U.S. SECURITIES AND EXCHANGE COMMISSION

Matter of

CHRISTOPHER M. GIBSON, A.P. No. 3-17184

Respondent.

RESPONDENT CHRISTOPHER M. GIBSON'S BRIEF SUPPORTING PETITION FOR REVIEW

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Respondent Christopher M. Gibson ("Gibson") submits this brief in support of his petition for review of the 3/24/2020 initial decision in this matter. The Division has failed to carry its burden of proof that Gibson engaged in either of the two violations it charged in the OIP – "frontrunning" of Geier International Strategies Fund, LLC ("GISF"), a small private fund, and "favoring" one GISF investor (James Hull) over others, in violation of Securities Exchange Act §10(b), and Rules 10b-5(a) and (c), and Investment Advisers Act §§ 206(1), (2) and (4), and Rule 206(4)-8.[1]

The hearing evidence demonstrates (i) that Gibson's small market sale of a stock also held by GISF was not frontrunning GISF under any known definition of the term (**Point I** below); (ii) that Gibson did not favor James Hull by allowing him to sell stock to GISF, a fund over 80% owned by Hull, thus essentially selling the stock to himself (**Point II**); and (iii) that Gibson's use of "protective" puts to partially hedge his substantially long stock exposure was likewise not frontrunning GISF (**Point III**). Separately, Constitutional defenses support dismissal (**Point IV**), and particularly after nine years, remedies are not warranted (**Point V**). This is a record that will not withstand court of appeals scrutiny.

PRELIMINARY STATEMENT

Gibson has been serially denied due process. From the outset of this matter, the Division should have seen that it had no good faith basis for its core point that Gibson was "shorting" the TRX stock that was GISF's principal investment and was thus in "conflict" with GISF. In the first (pre-*Lucia*) hearing in this matter in 2016, an SEC economist acknowledged that Gibson did not have a short position. And ultimately in the 2019 (post-*Lucia*) hearing, no less than THREE experts (two for the Division and one for Respondent) all agreed that Gibson was consistently "long" in his exposure to TRX stock, and thus with interests aligned with GISF investors.

[1] **Abbreviations**: Hearing transcript ("Tr."); Division Exhibit ("DX"); Respondent Exhibit ("RX"); Joint Exhibit ("JX"); Order Instituting Proceedings ("OIP"); 3/24/2020 Initial Decision ("ID"); Administrative Law Judge ("ALJ").

(Tr.1060-70, 929-30, 1576-82, 1647-48) With this unanimity of experts, the ALJ found that "the record does not support" the Division's theory. (ID-61)

Despite the significance of this important point, ultimately to both sides' experts and the ALJ, the Division has spent the five years this matter has been investigated and litigated (based on 2011 events) in trying to sell the contrary and unsupported narrative that Gibson was "short" and thus had a "conflict." And the Division did so while possessing account statements plainly confirming that Gibson did not have a short position.

The Division's campaign began in investigative testimony when it misrepresented to Hull, who as GISF's 81% investor was the matter's key witness, that Gibson had personally shorted GISF's principal investment TRX and thus bet against GISF. As the ALJ correctly found, on hearing this from the Division, "Hull hit the roof and asked [Gibson] for a tolling agreement" so that he and other GISF investors could sue Gibson. (ID-70-71)

The Division then continued to push this false and unsupported narrative in requesting that the Commission authorize this proceeding, with an OIP that accused Gibson of taking "a short position" and betting against GISF. (OIP-¶9, 45) The Division's OIP additionally told the Commission (and the hearing witnesses who would learn of the OIP) that Gibson was a greedy profiteer who made large sums betting against GISF's investors. But the evidence shows not only that Gibson was never "short," but also that he and his family lost millions on GISF, more than anyone save Hull. Gibson personally lost $724,660, his parents lost $1,399,053, and his former girlfriend's father lost $965,318. (ID-34)

The Division also omitted from the OIP it presented to the Commission for authorization the following highly material facts: **(i)** Hull personally owned 81% of GISF. **(ii)** GISF was a small and local private fund held by accredited investors. **(iii)** Apart from Hull's 81%, GISF was 9% comprised almost entirely of a small number of Hull's longtime close friends and colleagues in Augusta GA, who spoke personally with Hull before and after investing. **(iv)** The remaining 10% of GISF was owned by Gibson and his and his girlfriend's parents.

In the OIP it presented to the Commission, the Division misrepresented that it was Gibson who "caused" GISF to abandon the highly profitable commodities trading (up 110% in a year) he had been doing and instead to concentrate entirely in TRX common stock, and that it was Gibson who later "determined" to sell GISF's TRX stock. (OIP-¶3, 4) The Division failed to disclose that it was Hull (and not Gibson) who, as Hull frankly admitted in testimony, "caused" and "determined" all of GISF's major decisions. As the ALJ found, "Hull was in control." (ID-8) Hull's control, never disclosed in the OIP, precluded the Division's claims of frontrunning and favoritism.

And the Division likewise failed to disclose that the 9% Hull-related investors who were Hull's longtime Augusta friends and associates, like the 10% Gibson-related investors, all approved of the 81% Hull's decision-making control of GISF. The testimony was that they would not have invested in GISF without Hull's involvement. If the OIP here had made full disclosure of the foregoing material facts when the Division proposed it to the Commission, this proceeding would likely never have been authorized.

Once the proceeding was instituted, the continuing practical result of the Division's serial misrepresentations was that the all-important Hull did not appear as a witness during the first (pre-*Lucia*) hearing in this matter in 2016, and would not even speak to Gibson or his father (who had been Hull's longtime friend and one of his former business partners). But as the replacement ALJ noted, by the time of the second (post-*Lucia*) hearing in this matter in 2019, "Hull learned that Gibson had not taken a short position in TRX," and "his views about Gibson ... changed. No one who witnessed Hull's testimony during the merits hearing has any doubt that he currently is more favorably inclined toward Gibson and has a decidedly negative view of the Division's position and its attorneys." (ID-71)

Misconduct by the Division has permeated this matter, which is now before the Commission. Wholly apart from the merits arguments discussed below, a proceeding with these serial flaws was fundamentally unfair and violated Fifth Amendment due process. *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 316-17 (5th Cir. 1981). The decision here cannot stand and should be dismissed on Constitutional grounds, in addition to merits grounds. Nine years after the events, it is time to put this proceeding to rest.

RELEVANT BACKGROUND

A. Respondent Christopher Gibson. Gibson graduated from Williams College in 2006 with a bachelors degree in economics and art history, and then worked over two years in New York on securitization financing as a junior analyst in Deutsche Bank's training program.

In early 2009, he returned home to Augusta, Georgia and began working for James Hull in his shopping mall and real estate business, Hull Property Group, operating over 40 years in Augusta. Gibson's father (then Hull's business partner) "wanted him to get into the real estate business" on returning home, and Gibson did credit underwriting on Hull's shopping mall tenants. (Tr. 76-80, 110, 520-21, 1095-98, 1255, 1257)

Hull also asked Gibson to review Hull's personal investment accounts at Goldman Sachs and other firms. (C. Gibson Tr.85) Hull was "just taken with" Gibson's "investment thesis" and moved about $20 million of his personal funds away from professional managers and began informally getting advice from the then 25-year-old Gibson. (Tr.1099, 1257) This was against the advice of Gibson's father, who was concerned that in investment matters his son "didn't have a full staff, didn't have a mentor." (Tr.1257)

B. Formation of GISF. GISF was a private investment fund formed at the beginning of 2010. (DX-21; Hull Tr.550) GISF's organizational documents consisted of an Operating Agreement and a Private Offering Memorandum. (DX-21; DX-24) GISF's "managing member" was Geier Capital, LLC. GISF's "investment manager" was Geier Group, LLC. (DX-24) While GISF was owned 81% by Hull, Geier Capital and Geier Group were each owned 50% by Gibson, 35% by Hull, and 15% by Gibson's father. (Tr.529, 541-43, 671)

Geier Group used Hull's offices in Augusta. Gibson was "an employee of [Hull's] company," Geier Capital's "managing director," and Geier Group's president and sole employee.

Hull's company paid Gibson "advances," that were "in the form of a loan" that Hull said Gibson or Geier Group "was going to repay." (DX-12; DX-24; Tr.544-47, 550)

C. Concentrated Ownership of GISF. Hull and Gibson-related investors owned 91% of GISF. Hull invested $26 million in GISF and directly owned 81%, and another 10% was owned by Gibson, his parents and his longtime girlfriend's father. (Tr.529, 557, 561, 588, 664, 1111-12) Hull "wanted [Gibson] to be fully invested" and have "total focus on" GISF, so Hull loaned Gibson the money to personally invest in GISF. Hull demanded an "alignment" of interest. Hull also "thought it was great that [Gibson's] family and his fiancee's family was invested" in GISF, and Hull "pushed" for this. (Tr.561-65)

Hull testified that the remaining 9% of GISF, with one exception, "was owned by [Hull's] closest business associates and friends, long-term friends," people he knew "all [his] life" in Augusta. (Tr.523, 529, 541) These included Hull's 40-year business partner Bert Storey, Hull's general counsel, his stock broker, a CPA friend and others. (Tr.517-18, 676-78) Hull testified he spoke personally with "every one of them" before they invested and was "very clear that it was a ... high-risk type venture." (Tr.680-81) Hull swore that neither he nor Gibson "would do anything contrary to those interests" (these 9% GISF owners), and that "it is absurd" to think that Hull and Gibson (representing 91%) would "want to hurt ourselves." (Tr.529)

D. Hull's Direct Decision-Making at GISF. Hull testified that "as an 80 percent owner of the fund, I insisted that any major decision, that I would be a party to it and have approval of it." (Tr.569-70) Hull said that "any major decisions would first have to be approved by me," and "if I approved [Gibson's] decision, we would go forward. If I didn't, then we wouldn't." (Tr.570-71) Hull explained that he "owned 80 percent of the fund, [and] I put ... my closest friends in the other 10 percent of the fund. ... I'm known as somewhat of an irascible person and ... have that desire to be involved and ... to have things go the way I want them to go." (Tr.568)

Hull said that the other GISF investors were aware that he had approval authority over any major investing decision in the fund. They "all were very much aware of [Hull's] 80 percent" investment in GISF. And "all of these people are very close to me. They know my personality. I've testified earlier I've got a controlling personality so I don't think any of them would have thought otherwise." (Tr.735)

Doug Cates, one of the 9% investors in GISF, is a CPA and has worked as an accountant in Augusta for 40 years, including as accountant for several other GISF investors. He had also taken the FINRA Series 65 Uniform Investment Adviser Law Exam. (1281-82, 1305-07) Cates testified that, after Hull personally presented the GISF investment to him, Cates understood that Gibson would be "doing the research," but that Hull "was going to make the decisions" for GISF. (Tr.1283, 1287) Cates said he would not have invested in GISF if Hull "had not been involved" in running GISF. (Tr.1332) Based on personally investing in limited partnerships and reviewing them for his accounting clients, Cates understood that an investment in GISF "was a complete risk-taking investment." (Tr.1282, 1288; RX-57)

E. GISF's First-Year Success: Up Over 100%. Hull explained that "[t]he original investment thesis of the GISF fund was to invest in gold and other commodities." (Tr.539)

While Gibson "generated the original investment thesis for the fund," Hull said he personally "had a role in that," "was a promoter of that thesis," "bought into the thesis and thought it was correct." (Tr.540-41)

During 2010, its first year, GISF was "up 110 percent" following Gibson's investment thesis, which involved "a number of fairly complex strategies" in arbitrage transactions that were "very successful." Gibson's trading included a "wide number of investments, trading daily in and out of positions." (Tr.1362-63)

Hull said he was pleased that, during its first year, GISF was "very successful, made over 100 percent return." (Tr.673) But Hull said he was unhappy that GISF "encountered some adverse income tax [consequences] ... pertaining to investing in metals. They have unfavorable tax treatment." (Tr.540, 575-76) Hull testified he was "involved in" the decision to get out of those investments "and go to equities." Hull said he "want[ed] that done." (Tr.673) In particular, Hull determined to move GISF into equities to benefit from long-term gains and avoid higher taxation on short-term gains. (Tr.1365)

F. GISF's Switch to TRX Stock. Hull testified he "liked the idea of [GISF] owning a single stock," because he "liked the efficiency of the operation [GISF] had at that time," and did not want to hire additional staff to cover multiple equities. (Tr.1365-66) Gibson could not have resisted Hull's desire to concentrate GISF in a single stock. (Tr.1509-10) However with just a single stock in GISF's portfolio, the investment decision was reduced to "buy, hold, sell," and it was ultimately Hull who was "very, very intensely engaged in that process," and "making those calls." Entirely different from the year before when Gibson had been actively trading a portfolio in and out of gold and other commodities and earning a 110% profit. (Tr.1170, 1258)

Hull wanted GISF's sole investment to be in a "junior" mining company because it offered more upside potential, and Gibson suggested TRX (Tanzanian Royalty Exploration Corporation). While a single-stock investment, TRX offered the diversification of 46 mining properties and a "royalty model" that allowed it to partner with larger and better-capitalized companies. (Tr.1351) Hull testified that he felt "the underlying assets of TRX had ... great value," and wanted all of GISF's assets invested in TRX. (Tr.576, 673-74)

Gibson informed the other GISF investors in a 2/6/2011 email that "we are now highly concentrated in a single equity," but one that he "strongly believe[d] merit[ed] this positioning." Gibson's email described TRX as "a junior mining, exploration and royalty company that controls approximately half of the land prospectable for gold in Tanzania." (DX-48) None of the GISF investors asked for more information or sought to redeem. (Tr.1346)

G. TRX's Declining Stock Price. GISF initially saw gains. But after TRX peaked at $7.46 on 6/1/2011, it generally declined in price. TRX fell below $6 on 8/4/2011, with serious drops in late September. (JX-1)

Hull and Gibson could not understand the TRX decline, as it was a gold exploration company and gold was then "doing very well." (Tr.1373) But Hull testified that "we were very concerned about Jim Sinclair," TRX's president, "not doing the exploration" that was needed.

(Tr.582) And Gibson thought Sinclair failed to communicate TRX information to the market, and sent angry emails to Sinclair to instill "a sense of urgency in Mr. Sinclair." (Tr.1379-81) Hull characterized the then 27-year-old Gibson as someone who "would run very hot and cold," "would go unhinged," and "would rant and rave about different things," including Sinclair. (Tr.583-84)

On the other hand, Gibson thought it significant that TRX had won a Tanzanian auction for a valuable mining property. Additionally, TRX had gotten a capital infusion of $30 million from the Platinum Partners hedge fund, and the gold price was still increasing. (Tr.1377-79) And while Gibson was upset that Sinclair "delayed in making announcements ... constructive and supportive of" TRX, Gibson recognized that Sinclair's delays "had no impact on the 46 [TRX mining] properties, their economic value and the value of the company." (Tr.1381-82)

Over August and September, Hull and Gibson went back and forth on whether to increase GISF's TRX position as prices declined, or decrease or exit the position. Hull emailed on 8/5/2011 that GISF had "now lost a great deal of our gains last year," and that "none of our reasoning/predictions have come to bear," but Gibson responded that TRX's "strategy over the next months" was "a game plan ... that will succeed." (DX-75) On the other hand, Hull testified that, when Gibson considered exiting the position, it was Hull who pushed back in view of TRX's "huge underlying assets." (Tr.586-87)

H. GISF Exits Its TRX Position. However after closing at $5.57 on 9/21/2011, TRX's stock price proceeded to take a dramatic turn for the worse. On 9/22/2011, TRX closed substantially lower at $4.58, down 18% from the day before. On 9/23/2011, TRX dropped again to $4.07, down 11%. Following the weekend, TRX stabilized on 9/26/2011 to close at $4.11, and on 9/27/2011 rose to $4.34, but then during the day dropped again to close at $3.54, down 14% from the day before. (JX-1)

Late on 9/27/2011, after TRX had already dropped to $3.70, GISF received and accepted an off-market block bid to buy about 3.7 million of its TRX shares for $3.50. (DX-82) Hull and Gibson thereafter continued to waffle over whether to sell the rest of GISF's TRX position.

On 9/30/2011, investment bank Roheryn Investments agreed to an "open market sale" of 5.9 million TRX shares for GISF at a price of $3.50, to be conducted over five trading days. (RX-92) This 5.9 million share bid represented all of GISF's remaining TRX shares, plus 680,000 TRX shares that Hull owned individually. Roheryn demanded Hull's shares to assure no follow-on sales by a GISF affiliate. (Tr.1429-30, 1435) But the transaction with Roheryn never happened. (Tr.612)

Gibson emailed Hull on 10/5/2011 that GISF was "going to very likely be best served holding our position" in TRX, and that he "would assume we are where we are for the next several months." (RX-102) Gibson saw "tremendous value" in TRX from (i) "the deviation between gold prices and gold shares"; (ii) "the deviation between other gold shares and TRX"; (iii) "concentrated" short interest then reported among TRX stock traders needing to cover positions; and (iv) the prospect that the "large inventory of shares we owned could provide value to a strategic buyer who sought to develop a controlling position in the company." (Tr.1431-32)

Hull replied that GISF should "try to get a higher price for bulk sale of our shares." (RX-102) Hull testified that "every day is a different day," and GISF would try to get as much as it could "if we were going to" sell. Without "any particular price," Hull would "take every situation and try to understand ... and evaluate it." If Hull "felt like we were getting good value," GISF "would try to sell it." (Hull Tr.615-16)

On 10/14/2011, Gibson emailed Hull that "waiting for at least a few weeks ... looks like appropriate path." (RX-104; Tr 616-18) But with Hull and Gibson still waffling on 10/17/2011, Gibson asked brokers at Garwood Securities to "get us able to sell" GISF's remaining 5.9 million TRX shares. Hull testified that this instruction was subject to Hull viewing any proposal as being at "a good price." (DX-93; Tr.618-19)

On 10/17/2011, GISF block sold 364,495 TRX shares in a private transaction at market price. (Tr.879) On 11/3/2011, GISF sold 485,397 shares, 289,100 shares and 8,200 shares in market transactions at market prices. (Tr. 879-80, 1455) On 11/8/2011, GISF block sold 500,000 shares at or near market price. (Tr. 880-81, 884) On 11/9/2011, GISF sold 119,971 shares near market price. (Tr.885)

As the Division's expert noted, 11/10/2011 "was a busy day for TRX." (Tr.1052) After opening at $3.41, it rose to $3.44, but then dropped to $1.56 before closing up at $2.29. (JX-1) GISF sold its remaining 4.9 million TRX shares at an average price of $2.02. (Tr.1051) GISF was not alone. "Other market participants were selling too," and while substantial, GISF's sales were only about 29% of the day's domestic volume and 22% of worldwide volume. (Tr.1052)

Selling on 11/10/2011 turned out to be a very bad idea. After closing up at $2.29 later that day, TRX stock closed above $3 on 1/23/2012, closed above $4 on 2/23/2012, and closed above $5 (150% higher) in March, just four months later. (JX-1)

GIBSON'S "DEFINED" RELATIONSHIP WITH GISF

The Commission's recent "Interpretation Regarding Standard of Conduct for Investment Advisers," Rel. IA-5248 (6/5/2019), confirmed that "fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement." "[F]iduciary duty must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client," and that "the specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal." *Id*. at pp. 9-10 (emphasis added).

The Commission stressed that the relationship with a retail client "will be significantly different from the obligations of an adviser to a registered investment company or private fund [like GISF] where the contract defines the scope of the adviser's services." *Id*. at pp. 9-10 (emphasis added). An adviser and client "may even agree that certain investment opportunities will not be allocated or offered to a client." *Id*. at p.26 n.65.

As directed by the Commission's Interpretation, the Division's charges against Gibson must be viewed against the agreement that "defin[ed] the scope of [Gibson's] services." That agreement was GISF's' Operating Agreement, and its accompanying Private Offering Memorandum. (DX-21; DX-24) GISF had these prepared by New York-based Seward & Kissel LLP, which Gibson understood was "the leading and preeminent law firm providing advice to form a hedge fund of this nature." (RX-184; DX-24, p. 3; Tr.1334-35)

Below are the particular provisions defining Gibson's role and obligations. When shown these provisions at the hearing, the Division's expert called them "standard language in a fund agreement that gives the managing members of the fund the right to do other things." (Tr.463-64) So the Seward & Kissel-drafted language defining Gibson's relationship with GISF was nothing unusual.

A. GISF's Operating Agreement. GISF's Operating Agreement (DX-21) expressly permitted Gibson to advise and trade for others in separate accounts, including in an investment that GISF contemporaneously held and traded, as follows (emphasis added):

- "The Managing Member shall devote so much of its time and efforts" to GISF's affairs "as may, in its judgment, be necessary." (DX-21, p.2) Gibson was the Managing Member's managing director. (DX-21, p.12) So the agreement on its face it did not require Gibson's full-time commitment.

- "Nothing herein contained shall prevent the Managing Member (or any of its affiliates or employees) or any other Member from conducting any other business, including any business within the securities industry, whether or not such business is in competition with the Company [GISF]." (DX-21, p.2) So Gibson could do other securities activities that actually competed with GISF.

- "Without limiting the generality of the foregoing, the Managing Member (or any of its affiliates or employees) may act as investment adviser or investment managers for others, may manage funds or capital for others, and may serve as an officer, director, consultant, partner or stockholder of one or more investment funds, partnerships, securities firms or advisory firms." (DX-21, p.2) So Gibson could invest for himself and others, separately from GISF.

- "It is recognized that in effecting transactions, it may not always be possible or consistent with the investment objectives of the various persons or entities described above and of the Company [GISF] to take or liquidate the same investment positions at the same time or at the same prices." (DX-21, p.2) So Gibson could invest in the same investment as GISF, but separately, and liquidate at different prices.

B. GISF's Offering Memorandum. GISF's accompanying disclosure document, its Offering Memorandum (DX-24), likewise described the flexibility Gibson had under the Operating Agreement. But the Offering Memorandum did so even more fully, under a bold-and-underscored heading entitled "**Potential Conflicts of Interest**," as follows (emphasis added):

- "Under the ... Operating Agreement, the Managing Member, the Investment Manager, and each of their respective directors, members, partners, shareholders, officers, employees, agents and affiliates (hereinafter referred to as the 'Affiliated Parties') may conduct any other business, including ... in competition with [GISF]." (DX-24, p.19) Gibson was such an "Affiliated Party" – the Managing Member's managing director and a member of the Investment Manager. (DX-24, p.1)

- "Affiliated Parties may ... manage funds, separate accounts or capital for others, may have, make and maintain investments in their own name or through other entities and may serve ... one or more investment funds, ... securities firms or advisory firms." (DX-24, p.19)

- "Such other entities or accounts may have investment objectives or may implement investment strategies similar or different to those of [GISF]." (DX-24, p.19)

- "In addition, the Affiliated Parties may, through other investments, including other investment funds, have interests in the securities and futures in which [GISF] invests as well as interests in investments in which the Company does not invest." (DX-24, p.19)

- "The Affiliated Parities may give advice or take action with respect to such other entities or accounts that differs from the advice given with respect to [GISF]." (DX-24, p.19)

- "As a result of the foregoing, the Affiliated Parties may have conflicts of interest ... in effecting transactions for [GISF] and other entities, including ones in which the Affiliated Parties may have a greater financial interest." (DX-24, p.19)

- "From the standpoint of [GISF], simultaneous identical portfolio transactions for [GISF] and the other clients may tend to decrease the prices received, and increase the prices required to be paid, by [GISF] for its portfolio sales and purchases." (DX-24, p.19)

Gibson's client was GISF itself, not its underlying shareholders. (ID-p.39) Consistent with the Commission's 6/5/2019 Interpretation, it was GISF's Operating Agreement (and accompanying Offering Memorandum) that defined Gibson's scope of services and duties to GISF. And it did so in the "standard language" (as the Division's expert characterized it) of the provisions above. If these "standard" provisions do not protect Gibson from the Division's theories here, the failure of such standard provisions will surprise private funds and their advisers across the industry, and will be viewed as a result totally inconsistent with the Commission's 6/5/2019 Interpretation.

SCOPE OF REVIEW

The Commission's review is de novo, based upon its independent review of the record. "The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record." Rule 411(a).

I. GIBSON'S SMALL SALES OF TRX SHARES ON 9/26/2011 WERE NOT FRONTRUNNING

The Division charges Gibson with a "frontrunning transaction," by personally selling a small number of TRX shares on 9/26/2011, and thus purportedly "us[ing] to his advantage the fact that [GISF] would be selling a significant portion of its TRX position." (OIP-¶6, 28) As discussed below: **(i)** The Division relies on events that, as now demonstrated by unrefuted hearing evidence, do not constitute frontrunning (**Point A** below). **(ii)** The Initial Decision's contrary determination is inconsistent with any known definition of frontrunning in prior caselaw (**Point B**). And **(iii)** Gibson and other accounts he advised did not have to trade in lockstep with GISF's shifting strategies or wait for GISF to complete transactions (**Point C**).

A. No Evidence of Frontrunning. The Division bases its September 2011 frontrunning claim on the following series of transactions, which on their face do not evidence frontrunning:

- On Thursday 9/22/2011, TRX's share price suddenly dropped 18% in a day. The next day, on Friday 9/23/2011, following another steep price drop, Gibson had GISF itself sell 78,000 of its TRX shares at $4.04, and TRX closed at $4.07. (JX-1; RX-17)

- On Monday 9/26/2011, TRX stabilized, opening at $4.07 and closing at $4.11. (JX-1) On that stable Monday, Gibson personally sold 2,500 TRX shares he held in personal accounts, independent of GISF, at $4.04 – the exact same price he had gotten in selling for GISF on the previous Friday – and had a friend's account sell 18,900 shares, also at the same $4.04. (RX-23, 26, 29)

- On Tuesday morning, 9/27/2011, TRX stock opened higher, at $4.24, and then rose still higher to $4.34. So GISF's own Friday sale at $4.04, and Gibson's smaller Monday sale at the same $4.04, did not depress the rising TRX price on Tuesday morning.

- After thus rising on Tuesday morning to $4.34, TRX then proceeded to drop during the course of the day to close at $3.54. (JX-1) The OIP notes the price drop on Tuesday, but the OIP omits the key point that almost all of the substantial price drop happened before GISF sold a single share that day. (OIP-¶5) The Division's expert so confirmed and testified that TRX had already sunk to $3.70 at 3 pm, but that GISF had not done a single TRX trade by 3 pm. (Tr.1007-09)

- On Tuesday afternoon, with the TRX price already down to $3.70 by 3 pm, GISF got an off-market block bid for about 3.7 million of its over 9 million TRX shares at about $3.50, which the Division's expert testified GISF only executed after 3 pm. (Tr.1007-09) Respondent's expert confirmed that GISF's sale after 3 pm could not retroactively depress the price earlier in the day. (Tr.1562-63)

- Gibson accepted the late afternoon bid and agreed to execute only after first getting permission from GISF's 81% owner Hull, who admitted he "insisted" on approving "any" major decisions for GISF. (DX-82; Tr.569-71, 1007-09, 1421-23) Hull testified

he was then "generally" looking for GISF "to get out of TRX at good prices." (Tr.604-05) So Hull admittedly could have said no to the late afternoon block bid.

- Likewise, there is no evidence that GISF's block sale late on Tuesday of 3.7 million shares at $3.50 thereafter pushed down the TRX price. The next day, Wednesday 9/28/2011, with GISF then out of the market, TRX's price simply remained flat. After closing at $3.54 on Tuesday, TRX again closed at $3.54 on Wednesday. TRX continued relatively stable over the next five trading days, closing at $3.70, $3.59, $3.51, $3.28, and $3.56, and then traded mostly in the mid-$3s over the ensuing weeks. (JX-1)

The Division's expert testified to several key points that confirm that this was not frontrunning (Tr.499-504): **(i)** When Gibson made his small personal sales on Monday 9/26/2011, there was still no pending order for GISF to sell TRX shares. (Tr.499) **(ii)** While GISF was then looking for an off-market bid for some quantity of its TRX shares, at some price, from a block purchaser, GISF could have received such a bid to consider that day, or two days later, or two weeks later. (Tr.499-500) **(iii)** Nothing was forcing GISF to sell TRX shares, and it could have continued to hold the shares and benefitted from an increase in the price of the stock – above $5 by March. (Tr.500; JX-1) **(iv)** If a block purchaser appeared at all during the week of 9/26/2011, but with a purchase offer not to Hull's liking, GISF could instead just have continued to hold the shares – all depending on the offer's price, number of shares, other terms and market conditions. (Tr.501) **(v)** Even if GISF got a block bid that week, it was also possible that the bidder would walk away from actually doing a transaction. (Tr.504) Respondent's expert agreed with the Division's expert on these various points. (Tr.1552-63)

Confirming the uncertainty of any large bid, when another bidder in fact appeared three days later for the rest of GISF's TRX shares, the bidder actually did walk away. On 9/30/2011, investment bank Roheryn Investments entered into a "Share Sale Agreement," which stated it was a "legally binding agreement," for an "open market sale" of 5.9 million TRX shares for GISF at $3.50. (RX-92) A Roheryn client already held "a significant position in TRX." (Tr.1427-28) This 5.9 million-share bid covered all GISF's remaining TRX shares, plus 680,000 shares Hull owned individually, to assure no follow-on sales by GISF's affiliate. (Tr.1429-30, 1435) But the transaction with Roheryn never happened. (Tr.612)

Finally, the dollar amounts involved here are so trivial that the Division has failed to show materiality and scienter. The Division contends that, by selling his 2,500 TRX shares on 9/26/2011 at $4.04, Gibson thereby made about $1,350 more than if he had waited to sell until after GISF sold 3.7 million TRX shares off-market at $3.50 late on 9/27/2011 – *i.e.* $4.04 minus $3.50, times 2,500 shares. (Tr.1018-19, 1423) Indeed as the actual relevant price spread was between the $3.70 market price at 3 pm and the $3.50 block sale price after 3pm, as discussed above, a more accurate computation would be closer to $500 ($3.70 minus $3.50 times 2,500 shares). Or maybe another $3,500 if we count Gibson's friend's account.

GISF investors confirmed in testimony the absence of materiality here. A GISF investor called by the Division testified it did not "bother" him that Gibson "made $1,350 without letting ... the other investors know." (Tr.795) And GISF's largest investor Hull, not contemporaneously aware of Gibson's 9/26/2011 sales, similarly testified this "was an incidental

or small amount of shares and that there were probably good reasons for him to do that." (Tr.608-10) And the Division's expert acknowledged that Gibson continued through his substantial GISF ownership to have personal exposure to "the equivalent of 220,000 shares of TRX value," about $770,000 at $3.50. (Tr.874) Gibson remained fully invested in GISF, which was invested solely in TRX, though Gibson had the right to cash out at any time. (DX-21, pp.7-8)

B. Not What Caselaw Defines As Frontrunning. To recap, the $4.04 sale price Gibson obtained selling on Monday 9/26/2011 was exactly the same as the $4.04 sale price he had gotten for GISF's own sale of 78,000 shares the previous trading day. And after closing at $4.11 on Monday, the price jumped to $4.24 at the opening on Tuesday, and then climbed to $4.34. As the day wore on with GISF not trading, the price dropped to $3.70, all before GISF got a block bid later in the afternoon for 3.7 million shares off-market at $3.50. If and when a block bid did arrive that day or days later, it could not be anticipated whether Hull would have accepted or rejected.

Gibson's small personal sales on Monday were patently not frontrunning under any definition of the term. There is simply no way that Gibson on Monday was "trading ahead" of a surprise market rise Tuesday morning, followed by a surprise market drop during the day on Tuesday, followed after the Tuesday price drop by a block bid that might have arrived days or weeks later, followed by weeks of relatively stable prices.

The Initial Decision correctly notes that "there is little case law addressing frontrunning under the antifraud provisions of federal securities law." (ID-p.42) And all that the Initial Decision cites to explain frontrunning under the securities laws are the following cases in which the conduct bears no resemblance at all to Gibson's small 9/26/2011 sales:

- *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963): Advisers there had an undisclosed "practice" of repeatedly buying shares, then recommending that their investment research clients buy for long-term investment, and then selling shares after the clients' purchases boosted the price. The Court held this was unlawful "scalping." *Id*. at 181-83. The case did not involve frontrunning, which is not even mentioned.

- *SEC v. Yang*, 795 F.3d 674, 680 (7th Cir. 2015): An investment adviser with partial ownership of two accounts invested one before the other in a particular stock. After the jury found him liable for frontrunning but not for insider trading, he argued for the first time on appeal that his conduct was not frontrunning. The appeals court explicitly "declined to reach" the frontrunning issue because he had failed to raise it in the trial court and "the record is undeveloped." *Id*. at 679.

- *Matter of D'Alessio*, 2003 WL 178291 (SEC 4/3/2003): The SEC affirmed NYSE discipline of a floor broker who, hundreds of times over four years, traded an account he partially owned "while he held open and executable orders for the same security for other accounts." *Id.* at *7. His "pattern of trading" over the years "did not change" and involved, in the example given, buying shares for himself just as he was beginning to fill a large customer buy order, then executing successive purchases for the customer that

drove up the price, and then selling his own shares by crossing his sale with his customer's next purchase at the higher price. *Id.* at *3-*4.

- *Matter of E.F. Hutton & Co.*, 1988 WL 901859 (SEC 7/6/1988): The SEC ruled 3-2 that a large firm could not execute a proprietary trade when the inside bid never reached a customer's open limit order. Frontrunning is never mentioned.

- *Matter of Smith Barney*, 1984 WL 472586 (SEC 8/15/1984): The SEC affirmed an Amex censure of a large firm for trading options for its own account before publicly disseminating its negative research report on the same issuer. Frontrunning is never mentioned.

The Initial Decision fails to consider our additional citations that do explain frontrunning: *D'Alessio v. SEC*, 380 F.3d 112, 114 (2d Cir. 2004) ("broker 'trades ahead' or 'frontruns' when he or she receives a large order ... and, before executing the larger trade, first executes trades ... for an account in which the broker had an interest so as to anticipate and exploit the movement in price the larger trade is likely to cause"); *U.S. v. Mahaffy*, 693 F.3d 113, 120-21 (2d Cir. 2012) ("frontrunning" where leaked already-placed block-trade orders to another firm to allow it to trade ahead of the orders and profit from price impact following execution); *SEC v. Pasternak*, 561 F.Supp.2d 459, 509 (D.N.J. 2008) ("focal point in improper front-running is that the conduct is to the detriment of the customer").

None of these cases – the Initial Decision's citations or our citations – remotely resembles Gibson's sale of a small number of TRX shares on Monday 9/26/2011, after GISF had sold a larger number of shares at the same price on the previous trading day Friday 9/23/2011, and before GISF (through Hull) determined to accept a 3.7 million share block bid that first arrived late on the afternoon of the following trading day, Tuesday 9/27/2011, after the market price had already dropped.

C. No Duty to Trade in Lockstep With GISF's Shifting Plans. As discussed above, GISF's Operating Agreement and Offering Memorandum expressly allowed Gibson to trade separately from GISF in the same securities and in competition with GISF, and thus permitted his small 9/26/2011 sales. Gibson and accounts he advised and traded independently thus did not have to mimic or follow GISF.

Against this background, the Division has not offered proof that those independent sales of TRX in separate accounts Gibson advised and managed in any way impacted the price GISF got. Following Gibson's 9/26/2011 sales at $4.04, the stock price rose to $4.34 the next morning, so there is no proof that Gibson's small sales depressed the price. The rising price shows the contrary.

Nor has the Division proven that Gibson profited by trading with advance knowledge that GISF might get a block bid on the afternoon of 9/27/2011 and execute a sale. After TRX rose to $4.34 on 9/27/2011, the price sank to about $3.70 – all before GISF got the block bid at $3.50 for 3.7 million shares. And GISF's sale at $3.50 was not an event proven to have depressed the price, as it closed higher that day and then traded flat over the days that followed.

Moreover, a more detailed review of the evidence over the period leading up to and immediately following Gibson's small 9/26/2011 sales shows that GISF's intentions, as determined by Hull, concerning its TRX shares during this time were at best highly uncertain and shifting:

- Hull, who invested $26 million to own over 80% of GISF, was making all major decisions concerning GISF's investments. Hull testified that "any major decisions would first have to be approved by me," and "if I approved [Gibson's] decision, we would go forward. If I didn't, then we wouldn't." (Tr.570-71) So GISF's execution decision on a large block bid was simply not Gibson's call at any time. It was up to Hull.

- The previous month, on 8/23/2011, a broker had bid $5.85, then the market price, for GISF's entire over 9 million-share TRX position at the time, but Hull rejected the bid. (RX-62; 1386-88) Hull testified that TRX was "tremendously undervalued," that there was "no reason to have to sell," and that for GISF "it was just a matter of hanging on" in TRX. (Tr.588)

- After the TRX price drop on 9/22/2011, Hull "floated the idea of increasing [GISF's] position and purchasing more [TRX] shares in light of the decline in the share price." And with the price declining further on 9/23/2011, Hull expressed "a greater desire to purchase more shares." (Tr.1389-91; RX-52)

- Hull testified that, over the 9/24-9/25/2011 weekend, with Gibson then recommending a sale, Hull was still "not in favor of liquidating" GISF's position in TRX." (Tr.602-04) But Hull testified that, by the end of the weekend, he gave Gibson "a general guidepost to get out of TRX at good prices." (Tr.604-05)

- With Hull flipping between "a desire to purchase more" TRX shares and indicating he "wasn't sure he had a tolerance for more losses," Gibson interpreted this as "a potential posture to consider a sale" of GISF's TRX shares. So Gibson determined to "solicit a bid" and give Hull "an array of options to consider." However Gibson's "judgment was that, as occurred the previous month, [Hull] would reject" a bid to sell the shares. (Tr.1392-93)

- On Sunday evening, 9/25/2011, Gibson emailed the broker who had made the 8/23/2011 block bid at $5.85 that Hull had rejected. Gibson told the broker that GISF still "believed" in TRX, was not leveraged, and "contemplate[d] waiting it out." But as GISF was "concentrated in TRX," the broker should advise "if there is a buyer that sees current prices as very compelling as we otherwise would." (RX-62) Gibson was "intending to solicit a bid" while indicating GISF was "not a motivated seller." (Tr.1401)

- The Division's expert acknowledged that on 9/26/2011, the day of Gibson's small personal sales, there were multiple uncertainties: There was no telling when a block purchaser would appear, and it could be that day, two days later, or two weeks later. Whether GISF would accept a bid would depend on the price and other terms. And

finally, a block bidder could walk away after agreeing to a transaction (as actually happened three days later with the 9/30/2011 bid, discussed above). (Tr. 499-504)

- Later on 9/26/2011, the broker emailed that he thought he could sell 3 to 5 million shares. Gibson asked if the bid was "going to price today" (Monday), but the broker replied "more likely tomorrow" (Tuesday), and Gibson then responded that he wanted "to price and book the sale tomorrow" (Tuesday) and asked if that was "possible." (RX-62)

- On Tuesday afternoon 9/27/2011, with the price approaching $3.70, the broker asked Gibson for confirmation that GISF was willing to sell up to 5 million shares for $3.50 or better, but the broker said he would sell "more like 3.5mm shares or so." (DX-82) Gibson then responded "Confirm at 3.50 or better up to 5mm shares." (DX-82) Respondent's expert, with years of industry experience, testified that Gibson's email on Tuesday afternoon was "the first we see of an order." (Tr. 1560-61)

- The broker then phoned Gibson with a specific bid of $3.50 for 3.7 million shares. Gibson lacked authority to sell that many shares without Hull's permission. (Tr. 569-71, 1421) So Gibson put the broker on hold, and with "a couple of minutes at most to make a determination," got Hull's approval. (Tr. 1422-23) Minutes later, the broker reported the sale of 3,734,395 shares at an average price "somewhat above 3.50." (DX-82)

The overall situation was thus highly uncertain immediately before and after Gibson's small separate account sales on 9/26/2011. Would Hull actually agree to let GISF sell its TRX shares at all, in part, or not at all? Would Gibson get a block bid for all or some portion of GISF's shares, and if so when would the bid arrive? Would any such bid meet Hull's "at good prices" criterion and be otherwise acceptable to Hull? Would the bidder perform or back away? Whenever it arrived, how long would it take to finalize the transaction? How would the market price move in the meantime?

Gibson and other accounts he advised did not have to stand idly by and only trade in lockstep with these shifting GISF strategies, and did not have to wait for GISF to complete its transactions. The exact opposite is the case. Again, GISF's Operating Agreement and its Offering Memorandum specified: **(i)** that Gibson was not committed full-time to GISF and could conduct "other" securities industry business, including "in competition" with GISF; **(ii)** that Gibson could invest separately for himself or others, with the same or different strategies and trading as GISF; and **(iii)** that in so doing, Gibson could transact in the same securities or futures as GISF, including in simultaneous price-impacting transactions as GISF. (DX-21, p.2; DX-24, p.19) All "standard language" for private fund managers like Gibson, as acknowledged the Division's expert. (Tr.463-64)

Again in this context, the unrefuted evidence reviewed above shows that Gibson's small sales on 9/26/2011 did not seize an opportunity from GISF, nor did it exploit knowledge about GISF. Specifically, as detailed above, the evidence from the hearing shows, without challenge: **(i)** that Gibson small sales on 9/26/2011 at $4.04 followed GISF's larger sales the trading day before at the same price; **(ii)** that Gibson's sales did not depress the market, which closed higher at $4.11, opened on 9/27/2011 still higher at $4.24, and then rose to $4.34; **(iii)** that neither

Gibson nor GISF was in the market during the middle of the day on 9/27/2011, when it sank to $3.70 by 3 pm; **(iv)** that it was after the market sank to $3.70 that GISF received a block bid at $3.50 for 3.7 million shares; and **(v)** that GISF's block sale did not itself materially impact price, which then closed up at $3.54 that day and stayed flat for weeks.

In sum, Gibson's small 9/26/2011 sales, which the Division claims yielded him $1,350 in personal profit, were not at all frontrunning of GISF's 3.7 million-share block transaction. The Initial Decision's contrary finding is wrong and must be rejected.

II. ALLOWING HULL TO SELL TRX SHARES ON 10/18/2011 TO GISF, A FUND OWNED 81% BY HULL HIMSELF, DID NOT FAVOR HULL OVER OTHER GISF INVESTORS

The Division charges that Gibson "favored" Hull by allowing him to sell 680,636 TRX shares on 10/18/2011 to GISF "at prices favorable to" Hull, thus "furthering his relationship with" Hull, resulting in "an undisclosed conflict of interest." (OIP-¶34) In transacting with GISF, Hull was transacting mostly with himself. At the time GISF was owned 81% by Hull (Tr.529, 588, 664); about 10% by Gibson and his and his girlfriend's parents (Tr.529, 557, 561, 135-36, 1111-12, 1336); and about 9% by a small number of individuals, mostly close and longtime personal friends of Hull from Augusta GA (Tr.529, 541, 680).

This transaction did not "favor" Hull. The hearing evidence shows that: **(i)** The transaction complied precisely with GISF's Offering Memorandum (**Point A** below); **(ii)** Hull was personally disadvantaged, and certainly not "favored," by the transaction (**Point B**). **(iii)** Hull acted to benefit GISF by aggregating related TRX holdings, eliminating the overhang he represented, and thus making it easier for GISF to market its remaining shares (**Point C**). And **(iv)** Gibson obtained no benefit from this transaction between Hull and GISF (**Point D**).

A. The Hull Transaction Complied With the Offering Memorandum. On 10/18/2011, Hull sold 680,636 TRX shares from his personal account to GISF in a private transaction at $3.60, the closing market price that day. (DX-95; Tr.619-21, 1435) As this was a private transaction, neither Hull nor GISF paid a commission. (Tr.630) Hull was selling to GISF for less than the market had recently been willing to pay him. He had sold about 70,000 TRX shares a week earlier in a market transaction at a higher price than he charged GISF. (RX-105; JX-1; Tr.633-34)

GISF's Offering Memorandum specified that "purchase and sale transactions ... may be effected between" GISF "and any other entities or accounts," if "for cash consideration at the current market price of the particular securities." (DX-24, p.19) And an investor called by the Division at the hearing specifically testified that it would not "offend" him if Hull "sold his shares to [GISF] for market price," and that he would not consider it a "disservice to ... the other investors." (Tr.795-96)

So by purchasing TRX shares from Hull at the $3.60 closing market price that day, GISF complied with this provision in GISF's Offering Memorandum. Respondent's expert confirmed this "is exactly what that means" in the Offering Memorandum, and that executing "at the

closing price of the market on that day ... is the most equitable way to cross that stock," with "no premium or discount to either party." (Tr. 1569-70, 1625-27) GISF's Operating Agreement likewise allowed transactions with affiliates. (DX-21, p.3, §3.02(h))

B. The Hull Transaction Disadvantaged Hull. Hull soon lost money on the transaction. Just days after GISF bought shares from Hull at $3.60 on 10/18/2011, they increased in value. TRX then peaked in just a week at $4.09 on 10/25/2011 before closing that day at $3.92, and overall stayed well above $3.60 for most of the three weeks following the Hull transaction. (JX-1; Tr.891-92) So Hull could have personally profited from this price rise if he had not sold to GISF, but had instead given his TRX shares to a broker to sell for him on the open market over the ensuing days. (Tr. 624, 1571-73) With substantial volume over the next three weeks – including 1,355,974 shares on 10/25/2011 and 1,901,168 shares on 11/3/2011 – there was room to absorb market sales by Hull. (JX-1)

But even if Hull had sold anything in excess of 19% of his TRX shares on the open market, he would still have come out ahead over selling his shares to GISF. As GISF's 81% owner, Hull essentially sold 81% of his 680,636 shares (or 551,315 shares) back to himself. So he really disposed of only 19% (or 129,321 shares). (Tr.1030, 1573) Hull "believe[d] firmly" he could have disposed of these shares in market sales "and ended up in exactly the same place." (Tr.625) And likewise Hull and both sides' experts agree that the money GISF paid Hull for these shares was 81% Hull's own money as GISF's 81% owner. (Tr.706, 1573, 1030, 904-05) Respondent's expert confirmed that Hull throughout maintained a long exposure to TRX, and his interests remained aligned with GISF, as they were "both rooting for the same outcome," for TRX to go up. (Tr. 1568)

Nor did Hull benefit on GISF's resale of his TRX shares. When GISF ultimately sold these 680,636 shares upon liquidation of its remaining TRX position, it paid a commission of $0.002 per share to its broker Garwood Securities. (Tr. 1440-41) Simple math shows that GISF's commission as to these shares was about $1,360, and that the 9% investors (those apart from Hull and the Gibson group) thus paid about $120 in commissions on the ultimate sale of their portion of the shares bought from Hull weeks earlier on 10/18/2018. (Tr.1570-71, 1441)

C. Hull Acted to Benefit GISF Through the Hull Transaction. Hull had a particular reason to sell his 680,636 TRX shares to GISF – though effectively selling most of these shares back to himself as GISF's 81% owner. Hull explained that he "wanted to put ... my shares together with the fund shares to have a larger block," because "as a larger block of shares, ... we would have a much greater opportunity to get" a "substantially increased price" in selling GISF's block of TRX shares. (Tr.624, 627) The "idea" of Hull's sale to GISF was "to try to find a motivated buyer" and was "in preparation for putting a big block together to entice a buyer." (Tr. 638-39) By then, Hull wanted GISF "to get out of TRX at good prices." (Tr.604-05)

Hull's theory in building a larger TRX block for GISF was reasonable. Respondent's expert confirmed this would "consolidate the shares in one place, which greatly simplifies the process of entering into a block transaction." A buyer "would want to know that he's seeing the whole piece for sale and that would include any affiliates. So getting all of that into one place certainly would make it easier ... to then transact." Further, "because Jim Hull is 81 percent of

the fund, and then had this piece in his own account, he's ... a significant affiliate." This made it "just far cleaner to then put up a block or negotiate the price for a block if those shares are all combined." (Tr.1567-68)

Respondent's expert further explained that "[w]hen negotiating a block transaction, it's important that the seller in this case be able to show to ... the broker and to the buyer that he represents all of the holdings of the entities, and that what they were shopping was what they call a cleanup transaction or they might say I need to see the whole picture. And so in order to see the whole picture, you would have to look at them in combination." (Tr.1622) A cleanup transaction "means there is no more for sale," at least among large holders. (Tr.1650-51)

This view of the need for a cleanup transaction was not theoretical. As noted above, just two weeks earlier, on 9/30/2011, GISF and Roheryn Investments entered into an agreement for sale of 5.9 million TRX shares. (RX-92) This represented not only all of GISF's remaining TRX shares, but also Hull's separate 680,636 shares, which Roheryn also demanded to assure there would be no follow-on sales by GISF's affiliate Hull. (Tr.1429-30, 1435) But, as discussed above, the Roheryn transaction did not proceed. (Tr.612)

D. Gibson Obtained No Benefit From the Hull Transaction. The Hull transaction thus disadvantaged Hull, yet it was something that Hull himself determined to do to help GISF market its TRX shares "at good prices" by aggregating the shares of GISF's only large affiliated investor. For these reasons, the evidence does not at all support a conclusion that the Hull transaction was something Gibson had GISF do for the purpose of "furthering his relationship with" Hull. (OIP-¶34) And to the contrary, there was nothing for Gibson to "further" with Hull at that point. As described below, Gibson's debt to Hull was already in place and would not be forgiven, and there was no salary impact for Gibson.

Before the Hull transaction, Gibson owed Hull approximately $640,000. (RX-117) Hull testified that, as GISF's approximately 81% owner and $26 million investor, it was "important" to Hull that Gibson "be invested in the fund he was managing," that his interests be "aligned" with Hull and GISF, and that he have "total focus on the fund." (Tr.561-62) It was for this reason, Hull explained, that he personally loaned money to Gibson for him to use to invest in GISF. If Hull did not "require" Gibson to do this, Hull said he "strongly, strongly urged" it. (Tr.563) Hull said he "had a lot of money riding on" GISF and "wanted [Gibson] to be fully invested in the fund." Hull acknowledged he "was the moving party" on this, and "thought it was great that [Gibson's] family and his fiancee's family was invested," so Hull "pushed" for this. (Tr.563-64) In short, Hull was not doing Gibson a favor by loaning this money. Hull was acting in his own self-interest to guarantee Gibson's commitment to GISF's success.

After the Hull transaction, Gibson still owed Hull the same approximately $640,000. Gibson expected no slack from Hull, and Hull cut him none. Indeed, on 10/26/2011, just a few days after the Hull transaction, Hull had Gibson sign an "updated" promissory note that confirmed unequivocally that the loan remained outstanding and would not be forgiven. (RX-117) And Hull never did forgive the loan. Ultimately Hull's loan to Gibson for investment in GISF "was repaid" to Hull years later as part of a large real estate transaction with Gibson's father. (Tr.566) Gibson's father still holds his son's note. So this was exactly the opposite of

Gibson having GISF buy Hull's TRX shares in order to get his loan forgiven. Not a chance of that.

Before and after the Hull transaction, Hull's company paid Gibson a salary, beginning in 2009 and continuing through early 2013. (Tr.334-35, 1230-38, 1313-1320; DX-147; DX-156) There is no evidence that this was under review or subject to change around the time of the Hull transaction. And Hull flatly denied in his testimony that the salary his company was paying Gibson influenced the transaction in any way. (Tr.708) So again, there was no "furthering of a relationship" with Hull. Instead, the unrebutted testimony shows that the Hull transaction had no effect on any relationship with Hull.

III. GIBSON'S USE OF "PROTECTIVE" PUT OPTIONS AS A PARTIAL HEDGE WAS NOT FRONTRUNNING

Lastly, the Division charges Gibson with a "series of 'front-running' transactions" (OIP-¶42) by personally buying TRX "protective" put options. Gibson bought options over a two-week period between 10/27 and 11/8/2011, during which TRX rose to a temporary near-term peak price, in order to partially hedge his substantial TRX exposure through GISF. All the while Gibson continued to remain fully invested in and committed to GISF without redeeming any of his interest in GISF. When GISF liquidated its remaining TRX position in a suddenly collapsing market on 11/10/2011, Gibson's put options provided Gibson with some partial but relatively small protection. He was slightly less wiped out by having the protective puts.

As discussed below: **(i)** The hedging Gibson did with protective puts, as shown by the hearing evidence, does not demonstrate frontrunning (**Point A** below). **(ii)** Gibson maintained his continuing alignment with GISF throughout (**Point B**). **(iii)** Caselaw does not recognize such hedging activity as frontrunning (**Point C**). And **(iv)** GISF's Operating Agreement and Offering Memorandum allowed Gibson to engage in such hedging activity to protect his personal position (**Point D**).

A. Hedge Not Evidence of Frontrunning. Gibson bought puts on four days over a two-week period, after receiving a request to re-execute the Hull note, and while TRX stock was at a temporary near-term price peak. (RX-117) After TRX had dropped below $4 in late September and then traded mostly flat in the mid-$3 range for weeks, TRX closed at $3.67 on 10/24/2011, then rose to close the next day at $3.92 (after an intra-day peak of $4.09), and then had its closing price peak at $3.96 on both 10/27 and 10/28/2011, its highest closing price in a month. On those two closing peak days for TRX shares, 10/27 and 10/28/2011, Gibson personally bought $4 TRX put options. Gibson also bought the puts the following week on 11/2/2011 with TRX's closing price at $3.94, almost its recent peak, and finally the week after that on 11/8/2011 with TRX's closing price at $3.69. (OIP-¶43; JX-1)

Respondent's expert explained that the puts Gibson was buying were so-called "protective" puts, which are "very commonly used" as a hedge. (Tr.1575). As such, they demonstrate "good risk management" and "were in fact invented as a market hedging mechanism." When "used against a long position," puts "can mitigate loss below certain price

points while allowing" an investor "to maintain long exposure, particularly through bouts of volatility." Puts thus act like an insurance policy. (Tr.1574)

Gibson made these put purchases – which stretched out across two weeks as TRX was near-term peaking – in both his account and his friend's account (funded by her father, a GISF investor). (OIP-¶43) The puts were a hedge for both accounts. Gibson was then heavily invested in GISF, and "approximately a 50 cent [TRX] share price move away from being insolvent," while owing Hull $640,000. (RX-117; Tr.1445-47) His friend was then an art history graduate student living at home in a family economic unit with her parents, who then "had all of their liquid assets in" GISF and were thus significantly exposed to TRX. (Tr.1098, 1337, 1448, 1649) Gibson also recommended puts to his father, who was also net long in his exposure to TRX stock through GISF. (Tr.1100, 1103-04, 1143-44)

The Division misstated in the OIP that "the put contracts represented a short position" for Gibson in TRX. (OIP-¶45) At the hearing, the Division's expert disagreed with the Division. Indeed, the Division's expert correctly took exactly the opposite position, testifying: **(i)** that after buying the puts, Gibson "was long exposed to the stock through his involvement in [GISF]" (Tr.1060); **(ii)** that the options he bought are thus "characterize[d] ... as a protective put," and "as a hedge" (Tr.1061); and **(iii)** that a "protective" put protects an investor's long exposure in the underlying asset (Tr.1070).

Respondent's expert agreed and testified: **(i)** that buying a "protective put" is "what Chris Gibson did," as the put protected his interest in the underlying TRX stock (Tr. 1580); **(ii)** that Gibson's "exposed long position to TRX ... was through the GISF fund at this point and ... it was to the tune of something above 220,000, might have even been 225,000 shares of TRX" (Tr. 1582); **(iii)** that his puts only "partially" covered his TRX exposure, "similar" to buying an insurance policy on part of a car (Tr.1582, 1647-48); and **(iv)** that such a "partial" hedge left him "naked long," "didn't even take him to a neutral position," and "certainly did not take him into a position that opposed the other investors in the fund," as they "all remained aligned and bullish" (Tr. 1648-49);

GISF's 81% owner Hull concluded that Gibson's purchase of "protective puts on a portion of his investment" was "both morally and legally permissible." Hull noted that Gibson "was a young man," who "was willing to bet a lot of money" on GISF but personally "didn't have a lot of money." (Tr.534) Gibson "had an overall long position and ... took a little bit of money off the table." (Tr.535) Hull agreed that Gibson's puts acted "like insurance," and Hull testified that he did not think that Gibson "harmed the fund or that his intention was to harm the fund." (Tr.536, 663)

B. Gibson's Alignment With GISF While Hedging. Critically important to understand here is that, during the two-week period Gibson was buying his partial hedge through protective put options, Gibson's overall position made it consistently in his personal economic self-interest for TRX stock to go up, not down. He was not buying the protective puts in the hope that TRX would decline. To the contrary, as the Division's expert explained, **(i)** Gibson's "protective" puts protected only about a third of his and his friend's family's long exposure to TRX stock (Tr.1064-67); and **(ii)** in the aggregate, Gibson was still personally making a "bullish" bet on

TRX (Tr.1076-77). Respondent's expert likewise agreed that **(i)** Gibson's puts only "partially" covered his TRX exposure (Tr.1582, 1647-48); **(ii)** Gibson demonstrated a "bullish" view on TRX because a protective put holder "root[s] ... for higher stock prices, not lower stock prices," with the put simply a partial "insurance policy" (Tr.1576-78); and **(iii)** Gibson remained in alignment with the other GISF investors throughout (Tr.1587).

While thus still "rooting" for TRX shares to go up, Gibson was prudently taking steps to lighten GISF's holdings in TRX, which had comprised 100% of its portfolio earlier in 2011, through orderly market-price sales of TRX shares. On 11/3/2011, GISF sold 485,397 shares, 289,100 shares and 8,200 shares in market transactions at market prices. (Tr.879-80, 1455) On 11/8/2011, GISF did a negotiated off-market block sale of 500,000 shares at or near the market price. (Tr.880-81, 884) On 11/9/2011, GISF sold 119,971 shares at near the market price. (Tr.885) On these days, TRX closed at $3.67 (11/3), $3.69 (11/8), $3.42 (11/9). (JX-1)

At the hearing, Gibson testified, without challenge, concerning the objective facts underlying his strategy for GISF at this time:

> ... From the day that we [GISF] began to sell our shares ... we were able to liquidate five and a half million shares.... And as can be demonstrated in [the price/volume chart, JX-1], the share price was essentially flat, did not move. We remained bullish on the shares. The view was we're trading 50 percent below where we had earlier in the year [2011] and that we had now liquidated more than half of our position and the expectation would be we would liquidate the remainder of the position without moving the market either.
>
> In addition, when we began liquidating our shares, we were one of the largest owners of the stock. We're now not one of the largest owners. We now own less than 5 million [shares]. BPI owns 10 million. The sheik [a UAE investor] owns 10 million. Platinum Partners owns nearly 10 million.
>
> So the likelihood that if, during the six-week period that we liquidated half of our position, it didn't move the share price, and those owners were smaller owners of the shares and now they're larger owners of the shares and we are a much smaller owner of the shares, all things equal, it would be logical to assume that the past is indicative of the future and we would be able to liquidate the remaining position without a material move of the market. (Tr.1450-51)

Gibson explained that he could have benefited himself by having GISF spend investor money to buy protective puts covering GISF's entire remaining TRX position, as Gibson would then have achieved 100% of the personal "protection" he desired (against his $640,000 Hull debt) without having to buy his own puts for partial protection. (Tr.1452) But he concluded that this would have been "wrong" to do, since the puts "had a cost to them" and, while he personally desired the partial protection of the puts he bought, he expected the puts ultimately "to expire worthless." (Tr.1450)

The Division does not claim that Gibson had some duty to tell individual GISF investors the pros and cons of individually adopting this same hedging technique of buying partially protective puts. Respondent's expert explained that Gibson's put purchases did not deprive other GISF investors from buying their own TRX puts as "there was no scarcity to those puts," and buying protective puts did not hurt GISF. (Tr.1583-84) One GISF investor independently bought identical $4 puts. (RX-189) And the Division's expert agreed that nobody can know what tomorrow's stock price will be, and he acknowledged that by March, just four months later, TRX was trading back above $5. (Tr.936-38)

Things changed quickly. On the evening of 11/9/2011, Gibson received a proposal from the Platinum Partners hedge fund, which by then owned double GISF's shares in TRX. But instead of offering to buy out GISF's TRX shares, as Gibson was expecting, Platinum was offering to pay GISF $10,000 monthly not to sell any TRX shares for six months. (Tr.1456-57) On hearing about this from Gibson, Hull was "very concerned" that Platinum wanted such a lock-up because "they may want to sell their shares before we would." (Tr.1457-58)

GISF reacted with "a strategic decision to exit the position" in TRX entirely, with "the expectation that the other large holders who would be financially incentivized to purchase ... would come in and buy it." (Tr.1219) Gibson and Hull determined "to sell aggressively in order to signal to the other large shareholders that we were selling and that they needed to make a decision as to whether or not they were going to buy or sell under the theory that given our superior position at the table with far fewer shares than they did, that they would be forced to go ahead and buy our shares." (Tr.1461-62) Hull testified that "our theory was the price was going to be going up because they're going to have to defend their shares and they didn't want the price to go down. What happened was the opposite. All the other large shareholders sold." (Tr. 658-59) Hull acknowledged that this plan "could potentially tank the stock," but said "that was not our plan or theory of the sale." (Tr.659) To force the hand of other large holders, Gibson instructed GISF's own broker to sell hard that that day, even though this approach could "potentially tank this stock." (Tr.1461-62; DX-105)

The Division's expert called 11/10/2011 "a busy day for TRX," with GISF selling out its remaining 4.9 million shares at an average price of around $2.02, but in so doing still representing only about 29% of the domestic volume and 22% of the worldwide volume that day, as "other market participants were selling too." (Tr.1051-52) After opening at $3.41, TRX rose slightly to $3.44, but then dropped to $1.56 before closing up at $2.29. (JX-1) At the hearing, Gibson admitted that the decision on 11/10/2011 to flood the market with GISF's TRX shares in the belief that other large owners would decide to support the TRX stock price by buying GISF's shares did not achieve its intended purpose. (Tr.1464-66)

This miscalculation entirely wiped Gibson out, so his "protective" puts got overwhelmed. Ultimately he lost about $725,000, his friend's family lost about $965,000, and his parents lost about $1.4 million. (RX-205; RX-240; Tr.1301-04, 1328) As Gibson described it at the hearing, "I've been insolvent every day since the 10th of November of 2011." (Tr. 1469)

C. Again Not What Caselaw Defines As Frontrunning. At issue here are what the experts on both sides agree were "protective" puts for a partial hedge that Gibson bought during

a period of two weeks, on 10/27, 10/28, 11/2 and 11/8/2011. He could have saved himself the personal cost by instead having GISF spend investors' money to buy 100% protective-put coverage, but decided such a one-size-fits-all approach would be "wrong," as the puts would likely expire worthless.

By the time Gibson bought the puts, GISF had already liquidated over half of its TRX holdings, TRX was trading at half of its price earlier in 2011, Gibson expected GISF would liquidate the remainder of its TRX holdings without moving the market, and up through 11/9/2011 (the day after Gibson's last put purchase) GISF was in fact continuing to sell TRX shares in an orderly manner at relatively stable market prices. But on getting surprised by Platinum's lock-up proposal on the evening of 11/9/2011, Gibson and Hull panicked and determined to aggressively sell out GISF's remaining shares the next day to force Platinum and other larger holders to buy up GISF's shares, a considered strategy that sadly failed.

This is what actually happened, and there is no evidence to the contrary – far beyond merely the required "preponderance" of the evidence. This utterly fails to show Gibson buying puts to interpose himself ahead of an actual GISF order. And it fails to show a "series of 'front-running' transactions ... prior to selling a massive block of TRX shares for [GISF]," as the Division charged in the OIP (¶42). The Division has not proven its claim.

As discussed above, the Second Circuit tells us that frontrunning occurs where a broker "receives a large order ... and, before executing the larger trade, first executes trades ... for an account in which the broker had an interest so as to anticipate and exploit the movement in price the larger trade is likely to cause." *D'Alessio v. SEC*, 380 F.3d at 114. *See also U.S. v. Mahaffy*, 693 F.3d at 120-21 ("frontrunning" where leaked already-placed block-trade orders to another firm to allow it to trade ahead of the orders and profit from price impact following execution); *SEC v. Pasternak*, 561 F.Supp.2d at 509 ("focal point in improper front-running is that the conduct is to the detriment of the customer").

While the series of events here were unfortunate from an economic perspective, they were not frontrunning. Gibson's purchase of protective puts, stretched over two weeks as TRX was peaking, is not remotely close to the Second Circuit's or any definition of frontrunning.

D. GISF's Operating Agreement and Offering Memorandum. Finally, as discussed above, GISF's Operating Agreement (DX-21) and its Offering Memorandum (DX-24) defined a role for Gibson that allowed him to engage in other investment activities independent of GISF. And the Division's expert confirmed that such provisions are "standard language in a fund agreement that gives the managing members of the fund the right to do other things." (Tr.463-64) Certainly Gibson's purchases of these "protective" puts, as described above, were consistent with and authorized by provisions expressly giving him the ability to do the following:

- Engage in "any other business, including securities business, "in competition with" GISF, while working only part-time to GISF. (DX-21, p.2)

- Manage other accounts or funds making investments, including accounts or funds with investment strategies similar to or different from GISF. (DX-21, p.2; DX-24, p.19)

- Have personal investments and interests in the same securities as GISF. (DX-24, p.19)

- "Give advice or take action" that "differs" as between GISF and other entities or accounts. (DX-24, p.19)

- Have conflicts of interest in "effecting transactions" for multiple entities, including entities in which Gibson has "a greater financial interest." (DX-24, p.19)

- Make "simultaneous identical portfolio transactions" for "other clients" that could impact prices received or paid for portfolio transactions. (DX-24, p.19)

- "In effecting transactions" for GISF and others, "take or liquidate the same investment positions" at different times and different prices. (DX-21, p.2)

Indeed, it would come as a shock to investment managers large and small across the securities industry if such "standard" provisions did not allow them to hedge, through protective puts or otherwise, their personal exposure to investments held in the funds they managed. (As the record shows Gibson did not violate the securities laws by frontrunning GISF or favoring Hull, he could not violate Rule 206(4)-8)

IV. CONSTITUTIONAL AND PROCEDURAL DEFENSES

Gibson further seeks review on Constitutional and procedural grounds. The 14,000-word limitation on this brief, which must cover de novo review of multiple erroneous findings and conclusions, prevents more detailed discussion of the following points, but Gibson's counsel will provide additional briefing if requested.

A. Due Process. Gibson has been denied due process. See discussion in Preliminary Statement above, pp.1-3.

B. Removal Clause. The ALJ who presided over the hearing in this matter is insulated from removal by multiple layers of tenure protection in violation of the removal clause of Article II of the U.S. Constitution. SEC ALJs are "officers of the United States." *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Inferior officers, such as SEC ALJs, protected from removal by "dual for-cause limitations on ... removal ... contravene the constitutional separation of powers." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (2010). ALJs can only be removed for good cause as established and determined by the MSPB. 5 U.S.C. §7521(a). The President may remove MSPB members "for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. §1201(d). Nor can the President remove SEC members, who serve five-year terms, except for "inefficiency, neglect of duty, or malfeasance in office." *Free Enterprise*, 561 U.S. at 487; 5 U.S.C. §7521. Thus, the President cannot hold SEC ALJs directly accountable and remove them without MSPB permission, cannot hold the MSPB accountable if it disagreed, and thus lacks "free control" over these executive officers.

C. Right to Jury Trial. Gibson is entitled to a trial by jury under the Seventh Amendment to the Constitution. Where the government seeks a civil penalty, the citizen is entitled to trial by jury on liability. *Tull v. U.S.*, 481 U.S. 412, 414, 416-17, 425 (1987); *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781-82 (5th Cir. 2017). Denial of jury trial likewise deprives the citizen of due process. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

D. Other Constitutional Defenses. Gibson continues to assert, as stated in his Answer, that the claims alleged in the OIP are barred by an impermissible delegation of legislative authority under Article I of the Constitution, by violation of the doctrine of separation of powers, and by the Fifth Amendment's equal protection clause.

E. Statute of Limitations. This proceeding is barred by the statute of limitations because the SEC failed to commence a valid proceeding, consistent with Constitutional requirements, within five years of the 2011 conduct at issue. Following *Lucia*, the SEC "ratified" the defective appointment of its ALJs, by orders on 11/30/2017 and 8/22/2018. On 10/10/2018, the SEC again served its OIP and commenced a second administrative proceeding against Gibson. Thus, the SEC failed to commence a valid proceeding against Gibson within five years of the conduct at issue and is therefore time-barred. Title 28 U.S.C. §2462.

V. REMEDIES NOT WARRANTED

A. Industry Bar. In determining whether a securities industry bar (Investment Advisers Act §203(f)) or prohibition from activities (Investment Company Act §9(b)) is in the public interest, the SEC considers the factors listed in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979). Under each factor, as restated in *Matter of Schield Mgmt. Co.*, 2006 WL 231642 at *8 (SEC 1/31/2006), there should be no bar here.

- "Egregiousness of a respondent's actions": Gibson's transactions were not frontrunning under any known definition. And the transaction with GISF's 81% owner Hull disadvantaged Hull, including relative to Hull's close personal friends (GISF's 9% owners) and the Gibson group (GISF's remaining 10% owners, Gibson and his and his girlfriend's parents). This was not "egregious" conduct.

- "Isolated or recurrent nature of the infraction": Gibson's conduct occurred over a period of 45 days, between 9/26/2011 and 11/10/2011. This was "isolated" and not "recurrent."

- "Degree of scienter involved": Scienter is "a mental state embracing intent to deceive, manipulate, or defraud," involving "intentional or willful conduct designed to deceive or defraud investors." *Dirks v. SEC*, 463 U.S. 646, 664 n. 23 (1983). Scienter is "highly unreasonable" conduct that is "an extreme departure from the standards of ordinary care." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977). Gibson followed GISF's Operating Agreement (and Offering Memorandum) and did not act with "scienter" in dealing with Hull (the 81% investor), Hull's close friends (the 9% investors), and Gibson's and his girlfriend's parents (the other investors).

- "Sincerity of the respondent's assurances against future violations": Gibson's conduct was almost nine years ago. A record now showing no violations over nine years is a confirmation, not just an assurance.

- "Respondent's recognition of the wrongful nature of his or her conduct": Gibson cannot be punished for defending a case of this highly unusual nature.

- "Likelihood that the respondent's occupation will present opportunities for future violations": Gibson's father described how, since the OIP, his son "has had great difficulty obtaining any form of employment and had to leave the country." He lives alone in Montevideo, Uruguay where he works in a non-securities consulting business servicing companies in Africa. (Tr.1145-46) This occupation will not present opportunities raising future concerns.

B. Cease-and-Desist Order. The SEC considers the same Steadman factors in determining whether a C&D order is in the public interest. Additionally, it considers "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served." *Matter of KPMG*, 2001 WL 47245 at *26 (SEC 1/19/2001). Under these factors, there should be no C&D order here. It has been almost nine years, so any violation is not "recent." The record does not show "harm to investors or the marketplace." And no "remedial function" would be served.

C. Disgorgement Plus Interest. The Initial Decision orders disgorgement of $1,080 as a "reasonable approximation of the amount by which Gibson was enriched" from his 9/26/2011 stock sale, plus $81,008.81 from his protective put hedging, for total disgorgement of $82,088.81. (ID-65) The decision also orders "prejudgment" interest from 12/1/2011, compounded quarterly over nine years, at the IRS rate for underpayment of taxes, and continuing post-judgment until actual payment. (ID-74) The SEC may obtain "disgorgement" in C&D proceedings, but the Supreme Court is likely to soon explain the parameters of "disgorgement" for district court cases in *Liu v. SEC*, 18-1501 (argued 3/3/2020), and this should inform the parameters of "disgorgement" in administrative proceedings. The SEC may obtain "reasonable interest" on disgorgement, but the statute does not explain what is "reasonable." Exchange Act §21C(e); Advisers Act §203(k)(5).

Here, Gibson did not receive illegal profits warranting disgorgement with interest. He stayed loyal to GISF to the end and road the ship down. Gibson has been wiped out financially. Ultimately his investment in TRX caused him to lose about $725,000, caused his parents to lose about $1.4 million, and caused his former girlfriend's family to lose about $965,000. (RX-205; Tr.1301-02) At the hearing in 2019, Gibson was insolvent, with a negative net worth of $[redacted]. (RX-240; Tr.1303-04) He has been "insolvent every day" since 11/10/2011. (Tr.1469)

D. Monetary Penalty. The Initial Decision imposes a $41,000 penalty for the 9/26/2011 stock sale on top of the $1,080 disgorgement for the sale, essentially a 40-times penalty. It imposes another $41,000 penalty for the protective put hedging on top of the $81,008.81 disgorgement for the hedging. It imposes another $20,000 penalty for the Hull

transaction. Total penalties are thus $102,000. In deciding whether a penalty is in the public interest, the SEC considers scienter, harm to others, unjust enrichment, past violations, general deterrence, and "other" unspecified considerations. Exchange Act §21B(c); Advisers Act §203(i)(3). Here Gibson did not act with scienter toward Hull, Hull's close friends, and Gibson's and his girlfriend's parents. Gibson did not harm others, was not unjustly enriched, and had no past violations. The very unique circumstances here will not make this matter a vehicle for general deterrence. *Cf. State Farm v. Campbell*, 538 U.S. 408, 425 (2003) (punitive award "more than four times the amount of compensatory damages might be close to the line of constitutional impropriety").

E. Inability to Pay. Gibson asserts an inability to pay disgorgement, interest and penalties. He has previously filed Form D-A (8/25/2019), together with tax return and other supporting information and materials. The Initial Decision rejected Gibson's inability claim for the principal reason that most of his debt is owed to his father, and his father theoretically "could forgive" it. (ID-68-69) This debt included Gibson's former debt to Hull, now taken over by his father, and indebtedness to defend this proceeding. The Initial Decision thus appears to view Gibson's father as an underwriter of his debt. Gibson continues to have a substantial negative net worth, as he did at the time of the hearing, and he is prepared to file an updated Form D-A and other materials if so directed by the Commission under Rule 630(b).

CONCLUSION

The Division is wrong. Gibson's small stock sale on 9/26/2011 was not "frontrunning" under any known definition of the term. Allowing Hull to sell shares to GISF, his over-80% owned fund, on 10/18/2011 did not "favor" Hull but rather disadvantaged him. Gibson's purchase of "protective" puts over the two-week period from 10/27 to 11/8/2011 to partially hedge his substantially long exposure was likewise not frontrunning. The 3/24/2019 Initial Decision cannot be supported. This proceeding based on 2011 events should be dismissed.

Dated: June 1, 2020

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Certificate of Service and Filing

I certify that on June 1, 2020, pursuant to the Commission's March 18, 2020 order in all pending administrative proceedings, Rel. Nos. 33-10767, 34-88415, IA-5467, and IC-33820, I caused the foregoing to be filed with the Commission by sending it electronically to

apfilings@sec.gov; and that pursuant to the parties' March 23, 2020 stipulation, I caused the foregoing to be served on Nicholas C. Margida and Gregory R. Bockin, counsel for the Division of Enforcement, by sending it electronically to margidan@sec.gov and bocking@sec.gov.

/s/ Thomas A. Ferrigno

Certificate of Compliance

The undersigned certifies that this brief contains exactly 14,000 words, excluding cover, tables of contents and authorities, and certificates of service and compliance, and based on the word-count function of the Microsoft Word software used to prepare the brief.

/s/ Thomas A. Ferrigno