

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 84919 / December 21, 2018

INVESTMENT ADVISERS ACT OF 1940
Release No. 5091 / December 21, 2018

INVESTMENT COMPANY ACT OF 1940
Release No. 33338 / December 21, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-15141

In the Matter of

MOHAMMED RIAD AND
KEVIN TIMOTHY SWANSON

Respondents.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS AND A
CEASE-AND-DESIST ORDER PURSUANT
TO SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, SECTIONS 203(f)
AND 203(k) OF THE INVESTMENT
ADVISERS ACT OF 1940, AND SECTIONS
9(b) AND 9(f) OF THE INVESTMENT
COMPANY ACT OF 1940**

I.

On December 19, 2012, the Securities and Exchange Commission (“Commission”) instituted public administrative and cease-and-desist proceedings pursuant Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (“Investment Company Act”) against Respondents Mohammed Riad and Kevin Timothy Swanson (“OIP”). After an initial decision was issued in this matter and the Commission issued an Opinion following Respondents’ petition for review of the initial decision, Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit, who remanded the case to the Commission for rehearing pursuant to the Supreme Court’s decision in *SEC v. Lucia*, 138 S. Ct. 2044 (2018).

II.

Respondents have submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings

brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein or the allegations in the OIP, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"), as set forth below.

Respondents and the Division recognize that, according to *Lucia v. SEC*, 138 S. Ct. 2044 (2018), Respondents are entitled to a "new hearing" before "another ALJ (or the Commission itself)." 138 S. Ct. at 2055. Respondents knowingly and voluntarily waive any claim or entitlement to such a new hearing before another administrative law judge ("ALJ") or the Commission itself. Respondents also knowingly and voluntarily waive any and all challenges to the administrative proceedings or any and all orders that were issued during or at the conclusion of those proceedings, whether before the ALJ, the Commission, or any court, based upon any alleged or actual defect in the appointment of ALJ Carol Fox Foelak.

III.

On the basis of this Order and Respondents' Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of Respondents' management of the Fiduciary/Claymore Dynamic Equity Fund ("HCE" or the "Fund"), a closed-end fund that, according to its registration statement, purported to principally employ a covered call investment strategy. Beginning in July 2007, Riad caused the Fund to regularly employ two new types of derivative instruments that Respondents expected would contribute substantially to the Fund's performance, but that also exposed the Fund to a substantial risk of losses in the event of market turmoil or a sharp decline in stock prices. Despite this change, in the Fund's 2007 annual report and 2008 semi-annual report, Respondents mischaracterized the Fund as being "hedged," when in fact the use of these new kinds of derivatives added risk. Respondents' description of how the Fund would pursue its investment objective was misleading in that it failed to discuss the Fund's systematic, ongoing use of these instruments. Furthermore, Respondents misled by omission by not mentioning the derivatives in their descriptions of what contributed to the Fund's performance in the 2007 annual report and 2008 semi-annual report. Use of these derivatives eventually led to investor losses of \$45 million in the fall of 2008.

¹ The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Respondents

2. **Mohammed Riad**, age 49, resides in Clayton, Missouri. During 2007 and 2008, Riad was Managing Director and Senior Portfolio Manager at Fiduciary Asset Management, LLC (“FAMCO”). Riad was portfolio manager of HCE from its inception until October 2008. Riad also became a Vice President of HCE in 2007. From 2011 to 2014, Riad was the Chief Executive Officer of a Missouri-registered investment advisory firm located in St. Louis, Missouri. Riad has held Series 7, 8, 63, and 65 licenses.

3. **K. Timothy Swanson**, age 51, resides in University City, Missouri. During 2007 and 2008, Swanson was a portfolio manager at FAMCO and served as a co-portfolio manager of HCE with Riad. Between 2011 and 2012, Swanson served as the Chief Investment Officer for an investment adviser located in St. Louis, Missouri. Swanson formerly held a Series 7 license.

Procedural History

4. The Commission commenced this proceeding on December 19, 2012, with an order instituting administrative and cease-and-desist proceedings pursuant to Section 21C of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act.

5. The matter was assigned to ALJ Carol Fox Foelak.

6. On April 21, 2014, the ALJ issued an initial decision. Respondents filed a petition for review of initial decision to the Commission, and the Division of Enforcement and Respondents filed briefs with the Commission.

7. On June 13, 2016, the Commission issued an Opinion, later corrected on June 20, 2016 and amended on July 7, 2016, which (1) found that Respondents willfully violated Exchange Act Section 10(b) and Rule 10b-5 and Investment Company Act Section 34(b) and willfully aided and abetted and caused violations of Advisers Act Section 206(4) and Rule 206(4)-8 thereunder and Investment Company Act Section 34(b); (2) found that Respondent Riad caused violations of Investment Company Act Rule 8b-16; (3) ordered Respondents to cease and desist from committing and causing such violations; (4) ordered Respondent Riad to disgorge a total of \$128,091.81 in ill-gotten gains plus prejudgment interest; (5) ordered Respondents to each pay civil money penalties of \$130,000; (6) barred Respondent Riad from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and prohibited Respondent Riad from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and (7) barred Respondent Swanson from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent, with the right to apply for reentry after two years; and prohibited Respondent Swanson from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or

principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, with the right to apply for reentry after two years.

8. Respondents filed a motion to stay the Commission's order pending its circuit court appeal, which the Commission granted with respect to monetary sanctions but denied as to the non-monetary sanctions.

9. On August 4, 2016, Respondents filed a petition for review to the United States Circuit Court for the District of Columbia Circuit. Respondents filed their opening brief in January 2017.

10. On February 24, 2017, on the request of the Commission, the Circuit Court stayed the proceedings pending the Circuit Court's *en banc* review of *Lucia v. SEC*, and continued the stay pending the United States Supreme Court's review of *Lucia v. SEC*.

11. On June 21, 2018, the United States Supreme Court decided *Lucia v. SEC*, 138 S. Ct. 2044 (2018), in which the Court held, *inter alia*, that the Commission's ALJs were not constitutionally appointed, and respondents impacted by the constitutional infirmity, such as Respondents here, are entitled to a "new hearing" before "another ALJ (or the Commission itself)." 138 S. Ct. at 2055.

12. On September 19, 2018, the Circuit Court granted a joint motion to remand this proceeding and set aside the Commission's decision and order entered on July 7, 2016.

Violations

13. As a result of the conduct summarized above and detailed in the OIP, which Respondents neither admit nor deny, Respondents willfully² violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 34(b) of the Investment Company Act; willfully aided and abetted and caused FAMCO's violations of Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder; and willfully aided and abetted and caused HCE's violations of Section 34(b) of the Investment Company Act.

14. As a result of the conduct summarized above and detailed in the OIP, which Respondents neither admit nor deny, Respondent Riad caused HCE's violations of Investment Company Act Rule 8b-16.

² A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Section 21C of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Riad cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, and Section 34(b) of the Investment Company Act, and from causing any violations and any future violations of Investment Company Act Rule 8b-16.

B. Respondent Swanson cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, and Section 34(b) of the Investment Company Act.

C. Respondent Riad be, and hereby is:

barred, from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter;

with the right to apply for reentry after two (2) years from an effective date of June 13, 2016 (the date of the original Commission Opinion and Order in this matter), to the appropriate self-regulatory organization, or if there is none, to the Commission.

D. Any reapplication for association by Respondent Riad will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent Riad, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

E. Respondent Swanson be, and hereby is suspended from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent for the period of twelve (12) months following June 13, 2016 (the date of the original Commission Opinion and Order in this matter).

F. Respondent Swanson is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter for the period of twelve (12) months following June 13, 2016 (the date of the original Commission Opinion and Order in this matter).

G. Respondent Riad shall, within ten (10) days of the entry of this Order, pay disgorgement of \$75,000 and a civil money penalty of \$25,000 to the Securities and Exchange Commission. The Commission may distribute civil money penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds or, subject to Exchange Act Section 21F(g)(3), transfer them to the general fund of the United States Treasury. If timely payment of disgorgement is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600, and if timely payment of the civil money penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

H. Respondent Swanson shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of \$15,000 to the Securities and Exchange Commission. The Commission may distribute civil money penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds or, subject to Exchange Act Section 21F(g)(3), transfer them to the general fund of the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

I. Payment must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Mohammed Riad and/or Kevin Timothy Swanson as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Robert J. Burson, Senior Associate Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 1450, Chicago, IL 60604.

J. Regardless of whether the Commission in its discretion orders the creation of a Fair Fund for the penalties ordered in this proceeding, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondents, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondents under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondents of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Brent J. Fields
Secretary