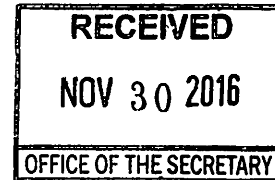
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549



ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent

CHIEF ADMINISTRATIVE LAW JUDGE
BRENDA P. MURRAY

RESPONDENT CHRISTOPHER M. GIBSON'S POST-HEARING BRIEF

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INTRODUCTION

In accordance with orders entered on September 16 and October 11, 2016, Respondent Christopher M. Gibson ("Respondent Gibson" or "Respondent") hereby submits his Post-Hearing Brief. Respondent is submitting separately his proposed findings of facts and conclusions of law.[1]

The order instituting administrative and cease-and-desist proceedings entered by the Securities and Exchange Commission (the "SEC" or the "Commission") pursuant to Section 21C of the Securities Exchange Act, Sections 203(f) and (k) of the Investment Advisers Act and Section 9(b) of the Investment Company Act ("the Order") alleges that (i) Respondent acted as an investment adviser with respect to a private fund; (ii) Respondent, as an investment adviser, owed fiduciary duties to the private 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 Order alleges that Respondent Gibson engaged in front running and favored one investor in a fund over the fund and other investors in the fund, without disclosing conflicts that arose from such conduct. The Order also alleges that Respondent failed to disclose certain information to the fund's investors.

The allegations contained in the Order relate to Geier International Strategies Fund, LLC (the "Geier Fund" or the "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 securities and other financial interests. The Operating Agreement of Geier International Strategies Fund, LLC (the "Operating Agreement") provided that Geier Capital, LLC ("Geier Capital"), a Georgia limited liability company would serve as the Managing Member of the Fund. The Operating Agreement provided, among other things, that Geier Capital could retain Geier Group, LLC ("Geier Group"), a Georgia limited liability company, to serve as the Investment Manager of the Fund. Interests in the

[1] Respondent's Proposed Findings Of Fact And Conclusions Of Law, filed November 29, 201 6.

Geier Fund were offered pursuant to the Confidential Private Offering Memorandum of the Geier International Strategies Fund, LLC (the "Offering Memorandum"). The allegations contained in the Order also relate to transactions in and options on the securities of Tanzanian Royalty Exploration Corporation ("TRX"), a company that held royalties with respect to properties on which gold mines could be operated.

THE DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF AND PROPOSED FINDINGS AND CONCLUSIONS

The Division of Enforcement, in its Post-Hearing Brief, asserts that the evidence admitted during the hearing in this matter establishes that Respondent Gibson acted as an investment adviser to a private fund, breached his fiduciary duties and engaged in fraudulent conduct. The Division of Enforcement's Post-Hearing Brief reflects numerous misstatements and omissions with respect to the relevant statutes and rules and fails to set forth authority for many of its proposed conclusions of law. The Division of Enforcement also refers to certain evidence admitted during the hearing, but fails to address other evidence which was admitted and which overwhelmingly establishes that Respondent did not act as an investment adviser, did not breach fiduciary duties, and did not violate the securities laws as alleged in the Order. When all of the evidence admitted in this matter is viewed in light of the applicable law, it is clear that the Division of Enforcement failed to prove that Respondent acted as an investment adviser, breached fiduciary duties or engaged in conduct constituting a device, scheme or artifice to defraud, or operated as a fraud or deceit or engaged in other misconduct.

Fiduciary Duties. In its Post-Hearing Brief, the Division of Enforcement states, "An investment adviser's federal statutory duties under Section 206 cannot be nullified by private agreement, or by the interaction of state law and private agreement." (Post-Hearing Brief at 35). The Division of Enforcement's statement regarding Section 206 of the Investment Advisers Act is inaccurate and disregards other provisions of the Investment Advisers Act. While Sections 206(1)

and (2) have been construed as imposing fiduciary duties on investment advisers, including a duty of loyalty, a duty of care, a duty of full and fair disclosure and a duty to act in the best interest of clients, such interpretations do not impose immutable fiduciary duties on investment advisers which cannot be modified, limited or eliminated. In fact, Section 206(3), the provision that follows Sections 206(1) and (2), specifically permits an investment adviser to disclose conflicts arising from transactions with clients and permits clients to consent to such conflicts.

Congress, in enacting legislation that would enable the Commission to adopt rules providing for a uniform standard of conduct for brokers, dealers and investment advisers, included a provision that forecloses any argument that a client may not consent to an investment adviser's material conflicts of interest. Section 211(g) of the Investment Advisers Act, in relevant part, states as follows: "any material conflicts of interest shall be disclosed and may be consented to by the customer."[2] Thus, Section 211(g) permits investment advisers to disclose material conflicts of interest and, if the client consents, to act in a manner that is not in a client's best interest and which would benefit the investment adviser's financial or other interest.

In a release issued shortly after Section 211(g) was added to the Investment Advisers Act, the Commission confirmed that an investment adviser may disclose material conflicts of interest and a client may respond as he or she deems appropriate: "A prospective client may seek modifications to an investment advisory agreement to better protect the client against an investment adviser's potential conflict of interest, either by better aligning the adviser's interest with that of the client or by prohibiting a particular practice in the client's account. If an adviser is unwilling to make such modifications, a prospective client may select a different adviser." Thus, the regulatory regime established by the Investment Advisers Act contemplates that

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[2] Section 211(g) was added by the Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No.111-203, 124 stat. 1376 (2010)(codified at 15 U.S.C. 780 (the "Dodd Frank Act") in order to provide the Commission with rulemaking authority relating to the harmonization of the standards of conduct for brokers, dealers and investment advisers.

investment advisers will disclose information, including material conflicts of interest, to prospective clients and, as the Commission has indicated, clients have a number of choices: (i) accept the investment adviser's services together with the material conflicts that have been disclosed; (ii) attempt to negotiate the terms of the advisory relationship, including negotiation with respect to material conflicts; or (iii) decline to enter into an advisory relationship with the particular investment adviser. Further, a client's agreement to an investment adviser's material conflicts of interest would not constitute an agreement that provides for the waiving of compliance with the Investment Advisers Act as the Division of Enforcement contends. Rather, an agreement between an investment adviser and a client which permits an adviser's conflicts of interest would establish the duties that the investment adviser owes to the client and against which compliance with the Investment Advisers Act would be measured.

Absence of Controlling Precedent. In its Post-Hearing Brief, the Division of Enforcement failed to set forth precedent supporting its contention that the Investment Advisers Act or the Securities Exchange Act proscribe "front running." The Division of Enforcement cites to one case, *SEC v. Yang*, 999 F. Supp. 2d 1007 (N.D. Ill. 2013) and states that the court "described front running as an attempt by an adviser 'to profit personally by secretly authorizing personal trades in anticipation of much larger trades he knew that he would be authorizing," but the *Yang* opinion and order concern the denial of a motion for summary judgment. The denial of a motion for summary judgement 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.")

The Division of Enforcement also references two treatises that contain descriptions of "front running" but does not cite a case that adopted the descriptions contained in the treatises. More importantly, the *Yang* case and the two treatises each describe "front running" in different terms. The *Yang* case refers to front running as an attempt by an adviser to profit personally by secretly authorizing personal trades in anticipation of much larger trades he **knew that he would be authorizing."** One of the treatises described "front running as "an investment adviser's use, with the expectation of personal gain, **of material, non-public information** concerning an anticipated transaction likely to impact the value of a security." The other treatise described "front running" as using **advance knowledge of impending client action** to secure advantage." The Division of Enforcement's proffer of three different definitions of "front running" demonstrates that at the time of the transactions at issue the Commission had not provided notice regarding conduct that in its view would constitute violations of the Investment Advisers Act or the Securities Exchange Act. *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 and internal quotations omitted).

Moreover, evidence admitted at the hearing established that at the time Respondent sold securities and purchased put contracts on TRX securities he did not know that the Geier Fund would be engaging in transactions in TRX shares. Further, at the time Respondent sold securities and purchased put contracts, information regarding the Fund's determination to explore the possibility of selling some or all of its TRX shares was not non-public as

Respondent, rather than placing an order with the broker-dealer at which the Fund maintained an account, sought offers for the Fund's securities from multiple parties, who conveyed such information to their clients.

The Commission's Administrative Jurisdiction. The Division of Enforcement also misstates the Commission's administrative jurisdiction. In its Post-Hearing Brief, the Division of Enforcement states that Section 203(f) of the Investment Advisers Act "authorizes the Commission to bar any person who was been (sic) associated with an investment adviser from future involvement in aspects of the securities industry." (Post-Hearing Brief at 25). However, the Commission's administrative authority pursuant to Section 203(f) is limited to imposing sanctions upon **any person associated, seeking to become associated, or, at the time of the alleged misconduct, is associated or seeking to become associated with an investment adviser.** One of the principal issues in this matter is whether Respondent was associated with an investment adviser and the Division of Enforcement has obfuscated that issue by misstating the Commission's administrative jurisdiction.

Short Position and Protective Puts. With respect to evidence admitted during the hearing, the Division of Enforcement selects evidence that appears to support its theories of liability, but ignores other relevant and dispositive evidence. The Division of Enforcement refers to evidence that it claims proves that Respondent violated the securities laws by purchasing put contracts and suggesting that his father purchase put contracts prior to sales by the Fund of the related security. The Division of Enforcement referred to Respondent's put contracts as a "short position," which represented a bet by Respondent that the price of the security would decline. The Division of Enforcement disregards evidence that Respondent maintained his interest in the Fund throughout the relevant period, that through his interest in the Fund he possessed a beneficial interest in the

securities held by the fund[3], and that, in light of his interest in the Fund and the securities it held, he maintained a long position in the relevant securities rather than a short position. Moreover, in light of his position in the Fund and his beneficial interest in the securities which the Fund held, he would benefit if the security increased in value rather than declined in value. Accordingly, rather than a short position or a bet that the security would decline in value, the put transactions constituted protective puts or a hedge on his long position in the stock.

Authority to Enter into Contracts. With respect to its claim that it has proven that Respondent favored one fund investor over another, the Division of Enforcement cites to a part of the conflicts of interest disclosures contained in the Offering Memorandum which states "purchase and sale transactions (including swaps) may be effected between the Company and the other entities and accounts subject to the following guidelines: (i) such transactions shall be effected for cash consideration at the current market price of the particular securities, and (ii) no extraordinary brokerage commissions or fees (i.e., except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction." The Division of Enforcement then claims that a transaction with a Fund investor was not completed at the current market price and that an extraordinary commission was paid and, as a result, the transaction with the investor constituted impermissible favoring of one client over another.

The construct presented by the Division of Enforcement fails for a number of reasons, including that the Division of Enforcement mischaracterizes the language that it relies upon and ignores another document that governs the transaction. In its brief, the Division of Enforcement states that "the offering memorandum required transactions between GISF and affiliated parties like Hull to occur at the 'current market price.'" However, the relevant provision clearly states that it is a **guideline**. The Law Dictionary defines the term "guideline" as "a practice that allows leeway in its

[3] The Division's expert acknowledged that "I didn't calculate how much he owned in his ownership in GISF." (Tr. 387:6-7). Dr. Taveras agreed that when the beneficial ownership of the underlying shares is considered, the puts only served to mitigate losses. (Tr. 387:18-21).

interpretation."[4] Accordingly, the Division of Enforcement's attempt to elevate a "guideline" to a "requirement" must fail.

More importantly, the Fund's Operating Agreement, which the Division of Enforcement largely ignores in its brief, provides a provision that controls this issue. The Operating Agreement, at Section 3.02(h), states 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 foregoing provision is directly applicable to the transaction as it involves the purchase by the Fund of securities owned by a member of the Fund. The provision does not incorporate the terms "current market price" or "extraordinary commissions." Rather, the provision authorizes the Managing Member to enter into agreements that it deems advisable in conducting the business of the Fund.

Irrelevant Documents. The Division of Enforcement also ascribes importance to documents that are irrelevant to this matter. The Division of Enforcement offered in evidence a Code of Ethics for Geier Group, Ltd., a Cayman Islands entity that was formed in the event that a master /feeder structure was pursued which would have involved the formation of an offshore fund. Evidence admitted during the hearing established that the master/feeder structure was never pursued and the Code of Ethics was never adopted by Geier Group, Ltd. Nevertheless, the Division of Enforcement attempts to argue that the draft code's provisions regarding fiduciary duties of investment advisers are somehow applicable to the Geier Fund, Geier Capital and Geier Group and by extension to Respondent. There is absolutely no basis to conclude that a draft document for an entity that never commenced operations somehow establishes duties to which Respondent should be held.

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

The Role of James Hull. The Division of Enforcement attempts to ignore applicable law and portray James Hull as a mere investor in the Fund. Section 202(a)(12) of the Investment Advisers Act defines the term "control" as the power to exercise a controlling influence over the policies or management of a company, unless such power is solely the result of an official position with such company. The evidence admitted during the hearing establishes that Mr. Hull controlled the Fund, Geier Capital and Geier Group. The Geier Fund was formed to accommodate Mr. Hull's desire to receive fees for managing a fund, notwithstanding that Respondent recommended that such an undertaking be deferred until a track record could be established for the investment vehicles that he and Mr. Hull had been managing on behalf of themselves and others.

The Division of Enforcement also disregards evidence that, notwithstanding the success that the Geier Fund achieved by investing in commodities, principally gold and silver, Mr. 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, which was the tax treatment accorded to commodities. Mr. 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. The Division of Enforcement also disregards evidence that establishes that 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, Mr. Hull, after communicating with certain Members of the Geier Fund, advised Respondent that he had "no more tolerance for losses" and that the Fund should attempt to sell its holdings if it could do so at "good prices."

The Division of Enforcement also disregards Mr. Hull's economic control over Respondent, his father and the Fund. At Mr. Hull's suggestion, Respondent, in order to demonstrate his commitment to their undertaking, accepted a loan from Mr. Hull and invested the proceeds in the

Geier Fund. The loan was memorialized by a demand note that bore interest at a rate of 8% per year. Similarly, Mr. Hull suggested that Respondent's father accept additional funds from Mr. 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. Further, Mr. Hull's interest in the Fund was approximately 80% and Mr. Hull's friends and business associates represented an additional 10% of the Fund. At any time, Mr. 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, Mr. Hull could call his demand notes and force Respondent and possibly his father to redeem their interests in the Fund. Thus, the evidence admitted in this matter conclusively establishes that Mr. Hull controlled the relevant entities.

STATEMENT OF FACTS

RESPONDENT'S EMPLOYMENT WITH HULL STOREY GIBSON COMPANIES

Respondent Gibson attended Williams College and studied economics and art history. (Div. Ex. 190 15:8-15).[5] After graduating from Williams College in 2006, Respondent began working at Deutsche Bank Securities, Inc. (Div. Ex. 190 16:5-16:9). While employed by Deutsche Bank Securities, Inc., Respondent initially worked in the securitization group and subsequently in the special situations group. (Div. Ex. 190 15:22-16:4). Respondent left Deutsche Bank Securities, Inc. in February 2009. (Div. Ex. 190 16:8-9).

After leaving Deutsche Bank Securities, Inc., Respondent Gibson visited Augusta, Georgia, where his parents resided, and participated in discussions regarding the currency markets with James Hull. (Div. Ex. 190 16:22-17:7). Mr. Hull and John Gibson, Respondent's father, owned and managed Hull Storey Gibson Companies (Div. Ex. 190 17:12-17), an entity

[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.

engaged in commercial real estate acquisition and management (Div. Ex. 190 17:18-23; 887:25-888:16). In or about February 2009, Mr. Hull offered Respondent Gibson a position as a Finance Manager with Hull Storey Gibson Companies. (Resp. Ex. 33; Div. Ex. 190 21:4-14). As a Finance Manager, Respondent Gibson's responsibilities included evaluating the credit quality of entities that leased space in the malls owned and operated by Hull Storey Gibson Companies, and evaluating financial terms of the agreements that Hull Story Gibson Companies was considering (Tr. 553:16-21; Tr. 729:23-730:3; Resp. Ex. 36, 37). Respondent Gibson continued to perform services for Hull Storey Gibson Companies through 2012. (Tr. 729:1-22; 820:2-21; Resp. Ex. 119).

While employed by Hull Storey Gibson Companies, Respondent Gibson, during his free time, continued to discuss the then-ongoing financial crisis and investment strategies with Mr. Hull.[6] (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). Mr. Hull's response to Respondent's explanation was that together they should allocate capital to take advantage of Respondent's investment thesis. (Div. Ex. 190 21:24-22:11).

During 2009, Mr. Hull and Respondent Gibson formed the Gibson Fund in order to invest funds in accordance with the investment thesis formulated by Respondent. (Div. Ex. 190 21:24-22:16). Mr. Hull and Respondent formed the Gibson Fund as a Georgia limited liability

[6] The financial crisis caused the worst recession in 80 years, Crash Course: The Origins of the Financial Crisis, The Economist (Sept. 7, 2013), available at http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article, and "triggered a stampede for gold – the traditional safe haven during times of uncertainty." Paul Farrow, Financial crisis: demand for gold soars as price tumbles, The Guardian, October 23, 2008, available at http://www.telegraph.co.uk/finance/personalfinance/investing/3245669/Financial-crisis-demand-for-gold-soars-as-price-tumbles.html.

company, which they managed by consensus. (Div. Ex. 190 22:12- 23:2). The Gibson Fund invested primarily in commodities, including gold and silver bars, and acquired and held some securities. (Div. Ex. 190 23:19- 24:4). Following the formation of the Gibson Fund, Mr. Hull and Respondent Gibson formed a second fund, the Hull Fund, which had investment objectives similar to the Gibson Fund and which invested in assets similar to assets acquired by the Gibson Fund. (Div. Ex. 190 23:13-24:4).

Respondent Gibson contributed a substantial part of his net worth to the Gibson and Hull Funds, while Mr. Hull contributed a relatively modest percentage of his net worth to the funds. (Div. Ex. 190 24:14-23; Resp. Ex. 175 60:2-13). Respondent's father, John Gibson, participated in the Gibson Fund by investing funds that Mr. Hull had loaned to him. (Div. Ex. 190 24:23-25:2). In addition, Mr. 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). As noted above, the Gibson Fund and the Hull Fund invested in commodities, and in order for the funds to invest in a commodities fund at preferred rates, Respondent and Mr. Hull formed Geier Group as a Georgia limited liability company and registered Geier Group as an investment adviser with the State of Georgia. (Tr. 19:1-25:14). The investment decisions of the Gibson and Hull Funds were made by consensus and the funds generally bought and held their investments. (Tr. 559:5-18).

During 2009, the value of the Hull Fund and the Gibson Fund each increased by approximately forty percent. (Tr. 566:19-567:6). In late 2009, however, Mr. Hull, who was well known in the Augusta, Georgia community as a gambler, (Tr. 885:24-886:3) told Respondent that he wanted to increase the funds' risk profile in order to generate higher returns. (Tr. 566:19-

567:11). Mr. Hull also expressed his dissatisfaction with the fact that the participants in the Gibson Fund and the Hull Fund were benefiting from their investment acumen but were not paying for it in the form of fees. (566:19-567:6). Respondent Gibson responded to Mr. Hull's suggestion by stating that a more formal structure should be employed, including the formation of a separate fund and the retention of legal counsel, a fund administrator and an accounting firm. (Tr. 565:1-9).

Mr. Hull's desire to receive fees for the services that he and Respondent Gibson were providing to other investors in the Gibson and Hull Funds precipitated a series of discussions regarding the formation of another investment vehicle, which would be managed by one or more entities and which would receive management fees and possibly incentive allocations. (Resp. Ex. 175 31:12-32:8). During the discussions, Mr. Hull conveyed the importance of their mutual commitment to the fund that they were contemplating. (Resp. 175 28:4-29:14). Respondent understood Mr. Hull to be underscoring the point that as Mr. Hull would be contributing funds in addition to those invested in the Gibson Fund and the Hull Fund, and as Mr. Hull planned on soliciting investments from additional business associates and friends, he expected Respondent to contribute additional funds to their undertaking and to encourage others to participate in the new investment vehicle.[7] (Div. Ex. 190 29:15-25). In particular, Mr. Hull advised Respondent Gibson that his borrowing additional funds from him and investing the proceeds in the fund to be formed was a prerequisite for Mr. Hull's participation in the new fund. (Resp. Ex. 175 62:11-16). The loan from Mr. Hull was memorialized by a demand note which bore interest at a rate of 8% per annum. (Resp. Ex. 175 61:25- 62:7; Resp. Ex. 117). On several occasions, Mr. Hull pointedly encouraged Respondent to convince his Mother, Martha Gibson, to participate in the

[7] Respondent Gibson had invested approximately $150,000 in the Gibson Fund, which would be rolled into the new fund. (Resp. Ex. 175 60:10-11).

fund. (Resp. Ex. 175 28:10-17). In addition, Mr. Hull offered to loan Respondent's father additional funds in order that he could increase his participation in the fund they planned to form. (Resp. Ex. 28:25- 29:1).[8]

The discussions between Mr. Hull and Respondent Gibson concerning the formation of and commitment to the fund, including the alignment of interests, included an exchange regarding transactions in personal accounts maintained by Respondent. (Resp. Ex. 176 345:23-346:8). Specifically, Mr. Hull expected that to the extent that Respondent acquired the wherewithal to maintain personal financial accounts, he would demonstrate his commitment to their undertaking by employing an investment strategy that was comparable to the investment strategy that was being pursued by the Fund. (Tr. 587:10-14). Respondent and Mr. Hull discussed the fact that such an approach would require a structure that permitted Respondent to pursue other investment strategies, if necessary. (Tr. 587:10-591:7).

GEIER INTERNATIONAL STRATEGIES FUND, LLC

In order to achieve Mr. Hull's objectives, Respondent began developing the structure they discussed, including the formation of a Delaware limited liability company to serve as the investment vehicle, and the retention of legal counsel, a fund administrator, an auditing firm, and a prime broker. (Resp. Ex. 175 44:8-12, Resp. Ex. 1, 8) Ultimately, Mr. Hull and Respondent determined to form the Geier International Strategies Fund, LLC, which would serve as the investment vehicle and to prepare an operating agreement that provided that Geier Capital would serve as the Managing Member with the authority to exercise discretion and make investments on behalf of the fund and also the authority to retain Geier Group to serve as the investment manager of the fund. (Tr. 35:19-23, Resp. Ex. 13).

[8] Over time, the amount of money that Respondent owed to Mr. Hull grew from $200,000-300,000 in 2009 to $600,000-675,000 in 2011. (Resp. 61:17-22). As a result of the foregoing, 160% of Respondent's assets were invested in the fund. (Resp. Ex. 175 62:24-63:3).

On or about December 16, 2009, the Geier Fund was formed as a Delaware limited liability company. (Resp. Ex. 1). Respondent Gibson also participated in the preparation of the Operating Agreement of the Geier International Strategies Fund, LLC. (Tr. 580:13-581:2; Resp. Ex.13). The Operating Agreement, which was dated January 1, 2010, provided that Geier Capital would serve as the Managing Member of the Geier Fund. (Resp. Ex. 13).[9] Section 1.02 of the Operating Agreement provided that the purpose of the company was to serve as a fund through which the assets of its Members would be utilized to invest, hold and trade (on margin and otherwise, whether directly or indirectly) in securities and other financial instruments (including commodities, commodity contracts, and commodity futures) and rights and options relating thereto. (Resp. Ex. 13).

Section 3.01 of the Operating Agreement provided that the Company would be managed by the Managing Member, who would have the discretion of making investments on behalf of the Company and of exercising the powers set forth in Section 3.02. The Operating Agreement also provided that the Managing Member would devote so much of its time and efforts to the affairs of the Company, as may, in its judgment, be necessary to accomplish the purposes of the Company. 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."

The Operating Agreement continued "Without limiting the generality of the foregoing, the Managing Member (or any of its affiliates or employees) may act as investment adviser or

[9] Geier Capital had been formed as a Georgia limited liability company on or about June 16, 2009 (Resp. Ex. 2) and dissolved as a Georgia limited liability company on or about March 28, 2011. (Resp. Ex. 2). A Certificate of Formation for Geier Capital, LLC as a Delaware limited liability company was filed on or about December 29, 2010 (Resp. Ex. 4) and the Certificate of Formation for Geier Capital, LLC as a Delaware limited liability company was voluntarily cancelled on or about December 23, 2011. (Resp. Ex. 5).

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." Finally, 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).

Section 3.02, Powers of the Managing Member, set forth thirteen specific powers that the Managing Member could exercise. In particular, the Operating Agreement provided that the Managing Member would have the power

> To purchase, hold, sell, and otherwise deal in securities of any sort and rights therein, on margin or otherwise;
> To sell short securities of any sort and rights therein, on margin or otherwise, and to cover such short sales;
> To write, purchase, hold, sell and otherwise deal in commodities, options thereon and rights therein, including forward foreign currency exchange contracts;
> 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;
> 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").[10] (Resp. Ex. 13).

With respect to management fees, the Operating Agreement provided that the Investment Manager 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

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[10] Geier Group, LLC was formed as a Georgia limited liability company on or about April 14, 2009 (Resp. Ex. 6) and was dissolved as a Georgia limited liability company on or about April 13, 2011. (Resp. Ex. 7).

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, 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 Member for that fiscal year does not fall below 10%. (Resp. Ex. 13). Thus, the Operating Agreement for the Geier Fund provided for management fees and an incentive allocation that would be fifty percent of the management fees and incentive allocations of comparable funds.

With respect to withdrawals, the Operating Agreement provided that a Member (other than the Managing Member) may, upon at least 30 calendar days' prior written notice to the administrator, withdraw all or a portion of its capital account attributable to a particular capital contribution as of the last day of each month, provided such capital contribution has been invested in the Company for at least six months. The Operating Agreement further provided that the Managing Member, in its sole discretion, may waive or modify the conditions relating to withdrawals for Members that are members, employees or affiliates of the Managing Member or the Investment Manager, relatives of such persons, and for certain strategic investors. (Resp. Ex. 13).

With respect to the dissolution of the Fund, the Operating Agreement provided that "the retirement, dissolution, bankruptcy or insolvency of the Managing Member will dissolve [the Fund] unless (i) at such time there is another managing member who agrees to continue the business of [the Fund], or (ii) an entity controlled by Christopher Gibson is substituted as managing member to continue the business of [the Fund]." (Resp. Ex. 13).

The Geier Fund's Offering Memorandum prepared in connection with the offering of interests in the Geier Fund contained extensive disclosures regarding potential conflicts of

interest which mirrored and amplified the provisions of the Operating Agreement. With respect to the time and effort that the Managing Member and the Investment Manager would devote to the Fund, the Offering Memorandum disclosed that the Managing Member and the Investment Manager would use their best efforts and devote so much of their time to the affairs of the Fund as they, in their judgment, deemed necessary to accomplish the purposes of the Fund. With respect to other activities, the Offering Memorandum stated that "the Managing Member, the Investment Manager, and each of their respective directors, members, partner, shareholders, officers, employees, agents and affiliates may conduct any other business, including any business within the securities and commodities industries, whether or not such business is in competition with the Company."

The Offering Memorandum further provided that the Affiliated Parties may act as, among other things, investment adviser or investment manager for others, may manage other funds or accounts, and may manage the capital of others. The funds and accounts advised or managed by the Affiliated Parties, according to the Offering Memorandum, may have investment objectives or may implement investment strategies similar to or different than those of the Geier Fund, and may have interests in the securities in which the Fund invests, as well as interests in investments in which the Fund does not invest.

With respect to effecting transactions for the Fund and other entities and accounts, the Offering Memorandum stated that the Affiliated Parties may give advice or take action with respect to such other entities or accounts that differs from the advice given with respect to the Fund. The Offering Memorandum further stated that "it may not always be possible or consistent with the investment objectives of the various persons or entities described above and

of the Company for the same investment positions to be taken or liquidated at the same time or at the same price." (Resp. Ex. 8).

The Offering Memorandum reiterated the extensive and significant disclosures by stating as follows:

> As a result of the foregoing, the Affiliated Parties may have conflicts of interest in allocating their time and activity between the Company and other entities, in allocating investments among the Company and other entities and in effecting transactions for the Company and other entities, including ones in which the Affiliated Parties may have a greater financial interest. (Resp. Ex. 8).

The Offering Memorandum further provided that "purchase and sale transactions (including swaps) may be effected between the [the Fund] and the other entities and accounts subject to the following guidelines: (i) such transactions shall be effected for cash consideration at the current market price of the particular securities, and (ii) no extraordinary brokerage commissions or fees (i.e., except certain customary transfer fees or commissions) or other remuneration shall be paid in connection with such transaction." (Resp. Ex. 8).

THE MEMBERS OF THE GEIER FUND

In late 2009, Mr. Hull and Respondent met with potential investors and explained that the Geier Fund would pursue a highly volatile strategy and take a high degree of risk: they would be "swinging for the fences" in hopes of hitting a "grand slam." (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 of the set forth therein, which included a description of the manner in which the Fund would operate. (Tr. 581:6-582:12).

A number of Mr. Hull's business associates and friends[11], including a number who had invested in the Hull Fund and the Gibson Fund, ultimately invested in the Geier Fund.[12] (Resp. Ex. 175 44:13-21) In addition, Mr. Hull loaned additional funds to Respondent's father under an existing demand note bearing interest at 8% and bringing the total debt Mr. Gibson owed Mr. Hull to between $8,000,000 and $10,000,000. (Resp. Ex. 175 28:24-29:1, Tr. 887:25-888:25). Mr. Hull also reiterated his request that Respondent's mother, Martha Gibson, invest in the Geier Fund. (Resp. Ex. 175 28:4-17). Martha Gibson, who had inherited approximately $725,000 and had invested her inheritance through PNC Wealth Management, agreed to invest in the Geier Fund and transferred the funds in her PNC account to the Fund. (Resp. Ex. 175 28:10-17, Tr. 639:4-21). Respondent also discussed the Geier Fund with Giovanni Marzullo, the father of Francesca Marzullo, who at the time the Geier Fund was formed, was a close personal friend of Respondent. (Resp. Ex. 175 28:18-23) Mr. Marzullo invested his and his wife's entire net worth other than the equity in their home in the Fund. (Tr. 638:21-639:3). Mr. Marzullo also funded a Schwab investment account, nominally in Francesca Marzullo's name, which Respondent also

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[11] Matthew McKnight and Mason McKnight IV fall within this category. The McKnights joined the Fund because of their family's relationship with Mr. Hull, not because of their relationship with Respondent. Mason McKnight IV testified that he went to high school with the Respondent but after that had no dealings with him. (Tr. 412:1-8). Matthew McKnight said he had no prior relationship with Respondent. (Tr. 482:22-25). Mason McKnight testified that "Jim Hull, who is a good family friend of ours, and our families have done deals in the past...but very seldom when a deal gets thrown together these parties is it turned down." (Tr. 466:5-10). The McKnights always did deals that were brought to them by Mr. Hull because "when the time comes when you don't want to be in the deal anymore, that's it. There are no more deals." (Tr. 893:2-4). This history of doing deals with Mr. Hull also explains the McKnights' lack of attention to the Fund's Offering Documents -- they just assumed they would "make some money and not have any headaches." (Tr. 416:11-14, 420:2-10, 470:19-23). This lack of attention to the Offering Documents is the source of the McKnights' discontent today. (Tr. 500:19-501:1). Those investors who carefully reviewed the Offering Documents knew the material facts, recognized the risk of loss, and all agreed that they were treated fairly. (Tr. 841:16-842:4, 845:9-847:23, 890:19-891:1, 892:17-19, 917:14-24, 954:17-20).

[12] These individuals were Douglas Cates, Nick Evans, Wayne Grovenstein, John Hudson, Jr., Mason McKnight III, Mason McKnight IV, Matthew McKnight, Marshall McKnight, Will McKnight, and T.R. Reddy. Respondent had no prior relationship with these individuals, and opposed bringing them into the Fund, but carried out Hull's instructions to include them as investors. Some of these investors were investors in the Hull and Gibson Fund, and on January 1, 2010, the assets of the Hull and Gibson Funds were transferred to the Fund. (Tr. 51:24 – 52:3, 565:25 – 566:18, 614:9-19. Tr. 38:4 – 25; 51:15-23, 564:8-21, 617:4 – 618:2; Div. Ex. 33).

managed in conjunction with the investment in the Fund. (Tr. 54:25 – 55:5, 575:4-13, 638:3-639:3).

During 2010, Geier Fund Members invested approximately $32,000,000 in the Fund. (Div. Ex. 31). Mr. Hull contributed approximately 80% of the total amount invested, Mr. Hull's colleagues invested approximately 10% of the total amount invested and Respondent Gibson and his relatives and friends contributed approximately 10% of the total amount invested.[13] (Tr. 129:11-17). Respondent's investment in the Fund was comprised of money earned from his prior employment, proceeds of the sale of a residence located in New York and the proceeds of a loan from Mr. Hull, which was memorialized by a Demand Note which bore interest at the rate of eight percent. (Resp. Ex. 175 47:4-11).

THE MANAGEMENT OF THE GEIER FUND

As set forth above, the Operating Agreement provided for Geier Capital to serve as the Managing Member of the Fund and vested Geier Capital with discretion to make investments on behalf of the Fund. (Resp. Ex. 13). The Operating Agreement also empowered Geier Capital to retain Geier Group to act as Investment Manager for the Fund. (Resp. Ex. 13). The members of Geier Capital and Geier Group included Respondent, Mr. Hull, and Respondent's father. (Div. 190 35:8-12; 36:1-5, Tr. 103:1-7). Respondent owned fifty percent of each entity; Mr. Hull owned thirty-five percent of each entity; and Respondent's father owned fifteen percent of each entity. (Div. 190 36:1, Tr. 103:1-7).

Although Respondent Gibson was the owner of fifty percent of Geier Capital and Geier Group, the evidence admitted during the hearing establishes that Mr. Hull controlled the Fund, Geier Capital and Geier Group. As noted above, the Geier Fund was formed to accommodate

[13] Respondent Gibson subsequently contributed additional funds to the Geier Fund and, as a result, his entire net worth was invested in the Fund.

Mr. Hull's desire to receive fees for managing a fund, notwithstanding that Respondent recommended that such an undertaking be deferred until a track record could be established for the investment vehicles that he and Mr. Hull had been managing on behalf of themselves and a few others. (Div. Ex.190 26:8-19; Tr. 38:4-18; 617:10-618:2). Mr. Hull and his business associates had contributed approximately 90% of the Fund's assets and the Operating Agreement permitted redemptions upon thirty days' notice, provided such capital contribution had been invested in the Fund for at least six months. (Resp. Ex. 13) Further the relevant provision of the Operating Agreement provided that the Managing Member may waive or modify such conditions for, among others, certain strategic investors. (Resp. Ex. 13). Thus, Mr. Hull and his associates possessed the ability to redeem interests totaling approximately 90% of the Fund on relatively short notice and effectively end the life of the Fund. (Tr. 631:4-9).

At Mr. Hull's suggestion, Respondent, in order to demonstrate his commitment to their undertaking, accepted a loan from Mr. Hull and invested the proceeds in the Geier Fund. (Resp. Ex. 175 45:3-15; 47:4-11). As the loan bore interest at the rate of 8% per year and was memorialized by a demand note, Respondent Gibson was cognizant of the possibility that he might be required to repay the loan at any time. (Resp. Ex. 117).

Similarly, Mr. Hull suggested that Respondent's father, who had previously borrowed funds from Mr. Hull, borrow additional funds from Mr. Hull and invest them in the Geier Fund. (Resp. Ex. 175 28:24-29:4). The loan Mr. Hull extended to Mr. Gibson was memorialized by a demand note that bore interest at a rate of 8% per year. During the relevant period, Mr. Gibson owed Mr. Hull between $8,000,000 and 10,000,000, which was secured by a pledge of Mr. Gibson's assets. (Tr. 887:25-888:25). Accordingly, Mr. Hull could call his demand notes and force Respondent and possibly his father to redeem their interests in the Fund. Thus, the evidence admitted in this matter conclusively establishes that Mr. Hull controlled the relevant entities.

The Geier Fund's Investments

During 2010, the Fund invested primarily in commodities, principally gold and silver, and the Fund achieved a favorable return. After achieving gains on commodities during 2010, Mr. Hull focused on the fact that gains on commodities are taxed at rates for ordinary income.(TR 622:25-624:19) Mr. Hull expressed his dissatisfaction regarding the tax treatment accorded to gains on commodities and directed Respondent Gibson to liquidate the Fund's investments in gold and silver and to focus on equities, 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). Mr. 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 was adverse to expending funds on the retention of research analysts. (Tr. 109:16-110:7; Resp. Ex. 59) (Email from J. Hull to Respondent dated 9/23/2011 "I am not signing on to diversification b/I believe concentration in one stock provides equal benefits (you can truly understand one company) and a thinly traded company has benefits as well.").

In response to Mr. Hull's directive, Respondent conducted extensive research regarding public companies that could serve as a proxy for a direct investment in gold or other commodities. (Tr. 624:20-627:3). Respondent formed the view that the stock price of companies referred to as "juniors" (i.e., companies that focused on exploration and companies that focused on obtaining royalties) were most likely to track the price of gold in a manner that met Mr. 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 the Chief Executive Officer of TRX, James Sinclair, had developed relationships with a number of Tanzanian officials. (Tr. 109:16-111:18) Respondent communicated the results of his efforts

regarding a public company that could serve as a proxy for the acquisition of gold to Mr. Hull, and, with his concurrence, the Geier Fund began investing in TRX. By December 2010, the Geier Fund held approximately 8,000,000 TRX shares, and lesser positions in other mining and energy stocks and options. (Tr. 90:12-16).

The Geier Fund exceeded the hurdle rate for 2010 and, as a result, Geier Capital received an incentive allocation of more than $3,000,000. (Tr. 84:13-85:13) Also, as the management fees were based upon assets under management and as the Fund's value appreciated during 2010, the Fund paid management fees of over $200,000 for 2010. (Div. Ex. 191 418:12-419:1). 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). Respondent did not, however, withdraw all of the funds to which he was entitled, rather he withdrew an amount necessary to cover his tax liability and left the remainder of the funds to which he was entitled in the Fund. (Div. Ex. 191 364:4-365:7).

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). Throughout the period during which the fund acquired its TRX position, the price of the stock was correlated with the price of gold. (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 other gold stocks continued to rise along with the price of gold, and as 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 Mr. Hull concluded that the deviation was the result of an "overhang rumor" generated by short sellers– that a large owner of

TRX stock (i.e., the Geier Fund) could not hold its position and would be forced to sell. (Tr. 641:18 – 642:11, 644:13-17, 645:12-18).

Respondent believed that John Engler, an investor in the Fund, who was related to and managed property for the McKnights, had shared the Fund's confidential investor letters with other market participants, and that such market participants understood that the Geier Fund had invested all of its assets in TRX and lacked any additional resources to defend the price of the stock.[14] (Tr. 656:17-657:3). Respondent and Mr. Hull believed that the spreading of the overhang rumor by the short sellers resulted in a perception in the market that the Fund would be forced to sell its TRX stock, and that absent sales of TRX stock the rumor would persist. (Tr. 641:18-642:3; 681:12-682:3). Despite the rumor generated by short sellers, Respondent continued to believe that TRX remained an attractive stock, and further believed that if this "overhang rumor" generated by short sellers could be dispelled, the price of the stock would rise significantly. (Tr. 112:9 – 25; 113:6-18, Tr. 653:12 – 654:24). Respondent discussed the TRX share price with other holders of large blocks of TRX stock who also believed that the "overhang rumor" generated by short sellers accounted for TRX's low share price, and that TRX's share price would rise if the rumor generated by short sellers could be dispelled.

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). On August 22, 2011, TRX closed at $5.85. (Resp. Ex. 149, Expert Report of James A. Overdahl, Ph.D., August 5, 2016, Ex. 9B, p.3.) On that date, Respondent sent an investor letter to the Fund's investors, stating that despite the decline in TRX's share price, he

[14] The McKnights testified that they no longer received communications or statements after September 2011. (Tr. 469:2-3). Respondent and Mr. Hull's belief that Mr. Engler, the McKnights cousin and co-worker, was feeding harmful information to other market participants was the reason why the McKnights ceased to receive communications. Mr. Hull determined that it was in the best interest of the Fund to cut off statements.

"remaine[ed] confident . . .that [the Fund was] positioned exceedingly well." (Resp. Ex. 51). Respondent stated that TRX was "trading at a stunning discount to its value . . . based on its resource base," and had "compelling fundamentals." (Resp. Ex. 51). He also described market conditions suggesting that "we are entering the phase when gold will begin to achieve spectacular gains," and that Geier Fund had made the correct investment, but "showed up a few months too early." Therefore, he stated that the Geier Fund should "be right and sit tight" – i.e., hold its position in TRX. (Tr. 121:8 – 123:7; Resp. Ex. 51).

During September 2011, the price of TRX shares continued to decline, and on September 21, 2011, the stock closed at $5.57. (Resp. Ex. 149 Expert Report of James A. Overdahl, PhD. August 5, 2016, 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 Expert Report of James A. Overdahl, PhD. August 5, 2016, 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 this decline, a decline not being experienced by other gold stocks. (Tr. 642:4-18). Moreover, he knew that during August 2011, a hedge fund-Platinum Partners- had purchased shares from the company in a private placement. (Tr. 643:9-17). The shares were sold at a price of $5.75 per share and Platinum Partners investment totaled $30,000,000. (Tr. 643:18-19). Richard Sands, the investment banker at Casimir Capital which placed the securities, told Respondent, on more than one occasion, that Platinum Partners would be "happy" to purchase the Fund's TRX securities at that price. (Tr. 139:9-140:20; 660:23-662:6; Resp. Ex. 62).

On September 23, 2011, Respondent sent an email to the 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 Geier Fund had accumulated more than 7,000,000 shares of TRX at prices above the September 23, 2011, close, and continued to buy, "confirm[ing his] view of the tremendous value [in] the assets owned and the business operated by TRX." He went on to state his belief that the price of gold would rise, bringing TRX's share price with it, and that the Fund had made the correct investment, but had done so prematurely. (Resp. Ex. 56).

He also stated that the holders of 90% of the Fund (Respondent, his parents, Giovanni Marzullo, and Mr. Hull) had confirmed their intention to remain invested in the Geier Fund and TRX, and that he personally would remain so invested. (Resp. Ex. 56). In addition, Respondent Gibson stated that effective at the end of September 2011 management fees would not be assessed until Geier Fund performed at an acceptable level. (Resp. Ex. 56). 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). In addition to communicating with investors regarding the decline in the TRX share price by email, Mr. Hull communicated with investors concerning the decline in the price of TRX securities. (Resp. Ex. 59).

Also, on September 23, 2011, Mr. Hull sent an email to Respondent and inquired whether there was any news regarding TRX. (Resp. Ex. 59) Respondent Gibson replied to Mr. Hull and

indicated that he was available at any time over the weekend. (Resp. Ex. 60). Respondent and Mr. Hull spoke by telephone on September 24th and/or 25th and discussed the decline in the price of TRX securities. (Tr. 648:18-21). During the discussions, Mr. Hull advised Respondent that he had "no tolerance for additional losses." ((Tr. 648:22-649:6). Respondent Gibson construed Mr. Hull's statement as a strategic directive to liquidate the position, which he was obligated to execute. (Tr. 649:9-14). Ultimately, Mr. 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 Gibson exchanged emails with a representative of GarWood Securities LLC, the brokerage firm at which the Geier Fund maintained an 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. In a later email, he 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 involving 1,000,000 to 5,000,000 TRX shares did not materialize. (Resp. Ex. 89).

In another effort to explore the possibility of selling TRX shares at good prices, Respondent Gibson, on September 25, 2011, sent an email to Richard Sands, an investment banker at Casimir Capital LP. (Resp. Ex. 62). Although the Geier Fund did not have an account at Casimir Capital, Respondent Gibson knew that Casimir Capital had been involved in Platinum Partners' purchase of $30,000,000 of TRX stock at a per-share price of $5.75, and Mr. Sands had told Respondent that Platinum Partners would be "happy" to purchase the Fund's shares at that price. (Tr. 139:9-140:20; 660:23-662:6; Resp. Ex. 62). In his email, Respondent Gibson inquired 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 Geier Fund believed in TRX and

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

During the evening of September 25, 2011, Respondent and Mr. Sands did not communicate regarding the number of shares that the Fund was interested in selling or the price per share that would be acceptable to the Fund. During the morning of September 26, 2011 when Respondent placed orders to sell TRX shares held in outside accounts, Mr. Sands responded by inquiring with respect to the amount of securities that Geier Fund was prepared to sell, and Respondent Gibson 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 Gibson continued to communicate with Mr. Sands, who 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). Mr. Sands then advised Respondent Gibson that the Fund's TRX securities would have to be transferred from GarWood to Casimir Capital, (Resp. Ex. 62), but he did not provide the proposed of number shares or the price which his "buyers" were willing to offer.

As a determination had been made to terminate the payment of management fees by the Fund, Respondent Gibson 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 maintained by Francesca Marzullo; (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 Gibson continued to communicate with Casimir Capital personnel regarding the possibility of a transaction and the steps that would need to be completed in order to proceed with a transaction (including the opening of a brokerage account at Casimir Capital and the transferring of the Fund's TRX shares from its account at GarWood Securities to Casimir Capital). (Resp. Ex. 62) During the day, Mr. Sands stated that he had a trade set up, but again did not provide the number of shares or the price for a transaction. Respondent Gibson completed the documents necessary to establish a brokerage account at Casimir Capital and to transfer TRX shares from GarWood Securities to Casimir Capital on September 27th and forwarded the shares to Casimir Capital. (Resp. Ex. 66 – 87). Respondent Gibson sent another email to Mr. Sands in which he stated "Please let me know when you can tell me the size and pricing that is available. (Resp. Ex. 63.)

TRX continued to trade down on September 27th. (Div. Ex. 84 Expert Report of Carmen A. Taveras, PhD. July 14, 2016 Ex. 3) At approximately 2:45 p.m. on September 27th, Mr. Sands advised Respondent Gibson that there was a buyer of up to 5,000,000 shares at $3.50 or better and asked Respondent Gibson to confirm the proposed transaction. (Resp. Ex. 62). Respondent Gibson contacted Mr. Hull and indicated that the transaction that Mr. Sands proposed differed from what Mr. Sands had indicated he could arrange. (Tr. 674:20-676:11). Respondent and Mr. Hull also discussed the fact that Mr. 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, Mr. 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 Mr. Sands had proposed. (Tr. 676:12-16). Subsequently, Mr. Sands advised Mr. Gibson 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 Geier Fund's TRX securities were sold by Casimir Capital at an average price of $3.5018. Resp. Ex. 20).

During the period Respondent communicated with Mr. Sands regarding the Fund's TRX position, he also communicated with Luis Sequeira, a representative with Roheryn Investments, S.A., regarding the Fund's position. (Tr. 681:12-682:3). Following the sale of TRX stock through Casimir Capital, Respondent Gibson, in accordance with Mr. Hull's direction to sell TRX shares at good prices, continued to explore the possibility of selling some or all of the Fund's TRX securities through negotiated transactions with Luis Sequeira, who acted on behalf of a sheik who owned approximately 11% of the outstanding TRX shares. (Resp. Ex. 89). On September 29, 2011, Respondent exchanged emails with Mr. Hull regarding a potential transaction involving Roheryn Investments and the shiek. (Resp. Ex. 89). Respondent Gibson informed Mr. Hull "It is definitely not happening today ..." To which Mr. 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).

Thus, Respondent Gibson continued to explore the possibility of selling TRX shares held by the Fund, but as Mr. Hull's email indicates, the Fund would only do so at prices it deemed appropriate and, more importantly, Mr. Hull was prepared to maintain the Fund's position in TRX. Put another way, the Fund was prepared "stay in for the duration," and a direction to place

an order to sell the Fund's TRX position in the market had not been issued by Mr. Hull. (Resp. Ex. 89).

The following day, September 30, 2011, Respondent Gibson and Luis Sequeira continued their discussions regarding a negotiated transaction. In an email to Respondent, Mr. 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, Mr. 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 Investments, S.A., the firm with Mr. Sequeira was associated. (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, Mr. 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 Mr. 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 Mr. Sequeira was acting failed to complete the transaction. (Resp. Ex. 101) Respondent Gibson informed Mr. 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 Mr. Hull responded: "No problem. 'Work" Luis on the 4 cents per share commission . . . .othewise 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).

In light of the fact that the Fund's efforts to sell TRX securities in the upstairs market had not resulted in transactions that Mr. Hull or Respondent deemed satisfactory, and the fact that the Fund might be holding TRX shares indefinitely, Mr. Hull directed Respondent to ensure that he received a daily portfolio statement as he had prior to the transfer of TRX securities to Casimir Capital in connection with the sale of the 3.7 million TRX shares through Casimir Capital.[15] (Resp. Ex. 103) Subsequently, Respondent confirmed to Mr. Hull that the transaction that he had been discussing with Mr. Seqeira 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 contemplating our options but waiting for at least a few weeks as we get kigosi resource report

[15] In an email dated October 11, 2011, Mr. Hull stated: "The latest portfolio statement I have is dated September 27th. Why haven't I continued to receive Portfolio Statements? What do I need to do to get contemporaneous Portfolio Statements?" In response, Respondent indicated that Casimir Capital the brokerage firm to which the Fund's shares were transferred in connection with the sale of 3.7 million TRX shares was not set up to generate daily portfolio statements, but Respondent will attempt to restart the issuance of daily portfolio statements. Mr. Hull responded by stating that "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).

and close rot QE3 looks like appropriate path.") (Resp. Ex. 104). Respondent continued to discuss a possible sale of a significant amount of the Fund's TRX securities through Mr. Seqeira on several occasions, but sold only 364,495 shares through him on October 17, 2011. (Resp. Exs. 106, 107, 108 and 109).

The foregoing establishes that Respondent attempted to implement Mr. Hull's directive to sell TRX shares at good prices by pursuing negotiated transactions. The foregoing also demonstrates that unlike placing a market order with a brokerage firm at which a customer maintains an account, the negotiation of transactions in the upstairs market does not assure a holder of securities that a transaction will be executed on terms desired by the owner of the stock.

THE HULL TRANSACTION

As discussions with potential purchasers of the Fund's TRX securities continued, Respondent Gibson considered the possibility that Mr. Hull might need to sell TRX securities which he held in a personal brokerage account in a market transaction in order increase his liquidity. (Tr. 688:21-689:12). Specifically, Mr. Hull held nearly 700,000 TRX shares in a personal account and the shares had been pledged as collateral for a line of credit, which Mr. Hull might access for his business. (Tr. 689:4-12). In October 2011, Mr. Hull's creditor, Wells Fargo, notified him that it would increase the price of credit to Mr. Hull's commercial real estate business unless he increased the level of his liquid assets. (Tr. 688:15-689:12). Since Wells Fargo did not consider Mr. Hull's TRX shares to be liquid, Mr. Hull expressed an interest in selling them. (Tr. 689:4-12). Respondent was concerned that the sale of a block of TRX stock, such as Mr. Hull's nearly 700,000 TRX shares, could result in a decline in TRX's market price at a time when Respondent was discussing a sale of the Fund's shares in the upstairs market, and

any downward pressure on the market price for TRX shares could have an adverse impact on the price the Fund could obtain in the upstairs market. (Tr. 689:4-17). Accordingly, Respondent Gibson determined that it would be in the Fund's interest to acquire Mr. Hull's TRX shares and include such shares in the block that he was attempting to sell in the upstairs market. (Tr. 689:4-17).

Respondent proposed such a transaction to Mr. Hull, although he understood that Mr. Hull was contemplating the sale of TRX shares due to his need for liquidity, and that the sale of TRX shares to the Fund rather than in the market would limit significantly Mr. Hull's ability to achieve his objective.(Tr. 689:13-24). Specifically, a sale of his TRX shares in the open market would likely increase Mr. 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 Geier Fund. (Tr. 689:18-24; 691:1-692:25). Thus, by selling his shares to the Fund rather than in the market, Mr. Hull would increase his liquidity in an amount 80% less than he would obtain by selling in the market. (Tr. 689:18-24).

The transaction that Respondent proposed to Mr. 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 Mr. Hull, a member of Geier Capital. (Tr. 694:13-695:8; Resp. Ex. 13).

Notwithstanding that the sale of his TRX shares to the Fund severely limited the increase in liquidity he was attempting to achieve, Mr. 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 Mr. Hull at the October 18, 2011closing price of $3.60 per share. (Tr. 691:1-692:20; Resp. Ex. 113). Accordingly, Mr. Hull gave up the opportunity to dispose of his TRX shares in a manner that achieved best execution for him (as the price of TRX increased after the execution of the October 18, 2011 agreement) and Mr. Hull could have sold his shares over several days in order to avoid any block discount that the market would have imposed on his sale of the shares. (Resp. Ex. 149 Expert Report of James A. Overdahl, PhD. August 5, 2016, Ex. 9B pp. 3-4.) Further, by selling in the market, Mr. 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. (Tr. 697:17-698:18).

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) Mr. Hull could have realized in October 2011.(Tr. 697:17-698:18). Further, Mr. 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 Mr. 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, Mr. 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).

Also, during the period when Respondent was engaged in discussions with potential buyers, Respondent Gibson received a communication from Mr. Hull's assistant regarding his loan, the proceeds of which had been invested in the Fund. (Tr. 698:23-700:25). The email from Mr. Hull's assistant included a spreadsheet which reflected the amount Respondent owed to Mr. Hull and a Demand Promissory Note to be executed by Respondent. (Resp. Ex. 117). 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). As the proceeds of the loan from Mr. 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 Mr. Hull. (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-i.e., the entirety of his assets-was worth only $720,000, just $75,000 more than his debt. (Tr. 698:23-699:7).

Respondent continued to believe that TRX's market price did not reflect its value, and that if the artificial constraints on its price were removed, TRX's price would rise significantly. Respondent was engaged in ongoing discussions with Richard Sands and Luis Sequeira, who represented large holders of TRX stock, and who had indicated to Respondent that their clients were interested in purchasing the Fund's shares, at current market prices, in order to dispel the "overhang rumor" that was depressing TRX's share price. (Tr. 699:20-700:15).

Nevertheless, at the current market price of TRX, Respondent's assets exceeded his debt by only $75,000, and a further decline of only 10% in TRX's share price would render him insolvent. In view of the volatility of TRX's share price, Respondent viewed his position as "precarious." (Tr. 203:3-13, 698:19-699:19).

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 would remain solvent. (Tr. 701:1-6). 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). Mr. Gibson 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 return, high risk fund where such insurance would only benefit a limited number of investors who were financially over exposed to the Fund. Mr. Grovenstein and Mr. Cates both agreed with that same judgement 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).

During the remainder of October and early November, Respondent Gibson continued his efforts to liquidate the Fund's position in TRX, including discussions regarding TRX securities with Mr. Sands regarding the possibility of a purchase of Geier Fund's TRX shares by Platinum Partners, a hedge fund that previously had purchased TRX securities in a private placementat a per share price of $5.75. (Tr. 708:10-709:7). On November 7 or 8th, 2011, Mr. Sands asked Respondent to attend a meeting with Platinum Partners on November 9, 2011. (Tr. 209:2-11). Respondent had previously met with David Levy, the individual at Platinum Partners responsible for that fund's TRX position. (Tr. 209:11-20). Mr. Levy had expressed bullish views on TRX stock and had indicated that Platinum might be interested in purchasing the Geier Fund's TRX

shares at the then-current market price. (Tr. 209:11-20). Mr. 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).

Based on his discussions with Mr. Sands and Mr. Levy, as well as his discussions with Luis Sequeira regarding the possibility that Sequeira's clients would purchase GISF's TRX stock, Respondent believed that TRX's share price would increase or, at a minimum, that the Fund would be able to sell its TRX shares without a significant price decrease. (Tr. 209:3-20; 212:7-10, 707:4 – 708:8, 709:2-20). However, at the November 9, 2011 meeting, Mr. Levy presented Respondent with an offer to pay the Geier 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, recognizing 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). At that point, Respondent concluded that, despite its indications that it would do so, Platinum might not buy GISF's TRX shares at the market price. (Tr. 210:3-20, 710:6 – 712:8).

Following the November 9, 2011 meeting with Platinum Partners and the realization that Platinum would not purchase GISF's shares at the current market price, Respondent and Mr. Hull met to discuss strategy. (Tr. 712:9-22). They believed that Platinum Partners was "bluffing" – they knew that a decrease in TRX's share price would harm the Geier Fund, but believed it would inflict greater harm on the other large holders of TRX stock, including Platinum Partners, and that if the Fund began selling TRX 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, Mr. Hull decided to call the bluff and 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 at market prices in order to avoid a price drop. (Tr. 201:21-25; 212:10 – 214:14, 712:9 – 713:24).

On the morning of November 10, 2011, Respondent emailed Garwood Securities, the broker-dealer holding the Fund's TRX shares, instructing it to "hassle Penson" – GarWood's clearing firm – and 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 , allowing him to profit in the form of an "insurance" payment on 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).

Instead, Respondent gave GarWood the instructions because, in the absence of such an instruction, 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 Mr. 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 Mr. Hull and Respondent believed they would, and they did not purchase the Fund's stock before the price could fall. Instead, other large holders of TRX stock were not bluffing; rather they sold their TRX stock. (Resp. Ex. 175 86:4-97:11). 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. The unexpected occurred on November 10 – a volume of shares four times the Fund's sales that day. One could make the case that GISF was fortunate that they sold when they did. On November 10, 2011, the price of TRX shares fell from slightly above $3.00 to slightly over $2.00. (Tr. 233:9-23).

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 who sold the $4 protective put options he had purchased. Respondent received proceeds of $80,000 more than he paid for the protective puts. (Resp. Ex. 21; Resp. Ex. 22). This did not represent a net gain to Respondent; rather, the proceeds from the put contracts 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 Mr. Hull. (Tr. 233:9 – 234:2; 240:5 – 242:4; 718:22-24). Mr. Gibson had also purchased for the Fund 6,440 protective put option contracts covering 644,400 shares of TRX at strike prices of $2 and $3. The $2 put option contracts added to the Fund's losses by $16,965 and the $3 put option contracts mitigated the Fund's losses by $53,420. (Div. Ex. 184, Expert Report of Carmen A. Taveras, Ph.D., July 14, 2016, Exhibit 17a).

JOHN GIBSON'S TRANSACTIONS

On November 8, 2011, John Gibson met over lunch with Mr. Hull, who told him that the Fund might be selling its TRX shares, and that he might consider selling his TRX stock. John Gibson called Respondent and asked what action he should take to remain aligned with the Fund. Respondent suggested that his father liquidate the TRX position in his IRA. (Tr. 214:13 – 215:9.). Accordingly, Respondent suggested that John Gibson place orders to purchase 350 $4 put contracts, sell his 46,000 shares of TRX stock, and sell the put contracts. (Tr. 215:11 – 216:5, 719:5 – 721:20). On November 8, 2011, John Gibson directed that the protective put options were to be both purchased and sold on November 9th, as documented in the January 1, 2011 – December 30, 2011 Statement from PNC Wealth Management. (Div. Ex. 104, Resp. Ex. 32). The statement specifies November 9th as both the trade purchase date (page 12 of 15) and the trade sale date (page 10 of 15) and is confirmed again on page 14 of 15. However, PNC did not execute the order as John Gibson instructed. Rather, the TRX put contracts were purchased on November 9, 2011, but PNC only sold 10,000 shares of TRX stock held in the IRA account on that day. The remaining 36,000 TRX shares held in the IRA account and the put contracts were sold on November 10, 2011. Div. Ex. 117). The trade tickets for the purchase and sale of the 350 protective put options for 35,000 TRX shares identify a company named "Blackrock" as the trader effecting the purchase and sale of the 350 protective put options with "MKM Partners LLC" as the executing broker and Chris Young is identified under "General Use." The record contains no evidence of or reference to any direction from Respondent or John Gibson with the entities that actually sold the put options and no documented evidence that John Gibson gave any direction other than to sell the 350 put options on November 9, 2011. Div. Ex. 114, 115 and 116. John Gibson's approval of the trades eighteen days later did not approve of the timing of the

trades and Respondent contemporaneously stated in an email to John Gibson that "Pnc (sic) is awful they did not execute your trades in a timely manner at all for what it's worth. Buy SLV with cash." (Parenthetical added) (Division Exhibits 119 and 120) (Respondent's response in Exhibit 120 was inadvertently omitted by the Division from the exhibit filed with the Court).

LEGAL ARGUMENT

The Order alleges that Respondent Gibson violated the Securities Exchange Act and the Investment Advisers Act and the rules thereunder by front running the Geier Fund's sales of TRX securities, by favoring one Fund investor over the Fund and other Fund investors, and by failing to disclose certain information to Fund investors. The alleged violations are predicated upon contentions that Respondent Gibson, acting as an investment adviser, breached fiduciary duties to the Fund and others by failing to disclose the alleged conflicts of interest arising from the alleged front running and favoring transactions and, acting as an investment adviser, failed to disclose certain matters to Geier Fund investors. The evidence admitted during the hearing established that Respondent Gibson did not act as the investment adviser to the Geier Fund or breach fiduciary duties to the Fund; that potential conflicts of interest were disclosed to investors and prospective investors in the Fund; that Respondent Gibson did not engage in front running or favor one investor over the Fund or other investors; and did not fail to disclose information to investors in the Fund.

RESPONDENT GIBSON DID NOT ACT AS INVESTMENT ADVISER TO THE FUND

The Investment Advisers Act contains a clear definition of the term "investment adviser." Section 202(a)(11),in part, provides that an investment adviser is "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." Evidence admitted during

the hearing established that Geier Capital and Geier Group acted as investment advisers to the Fund for a period of time and ceased acting as investment advisers to the Fund prior to October 1, 2011. Further, evidence admitted during the hearing established that Respondent Gibson did not act as an investment adviser to the Fund.

The Fund's Operating Agreement provided that Geier Capital shall be the Managing Member of the Fund. Section 3.01, Management of the Company, provided that the Fund "shall be managed by the Managing Member, who shall have the discretion of making investments on behalf of the Company and of exercising the powers set forth in Section 3.02." Section 3.02, Powers of the Managing Member, provides, 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. Section 3.02 of the Operating Agreement further provides 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.[16] The Operating Agreement further provided that the Fund would pay management fees to the Investment Manager and would pay an incentive allocation to the Managing Member, 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.[17] During April 2011, Geier Group was terminated as a Georgia limited liability company and Geier Capital acted as the Fund's investment adviser in accordance with the terms of the Fund's Operating

[16] Respondent Gibson, James Hull and John Gibson were the members of Geier Group and also the members of Geier Capital. The ownership of Geier Capital and Geier Group was the same. Respondent Gibson owned 50% of each entity, James Hull owned 35% of each entity and John Gibson owned 15% of each entity.

[17] For the year 2010, the Fund's performance was such that it paid an incentive allocation of more than $3,000,000 to Geier Capital and management fees of over $200,000 were paid to Geier Group.

Agreement. During the period from April 2011 through late September 2011, the value of the Fund declined to slightly more than the amount contributed by Members of the Fund, as the price of the Fund's principal investment, TRX securities, declined. On September 23, 2011, Geier Capital determined to suspend the payment of management fees by the Fund. Once the Fund ceased paying management fees at the end of September 2011, Geier Capital ceased to meet the definition of investment adviser and, as a result, Geier Capital ceased to owe whatever fiduciary duties would be imposed by the Investment Advisers Act, under the relevant circumstances.

As the Court of Appeals for the District of Columbia Circuit stated, in a matter regarding a rule adopted pursuant to the Investment Advisers Act, "form matters in this area of the law."[18] The Operating Agreement is binding upon the Fund and the Members of the Fund and conclusively establishes that Geier Capital and Geier Group acted as investment advisers to the Fund and that after September 30, 2011, the Geier Fund ceased paying management fees or incentive allocations, and, thus, there was no longer an investment adviser providing advisory services to the Fund.

The Division of Enforcement's argument that Geier Capital, pursuant to the Operating Agreement, possessed the right to receive compensation, and that a right to receive compensation is sufficient for purposes of determining whether a person is an investment adviser within the terms of Section 202(a)(11) is unavailing. *First,* the Division of Enforcement relies upon *SEC v. Fife*, 311 F.3d 1 (1st Cir. 2002), but *Fife* involves a motion for a preliminary injunction and a determination relating to such a motion has no precedential value as a court is merely ruling on the likelihood of success on the merits. *See Martin v. Texaco*, 602 F. Supp. 60 (N. D. Fla. 1985) ("Of course, *Daniels* involved a preliminary injunction and was not a decision on the merits and so has no precedential

[18] *Goldstein v. Securities and Exchange Commission,* 451 F. 3d 873 (D.C. Cir. 2006). "The Commission also argues that the organizational form of most hedge funds is merely legal artifice" Br. for Resp. 41, to shield advisers who want to advise more than fifteen clients and remain exempt from registration. See Hedge Fund Rule, 69 Fed. Reg. at 72,068. But as the discussion above shows, form matters in this area of the law because it dictates to whom fiduciary duties are owed."

value."). *Second,* in Investment Advisers Act Release No. 1092, the SEC Staff stated that the standard for determining the compensation element of the definition of "investment adviser" is the receipt of compensation, not the right to receive compensation. ("This compensation element is satisfied by the *receipt* of any economic benefit, whether in the form of an advisory fee or some other fee relating to the total services rendered, commissions, or some combination of the foregoing.")

The Division of Enforcement's assertion that Respondent Gibson acted as the investment adviser to the Fund also misses the mark. The Division of Enforcement does not address the provisions of the Operating Agreement, which vest the authority to act as the Fund's investment adviser in Geier Capital. Instead, in a failed attempt to prove that Respondent Gibson acted as an investment adviser with respect to the Geier Fund, the Division of Enforcement points to certain advisory tasks that Respondent performed, including opening brokerage accounts, transferring funds among broker-dealers and financial institutions and tracking the performance of the Fund's investments. The Division of Enforcement also points to the payment of certain management fees to Geier Capital, LLC, the Managing Member of the Fund and/or Geier Group, LLC, an entity that acted as the investment manager of the Fund, and asserts that as an owner of Geier Capital and Geier Group, Respondent was entitled to a portion of such fees. The Division of Enforcement further points to an incentive allocation that was paid by the Fund to Geier Capital, LLC. The Division of Enforcement also points to the payment of money to Respondent by an entity operated by Respondent's father, John Gibson, and James Hull.

The Division of Enforcement's approach blurs the distinctions that the Investment Advisers Act draws between investment advisers and persons who act on behalf of investment advisers. The Investment Advisers Act defines the term "supervised person," in relevant part, as "any partner, officer, director (or other person occupying a similar status or performing similar functions), or an employee of an investment adviser, or other person who provides advice on

behalf of the investment adviser and is subject to the supervision and control of the investment adviser." The Investment Advisers Act defines the term "person associated with an investment adviser " as any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser."

The Division of Enforcement's argument that Respondent Gibson acted as the investment adviser to the Fund would render the definitions of the terms "supervised persons" and "person associated with an investment adviser" superfluous. The SEC has observed the distinction between an investment adviser and persons associated with an investment adviser. For example, the Commission, in *Russell W. Stein*, stated

> We do not address the merits of the Division's claims with respect to Stein's alleged violation of Section 206. Section 206 applies by its terms only to investment advisers, rather than associated persons of investment advisers. Sections 206(1) and (2) specifically prohibit "investment advisers" from committing fraud on "any client or prospective client." Only investment advisers can be charged with primary liability pursuant to Section 206, and "persons associated with investment advisers" must be charged as aiders and abettors . . . . Many employees of investment advisers, of necessity, perform investment adviser activities because an adviser can only act through its employees. Nonetheless, the Act's sections distinguish between those applicable to investment advisers and to their associated persons." (citations omitted).[19]

While the SEC, in some cases, has alleged that associated persons were investment advisers within the meaning of Section 202(a)(11) and there have some cases that found that associated persons did meet the definition of investment adviser, the issue remains unsettled. In many of the actions that have found that an associated person was within the definition of investment adviser, the associated person held a senior position and held a significant ownership

[19] Russell W. Stein, Exchange Act Release No.47504, Investment Advisers Act Release No. 2114, 79 SEC Docket 2390, (March 14, 2003) 2003 WL 1125746.

interest in the investment adviser. [20] However, the evidence admitted during the hearing in this matter does not support a finding that Respondent is similar to the individuals who, although associated with an investment adviser, nevertheless come within the definition of investment adviser.

Respondent, while a 50% owner of Geier Capital and Geier Group, was not the alter ego of either entity and did not control either entity. Evidence admitted during the hearing established that Mr. Hull was the dominant force in the Fund, Geier Capital and Geier Group. While Mr. Hull owned 35% of Geier Capital and Geier Group, Mr. Hull owned 80% of the Fund and business associates and friends of Mr. Hull owned approximately 10% of the Fund. In that regard, it is important to note that Section 8.02 of the Operating Agreement provided that a member may, upon at least 30 calendar days' prior written notice to the administrator, withdraw all or a portion of its capital account attributable to a particular capital contribution as of the last day of each month, provided such capital contribution has been invested in the Company for at least six months." Further, the Fund observed a policy of permitting members to withdraw capital on shorter notice. Moreover, Mr. Hull had required Respondent Gibson to accept a loan memorialized by a demand note that bore interest at the rate of 8% per annum and to invest the proceeds of the loan in the Geier Fund.

Evidence admitted during the hearing also established that Mr. Hull wielded the leverage that his ownership in the Fund and his extensions of loans to Respondent and his father afforded him. Mr. Hull determined to progress from the Gibson Fund and the Hull Fund, investment vehicles which did not pay advisory fees, to the Geier Fund which could pay an incentive allocation and a management fee. Mr. Hull determined that the Geier Fund would progress from

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[20] See e.g., Warwick Capital Management, Inc., Investment Advisers Act Release No. 2694, 92 SEC Docket 1147 (January 16, 2008) 2008WL149127.

investments in commodities, the gains on which are taxed at ordinary rates, to securities which may benefit from capital gains treatment. Mr. Hull determined that the Geier Fund would identify and invest in one security rather than diversify the Fund's portfolio, because he believed that one could follow and understand one company better than one could follow and understand multiple companies. Mr. Hull also encouraged Members to acquire TRX securities for their personal accounts, as a demonstration of a commitment to the Fund's investment. And Mr. Hull determined that he could not tolerate additional losses which would result from further declines in the price of TRX, and determined that the Fund should explore sales of its TRX securities at "good prices."

Thus, under the relevant facts and circumstances, Mr. Hull exercised control over the Fund, Geier Capital and Geier Group. Respondent Gibson did not demonstrably control the investment adviser, and does not meet the definition of investment adviser. As a member of the limited liability company that, for a period of time, met the definition of investment adviser, Respondent may be deemed to be an associated person of an investment adviser.

The Division of Enforcement also failed to prove that Respondent received compensation for providing advisory services after Geier Capital ceased receiving management fees. The Division of Enforcement argues that funds that Respondent Gibson received from Hull Storey Gibson Companies, an entity owned by Respondent's father, John Gibson, and James Hull, constituted payment for the management of the Fund, but the argument fails for several reasons. *First,* Respondent was hired by Hull Storey Gibson Companies in 2009, prior to the time that the Fund was organized as a Delaware limited liability company. *Second,* Respondent Gibson performed services for the Hull Storey Gibson Companies from the time he joined that firm in 2009 through 2012. *Third,* the Fund credited Geier Capital's capital account with $223,351 for management fees for 2010 and $295,000 for management fees for the period from January 1, 2011 through September 30, 2011.

Based upon Respondent's interest in Geier Capital and Geier Group, he was entitled $111, 675.50 and $147,500 for 2011. Respondent Gibson did not withdraw such amounts from the capital account maintained by the Geier Fund for Geier Capital. Rather, Mr. Hull directed Hull Storey Gibson Companies to advance funds to Respondent Gibson, so that he could receive a steady income stream rather than payments following the Geier Fund's quarterly payments pursuant to the terms of the Operating Agreement. Further, Geier Group reimbursed Hull Storey Gibson Companies for the funds that it advanced to respondent Gibson during 2010 and absent the cessation of the payment of management fees after September 30, 2011, Hull Storey Gibson Companies would have been reimbursed for the advances to Respondent Gibson during 2011. The payments that Respondent received from Hull Storey Gibson Companies for 2010 and 2011 did not exceed the amount to which Respondent Gibson was entitled pursuant to his ownership interests in Geier Capital and Geier Group.

Moreover, the Order was entered pursuant to Section 203(f) which authorizes the imposition of administrative sanctions upon a person associated with or seeking to become associated with an investment adviser or a person who was associated or seeking to become associated at the time of the alleged violations. The Investment Advisers Act distinguishes between an investment adviser, who has primary liability for violations of Section 206, and an associated person, who can be charged with aiding and abetting or causing an adviser's violation of Section 206. Section 203(f) was added to the Investment Advisers Act in 1970 in order that enforcement actions could be instituted against associated persons precisely because they did not meet the definition of investment adviser and therefore could not be charged under Section 203(e).[21]

Accordingly, the Order requires the Division of Enforcement to prove that Respondent was an associated person rather than an investment adviser. In order for Respondent to be an associated

[21] See Resp. Ex. 148 Expert Report of Thomas S. Harman, August 5, 2016.

person he must be associated with another person who meets the definition of investment adviser. Respondent cannot be found deemed to be an investment adviser and an associated person of an investment adviser at the same time. Assuming that Respondent is determined to have been an associated person of Geier Capital and/or Geier Group during the periods that those entities me the definition of investment adviser, he could not violate the provisions with which he has been charged in the manner he has been charged and those charges must be dismissed.

RESPONDENT DID NOT VIOLATE THE FEDERAL SECURITIES LAWS

The Division of Enforcement failed to prove that Respondent violated the Investment Advisers Act or the Securities Exchange Act. The Fund's Operating Agreement clearly disclosed potential conflicts of interest and the Members of the Fund consented to such conflicts by signing the Operating Agreement. Moreover, the Offering Memorandum amplified the disclosures in the Operating Agreement, further disclosing potential conflicts of interests. Further, Respondent did not engage in front running, did not favor one investor over the Fund or other Fund investors, and did not fail to disclose information to Fund investors.

THE INVESTMENT ADVISERS ACT ANTIFRAUD PROVISIONS

Sections 206(1) and 206(2) of the Investment Advisers Act proscribe certain fraudulent and deceptive acts and practices. 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." The provisions of the Investment Advisers Act at issue in this matter have consistently been construed as permitting an investment adviser to disclose material conflicts of interest and with the client's consent to such conflicts, engage in activity that would otherwise be impermissible. Further, amendments to the Investment Advisers Act contained in the 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 Investment Advisers Act as requiring the disclosure of certain practices in which the investment adviser engaged with respect to securities that it recommended to its clients. In *Capital Gains*, the investment adviser, on a number of occasions, purchased securities of an issuer prior to issuing a newsletter in which it recommended the securities for long-term investment. After the issuance of the newsletter and an increase in market volume and price of the securities it recommended, the investment adviser sold the securities which it had recommended. 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 Investment 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 Investment 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 to be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure. *Id.* at 196.

The Commission has recognized that the disclosures by investment advisers concerning conflicts of interest will vary, as investment advisers may offer advisory services regarding a range of securities and as investment advisers and their associated persons may recommend to clients the same securities that they purchase or sell for their own account.

In a release regarding the applicability of the Investment Advisers Act to persons who provide investment advice as a component of other financial services,[22] the Staff stated:

> The type of disclosure required by an investment adviser who has a potential conflict of interest with a client will depend upon all the facts and circumstances. As a general matter, an adviser must disclose to clients all material facts so that the client can make an informed decision as to whether to enter into or continue an advisory relationship with the adviser or whether to take some action to protect himself against the specific conflict of interest involved.

In IA-1092, the Staff further stated "An investment adviser who structures his personal securities transactions to trade on the market impact caused by his recommendations to clients must disclose this practice to clients. An investment adviser generally also must disclose if his personal securities transactions are inconsistent with the advice given to clients (citations omitted)."

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

> Unlike the laws of many other countries, the U.S. federal securities laws do not prescribe minimum experience or qualification requirements for persons providing investment advice. They do not establish maximum fees that advisers may charge. ***Nor do they preclude advisers from having substantial conflicts of interest that might adversely affect the objectivity of the advice they provide.*** Rather, investors have the responsibility, based on disclosures they receive, for selecting their own advisers, negotiating their own fee arrangements, and evaluating their advisers conflicts. Amendments to Form ADV, Investment Advisers Act Release No. IA-2711, 92 SEC Docket 2278 (March 3, 2008) (emphasis added).

In adopting amendments to Part 2 of Form ADV, the Commission, in Investment Advisers Act Release No. IA-3060, stated "Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to

[22] *See*, Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. IA-1092, 39 SEC Docket 494 (October 8, 1987).

subrogate clients' interests to its own. An adviser must deal fairly with clients and prospective clients, seek to avoid conflicts with its clients and, at a minimum, make full disclosure of any material conflict or potential conflict." Amendments to Form ADV, Investment Advisers Act Release No. IA-3060, 98 SEC Docket 3502 (July28, 2010). The Commission further stated: "A prospective client may seek modifications to an investment advisory agreement to better protect the client against an investment adviser's potential conflict of interest, either by better aligning the adviser's interest with that of the client or by prohibiting a particular practice in the client's account. If an adviser is unwilling to make such modifications, a prospective client may select a different adviser."

Thus, advisers and clients may define the nature and extent of their advisory relationship. In fact, the Staff has agreed that liability of investment advisers can be limited in similar circumstances regarding hedge fund clauses. *Heitman Capital Mgmt., LLC*, S.E.C. No - Action Letter, 2007 WL 789073, at *3 (Feb. 12, 2007). There, the Staff concluded that an investment adviser that limits his liability to acts of gross negligence or willful malfeasance in hedge fund clauses will not be liable under the Investment Advisers Act, if the form and content of those clauses are accurate and the client is a sophisticated party. *Id.*

In the Dodd Frank Wall Street Reform and Consumer Protection Act, Congress amended the Investment 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 Investment Advisers Act. 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.***

Section 913 also adds Subsection (h), Other Matters, to Section 211 of the Investment Advisers Act. Subsection (h) 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."

Section 913 of the Dodd Frank Act also directed the Commission to conduct a study to evaluate the effectiveness of existing standards of care of brokers, dealers and investment advisers imposed by the Commission and other regulatory authorities and whether there are legal or regulatory gaps in the protection of retail customers relating to the standard of care which should be addressed by rule or statute. The Staff 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), 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).

Study 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 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. Study 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. Study 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." Study 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." Study 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. Study at pp. 114-17.

To date, the Commission has not adopted rules to implement a uniform standard of conduct for brokers, dealers, and investment advisers. Similarly, the Commission has not

provided guidance regarding 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 or adopted rules prohibiting or restricting certain conflicts of interest, or the manner in which investment advisers must disclose conflicts of interest.[23]

In the absence of federal law governing the specific content of disclosures or the modification of fiduciary duties, courts may look to state law unless the particular state law is inconsistent with the policy underlying the federal statue or the state law would permit action that the federal prohibits.[24] In the present matter, state law regarding the modification or waiver of fiduciary duties is not inconsistent with the policy underlying the Investment Advisers Act as the Act, in Section 211(g), explicitly permits the disclosure of material conflicts of interest by an adviser and the consent to such conflicts by the client. In the present context, the Delaware Limited Liability Company Act (the DLLCA") and the decisions construing that statute provide parameters regarding fiduciary duties and the restriction or elimination of such duties.[25]

The DLLCA permits the parties considerable flexibility with respect to the duties and obligations of the members of a limited liability company.[26] In particular, the DLLCA permits members of a limited liability company to reach an agreement regarding a number of issues,

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[23] *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).

[24] *Burks v. Lasker,* 441 U.S. 471 (1979) and *Kamen v. Kemper Financial Services, Inc.,* 500 U.S. 90 (1991), may look to state law. In *Burks*, the Supreme Court stated that the Investment Company Act and the Investment Advisers Act do not require that federal law displace state law governing the powers of directors unless the state laws permit action prohibited by the Acts, or unless 'their application would be inconsistent with the federal policy underlying the cause of action.'" *Burks*, 441 U. S. at 479. And, in *Kamen*, the Court stated that "where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute." *Kamen*, 500 U.S. at 108.

[25] See Resp. Ex. 150, Expert Report of Myron T. Steele, August 5, 2016.

[26] Del. Code Ann. tit. 6, § 18-1101(b) provides that "it is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to enforceability of limited liability company agreements."

including the standards that will govern the internal affairs of the limited liability company.[27] With respect to default fiduciary duties that would otherwise apply, the DLLCA provides that the fiduciary duties of a member, manager, or other person that is a party to or bound by a limited liability agreement "may be expanded or restricted or eliminated by provisions in a limited liability company agreement.[28] Accordingly, the provisions of the relevant limited liability company agreement will determine whether otherwise applicable fiduciary duties have been modified, restricted or eliminated.[29]

A prospective investor in the Geier Fund who had an opportunity to review the Offering Memorandum --which contained the disclosures regarding potential conflicts of interest-- and who planned to invest in the Geier Fund was provided with the Fund's Operating Agreement for review and execution. The Operating Agreement authorized the Managing Member to act in accordance with the disclosures contained in the Offering Memorandum. The Operating Agreement provided that the Managing Member shall devote so much of its time and efforts to the affairs of the Company, as may, in its judgment, be necessary to accomplish the purposes of the Company. 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."

The Operating Agreement continued, "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

[27] *See, Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286, 291-92 (Del. 1999).
[28] Del. Code Ann. tit. 6, § 18-1101(c).
[29] See, *Zimmerman v. Crothall,* 62 A.3d 676, 703 (Del. Ch. 2013), (finding that "through the Adhezion Operating Agreement and consistent with their prerogative under 6 Del. C. § 18–1101(c), the parties 'restricted' the fiduciary duties that the Director Defendants owed in the context of their dealings with the Company.)"

officer, director, consultant, partner, stockholder of one or more investment funds, partnerships, securities firms or advisory firms." Finally, 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."

By executing the Operating Agreement, Members of the Geier Fund agreed that other Members were permitted to engage in any other business, including any business within the securities industry, whether or not such business is in competition with the Fund; were free to engage in other activities in the securities business, including businesses which compete with the Geier Fund; were free to pursue investment objectives or implement strategies similar to or different than the objectives or strategies of the Geier Fund; were free to invest in securities in which the Fund invests or invest in securities in which the Fund does not invest; were free to give advice or take action that differs from the action taken by the Geier Fund or the advice given to the Geier Fund; and were free to purchase the same securities as the Fund as well as securities in which the Fund did not invest. 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."

In this matter, prospective investors in the Geier Fund were also provided with an Offering Memorandum which, in great detail and clear and unequivocal language, disclosed potential conflicts of interest. The Offering Memorandum disclosed potential conflicts of interest with respect to the allocation of investments among the Fund and other entities or

accounts; and the execution of transactions for the Fund and other entities and accounts in which the Managing Member, the Investment Manager or their members, officers, agents and affiliates may have interests. With respect to other securities activities, the Offering Memorandum stated that "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 the "Affiliated Parties") may conduct any other business, including any business within the securities and commodities industries, whether or not such business is in competition with the Company."

The Offering Memorandum further provided that the Affiliated Parties may act as, among other things, investment adviser or investment manager for others, may manage other funds or accounts, and may manage the capital of others. The funds and accounts advised or managed by the Affiliated Parties, according to the Offering Memorandum, may have investment objectives or may implement investment strategies similar to or different than those of the Company and may have interests in the securities in which the Company invests as well as interests in investments in which the Company does not invest. With respect to effecting transactions for the Fund and other entities and accounts, the Offering Memorandum states that "the Affiliated Parties may give advice or take action with respect to such other entities or accounts that differs from the advice given with respect to the Company." The Offering Memorandum further states that "it may not always be possible or consistent with the investment objectives of the various persons or entities described above and of the Company for the same investment positions to be taken or liquidated at the same time or at the same price."

The Offering Memorandum reiterated the extensive and significant disclosures by stating as follows:

> As a result of the foregoing, the Affiliated Parties may have conflicts of interest in allocating their time and activity between the Company and other entities, in allocating investments among the Company and other entities and in effecting transactions for the Company and other entities, including ones in which the Affiliated Parties may have a greater financial interest.

The Offering Memorandum further states that "purchase and sale transactions (including swaps) may be effected between [the Fund] and the other entities or accounts subject to the following guidelines: (i) such transactions shall be effected for cash consideration at the current market price of the particular securities, and (ii) no extraordinary brokerage commission or fees (i.e., except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction."

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 Mr. 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 Division of Enforcement's argument that duties imposed by Sections 206(1) and (2) cannot be waived or modified, and that the Fund's governing documents did not even purport to waive or reduce fiduciary duties or other obligations under Section 206, fails. The Division of Enforcement begins its attempt at obfuscation by asserting (without citation to any authority) that federal fiduciary duties cannot be waived or modified by private agreement. It then states that the provisions of the Fund's Operating Agreement and Offering Memorandum did not state that "Gibson was authorized to conduct such other businesses, or make personal investments, in a way that violated his federal fiduciary duties to GISF," and then claims that if the governing documents did state that Respondent could engage in conduct that violated a provision of the Investment Advisers Act, the provisions of the Fund's governing documents would be void under Section 215 of the Advisers Act. Finally, the Division of Enforcement states that Respondent's front running and favoritism were not disclosed adequately or at the time that Respondent engaged in the activity.

As discussed above, it is well settled that an investment adviser may disclose material conflicts of interest and a client may consent to material conflicts of interest. The Commission, in its release adopting amendments to Part 2 of Form ADV, stated an investment adviser must "make full disclosure of any material conflict or potential conflict" and a prospective client "may seek modifications to an investment advisory agreement to better protect the client against an investment adviser's potential conflict of interest by better aligning the adviser's interest with that of the client or prohibiting a particular practice in the client's account." Further, Congress, in the Dodd Frank Act, specifically stated that investment advisers may disclose material conflicts of interest and clients may consent to such conflicts. While the Commission has adopted the position that Section 206 of the Investment Advisers Act imposes fiduciary duties on

investment advisers, it has recognized that those duties are not immutable and that the parties to an investment advisory agreement determine the nature and extent of the fiduciary duties an investment adviser owes to its clients. If the duties investment advisers owe to clients could not be modified or restricted by disclosure of material conflicts of interest, no purpose would be served by such disclosure and the Commission would not require that advisers disclose conflicts of interest in Form ADV. Moreover, Congress has unequivocally confirmed this position by adding Section 211(g) to the Investment Advisers Act, which specifically provides that investment advisers may disclose material conflicts of interest and clients may consent to such conflicts.

The Division of Enforcement's claim that the Fund's governing documents did not purport to reduce or waive fiduciary duties or other obligations, because they did not repeatedly attach the words "conflict of interest" to each disclosure, is unpersuasive. The governing documents stated clearly that Members of the Fund, including Respondent, could engage in other business in the securities industry, whether or not such business is in competition with the Fund, could advise others regarding securities matters, and could pursue different investment strategies than the Fund. Moreover, the governing documents specifically state that it may not always be possible or consistent with the investment objectives of the various parties to take or liquidate the same investment positions at the same time and at the same prices. The disclosures clearly indicate that Members of the Fund may engage in activities unrelated to the Fund and may even compete with the Fund or pursue differing investment strategies.

Nevertheless, the Division of Enforcement argues that an investment adviser would be able to engage in the transactions in which Respondent engaged only if he disclosed that he would breach the duties and obligations imposed by Section 206. Specifically, the Division of

Enforcement contends that, in order to avoid liability, the Fund's governing documents would have to disclose that Respondent would engage in front running and would favor one investor over the Fund. But, if the Fund's governing documents contained such disclosures, the Division of Enforcement would assert that such disclosures would be impermissible because they would run afoul of Section 215 which prohibits any waiver with compliance with the Investment Advisers Act.

The Division of Enforcement continues to argue that disclosures regarding conflicts of interest do not permit investment advisers to engage in conduct that would otherwise be inconsistent with an investment advisers fiduciary duty notwithstanding that Section 211(h), added by the Dodd Frank Act, provided the Commission with specific authority to prohibit particular conflicts of interest and the Commission, to date, has not adopted such rules. Further, the Commission Staff, in its report pursuant to Section 913 of the Dodd Frank Act, stated that the Investment Advisers Act does not prohibit any particular conflicts of interest; unlike the Division of Enforcement, the Staff who prepared the report does not contend that a conflicts of interest disclosure that permitted an adviser to engage in activity that would otherwise be precluded by an investment adviser's fiduciary duty would run afoul Section 215. Further, 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."

Thus, according to the Division of Enforcement, an investment adviser may disclose conflicts of interest, but such disclosures would not permit the investment adviser to engage in the activity which it disclosed because (i) an investment adviser's duties cannot be abrogated, modified, or restricted; (ii) the disclosures will necessarily be inadequate unless they state that

the adviser will engage in violations of the Investment Advisers Act; and (iii) Section 215 of the Investment Advisers Act prohibits any agreement that purports to waive compliance with the Investment Advisers Act. Notwithstanding its commitment to the foregoing interpretation of the Advisers Act, the interpretation is inconsistent with positions that the Commission has articulated on numerous occasions and inconsistent with the statute that it seeks to enforce.

The Division of Enforcement's argument that Respondent "did not notify GISF' investors when the actual conflicts of interest at issue here emerged in September, October and November 2011, (i.e., when Respondent sold TRX securities and purchased put contracts and when Mr. Hull sold his TRX securities to the Fund) is equally flawed. First, the Division of Enforcement fails to cite any authority for the proposition that notwithstanding that an investment adviser disclosed a conflict of interest when entering into an advisory relationship with a client, the investment adviser must also disclose the same conflict when the investment adviser engages in the conduct that he previously disclosed to the client. The Commission's Staff, in the report mandated by Section 913 of the Dodd Frank Act, recommended that the Commission consider rulemaking regarding the timing of disclosures regarding conflicts of interest. 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. To date, the Commission has not adopted such rules.

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

The Division of Enforcement failed to prove that Respondent Gibson engaged in front running or favored a Fund investor in violation of the Investment Advisers Act, the Securities Exchange Act or the rules thereunder.

RESPONDENT GIBSON DID NOT ENGAGE IN FRONT RUNNING

The Order alleges that Respondent Gibson violated Sections 206(1) and (2) of the Investment Advisers Act and Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder by selling TRX securities and purchasing put contracts prior to sales of TRX securities by the Fund. The Division of Enforcement has failed to prove that Respondent engaged in front running. In particular, the Division of Enforcement has failed to cite to controlling precedent. Further, even if the non-controlling cites were deemed to be applicable, the Division of Enforcement has failed to establish that Respondent's conduct comes within the standards the Division of Enforcement has cited.

Neither the Investment Advisers Act nor the Securities Exchange Act contains a provision proscribing front running. And to date, the SEC has not adopted a rule that defines and prohibits front running. The Commission has, however, expressed a view on the parameters of front running. In response to a request from Congress for clarification and information regarding front running, former Chairman Ruder forwarded a memorandum prepared by the Division of Market Regulation regarding short selling and front running.[30] With respect to front running, the memorandum states:

[30] Memorandum Prepared by the Division of Market Regulation in Response to the Questions Contained in the Letter of March 4, 1988 From the Honorable John D. Dingell and the Honorable Edward J. Markey Regarding Short Selling and Frontrunning, dated May 13, 1988.

> Frontrunning may be generally defined as involving trading a stock, option, or future while in possession of non-public information regarding an imminent block transaction that is likely to affect the price of the stock, option or future. The Commission, since the development of standardized individual equity options, has viewed frontrunning as a serious trading abuse that can adversely affect the integrity of the markets.
>
> Certain instances of frontrunning may be analyzed pursuant to Section 10(b) of the Exchange Act and Rule 10b-5 as a form of insider trading. For example, instances of a broker-dealer trading in derivative markets to take advantage of the market impact of a customer's stock order might be addressed as a form of misappropriation of material non-public information in breach of a fiduciary obligation of trust and confidence, although we are not aware of any case that has done so.
>
> The Commission has preferred to address this issue by working with the securities self-regulatory organizations ("SROs") to detect and prosecute frontrunning activities in these markets as violations of the rules of these SROs. Although none of the exchanges has a specific rule proscribing frontrunning, each exchange has issued circulars that prohibit frontrunning as conduct inconsistent with just and equitable principles of trade. . . . Because frontrunning abuses have been addressed as SRO rule violations, prosecution of frontrunning violations has been primarily the responsibility of the SROs.

The evidence presented at the hearing in this matter established that Respondent Gibson did not engage in front running. The evidence admitted at the hearing established that following the decline in the price of TRX securities, Mr. Hull and Respondent spoke on September 24 and/or 25, 2011 and determined to liquidate the Fund's position in TRX. Evidence presented at the hearing further established that Mr. Hull and Respondent determined that they would sell TRX securities if the Fund could do so at "good prices."

In an effort to explore the possibility of selling TRX shares at good prices, Respondent Gibson explored two potential avenues to a disposition of the Fund's TRX shares at "good prices." Initially, Respondent communicated with, Luis Sequeira, a representative of a large holder of TRX securities and explored the large holder's interest in purchasing the Fund's shares at good prices. After communicating with Mr. Sequeira, Respondent, on September 24, 2011, exchanged emails with a representative of GarWood Securities LLC, the brokerage firm at which the Geier 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. In a later email, he 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 involving 1,000,000 to 5,000,000 TRX shares did not materialize.

While discussions continued with Mr. Sequeira, Respondent also contacted a representative of an investment banking firm which had recently been involved in a private placement of TRX securities. Specifically, on September 25, 2011, Respondent sent an email to Richard Sands, an investment banker at Casimir Capital. Mr. Sands and Casimir Capital, in August 2011, had been involved in the private placement of approximately $30,000,000 of TRX shares. Mr. Sands had previously indicated to Respondent Gibson that Platinum Partners, which had paid $5.75 for the TRX shares it had acquired in the private placement, would be happy to purchase the Fund's shares. In his email, Respondent Gibson inquired whether a hedge fund or another buyer was interested in increasing its position in TRX securities at current prices. He indicated that Geier Fund believed in TRX and might retain its position in the stock, but nevertheless would be interested in learning whether there was another buyer which believed that TRX was an attractive investment opportunity at the then current market price. Mr. Sands inquired regarding the number of shares Geier Fund was prepared to sell and Respondent Gibson responded by stating that the Fund was prepared to sell its entire position or something less than the entire position. Throughout September 26th, Respondent Gibson continued to communicate with Mr. Sands, who represented that he had a "buyer in hand," but did not indicate the number of shares that "the buyer" would purchase or the price at which it would purchase the TRX shares.

During the afternoon of September 26th, Respondent Gibson, before Mr. Sands indicated that he had an interested buyer and before any mention of an amount of securities that a buyer would purchase or the price which the buyer was prepared to offer, placed orders to sell 2,000 shares of TRX from his personal brokerage account; 18,900 shares from the personal brokerage account of a close personal friend; and 1000 shares from the account of Geier Group's brokerage account.

Through the morning and afternoon of September 27th, Respondent Gibson communicated with Casimir Capital personnel regarding the possibility of a transaction and the steps that would be needed to complete a transaction, including the opening of a brokerage account at Casimir Capital and the transfer of the Fund's TRX shares from its account at GarWood Securities to Casimir Capital. At approximately 2:45 p.m. on September 27th, the Casimir Capital representative advised Respondent Gibson that there was a buyer of up to 5,000,000 shares at $3.50 or better and asked Respondent Gibson to confirm the proposed transaction. Subsequently, Mr. Sands advised Respondent Gibson that he would be able to sell between three and five million TRX shares. On September 27, 2011, 3,734,395 of the Funds TRX shares were sold by Casimir Capital at an average price of $3.5018.

Evidence presented at the hearing established that at the time that Respondent Gibson placed orders to sell the TRX securities that were held in his account, his friend's account and Geier Group's account there was no imminent transaction that he could front run. First, Respondent did not contact the brokerage firm at which Geier Fund maintained an account and place an order to sell TRX securities either at the market or pursuant to a limit order. Rather, he contacted a firm at which he had not established an account or relationship and which did not owe the Fund a duty of confidentiality or a duty of best execution. Once Respondent Gibson

asked whether Casimir Capital was aware of a potential buyer, a potential sale of TRX securities by the Fund was no longer nonpublic information. Accordingly, Respondent Gibson was not placing an order to sell TRX securities through Casimir Capital; rather, he was soliciting a bid from Casimir Capital for the TRX securities held by the Fund. And at the time he placed sell orders on September 26th, he could not know whether Casimir Capital would be able to locate a buyer or whether the size of any proposed transaction or the price at which the Fund's TRX securities could be sold would be acceptable.

Similarly, 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 Gibson's initial purchase of $4.00 TRX put contracts followed his receipt of an email from Mr. Hull's assistant regarding the loan that Mr. Hull had extended to Respondent. Attached to the email from Mr. Hull's assistant was a schedule which reflected the amount Respondent owed to Mr. 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%. As the proceeds of the loan from Mr. 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 Mr. Hull. On October 27, 2011, the day after he received the spreadsheet and the demand promissory note, Respondent began placing orders to purchase $4.00 put contracts on TRX shares. Respondent ultimately purchased 565 TRX $4.00 put contracts in his personal brokerage account and purchased 1,604 TRX $4.00 put contracts in

the account of Francesca Marzullo, a close personal friend which Respondent viewed as a proxy for her father who was a Member of the Geier Fund.

During the remainder of October and early November, Respondent Gibson continued his efforts to liquidate the Fund's position in TRX, including discussions regarding TRX securities with Roheryn Investments, a money manager located in Europe, a bank located in Portugal 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 Securities, the brokerage firm where the Fund had maintained an account since its inception.

The Division of Enforcement has failed to cite to any controlling authority regarding the elements of front running. Rather, the Division of Enforcement has pointed to one decision that has no precedential value, cites to a decision that does not involve front running and cites to two treatises that, while describing the authors' view of front running, are not applicable to the evidence admitted in this matter.

The Division of Enforcement cites *SEC v. Yang*, 999 F. Supp. 2d 1007 (N. D. Ill. 2013), in which the District Court ruled on the defendants' motion for summary judgment. In its brief, the Division of Enforcement states that the court described front running "as an attempt by an adviser to 'profit personally by secretly authorizing personal trades in anticipation of much larger trades he knew he would be authorizing.'" However, the district court's opinion and order concerned the defendants' motion for summary judgment (which it denied) and, as the Supreme Court has ruled, a denial of a motion for summary judgment has no precedential value. *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.")

The Division of Enforcement also states that "Front running creates a conflict of interest between the adviser and the client, undermines the integrity of the market, and is universally recognized as a violation of fiduciary duties and Sections 206(1) and (2) of the Advisers Act. See Capital Gains, 375 U.S. at 196-97, 201 (1963); SEC v. Yang, 999 F. Supp. 2d at 1016." However, the Supreme Court's decision in *Capital Gains* concerned conduct very different than the conduct at issue in this matter. In *Capital Gains*, the author of an investment newsletter engaged in a practice of purchasing securities, discussing such securities in a newsletter and then selling the securities at a profit after purchases of the securities by subscribers resulted in an increase in the price of the securities. *Capital Gains* did not involve a purchase or sale of a security by an investment adviser prior to the placement of a block or large trade on behalf of a managed account. Moreover, if front running were universally recognized as a violation of fiduciary duties and Section 206(1) and (2) of the Advisers Act, the Division of Enforcement presumably would be able to cite authority more persuasive than a district court decision that does not have precedential value and a Supreme Court decision that involves a practice that has been referred to as "scalping" rather than "front running" for decades. Further, if it were universally recognized as a breach of fiduciary duty and a violation of Sections 206(1) and (2), there would not be as much uncertainty as to what the term "front running" encompasses.[31]

And the descriptions of front running in the treatises cited by the Division of Enforcement do not provide support for the contention that Respondent violated Sections 206(1)

[31] *See,* Securities Market Manipulations: An Examination and Analysis of Domination and Control, Frontrunning, and Parking, 55 Albany Law Rev. 293 (1991) (Of all the manipulative techniques, perhaps the most difficult to define is "frontrunning.")

and (2) in connection with his sales of TRX securities and purchase of put contracts. One treatise cited by the Division of Enforcement describes front running as the illicit practice of "using advance knowledge of impending client action to secure advantage," while the other states that the "distinguishing feature of front running is an investment adviser's use, with the expectation of personal gain, of material non-public information concerning an anticipated transaction likely to impact the value of a security." The definition of "front running" in the first treatise would merely require proof of "use" of "advance knowledge" of "impending client action," while the definition in the second treatise cited by the Division of Enforcement would require proof of "use, with the expectation of gain" of "material," "non-public" information concerning "an anticipated transaction" "likely to impact the value of a security." The second definition contains numerous elements not included in the first definition and proves the point that there is no universal recognition regarding front running as proclaimed by the Division of Enforcement.

Moreover, the application of either definition to evidence admitted in this matter would result in a determination that Respondent did not engage in front running and did not violate the securities laws in connection with his sales of TRX securities or his purchase of TRX put contracts. The evidence admitted in this matter establishes that at the time Respondent sold TRX securities and purchased put contracts he did not have advance knowledge of impending client action. The evidence establishes that Respondent undertook efforts to locate a holder of TRX securities who was willing to increase its TRX position through a negotiated transaction. When Respondent engaged in sales of TRX securities and purchases of TRX puts, he did not know whether one of the large holders with whom he was communicating was interested in increasing

its position, the amount of TRX securities the large holder would purchase from the Fund or the price at which the large holder was willing to purchase the Fund's securities.

RESPONDENT GIBSON DID NOT FAVOR A FUND INVESTOR OVER THE FUND

The Division of Enforcement failed to prove that Respondent Gibson favored a Fund investor over the Fund in violation of the Investment Advisers Act. Specifically, the Division of Enforcement has failed to prove that Respondent violated Section 206 of the Investment Advisers Act in connection with Mr. Hull's sale of TRX shares to the Fund in October 2011. In another failed attempt to prove violations of the securities laws, the Division of Enforcement cites cases that do not support its theories of liability, cites cases that have no precedential value, or omits any discussion of applicable law, and either misstates or omits evidence that was admitted in this matter.

The Division of Enforcement initially asserts that Respondent Gibson failed to disclose to the Fund or its investors that, at the time of the Hull Transaction, the Fund's trading strategy was to exit its TRX position. The Division of Enforcement cites no authority for its assertion that Respondent was obligated to make such a disclosure.[32] Nor does the Division of Enforcement address the fact that Respondent had attempted and was attempting to sell TRX shares at good prices since the Fund's sales of TRX shares on September 27, 2011, but had not been successful in finding a TRX shareholder that was willing to acquire the Fund's TRX securities in a negotiated transaction as of the date of the Hull Transaction, and never did find such a buyer. Further, the Division of Enforcement ignores the fact that Mr. Hull advised Respondent that he

[32] The Division of Enforcement seems to suggest that the purchase of the Hull shares was a change in strategy from the determination to liquidate the Fund's TRX at good prices, which in turn was a change in strategy from a determination that the Fund should hold its TRX securities, all of which indicates that the Fund, Mr. Hull and Respondent found themselves in a fluid situation and a change in the Fund's trading could be appropriate at any moment. Respondent Gibson, however, did not deviate from his representation to the Fund's investors that he would not redeem his interest in Geier and TRX, as he maintained his interest in the Fund through the relevant period.

was not sure whether the Fund should engage in further sales of TRX securities. Accordingly, while Mr. Hull and Respondent were attempting to act in the best interest of the Fund in light of the circumstances, neither had determined at that point that the Fund should liquidate its position by entering a sell order with its broker.

The Division of Enforcement next asserts that Respondent did not disclose to the Fund or its investors that Mr. Hull sold his shares to the Fund at an above-market price or that the Fund paid an extraordinary commission when it sold the Hull shares. Again, the Division of Enforcement does not cite any authority for such a disclosure obligation. More importantly, the Division of Enforcement fails to address the relevant provision of the Operating Agreement. While the Offering Memorandum generally amplifies the provisions of the Operating Agreement, the specific provisions of the Operating Agreement govern the management of the Fund.

The Operating Agreement, at Section 3.02, provides that the Managing Member shall have the power to enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements or other undertakings with persons, firms or corporations with which the Managing Member or any other Member is affiliated. 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 Mr. Hull of TRX securities in through 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 Mr. Hull and although the transaction did not fully achieve Mr. Hull's objectives to increase his liquidity he agreed to enter into the transaction.

Rather than address the relevant provision of the Operating Agreement, the Division of Enforcement focuses upon a part of the Offering Memorandum that addresses the activities in which the Managing Member and its members (i.e., Respondent and Mr. Hull) could engage apart from the Fund. 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.
>
> The Offering Memorandum further states as follows:
>
> "In addition, purchase and sale transactions (including swaps) may be effected between the Company and **the other entities and accounts** subject to the following guidelines: (i) such transactions shall be effected for cash consideration at the current market price of the particular securities, and (ii) no extraordinary brokerage commissions or fees (i.e., except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction."

Thus, the provision of the Operating Agreement described above covers transactions between the Fund and affiliates of the Managing Member or other Members. The Offering Memorandum addresses transactions between the Fund and the various persons and accounts to whom the Managing Member or its affiliates 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 Mr. 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 Division of Enforcement contends. 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."[33] Accordingly, the Division of Enforcement'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, Mr. Hull would have borne 80% of that discount and Respondent would have borne part of that discount. The remaining investors, including Respondent's mother and father would have experienced an immaterial impact. As such, there would be no obligation to disclose this information because if the transaction were deemed to involve a conflict that was not already addressed in the governing documents it was not a material conflict and only material conflicts of interest need be disclosed.

The Division of Enforcement's contention that the Respondent failed to disclose that he caused the Fund to pay an extraordinary commission in connection with the Hull Transaction is similarly flawed. The Division of Enforcement disregards the evidence admitted in this matter when it asserts that Respondent caused the fund to pay a commission that it would otherwise

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

have to pay when it sold the Hull TRX shares several weeks later. The evidence admitted in this matter establishes that the Hull Transaction was handled as a private transaction and neither Mr. 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 Mr. 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 Mr. Hull were sold as a part of the transaction.

After its failed attempt at arguing that Respondent failed to disclose information to the Fund or its investors, the Division of Enforcement states that "favoring one advisory client over another, particularly in connection with material misstatements and omissions, constitutes a fraud in violation of Section 206(1)" citing *J. S. Oliver,* 2014 SEC LEXIS 2812 at *102-05. This attempt by the Division of Enforcement fails as well. However, *J. S. Oliver* involved a "cherry picking scheme" and the Hull Transaction does not involve cherry picking. Specifically, *J. S. Oliver* involved an adviser who placed multiple orders for securities without allocating the securities to particular advisory accounts at the time the order was placed. Rather, the

investment adviser waited for a period of time and determined which trades were profitable and which trades were not and then allocated the profitable trades to certain accounts and the trades that were not profitable to other accounts. In the Hull Transaction, the Fund acquired TRX shares at the closing price on the day of the transaction at which point the Fund, Respondent and Mr. Hull had no knowledge regarding the future movement in the price of TRX stock. In fact, the price of TRX stock increased after the Hull Transaction and the Fund would have made profit if it determined to sell the stock at that time and Mr. Hull missed the opportunity for better pricing on his sale of TRX securities.

The Division of Enforcement also contends that Respondent was obligated to disclose that he was employed by Mr. Hull's real estate company at the time that Mr. Hull sold TRX shares to the Fund. Once again, the Division of Enforcement does not cite any authority for this proposition. And once again, the Division of Enforcement ignores evidence that was admitted during hearing that eviscerates its contention. First, the investors in the Fund fall into only two groups: the Gibson Group and the Hull Group. Clearly, Respondent's father, who was a co-owner of the Hull Storey Gibson Companies, and his mother were aware that he was associated with the company. Also, Mr. Hull was aware of Respondent's status as was Mr. Grovenstein and Mr. Storey, who also were employed by the Hull Storey Gibson Companies. Mr. Cates was aware that Mr. Gibson was employed by the Hull Storey Gibson companies because he prepared Respondent's tax returns. The other members of the Hull Group were close personal friends and business associates of Mr. Hull and acquaintences of John and Martha Gibson and encountered Respondent when he was present in Augusta, Georgia. Thus, investors in the Geier Fund were aware of Respondent's employment with the Hull Storey Gibson Companies prior to the formation of the Fund. To the extent that Respondent was obligated to disclose that he was

receiving an advance from the Hull Storey Gibson Companies with respect to the management fees paid by the Fund, such an obligation would have arisen at the time that investors invested in the Fund. As a result any action predicated upon such a disclosure matter is barred by the statute of limitations.

Moreover, Respondent Gibson did not favor the Fund's largest investor over the Fund when Mr. Hull sold 680,636 shares of TRX to the Fund. At the time the Hull transaction occurred, Respondent was engaged in discussions to sell the Fund's TRX shares through negotiated transactions in the upstairs market. To the extent that Mr. Hull accessed his line of credit and the TRX shares which had been pledged as collateral were sold in the market during the time period when Respondent was discussing a sale of the Fund's shares in the upstairs market any downward pressure on the market price for TRX shares could have an adverse impact on the price the Fund could obtain in the upstairs market. The Order attempts to portray the Fund as an entity whose holders are unidentifiable, when, in fact, Mr. Hull's interest in the Fund was approximately 80%, his friends and business associates held interests in the fund totaling approximately 10% and Respondent and his friends and family held the remaining 10%. As a holder of 80% of the Fund, Mr. Hull owned approximately 4,000,000 TRX shares through the Fund. As a result, Mr. Hull would have borne the brunt of any downward pressure on the price of TRX shares that would result from his sale of 680,636 TRX shares in the market. While the Order implies that Mr. Hull's sale of TRX shares benefitted him at the expense of the Fund, such an implication disregards the fact that Mr. Hull held approximately 80% of the Fund and his interest in TRX shares through the Fund vastly exceeded the 680, 636 shares he held in his personal account. Further, it would not have been in Respondent's interest or the interest of his friends and family to acquire Mr. Hull's shares if such a transaction would have an adverse effect

on the Fund, as he would be transferring part of the adverse impact of the Hull transaction to himself and his friends and family.

Moreover, the Fund's Operating Agreement provides the Managing Member with authority to modify the Operating Agreement in a manner to accommodate the Hull Transaction, if such action were deemed necessary. Section 11.04(a) provides as follows:

> This agreement may be amended by the Managing Member, in its sole discretion, in any manner that does not materially adversely affect any Member, including to effectuate the investment of the company's assets in a Master Fund, or to effect any changes required by applicable law or regulations. The Operating Agreement may also be amended by action of the Managing Member with the consent (which may be in the form of a negative consent) of the Members owning a majority-in-interest of the capital accounts of all the Members in any manner that does not discriminate among the Members.

This section of the Operating Agreement empowers the Managing Member, with the consent of Members owning a majority-in-interest, to amend the Operating Agreement, if necessary. As Mr. Hull owned approximately 80% of the Fund, he held an ownership interest sufficient to permit the amendment to the Operating Agreement proposed by the Managing Member. Further, the Hull Transaction does not discriminate among the Members as Mr. Hull shared fully in any effect the Hull Transaction had on the Members of the Fund. Accordingly, to the extent necessary, the Managing Member and Mr. Hull may be deemed to have amended the Operating Agreement to the extent necessary to permit the Hull Transaction.

RESPONDENT GIBSON 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 and authorizes the Commission to define and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive or manipulative. Rule 206(4)-8, adopted pursuant to Section 206(4) of the Advisers Act, prohibits an adviser to a pooled investment

vehicle from: (1) making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in light of the circumstances under which they were 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. Rule 206(4)-8 does not establish a fiduciary relationship between an investment adviser to a pooled investment vehicle and an investor in the pooled investment vehicle.

The Division of Enforcement contends that the disclosures in the Fund's Operating Agreement and its Offering Memorandum contained only general disclosures, that the disclosures did not cover Respondent's sales of securities in September 2011 or his purchase of puts in October and November 2011, and that Respondent's failure to provide notice of his trading activity to investors rendered the Offering Memorandum misleading.

The Division of Enforcement has not cited any authority for its contention that investment advisers to pooled investment vehicles have a duty to update previous disclosures to investors. Further, and as discussed above, the disclosures in the Operating Agreement and the Offering Memorandum were clear and specific, and as the disclosures addressed Respondent's trading activity, further disclosure was not necessary even if Respondent were under a duty to update prior disclosures. Moreover, as demonstrated above, Respondent did not engage in front running.

The Offering Memorandum disclosed that members of the Fund's Managing Member and Investment Manager could engage in business apart from the Fund, including any business in the securities industry, whether or not such business was in competition with the Fund, could

manage funds for others, and could make investments in accounts in their own name or in the name of other entities. The disclosure document further stated that the accounts with which a member could be involved could have investment objectives or implement investment strategies that were similar to or different than the Fund's, and that Respondent could give advice to others that differed from the advice that he gave to the fund. Moreover, the Fund's 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 price." Clearly, the disclosures provided to investors who became Members of the Fund and who are bound by the Operating Agreement stated that Respondent could have a securities brokerage account, could advise others with respect to securities brokerage matters and could trade ahead of the Fund and could receive better prices than the Fund when each were selling the same security.

Notwithstanding that the Fund's disclosure documents permitted Respondent to trade in the same securities as the Fund and permitted Respondent to trade before the Fund and at better prices than the Fund, Respondent did not engage in front running. As discussed above, at the time that Respondent sold TRX securities and purchased put contracts, Mr. Hull had determined that the Fund would pursue a strategy of selling TRX securities at good prices. Respondent attempted to execute the strategy formulated by Mr. Hull by contacting representatives of large holders of TRX securities and inquiring whether the large holders of TRX securities were interested in the some or all of the Fund's TRX securities at current market prices. At the time that Respondent sold TRX securities and purchased TRX put contracts, such discussions had commenced, but had not proceeded to the point at which a large transaction was imminent.

Thus, Respondent did not engage in front running. Moreover, Respondent did not sell or purchase TRX securities before placing an order with the Fund's broker to sell a quantity of TRX securities that would foreseeably impact the price of TRX securities.

The Division of Enforcement failed to prove that Respondent violated Section 206(4) and Rule 206(4)-8 by not providing notification to Fund investors regarding the Hull Transaction. According to the Division of Enforcement, a provision in the Offering Memorandum regarding transactions between the Fund and certain "entities and accounts" provides the predicate for a violation of Section 206(4) and Rule 206(4)-8. The provision at issue follows lengthy disclosures regarding conflicts of interest, including disclosures that members of the Managing Member and the Investment Manager may engage in other aspects of the securities business, including aspects of the securities business that involves competition with the Fund. Members of the Managing Member, according to the Offering Memorandum, may also advise other persons, and may manage funds, separate accounts or capital for others. Following such disclosures, the Offering Memorandum states that transactions may be effected between the Company and **other entities or accounts** subject to the following guidelines (i) such transactions shall be effected for cash consideration at the current market price of the particular securities, and (ii) no extraordinary brokerage commissions or fees (i.e., except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction. The provision, thus, was applicable to, among others, third parties and was a guideline rather than a requirement.

The Division omits any reference to the applicable provision of the Operating Agreement, which was binding on the Members and the Fund. The Operating Agreement, at Section 3.02(h), provided that the Managing Member shall have the power to enter into, make

and perform any other contracts, agreements or other undertakings 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.** This provision, which the Division of Enforcement ignores, specifically permitted the Hull Transaction. As the Members of the Fund consented to transactions such as the Hull transaction when they signed the Operating Agreement, further notification of such a transaction was not required. Accordingly, the Division of Enforcement has failed to prove that Respondent violated Section 206(4) and Rule 206(4)-8.

Moreover, by its terms, Rule 206(4)-8 applies to investment advisers and evidence admitted during the hearing established that Respondent Gibson did not act as investment adviser with respect to the Fund. In addition, Rule 206(4)-8 prohibits an investment adviser from making an untrue statement of material fact or omitting a material fact necessary to make the statements made not misleading. The rule does not affirmatively require an investment adviser to make statements to investors or potential investors. Moreover, the rule does not establish a fiduciary relationship between an investment adviser and investors or prospective investors, which relationship might require disclosure of material information to investors or prospective investors. Further, in light of the relevant facts and circumstances, the alleged failures to disclose information relating to Geier Group and Geier Capital were not material. Finally, any claim relating to violations involving a failure to disclose information is now barred by the applicable statute of limitations.

THE SECURITIES EXCHANGE ACT ANTIFRAUD PROVISIONS

Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder prohibit a person from engaging in certain fraudulent or deceptive practices in connection with the purchase or sale of any security. Section 10(b) makes it "unlawful for any person, directly or indirectly . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Rule 10b-5, which implements the Commission's authority under Section 10(b), similarly makes it "unlawful for any person, directly or indirectly, to employ any device, scheme, or artifice to defraud; to make any untrue statement of a material fact or to omit a material fact necessary in order to make the statements made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Rule 10b-5, thus, encompasses material misrepresentation (or a material omission if the defendant had a duty to speak) and fraudulent schemes or devices. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996).

However, in order to establish violations of the antifraud provisions, there must be proof of a manipulative or deceptive act. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 471 (1977) (Section 10(b) of the Securities Exchange Act "makes it 'unlawful for any person . . . to use or employ . . . any manipulative or deceptive device or contrivance in contravention of (Securities and Exchange Commission rules)' *See S.E.C. v. Lee*, 720 F. Supp. 2d 305, 325 (S.D.N.Y. 2010) ("To state a claim under Sections 10(b) of the Exchange Act and 17(a) of the Securities Act, the plaintiff must successfully allege that each defendant . . . committed a deceptive or manipulative

act . . . .") (citing *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir.1999)). Thus, without a requisite deceptive act there can be no violation. As further explained by the Court in *United States v. O'Hagan*, 521 U.S. 642 (1997), full disclosure of the relevant conduct negates any deception or manipulation, and thus negates liability. 521 U.S. 642, 655 (1997).

The Order alleges that Respondent Gibson's sales of TRX securities and purchases of put contracts constituted front running in violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder. The Division of Enforcement has failed to prove that Respondent violated the Securities Exchange Act by engaging in front running for at least two reasons: (i) the Division of Enforcement failed to prove the requisite element of deceptive or manipulative conduct; and (ii) the Division of Enforcement failed to prove that Respondent engaged in front running as alleged in the Order.

Here, the relevant act—a Member of the Fund selling securities which are also held by the Fund or purchasing a derivative of the security held by the Fund—was fully disclosed or exposed. In particular, the Operating Agreement in the instant matter provided:

> The Company shall be managed by the Managing Member, who shall have the discretion of making investments on behalf of the Company and of exercising the powers set forth in Section 3.02. ***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 manage funds or capital for others . . . . It is recognized that in effecting transactions, it may not always be possible or consistent with the investment objectives of the various persons or entities described above and of the Company to take or liquidate the same investment positions at the same time or at the same prices (emphasis added).

The Offering Memorandum reiterated this point:

> 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 the 'Affiliated Parties') may conduct any other business, including business

> within the securities and commodities industries, whether or not such business is in competition with the Company. Without limiting the generality of the foregoing, the Affiliated parties . . . may have, make and maintain investments in their own name or through other entities . . . . Such other entities or accounts may have investment objectives or may implement investment strategies similar to or different to those of the Company. In addition, the Affiliated Parties may, through other investments, including other investment funds, have interests in the securities and futures in which the Company invests as well as interests in investments in which the Company does not invest.

Thus, the Offering Memorandum sets forth in considerable detail that Members of the Managing Member:

(1) may conduct securities business in competition with the Fund;

(2) may make and maintain investments that employ strategies similar or different to those of the Fund; and

(3) may have interests in the securities and futures in which the Fund invests as well as interests in investments in which the Fund does not invest.

Put differently, these documents fully disclosed those actions of Respondent that are now at issue. Notably, these disclosures appeared in the Operating Agreement, as well as the Offering Memorandum, in advance of the Fund commencing operations and in advance of investors investing in the Fund. Thus, the disclosures allowed all relevant parties to make an informed decision about whether to participate in the Fund, given that Respondent Gibson, as well as others, could place trades in competition with the Fund. In short, there is no evidence that Respondent Gibson sought to engage in a manipulative or deceptive act, and therefore, there are no violations of the antifraud provisions of the securities laws.

Further, the Division of Enforcement failed to prove that Respondent engaged in conduct that constitutes front running. As discussed above, the Division of Enforcement failed to cite controlling precedent regarding the elements of front running. Rather, the Division of

Enforcement cited one case (*SEC. v. Yang,* 999 F. Supp. 2d 1007 (N.D. Ill. 2013)) that has no precedential value as it involved a denial of a motion to dismiss, and one case (*SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180 (1963)) that involved a practice referred to as "scalping," rather than front running. Further, the Division of Enforcement cited two treatises that defined front running in different terms.

Moreover, Respondent's sales of TRX securities and purchase of TRX puts because at the time of his transactions the Fund had not placed an order to sell TRX securities that Respondent could front run. Rather, at the time of his transactions, the Fund was exploring the possibility of entering into negotiated transactions in the upstairs market, and as discussed above, many of Respondent's efforts to enter into negotiated transactions were unsuccessful, demonstrating that, at the time of his transactions there did not exist orders that one could front run.

Moreover, information regarding the Fund's interest in discussing negotiated transactions at current prices was disclosed to market participants and therefore was not non-public information of which someone could take advantage. As discussed above, Respondent communicated with Richard Sands regarding TRX securities and he, in turn, communicated with persons who held TRX securities. The Fund did not have a relationship with Casimir Capital at the time Respondent initiated communications with Mr. Sands. Accordingly, the fund's interest in discussing a possible transaction was not non-public information.

The Division of Enforcement's invocation of "scheme liability" does nothing to revive a failed attempt to prove that Respondent violated the securities laws by engaging in transactions in TRX securities. The Division of Enforcement cites three cases in support of its "scheme liability" argument, but none provide such support. In *Stoneridge Investment Partners, LLC v.*

Scientific –Atlanta, Inc., 552 U.S. 148 (2008), the Supreme Court considered, in the context of a private action, whether secondary actors could be liable for a public company's " variety of fraudulent practices so its quarterly reports would meet Wall Street expectations for cable subscriber growth and operating cash flow." company regarding revenues. This matter involves alleged violations by Respondent rather than violations by another person which Respondent assisted. In fact, in its brief, the Division of Enforcement states

> By secretly trading for his own account and accounts he controlled (and advising his father to make trades) based on his knowledge of confidential information regarding GISF' intended large block sales, Gibson used a 'device, scheme or artifice to defraud" within the scope of Rule 10b-5(a) and engaged in acts and practices that operated as a fraud within the scope of Rule 10b-5(c).

Thus, *Stoneridge* is inapposite to this matter.

The Division of Enforcement's reliance upon *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450 (2d Cir. 1996) is equally unavailing for its invocation of scheme liability in this matter. The Division of Enforcement includes, in its brief, states "Scheme liability extends to those 'who had knowledge of the fraud and assisted in its perpetration.' First Jersey Sec., 101 F.3d at 1471." However, the quote is taken from the part of decision in which the court is discussing an individual's liability for violations by an entity with which he is associated. Again, in this matter, the Division of Enforcement must prove that Respondent violated the securities laws, not that he participated in a violation by another person to the extent that he may also be liable as a primary violator. Thus, *First Jersey* does not advance the Division of Enforcement's cause in any way.

The remaining case cited by the Division of Enforcement, *SEC v. Brown,* 740 F. Supp. 2d 148 (D.D.C. 2010) involves a motion to dismiss. As discussed above, the denial of a motion to dismiss has no precedential value.

RESPONDENT DID NOT ACT WITH THE REQUISITE MENTAL STATE

To establish that Respondent Gibson violated the Investment Advisers Act, the Securities Exchange Act or the rules thereunder, the Division of Enforcement must prove that Respondent acted with the requisite mental state. Section 206(1) and Section 10(b) and Rule 10b-5 require proof of scienter, [34] while Section 206(2) and 206(4) and Rule 206(4)-8 require proof of negligence.[35] Whether the Division of Enforcement is required to prove that Respondent acted with scienter or negligently, it has not done so. Evidence admitted at the hearing established that the Offering Memorandum and the Operating Agreement contained extensive disclosures regarding potential conflicts of interest, Respondent Gibson was well aware of the disclosures contained in the Offering Memorandum and Operating Agreement, and the transactions in TRX stock and options and the Hull Transaction were entirely consistent with such disclosures. Accordingly, the Division of Enforcement failed to establish the requisite mental state. Moreover, evidence admitted during the hearing established that Respondent Gibson did not engage in front running or favor Mr. Hull over the Fund in violation of the Investment Advisers Act or the Securities Exchange Act or rules thereunder.

RESPONDENT CANNOT BE LIABLE FOR THE PUT TRANSACTIONS OF JOHN GIBSON

The Division of Enforcement failed to prove that Respondent is liable for the put transactions of John Gibson. Evidence admitted at the hearing established that Respondent did

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[34] 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.*

[35] To establish negligence, the SEC must show that Mr. 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).)

not violate the Investment Advisers Act or the Securities Exchange Act in connection with his suggestion to John Gibson that he purchase and sell $4.00 TRX put contracts as a part of John Gibson's liquidation of his position in TRX securities, which were held in an individual retirement account.

Respondent Gibson did not purchase or sell the $4.00 TRX put contracts. Similarly, he did not exercise discretion with respect to John Gibson's purchase or sale of the $4.00 put contracts in his individual retirement account. And the Division of Enforcement failed to prove that Respondent and John Gibson had an advisory relationship.

Further, evidence admitted during the hearing established that Respondent suggested that John Gibson buy and sell put contracts as a part of his liquidation of his position in TRX securities as part of a liquidation strategy. In that regard, Respondent suggested that, at the same time, John Gibson place one order to purchase $4.00 TRX put contracts, sell his TRX securities and sell the put contracts, which he did. However, the order was not executed as suggested by Respondent Gibson or as placed by John Gibson. Mr. Gibson followed Respondent's suggestion and placed one order to buy puts, sell stock and sell puts. However, PNC did not execute the order in accordance with Mr. Gibson's instructions. Instead, PNC purchased the puts, but only sold 10,000 of Mr. Gibson's 46,000 TRX shares on the day he placed the order. The next day, PNC executed the remainder of Mr. Gibson's order by selling 36,000 TRX shares and the $4.00 TRX put contracts.

Also, John Gibson, at the time he liquidated his position in TRX securities (which included his put transactions), was a Member of the Geier Fund and a member of Geier Capital. As discussed above, the Fund's Operating Agreement permitted Fund Members to conduct "any other business, including any business within the securities industry, whether or not such

business is in competition with the Company." And the Operating Agreement further provided 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 or stockholder of one or more investment funds, partnerships, securities firms or advisory firms." Thus, under relevant provisions of the Operating Agreement, John Gibson was permitted to engage in the liquidation of his position in TRX securities.

Moreover, John Gibson experienced a loss on his position in TRX securities, and proceeds of the purchase and sale of the puts cannot be viewed as separable transactions, as the transactions were part of a strategy to liquidate John Gibson's position in TRX securities.

Finally, as discussed above, neither Geier Capital nor Respondent Gibson was acting as an investment adviser and neither owed duties to the Fund that could be breached in connection with John Gibson's liquidation of his position in TRX securities.

THE DIVISION OF ENFORCEMENT'S WITNESS WAS NOT CREDIBLE

In its Post-Hearing Brief, the Division of Enforcement relies extensively on Dr. Gary Gibbons. Dr. Gibbons' Expert Report contained numerous references to judicial and Commission decisions and Commission releases. Dr. Gibbons' Expert Report also contained numerous representations regarding the understanding of the investment adviser community. Dr. Gibbons' testimony demonstrated that Dr. Gibbons does not have an understanding of the law relevant to this matter and does not have a basis for his representations regarding the universal understanding of the investment adviser community.

In his report, Dr. Gibbons stated "it is widely understood in the investment advisory community that an advisor's federal fiduciary duties cannot be abrogated, delegated, transferred

or in any other way eliminated or reduced, unilaterally or by agreement." Div. Ex. 185 at p. 18. Dr. Gibbons clearly is inaccurate regarding an investment adviser's federal fiduciary duties. As discussed above, Section 211(g) of the Investment Advisers Act, added by Section 913 of the Dodd Frank Act, provides that investment advisers may disclose material conflicts of interest and clients may consent to such conflicts. It is beyond dispute that Congress, in amending the Investment Advisers Act, confirmed that an agreement between an investment adviser and its client regarding conflicts of interest may be modified by private agreement.

Section 913 of the Dodd Frank Act also directed the Commission to conduct a study to evaluate the effectiveness of existing standards of care of brokers, dealers and investment advisers imposed by the Commission and other regulatory authorities and whether there are legal or regulatory gaps in the protection of retail customers relating to the standard of care which should be addressed by rule or statute. The Staff of the Securities and Exchange Commission conducted the study mandated by the Dodd Frank Act, in which it discussed the Commission's position regarding fiduciary duties of investment advisers. The Staff stated that Dodd-Frank Act Section 913(g) addresses the duty of loyalty in that it provides that, [i]n accordance with such rules [that the Commission may promulgate with respect to the uniform fiduciary standard] . . . any material conflicts of interest shall be disclosed and may be consented to by the customer." 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."

Dr. Gibbons also stated in his report that "before the fact" disclosures regarding potential conflicts of interest were insufficient, but rather an investment adviser must make disclosures regarding conflicts of interest at the time that the conflicts arose. Expert Report of Gary

Gibbons, PhD. at p. . However, the Staff, in its report pursuant to Section 913 of the Dodd Frank Act, 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. Thus, according to the Commission Staff, the Investment Advisers Act and the rules thereunder did not prescribe specific requirements regarding the timing of disclosures for particular conflicts of interest. Thus, Dr. Gibbons again demonstrated a complete misconception regarding the timing of disclosures relating to conflicts of interest.

As the foregoing demonstrates, Dr. Gibbons has demonstrated that he is unfamiliar with the law relating to investment advisers as enacted by Congress. Accordingly, he is not qualified to render an opinion regarding the duties and obligations of investment advisers, nor is he qualified to speak for the investment adviser community.

SANCTIONS AND RELIEF

These proceedings were instituted pursuant to pursuant Section 21C of the Securities Exchange Act, Sections 203(f) and (k) of the Investment Advisers Act and Section 9(b) of the Investment Company Act. Section 203(f) permits the imposition of administrative sanctions against certain persons associated or seeking to become associated with an investment adviser. However, a central tenet of the Division of Enforcement's theory of liability is that Respondent Gibson acted as an investment adviser to the Geier Fund. (DOE Brief at 1). The Division of Enforcement attempts to overcome this threshold problem by claiming that it can offer proof that Respondent violated Section 206 "which would necessarily include a finding that he was an investment adviser" (DOE Brief at 25) and that a sanction could be imposed pursuant to Section 203(f), "which authorizes the Commission to bar any person who was been (sic) associated with an investment adviser from future

involvement in the securities industry." (DOE Brief at 25). The Division of Enforcement has blatantly misstated the scope of Section 203(f) of the Investment Advisers Act. Section 203(f) provides that the Commission's administrative jurisdiction extends to persons who are or are seeking to become associated with an investment adviser or a person who was associated or seeking to become associated at the time of the alleged misconduct.

The Division of Enforcement has failed to identify in its proposed findings of fact and conclusions of law, the investment adviser with which Respondent is or was associated. Rather the Division of Enforcement has steadfastly proclaimed that Respondent was acting as an investment adviser. And the Division of Enforcement is unable now to identify an investment adviser with which Respondent Gibson is or was associated or seeking to become associated, because it has proposed findings that Geier Capital, LLC and Geier Group, LLC were dissolved. In any event, neither Geier Capital nor Geier Group received compensation after September 30, 2011 and could no longer meet the definition of investment adviser when the most of the conduct at issue occurred.

With respect to other administrative orders, cease-and-desist orders, disgorgement or civil penalties, the Division of Enforcement is not entitled to such relief as it has failed to prove that Respondent violated the Securities Exchange Act or the Investment 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.

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, 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,believed to be in the interest of the Fund as opposed to the interest of Mr. 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 Gibson 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.

The imposition of sanctions or other relief is further precluded because (i) this administrative proceeding violates Respondent's right to due process under the Constitution as the administrative procedures are unconstitutionally inadequate; (ii) this administrative proceeding violates Respondent's right to equal protection of the laws under the Constitution; (iii) this administrative proceeding violates Respondent's right to a jury trial under the Seventh Amendment of the Constitution; and (iv) claims are barred by the applicable statute of limitations.

CONCLUSION

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

Respectfully submitted this 29th day of November, 2016.

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CERTIFICATE OF SERVICE

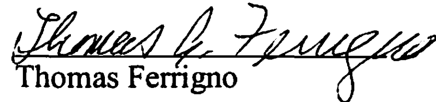
I hereby certify that on this 29th day of November, 2016:

(i) an original and three copies of the foregoing Post Hearing Brief were filed by hand-delivery 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.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