Initial Decision Release No. 1398
Administrative Proceeding
File No. 3-17184

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

In the Matter of

Christopher M. Gibson

Initial Decision
March 24, 2020

Appearances: Nicholas C. Margida, Gregory R. Bockin, George J. Bagnall, and Paul J. Bohr for the Division of Enforcement, Securities and Exchange Commission

Thomas A. Ferrigno, Stephen J. Crimmins, and Elizabeth L. Davis, Murphy & McGonigle PC, and David E. Hudson, Hull Barrett PC, for Respondent

Before: James E. Grimes, Administrative Law Judge

Summary

Christopher M. Gibson was an investment adviser to Geier International Strategies Fund, LLC (the Fund), that had invested virtually all its assets in a single security, the common stock of Tanzanian Royalty Exploration Corporation (TRX). The Division of Enforcement alleges that Gibson engaged in three courses of conduct that breached his fiduciary duties to his client fund and created undisclosed conflicts of interest, in violation of the antifraud provisions of the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, and rules under those Acts.

First, Gibson engaged in a practice known as front running. The day before he executed a large block sale of the Fund's position in TRX, he sold all the TRX shares in his personal brokerage account and two other accounts he controlled. Gibson did this while actively seeking to sell the Fund's position in TRX.

Second, Gibson caused the Fund to buy a large block of additional TRX shares from the Fund's majority owner in a private transaction. He later sold those shares with the Fund's remaining shares in a market transaction. Gibson operated under a conflict of interest when he executed this transaction; the investor effectively paid Gibson's salary, and Gibson owed him a substantial debt at the time.

Third, Gibson engaged in another instance of front running. He bought put options in TRX for himself and his then-girlfriend, and he advised his father to do the same, while knowing that the fund sought to sell its remaining TRX shares. He then sold the Fund's remaining TRX shares before the expiration date of the personal put contracts. This sale caused a drop in TRX's share price. Gibson, his girlfriend, and his father exercised their put options the same day.

The evidence establishes that Gibson recklessly breached his fiduciary duties and failed to either eliminate or disclose conflicts of interest. I therefore find that Gibson violated Advisers Act Section 206(1), (2), and (4) and Rule 206(4)-8, and Exchange Act Section 10(b) and Rule 10b-5(a) and (c).[1]

For sanctions, I order Gibson to cease and desist from further violations of the securities laws he violated; prohibit Gibson from the activities listed in Section 9(b) of the Investment Company Act of 1940 and bar him from the securities industry under Advisers Act Section 203(f), with the right to reapply for reentry after three years for both sanctions; order disgorgement of $82,088.81 plus prejudgment interest; and impose second-tier civil penalties totaling $102,000.

Procedural Background

The Commission initiated this proceeding in March 2016 with an order instituting proceedings (OIP) under Exchange Act Section 21C, Advisers Act Section 203(f) and (k), and Investment Company Act Section 9(b).[2] The OIP alleges that Gibson committed securities fraud through the three instances of conduct summarized above.

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1 15 U.S.C. §§ 78j(b), 80b-6(1), (2), (4); 17 C.F.R. §§ 240.10b-5, 275.206(4)-8.

2 15 U.S.C. §§ 78u-3, 80a-9(b), 80b-3(f), (k).

An administrative law judge held a hearing in 2016 and issued an initial decision in 2017.[3] In August 2018, following the Supreme Court's decision in *Lucia v. SEC*, the Commission remanded this proceeding, ordered that it be reassigned to an administrative law judge who had not previously participated in the matter, and directed that Gibson be given the opportunity for a new hearing.[4]

I held a one-week hearing in July and August 2019. Post-hearing briefing concluded in October 2019.

The parties stipulated that nine affirmative defenses raised by Gibson alleging constitutional infirmities in this proceeding are preserved for Commission review.[5] I briefly discuss aspects of these constitutional claims at the end of the decision to put matters in context.

In conducting this proceeding, I gave no weight to the opinions, orders, or rulings of the administrative law judge who presided over this proceeding before the Commission's remand.[6]

Motions to Strike

I previously reserved ruling on two motions to strike, one filed by the Division and the other by Gibson. I now DENY both.

The Division asks me to strike all portions of Gibson's proposed findings of fact and conclusions of law containing argument, citing my post-hearing order indicating that I would do so.[7] In this instance, there is no point in removing improper arguments from the record that I can simply ignore or decline to adopt. Similar to a federal bench trial, concerns about confusion or

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[3] *Christopher M. Gibson*, Initial Decision Release No. 1106, 2017 WL 371868 (ALJ Jan. 25, 2017).

[4] *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 WL 4003609, at *1, *4 (Aug. 22, 2018); *see also Lucia v. SEC*, 138 S. Ct. 2044 (2018).

[5] *Gibson*, Admin. Proc. Rulings Release No. 6668, 2019 SEC LEXIS 2319 (ALJ Aug. 29, 2019).

[6] *See Pending Admin. Proc.*, 2018 WL 4003609, at *1.

[7] Div. Reply at 2; Div. Resps. to Resp't's Proposed Findings of Fact & Conclusions of Law at 2 (Oct. 4, 2019); *see Gibson*, Admin. Proc. Rulings Release No. 6648, 2019 SEC LEXIS 1937, at *3 (ALJ Aug. 5, 2019) ("I will strike findings or conclusions that contain argument.").

undue prejudice from improper argument or evidence do not apply in this proceeding.[8] Instead of striking portions of Gibson's findings and conclusions that contain improper argument, I have simply not relied on those points.

Invoking Rule of Practice 152(f), Gibson asks me to strike what he considers "scandalous or impertinent matter" in the hearing record and in the Division's post-hearing brief concerning Gibson's current financial activities as reflected in his recent tax filings.[9] In particular, Gibson wants any insinuation that he has been committing tax fraud excised from the record. The Division opposes the motion, arguing that the portions of testimony and argument objected to by Gibson are not scandalous and are relevant to Gibson's claim of inability to pay and to his credibility.[10]

Rule 152(f) is mirrored, in part, by Rule 12(f) of the Federal Rules of Civil Procedure.[11] In the federal court context, scandalous material "unnecessarily reflects on the moral character of an individual," such as a party or other person, or contains "repulsive language that detracts from the dignity of the court."[12] Impertinent matter "consists of statements that do not pertain, and are not necessary, to the issues in question."[13]

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[8] *See Harris v. Rivera*, 454 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."); *City of Anaheim*, Exchange Act Release No. 42140, 1999 WL 1034489, at *2 (Nov. 16, 1999) ("Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries.").

[9] Resp't's Mot. Pursuant to Rule 152(f) for an Order Striking Scandalous & Impertinent Matter at 1 (Sept. 26, 2019); *see* 17 C.F.R. § 201.152(f).

[10] Div. Opp'n to Resp't's Mot. to Strike at 2–3 (Oct. 2, 2019).

[11] *Compare* 17 C.F.R. § 201.152(f) ("Any scandalous or impertinent matter contained in any brief or pleading or in connection with any oral presentation in a proceeding may be stricken on order of the Commission or the hearing officer."), *with* Fed. R. Civ. P. 12(f) ("The court may strike from a pleading … impertinent, or scandalous matter.")

[12] *Pigford v. Veneman*, 215 F.R.D. 2, 4 (D.D.C. 2003); *see Collura v. City of Philadelphia*, 590 F. App'x 180, 185 (3d Cir. 2014).

[13] *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994).

The only portion of the hearing transcript objected to by Gibson that *might* qualify as scandalous or impertinent is Division counsel's remark that he could prove tax fraud if he wanted to, but was not going to try.[14] I already stated that I would disregard that remark, so I need not strike it.[15] The sentence in the Division's brief suggesting that Gibson's current financial activities are further reason to bar him from the securities industry is not scandalous or impertinent.[16] It is argument, it cites the record, and it has a modicum of relevance. I will not strike it.

Findings of Fact

I base the following factual findings and legal conclusions on the entire record before me and the demeanor of the witnesses who testified at the hearing, applying preponderance of the evidence as the standard of proof.[17] All arguments that are inconsistent with this decision are rejected.

1. Gibson and Hull set up the Fund in 2009 and 2010.

The relevant facts in this case are largely undisputed. But because the implication of the facts is vigorously disputed, I consider in detail what happened and the overall context. Although Gibson is the respondent in this matter, James Hull, the majority owner of the Fund, played a significant part in many of Gibson's actions. I therefore detail Hull's role below as well.

Gibson, now in his mid-thirties, was in his mid and late twenties during the relevant period.[18] He graduated from Williams College in 2006, and immediately started working at Deutsche Bank Securities in New York in the securitized products group.[19] In that position, he worked on auto and mortgage loan securitizations.[20] Gibson left Deutsche Bank in early 2009, took and

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14 Tr. 1516.

15 Tr. 1516–17.

16 Div. Br. 39.

17 *See Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *14 (June 30, 2005), *pet. denied*, 465 F.3d 780 (7th Cir. 2006).

18 Div. Ex. 216 (joint stipulations) ¶ 1.

19 Tr. 76–77.

20 Tr. 76.

passed the series 65 investment adviser exam, and returned to Augusta, Georgia—where he had grown up and where his parents lived.[21]

At that time, Gibson's father, John Gibson, was one of Hull's business partners.[22] John Gibson suggested that Gibson speak to Hull for career advice.[23] Hull founded a real estate development business, then called Hull Land Company, in 1977.[24] By 2010, the firm was called Hull Storey Gibson (as in Gibson's father, John Gibson).[25] Hull's company bought and ran shopping malls around the United States.[26] By all accounts, the various iterations of Hull's companies have been successful. According to one witness, Hull and his partners "made a lot of money" by "cut[ting] … costs to the bone," in part by cutting the number people involved in running the malls.[27] Hull is also quite involved in his community. In 2018, he was chair of the board of regents of the 26-institution university system of Georgia, and he sits on the board of the Augusta University health system and a number of other civic entities.[28]

From an office at Hull Storey Gibson, Gibson initially provided Hull with personal investment advice and helped with Hull's real estate business.[29] Hull and Gibson often discussed investing and Hull became quite interested in Gibson's investment ideas.[30] So he took roughly $20 million he held in accounts

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[21] Tr. 77–79, 1083, 1105. Gibson had previously passed the series 7 and 63 exams. Tr. 78–79.

[22] Tr. 79, 670.

[23] Tr. 1096–97.

[24] Tr. 79, 520.

[25] Tr. 79–80, 520–21.

[26] Tr. 79.

[27] Tr. 1257.

[28] Tr. 668, 679. Additionally, Hull is a member of Augusta National Golf Club, annual host of the Masters Tournament, and home of one of the most famous golf courses in the world. *See* Tr. 143. He was also instrumental in securing government funding for the $100 million Hull McKnight Georgia Cyber Center. Tr. 679; *see* https://georgia.gov/agencies/hull-mcknight-georgia-cyber-center-innovation-and-training.

[29] Tr. 86, 1097–98; Div. Ex. 10.

[30] Tr. 1098–99, 1257.

with two firms and had Gibson manage it.[31] Gibson soon formed the Hull Fund and the Gibson Fund, investment partnerships that principally invested in physical gold and silver.[32] It is apparent that Hull gave Gibson the opportunity to manage his investments in large part because of Hull's business relationship with John Gibson.[33]

Gibson and Hull then began working together to set up the Fund as an investment hedge fund.[34] Before setting up the Fund as a Delaware company in December 2009, Gibson formed Geier Group, LLC, in April 2009, and registered it as a Georgia investment advisory firm.[35] It initially served as the Fund's investment manager.[36] In June 2009, he formed Geier Capital, LLC, also a Georgia company, and it was the Fund's managing member for a time.[37] Geier Group and Geier Capital were each owned 50% by Gibson, 35% by Hull, and 15% by John Gibson.[38]

In January 2010, the Hull Fund and the Gibson Fund rolled into the Fund.[39] Starting in that month, Gibson distributed the Fund's confidential private offering memorandum, operating agreement, and subscription agreement to potential investors.[40] Each person who invested signed the operating and subscription agreements.[41] Gibson signed the operating agreement as the managing director of the Fund's managing member—Geier Capital—and as the managing director of Geier Group—the investment

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31 Tr. 1257; *see* Div. Ex. 10.

32 Tr. 86–87.

33 Tr. 1255.

34 *See* Tr. 140; Div. Ex. 10; Div. Ex. 31 at 2.

35 Div. Exs. 11, 12; Div. Ex. 21 at 1; Div. Ex. 216 ¶¶ 3, 10.

36 Div. Ex. 21 at 3; *see* Div. Ex. 64 (certificate of termination of Geier Group).

37 Div. Ex. 21 at 1; Div. Ex. 216 ¶ 5; *see* Div. Ex. 63 (certificate of termination of the Georgia Geier Capital).

38 Div. Ex. 216 ¶¶ 4, 9.

39 Tr. 87.

40 *See* Tr. 115–16; *see* Div. Ex. 24.

41 Tr. 116; *see, e.g.*, Resp't Exs. 9–16.

manager.[42] The offering memorandum informed investors that "The success of the Company is significantly dependent upon the expertise and efforts of Chris Gibson."[43]

Despite this information, and the fact that Hull is not mentioned in the offering memorandum or operating agreement, no one actually thought that Gibson was making major investment decisions for the Fund without Hull's involvement.[44] Gibson knew Hull was in control[45] and even Gibson's father believed the Fund was ultimately being run by Hull.[46] Hull, who approved the Fund's structure, believed he exercised approval authority over any "major decision."[47] And many investors who knew Hull invested not so much because of Gibson's involvement, as described in Fund documents, but because Hull was involved in the Fund.[48]

In 2011, the Fund had 21 members total.[49] Hull owned over 80% of the Fund valued at about $26 million.[50] Gibson, Gibson's parents, and Giovanni Marzullo, the father of Gibson's girlfriend, Francesca Marzullo, held another 10% of the Fund.[51] With the exception of one investor connected to Gibson,

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42 Div. Ex. 22 at 12; Div. Ex. 23 at 12.

43 Div. Ex. 24 at 17.

44 Tr. 1308–10, 1332.

45 *See* Tr. 1366–67, 1509–10; *see also* 1386 (discussing process of getting Hull's approval for possible transactions), 1393 (same), 1411–12 (same).

46 Tr. 1258, 1287.

47 Tr. 570–71, 672–73.

48 *See* Tr. 1332; *see also* Tr. 754 (investor affirming that he did not read the operating agreement), 771–75 (investor affirming that he invested because his father, who invested and vacationed with Hull, wanted him to invest), 835–36 (investor confirming he only "scanned over" certain Fund documents).

49 Div. Ex. 216 ¶ 11.

50 Tr. 529, 588, 669–70; Resp't Ex. 206.

51 Tr. 561; Div. Ex. 33; Resp't Ex. 206.

every remaining investor was one of Hull's business associates or life-long friends or both.[52]

2. The Fund's offering documents disclosed features of the investment, and Hull required an "alignment of interest" between Gibson and the Fund.

Gibson and Hull spoke with nearly every investor before they invested.[53] In these conversations, Hull made clear that the Fund was a "high-risk type venture."[54] The offering memorandum likewise stated that the Fund was "a highly speculative investment" that was "designed only for sophisticated" investors.[55] The offering memorandum further affirmed that the Fund, like many such funds, "generally will not disclose all of its positions to Members on an ongoing basis," suggesting that it could remain secretive about its positions and strategies.[56]

The operating agreement and offering memorandum both warned investors that affiliates of the Fund, such as Gibson, may conduct business "in competition with the" Fund.[57] The offering memorandum further warned that affiliated parties, like Gibson, might serve as investment advisers to others, and might invest in the same securities as the Fund in separate accounts.[58] Gibson in fact did both: he served as a personal adviser to Hull without further disclosing that relationship to the Fund, and he invested in TRX in his personal account.[59]

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[52] Tr. 134, 142–43, 529, 541, 675–80; Resp't Ex. 206.

[53] Tr. 680, 1337–38.

[54] Tr. 681. *But cf.* Tr. 836 (testimony that investor did not remember whether he was told the investment was "risky").

[55] Div. Ex. 24 at 1, 7, 10.

[56] *Id.* at 17; *see Goldstein v. SEC*, 451 F.3d 873, 875 (D.C. Cir. 2006) ("[Hedge funds typically remain secretive about their positions and strategies, even to their own investors.").

[57] Div. Ex. 21 at 2; Div. Ex. 24 at 19.

[58] Div. Ex. 24 at 19.

[59] Tr. 145, 254, 763, 827; Div. Ex. 86 at 1, 3 (statement from Gibson's personal Schwab account); Div. Ex. 216 ¶ 23.

The offering memorandum also made clear that Gibson was to invest "the majority of his liquid net worth" in the Fund.[60] This was because Hull wanted Gibson to have "total focus" on the Fund he was managing.[61] In fact, Gibson, Hull, and John Gibson each mentioned Hull's desire to establish an "alignment of interest" between Gibson on one side and Hull and the Fund on the other.[62] Hull wanted both Gibson and his father "to have skin in the game and to be totally focused on this fund being successful."[63] When asked if he wanted "Gibson to be aligned with" him or with the Fund, Hull responded "I would view them one and the same."[64]

Gibson was thus required to borrow close to $650,000 from Hull, invest virtually all of his money in the Fund, and invest outside the Fund in what the Fund invested in.[65] And Hull loaned money to John Gibson to invest as well.[66] John Gibson agreed to this arrangement because of his "loyalty" to Hull and because he "had complete confidence in" him.[67] By design, if the Fund lost money, Gibson would lose more than other investors, and his family and "individuals close to" him would be "exposed."[68] Indeed, when Gibson paid off his note to Hull in 2011, after receiving his bonus for 2010, Hull became "visibly upset," and required Gibson to re-borrow the same amount.[69] And the approximately $650,000 that would otherwise have gone to pay off the note went back into the Fund, not into Gibson's pocket.[70] Although the Fund's offering documents disclosed Gibson's investment in the Fund—and in fact

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60 Div. Ex. 24 at 1, 7.

61 Tr. 561–62. Both Gibson and his father testified that Hull wanted a "severe alignment of interest" between himself and the other investors in the Fund. Tr. 1112, 1472.

62 Tr. 562, 674, 736, 1112, 1259, 1340.

63 Tr. 674.

64 Tr. 736.

65 Tr. 1340, 1358–59; Resp't Ex. 117 at 5.

66 Tr. 1359; *see* Tr. 1259.

67 Tr. 1259.

68 Tr. 1358.

69 Tr. 1360–61.

70 Tr. 1361–62.

required it—the documents did not disclose the loan from Hull, and Gibson did not otherwise reveal it to investors.[71]

3. Gibson managed the Fund and received compensation for doing so.

As noted, Hull had great success in his real estate business by "cut[ting] … costs to the bone."[72] Hull decided to apply this idea to managing the Fund.[73] And this meant that Gibson, at about 26 years of age, was managing a $32 million fund with little experience and without "a full staff" or an experienced investment adviser to give him guidance or advice.[74] Gibson was thus alone in managing the Fund's day-to-day operations and performing investment advisory services for it.[75] He also negotiated securities transactions on its behalf, tracked market conditions and the performance of the Fund's portfolio, sent status reports about the Fund to investors, communicated with brokers and counterparties, spoke with the management of TRX, and submitted filings to the Commission.[76] Major decisions about the Fund's investment strategy, such as which stocks to invest in and when to hold or sell, were approved by Hull in close consultation with Gibson.[77]

Gibson was compensated for his services to the Fund. From 2010 until early 2013, he received a salary from Hull's real estate business.[78] These payments were for his advisory services to the Fund.[79] Through 2010, Geier

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71 Tr. 765–66, 828.

72 Tr. 1257.

73 Tr. 1257.

74 Tr. 1257.

75 Tr. 129, 186, 567. The offering memorandum stated that Gibson was the managing member of Geier Group, and that Geier Group was "responsible for certain administrative and investment advisory matters" for the Fund. Div. Ex. 24 at 1. Gibson told investors that he was Geier Group's investment adviser. Tr. 109–110; Div. Ex. 16 at 24407.

76 Tr. 185–87; *see, e.g.*, Tr. 242–44, 279–80, 320–21; Div. Exs. 31, 39, 70, 71.

77 Tr. 569–71, 673; *see, e.g.*, Div. Exs. 80, 91; Resp't Exs. 59, 102.

78 Tr. 246–52; Div. Exs. 43, 128, 147, 156.

79 Tr. 247–49, 251–52; Div. Ex. 188 at 472–74 (Gibson's investigative testimony).

Group repaid Gibson's salary to Hull's company; effectively, Gibson's salary was paid by Geier Group while the entity existed.[80] Under the Fund's operating agreement and offering memorandum, Geier Group was also entitled to an annual investment management fee equal to 1% of each member's capital account.[81] The agreements also entitled Geier Capital to a 10% "incentive allocation" if the Fund met certain benchmarks.[82] Both the management fees and incentive allocation were compensation for Gibson's advisory services to the Fund.[83] The Fund paid investment management fees in 2010 and 2011.[84] As a 50% owner of Geier Group and Geier Capital, Gibson was entitled to half this amount, which was around $250,000 for 2010 and 2011 combined.[85] He reinvested the money in the Fund.[86] In 2010, the Fund also paid Geier Capital an incentive allocation of around $3 million.[87] Gibson was entitled to half of this amount, which he reinvested in the Fund.[88]

4. Geier Group is dissolved and Gibson substitutes Geier Capital for another entity of the same name.

At the end of December 2010, Gibson allowed Geier Group's registration as a Georgia investment adviser to lapse.[89] He did not tell the Fund's investors, and in fact, solicited two new investors using offering documents stating that Geier Group was a registered investment adviser even though it was no longer registered.[90] Geier Group was dissolved in April 2011; nonetheless, Gibson

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80 Tr. 248–54. The salary was distributed through Hull's company and its payroll services to avoid the need to set up a separate payroll for Gibson's advisory services to the Fund. Tr. 248.

81 Tr. 121; Div. Ex. 21 at 4; Div. Ex. 24 at 8; Div. Ex. 216 ¶ 12.

82 Tr. 123; Div. Ex. 21 at 5; Div. Ex. 24 at 8–9.

83 Div. Ex. 188 at 407, 461.

84 *Id.* at 402, 457, 461.

85 *Id.* at 403, 461; Div. Ex. 216 ¶ 13.

86 Div. Ex. 188 at 363–64, 461–62.

87 Div. Ex. 42 at 4; Div. Ex. 216 ¶ 14.

88 Tr. 123, 125–27; Div. Ex. 216 ¶ 13.

89 Div. Ex. 167; Tr. 149–51.

90 Tr. 151–52, 176–77; Div. Exs. 54, 56.

falsely indicated in Commission filings that it still existed.[91] Despite Geier Group's dissolution, Gibson continued to advise the Fund in 2011 just as he had in 2010.[92] Gibson created a new Geier Capital entity in Delaware in December 2010 with the same ownership structure as the old one.[93] He dissolved the Georgia Geier Capital in March 2011.[94] Gibson neither disclosed to investors the dissolution of Geier Group nor the substitution of the Delaware Geier Capital for the Georgia entity, and he failed to amend the Fund's offering documents to reflect these changes.[95] The Fund's operating agreement, however, stated that the managing member had the "sole discretion" to retain a different entity than Geier Group "to serve as the [c]ompany's investment manager."[96]

5. The Fund invests all its money in TRX, but as 2011 progresses, the stock's value declines.

Initially, the Fund invested in gold and other commodities.[97] During 2010, the Fund was "up 110 percent."[98] But Hull became "irritated" in late 2010 on learning that the Fund's successful commodities trading resulted in a large tax bill.[99] To deal with this "unfavorable tax" situation, and to generate fees, he decided to increase the Fund's equity investments instead.[100] Although Gibson thought the Fund should add additional employees to "cover a number" of potential investments, Hull favored a leaner operation.[101] Based on his real

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91 Div. Exs. 60, 64; Tr. 159–60, 177–82.

92 Tr. 184, 187.

93 Tr. 182–83; Div. Ex. 40; Div. Ex. 216 ¶¶ 7, 9.

94 Div. Ex. 216 ¶ 6; Div. Exs. 49, 63.

95 Tr. 162, 184.

96 Div. Ex. 21 at 3.

97 Tr. 539–40, 1350; *see* Tr. 1363–64 (the Fund was trading in commodities in 2010).

98 Tr. 1362.

99 Tr. 540, 575, 672, 1364–66.

100 Tr. 540, 575, 672, 1366.

101 Tr. 1257, 1366.

estate experience, Hull favored having one employee—Gibson—and "owning a single stock."[102]

Gibson knew that investing all of the Fund's assets in one stock was risky.[103] But he deferred to Hull's experience and identified TRX as a suitable investment for the Fund.[104] According to Gibson, TRX is a "junior" gold mining company that explores for gold resources in Africa.[105] He testified that it had 46 mining properties in Tanzania.[106] The Fund began investing in TRX in late 2010 and early 2011.[107] By the end of April 2011, the Fund's assets were invested solely in TRX, and the Fund owned approximately 9.7 million shares of TRX stock (worth approximately $70 million), which was around 10.3% of all outstanding TRX shares.[108]

The Fund's fortunes began to change soon after it concentrated its investments in TRX. In June 2011, TRX peaked at $7.46 a share, and then slowly declined the rest of the summer.[109] Given that TRX was a gold-mining company and the price of gold was high, Gibson had difficulty understanding why TRX's share price was declining.[110] And Hull was concerned that TRX's president and CEO, Jim Sinclair, was not doing the exploration necessary for TRX to succeed.[111] On August 5, Hull communicated his concerns to Gibson,

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102 Tr. 1257, 1366.

103 Tr. 1366–67.

104 Tr. 575, 1367 ("I … had … supreme respect for Mr. Hull's judgment. Who am I? You know, I haven't had nearly the success he has and I believed it would -- and I certainly also believed it was an achievable objective.").

105 Tr. 189. Gibson testified that a junior gold mining company "is one that is entire[ly] or generally exploratory in nature, less capitalized, typically does not have the resources to fully develop the asset and is more dependent upon access to the capital markets and typically has a greater leverage to the gold price." Tr. 1350.

106 Tr. 1351.

107 Tr. 1345; Div. Ex. 53 at 1.

108 Tr. 188; Div. Ex. 216 ¶¶ 15, 16.

109 Tr. 1347; Joint Ex. 1 at 3–4.

110 Tr. 1373.

111 Tr. 582.

noting that the Fund had lost most of its gains and "incurred a huge income tax obligation."[112] Hull also pointed out that "none of" his and Gibson's "reasoning/predictions have come to [bear]."[113] Gibson felt the pressure.

6. Gibson berates TRX's president and considers a potential sale.

On August 10, when TRX was trading a little below six dollars a share, Gibson e-mailed Sinclair, saying that he was "physically ill over our performance," it would "[v]ery soon … make sense to exit our positions," and "[t]here is no time left."[114] In a separate e-mail, Gibson berated Sinclair, complaining about statements made by TRX's chief geologist that contradicted both Sinclair and TRX press releases and that Gibson worried would be publicly reported.[115] Gibson demanded, "What is the answer," and told TRX's CEO to "make sure [the geologist] is on the same page."[116]

Sinclair replied and tried to reassure Gibson that he was doing what he could to move the company forward.[117] Gibson quickly responded asking whether certain things Sinclair had previously said were no longer accurate.[118] Receiving no immediate response, Gibson e-mailed Sinclair again (in all caps), asserting that "everything you say is always inaccurate," "this is the last straw," and Gibson was in danger of losing credibility with his investors because of Sinclair's lapses.[119] Sinclair responded that he "totally disagree[d]"

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[112] Div. Ex. 75 at 71133.

[113] *Id.*

[114] Div. Ex. 76; Joint Ex. 1 at 4. Although all the e-mails discussed in this paragraph appear to have been sent on August 10, 2011, the time stamps are confused, and it is unclear whether this e-mail was sent before or during a separate exchange shown in Division Exhibit 77.

[115] Div. Ex. 77 at 71655; *see* Tr. 1348 (identifying chief geologist).

[116] Div. Ex. 77 at 71655.

[117] *Id.* at 71654–55.

[118] *Id.* at 71654.

[119] *Id.* ("I TOLD MY INVESTORS YOU SAID THIS AND NOW IT IS NOT TRUE? HOW DO YOU EXPECT THEM TO STAND BY ME WHEN THIS HAPPENS OVER AND OVER AND OVER?").

and did "not intend to continue" the conversation.[120] A few hours later, Gibson told Sinclair that "our share price is a disaster" and "[w]hatever we are doing is failing."[121] Gibson then instructed that "We need to be all hands on deck. We need to be mapping out a calendar or announcements for the next six weeks. We need to be planning a roadshow. We need to be PRODUCING the gravels and tailings. We need to be announcing that."[122]

On August 15, Gibson and Sinclair traded e-mails again about planning a roadshow to attract additional investors. Gibson felt that "[t]his is a priority whose significance I cannot sufficiently emphasize" and added that this was a "do or die moment" and if "we do not move by [September 2011], we are toast."[123] Sinclair assured Gibson that he was "working as hard and fast as possible."[124]

In context, it is clear that although Gibson was worried about TRX's share price, perhaps thought TRX's management was not doing enough to raise that share price, and was trying to "[i]nstill a sense of urgency in Mr. Sinclair," he still believed that TRX had substantial value as a company.[125] For one thing, he did not immediately sell his own TRX shares. And he told the Fund's investors in a letter on August 22, that although his "performance year to date ha[d] been an exceptional failure," the Fund was "positioned exceedingly well" and investors should "sit tight."[126]

Gibson was, however, starting to consider selling the Fund's interest in TRX. On the same day he communicated with Fund investors, he reached out

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[120] *Id.* The parties presented little evidence about the nature of Gibson's relationship with Sinclair. The record reveals, however, that at this point, Gibson was about 27 years old and Sinclair, who was approaching 70 years of age, *see* Div. Ex. 183A at 5, was TRX's president and CEO.

[121] Div. Ex. 77 at 71654.

[122] *Id.*

[123] Div. Ex. 78 at 73888.

[124] *Id.*

[125] Tr. 1380–82. According to Hull, the hyperbolic language Gibson used with Sinclair was typical of his "personality." Tr. 583. Gibson would "run very hot and cold" and "go unhinged on them" but then be "nice." Tr. 583. Gibson would sometimes "rant and rave about … Jim Sinclair in a negative way." Tr. 584.

[126] Resp't Ex. 51 at 2; *see* Tr. 1382.

to Richard Sands, a banker at Casimir Capital, and told Sands that he would be willing to sell the Fund's entire position, but wanted $6.25 per share, which would have been a premium above the then-current market price of $5.85.[127] Sands did not think the price Gibson sought was "doable," but looked into it, and came back with a buyer who was willing to buy at market price.[128] Hull and Gibson "seriously" considered the offer, but rejected it because they "did not [think it] reflect[ed] the value of [the Fund's] position."[129] Hull and Gibson were therefore still sufficiently bullish in late August about TRX's value that they would only have sold for a premium.

7. Gibson suspends management fees for the Fund in light of its poor performance.

But TRX's share price continued to decline. On September 22, it tumbled from around $5.50 to around $4.50.[130] Gibson again expressed displeasure to Sinclair, but in a more measured tone than in August.[131] Meanwhile, Hull asked Gibson whether Hull should increase his personal investment in TRX because the stock had gone so low.[132] Gibson told him that although he remained "bullish" on TRX, and expected the share price to recover over time, he did not recommend buying more shares.[133] Later that evening, however, Gibson opined that the Fund should buy more TRX shares.[134] Gibson also told Hull that although he would personally hold "TRX until its share price has the opportunity to better reflect its underlying value," he had "failed to fulfill the expectations our partners and I have had for its performance" and would cease taking management fees for his work on behalf of the Fund.[135]

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127 Resp't Ex. 177 at 1–4.

128 *Id.* at 1; Tr. 1384–86.

129 Tr. 1386; *see* Resp't Ex. 62 at 6 (e-mail from Sands noting in late September that Gibson had backed away from previous sale).

130 Joint Ex. 1 at 4.

131 Div. Ex. 79.

132 Tr. 1389; *see* Resp't Ex. 52.

133 Resp't Ex. 52 at 1; Tr. 1389–90; *see* Resp't Ex. 54.

134 Resp't Ex. 53 at 1 ("I think it is extremely compelling to do so. I would not buy anything else.").

135 *Id.*

The following day, Gibson backed off his advice to Hull to buy TRX shares and instead urged caution.[136] Gibson also told investors that the Fund was down "to only slightly above original principal investments last year," and that at the end of the month, he would stop assessing management fees until the Fund's performance returned to "acceptable levels."[137] He nonetheless reiterated his faith in TRX's "underlying value" and wrote, "Personally, I will not redeem my interest in Geier and TRX until the bull market matures over the coming years at what I strongly believe will be significantly higher levels."[138] Two investors responded to Gibson's email stating that they remained supportive of his efforts.[139]

TRX's share price dropped again on Friday, September 23, to $4.07.[140] Around the end of the trading day, Gibson sold 78,000 of the Fund's TRX shares for $4.04 per share.[141] An investor urged Hull that day to consider diversifying the Fund's portfolio in the near future, but Hull rejected the proposal.[142]

8. Hull and Gibson decide to sell the Fund's investment in TRX.

Over the following weekend, however, Hull had a change of heart about holding TRX. He told Gibson that he was not sure "he had a tolerance for more losses," which Gibson took to mean that he (Gibson) should "consider a sale" and "solicit a bid" for the Fund.[143] Hull's general guidance was to get out at

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136 Resp't Ex. 54.

137 Resp't Ex. 56 at 1.

138 *Id.*; Div. Ex. 81 at 1 (same letter). Context shows that when Gibson said he would not redeem his "interest in Geier and TRX," he was talking about his personal investment in the Fund, and not about any investment he had in TRX outside the Fund.

139 Resp't Exs. 57, 58.

140 Joint Ex. 1 at 4.

141 Resp't Ex. 17 at 4; Tr. 1391; Div. Ex. 216 ¶ 22.

142 Resp't Ex. 59 at 1 ("[C]oncentration into one stock provides equal benefits (you can truly understand one company) and a thinly traded company has benefits as well.").

143 Tr. 1392–93.

good prices.[144] Gibson never informed the Fund's investors of Hull's change in strategy.[145]

Over the next month and a half, Gibson tried to sell the Fund's TRX shares at good prices. Although there were times during this period when Hull and Gibson were content to briefly hold and wait for better offers,[146] the evidence shows—as will be detailed below—that Gibson regularly reached out to brokers and counterparties from September 25 until November 10 to try to liquidate the Fund's holdings in TRX on favorable terms.

9. Gibson sells personal shares ahead of the Fund's sale of a third of its TRX investment.

On Sunday evening, September 25, Gibson wrote to Sands at Casimir asking if there was a buyer for up to the Fund's entire position in TRX.[147] Gibson offered 10,250,000 shares, which was the total held by the Fund, combined with a block of around 680,000 shares held separately by Hull.[148] Sometime on September 26, Sands informed Gibson that he thought he had a buyer for about three to five million shares.[149] Gibson told Sands to "maximize the number of shares" and "price and book the sale" on September 27.[150]

As noted above, Gibson held TRX shares in his personal account outside of the Fund.[151] Sometime on September 26, he sold 2,000 TRX shares from his personal Schwab brokerage account.[152] He also sold 1,000 TRX shares from Geier Group's Schwab account.[153] Finally, he sold 18,900 TRX shares from the

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144 Tr. 219–20, 605; Div. Ex. 187 at 77–78 (Gibson's investigative testimony).

145 Tr. 220.

146 Resp't Exs. 89, 101; Div. Ex. 91.

147 Resp't Ex. 62 at 6, 8.

148 Tr. 1404–05.

149 Resp't Ex. 62 at 4–5.

150 *Id.* at 4.

151 Div. Ex. 216 ¶ 23.

152 *Id.* ¶ 26; Div. Ex. 86 at 3; Tr. 226, 1394.

153 Div. Ex. 88 at 7; Div. Ex. 216 ¶¶ 25, 28; Tr. 231–32, 1394.

account of his girlfriend, Francesca Marzullo.[154] Ms. Marzullo was not invested in the Fund.[155] Her account "was conceived by" and funded solely by her father.[156] Gibson was "exclusively responsible for the trades in [Ms. Marzullo's] account," and he "reported those trades and discussed them daily with Mr. Marzullo."[157] He did not, however, speak with Mr. Marzullo before selling Ms. Marzullo's shares on September 26.[158]

Gibson obtained an average share price of $4.04 to $4.05 for sales from the three accounts.[159] No TRX shares remained in these accounts after the sales.[160] Gibson never disclosed these transactions to Fund investors.[161] In light of Gibson's investment in the Fund and its concentration in TRX, Gibson's sale of his personal shares amounted to a "little under 1 percent" of his total exposure to TRX through the Fund.[162] So he remained "significantly long" in TRX.[163] As Gibson testified, because of their relatively small size, there is no evidence that his September 26 sales materially affected TRX's share price.[164]

Gibson testified that he sold his personal TRX shares because he had no liquid assets and management fees from the Fund had just been suspended.[165] But given that Francesca Marzullo's shares were funded by her father,

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154 Div. Ex. 87 at 2–3; Div. Ex. 216 ¶¶ 24, 27; Tr. 230. As noted, Ms. Marzullo was the daughter of Giovanni Marzullo, an investor in the Fund. Tr. 135, 227, 1336.

155 Tr. 143.

156 Tr. 1395–97. Ms. Marzullo was an unemployed graduate student at the time. Tr. 1397.

157 Tr. 1396–97.

158 Tr. 1471.

159 Div. Ex. 86 at 3; Div. Ex. 87 at 2–3; Div. Ex. 88 at 7.

160 Tr. 226, 230, 232.

161 Div. Ex. 188 at 662–63, 665–66, 669–71; Tr. 760, 823–24 (two investors testified that they were unaware of Gibson's personal sales of TRX).

162 Tr. 1395.

163 Tr. 1398.

164 Tr. 1424.

165 Tr. 1394, 1472–73.

Gibson's testimony regarding a need for liquidity does not explain why he sold her shares.[166] Most importantly, Gibson's explanation does not sufficiently address the timing of the sale. On the morning of Monday, September 26, Gibson was actively working to sell the Fund's entire position.[167] Gibson understood that Sands likely would have a buyer for a block sale and urged Sands "to price and book the sale" on Tuesday, September 27.[168] Although Gibson did not know exactly when the Fund's block sale would take place, and any sale was still dependent on Hull's approval,[169] he was in the midst of a negotiation that he hoped would lead to a sale. The timing of the sale in the three accounts outside the Fund suggests that at the very least, Gibson was attempting to avoid potential losses by selling personal shares ahead of the Fund's impending block sale.

TRX closed at $4.11 on Monday, September 26, and opened at $4.24 on Tuesday, September 27.[170] Following Sands's instructions, Gibson transferred all of the Fund's TRX shares to an account at Casimir.[171] The volume of trading in TRX was heavy all day, with the share price rising to $4.34 and then dropping to $3.70 around 3 p.m.[172] Around that time, Sands phoned Gibson with an offer of $3.50 a share for around 3.5 million of the Fund's TRX shares.[173] Gibson and Hull decided "in one minute to accept it."[174] The Fund

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166 *See* Tr. 1395–97, 1473.

167 Resp't Ex. 62 at 6–7.

168 *Id.* at 4–5.

169 Tr. 1415–16, 1421–23.

170 Joint Ex. 1 at 4.

171 Resp't Ex. 62 at 1–3; Resp't Ex. 66; Div. Ex. 90 at 3. Sands told Gibson that Gibson needed to place all the Fund's shares in its Casimir account in order to reassure the buyer because "no buyer will buy that quantity if they know another 5mm is being sold behind it." Resp't Ex. 62 at 1.

172 Joint Ex. 1 at 4; Tr. 1007–08; Div. Ex. 184 at Exhibits p. 4 (Dr. Taveras Expert Report – TRX intraday trading for September 27); *see* Tr. 1679 (reflecting Gibson's counsel's concession that Division expert Dr. Carmen A. Taveras's calculations, as opposed to her conclusions, are not in dispute).

173 Tr. 1422; Div. Ex. 82 at 6711.

174 Tr. 1422–23.

sold 3,734,395 TRX shares for around $3.50 a share.[175] TRX closed at $3.54 on a volume of over six million shares traded that day.[176] If Gibson had sold his personal TRX shares immediately after the Fund sold its shares and obtained the same price as the Fund, he would have received around 54 cents less per share than he did.[177]

10. Gibson considers other offers for the Fund in late 2011.

Gibson attempted to sell the remainder of the Fund's TRX position throughout the end of September and in October. At the end of September, Gibson reached an agreement with Luis Sequiera, a principal at Roheryn Investments S.A., to buy the rest of the Fund's TRX position, plus the additional block of shares held separately by Hull, at $3.50 a share.[178] In early October, however, the sale fell through.[179] When he told Hull the deal fell through, Gibson said that "[w]e're going to very likely be best served holding our position" and "I would assume we are where we are for the next several months."[180] Hull wanted Gibson to keep trying to find a different buyer or work with Sequiera to make a deal.[181] Negotiations with Sequiera picked up again when Sequiera offered to buy about 200,000 of the Fund's shares a day, but Gibson rejected the offer in mid-October.[182] Gibson told Hull on October 14, "I am contemplating our options but waiting for at least a few weeks."[183] Nonetheless, on October 16, Gibson e-mailed a broker at GarWood Securities and said that the Fund "will be closing [its] TRX position in the next few weeks with a pre-arranged buyer beginning" the next day.[184] Indeed, Gibson testified that at this time, "[o]n a near-daily basis, we had a belief that we were

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175 Div. Ex. 82 at 6710; Div. Ex. 90 at 3.

176 Joint Ex. 1 at 4.

177 Tr. 234–35.

178 Resp't Ex. 92 at 3; Resp't Ex. 93; Tr. 1427–30.

179 Resp't Ex. 101; Tr. 611–12, 1430–31.

180 Resp't Ex. 101.

181 Resp't Ex. 102.

182 Resp't Ex. 104; Tr. 1433–34.

183 Resp't Ex. 104 at 1.

184 Resp't Ex. 108; Div. Exs. 92, 93.

imminently close to the consummation of that full sale."[185] But the planned transaction that was to begin on October 17—and which may again have been a deal with Sequiera—also fell through.[186] The Fund, however, did sell 364,495 TRX shares at an average price of $3.42 per share on October 17.[187]

11. The Fund purchases a block of TRX shares separately held by Hull.

The Fund's offering memorandum provided that "purchase and sale transactions" between the Fund and "other entities or accounts" could take place subject to the following guidelines: (1) the sale had to be "for cash" at the "current market price" of the securities; and (2) "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."[188]

On October 18, Gibson caused the Fund to buy the block of 680,636 TRX shares owned by Hull at the closing price that day, $3.60 a share.[189] The purchase price was about $2.45 million.[190] Given Hull's over 80% interest in the Fund, the cost borne by other investors for this transaction was about $470,000.[191] Neither the Fund nor Hull paid a commission on the transaction.[192] Gibson provided investment advisory services to both Hull and the Fund on this transaction.[193]

Gibson testified that he proposed this sale to Hull.[194] Hull first suggested that Gibson proposed the idea before conceding that he was unsure who proposed the sale.[195] But both agreed that they were trying "to achieve a block

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185 Tr. 1434; *see* Tr. 260.

186 Tr. 260, 1434–35; *see* Resp't Exs. 107, 109.

187 Tr. 1475.

188 Div. Ex. 24 at 19.

189 Div. Ex. 95; Joint Ex. 1 at 5; Tr. 260–61.

190 Div. Ex. 95. The exact figure was $2,450,589.60. *Id*.

191 In October 2011, Hull owned 80.702% of the Fund. Resp't Ex. 206.

192 Tr. 262, 629–30.

193 Tr. 261.

194 Tr. 1438–39.

195 Tr. 706, 737.

sale" of all shares held by the Fund and its affiliates, consistent with Sequiera's previous request.[196]

The Division's expert, Dr. Gary Gibbons, opined that since the market volume for TRX on October 18 was just under 500,000 shares traded, if Hull had sold 680,000 shares into the market on that day, it would have depressed TRX's share price.[197] One potential implication of Dr. Gibbons's observation is that the Fund should have received a block discount.[198] In other words, the Fund should have purchased Hull's shares for less than the closing price, because if those shares had been sold on the market, Hull would not have been able to obtain $3.60 for each share.[199] The Fund, however, did not receive a block discount.[200]

Gibson's expert, Daniel R. Bystrom, disagreed with Dr. Gibbons and the Division.[201] He testified that it is hard to know whether TRX prices would have been depressed if Hull sold his shares on the market.[202] He admitted that a block discount could be appropriate when a private transaction avoids the price-depressing impact of a sale into the market, but noted that "[t]hose

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196 Tr. 705–06, 1435, 1438–39.

197 Div. Ex. 185 at 23; Joint Ex. 1 at 5; *see* Tr. 1484–85. Dr. Gibbons is a professor of finance and entrepreneurship at the Thunderbird School of Global Management, which is an independent college at Arizona State University. Tr. 346–47. His work focuses on securities valuation, and he is a registered investment adviser. Tr. 347–48.

198 *See* Tr. 630, 1628. Dr. Gibbons did not say in his report or testimony that the Fund should have received a block discount in this transaction; he testified only that, because the shares were not sold in the market, the transaction did not occur at the current market price, even though the shares were sold at the closing market price on the day the Fund purchased them. *See* Tr. 945–46, 950–52.

199 *See* Tr. 945–46, 1628.

200 Tr. 262.

201 Bystrom currently oversees risk management at a New York-based investment adviser. Tr. 1552. He has worked in the financial sector since 1992, and has been a portfolio manager at hedge funds. Tr. 1553. He is not a registered investment adviser. Tr. 1590.

202 Tr. 1628–31.

situations are really case by case" and that a motivated buyer "may be willing to pay at market price or even above market price."[203]

When the Fund eventually liquidated its TRX holdings on November 10, which is discussed below, it paid a commission on that sale.[204] Although the parties dispute whether the Fund's purchase from Hull caused it to pay $1,360 or $6,866 in extra commissions, because the Division is not asking for disgorgement of this extra commission, I need not decide who is correct.[205] In any event, because Hull owned over 80% of the Fund, only about 19.3% of the extra commission was borne by investors other than Hull.[206]

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[203] Tr. 1628, 1630. Dr. Gibbons proved to be a difficult witness on cross-examination. He sometimes refused to answer simple yes-or-no questions with a yes or no, Tr. 408–09, 494–96, 501–03, 892–94, and fought counsel's *hypothetical* premises because the premises did not match his view of the facts, *e.g.* Tr. 501, 503, 927–28. On occasion, I had to ask Dr. Gibbons to simply answer the question asked. Tr. 495–96, 883–84. A particularly frustrating exchange occurred when Gibson's counsel asked Dr. Gibbons about a treatise on options. Counsel twice walked Dr. Gibbons through a point in the treatise and concluded by asking whether Dr. Gibbons agreed with the point only to have Dr. Gibbons ask, "In what context?" Tr. 915, 917.

Dr. Gibbons's demeanor diminished his credibility. These sorts of problems generally did not mar Bystrom's testimony, however.

[204] Tr. 1440–41.

[205] Gibson testified that the Fund paid a commission of .2 cents per share when it liquidated its TRX assets. Tr. 1441. Multiplied by 680,636 shares, the total commission to sell Hull's former shares would come to $1,361. Relying on the GarWood account statements detailing the sales, the Division notes that a mathematical comparison of the amounts sold with the proceeds received demonstrates that the commission was approximately one cent per share. Div. Ex. 122 at 14–24. The second to last row on page 24 of Division Exhibit 122 indicates 100,000 shares were sold for $2.106 a share with proceeds of $209,594. Multiplying 100,000 by 2.106 equals 210,600. Subtracting 209,594 from that amount yields 1,006. And dividing that by 100,000 shares yields approximately 1 cent per share. According to the Division's calculation, which is based on more concrete evidence than Gibson's, the total extra commission paid was $6,866. *See* Div. Proposed Findings of Fact ¶ 143.

[206] Tr. 1441. Gibson, his parents, and Giovanni Marzullo, together owned 10.278% of the Fund. Resp't Ex. 206. Subtracting this percentage and Hull's

Dr. Gibbons opined that the Fund's purchase of Hull's shares was "counterproductive to the goals of" the Fund because "the decision to liquidate" the Fund's TRX holdings had already been made.[207] Dr. Gibbons therefore believed that the trade was made to benefit Hull at the expense of the Fund.[208] But both Gibson and Hull testified that the purchase was in the Fund's interest. According to Hull, the Fund purchased his shares in order to consolidate a larger block of shares available for sale, which could "entice the buyer" and could garner a "substantially increased price."[209] Gibson testified, "We wanted to be in a position to sell the full shares of the fund and its affiliates in a single transaction."[210] Bystrom confirmed based on his industry experience that consolidating the shares "greatly simplifies the process of entering into a block transaction" because a "buyer would want to know that he's seeing the whole piece for sale" and that there are no additional shares left behind.[211]

The evidence lends some support Gibson's contention that there were reasons to sell Hull's shares in a block with the Fund's shares.[212] Both Sands on September 26 and Sequiera on October 1 wanted confirmation from Gibson that the Fund's entire position would be available to sell, and that no shares would be left behind.[213] When Gibson communicated with them, he included

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percentage from the total means that 9.01% of the extra commission was borne by the remaining Fund investors. And 9.01% of $6,866 is $618.63.

[207] Div. Ex. 185 at 23.

[208] *Id.*

[209] Tr. 624, 627, 639.

[210] Tr. 1435; *see* Tr. 1438–39. Elsewhere, however, Gibson was somewhat vague as to his reasons for the Fund's purchase of Hull's shares. On October 17, he told Hull that the consolidation would "help me for regulatory and other reasons." Div. Ex. 94. The same day, he told a banker involved with Hull's account that it would be "easier to manage this position in one place." Resp't Ex. 110.

[211] Tr. 1567; Resp't Ex. 228 at 6 (Bystrom expert report).

[212] Tr. 1435 (Gibson testified that the Hull transaction was consistent with Sequiera's request that all shares of the Fund and its affiliates needed to be sold together).

[213] Resp't Ex. 62 at 7 (Sands said, "whatever we do needs to be a clean up"); Resp't Ex. 93 at 1–2 (Sequiera wanted to make sure the Fund has no other shares to sell).

Hull's 680,000 shares in the total amount he had available to sell in an effort to identify other large blocks as they had requested.[214] And Sands asked Gibson to move all of the Fund's shares to an account at Casimir for this very reason; even though he was only brokering the sale of three to five million shares, he wanted everything in one account because "no buyer will buy that quantity if they know another 5 [million] is being sold behind it."[215] But the evidence also shows that the Fund did not need to purchase Hull's shares for all of the shares to be sold at once.[216]

Gibson never disclosed the purchase of Hull's stock to the Fund's investors.[217]

12. Gibson buys puts for himself, his girlfriend, and recommends puts to his father.

After arranging the purchase of Hull's shares on October 18, Gibson continued to search for a buyer for the Fund's remaining TRX position. On October 24, he told one Fund investor that he was planning to liquidate the Fund but, "to ensure we can achieve good execution on the sale," had not disclosed his intent to investors.[218]

On October 26, Hull's executive assistant, Laurie Underwood, e-mailed Gibson a "sixteenth amended and restated demand promissory note," evidencing that he owed Hull $636,921 with an 8% interest rate.[219] Ms. Underwood, who included accounting figures for the note, asked Gibson to

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214 Tr. 1404–05, 1429–30.

215 Resp't Ex. 62 at 1.

216 *See* Tr. 1429–30, 1621–22; Resp't Ex. 92 at 3–4. It is true that Gibson did not consolidate Hull's shares before the September 27 sale or as part of the failed deal with Roheryn. *See* Resp't Ex. 92. But the September 27 sale was anticipated to be for three to five million shares, or less than all of the Fund's shares. Resp't Ex. 62 at 4–5.

217 Tr. 261–62.

218 Div. Ex. 98 at 10236; Tr. 635.

219 Resp't Ex. 117 at 1, 5.

execute the amended note and return it to her.[220] Gibson realized at that point that a 50-cent drop in TRX's share price would render him "insolvent."[221]

The next day, Gibson began purchasing $4 TRX put option contracts with an expiration date of November 19 for his personal account and for Francesca Marzullo's account.[222] A put option gives the purchaser of the put the right, but not the obligation, to sell a security at a specified "strike price" (in this case $4) by a specified date.[223] If the price of the underlying security declines below the strike price, the put is "in the money" and the put's purchaser can sell it for a profit. Conversely, if the prices rises above the strike price, the put will expire worthless and the purchaser will only have lost the cost of the put.

On October 27 and 28, Gibson bought a total of 1,604 $4 TRX put contracts in Ms. Marzullo's account, paying approximately $50,000.[224] On October 28, November 2, and November 8, Gibson bought a total of 565 $4 TRX put contracts for his own account, paying approximately $20,000.[225] Each put contract covered 100 TRX shares and cost between 30 and 45 cents a share.[226] Gibson did not disclose his put purchases to the Fund or any of its investors, including Hull.[227]

Gibson testified that he purchased protective puts, fearing he might become insolvent, to hedge against a potential loss should TRX decline in

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220 *Id.* at 1; *see* Tr. 1445–46.

221 Tr. 312–13, 1446–47.

222 Tr. 300–01, 1446–47; *e.g.* Div. Ex. 102 at 2.

223 Div. Ex. 184 at 20–22.

224 Div. Ex. 216 ¶ 31; *see* Div. Ex. 102 at 2–3; Tr. 308.

225 Div. Ex. 216 ¶ 30; Div. Ex. 99 at 3; Div. Ex. 124 at 3. Gibson also bought some $2 TRX puts on November 10, which he was able to sell later that day for a profit of about $2,500. Div. Ex. 124 at 3. Although it may be that he timed his purchase and sale of these puts based on knowledge about the Fund's activity, *see* Div. Ex. 184 at 23, Exhibits p. 18; *see also* Div. Ex. 187 at 103, the Division does not press this point or seek disgorgement of the resulting profit, *see* Div. Br. 41.

226 Tr. 1443; Div. Ex. 99 at 3; Div. Ex. 102 at 2–3; Div. Ex. 124 at 3.

227 Div. Ex. 187 at 120, 215–16.

value.[228] As Bystrom explained, a protective put acts like an insurance policy.[229] If one is long in a stock, then purchasing puts to cover a percentage of that exposure can "mitigate your loss below the strike price of the option" should the value of the stock decline.[230] Purchasing protective puts could allow an investor "to maintain long exposure, particularly through bouts of volatility."[231] A naked put, on the other hand, is the purchase of a put option by an investor who does not have a long position in the underlying security.[232] For example, if an investor who does not own a stock buys a put contract for that stock and exercises the put when the stock drops, the investor has made money even though the share price has fallen. If the same investor has a long position in the underlying stock even after purchasing puts, the best the investor will do by exercising the puts when the share price falls is mitigate a portion of the overall loss suffered.[233]

When Gibson bought the puts in his personal account, his interest in the Fund equated to over 100,000 shares of TRX.[234] The puts covered 56,500 shares.[235] According to Bystrom, because Gibson was still long in TRX after purchasing the puts, his puts were protective.[236] The Division's experts, Dr.

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228 Tr. 312–13, 1445–46.

229 Tr. 1577; *see* Robert J. Aalberts & Percy S. Poon, *Derivatives and the Modern Prudent Investor Rule: Too Risky or Too Necessary?*, 67 Ohio St. L.J. 525, 566 & n.262 (2006).

230 Tr. 1633.

231 Tr. 1574.

232 Tr. 1576–77.

233 *See* Tr. 1633.

234 Tr. 1444. Gibson's counsel asserted that Gibson held around 220,000 shares of TRX through his interest in the Fund. *See, e.g.*, Tr. 1063–64. But Gibson stated that although he originally held over 230,000 shares, he only held about "half of those shares" when he purchased the puts. Tr. 1444. Indeed, when Gibson bought puts at the end of October and the beginning of November, the Fund had already liquidated half of its TRX position.

235 Div. Ex. 216 ¶ 30.

236 Tr. 1580.

Gibbons and Dr. Taveras,[237] agreed in substance with the definition of a protective put, and acknowledged that Gibson's puts could be characterized as protective puts because of Gibson's long exposure to TRX through the Fund.[238]

Although Gibson bought as many puts as he could, he felt in hindsight that he "wildly underhedged [his] risk" because he still lost a lot of money when the Fund liquidated its TRX holdings.[239] Gibson further testified that he bought puts for Francesca Marzullo's account to hedge her father Giovanni Marzullo's exposure to TRX through the Fund.[240] Gibson said he considered Francesca Marzullo's parents as advisory clients of his, and he purchased puts to hedge their TRX exposure because "[t]hey were elderly[,] … living on a fixed income[,]" and "had all of their liquid assets in the Fund."[241] Although the puts were really for Ms. Marzullo's parents, Gibson testified that he bought them in Ms. Marzullo's account because he had access to her account.[242] But after Gibson received the proceeds from the sale of Ms. Marzullo's puts on November 10, he continued to trade in her account and lost all of the proceeds from the put sales on other options trades.[243] I therefore doubt that Gibson's actions

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237 Dr. Taveras is a financial economist at the Commission. Tr. 963. Her report concerns the profits made by Gibson and others on the transactions at issue in this proceeding. Tr. 964–66.

238 Tr. 918–19, 928–30 (Dr. Gibbons acknowledged that although Gibson did not have any TRX stock in his personal account when he purchased the puts, he intended to hedge his exposure to TRX through the Fund); Tr. 1043, 1060–62 (Dr. Taveras agreed with Gibson's counsel that because Gibson was long in TRX through his exposure to the Fund, his puts could be characterized "as a hedge").

239 Tr. 312–13, 1447; *see* Div. Ex. 187 at 130–31. The Division emphasizes that in his investigative testimony, Gibson called his put purchases "a short bet" against TRX. Div. Ex. 187 at 118–19; Tr. 301–03. But because Gibson was net long in TRX through his exposure to the Fund's investment, his puts are better characterized as protective. *See* Div. Ex. 187 at 118–20 (agreeing that while in his personal account, he "had a short bet against TRX," he was overall through the Fund "exceptionally long and far longer than anyone else in the Fund").

240 Tr. 1447–48.

241 Tr. 1448.

242 Div. Ex. 187 at 113.

243 Tr. 331, 1507.

were motivated solely out of concern for the Marzullos as an elderly couple on a fixed income.

When asked the obvious question, Gibson testified that he did not buy puts to hedge the Fund's position because he believed buying puts would not have been a responsible investment for the Fund.[244] The puts cost money, and Gibson said he "expected them to expire worthless."[245] The Fund had already sold about half of its interest in TRX, and given that the Fund was no longer one of the largest owners of the stock, Gibson said that he did not expect the impending sale of the remainder of the Fund's shares to push TRX's stock price down enough to render the puts valuable.[246]

In addition to his own put purchases, Gibson advised his father on November 8 to buy $4 TRX puts, sell the TRX shares he held in a personal IRA account, and then sell the puts.[247] John Gibson was one of his son's advisory clients.[248] After speaking to his son, John Gibson phoned his broker, which did not execute the sale of his TRX stock or the purchase of the puts until the next day.[249] When Gibson told his father to execute these transactions, he knew the Fund was planning imminently to sell the remainder of its TRX holdings.[250] Gibson testified that he told his father to buy puts as "a hedge for execution

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244 Tr. 1450–51. Gibson purchased some $2 and $3 puts for the Fund on the day that the Fund sold the balance of its TRX shares. Div. Ex. 187 at 103; Resp't Ex. 204. But neither party has raised any issue about those puts.

245 Tr. 1450.

246 Tr. 1450–51.

247 Tr. 322–23, 1107–08, 1114, 1243–44, 1253; Resp't Ex. 207; *see* Tr. 1277–79. On November 8, John Gibson spoke with Hull, who reported that "we're going to do something here in Geier." Tr. 1108. John Gibson asked what Hull meant and Hull told John Gibson to "just call Christopher and whatever he tells you to do, you do that." Tr. 1108. So John Gibson called his son who, in a brief conversation, said "get a pen, buy a put, sell the stock, sell the put, do it immediately." Tr. 1108.

248 Tr. 145.

249 Tr. 1108, 1114–18; Resp't Ex. 191 at 2–3; Resp't Ex. 192 at 1; *see* Tr. 1277–79.

250 Tr. 322–25.

risk."[251] In other words, he wanted his father to sell his personal TRX shares as soon as possible but was afraid the sale transaction would not be executed immediately.[252] Gibson, therefore, told his father to buy puts so he would not lose out if TRX's share price dropped in the interim.[253]

13. The Fund sells the rest of its TRX stock into the market at great loss.

At the beginning of November, the Fund continued to incrementally sell its shares on the market or in negotiated transactions at around market price.[254]

Then, on November 7 or 8, Sands from Casimir contacted Gibson and told him "he had an offer that would make us very pleased."[255] On November 9, after the market had closed for the day, Gibson met with Sands and Platinum Partners's CFO, David Levy.[256] In prior meetings with Levy, Gibson had tried to negotiate a sale of the Fund's TRX shares to Platinum.[257] But during the November 9 meeting, Levy instead told Gibson that Platinum would pay the Fund $10,000 a month not to sell any TRX shares for six months.[258] Gibson was "shocked and disappointed," and he told Hull, who was concerned that Platinum was trying to lock up the Fund's shares so it could sell its TRX holdings before the Fund could sell.[259] Hull and Gibson decided to sell the remainder of the Fund's TRX position the next day into the market.[260] Hull and Gibson were hoping that if they sold the Fund's shares, other large TRX investors like Platinum would be forced to buy TRX to prevent the share price

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[251] Tr. 1449.

[252] Tr. 1449.

[253] Tr. 322–24, 1449.

[254] Tr. 879–81, 885, 1455–56; Resp't Ex. 121 (November 8 sale to Sequiera); Resp't Ex. 153 at 1 (summary chart of the Fund's sales).

[255] Tr. 1456.

[256] Tr. 323–24, 1456.

[257] Tr. 319–21.

[258] Tr. 321, 1457.

[259] Tr. 1457–58.

[260] Tr. 1458–59.

from dropping and to protect their own positions.[261] Gibson and Hull hoped that as other investors rushed in to buy the stock, the Fund would lose less money on the shares it sold as the day progressed.[262] But Gibson was aware that his strategy was risky.[263]

On the morning of November 10, Gibson emailed his broker at GarWood and told him to sell, noting, "We are going to potentially tank this stock."[264] Gibson explained that he told this to his broker to signal that there was no need to sell slowly and get best execution prices.[265] Rather, Gibson wanted to sell aggressively to force the other large shareholders to buy the Fund's shares as he had discussed with Hull.[266]

Gibson was half right. His strategy did not work but he did tank the stock. As the Fund sold its remaining 4.9 million shares of TRX into the market, other big investors sold too, and the stock price declined dramatically.[267] TRX fell so fast that the New York Stock Exchange twice briefly halted trading in it.[268] Around 10:00 a.m., when TRX's share price had fallen to approximately $2.00, Gibson sold all of the $4 puts in his account and in Francesca Marzullo's account.[269] The $4 puts from John Gibson's account were also sold that day.[270] The Fund liquidated its TRX holdings for average prices ranging from $3.15 to $1.65 per share.[271] TRX's share price, which had opened at $3.41, went as low as $1.56 and closed at $2.29 on a volume of over 17 million shares traded.[272]

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261 Tr. 1458.

262 Tr. 658–59, 1458–59.

263 Div. Ex. 105 at 11858; *see* Tr. 659.

264 Div. Ex. 105 at 11585; Tr. 1459–60.

265 Tr. 1461–62.

266 Tr. 1461–62.

267 Tr. 324–25, 659, 1462–63; Div. Ex. 216 ¶ 32.

268 Tr. 325; Div. Ex. 184 at Exhibits p. 12.

269 Div. Ex. 123 at 14; Div. Ex. 124 at 3; Div. Ex. 184 at 23, Exhibits p. 18.

270 Div. Ex. 114 at 46; Div. Ex. 184 at 23; *see* Tr. 1119–20.

271 Tr. 1051; Div. Ex. 184 at Exhibits p. 11.

272 Joint Ex. 1 at 5.

Gibson made $81,930 ($81,008.81 after commissions) on the sale of his $4 puts. The puts in Francesca Marzullo's account generated a profit of $254,380 ($251,879.81 after commissions). John Gibson made $43,240 ($41,823.06 after commissions).[273] Even with his profit from the puts, Gibson lost $724,660 in the Fund.[274] Giovanni Marzullo lost $965,318, and Gibson's parents lost $1,399,053.[275]

At some point, possibly as early as mid-February 2012, Gibson spoke with Sequiera by phone.[276] During the call, Gibson used profane and often hyperbolic language to express his anger toward Sinclair.[277] Relevant to this proceeding, Gibson said that Sinclair "lied to [Gibson] for a year," had "taken everything from" Gibson, was "a complete crook," and "screws everyone he deals with."[278]

According to the Division, Gibson's assertion that Sinclair had been lying for a year shows that Gibson knew Sinclair was dishonest in August 2011, when he berated Sinclair but gave investors a more positive view of TRX.[279] But Gibson did not sell his personal shares in August 2011; rather, he remained sufficiently bullish about TRX to decline a liquidation sale at $5.85 per share, advised Hull in September 2011 that he remained "bullish" on TRX, and before September 23, told Hull the Fund should consider buying more shares. So the record does not show that before November 2011, Gibson thought Sinclair might be lying.[280]

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273 Tr. 330–31; Div. Ex. 185 at 47; *see* Resp't Ex. 205.

274 Resp't Ex. 205.

275 *Id.*; Tr. 1143.

276 *See* Div. Exs. 183, 183A; *see* Tr. 845–46, 1487.

277 Div. Ex. 183A; *see* Tr. 847.

278 Div. Ex. 183A at 3–4, 6.

279 Tr. 848.

280 In a sarcastic e-mail sent November 4, 2011, Gibson asked Sinclair whether he'd done a number of things Gibson said Sinclair had promised to do. Div. Ex. 103. Gibson added that if Sinclair did not "fix what you've broken, it will be my life's goal to ensure your children will know you were a crook and the pain you caused so many people all in an effort at self glorification." *Id*.

In context, therefore, Gibson's phone conversation supports Hull's observation—relevant to Gibson's August 2011 berating e-mails to Sinclair—that Gibson tended to "rant and rave about different things," and sometimes would "rant and rave about … Sinclair in a negative way."[281] The phone call otherwise has little relevance.

14. The Fund shuts down in April 2013.

Gibson continued to manage the Fund until April 2013, when he closed it and returned money to its 13 remaining investors.[282] In his wind-up letter to investors, Gibson admitted that the Fund's performance had been "disastrous" and he accepted full responsibility for its failure.[283] In his testimony, Gibson explained that he and Hull had made bad decisions, such as not accepting the buyout offer for its TRX stock at $5.85 a share in August 2011 and flooding the market with shares on November 10.[284]

Gibson currently lives in Montevideo, Uruguay, where he works for East Century Capital, Ltd., a Hong Kong consulting firm that advises companies in Africa.[285]

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281 Tr. 584.

282 Tr. 334–35; Div. Ex. 154.

283 *E.g.*, Div. Ex. 154 at 2149.

284 Tr. 1464–66.

285 Tr. 1492, 1498, 1502.

Discussion and Conclusions of Law

The Division alleges that Gibson willfully violated Advisers Act Section 206(1) and (2) by engaging in a transaction that favored Hull over the interests of his advisory client, the Fund, and by engaging in front running transactions that benefited him and persons close to him.[286] I will first consider the allegations under these provisions and then consider whether, as the Division further alleges, Gibson also willfully violated Exchange Act Section 10(b) and Rule 10b-5(a) and (c), and Advisers Act Section 206(4) and Rule 206(4)-8, through the same conduct.[287]

1. *The antifraud provisions of Advisers Act Section 206(1) and (2) impose federal fiduciary standards on investment advisers and require elimination or disclosure of even potential conflicts of interest.*

Advisers Act Section 206 makes it:

> unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client; [or]
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.[288]

Section 206 "establishes 'federal fiduciary standards' to govern the conduct of investment advisers."[289] As a result, investment advisers "owe their clients 'an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading [their] clients.'"[290] To this end, the Act "reflects a

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286 OIP ¶¶ 2, 55, 56.

287 *Id.* ¶¶ 54, 57.

288 15 U.S.C. § 80b-6(1), (2).

289 *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) (quoting *Santa Fe Indus. v. Green*, 430 U.S. 462, 471 n.11 (1977)).

290 *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *13 (May 2, 2014) (alteration in original) (quoting *SEC v. Capital Gains Research*

congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline as investment adviser—consciously or unconsciously—to render advice which was not disinterested."[291] An adviser must therefore "disclose information that would expose any" actual or potential conflicts of interest with a client.[292] The Commission "has long held that '[f]ailure by an investment adviser to disclose potential conflicts of interest to its clients constitutes fraud within the meaning of Section[] 206(1) and (2).'"[293] "It is indisputable that potential conflicts of interest are 'material' facts with respect to clients and the Commission."[294]

To establish liability under Section 206(1), the Division must show that a respondent acted with scienter.[295] A showing of negligence, however, is sufficient to establish a violation of Section 206(2).[296] Scienter may be shown by evidence of recklessness.[297] In this context, recklessness is "an extreme departure from the standards of ordinary care … present[ing] a danger of

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Bureau, Inc., 375 U.S. 180, 194 (1963)), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015).

[291] *Capital Gains*, 375 U.S. at 191–92 (quoting Louis Loss, *Securities Regulation* 1412 (2d ed. 1961)).

[292] *Montford*, 2014 WL 1744130, at *13 (quoting *Kingsley, Jennison, McNulty & Morse, Inc.*, Advisers Act Release No. 1396, 1993 WL 538935, at *3 (Dec. 23, 1993)).

[293] *Robare Grp. v. SEC*, 922 F.3d 468, 472 (D.C. Cir. 2019) (first alteration in original) (quoting *Fundamental Portfolio Advisors, Inc.*, Securities Act Release No. 8251, 2003 WL 21658248, at *15 & n.54 (July 15, 2003), *pet. denied sub nom. Brofman v. SEC*, 167 F. App'x 836 (2d Cir. 2006)).

[294] *Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003). A misstatement is material if there is a substantial likelihood that a reasonable investor would view "disclosure of the omitted fact … as having significantly altered the 'total mix' of information made available." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988)).

[295] *Montford*, 2014 WL 1744130, at *14; *see SEC v. Steadman*, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992).

[296] *Montford*, 2014 WL 1744130, at *14.

[297] *Id.* at *14 n.108.

misleading [clients] that is either known to the [actor] or is so obvious that the actor must have been aware of it."[298] "Negligence is the failure to exercise reasonable care."[299]

2. Gibson was an investment adviser to the Fund and used instrumentalities of interstate commerce.

Section 206 only applies to investment advisers.[300] An investment adviser is "any person who, for compensation, engages in the business of advising others … as to the advisability of investing in, purchasing, or selling securities."[301]

Gibson was the managing director of both the Fund's managing member, Geier Capital, and the Fund's investment manager, Geier Group, while those entities existed.[302] He acknowledged that he provided investment advisory services to the Fund.[303] He devised the strategy of investing in TRX,[304] negotiated purchases and sales with brokers and counterparties,[305] communicated with Fund investors regarding the Fund's future performance,[306] and held himself out as an adviser to regulators.[307] For these services, he was paid a salary through April 2013 and, through Geier Group,

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[298] *Id.* (final alteration in original) (quoting *David Henry Disraeli*, Securities Act Release No. 8880, 2007 WL 4481515, at *5 (Dec. 21, 2007), *pet. denied*, 334 F. App'x 334 (D.C. Cir. 2009)).

[299] *IFG Network Sec., Inc.*, Exchange Act Release No. 54127, 2006 WL 1976001, at *11 (July 11, 2006).

[300] 15 U.S.C. § 80b-6.

[301] 15 U.S.C. § 80b-2(a)(11); *see Abrahamson v. Fleschner*, 568 F.2d 862, 871 (2d Cir. 1977) (holding that advice can take the form of "exercising control over what purchases and sales are made with their clients' funds").

[302] Div. Ex. 22 at 1, 12; Div. Ex. 23 at 1, 12; Div. Ex. 24 at 1.

[303] Tr. 184, 186, 187, 335 (admitting provision of advisory services both before and after dissolution of Geier Group); *see* Tr. 570 (Hull agreeing).

[304] Tr. 575, 1367.

[305] *See, e.g.*, Resp't Exs. 62, 92.

[306] *See, e.g.*, Resp't Ex. 51.

[307] *See, e.g.*, Div. Exs. 31, 39, 70, 71.

was entitled to annual management fees and incentive allocations even if he did not receive them once the Fund started to fail.[308] For these reasons, Gibson meets the statutory definition of an investment adviser to the Fund.[309]

Liability under Section 206 requires that the adviser make "use of the mails or any means or instrumentality of interstate commerce."[310] This element is satisfied because when Gibson engaged in the problematic trading activities and the transaction with Hull, he used the telephone, e-mail, and the internet.[311]

3. Elimination or disclosure of conflicts where the client is a hedge fund.

Investment advisers owe their clients a duty of full disclosure.[312] But Gibson's advisory client was the Fund, not its individual investors.[313] Indeed,

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[308] Tr. 246–52, 334–35; Div. Exs. 43, 128, 147, 156; Div. Ex. 24 at 2.

[309] *See SEC v. Fife*, 311 F.3d 1, 11 (1st Cir. 2002) (finding that an investment adviser received compensation when "he understood that he would be compensated for his efforts by a commission based on a percentage of the profits from the investments, *if successful*"); *SEC v. Ahmed*, 308 F. Supp. 3d 628, 652–53 (D. Conn. 2018) (finding a similar involvement in recommending investment opportunities and in negotiating the terms of transactions to be sufficient to establish that the defendant was an investment adviser); *Timothy S. Dembski*, Advisers Act Release No. 4671, 2017 WL 1103685, at *10 n.33 (Mar. 24, 2017), *pet. denied*, 726 F. App'x 841 (2d Cir. 2018).

[310] 15 U.S.C. § 80b-6.

[311] *Larry C. Grossman*, Securities Act Release No. 10227, 2016 WL 5571616, at *4 n.11 (Sept. 30, 2016), *vacated as to certain sanctions*, 2019 WL 2870969 (July 3, 2019).

[312] *Montford*, 2014 WL 1744130, at *13.

[313] *See Goldstein*, 451 F.3d at 881 (a hedge fund "adviser owes fiduciary duties only to the fund, not to the fund's investors," because "[i]f the [individual] investors are owed a fiduciary duty and the entity is also owed a fiduciary duty, then the adviser will inevitably face conflicts of interest"). To be clear, Gibson had separate advisory relationships with his parents and the Marzullos, but those relationships had nothing to do with any investment in the Fund those individuals might have had. *See* Tr. 804; Inv. Adviser Advertisements; Comp. for Solicitations, 84 Fed. Reg. 67,518, 67,527 & n.66 (Dec. 10, 2019) (noting that an "adviser's 'clients' … are the pooled investment vehicles themselves" and explaining that "[t]here are circumstances under which an investor in a pooled investment vehicle is also a client of the investment adviser" such as

the Division conceded that although the Fund was Gibson's advisory client, the Fund's investors were not Gibson's advisory clients simply by virtue of their investment in the Fund.[314] The Fund, however, was a mere legal entity with no independent decision-makers. Gibson was therefore essentially "in the perverse position" of disclosing conflicts or potential conflicts to himself as the client's agent.[315] This sort of disclosure to himself, which would have amounted to no disclosure at all, could not have been sufficient.[316]

Because this is the case, the question is to whom Gibson should have made disclosures once conflicts of interest arose. Arguably, disclosure to investors in the Fund would not have been sufficient, and could have even been harmful. The interests of individual investors could have easily been drawn into conflict with the Fund's interests.[317] Moreover, individual investors had no decision-

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"when the investor has its own investment advisory agreement with the investment adviser"). In this regard, *Goldstein*, "did not hold that no hedge fund adviser could create a client relationship with an investor," *United States v. Lay*, 612 F.3d 440, 446–47 (6th Cir. 2010), and the OIP could be read as alleging that Gibson breached duties as to other clients as well as the Fund, *see*, *e.g.*, OIP ¶ 2. The Division, however, has focused on the allegation that Gibson breached his fiduciary duties to the Fund. *See*, *e.g.*, Div. Br. 1–2, 12; Tr. 804.

314 Tr. 804.

315 J. Tyler Kirk, *A Federal Fiduciary Standard Under the Investment Advisers Act of 1940: A Refinement for the Protection of Private Funds*, 7 Harv. Bus. L. Rev. Online 19, 20 (2016).

316 *See id.* Gibson has not argued that disclosure to himself as an agent of the Fund would have been sufficient to remedy any conflict that arose, nor is such an argument viable. *See id.* at 28–31 & n.77 (arguing that an agent's knowledge should not be imputed to the principal when the principal is the agent's intended victim); *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 952 (N.Y. 2010) ("[T]he presumption that an agent will communicate all material information to the principal operates except in the narrow circumstance where the corporation is actually the victim of a scheme undertaken by the agent to benefit himself."); *see also* Div. Ex. 185 at 20 (Dr. Gibbons opined that "it was not adequate that the intended misconduct of Gibson as adviser was known to Gibson as managing member. Gibson's own knowledge of his plans to engage in improper conduct cannot be attributed to the Fund or its investors.").

317 *See Goldstein*, 451 F.3d at 881. For example, a disclosure that Gibson intended to sell his personal shares of TRX due to a potential conflict with the Fund's impending block sale could have caused other investors to attempt to

making authority for the Fund, and no meaningful recourse had they known of Gibson's intended actions. The operating memorandum limited their ability to even withdraw money and permitted Geier Capital to suspend their right to withdrawal under certain conditions.[318]

For these reasons, because the transactions Gibson intended to effectuate posed conflicts or potential conflicts of interest, he should have refrained from engaging in those transactions or, failing that, established an appropriate disclosure mechanism through which a disinterested committee or person could have independently evaluated those conflicts and transactions on behalf of the Fund.[319] Thus, in Gibson's circumstances, a failure to obtain independent advice or abstain from a transaction in the event of even a potential conflict would constitute a violation of the Advisers Act.[320]

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sell their personal shares, which in turn could have adversely affected TRX's share price or limited the Fund's ability to later sell its shares.

[318] Div. Ex. 24 at 3, 16, 20–22.

[319] Independent disclosure mechanisms may involve, for example, disclosure to an independent conflicts committee or an independent person in management to evaluate the conflict and render a decision for the Fund. *See SEC v. DiBella*, 587 F.3d 553, 568 (2d Cir. 2009); Asset Managers' Committee, Best Practices For The Hedge Fund Industry 42, 48–49 (2008), https://www.treasury.gov/press-center/press-releases/Documents /amcreportapril152008.pdf; Div. Ex. 185 at 20. As "[c]onflicts are inherent in the asset management business as in many other financial services businesses," a fund "[m]anager should adopt policies and procedures to identify and address potential conflicts of interest that may arise in its specific businesses" and "establish a Conflicts Committee." Best Practices at 47–48. Typically, a fiduciary must seek independent, disinterested advice when he or she has divided loyalties or lacks the ability to make the decision at hand. *Accord Leigh v. Engle*, 727 F.2d 113, 132 (7th Cir. 1984) (addressing ERISA fiduciaries with divided loyalties).

[320] *See Capital Gains*, 375 U.S. at 191 (an adviser must "eliminate, or at least … expose" all potential conflicts of interest).

4. Front running in the investment adviser context.

The Division argues that Gibson is liable for front running.[321] "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."[322] As is the case with insider trading, there is no specific statute or regulation prohibiting front running. But unlike insider trading, which courts have long addressed under the federal securities laws, there is little case law addressing front running under the antifraud provisions of federal securities law.[323]

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[321] Div. Posthearing Br. at 4–7, 16–20, 26–27.

[322] 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 11 (May 13, 1988), http://www.sechistorical.org/museum/papers/1980/page-14.php (scroll to May 13); *see* Lewis D. Lowenfels & Alan R. Bromberg, *Securities Market Manipulations: An Examination and Analysis of Domination and Control, Frontrunning, and Parking*, 55 Alb. L. Rev. 293, 313 (1991); *see also John R. D'Alessio*, Exchange Act Release No. 47627, 2003 WL 1787291, at *2 (Apr. 3, 2003) (stating that a broker who times "the purchase or sale of shares of a security for his own account so as to benefit from the price movement that follows execution of large customer orders, [engages in] a practice commonly known as trading ahead or frontrunning"), *pet. denied*, 380 F.3d 112 (2d Cir. 2004).

[323] *See* Thomas A. Russo & Marlisa Vinciguerra, *Financial Innovation and Uncertain Regulation: Selected Issues Regarding New Product Development*, 69 Tex. L. Rev. 1431, 1527–28 (1991); Lowenfels & Bromberg, 55 Alb. L. Rev. at 313–21, 337; *see, e.g.*, *SEC v. Yang*, 795 F.3d 674, 680 (7th Cir. 2015) (declining to reach defendant's argument that front running should never be considered fraudulent conduct under Section 10(b) and Rule 10b-5 because he had failed to preserve the issue). The Commission has largely left it to self-regulatory organizations—most recently the Financial Industry Regulatory Authority, Inc. (FINRA)—to regulate front running. *See, e.g.*, Self-Regulatory Organizations; FINRA; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Existing NASD IM-2110-3 as New FINRA Rule 5270 (Front Running of Block Transactions) With Changes in the Consolidated FINRA Rulebook, 77 Fed. Reg. 55,519, 55,522 (Sept. 10, 2012) (approving adoption of FINRA Rule 5270); *D'Alessio*, 2003 WL 1787291, at *3, *7–9 (affirming a violation of NYSE Rule 92 prohibiting front running); *E.F. Hutton & Co.*, Exchange Act Release No. 25887, 1988 WL 901859, at *1, *4 (July 6,

In *Capital Gains*, the Supreme Court found that scalping, a manipulative technique related to front running, violated the Advisers Act.[324] An investment adviser purchased shares of a stock for his own account, recommended the security to his clients, and then immediately sold his personal shares at a profit upon the stock's gain due to his buy recommendation.[325] The Court held that one who

> secretly trades on the market effect of his own recommendation may be motivated—consciously or unconsciously—to recommend a given security not because of its potential for long-run price increase (which would profit the client), but because of its potential for short-run price increase in response to anticipated activity from the recommendation (which would profit the adviser).[326]

The Advisers Act required the "adviser to make full and frank disclosure of his practice of trading on the effect of his recommendations," and his failure to do so was fraud.[327]

The conflict of interest in *Capital Gains* between the adviser and his clients is clear. As one commentator has noted: "Scalpers seek to move the market price of a security by triggering client investment action and to profit by taking action opposite to the clients immediately after the movement."[328] In

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1988) (affirming a violation of NASD rules); *Smith, Barney, Harris Upham & Co.*, Exchange Act Release No. 21242, 1984 WL 472586, at *3–4 (Aug. 15, 1984) (affirming a finding by AMEX). Private firms often also have codes of ethics prohibiting front running. *See, e.g.*, Div. Ex. 185 at 22 n.41 (Dr. Gibbons noted in his report that Deutsche Bank, Gibson's former employer, explicitly prohibited front running).

[324] *Capital Gains*, 375 U.S. at 181, 196–97; *see* David M. Bovi, *Rule 10b-5 Liability for Front-Running: Adding A New Dimension to the "Money Game"*, 7 St. Thomas L. Rev. 103, 106–07 (1994) (noting that scalping is sometimes confused with front running, but that the two practices are different).

[325] *Capital Gains*, 375 U.S. at 181.

[326] *Id.* at 196.

[327] *Id.* at 196–97.

[328] Harvey E. Bines & Steve Thiel, *Investment Management Law and Regulation* 807 (2d ed. 2004).

a sense, "Scalping is little more than price manipulation as an end in itself."[329] Front running "is less blatant a breach of the duty of loyalty than scalping," but is still a "deliberate subordination of the client's interest."[330]

Cases have usually analyzed front running as a violation of a broker's duty of best execution, since the price obtained for the customer's order may not be as favorable as it would have been had the customer's order been executed first.[331] Whether or not the price obtained for a client order would have been the best price but for the investment adviser's front running is, however, not a dispositive consideration. Under the Advisers Act, it is immaterial whether the conduct actually harmed the client or whether the adviser intended to harm the client.[332] Investment advisers are fiduciaries "governed by the highest standards of conduct."[333] An investment adviser has not only a duty of best execution,[334] but also a duty of undivided loyalty[335] and an affirmative duty of

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[329] *Id.*

[330] *Id.*

[331] *See, e.g.*, *United States v. Dial*, 757 F.2d 163, 168–69 (7th Cir. 1985) (analyzing a broker's practice of trading ahead of client under mail and wire fraud statutes); *D'Alessio*, 2003 WL 1787291, at *3–4 (analyzing a broker's practice of trading ahead of a client under NYSE Rules).

[332] *See Capital Gains*, 375 U.S. at 192.

[333] *Fundamental Portfolio Advisors*, 2003 WL 21658248, at *15 (quoting *Victor Teicher & Co.*, Exchange Act Release No. 40010, 1998 WL 251823 (May 20, 1998), *pet. granted in part on other grounds*, 177 F.3d 1016 (D.C. Cir. 1999)); *see also Montford*, 2014 WL 1744130, at *13 ("The 'fundamental purpose of [the Advisers Act is] to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus … achieve a high standard of business ethics in the securities industry.'" (quoting *Capital Gains*, 375 U.S. at 186) (alterations in original)).

[334] *See Clarke T. Blizzard*, Advisers Act Release No. 2253, 2004 WL 1416184, at *2 (June 23, 2004).

[335] *See IMS/CPAs & Assocs.*, Securities Act Release No. 8031, 2001 WL 1359521, at *8 (Nov. 5, 2001), *pet. denied sub nom. Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003).

utmost good faith and must eliminate or expose even potential conflicts of interest.[336]

The exact contours of front running need not be defined to capture or contemplate every form of misconduct. Here, it suffices to say that there is a potential conflict of interest when an investment adviser's personal trading or recommendation to close friends or relatives coincides with the adviser's possession of confidential information about a client's forthcoming trading plans in the same security. An adviser is "not entitled to benefit from the fiduciary relationship except to the extent provided for by fees and compensation the client expressly consents to pay."[337]

Absent the client's consent, it is a breach of an adviser's fiduciary duties to use confidential client information to benefit himself or others—whether to avoid losses or realize gains.[338] Moreover, front running can potentially

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[336] *See Capital Gains*, 375 U.S. at 194; *Montford*, 2014 WL 1744130, at *13; *Fundamental Portfolio Advisors*, 2003 WL 21658248, at *15. "One activity specifically mentioned and condemned by investment advisers" leading up to the passage of the Advisers Act "was trading by investment [advisers] for their own account in securities in which their clients were interested." *Capital Gains*, 375 U.S. at 189. Although the Supreme Court did not go as far as to say that all such personal trading is prohibited, there is little doubt that it could lead to conflicts of interest. *See id.* at 196.

[337] *Feeley & Willcox Asset Mgmt. Corp.*, Securities Act Release No. 8249, 2003 WL 22680907, at *12 (July 10, 2003).

[338] *See Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 WL 56755, at *4 (Jan. 9, 2009) (observing that the duty to maintain confidentiality of client information, which "is grounded in fundamental fiduciary principles," is "one of the most fundamental ethical standards in the securities industry"), *pet. denied*, 586 F.3d 122 (2d Cir. 2009); Restatement (Third) of Agency § 8.01 (2006) ("Unless the principal consents, the general fiduciary principle … requires that an agent refrain from using the agent's position or the principal's property to benefit the agent or a third party."); *id.* § 8.05 (setting forth an agent's duty "not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party," and stating that "it is a breach of an agent's duty to use confidential information of the principal for the purpose of effecting trades in securities although the agent does not reveal the information in the course of trading"). The same principle is expressed in case law on insider trading. *See United States v. O'Hagan*, 521 U.S. 642, 652 (1997) ("[A] fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that

undermine the client's interests or involve conflicting motivations that cannot be adequately judged in hindsight. For example, the adviser might usurp a trading opportunity that otherwise should have gone to the client. Or the adviser's front running, even in small quantities, could cause unexpected price movements in a thinly traded stock. The adviser could also be motivated, even in part, to execute a client's block trade so that he or someone close to him can realize gains before the expiration date of previously purchased put option contracts in the same security. None of these scenarios need be proven or realized, however. The point is that front running poses the potential for the adviser's outside interests to conflict with those of the client. This makes the practice especially problematic.[339]

Given the potential conflict in this context, the client must be permitted to evaluate the adviser's "overlapping motivations" and "decid[e] whether an adviser is serving 'two masters' or only one."[340] And if the client does not consent, then the adviser must abstain from his outside trading or recommendations to others. Requiring anything less—or subjecting the client's interests to hindsight analysis—would undermine the Advisers Act's manifest purpose.

5. Gibson's trading ahead of the Fund violated fiduciary duties and posed potential conflicts of interest.

Gibson's sale of personal shares on September 26, 2011, constituted a fraud in violation of the Advisers Act. When he sold, he was actively

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information."); *Dirks v. SEC*, 463 U.S. 646, 662 (1983) ("[A] purpose of the securities laws was to eliminate 'use of inside information for personal advantage.'" (quoting *Cady, Roberts & Co.*, Exchange Act Release No. 6668, 1961 WL 60638, at *4 n.15 (Nov. 8, 1961))).

[339] In discussing conflicts in the investment-adviser context, the Supreme Court relying on precedent on the problems that flow from contingent-fee arrangements for obtaining government contracts, noted that a person "who occupies confidential and fiduciary relations toward another" should remove "any temptation" to violate those trust relations. *Capital Gains*, 375 U.S. at 196 n.50 (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 550 n.14 (1961)). The Court further posited: "The objection rests in their tendency, not in what was done in the particular case. The court will not inquire what was done. If that should be improper it probably would be hidden, and would not appear." *Id.* (ellipses omitted) (quoting *Miss. Valley Generating*, 364 U.S. at 550 n.14).

[340] *Id.* at 196.

negotiating a block sale of millions of shares of the Fund's TRX position. The particulars of that impending sale was not known to anyone but Gibson, his broker Sands, and maybe Hull, rendering the information non-public.[341] Gibson testified that he sold his personal shares and those of his girlfriend to earn some liquidity, but the timing of the sale suggests that he was attempting to avoid potential losses by selling the shares ahead of the Fund's impending block sale. Perhaps he was concerned that the Fund's block sale, even though it was negotiated in the upstairs market, could lower TRX's share price.[342] But whatever the reason, he should not have engaged in outside trading while negotiating his client's trades in the same security. As discussed earlier, the Fund lacked any independent disclosure mechanism to evaluate Gibson's outside activities. He failed to fully consider—and lacked the independence to consider—the impact that his personal trading may have had on the Fund. In trading when he did, Gibson breached his fiduciary duties to his client and created a potential conflict of interest. Whether or not, in hindsight, his actions actually harmed the Fund is irrelevant.

Gibson's purchase of put options for himself and in Francesca Marzullo's account, and his recommendation to his father to purchase puts also constituted a fraud. When he purchased the puts, he used the Fund's confidential information that it was in the process of liquidating its TRX holdings for his own potential advantage and the advantage of those close to him. The Fund never waived the use of its information for its adviser's personal advantage. Moreover, by all appearances, when Gibson bought $4 puts for himself and others but not for the Fund, he was favoring his own position over his client's. He explained at the hearing why he did this: puts are not free, and he had assessed that the Fund should not take on the additional financial burden because the puts might have expired worthless.[343] Still, he lacked the independence necessary to evaluate the conflict between the position he was taking for himself and those close to him versus the one appropriate for the

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[341] Although market participants knew that the Fund was willing to consider offers for its TRX shares because Gibson previously sought to sell the Fund's TRX shares at the end of August, this fact does not change the confidential nature of the block sale on September 27, 2011. *See* Resp't Br. 21. No one aside from Gibson and his broker knew exactly what the Fund intended to do or when, even if some knew that the Fund was willing to negotiate a transaction.

[342] *See* Tr. 1022; *cf.* Div. Ex. 187 at 108 (Gibson acknowledged that large sales of a stock—at least ones into the market—generally lowered its share price).

[343] Tr. 1450–51.

Fund.[344] Finally, at the same time as he was negotiating the Fund's sale, Gibson was seeking to mitigate losses through a hedging strategy of buying put options. He thus lacked the independence to decide the appropriate timing of the Fund's liquidation of its TRX position, as that decision could significantly affect the value of those puts.

On each occasion, Gibson's misconduct demonstrated scienter. Even though he never intended to harm the Fund, he was a licensed securities professional who was well aware of his fiduciary responsibilities.[345] And he knew that front running was a problematic practice.[346] In this context, Gibson's decision to use the Fund's non-public information to protect his and others' investments was "an extreme departure from the standards of ordinary care" which created conflicts with his duties "so obvious" that he "must have been aware of" them.[347]

Contrary to Gibson's argument, the disclosures in the offering documents were insufficient to alert investors to the potential conflicts created by Gibson's front running.[348] The offering memorandum allowed Gibson to invest in the same securities as the Fund, advise his other clients in ways that differed from his advice to the Fund, and conduct business in competition with the Fund.[349] It noted that Gibson might have conflicts of interest when effecting transactions for the Fund and when transacting in other entities in which he

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344 *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669, 33,677 (July 12, 2019) ("When allocating investment opportunities among eligible clients, an adviser may face conflicts of interest either between its own interests and those of a client or among different clients. If so, the adviser must eliminate or at least expose through full and fair disclosure the conflicts associated with its allocation policies, including how the adviser will allocate investment opportunities, such that a client can provide informed consent."); *see also Montford*, 2014 WL 1744130, at *16 ("The soundness of [an adviser's] investment advice is irrelevant to their obligation to be truthful with clients and to disclose a conflict of interest").

345 Tr. 77–78.

346 *See* Div. Ex. 68; Tr. 235–36, 1426–27.

347 *Montford*, 2014 WL 1744130, at *14 n.108 (quoting *Disraeli*, 2007 WL 4481515, at *5).

348 Resp't Br. at 19–20.

349 Div. Ex. 24 at 19.

had a financial interest.[350] But "for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent."[351] The offering memorandum speaks in generalities. It was not specific enough to disclose that Gibson might front run the Fund for his own personal advantage and the advantage of those close to him. The Fund did not consent to Gibson's behavior nor were there any conflict resolution mechanisms in place.[352]

As a result of his front running, Gibson violated Advisers Act Section 206(1) and 206(2).

6. Gibson violated fiduciary duties when he arranged the Fund's purchase of Hull's shares.

On October 18, 2011, during the period when Gibson and Hull were trying to sell the Fund's entire position in TRX, Gibson had the Fund purchase 680,636 TRX shares from Hull for the closing market price that day. Hull was not charged a commission, but the Fund paid a commission when it later sold Hull's shares together with its remaining TRX shares in a market transaction. The Division argues that Gibson had a conflict of interest that he recklessly failed to disclose when he executed the Hull transaction.[353]

The Division claims that Gibson burdened the Fund with additional TRX shares at a time when he was trying to sell the Fund's position in TRX, and that the only plausible explanation was that Gibson intended to benefit Hull at the Fund's expense.[354] The evidence, however, shows that Gibson suggested consolidating Hull's TRX shares with the Fund's because he believed that it

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350 *Id.*

351 Commission Interpretation, 84 Fed. Reg. at 33,676.

352 Investors essentially gave Gibson control over how conflicts would be managed, as the offering documents lean on his expertise and provide no mechanism for conflict disclosure or remediation should one arise. *See* Div. Ex. 24 at 17. If anything, this makes Gibson's decision to breach the investors' trust and front run the Fund even more problematic.

353 Div. Br. 20–26.

354 *Id.* at 20–21, 24–25.

might put the Fund in a better position to liquidate its TRX position.[355] As noted earlier, Bystrom opined that consolidating shares made block transactions easier because buyers would then know that no shares were being left behind.[356] Gibson's experiences with Sequiera and Sands provided examples of this, although those experiences also show that the Fund did not necessarily need to purchase Hull's shares for them to be sold as a block.[357] In short, it is true, as the Division maintains, that Hull's shares did not necessarily need to be consolidated with the Fund's in one account to facilitate their sale,[358] but because Gibson was the one to suggest the consolidation, the Division has not established that he lacked a good-faith belief that it would be helpful *to the Fund*. I cannot retrospectively critique Gibson's judgment on the current record.

But this does not mean that the transaction was free of conflicts of interest. As the Division argues, when Gibson arranged the trade with Hull on the Fund's behalf, Gibson owed Hull over $600,000 and Hull was paying Gibson's salary for advising the Fund.[359] Gibson had a clear and obvious conflict of interest. His impartiality in arranging any purchase from Hull for the Fund would thus be questionable, regardless of the transaction's merit. In fact, Gibson testified that he was acting as an adviser to both Hull and the Fund on this transaction.[360] This is the kind of situation where an advisory client must "be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving 'two masters' or only one."[361]

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355 *See* Div. Ex. 94.

356 Tr. 1567; Resp't Ex. 228 at 6.

357 Resp't Ex. 62 at 1; Resp't Ex. 93 at 1–2; Tr. 1404–05.

358 Div. Reply at 9–10.

359 Div. Br. 23–24; Div. Reply at 9.

360 Tr. 261.

361 *Capital Gains*, 375 U.S. at 196; *cf. Frey v. Fraser Yachts*, 29 F.3d 1153, 1156 (7th Cir. 1994) (a broker and fiduciary "cannot act as the representative for both buyer and seller in the same transaction unless both parties are fully aware of such dual representation and consent to it" and must "disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency" (quoting *Quest v. Barge*, 41 So.2d 158, 160 (Fla. 1949))); *UBS AG, Stamford Branch v. HealthSouth Corp.*, 645 F.

As mentioned earlier, the Fund lacked any independent disclosure mechanism. It is not possible to say how disclosure by Gibson would have played out. It's also not possible to say on the current record that the Fund's purchase of Hull's shares harmed the Fund or that it lacked a legitimate purpose. The problem is not that Gibson caused the Fund to buy Hull's shares but rather that he did so while operating under a serious, undisclosed conflict of interest.[362] It thus suffices to say that Gibson's conduct failed to account for the potential conflict of interest and he failed to take measures to remedy or eliminate the conflict before executing the transaction.

Gibson's conduct was reckless. He knew of his fiduciary responsibilities. It should have been obvious to him that a transaction with Hull, to whom he owed so much money and on whose salary payments he depended, conflicted with his duties to the Fund. Again, it does not matter whether Gibson believed the transaction would promote the Fund's interest. There were still obvious conflicts that Gibson recklessly disregarded in carrying out the Hull transaction.

I reject, however, the Division's arguments that the Hull transaction violated the terms of the Fund's offering memorandum. The Division asserts that the sale was not done "at the current market price" as required.[363] But TRX closed at $3.60 that day and the Fund purchased at $3.60 per share. The transaction was thus in accordance with the plain meaning of words "current market price."

The Division also contends that the transaction contravened the offering memorandum because the Fund paid an extra commission to sell Hull's shares when it liquidated its holdings on November 10.[364] But the offering memorandum proscribed only "extraordinary brokerage commissions … in connection with … [a] transaction," and not "customary transfer fees or

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Supp. 2d 135, 144 (S.D.N.Y. 2008) (explaining that under New York law, a fiduciary violates his duty if he "omits to disclose any interest which would naturally influence his conduct").

362 It is true that Hull sold without giving a block discount or paying a commission. But, as explained below, it's not clear that the lack of a block discount was problematic, and the failure to charge a commission was marginal compared to the conflict of interest.

363 Div. Ex. 24 at 19; Div. Br. 21–22.

364 Div. Br. 22–23.

commissions."[365] Even if the commission paid on November 10 can be considered "in connection with" the purchase of Hull's shares on October 18—an issue I do not decide—there is no evidence that it was not a "customary" commission usually charged for such transactions, let alone evidence that it was "extraordinary."

The Division argues that notwithstanding the offering memorandum, $3.60 per share was not the appropriate price for this transaction.[366] As noted above, if Hull had sold his shares into the market instead of to the Fund, then given the stock's trading volume, it would likely have depressed TRX's share price and he would not have been able to sell for $3.60 per share.[367] But Hull did not sell his shares into the market, and the Division has not shown that a block discount is always appropriate in upstairs-market transactions like this one.[368] Even if some discount was warranted, it is not apparent what price would have been more appropriate. Dr. Gibbons opined that Gibson could have hired a valuation expert to determine fair market value, but presumably such experts charge for their services.[369] I cannot determine on this record whether it would have been more cost effective for the Fund to hire an expert to value the shares at a discount or just to pay the market price of $3.60 a share. Maybe, as Dr. Gibbons opined, the Fund could have bought Hull's stock slowly over time in the market, and then each transaction would have been at market price.[370] But nothing required the Fund to structure the transaction in this

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365 Div. Ex. 24 at 19.

366 Div. Br. 21–22; Div. Reply at 10–11.

367 *See supra* at 24–25.

368 The Division tried to show that on several occasions when the Fund sold its shares in the upstairs market, it had to give a block discount, but Gibson demonstrated that this was untrue. Tr. 265–78. Even though Dr. Gibbons opined that the Fund did not purchase Hull's shares at the current market price—because the sale did not occur in the market—he did not specifically say that Gibson should have obtained a block discount for the Fund in the Hull transaction. *See* Tr. 945–46, 950–52. And Bystrom said that the appropriateness of a block discount depends on the situation, and sometimes buyers pay a premium to buy a stock. Tr. 1628, 1630.

369 Tr. 951.

370 *See* Tr. 950–51.

manner. In any event, whether or not the Fund charged Hull the wrong price, Gibson was reckless in ignoring the conflicts inherent in the transaction.

Finally, the Division argues that because the Fund charged Hull no commission, the transaction allowed Hull to avoid paying a commission when the Fund ultimately sold his shares along with its own, and this needlessly favored Hull.[371] The Division is right about this. Even though Gibson concluded that it was in the Fund's best interest to purchase Hull's shares, he should have conducted the sale in a manner that did not favor Hull in any manner. Because it was likely that the Fund would pay a commission when it sold its shares into the market, Gibson should have recouped those costs for the Fund by charging Hull a commission when purchasing his shares or disclosed what he was doing.[372] Yet, the Fund paid at most $6,866 extra to sell Hull's shares, of which Hull effectively paid more than 80% because of his ownership stake in the Fund.[373] Gibson's failure to disclose this aspect of the transaction only marginally adds to his reckless behavior surrounding this transaction.

Accordingly, Gibson violated Advisers Act Section 206(1) and (2) for his conduct related to the Hull transaction.

7. Gibson violated Exchange Act Section 10(b) and Rule 10b-5.

The Division also alleges that Gibson's front running and the Hull transaction violated Exchange Act Section 10(b) and Rule 10b-5(a) and (c).[374] Section 10(b) prohibits any person, using any means or instrumentality of interstate commerce or the mails, "[t]o use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance" that contravenes Commission rules promulgated under this section.[375] Rule 10b-5(a) and (c) prohibit any person, directly or indirectly, from "employ[ing] *any* device, scheme, or artifice to defraud," and from "engag[ing] in *any* act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[376] The terms used in Rule 10b-5(a) and (c)

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371 Div. Br. 22–23; Div. Reply 11.

372 Indeed it seems that the offering memorandum would have permitted the Fund to charge Hull a "customary" commission. *See* Div. Ex. 24 at 19.

373 *See supra* at 25; *see also supra* nn. 205–06.

374 OIP ¶ 54; Div. Br. 34–36.

375 15 U.S.C. § 78j(b).

376 17 C.F.R. § 240.10b-5(a), (c) (emphasis added).

"'provide a broad linguistic frame within which a large number of practices may fit'" and "connote a broad proscription against conduct that deceives or misleads another."[377] The Division must demonstrate scienter to establish any violation of Section 10(b) and Rule 10b-5.[378]

Gibson's conduct involved interstate commerce and the purchase and sale of TRX stock. As to whether his actions were a fraudulent scheme or practice, "for the purpose of rule 10(b)-5, an investment adviser is a fiduciary and therefore has an affirmative duty of utmost good faith to avoid misleading clients. This duty includes disclosure of all material facts and all possible conflicts of interest."[379] And "nondisclosure in violation of a fiduciary duty involves 'feigning fidelity' to the person to whom the duty is owed and is therefore deceptive."[380] Gibson breached his duty to the Fund because he recklessly failed to disclose or otherwise remediate his conflicts of interest.[381] This deceptive and fraudulent conduct violated Exchange Act Section 10(b) and Rule 10b-5(a) and (c).

8. Gibson violated Advisers Act Section 206(4) and Rule 206(4)-8.

The Division also alleges that Gibson's conduct violated Advisers Act Section 206(4) and Rule 206(4)-8.[382] Advisers Act Section 206(4) prohibits an investment adviser from engaging "in any act, practice, or course of business which is fraudulent, deceptive, or manipulative" as further prescribed by Commission rule.[383] Rule 206(4)-8 makes it prohibited under Section 206(4)

> for any investment adviser to a pooled investment vehicle to:

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377 *Dennis J. Malouf*, Securities Act Release No. 10115, 2016 WL 4035575, at *7 (July 27, 2016) (quoting *SEC v. Clark*, 915 F.2d 439, 448 (9th Cir. 1990)), *pet. denied*, 933 F.3d 1248 (10th Cir. 2019).

378 *Aaron v. SEC*, 446 U.S. 680, 701–02 (1980).

379 *Laird v. Integrated Res., Inc.*, 897 F.2d 826, 835 (5th Cir. 1990).

380 *Malouf*, 2016 WL 4035575, at *8 (quoting *O'Hagan*, 521 U.S. at 655).

381 *Vernazza*, 327 F.3d at 859 ("It is indisputable that potential conflicts of interest are 'material' facts with respect to clients and the Commission.").

382 OIP ¶ 57; Div. Br. 30–34.

383 15 U.S.C. § 80b-6(4).

> (1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or
>
> (2) Otherwise engage in an 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.[384]

The Division need not prove scienter to establish a violation of Section 206(4); a showing of negligence is sufficient.[385]

Gibson violated Section 206(4) and Rule 206(4)-8 for the conduct discussed above. The rule applies because the Fund was a type of pooled investment vehicle.[386] And Gibson's potential conflicts with the Fund would have been material information to investors.[387] Since, for the reasons discussed earlier, Gibson's actions constituted a fraud within the meaning of the securities laws, he also deceived investors.

Gibson argues that he could not have violated this rule because he owed a duty exclusively to the Fund and not to its investors.[388] But Gibson misreads the rule. It is true that because he breached no fiduciary duty to investors, he did not directly defraud them under Section 206(2) through his lack of disclosure.[389] By its terms, however, Rule 206(4)-8 applies even when there is no fiduciary duty to the investors.[390] Conduct that operates as a fraud against

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384 17 C.F.R. § 275.206(4)-8.

385 *Steadman*, 967 F.2d at 647.

386 *See* 17 C.F.R. § 275.206(4)-8(b); *see also* 15 U.S.C. § 80a-3(a)(1); Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, 72 Fed. Reg. 44,756, 44,758 (Aug. 9, 2007); Tr. 140; Div. Ex. 31 at 2.

387 *Vernazza*, 327 F.3d at 859.

388 Resp't Br. 26–27 (citing *Goldstein*, 451 F.3d at 881).

389 *See* Prohibition of Fraud, 72 Fed. Reg. at 44,760 ("Rule 206(4)-8 does not create under the Advisers Act a fiduciary duty to investors or prospective investors in a pooled investment vehicle not otherwise imposed by law.").

390 *See* 17 C.F.R. § 275.206(4)-8; Inv. Adviser Advertisements, 84 Fed. Reg. at 67,527; *SEC v. Quan*, No. 11-cv-723, 2013 WL 5566252, at *16 n.10 (D. Minn.

the Fund can also by extension be materially misleading as to investors under Rule 206(4)-8. The investors were deceived by Gibson's failure to disclose his front running and the Hull transaction or abstain from those transactions, which brings his conduct within the ambit of Section 206(4) and Rule 206(4)-8. In fact, this is exactly the type of misconduct the rule was designed to capture.[391]

9. Gibson is not charged with making false statements to investors regarding Geier Group and Geier Capital, and, in any event, such misstatements appear immaterial.

Gibson contends that two additional allegations should not be grounds for liability under Rule 206(4)-8: (1) his failure to disclose the dissolution of Geier Group and the Georgia Geier Capital; and (2) his solicitation of two investors for the Fund using offering documents falsely stating that Geier Group was a registered investment adviser at the time.[392] I agree. Although the OIP mentions these facts—and they were proven at the hearing—the OIP specifically predicates liability on the front running and the Hull transaction.[393] Furthermore, the Division, which does not contend in its opening brief that these failures or false statements give rise to liability, failed to preserve this argument.[394] The OIP appears to mention these matters for a

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Oct. 8, 2013) ("the existence of a fiduciary duty is not required to prove a violation of Rule 206(4)-8"), *aff'd*, 870 F.3d 754 (8th Cir. 2017).

391 *See* Prohibition of Fraud, 72 Fed. Reg. at 44,756–57 (explaining that the rule, which the Commission promulgated in response to *Goldstein*, "clarifies that an adviser's duty to refrain from fraudulent conduct under the federal securities laws extends to the relationship with ultimate investors" in pooled investment vehicles), 44,759 ("section 206(4) encompasses 'acts, practices, and courses of business as are * * * deceptive,' thereby reaching conduct that is negligently deceptive as well as conduct that is recklessly or deliberately deceptive").

392 Resp't Br. 27.

393 OIP ¶¶ 2–11, 14, 15; *see supra* at Facts Section 4.

394 *See Dembski*, 2017 WL 1103685, at *8. In its response to Gibson's proposed findings of fact and conclusions of law, the Division counters that these facts were material, but does not elaborate. *See* Div. Responses to Resp't's Proposed Findings of Fact & Conclusions of Law ¶ 135.

different reason: to show that despite the dissolution of Geier Group and Geier Capital, Gibson was still the Fund's investment adviser.[395]

In any event, the Division failed to prove that the status of Geier Group or Geier Capital was material to investors. Most, if not all of the Fund's investors invested because of their personal relationships with Hull and Gibson, and knew that Gibson and Hull were managing the Fund.[396] Moreover, Gibson testified that after Geier Group was dissolved, his role as adviser to the Fund did not change.[397] And the Fund's operating agreement stated that a different entity could be substituted for Geier Group at the sole discretion of the Fund's managing member.[398] Gibson's false statements about Geier Group and his failures to disclose the dissolution of Geier Group and Geier Capital did not violate Rule 206(4)-8 because the Division did not establish their materiality.

Sanctions

The Division requests that Gibson be ordered to cease and desist from violations of the securities laws, be permanently barred from the securities industry under the Advisers Act and the Investment Company Act, disgorge $82,088, and pay civil money penalties of $825,000.[399] I impose a portion of the sanctions the Division requests for Gibson's misconduct.

1. Industry bars.

Advisers Act Section 203(f) authorizes the Commission to bar or suspend any person from associating with various segments of the securities industry if, in relevant part, that person willfully violated any provision of the Advisers Act, Exchange Act, or rules promulgated under either Act; was associated with an investment adviser at the time of the misconduct; and the sanction is in the public interest.[400]

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395 *See* OIP ¶¶ 14, 15.

396 *See, e.g.*, Tr. 529, 541, 1337–38.

397 Tr. 184, 187.

398 Div. Ex. 21 at 3.

399 Div. Br. at 37–43.

400 15 U.S.C. § 80b-3(e)(5), (f).

Investment Company Act Section 9(b) authorizes the Commission to prohibit any person, either permanently or temporarily, from serving or acting in various capacities with respect to a registered investment company, if that person has willfully violated a provision of the Advisers Act or Exchange Act, or a rule promulgated under them; and the sanction is in the public interest.[401]

In considering the public interest, the Commission starts with the factors set out in *Steadman v. SEC*.[402] These factors include:

> the egregiousness of a respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[403]

The Commission also considers the public at large,[404] the welfare of investors as a class, standards of conduct in the securities business generally,[405] and the threat a respondent poses to investors and the markets in the future.[406] The public-interest inquiry is flexible, and no single factor is dispositive.[407]

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401 15 U.S.C. § 80a-9(b)(2).

402 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see Brendan E. Murray*, Advisers Act Release No. 2809, 2008 WL 4964110, at *10 (Nov. 21, 2008).

403 *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 WL 231642, at *8 (Jan. 31, 2006).

404 *Christopher A. Lowry*, Advisers Act Release No. 2052, 2002 WL 1997959, at *6 (Aug. 30, 2002), *pet. denied*, 340 F.3d 501 (8th Cir. 2003).

405 *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 WL 163472, at *15 (Oct. 24, 1975), *penalty modified*, *pet. otherwise denied*, 547 F.2d 171 (2d Cir. 1976).

406 *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *5 (July 26, 2013).

407 *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. denied*, 548 F.3d 129 (D.C. Cir. 2008).

Gibson acted as an investment adviser to the Fund, and was therefore associated with an adviser for the purposes of the sanctions requested under the Advisers Act.[408] His violations were willful because he intended to take the actions that resulted in the violations.[409]

Turning to the public interest, the Commission considers misconduct involving a breach of fiduciary duty to be egregious.[410] In September 2011, Gibson sold personal shares ahead of the Fund's sale, and in October and November, he purchased and recommended that others purchase put options while the Fund was trying to find a buyer for its remaining TRX shares. In doing so, Gibson recklessly used his client's confidential information without consent to benefit himself and those close to him, which created potential conflicts with his client. He further recklessly engaged in the Hull transaction in October 2011, despite his numerous conflicts of interest with respect to Hull. Gibson's recurrent failures to appropriately disclose or remediate his conflicts of interest breached his fiduciary duty and were therefore egregious. Given that Gibson was a securities professional with several exam licenses, his misconduct—committed with scienter—cannot be excused.[411]

Gibson has not expressed remorse or made any assurances against future violations. Although he is not directly involved in the securities industry now, given his relative youth, he could work in the industry in the future. Gibson

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[408] *Anthony J. Benincasa*, Investment Company Act of 1940 Release No. 24854, 2001 WL 99813, at *2 (Feb. 7, 2001) (a person who "function[s] as an investment adviser in an individual capacity … meets the definition of a 'person associated with an investment adviser'"); *Alexander V. Stein*, Advisers Act Release No. 1497, 1995 WL 358127, at *2 (June 8, 1995) ("[A]uthority to proceed under Section 203(f) … rest[s] on whether or not an entity or individual in fact acted as an investment adviser").

[409] *See Wonsover v. SEC*, 205 F.3d 408, 413–14 (D.C. Cir. 2000) (willfulness means the intentional commission of the act that constitutes the violation of the securities laws; there is no requirement that the actor be aware that he or she is violating any statutes or regulations); *accord Robare Grp.*, 922 F.3d at 479.

[410] *James S. Tagliaferri*, Securities Act Release No. 10308, 2017 WL 632134, at *6 (Feb. 15, 2017).

[411] *See Blizzard*, 2004 WL 1416184 at *5 ("Securities professionals are required to be knowledgeable about, and to comply with, requirements to which they are subject.").

presents some risk to the investing public, particularly since the "existence of a violation raises an inference that it will be repeated."[412]

In a typical case in which a respondent committed fraud and showed no remorse, consistent with Commission precedent, I would impose a permanent bar and be disinclined to give the individual a second chance.[413] But this is not a typical case and there are several mitigating factors.

First, there is no evidence that Gibson intended to harm the Fund. When he liquidated the personal accounts on September 26, he believed that the small size of his personal trades would have no effect on the Fund's impending sale.[414] Indeed, when he traded, it was unclear when the Fund's sale would go through. Gibson's front running is thus different from a case in which a broker holds a client's order and then executes personal trades immediately ahead of a client's trades, which could lead to the client receiving a worse execution than the broker.[415] And the puts Gibson purchased for himself were hedging transactions; Gibson was not taking a short position contrary to the Fund's long one.[416] He was nearly insolvent because Hull required him to execute a promissory note he didn't need and was trying to protect his own investments rather than trying to harm the Fund. The same is also true with regard to the Hull transaction. Although he was deeply conflicted, the evidence shows that

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412 *Korem*, 2013 WL 3864511, at *6 n.50 (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)).

413 *See id.* at *5 ("Ordinarily, and in the absence of evidence to the contrary, it is in the public interest to bar a respondent who is enjoined from violating the antifraud provisions."); *see, e.g.*, *Stanley Jonathan Fortenberry*, Initial Decision Release No. 748, 2015 WL 860715, at *32–33, *35 (ALJ Mar. 2, 2015).

414 Tr. 1424.

415 *See, e.g.*, *Dial*, 757 F.2d at 168–70; *D'Alessio*, 2003 WL 1787291, at *3.

416 The puts Gibson purchased for Francesca Marzullo might be different, although the record is not entirely clear. On the one hand, she was not a Fund investor and owned no TRX shares in late October and early November 2011, which suggests that her puts were not hedges. And although Gibson testified that he purchased Ms. Marzullo's puts to hedge her father's position in the Fund, he later lost her profits in other options trades. This fact diminishes the credibility of Gibson's explanation. On the other hand, these facts are not strictly contradictory: it is possible that Gibson purchased the puts to hedge Giovanni Marzullo's position in the Fund and later decided to risk the profits in other trades.

Gibson thought the purchase of Hull's shares would improve the Fund's chances of selling its remaining shares. And in addition to the fact that Gibson did not intend to harm the Fund, it is not clear that his front running transactions or the Fund's purchase of Hull's shares actually caused investors any significant losses.

Second, Gibson's lack of remorse must be seen in context. Throughout this proceeding, the Division has claimed that: Gibson misled investors by telling them that he still had faith in TRX even though he privately believed it was failing; and gave Hull a "sweetheart" deal by dumping his shares on the Fund after the decision had been made to exit TRX.[417] At times, the Division has also suggested that by purchasing puts, Gibson was taking a short position in TRX.[418] The record does not support these claims. I therefore do not hold against Gibson his vigorous defense of these particular charges. Still, Gibson's reckless disregard of his fiduciary duties is on its own a serious matter which he has failed to acknowledge.

Finally, Gibson ended up in a nearly impossible situation as investment adviser to the Fund. No one presented evidence about why he left Deutsche Bank in early 2009, but within a year after he left, he found himself, at about 27 years of age, "managing" a $32 million fund involving not just his father's business partner, Hull, but also Hull's contemporaries and their children, and Gibson's family and his girlfriend's family.

Gibson only received this opportunity because Hull was his father's business partner. And although Gibson's name was on Fund documents, Gibson knew Hull was the Fund's ultimate decision-maker and that he was not in a position to question Hull's judgment.[419] Moreover, Hull enjoyed the respect of a large portion of his community. The pressure all of this might have placed on Gibson was evidenced at times in Gibson's over-the-top and desperate sounding e-mail and phone communications.

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417 *See, e.g.*, Div. Br. 3–4, 19–21, 24–25.

418 *See* OIP ¶ 45; Tr. 49, 301–03.

419 Hull described himself as irascible. Tr. 568, 583. From watching his testimony and demeanor, that description is apt. It is clear that he has little tolerance for incompetence. Given this trait plus Hull's forceful personality, experience, and standing in his community and among his peers, it would have been difficult for Gibson—at age 26 or 27 with no prior advisory experience—to question Hull's judgment if he disagreed with Hull.

What's more, this opportunity came with a significant string attached. Gibson and his family had to be all in. Hull required Gibson and his family to be aligned with Hull and the Fund. As a condition to managing the Fund, Hull required Gibson to invest his entire net worth in the Fund, and even loaned him money to do so, which increased the pressure on him.[420] This meant that if the Fund's investments declined, Gibson and those close to him would feel that decline the most. Gibson recalled that Hull required:

> that at all times, over any period of time -- a year, a month, a week, a day, an hour -- at every point in time, that if the securities or investments that we owned in that fund declined, I would lose more than other investors and that the individuals close to me and everything that mattered to me in my life would be exposed in that regard.[421]

And when Gibson wanted to repay Hull's loan, Hull refused to let him.[422] Additionally, in late 2010, Hull decided to invest all the Fund's money in one stock, TRX, which made Gibson's fortunes even more precarious.[423]

In hindsight, the problems with this situation are obvious. The entire setup created a conflict of interest between Gibson and the Fund. But at the time and given Gibson's circumstance, it is not difficult to understand how Gibson ended up in the situation that led to this proceeding. Gibson's reckless violations of his fiduciary duties to mitigate his losses cannot be excused, but should be seen in context.

Gibson's lapses of judgment were serious. He cannot, at this time, be permitted to remain in the securities industry. But because of the mitigating factors I've noted, I will give him the opportunity to return. I impose full industry bars under Advisers Act Section 203(f) and a prohibition under Investment Company Act Section 9(b), with the right to reapply for reentry after three years for both sanctions.

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420 Div. Ex. 24 at 1, 7; Resp't Ex. 117 at 5; Tr. 1358–59.

421 Tr. 1358.

422 Tr. 1360.

423 *See* Tr. 1366–67.

2. Cease-and-desist order.

Exchange Act Section 21C and Advisers Act Section 203(k) authorize the Commission to issue a cease-and-desist order against any respondent who violates a provision of those acts or a rule promulgated under them.[424] The public interest factors discussed above inform the decision whether to impose a cease-and-desist order.[425] The Commission also considers "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings."[426] No single factor in this analysis is dispositive, and the entire record is considered when deciding whether to issue a cease-and-desist order.[427]

To issue a cease-and-desist order, "there must be some likelihood of future violations."[428] But the "risk" of future violations "need not be very great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[429]

Giving the length of time this case has been pending, Gibson's violations are not recent. Although his failures to remediate his conflicts of interest did not necessarily cause his client to lose money, an adviser who fails to address conflicts of interest poses a risk to the securities industry as a whole. Moreover, Gibson has shown no remorse, and until he fully understands the need to take his fiduciary duties more seriously, there remains a risk of future violations. In combination with the other sanctions imposed, a cease-and-desist order is warranted.

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424 15 U.S.C. §§ 78u-3(a), 80b-3(k)(1).

425 *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *23 & n.114, *26 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002); *see Dembski*, 2017 WL 1103685, at *14.

426 *KPMG Peat Marwick*, 2001 WL 47245, at *26.

427 *Id.*

428 *Id.* at *24.

429 *Id.*; *see also id.* at *26.

3. Disgorgement.

Advisers Act Section 203(j) and (k)(5), Exchange Act Sections 21B(e) and 21C(e), and Investment Company Act Section 9(e) authorize disgorgement, including reasonable interest, in this proceeding.[430] "Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws."[431] To establish the appropriate amount of disgorgement, the Division need show only "a reasonable approximation of profits causally connected to the violation" in question.[432] Ordinarily, once the Division makes the required showing, the burden shifts to the respondent to show that the disgorgement figure was not a reasonable approximation.[433]

The Division seeks disgorgement of the losses Gibson avoided by selling the TRX shares in his personal account on September 26, 2011, as well as the profits he made from the purchase of $4 put options in his own account in October and November 2011.[434]

The Division wants Gibson to disgorge $1,080 for the September front running. This sum represents the difference between the price he obtained per share on September 26 for the 2,000 personal shares ($4.04), and the price he would have obtained had he sold on September 27 directly following the Fund's sale, when he would have received 54 cents less per share ($3.50).[435] This figure represents a reasonable approximation of the losses Gibson avoided, because in the analogous insider trading context, "the proper amount of disgorgement is generally the difference between the value of the shares when the insider sold them while in possession of the material, nonpublic information, and their

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430 15 U.S.C. §§ 78u-2(e), 78u-3(e), 80a-9(e), 80b-3(j), (k)(5).

431 *Montford*, 2014 WL 1744130, at *22 (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

432 *First City Fin.*, 890 F.2d at 1231; *see also Montford & Co. v. SEC*, 793 F.3d 76, 83–84 (D.C. Cir. 2015).

433 *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).

434 Div. Br. 40. The Division does not ask that Gibson disgorge the losses he avoided in September by selling the shares in Ms. Marzullo's account or the shares in the Geier Group account that belonged to him because of his 50% ownership of the entity. *See id.* at 41. The Division also does not request that Gibson disgorge any profits realized on puts other than his own.

435 Div. Br. 41; *see* Tr. 234–35.

market value 'a reasonable time after public dissemination of the inside information.'"[436] Although Gibson could have sold his shares at any time, such as when TRX was slightly higher at the end of October, he testified that he sold when he did to obtain liquidity due to his suspension of management fees, which shows he would not have wanted to wait much longer to sell.[437] The Division has therefore met its burden of showing that $1,080 is a reasonable approximation of the amount by which Gibson was enriched but-for his front running.[438] Gibson does not attempt to rebut the Division's reasonable approximation.

Gibson also does not dispute that he sold his $4 TRX puts for $81,930 more than he purchased them.[439] These profits are causally connected to his violation; had he refrained from purchasing the puts or obtained independent advice as his fiduciary obligations demanded, he would not have made the profits from the puts which mitigated his losses in the Fund. I will, however, deduct the broker commissions he paid to sell his puts.[440] Gibson must therefore disgorge his $81,008.81 net profit from his sale of the $4 puts.[441]

In total, Gibson must disgorge $82,088.81, plus prejudgment interest as calculated according to the ordering paragraphs below.[442]

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[436] *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004) (quoting *SEC v. MacDonald*, 699 F.2d 47, 54–55 (1st Cir. 1983) (en banc)); *see also SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995).

[437] Tr. 1394; *see* Joint Ex. 1 at 5.

[438] *See Jay T. Comeaux*, Securities Act Release No. 9633, 2014 WL 4160054, at *3 (Aug. 21, 2014) (requiring but-for causation for disgorgement).

[439] Tr. 330.

[440] The Division deducts broker commissions from the requested disgorgement amount. *See* Div. Br. 41–42. This deduction of "expenses customarily incurred in the purchase and sale of stock" is permissible. *See SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006).

[441] Div. Ex. 185 at 47 (Dr. Gibbons's calculation of Gibson's net profits).

[442] 17 C.F.R. § 201.600(a) (requiring the payment of prejudgment interest on disgorgement ordered).

4. Civil penalties.

Exchange Act Section 21B(a)(2) and Advisers Act Section 203(i)(1)(B) authorize civil penalties in cease-and-desist proceedings against a respondent who has violated a provision of those acts or a rule promulgated under them.[443] Investment Company Act Section 9(d)(1)(A) and Advisers Act Section 203(i)(1)(A) authorize civil penalties against a respondent who has willfully violated a provision of the Advisers Act or Exchange Act, or a rule promulgated under them, if a penalty is in the public interest.[444]

The statutes set out a three-tiered system for determining the maximum monetary penalty for each act or omission constituting a violation.[445] First-tier penalties are available based on the fact of the violation alone.[446] Second-tier penalties are permitted if a respondent's misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.[447] Third-tier penalties require the additional finding that the misconduct, directly or indirectly, resulted in either "substantial losses or created a significant risk of substantial losses to other persons" or "substantial pecuniary gain to the person who committed the act or omission."[448] For the time period from March 4, 2009, to March 5, 2013—when Gibson's misconduct occurred—the maximum first-, second-, and third-tier penalties for each violation are, respectively, $7,500, $75,000, and $150,000 for a natural person.[449]

When determining whether civil penalties are in the public interest, the Commission considers six factors listed in the securities statutes: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the resulting harm, directly or indirectly, to other persons; (3) any unjust enrichment and prior restitution; (4) whether the respondent has prior violations of the securities laws; (5) the

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443 15 U.S.C. §§ 78u-2(a)(2), 80b-3(i)(1)(B).

444 15 U.S.C. §§ 80a-9(d)(1)(A), 80b-3(i)(1)(A).

445 15 U.S.C. §§ 78u-2(b), 80a-9(d)(2), 80b-3(i)(2).

446 15 U.S.C. §§ 78u-2(b)(1), 80a-9(d)(2)(A), 80b-3(i)(2)(A).

447 15 U.S.C. §§ 78u-2(b)(2), 80a-9(d)(2)(B), 80b-3(i)(2)(B).

448 15 U.S.C. §§ 78u-2(b)(3), 80a-9(d)(2)(C), 80b-3(i)(2)(C).

449 17 C.F.R. § 201.1001, tbl. I; *see* 15 U.S.C. §§ 78u-2(b), 80a-9(d)(2), 80b-3(i)(2).

need to deter the respondent and other persons, and (6) such other matters as justice may require.[450]

The Division requests second-tier penalties for Gibson's reckless front running violations, which I agree are justified given that his violations of the relevant laws were willful and committed with scienter.[451] Considering the public interest, Gibson recklessly deceived the Fund by using its confidential information. The Division has not shown that the violations harmed investors monetarily, although they unjustly enriched Gibson. Gibson also has no prior convictions or securities law violations. Still, he must be deterred from further violations, and others in the industry must realize that front running is a serious offense that is actionable under the securities laws. Commensurate with the disgorgement amount imposed, I impose two second-tier penalties totaling $82,000, comprised of $41,000 for Gibson's September 26 front running, and $41,000 for all of his put transactions and recommendations.

The Division argues that Gibson's conduct regarding the Hull transaction deserves third-tier penalties because it burdened the Fund with additional TRX stock that it sold at a loss on November 10, which means that the Fund's investors lost a substantial sum.[452] It was not clear at the outset, however, that the transaction was to the Fund's detriment. To the contrary, Bystrom opined that the purchase could have aided the Fund.[453] And Gibson believed that consolidation would encourage a buyer to come forward. When Gibson engaged in the Hull transaction, he did not know that TRX's share price would fall farther, and most importantly, he had no plans to sell the Fund's shares into the market, which precipitated the tremendous decline in TRX's value. And it is possible that the Hull transaction could have saved the Fund money; it prevented Hull from separately selling his personal shares into the market at some point and depressing the price of TRX. I will impose second-tier penalties for this instance of reckless misconduct.

Regarding the public interest, as noted, it is difficult to measure the harm, if any, that Gibson's reckless conduct caused to the Fund and its investors. Further, unlike with the front running violations, Gibson was not unjustly

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450 15 U.S.C. §§ 78u-2(c), 80a-9(d)(3), 80b-3(i)(3).

451 *See SEC v. M & A W. Inc.*, 538 F.3d 1043, 1054 (9th Cir. 2008) ("[T]he imposition of second-tier penalties requires an assessment of scienter.").

452 Div. Br. 43.

453 Tr. 1567; Resp't Ex. 228 at 6.

enriched in this transaction. And Gibson believed he was looking after the Fund's best interests. Thus, even though Gibson's compliance with his fiduciary duties was severely wanting, I impose a reduced second-tier penalty of $20,000, for total civil penalties of $102,000.[454]

5. Gibson has ability to pay monetary sanctions.

In determining whether disgorgement, interest, or monetary penalties are in the public interest, the Commission or its administrative law judges may consider evidence concerning ability to pay.[455] Considering this evidence is an exercise of discretion, and even if the Commission considers ability to pay, it "is only one factor … and is not dispositive."[456] A respondent bears the burden of proving his inability to pay.[457]

Gibson has not established that he is unable to pay sanctions. His primary liabilities are large loans he owes to his father.[458] One loan is for some of the costs John Gibson incurred in paying for Gibson's legal defense in this proceeding.[459] The other is the loan that Gibson originally owed to Hull and that he now owes to his father after his father assumed his obligation to Hull.[460] Although both notes accrue interest annually, they are only payable upon demand, and so far, no demand has been made for the principal or the

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[454] *Cf. Rockies Fund, Inc.*, Exchange Act Release No. 54892, 2006 WL 3542989, at *7 (Dec. 7, 2006) (imposing only mid- to upper-level second tier penalties, despite the seriousness of the fraud, as there was no harm to investors or unjust enrichment), *pet. denied*, 298 F. App'x 4 (D.C. Cir. 2008).

[455] 17 C.F.R. § 201.630(a).

[456] *Thomas C. Bridge*, Securities Act Release No. 9068, 2009 WL 3100582, at *25 (Sept. 29, 2009) (reserving power to impose full sanction when conduct is sufficiently egregious), *pet. denied sub nom. Robles v. SEC*, 411 F. App'x 337 (D.C. Cir. 2010).

[457] *Philip A. Lehman*, Exchange Act Release No. 54660, 2006 WL 3054584, at *4 & nn.29–30 (Oct. 27, 2006).

[458] *See* Gibson's Form D-A at 3 (of 114) (August 25, 2019).

[459] Div. Ex. 217; Tr. 1224–25.

[460] Tr. 566.

interest.[461] Gibson's father could also forgive the notes at any time.[462] I will therefore discount these liabilities in considering Gibson's ability to pay. Although Gibson has some credit card debt, it appears to be short term. The documentation Gibson provided for his credit card accounts is deficient, but it appears he has not carried over a significant credit card balance from month to month.[463] Similarly, although he has not yet paid his 2018 taxes, and he believes his liability will be substantial, he is not carrying over any tax liability from year to year.[464]

Gibson's expenses between August 2018 and August 2019 exceeded his income by a couple thousand dollars.[465] His salary from East Century Capital fluctuates from year to year, and it is hard to understand Gibson's testimony about the amount he has made and in what years he received such income.[466] He has not submitted any W-2s or other tax forms that might help determine his exact compensation. Nonetheless, in 2018 at least, his income was well in excess of $100,000, which is substantially higher than his average basic living expenses.[467] And given his age, education level, ability to find work, and lack of dependents to support, it is reasonable to assume that he will continue to earn a sufficient income. Perhaps most significantly, in addition to some cash on hand, he has a large securities investment that alone could be sold to pay a significant percentage of the disgorgement and penalties I am ordering.[468] For these reasons, I reject Gibson's inability-to-pay defense.

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461 Tr. 1228.

462 Tr. 1228.

463 *Compare* Form D-A at 3 (of 114) (listing significant credit card debt) *with* Resp't Ex. 240 (relying on account statements from early July 2019 and listing virtually no credit card debt).

464 Tr. 1505; Form D-A at 3, 26 (of 114).

465 Form D-A at 4–5 (of 114).

466 *See* Tr. 1498–1505.

467 Form D-A at 26 (of 114).

468 *Id.* at 3, 22 (of 114).

Constitutional Issues

Gibson raised a number of constitutional affirmative defenses in his answer to the OIP.[469] Because Gibson did not address all of these defenses in his prehearing brief, I asked his counsel during the final prehearing conference which defenses were actually at issue.[470] Counsel reserved answering and in advance of the merits hearing filed a letter asserting three constitutional defenses: (1) "Respondent has been denied due process,"[471] (2) "the appointment of the ALJ violates the [Constitution's] removal provisions," and (3) Gibson "is entitled to a trial by jury."[472]

After the merits hearing, the parties filed a stipulation in which they agreed that Gibson had preserved these arguments and others not discussed in Gibson's counsel's letter.[473] Although the Commission will decide what issues Gibson has preserved and will ultimately decide those issues, I include the following observations about the constitutional issues raised in Gibson's counsel's July 28, 2019 letter in order to set those issues in context.

Throughout this proceeding Gibson has attempted to raise a due process claim related to the Division's conduct when it took Hull's February 2015 investigative testimony.[474] Specifically, during Hull's investigative testimony, Division counsel defined a short position as "borrowing stock and selling stock in the hope that the stock's price will decline."[475] Counsel then represented to

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469 Answer 11–13.

470 Prhr'g Tr. 24 (July 23, 2019).

471 This argument includes several sub-arguments: (1) unfairness because I am situated in the agency whose officials allegedly engaged in misconduct in this case, (2) the lack of counterclaims in Commission proceedings, (3) the lack of discovery in Commission proceedings regarding alleged due process violations, and (4) the Commission issued the OIP that contained alleged misstatements of Division staff, but allowed the OIP to be re-served after *Lucia*. Letter from Thomas A. Ferrigno at 1 (July 28, 2019).

472 *Id*. at 1–3. Counsel's letter also referenced a statute-of-limitations defense. *Id*. at 4.

473 Jt. Stipulation at 1 (Aug. 27, 2019).

474 See Prehr'g Tr. 63 (July 9, 2019); *see* Opp'n to Mot. to Preclude Testimony of Current and Former Division Counsel at 4–5, 10–15 (June 3, 2019).

475 Resp't Ex. 187 at 37.

Hull that "in October and November 2011 … Gibson took a short position in TRX in his" personal investment account.[476] After hearing this, Hull hit the roof and asked for a tolling agreement with Gibson and his father so that he could potentially sue them.[477] Hull also spoke to other Fund investors about what he learned.[478] But when Hull learned that Gibson had not taken a short position in TRX, his views about Gibson and his put purchases changed.[479] No one who witnessed Hull's testimony during the merits hearing has any doubt that he currently is more favorably inclined toward Gibson and has a decidedly negative view of the Division's position and its attorneys.[480]

Believing the Division's conduct during Hull's investigative testimony amounted to a due process violation, Gibson listed three Division attorneys on his witness list, explaining that he expected them to testify about their "representations to James Hull during his investigative testimony regarding short sales and short positions in TRX securities by Christopher Gibson."[481] The Division moved to bar Gibson from calling its attorneys to testify and Gibson opposed the Division's motion.[482] I granted the Division's motion because Gibson had not shown that the testimony he sought from counsel was crucial or unavailable from other sources.[483] I did not, however, rule on the validity of Gibson's then-unspecified due process claim.

Fast forward to early July 2019, when I heard oral argument on the parties' motions. During the argument, I asked Gibson's counsel "what exactly

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476 *Id.* at 43.

477 *See* Tr. 711–12.

478 Tr. 712.

479 Tr. 712.

480 *See* Tr. 1526–27.

481 Resp't Witness List at 4 (May 10, 2019).

482 *See Gibson*, Admin. Proc. Rulings Release No. 6615, 2019 SEC LEXIS 1544, at *1 (ALJ June 28, 2019).

483 *Id.* at *10–11.

is your due process claim?"[484] Counsel and I engaged in an extended discussion during which the basis for Gibson's claim shifted.[485]

During the merits hearing, we again discussed Gibson's claim with reference to his counsel's letter.[486] After some discussion, counsel stated that Gibson's due process claim had two parts, the first being part of a systemic attack on Commission administrative proceedings and the second being that the Division "soured" Hull toward Gibson.[487] But counsel conceded that however Hull may have previously felt about Gibson, by the time of the hearing, his "understanding of the situation … [was] very different" from immediately after his investigative testimony.[488] After counsel seemed to suggest that Hull's former antipathy toward Gibson, resulting from what Division counsel told him, might have leaked to other witnesses, I remarked on the fact that Gibson had presented no evidence on that score.[489] At that point, counsel stated that although he needed to consult with his client, he was satisfied with the record on the prejudice argument.[490] Indeed, Gibson did not raise the prejudice argument in his briefing, and consistent with my order following the parties' joint stipulation on constitutional issues, I need not say anything further on the matter.[491]

Similar to many respondents in recent Commission administrative proceedings, Gibson also argued that the tenure protections that apply to the Commission's administrative law judges violate the Constitution's separation

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484 Prhr'g Tr. 63 (July 9, 2019).

485 Prhr'g Tr. 63–68 (July 9, 2019).

486 Tr. 1520–29.

487 Tr. 1523–25.

488 Tr. 1527.

489 Tr. 1527–28.

490 Tr. 1529, 1532. During the discussion, I disagreed with counsel's argument that respondents in Commission administrative proceedings cannot obtain discovery relevant to due process claims, pointing out that I had previously "granted discovery on due process claims." Tr. 1531; *see Charles L. Hill, Jr.*, Admin. Proc. Rulings Release No. 2706, 2015 SEC LEXIS 2016 (ALJ May 21, 2015). Counsel agreed that such discovery is allowed. Tr. 1531–32.

491 *See Gibson*, 2019 SEC LEXIS 2319, at *1.

of powers.[492] I've previously addressed and rejected this argument.[493] In any event, if either party appeals this initial decision, the Commission will have the opportunity to decide the issue.

Record Certification

I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on January 10, 2020, and five additional items: (1) a letter dated July 28, 2019, from Thomas A. Ferrigno to me concerning Gibson's constitutional challenges; (2) another letter dated July 28, 2019, from Mr. Ferrigno concerning the admissibility of Division Exhibits 183 and 183A; (3) a March 20, 2020 e-mail from Stephen J. Crimmins waiving paper service of all opinions and orders; (4) a March 20, 2020 e-mail from Gregory R. Bockin also waiving paper service; and (5) a stipulation and notice of parties' agreement on service of papers dated March 23, 2020.[494]

Order

Under Section 21C of the Securities Exchange Act of 1934 and Section 203(k) of the Investment Advisers Act of 1940, Christopher M. Gibson must CEASE AND DESIST from committing any violations or future violations of Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5(a) and (c), and Section 206(1), (2) and (4) of the Investment Advisers Act of 1940 and Advisers Act Rule 206(4)-8.

Under Section 203(f) of the Investment Advisers Act of 1940, Christopher M. Gibson is BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization—with the right to reapply for reentry after three years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Under Section 9(b) of the Investment Company Act of 1940, Christopher M. Gibson is PROHIBITED from serving or acting as an employee, officer,

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492 *See* Letter from Thomas A. Ferrigno at 2–3 (July 28, 2019) (relying on *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)).

493 *See David Pruitt, CPA*, Admin. Proc. Rulings Release No. 6675, 2019 SEC LEXIS 2850, at *1–24 (ALJ Sept. 16, 2019). In that order, I also rejected a Seventh Amendment challenge. *Id.* at *24–30 (discussing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)).

494 *See* 17 C.F.R. § 201.351(b).

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 reapply for reentry after three years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Under Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, Section 203(j) and (k)(5) of the Investment Advisers Act of 1940, and Section 9(e) of the Investment Company Act of 1940, Christopher M. Gibson must DISGORGE $82,088.81, plus prejudgment interest. The prejudgment interest owed will be calculated from December 1, 2011, the first day of the month following Gibson's last violation, to the last day of the month preceding the month in which payment of disgorgement is made.[495] Prejudgment interest will be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and compounded quarterly.[496]

Under Section 21B(a) of the Securities Exchange Act of 1934, Section 203(i) of the Investment Advisers Act of 1940, and Section 9(d) of the Investment Company Act of 1940, Christopher M. Gibson must PAY A CIVIL MONEY PENALTY in the amount of $102,000.

Payment of civil penalties, disgorgement, and interest must be made no later than 21 days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment must be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/ofm; or (3) by certified check, bank cashier's check, bank money order, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address alongside a cover letter identifying Respondent and Administrative Proceeding No. 3-17184: Enterprise Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and

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495 *See* 17 C.F.R. § 201.600(a); *see, e.g.*, *Terence Michael Coxon*, Advisers Act Release No. 2161, 2003 WL 21991359, at *14 (Aug. 21, 2003) (ordering "that the interest run from the date of the last violation"), *aff'd*, 137 F. App'x 975 (9th Cir. 2005).

496 *See* 17 C.F.R. § 201.600(b).

instrument of payment must be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360.[497] Under that rule, a party may file a petition for review of this initial decision within 21 days after service of the initial decision. Under Rule of Practice 111, a party may also file a motion to correct a manifest error of fact within ten days of the initial decision.[498] If a motion to correct a manifest error of fact is filed by a party, then a party has 21 days to file a petition for review from the date of the order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision will not become final as to that party.

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James E. Grimes
Administrative Law Judge

Served by e-mail on all parties.

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497 *See* 17 C.F.R. § 201.360.

498 *See* 17 C.F.R. § 201.111.