

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

Administrative Proceedings Rulings
Release No. 5724 / May 11, 2018

Administrative Proceeding
File No. 3-17184

In the Matter of
Christopher M. Gibson

Order Ratifying Prior Actions

Procedural Posture

The Securities and Exchange Commission issued an order instituting proceedings (OIP) on March 29, 2016.¹ In September 2016, I held a five-day hearing where the Division of Enforcement and Respondent Christopher M. Gibson presented evidence including investor and expert testimony; Gibson testified as part of the Division's case-in-chief and in his defense. *Christopher M. Gibson*, Initial Decision Release No. 1106, 2017 SEC LEXIS 234 (Jan. 25, 2017) (Initial Decision at 1, 10-21). Both parties filed post-hearing briefs.

I issued an initial decision on January 25, 2017. I found that Gibson—while acting as an investment adviser to a private fund, Geier International Strategies Fund, LLC (the Fund)—engaged in front running by trading ahead of the Fund on September 26, 2011, and again in late October and early November 2011, based on material, nonpublic information that the Fund was going to sell its shares in Tanzanian Royalty Exploration Corporation (TRX). Initial Decision at 2, 8-10, 23-38. I also found that Gibson had the Fund purchase TRX shares from a favored Fund investor, James Hull, on October 18, 2011, without disclosure to other Fund investors. *Id.* at 9, 38-40. As a result of such conduct, I found that Gibson violated his fiduciary duties as an adviser and the following antifraud provisions of the

¹ The proceeding was instituted pursuant to Section 21C of the Securities Exchange Act of 1934, Section 203(f) and (k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940.

federal securities laws: 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. *Id.* at 27, 34-35, 38, 40. I ordered Gibson to cease and desist from committing or causing violations of those provisions; barred Gibson from various segments of the securities industry; imposed an investment company bar; imposed a civil money penalty of \$210,000; and ordered disgorgement of \$82,088, plus prejudgment interest. *Id.* at 40-47, *as amended by* Admin. Proc. Rulings Release No. 4546 (Jan. 25, 2017).²

On March 6, 2017, the Commission granted Gibson's petition for review; briefing before the Commission was completed by July 2017. *Christopher M. Gibson*, Exchange Act Release No. 80163, 2017 SEC LEXIS 700; Exchange Act Release No. 80663, 2017 SEC LEXIS 1420 (May 11, 2017).

On November 30, 2017, the Commission ratified my appointment as an administrative law judge and remanded the case with instructions for me to (1) reconsider the record, including all substantive and procedural actions taken; (2) allow the parties to submit new evidence they deem relevant to the reexamination of the record; and (3) determine whether to ratify or revise my prior actions.³ *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10440, 2017 SEC LEXIS 3724. The remand order set January 5, 2018, as the date for filing new evidence and February 16, 2018, as the date for my ratification ruling, while allowing me to modify these deadlines. *Id.* at *2-4. I extended the time for filing new evidence and briefs to February 14, 2018, with any responsive brief due March 1, and set March 30, 2018, as the date for my ratification ruling. *Christopher M. Gibson*, Admin. Proc. Rulings Release No. 5429, 2018 SEC LEXIS 2 (Jan. 2, 2018).

On February 15, 2018, Gibson filed a fifty-six page brief with six exhibits.⁴ On March 1, 2018, the Division responded to Gibson's filing.

² Consistent with the initial decision, I will cite the hearing transcript as "Tr." and the Division's and Respondent's exhibits as "Div. Ex." and "Gibson Ex.," respectively. I will cite the Division's and Respondent's briefs regarding ratification and new evidence as Div. Br. and Gibson Br.

³ I ratified my designation as the presiding administrative law judge on December 4, 2017. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5247, 2017 SEC LEXIS 3780.

⁴ Gibson Ex. 177 is a multipage printout of emails between Gibson and Richard Sands, CEO of Casimir Capital L.P.; Gibson Ex. 178 is the affidavit of James M. Hull; Gibson Ex. 179 is the supplemental expert report of James

(continued...)

On March 14, 2018, I extended the date for my ratification ruling to May 11, 2018. *Christopher M. Gibson*, Admin. Proc. Rulings Release No. 5648, 2018 SEC LEXIS 721.

Gibson's Position

Gibson raises constitutional challenges to this proceeding and also challenges all my rulings, findings, and conclusions. Gibson Br. 1-2. Gibson specifically contests my rulings that he acted as an investment adviser to the Fund, breached his fiduciary duties, was not credible, committed front running, and favored a Fund investor. *Id.* at 8-49. In addition to generally arguing that he did not violate the federal securities laws, he specifically contests my ruling that he violated Advisers Act Section 206(4) and Rule 206(4)-8. *Id.* at 23, 49-51. Lastly, he takes issue with the sanctions imposed and argues that I made procedural errors by admitting certain evidence. *Id.* at 51-56.

General Constitutional challenge

Gibson argues that the proceeding is unconstitutional because: my appointment as an administrative law judge by the Commission's Office of Human Resources violated the Appointments Clause of the U.S. Constitution; the Commission's subsequent ratification of that appointment on November 30, 2017, is of no force and effect because it purports to "ratify" an unconstitutional act"; and, as an alleged officer, my administrative law judge position has too many levels of protection against presidential removal authority. Gibson Br. 3-6. The status of Commission administrative law judges is at issue before the Supreme Court in *Lucia v. SEC*, No. 17-130.

Gibson contends that he was not an investment adviser to the Fund

In challenging my finding that he was an investment adviser to the Fund, Gibson faults me for relying on the statutory definition of an investment adviser. *See* 15 U.S.C. § 80b-2(a)(11); Gibson Br. 8-9. Gibson claims I ignored the Fund's operating agreement which, among other provisions, vested discretion in Geier Capital, LLC, to make investments on the Fund's behalf, provided that Geier Capital should receive payment of fees, and authorized Geier Capital to retain Geier Group as the investment manager. Gibson Br. 9, 13.

A. Overdahl, PhD; Gibson Ex. 180 is the affidavit of John Douglass Cates; Gibson Ex. 181 is the affidavit of John William Gibson, which attaches exhibits A through G; and Gibson Ex. 182 is the expert report of Garrick Tsui.

Gibson also claims the initial decision was wrong to find that he came up with the idea of organizing the Fund, worked on the documentation, and created Geier Capital and Geier Group. *Id.* at 9-10. Gibson asserts that he and Hull acted on behalf of the Fund as members of Geier Capital and Geier Group, limited liability companies. *Id.* at 10. Gibson also faults the initial decision for determining that he was an investment adviser by focusing on his activities when those functions “are commonly performed at investment advisers by supervised persons and persons associated with investment advisers.” *Id.* at 11. In Gibson’s view, the definition of investment adviser involves a contractual relationship between the adviser and “others” and that did not exist in this situation. *Id.* at 12.

Gibson offers the Hull affidavit (Gibson Ex. 178) to show that Gibson did not control the Fund and that Hull controlled Geier Capital and Geier Group. *Id.* at 16-17. It is Gibson’s position that Geier Capital and Geier Group acted as investment advisers to the Fund. *Id.* at 13. Gibson acknowledges that he performed advisory services as a person associated with Geier Capital but insists that he and Hull managed the Fund and “acted as persons associated with an investment adviser and supervised persons.” *Id.* at 13-14. According to Gibson, the initial decision wrongly applied the legal standard for determining when a person associated with an investment adviser can be held liable for a primary violation of Advisers Act Section 206. *Id.* at 14.

Gibson contends that he did not breach his fiduciary duty to the Fund

Gibson asserts that because the Fund’s private offering memorandum (POM), and operating agreement gave investors notice of permitted actions, the initial decision was wrong to fault him for failing to disclose certain actions and acting contrary to the interest of the Fund investors. *Id.* at 21-23. In Gibson’s view, because the possibility of conflicts of interest was disclosed in the documentation and consented to by the investors, he had no obligation to put the Fund before his personal interest. *Id.* at 23. Gibson asserts that an investor’s expectations of fair treatment cannot revoke his or her consent to the disclosed conflicts in the Fund’s offering documents. *Id.*

Gibson contends that he did not commit front running

According to Gibson, neither the securities statutes nor Commission rules define and prohibit front running, there is no support for the initial decision’s definition of front running, and other definitions vary; so, he did not have notice of what conduct was prohibited and thus was denied due process. *Id.* at 24-25, 35-36. Gibson also takes issue with my credibility

determinations and the role that they played in making findings. *Id.* at 25-28.

Gibson further contends that, under the Supreme Court standard for materiality, he did not have material information relating to the sale of Fund shares when he sold TRX shares on September 26, 2011, and when he purchased or recommended the purchase of put options outside the Fund in late October and early November 2011. *Id.* at 29-30, 36-38. Gibson believes that I failed to find that he knew material information regarding the sale of Fund shares, which was required by the definition of front running as articulated in the initial decision. *Id.* at 33-34. He reiterates the argument made during the proceeding that the evidence does not show he knew specifics—the number of shares, price, or the sale date of the Fund’s sale of TRX shares—when he engaged in or recommended that others engage in transactions outside the Fund. *Id.* at 30, 33-34, 37. He also faults me for finding that the information he had was non-public. *Id.* at 31-32, 38-40.

Gibson denies that he knowingly violated his fiduciary duty when he sold privately held TRX shares on September 26, 2011. *Id.* at 32. His reasons are that he did not possess material, non-public information; any fiduciary duties he may have had were modified by disclosures in the POM and operating agreement; and he did not owe a fiduciary duty to investors in the Fund. *Id.*

Finally, Gibson claims I disregarded the conflicts-of-interest disclosures in the POM and operating agreement in finding that he violated the Advisers and Exchange Acts. *Id.* at 34.

Gibson contends that he did not favor a Fund investor

Gibson emphatically contests the initial decision’s finding that he entered into a sweetheart deal when he had the Fund purchase Hull’s TRX shares and disagrees with my finding that the deal was not allowed by the POM, which permitted transactions between the Fund and outside entities subject to the transactions being effected at the current market price of the particular securities and no extraordinary brokerage commissions or fees being paid. *Id.* at 42; Initial Decision at 39-40. First, he argues that the POM language is only a guideline. Gibson Br. 43. He challenges the initial decision’s use of “questionable” to describe whether the closing price of the Fund’s purchase of Hull’s shares was the current market price and whether no extraordinary brokerage commission was paid. *Id.* at 43-44. He believes the lack of a block discount on the sale of Hull’s shares to the Fund and the fact that Hull did not pay a commission do not show that he favored Hull. *Id.* at 44; Initial Decision at 39.

Gibson sees no link between the Fund's purchase of Hull's shares in mid-October and the Fund's sale of TRX shares in early November, and believes that the evidence shows that the Fund did not pay extraordinary brokerage commissions or fees. Gibson Br. 45. Gibson offers the supplemental expert report of James A. Overdahl, PhD, and an affidavit from Hull to show that the Hull transaction did not favor Hull. *Id.* at 46-47; Gibson Exs. 178, 179. Gibson reiterates that the Hull transaction was allowed by the operating agreement. Gibson Br. 47.

Finally, Gibson believes the initial decision is deficient because it failed to articulate the standard applied when finding that he acted with scienter when participating in the Hull transaction. *Id.* at 48-49.

Gibson contends that he did not violate Advisers Act Section 206(4) and Rule 206(4)-8

Gibson argues that the initial decision found Section 206(4) and Rule 206(4)-8 violations based on immaterial matters and on matters not alleged in the OIP. *Id.* at 49-50. Gibson maintains that Section 206(4) is inapplicable because he did not act as an investment adviser, and Rule 206(4)-8 does not impose an affirmative duty to continuously provide information to investors and prospective investors. *Id.* at 51. Gibson insists that the offering documents allowed his conduct. *Id.*

Gibson contests the sanctions and admissibility of certain evidence

Gibson claims that the sanctions are unwarranted because he did not violate the federal securities laws. *Id.* at 51. Then, referencing the public-interest criteria considered by the Commission when assessing sanctions,⁵ Gibson asserts that his transactions in TRX securities and put contracts did not harm the Fund and the Hull transaction was for the Fund's benefit. *Id.* at 51-52. He insists that his conduct was done in the belief that it was authorized by the Fund's offering documents and that seven years have passed without incident. *Id.* at 52. He notes his claimed inability to pay a penalty or disgorgement, citing the affidavit of John Douglass Cates as additional evidence. *Id.*; Gibson Ex. 180. He cites *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989), for the proposition that a failure to admit wrongdoing is not a legitimate consideration in determining sanctions. Gibson Br. 52 n.35. He also argues that disgorgement was inappropriate because he did not realize any profits, the

⁵ See *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

penalty amount was excessive, and the initial decision inappropriately referenced the financial circumstances of his father, John William Gibson. *Id.* at 53-54. He further contends that in imposing an associational bar under Advisers Act Section 203(f), the initial decision failed to contain findings regarding the investment adviser with which he was associated. *Id.* at 54.

Lastly, Gibson claims that I improperly admitted into evidence Division exhibits 183, 183A, 184, 185, 187, and 188—which consist of a recording and transcript of a conversation between Gibson and Luis Sequeira, and the expert and rebuttal reports offered by the Division. *Id.* at 54-55.

Admissibility of Gibson’s New Exhibits

An initial issue is whether the exhibits attached to Gibson’s brief are admissible. The Commission did not describe what it meant by allowing the parties to “submit any new evidence [they] deem relevant to the administrative law judge’s reexamination of the record.” *Pending Admin. Proc.*, 2017 SEC LEXIS 3724, at *2. So for guidance, I rely on the Rules of Practice, which provide that evidence is admissible so long as it is not irrelevant, immaterial, unduly repetitious, or unreliable. 17 C.F.R. § 201.320. Commission precedent favors admissibility, even where evidence may be of limited relevance. *See Herbert Moskowitz*, Exchange Act Release No. 45609, 2002 SEC LEXIS 693, at *46 n.68 (Mar. 21, 2002); *City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 & n.7 (Nov. 16, 1999). As summarized below, Gibson’s new exhibits are relevant to the issues in this proceeding.

Gibson Ex. 177 is an email string on August 22-23, 2011, between Gibson and Richard Sands, a broker at and CEO of Casimir Capital, in which Gibson inquired whether Sands had a bid for a block of TRX shares. Gibson Ex. 177 at 4. Sands replied: “Yah, I have check, but I think I have a size buyer for whatever you have.” *Id.* at 3. Gibson offers the exhibit to show that he gave credible testimony about what Sands or a trader at Casimir told him about interest in the Fund’s TRX shares. Gibson Br. 26-27. The exhibit meets the criteria of admissibility.

Gibson Ex. 178 is the affidavit of James M. Hull. Hull states that on February 25, 2015, Division attorneys told him that Gibson and his father had taken “short positions” in TRX stock in the hopes that the stock’s price would decline, and they would cash out their positions. Gibson Ex. 178 at 1. After being shown trading records that purportedly supported the Division’s representation, Hull was shocked and informed other Fund investors and contemplated legal action against the Gibsons. *Id.* According to the affidavit,

Hull has since learned that the information he received from the Division was inaccurate. *Id.*

Next, Hull challenges several findings and conclusions in the initial decision. Hull claims that Gibson could not have known on September 26, 2011, that Fund was going to sell 3.7 million shares of TRX stock the next day because he and Gibson did not decide to sell until moments before the sale was made. *Id.* at 2.

Hull claims the initial decision erroneously questioned Gibson's testimony that he had a positive view of the value of TRX shares and whether there were other large holders of TRX interested in purchasing the Fund's position in TRX. *Id.* Hull says that he and Gibson shared a positive view of TRX's mining deposit assets at all times in 2011. *Id.* Hull contends that large holders of TRX investments were interested in purchasing blocks of TRX stock because the Fund sold almost six million TRX shares between September 27 and November 9, 2011. *Id.*

Hull also claims the initial decision inaccurately questioned whether the Fund was a patient holder of TRX shares. *Id.* He says that he and Gibson did not make the final decision to liquidate the Fund's 4.87 million TRX shares until late in the evening on November 9, 2011. *Id.* at 2-3. Hull believes that Gibson credibly testified that he did not expect the price of TRX to decline on November 10, 2011, when the Fund sold its remaining position in TRX. *Id.* at 3.

Hull contends the Fund's sale on November 10, 2011, was a good decision because other large holders also sold and if it had not sold, the Fund's TRX shares would have had a lower market value. *Id.* Hull believes Gibson was credible when he attributed TRX's low stock price in the fall of 2011 to rumors spread by short sellers. *Id.* at 3-4. Hull disagrees with the initial decision's finding that the Fund's purchase of his TRX shares was an undisclosed, sweetheart deal. *Id.* at 4.

Gibson Ex. 178 meets the criteria of admissibility.

Gibson Ex. 179 is the supplemental expert testimony of James A. Overdahl, PhD, addressing the allegation that Gibson, before selling the Fund's remaining TRX shares, purchased TRX put options for himself and his then-girlfriend with a \$4 strike price and advised his father to do likewise, which "represented a short position, i.e., a bet that TRX's share

price would decline below \$4 before the put contract's . . . expiration date.”⁶ Gibson Ex. 179 at 2; OIP at 3, 8.

Overdahl notes that the purchase of put options to manage portfolio risk is customary and appropriate. Gibson Ex. 179 at 5. Overdahl disagrees with the Division's characterization of Gibson's purchase of TRX put options as “in effect . . . a short position.” *Id.* at 3. Referencing a financial economics textbook, *Options, Futures, and Other Derivatives*, by John C. Hull (9th ed.), Overdahl believes that “[t]he Gibson Group's use of put options when combined with broader portfolio holdings can be described as a ‘protective put,’” or a “put option *combined with* a long position in the underlying asset.”⁷ *Id.* Overdahl disputes the Division's claim that Gibson's use of put options resulted in “illicit profits,” and states that the Gibson Group only recorded losses and no gains. *Id.* at 4. Overdahl criticizes the Division for not considering that the Gibson Group had an overall long position in TRX shares and therefore “would benefit only if the price of TRX shares increased and would incur losses if the price of TRX shares decreased.” *Id.* at 4-5, 7.

Overdahl does not agree that the \$3.60 per share, no commission price Hull received from the Fund when it purchased from him over half a million TRX shares was favorable to Hull. *Id.* at 8. Overdahl believes Hull “would have been better off selling his shares in the open market even if he had received a price considerably below the \$3.60 per share he received from the [Fund].” *Id.* at 8-9.

Overdahl repeats his prior testimony that the put options did not affect the price at which TRX shares were liquidated and TRX put options were readily available in the market. *Id.* at 6. Also, Gibson's personal incentives were aligned with the Fund because he was always long in TRX stock. *Id.* at 7. Finally, Overdahl repeats his disagreement with the Division's expert on using actual pricing information to calculate the benefit Gibson and others received from selling TRX shares on September 26, 2011, the day before the Fund sold a great deal of shares. *Id.* at 9-10.

Despite being very close to unduly repetitious, I will admit Gibson Ex. 179 into evidence.

⁶ At the hearing, Overdahl was examined on his written expert testimony. Tr. 955-1143; Gibson Ex. 149.

⁷ The Gibson Group includes Gibson, his parents, his then-girlfriend, and her father. Gibson Ex. 179 at 2.

Gibson Ex. 180 is the affidavit of John Douglass Cates, who prepared Gibson's income tax returns. Cates states that his review of the documents in this case reveals that the Division told Fund investors that Gibson "shorted" TRX stock. Gibson Ex. 180 at 1. Cates's review of Gibson's Charles Schwab account does not show any "short" transactions. *Id.* Cates believes the Division provided inaccurate and misleading information to Fund investors. *Id.* Cates did not mention short sales when he testified at the hearing. Tr. 836-83.

Cates further claims that the Division incorrectly asserted that Gibson profited personally in TRX while the Fund lost money on TRX shares. Gibson Ex. 180 at 1. According to Cates, Gibson and the Fund's interests were aligned, and Gibson had a net loss on TRX transactions on or about November 10, 2011, of almost three quarters of a million dollars. *Id.* Cates claims the initial decision was misleading to assert that Gibson profited from certain personal TRX transactions, because the decision did not consider the losses Gibson incurred due to his TRX ownership through the Fund. *Id.* at 2. Cates's analogy is that the initial decision only described one half of a football game. *Id.* Cates criticizes the Division's position that there is a lack of clarity about Gibson's financial situation and reiterates his prior position that Gibson is insolvent and has no income.⁸ *Id.*

Gibson Ex. 180 is admissible.

Gibson Ex. 181 is a ten-page affidavit of John William Gibson, Gibson's father, with exhibits A through G.⁹ John Gibson details the business relationship of mutual trust he had with Hull. Gibson Ex. 181 at 1. From 1999 until 2014, John Gibson managed companies that he owned with Hull and Barry L. Storey. *Id.* At one time, the companies had almost 300 employees and annual revenues exceeding \$100 million. *Id.* at 2. John Gibson contributed almost all his assets to this business enterprise, and he signed multi-millions of demand notes to Hull for additional investment

⁸ Gibson's adjusted gross income of \$141,396 in 2012 fell to a low five-figure income in 2013 through 2016. Gibson Ex. 180 at 2.

⁹ John Gibson graduated from Johns Hopkins University and the University of Georgia Law School and is an Army veteran. He practiced law in Augusta, Georgia, for fifteen years. In 1999, he joined with Hull and Barry L. Storey in a real estate business that became Hull Storey Gibson Companies. He retired in 2014. Gibson Ex. 181 at 1.

capital. *Id.* at 1-2. According to John Gibson, Hull's reputation in the community for integrity is unquestioned. *Id.* at 2.

Hull invested \$26 million in and beneficially owned eighty percent of the Fund that he managed with Gibson. *Id.* Similar to other business enterprises, Hull expected John Gibson to invest in the Fund. *Id.* To do so, John Gibson borrowed half a million dollars from Hull, Gibson's mother invested \$700,000, and Gibson invested his assets. *Id.* John Gibson believes that his family's interests were aligned with the Fund and their financial commitment far surpassed any other Fund investor. *Id.* at 3.

According to John Gibson, Hull told people that he invested personally in the same positions the Fund held, outside the Fund. *Id.* at 2. Because Hull emphasized the need to support the Fund's positions, John Gibson bought \$288,000 of TRX stock for his IRA account in the spring of 2011. *Id.* at 3.

Hull told John Gibson on or about November 8, 2011, that the Fund "was probably going to engage in some form of transaction," and suggested that John Gibson follow Gibson's advice about positions held outside the Fund. *Id.* Gibson gave his father "liquidating instructions which were to sequentially and immediately *purchase with additional capital* a put option for 35,000 TRX shares,"¹⁰ sell the IRA position, and sell the TRX put option. *Id.* John Gibson placed his order on or about November 8, 2011, for the put options to be sold the next day, but it was not executed until November 10. *Id.* 3-5. John Gibson believes that the broker failed to timely execute the order. *Id.* at 4.

John Gibson alleges that during Hull's investigative testimony on February 25, 2015, a Division attorney defined a short position "to be borrowing stock and selling stock in the hope that the stock's price will decline," and that Division attorneys told Hull that the Gibsons (father and son) had short positions in TRX stock. *Id.* at 5-6. John Gibson claims allegations that he and his son took "short position" were inaccurate, misleading, and prejudicial; irreparably shattered the confidence and trust that Hull had for him; and poisoned investors and witnesses against him and his son. *Id.* at 5-7. He is upset that the Division has not publicly corrected or withdrawn the allegations. *Id.* at 6, 8. John Gibson attaches a February 2015 affidavit from Timothy F. Strelitz, a limited partner in the Fund, as an example of a misinformed investor; Strelitz averred that he did not know that Gibson took a short position in TRX in two personal accounts Gibson

¹⁰ The IRA had 45,000 TRX shares, so the put option covered less than the full amount. *Id.* at 3.

controlled but would have withdrawn his money from the Fund had he known about them. *Id.* at 6 & Ex. G.

John Gibson states that two expert witnesses, Dr. Carmen Taveras (presented by the Division) and Overdahl, testified that there were no “short positions” as to Gibson. *Id.* at 7-8. He views the purchase of the TRX put options as a long position. *Id.* at 7. John Gibson acknowledges that the initial decision did not refer to allegations of “short positions.” *Id.* at 8.

John Gibson believes the OIP is highly prejudicial because it does not accurately portray the Gibson family’s financial investment in and commitment to the Fund and TRX.¹¹ *Id.* at 9. John Gibson argues that his financial capacity is not relevant and objects to references to him in the Division’s post-hearing reply brief and the initial decision with respect to Gibson’s finances. *Id.*

Gibson Ex. 181 is admissible.

Gibson Ex. 182 is the expert report of Garrick Tsui with his curriculum vitae attached as exhibit A. Tsui is the senior vice president of Risk Solutions & Investigations and a securities industry investigator retained to review Gibson’s trading for the Fund and to provide an expert opinion on Gibson’s trading in TRX shares and puts in 2011.¹² Gibson Ex. 182 at 1. Tsui describes negotiated block transactions as having negotiable terms as to price and volume until the trade is executed, often on the over-the-counter or upstairs market. *Id.* at 3. According to Tsui, although terms may be deemed firm by both parties, there are no obligations until the block transaction is executed. *Id.*

Referencing Gibson’s testimony and other evidence, Tsui describes Gibson’s efforts to find a buyer for the Fund’s TRX shares beginning August 22, 2011, and the subsequent trading related to TRX and the Fund. *Id.* at 4-7. Negotiations with a broker to sell nine million TRX shares at \$6.25 a

¹¹ The initial decision states that outside of Hull’s eighty percent, “Gibson, his family, and friends owned half of the remaining twenty percent of Fund assets.” Initial Decision at 21 n.39.

¹² Tsui holds a bachelor’s degree from Tufts University and a master of business administration from Boston University. He has worked as an investigator for the Commission, the Financial Industry Regulatory Authority, and several private firms. Gibson Ex. 182 at Ex. A.

share and concurrent conversations with a short seller did not result in sales. *Id.* at 4. In late September 2011, Gibson was negotiating a sale of five million shares with a third major buyer and he again contacted the broker he had contacted in August about selling TRX shares at current prices. *Id.* According to his own testimony, Gibson thought Platinum Partners would buy TRX at \$4.00 a share. *Id.* at 5 (citing Tr. 146). On September 27, 2011, the broker gave Gibson the price of \$3.50 per share for 3.7 million shares, which Hull and Gibson accepted.¹³ *Id.* Gibson negotiated a sale of 5.9 million TRX shares at \$4.50 per share with Luis Sequeira in late September 2011, but the sale was never consummated and the buyer ultimately purchased less than 400,000 shares. *Id.* at 6. On October 18, 2011, the Fund purchased 680,636 TRX shares from Hull in a private transaction at \$3.60 per share. *Id.* Relying on Gibson's testimony, Tsui states that the Fund's purchase helped Hull's liquidity and kept his interests aligned with other Fund investors. *Id.* After meeting with a representative from Platinum in November 2011, Gibson believed Platinum intended to sell its TRX shares, as it had offered a standstill agreement whereby the Fund would not sell any TRX shares for six months in exchange for \$10,000 per month. *Id.* at 7. After consulting with Hull, they decided to sell the Fund's TRX shares immediately. *Id.*

Tsui first analyzes Gibson's September 26, 2011, sales of TRX stock. *Id.* at 7-8. Tsui states that Gibson knew by August 24, 2011, that the Fund was looking to sell its shares but he first sold TRX shares he personally controlled on September 26, 2011. *Id.* at 8. Tsui makes the points that: when Gibson sold personal shares, it was known in the marketplace that the Fund intended to sell up to ten million TRX shares; by that date Gibson had entered into three separate negotiations for selling TRX without completing any block sales; and Gibson did not have clear knowledge of the price, volume, or timing of the Fund's block sales. *Id.*

Tsui next analyzes the Hull transaction that took place on October 18, 2011. *Id.* at 8-10. Tsui acknowledges that the 680,636 shares that the Fund bought from Hull for \$3.60 per share (or a total of \$2.45 million)¹⁴ were

¹³ According to Tsui, Gibson offered the broker the Fund's entire TRX position but Sands arranged for the purchase of only 3.7 million shares. *Id.* at 5.

¹⁴ According to Tsui, the Fund paid a commission of \$0.01 per share on sales during the relevant period. If Hull had paid a \$0.01 per share commission, he would have paid a commission of \$6,806.36 and eighty percent would have represented his interest in the Fund. *Id.* at 10.

included in the 4.8 million shares that the Fund sold on November 10, 2011, for about \$2 per share, for a loss of over a million dollars. *Id.* at 9. Given that Hull owned eighty percent of the Fund, Hull suffered a direct loss of \$859,921.60 when the Fund sold the shares it had purchased from him. *Id.*

Tsui contends that Hull would have been better served if, instead of selling to the Fund, he had sold his 680,636 TRX shares into the marketplace or in a negotiated block transaction at a discount. *Id.* 9-10. TRX consistently traded at over \$3.60 per share thirteen of the next sixteen days after October 18, 2011. *Id.* at 9.

Last, Tsui analyzes Gibson's trades in October and November 2011. *Id.* at 10-11. Based on Gibson's testimony, Tsui asserts that Gibson and his former girlfriend were in a different financial status from other Fund investors. *Id.* at 11. Almost Gibson's entire net worth and borrowed funds were invested in the Fund, which was dependent on TRX stock. *Id.* On October 23, 2011, Gibson's loan balance with Hull was \$645,000 and his Fund holdings were valued at \$715,000. *Id.*

Gibson Ex. 182 meets the criteria for admissibility but portions are repetitious of Gibson's testimony and other evidence, which it cites as support.

Division's Position

The Division cites supporting case law on ratification and notes that the Commission ratified the hiring action made by one of its offices, not, as Gibson asserts, an action by the Office of Personnel Management. Div. Br. 1-2. The Division also notes that the Commission has rejected attacks on the legitimacy of administrative law judges because of their removal protections. *Id.* at 3.

The Division rejects Gibson's arguments and argues that the evidence, including Gibson's testimony, shows that Gibson knew as of September 25, 2011, that the Fund was going to liquidate its TRX position and he used his position as a fiduciary to front run the Fund to benefit himself and others. *Id.* at 3-5. The Division believes that the initial decision used the appropriate scienter standard and made supported findings for Gibson's violations of Advisers Act Section 206(1) in connection with the Fund's purchase of Hull's shares. *Id.* at 4-5.

The Division does not claim Gibson's exhibits are inadmissible or ask to cross examine the sponsors. Rather, the Division considers that the material "repackages and rehashes evidence . . . already considered," contradicts evidence in the record, or is irrelevant. *Id.* 6-10. The Division denies that it

made improper allegations about short sales and misled Hull, noting that Hull was shown trading records. *Id.* 6-7. The Division claims Overdahl's supplemental testimony contradicts his hearing testimony that: (1) Gibson's former girlfriend's position was "not net long – or not long" after Gibson purchased TRX put options for her account; (2) Gibson's trading in TRX was a "short exposure"; and (3) Hull received a \$274,439 benefit because a block discount was not applied to the Fund's purchase of Hull's TRX shares. *Id.* at 8-10. The Division claims the email thread that is Gibson Ex. 177 does not disclose new information, the expert report of Tsui is based on record evidence and parrots Gibson's testimony, and Cates's affidavit does not differ from his hearing testimony. *Id.* at 10.

Discussion

Almost every administrative proceeding is sad in some way; this one is particularly so because it involves a few people who have worked and lived together for years in a relatively small community.

Constitutional challenges

Gibson's position that this proceeding violated the Constitution is unpersuasive for the following reasons. The Administrative Procedure Act (APA) created the position of hearing examiner in 1946. Pub. L. 79-404, § 11, 60 Stat. 237, 244 (1946). Section 11 of the APA "provide[d] for the appointment, compensation, and tenure of examiners who will preside over hearings and render decisions" Attorney General's Manual on the Administrative Procedure Act 138 (1947). "Appointments are to be made by the respective employing agencies of personnel determined by the Civil Service Commission to be qualified and competent examiners." *Id.* The title of hearing examiner was changed to administrative law judge by regulation in 1972 and then by statute in 1978. Change of Title to Administrative Law Judge, 37 Fed. Reg. 16,787 (Aug. 19, 1972); Pub. L. No. 95-251, § 2, 92 Stat. 183 (1978). Also in 1978, the Civil Service Commission was reorganized into three new organizations, one of which was the Office of Personnel Management (OPM), which has a non-delegable duty to administer the administrative law judge examination, through which agencies make competitive service appointments of administrative law judges.¹⁵ See Civil Service Reform Act of 1978, Pub. L. 95-454, §§ 201, 906, 92 Stat. 1111, 1118-21, 1224-26 (1978); OPM, *Our Mission, Role & History*, <https://www.opm.gov/about-us/our-mission-role-history>; OPM, *Administrative*

¹⁵ The other agencies are the Merit Systems Protection Board and the Federal Labor Relations Authority.

Law Judges, <https://www.opm.gov/services-for-agencies/administrative-law-judges>; *see also* 5 U.S.C. § 1302; 5 C.F.R. § 930.201.

OPM qualified me as an administrative law judge and the Commission appointed me to serve at this federal agency. *See* 5 U.S.C. § 3105 (“Each agency shall appoint as many administrative law judges as are necessary . . .”). As set out in a recent brief filed before the Supreme Court:

The Commission itself is authorized by 5 U.S.C. § 3105 to appoint ALJs to preside over such hearings. Since 1962, however, Congress has authorized the Commission to delegate “any of its functions” other than rulemaking to “a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board.” 15 U.S.C. § 78d-1(a); *see* Pub. L. No. 87-592, 76 Stat. 394, 394-95 (1962). The Commission under this authority had (until recently) delegated the power to hire ALJs to SEC staff, who typically chose from a list of qualified candidates provided by OPM.

Brief for Court-Appointed *Amicus Curiae* in Support of the Judgment Below at 7, *Lucia v. SEC*, No. 17-130 (Mar. 26, 2018).

I reject Gibson’s premise that the Commission’s November 30, 2017, order ratifying my prior appointment as a Commission administrative law judge is of no force and effect because, according to Gibson, it purports to “ratify’ an unconstitutional act.” Gibson Br. 6; *see Pending Admin. Proc.*, 2017 SEC LEXIS 3724, at *1. Case law supports the ability of the Commission to ratify that original appointment. *See, e.g., Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (“In general, ‘[r]atification occurs when a principal sanctions the prior actions of its purported agent.” (alteration in original) (quoting *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998))).

Gibson also claims that administrative law judges are unconstitutional because there are too many levels of protection against presidential removal authority. Gibson Br. 7-8. His claim, however, assumes that administrative law judges are officers under Article II of the Constitution; that issue is pending before the Supreme Court in *Lucia v. SEC*. In any event, the Commission has held that the for-cause removal restrictions on its administrative law judges are constitutional. *Timbervest, LLC, Advisers Act*

Release No. 4197, 2015 SEC LEXIS 3854, at *104-12 (Sept. 17, 2015), *pet. filed*, No. 15-1416 (D.C. Cir. Nov. 13, 2015).¹⁶

Gibson was an investment adviser with a fiduciary duty to the Fund

No evidence or argument on remand is persuasive that Gibson was not an investment adviser to the Fund. Gibson argues that I ignored the operating agreement that vested authority in Geier Capital to make investments on behalf of the Fund and to receive fees. Gibson Br. 9. I was and remain aware of the operating agreement, but actions speak louder than words. The initial decision sets out a great deal of evidence showing that Gibson acted as the Fund's investment adviser. Initial Decision at 23-26.

I accept Gibson's point that Hull, through his financial position, controlled the Fund, Geier Capital, and Geier Group and also exercised economic control over Gibson. Gibson Br. 15-16. Geier Group dissolved and its status as a Georgia registered investment adviser ended before the fall of 2011, when the relevant conduct took place. Initial Decision at 3-4. There is no claim that Geier Capital was a registered investment adviser. Gibson acknowledged that he performed advisory services but he claims he did so as a person associated with Geier Capital. Gibson Br. 14. Geier Capital and Geier Group had no employees; Gibson ran the Fund with Hull making strategic investment decisions because Hull provided eighty percent of the Fund's assets. Initial Decision at 6, 24; Gibson Br. 15-16. Although Gibson suggests that the fact that these entities had no employees is irrelevant to whether he was an adviser, Gibson Br. 10, the point is that Gibson was the sole person who performed advisory services for the Fund.

Gibson, for compensation, engaged in the business of advising others as to the advisability of investing in, purchasing, or selling securities, thus meeting the statutory definition of an investment adviser. 15 U.S.C. § 80b-2(a)(11); Initial Decision at 22-26. The material used in presentations to investors stated: "Chris Gibson serves as [Geier Group's] investment advisor." Div. Ex. 16. That material also represented: "In February 2009,

¹⁶ The Court of Appeals for the District of Columbia Circuit has held *Timbervest* in abeyance pending the Supreme Court's disposition of *Lucia v. SEC*, No. 17-130 (oral argument held Apr. 23, 2018). Per Curiam Order, *Timbervest*, No. 15-1416 (D.C. Cir. Aug. 8, 2017). The Supreme Court did not accept the Solicitor General's invitation to consider the removal question in *Lucia*. See *Lucia v. SEC*, 138 S. Ct. 736 (2018) (granting certiorari without adding additional question presented).

Chris resigned from Deutsche Bank in order to form an advisory company to capitalize on the extraordinary dislocations in the market.” *Id.* Investors who testified believed that Gibson, who advised them to invest in the Fund, managed it. Initial Decision at 10-12, 25. One of the new exhibits echoes other testimony in the record: “During the entire time I was a limited partner in [the Fund], it was managed by [Gibson].” Gibson Ex. 181 at Ex. G ¶ 8. The evidence is that when Hull wanted the Fund to shift investments out of commodities, Gibson bought TRX securities for the Fund based on his belief that the value of TRX stock was correlated with the price of gold. Tr. 89-90, 109-12, 630-31, 640. Gibson’s testimony was replete with references to what “we”—referencing Gibson and Hull—decided as to the Fund’s investment strategy. *See, e.g.*, Tr. 110 (“[W]e settled on TRX.”).

I reject Gibson’s position, repeated here, that that he did not breach a fiduciary duty because the Fund’s POM provided that any member “may conduct any other business, including any business within the securities and commodities industries, whether or not such business is in competition with the [Fund].” Initial Decision at 4-5, 39 (quoting Div. Ex. 24 at 2378). Although the POM and operating agreement may have generally permitted private trading outside the Fund, they did not disclose that the Fund’s adviser may engage in front running based on inside knowledge of the Fund’s trading activities or that the Fund may purchase stock from an investor who had economic control over the adviser. Thus, the documents did not relieve Gibson of his fiduciary duty to disclose the transactions at issue and put the interests of his advisory client ahead of his own. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 189, 191-92, 194-95, 200-01 (1963).

Gibson acknowledged that he had a fiduciary duty that included a duty of loyalty, care, and good faith to an advisory client. Tr. 170-71. Investors received the POM but did not read it carefully. Tr. 416. Gibson’s expert, Thomas S. Harman, stated that the extent of an adviser’s fiduciary duties depends on the adviser’s disclosure of its conflicts and the client’s acceptance. Gibson Ex. 148 at 12-13. There is no question that Gibson was able to engage in private transactions. The issue here is that Gibson used information that he did not share with others to engage in undisclosed transactions to benefit the private interests and mitigate the losses of himself and favored Fund investors such as Hull. Tr. 421, 424-26, 428, 431-32, 479, 488, 490, 493-95, 498-99, 524-27, 551, 635; Div. Exs. 107, 154. In agreeing to private transactions, Fund investors did not know of, and accept, Gibson’s conduct.

Gibson says that he did not have a fiduciary duty to the investors because they were not his clients and thus he did not have a duty to disclose information to them. Gibson Br. 32-33. My finding was that Gibson had a fiduciary duty to the Fund, which necessarily would include a duty to put the

client's interest first and to eliminate—or at least fully expose—any actual or potential conflicts of interest. See *Capital Gains*, 375 U.S. at 191-92, 194-97, 200-01; *Vernazza v. SEC*, 327 F.3d 851, 859-60 (9th Cir. 2003); *Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *13 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015); *cf. Feeley & Willcox Asset Mgmt. Corp.*, Advisers Act Release No. 2143, 2003 WL 22680907, at *13 (July 10, 2003) (“It is the client, not the adviser, who is entitled to make the determination whether to waive the adviser’s conflict.”). The required disclosure to Fund investors in this context was derivative of his duty to the Fund.¹⁷

Gibson was not credible

Hull disagrees with my finding that Gibson was not credible. Initial Decision at 29; Gibson Ex. 178. The initial decision gives a detailed basis for each of my findings. Initial Decision at 29-30, 37 & n.47. The following is a response to each of Hull’s points.

(1) Hull maintains that Gibson could not have known on September 26, 2011, that the Fund was going to sell 3.7 million TRX shares on September 27. Gibson Ex. 178 at 2.

Response: TRX’s share price dropped from \$7 to around \$4 between April and September 2011. Initial Decision at 15, 30-31; Div. Ex. 184 at Ex. 1. Gibson had worked with Hull, a business person who liked to make money, not lose it. Hull told Gibson on September 25 that he had no tolerance for further losses, which Gibson testified he took to mean the Fund should sell its TRX shares if it could get a good price. Initial Decision at 8, 32. Gibson called a broker that evening inquiring whether he had a buyer for TRX shares. *Id.* at 8, 32. Given these facts, Gibson would have known with reasonable certainty when he sold his TRX shares that the Fund was about to sell its TRX shares. I disagree that to be found to have knowledge, Gibson had to have known on September 26, 2011, the per share price, the name of the buyer, and the precise number of shares to be sold the next day. Gibson

¹⁷ Contrary to Gibson’s suggestion, the court in *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006), did not categorically hold that a fund adviser owes no duties to fund investors, but vacated a Commission rule that would have treated all investors in hedge funds as clients. See *United States v. Lay*, 612 F.3d 440, 446-47 (6th Cir. 2010) (rejecting similar argument based on *Goldstein*). Moreover, independent of his duty to the Fund, Gibson had a duty under Section 206(4) and Rule 206(4)-8 to avoid material misstatements or omissions to Fund investors.

knew enough material information that would cause him to believe that the Fund was poised to sell a large number of shares, and he immediately sought to mitigate his personal losses through private transactions outside the Fund. The timing was not mere coincidence.

(2) Hull believes Gibson had a positive view about TRX's share value throughout 2011 because they shared their views. Gibson Ex. 178 at 2.

Response: The record evidence—which includes Gibson's scathing, critical emails to TRX's CEO Jim Sinclair and his comments to Sequeira in August 2011 that he was "physically ill" over the TRX share price so that it would make sense for the Fund to exit its position very soon—goes way beyond Hull's statement that he encouraged Gibson to challenge Sinclair on his failure to execute strategy for TRX. *Id.*; Div. Exs. 76-78; Initial Decision at 30-31. As detailed in the initial decision, there is considerable, persuasive evidence that Gibson did not view TRX shares positively throughout 2011, but that he was telling Fund investors otherwise. From Hull's affidavit, it appears that Gibson also misrepresented his position to Hull.

(3) Without specifying a time period, Hull believes Gibson was credible in saying that large TRX shareholders were interested in buying the Fund's TRX shares, as shown by the fact that the Fund sold almost six million shares between September 27 and November 9, 2011. Gibson Ex. 178 at 2.

Response: You can sell anything at a price. On August 23, 2011, Gibson did not think one could get \$6.25 per TRX share "from a long." Gibson Ex. 177. Sands thought he could sell nine million shares at \$5.85 per share. *Id.* The share price dropped from \$5.57 to \$4.07 between September 21 and September 23, 2011. Initial Decision at 7. The Fund sold 78,000 TRX shares at \$4.11 per share on September 23, 2011. *Id.* at 7 n.12. Gibson sold personal shares outside the Fund on September 26, 2011, for \$4.04 per share. *Id.* at 8. The Fund sold 3.7 million shares on September 27 at an average share price of \$3.50. *Id.* There is nothing in the record that supports Hull's suggestion that large TRX shareholders were interested in buying TRX shares at a good price after August 2011, and, in fact, Gibson acknowledged at the hearing that no record evidence supported this notion. *Id.* at 29.

(4) Hull states that Gibson was credible in asserting that the Fund was a patient holder of TRX shares and was willing to hold them for a long time because he and Gibson did not decide to liquidate the Fund's position until late in the evening on November 9, 2011. Gibson Ex. 178 at 2-3.

Response: Contrary to Hull's claim, there is a great deal of evidence that the Fund was not a patient holder of TRX shares but wanted to sell its TRX shares beginning in August 2011 when Gibson inquired whether Sands knew

a buyer and certainly after September 25, 2011, when Hull told Gibson that he had no tolerance for further losses and Gibson thereafter tried to sell off the Fund's position as quickly as he could. Initial Decision at 7-9, 30-32; Gibson Ex. 177.

On September 22-23, the price of TRX shares had declined so dramatically that Gibson considered TRX an unsuitable investment for the Marzulllos, the family of his then-girlfriend. Tr. 789. On September 22, 2011, Gibson wrote to Sinclair requesting a conversation on ways to save the company, which was "down 16%, twice as bad as any comparable. We are now in uncharted territory to the downside, even among the worst performing peers." Initial Decision at 32 (quoting Div. Ex. 79).

On October 16, 2011, Gibson notified the Fund's brokers that the Fund would be closing its TRX position in the next few weeks, and on October 17, 2011, he instructed the brokers to "get us able to sell 5,945,000 TRX shares starting ASAP." *Id.* at 38 (quoting Div. Ex. 93). Gibson's actions demonstrate that the Fund was trying to sell its position as quickly as it could, at least several weeks before the Fund liquidated its remaining TRX shares on November 10, 2011.

(5) Hull finds credible Gibson's belief that TRX's share price would not decline on November 10, 2011, after the Fund liquidated its remaining 4.87 million shares. Gibson Ex. 178 at 3.

Response: I stand by my assessment that Gibson knew that the Fund's sale of its remaining TRX shares on November 10, 2011, would cause a decline in TRX's share price. "[O]n the morning of November 10, 2011, Gibson emailed [a Fund investor,] T.R. Reddy, 'I think you should sell your TRX shares immediately,' and e-mailed the Fund's broker [Dennis Gerecke] that '[w]e're going to potentially tank [TRX].'"¹⁸ Initial Decision at 38 n.48 (quoting Div. Exs. 105, 107); *see also* Tr. 714-17. In a December 2011 (date is not certain) phone conversation, Gibson explained to Sequeira that the Fund sold its final shares because "[n]o one would buy" them. Initial Decision at 36-37 (quoting Div. Ex. 183A).

Gibson, who was well educated and had several years of securities industry experience, should have known that, as expressed by the Division's expert, one would have expected TRX's share price to fall drastically on

¹⁸ Gibson instructed the Fund's broker to sell the shares aggressively because, according to his testimony, he and Hull believed this would cause holders of TRX to buy the Fund's shares. Tr. 715-16.

November 10, 2011, because: the amount of Fund sales in four hours was ten times TRX's usual daily trading volume, no information was released that would have caused the price drop, and the amount of Fund sales far exceeded the demand for TRX shares. *Id.* at 15-16.

(6) Hull contends that Gibson's expressed belief that the low price of TRX shares in the fall of 2011 was due to rumors spread by short sellers was credible. Gibson Ex. 178 at 3-4.

Response: In his after-the-fact phone conversation with Sequeira, Gibson did not mention short sellers as the cause of TRX's falling stock price. Div. Ex. 183A. To bolster Gibson's assertion about short selling rumors, Hull states that he and Gibson were concerned about information flowing from John Engler, a Fund investor, "to potential short sellers." Gibson Ex. 178 at 3-4. Gibson testified that Engler had released the Fund's plans to a multi-billion dollar hedge fund that had confirmed to Hull that they were short in the stock. Tr. 653-54, 656-57. Hull's affidavit does not name any particular hedge fund or any conversation with one. There is no reliable evidence of short selling in TRX shares in the record. Initial Decision at 30.

Gibson breached his fiduciary duties and violated the securities laws

The initial decision found that Gibson violated his fiduciary duties and the antifraud provisions when, without disclosure to other Fund investors, he: (a) sold all the TRX shares in his personal account and two other accounts he controlled on September 26, 2011, the day before he sold 3.7 million shares in the Fund's account; (b) bought TRX puts for himself and his girlfriend, and advised his father to buy TRX puts and sell his TRX shares, before selling the Fund's remaining TRX shares on November 10, 2011; and (c) had the Fund purchase 680,636 TRX shares from Hull on October 18, 2011. Initial Decision at 27-40.

Gibson objects to the initial decision's definition of front running as "a fiduciary's non-disclosed use of material, non-public information about a client to conduct transactions ahead of the client's transaction to secure a personal advantage, for himself or a close friend or relative," but does not offer a better one. Initial Decision at 28 (citing case law and treatise); Gibson Br. 24-25. Moreover, Gibson's lack-of-notice due process claim is unpersuasive. The legal principles applied by the initial decision follow established precedent regarding an adviser's duties to eliminate or disclose all actual or even potential conflicts of interest. The antifraud provisions are "necessarily broad so as to embrace the infinite variety of deceptive conduct." *Investors Mgmt. Co.*, Exchange Act Release No. 9267, 1971 SEC LEXIS 962, at *33 (July 29, 1971). As such, their application may evolve by adjudication

without violating due process or the Administrative Procedure Act. See *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

Nothing presented in this remand is persuasive that the initial decision was wrong in finding that Gibson knew with reasonable certainty that the Fund was going to sell as many of its TRX shares as it could on or about September 27, 2011, when he sold private TRX shares on September 26 without informing Fund investors.

Likewise, nothing presented in this remand undermines the initial decision's finding that when Gibson, a fiduciary, bought TRX puts and advised his father to do the same in late October and early November 2011, without informing Fund investors, he knew the Fund would liquidate its remaining TRX shares. Gibson was a fiduciary to the Fund, yet he used material, nonpublic information about the Fund's activities to benefit himself, his former girlfriend, and his father, without disclosure to the other Fund investors. Contrary to Gibson's suggestion, the information that the Fund intended to liquidate its remaining shares was nonpublic—it was neither broadly disseminated without favoritism to specific persons nor known by a few persons whose trading caused the information to be fully reflected in the TRX stock price. See *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997).

Hull criticizes the initial decision for characterizing the Fund's purchase of his TRX shares as a sweetheart deal and claims that the initial decision wrongly found that his "largest creditor was demanding an increase in liquid assets and the only investment available to create cash was his TRX shares." Gibson Ex. 178 at 4; Initial Decision at 40. According to Hull, he "never received any demand from Wells Fargo, and [he] had no unmanageable liquidity crisis in October[] 2011." Gibson Ex. 178 at 4. My basis for the statement in the initial decision was Gibson's testimony:

So at this point in time Jim Hull, again, this is relating to the Wells Fargo situation where he has to generate liquidity. He has every right to sell the shares. He had sold the shares in the other account. We had several strategies, or options available to us. One was Jim could sell into the market, and he could sell at the market, in the market, and he would generate \$2.5 million in cash to himself.

Another option would be to contribute the shares to the Fund whereby he'd actually only net \$500,000. So in

other words, when he sells to Geier, he is 80 percent Geier.

Tr. 184.

Q Why did you buy those shares from Mr. Hull?

A Mr. Hull was in discussions with his largest creditor, Wells Fargo, who was demanding, in a manner, that he increase his liquidity. They were telling him if he didn't have more liquidity, there would be adverse consequences for the availability in pricing of credit to his primary commercial real estate business.

So he expressed an interest to me to sell his TRX shares in that account. This wasn't 2,000, 5,000, 10,000 shares. It was 680,636 shares. At this time we are in active negotiations to liquidate the remaining balance of the Fund's shares. I discussed with Mr. Hull that I didn't think it would be helpful if he sold those into the market, which would, of course, provide him with liquidity immediately in the full amount of those shares.

Tr. 688-89.

Whether or not Hull had received a demand to increase his liquidity, as Gibson testified, there is no cause to overturn the initial decision's finding that on October 18, 2011, Gibson willfully violated his fiduciary duty and Advisers Act Section 206(1), (2), and (4) and Rule 206(4)-8 by having the Fund purchase 680,636 TRX shares from Hull without disclosure to the other Fund investors. Initial Decision at 38-40.

Many of Gibson's remaining arguments are repetitive of points considered and rejected in the initial decision, and upon reconsideration, I affirm my prior conclusions. *See, e.g.*, Gibson Br. 54 (arguing that the initial decision "does not contain findings or conclusions regarding the investment adviser with which Respondent was associated" for a Section 203(f) sanction); Initial Decision at 42 (rejecting Gibson's argument on this same issue and citing Commission precedent holding that when an individual acts as an investment adviser, he meets the definition of a "person associated with an investment adviser" under Section 203(f)).

Other issues

Gibson has not shown that certain Division exhibits admitted into evidence should have been excluded. The challenged exhibits—a recording

and transcript of a conversation between Gibson and Sequeira, and the expert and rebuttal reports offered by the Division—were admissible under 17 C.F.R. § 201.320. *See* Div. Exs. 183, 183A, 184, 185, 187, & 188.

Gibson argues on remand that the Division’s allegations that he and his family took short positions may have or did adversely affect their reputations and business and personal relationships. Gibson’s arguments if true are unfortunate but irrelevant. Such allegations played no part in my decision, I made no finding that Gibson engaged in short selling, and nothing shows that the Division deliberately misled Hull or others. Thus, Gibson’s claims do not give rise to relief as there is no showing that the hearing process was prejudiced. *See Kevin Hall, CPA*, Exchange Act Release No. 61162, 2009 SEC LEXIS 4165, at *84-86, *86 n.115 (Dec. 14, 2009). Nonetheless, if allegations are immaterial but may have negative consequences for a respondent, perhaps greater caution should be taken when disseminating them.

Ruling

I have reconsidered the record, including all my substantive and procedural actions, and I have fully considered all the parties’ submissions, those discussed in this order and those not discussed. I RATIFY all the actions that I have taken in this proceeding. The process contemplated by the Commission’s November 30, 2017, order is complete.

Brenda P. Murray
Chief Administrative Law Judge