INITIAL DECISION RELEASE NO. 1106
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 January 25, 2017

APPEARANCES: H. Michael Semler, Gregory R. Bockin, Paul J. Bohr, and George J. Bagnall for the Division of Enforcement, Securities and Exchange Commission

Thomas A. Ferrigno of Brown Rudnick LLP and Paul F. Enzinna of Ellerman Enzinna PLLC for Christopher M. Gibson

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

The Securities and Exchange Commission issued an order instituting administrative and cease-and-desist proceedings (OIP) on March 29, 2016, 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. I held a hearing September 12-16, 2016, at which the Division of Enforcement presented evidence from five witnesses, including Respondent Christopher M. Gibson and two experts, and Gibson presented evidence from seven witnesses, including himself and three experts.[1] The final brief was filed on December 20, 2016.

Issues

The Division alleges that Gibson was an investment adviser to a private fund who willfully violated Section 206(1) and (2) of the Advisers Act by "front running" his client fund,

[1] Pursuant to the parties' stipulation, transcript page 57, lines 5 through 8, and page 58, line 7 through page 60, line 9, are stricken. Tr. 480-81; Div. Ex. 192 (stipulation citing unamended transcript). I will cite the hearing transcript as "Tr. __"; the Division's and Respondent's exhibits as "Div. Ex. __" and "Gibson Ex. __," respectively; and the post-hearing briefs as Div. Br., Gibson Br., and Div. Reply Br. I will cite to the page numbers of some exhibits by the last four digits of their Bates numbers.

and by having the fund purchase securities from a favored fund investor in an undisclosed transaction. OIP at 1-3, 9; Div. Br. 15-70; Div. Reply Br. 4-25. The Division believes Gibson's conduct also willfully violated Section 206(4) of the Advisers Act and Advisers Act Rule 206(4)-8, and that his front running conduct willfully violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5(a) and (c). OIP at 9; Div. Br. 70-80; Div. Reply Br. 25-27.

Findings of Fact

The factual findings and legal conclusions are based on the entire record. I applied preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this initial decision.

Christopher M. Gibson and Geier International Strategies Fund, LLC

Gibson graduated from Williams College in 2006, worked at Deutsche Bank Securities Inc. from June 2006 until February 2009, and as a finance analyst for Hull Storey & Gibson (HSG), a commercial real estate company in Augusta, Georgia, from March or April 2009 until December 2012.[2] Tr. 16-19, 169, 553, 555, 560-63, 607, 728; Div. Ex. 167; Gibson Ex. 34. From 2009 through 2011, Gibson provided investment advice to James Hull and his daughters; in 2009, he and Hull formed two investment partnerships, the Gibson Fund and the Hull Fund. Tr. 28-30, 176-77, 556-57, 563-64.

The Gibson Fund began in April and the Hull Fund began in July or August 2009.[3] Tr. 615. Neither fund assessed fees to its limited number of investors that included Gibson and Hull's long-time business associates, such as his counsel Wayne Grovenstein, Douglas Cates, members of the McKnight family, and Nick Evans. Tr. 28, 30, 97, 564.

Hull became dissatisfied with the funds no-fee partnership arrangement and Gibson suggested to Hull that they leverage Gibson's series 7 and 63 licenses to form an investment advisory company. Tr. 19, 25-26, 564-65, 615; Div. Ex. 10. As a result, the Geier International Strategies Fund, LLC (the Fund), a private fund open to accredited investors, filed a certificate of formation with the State of Delaware on December 16, 2009.[4] Tr. 31-36, 48, 170, 566; Div. Exs.

[2] The Gibson in Hull Storey & Gibson was John Gibson, Gibson's father. Tr. 18, 466, 555, 558. James Hull is a successful and wealthy businessman active in the Augusta community. Tr. 839, 886.

[3] The funds bought gold, silver, and a position in the Rogers International Commodity Index. Tr. 621. Gibson testified that the funds achieved generally a forty percent return in 2009. Tr. 567, 616.

[4] An accredited investor is defined in Regulation D, Rule 501 under the Securities Act of 1933. In 2010, generally speaking, an accredited investor was any natural person with a net worth exceeding $1 million or an income over $200,000 ($300,000 together with a spouse) in each of the prior two years. 17 C.F.R. § 230.501(a)(5)-(6) (2010).

16-17, 19; Div. Ex. 24 at 2362. The Fund began operations on January 1, 2010. Tr. 566, 621. Investors in the Gibson and Hull Funds rolled their assets into the Fund. Tr. 51-52, 566. According to Gibson, he implemented Hull's overall strategy. Tr. 631.

Gibson testified that Hull thought it was important to have an "alignment of interest," and left him no option but to invest his net worth and $645,000, borrowed from Hull on a demand note at eight percent interest, in the Fund.[5] Tr. 576-77, 636, 744-45. In addition, Gibson had his mother invest her inheritance in the Fund, and his father borrowed from Hull to do likewise. Tr. 576, 579, 639-40; Div. Ex. 33. Gibson made the investments because he saw the Fund as a compelling chance to generate high returns. Tr. 577-78.

Geier Group LLC, Geier Capital LLC (Georgia), and Geier Capital LLC (Delaware)[6]

Geier Group, Geier Capital (Georgia), and Geier Capital (Delaware) were each owned by Gibson, Hull, and John Gibson: fifty percent, thirty-five percent, and fifteen percent, respectively. Div. Ex. 189 ¶¶ 4, 9; Tr. 27, 43, 103-04, 138, 170, 581-82, 584.

Gibson created Geier Group to be the entity that would receive the investment management fee. Tr. 42-43, 584-85. Geier Group received a certificate of organization from the Georgia Secretary of State on April 14, 2009. Tr. 21; Div. Ex. 11. Gibson was Geier Group's organizer, registered agent, and president. Div. Exs. 11-12. Geier Group's Form ADV investment adviser registration, filed with the Commission on April 24, 2009, represented: that the adviser would perform portfolio management for individuals, small businesses, or institutional clients (other than investment companies); the various ways the adviser would be compensated; the adviser's discretionary authority over customer accounts; that the adviser was only registered in the State of Georgia; and that Gibson was responsible for supervision and compliance. Div. Ex. 12 at 8, 12, 17, 29.

The second entity, Geier Capital (Georgia), received a certificate of organization from the Georgia Secretary of State on June 16, 2009.[7] Div. Ex. 15. Geier Capital's literature stated that Geier Group, a subsidiary, was an investment adviser in the State of Georgia and a Financial Industry Regulatory Authority (FINRA) member. Div. Ex. 16. Gibson created Geier Capital because he thought it was important to have an entity "to receive the performance allocation in order to position the managing member to capitalize on the potential for carried interest." Tr. 584.

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[5] Gibson testified he invested $300,000, in addition to the loan from Hull. Tr. 580, 636. There is evidence of a Chris Gibson loan at eight percent interest per annum, calculated on the basis of 360 days per year for the actual number of days elapsed, without compounding. Gibson Ex. 117 at 0408. The initial amount of the loan was $100,000 on April 22, 2009, attributable to the Hull Fund. Loan amounts after January 1, 2010, are attributable to the Fund. *Id.* at 0405.

[6] Unless the distinction is clear in the record and necessary for context, this initial decision generally does not distinguish between Geier Capital (Georgia) and Geier Capital (Delaware).

[7] The articles of organization dated June 16, 2009, lists Hull as the registered agent and Laurie Underwood, Hull's assistant, as organizer. Div. Ex. 15; Tr. 27.

Gibson testified that "we received a performance allocation at one time, 100 percent of which remained in the Fund." Tr. 637. Geier Capital was the Fund's managing member and Gibson was managing director of the managing member.

The third entity, Geier Capital (Delaware), filed a certificate of formation with the State of Delaware on December 29, 2010, and filed a certificate of cancellation on December 23, 2011. Div. Ex. 40; Div. Ex. 189 ¶ 8. It is Gibson's position that Geier Capital (Delaware) replaced Geier Capital (Georgia) as the Fund's managing member. Tr. 103.

Gibson agreed that a FINRA record showed that Geier Group's investment adviser registration in Georgia and Gibson's associated status ended December 31, 2010, and that Gibson did not disclose this information to Fund investors. Div. Ex. 167; Tr. 93-95. However, the record contains evidence that the registrations of Geier Capital (Georgia) and Geier Group were terminated in the State of Georgia on March 28, 2011, and April 13, 2011, respectively. Tr. 95-99; Div. Exs. 60, 63-64; Div. Ex. 189 ¶ 6. The Georgia Secretary of State's website shows the registration status of Geier Group as "dissolved" effective April 13, 2011. *See* Georgia Corporations Division, Geier Group LLC, https://ecorp.sos.ga.gov/BusinessSearch/BusinessInformation?businessId=1438850&businessType=Domestic%20Limited%20Liability%20Company (last visited January 5, 2017).

Gibson testified that when Geier Capital (Georgia) was terminated, he continued to perform the same activities, and he did not inform Fund investors of the change because he considered it immaterial. Tr. 99, 100-04, 108, 585-86; Div. Ex. 40. Gibson did not amend offering documents that referred to Geier Capital (Georgia) as the managing member of the Fund after that entity was terminated. Tr. 104-05.

Geier International Strategies Fund, LLC

Fund investors received copies of the Fund's January 2010 private offering memorandum (POM) and signed two other critical documents: an operating agreement and a subscription agreement. Tr. 39, 580-81; Div. Exs. 22-28; Gibson Exs. 8-13. The POM described:

(1) Geier Capital (Georgia) as the Fund's managing member, and Gibson as Geier Capital's managing director;
(2) Geier Group, a registered investment adviser in Georgia, as the Fund's investment manager and Gibson as Geier Group's managing member; and
(3) Gibson as significant for the Fund's success.[8] Tr. 41, 44-45, 56; Div. Ex. 24 at 2360, 2376.

Gibson believes the language in the POM concerning risk factors, titled potential conflicts of interest, permits the Fund's managing member, the investment manager, and

[8] The POM noted that Gibson would invest the majority of his net worth in the company and/or its affiliates. Div. Ex. 24 at 2360.

affiliated parties to buy and sell securities related to the Fund at different times and prices than the Fund and to act in conflict with the Fund. Tr. 753; Div. Ex. 24 at 2378. The language reads:

> Under the terms of the Operating Agreement, the Managing Member, the Investment Manager, and each of their respective directors, members, partners, shareholders, officers, employees, agents and affiliates . . . 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].
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> * * *
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> In addition, purchase and sale transactions (including swaps) may be effected between the [Fund] and the other entities or accounts subject to the following guidelines: (i) such transactions shall be effected for cash consideration at the current market price of the particular securities, and (ii) no extraordinary brokerage commissions or fees (i.e., except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction.

Div. Ex. 24 at 2378. Gibson testified that he and Hull decided on this language knowing that Gibson would be borrowing a significant amount to invest in the Fund and that he might have to hedge that risk. Tr. 745-48, 768. Gibson acknowledges that this language does not waive an investment adviser's fiduciary duty and, more specifically, does not allow the Fund's managing member, the investment manager, and affiliated parties to trade on the Fund's trading intentions. Tr. 760.

The Fund's January 1, 2010, operating agreement provided that the Fund would be managed by the managing member, and nothing prevented the managing member "or any other Member from conducting any other business, including any business within the securities industry, whether or not such business is in competition with the [Fund]."[9] Div. Ex. 22 at 2; Gibson Ex. 13 at 2. The operating agreement also provided that in effecting transactions, it may not always be possible for an investor and the Fund to liquidate the same investment positions at the same time. Tr. 764-65; Gibson Ex. 13 at 2. The operating agreement gave the managing member, Geier Capital, the power to retain Geier Group or another entity to serve as investment manager. Tr. 46-47, 580-82; Div. Ex. 22 at 1-3; Gibson Ex. 13 at 1-3. Gibson signed the operating agreement on behalf of Geier Capital and Geier Group. Div. Ex. 22 at 2676; Gibson Ex. at 13 at 12.

The subscription agreement between an investor and the Fund, with Gibson signing on behalf of the Fund's managing member, established whether the investor was accredited. Tr. 49; Div. Exs. 25-28. The subscription agreement identified Geier Group as the Fund's investment manager. Div. Ex. 25 at 3; Div. Ex. 185 at 7.

[9] Gibson testified that he and Hull drafted this sentence to allow them to maintain private accounts. Gibson believed it allowed him to take a position on a security in his private account that was different from a Fund position in the same security. Tr. 587-88.

In an e-mail to a potential Fund investor in December 2009, Gibson referred to Geier Capital's "2010 Outlook" document; Hull was copied on the e-mail. Tr. 31-32; Div. Exs. 16, 19. This material identified Gibson as Geier Group's investment adviser and described Gibson as holding series 7, 63, and 65 licenses; the document also noted that while previously employed at Deutsche Bank, he advised clients on a range of assets suitable for securitization financing, managed securities for proprietary trading, contributed to loan evaluation and due diligence, structuring and placement of "US$40bn+" in securities collateralized by subprime mortgages, and successfully negotiated terms with rating agencies and bond insurers for the issuance of "$454mm in notes." Div. Ex. 16. According to Gibson, Hull was responsible for the Fund's formation and operation, and for bringing in ninety percent of the Fund's assets – eighty percent personal assets and ten percent friends and business associates; and Hull set the Fund's investment strategies. Tr. 46, 74.

By February 11, 2010, the Fund had raised $32,237,971 from seventeen investors in a private offering; by February 9, 2011, it reported the offering had raised $39,737,474. Tr. 52-53; Div. Ex. 31 at 4; Div. Ex. 132 at 4. Gibson acknowledges raising over $30 million. Tr. 170. In February 2010, Gibson reported to investors that the Fund returned 9.51 percent net of fees in January 2010. Div. Ex. 32. The Fund's value was up about 110 percent in 2010, for an approximate $36 million gain. Tr. 84-85, 579. The Fund paid Geier Group a quarterly management fee of 0.25 percent (i.e., one percent per annum) of each investor's assets under management, and would pay Geier Capital an incentive allocation of ten percent of total net profits when, for each fiscal year, the investor's return exceeded a non-cumulative "hurdle rate" equal to an annual return of ten percent. Tr. 43; Div. Ex. 24 at 2361.

The Fund more than doubled in value in 2010 when it held similar physical assets to those the Hull and Gibson funds had held. Tr. 621-23. Reflecting his ownership, Gibson was entitled to receive fifty percent of the $223,351 the Fund paid Geier Group for management services in 2010 and the $295,000 the Fund paid in 2011; but Gibson testified that he did not consider Geier Group or himself as the Fund's investment adviser. Tr. 44, 80, 82-84; Div. Ex. 189 ¶ 13; Div. Ex. 191 at 402-03, 457, 461-62. In addition to the management fee, as a fifty percent owner of Geier Capital, Gibson was entitled to receive a performance allocation for 2010 of approximately $1.5 million. Tr. 84-85; Div. Ex. 189 ¶ 13; Div. Ex. 191 at 405-07. Although entitled to take his share of the fees and incentive allocation, Gibson kept or reinvested his share in the Fund. Tr. 781, 784; Div. Ex. 191 at 363-64, 405, 461-62. For the year 2011 when the relevant conduct occurred, Gibson received a salary of $148,718 paid out from HSG's human resources service; this salary was paid to Gibson primarily for his services to the Fund.[10] Tr. 732-36; Div. Ex. 128; Div. Ex. 138 at 2030, 2056; Div. Ex. 191 at 450-51, 468-69. The Fund had twenty-one investors in 2011. Div. Ex. 189 ¶ 11.

Tanzanian Royalty Exploration Corporation (TRX)

[10] Geier Capital was supposed to repay HSG for Gibson's 2011 salary, but ultimately did not. Tr. 152, 733-74. Gibson claims that he is liable for the salary as an unpaid loan, Tr. 152-53, despite having listed the salary as income on his tax return. Div. Ex. 138 at 2030.

In late 2010, the Fund began shifting its investments from commodities into a single equity, Tanzanian Royalty Exploration Corporation; on April 29, 2011, the Fund was one hundred percent invested in more than nine million shares of TRX.[11] Tr. 86, 89-90, 109, 623-24, 630; Div. Ex. 69; Div. Ex. 189 ¶ 15. Gibson's investment thesis was based on his belief that the price of gold would increase as the value of the dollar decreased and that the value of TRX shares would correlate with the price of gold. Tr. 640, 1170.

As of August 31, 2011, TRX had not generated any revenue. TRX 2011 Annual Report (Form 20-F) at 7, 10 (filed Dec. 12, 2011); 17 C.F.R. § 201.323 (official notice). Gibson testified that despite his critical complaints about TRX that he expressed in e-mails to TRX's CEO James Sinclair, he believed TRX was worth from $10 to $20 a share and his communications were attempts to get Sinclair to release favorable information that would support TRX's share price. Tr. 113-20; Div. Exs. 76-77.

On September 23, 2011, Gibson, acting for Geier Capital, informed Fund investors that the Fund was suspending its management fee because of TRX's poor performance, but that a Morgan Stanley research report and TRX purchases by other funds "confirms my view of the tremendous fundamental value of the assets owned and business operated by TRX and is a verification . . . of my analysis of TRX's underlying value and of the reputation, character and integrity of Mr. Sinclair." Tr. 126-29, 628; Div. Ex. 81. Gibson represented that ninety percent of Fund investors remained in the Fund despite the Fund's performance. Tr. 129; Div. Ex. 81.

Gibson testified that in September 2011 he was bullish on TRX stock, which he thought was worth between $10 and $15 per share, but short sellers were driving the price down, so he believed the Fund should sell TRX at $4.00 or $4.50 per share and move into securities where it could better take advantage of rising gold prices. Tr. 644, 647, 653-56.

TRX Shares

The price of TRX shares dropped from $5.57 to $4.07 per share between September 21 and September 23, 2011.[12] Gibson Ex. 149 at 9. On Saturday, September 24, 2011, Gibson told Dennis Gerecke, the Fund's broker at Gar Wood Securities, that Gibson was going to hear on Thursday regarding a transaction where the Fund might sell one to five million TRX shares. Tr. 714, 978-81; Gibson Ex. 61.

[11] Gibson believed TRX had multiple properties in Tanzania, that it would receive royalties from joint ventures, and that its CEO had a special relationship with the leadership in Tanzania. Tr. 90, 110-13.

[12] The Fund sold 78,000 TRX shares at $4.11 per share on September 23, 2011. Tr. 657.

On Sunday, September 25, Hull told Gibson that he had no tolerance for further losses, which Gibson took to mean the Fund should sell its TRX shares, if he could get good prices.[13] Tr. 130-33, 153, 648-49, 979-80, 1086. After his conversation with Hull, Gibson immediately began to shop the shares by inquiring on Sunday evening whether Richard Sands, CEO of Casimir Capital L.P., knew of any interested buyers for the Fund's TRX shares. Tr. 660-62, 981-82; Gibson Ex. 62 at 3237. Sands said he would work on it the next day. Tr. 663; Gibson Ex. 62 at 3236.

Gibson believed that a Fund investor was disclosing the Fund's investment strategy to a hedge fund trader so he did not inform investors that the Fund's investment strategy changed "in order to protect them and optimize the value of the shares." Tr. 131-33, 654, 656-57.

On Monday, September 26, 2011, Gibson sold all the TRX shares in his personal account and his then-girlfriend's account at an average price of $4.04 per share, and he also sold one thousand shares of TRX held by an account in Geier Group's name at an average price of $4.05.[14] Tr. 136-39, 144, 217, 657-58, 780, 788, 982; Div. Ex. 86 at 1059; Div. Ex. 87 at 0464-65; Div. Ex. 88 at 6; Div. Ex. 184 at 9; Div. Ex. 189 ¶¶ 22-24.

Gibson testified that the Fund gave possible buyers guidance that the price of the Fund's TRX shares was the current market price or higher; however, on Tuesday, September 27, 2011, the Fund sold 3.7 million shares of TRX at an average price of $3.50 a share for a total of $12.9 million.[15] Tr. 143, 775-79, 790; Div. Ex. 90 at 3. The Fund's sales were fifty-nine percent of TRX sales on the day. Tr. 354. Gibson testified that he thought he was selling the Fund shares at the same price that he had sold his personal shares and he did not expect the share price to be so low because Sands, who arranged the sale, misrepresented what he could accomplish. Tr. 144, 165-66.

Gibson and Hull accepted the $3.50 share price even though they were bullish on TRX because if they "walk[ed] away from this transaction, that might embolden short sellers further to actually drive the price down to $3." Tr. 151, 167, 675-76, 680. Gibson testified that he would not have sold TRX shares on September 26 if he had known the Fund would be selling shares at a discount the next day. Tr. 146, 171. Gibson denied knowing on September 26 that the Fund would

[13] Gibson references the weekend of September 24-25 for the conversation that is the basis of the changed strategy, "get out of TRX at good prices," but evidence puts the conversation with Hull on Sunday, September 25. Tr. 978-80; Div. Ex. 190 at 77-78; Div. Ex. 191 at 679.

[14] Gibson's girlfriend did not invest in the Fund. Tr. 638. Gibson had an advisory relationship over an account initially funded with $900,000 from the Marzullos, his girlfriend parents who were in their late seventies; that money, which grew to over $1 million, was invested in the Fund. Tr. 137, 575, 638-39, 724-25, 788-89, 827-28, 1052-53; Div. Ex. 33.

[15] The exchange traded price—approximately $4.00 and $3.50—was the result of the block discount. Tr. 144-45, 1020. Sands asked for confirmation that he had "upto [sic] 5mm shares for sale at 3.50 or better" on September 27 at 8:44 pm. Gibson replied at 8:45pm, "confirm at $3.50 or better up to 5mm shares." Tr. 674; Gibson Ex. 64.

be selling shares at a lower price on September 27 or that the Fund expected to sell a large portion of shares on that date, rather he knew the Fund was open to a sale. Tr. 679-80.

After September 27, 2011, Gibson attempted to sell the Fund's remaining 5.9 million shares in a single block at a good price but the sale fell through and Luis Sequeira bought around only 350,000 shares.[16] Tr. 172-81, 212, 682-85; Div. Ex. 93; Gibson Exs. 92, 104.

In mid-October 2011, Gibson asked whether Hull could combine his TRX shares with the Fund's shares to "accommodate the other members of the Fund and demonstrate a greater alignment of interest." Tr. 185-86, 217-18, 689-90, 692. On October 18, 2011, the Fund bought 680,636 shares of TRX from Hull in a private transaction for $3.60 a share, the closing price that day, for a total of $2.45 million (the Hull transaction).[17] Tr. 182, 185-86, 688, 1011, 1014; Div. Exs. 94-95. The Fund did not assess a block discount to the shares that would likely have been applied if the shares were sold on the open market and Hull did not pay a commission, which would have happened if Hull sold in the open market. Tr. 191, 696-97, 1015, 1022, 1026-28. Hull and Gibson were the only Fund investors who knew of the transaction. Tr. 183. Following the purchase, the Fund continued to try to sell its remaining TRX shares at a good price. Tr. 198.

On October 27-31, 2011, Gibson bought $4 put options on TRX in his girlfriend's account and his own account; Gibson continued to buy TRX put options in his own account in early November; and on November 8-9, Gibson advised his father to sell TRX shares in a private account and to buy puts on TRX.[18] Tr. 200-02, 215-16, 719-21; Div. Ex. 99 at 1065; Div. Ex. 102 at 0470-71; Div. Exs. 114, 117, 119; Div. Ex. 124 at 1071; Div. Ex. 189 ¶¶ 25-27. Gibson did not suggest that other Fund investors buy puts. Tr. 1048.

Sands called Gibson to a meeting on November 9, 2011, where Gibson thought Sands was going to have a buyer for the Fund's 4.8 million shares at the current price. Tr. 708, 713. Instead, Platinum offered to pay the Fund $10,000 a month for six months if the Fund agreed not to sell any shares. Tr. 709-10. Gibson testified this meeting caused him to change his strategy because he thought other holders of TRX shares were buyers, but now realized that Platinum might sell its nine million shares ahead of the Fund. Tr. 712-13.

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[16] Luis Sequeira ran Roheryn Investments. Tr. 683. Gibson understood Sequeira to be an investment manager in Lisbon, Portugal, whose clients were high net worth individuals in Europe and the Middle East who owned ten to twelve million TRX shares. Tr. 114-15, 680-81, 713.

[17] Div. Ex. 95 shows $2,450,589.60. The contract price and the paid price was this amount. Tr. 405-07. Div. Ex. 96 at 4854 shows $2,450,289.60. Tr. 378-79. Earlier, around October 15, 2011, Gibson sold a small amount of TRX shares Hull held in another private account. Tr. 177-78, 217.

[18] A put is an option contract giving the owner the right, but not the obligation, to sell a specified amount of an underlying asset at a set price within a specified time. https://index.investopedia.com/index/?q=put&o=40186&qo=investopediaSiteSearch. The puts Gibson bought were covered puts in that he owned more TRX shares than the number of shares he bought an option to sell. Tr. 941, 1135.

On November 10, 2011, the Fund sold 4,878,772 TRX shares and the share price plummeted from an opening price of $3.41 per share to a low of $1.56, ending up at $2.29.[19] Tr. 214-15, 229-33, 395-98; Div. Ex. 184 at 12-13. It appears that the Fund received in the range of $2.00 per share. Tr. 855-56. The Fund received $1.3 million from the sale. Tr. 370-71. Right before selling the TRX shares, Gibson had the Fund buy $2 and $3 TRX puts. Div. Ex. 184 at 18. Also on November 10, as the TRX share price sank, Gibson sold the TRX put options in his account, his girlfriend's account, and his father's account for more than the amount for which they were purchased—resulting in profits for all three accounts. Div. Ex. 114 at 0046; Div. Ex. 123 at 14; Div. Ex. 124 at 1071; Div. Ex. 184 at 22-25 & Ex. 16; Div. Ex. 185 at 45; Tr. 239-42.

On April 10, 2013, Gibson sent investors a letter accepting full responsibility for the Fund's disastrous performance along with a check for their share of the remaining assets. Tr. 246; Div. Ex. 154. Investors recovered about eighteen percent of their investment. Tr. 576-77.

Investor Testimony

Investors called by Division

Mason Harris McKnight, IV, works in his family's construction company and **Matthew McWhorter McKnight** is a general contractor. Both McKnights knew Gibson in grade school and Mason McKnight had a high opinion of him. Tr. 411-12, 433, 482. Prior to 2010, the McKnight family, Hull, and John Gibson had done business deals together and trusted one another. Tr. 466.

The McKnights invested $100,000 and $150,000, respectively, in the Fund.[20] Tr. 412-13, 434, 499-500. Both McKnights received the offering documents but no amendments. Tr. 418, 420, 486, 488. Mason McKnight knew the Fund was going to be a high risk investment. Tr. 447-48.

Both McKnights thought Gibson was managing the Fund as its investment adviser. Tr. 414, 429, 484-85. Gibson never told the McKnights that: he was not the Fund's investment adviser; the Fund did not have an investment adviser; Geier Capital (Georgia) had dissolved; the Fund's managing member had been replaced; or Geier Group had been dissolved and was no longer a Georgia registered investment adviser. Tr. 415-18, 485-86. Gibson did not discuss with the McKnights in detail the POM's potential conflict of interest section. Tr. 418, 478, 551. Gibson did not disclose to the McKnights that the Fund spent approximately $2.45 million to buy TRX securities from Hull, another of Gibson's advisory clients; that Hull did not pay a commission on the sale, but the Fund paid a commission when it sold the shares less than a month later; or that the offering documents permitted him to favor his other advisory clients over the Fund. Tr. 420-21, 427, 479, 489, 496, 696-97; Div. Ex. 95.

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[19] On the same day, Gibson filed a Schedule 13G with the Commission for Geier Capital, Geier Group, and the Fund showing ownership of 4,879,743 shares of TRX. Tr. 948-49; Div. Ex. 109.

[20] Mason McKnight's first $50,000 investment was a loan from his father, Mason McKnight, III, which he had to repay. Tr. 434-35. Mason McKnight, III, who also was an investor, made Matthew McKnight's first $50,000 Fund investment. Tr. 483, 609.

Neither McKnight knew that Gibson sold his personal TRX shares and shares in other accounts he controlled before the Fund sold 3.7 million shares on September 27, 2011, or that Gibson bought TRX options for himself and others before he sold the Fund's approximate 4.9 million TRX shares on November 10, 2011. Tr. 424-25, 488, 493-94. In October or November 2011, Gibson did not advise either of the McKnights to buy $4 TRX put options. Tr. 425, 479, 494. Mason McKnight would probably have wanted out of the Fund if he had known Gibson was buying $4 TRX puts and the Fund was about to sell almost five million TRX shares. Tr. 479-80. Gibson did not give the McKnights the advice to sell TRX that he gave another Fund investor, T.R. Reddy, on November 10, 2011. Tr. 426, 495, 635; Div. Ex. 107. Both McKnights would have liked to have received Gibson's opinion on TRX. Tr. 426, 495.

In April 2013, Mason McKnight received $17,219 back on his $100,000 Fund investment. Matthew McKnight received $24,010, for a loss of about $125,000, when the Fund liquidated in 2013. Tr. 412-13, 431, 483, 507-08, 535, 547. Even after suffering the financial loss, Mason McKnight told Gibson to let him know of other investments. Tr. 459. Mason McKnight's opinion of Gibson changed, however, when he learned that Gibson had not informed him that the Fund had purchased TRX shares from Hull and Gibson had bought TRX puts. Tr. 459-62, 466-67, 471-73.

The McKnights believed that all Fund investors would be treated the same. Tr. 421, 489. Based on what they have learned, they do not think Gibson treated them fairly because he did not give them the same information or opportunities that he gave to others to mitigate their losses, and he was not completely devoted to the Fund. Tr. 421, 428, 431, 490, 498-99, 524-27, 551; Div. Ex. 154.

Investors called by Respondent

John Douglass Cates, CPA, is a partner in Cherry Bekaert, LLP, in Augusta. Tr. 836-37. Members of the Gibson family, Hull, and the Geier entities are clients and/or long-time friends. Tr. 839, 868, 870-72. Cates invested $50,000 in the Fund and received $26,000 or $28,000 when it liquidated. Tr. 853. Cates was aware the Fund was a risky investment and bears no ill will about his financial loss. Tr. 853-54. Cates believed Gibson had been a successful trader in New York. Tr. 844. Cates has prepared Gibson's tax returns for a number of years, and agrees with an unaudited financial statement that puts Gibson's net worth on July 1, 2016, at about a negative $570,000, and shows that all but $1,000 of Gibson's liabilities are to his father. Tr. 860-63, 879-80; Gibson Ex. 145.

Cates did not know that Gibson or those close to him purchased $4 puts on TRX in late October and early November 2011, or that the Fund purchased Hull's TRX shares in October 2011 at the time of those transactions. Tr. 856-59. These transactions do not bother Cates as long as there were no unusual commissions paid in violation of the Fund's POM. Tr. 858-59; Div. Ex. 24 at 2378. Cates testified that John Gibson received Gibson's promissory note for $467,000, as part of a settlement when he retired from HSG. Tr. 864; Gibson Ex. 145.

Martha Mason Gibson, Gibson's mother and John Gibson's wife, has known Hull and his family her entire life. Tr. 885. John Gibson's business relationship with Hull resulted in loans from

Hull for real estate investments and a sizeable demand note. Tr. 888. In the interests of her son and husband, Martha Gibson invested her inheritance of $700,000 in the Fund to align her interest with the Fund, which is what she understood Hull wanted, and lost about eighty percent of that investment. Tr. 887-90, 892-93. Martha Gibson's Fund investment was "the full value of [her] interest in the Gibson Fund." Gibson Ex. 11 at 3034.

Nelson Wayne Grovenstein, general counsel for the Hull Property Group, invested approximately $100,000 in the Fund. Tr. 914, 916. Grovenstein thought Gibson and Hull made decisions about the Fund and that Hull was one of the investment advisers. Tr. 953-54. Grovenstein did not know the Fund purchased Hull's TRX shares, that Gibson purchased TRX puts, or that Gibson sold his personal TRX shares in September 2011 at the time of those transactions. Tr. 934-44, 954. Grovenstein's lack of concern and his staunch belief that he was treated fairly and not defrauded is because he believed that Gibson's actions were aligned with the Fund and Gibson did not know that the price of TRX shares was going to drop. Tr. 925, 935, 941-42, 952, 954.

Expert Witnesses

Division Expert Dr. Gary Gibbons[21]

Gibbons considers Gibson an investment adviser because: the POM described him as one; Gibson registered Geier Group as an investment adviser and he was a firm principal; Gibson received compensation for giving investment advice; Gibson made investment recommendations; Gibson had discretionary authority over client funds; and Gibson directed trades in client accounts. Div. Ex. 185 at 9-10; Div. Ex. 188 at 9. And Gibson breached his duty as investment adviser when put his own interest before his client's by front running the Fund and by failing to get best execution and dumping Hull's TRX shares into the Fund. Div. Ex. 188 at 7.

Gibbons opines that general disclosures in the POM and subscription agreement regarding potential conflicts of interest do not constitute adequate disclosure of actual conflicts, and the federally imposed fiduciary duty of an investment adviser cannot be abrogated by contract.[22] Div. Ex. 185 at 5, 18. Gibbons finds these disclosures to be vague and imprecise and thus inadequate.

[21] Gibbons sponsored Div. Ex. 185 with ten exhibits and four attachments, and Div. Ex. 188 with one exhibit. Gibbons received a Ph.D. in business administration in 2005 from Claremont Graduate University, Drucker School of Management. Div. Ex. 185, Att. A. Since 2007, he has been academic director and professor at Arizona State University's Thunderbird School of Global Management, focusing on securities investing and corporate finance. Div. Ex. 185 at 3. Since 1987, Gibbons has been principal, senior analyst, and portfolio manager with The Coleridge Group, a registered investment advisory firm that he owns. Div. Ex. 185, Att. A. *See also* http://www.lexissecuritiesmosaic.com/uploaded/resourcecenter/ADV2B/Gary_Eugene.pdf (last visited Jan. 14, 2017).

[22] Gibbons understands that managing members and investment advisers have different duties and responsibilities, and the former are determined by state law and the organizing documents. Div. Ex. 185 at 18 n.29.

Div. Ex. 188 at 10. Gibbons reads the overall language in the POM and subscription agreement as creating the impression that the investment adviser would not breach its fiduciary duty and favor the interest of some investors over the interest of the Fund. Div. Ex. 185 at 20 n.33.

According to Gibbons, neither "access persons," who are members of the advisory firm, nor "affiliates," persons close to them, may trade in the "black out period," which is the period before the client executes its trades. *Id.* at 21. Usually, investment advisers have independent committees or some mechanism to track employee trading. *Id.* Gibbons considers Gibson's sales of TRX on September 26, 2011, to be front running, and as such a breach of his investment adviser duty to act in good faith, of care, of loyalty, and of full and fair disclosure, because in selling TRX, Gibson put his personal interest ahead of the Fund's interests.[23] *Id.* at 21-22.

Gibbons testified that the trading window is closed for investment advisers and other "access persons" while client transactions are pending. *Id.* In Gibbons's opinion, Gibson violated his fiduciary duty by "front running" or selling TRX shares for himself and others on September 26, 2011, knowing the Fund would sell a large block of TRX shares the next day. *Id.*

Gibbons believes that Gibson made an unfair trade allocation when he favored Hull over the Fund, which violated his fiduciary duty to his client and the POM by having the Fund buy Hull's shares directly on October 18, 2011, when he knew the Fund was seeking to close out its TRX position. *Id.* at 6, 22-23. Gibbons concluded that the Fund would have paid significantly less if Hull had sold his shares into the market and Gibson had arranged for the Fund to buy TRX shares through the market.[24] *Id.* at 23. Gibbons states that there were multiple problems with the transaction that made it unfair to the Fund: (1) as noted, Hull's shares were not bought at the market price; (2) the shares were sold near the day's high at a price arbitrarily set by Gibson without the benefit of normal market operations; (3) Hull did not pay a commission but the Fund ultimately paid a commission when it sold the shares; (4) the purchase was contrary to the Fund's strategy of selling TRX and increased the Fund's risk exposure to TRX; (5) the purchase increased the Fund's losses because it paid $3.60 per share to buy TRX when it had recently sold TRX for $3.50 per share; and (6) Hull was an access person who should not have been trading his TRX shares. *Id.* at 23-24. Contrary to the POM, the transaction was not at current market price and the Fund paid extraordinary commissions. *Id.* at 24-25.

Gibbons insists that Gibson violated his fiduciary duty by "front running" or buying TRX puts and urging his father to do so when he knew the Fund would be liquidating its TRX shares. *Id.*

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[23] Gibbons uses the following definition of front running: "Front-running, like scalping, involves using advance knowledge of impending client action to secure advantage." *Id.* at 21 n.37 (citing Harvey E. Bines and Steve Thel, Investment Management Law and Regulation 807 (2nd ed. 2006)).

[24] Gibbons puts the number of TRX shares sold in the market on October 18, 2011, as 490,625, so that a sale of 680,636 shares more would have been a 139 percent volume increase. *Id.* at 23. According to Gibbons, the size of the sale relative to trading volume would have reduced the share price.

at 25-26. Finally, Gibbons contends that Gibson made false or misleading statements and failed to notify investors when prior statements became misleading. Specifically, Gibbons notes Gibson's failure to notify investors that Geier Group's investment adviser registration had lapsed. *Id.* at 26 n.50. Additionally, after the lapse occurred, Gibson improperly solicited at least two investors using the POM that referenced Geier Group as the Fund's registered investment adviser. *Id.* Moreover, Geier Group was terminated as a legal entity in April 2011, but Gibson did not inform investors and continued to make filings for Geier Group with the Commission until at least November 2011. *Id.*

Gibbons faults Dr. James A. Overdahl, Respondent's expert, for relying on FINRA IM-2110-3, to define front running. Gibbons claims this is a policy statement, and that Overdahl's interpretation is extremely narrow, not the industry standard, and unworkable. Div. Ex. 188 at 2-3.[25] Gibbons argues that under FINRA IM-2110-3, simple knowledge of the client's intention to sell is sufficient for front running, and Gibson knew the Fund intended to trade, controlled the execution, and acted on that knowledge for his benefit. *Id.* at 2-4. Gibbons considers Gibson's long positon in TRX irrelevant to assessing Gibson's actions and asserts that Gibson's actions should be measured on actual outcomes, not on an ex-ante basis or forecasts. *Id.* at 4-5.

Gibbons rejects Respondent's second expert Thomas S. Harman's position that Gibson ceased being the Fund's investment adviser when he waived the management fee. *Id.* at 8. According to Gibbons, the potential to earn a fee and the client's obligation to pay it when earned determine if an investment adviser is being compensated. *Id.* For example, advisers who are compensated on performance do not cease being advisers if they fail to earn a fee due to poor performance. *Id.* Gibbons also rejects as contrary to industry understanding Hartman's position that Gibson was not himself an investment adviser because a person can be either an investment adviser or a person associated with an investment adviser, but not both.[26] *Id.* at 9. Gibbons disagrees with Hartman that the potential conflict of interest language in the POM and operating agreement provided the timely and specific disclosure of Gibson's front running and dumping that is required:

> While the language in the documents allowed investment strategies, advice, and actions that were different to those of the [Fund], they did not imply, let alone state, that when acting as investment adviser, Gibson would be allowed to abuse [the Fund] and not act in its best interest.

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[25] IM-2110-3 states, "The violative practice noted above may include transactions which are executed based upon knowledge of less than all of the terms of the block transaction, so long as there is knowledge that all of the material terms of the transaction have been or will be agreed upon imminently." Div. Ex. 188, Ex. I. FINRA IM-2110-3 was superseded by Rule 5270. *Id.*

[26] Gibbons's view is consistent with those of the staff of the Investment Adviser Regulation Office. *See* Regulation of Investment Advisers by the U.S. Securities and Exchange Commission (March 2013), at page 17, https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.

Id. at 10. Finally, Gibbons dismisses Respondent's third expert Myron T. Steele's report as irrelevant since it deals with state law issues. *Id.*

Division Expert Dr. Carmen Taveras[27]

Taveras's testimony is based on "actuals," i.e., the economic outcomes of the transactions at issue using trade blotters and account statements; she does not speculate on expected economic benefit or harm. Tr. 350, 353; Div. Ex. 187 at 2, 4, 6; Gibson Ex. 149 at 25. To prepare her report, Taveras reviewed, among other materials for 27,000 TRX trades held in the accounts of seven entities. Div. Ex. 184 at App. B; Div. Ex. 187 at 5. According to Taveras, TRX's share price hovered around $6.00 or $7.00 per share for the first part of 2011, but dropped from about $5.50 a share on September 20, 2011, to about $3.50 a few days thereafter, and from about $3.50 to a little over $2 shortly before November 15, 2011. Div. Ex. 184 at 8 & Ex. 1. These price drops coincide with large sales by the Fund, on September 27, 2011, and November 10, 2011, which dwarfed the average sales volume.[28] *Id.* The weighted average price of TRX on September 27, 2011, was $3.70 per share before the Fund's sale of 3.7 million shares over a two-minute period brought the price down to $3.50 per share. Div. Ex. 184 at 9-10, Ex. 4.

Taveras concluded that: Gibson, his girlfriend, and Geier Group received $0.54 and $0.55 more per share on September 26, 2011, when Gibson sold their TRX shares than the Fund received when it sold 3.7 million TRX shares the next day. Tr. 302-03; Div. Ex. 184 at 5; Div. Ex. 187 at 3. By selling the day before the Fund's sale of TRX shares, Gibson was able to obtain an average share price of $4.04 or $4.05 for him and others while the Fund received $3.50 per share the next day. Tr. 303; Div. Ex. 184 at 10.

Taveras testified that the purchase of 680,636 TRX shares from Hull in October 2011 was one of the Fund's last purchases of TRX, and occurred after the decision was made to liquidate the Fund's TRX shares, and Gibson knew the Fund was going to sell at some point.[29] Tr. 365-66; Div. Ex. 184 at 10-11. Using the weighted average and first-in, first-out (FIFO) inventory method, Taveras calculates that the shares purchased from Hull at an average price of $3.60 per share were included in the Fund's sale of TRX shares on November 10, 2011, at an average sale price of $2.02.

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[27] Taveras sponsored Div. Ex. 184 with appendixes A and B, and exhibits 10-18, and Div. Ex. 187. Taveras holds a bachelor and postgraduate diploma in economics from universities in the Dominican Republic and Chile and a Ph.D. in economics from the Massachusetts Institute of Technology. Taveras was a principal for almost four years with Securities Litigation and Consulting Group, Inc., and since July 2014, has been a financial economist at the Commission. Div. Ex. 184, App. A.

[28] Average daily sales volume of TRX in 2011 appears to be somewhere under one million shares. Tr. 188, 831. On September 27 and November 10, 2011, the daily sales volume was over six million and over seventeen million, respectively. Tr. 831; Div. Ex. 184, 8, Ex. 1.

[29] The Fund purchased 386,400 shares on October 21, 2011, to fulfill an obligation on puts it had written, and it purchased 17,915 shares on November 2, 2011. Div. Ex. 184 at 11.

The result was that the Fund lost between $807,692 (weighted average) and $1,074,902 (FIFO), excluding commission costs on the Hull shares.[30] Div. Ex. 184 at 5, 11, Ex. 7; Div. Ex. 187 at 3.

Taveras is absolute in her opinion, supported by academic literature, that large stock sales eliminate liquidity in the market and negatively affect the stock's price. Tr. 342; Div. Ex. 184 at 12. Specifically, Taveras opines that one would have expected TRX's share price to fall drastically on 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. Tr. 342-44, 364; Div. Ex. 184 at 5-6, 20. Taveras noted that buying a put indicates a bearish view on the stock's price, and Gibson, his girlfriend, and John Gibson all made a profit from the puts they bought in TRX in November 2011 before the share price dropped. Tr. 382, 394, 408; Div. Ex. 184 at 6, 20-25; Div. Ex. 187 at 3. Taveras calculated that Gibson, his girlfriend, and John Gibson had combined total gross profits of $379,550 from the $4 puts. Div. Ex. 184 at 24; Div. Ex. 187 at 3, 8.

Taveras disagrees with Overdahl's use of expectations based on assumptions that did not materialize to calculate economic benefits or harm, and insists that her methodology, which quantifies what actually occurred using trade blotters and account statements, is correct. Div. Ex. 187 at 2, 4-9. Taveras notes that Overdahl does not take issue with her calculation of realized profits, losses, and avoided losses in Gibson's personal account, his girlfriend's account, and John Gibson's account from trades in TRX securities and options. *Id.* at 3.

Taveras argues that Gibson contradicted Overdahl's claim that he did not know what would happen to the TRX share price prior to the Fund's sale of TRX shares on September 27, 2011. *Id.* at 6. Even with assumptions, Overdahl found that the purchase of Hull shares harmed Fund investors other than Gibson by $54,400 to $61,400, and again even with assumptions, Overdahl calculated a positive expected profit on the $4 puts in the personal accounts. *Id*. at 7-8. Taveras considers Overdahl's emphasis on Gibson's long exposure to TRX through his Fund ownership irrelevant to the actions Gibson took to mitigate losses to himself and others. *Id.* at 9.

Respondent Expert Attorney Thomas S. Harman[31]

[30] The FIFO method of valuing inventory results in a $1,074,902 loss, and use of a weighted average pricing method results in a $807,692 loss. Div. Ex. 184, Ex. 7. Taveras calculated the loss using the price paid to Hull, minus the final liquidation price of the shares, times the number of shares. Div. Ex. 187 at 6. According to Taveras, Hull's eighty percent of the loss was $640,000 or $800,000 depending on the method of valuation used. Tr. 371.

[31] Harman, a partner at Morgan, Lewis & Bockius LLP, presented Gibson Ex. 148 with Exhibit A. He is a graduate of Duke University, the University of Virginia Law School, and Georgetown University Law Center. Harman joined the Commission's Division of Investment Management in 1982, where he served as chief counsel/associate director from 1988 to 1994. Harman has written or co-written many articles and taught investment management courses at the Georgetown University Law Center. Gibson Ex. 148 at 1-4, Ex. A

Harman's expert focus is on the definition of an investment adviser and an adviser's fiduciary duties. Gibson Ex. 148 at 2. Harman opines that if Gibson's compensation from HSG and housing provided by the Marzullos are considered payment of fees for advisory services, it follows that Gibson was an investment adviser to Hull and his daughters, his father, and the Marzullos. *Id.* at 7-8. Harman views Gibson's status as Geier Capital's managing member as the equivalent of officer or director status.[32] *Id.* at 8.

However, Harman represents further that Geier Capital did not appoint Gibson as the Fund's investment adviser; rather, citing sections 3.01 and 3.02 of the operating agreement, Harman opines that Geier Capital was the Fund's investment adviser until the Fund was terminated. *Id*. Harman asserts that pursuant to the operating agreement section 3.02, Geier Capital retained Geier Group as the Fund's investment manager, which the latter did until it was terminated as an LLC in April 2011, at which time Geier Capital exercised the authority in the operating agreement sections 3.01 and 3.02 and served as the Fund's investment adviser. *Id.* According to Harman, Gibson was an "associated person" with Geier Capital due to his status as its managing member, but an "associated person" is distinct from an investment adviser, and therefore, Gibson was not an investment adviser to the Fund. *Id.*

Harman appears to argue that an "associated person" cannot be an investment adviser unless the person was the sole owner or principal of the adviser and is considered the adviser's alter ego. *Id.* at 9. According to Harman, Gibson does not fit this description because he was not the sole owner of Geier Capital and Hull's approval was required for significant Fund decisions. *Id.*

Harman also argues that the Division misreads legislative history by asserting that Gibson can be held primarily liable for antifraud violations under Advisers Act Section 206(1) and (2). *Id.* at 10-11.

Harman's final argument is that an adviser's duty is not absolute and the Commission has acknowledged that an adviser may limit its fiduciary duty by agreement with a client, "including an implied agreement through disclosure in the adviser's Form ADV." *Id.* at 11-12. Harman acknowledges there is no bright line between what needs to be disclosed and what can be waived. The extent of an adviser's fiduciary duties depends on the adviser's disclosure of its conflicts and the client's acceptance. *Id.* at 12-13.

Harman asserts that Advisers Act Section 215(a), which voids any contract binding a person to waive compliance with the Advisers Act, does not apply where an adviser has made full disclosure of a conflict and received a client's consent. *Id.* at 13. In Harman's opinion, the POM at page 19 and the operating agreement, "clearly disclosed that the Managing Member or its affiliates need not put the Fund's interests ahead of their own." *Id.* at 15. Harman asserts that Gibson's sales of TRX shares and purchase of TRX put options are the types of transactions described in the POM and operating agreement. *Id.* Harman notes that even if the disclosure was inadequate, Gibson's sales and purchases were small and he did not take for himself or others a scarce opportunity that he should have offered to the Fund. *Id.* Harman maintains that only Advisers Act Section 206(3), the

[32] Harman does not distinguish between Geier Capital (Georgia) and Geier Capital (Delaware). Gibson Ex. 148 at 4.

principal trade provision, requires an adviser to provide specific disclosure of a conflicted transaction close in time to the transaction. *Id.* at 16.

Harman cites a 2008 Commission release proposing an amendment to the Form ADV in support of his positon that investors are responsible, based on disclosures they received, for selecting an investment adviser. *Id.* at 16.

Harman concludes that Geier Capital stopped acting as an investment adviser to the Fund after September 2011, when it ceased receiving compensation. *Id*. at 7, 16-17. According to Harman, Gibson was an associated person of Geier Capital and never the Fund's investment adviser. *Id.* at 8, 17. Finally, Fund investors received clear disclosure that addressed "the type of trading that occurred when Gibson engage[d] in transactions in TRX and TRX put options." *Id.* at 17. By agreeing to the offering documents, investors limited the scope of the fiduciary duty that Geier Capital owed to them and the Fund. *Id.*

Respondent Expert Dr. James A. Overdahl[33]

Overdahl opines that Gibson's conduct does not meet the following definition of front running derived from FINRA IM-2110-3, "Front Running Policy," in effect at the relevant time. Tr. 997-98; Gibson Ex. 149 at 20-21.

> [U]nlawful front-running occurs when an investment professional, who is aware of an "imminent" market moving block transaction as a result of his relationship with the party planning to execute the block transaction, uses this information to obtain a more favorable price than would be available after the publication of the block transaction.

Tr. 994; Gibson Ex. 149 at 21. Overdahl's personal understanding is that front running is having valuable, confidential information about an impending market-moving trade, and being able to take advantage of it for personal benefit. Tr. 1059. For front running to occur, Overdahl would require knowledge of material terms of an upcoming transaction and, in his opinion, Gibson did not have that. Tr. 1100.

Overdahl's analysis of Gibson's actions and motivation was based on the information that Gibson had at the time of the transactions, not on actual outcomes. Tr. 1094-96. Overdahl believes that Gibson benefited if TRX's share price increased because he and certain persons always had a net long position in TRX, and from an economic perspective Gibson was always motivated to

[33] Overdahl sponsored Gibson Ex. 149 with exhibits 1-14B and appendices A-B. He has a Ph.D. in economics from Iowa State University, has published articles, book chapters, and books, and has taught economics at the graduate level for twenty-five years. From May 2002 through July 2007, Overdahl was chief economist at the Commodity Futures Trading Commission, and from July 2007 through March 2010, Overdahl was the Commission's chief economist. Overdahl is presently a partner in Delta Strategy Group where he offers litigation support and advisory services in securities and commodities related matters. Tr. 964; Gibson Ex. 149 at 1-2, App. A.

obtain the highest price for TRX shares.[34] *Id.* at 1132-33; Gibson Ex. 149 at 4-5, 18-19. Gibson's sales of TRX on October 26, 2011, occurred when Gibson was aware that the Fund would explore opportunities to exit its TRX position, but Overdahl's expert opinion is that Gibson lacked specific information regarding an "imminent" block trade transaction by the Fund—both with respect to the trades he executed on September 26, 2011, and when he bought puts before the Fund's final liquidation of its TRX shares on November 10, 2011. Gibson Ex. 149 at 5, 10-12, 21. Overdahl opined that Gibson did not know whether the strategy to get out of TRX at good prices would be implemented in full or in part, when the sales would occur, or the terms of the transaction. Gibson Ex. 149 at 11, 22. However, on cross examination Overdahl admitted he did not know what Gibson knew at the time. Tr. 976-78. It is Overdahl's opinion that Gibson did not have sufficient information on September 26 to make the judgment that a block trade of from three to five million shares would occur on September 27, and would result in a price of Fund shares lower than the $4.00 market price on September 26. Tr. 1075-76, 1102-05.

According to Overdahl, Gibson's purchase of TRX puts for himself and his girlfriend, and the advice he gave his father before the Fund's final liquidation in November caused no harm to the Fund, and caused an indeterminate benefit to Gibson and others. Gibson Ex. 149 at 5-6, 14-17. Because Gibson did not know of an imminent block trade and "the likely size and duration of the price impact" of that trade, Gibson's conduct did not satisfy the definition of front running. *Id.* at 22-25.

Overdahl argues that Gibson's actions should be judged on information known or reasonably knowable at the time the transactions occurred, and is critical of Taveras's reliance on actual figures. *Id.* at 25. Overdahl argues that when Gibson sold 21,900 shares of TRX on September 26, he could not have foreseeably harmed the Fund's sale of TRX shares the following day. He points out that TRX's closing price September 27—right after Gibson sold his shares—was higher than the price Gibson received, and because of his investment in the Fund, Gibson's interests were aligned with the Fund. *Id.* at 26. According to Overdahl, "at the time Gibson sold his shares, he had begun negotiations to sell [the Fund's] TRX position in an off-exchange block transaction through the 'upstairs' market," which resulted in a sale of 3.7 million shares on September 27. *Id.* Overdahl rejects Taveras's claim that Gibson benefited on the order of $0.54 per share because he received a higher price for his TRX shares than the Fund did when he sold the Fund's TRX shares the following day, because it relies on actual prices and thus assumes that Gibson had foresight of what would occur. Overdahl argues that Gibson could not have foreseen a benefit from his September 26 sales because of numerous existing uncertainties.[35] *Id.* at 28-29.

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[34] Overdahl refers to Gibson, his father, his mother, Giovanni Marzullo, SueJin Marzullo, Francesca Marzullo, and Geier Group. Gibson Ex. 149, Ex. 5B at 2 n.1. Francesca Marzullo's account outside the Fund funded by her father, Giovanni Marzullo, held TRX shares and was not always net long in TRX. That account benefited by $254,380 from the sale of puts on November 10, 2011. Tr. 1056-58, 1140-41, 1152-53.

[35] Overdahl finds Taveras's calculation of Gibson's economic benefit of $11,826 to be inappropriate because of the uncertainties he describes. Gibson Ex. 149 at 30.

Overdahl is critical of the Division's evidence of Gibson's purchase of 680,636 TRX shares from Hull for the Fund because it relies only on information available after the fact to calculate the benefit to Hull and the cost to the Fund. *Id* at 30. Again, Overdahl stresses that before the transaction, many uncertainties existed, and that Gibson might have been motivated to buy shares from Hull because if Hull attempted to sell his block of shares "in the upstairs market rather than on the exchange," it could have damaged Gibson's attempt to negotiate the sale of Fund shares. Gibson Ex. 149 at 31; Tr. 1123-24. Overdahl acknowledges that Hull would likely not have received $3.60 per share if he sold his shares on the open market. Tr. 1027-28. In Overdahl's expert opinion, the Fund's purchase of Hull's TRX shares was anticipated by the Fund's operating agreement and plausibly made economic sense for both the Fund and Hull. Gibson Ex. 149 at 32.

Overdahl considers it plausible that Gibson purchased Hull's shares to avoid Hull selling them subject to a block discount which would reduce the price of TRX temporarily at the time when Gibson would be trying to sell Fund shares. *Id.* at 31; Tr. 1121-24. Overdahl acknowledges that Gibson could reasonably have known that when the Fund sold the shares it acquired from Hull, it would have to pay a brokerage commission and take a block discount on the share price.[36] Tr. 1021, 1036.

Overdahl calculated the net economic benefit to Hull—and thus the loss to the Fund investors, except Hull—of Hull's sales of TRX shares to the Fund, to be approximately $54,400 to $61,400 depending on the method of calculation used. Gibson Ex. 149 at 33-34, Ex. 13; Tr. 1029-34. Overdahl agrees that Hull benefited because the Fund did not charge him a customary transaction fee, estimated at $0.05 per share. Tr. 1037; Gibson Ex. 149 at 34 n.78.

Overdahl notes that when Gibson first bought put options in late October and early November, Gibson was continuing his efforts to sell the Fund's TRX shares in the upstairs market. Gibson Ex. 149 at 36. Overdahl contends that because there was no imminent transaction pending, this uncertainty would make the benefits indeterminate when the options were bought. *Id.* at 37. Gibson knew when he bought puts on November 10 that a sale of a large block could cause TRX's stock price to drop. Div. Ex. 190 at 108-09. Using information available at the time, Overdahl calculates that Gibson received $18,177 from his purchase of puts, and that Gibson, his girlfriend, and his father received a $103,536 benefit. Gibson Ex. 149 at 7, 37-38.

Respondent Expert Attorney Myron T. Steele[37]

Steele opines that under Delaware state law, the operating agreement: modified Geier Capital's fiduciary duty of loyalty; allowed Geier Capital to make trades that benefited Gibson and

[36] The Fund's sale of TRX shares on September 27, 2011, appears to have been at slightly less than a twelve percent discount. Tr. 1020-21, 1113.

[37] Steele sponsored Gibson Ex. 150 with exhibits 1 and 2. Steele is a graduate of the University of Virginia, undergraduate and law school (J.D and LLM degrees). He is a partner at Potter Anderson & Corroon LLP, and was a member of the State of Delaware judiciary for twenty-five years. Steele served as chief justice of the Delaware Supreme Court from May 2004 until November 2013. Gibson Ex. 150 at 3, Ex. 1.

others over the Fund; and authorized Geier Capital to act as the Fund's investment manager following the termination of Geier Group.[38] Gibson Ex. 150 at 5, 19.

Arguments of the Parties

Division

The Division charges Gibson with violations of Advisers Act Section 206(1), (2), and (4), and Rule 206(4)-8, and Exchange Act Section 10(b) and Rule 10b-5. Div. Br. 38-51; Reply Br. 4-27. The Division's main focus is on Gibson's disclosure. The Division views this proceeding as a way to protect future investors by determining that there was inappropriate behavior by someone who assumed the role of an investment adviser. *See* Tr. 1164-66. The Division contends that the key to Gibson's status is whether he was performing advisory services for compensation, not his title or what corporate shell he was operating under. Tr. 1159-60. The Division argues that Gibson functioned as an investment adviser and, as such, he was obliged to disclose to all investors transactions that presented a conflict of interest with the Fund—for example, the transactions the Division considers to be front running and the Fund's purchase of Hull shares. Tr. 1160-62.

The Division considers Gibson's personal indebtedness to Hull and whether or not Hull was an investment adviser irrelevant to the Division's allegation as to Gibson. Tr. 1156-58, 1164.

The Division contends that Gibson's conduct showed a pattern of reckless disregard for the duties he undertook as an investment adviser. Tr. 1165-66. For example, Gibson represented to investors that Geier Group was a registered investment adviser, but then allowed Geier Group's investment adviser registration to lapse, and never told investors his original representation was no longer true. The same thing occurred with Geier Capital (Georgia), identified as the Fund's managing member. Gibson did not bother to tell investors that Geier Capital (Georgia) was dissolved and that another entity, Geier Capital (Delaware) was substituted as managing member. Tr. at 1165.

The Division considers further that Gibson acted deliberately, knowingly, and with intent to defraud, or at least with recklessness, in front running the Fund's sales of TRX shares. Over a two or three week period, Gibson took actions that put ahead his interests, at least to the extent of reducing potential losses, without disclosing those actions, in violation of his fiduciary duty. Tr. 1166-67.

Respondent

Gibson maintains that he was not an investment adviser, and he asserts he always put the Fund first. Tr. 1168-69. Gibson testified that the Fund did not have an investment adviser, and that he provided "investment management services as part of [his] participation as a managing member of the Fund." Tr. 80-81, 106-07, 243. Gibson also testified that he was told in December 2009 that he was not functioning as an investment adviser, and in February 2010, "that [Geier Capital and

[38] Steele does not distinguish between Geier Capital (Georgia) and Geier Capital (Delaware). Gibson Ex. 150 at 6-7.

members of Geier Capital who managed the Fund] ceased to be an investment adviser and that we qualified under an exemption, since we only had a certain number of investors, and the fund qualified as one investor," and there was no need to withdraw the investment adviser registration. Tr. 55-56, 87-89. Gibson summarizes the issue as whether he acted to benefit himself at the expense of the investors. Tr. 169. Gibson believes it significant that his interests were always perfectly aligned with the Fund as he was always net long in TRX shares, he was always bullish on TRX stock, and at the time of the transactions no one knew the share price was going to fall. *Id.*

Gibson insists that the Fund's purchase of 680,000 TRX shares from Hull for $2.45 million did not benefit Hull over the Fund because Hull, as eighty percent owner of the Fund, ended up owning eighty percent of the TRX shares the Fund purchased from him.[39] Tr. 934. Gibson argues that Hull would have been better off if he sold his shares into the market for $3.60 or even $3.00 per share rather than to the Fund for $2.45 million, because eighty percent of the $2.45 million, or $1.96 million, was Hull's money, so he received only $490,000 of other investors' money. Tr. 934-35. Thus, according to Gibson, even though Hull could have benefited more by selling his shares in the market, he sold them to the Fund to benefit the Fund. Tr. 173.

Gibson also justified his purchase of put options on TRX. He argued that he and the Marzullos were in a completely different financial situation than the other Fund investors who were very wealthy people who invested only a small part of their net worth.[40] Tr. 456-57, 705-06, 826. Gibson alleges that in late October 2011, he owed Hull $645,000, and the value of his Fund shares was $720,000, which left him in a precarious position. Tr. 699; Gibson Ex. 117. Gibson testified that put options were a good investment for him and the Marzullos but not other Fund investors because he expected the puts would expire with a zero value. Tr. 202-05, 705-06. Gibson testified that his purchase of covered puts was a bullish position. Tr. 702. Gibson also testified that he was bullish on TRX on October 27-28:

> Now, up until this moment in time, we had sold our shares all at the same price. We had numerous large buyers who had expressed strong interest in purchasing our shares and had theretofore purchased 60 percent of our shares at the current price. And our expectation was that that would continue, and we would conclude the sale of our shares at the current price per all of the guidance we had been given, which was substantiated by the actions of those buyers theretofore to buy 60 percent of our position.[41]

[39] Gibson, his family, and friends owned half of the remaining twenty percent of Fund assets. Thus, other Fund investors became owner through the Fund of ten percent, or 68,000 TRX shares the Fund bought from Hull. Tr. 191 (transcript says 65,000 shares, but 68,000 appears to be more accurate).

[40] Gibson describes the options as protective long put options which are bullish. Tr. 701-02.

[41] The possible buyers were Platinum Partners, Richard Sands at Casimir Capital, and Luis Sequeira. Tr. 707-08.

Tr. 699-700; *see also* Tr. 203. Gibson testified that on October 26, he did not expect TRX shares to decline in value; rather he expected TRX shares to increase in price, making the puts worthless. Tr. 205-06.

Legal Conclusions

To resolve the allegations, it is necessary to determine whether: (1) Gibson was the Fund's investment adviser when the alleged misconduct occurred in 2011; (2) Gibson engaged in front running and by doing so violated the antifraud provisions on two occasions: (a) when he sold all the TRX shares in his personal account and two other accounts the day before he sold 3.7 million shares in the Fund's account, and (b) when he bought TRX puts for himself and his girlfriend, and advised his father to buy TRX puts and sell his TRX shares before Gibson sold the Fund's remaining TRX shares; and (3) Gibson violated his fiduciary duty to the Fund by having the Fund purchase 680,636 TRX shares from Hull on October 18, 2011.

1. Gibson was the Fund's investment adviser when the alleged misconduct occurred in 2011

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities[.]

15 U.S.C. § 80b-2(a)(11). Gibson admits to being the Fund's investment manager and providing advisory services, but denies being the Fund's investment adviser. Tr. 80-81.

Gibson's activities

The evidence is overwhelming that the Fund promoted Gibson as a key figure in the Fund's investment activities and that, in fact, he was the Fund's investment adviser. *See, e.g.*, Div. Ex. 24 at 2376. Gibson came up with the plan for organizing the Fund and worked on the documents creating the Fund. Tr. 21-23, 27-28; Div. Ex. 10. The Fund began following his investment thesis when it moved from gold and silver into TRX securities in April 2011. Gibson Ex. 51 at 7483-84.

Gibson created two entities in connection with the Fund: one to receive the management fee and another to "receive the performance allocation in order to position the managing member to capitalize on the potential for carried interest." Tr. 584-85. Geier Capital was the managing member of the Fund, which meant carrying out the duties of the Fund, including retaining Geier Group or some other entity as the Fund's investment manager. Tr. 99, 582-83, 618.

Fund investors signed or received three critical documents. Each document featured Gibson prominently or was signed by Gibson on behalf of the Fund's managing member. Tr. 39, 580-81; Div. Exs. 22-28; Gibson Exs. 8-13. The POM described Gibson as Geier Capital's managing director, as Geier Group's managing member, and as a significant person for the Fund's success. Div. Ex. 24 at 2360, 2376. While soliciting an investor, Gibson referred to Geier Capital's "2010

Outlook" document that identified Gibson as Geier Group's investment adviser and described Gibson as holding series 7, 63, and 65 licenses. Tr. 31-32; Div. Exs. 16, 19.

Gibson's investment management duties for the Fund were the same from 2010 until April 2013 when the Fund was liquidated. Tr. 243-46. Gibson admitted that he was an investment manager for the Fund along with Hull and that he made mistakes managing the Fund. Tr. 726, 742.

The Division's expert witness, Gibbons, put forth six functions Gibson performed that led him to conclude that Gibson was an investment adviser, and even Gibson's expert witness Overdahl referred to Gibson and Hull as advisers. Tr. 1025; Div. Ex. 185 at 9-10. The Fund, Geier Group, and Geier Capital had no employees. Tr. 45-46, 77, 592-93. Hull allowed Gibson to use his office space and secretary. Tr. 46. In 2010 and 2011, Gibson tracked general market conditions, monitored macroeconomic trends that impacted the market, tracked the daily performance of the Fund's portfolio, negotiated Fund transactions, corresponded with investors, dealt with brokers, and communicated with managers of companies whose stock the Fund owned. Tr. 76-78, 105-08. Gibson was the authorized signatory on Fund accounts, he reported to investors, he met with potential investors, promoted Fund investments, answered questions, sent out reports and statements, and decided on investments with Hull. Tr. 38, 73, 76-77, 414, 468, 485, 490; Div. Exs. 29, 30. Gibson signed the Form D, Notice of Exempt Offering of Securities with the Commission on February 11, 2010, as managing director of the managing member. Div. Ex. 31.

Gibson presented the Fund's POM, operating agreement, and subscription form to the McKnights and others and urged them to invest in the Fund. Members of the McKnight family discussed the Fund numerous times with Gibson, and believed Gibson was the Fund's investment adviser and that he also was going to invest and manage the Fund investments. Mason McKnight invested in the Fund because he knew other Fund investors and Gibson. Tr. 414-15, 429, 445, 447, 459, 468-69, 475, 482, 484-85. Gibson told Matthew McKnight on January 18, 2011, that he was highly bullish on TRX. Div. Ex. 47; Tr. 491-92. When Gibson circulated an article about TRX on June 21, 2011, Mason McKnight asked him whether this would be a good time to invest in TRX shares. Tr. 423; Div. Ex. 72. Gibson replied that he thought "we are going to be in double digits by year end." Div. Ex. 72. Mason McKnight took this to be a favorable answer. Tr. 423-24.

On August 22, 2011, Gibson shared information about TRX with Fund investors as an adviser citing "his performance year to date":

> I remain confident, however, that we are positioned exceedingly well and that we are on the cusp of finally achieving appropriate compensation for the risk we have endured.
>
> * * *
>
> Mining companies, however, are operating entities creating gold output, cash flow and yield. In the long run, a mining company is an investment that has the potential to create value while an ounce of gold will not turn into two ounces. In short, for the same gain, we are better served experiencing it in the form of a mining company for tax reasons.

> * * *
>
> In conclusion, I believe very strongly we are in the right company in the right asset class at the right time, although we showed up a few months too early.

Tr. 122-23; Gibson Ex. 51 at 7483-84, 7488.

Another indicator that Gibson was a Fund investment adviser is Cates's belief that Gibson would do all the work, do all the research, and be involved in making Fund decisions. Tr. 844-45, 854, 875, 883. On October 23, 2011, Cates wrote a note of encouragement to Gibson urging him to "[s]tay with your plan." Tr. 854; Gibson Ex. 57.

Finally, in his April 2013 final Fund report on the liquidation of assets, Gibson told investors:

> You afforded me a tremendous opportunity these past few years that I wholeheartedly accepted. I was provided with every tool and form of support that I sought.
>
> * * *
>
> Notwithstanding my complete devotion to our collective investment, I failed to manage market risks and underestimated the resolve of policy makers to manage prices. I accept full responsibility for this failure and deeply regret having failed you.

Div. Ex. 154.

Compensation

The evidence is also overwhelming that Gibson received compensation for advising the Fund. Gibson's contention that Geier Capital ceased being the investment adviser when the Fund suspended payment of a management fee at the end of September 2011 is irrelevant. The notice said no management fee would be assessed until the Fund performed at acceptable levels. Div. Ex. 81. Moreover, during the 2011 period when the alleged misconduct occurred, Gibson admittedly spent most of his time on Fund matters and was paid a salary of $148,718 from HSG's human resources service. Tr. 732-36; Div. Ex. 128; Div. Ex. 138 at 2030, 2056; Div. Ex. 191 at 450-51, 468-69. Gibson was paid $73,953 in 2010, $148,395 in 2012, and $6,270 in 2013 for investment services he provided to the Fund. Div. Exs. 43, 147, 156; Div. Ex. 191 at 421-22, 472-74.

Gibson testified that his 2011 salary was actually a loan which he had to pay off at the end of the year with income earned "from Geier"; however, the amount was not paid back to HSG. Tr. 152-53, 730-31, 733-74, 780. Outside of Gibson's testimony, there is scant evidence in the record that I am aware of that the salary was a loan for which he was personally responsible. Gibson listed the salary as income on his tax return. Div. Ex. 138 at 2030. Geier Capital paid back HSG

for Gibson's 2010 salary. Div. Ex. 191 at 419-20. Even assuming the same was expected for 2011 but did not materialize, this fact further supports the conclusion that Gibson was being paid a salary primarily for his advisory services to the Fund because repayment from Geier Capital would reflect that Gibson's salary was for this purpose, not for independent real-estate work for Hull.

Gibson argues that Geier Capital and Geier Group were the Fund's investment advisers. Gibson Br. 43-45. I reject this argument for two main reasons. First, Gibson was the managing director of Geier Capital, the Fund's managing member, and he was managing member of Geier Group, the Fund's investment manager. Neither Geier Group nor Geier Capital had any employees and were entities established by Gibson to receive management fees and incentive fees from the Fund. Tr. 584-85, 593. Second, Gibson's activities were those of an investment adviser. Gibson testified he performed investment management and advisory services for the Fund. Tr. 80-82, 88-89, 106-07, 243.

Finally, Gibson's effort to apply to himself only the statutory definition of "supervised person" and "person associated with an investment adviser" ignores the fact that a person can be both an investment adviser and a person associated with an investment adviser. Gibson Br. 46-49. It does not make any difference what name Gibson used to describe his role, the statutory definition is determinative.

For the reasons stated, I find that Gibson was the Fund's investment adviser when the relevant conduct occurred in 2011.

2. Applicable legal provisions

As relevant here, Advisers Act Section 206 provides:

> It shall be 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;
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
> (3) * * * ; or
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

15 U.S.C. § 80b-6(1), (2), (4).

Rule 206(4)-8 makes it a fraudulent, deceptive, or manipulative act or practice, or course of business within the meaning of Section 206(4) for an adviser to a pooled investment vehicle: (1) to make an 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) to 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. 15 U.S.C. § 80b-6(4); 17 C.F.R. § 275.206(4)-8.

Exchange Act 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 in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Under Rule 10b-5(a) and (c), scheme liability extends to a person who, directly or indirectly, "employ[s] any device, scheme, or artifice to defraud," or "engage[s] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(a), (c). The term 'scheme' is broadly defined. *See Aaron v. SEC*, 446 U.S. 680, 696 n.13 (1980) (defining "scheme" as "a plan or program of something to be done; an enterprise; a project; as, a business scheme, or a crafty, unethical project" (quoting Webster's International Dictionary (2d ed. 1934)) (emphasis and brackets omitted)); *SEC v. Familant*, 910 F. Supp. 2d 83, 95 (D.D.C. 2012) (a scheme "is the plan or design, not the ultimate result"). Scheme liability may be predicated on misstatements or omissions. *See SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1205-06 (D.N.M. 2013); *Familant*, 910 F. Supp. 2d at 95.

Scienter is required to establish a violation of Advisers Act Section 206(1) or Exchange Act Section 10(b) and Rule 10b-5; negligence is sufficient to establish a violation of Advisers Act Section 206(2) or (4). *Aaron*, 446 U.S. at 691; *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92, 195 (1963); *VanCook v. SEC*, 653 F.3d 130, 138 (2d Cir. 2011); *SEC v. Steadman*, 967 F.2d 636, 641 & n.3, 643 & n.5, 647 (D.C. Cir. 1992); *J.S. Oliver Capital Mgmt., L.P.*, Securities Act Release No. 10100, 2016 SEC LEXIS 2157, at *12 (June 17, 2016).

Use of the mails or any means or instrumentality of interstate commerce

The record contains many facts that satisfy the interstate commerce prerequisite for an Advisers Act Section 206 and Exchange Act Section 10(b) violation. Most Fund investors were from Augusta, Georgia, but at least one was from California. Tr. 49. In the course of his misconduct, Gibson used telephones, e-mails, and the Internet—which are instrumentalities of interstate commerce. *See, e.g.*, *SEC v. Tourre*, 10-cv-3229, 2013 WL 2407172, at *11 (S.D.N.Y. June 4, 2013); *Larry C. Grossman*, Securities Act Release No. 10227, 2016 SEC LEXIS 3768, at *13 n.11 (Sept. 30, 2016).

3. Gibson engaged in front running when he sold all the TRX shares in his personal account and two other accounts on September 26, 2011, the day before the Fund sold 3.7 million TRX shares in its account

The Division posits that front running consists of "using advance knowledge of impending client action to secure advantage." Div. Br. 46 (citing Harvey E. Bines and Steve Thel, Investment Management Law and Regulation 807 (2d ed. 2006)). The Division argues that Gibson engaged in front running on September 26, 2011, and thereby violated the fiduciary duty of an investment adviser mandated by the Advisers Act and the antifraud provisions of both the Advisers Act and the Exchange Act. Div. Br. 44-46, 77-79.

Gibson defined front running "[i]n the context of a representative knowing about a client order and placing a trade in advance of that order in order to benefit themselves." Tr. 774; Div. Ex. 191 at 330. Gibson does not consider his sale of TRX shares on September 26, 2011, front running because at that time the Fund did not have a firm order to sell its TRX shares; i.e., before September 27, 2011, Gibson did not know the essential elements of the Fund's sale: the date and time the sale would take place, the number of shares to be sold, the share price, and the identity of the counterparty. Tr. 149, 171, 775, 822, 1076. Gibson denies that on September 26, 2011, he knew the Fund was going to sell on September 27, and claims that he did not know the price.

Gibson makes all these arguments and more in his brief, with emphasis on the ability of an adviser and its clients to define the nature of their fiduciary relationship, and on changes by the Dodd-Frank Wall Street Reform and Consumer Protection Act to Advisers Act Section 211 that provide an adviser may disclose, and its clients may consent to material conflicts of interest. Gibson Br. 51-74.

This decision considers 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, to be front running. *See Capital Gains*, 375 U.S. at 196-97; *SEC v. Yang*, 999 F. Supp. 2d 1007, 1016 (N.D. Ill. 2013); Bines & Thel, supra; *cf. United States v. Mahaffy*, 693 F.3d113, 120, 124-25 (2d Cir. 2012).

The validity of the Fund's basic conflicts of interest protections is not the issue

The Division agrees that investors knew from the POM and operating agreement that potential conflicts might occur in the future and acknowledges that the conflicts of interest language in these documents allowed Gibson and Hull to engage in outside accounts that could conflict with the Fund. Div. Br. 36-37. However, contrary to Respondent's argument, the Division insists that the conflicts of interest language in the Fund's POM and operating agreement did not relieve Gibson from the obligation he had as an investment adviser to disclose the transactions that are at issue in this proceeding and from the Exchange Act's antifraud provision. Tr. 1158-59; Div. Br. 34-43.

Gibson knew on September 26, 2011, that the Fund was going to sell TRX shares

Gibson's defense that he did not front run or violate the securities statutes on September 26, 2011, when he made an undisclosed sale of all the TRX shares in his private account and other accounts where he had authority, rests primarily on the position that he did not know of a certain and imminent sale of the Fund's TRX shares. Gibson's position is unpersuasive for several reasons.

I accept Overdahl's position that in determining whether front running occurred it is necessary to judge what material, non-public information Gibson knew when he sold TRX shares outside the Fund. Information about the Fund's impending sales of its TRX shares was material, non-public information. I disagree that for front running to have occurred the Fund's sales had to be imminent and all material elements of the transactions had to be in place. Overdahl's definite, certain, and imminent standard is too rigid. Even Overdahl acknowledged he did not mean one hundred percent certainty on every detail of the Fund sale, but he could not estimate what percentage of certainty was required. Tr. 1100. Second, Gibson, along with some undetermined amount of participation by Hull, decided when and what the Fund would buy and sell. There were no committees or boards that exercised final authority; Gibson was a decision maker for the Fund.

My review of the evidence leads me to conclude that Gibson knew with reasonable certainty on September 26 that the Fund was going to sell as much of its TRX shares as it could, as quickly as it could. The bases for this conclusion are the following.

Gibson's credibility

Gibson did not give credible testimony, which is significant because a great deal of the factual evidence on which he relies comes from him. The evidence that follows shows that Gibson did not have a positive opinion on Sinclair and the value of TRX from at least August 2011, but he represented the opposite to Fund investors in the period leading up to his and the Fund's September 2011 sales of TRX shares, as shown in his September 23, 2011, e-mail. Div. Ex. 81. Gibson's explanation—that he really did not believe what he communicated to Sinclair and to Sequeira about Sinclair and TRX, but, rather, that he was goading Sinclair to do something to benefit TRX shareholders—is unbelievable. Tr. 115-19, 125-29; *see* Div. Exs. 77, 78, 79. The claim makes little sense and it has no support in the record. Also, the words and tone of a November 2011 e-mail and a subsequent taped conversation indicate that Gibson was expressing his candid opinions and that he was very angry and upset at Sinclair. Tr. 799, 812; Div. Exs. 103, 183, 183A.

Gibson's representations—i.e., that in the fall of 2011, he believed there were numerous large holders who owned substantial positions in TRX and they had substantial amounts of cash to allocate and were interested in purchasing the Fund's position at the market—are highly questionable. Tr. 139, 708. Gibson identified Platinum, Sequeira, and Casimir. Tr. 139-40, 707. It is true that Platinum bought TRX shares earlier, but Sequeira did not follow through on a large purchase from the Fund, and Casimir knew of the Fund's desire to sell but did not make an offer until requested to find a buyer.

No document or third-party testimony supports Gibson's claims that Sands told him that "he would have an eager buyer for [the Fund's TRX] shares at a price between where we were and where we had been," that Sands assured him numerous times that Platinum would be happy to take out the Fund's position at the current price, or that in September 2011 a trader in Casimir's office told Gibson there was a buyer excited about buying TRX at the current price. Tr. 139-42, 144, 660-61. Similarly, Gibson admitted to having no documentation to support his assertion that persons in the market thought TRX's price would "rally back to where it had been in the 5's and 6's" if the Fund sold its TRX position. Tr. 181.

There is also no support for Gibson's testimony that, in the fall of 2011, the Fund was a patient holder of its TRX position and willing to sit on its position indefinitely, perhaps years, and that Gibson was "overwhelmingly and exceptionally bullish" on TRX. Tr. 175-76, 644. "We thought it was tremendously good value at [$]6- and $7 a share at $1[,]400 gold. Now we're at $1,900 gold and at $4 a share. We absolutely thought it was the best company in the world." Tr. 644. In fact, the evidence shows that Gibson had serious concerns about TRX beginning in August and from September 24, Gibson tried to sell all the Fund's TRX shares as quickly as he could. Tr. 130-31, 134-35, 171-175; Gibson Ex. 61; Gibson Ex. 62 at 3235.

Gibson testified that he sold his shares on September 26, 2011, because the Fund suspended its management fee, purportedly his sole source of income, and he owed Hull and the Marzullos approximately $640,000, and $30,000, respectively. Tr. 136-37, 152, 658, 780. However, Gibson did not use the proceeds of the sale for living expenses or to pay back such debt; rather, on the same day he sold his TRX shares, Gibson bought shares of the iShare Silver Trust index fund for $8,000, approximately what he received for his TRX shares. Tr. 786; Div. Ex. 86.

Another example of Gibson's lack of candor is his claim that TRX's low price in the fall of 2011was because short sellers had spread a rumor that the Fund had to sell TRX shares and selling its TRX shares at the market price or higher would dispel the short sellers' rumors. Tr. 139-43, 203-07. There is nothing in the record that provides any basis for these claims. Gibson acknowledged in his conversation with Sequeira detailed later that he knew there were no buyers at good prices for TRX when the Fund liquidated its shares, which is the opposite of what Gibson testified to at the hearing. Div. Ex. 183 at 4; Div. Ex. 183A. In addition, Gibson testified that he did not expect the Fund's November 2011 sale of approximately 4.8 million shares to push the price of TRX down when TRX's daily average sales were under one million shares. Tr. 830-31. During his investigative testimony, however, he said the opposite. Div. Ex. 190 at 108.

Gibson explained that his claim in a June 2011 e-mail—that he received serious threats of bodily harm from short sellers—was the result of short sellers "just trying to get into my head and I overreacted." Tr. 792-96; Div. Ex. 73.

Finally, to become a Fund investor, Gibson signed a subscription agreement on January 1, 2010, stating he had a net worth of in excess of $1 million. Div. Ex. 25. The evidence is that when the Fund began, Gibson had total assets of $300,000 and a salary of about $30,000 in 2009. Tr. 636-38, 735; Div. Exs. 43, 65. Gibson's representations on the subscription form were false; he was not an accredited investor on January 1, 2010.

Gibson believed on September 26 that the Fund was soon going to sell a large amount of TRX shares

Between October 2010 and May 2011, TRX's per share price fluctuated between slightly over $6.00 and a little over $7.00. Gibson Ex. 149 at Ex. 8A. By April 29, 2011, the Fund was one hundred percent invested in more than nine million TRX shares valued at approximately $70 million, which represented 10.3 percent of TRX's outstanding common shares. Tr. 86, 89-90, 93,

109, 623-24, 630; Div. Ex. 69; Div. Ex. 189 ¶ 15; Gibson Ex. 149 at 8.[42] The Fund had paid an average price of $5.00 a share. Tr. 654-55. Around July or August 2011, TRX's per share price began dropping drastically and ended at a little over $2.00 in November 2011. Gibson Ex. 149 at Ex. 8A. According to one expert, TRX's share price hovered around $6.00 or $7.00 per share for the first part of 2011, but dropped from about $5.50 a share on September 20, 2011, to about $3.50 a few days thereafter. Div. Ex. 184 at 8 & Ex. 1.

Gibson sent Sinclair, TRX's CEO, several e-mails on August 10, 2011.[43] One stated that he and Sequeira were "physically ill" over the price of TRX stock, that very soon it will make sense to "exit our positions," and that "TRX will go to $3 if we are not at $8 in September." Tr. 113-14; Div. Ex. 76. Another August 10, 2011, e-mail indicated:

> I CANT TAKE THIS ANYMORE. EVERYTHING YOU SAY IS ALWAYS INACCURATE. YOU SAID ALL THE RIGHT THINGS IN LONDON, BUT NOW I FIND OUT THEY JUST ARE NOT TRUE???? WE ARE NOT GOING TO HAVE "BIG NEWS" "THE DAY AFTER THE FINANCING IS ANNOUNCED"? I CANNOT RUN MY BUSINESS THIS WAY. THIS IS THE LAST STRAW. 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?

Tr. 118; Div. Ex. 77. Still another e-mail to Sinclair from Gibson on August 10, 2011, stated:

> Our share price is a disaster. At what point will anyone in management accept any responsibility for that? Every gold share is outperforming us hugely. This is not a matter of gold shares outperforming gold. This is TRX failing.
>
> * * *
>
> You know markets. You know our share price will collapse and your capacity to bring the big projects to production will be limited if this share price fails this fall. We cannot let that happen.
>
> The first step is to get us to $10/share and I see no focus on that.

Div. Ex. 77. On August 15, 2011, Gibson informed Sinclair, "We are running on fumes, and it is clear large shareholders are either unable to buy more shares, or have no intention of doing so." Tr. 118-20; Div. Ex. 78. In another August 15, 2011, e-mail Gibson wrote:

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[42] Gibson signed a Schedule G on February 11, 2011, for Geier Capital, Geier Group, the Fund, and himself personally. Tr. 91-92; Div. Ex. 53.

[43] The time stamp on the e-mails appears to be inaccurate so the order is uncertain. Tr. 985. Sequeira was the only person Gibson copied, and on only one e-mail. Div. Ex. 78.

> Finally, it is a now or never, do or die moment. If the share price falls further at any point in the next few days or weeks, it will be irrevocable. A meeting for this week is significantly more valuable than one next week. I'm afraid that by the second week of September our fate will be sealed for 2011. If we do not move by then, we are toast. I therefore strongly urge you to arrange these meetings for as soon as possible.

Div. Ex. 78. Gibson testified that he made these statements to Sinclair to incentivize Sinclair to perform for TRX shareholders and actually thought TRX had tremendous value. Tr. 116-18. However, the record establishes that by late September 2011, Gibson no longer had a genuine positive outlook for TRX.

The price of gold reached a high in August 2011, but TRX shares dropped from $7 to $4 a share between April and September 2011, which contradicted Gibson's investment thesis that TRX's share price would track the price of gold. Tr. 113, 644. On September 22-23, the price of TRX shares had declined so dramatically that Gibson considered TRX an unsuitable investment for the Marzullos. 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 unchartered territory to the downside, even among the worst performing peers." Tr. 123-24; Div. Ex. 79.

On Saturday, September 24, 2011, Gibson told a broker he was going to hear back by Thursday regarding a trade where he might sell one to five million TRX shares.[44] Tr. 978-81; Gibson Ex. 61. This communication shows that Gibson believed before his phone conversation with Hull on September 25 that the Fund was selling a lot of its approximate seven million shares. On Sunday, September 25, Hull told Gibson he had no tolerance for further losses, and Gibson almost immediately that very evening called Sands inquiring whether he had a buyer for all or some of the Fund's shares. Tr. 130, 133, 648-49, 660-62, 979-82; Gibson Ex. 62 at 3237.

On Monday, September 26, Gibson sold all the TRX shares in his personal account and his girlfriend's account at an average price of $4.04 per share, and he also sold all the shares of TRX held by an account in Geier Group's name at an average price of $4.05. Tr. 136-39, 144, 217, 657-58, 780, 788, 982; Div. Ex. 86 at 1059; Div. Ex. 87 at 0464-65; Div. Ex. 88 at 6; Div. Ex. 184 at 9; Div. Ex. 189 ¶¶ 22-24. The total number of shares sold was 21,900. Div. Ex. 189 ¶¶ 22-24. On September 27, 2011, Gibson e-mailed Nathaniel Gibson and Bryon LaPlant, "[S]ell your TRX. [Y]ou get to punch me in the face the next time you see me, and beers on me if I can afford them. Sorry guys about this one." Div. Ex. 83. On September 27, the Fund sold 3.7 million shares of TRX at an average price of $3.50 a share. Tr. 143, 775-79, 790; Div. Ex. 90 at 3.

According to one of Gibson's experts: "at the time Gibson sold his shares [on September 26], he had begun negotiations to sell [the Fund's] TRX position in an off-exchange block transaction through the 'upstairs market,'" which resulted in the sale of 3.7 million shares on September 27. Gibson Ex. 149 at 26. This admission and several other facts—Gibson's strong

[44] Hull was personally responsible for eighty percent of the Fund's assets. Tr. 46.

critical comments to Sinclair in August, the drastic decline in TRX's price shortly after September 20, Gibson's acknowledgement that his investment thesis was invalid, Hull's intolerance for greater TRX price drops, the information Gibson conveyed to a broker on September 24, and Hull's comments on September 25—all support a conclusion that Gibson knew when he sold his privately owned shares and those of others on September 26 that he believed the Fund's sale of a substantial portion of its TRX shares was imminent. This information was material, non-public information known to Gibson because of his position as the Fund's investment adviser. Circumstantial evidence can be persuasive. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *SEC v. Ginsburg*, 362 F.3d 1292, 1298 (11th Cir. 2004).

Gibson's representations that he believed on September 24 that the Fund would sell its TRX shares only at a good price, by which he seems to have meant over $4.00 a share, are unsupported. Gibson admits to asking Sands for a price numerous times in connection with the September 27 sale and not getting a price until late in the afternoon of September 27. Tr. 144. Gibson's September 30, 2011, "Confirmation of Sale" sent to Sequeira offers to sell 5.9 million TRX shares and does not even mention price. Gibson Ex. 94.

Gibson and others received a benefit from selling TRX shares on September 26, 2011

The benefit to Gibson and the other accounts for which he traded on September 26, 2011, is evident. They received $4.04 or $4.05 per share on average for their 21,900 TRX shares on September 26, 2011, and the Fund received an average price of $3.50 per share for 3.7 million shares the following day. Div. Ex. 184 at 9-10.

The next questions are: (1) whether Gibson's conduct on September 26, 2011, satisfies the statutory description of fraud; and (2) if it does, did Gibson act negligently or with scienter.[45]

My conclusion is that Gibson's sale of 21,900 shares of TRX when he was almost simultaneously seeking to sell millions of Fund shares of TRX as soon he could was a material fact that as an investment adviser he was required to disclose, and his failure to do so was a fraudulent act. *See Capital Gains*, 375 U.S. at 194-95, 200-01; *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 240 (1988). For at least forty years, courts have consistently held that an investment adviser is a fiduciary that must put his or her client's interests first. *See Capital Gains*, 375 U.S. at 189-91, 194.

The Fund's basic documents allowed sales in privately held accounts that were contrary to the Fund's position, however, this sale by Gibson of his privately owned and controlled shares contradicted the information he was withholding and providing to Fund investors. Gibson did not disclose to Fund investors the communications he had with Sinclair on August 10 and 15, voicing concerns about Sinclair's false representations, TRX's falling share price, and TRX's future. Div. Exs. 76-77. Instead, on September 23, 2011, Gibson represented that the Fund was suspending its management fee because of TRX's poor performances, but that a research report and TRX

[45] Having determined that Gibson was the Fund's investment adviser and knew on September 26 that the Fund was going to sell its TRX shares soon thereafter, and he sold his TRX shares for his personal benefit, his conduct amounted to front running.

purchases by others confirmed his view of TRX and verified his analysis of TRX's underlying value and the reputation, character, and integrity of Sinclair. Tr. 126-29, 628; Div. Ex. 81. And, Gibson did not disclose to investors that on September 22, he wrote to Sinclair requesting a conversation on ways to save the company. Tr. 123-24; Div. Ex. 79.

Three days later, before Gibson sold all the TRX shares in his personal account, his girlfriend's account, and Geier Group's account, he misled Fund investors by professing a strong belief in TRX. In his September 23, 2011, e-mail Gibson stated, "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." Div. Ex. 81.

Finally, Gibson knew, or should have known on September 26, that the anticipated sale of a large amount of TRX stock, which occurred on September 27, would drive the stock price down, which it did. Div. Ex. 190 at 108; Tr. 235, 348-49, 1011, 1017.

The law is clear that an investment adviser is obliged to put the Fund before his or her personal benefit. The conflicts of interest provision in the Fund's documents did not abrogate this responsibility. Investors who testified were knowledgeable about, and comfortable with, the conflicts of interest language in the documentation, but this is irrelevant because none of them thought they were relinquishing their right to fair treatment and agreeing to material misstatements and material omissions. Tr. 500-01, 523, 526-27, 852, 931.

Scienter

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud," and may be established by extreme recklessness—an extreme departure from the standards of ordinary care that presents a danger of misleading buyers, sellers, or investors that is either known to the respondent or is so obvious that he must have been aware of it. *See Aaron*, 446 U.S. at 686 n.5 (internal quotation marks omitted); *SEC v. Steadman*, 967 F.2d at 641-42; *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc). Scienter may be inferred from circumstantial evidence. *Herman & MacLean*, 459 U.S. at 390 n.30.

The persuasive evidence is that Gibson acted with scienter and knowingly violated his fiduciary duty when he sold privately held TRX shares on September 26, 2011. Gibson acknowledged that he had a fiduciary duty that included a duty of loyalty, care, and good faith to an advisory client. Yet, Gibson did not disclose the sale of all his privately held TRX shares to any investors. He kept it a secret. At the time of this conduct, Gibson was a college graduate who had been in the securities industry for over four years and held three securities licenses: series 7, 63, and 65. Gibson passed the Series 65-Uniform Investment Adviser Law Examination in the late spring of 2009. Tr. 25-26. Gibson worked for Deutsche Bank for over two and a half years and while there took many training courses. Div. Ex. 4. Deutsche Bank's code of ethics specifically prohibited front running:

> "Frontrunning:" Employees are prohibited from buying or selling Securities, Mutual Funds or other instruments in their Employee Related Accounts so as to

> benefit from the Employee's knowledge of the Firm's or a client's trading positions, plans or strategies, or forthcoming research recommendations.

Div. Ex. 185 at 22n.40 (quoting Deutsche Asset Management, U.S. Code of Ethics (2005), http://www.sec.gov/Archives/edgar/data/1320615/000113743905000169/deutschecoe.htm, at Part IV). There is no evidence that Gibson sought a legal opinion on whether his actions were appropriate.

Given these facts, I conclude that Gibson's front running on September 26, 2011, was a willful violation of Section 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8, and Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c).[46] Gibson acted to defraud; he engaged in acts, practices, and a course of business which were fraudulent, deceptive, or manipulative; and he made untrue statements of a material fact or he omitted material information in connection with the purchase or sale of securities.

4. Gibson engaged in front running by buying and advising others to buy TRX puts in late October and early November 2011 before the Fund liquidated its remaining TRX shares on November 10

As has been noted, without disclosure to Fund investors, Gibson bought $4 put options on TRX in his girlfriend's account and his own account and advised his father to sell TRX shares in a private account and to buy puts on TRX. Shortly thereafter, the Fund sold its approximately 4.8 million remaining TRX shares and the share price plummeted from an opening price of $3.41 per share to a low of $1.56, ending at $2.29.

Gibson and others received a benefit from selling the puts after the Fund liquidated its TRX shares on November 10, 2011. Gibson testified that, after the Fund sold its shares, he sold the puts he had purchased at about $80,000 more than he had paid for them and $250,000 more than his girlfriend's account paid, and his father benefited by following Gibson's advice on November 10. Tr. 241-42. The persuasive evidence is that Gibson, his girlfriend, and John Gibson had combined total gross profits of $379,550 from the sale of puts purchased by Gibson or on his advice. Div. Ex. 184 at 24; Div. Ex. 187 at 8.

Gibson knew in October and November that the Fund was going to sell its TRX shares

Much of what has already been decided is relevant here. The initial inquiry as to this front running allegation is whether Gibson knew with reasonable certainty when he bought or advised others to buy the TRX puts that the Fund was going to sell its TRX shares. The following is additional evidence that in late October and early November Gibson believed with reasonable

[46] A willful violation of the securities laws means "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that a person be aware that he or she is violating a statute or rule. *Id.*

certainty that a sale of the Fund's remaining TRX shares was going to occur because he no longer believed in the company.

On November 4, 2011, six days before he sold the Fund's remaining TRX holdings, Gibson sent a sarcastic e-mail to Sinclair calling him a crook:

> Heard Kahama was in town. Got any plans for progress? Like a mining license at kigosi? Or a resource report? You know those things you promised in 2009 and every few months since then?
>
> I had drinks with David Levy from Platinum. Great kid. Hope you don't ruin his life too. If you don't 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.

Tr. 799-800; Div. Ex. 103. Gibson repeated his views in more detail in an undated phone conversation with Sequeira that likely occurred in December 2011. Tr. 810, 812, 815. In response to how he lost $57 million:

> [Gibson]: (Inaudible). Jim [Sinclair . . .] lied to me for (inaudible) I tell you this, you are -- keep this in mind though, too, Luis. I am looking to murder Jim. I'm going to kill him. (Inaudible) after this I'm going to kill him for what he's done to me. So --
>
> Luis: I mean, you're going nuts. Come on. What are you saying? Don't say stupid things.
>
> [Gibson]: No, I'm not. I'm serious. I will kill him. If I fail from here because that fucker lied to me for a year, if he had told me the truth for the last year I would have gone slower, everything would have been fine. But he's a fucking liar, and if he thinks he's going to actually win after this he's out of his fucking mind.
>
> If he thinks he can just totally lie and get away with it he's got something else coming. I can tell you that. I have nothing to lose. He's taken everything from me. I've lost my business. I lost everything. I don't know what he thinks. I don't know what he thinks he -- he -- how he thinks he can just lie to people like that and there will be no consequences. I don't know what he thinks.
>
> * * *
>
> Luis: Yeah, but you sold your shares to the market so you kicked the company even lower.
>
> [Gibson]: Are you kidding? Do you realize what was going on at that point in time? No one would buy my shares --
>
> Luis: We were buying your shares slowly.

[Gibson]: Oh my God, yeah, like every (inaudible) good Lord. The thing would be a dollar by the time I got out of it because Jim is a fucking liar. . . .

* * *

Luis: Come on. I mean, I just don't understand, why did you kick the last three million shares to the market?

[Gibson]: Because Platinum -- you realize if you didn't buy however many billions of shares you bought that day the stock would be at 50 cents. The only reason the stock is not at 50 cents is because you just buy no matter -- you're buying all the volume so of course the stock's not down.

I think you guys are totally nuts. Here's what I think is going to happen, and I think it's really sad. This is why I'm telling you this, it makes me so angry. The guy -- Jim has fucked a lot of people, a lot of people going back.

This whole idea he's never lost anyone money is just a lie. He's -- I've now found out Jim screws everyone he deals with. So here's what's going to happen: You guys are going to buy the stock, buy, buy, buy, buy; it's going to go back to five or six, and then after another six months or a year or two years of Jim totally not doing anything what are you going to do?

* * *

[Gibson]: It's not an attitude. The point is the company has nothing. That's the point. It failed. Don't you get that? Like why are you buying it? That's the point. Like, there's so many, like, you do realize, like, U.S. Gold and TRX I could barely talk about it during the whole year because it was so terrible, but U.S. Gold is actually succeeding in doing things.

* * *

[Gibson]: . . . The reality is that your shares are worth, like, a dollar, or 50 cents.

Div. Ex. 183A at 2-8. Gibson testified that, despite the evidence, he had a positive view of TRX in November 2011. He did not think Sinclair was a crook, but "after the fact" he was skeptical of Sinclair.[47] Tr. 800, 815-16.

The evidence detailed in the prior sections shows that: Gibson believed TRX's stock price was dropping under Sinclair's leadership since early August 2011; Gibson had begun negotiations to sell the Fund's TRX position and he thought a sale would occur in late September; on September 25, Hull told Gibson he could not tolerate losses and wanted to sell TRX; and on the evening of September 25, Gibson asked Sands to find a buyer for all the Fund's shares. This evidence and Gibson's unvarnished opinion of TRX shares set out immediately above are persuasive that Gibson

[47] This is another example where Gibson is not credible.

knew with reasonable certainty in late October and early November 2011 that the Fund was going to liquidate its remaining TRX shares, which it did on November 10. This was material, non-public information known only to Gibson because of his position as the Fund's investment adviser. Gibson committed front running because he used this information to benefit himself and others close to him.

By front running the Fund and failing to disclose his true opinion of TRX, and not informing all Fund investors that he was buying puts as a defensive strategy based on non-public information about the Fund's anticipated TRX sales, Gibson withheld material information from the Fund and its investors.[48] It is irrelevant that certain Fund investors testified they would not have purchased puts even had they known Gibson was buying them. The determinative fact is that Gibson put his interests ahead of the Fund by using material, non-public information for his own benefit and those close to him.

Gibson argues that he was always long in TRX so that an increase in TRX's stock price was always a priority and that his purchase of covered puts was a defensive measure. Those arguments are irrelevant. An investment adviser has to put the Fund first, regardless of his personal financial situation. By front running the Fund and buying puts without disclosing his actions, Gibson did not suffer the same degree of financial loss that other Fund investors suffered when the TRX shares dropped precipitously after the Fund sold approximately 4.9 million TRX shares on November 10, 2011, as he did not disclose his investment strategy to them. Tr. 424-25, 488, 493-94. TRX's share price went from $3.25 before Gibson began selling Fund shares to a low of $1.56 per share to $2.21 in the minute after the Fund stopped selling shares. Ex. 184 at 20, Exs. 11-13. Gibson knew that a sale of that size would cause TRX's stock price to drop. Tr. 716-17; Div. Ex. 190 at 108.

The persuasive evidence is that Gibson acted with scienter and knowingly violated his fiduciary duty when he bought TRX puts for himself and his girlfriend, and advised his father likewise. He used material information that he gained as an insider to benefit himself and certain others and by doing so violated Section 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8, and Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c). Gibson acted to defraud; he engaged in acts, practices, and a course of business which were fraudulent, deceptive, or manipulative; and he made untrue statements of a material fact or he omitted material information in connection with the purchase or sale of securities.

5. As the Fund's investment adviser, 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 about 680,636 TRX shares from Hull on October 18, 2011

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." Tr. 1009-10; Div. Ex. 93. In mid-October, even

[48] In addition to the puts discussed above, on the morning of November 10, 2011, Gibson e-mailed T.R. Reddy, "I think you should sell your TRX shares immediately," and e-mailed the Fund's broker that "[w]e're going to potentially tank [TRX]." Tr. 716-17, 882; Div. Exs. 105, 107.

though Gibson knew the Fund would be selling it TRX position, Gibson asked whether Hull could combine his TRX shares with the Fund's shares to "accommodate the other members of the Fund and demonstrate a greater alignment of interest." Tr. 185-86, 217-18, 689-90, 692. On October 18, 2011, the Fund bought 680,636 shares of TRX from Hull in a private transaction for $3.60 a share, the closing price that day, for a total of $2.45 million.[49] Tr. 182, 185-86, 688, 1011, 1014; Div. Exs. 94- 95.

Gibson reasons that Hull would receive the same amount for the TRX shares whether he sold outside the Fund or to the Fund, but if he sold to the Fund where he owned approximately eighty percent of the shares and thus eighty percent of the Fund's cash, the Fund's cash decreased by the price it paid for Hull's stock and Hull would have eighty percent of a lesser amount. Tr. 691-92. Hull and Gibson were the only Fund investors who knew of the transaction. Tr. 183. Following the purchase, the Fund continued to try to sell its remaining TRX shares at a good price. Tr. 198.

The POM had a potential conflicts of interests section that provided:

> In addition, purchase and sales transactions . . . may be effected between the [Fund] and the other entities or accounts subject to the following guidelines: (i) such transactions shall be effected for cash consideration at the current market price of the particular securities, and (ii) no extraordinary brokerage commissions or fees (i.e., except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction.

Div. Ex. 24 at 2378; *see also* Div. Ex. 22 at 2656-58 (operating agreement sections 3.01 and 3.02).

I do not consider the Fund's purchase of Hull's TRX shares to be a transaction allowed by the POM. Gibson, the Fund's investment adviser, who was also the investment adviser to the Fund's largest investor, initiated a transaction with that investor on terms that were not favorable to the Fund. This transaction violated the POM's terms that allowed transactions at current market prices but disallowed extraordinary brokerage commissions. Div. Ex. 185 at 24-25. It is questionable whether the closing price of the Hull transaction was the "current market price" and whether there was "no extraordinary brokerage commission" paid. But the Fund's normal practice did not involve acquiring private shares of an individual investor and then selling those shares into the market shortly thereafter, effectively paying the brokerage commissions for that investor, as it did here. Tr. 197-98, 696-97, 1037.

I conclude that Gibson violated the fiduciary duty he owed the Fund and that acting with scienter he violated the antifraud provisions because he entered an undisclosed, sweetheart deal—

[49] As has been noted, the Fund did not receive a block discount to the shares and Hull did not pay a commission, which would have happened if Hull sold in the open market. Tr. 191, 696-97, 1015, 1022, 1026-28.

no application of a block discount and no commission paid by seller—to the Fund's largest investor, who was also his employer and to whom he was indebted, without any third-party opinion that this was appropriate conduct.[50]

There is no persuasive evidence that the Fund benefited by purchasing Hull's shares or that Hull would have received the same per share price if he sold outside the Fund, which is a basic premise to Gibson's positon that Hull suffered a loss by selling his shares to the Fund. Tr. 691-92, 694. Gibson's expert acknowledged that Hull would not have received $3.60 a share in a block transaction on an exchange. Tr. 1015-16, 1027-28. I accept the Division's expert's opinion and calculations that the Fund was harmed by purchasing shares from Hull. Tr. 361, 376. I accept as credible Taveras's calculations showing that the Fund lost between $807,692 (weighted average) and $1,074,902 (FIFO), excluding commission costs on the Hull shares that withstood criticism. Div. Ex. 184 at 5, 11, Ex. 7; Div. Ex. 187 at 3.

Gibson also argues that he feared that if Hull sold his shares on the open market it would depress the price of TRX shares when the Fund was attempting to sell them. Tr. 693-94. This argument is plausible, however, it is outweighed by other evidence. There is no documentation that shows Gibson designed the purchase to benefit the Fund. The evidence is that Hull is a smart business person who does not act to hurt his business interests. Tr. 860. The persuasive evidence is that the motivation of the purchase was to benefit Hull, whose largest creditor was demanding an increase in liquid assets and the only investment available to create cash was his TRX shares. Tr. 183-86, 688-90.

In summary, as the Fund's investment adviser, 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 on October 18, 2011, in an undisclosed transaction, which was a fraudulent, deceptive act or course of business with respect to investors in a pooled investment vehicle.

Sanctions

The Division requests the following sanctions against Gibson: a cease-and-desist order, industry bars under Advisers Act Section 203(f) and Section 9(b) of the Investment Company Act of 1940, disgorgement plus prejudgment interest, and civil penalties. Div. Br. 84-96; Div. Reply Br. 27-31.

Gibson argues that the Division's request for a bar under Advisers Act Section 203 is misplaced because that provision is applicable to persons associated with or seeking to become associated with an investment adviser whereas, in this proceeding, the Division has alleged that Gibson was the investment adviser to the Fund. Gibson Br. 95-96. Gibson maintains that Division has not shown that he violated the Exchange Act or the Advisers Act so there is no basis for the other sanctions and, moreover, the requested sanctions are not in the public interest. Gibson Br. 95-97.

[50] A sweetheart deal is a collusive agreement. Black's Law Dictionary 1462 (7th Ed. 1999).

Cease and desist

As applicable here, Exchange Act Section 21C and Advisers Act Section 203(k) authorize the Commission to issue a cease-and-desist order against any person who has violated the Exchange Act or Advisers Act, respectively, or any rule or regulation thereunder. 15 U.S.C. §§ 78u-3(a), 80b-3(k)(1). Although there must be some likelihood of future violations whenever the Commission issues a cease-and-desist order, the required showing is "significantly less than that required for an injunction." *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *114 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002).

In determining whether to issue a cease-and-desist order, the Commission's considerations are essentially the same as the *Steadman* factors: the egregiousness of the 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. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *KPMG Peat Marwick LLP*, 2001 SEC LEXIS 98, at *116. 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." *KPMG Peat Marwick LLP*, 2001 SEC LEXIS 98, at *116.

Gibson's conduct was egregious because he was acting as an investment adviser, a role in which investors trusted and relied on Gibson's honesty and expected that he would act in their best interest and provide full and fair disclosure of all material facts relating to their investments. *See Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *50-51 (May 2, 2014), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015). Gibson's conduct was recurrent, not isolated. The specific violations occurred in late September 2011 and October-November 2011, but Gibson also engaged in questionable conduct several times from at least early August 2011 when he communicated upbeat information about the Fund to its investors, while at the same time complaining bitterly to Sinclair and questioning TRX's value. Gibson revealed his true opinion of TRX only to Sequeira.

Gibson exhibited, at minimum, a reckless degree of scienter. His testimony, e-mails, and credentials demonstrate that he understood the duties of an investment adviser, but that he failed to fully appreciate those duties in considering his actions. Gibson wrote to Fund investors expressing remorse at their financial losses due to his invalid investment strategy, but he does not acknowledge any wrongful conduct.

Gibson testified that he worked at Nova Capital Global Markets, LLC, from January through late November 2013, and that since January 2014 he has been working at Weiji Capital providing consulting services on the construction of marketing documents for mergers and acquisitions, targeted to non-United States investors. Div. Ex. 190 at 38-41. Given Gibson's lack of appreciation and understanding of how his conduct was fraudulent, and indications that he intends to remain active in the financial services industry, there is a risk of future violations which a cease-and-desist order should help to prevent. Accordingly, I will order that Gibson

cease and desist from committing or causing any violations or future violations of the statutes and regulations that he has been found to have violated.

Industry bars

As relevant here, Advisers Act Section 203(f) authorizes the Commission to censure or place limitations on the activities of any person associated with an investment adviser at the time of the alleged misconduct or suspend the person for a period up to twelve months or impose a collateral bar, if such sanction is in the public interest and the person has willfully violated the Advisers Act or Exchange Act or any rule thereunder. 15 U.S.C. § 80b-3(e)(5)&(f).

Investment Company Act Section 9(b) authorizes the Commission, where it is in the public interest, to prohibit "any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company, or affiliated person of such investment adviser, depositor, or principal underwriter," if the person has willfully violated the Advisers Act or the Exchange Act or any rule thereunder. 15 U.S.C. § 80a-9(b)(2).

Gibson's argument that Section 203(f) is inapplicable to him is unpersuasive because a person may be both an adviser and a person associated with an investment adviser. At the time of the misconduct, Gibson functioned as an investment adviser, which subjects him to Section 203(f). *See Anthony J. Benincasa*, Investment Company Act Release No. 24854, 2001 SEC LEXIS 2783, at *6 (Feb. 7, 2001) ("By functioning as an investment adviser in an individual capacity, [a respondent] will be in a position of control with respect to the investment adviser [i.e., himself], and therefore, he meets the definition of a 'person associated with an investment adviser.'"); *Alexander V. Stein*, Advisers Act Release No. 1497, 1995 SEC LEXIS 3628, at *2 & n.10 (June 8, 1995) (Commission has authority under Section 203(f) where the respondent "acted as an investment adviser").

The *Steadman* factors applied to assess the public interest with respect to a cease-and-desist order are set out and discussed above. The Commission considers conduct involving fraud to be particularly serious and subject to severe sanctions. *See, e.g.*, *Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). The Commission also considers the deterrent effect of administrative sanctions. *See Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006).

For the reasons discussed previously, it is in the public interest to apply to Gibson the industry bars under the Advisers Act and Investment Company Act.

Civil penalties[51]

[51] I have not considered Investment Company Act Section 9(d) because the Division does not cite it in support of civil money penalties. Div. Br. 92-95; Div. Reply Br. 29-30. The OIP cites the statute as a basis for civil penalties. OIP at 10.

Advisers Act Section 203(i) and Exchange Act Section 21B(a) authorize the Commission to impose civil money penalties in a cease-and-desist proceeding if it is in the public interest and the person has violated the Advisers Act or Exchange Act, respectively, or any rule or regulation thereunder. 15 U.S.C. §§ 78u-2(a)(2), 80b-3(i)(1)(B). Each statute sets out the same three-tiered system for determining the maximum civil penalty for each act or omission. A maximum second-tier penalty is permitted if the acts or omissions involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. A maximum third-tier penalty is permitted if, in addition to second-tier criteria, the acts or omissions directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. §§ 78u-2(b)(2)-(3), 80b-3(i)(2)(B)-(C).

For violations that occurred in 2011, the maximum first-tier, second-tier, and third-tier penalties, per act or omission, for a natural person were $7,500, $75,000, and $150,000.[52] 17 C.F.R. § 201.1004, Subpt. E, Table IV (2009). In deciding whether a civil penalty is in the public interest, the Commission considers several factors, including inability to pay. *Robert L. Burns*, Advisers Act Release No. 3260, 2011 SEC LEXIS 2722, at *38 (Aug. 5, 2011). "Ability to pay, however, is only one factor that informs [this] determination and is not dispositive." *Id.* Other factors include 1) whether the act or omission involved fraud; 2) whether the act or omission resulted in harm to others; 3) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; 4) whether the individual has committed previous violations; 5) the need to deter such person and others from committing violations; and 6) such other matters as justice may require. *Jay T. Comeaux*, 2014 SEC LEXIS 3001, at *22 n.39 (citing statutory factors).

The Division argues that Gibson should be assessed civil penalties at the second-tier level for his three acts of front running on September 26, 2011, and six acts of front running in late October and early November 2011; and one third-tier penalty for the October 18, 2011, Hull transaction. Div. Br. 94. As a result, the total penalty sought by the Division is $825,000. Div. Br. 95.

Gibson argues that the Division has not proven that he violated the statutes, and that sanctions and other relief are inappropriate because Gibson's actions were permitted by the POM and operating agreement, Gibson's transactions in TRX securities and TRX puts did not harm the Fund, the purchase of Hull's shares was to benefit the Fund, the activities at issue were isolated rather than recurrent, it is unlikely that Gibson will be in a positon to violate the securities laws in the future, and Gibson is unable to pay a civil penalty or disgorgement. Gibson Br. 96-97.

[52] The Commission issued an interim final rule last year retroactively increasing these amounts. *See* 17 C.F.R. § 201.1001 & Subpt. E; Adjustments to Civil Monetary Penalty Amounts, 81 Fed. Reg. 43042 (July 1, 2016). However, pursuant to a final rule issued this month, the adjustment amounts in effect for violations that occurred in 2011 will be reinstated. *See* Adjustments to Civil Monetary Penalty Amounts, 82 Fed. Reg. 5367 (Jan. 18, 2017). In its brief, the Division uses the penalty amounts in effect for violations that occurred in 2011. Div. Br. 93.

The facts set out in this initial decision and my prior *Steadman* analysis support a conclusion that the public interest merits imposition of civil penalties. Gibson's acts and omissions violated his fiduciary duty as an investment adviser and involved violations of the antifraud provisions. In addition, the evidence supports the calculations of the Division's expert Taveras that the Fund lost between $807,692 and $1,074,902, depending on the cost methodology applied, as a result of its purchase of Hull's shares, and this loss amount does not consider the commissions paid by the Fund approximately three weeks later when it sold all its TRX shares. Div. Ex. 184 at 10-11. Gibson's expert Overdahl believed Gibson's actions were reasonable based on his belief regarding what Gibson knew at the time. My assessment is that Gibson knew a lot more than Overdahl was aware of. Overdahl did not take issue with Taveras's calculations, although he disagreed with her premise for them. Tr. 1035. In fact, Gibson found them objectionable because they were not expert opinions but mere calculations that any mathematician could perform. Tr. 296-97.

A respondent may present evidence of an inability to pay money sanctions and file a Form D-A (Disclosure of Assets), which Gibson did under seal on October 20, 2016, after the hearing concluded. 17 C.F.R. §§ 201.630, 209.1. In his brief and in his proposed findings, Gibson cites to evidence and the Form D-A to support his claim that he is insolvent. Gibson Br. 97; Gibson FOF ¶¶ 163-69. I have considered Gibson's submissions and exhibits, including the unsworn, one-page statement reviewed by Cates regarding Gibson's financial condition; his 2013 to 2015 tax returns; a promissory note of amounts due to his father; and his Form D-A, which I admit into evidence.[53] Gibson Exs. 141-45.

The Division raises doubts about Gibson's representations regarding his financial condition and notes his father's considerable financial support. Div. Reply 29-30. Gibson's financial situation is unclear. But as his future earning potential gives him some ability to pay and given the nature of the violations, I will not completely excuse him from civil penalties.[54]

For the reasons stated, I will assess three second-tier penalties at $70,000 each, one for each course of misconduct: his September 2011 front running, the October 2011 Hull transaction, and the October to November 2011 front running. *See Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012) ("To impose second-tier penalties, the Commission must determine how many violations occurred and how many violations are attributable to each person, as the statute instructs."). This results in a total civil money penalty of $210,000, which is substantially less than the amount sought by the Division. When considered with the other measures imposed on Gibson in this initial decision, however, this penalty should serve the public interest. *See J.S.*

[53] The Form D-A should have been submitted before or at the hearing. *Cf. Terry T. Steen*, Exchange Act Release No. 40055, 1998 SEC LEXIS 1033, at *21-22 (June 1, 1998). Doing so would have allowed the Division an opportunity to question Gibson on its contents.

[54] Inability to pay is given less weight in determining disgorgement because violations, especially in the antifraud context, should be made unprofitable. *See SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996). I therefore do not reduce the disgorgement amount found in the next section.

Oliver Capital Mgmt., L.P., 2016 SEC LEXIS 2157, at *59 ("Th[e] variation in calculating the number of acts or omissions sanctioned in particular cases is a feature of the discretion granted to [the Commission] in the penalty regime that Congress created."), *81-82 (noting that although the Commission "could be justified in finding a much larger number of acts or omissions [based on the number of transactions], . . . this alone would not establish that a greater penalty was appropriate in the public interest").

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

Disgorgement is defined as "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." Black's Law Dictionary 568 (10th ed. 2014). Disgorgement of ill-gotten gains "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Montford & Co.*, 2014 SEC LEXIS 1529, at *94 (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)). The Division "has the initial burden of demonstrating a reasonable approximation of profits causally connected to the violation," i.e., "but-for causation between a [respondent]'s violations and profits." *Jay T. Comeaux*, Securities Act Release No. 9633, 2014 SEC LEXIS 3001, at *9 (Aug. 21, 2014) (internal quotation marks omitted). If the Division presents a reasonable approximation of profits causally connected to the violations, it is incumbent on the respondent to show that the approximation is not reasonable. *See id.* at *9-10.

The Division totals ill-gotten gains as a result of the front-running violations—in terms of losses avoided and/or profits received by Gibson, his girlfriend, his father, and Geier Group—as $404,543. Div. Br. 89-90. The Division would add $216,341.67, its estimate of Hull's benefit by selling TRX shares to the Fund, to this total. Div. Br. 91. If Gibson is not required to disgorge $216,341.67 in connection with the Hull buyout, the Division requests that, at a minimum, Gibson be required to disgorge $41,841 (i.e., Overdahl's low estimate of Hull's benefit), in connection with this transaction. Div. Br. 92. Gibson has not addressed the Division's disgorgement calculation in his brief.

My view differs from the Division in that, generally, there has to be a showing that the person ordered to disgorge received a benefit as a result of violation so as to create an ill-gotten gain.[55] Courts "are mixed regarding the extent to which a party can be ordered to disgorge total

[55] Disgorgement is an equitable remedy that requires "a defendant to give up the amount by which *he* was unjustly enriched." *SEC v. First Jersey Sec., Inc*., 101 F.3d 1450, 1475 (2d Cir. 1996) (emphases added). The cases cited by the Division for a different proposition are not directly on point. Unlike *SEC v. Kokesh*, there is no claim here that the respondent misappropriated money from a fund and then "diverted" such illicit gains to subordinate cohorts. *See* 834 F.3d 1158, 1164-65 (10th Cir. 2016), *cert. granted*, 2017 WL 125673 (U.S. Jan. 13, 2017). In the insider-trading context, certain courts have found tippers liable for profits conferred on third-party tippees. *See, e.g., SEC v. Contorinis*, 743 F.3d 296, 304 (2d Cir. 2014);

gain from an unlawful act, when the party has not personally received the full benefit of the wrongdoing." *SEC v. Contorinis*, 743 F.3d 296, 305 n.5 (2d Cir. 2014). It is difficult to square the Division's theory of disgorgement with the established proposition that the "power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment." *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978), *as quoted in Larry C. Grossman*, Securities Act Release No. 10227, 2016 SEC LEXIS 3768, at *70 n.131 (Sept. 30, 2016); *see Larry C. Grossman*, 2016 SEC LEXIS 3768, at *70 (Commission "lack[s] discretion to order disgorgement that exceeds the amount obtained through the wrongdoing; being required to disgorge only the amount by which one has been unjustly enriched is not punitive").

Applying this logic, Gibson received $1,080 in avoided losses from his September 26, 2011, TRX sales, and $81,008 in profits from his sale of the 565 TRX puts in November 2011,[56] for a total of $82,088. Div. Br. 89-90; Div. Ex. 99 at 1065; Div. Ex. 124 at 1071; Div. Ex. 184 at 8-10, 22-24 & Ex. 6; Div. Ex. 185 at 25-26, 45 (Ex. X); Div. Ex. 189 ¶¶ 22, 26. I will order Gibson to disgorge this amount, with prejudgment interest, as defined in the ordering paragraphs below.

Record Certification

Pursuant to Commission Rule of Practice 351(b), I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on December 27, 2016, with the addition of Gibson's Form D-A filed under seal on October 20, 2016. 17 C.F.R. § 201.351(b).

Order

Pursuant to Section 21C of the Securities Exchange Act of 1934 and Section 203(k) of the Investment Advisers Act of 1940, Christopher M. Gibson shall CEASE AND DESIST from committing or causing violations, and any 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.

SEC v. Warde, 151 F.3d 42, 49 (2d Cir. 1998). But this is not an insider-trading case. Front running, while sharing some elements with insider trading, is not entirely analogous.

[56] The Division seeks disgorgement of $81,930, which is the amount of gross profits from Gibson's sale of TRX puts in his personal account (i.e., prior to commissions) calculated by its expert. Div. Br. 89-90; Div. Ex. 185 at 26, 45 (Ex. X). I decline to adopt this figure and use net profits, also calculated by the expert, which can be ascertained from a comparison of Gibson's October and November 2011 account statements. Div. Ex. 99 at 1065; Div. Ex. 124 at 1071; Div. Ex. 185 at 45 (Ex. X); *see SEC v. Shah*, No. 92-cv-1952, 1993 WL 288285, at *5 (S.D.N.Y. July 28, 1993). In a footnote, the Division suggests disgorgement of Gibson's entire salary that he received in 2011, *see* Div. Br. 91 n.55, without any attempt to explain how that entire salary (or some reasonably apportioned subset) is causally related to the violations, which took place over the course of a finite period, not the entire year.

Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Christopher M. Gibson is BARRED from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Pursuant to Section 9(b) of the Investment Company Act of 1940, Christopher M. Gibson is permanently PROHIBITED from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

Pursuant to Section 21B(a) of the Securities Exchange Act of 1934 and Section 203(i) of the Investment Advisers Act of 1940, Christopher M. Gibson shall pay a CIVIL MONEY PENALTY in the amount of $210,000.

Pursuant to 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 shall DISGORGE $82,088 plus prejudgment interest. Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), shall be compounded quarterly, and shall run from December 1, 2011 (i.e., the first day of the month following Gibson's last violation), through the last day of the month preceding the month in which disgorgement is made, consistent with 17 C.F.R. § 201.600.

Pursuant to Commission Rule of Practice 1100, any funds recovered by disgorgement, prejudgment interest, or civil penalties shall be placed in a fair fund for the benefit of investors harmed by the violations.

Payment of civil penalties, disgorgement, and prejudgment interest shall be made no later than twenty-one days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment shall 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 https://www.sec.gov/paymentoptions; 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: Enterprises 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 instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision shall become effective in accordance with and subject to the provisions of Rule of Practice 360, 17 C.F.R. § 201.360. Pursuant to that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the

initial decision, pursuant to Rule of Practice 111, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's 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 shall not become final as to that party.

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Brenda P. Murray
Chief Administrative Law Judge