UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent.

THE DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT'S BRIEF REGARDING NEW EVIDENCE AND CHALLENGED RULINGS, FINDINGS, AND CONCLUSIONS

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The Division of Enforcement ("Division") respectfully submits this response to Respondent's Brief Regarding New Evidence and Challenged Rulings, Findings, and Conclusions ("Respondent's Brief") submitted to this Court on February 14, 2018. Despite this Court's invitation to submit *new* evidence relevant to its reexamination of the record, Respondent merely reasserts his prior challenges to the validity of the administrative forum, makes specious arguments regarding the Court's scienter determinations, submits irrelevant evidence, and resubmits evidence previously considered and rejected by the Court. Nothing in Respondent's submission provides the Court with a basis to refrain from independently ratifying all prior actions in this proceeding. Accordingly, this Court should enter the Division's proposed order ratifying its January 25, 2017 Initial Decision (the "Initial Decision"). Division's February 14, 2018 Letter to the Court ("Letter"), Ex. A.

ARGUMENT

A. Respondent's Appointments Clause Challenge Fails.

Respondent's challenge based on the Appointments Clause is meritless because the Commission's November 30, 2017 Order "ratifie[d] the agency's prior appointment" of its ALJs. *See* Respondent's Brief at 3-6. Subsequent ratification of an earlier decision rendered by an unconstitutionally appointed officer remedies any alleged harm or prejudice caused by the violation. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996).

. The November 30, 2017 Order also forecloses Respondent's challenge to the Commission's ratification of the appointment of its ALJs. It is undisputed that the Commission, acting in its capacity as head of a department, has the constitutional authority both to appoint ALJs as inferior officers and to ratify any such appointments after the fact. *See* U.S. Const. Art. II, § 2,

Cl. 2; 15 U.S.C. § 78d(b)(1); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 (2010); *Wilkes-Barre Hospital Company, LLC v. Nat'l Labor Relations Bd.*, 857 F.3d 364, 370-71 (D.C. Cir. 2017). The Commission's order exercising that authority and ratifying the appointment of its ALJs is, moreover, binding on those ALJs. The scope of the inquiry before this Court is therefore limited to whether—having had her appointment ratified by the Commission—the presiding ALJ should affirm or revise in any respect her prior actions in this proceeding.

Even if this Court were to consider the validity of the Commission's ratification of its ALJs' appointments, Respondent's claims that the ratification was invalid fall short. He asserts, incorrectly, that the act being ratified is a hiring decision made by the Office of Personnel Management (OPM) and asserts that the Commission may not ratify that decision. Respondent's Brief at 5-6. But the Commission's order does not ratify actions taken by *OPM*[1]; rather, it ratifies the decisions by its own staff to appoint the ALJs to their current positions. And the Commission's staff members are indisputably agents of the Commission. Thus, any defect in the initial appointment process was remedied by the Commission's November 30 Order. *See, e.g.*, 1 *Floyd R. Mechem, Treatise on the Law of Public Offices and Officers* § 533 (1890) (ratification of an act "render[s] it good from the beginning and the same as though he had originally authorized or made it"); *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907) (ratification "retroactively give[s]" an agent's acts "validity").

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[1] Indeed, OPM does not make ALJ hiring decisions on behalf of federal agencies. It administers the competitive examination process for ALJs, ranks the candidates, and prepares a list of eligible candidates for agencies to appoint. *See, e.g.*, 5 U.S.C. § 1104(a)(2); 5 C.F.R. §§ 332.401, 332.402, 930.201; *see also* 5 U.S.C. § 3105 (specifying that "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title").

Respondent similarly errs in stating that "[t]he delegation of its appointment power by the Commission" to the Commission's chief administrative law judge "constituted a violation of the Constitution." Respondent's Brief at 6. The Commission's order does not ratify a prior delegation; again, it ratifies the original decision to appoint the ALJs in the first instance. Whether the Commission may delegate certain hiring decisions is therefore beside the point—the only relevant question is whether the Commission is constitutionally authorized to appoint its ALJs. And on that question, there is no dispute.

B. Respondent's Removal Challenge Fails.

Respondent's removal challenge also misses the mark. *See* Respondent's Brief at 7-8. The Commission's decision in *In re Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *26-28 (Sept. 17, 2015), forecloses his claim that the manner of removing ALJs is unconstitutional. *Timbervest* concluded that the Commission's ALJs were employees, but it also expressly stated that "even if the Commission's ALJs are considered officers," the method of their removal does not offend separation-of-powers principles. *Id.* at *27 (emphasis added). Respondent's suggestion that the government's change of position in *Lucia v. SEC*, No. 17-130 2017 WL 5899983 (U.S. November 29, 2017), compels a different result is wrong. Consistent with the government's merits brief in *Lucia*, it remains our position that the current removal structure under which ALJs operate does not unduly impinge on the President's executive authority.

C. Respondent's Arguments that the Initial Decision Erroneously Concluded He Acted with Scienter Are Specious.

Respondent's arguments that the Initial Decision erroneously concluded he acted with scienter are specious. First, with respect to front running, Respondent argues that that the scienter decision was erroneous because *some* of the words the Court used to describe his

knowledge of GISF's trading intentions were different than the words the Court used in its definition of front running. The evidence admitted at the hearing, however, including his own testimony, overwhelmingly established that Respondent knew as of September 25, 2011 that GISF was going to liquidate its TRX position. *See, e.g.*, Tr. 9/12/16 130:22 – 131:2. Respondent conceded as much in his post-hearing brief: "The evidence admitted at the hearing established that following the decline in price of TRX securities, Mr. Hull and Respondent spoke on September 24 and/or 25, 2011 and determined to liquidate the Fund's position in TRX." Respondent Christopher M. Gibson's Post-Hearing Brief at 67. Although the Initial Decision used words like "believed," "knew with reasonable certainty," and "knew or should have known" to describe Respondent's knowledge in some places, in others it unequivocally stated that Respondent knew GISF was going to liquidate its TRX position when, as a fiduciary, he used that information to engage in trades that benefited himself and those close to him. *See, e.g.*, Initial Decision at 28 and 35 (Stating on page 28 that "Gibson knew on September 26, 2011, that the Fund was going to sell TRX shares," and on page 35 that "Gibson knew in October and November that the Fund was going to sell its TRX shares."). Thus, regardless of any variations in the phrases the Court used to describe Respondent's knowledge, the Initial Decision unmistakably found that Respondent acted knowingly when he front ran GISF, and there is no basis to find that it erred in concluding Respondent acted with scienter.

Second, with respect to the Hull transaction, Respondent argues that the scienter decision was erroneous because the Court neither set out the relevant standard nor entered findings to support its conclusions. Both positions are incorrect. In connection with Respondent's front-running misconduct, the Initial Decision held that scienter was required to establish a violation of Section 206(1) of the Advisers Act and explained that scienter was a mental state embracing an

intent to deceive, manipulate, or defraud. Initial Decision at 27 and 34. It further held that scienter could be established by a showing of "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." *Id.* at 34 (citing *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980)). Moreover, the Initial Decision repeatedly explained that, as an investment adviser, Respondent owed his clients a fiduciary duty and noted that "courts have consistently held that an investment adviser is a fiduciary that must put his or her client's interests first." *Id.* at 33 (citing *SEC v. Capital Gains*, 375 U.S. 180, 189-91, 194 (1963)). Respondent seems to take issue with the fact that this clearly delineated standard was not *repeated* by the Court in the section of the Initial Decision dealing with the Hull Transaction, but such redundancy is not required.

After setting out this standard, in assessing the Hull Transaction, the Court concluded that Respondent acted with scienter when he breached his fiduciary duty to GISF by favoring Hull and supported that conclusion with the following findings: (i) Respondent knew GISF would be selling its TRX position when he caused GISF to purchase Hull's personal TRX shares; (ii) the transaction violated the terms of the Fund's offering documents; (iii) the transaction was not disclosed; and (iv) the transaction benefited one client (Hull) over another (the Fund) at a time when Hull was the Fund's biggest investor as well as Respondent's employer and creditor. Initial Decision at 38-40. For an investment adviser like Respondent, this conduct was, at a minimum, an extreme departure from the standard of ordinary care. Thus, contrary to Respondent's argument, the Initial Decision properly concluded that Respondent acted with scienter in connection with the Hull transaction.

D. Respondent's Post-Hearing Evidence Should Not Change the Outcome of this Case.

Respondent challenges this Court's determination that, as an investment adviser, he violated the antifraud provisions of both the Advisers and Exchange Acts when he breached the fiduciary duties he owed to GISF. Respondent's Brief at 23-24. As extensively argued in the Division's post-hearing briefs[2] and fully addressed by this Court in its Initial Decision, Respondent repeatedly and egregiously violated these antifraud provisions. Initial Decision at 23-40. Respondent's purportedly new evidence should not change the outcome of these proceedings as it merely repackages and rehashes evidence this Court has already considered.

1. The Affidavits of James Hull and John Gibson Are Contradicted by Evidence Admitted at the Hearing, Make Arguments that Support the Initial Decision's Conclusions, and Rehash Old Evidence.

The affidavits of James Hull (Respondent's Exhibit 178) and John Gibson (Respondent's Exhibit 181) should not affect the outcome of this case, and the Court should, therefore, ratify its well-reasoned and fully-supported Initial Decision. First, contrary to James Hull's and John Gibson's assertions that the Division staff made improper allegations regarding "short positions," the Division did not mislead any witnesses regarding the nature of Respondent's or his father's trading in $4 TRX put options. *See, e.g.*, Respondent's Exhibit 181, ¶¶ 27, 31, 33; Respondent's Exhibit 178, ¶ 7. Respondent admitted under oath that these trades were short:

> Q: Would have to go lower. Okay. So when you purchased [the $4 TRX put options], was this a long bet?

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[2] The Division's Post-Hearing submissions and submissions to the Commission on Respondents' Petition for Review are available upon request of the Court and on file with the Office of the Secretary.

A: No, it was a short.
Q: It was a short bet?
A: Yes.
Q: Okay. So in your personal account, you had a short bet against TRX.
A: Correct.

Division Exhibit 190 at 119:8-16. Moreover, contrary to the statements in his supplemental report (Respondent's Exhibit 179), during the hearing Dr. Overdahl referred to Respondent's and his father's $4 TRX put option trading in the personal accounts as "Short Exposure." Respondent's Exhibit 149 at Exhibits 5A and 5B (The note accompanying the relevant column on Exhibit 5B explains that the trading "[r]efers to underlying shares of TRX $4.00 put option contract expiring 11/19/2011 purchased and sold by Mr. Gibson, Francesca Marzullo, and John Gibson."). The affidavits also demonstrate that when meeting with Division attorneys, Mr. Hull saw Respondent's and his father's trading records. Thus, Mr. Hull could not have been misled because he saw the specific details of their trading in the $4 TRX put options, including the type of securities traded, the timing of the purchases and sales, the purchase and sale prices, and the extent to which the sales proceeds exceeded the purchase price. John Gibson's claim that the Division staff misled Timothy Strelitz regarding the nature of Respondent's trading in his personal account is also inaccurate. *See e.g.*, Respondent's Exhibit 181, ¶ 29, Ex. G. As noted above, Respondent previously admitted that he had a "short bet" against TRX in his personal account, which is the account Mr. Strelitz references in his affidavit. *See e.g.*, Division Exhibit 190 at 119:8-16; Respondent's Exhibit 181, Ex. G.

Second, the allegations in John Gibson's affidavit that PNC did not execute his TRX trades correctly are irrelevant and, even if accepted as true, support the Court's finding that Respondent breached the fiduciary duties he owed to his clients, including the Fund. *See*

Respondent's Exhibit 181 at ¶¶ 11-18. The affidavit states that two days before GISF sold all its TRX shares – Fund trading that Respondent controlled as investment adviser – Respondent directed his father to exit the personal TRX position he held in an IRA account. *Id.* Regardless of how they were executed, in providing these trading directions Respondent still breached his fiduciary duties. Respondent used his client's confidential trading information to provide an improper benefit to his father, directing his father to exit his personal TRX position before GISF dumped millions of TRX shares into the market and "tanked" the share price. *See* Division Exhibits 105; 190 at 108:12-109:10.

Finally, the remainder of the supposedly new evidence in the affidavits is not new at all. This includes the evidence regarding (1) Mr. Hull's participation in managing the Fund; (2) the loans Mr. Hull made to Respondent and his father; and (3) Respondent's financial capacity. *See* Respondent's Exhibits 178, 181. Rather, extensive documentary and testimonial evidence on all these subjects was admitted at the hearing and, as is clear from the Initial Decision, considered by the Court. For all these reasons, neither James Hull's nor John Gibson's affidavit should affect the outcome of this case.

2. Dr. Overdahl's Supplemental Report Provides No New Evidence and Is Unavailing.

Respondent offered a supplemental report (Respondent's Exhibit 179) from his expert, Dr. Overdahl, as new evidence. But this supplemental report does not contain new evidence. Rather, in the supplemental report, Dr. Overdahl contradicts his sworn hearing testimony. Specifically, Dr. Overdahl states that he was asked to address the accuracy of characterizing the "Gibson Group's" trading in $4 TRX put options as a short position. Respondent's Exhibit 179 at 2. Dr. Overdahl concluded that after "carefully reviewing" the trading records, no members of

the "Gibson Group" held a "short position" in TRX shares. *Id.* at 3. In both his original and supplemental reports, however, Dr. Overdahl included Francesca Marzullo in the members of the "Gibson Group." Respondent's Exhibit 149 at 7. When he was asked about Respondent's trading in Marzullo's account during the hearing, he testified, contrary to the opinion he now offers in his supplemental report, that her account was "not net long – or not long" after Respondent purchased the $4 TRX put options on October 28, 2011. Tr. 9/15/16 1055:8-1055:19. Further, as noted above, Dr. Overdahl also referred to Respondent's and his father's trading in the $4 TRX put options as "short exposure" in his initial report, which directly contradicts his supplemental report. Respondent's Exhibit 149 at Ex. 5B. Respondent's attempt to modify his expert's sworn hearing testimony and original report with a supplemental report is not new evidence. Dr. Overdahl's contradictory statements are unavailing and should not change the Court's conclusions.

Dr. Overdahl has apparently also changed his expert opinion regarding the Hull transaction, claiming now that he "cannot conclude that the price Mr. Hull received from GISF was necessarily 'favorable' given the risk he retained relative to the alternative." Respondent's Exhibit 179 at 8-9. Dr. Overdahl's "new" conclusion directly contradicts his original report and his testimony at the hearing. In Exhibit 13 to his original report, Dr. Overdahl calculated the "Estimated Benefit to Mr. Hull on Hull Transaction 10/18/11." Respondent's Exhibit 149 at 78. Specifically, Dr. Overdahl concluded that Hull benefited by $274,439 because of Respondent's failure to apply a block discount on the Hull transaction. *Id.* Dr. Overdahl confirmed that conclusion in his sworn testimony during the hearing. Tr. 9/15/16 1030:1 – 1030:16. Now, Dr. Overdahl wants the Court to disregard his original report and his sworn testimony and accept his new conclusion that he "cannot conclude that the price Mr. Hull received from GISF for his TRX

shares was necessarily 'favorable.'" Respondent's Exhibit 179 at 8- 9. Dr. Overdahl's unsupported reversal of opinion is not new evidence and should not change the outcome of these proceedings.

3. The Remainder of Respondent's "New" Evidence Also Fails to Provide a Basis to Change the Outcome in This Proceeding.

Respondent's Exhibit 177 offers no new evidence. It is merely another thread of emails between Respondent and Richard Sands of Casimir Capital regarding the sale of GISF's TRX shares. Numerous similar exhibits were admitted at the hearing and considered by the Court. *See* Division Exhibits 82; 84; 92; 93; Respondent's Exhibits 61-64; 92; 94-95; 98-100; and 121. Respondent's additional email thread only confirms what the Court found in the Initial Decision: Respondent knew GISF was going to liquidate its TRX position when he breached his fiduciary duty and traded on the basis of that knowledge for his own benefit and the benefit of those close to him.

The Expert Report of Mr. Garrick Tsui (Respondent's Exhibit 182) also contains no new evidence or new analysis. On the contrary, Exhibit 182 merely parrots Respondent's self-serving hearing testimony recounting the chronology of his efforts to liquidate the Fund's TRX position in the fall of 2011. In fact, the preface to Mr. Tsui's report notes that it is based entirely on evidence that was admitted during the hearing, and the report itself contains no fewer than 19 citations to Respondent' own testimony during the first day of the hearing. Likewise, Mr. Cates's affidavit (Respondent's Exhibit 180) provides nothing different from his testimony at the hearing, and therefore should be disregarded.

CONCLUSION

For the foregoing reasons and those stated in the Division's Letter, the Division respectfully requests that the Court enter the Division's proposed order on remand. Letter at Ex. A.

Dated: March 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were served on the following, this 1st day of March 2018, in the manner indicated below:

By hand delivery - an original and 3 copies:

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February 14, 2018

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Re: In the Matter of Christopher M. Gibson, No. 3-17184

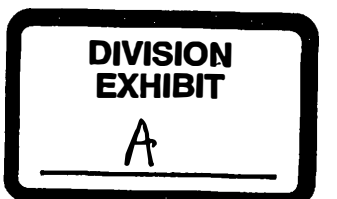
Dear Chief Judge Murray:

On November 30, 2017, the Commission issued an order ratifying the prior appointment of its administrative law judges to preside over administrative proceedings. *See In re: Pending Administrative Proceedings*, Securities Act Release No. 10440 (Nov. 30, 2017). As applied to this proceeding, the order directs the administrative law judge to determine, based on a *de novo* reconsideration of the full administrative record, whether to ratify or revise in any respect all prior actions taken by any administrative law judge during the course of this proceeding. *Id.* at 1-2.e

It is well established that subsequent ratification of an earlier decision rendered by an unconstitutionally appointed officer remedies any alleged harm or prejudice caused by the violation. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996). And that principle applies whether or not the ratifying authority is the same person who made the initial decision, so long as "the ratifier has the authority to take the action to be ratified," and, "with full knowledge of the decision to be ratified," makes a "detached and considered affirmation of th[at] earlier decision." *Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016).

Accordingly, to implement this remedy, the administrative law judge should conduct a *de novo* review of the administrative record, engage in an independent evaluation of the merits through the exercise of detached and considered judgment, and then determine whether prior actions should be ratified and thereby affirmed. This process ensures "that the ratifier does not blindly affirm the earlier decision without due consideration." *Advanced Disposal Services East*, 820 F.3d at 602-03.

The Division submits that the previous decisions issued by an administrative law judge in this proceeding, including the initial decision issued on January 25, 2017, were well-founded and



respectfully requests that they be ratified. To that end, the Division attaches a proposed draft order to this letter.

Respectfully submitted,

H. Michael Semler

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON,

Respondent.

ORDER

After a *de novo* review and reexamination of the record in these proceedings, I have reached the independent decision to ratify and affirm all prior actions made by an administrative law judge in these proceedings, including the initial decision issued on January 25, 2017. This decision to ratify and affirm is based on my detached and considered judgment after an independent evaluation of the merits.

Date: _____

_____
Brenda P. Murray
Chief Administrative Law Judge