX until the bull market matures over the coming years at what I strongly believe will be higher levels." (Decision at pp. 33-34). While the ALJ 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 used material non-public information regarding a sale of TRX securities by the Fund when he sold TRX securities on September 26, 2011.

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

Tuesday, September 27. At the time he placed orders to sell TRX securities on Monday, September 26, Respondent did not know whether a transaction would occur, the size of a transaction, a price for the TRX shares, or most importantly, when the transaction would occur. Accordingly, Respondent did not know material information regarding a transaction on behalf of the Fund in TRX securities.

Similarly, Respondent did not know non-public information regarding a transaction on behalf of the Fund in TRX securities. Unlike orders that Respondent placed with GarWood, the Firm at which the Fund maintained its brokerage account, Respondent's inquiries on behalf of the Fund were directed to firms with which the Fund did not have a relationship. In particular, Respondent communicated with representatives of Roheryn and Casimir and those representatives, in turn, communicated with potential buyers. As a result of these communications, the information regarding the Fund's interest in identifying a potential buyer for its TRX securities was not non-public information.

Further, when Respondent purchased $4.00 put contracts on the securities of TRX in late October, he was continuing to explore the possibility of negotiated transactions in the upstairs market, but he had not reached agreements with other parties regarding the price or volume of a transaction involving TRX securities, and, thus, there was not an order to sell TRX securities or even a contemplated transaction, which he could front run. 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.[49] 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

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[49] Attached to the email from Hull's assistant was a schedule which reflected the amount Respondent owed to Hull and a Demand Promissory Note to be executed by Respondent. The demand promissory note was in the amount of $636,921.07 and the loan bore interest at a rate of 8%.

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.

During the remainder of October and early November, Respondent continued his efforts to liquidate the Fund's position in TRX, including discussions regarding TRX securities with Roheryn, and Platinum Partners, the hedge fund that had purchased TRX securities in a private placement conducted in August 2011. Respondent's efforts to dispose of all of the Fund's TRX shares through negotiated transactions were unsuccessful, and on November 10, 2011, the Fund's remaining shares in TRX were sold through GarWood, the brokerage firm where the Fund had maintained an account since its inception.

Favoring a Fund Investor

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

Fund's efforts to sell TRX securities through negotiated transactions in the upstairs market. Accordingly, he proposed the transaction to Hull and although the transaction did not fully achieve Hull's objectives to increase his liquidity, he agreed to enter into the transaction.

The OIP alleges that Respondent violated the Advisers Act by favoring Hull over the Fund when it purchased TRX shares at the closing price of TRX stock on October 18, 2011 and enabled Hull to sell his TRX shares without paying a commission to a broker. The Decision concludes that a provision in the Offering Memorandum which permitted certain transactions between the Fund and other parties must be consummated at the current market price and without the payment of an extraordinary commission and that the Hull transaction did not comport with the provision contained in the Offering Memorandum.

The Decision does not address the provision of the Operating Agreement that is directly applicable to the Hull Transaction. Rather, the Decision focuses upon a part of the Offering Memorandum that addresses the activities in which the Managing Member and its members (i.e., Respondent and Hull) could engage apart from the Fund. The Offering Memorandum provided that the Managing Member and its members could conduct any other business, including businesses in the securities industry and which competed with the Fund and could advise others regarding securities matters.[50] The Offering Memorandum further provided that

> 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)

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[50] The Offering Memorandum states as follows:
Under the terms of the Operating Agreement, the Managing Member, the Investment Manager, and each of their respective directors, members, partners, shareholders officers, employees, agents and affiliates (hereinafter referred to as 'Affiliated Parties') may conduct any other business, including any business within the securities and commodities industries, whether or not such business is in the commodities business is in competition with the Company. Without limiting the generality of the foregoing, the Affiliated Parties may act as general partner, managing member, investment adviser or investment manager for others, may manage funds, separate accounts or capital for others, may have, make and maintain investments in their own name or through other entities and may serve as an officer, director, consultant, partner, member or stockholder of one or more investment funds, partnerships , limited liability companies, securities firms, or advisory firms. Such other entities or accounts may have investment objectives or may implement investment strategies similar or different to those of the Company.

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.

Thus, the Offering Memorandum addressed transactions between the Fund and the various persons and accounts to whom the Managing Member or its members may provide investment advice, which would necessarily include persons that are not affiliates of the Managing Member or its members. The provision of the Operating Agreement is applicable to the transaction between Hull and the Fund, and it does not include requirements that the transactions be executed at current market prices or that no extraordinary commissions be paid. Thus, Respondent would not be obligated to make the disclosures that the Hull Transaction involved above-market prices or extraordinary commissions as the Decision concludes. In any event, the provision set forth in the Offering Memorandum is a guideline rather than a condition or requirement. The Law Dictionary defines the term "guideline" as "a practice that allows leeway in its interpretation."[51] Accordingly, the Decision's attempt to elevate a "guideline" to a "requirement" must fail.

Moreover, any difference in the price at which the Hull Transaction was completed and the price at which the transaction would have been completed had a block discount been applied would not be material and would not need to be disclosed. First, the transaction was completed at the price at which the TRX stock closed on the date of the transaction. If Respondent had attempted to incorporate a block discount, based on his experience, the likely range of such a discount would be a matter of pennies. Moreover, Hull would have borne 80% of that discount and Respondent would have borne part of that discount. The remaining investors, including Respondent's mother and father would have experienced an immaterial impact. As such, there

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

would be no obligation to disclose this information because if the transaction were deemed to involve a conflict that was not already addressed in the governing documents it was not a material conflict and only material conflicts of interest need be disclosed.

Further, Respondent did not cause the Fund to pay an extraordinary commission in connection with the Hull Transaction. The record in this matter establishes that the Hull Transaction was handled as a private transaction and neither Hull nor the Fund paid a commission on the transaction. Also, both before and after the Hull Transaction, Respondent was exploring a sale of the Fund's TRX shares through a negotiated transaction in the upstairs market and if such a transaction was completed it may not have involved the payment of a commission. In any event, funds such as the Geier Fund routinely enter into securities transactions; some transactions are completed as market transactions and some are completed as privately negotiated transactions which do not involve a commission. It would not be an extraordinary occurrence for a fund to acquire securities in one type of transaction and sell the same securities in the other type of transaction. Further, the purchase of the TRX securities by the Fund and the sale of the securities by the Fund are separate transactions that were completed weeks apart. Once the Fund acquired the TRX securities from Hull, the securities were part of the Fund's portfolio rather than a discrete segment of the portfolio, and when the Fund's TRX shares were sold in November 2011 the shares acquired from Hull were sold as a part of the transaction.

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 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.

For a number of 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.

The OIP alleges that Respondent failed to disclose to the Fund or other clients information relating to his sales and recommendations to sell securities,[52] his purchase and recommendation to purchase put contracts on TRX securities[53] and his favoring of a Fund

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[52] 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.

[53] 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 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.

investor over the Fund.[54] 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.").

The Decision makes findings and conclusions that Respondent violated Section 206(4) and Rule 206(4)-8, but the findings and conclusions relate to matters that are not alleged in the OIP and/or are not material. For example, the Decision contains findings that Respondent made misstatements or omitted to state facts necessary to make statements made not misleading that related to Respondent's opinion of Sinclair, his communications with Sinclair, his views regarding TRX and his interest in the Fund and TRX. However, the OIP does not contain allegations that Respondent violated Section 206(4) and Rule 206(4)-8 by making such alleged misstatements and omissions and many of such findings and conclusions are not material. As a result, the ALJ's findings and conclusions relating to Section 206(4) and Rule 206(4)-8 must be set aside.

RESPONDENT DID NOT ACT WITH THE REQUISITE MENTAL STATE

To establish that Respondent violated the Advisers Act, the Exchange Act or the rules thereunder, there must be a preponderance of the evidence that Respondent acted with the

54 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.

requisite mental state. Section 206(1) and Section 10(b) and Rule 10b-5 require proof of scienter,[55] while Section 206(2) and 206(4) and Rule 206(4)-8 require proof of negligence.[56]

In order for Respondent to have engaged in the front running violations alleged in the OIP, a preponderance of the evidence must support findings and conclusions that Respondent knowingly, recklessly or negligently failed to disclose his use of material, non-public information about the Fund to conduct transactions ahead of the Fund's transaction to secure an advantage.[57] The record reflects that information regarding the possible sale of the Fund's TRX shares was not material and was not non-public at the time Respondent sold or recommended the sale of TRX securities or purchased or recommended the purchase of TRX puts. At the time Respondent sold TRX securities, he had made inquiries to two different firms, Roheryn and Casimir, regarding sales of the Fund's TRX securities. The transaction through Roheryn was not consummated. And with respect to Casimir, at the time Respondent sold TRX securities, he did not know whether Casimir could locate a buyer, the number of shares the buyer would be willing to purchase, the price per share that a buyer would be willing to pay, or when the transaction would be consummated. Moreover, the Casimir transaction was consummated on terms different than Respondent was seeking. Further, as Respondent had approached two firms regarding the

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55 Scienter is shown by facts demonstrating, "a mental state embracing intent to deceive, manipulate, or defraud." *SEC v. Rubera,* 350 F.3d 1084, 1094 n.1 (9th Cir. 2003) (citations omitted). It may also be established by recklessness, which is: highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it. *Id.*

56 To establish negligence, the SEC must show that Respondent Gibson had no reasonable basis for his actions. "Negligence is not a strict liability standard" but "requires the absence of a reasonable basis." *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).

57 *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).

Fund's TRX securities and the representatives at those firms, in turn, communicated with potential buyers, any information regarding the Fund's TRX position was not non-public. With respect to transactions in TRX put contracts, the record is similar. Respondent continued to explore the possibility of negotiating a sale of the Fund's TRX securities, but the Fund never completed such a transaction at that time. Moreover, as the Fund had sold 3.7 million TRX shares on September 27, 2011, the Fund's interest in selling the remainder of its TRX shares was known in the market and therefore was not non-public.

Similarly, the record does not support findings and conclusions that Respondent knowingly, recklessly or negligently failed to disclose that he favored an investor over the Fund. Specifically, Respondent did not favor an investor over the Fund when the Fund acquired TRX shares which Hull owned personally. The record reflects that the impetus for the transaction was Hull's need to increase his liquidity, and that Hull would have increased his liquidity much more by simply selling the TRX shares in the market. Moreover, as Hull owned approximately 80% of the Fund, he experienced the consequences of the Fund's sale of TRX shares on November 10, 2011, including the commissions that the Fund paid on the sales that day. Also, the Hull transaction was clearly permitted by the Fund's Operating Agreement, which severely undermines any suggestion that Respondent acted knowingly, recklessly or negligently in not disclosing the Hull transaction.

The ALJ's statements that the record supports findings and conclusions that Respondent acted with the requisite mental state are not supported by the facts of this case or by analysis of the issues discussed above.

SANCTIONS AND RELIEF

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

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.

With respect to the imposition of a cease-and-desist order, disgorgement and civil penalties, the record reflects that Respondent did not violate the Exchange Act or the Advisers Act. 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. Several of the factors generally considered are particularly relevant to this matter. 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.[58]

Evidence admitted during the hearing establishes that sanctions and other relief should not be imposed upon the Respondent. First, the Respondent engaged solely in activities that were permitted by the Fund's Offering Memorandum and Operating Agreement. Further,

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[58] 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. SEC. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989).

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, and was believed to be in the interest of the Fund as opposed to the interest of Hull. Second, 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. Third, Respondent undertook the actions at issue with the understanding that they were permitted by the Fund's Offering Memorandum and Operating Agreement and that the actions either did not harm the Fund or benefitted the Fund. Fourth, in light of the activities that Respondent has undertaken since the events at issue and in the future it is unlikely that he will be in a position to engage in violations of the securities laws in the future. Further, evidence admitted in this matter establishes Respondent's inability to pay a civil penalty or to comply with an order requiring him to pay disgorgement.

Further, case law indicates that disgorgement is an inappropriate remedy in a case such as this. 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. SEC 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"). As the record clearly shows, Respondent did not realize any "profits" which are subject to disgorgement. Respondent's net financial outcome from his activities was a substantial loss. Because disgorgement should not force anyone to pay money which is not a "gain", disgorgement is not available in this case.

To the extent that disgorgement is deemed an appropriate sanction, the penalties imposed on the Respondent should be reduced so as to be proportional with the amount of disgorgement. The District of Columbia Circuit's decision in *Rapoport v. Securities and Exchange Commission*, 682 F.3d 98 (D.C. Cir. 2012) requires consistency across cases in the application of penalties. SEC administrative decisions and federal cases reflect a well-established pattern whereby penalties imposed on a defendant bear a proportional relationship to disgorgement in the case -- usually the penalty amount is approximately equal to, or less than, the disgorgement amount. *See e.g. optionsXpress, Inc.*, Initial Dec. Rel. No. 490 (June 7, 2013) (imposing total penalties of $4 million and total disgorgement of $4.2 million); *In the Matter of Daniel Bogar*, Initial Dec. Rel. No. 502 (Aug. 2, 2013) (imposing a penalty of $260,000, much less than the disgorgement figures of $592,000, $1.5 million, and $2.6 million for the three respondents).

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. SEC 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).

The practice of relying on proportionality is unmistakable. Here, the SEC seeks to impose penalties in the amount of $210,000 -- an amount that is more than 2.5x the disgorgement amount of $81,008 in "profits" on the put contracts. This is not consistent with the historical application of penalties, and any penalty amount should be reduced to the amount of disgorgement or less, especially in light of the other severe sanctions being imposed.

CONSTITUTIONAL CHALLENGE

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

The Court of Appeals for the Tenth Circuit, in *Bandimere v. Securities and Exchange Commission,* 844 F.3d 1168 (10th Cir. 2016) held that the Commission's ALJs are inferior officers and appointed unconstitutionally. The Tenth Circuit began its analysis by noting that the Supreme Court, in *Buckley v. Valeo,* 424 U.S. 1, 126 (1976), defined an officer as "any appointee exercising significant authority pursuant to the laws of the United States." The Tenth Circuit then discussed the Supreme Court's opinion in *Freytag* in which the Supreme Court held that Special Trial Judges appointed by the Tax Court were inferior officers as the position was established by law; the duties, salary and means of appointment for the office were specified by statute; and the tasks performed by the government official were not ministerial, but rather involved the exercise of significant discretion. The Tenth Circuit then stated that it must consider the creation and duties of SEC ALJs in order to determine whether they are inferior officers and stated that the ALJ position was created by the Administrative Procedure Act 5 U.S.C. § 556(b)(3); statutes enacted by Congress set forth SEC ALJs' duties, salaries and means of appointment; and SEC ALJs exercise significant discretion in performing "important functions." The Tenth Circuit held that SEC ALJs are inferior officers who must be appointed in conformity with the Appointments Clause and set aside the Commission's opinion. As SEC

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

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

PROCEDURAL ERRORS

Rule 320, in relevant part, provides that "the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable." During the proceeding, the ALJ admitted into evidence Div. Exs. 183, 183A, 184, 185, 187 and 188 over Respondent's objections, notwithstanding that each exhibit was irrelevant, immaterial and unreliable.

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

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

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

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

CONCLUSION

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

Dated this 5th of April, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2017:

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

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

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

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

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

Thomas Ferrigno

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CERTIFICATE OF COMPLIANCE

This brief complies with SEC Rule 450 in that it contains 13,460 words.

Thomas A. Ferrigno

Thomas A. Ferrigno

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