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

Administrative Proceeding
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent.

DIVISION OF ENFORCEMENT'S OPPOSITION BRIEF

June 19, 2017

H. Michael Semler
Gregory R. Bockin
Paul J. Bohr
George J. Bagnall
U.S. Securities and Exchange Commission
Division of Enforcement
100 F Street, N.E.
Washington, D.C. 20549

Counsel for Division of Enforcement

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INTRODUCTION

Following a five-day hearing, Chief Administrative Law Judge Brenda Murray ("ALJ Murray") determined that Respondent Christopher M. Gibson ("Gibson") violated his fiduciary duties and engaged in fraud in his capacity as an investment adviser to the Geier International Strategies Fund, LLC ("Fund").[1] ALJ Murray found that in late 2011 Gibson violated Section 206 of the Investment Advisers Act of 1940 ("Advisers Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") by "front running" the Fund and making false and misleading statements to the Fund and its investors. Initial Dec. at *24-31. ALJ Murray also determined that Gibson violated Section 206 by favoring one large investor over the Fund, without disclosure and contrary to the Fund's offering documents. Id. at *34-36.

Gibson asks that the Commission vacate the Initial Decision, but fails to identify any factual or legal basis for doing so.[2] Because ALJ Murray's decision is firmly supported by the evidentiary record, her credibility determinations, and the applicable law, the Division of Enforcement ("Division") requests that the Commission affirm the Initial Decision.

THE EVIDENTIARY RECORD

The facts established by the evidentiary record are summarized below.

Gibson Created Geier Group As An Investment Adviser

1. From June 2006 to February 2009, Gibson was an asset securitization analyst at Deutsche Bank Securities. Tr. 16:7-9 and 17:25 to 18:6; Div. Ex. 190 at 15:9-15 and 15:22 to

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[1] Christopher M. Gibson, Initial Decision Release No. 1106, 115 SEC Docket 19, 2017 WL 371868 (January 25, 2017) ("Initial Decision"). The Initial Decision is cited herein as "Initial Dec. at * __," using the page numbers from the decision as available at 2017 WL 371868.

[2] Opening Brief of Respondent Christopher M. Gibson, filed May 18, 2017 ("Gibson Br.")

16:14.[3] He passed the Series 7 and Series 63 exams while at Deutsche Bank, and passed the Series 65 exam for investment advisers in 2009. Tr. 25:22 to 26:5; Div. Ex. 189 (Stipulations of the Parties) at ¶ 2; Div. Ex. 190 at 41:13-21.

2. After leaving Deutsche Bank in February 2009, Gibson began providing investment advice to James Hull ("Hull"), a Georgia real estate developer, and to Hull's family, as well as to two private investment funds ("Hull Fund" and "Gibson Fund"). Div. Ex. 10; Tr. 19:18 to 20:1 and 28:11 to 29:5.

3. In April 2009, Gibson formed Geier Group, LLC ("Geier Group") as a Georgia entity, Div. Ex. 11, and registered it as an investment adviser under Georgia law, Div. Ex. 12. Geier Group's Form ADV identified Gibson as "President" and the "person responsible for supervision and compliance." Id. Gibson owned 50% of Geier Group, Hull owned 35%, and Gibson's father (John Gibson) owned 15%. Div. Ex. 189 at ¶4.

4. Gibson, Hull, and Gibson's father also owned a parallel Georgia entity, Geier Capital, LLC ("Geier Capital"). Div. Ex. 15. The ownership interests in Geier Capital were the same as in Geier Group. Id.; Div. Ex. 189 at ¶9.

Gibson Created The Fund

5. Gibson created Geier International Strategies Fund, LLC in December 2009 as a Delaware entity. Div. Ex. 17. Hull provided resources to assist in the formation of the Fund and

[3] The Division's exhibits are cited as "Div. Ex. __." Respondent's exhibits are cited as "Resp. Ex. __." The hearing transcript (as amended November 11, 2016) is cited as "Tr." followed by page and line numbers. Gibson's investigative testimony is cited by the exhibit numbers assigned to the Division's transcript designations (Div. Exs. 190 and 191).

encouraged business associates to invest in the Fund. Tr. 22:10-12 and 22:21 to 23:3; 27:15 to 28:5, 46:2-14.

6. The Fund's Confidential Private Offering Memorandum ("offering memorandum"), Div. Ex. 24, and the Fund's Operating Agreement ("operating agreement"), Div. Exs. 21, 22 and 23, were initially distributed to investors in early 2010. Tr. 37:7-18 and 40:15-19; Div. Ex. 29. Subscription agreements were also distributed at that time. See Div. Exs. 25, 26, 27, 28, 57 and 58.

7. The offering memorandum identified Geier Capital as the "Managing Member" of the Fund. Gibson was identified as "the Managing Director" of Geier Capital. Div. Ex. 24 at 1.

8. The offering memorandum identified Geier Group as the "Investment Manager." Gibson was identified as "the managing member" of Geier Group. Div. Ex. 24 at 1. The offering memorandum told investors that Geier Group was "registered in the State of Georgia as an investment adviser." Div. Ex. 24 at 1.

9. In early 2010, the Fund raised approximately $32 million. Div. Ex. 31 at ¶13. Hull was the Fund's largest investor. Tr. 129:11-17. Other investors included Hull's friends and business associates, Gibson's parents, and the father of Gibson's then-girlfriend. Div. Ex. 33; Tr. 54:11 to 55:2.

Gibson Was An Investment Adviser To The Fund

10. Gibson testified that he provided "investment management services" to the Fund, Tr. 81:15-17, and that he was "the investment manager" of the Fund, id. 81:8-10 ("Q: So is it fair to say that you were the investment manager of the fund? A: Yes, sir.").

11. Gibson did not need Hull's authorization to purchase or sell securities for the Fund. Tr. 72:7 to 73:11. He sought Hull's approval only for "substantial material changes to the strategy." Id.

12. Gibson communicated with brokers on behalf of the Fund, Tr. 107:15-18; Div. Exs. 82, 84, 92, 93, and 105, and gave brokers instructions for handling the Fund's assets, Div. Exs. 92, 93, 96, and 97. Gibson was the only person who interacted on behalf of the Fund with brokers or ordered trades. Tr. 76:5-7; 77:15 to 78:17; 107:10-18.

13. Gibson monitored macroeconomic trends on behalf of the Fund, Tr. 105:17-23; Div. Ex 190 at 268:13-18, and tracked the daily performance of the Fund's portfolio, Tr. 106:2-4; Div. Ex. 190 at 268:23-25.

14. Gibson communicated with investors about the Fund, Tr. 106:10-16; Div. Exs. 32, 45, 48, and 81; Resp. Ex. 51, providing analyses of the Fund's past performance, Div. Exs. 32, 45, 48, 51, and 81, and describing his expectations for future performance, Resp. Ex. 51; Div. Ex. 81.

15. Gibson communicated regularly with the management of Tanzanian Royalty Exploration, Inc. ("TRX"), the company in which the Fund invested most heavily, Tr. 106:17-19; Div. Exs. 76, 77, 78, 79, and 103; Div. Ex. 190 at 269:7-11, and he initiated transactions in TRX shares on behalf of the Fund. Tr. 172:2 to 174:17; 198:6-15; 209:2 to 210:9; Resp. Exs. 90, 92, 94, and 97.

16. Gibson signed all reports submitted to the Commission on behalf of the Fund (and Geier Group and Geier Capital). Div. Exs. 31, 50 and 132 (Forms D); Div. Exs. 39, 53, 69, and 109 (Schedules 13G); Div. Ex. 70 (Form 3); Div. Ex. 71 (Form 4).

17. Gibson referred to the Fund as "my business," Div. Ex. 77 at GISF000071654, and "my fund," Div. Ex 183A at 2:20-21, Div. Ex. 183A at 3:21. In his April 2013 letter to investors returning their remaining funds, Gibson indicated that managing the Fund had been his responsibility. Div. Ex. 154 at GISF000002149.

18. Gibson was compensated in three ways for serving as an investment adviser to the Fund: investment management fees; incentive fees; and salary. He received 50% of the $223,351 investment management fee paid by the Fund in 2010 and 50% of the $295,005 investment management fee paid by the Fund in 2011. Tr. 44:5-13 and 84:3-18. Div. Ex. 191 at 363:25 to 364:3, 402:7-13, 403:1-20, 418:19 to 419:4, 457:4-16; and 461:12 to 462:12.

19. The Fund was also obligated to pay a 10% "incentive" fee if Gibson generated an annual return in excess of a designated "hurdle rate." Tr. 43:18 to 44:4. In 2010, the Fund paid Geier Capital an incentive fee of $3,147,283. Tr. 84:13 to 85:8. Gibson received 50% of that payment, i.e., $1,573,642. Id.; Div. Ex. 189 at ¶¶13-14.

20. Gibson also received a salary from Hull's business for advisory services to the Fund. The amounts Gibson received in salary were: $73,953.51 in 2010;[4] $148,718.31 in 2011; $148,395.53 in 2012; and $6,270.54 in 2013. Div. Exs. 43, 128, 147, and 156.

The Fund's Declining Performance in 2011

21. In late 2010, after discussions with Hull, Gibson began shifting the Fund's investments from commodities (gold and silver) to the common stock of TRX, a small, thinly-traded company involved in exploration for gold reserves in Africa. Tr. 85:9 to 86:18; 109:16 to 112:7; Div. Ex. 190 at 67:8 to 68:6. By April 2011, the Fund held approximately 9.7 million

[4] Because Geier Group later repaid Hull $75,000 to cover Gibson's 2010 salary, and Gibson was a 50% owner of Geier Group, Gibson's effective salary benefit in 2010 was approximately $36,453. Div. Ex. 191 at 419:5 to 420:2 and 421:1 to 422:15.

TRX shares, Tr. 90:1 to 93:1; Div. Ex. 69; Div. Ex. 189 at ¶¶15-16, with a market value of approximately $70 million, Tr. 93:2-9; Div. Ex. 189 at ¶¶15, 17. The TRX shares made up 100% of the Fund's investments. Tr. 109:2-15.[5]

22. The TRX share price declined during the summer of 2011. Tr. 112:16-25. While issuing optimistic projections about TRX to the Fund's investors, Gibson told TRX management in private communications that the company was failing. Div. Ex. 76, 77, 78, 79 and 103. On August 10, 2011, Gibson told TRX management that he was "physically ill" over TRX's stock price and "[v]ery soon it will make sense to exit our positions. There is no time left." Div. Ex. 76; Tr. 113:23 to 114:16. The same day, Gibson told James Sinclair, TRX's Chairman, that "everything you say is always inaccurate." Div. Ex. 77; Tr. 118:11 to 119:19. On August 15, 2011, Gibson told TRX management that "[w]e are running on fumes." Div. Ex. 78; Tr. 119:20 to 121:7. On Thursday, September 22, 2011, Gibson suggested that TRX management seek a buyer. Div. Ex. 79; Tr. 123:22 to 124:11.

23. On Friday, September 23, 2011, Gibson acknowledged to investors that the Fund had performed poorly and stated that management fees would be suspended beginning October 1, 2011. Div. Ex. 81. But in contrast to his statements to TRX management, Gibson told the

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[5] In early 2011 Gibson also made fundamental changes regarding Geier Group and Geier Capital. Geier Group: Gibson allowed Geier Group's registration as an investment adviser to lapse by January 2011. Div. Ex. 167; Tr. 93:17 to 94:3 and 94:19 to 95:10. The Fund's investors were never told that Geier Group was no longer a registered investment adviser. Tr. 94:4-7. Then in April 2011, Geier Group was dissolved. Div. Exs. 60, 64; Tr. 98:2 to 99:19. Gibson never told the Fund's investors that the entity designated in the offering documents as the investment adviser had been dissolved. Tr. 99:10-22. Geier Capital: Geier Capital, the Georgia entity identified in the offering documents as the managing member of the Fund, was dissolved on March 28, 2011, at Gibson's direction. Div. Exs. 49, 189 at ¶ 6; Tr. 95:19 to 96:25. Gibson never told the investors that the managing member of the Fund had been dissolved. Div. Ex. 63; Tr. 101:5 to 102:9. Gibson claims that Geier Capital was replaced by a Delaware entity also named Geier Capital. Div. Ex. 191 at 309:17 to 310:11. See note 13 infra.

investors that there was "tremendous fundamental value" in TRX and that he believed in the "reputation, character, and integrity" of TRX's Chairman, James Sinclair. Id. Gibson stated that he expected the TRX stock price to rise to "significantly higher levels" and assured investors that "[p]ersonally, I will not redeem my interest in Geier and TRX until the bull market matures over the coming years." Id.

Gibson's "Front-Running" On September 26, 2011

24. Nevertheless, after speaking with Hull over the weekend of September 24-25, 2011, Gibson decided to liquidate the Fund's entire TRX position. Tr. 130:4-21. Apart from Hull, none of the Fund's investors were told of this decision. Tr. 131:3-5 and 133:3-13. Gibson understood that the sale of a large block of TRX shares was likely to depress the market price of TRX shares. Div. Ex. 190 at 108:12-21.

25. Gibson had previously purchased TRX shares in his personal brokerage account and two other accounts he controlled, i.e., an account in the name of his then-girlfriend (Francesca Marzullo) and an account in the name of the defunct Geier Group. Tr. 135:22 to 139:6.

26. On Monday, September 26, 2011, Gibson sold all of the TRX shares in his personal brokerage account (2,000 shares). Div. Ex. 189 at ¶ 22, Div. Ex. 86 at 3. On the same day, he sold all the TRX shares in Marzullo's account (18,900 shares), Div. Ex. 189 at ¶ 23, Div. Ex. 87 at 2-3, and all the TRX shares in the Geier Group account (1,000 TRX shares), Div. Ex. 189 at ¶ 24, Div. Ex. 88 at 7. Gibson sold these 21,900 TRX shares for approximately $4.04 per share. Div. Ex. 184 at 8-10; Tr. 135:22 to 139:8. Gibson did not disclose his intention to sell, or the sales themselves. Div. Ex. 191 at 662:7 to 663:5, 665:23 to 666:15, 669:22 to 670:1, and 671:1 to 671:4.

27. The next day, September 27, 2011, Gibson sold approximately 3.7 million of the Fund's TRX shares, at an average price of $3.50 per share, Div. Ex. 184 at 8-10, and the market price of TRX shares fell 14%, id. at 8.

28. By trading ahead of his client based on his foreknowledge of the client's intended sale, Gibson was able to dispose of all the TRX shares in his personal account and two accounts he controlled at a price more than $0.50 per share higher than the price he obtained for the Fund the following day. Id. at 8-10.

Unfair Trade Allocation/Favoritism in October 2011

29. After September 27, 2011, Gibson continued to seek buyers for the Fund's approximately 5.9 million remaining TRX shares. Tr. 171:23 to 172:9, 173:19 to 175:1, and 179:8 to 180:3; Resp. Ex. 92 at 4; Resp. Ex. 94 at 3; Resp. Ex. 96 at 1; Resp. Ex. 104 at 1. Nevertheless, on October 18, 2011, Gibson agreed to use over $2.45 million in Fund assets to relieve Hull of all 680,636 TRX shares held by Hull, paying $3.60 per share. Div. Ex. 95; Tr. 181:18 to 182:10, 1013:12-23. This transaction enabled Hull to exit his personal TRX position at a favorable price, Div. Ex. 185 at 22-25; Tr. 1015:7 to 1017:9, Tr. 1021:17 to 1022:8, without paying a sales commission, Div. Ex. 185 at 24, Tr. 190:23 to 191:10.

30. When Gibson dumped all of the Fund's remaining TRX shares into the market approximately three weeks later, on November 10, 2011, the shares purchased from Hull were among those sold at an average price of $2.02. Div. Ex. 184 at 10-11. The Fund lost $1.58 per share, or $1,074,902, as a result of the October 2011 transaction with Hull. Div. Ex. 184 at 10-11. Additionally, the Fund paid $6,806 more in commissions than it would otherwise have incurred. Tr. 190:21 to 191:10; Div. Ex. 188 at 5, n.10.

31. When Gibson used Fund assets to purchase the Hull TRX shares, Hull's real estate business was paying Gibson a salary of approximately $148,000 per year for services to the Fund. Div. Ex. 128. At the same time, Gibson was providing personal investment advice to Hull and members of Hull's family. Div. Ex. 191 at 630:11 to 632:10; Tr. 563:16-20, 183:8-20; Div. Ex. 35; Resp. Ex. 46 at 3. The Fund's other investors were never told that Gibson was receiving a salary from Hull or that Gibson was Hull's personal investment adviser. Div. Ex. 191 at 439:6-15. Similarly, Gibson used Fund assets to purchase Hull's TRX shares without disclosing that transaction to the Fund's investors. Tr. 197:1 to 197:14; Div. Ex. 191 at 723:8 to 723:17.

Front Running In October and November 2011

32. In October and early November 2011, Gibson continued to try to liquidate the Fund's remaining TRX holdings. Resp. Ex. 115 at 1; Div. Ex. 98 at 1. Gibson also continued to privately disparage TRX and its management, telling TRX Chairman James Sinclair that he was "a crook" and that TRX was "broken." Div. Ex. 103.

33. On October 27, 2011, Gibson bought put option contracts on TRX with a strike price of $4 for his girlfriend's account. Tr. 200:1-21; Div. Ex. 102 at 2-3. On October 28 he bought $4 put options on TRX for his girlfriend's account and for his own account. Tr. 200:1-21; 202:16 to 203:3; Div. Ex. 99 at 3, Div. Ex. 102 at 2-3. On November 2 and November 8 he bought additional $4 put options on TRX for his own account. Div. Ex. 124 at 3. On November 9, Gibson told his father to buy $4 puts options on TRX, and his father did so the same day. Tr. 214:13 to 217:2; Div. Ex. 114 at 1; Div. Ex. 119.

34. The put options gave Gibson, his girlfriend, and his father the right to sell shares of TRX at $4 per share regardless of the market price. This meant that if the price of TRX shares fell below $4 by more than the cost of the options, Gibson, his girlfriend, and his father would

profit on their options. Div. Ex. 190 at 118:4 to 119:20; Div. Ex. 184 at 20-22. Through these option purchases, Gibson in effect "shorted" TRX. Div. Ex. 190 at 118:4 to 119:20; Tr. 202:18 to 204:10; Div. Ex. 190 at 127:21 to 128:3.

35. Early on November 10, 2011, Gibson told his broker that "we are going to potentially tank this stock." Div. Ex. 105 at 1. Gibson then dumped the Fund's remaining 4.9 million TRX shares into the market. Div. Ex. 189 at ¶ 28; Div. Ex. 190 at 108:12 to 109:15; Div. Ex. 122 at 16-26. The share price plummeted and at 9:52 AM the New York Stock Exchange suspended trading in TRX. Div. Ex. 184 at accompanying exhibit 12. At 10:00 AM, after the trading halt was lifted and with TRX's share price down to $2.02 (from $3.41 at the start of the day), Gibson sold all the $4 TRX options in his account. Div. Ex. 184 at 22-25 and accompanying exhibit 16; Div. 124 at 3. Two minutes later, he sold all of the TRX options in his girlfriend's account. Div. Ex. 184 at 22-25 and accompanying exhibit 16; Div. Ex. 123 at 14. At 11:40 AM, Gibson's father sold all of his TRX options. Div. Ex. 184 at 22-25 and accompanying exhibit 16; Div. Ex. 114 at 2. Although Gibson, his girlfriend, and his father paid an average of $0.31 to $0.52 for the $ 4 put option contracts, when the TRX share price fell, they were able to sell those options for an average price of between $1.76 and $1.90. Div. Ex. 184 at accompanying exhibit 17b.

36. By trading in front of his client Fund, Gibson generated a net profit (i.e., after reduction for the cost of the option contracts and commissions) of $81,008 in his own account, Div. Ex. 185 at 45; Div. Ex. 99 at 0001065; Div. Ex. 124 at 0001071, and a net profit of $251,879.81 in his girlfriend's account, Div. Ex. 185 at 45. By advising his father to purchase $4 put options, Gibson enabled his father to obtain a net profit of $41,823.06. Id. The total net profit to Gibson, his girlfriend, and his father from the sale of the $4 put option contracts on November

10, 2011, was $374,711.68. Id. In contrast, the Fund lost over $6 million on that day. Div. Ex. 185 at 26.

Gibson Continued As An Investment Adviser After November 10, 2011

37. Gibson continued to manage the Fund's investments until April 2013. Tr. 243:10 to 244:2, 245:23 to 246:10; Div. Exs. 128, 131, 139, 142, 143, 147, 148, 149, and 156.[6] In April 2013, Gibson sent letters to thirteen investors returning what remained of their investments. Div. Ex. 154. Investors who had been invested in the Fund from the outset lost approximately 82% of their initial investment. Tr. 576:23 to 577:3.

Gibson's Subsequent Positions

38. Gibson was employed at Nova Capital Markets in 2013. Div. Ex. 190 at 39:8-12. From January 2014 through at least the date of the hearing in September 2016, Gibson was the managing director of Weiji Capital, a firm he founded to provide merger and acquisition consulting internationally. Div. Ex. 190 at 39:13 to 41:12.[7]

THE INITIAL DECISION

The hearing in this matter was held on September 12-16, 2016. Eleven witnesses testified and approximately 320 exhibits were admitted into evidence. Gibson testified for more than eleven hours and his testimony makes up more than 500 pages of the 1,182-page hearing

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[6] On December 23, 2011, Gibson dissolved Geier Capital, the Delaware entity he testified was the Fund's managing member during the last half of 2011. Div. Ex. 127; Div. Ex. 191 at 535:19 to 536:15. That dissolution was not disclosed to investors, Div. Ex. 191 at 545:4-7, and Gibson continued to exercise discretionary control over investors' funds and otherwise act as an investment adviser. Tr. 243:10 to 244:22 and 245:23 to 246:24.

[7] The factual record is described in greater detail in the Division's post-hearing proposed findings of fact. See Division of Enforcement's Proposed Findings of Fact and Conclusions of Law ("Div. Findings"), filed October 24, 2016, at 1-38. See also Division of Enforcement's Post-Hearing Brief ("Div. Post-Hearing Br."), filed October 24, 2016, at 5-15.

transcript. Having heard Gibson's version of events at great length, ALJ Murray found him to utterly lack credibility. The Initial Decision includes the following descriptions of Gibson's testimony: "did not give credible testimony," Initial Dec. at *25, "unpersuasive," id.; "unbelievable," id. ; "makes little sense and . . . has no support in the record," id.; "highly questionable," id. at *26; "lack of candor," id.; ""unsupported," id. at *29; and "not credible," id. at *33, n. 47.[8]

Based on the hearing record, ALJ Murray determined that Gibson was an investment adviser to the Fund, Initial Dec. at *20-22, that he knowingly created and exploited undisclosed conflicts of interest with the Fund to obtain financial benefits for himself and those close to him, id. at *24-25, *29-36, and that he made numerous materially false or misleading statements and omissions to the Fund's investors, id. at *27-29, *32-34. ALJ Murray concluded that Gibson's misconduct was undertaken "with scienter and knowingly," id. at 31, 34, in violation of Sections 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8, as well as Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c), id. at *31, 34, 36. The Initial Decision ordered Gibson to cease and desist from further violations, imposed an industry bar, ordered

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[8] The Commission has given great weight to the credibility determinations of its administrative law judges. See, e.g., Robert Thomas Clawson, SEC Release No. 48143, 2003 WL 21539920 at *2 (July 9, 2003) ("We accept a fact finder's credibility finding, absent overwhelming evidence to the contrary"), aff'd 2005 WL 2174637 (9th Cir. Sept. 8, 2005); C. James Padgett, SEC Release No. 38423 (March 20, 1997), 1997 WL 126716 at *16 n. 65 ("The credibility determination of the initial decision maker is entitled to considerable weight since it is based on hearing the witnesses' testimony and observing their demeanor"), aff'd sub nom Sullivan v. SEC, 159 F.3d 637 (D.C. Cir. 1998). Indeed, Gibson's counsel argued that his client's live testimony would provide the most appropriate basis on which to judge his credibility and would provide the "best evidence:" "He's here. He's present. Ready to testify. Your Honor can see him. Your Honor can observe him. Make credibility determinations. This is the best evidence." Tr. 9:3-6.

disgorgement of $82,088 plus prejudgment interest, and imposed a civil penalty of $210,000. Id. at *36-42.

ARGUMENT

I. Gibson Violated Sections 206(1) and (2) Of The Advisers Act

Section 206(1) of the Advisers Act makes it unlawful for an investment adviser "to employ a device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Section 206(2) makes it unlawful for an investment adviser to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2). While scienter is required to establish a violation of Section 206(1), negligence is sufficient for a Section 206(2) violation. SEC v. Seghers, 298 Fed. App'x 319, 328 (5th Cir. 2008); SEC v. Washington Inv. Network, 475 F.3d 392, 396-7 (D.C. Cir. 2007); Steadman v. SEC, 967 F.2d 636, 641 n.3, 643 n.5 (D.C. Cir. 1992).

A. Gibson Was An Investment Adviser Subject To Section 206

The term "investment adviser" includes, inter alia, any person not exempted by statute[9] who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11). Anyone whose activities fall within this broad definition is an investment adviser subject to primary liability under Section 206. Dennis Malouf, SEC Release No. 4463, 2016 WL 4035575 (July 27, 2016) at *13. An individual who manages the money of others for compensation is an investment adviser. Goldstein v. SEC, 451 F.3d 873, 876 (D.C. Cir. 2006); Abrahamson v. Fleschner, 568 F.2d 862, 869-70 (2d Cir. 1977).

[9] None of the exemptions in 15 U.S.C. § 80b-2(a)(11) are applicable to Gibson.

1. Investors Were Told That Gibson Would Manage The Fund's Investments And Gibson Did So

ALJ Murray concluded that "[t]he evidence is overwhelming . . . that, in fact, he [Gibson] was the Fund's investment adviser." Initial Dec. at *20. The offering memorandum stated that Gibson was the Managing Director of Geier Capital, which was responsible for managing the Fund, Div. Ex. 24 (Summary at 1), and he was also the managing member of Geier Group, the Fund's "Investment Manager," id. The offering memorandum also stated that the Fund's success depended on Gibson's performance: "The success of the Company is significantly dependent upon the expertise and efforts of Chris Gibson." Id. at 17.[10] Investors understood that Gibson was providing investment advice to the Fund.[11]

Most important, Gibson actually functioned on a day-to-day basis as an investment adviser to the Fund. Gibson held discretionary control of the Fund's assets, determined the Fund's investment strategy (in consultation with Hull), directed the Fund's trading on a daily basis, selected the Fund's brokers, opened brokerage accounts in the Fund's name, transferred the Fund's holdings among brokers and financial institutions, tracked the performance of the Fund's investments, communicated with investors regarding the Fund's performance, and provided market analysis and projections to the Fund's investors. See The Evidentiary Record, supra, at ¶¶ 10-16. See also Tr. 105:7-107:9; Div. Findings at ¶¶ 48-68.[12]

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[10] In contrast, the offering memorandum made no reference to Hull or Gibson's father, the only other members of Geier Group and Geier Capital. Div. Ex. 190 at 187:17-21.

[11] For example, investors Mason McKnight IV and Matthew McKnight testified that they invested in the Fund on the understanding that Gibson would be making the investment decisions. Tr. at 413:22 to 414:10 and 484:16 to 485:4.

[12] Gibson has at times claimed that Hull was an investment adviser to the Fund because, as the largest investor, he was able to set broad strategic guidelines. However, if an individual or entity provides investment advice for compensation, that individual is an investment adviser regardless

2. Gibson Was An Investment Adviser Even If He Acted In The Name Of Geier Capital

Although Gibson admits that he was the Fund's investment manager, Tr. 81:8-10, and that he provided advisory services to the Fund, Tr. 81:15-17, Tr. 105:7 to 107:9, he contends that he was not an investment adviser because he was acting in the name of a legal entity, Geier Capital.[13] Gibson Br. at 15-20. In essence, Gibson denies that an individual providing investment advice on behalf of an advisory firm is an investment adviser subject Section 206. According to Gibson, such an individual is only a "person associated with an investment adviser" or a "supervised person,"[14] and is beyond the reach of Section 206. Id. at 17-18.

Gibson's argument ignores both the statutory language and Commission precedent. As noted, pursuant to Section 202(a)(11) of the Adviser's Act, "any person" who provides

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of whether another individual or entity also provides advisory services to the same client. See e.g., Abrahamson v. Fleschner, 568 F.2d at 869-70 (three general partners who managed the fund's investments were investment advisers); SEC v. Bolla, 401 F.Supp. 2d 43, 61 (D.D.C. 2005) ("each client [of the advisory firm]. . . had three or four investment advisers"); Alan Gavornik, SEC Rel. No. 3972, 2014 WL 6617088 at * 7 (Nov. 24, 2014) (three principals of advisory firm were investment advisers; settled matter). Gibson was an investment adviser regardless of whether Hull also provided investment advice or is deemed to have been an investment adviser.

[13] Gibson testified that by at least April 2011, a Delaware entity named Geier Capital had been "substituted in" as the managing member of the Fund, in place of the Georgia entity also named Geier Capital, and that the Delaware entity thereafter provided investment advisory services to the Fund. Tr. 103:1-12. See note 5 supra. The ownership of the Delaware entity was identical to the ownership of the dissolved Georgia entity, i.e., Gibson was the 50% owner and Managing Member of the Delaware entity, while Hull owned 35% and Gibson's father owned 15%. Tr. 103:1-7; Div. Ex. 191 at 490:5 to 491:11. The Delaware entity, like its predecessor, had no employees and Gibson testified that he provided investment advisory services to the Fund after April 2011 just as he did before that time. Tr. 105:7-16.

[14] The term "person associated with an investment adviser" includes, inter alia, any partner, officer, director, or employee of an investment adviser, other than employees with solely clerical or ministerial functions. See Advisers Act Section 202(a)(17). The term "supervised person" includes, inter alia, any partner, officer, director, or employee of an investment adviser, as well as persons who provide investment advice on behalf of, and are subject to the supervision and control of, the adviser. See Advisers Act Section 202(a)(25).

investment advice for compensation (and is not within a statutory exception) is an investment adviser. The fact that the advisory services are provided in the name of a partnership, limited liability company, or other legal entity does not shelter the individual adviser from Section 206 liability. See, e.g., SEC v. The Nutmeg Group, 162 F. Supp.3d 754, 772 (N.D. Ill. 2016) (both entity and individual acting on its behalf violated Section 206); SEC v. Nadel, 97 F. Supp.3d 117, 119-20, 126 (E.D.N.Y. 2015) (same); SEC v. Haligiannis, 470 F. Supp.2d 373, 378-79, 383 (S.D.N.Y. 2007) (same).[15] Thus, ALJ Murray correctly concluded that for purposes of Section 206, "a person can be both an investment adviser and a person associated with an investment adviser."[16] Initial Dec. at *22.[17]

Gibson begrudgingly acknowledges that the Commission has held that individuals providing investment advice on behalf of an advisory firm were subject to Section 206, Gibson. Br. at 18, but claims that nevertheless he was not an investment adviser because he did not "control" Geier Capital. Id. at 18-20. However, whether an individual is subject to Section 206 turns on the

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[15] See also Investment Adviser Regulation Office, Division of Investment Management, SEC, Regulation of Investment Advisers by the U.S. Securities and Exchange Commission (March 2013) at 17 ("individuals who are employed by advisers fall within the definition of 'investment adviser'"), available at www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.

[16] Gibson conflates the obligation to register as an investment adviser with the obligation to comply with Section 206. All investment advisers, whether individuals or entities and whether or not required to register, are subject to Section 206. Koch v SEC, 793 F.3d 147, 157 (D.C. Cir. 2015).

[17] If Gibson's "entity only" argument were adopted, even the principals of advisory firms would not be subject to the antifraud provisions in Section 206 because they are also "persons associated with an investment adviser" and "supervised persons." The Commission has frequently found such individuals to have primary liability under Section 206. See, e.g., Dennis Malouf, 2016 WL 4035575 at *18; ZPR Investment Management, Inc., SEC Release No. 4249, 2015 WL 6575683 at *25 (Oct. 30, 2015); John J. Kenny, SEC Release No. 8234, 2003 WL 21078085, at *17 n.54 (May 14, 2003)("An associated person may be charged as a primary violator under Section 206 where the activities of the associated person cause him or her to meet the broad definition of "investment adviser").

functions the individual performs, not on whether the individual controls the advisory firm. See, e.g., Nutmeg Group, 162 F. Supp.3d 754 at 772 (Section 206 encompasses "anyone who manages the funds of others for compensation *or* controls an investment advisory firm") (emphasis added); United States v. Jensen, 573 Fed. App'x 863, 877 (11th Cir. 2014) (officer of large advisory firm was subject to Section 206 because she managed investor's funds; no finding of control of entity); United States v. Elliot, 62 F.3d 1304, 1306-11 (11th Cir. 1995) (officer with no ownership interest in advisory entities violated Section 206; no finding of control of entities).[18]

Further, Gibson's "control" argument is factually wrong because Gibson did control Geier Capital. Because Gibson was the 50% owner and Managing Director of Geier Capital, while his father owned another 15% of the firm, the Gibsons' joint interest substantially outweighed Hull's 35% interest. See The Evidentiary Record, supra, at ¶¶ 3, 4, 7, 13. Only Gibson controlled the Fund's assets on a day-to-day basis, regularly made trading decisions, implemented the Fund's trading decisions, or signed filings on behalf of the Geier Capital with the SEC. Id. at ¶¶ 10-16. While Hull's large investment in the Fund and his loans to Gibson may have given Hull considerable influence, it did not diminish Gibson's control over the only activity in which Geier Capital ever engaged, i.e., managing the Fund and its investments.[19]

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[18] The Commission has also concluded in settled matters that officers or employees of advisory firms were subject to Section 206 even though they did not control the firm. See, e.g., Sanford Michael Katz, SEC Release No. 4679, 2017 WL 1311651 at *2, 5 (April 4, 2007) (investment adviser representative at Credit Suisse); Sylvester King, Jr., SEC Release No. 4648 2017 WL 549107 at *2,4 (Feb. 10, 2017) (investment adviser representative at Morgan Stanley and Wells Fargo; partial settlement); Ronald Speaker, SEC Release No. 1605, 1997 WL 9871 at *1-2 (Jan. 13, 1997) (portfolio manager at large advisory firm).

[19] Gibson attacks a straw man in arguing that not every person associated with an investment advisory firm is an investment adviser. Gibson Br. at 22. The Division does not contend that an

3. Gibson Was An Investment Adviser After Suspending Management Fees Beginning October 1, 2011

The compensation element of the investment adviser definition "is satisfied by the receipt of any economic benefit, whether in the form of an advisory fee or some other fee relating to the total services rendered . . . ." Investment Advisers Act Release No. 1092 (October 16, 1987), 52 Fed. Reg. 38400, 38402. The adviser's compensation need not be "specifically earmarked as payment for investment advice." United States v. Everett Miller, 833 F.3d 274, 282 (3d Cir. 2016).

ALJ Murray concluded that "the evidence is . . . overwhelming that Gibson received compensation for advising the Fund." Initial Dec. at *21. In 2010, Gibson received more than $111,000 in management fees, Div. Ex. 191 at 403:1-20, and over $1.5 million in incentive fees, Tr. 84:3 to 85:8, as well as bi-weekly salary payments, Div. Ex. 43; Div. Ex. 191 at 421-22.

From January through September 30, 2011, Gibson received approximately $147,502 in management fees. Div. Ex. 191 at 461:12 to 462:12. Throughout all of 2011, Gibson continued to receive a salary of approximately $148,700 per year. Div. Ex. 128.[20]

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employee who does not provide advice, make investment decisions, or otherwise provide advisory services is within the scope of Section 206. However, all persons who do provide advisory services are subject to Section 206. The Lisa B. Primo matter cited by Gibson, Gibson Br. at 18, supports the Division's position, i.e., in that matter ALJ Murray found that a non-controlling employee of an advisory firm "might reasonably be considered an investment adviser." See Lisa B. Primo, Initial Decision Release No. 476, 2012 WL 6705813 at * 19 (Dec. 26, 2012). ALJ Murray found that Primo was not liable for the specific misconduct at issue there because she was not involved in the communications at issue. Id. In contrast, ALJ Murray found that not only was Gibson an investment adviser to the Fund, but that, unlike Primo, his own conduct resulted in the violations.

[20] Gibson testified that in 2011 the vast majority of his time and effort related to Fund matters, not Hull's real estate business, and that the salary Gibson received (paid by Hull's business through Insperity PEO Services, see Div. Ex. 128) was largely or exclusively for advisory services to the Fund. Tr. 733:9-21; Div. Ex. 191 at 426:2-16.

Gibson's only argument regarding compensation is the assertion that because collection of the management fee was suspended effective October 1, 2011, the Fund had no investment adviser after that date. Gibson Br. at 16 n.17. That argument completely ignores the salary of approximately $148,000 Gibson was receiving throughout 2011 (and beyond) for providing investment advisory services to the Fund. Moreover, the suspension of the 1% management fee was voluntary, and Gibson could have resumed collecting that fee at any time. Additionally, Gibson never suspended or revoked his right to receive the 10% incentive fee if earned by performance. Such a right to compensation if ultimately earned by performance satisfies the compensation element. See SEC v. Fife, 311 F.3d 1, 10-11 (1st Cir. 2002) (defendant found to be an investment adviser where "he understood that he would be compensated . . . based on a percentage of the profits from the investments, if successful"). See also Div. Ex. 188 at 8 ("as . . . understood in the investment advisory industry, the potential to earn a fee, and the client's obligation to pay it, when earned, determines if an investment adviser is being compensated").

Thus, ALJ Murray was correct in concluding that Gibson was an investment adviser to the Fund within the scope of Section 206 throughout relevant period.

B. As An Investment Adviser, Gibson Was Subject To Federal Fiduciary Duties And Prohibitions Under Sections 206(1) and (2)

1. Sections 206(1) And (2) Impose Fiduciary Duties And Prohibit Fraudulent Conduct

Sections 206(1) and (2) impose "federal fiduciary standards," Transamerica Mortgage Advisers, Inc., 444 U.S. 11, 17 (1979), including affirmative obligations to exercise "utmost good faith," make "full and fair disclosure of all material facts," and "employ reasonable care to avoid misleading clients," SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 200-01 (1963). See also SEC v. DiBella, No. 04-CV-1342, 2007 WL 2904211, at *12 (D. Conn. Oct. 3,

2007), aff'd, 587 F.3d 553 (2d Cir. 2009); SEC v. Moran, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996).

An investment adviser must disclose "all conflicts of interest which might incline . . . [the adviser] . . . to render advice which was not disinterested." Capital Gains, 375 U.S. at 191. See also Vernazza v. SEC, 327 F.3d 851, 859 (9th Cir. 2003) ("potential conflicts of interest are 'material' facts"); The Robare Group, Ltd., SEC Release No. 4566, 2016 WL 6596009 at *5 (November 7, 2016) (fiduciary duty to make full disclosure of all conflicts of interest).

2. Gibson's Obligations Under Section 206 Were Not Nullified By The Fund's Offering Documents

Gibson contends that whatever his obligations under Section 206 might otherwise have been, they were eliminated by the Fund's offering documents. Gibson Br. at 22-24. Most fundamentally, Gibson argues that the offering documents "did abrogate . . . [his] obligation to put the Fund before Respondent's personal benefit," id. at 24, and overrode the investors' "right to fair treatment," id. ALJ Murray soundly rejected that argument, concluding that the Fund's offering documents "did not abrogate" Gibson's duty to put the interests of the Fund before his own interests, Initial Dec. at *30, and did not extinguish the investors' "right to fair treatment," id.

ALJ Murray was correct in concluding that the offering documents did not eliminate Gibson's Section 206 obligations, including the obligation to disclose material conflicts of interest. Indeed, the relevant provisions in the offering documents did not even purport to reduce or eliminate Gibson's obligations as an investment adviser, much less free him from the prohibitions of Section 206. The offering memorandum disclosed no more than that Gibson could conduct other businesses, make other investments, and give advice or take action that differed from his advice to or action on behalf of the Fund. Div. Ex. 24 at 19. The only

reference to a "conflict of interest" was the statement that Gibson and affiliated persons "may have conflicts of interest" in allocating their time, activity, and investments, and in effecting transactions. Id.[21] Nothing in these provisions stated or implied that Gibson could engage in undisclosed front running or otherwise violate his obligations under Section 206. Gibson himself testified that the offering documents did not waive his fiduciary duties or permit trading based on foreknowledge of the Fund's anticipated transactions. Tr. 760:6-18.

In short, even if Gibson's obligations under Section 206 could have been waived by private agreement (which is not the case[22]), the waiver language that Gibson claims to find in the offering documents is simply not there.

3. The Offering Documents Did Not Disclose The Conflicts Of Interest Gibson Created And Exploited

Gibson also argues that even if his fiduciary duties were not eliminated by the Fund's offering documents, his obligation to disclose conflicts was satisfied by those documents. Gibson Br. at 22-23. In essence, Gibson claims that the vague reference in the January 2010 offering memorandum to potential conflicts gave him free rein to create and exploit actual conflicts eighteen months later, without further notice and regardless of the nature, extent, or financial impact of the actual conflicts.[23]

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[21] The "Management of the Company" provision in the operating agreement contained comparable language. See Div. Ex. 21 at Section 3.01.

[22] Section 215 of the Advisers Act provides that any contract provision purporting to waive an adviser's obligations under the Act is void. Gibson's waiver argument is particularly untenable as a defense to an enforcement action by the Commission, which, of course, was not a party to the Fund's offering documents. Regardless of what those documents stated, the Commission could not be precluded from enforcing Section 206.

[23] Because front running by an investment adviser is unethical and damaging to the securities markets, see Div. Post-Hearing Br. at 46-47, it is unlikely that Gibson could have lawfully engaged in front running even if his intention to do so had been fully disclosed. However, the Commission

ALJ Murray concluded that Gibson's front running and favoritism were not adequately disclosed in the Fund's offering documents. Initial Dec. at *29, 33-34. As noted, the offering documents stated only that Gibson and affiliated parties "may have conflicts of interest" with the Fund. Div. Ex. 24 at 19 (third paragraph). No specifics were provided. Most important, there was no reference to the possibility that Gibson might use his foreknowledge of the Fund's anticipated trading to front run the Fund[24] or that he might use Fund assets to buy shares from Hull at an above-market price when the Fund was seeking to rid itself of similar shares. As a result, the offering documents failed to satisfy Gibson's obligation to disclose potential conflicts. See, e.g., Robare, 2016 WL 6596009 at *6 ("boilerplate" disclosures noting possible third-party payments to adviser did not sufficiently alert investors to potential conflict).

Gibson was also obligated to make full disclosure of any actual conflicts at the time those conflicts arose. See Div. 185 at 19-20. But it is undisputed that Gibson failed to inform investors when the actual conflicts at issue here emerged in September, October, and November 2011. As a result, Fund investors did not know in late 2011 that Gibson was trading for his own account based on an undisclosed plan to liquidate the Fund's only investment, and did not know that he was using Fund assets to benefit Hull. Tr. 418:17 to 419:15; 488:9-489:3.[25]

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need not reach that question because Gibson's front running was never disclosed. See Division of Enforcement's Post-Hearing Reply Brief ("Div. Post-Hearing Reply Br.") at 13-14.

[24] As noted, Gibson admitted during the hearing that even he did not understand the Fund's offering documents to indicate that he might trade for his own account based on his knowledge of the Fund's anticipated trading: "No. You're not - no, it does not allow someone to use foreknowledge in order to benefit themselves." Tr. at 765:18 to 766:7; see also Tr. 760:6-18.

[25] Gibson has not argued that his disclosure obligations were satisfied because he was an agent of the Fund and was aware of his own misconduct. An agent's knowledge is not attributable to the principal when the agent is acting contrary to the interests of the principal ("adverse interest exception"). See DiBella, 587 F.3d at 562-63, 566; Bank of China v. NBM LLC, 359 F.3d 171, 179 (2d Cir. 2004); Lincoln National Life Insur. Co. v. Snyder, 722 F. Supp. 2d 546, 555-56 (D.

C. Gibson Engaged In "Front Running" On September 26, 2011

ALJ Murray determined that Gibson violated Sections 206(1) and (2) of the Advisers Act by engaging in undisclosed front running on September 26, 2011. Initial Dec. at 24-31. Gibson challenges this finding on the grounds that (i) front running is not sufficiently defined, (ii) ALJ Murray erred in evaluating whether he knew the Fund intended to sell TRX shares, and (iii) information regarding the Fund's intention to sell TRX shares was not material. Gibson Br. at 24-30. Each of these arguments is without merit.

1. Trading Based On Knowledge Of A Client's Intention To Trade Constitutes "Front Running"

"Front running" refers to "using advance knowledge of impending client action to secure advantage."[26] The distinguishing feature of front running is the use, with the expectation of personal gain, of material, non-public information concerning an anticipated transaction likely to impact the value of a security.[27] See SEC v. Yang, 999 F. Supp. 2d 1007, 1016 (N.D. Ill. 2013) (describing front running as an attempt by an adviser "to profit personally by secretly authorizing personal trades in anticipation of much larger trades he knew that he would be authorizing"). Front running creates a conflict of interest between the adviser and the client, undermines the integrity of the market, and is recognized as a violation of fiduciary duties and Section 206 of the Advisers Act. Capital Gains, 375 U.S. at 196-97, 201 (1963);[28] Yang, 999 F. Supp. 2d at 1016;[29] SEC v.

Del. 2010); Restatement (Second) of Agency § 282(1). Thus, Gibson's disclosure obligations could only have been satisfied by disclosure to the Fund's investors.

[26] Harvey E. Bines and Steve Thel, Investment Management Law and Regulation 807 (2nd ed. 2006).

[27] Margaret E. Beare, Encyclopedia of Transnational Crime and Justice 147 (2012).

[28] In Capital Gains the adviser violated his fiduciary duties by "scalping," i.e., selling stocks from his personal account after pushing the price up by recommending those stocks to his clients.

Bergin, No. 3:13-CV-1940-M, 2015 WL 4275509 at *6 (N.D. Tex. July 15, 2015).[30] The elements of front running have long been identified not only by scholars, the courts, and industry authorities,[31] but also by the Commission.[32] ALJ Murray was correct in concluding that "a fiduciary's non-disclosed use of material, non-public information about a client to conduct transactions ahead of the client's transactions to secure a personal advantage, for himself or a close friend or relative," constitutes front running. Initial Dec. at *24.

Thus, front running has long been recognized to be a prohibited practice and Gibson had abundant notice before September 2011 that trading for his own account based on his knowledge of the Fund's intended trades was unlawful.[33]

"Scalping" and front running are variations on the same fraudulent practice of trading by an adviser based on the anticipated impact of the trades he is recommending to his clients. Div. Ex. 185 at 21, n.37.

[29] The defendant investment adviser in Yang was found liable for front running, SEC v. Yang, No. 12-C-2473, 2014 WL 2198323 at *1 (N.D. Ill. May 27, 2014), and that judgment was affirmed, SEC v. Yang, 795 F.3d 674, 677 (7th Cir. 2015) (describing front running as "a practice that involves trading for one's personal gain in advance of trades for one's client").

[30] Like Gibson, the defendant investment adviser in SEC v. Bergin "was privy to material, non-public information regarding the size and timing of securities trades [his firm] intended to make for its clients" and breached his duties to his firm and its clients by "using [the firm's] confidential trading information to trade on and ahead of . . . client trades." 2015 WL 4275509 at *1.

[31] See Expert Report of Dr. Gary Gibbons, Div. Ex. 185 at 21 (discussing the understanding in the investment advisory community that front running is a violation of an adviser's fiduciary duties, a "pernicious form of insider trading," and "a personal trading abuse)."

[32] See SEC Release No. 15743, 1998 LEXIS 946 (May 18, 1998), which describes an SEC action against brokers who engaged in front running, SEC v. The Oakford Corp., No. 98 Civ. 1366 (S.D.N.Y. 1998). The SEC release stated that a broker "could receive a large customer order and, before executing the customer order, purchase or sell shares of the same security for his own account, thereby benefiting from the price movement that follows execution of the customer's order. This practice is commonly known as frontrunning."

[33] See Div. Ex. 185 at 22 n.40 (the code of ethics issued by Gibson's prior employer, Deutsche Bank, expressly prohibited "frontrunning"). Gibson testified that he understood the nature of front

2. Gibson Knew On September 26, 2011, That The Fund Planned To Sell A Large Block Of TRX Shares

ALJ Murray concluded 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," Initial Dec. at *25. Gibson argues that it was somehow improper for ALJ Murray to evaluate his his credibility when reaching this conclusion. Gibson Br. at 25-27. But Gibson's defense to the front running allegations "rest[ed] primarily on the position that he did not know of a certain and imminent sale of the Fund's TRX shares". Initial Dec. at *25. As a result, it was necessary for the ALJ to determine whether Gibson's assertion of ignorance was credible.

Similarly, other arguments advanced by Gibson (e.g., that he sold his personal TRX shares because he needed cash, that he thought the Fund could sell a large block of TRX shares without depressing the share price, and that he believed in TRX and its management) required that ALJ Murray evaluate not only the documentary record, but also the credibility of Gibson's testimony regarding his knowledge and motivation in late 2011. On these issues too, ALJ Murray found that Gibson "did not give credible testimony." Id. at *25.

Gibson has failed to show that ALJ Murray erred in evaluating his credibility, or in concluding that he sold TRX shares on September 26, 2011, knowing that the Fund would soon make a large sale likely to depress the price of TRX shares. Initial Dec. at *25-30

3. Information Regarding The Fund's Intention To Sell Its TRX Shares Was Material Information

Gibson also contends that his knowledge of the Fund's intention to sell a large block of TRX shares was not material because the exact volume, price, and timing of the sale had not yet

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running. See Div. Ex. 191 at 330:9-15. Indeed, in April 2011 he instructed the Fund's broker not to disclose a potential trade, stating that "I do not want anyone to know and possibly front run us." Div. Ex. 68.

been established. Gibson Br. at 27-29. However, Gibson offers no legal or factual support for his extremely narrow view of materiality.[34] Whether information is material depends on "the significance the reasonable investor would place on the withheld or misrepresented information." Basic v. Levinson, 485 U.S. 224, 240 (1988) (rejecting argument that information regarding a potential acquisition could be material only after agreement had been reached on the key terms of the transaction). See also United States v. Mylett, 97 F.3d 663, 667 (2nd Cir. 1996) (information regarding anticipated but still uncertain corporate transaction was material); Holmes v. Bateson, 583 F.2d 542, 558 (1st Cir.1978) (information regarding negotiations was material although parties had not discussed precise terms). A reasonable investor would certainly consider it important that the manager of a $70 million fund had decided to liquidate the fund's only holding, even if the exact timing and terms of the liquidation were not yet determined.[35] Thus, ALJ Murray was correct in rejecting Gibson's cramped interpretation of materiality ("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").[36] Initial Dec. at 29. The Initial

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[34] The only expert called by Gibson with regard to front running (Dr. Overdahl) admitted that front running could include trading based on "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." Tr. 1000:8 to 1001:2. See also Div. Ex. 188 at 2-3.

[35] The Division's investment advisory expert (Dr. Gibbons) testified that it is widely understood in the advisory community that knowledge of the client's intention to trade, rather than knowledge of the exact terms of the proposed transaction, is sufficient to bar the adviser from trading for his personal account. Div. 185 at 21-22. See also SEC v. Bergin, 2015 WL 4275509 at *1 (imposing sanctions for front running based on knowledge of trades the firm "intended to make").

[36] Although the Fund's sale need not have been imminent in order for Gibson's inside information to be material, the sale was in fact very imminent -- it was being negotiated when Gibson sold his personal shares on September 26, 2011, and was consummated the next day, September 27, 2011. Additionally, Gibson "believed that the Fund's sale of a substantial portion of its TRX shares was imminent." Initial Dec. at *29.

Decision correctly holds that the Fund's intention to liquidate its TRX holdings was material, non-public information and that Gibson's intention to engage in personal trading based on that information should have been fully disclosed. Id.[37]

4. Gibson Acted With Scienter In Front Running The Fund

Scienter is a mental state embracing intent to deceive, manipulate, or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). Scienter can be established by showing recklessness, i.e., conduct that is "highly unreasonable and which represents an extreme departure from the standards of ordinary care." Novak v. Kasaks, 2016 F.3d 300, 308 (2d Cir. 2000). "[T]he standard of care to which an investment adviser must adhere imposes 'an affirmative duty of utmost good faith, . . . as well as an affirmative obligation to employ reasonable care to avoid misleading his clients." SEC v. Blavin, 760 F.2d 706, 711-12 (6th Cir. 1985). Investment advisers act at least recklessly when they fail to disclose material information to their clients. Id. at 712.[38]

ALJ Murray found that that Gibson "acted with scienter and knowingly" when he engaged in front running on September 26, 2011. Initial Dec. at *31. Gibson does not address that finding,

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[37] Gibson also asserts that his knowledge of the Fund's intention to sell a large block of TRX shares was not "non-public" information because he had informed a broker (Casimir) that the Fund was seeking to sell its TRX shares. Gibson Br. 34. However, disclosure of that information to Casimir did not make the information public, and there is no evidence that Casimir disclosed to anyone that the Fund (rather than another person or entity) was seeking to sell TRX shares.

[38] Liability under Section 206(2) can also be based on negligence, which is "'the failure to exercise reasonable care or competence.'" Robare, 2016 WL 6596009 at *5 n.9 and *9; see also Capital Gains, 375 U.S. at 195; Seghers, 298 Fed. App'x at 328.

other than to repeat the argument (addressed above) that information regarding the Fund's anticipated sale of its TRX shares was not material, non-public information. Gibson Br. at 35-36.[39]

In sum, Gibson has failed to identify any error in ALJ Murray's determination that he engaged in front running on September 26, 2011, in violation of Sections 206(1) and (2) of the Advisers Act.

D. Gibson Favored Hull Over The Fund By Using Fund Assets To Purchase Hull's TRX Shares In October 2011

ALJ Murray determined that Gibson violated Sections 206(1) and (2) of the Advisers Act also by arranging for the Fund to purchase all of Hull's TRX shares on October 18, 2011, for $2.45 million in a transaction ("Hull Buyout") never disclosed to the Fund's investors. Initial Dec. at *34-36. Gibson challenges that finding on four grounds, none of them valid.

First, Gibson claims that the Initial Decision addressed the wrong provision in the Fund's offering documents. Gibson Br. at 30-32. ALJ Murray determined that the Hull Buyout was governed by the third paragraph of the "Conflicts of Interest" provision in the Fund's offering memorandum, which addressed transactions between the Fund and entities or accounts in which persons affiliated with the Fund (such as Hull) had an interest. Initial Dec. at *35. That provision stated, inter alia, that such transactions could be effected "at the current market price of

[39] Gibson has not claimed that he consulted with or relied on counsel in connection with his decisions to front run the Fund in late 2011. Initial Dec. at *31. Throughout the investigation and hearing, Gibson asserted the attorney-client privilege and refused to respond to questions, or provide documents, relating to communications with counsel. Consequently, Gibson could not argue that he relied on the advice of counsel. (At one point during the hearing Gibson referred to communications with counsel and those portions of his testimony were stricken by agreement of the parties. See Tr. at 228:14-22; 480:18 to 481:14. The portions of the amended hearing transcript that were stricken, and therefore must be disregarded, are Tr. 57:5-8 and 58:7 to 60:9. See Initial Dec. at *43 n.1. See also Div. Ex. 192 (stipulation, referring to page and line numbers from the unamended transcript).

the particular securities" if there were "no extraordinary brokerage commission or fees." Div. Ex. 24 at 19 (third paragraph of Conflicts Of Interest provision). ALJ Murray found that the Hull Buyout violated this provision because the Fund paid Hull more than the "current market price" and ultimately incurred a brokerage commission it would not otherwise have incurred. Initial Dec. at *35-36.

Gibson now argues that the applicable provision was Section 3.02(h) of the Fund's operating agreement, Div. Ex. 21 at 2, a general provision indicating that the managing member of the Fund could "enter into . . . contracts, agreements, or other undertakings it may deem advisable in conducting the business of the Company." Gibson Br. at 30, 32. However, Gibson fails to show that the general language of Section 3.02(h) of the operating agreement was understood at the time, or should be understood now, to supersede the more targeted and restrictive provision in the offering memorandum. See In re G-I Holdings, Inc., 755 F.3d 195, 205 (3rd Cir. 2014) ("specific provisions in a contract trump the general provisions"); Puerto Rico Telephone Co., Inc. v. SprintCom, Inc., 662 F.3d 74, 96 (1st Cir. 2011) ("It is a well-known precept for the interpretation of contracts that specific provisions in a contract trump the general provisions"); Banca Cremi, S.A. v. Alex Brown & Sons, Inc. 132 F.3d 1017, 1031 (4th Cir. 1997) ("general statement creates less justifiable reliance than would a specific statement"). Further, Gibson's argument based on the general language of Section 3.02(h) is ultimately no more than another version of his baseless claim, discussed above, that his fiduciary duties and other obligations under Section 206 were nullified by broad language in the offering documents.

Second, Gibson argues that the relevant provision in the offering memorandum was merely a "guideline." Gibson Br. at 32. Although the word "guideline" appears in that provision, it is followed by two clauses using the imperative "shall," i.e., transactions between

the Fund and affiliates "shall be effected . . . at the current market price" and "no extraordinary brokerage commissions . . . shall be paid." See Div. Ex. 24 at 19. Consequently, the offering memorandum indicated to investors that compliance with the "market price" and "no extraordinary commission" restrictions was mandatory.

Third, Gibson argues that even if the Fund overpaid Hull for the TRX shares, the amount of overpayment was immaterial. Gibson Br. at 32-33. Misrepresentations and omissions about the use of investor funds are inherently material. See, e.g., SEC v. Research Automation Corp., 585 F.2d 31, 35-36 (2d Cir. 1978). Moreover, the evidence shows, and ALJ Murray expressly found, that the Fund lost between $807,692 and $1,074,902 as a result of the Hull Buyout, which was a material amount. Initial Dec. at *35. Gibson's effort to minimize that loss by focusing on the relative losses to the individual investors, Gibson Br. at 32-33, reflects Gibson's failure to recognize that his fiduciary duties were to the Fund itself.

Fourth, Gibson argues that the Hull Buyout did not cause the Fund to pay an extraordinary commission because it was conceivable at the time of the Hull Buyout that the Fund might later sell the Hull shares without incurring a commission. Gibson Br. at 33 ("if such a transaction were completed, it may not have involved the payment of a commission"). In essence, Gibson asks the Commission to ignore what actually happened and instead imagine what might have happened under different circumstances. The record shows that approximately three weeks after buying all of Hull's 680,636 TRX shares, the Fund sold its entire interest in TRX, including the shares acquired from Hull, paying materially more in commissions than it would have paid absent the Hull shares. Initial Dec. at *34-35. ALJ Murray correctly concluded that the commission was "extraordinary" because the Fund did not ordinarily incur commissions relating to the investors' sales of their personal securities. Id. at *35.

If Gibson intended to have the Fund engage in a transaction with Hull on terms materially different than those described in the offering memorandum, he had a duty to disclose that intention (and to disclose that he was serving as an investment adviser to Hull and was receiving a salary from Hull for services to the Fund). See Div. Post-Hearing Br. at 55-66. But instead, Gibson, "acting with scienter," engaged in an "undisclosed, sweetheart deal" that favored Hull over the Fund. Initial Dec. at *35.[40] Thus, ALJ Murray correctly determined that the Hull Buyout violated Sections 206(1) and (2) of the Advisers Act. See, e.g., SEC v. K.W. Brown and Co., 555 F. Supp. 2d 1275, 1308-09 (S.D. Fla. 2007) (allocation of favorable trades to insiders); SEC v. Trabulse, 526 F. Supp. 2d 1008, 1013 (N.D. Cal. 2007) (failure to disclose misuse of client assets); J.S. Oliver Capital, SEC Release No. 4431, 2016 WL 3361166 at *7-8 (June 17, 2016) (same).

E. Gibson Engaged In Front Running In October and November 2011 Using Put Option Contracts

ALJ Murray also found that Gibson violated 206(1) and (2) on five dates in late October and early November 2011 by front running the Fund using put option contracts, based on his foreknowledge of the Fund's approaching liquidation of its TRX shares. Initial Dec. at *34. As he dumped the Fund's large TRX holdings on November 10, 2011, and the share price plummeted, Gibson sold the option contracts in his account and his girlfriend's account (and his father sold the option contracts he had purchased on Gibson's recommendation), generating gross profits of $379,550 in the three accounts. Initial Dec. at *31-34.

[40] By engaging in the Hull Buyout without the required disclosures, Gibson also breached his duty to exercise "the degree of care a reasonably careful person would use under like circumstances," Robare, 2016 WL 6596009 at *9, which is sufficient to establish a negligent violation of Section 206(2).

Gibson makes only one argument specifically regarding the October and November front running, claiming that he when he purchased the put options, he did not know that the Fund would be selling its TRX shares. Gibson Br. at 34.[41] However, ALJ Murray found that in late October and early November 2011, Gibson "knew with reasonable certainty that a sale of the Fund's remaining TRX shares was going to occur." Initial Dec. at *33. That finding is firmly grounded in the factual record as discussed in the Initial Decision, id. at *32-35, and Gibson has failed to identify any error in ALJ Murray's evaluation of that evidence. See also Div. Findings at ¶¶ 166-171; 198, 206.

II. Gibson Violated Section 206(4) And Rules 206(4)-8(a)(1) And (2)

Section 206(4) of the Advisers Act prohibits an investment adviser from engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative. Rule 206(4)-8 bars an adviser to a pooled investment vehicle from defrauding investors or prospective investors. 17 C.F.R. § 275.206(4)-8. These provisions prohibit even negligent misconduct. SEC v. Steadman, 967 F.2d at 647.

ALJ Murray found that in connection with the front running in September, October, and November 2011 and the Hull Buyout in October 2011, Gibson made false statements to the Fund's investors and failed to provide investors with material information, thereby violating Section 206(4) and Rule 206(4)-8. Initial Dec. at *31, 34, 36. Gibson challenges those findings on the ground that Rule 206(4)-8 does not impose a fiduciary duty or "an affirmative duty to continuously provide information to investors and prospective investors." Gibson Br. at 33-34. But ALJ Murray's conclusion that Gibson violated Rule 206(4)-8 does not rest on his fiduciary

[41] Gibson's contentions that he was not an investment adviser, that the Fund's offering documents adequately disclosed that he might engage in front running, and that he did not act with scienter have been addressed above.

obligations to the Fund, but on the glaring contrast between what Gibson told investors (in the offering memorandum, in person, and in email communications) and what he actually knew, intended to do, and did. Having chosen to communicate with investors, Gibson was obligated to ensure that they were not misled. Capital Gains, 375 U.S. at 194.

ALJ Murray found that the investors were in fact misled. Gibson's front running made the offering documents materially misleading because they did not disclose that he could or would engaging in front running. Initial Dec. at *29-34. Similarly, in view of Gibson's affirmative statement to investors on September 23, 2011, that the Fund would not sell its TRX holdings, it was a material omission for Gibson to fail to notify investors that the Fund had reversed position and decided to liquidate its TRX holdings. Id. at *29-30. Gibson also affirmatively misrepresented his evaluation of TRX, its management, and the likelihood that the TRX share price would increase. Id. at *25-27, 30-34. Still further, Gibson's purchase of Hull's TRX shares in October 2011, on terms inconsistent with the offering memorandum, rendered the offering memorandum false and misleading. Initial Dec. at *34-36. These misstatements and omissions directed to investors violated Rule 206(4)-8, wholly apart from the duties Gibson owed to the Fund itself.

Gibson also claims that any material misstatements or omissions to investors discussed in the Initial Decision were not mentioned in the OIP. Gibson Br. at 34-35. However, the OIP did allege that the misstatements and omissions in the offering documents were directed to the investors, e.g., the OIP alleged that "through the Fund's offering documents, Gibson conveyed to the Fund's investors that they would be treated fairly and equitably." OIP at ¶ 24.[42] As a result,

[42] Because Gibson was the Managing Director of the managing member (Geier Capital) of the Fund, his conflicts of interest with the Fund could have been cured only by disclosure directly to

the OIP adequately notified Gibson that the Division's claims were based on misstatements and omissions directed to the Fund's investors as well as to the Fund itself.

III. Gibson's Front Running Violated The Anti-Fraud Provisions Of The Exchange Act

Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder make it unlawful, in connection with the purchase or sale of any security, to "employ any device, scheme, or artifice to defraud" or "engage in any act, practice, or course of business which operates . . . as a fraud or deceit upon any person." These provisions create "scheme liability." See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008); SEC v. Brown, 740 F. Supp. 2d 148, 172 (D.D.C. 2010). Scheme liability extends to those "who had knowledge of the fraud and assisted in its perpetration." SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1471-72 (2d Cir. 1996).

To establish that Gibson violated the scheme liability provisions of Rule 10b-5, the Division was not required to show that Gibson's misconduct was directed toward the Fund itself, i.e., liability can also be based on conduct impacting the Fund's investors. Nor was it necessary to establish that Gibson was an investment adviser. However, because Gibson was an investment adviser, his fiduciary duties are considered in evaluating his liability under Rule 10b-5. Laird v. Integrated Res., Inc., 897 F.2d 826, 835 (5th Cir. 1990); see also Marc N. Geman, SEC Release No. 1924, 2001 WL 124847 at *6-8 (Feb. 14, 2001), aff'd, Geman v. SEC, 334 F.3d 1183 (10th Cir. 2003).

(and approval by) the investors. See note 25 above. For this reason as well, the disclosure failures alleged in the OIP were also failures to make disclosure to the Fund's investors.

ALJ Murray determined that by front running the Fund, and by making material misrepresentations and omissions relating to that front running, Gibson violated Section 10(b) and Rules 10b-5(a) and (c). Initial Dec. at *30, 34. Gibson does not separately address that finding, and all of Gibson's arguments relevant to Section 10(b) and Rules 10b-5(a) and (c) have been shown above to be without merit.

IV. There Is No Merit To Gibson's Constitutional Challenge

Gibson contends that the Commission's administrative law judges are "inferior officers" and "are not appointed in accordance with the Appointments Clause" of the Constitution, U.S. Const. art. II, § 2, cl. 2, and consequently "this proceeding should be set aside." Gibson Br. at 39-40. However, the Commission has consistently held that the Appointments Clause's requirements apply only to officers of the United States, not employees, and that its ALJ's are employees. See, e.g., Bennett Gr. Fin. Serv., LLC & Dawn J. Bennett, Securities Act Rel. No. 10331, 2017 WL 1176053, at *5 (Mar. 30, 2017), pet. filed May 26, 2017 (10th Cir. No. 17-9524). And it has reiterated that holding in two decisions that post-date the Tenth Circuit's contrary determination in Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016), on which Respondents rely. Bennett, 2017 WL 1176053, at *5; Harding Advisory LLC & Wing F. Chau, Securities Act Rel. No. 10277, 2017 WL 66592, at *19 & n.90 (Jan. 6, 2017), pet. filed Mar. 6, 2017 (D.C. Cir. No. 17-1070). The Commission's position remains correct, and Gibson has offered no compelling reason why the Commission should depart from its carefully considered and established approach.

V. Gibson Has Failed To Identify Any Error In The Admission Of Evidence

Gibson argues that Division Exhibit 183 (an audio recording) and Exhibit 183A (a transcript of that recording) should not have been admitted into evidence because they were

inadequately identified and are therefore "unreliable." Gibson Br. at 41. But after Exhibit 183 was played in the hearing room, Gibson himself identified it as a recording of a telephone conversation he had in late 2011 with Luis Sequeira, who represented another large TRX investor. Tr. 810:7-13; 811:9 to 812:9. Gibson also described the circumstances surrounding that conversation, Tr. 811:9 to 812:9, 814:15 to 819:12, and admitted that "I did say the things that are on the tape," Tr. 812:16-17. Gibson has never contended that Exhibit 183A (the transcript of the telephone conversation) was inaccurate. Thus, Exhibits 183 and 183A were properly authenticated and highly relevant, see Initial Dec. at 32-33 (quoting the taped conversation at length), and ALJ Murray properly admitted them into evidence.

Gibson asserts that Division Exhibit 184 and 187, the report and rebuttal report of expert witness Dr. Carmen Taveras, should have been excluded because they contained "opinions in which she simply performs . . . subtraction and multiplication." Gibson Br. at 41-42. After considering that objection, ALJ Murray disagreed, finding that Dr. Taveras' reports involved the application of "specialized knowledge" grounded in Dr. Taveras' professional training and experience as an economist. Tr. 296:2 to 297:8. See also Initial Dec. at n.27. Consequently, and because Dr. Taveras' reports were relevant to the analysis of Gibson's trading and profits, see id. at *12-13, 35, and 39, ALJ Murray's decision to admit Dr. Taveras' reports was correct. See 17 C.F.R. § 201.320 (authorizing the admission of "relevant" evidence).

Gibson also claims that Division Exhibits 185 and 188, the report and rebuttal report of expert witness Dr. Gary Gibbons, should have been excluded because, according to Gibson, Dr. Gibbons was offering conclusions of law. Gibson Br. at 41-42. Gibson is mistaken here as well. The reports submitted by Dr. Gibbons, an experienced investment adviser and a business school professor, described the understanding in the investment advisory community regarding the

fiduciary duties of investment advisers, the interpretation advisory agreements, and the nature of front running.[43] Although Dr. Gibbons necessarily referred to the understanding of applicable legal requirements in the advisory community, he was not offering legal opinions. ALJ Murray concluded, correctly, that Dr. Gibbons' testimony was relevant and admissible. Tr. 251:9 to 252:2.

VI. The Sanctions Imposed In The Initial Decision Are Appropriate

A. Cease-and-Desist Order and Industry Bar

Gibson argues that neither a cease-and-desist order nor an industry bar is appropriate because he "did not harm the Fund" and the Hull Buyout was arranged "for the benefit of the Fund." Gibson Br. at 37. The evidence establishes just the opposite. The Fund lost between $807,692 and $1,074,902 as a result of the Hull transaction, Div. Ex. 184 at 10-11, and paid approximately $6,800 in commissions that it would not otherwise have incurred, Div. Ex. 188 at 5 n.10. Additionally, the harm from Gibson's violations was not limited to the Fund and its investors, because front running harms the securities market itself. See, e.g., Yang, 2014 WL 2198323 at *1.

Gibson also claims that his activities were "isolated rather than recurrent." Gibson Br. at 37-38. But Gibson violated the securities laws on at least ten occasions over a period of approximately six weeks. On September 26, 2011, Gibson arranged for the sale of TRX shares out of three separate accounts to front run the Fund, each such transaction constituting a separate

[43] Dr. Gibbons testified, inter alia, that it is widely recognized in the investment advisory community that an investment adviser owes fiduciary duties to the client, and that this understanding is reflected in numerous standards, codes of conduct, and guidelines developed by the industry's professional associations and governing bodies. Div. Ex. 185 at 10-11. (Dr. Gibbons provided the only expert testimony by an investment adviser. Gibson offered no contradictory expert testimony and withdrew the report of the individual who was to testify on his behalf regarding investment advisory issues. Tr. 1151:6-14.

violation. The Hull Buyout on October 18, 2011, was a fourth violation. In October and November 2011, Gibson engaged in six additional prohibited transactions, i.e., purchasing put options in his girlfriend's account on October 27 and 28, purchasing put options for his own account on October 28 and November 2 and 8, and then instructing his father on November 9 to buy put options. See The Evidentiary Record., supra, at ¶¶ 24-26, 29, 33. Thus, Gibson's misconduct consisted of multiple violations, not an isolated incident.

Gibson makes no argument regarding the likelihood of future violations other than to note that it has been almost six years since the conduct at issue. Gibson Br. at 38. The passage of time does not itself reduce the likelihood of future violations, particularly in view of Gibson's youth. Gibson's professional training and experience have been exclusively in the field of finance, see The Evidentiary Record, supra, at ¶¶ 1-4, he has been employed in finance subsequent to the misconduct at issue here, id at ¶ 38, and he can be expected to work in finance for many years to come. Therefore, a cease-and-desist order and an industry bar[44] are appropriate.

B. Disgorgement

ALJ Murray determined that Gibson should disgorge the $1,080 in losses he avoided by the front running on September 26, 2011, and the $81,008 in net profit he obtained from the sale

[44] Gibson argues that a bar is not authorized by Section 203(f) of the Advisers Act because, Gibson contends, the Initial Decision does not identify any investment adviser with which he was associated. Gibson Br. at 39. However, Gibson himself identities Geier Capital as the entity that managed the Fund's investments after mid-2011, see, e.g., Gibson Br. at 16 ("After Geier Group was terminated, Geier Capital continued to act as the Fund's investment adviser."), and it is undisputed that Gibson was "associated with" Geier Capital within the meaning of Section 203(f). See Initial Dec. at *38.

of his options on November 10, 2011. Initial Dec. at *41-42. The total disgorgement ordered was $82,088, with prejudgment interest.[45]

Gibson claims that he did not realize any profit from his front running, apparently on the rationale that the loss he suffered on his investment in the Fund exceeded his gain from the front running in his personal account. Gibson Br. at 38. But the front running profits cannot be disregarded because Gibson lost money on a separate investment, i.e., his investment in the Fund. Gibson has failed to show any flaw in ALJ Murray's decision to require disgorgement of $82,088.

C. Civil Penalties

Advisers Act Section 203(i) and Exchange Act Section 21(B)(a) each provide for three tiers of potential penalties for each violation. A second tier penalty is appropriate if the violation involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." See 15 U.S.C. §78u-2(b)(2). The maximum Tier II penalty for each violation committed by an individual in 2011 is $75,000. 17 C.F.R. § 201.1004 (Table IV).

ALJ Murray assessed three second-tier penalties of $70,000 each, one for Gibson's front running in September 2011, one for the Hull Buyout, and one for Gibson's front running in October and November 2011, for a total penalty of $210,000. Initial Dec. at *38-40.

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[45] The Initial Decision denied the Division's request that Gibson be required to also disgorge: (i) the $10,200 in losses avoided in his girlfriend's account due to Gibson's front running on September 26, 2011, Div. Ex. 184 at attached exhibit 6; (ii) the net profit of $374,711.68 generated for his girlfriend's account by Gibson's front running in October and November 2011, Div. Ex. 185 at attached exhibit X; and (iii) the net profit of $41,823.06 Gibson's father obtained by trading in put options at Gibson's direction, id. The Initial Decision also rejected the Division's request that Gibson be required to disgorge the profits obtained by Hull as a result of the Hull Buyout. Initial Dec. at *41.

Gibson argues that this penalty is disproportionate to the disgorgement amount and is therefore inconsistent with a Commission "pattern" of imposing penalties equal to or less than the disgorgement amount. Gibson Brief at 38-39. However, the appropriate penalty necessarily varies with the circumstances of each case, and there is no reason to expect that the penalty will uniformly be no more than the disgorgement amount. See, e.g., J.S. Oliver, 2016 WL 3361166 at * 20 ("it is reasonable for disgorgement and civil money penalties to differ because they serve different purposes"); Collins v. SEC, 736 F.3d 521, 525 (D.C. Cir. 2013) (noting that in SEC administrative proceedings, civil penalties have ranged from "roughly one-half of the disgorgement" to "about 25 times the disgorgement"). Gibson has failed to show that there is any pattern, much less any policy, requiring that the penalty be no more than the disgorgement amount.

Gibson asserts that he is unable to pay a civil penalty, Gibson Br. at 38, but offers no explanation in support of that claim. From January 2014 through at least late 2016, Gibson was the managing member of his own international consulting firm, Weiji Capital, Div. Ex. 190 at 39:13 to 42:12, and less than three months before the hearing in this matter he transferred assets worth $423,896 to this father. See Resp. Ex. 145. Gibson also appears to have access to the funds required to retain experienced Washington counsel to litigate this matter. Gibson did not make comprehensive disclosure of his finances prior to the hearing,[46] and ALJ Murray determined that his financial situation was "unclear." Initial Dec. at *40. However, the Initial Decision notes Gibson's considerable experience in finance, id. at *1, and concludes that Gibson's "future earning potential" indicates that he has some ability to pay a penalty, id. at *40.

[46] Gibson did not report his financial condition on Form D-A until after the hearing concluded, thereby denying the Division an opportunity to question him regarding that submission. See Initial Dec. at *40 n.53.

Gibson has failed to show that these findings are in error or that the monetary penalty imposed in the Initial Decision is inappropriate.

CONCLUSION

Wherefore, the Division requests that the Commission affirm the Initial Decision.

Respectfully submitted,

June 19, 2017

H. Michael Semler (202) 551-4429
Gregory R. Bockin (202) 551-5684
Paul J. Bohr (202) 551-4899
George J. Bagnall (202) 551-4316
U.S. Securities and Exchange Commission
Division of Enforcement
100 F Street, N.E.
Washington, D.C. 20549

Counsel for Division of Enforcement

Certificate Of Compliance

I certify that the foregoing Division of Enforcement's Opposition Brief complies with the requirements of Rule 450(c) of the Commission's Rules of Practice and contains 13,919 words as counted by the word processing system used to prepare this brief.

H. Michael Semler

H. Michael Semler

Certificate Of Service

I certify that on this 19th day of June 2017:

(i) an original and three copies of the foregoing Division of Enforcement's Opposition Brief ("Opposition Brief") were filed with the Office of the Secretary, SEC, 100 F Street, N.E., Washington, D.C. 20549-9303;

(ii) a copy of the Opposition Brief was sent to Thomas A. Ferrigno via email to TFerrigno@brownrudnick.com and via UPS next day delivery to:

Thomas A. Ferrigno, Esq.
Brown Rudnick LLC
601 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005; and

(iii) a copy of the Opposition Brief was provided to Chief Administrative Law Judge Murray via email to *ALJ@sec.gov*.

H. Michael Semler

H. Michael Semler