UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6585 / April 12, 2024

INVESTMENT COMPANY ACT OF 1940
Release No. 35170 / April 12, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-21906

In the Matter of **GEA SPHERE, LLC,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) 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 Gea Sphere, LLC ("GeaSphere" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent 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, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

1. This matter involves violations of the Advisers Act and the Investment Company Act by GeaSphere, a registered investment adviser, including GeaSphere's failure after November 4, 2022 to comply with amendments to Advisers Act Rule 206(4)-1 that the Commission adopted in December 2020 (the "Amended Marketing Rule"). GeaSphere violated various provisions of the Amended Marketing Rule, including by making false and misleading claims about its performance, failing to present net performance information alongside gross performance, being unable to substantiate performance claims upon demand by the Commission, advertising hypothetical performance on its public website without adopting and implementing required policies and procedures, and failing to enter into written agreements with persons giving compensated endorsements. In addition, GeaSphere made misleading statements about its performance to its registered investment company client, which were incorporated in the client's prospectus that was filed with the Commission in October 2021. Further, GeaSphere did not maintain copies of advertisements that appeared on its website, nor did GeaSphere maintain books and records demonstrating the calculation of performance in its advertisements. GeaSphere also failed to conduct an annual review of its compliance policies and procedures required under Commission rules and failed to implement certain of those policies and procedures.

Respondent

2. **Gea Sphere, LLC**, doing business as GeaSphere Advisors, is a Delaware limited liability company with its principal place of business in Cranston, Rhode Island. GeaSphere has been registered with the Commission as an investment adviser since October 8, 2021. GeaSphere is an investment adviser to retail clients and the Fund, as defined below. In its Form ADV filed on April 11, 2023, GeaSphere reported that it had approximately $86 million in regulatory assets under management.

Other Relevant Entities

3. **The Alpha Dog ETF** (the **"Fund"**), a series of ETF Opportunities Trust, is an investment company that registered with the Commission on October 12, 2021. The Fund trades on the NYSE Arca (RUFF). As of September 30, 2023, the Fund had approximately $51 million in net assets. The Fund is a "pooled investment vehicle" as defined in Rule 206(4)-8 under the Investment Advisers Act of 1940, as it is an investment company as defined in Section 3(a) of the Investment Company Act of 1940.

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

Facts

Amended Marketing Rule Failures

4. On December 22, 2020, the Commission adopted significant amendments to Advisers Act Rule 206(4)-1, which governs marketing by Commission-registered investment advisers. *See Investment Adviser Marketing*, Release No. IA-5653 (Dec. 22, 2020) (effective May 4, 2021). The Commission set a deadline of November 4, 2022 (the "Compliance Date"), eighteen months after the amendments' effective date of May 4, 2021, for registered investment advisers to come into compliance with the Amended Marketing Rule. *See id.* at 252.

5. Among other things, the Amended Marketing Rule states that it is unlawful for registered investment advisers, directly or indirectly, to disseminate any advertisement[2] that includes:

- any untrue statement of a material fact, or omits to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading, *see* Advisers Act Rule 206(4)-1(a)(1);

- any material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Commission, *see* Advisers Act Rule 206(4)-1(a)(2);

- any endorsement, and prohibits an adviser from providing compensation (other than *de minimis* compensation), directly or indirectly, for an endorsement, unless the adviser has a written agreement with any person giving an endorsement that describes the scope of the agreed-upon activities and the terms of compensation for those activities, *see* Advisers Act Rule 206(4)-1(b);

- any presentation of gross performance, unless the advertisement also presents net performance: (i) with at least equal prominence to, and in a format designed to facilitate comparison with, the gross performance; and (ii) calculated over the same time period, and using the same type of return and methodology, as the gross performance, *see* Advisers Act Rule 206(4)-1(d)(1); or

- any hypothetical performance, unless the registered investment adviser "(i) adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement; (ii) provides sufficient information to enable the

[2] The Amended Marketing Rule defines an "advertisement," in pertinent part, to include "[a]ny direct or indirect communication an investment adviser makes . . . to one or more persons if the communication includes hypothetical performance, that offers the investment adviser's investment advisory services with regard to securities to prospective clients . . . or offers new investment advisory services with regard to securities to current clients." Advisers Act Rule 206(4)-1(e)(1).

intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and (iii) provides . . . sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions . . . ." *See* Advisers Act Rule 206(4)-1(d)(6). "Hypothetical performance" is defined as "performance results that were not actually achieved by any portfolio of the investment adviser" and includes, but is not limited to, performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods. *See* Advisers Act Rule 206(4)-1(e)(8)(i)(B).

6. From the Compliance Date, GeaSphere disseminated material on its public website and social media sites that constituted advertisements, and that contained false and misleading statements in violation of Rule 206(4)-1(a)(1). For example, on its public website and on various social media sites, GeaSphere included a promotional video called "The GeaSphere Difference" that made false and misleading statements. Those statements included claims that, unlike clients of other investment advisers who invest in mutual funds and pay the fund's management fees as well as advisory fees to their investment advisers, GeaSphere does not "charge clients twice." In fact, individual clients of GeaSphere who invested in the Fund also paid both a fund management fee, which was a percentage of the value of their investment in the Fund, and an advisory fee to GeaSphere, which was a percentage of the value of their assets managed by GeaSphere, including any amounts invested in the Fund. The video also claimed falsely that money invested with GeaSphere "is never commingled with other clients the way it is with mutual funds." In fact, GeaSphere clients' money invested in the Fund was commingled with that of other Fund investors, including other clients of GeaSphere.

7. GeaSphere also advertised certain factsheets on its public website that depicted misleading model portfolio performance in one or more of the following ways. *First*, some of the factsheets compared the model portfolio performance to the S&P 500 Index as a benchmark, yet the factsheets showed the benchmark's price returns rather than showing total returns with dividends reinvested, which was how the model portfolio performance was calculated. *Second*, although GeaSphere used tracking accounts to calculate the performance shown in the factsheets, these factsheets presented performance that was consistently inaccurate, in some cases overstated and in some cases understated. *Third*, certain factsheets presented gross performance without also presenting net performance, in violation of Rule 206(4)-1(d)(1). Although the factsheets were created by third-party vendors, GeaSphere advertised the factsheets on its public website.

8. GeaSphere made material statements of fact in certain advertisements without being able to produce substantiating documents upon demand by the Commission in violation of Rule 206(4)-1(a)(2). Specifically, GeaSphere was not able to produce records substantiating the performance shown in the factsheets and was not able to substantiate the claim made in "The GeaSphere Difference" video that its models "outperform[ed] the market over most time frames, even as we assume less risk over those same periods."

9. In addition, GeaSphere's advertisements on its public website included hypothetical performance that consisted of performance derived from model portfolios and performance that

was backtested by applying strategy to data from prior time periods when the strategy had not actually been used. *See* Rule 206(4)-1(e)(8)(i)(B). Specifically, GeaSphere advertised the GeaSphere Price to Full Cash Flow (PFCF) Dow Portfolio, which showed backtested performance results for the years 1950 to 2009, prior to the strategy's commencement in 2011. While advertising hypothetical performance after the Compliance Date, GeaSphere failed to adopt and implement policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. As a result, GeaSphere disseminated hypothetical performance in an advertisement to a mass audience rather than presenting hypothetical performance relevant to the likely financial situation and investment objectives of the intended audience. *See Investment Adviser Marketing*, Release No. IA-5653 at 220 (Dec. 22, 2020) ("[A]dvisers generally would not be able to include hypothetical performance in advertisements directed to a mass audience or intended for general circulation . . . because the advertisement would be available to mass audiences, an adviser generally could not form any expectations about their financial situation or investment objectives.").

10. After the Compliance Date, GeaSphere also paid more than $1,000 to each of two unaffiliated accounting firms for endorsements to obtain clients through referrals. However, GeaSphere did not have a written agreement with either firm providing the endorsements, thereby violating Advisers Act Rule 206(4)-1(b).

GeaSphere's Misstatements to the Fund

11. GeaSphere made misleading statements to the Fund regarding the performance of a tracking account that it advised, which the Fund incorporated in a prospectus filed with the Commission on October 12, 2021. Specifically, GeaSphere provided the Fund with performance data to illustrate GeaSphere's past performance in managing a fully discretionary private account that had a strategy similar to the Fund's expected strategy. GeaSphere represented to the Fund that the performance data showed net performance, when, in fact, advisory fees were not charged to the account. The Fund filed a subsequent prospectus on January 28, 2023, which did not include the aforementioned performance information.

12. In addition, GeaSphere provided the Fund with performance data that compared the private account data to a benchmark index (the S&P 500 Index) that showed price returns only, rather than showing total returns inclusive of reinvested dividends as the private account data showed. The use of price returns only, with no disclosure, coupled with the fact that the performance data presented did not include the charging of fees, gave a misleading impression of GeaSphere's performance relative to the index. GeaSphere reviewed and approved the performance data that was included in the Fund's prospectus filed on October 12, 2021 with the Commission.

Books and Records Failures

13. GeaSphere failed to keep copies of advertisements published on its public website and did not maintain records or documents necessary to form the basis for or demonstrate the

calculation of the model portfolio performance included in the factsheets that were advertised on GeaSphere's public website.

Other Compliance Failures

14. GeaSphere failed to implement certain compliance policies and procedures in its compliance manual. For example, GeaSphere's compliance manual required that the Chief Compliance Officer review and approve all marketing materials in writing prior to dissemination and maintain a log of any such approvals. In addition, GeaSphere's compliance manual required any person giving an endorsement for compensation to provide referred individuals with certain disclosures and required GeaSphere to obtain written confirmation that the referred individual did in fact receive the disclosures. GeaSphere failed to implement any of these policies and procedures. GeaSphere also has failed to conduct an annual review of the adequacy of its investment advisory compliance program or the effectiveness of its implementation since its registration with the Commission in October 2021.

Violations

15. As a result of the conduct above, Respondent willfully[3] violated Section 206(4) of the Advisers Act and Rules 206(4)-1(a), 206(4)-1(b), and 206(4)-1(d) thereunder.

16. As a result of the conduct described above, Respondent willfully violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser, directly or indirectly, to "engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client." Scienter is not required to establish a violation of Section 206(2), but rather a violation may rest on a finding of negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194-95 (1963)).

17. As a result of the conduct described above, Respondent willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which make it unlawful for any investment adviser to a pooled investment vehicle to "make any untrue statement of a material fact or to omit 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 the pooled investment vehicle; or [o]therwise engage 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." A showing of negligence is sufficient to establish a violation of Section 206(4) of the Advisers Act or Rule 206(4)-8 thereunder; proof of scienter is not required. *Steadman*, 967 F.2d at 647.

[3] "Willfully," for purposes of imposing relief under Section 203(e) of the Advisers Act and Section 9(b) of the Investment Company Act, "'means no more than 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." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965).

18. As a result of the conduct described above, Respondent willfully violated Section 34(b) of the Investment Company Act, which makes it unlawful for any person to make any untrue statement of a material fact in any registration statement, or other document filed or transmitted pursuant to the Investment Company Act, or for any person so filing or transmitting to omit to state therein any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading. Establishing a violation of 34(b) of the Investment Company Act does not require proof of scienter. *In the Matter of Fundamental Portfolio Advisors, Inc.*, Advisers Act Rel. No. 2146, 2003 WL 21658248, at *8 (July 15, 2003).

19. As a result of the conduct described above, Respondent willfully violated Section 204 of the Advisers Act and Rules 204-2(a)(11) and (16) thereunder, which require registered investment advisers to preserve in an easily accessible place copies of all advertisements and records or documents necessary to form the basis for or demonstrate the calculation of any performance of any or all managed accounts, portfolios, or securities recommendations included in advertisements.

20. As a result of the conduct described above, Respondent willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require a registered investment adviser to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder and to review, no less frequently than annually, the adequacy of its compliance policies and procedures established pursuant to Rule 206(4)-7 and the effectiveness of their implementation.

Remedial Steps

21. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by GeaSphere and the cooperation afforded the Commission staff, including its prompt removal of advertisements that violated the Amended Marketing Rule from its public website and/or social media sites, voluntary decision to terminate its existing referral arrangements and/or reduce them to writing, voluntary notification to the Fund that the Fund's initial prospectus contained inaccurate and misleading performance information and voluntary retention of a compliance consultant to conduct an annual compliance review, conduct compliance training for all employees, review and revise GeaSphere's compliance manual and otherwise assist in compliance matters.

Undertakings

22. Respondent has undertaken to:

a. Within 30 days of the entry of this Order, to the extent Respondent plans to disseminate advertisements that contain hypothetical performance, evaluate, update, and review for the effectiveness of their implementation, Respondent's policies and procedures concerning advertisements that include hypothetical performance to ensure that

Respondent's policies and procedures are reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement.

b. Within 30 days of the entry of this Order, conduct an annual compliance review and complete compliance training.

c. Within 40 days of the entry of this Order, certify, in writing, compliance with the undertakings ordered pursuant to Section IV.C. below. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Colin Forbes, Assistant Director, Asset Management Unit, Securities and Exchange Commission, 33 Arch Street, Boston, MA 02110.

d. For good cause shown, the Commission staff may extend any of the procedural dates relating to these undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

IV.

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

Accordingly, pursuant to Sections 203(e) 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 cease and desist from committing or causing any violations and any future violations of Sections 206(2), 206(4), and 204 of the Advisers Act and Rules 206(4)-1, 206(4)-7, 206(4)-8, and 204-2 thereunder, and Section 34(b) of the Investment Company Act.

B. Respondent is censured.

C. Respondent shall comply with the undertakings enumerated in Section III, paragraphs 22.a through .d above.

D. Respondent shall pay a civil money penalty in the amount of $100,000 to the Commission for transfer to the general fund of the United States Treasury, subject to the Securities Exchange Act of 1934 Section 21F(g)(3). Payment shall be made in the following installments: within 10 days of the entry of this Order, Respondent shall pay $25,000 of the civil penalty amount; thereafter, Respondent shall pay three additional installments of $25,000 each with the first additional installment to be paid within 120 days of the entry of this Order, the second additional installment to be paid within 240 days of the entry of this Order, and the third additional

installment to be paid within 360 days of the entry of this Order, plus all accrued interest. Payments shall be applied first to post-order interest, which accrues pursuant to 31 U.S.C. §3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request.

(2) Respondent 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) Respondent 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
Account 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 Gea Sphere, LLC as a Respondent in these proceedings, and the file number of the proceedings; a copy of the cover letter and check or money order must be sent to Colin Forbes, Assistant Director, Asset Management Unit, Securities and Exchange Commission, 33 Arch Street, Boston, MA 02110, or such other address as the Commission staff may provide.

E. 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, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it 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 Respondent 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.

By the Commission.

Vanessa A. Countryman
Secretary