UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON

DIVISION OF ENFORCEMENT'S OPPOSITION BRIEF

July 1, 2020

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INTRODUCTION

Following a five-day hearing, ALJ James E. Grimes (the "ALJ") determined that Respondent Christopher M. Gibson ("Gibson") fraudulently breached his fiduciary duties to his client, Geier International Strategies Fund, LLC ("GISF" or the "Fund"), and recklessly failed to disclose or eliminate obvious conflicts he created – all in violation of Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-8, and Exchange Act Section 10(b) and Rules 10b-5(a) and (c) – by front-running the Fund on multiple occasions and causing the Fund to purchase securities from a person to whom he was massively indebted.[1] Gibson now asks that the Commission vacate the Initial Decision.[2] Because it is firmly supported by the evidentiary record and applicable law, the Division of Enforcement ("Division") requests that the Commission affirm the Initial Decision.

THE RECORD

On April 14, 2009, Gibson formed Geier Group, LLC ("Geier Group") and registered it as an investment adviser. DX-11-12.[3] Geier Group's Form ADV identified Gibson as the "person responsible for supervision and compliance," and disclosed that it would provide "[p]ortfolio management" for its clients. DX-12. Gibson owned 50% of Geier Group; James Hull owned 35%; and Gibson's father owned 15%. DX-216 ¶4. Hull was Gibson's father's business partner and owned the largest interest – greater than 80% – in GISF. Tr. 669:19-670:3; RX-206. Hull required Gibson to invest his entire net worth in GISF, paid Gibson an annual salary to advise GISF, and loaned him over $650,000 to invest in the Fund. Tr. 1358:25-1361:6. Neither the salary nor the loan was ever disclosed to GISF or its investors. Tr. 765:25-766:3;

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[1] *Christopher M. Gibson,* File No. 3-17184 Init. Dec. Rel. No. 1398 (March 24, 2020), cited as "ID."

[2] Respondent's Brief Supporting Petition for Review, filed June 1, 2020 ("Review Brief" cited as "Resp. Br.").

[3] Division Exhibits are cited as "DX", Respondent's as "RX", and Joint Exhibit 1 as "JX-1."

828:8-11. In early 2009, Gibson took and passed the Series 65 exam; he also held Series 7 and 63 licenses. Tr. 77:8-78:24. Geier Capital, LLC ("Geier Capital") was formed in May 2009, and its ownership interests were the same as Geier Group's. DX-15; 216 ¶9.

Gibson created GISF in December 2009. DX-17. GISF's private offering memorandum, operating agreement, and subscription agreement were distributed to potential investors beginning in January 2010. DX-22; 24; 25; 29; Tr. 114:22-116:25. The offering memorandum identified Geier Group as a registered investment adviser and GISF's "Investment Manager" (and Gibson as Geier Group's "managing member") and Geier Capital as GISF's "Managing Member" (and Gibson as Geier Capital's "Managing Director."). DX-24. In fact, Gibson was the only individual named in GISF's offering documents, which stated that "[t]he success of the Company is significantly dependent upon the expertise and efforts of Chris Gibson." *Id*. at 17. Gibson used GISF's offering materials to solicit investments from December 2009 through March 2011, and raised approximately $32 million from approximately 21 investors. DX-19; 31; 33; 54; 57-58.

Initially, Gibson successfully invested GISF's assets in commodities. By late 2010, after Hull complained about the tax liability associated with commodities investments, Gibson had invested essentially all of GISF's assets in the shares of a single issuer, Tanzanian Royalty Exploration Corp. ("TRX"). DX-48 at 3; Tr. 1345:3-13. TRX performed well initially – closing at $7.26/share on April 29, 2011 – and GISF's approximately 9.7 million shares were valued at approximately $70 million. DX-216 ¶¶15-16. Beginning in August 2011, however, TRX's performance deteriorated. JX-1 (TRX trading between $5-6/share). As TRX's price continued to decline over the next several months, Gibson repeatedly issued optimistic projections to GISF, explaining that he believed "very strongly we are in the right company at the right asset class at the right time" (RX-51 at -7488.), while conveying the opposite view to TRX management, (DX-

76 (Gibson "physically ill" over TRX's stock price, and "[v]ery soon it will make sense to exit our positions") and DX-78 ("We are running on fumes.")).

September Front-Running

By Friday, September 23, TRX's share price dropped to $4.58 (JX-1) and Gibson emailed GISF's investors, acknowledging TRX's poor performance and notifying them that he was suspending management fees beginning October 1. DX-81. Nevertheless, Gibson also continued touting TRX, explained that over 90% of GISF's investors had committed to maintaining their investments "at their current levels," and stated that: "[p]ersonally, I will not redeem my interest in Geier and TRX until the bull market matures over the coming years." *Id*. Contrary to these assurances, over the following weekend, Gibson and Hull decided to liquidate GISF's TRX position at "good prices" (DX-187 at 77:24 to 78:5); and Gibson emailed a broker that Sunday, September 25, to begin the liquidation (RX-62).

At the time, Gibson held TRX shares in his personal brokerage account (2,000 shares) and two other accounts he controlled; his then-girlfriend's, Francesca Marzullo, (18,900 shares) and Geier Group's (2,000 shares) accounts (together, the "personal accounts"). On Monday, September 26 – the first trading day after the decision to liquidate GISF's TRX position and while Gibson was actively negotiating that transaction – Gibson sold all the TRX shares in the personal accounts for approximately $4.04/share. DX-216 ¶¶26-28; DX-184 at 8-10. Gibson never disclosed these personal trades (hereinafter the "September Front-Running") to GISF or its investors. DX-188 at 662:7-663:5, 665:23-666:15, 669:22-670:1, 671:1-671:4; Tr. 760:9-22, 823:25-824:12. The next afternoon, September 27, Gibson sold approximately 3.7 million of GISF's TRX shares for approximately $3.50/share, a drop of approximately 5.3% from its price two minutes earlier. DX-184 at 8-10. By front-running GISF, Gibson was able to sell his TRX

shares before – as he expected – the price-depressing effect of GISF's large block sale and avoid losses of more than $0.50/share. DX-216 ¶¶22-24; DX-184, ex. 6; DX-187 at 108:12-21 (one would "generally expect the share price to drop when you sell a large portion of the shares").

Hull Buyout Transaction

After September 27, Gibson continued seeking buyers for GISF's remaining 5.4 million TRX shares, selling another 364,495 shares on October 17 for $3.42/share. Tr. 259:6-260:7, 1475:4-16; DX-227. The next day, however, Gibson caused GISF to buy all 680,636 of Hull's personal TRX shares for $3.60/share (over $2.45 million) without negotiating a block discount or charging a commission (hereinafter "Hull Buyout Transaction" or "HBT"). DX-95; Tr. 260:14-262:5.

The HBT favored Hull – Gibson's creditor and only source of income after suspending the management fees – at GISF's expense. First, although $3.60 was TRX's closing price on October 18 (JX-1), it was not its true market price for Hull's shares that day because that closing price reflected total market volume of only 490,625 TRX shares. Had Hull sold his shares into the market on October 18, it would have increased market volume by 139% and depressed the price of the thinly-traded stock. DX-185 at 23. Gibson knew this at the time because, when he sold over 360,000 of GISF's TRX shares the day prior, it comprised only 38% of the day's volume and, during the two-minute sale, TRX's price dropped approximately $0.19/share. DX-227. For this reason, block sales like the HBT often occur in the "upstairs" market where it is customary for the buyer to receive a discount from the prevailing market price. RX-228 at 5. Yet, despite knowing they were customary (*see e.g*, RX-177), Gibson did not seek such a discount for GISF. Thus, through the HBT, Gibson enabled Hull to avoid both the price-depressing impact of a large market sale and a block discount.

Further, through the HBT, Gibson caused GISF to take on more TRX at a time it was trying to exit its position in that security. DX-95; Tr. 260:14-262:5. When GISF ultimately sold these shares on November 10 for approximately $2.02/share, it lost approximately $1.58/share, or $1,074,902. *Id*. These losses were compounded by another aspect of the HBT, Gibson's decision not to charge Hull a commission. When GISF sold Hull's shares on November 10, it paid a $6,866[4] commission. Tr. 262:2-5, 629:18-20; DX-185 at 24. But for the HBT, GISF would not have paid this commission, and thus it constituted an extraordinary commission. GISF's offering memorandum only permitted transactions between GISF and affiliates like Hull (i) at the current market price and (ii) without extraordinary commissions. DX-24 at 19. The HBT violated both provisions.

Most importantly, before Gibson used GISF's assets to complete the HBT, GISF had the right to know whether Gibson's investment advice was infected by any personal conflicts of interest. Yet, Gibson never disclosed that (i) he owed Hull over $600,000 (Tr. 765:25-766:3); (ii) Hull's real estate business was paying him a $148,700 annual salary in 2011, his only source of income (DX-128; Tr. 254:22-25, 765:21-24, 828:3-7); or (iii) he was providing investment advice to Hull personally (Tr. 145:20-146:3; DX-188 at 439:6-15).

<u>October/November Front-Running</u>

In late October and early November 2011, Gibson again used his foreknowledge of GISF's anticipated TRX sales to benefit himself, Marzullo, and his father. During this period, TRX shares were generally trading between $3.40 and $4.07. DX-184, ex. 15a. While actively pursuing the sale of GISF's remaining 4.9 million TRX shares (Tr. 320-21; RX-115) – which he knew would occur in the near future and likely depress TRX's share price (DX-98; 188 at

[4] *See* DX-122 at 14-24; ID-25, n.205.

108:12-109:10) – Gibson bought TRX put option contracts (hereinafter "puts") with a $4 strike price. Without disclosing his actions to GISF, between October 28 and November 8, he purchased 565 puts in his own account, 1,604 in Marzullo's account, and advised his father to purchase 350 in his personal IRA account (hereinafter the "October/November Front-Running"). *See* DX-117; 123; 124; 187 at 120:22-24; Tr. 767:10-15, 825:3-25. The puts gave Gibson, Marzullo, and Gibson's father the right to require the sellers of the puts to buy 251,900 TRX shares for $4 each, regardless of TRX's prevailing market price, and thus became more valuable as TRX's price decreased. DX-184 at 20-22. On November 8 or 9, when Gibson advised his father to purchase the puts, Gibson also advised him to sell the TRX shares in his IRA, and his father immediately directed his broker accordingly. Tr. 322:9-24, 1108:16-22, 1114:20-1115:3. Gibson testified that when he gave his father this advice, he knew GISF was going to liquidate its TRX position the next day. *Id*. 323:7-10.

On the morning of November 10, Gibson emailed GISF's broker: "we are going to potentially tank this stock." DX-105. Gibson then dumped GISF's remaining 4.9 million TRX shares into the market. As he expected, TRX's share price plummeted, declining from $3.41 (open) to $2.99 by 9:45 AM. JX-1; DX-184 at 14 & ex. 9 (describing impact of GISF sales on TRX price). As a result, at 9:52 AM, the NYSE halted TRX trading for five minutes. At 10:00 AM, shortly after the NYSE lifted the halt, and with TRX's share price down to $2.02, Gibson sold all 565 of his TRX puts. DX-16; 124 at 3; 184 at 22-25. Two minutes later, he sold all of Marzullo's puts, and at 11:40 AM, his father's puts were sold. DX-16; 114 at 2; 117; 123 at 14; 184 at 22-25. Gibson concedes "it was GISF's selling of TRX stock that caused the market price for TRX to drop" on November 10 "because [he] sold a large volume of stock that, generally speaking, would result in what occurred." DX-187 at 108:12-17.

As TRX's share price declined and GISF lost millions of dollars, the puts in Gibson's, his father's, and Marzullo's accounts increased in value substantially. DX-184 at 22-25; 185 at 45. Their put sales yielded profits of $81,930 for Gibson, $254,380 for Marzullo, and $43,240.01 for Gibson's father, for total, after-commission profits of $379,550.01. *Id.* Just as Gibson had done through the September Front-Running, Gibson's father also avoided losses by front-running GISF and selling a portion of the TRX shares in his IRA before GISF liquidated its position. DX-117; 184 at 25; 185 at 45. Gibson admitted that his puts were a "short bet" against TRX in his personal account intended to mitigate his Fund-related TRX losses. DX-187 at 119:6-16, 127:21-128:3; Tr. 328:4-9. He also admitted that he used every liquid asset he had outside GISF to purchase the puts and that he would have purchased even more of them if had the resources to do so. DX-187 at 131:7-21.

ARGUMENT

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

Based on the evidentiary record, the Initial Decision correctly found that Gibson repeatedly violated Advisers Act Sections 206(1) and (2). ID-46-53. Section 206(1) makes it unlawful for an investment adviser "to employ a device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Section 206(2) makes it unlawful for an investment adviser to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2). These provisions also establish "federal fiduciary standards to govern the conduct of investment advisers." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979).

The Division established Gibson's Section 206(1) violation by proving that he (i) was an investment adviser, (ii) breached his fiduciary duties through nondisclosure of material facts or otherwise engaged in a fraudulent scheme, and (iii) acted with scienter. *Steadman v. SEC*, 603

F.2d 1126, 1129-1134 (5th Cir. 1979) (*Steadman I*); *ZPR Investment Mgmt. Inc. v. SEC*, 861 F.3d 1239, 1247 (11th Cir. 2017). In doing so, the Division also established the elements of Gibson's Section 206(2) violations, which only required proving that Gibson acted negligently. *Id*. The Division was not required to prove that Gibson caused injury to a client, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963), though he clearly did so.

A. Gibson Was an "Investment Adviser"

An "investment adviser" is, *inter alia*, any person "who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a) (11). This is a "broad definition." *Financial Planning Ass'n v. SEC*, 482 F.3d 481, 484 (D.C. Cir. 2007). Whether an individual is an investment adviser depends on the individual's actual conduct, not his title or position. *See In re John J. Kenny*, Admin. Proc. No. 3-9611, 2003 WL 21078085, at n.54 (May 14, 2003). Here, the Initial Decision correctly found Gibson was an investment adviser because he provided investment advisory services for compensation. ID-39.

1. Gibson Provided Investment Advisory Services to GISF

The ALJ found that Gibson was an investment adviser because he "acknowledged that he provided investment advisory services to the Fund," and "devised the strategy of investing in TRX, negotiated purchases and sales with brokers and counterparties, communicated with Fund investors regarding the Fund's future performance, and held himself out as an adviser to regulators." *Id*. at 38. Gibson does not, and cannot, challenge the ALJ's finding in this regard given the evidence that he (1) pitched GISF to investors (Tr. 133:25-134:3); (2) negotiated GISF's transactions and dictated its investments (*id* at 186:18-21); (3) communicated with TRX management (*id* at 186:22-24); (4) monitored the relevant markets and trends (*id* at 184:24-185:4); (5) communicated with GISF's brokers (*id* at 187:3-5); and (6) tracked performance and

updated GISF investors (*id* at 185:8-23). *SEC v. Ahmed*, 308 F. Supp. 3d 628, 652 (D. Conn. 2018) (similar conduct constituted advisory services).

To blunt the implication of this finding – namely, that as an investment adviser, he owed his clients fiduciary duties – Gibson now claims that Hull controlled GISF. Resp. Br. 4, 14. This claim is not supported by the record. Gibson alone provided the aforementioned advisory services – none were provided by Hull – and, in his investigative testimony, Hull emphatically denied running GISF. DX-174 at 24:9-24 ("[W]hat would not be a characterization that I would agree to in any way is that . . . I was running and operating this fund, the . . . day-to-day investment decisions or operations.").[5] Regardless, even if Hull was an investment adviser to GISF, a fund can have more than one adviser. *See Abrahamson v. Fleschner*, 568 F.2d 862, 869-70 (2d Cir. 1977) (three general partners who managed the limited partners' funds were each investment advisers); *SEC v. Bolla*, 401 F. Supp. 2d 43, 61 (D.D.C. 2005) ("each . . . client had three or four investment advisers"). The Initial Decision acknowledged Hull's role in GISF (ID-5), but correctly determined that Gibson managed GISF for compensation and was therefore its investment adviser under Section 206. *Id*. at 11, 38-39.[6]

2. Gibson Received Compensation For Advising GISF

The ALJ also found that Gibson "was paid a salary through April 2013 and, through Geier Group, was entitled to annual management fees and incentive allocations even if he did not receive them once the Fund started to fail" (ID-39), a finding that cannot seriously be disputed.

[5] The disclosures in GISF's offering memorandum identified Gibson as the "managing member" of Geier Group (GISF's Investment Manager), and expressly stated that GISF's success depended on Gibson's performance. DX-24 at 1, 17 ("Reliance on Chris Gibson"). It did not reference Hull. *Id.*

[6] Should Gibson resuscitate his post-hearing argument that Geier Group and/or Geier Capital (not Gibson) were GISF's investment advisers, that argument fails for the reasons set forth in the Division's post-hearing brief ("Div. Br."), at 10-12.

Hull paid Gibson a $148,700 salary in 2010 and 2011 for advising GISF. Tr. 249:17-19, 251:21-252:6. GISF also paid Geier Capital (and thus, Gibson) a 10% incentive allocation fee in 2010 as required by the offering memorandum. DX-216 ¶14.[7] Lastly, GISF paid Geier Capital $295,005 in management fees through September 2011, 50% of which was Gibson's. DX-188 at 457:4-16, 461:12-16.

B. Gibson Owed His Clients Fiduciary Duties

As an investment adviser, Gibson owed GISF fiduciary duties, including affirmative obligations to exercise utmost good faith, make "full and fair disclosure of all material facts," and "employ reasonable care to avoid misleading." *Capital Gains*, 375 U.S. at 194; *see also, SEC v. Moran*, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996), *aff'd*, 587 F.3d 553 (2d Cir. 2009); *see also* DX-185 at 10-14 (citing authority). Gibson was required to disclose to his clients "all conflicts of interest which might incline an investment adviser – consciously or unconsciously – to render advice which was not disinterested." *Capital Gains*, 375 U.S. at 191; *see also Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003) ("It is indisputable that potential conflicts of interest are 'material' facts with respect to clients and the Commission."). "Failure by an investment adviser to disclose potential conflicts of interests to [his] clients constitutes fraud within the meaning of Sections 206(1) and (2)." *Robare Grp., Ltd. v. SEC* 922 F.3d 468, 472 (D.C. Cir. 2019) (internal quotations and citations omitted).

1. Gibson's Fiduciary Duties Were Not Abrogated by GISF's Offering Documents

Gibson argues that his fiduciary obligations were modified or eliminated by GISF's offering memorandum. Resp. Br. at 7-9. Advisers Act Section 215(a) dooms Gibson's argument. 15 U.S.C. § 80b-15(a) ("Any condition, stipulation, or provision binding any person

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[7] Although no such fee was paid in 2011 (due to poor performance), Geier Capital's right to that fee was never revoked, and thus still satisfies the compensation element. *See SEC v. Fife*, 311 F.3d 1, 10-11 (1st Cir. 2002).

to waive compliance with any [other Advisers Act provisions or rules thereunder] shall be void."). Indeed, the authority Gibson relies on to support his flawed argument *affirms* Section 215's anti-waiver provision: "an adviser's federal fiduciary duty may not be waived, though it will apply in a manner that reflects the agreed-upon scope of the relationship." SEC Release No. IA-5248, 2019 WL 3779889 (June 5, 2019) ("IA Release"), *4. Gibson misinterprets the relevant IA Release provision, which stands only for the proposition that the adviser-client relationship can shape the *services* to be performed. *Id*. ("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"); Tr. 942:10-943:2 (Division expert testifying that "best-execution" duty would not apply if adviser-client agreement provided that adviser would not trade).

Moreover, as Gibson admitted, nothing in the offering memorandum's Potential Conflict of Interest provision abrogated the fiduciary duties Gibson owed GISF. DX-24 at 19; Tr. 1436:1-7 (GISF's organizing documents "delineated how [Gibson] was to maintain" his fiduciary duties). Importantly, Gibson fails to articulate which fiduciary duties were actually eliminated, waived, or modified by the "standard language" of the Potential Conflicts of Interest provision. Resp. Br. at 8-9. Instead, he vaguely complains that if "these 'standard' provisions do not protect [him] from the Division's theories here, the failure of such standard provisions will surprise private funds and their advisers across the industry . . . ." *Id*. However, nothing in the Potential Conflicts of Interest provision, or any other provisions in GISF's offering documents, authorized Gibson to front-run GISF or engage in the HBT without disclosing his personal, financial dealings with Hull.

2. GISF's Offering Documents Did Not Disclose Gibson's Conflicts

Gibson also does not dispute that the offering documents failed to disclose the details of his personal trading or the conflicts he created through his financial dealings with Hull. Tr. 1342:6 to 1343:7; Resp. Br. at 8-9. Gibson nevertheless argues that the offering documents satisfied his disclosure obligations. *Id.* In essence, Gibson claims that a generalized discussion of *potential* conflicts of interest in 2010 obviates the need to disclose the *actual* conflicts of interest he created 18 months later. This argument has no support in the law; it would eviscerate Section 206's requirement that advisers fully disclose all conflicts of interest. *Capital Gains*, 375 U.S. at 191. As the ALJ found, Gibson "should have refrained from engaging in those transactions, or failing that, established an appropriate disclosure mechanism through which a disinterested committee or person could have independently evaluated those conflicts or transactions on behalf of the Fund." ID-41. Because Gibson did neither, the ALJ was correct in finding that Gibson breached the fiduciary duties he owed to GISF and violated the Adviser's Act. *Id.*

C. Gibson's September Front-Running Violated The Antifraud Provisions of the Advisers Act and Exchange Act

1. Front-Running

The Initial Decision defines front-running as "trading a stock, option, or future while in possession of non-public information regarding an imminent block transaction that is likely to affect the price of the stock, option, or future." ID-42, n.322 (internal quotations and citation omitted). The Commission should affirm this definition because it is amply supported by existing law. *See, e.g.*, *SEC v. Yang*, 999 F. Supp. 2d 1007, 1016 (N.D. Ill. 2013) (front-running is an adviser's attempt "to profit personally by secretly authorizing personal trades in anticipation of much larger trades he knew that he would be authorizing"). Moreover, front-

running creates a conflict of interest between the adviser and the client, undermines the integrity of the market, and is recognized as a violation of Advisers Act Sections 206(1) and (2). *See Capital Gains*, 375 U.S. at 196-97 (Advisers Act requires "full and frank disclosure of . . . practice of trading on the effect of his recommendations"), 201 (Advisers Act, "in recognition of adviser's fiduciary relationship to his clients, requires that his advice be disinterested" and "[t]o insure this it empowers the courts to require disclosure of material facts"); *Yang*, 999 F. Supp. 2d at 1016. The Division's expert confirmed that the above definition of front-running is commonly understood in the industry, DX-185 at 21-22 (citing industry authority), and emphasized that the hallmark of front-running is "advance knowledge of impending client action," *id* at 21, n.38.

Gibson rejects this commonly-accepted definition of front-running – suggesting instead that front-running can only occur after a client has placed an *actual* order. Resp. Br. at 13 and 23. The cases Gibson cites to support his definition of front-running are easily distinguishable:

- *U.S. v. Mahaffy*, is a criminal case involving misconduct by brokers, not investment advisers owing fiduciary duties to their clients, who did not even litigate the definition of front-running. 693 F.3d 113, 120 (2d Cir. 2012) ("no real dispute that each of the Broker Defendants used open phone lines to transmit squawk box feeds to [co-defendant], or that [co-defendant] sought to take advantage of that information by front running [sic].")

- *D'Alessio v. SEC*, 380 F.3d 112 (2d Cir. 2004), selectively quoted by Gibson, describes NYSE Rule 92, a rule applicable to brokers, not investment advisers, that no longer exits. *Id*. at 114. There, petitioners' sought review of the severity of the sanctions imposed, and the wrongfulness of their front-running was not at issue. *See* 380 F.3d at 112.

- *SEC v. Pasternak*, 561 F. Supp. 2d 459 (D.N.J. 2008), addressed whether a broker working customer orders on a "not-held" basis satisfied the "best execution" standard applicable to brokers – not the higher fiduciary standard applicable here. *Id*. at 506. Moreover, the Court found that, for this type of order, "the customer and market maker could agree that the market maker may, 'if necessary to fill the entire order at an acceptable price, *trade ahead of the institutional customer's order*.'" *Id*. at 484 (emphasis added). Gibson and GISF reached no such agreement, and Gibson's front-running was not done to achieve an "acceptable price" for GISF but to mitigate any negative market effects GISF's sales could have *on Gibson*.

More importantly, any argument that front-running can occur only after a client has placed or received a firm order (with all material terms set) is belied by case law and industry authority, which emphasize the client's *intention* to trade in determining whether an adviser front-ran the client. DX-185 at 21-22. Under Gibson's definition of front-running, an investment adviser with the knowledge of, and power to control, a client's trading – as Gibson had here – could always trade in front of and at the expense of his client by simply waiting to place the client's order until after his or her personal trading was complete. This is not, and cannot be, the law.

2. <u>The September Front-Running Was Material and Gibson Acted With Scienter</u>

It is well-settled that the front-running Gibson failed to disclose to GISF and its investors was material information because it created a conflict of interest between Gibson and GISF. *Vernazza*, 327 F.3d at 859 (conflicts of interest are material facts). Moreover, Gibson acted with scienter both when he engaged in the front-running and when he failed to disclose the conflict it created. Scienter is a mental state embracing intent to deceive, manipulate, or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976). Scienter includes recklessness – conduct that is "highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *SEC v. Espuelas*, 579 F. Supp. 2d 461, 470 (S.D.N.Y. 2008) (citing *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000)). "[T]he standard of care to which an investment adviser must adhere imposes 'an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients." *SEC v. Blavin*, 760 F.2d 706, at 711-12 (6th Cir. 1985).

Here, as the ALJ found, "Gibson's decision to use the Fund's non-public information to protect his and others' investments was an 'extreme departure from the standards of ordinary care' which created conflicts with his duties 'so obvious' that he 'must have been aware of' them." ID-48 (citing *Montford & Co.,* Advisers Act Release No. 3829, 2014 WL 1744130, at *14, n. 108 (May 2, 2014)). This finding is thoroughly supported by the record and should be affirmed.[8] Indeed, courts have found that investment advisers act at least recklessly when they, like Gibson did here, fail to disclose material information to their clients. *Blavin*, 760 F.2d at 712 ("[a]t a minimum, [investment adviser] recklessly failed to disclose that he was trading in stocks that his newsletter recommended" and thus acted with scienter).

Gibson admitted that he expected GISF's block sale of 3.7 million TRX shares to depress TRX's price. DX-187 at 108:12-21 (admitting that he would "generally expect the share price of a stock to drop when you sell a large portion of the shares"). Any suggestion that GISF was simply unlucky on September 27 is not credible. Gibson traded ahead of a price drop he anticipated, and he knew what he was doing was wrong. Indeed, by Fall 2011, Gibson – a licensed securities professional having previously worked at Deutsche Bank (Tr. 77-78) – was well aware of the harm that could befall subsequent traders as a result of front-running. *See e.g.*, DX-68 (Gibson told broker in advance of a big trade in April 2011: "Do not speak to any other individual about this order request . . . I do not want anyone to know and possibly front run us"). Yet, when presented with the opportunity to front-run his client in late September 2011, Gibson took it. This was no accident or mistake, and there is no excuse for this "wanton disregard for his fiduciary duties." DX-185 at 27.

[8] Gibson's conduct was *at least* reckless, *i.e.*, the minimum required to establish scienter for purposes of liability under Advisers Act Section 206(1) and Exchange Act Section 10(b)/Rule 10b-5. The evidentiary record – specifically, the repeated, extensive, and egregious nature of Gibson's self-dealing and favoring of himself and those close to him (or to whom he owed substantial money) – supports a finding that Gibson acted *intentionally*.

Gibson has offered various, contradictory excuses to explain away his misconduct. *Compare* Tr. 1394:18-25 (Gibson testifying that he sold his personal TRX shares on 9/26 because he needed "liquidity") *with* Tr. 252:2-6 (Gibson testifying that Hull paid him a bi-weekly salary through 2011) *and* DX-86 (showing Gibson reinvested proceeds of 9/26 TRX sales). Gibson also argues that GISF's TRX sales on Friday, September 23 demonstrate he did not engage in front-running (Resp. Br. at 10), but this baseless argument completely ignores the intervening fact that he and Hull made the decision to get out of TRX after GISF's sales on Friday, but before his front-running on Monday. As a fallback position, Gibson claims that, even if he did front-run his client, GISF's offering documents adequately disclosed the conflict, *Id*. at 13-16. The ALJ correctly found, however, that "the disclosures in the offering documents were insufficient to alert investors to the potential conflicts created by Gibson's front running." ID-48; *see also supra* at 12.

Accordingly, Gibson violated Section 206(1) by front-running GISF and failing to disclose or eliminate the conflicts that illicit trading created, in violation of his fiduciary duties. Because Gibson acted recklessly in violating his fiduciary duties, Gibson also violated Section 206(2), which only required the Division to show Gibson acted negligently. *Robare Grp. Ltd*., 922 F.3d at 477 ("reasonable adviser with knowledge of the conflicts would not have committed such clear, repeated breaches of its fiduciary duty").

D. Gibson Violated His Fiduciary Duties and Committed Fraud Through The Hull Buyout Transaction

Gibson violated his fiduciary duties and engaged in fraud when he caused GISF to spend over $2.45 million to purchase Hull's personal TRX position without disclosing that, at the time, he owed Hull over $600,000 and Hull was paying him to advise the Fund. ID-50. Gibson

declines to even challenge the Initial Decision's central conclusion on this point, that Gibson carried out the HBT "while operating under a serious, undisclosed conflict of interest." *Id.* at 51.

Instead, Gibson concedes the loan and salary were never disclosed, but argues that he did not agree to the HBT to further his relationship with Hull because he "expected no slack from Hull, and Hull cut him none." Resp. Br. at 18-19. Even assuming counterfactually that such representations are colorable, Gibson's argument only demonstrates his fundamental disregard of his fiduciary duties and supports the ALJ's decision to bar him from the industry. When an investment adviser has a conflict of interest, it is the client, *not the investment adviser*, who gets to decide whether the advice is disinterested. *See* ID-50 ("This is the kind of situation where an advisory client must 'be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving 'two masters' or only one.'") (quoting *Capital Gains*, 375 U.S. at 196). Gibson's "clear and obvious conflict of interest," ID-50, was material. *Vernazza*, 327 at 859. On that basis alone, Gibson violated his fiduciary duties to the Fund and, thus, Section 206(1). *See Malouf v. SEC*, 933 F.3d 1248, 1260-62 (10th Cir. 2019) (affirming SEC decision finding defendant acted with scienter in failing to disclose financial conflicts of interest and thus violated Section 206(1)).

Contrary to the ALJ's findings on this point, however, the evidence also shows that Gibson favored Hull over GISF by using its funds to purchase Hull's personal TRX shares (i) at an above-market price, allowing Hull to avoid both the price-depressing effect of a market sale and the likely block discount in the upstairs market; (ii) after the decision had been made to exit the position; and (iii) without charging Hull a sales commission, which caused GISF to incur a \$6,866 sales commission when it ultimately sold those shares. *See supra* at 4-5. Despite finding that the HBT did not violate the terms of the offering memorandum (ID-51-52), the ALJ

nevertheless still found that Gibson favored Hull over GISF by failing to charge Hull a sales commission; Gibson should have "conducted the sale in a manner that did not favor Hull in any manner" and "recouped those costs for the Fund by charging Hull a commission when purchasing his shares or disclosed what he was doing" (*id* at 53).

Gibson also seeks to avoid responsibility for his misconduct by arguing that Hull conceived of the HBT, intending it would aid GISF by consolidating the shares in one place and simplifying their sale. Resp. Br. at 17-18. As an initial matter, this argument is belied by the record.[9] Moreover, regardless of what Gibson now says he believed, the HBT in fact favored Hull and disadvantaged the Fund. GISF ultimately lost over a $1 million by purchasing hundreds of thousands of shares of a security Gibson had already decided to jettison. Any theoretical benefit arising from consolidating Hull's and the Fund's TRX "shares in one place" and "simplify[ing] the process of entering into a block transaction" (Tr. 1567:1-4) is a benefit only to Gibson and Hull – not GISF.

Gibson's conduct was at least reckless; it represents an extreme departure from the standard of ordinary care an investment adviser owes as a fiduciary – a departure that should have been obvious to anyone with even a rudimentary knowledge of the industry, let alone someone with Gibson's education, training, licenses, and prior work experience at Deutsche Bank. Additionally, Gibson's conduct was at least reckless because he "knew of his fiduciary responsibilities" and "it should have been obvious to him that a transaction with Hull, to whom

[9] The day before the HBT was executed, Gibson emailed Hull, asking if he could "combine [Hull's personal] shares with [GISF's] as it might *help me* for regulatory and other reasons . . . ." DX-94 (emphasis added). That email also highlights that it was Gibson, not Hull, who proposed the deal, undermining Gibson's characterization of Hull as the one who proposed or decided to carry out the HBT. *See* Resp. Br. at 17 ("Hull acted", "Hull's theory"), 18 (HBT was "something Hull himself determined to do"). That argument is further belied by Gibson's own sworn testimony. Tr. 1438 ("Mr. Hull was not the progenitor of this idea.").

he owed so much money and on whose salary payments he depended, conflicted with his duties to the Fund." ID-51.

Accordingly, through the HBT, Gibson violated Section 206(1) by failing to disclose or eliminate his conflicts of interest and by favoring Hull's interest over GISF's, in violation of his fiduciary duties of good faith, care, loyalty, and full and fair disclosure. *See SEC v. K.W. Brown & Co.,* 555 F. Supp. 2d 1275, 1308-09 (S.D. Fla. 2007) ("failing to disclose their practice of allocating favorable trades to [favorable account] at the expense of their clients and failing to disclose the conflict of interest created by Defendant['s] financial interest in the [the favorable account]" violates Section 206); *Malouf v. SEC*, 933 F.3d. at 1260-62. Because Gibson acted recklessly in carrying out the HBT, Gibson also violated Section 206(2), which only required the Division to show that Gibson acted negligently. *See Lisa B. Premo*, Init. Dec. Release No. 476, 2012 WL 6705813, *22, n.34 (Dec. 26, 2012) (failure to "exercise the standard of care that a reasonably prudent person would have exercised in a similar situation" and acted with "culpable carelessness" satisfies 206(2) negligence standard); *Robare Grp. Ltd.*, 922 F.3d at 477 (adviser's failure to disclose known conflicts was unreasonable).

E. Gibson Violated His Fiduciary Duties and Committed Fraud Through The October/November Front-Running

By purchasing TRX puts to benefit himself and those close to him without disclosing his actions to GISF or its investors (other than his father), Gibson breached his fiduciary duties and violated Advisers Act Sections 206(1) and (2). Gibson does not dispute the basic facts of his October-November Front-Running. He admits that he purchased $4 TRX puts for himself and Marzullo, and that he advised his father to sell his personal TRX shares and purchase the same puts, at a time when Gibson had already decided GISF would exit its TRX position and was actively pursuing that sale. *See supra* at 5-6. Nor does Gibson contest that these transactions

benefitted himself, Marzullo, and his father. Resp. Br. at 19-20 (admitting he was "slightly less wiped out" and that it "took a little bit of money off the table"). Instead, Gibson argues he (i) did not front-run GISF, Resp. Br. at 19-20, 22-23, and (ii) remained aligned with GISF, despite the puts, because he was net long in TRX (through his interest in GISF), *id* at 20-22. Gibson's first argument is wrong, the second is irrelevant, and he conspicuously avoids any meaningful discussion of the obvious conflicts of interest the puts represented. By engaging in this self-dealing and front-running without disclosing or eliminating the conflicts that misconduct created, Gibson violated his fiduciary duties and Sections 206(1) and (2).

1. <u>Gibson's Self-Dealing and Front-Running</u>

Gibson engaged in fraudulent self-dealing by misappropriating GISF's material, non-public information (*i.e.*, its intention to sell its remaining TRX position, DX-98) to benefit himself and those close to him. Gibson does not contest the finding that he misused GISF's confidential information when he bought and recommended the puts. ID-47. Accordingly, when Gibson purchased the puts to protect himself on the basis of this non-public information, he was engaging in front-running. In fact, he repeatedly confirms that this is exactly what he was doing, purchasing puts to protect himself and his family while he sold GISF's TRX holdings. Resp. Br. 20-21. Gibson now, conveniently, attempts to avoid the consequences of his misconduct by claiming that he was "prudently taking steps to lighten GISF's holdings in TRX . . . through orderly market-price sales of TRX shares" and expected his puts to expire worthless. *Id.* at 21.

Gibson's claims in this regard are not credible. The record makes clear that he knew GISF's selling could drive down TRX's share price. *See e.g.*, DX-105 ("we are going to potentially tank this stock."). Moreover, Gibson used every liquid asset he had available to purchase puts and testified he would have purchased even more if he had the resources. DX-187

at 131:7-21. Indeed, even now, Gibson claims that he could have "achieved 100% of the personal 'protection' he desired" by having GISF purchase puts to cover the debt he owed to Hull. Resp. Br. 21. But, using every available asset he had to purchase puts, and desiring 100% protection, would make absolutely no economic sense if Gibson truly expected the puts to expire worthless.

As discussed *supra* at 12-14, Gibson cannot escape responsibility for this misconduct, by relying on his own cramped definition of front-running requiring the Division to show that he purchased "puts to interpose himself ahead of actual GISF order." Resp. Br. at 23. Gibson's definition is acutely unworkable in situations where an adviser sells his client's securities through open-market transactions, as Gibson did on November 10. In those situations, any adviser could avoid liability by simply closing out his options transactions after completing the client's market order (including any resulting "tanking"). Such a ruling would create an open season for the misappropriation of client information, and clearly cannot be the law.

2. <u>Gibson's Net Long Position Is Irrelevant</u>

Gibson also argues he did not engage in front-running because, even after purchasing the puts, he was long TRX through his GISF holdings and, thus, still in overall alignment with GISF. Resp. Br. at 20-21. But Gibson's overall financial interest in TRX is irrelevant to whether he engaged in self-dealing or front-running. Gibson purchased the puts to obtain a profit in his personal account and mitigate his share of any losses GISF suffered liquidating its remaining TRX shares. Gibson argues that because he was net long he could not have had a "short position" in TRX in his personal account, and for this reason the puts he purchased should be called "protective puts." Resp. Br. at 20. But this is a distinction without a difference. First, the puts in Gibson's personal account, standing alone, represented a "short position, *i.e.* a bet that

TRX's share price would decline," OIP ¶¶9, 45, which is entirely consistent with Gibson's own testimony that the puts represented a "short bet" against TRX. DX-187 at 119:6-16. That the puts in his, Marzullo's, and his father's personal accounts represented a short position that increases in value as the underlying security price decreases, is indisputable. *Olagues v. Icahn,* 866 F.3d 70, 72 n.1 (2d Cir. 2017) ("The buyer of a put option . . . anticipate[s] the stock price to drop (a 'short' position)."); Tr. 1639:21-23 (Gibson's expert testifying that Gibson's use of the term "short bet" referred to the "options portion of the portfolio" *i.e.* the puts). Regardless, Gibson's quibbling over whether the puts were "protective" (like his) or "naked" (like Marzullo's)[10] is irrelevant. By whatever name, Gibson purchased the puts (and advised his father to purchase puts) after misappropriating his client's material, non-public information regarding its intention to sell almost 5 million TRX shares to benefit himself and those close to him.

Gibson's self-dealing and front-running are, standing alone, violations of his fiduciary duty. *See Moran*, 922 F.2d at 896. But through that misconduct, Gibson also placed his own financial interest, and the financial interests of Marzullo and his father, in direct conflict with GISF's interests – conflicts which, despite his duty to do so, Gibson took no steps whatsoever to disclose. Gibson's repeated explanation that he purchased the puts to protect Hull, his creditor (Resp. Br. at 20), only highlights the severity of the conflicts Gibson's conduct created. By failing to disclose these conflicts to GISF (Tr. 767:10-15, 825:3-25), or abstain from engaging in the put transactions, Gibson violated his fiduciary duties. *See Blavin*, 760 F.2d at 711-12.

[10] Regardless, Gibson's purchase of naked puts in Marzullo's account cannot be excused, as Gibson contends, on the basis that he bought the puts for her (not a GISF investor) to protect her father's exposure to TRX through GISF. Resp. Br. at 20; Tr. 1447-48. Gibson cites no legal or other authority to support the contention that the Marzullos constituted a single advisory client. *Cf.* Tr. 1313, 1327-28 (family friend/accountant testifying he treated Marzullos' losses together for tax purposes only); *see also id*. 330-31, 1507 (Gibson did not provide put profits to Marzullo's parents but kept, traded, and lost them).

Gibson acted with scienter for the same reasons set forth regarding the September Front-Running, *see supra* at 14-15, and thus violated Section 206(1). *See Capital Gains*, 375 U.S. at 194. Likewise, because Gibson's undisclosed misconduct violated the ordinary standard of care a fiduciary owes a client, Gibson also acted negligently in violation of Section 206(2).

II. <u>Gibson Violated Advisers Act Section 206(4) and Rule 206(4)-8 Thereunder</u>

Gibson's front-running, HBT-related misconduct, and failure to disclose the conflicts they created violated Adviser's Act Section 206(4) and Rule 206(4)-8. As the Initial Decision found: (i) Rule 206(4)-8 "applies because the Fund was a type of pooled investment vehicle" (ID-55 n.386); (ii) Gibson's conflicts were material (*id.*, citing *Vernazza*, 327 F.3d at 859); and (iii) Gibson's misconduct constituted fraud and, thus, he "also deceived investors." *Id.*

Gibson's Review Brief contains no discussion whatsoever of the Initial Decision's conclusion that Gibson violated Section 206(4) and Rule 206(4)-8. He does not even bother to reassert his post-hearing arguments that his client was GISF, not its investors, and that he owed no fiduciary duties to GISF's investors and that his lack of disclosure to GISF cannot form the basis of the Division's 206(4) claims. Resp. Posthearing Br. at 26-27 (citing *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006) and Release No. IA-2628 (Aug. 3, 2007)). Instead, Gibson argues only that, because he did not engage in front-running or favor Hull, he could not have violated Rule 206(4)-8. Resp. Br. 24. Such omission likely stems from the fact that Gibson has no defense to these claims. The Division need not show the existence of a fiduciary duty to prove a violation of Section 206(4) or Rule 206(4)-8. *See SEC v. Quan*, No. 11-cv-723, 2013 WL 5566252, at *16 n.10 (D. Minn. Oct. 8, 2013). And the Commission promulgated Rule 206(4)-8 *in response to Goldstein* to "clarify[y] that an adviser's duty to refrain from fraudulent conduct . . . extends to the relationship with ultimate investors" in pooled investment vehicles. *See*

Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, 72 Fed. Reg. 44,756 at 44,756-57 (Aug. 9, 2007). Accordingly, as the Initial Decision found, "[c]onduct that operates as a fraud against the Fund can also by extension be materially misleading as to investors under Rule 206(4)-8." ID-55-56.[11]

As explained throughout this brief, Gibson engaged in multiple instances of self-dealing, front-running, and favoritism and never disclosed the conflicts this conduct created. In doing so, Gibson deceived, manipulated, and defrauded GISF's investors in violation of Rule 206(4)-8(a)(2). Gibson also violated Rule 206(4)-8(a)(1) because his undisclosed misconduct rendered GISF's offering documents materially misleading by omission. *See* Div. Br. at 31.

Again, the conflicts Gibson failed to disclose are *per se* material. *Vernazza*, 327, F.3d at 859. Any reasonable GISF investor would have wanted to know if GISF's adviser was repeatedly self-dealing to benefit himself and those close to him, and using Fund assets to favor another advisory client who was paying his salary and to whom he was massively indebted. *Blavin*, 760 F.2d at 711; *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988). Even Hull confirmed this obvious conclusion during his sworn investigative testimony. DX-174 at 138:7-14 ("those actions or those puts should have been . . . known to everybody"). The record makes clear that Gibson acted at least recklessly, and thus also negligently, in failing to exercise due or ordinary care in his management of GISF and treatment of its investors. *See supra* at 14-16, 18-19, 22-23.

[11] Any argument that Gibson disclosed his conflicts to himself (as GISF's agent) is nonsensical because Gibson was acting adversely to GISF. *See* Division Posthearing Reply at 17-18.

III. **Gibson Violated Exchange Act Section 10(b) and Rules 10b-5(a) and (c)**

Gibson's repeated misconduct also violated Exchange Act Section 10(b) and Rule 10b-5(a) and (c) thereunder, which make it unlawful for any person, by use of any means or instrumentalities of interstate commerce and with scienter, to "employ any device, scheme, or artifice to defraud" or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person" in connection with the purchase or sale of any security.[12] Because Gibson was an investment adviser, his fiduciary duties are considered when evaluating his liability under Rule 10b-5. *Laird v. Integrated Res., Inc*. 897 F.2d 826, 835 (5th Cir. 1990).

The Initial Decision correctly found that Gibson, as a fiduciary, owed GISF an "affirmative duty of utmost good faith to avoid misleading clients[, which] includes disclosure of all material facts and all possible conflicts of interest" (ID-54), adding that "nondisclosure in violation of a fiduciary duty involves 'feigning fidelity' to the person to whom the duty is owed and is therefore deceptive." *Id*.; *see also Dennis J. Malouf*, S.E.C. Rel. No. 4463, 2016 WL 4035575, at *8 (July 27,2016) (quoting *United States v. O'Hagan*, 521 U.S. 642, 655 (1997)). On that basis, the Initial Decision correctly found that Gibson's reckless failure to disclose or remediate the conflicts created by his front-running and the HBT was deceptive and fraudulent in violation of Section 10(b) and Rules 10b-5(a) and (c). ID-54.

Neither Gibson's post-hearing briefing nor his Review Brief contain any discussion whatsoever of his Exchange Act violations – in particular his failure to disclose the conflicts created by his front-running and the HBT. Instead, Gibson appears to rely exclusively on his

[12] Gibson's conduct involved "interstate commerce", and it was "in connection with" the purchase and sale of TRX securities. *SEC v. Levine*, 671 F. Supp. 2d 14, 31 (D.D.C. 2009).

claim that he did not engage in front-running or favor Hull. But, as discussed above and as the Initial Decision rightly found, ID-48, 54, Gibson's conduct was rife with fraud. Gibson's failure to disclose the severe conflicts created by his financial dealings with Hull before the HBT, for example, violated Rule 10b-5(a) and (c). *See e.g., Malouf*, 933 F.3d. at 1260-61 (failures to disclose financial conflict of interest constituted improper conduct under Rule 10b-5(a) and (c)). Similarly, for the reasons described *supra* at 14-15, 18-19, 22-23, Gibson acted with scienter, *i.e.* knowingly or at least recklessly, when he engaged in the September and October/November Front-Running and in carrying out the HBT. Gibson's reckless and deceptive conduct, therefore, violated Section 10(b) and Rules 10b-5(a) and (c). Given the evidence, such a finding is indisputable, as Gibson's silence concedes.

IV. Gibson's Constitutional and Procedural Claims Are Meritless

Gibson asserts various constitutional and procedural arguments (Resp. Br. at 24-25); they are all without merit.

A. Gibson Has Not Been Denied Due Process

Contrary to Gibson's claims (Resp. Br. at 1-3) no aspect of the proceeding violated his due-process rights because (1) the Division had a good faith basis for the charges alleged in the OIP, and (2) the OIP provided sufficient notice of the charges to allow Gibson to present his defense. *See Harding Advisory LLC & Wing F. Chau*, S.E.C. Rel. No. 4600, 2017 WL 66592, at *17 (Jan. 6, 2015) ("due process" satisfied when "[r]espondents had a sufficient understanding of the matters in dispute, the relevant evidence, and a meaningful opportunity to prepare and present a defense"); *Jonathan Feins*, S.E.C. Rel. No. 41943, 1999 WL 770236, at *7 (Sept. 29, 1999).

First, the Division had a good faith basis for the charges, and the allegations have been borne out by evidence admitted during the hearing. For example, the OIP stated that "Gibson

purchased TRX put contracts in his personal account and the account of his then-girlfriend" (OIP ¶42), and that "[i]n effect, the put contracts represented a "short position, *i.e.* a bet that TRX's share price would decline below $4 before the put contract's . . . expiration date," OIP ¶45. To support the description of the "short position" taken by Gibson, his then-girlfriend, and his father in their personal accounts, the OIP specifies the dates, exact number of puts, and total costs of the relevant put transactions. *Id*. ¶¶43-44. In contrast to Gibson's argument, the OIP never alleged that Gibson was not "net long" in TRX; it acknowledges that Gibson was invested in TRX through GISF. *Id.* ¶13. Gibson also admitted that his purchase of the puts "was a short bet," despite his "long investment in TRX at the time" through GISF. DX-187 at 119. The OIP, therefore, is entirely accurate.

To the extent Gibson claims the OIP and/or the proceedings were tainted by a purported "misrepresent[ation] to Hull . . . that Gibson had personally shorted . . . TRX and thus bet against GISF" (Resp. Br. at 2), Gibson failed to preserve that argument by not raising it in his post-hearing briefing – as the ALJ expressly required. *Gibson*, 2019 SEC LEXIS 2319, at *1 (Aug. 29, 2019) ("should Gibson continue to raise a due process violation because of alleged misrepresentations by the Division . . . to witnesses during the investigation, [the ALJ] will be required to rule on it.").

Regardless, the Division never misled Hull, as any fair reading of Hull's investigative testimony transcript shows. The Division staff, earlier in Hull's investigative testimony, provided Hull with one definition of a "short position" – borrowing and then selling stock – when asking Hull about GISF's investments (DX-174 at 37:11-2), but in its questioning, the Division also used the term "short position" when discussing Gibson's "October and November 2011" purchases of puts in his "personal . . . Charles Schwab investment account." *Id*. at 43:11-

13. There could have been no confusion on Hull's part as the Division specifically explained that the short position in Gibson's and Marzullo's accounts to which it was referring were the puts, *id* at 47:9-19 ("[t]he short position in the . . . two Schwab accounts were options, short options, puts, with a $4 strike price, expiring November 2011"), and subsequently showed Hull the actual brokerage account statements reflecting these put transactions, *id* at 117-20, a fact Hull conceded during his hearing testimony, Tr. 532:11-17. Any suggestion that Hull, at the time of his investigative testimony, did not know Gibson was also "hugely exposed to TRX" through GISF, Tr. 1526, is preposterous given the undisputed evidence that Hull required Gibson to invest his entire net worth in GISF (a fact memorialized in GISF's offering memorandum) and loaned Gibson an additional $650,000 to invest in the Fund. *See* Tr. 674:11-21, 1340:2-6; DX-24 at 1. Moreover, as Gibson concedes, he was not prejudiced because Hull testified live at the hearing in July 2019 – *on Gibson's behalf* – long after the evaporation of the supposed hostility Hull felt toward Gibson. Resp. Br. at 3 (citing ID-71).

Second, the OIP provided notice of the charges sufficient to allow Gibson to present his defense – *i.e.*, the "short and plain statement of the matters of fact and law to be considered" and the nature of the relief sought required by the Commission's Rules. 17 C.F.R. § 201.200(b)(3). An OIP need not recite every potentially-relevant fact, but need only "inform the respondent of the charges in enough detail to allow the respondent to prepare a defense." *In re Rita J. McConville*, S.E.C. Rel. No. 2271, 2005 WL 1560276, at *14 (June 30, 2005), *aff'd*, 465 F.3d 780 (7th Cir. 2006); *accord*, *e.g.*, *Clawson v. SEC*, No. 03-73199, 2005 WL 2174637, at *1 (9th Cir. Sept. 8, 2005) (unpublished); *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979). Here, the OIP fully satisfied Commission Rule 200(b)(3)'s pleading standard, alleging, *inter alia*, that despite Gibson's fiduciary duties, "Gibson on three instances

engaged in transactions that benefited him and persons close to him or that favored [Hull] over . . . the Fund." OIP ¶2; *see also*, *id* ¶¶31, 34, 41. The OIP set out the precise details of Gibson's front-running trades, including the puts, and how Gibson's use of GISF's confidential information regarding imminent TRX sales enabled him and those close to him to personally profit or avoid losses (*id* ¶¶ 27-30, 43-49); and explained how Gibson, through the HBT, "created an undisclosed conflict of interest" and favored one client (Hull) over the other (GISF), *id* ¶¶ 33-41. This was sufficient notice for Gibson to prepare his defense.

Gibson's claim that the Division intentionally omitted "highly material facts" from the OIP (*e.g.* Hull's and other investors' Fund ownership percentages,) Resp. Br. at 2, also fails. In fact, Gibson disproves his own argument. Because he had sufficient notice of the Division's claims, each fact he claims was omitted from the OIP was offered as part of his defense, through testimony and exhibits, and considered by the ALJ who still found the Division had proved each of the charges alleged in the OIP. *See Clawson*, 2005 WL 2174637, at *1 (finding notice sufficient where the facts ultimately found were "consistent with" and "subsumed in" the theory alleged in the OIP).

Gibson has suffered no prejudice stemming from any of supposed defects he has proffered as proof of his ill-defined due process claims. He has had ample opportunity to present evidence demonstrating that, as he claims, the allegations in the OIP were untrue and that he was prejudiced as a result – but he has failed to do so.

B. <u>The ALJ's Removal Protections Do Not Violate the Constitution</u>

Gibson wrongly asserts that this proceeding is invalid because the removal provisions governing the Commission's ALJs are unconstitutional. His argument ignores both the fact that the statute governing ALJ removal can be construed in a manner consistent with constitutional

separation of powers principles and that the protections are constitutional in any event in light of the quasijudicial functions that the Commission's ALJs perform.

Article II of the Constitution vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.* § 3. Unlike its specific directives governing the power of appointment, "[t]he Constitution is silent with respect to the power of removal from office, where tenure is not fixed." *In re Hennen*, 38 U.S. 230, 258 (1839). The "power of removal" nonetheless has been viewed as "incident to the power of appointment." *Id.* at 259; *see also Myers v. United States*, 272 U.S. 52, 117 (1926) (the Constitution implicitly reserves to the President the "power of removing those for whom he cannot continue to be responsible").

The Supreme Court has long recognized that Congress may impose limited restrictions on the removal power. Congress may, for example, impose a for-cause removal restriction on the President's power to remove principal officers of certain independent agencies. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493-94 (2010). And the Court has countenanced for-cause limitations on a principal officer's ability to remove inferior officers. *Id.* at 494.

In *Free Enterprise*, however, the Court held that the "novel" and "rigorous" barrier to removing members of the Public Company Accounting Oversight Board ("PCAOB") by the Commission, whose members are presumed to enjoy "for cause" removal protection, left the President with insufficient ability to supervise the PCAOB's execution of the laws. 561 U.S. at 496. The Court noted that it had "previously upheld limited restrictions on the President's removal power" but only where "one level of protected tenure separated the President from an officer exercising executive power." *Id* at 495. Two levels of "for cause" removal for an officer

exercising "executive power," the Court held, "result[s] i[n] a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.*

For two reasons, *Free Enterprise* does not compel the conclusion that the statute providing that the Commission ALJs may be removed only for "good cause" (5 U.S.C. § 7521) violates the separation of powers. First, in his brief in *Lucia v. SEC* (S. Ct. No. 17-130),[13] the Solicitor General has offered an interpretation of ALJs' "good cause" removal protection that comports with constitutional constraints. Drawing from constitutional avoidance principles, the Solicitor General explained (SG Br. 51) that, even where ALJs are embedded "in a structure involving more than one layer of tenure protection," a proper construction of "good cause" may alleviate constitutional concerns. The statutory scheme, the Solicitor General stated (SG Br. 47), must be understood to allow "[a]gency heads [to] be able to remove ALJs who refuse to follow agency policies and procedures, who frustrate the proper administration of adjudicatory proceedings, or who demonstrate deficient job performance." Under that view, Section 7521 should be "interpreted to permit an agency to remove an ALJ for personal misconduct or for failure to follow lawful agency directives or to perform his duties adequately." *Id.* at 45. At the same time, an ALJ may not be removed " 'at the whim or caprice of the agency or for political reasons,' " *id.* at 49 (quoting *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 142-43 (1953)), and "an ALJ would still be protected from removal for invidious reasons otherwise prohibited by law," *id.* at 50.

According to the Solicitor General, that interpretation of Section 7521 avoids the constitutional defects at issue in *Free Enterprise*. There, "the PCAOB's members could be removed only under an 'unusually high standard' that required a 'willful' violation of the law, a

[13] The Solicitor General's (cited as "SG Br.") brief is available at https://www.supremecourt.gov/DocketPDF/17/17-130/36184/20180221202805163_17-130tsUnitedStates.pdf.

'willful' abuse of their authority, or an 'unreasonable' failure to enforce legal requirements"; here, by contrast, "[t]he intrusion on presidential authority is significantly less." SG Br. 51 (quoting *Free Enterprise*, 561 U.S. at 503). "ALJs could accordingly be held accountable, by the Heads of Departments and the President who appoint them, for failure to execute the laws faithfully." *Id.*[14]

Second, crucial to the Court's decision to invalidate the dual for-cause structure in that case was that PCAOB Board members exercised quintessential "executive" functions – and not solely "quasijudicial" functions. *Free Enterprise,* 561 U.S. at 496, 502, 505, 507 n.10. Indeed, the Court refused to extend its holding to ALJs, who "of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers." *Id.* at 507 n.10. The Solicitor General in *Lucia* similarly drew a line (SG Br. 45, 50) between quasijudicial duties and purely executive functions when explaining that the President, acting through principal officers, cannot remove an ALJ "to influence the outcome in a particular adjudication," and noted the need to "respect[ ] the independence of ALJs in adjudicating individual cases."

That reflects the Supreme Court's longstanding recognition that Congress's ability to enact limited removal protections depends in part on the functions of the particular office. In *Wiener v. United States*, 357 U.S. 349 (1958), for example, the Court upheld statutory removal restrictions of War Claims Commission members because the members performed

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[14] The Solicitor General also stated that Section 7521(a) – which allows removal "only for good cause established and determined by the Merit Systems Protection Board [MSPB] on the record after opportunity for hearing before the Board"—should be construed so that "the MSPB's review is limited to determining whether factual evidence exists to support the agency's proffered good faith grounds." SG Br. 39, 52. Such an approach ensures that the Department Head retains primary control in the decision to remove an ALJ. But it is not necessary to address this aspect of the statutory scheme at this juncture; regardless of how the MSPB's role in the removal process is understood, agencies like the Commission "possess the authority to reassign responsibilities away from ALJs while awaiting MSPB review of a removal decision." *Id.* at 53, 55. Consequently, "[t]hat authority avoids the possibility that an ALJ might continue to adjudicate cases beyond the point at which the Department Head has lost confidence in the ALJ's ability to exercise appropriate judgment." *Id.* at 55.

"quasijudicial" rather than purely executive functions. *Id.* at 353-54. And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld good-cause restrictions on the removal of an "independent counsel," who was an executive officer with the power to investigate allegations of crime by high officers, because the restrictions provided structural independence necessary to the proper functioning of the particular office, and the independent counsel had "limited jurisdiction and tenure and lack [of] policymaking or significant administrative authority." *Id.* at 689-91, 695-96. Accordingly, Congress has the latitude to impose removal restrictions to ensure the structural independence necessary for ALJs to properly perform their quasijudicial functions.

Gibson nevertheless asserts (Resp. Br. 24) that *Free Enterprise*, read in light of *Lucia*, 138 S. Ct. 2044 (2018), establishes that the dual for-cause removal restrictions on ALJs are unconstitutional. But that argument overreads both decisions, neither of which held that multiple layers of removal protections are always unconstitutional or addressed the constitutionality of removal protections for ALJs. Indeed, the Commission has specifically noted that *Free Enterprise* did *not* hold that multiple layers of removal protections are always unconstitutional. *OptionsXpress, Inc.*, S.E.C. Rel. No. 10125, 2016 WL 4413227, at *50-52 (Aug. 18, 2016), *abrogated in part on other grounds by Lucia*, 138 S. Ct. 2044; *see also Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *26-28 (Sept. 17, 2015), *vacated on other grounds by Timbervest, LLC et al. v. SEC*, No. 15-1416 (D.C. Cir. Nov. 19, 2018). Rather, as the Commission has explained, under *Free Enterprise*, the analysis turns on "whether the removal restrictions [at issue] are of such a nature that they impede the President's ability to perform his constitutional duty." *OptionsXpress*, 2016 WL 4413227, at *50. And "ALJs differ from the PCAOB members [considered in *Free Enterprise*] in a number of significant ways" that "obviate

any constitutional concerns from the dual for-case removal restrictions in the context of ALJs." *Id.*[15]

C. The Proceeding Does Not Violate the Seventh Amendment

Gibson's claim that the proceeding violates the Seventh Amendment (Resp. Br. 25) fares no better. He ignores the Supreme Court's consistent recognition that the Seventh Amendment's right to a jury trial "is not applicable to administrative proceedings." *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977). Nor does he account for the fact that both courts and the Commission have repeatedly rejected claims that the Commission's administrative enforcement actions violate the Seventh Amendment. *E.g.*, *Hill v. SEC*, 114 F. Supp. 3d 1297, 1316 (N.D. Ga. 2015) ("Plaintiff cannot prove a substantial likelihood of success on the merits on his Seventh Amendment claim as this claim involves a public right, and Congress has the right to send public rights cases to administrative proceedings"), *overruled on other grounds by Hill*, 825 F.3d 1236; *Charles L. Hill, Jr.*, S.E.C. Rel. No. 79459, 2016 WL 7032731, at *3 (Dec. 2, 2016); *Harding Advisory LLC & Wing F. Chau*, S.E.C. Rel. No. 3796, 2014 WL 988532, at *9 n.46 (Mar. 14, 2014). That result should hold here.

D. The Proceeding Is Not Otherwise Constitutionally Infirm

Gibson summarily asserts – both in his brief and Answer (Resp. Br. 25; Answer at 11-13) – that this proceeding contravenes "the doctrine of separation of powers," constitutes "an impermissible delegation of legislative authority under Article I of the Constitution," and

[15] *See also* Order, *David. S. Hall, P.C.*, Admin. Proc. Rulings Rel. No.6635 (July 23, 2019), https://www.sec.gov/alj/aljorders/2019/ap-6635.pdf (denying motion to dismiss that argued that ALJ removal protections were unconstitutional); Order, *Raymond J. Lucia Cos.*, Admin.Proc. Rulings Rel. No. 6628 (July 15, 2019), https://www.sec.gov/alj/aljorders/2019/ap-6628.pdf (same).

violates equal protection. He fails to explain – or provide any authority to support – these arguments, but in any event each is meritless.

To the extent Gibson's separation of powers argument is premised on the nature of the ALJs' removal protections, it fails for the reasons addressed above. To the extent it rests on some other legal theory, the Commission has rejected similar claims and should do so again here. *See, e.g.*, *Thomas C. Gonnella*, S.E.C. Rel. No. 4476, 2016 WL 4233837 at *11 (Aug. 10, 2016) (rejecting separation of powers claim based on the fact that the Commission both instituted and adjudicated claims against respondent), *pet. denied* 954 F.3d 536, 544 (2d Cir. 2020).

Although unclear, Gibson's non-delegation claim seems to be that Congress impermissibly delegated legislative power to the Executive Branch by authorizing the Commission to initiate administrative enforcement proceedings he Constitution vests authority to enforce the law in the Executive Branch, U.S. Const. Art. II, § 3, and grants Congress only "legislative Powers," *id.*, Art. I, § 1. The success of any delegation challenge thus turns on whether Congress has impermissibly "delegated legislative power to [an] agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). But abundant case law confirms that the Executive acts in an executive—not legislative—capacity when selecting the enforcement forum; such authority is an inherent part of the Executive power. *E.g.*, *United States v. Haynes*, 985 F.2d 65, 69 (2d Cir. 1993); *United States v. Dockery*, 965 F.2d 1112, 1117 (D.C. Cir. 1992). Thus, any non-delegation challenge falls short.

Likewise, Gibson's unclear equal protection argument also fails. The Commission has repeatedly rejected such claims, emphasizing the Supreme Court's consistent holding that equal protection "class-of-one" claims are "not cognizable in the context of activities or decisions that 'by their nature involve discretionary decision-making based on a vast array of subjective,

individualized assessments.'" *Application of Newport Coast Sec., Inc. for Review of Disciplinary Action Taken by FINRA*, S.E.C. Rel. No. 88548, 2020 WL 1659292 at *13 (Apr. 3, 2020) (quoting *Engquist v. Oregon Dep't of Ag.*, 553 U.S. 591, 603 (2008)). Accordingly, because administrative enforcement proceedings reflect an exercise of prosecutorial discretion, equal protection "challenges to prosecutors' decisions about whom, how, and where to prosecute'" fail as a matter of law. *Charles L. Hill, Jr.*, 2016 WL 7032731, at *2 & n.21 (citing *United States v. Green*, 654 F.3d 637, 650 (6th Cir. 2011) and *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008)). Moreover, as a factual matter, Gibson has made no effort to "show an extremely high degree of similarity between [himself] and the persons to whom" he presumably compares himself, further dooming his claim. *See Newport*, 2020 WL 1659292 at *13.

E. The Proceeding Does Not Violate the Statute of Limitations

Gibson erroneously contends that the Commission "failed to commence a valid proceeding . . . within five years of the conduct at issue and is therefore time-barred" by 28 U.S.C. § 2462. Resp. Br. 25. The OIP here was issued by the Commission in March 2016, within five years of Gibson's 2011 misconduct. Because the constitutionality of the *Commissioners'* appointments is undisputed, the OIP was – and remains – valid, regardless of any initial defect in the appointments of the Commission's ALJs. Indeed, the fact that the Supreme Court itself remanded the proceeding in *Lucia* with directions that the respondents be given a new administrative hearing is clear indication that the Court contemplated that ongoing administrative actions affected by its decision would proceed as originally authorized, even if certain elements of those proceedings needed to be re-done. *See Lucia*, 138 S. Ct. at 2055. Gibson offers no reason why his case should be treated differently.

Nor is he correct that that the Division's decision to re-serve the original OIP somehow "commenced a second administrative proceeding." Resp. Br. 25. The Commission's own rules

make clear that it is the issuance, not service, of the order instituting proceedings that commences an administrative enforcement action. *See* 17 C.F.R. § 201.101(a)(4),(7),(9) (defining administrative proceeding as "an action, *initiated by an order instituting proceedings*" and OIP as "an order issued by the Commission *commencing* a proceeding" (emphases added)); *see also id.* § 201.141 (service of an OIP is the process by which "[n]otice of a proceeding shall be made" after issuance of "an order instituting proceedings"); *accord Iran Air v. Kugelman*, 996 F.2d 1253, 1257 (D.C. Cir. 1993) (administrative "charge was timely made because it was filed within the [limitations period], although not served until some days thereafter"). Therefore, because there is no dispute that a valid OIP was issued within five years of Gibson's misconduct, Gibson's statute-of-limitations claim fails.

Moreover, the statute Gibson cites for the imposition of a five-year statute of limitations, 28 U.S.C. § 2462, applies only to the enforcement of any "civil fine, penalty, or forfeiture," and does *not* apply to claims for injunctive relief. *SEC v. Graham*, 823 F.3d 1357, 1360, 1362 (11th Cir. 2016). Thus, even if Gibson's claims had merit – which they do not – the Division's claims for injunctive relief would be unaffected.

V. <u>The Sanctions Imposed In the Initial Decision Are Appropriate</u>

A. <u>Industry Bars</u>

The Initial Decision imposed industry bars, with the right to apply for reentry after three years. ID-62. Gibson does not meaningfully discuss the factors considered when determining the need for, or duration of, an industry bar, stating simply that because he did nothing wrong, "there should be no bar here." Resp. Br. at 25.

Having already discussed Gibson's multiple frauds at length, it is well settled (and Gibson does not contest) that "[o]rdinarily, and in the absence of evidence to the contrary, it is in the public interest to bar a respondent" who committed fraud. *Tzemach David Netzer Korem*,

S.E.C. Rel. No. 70044, 2013 WL 3864511, at *5 (July 26, 2013). When determining whether a bar is warranted, the Commission considers the *Steadman* factors: egregiousness of the misconduct; isolated or recurrent nature of infractions; degree of scienter; assurances against future violations; recognition of the wrongful nature of his conduct; and likelihood of future violations. *Schield Mgmt. Co.*, S.E.C. Rel. No. 2477, 2006 WL 231642, at *8 (Jan. 31, 2006). These factors overwhelmingly favor permanent industry bars:

- *Egregiousness*. Misconduct involving a breach of fiduciary duty – such as Gibson's – is egregious. *James S. Tagliaferri*, S.E.C Rel. No. 4650, 2017 WL 632134, at *6 (Feb. 15, 2017). While serving as GISF's fiduciary, Gibson engaged in three, separate fraudulent courses of conduct, placing the financial interests of himself, his father, his girlfriend and the individual paying his salary above those of GISF.

- *Recurrent*. Gibson violated the law in connection with three separate transactions and, for two of the transactions, violated the law several times to financially benefit himself and those close to him.

- *Scienter*. As demonstrated *supra* at 14-15, 18-19, 22-23, Gibson acted with a high degree of scienter.

- *Assurances & Recognition*. Gibson has made no assurances against future violations and vexingly maintains that actual conflicts need not be disclosed to clients or investors as they materialize. He has in no way acknowledged the wrongfulness of his conduct. ID-59.

- *Future Violations*. Gibson is young, has held several jobs in the financial sector, and thus the likelihood of future violations is high. *See Korem*, 2013 WL 3864511, at *6 n.50 ("violation raises an inference that it will be repeated").

Given this evidence, which Gibson does not even address, the Division submits Gibson should be *permanently* barred from the industry. *See* Div. Br. at 38-39. Gibson was a licensed securities professional; he knew his obligations. Nevertheless, when the value of the Fund he advised was plummeting because of a stock he picked, Gibson repeatedly put himself and those closest to him first. Gibson also repeatedly failed to disclose the material conflicts of interest his misconduct created. That track-record should not be rewarded with any future responsibility to

oversee others' investments. Accordingly, the Commission should permanently bar Gibson from the industry.

B. <u>Cease-and-Desist Order</u>

The Initial Decision also imposed a cease-and-desist order, ID-63, which Gibson largely does not address other than to deny he did anything wrong. The *Steadman* factors weigh heavily against Gibson. *Steadman I*, 603 F.2d at 1140. Regardless, the "risk" of future violations "need not be very great to warrant issuing a cease-and-desist order," and "evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist." *KPMG Peat Marwick*, S.E.C. Rel. No. 1360 2001 WL 47245, at *24 (Jan. 19, 2001).

The Commission also considers "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *Id.* at *26. Though Gibson's misconduct occurred in 2011, it unquestionably harmed GISF and the marketplace. The HBT resulted in GISF losing over $1 million, and though Gibson's front-running did not cause direct monetary harm to GISF, "an adviser who fails to address conflicts of interest poses a risk to the securities industry as a whole." ID-63; *see also*, *SEC v. Yang*, No. 12 C 2473, 2014 WL 2198323 at *1 (N.D. Ill. May 27, 2014) (front-running harms market). Because Gibson has not recognized the wrongfulness of his conduct or shown any remorse for violating his fiduciary duties to GISF, the Commission should affirm the cease-and-desist order as it is necessary to deter future violations. *Id.* at 24 (emphasizing "forward-looking aspect of the [cease-and-desist] remedy").

C. Disgorgement

The Initial Decision ordered Gibson to disgorge the $82,088.81, with prejudgment interest, he obtained through the avoided losses and profits associated with the September and October/November Front-Running. ID-64-65. This amount represented the Division's reasonable approximation of Gibson's ill-gotten gains,[16] which Gibson did "not attempt to rebut" (ID-65) and does not now challenge. *See SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) (upon showing of reasonable approximation, burden shifts to respondent to show calculation was unreasonable). Instead, Gibson claims that he "did not receive illegal profits warranting disgorgement with interest," apparently, because he suffered significant losses through his investment in GISF. Resp. Br. at 26. That Gibson lost money through his separate, GISF investment is immaterial; he avoided losses in his personal account through the September Front-Running, and he mitigated his GISF losses via the October/November Front-Running. The Initial Decision's disgorgement order comports with the United States Supreme Court's recent decision in *Liu v. SEC*, 2020 WL 3405845 (June 22, 2020). In determining the amount of disgorgement, the ALJ calculated net profits and losses avoided after deducting relevant expenses. ID-64-65 & n.440. At the Commission's request, the Division will submit further briefing on the appropriateness and feasibility of any distribution of such disgorgement.

Accordingly, Gibson has failed to identify any error in the Initial Decision's adoption of the Division's reasonable approximation or that ordering disgorgement of $82,088.81, plus prejudgment interest, was inappropriate.

[16] For the puts, the gain equals the difference in purchase and sale price multiplied by the number of contracts. *See* Div. Br. at 41. For the losses avoided on September 26, the calculation, per the analogous insider-trading context, is the difference between TRX's average sale price on September 26 compared to the average price for which GISF sold its 3.7 million shares the next day multiplied by Gibson's 2,000 shares. *Id.* at 42, n.13.

D. Civil Penalties

The Initial Decision assessed three second-tier penalties against Gibson for each of his fraudulent courses of conduct: $41,000 for the September Front-Running, $20,000 for the HBT, and $41,000 for the October/November Front-Running. ID-66-68. A second-tier penalty is appropriate if the violations – as here – involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 78u-2(b)(2), 80b-3(i)(2)(B). The Initial Decision declined to impose the maximum second-tier penalty of $75,000, for each course of Gibson's fraudulent misconduct – a decision with which the Division respectfully disagrees given the egregiousness of Gibson's repeated self-dealing.[17]

To the extent Gibson argues the penalty imposed for the September Front-Running is disproportionate to the disgorgement amount assessed for that misconduct (Resp. Br. at 26, noting that $41,000 is "a 40-times penalty") that argument conspicuously overlooks the fact that the same $41,000 penalty imposed for the October/November Front-Running is less than half the disgorgement ordered for that misconduct. Regardless, there is no requirement that the penalty be directly proportional to disgorgement, as the appropriate penalty varies with the circumstances of each case. *See Collins v. SEC*, 736 F.3d 521, 525 (D.C. Cir. 2013) (observing penalties have ranged from "roughly one-half of the disgorgement to "about 25 times the disgorgement" in administrative proceedings).

In determining whether penalties are in the public interest, the Commission considers whether the violation involved fraud; the resulting harm, directly or indirectly, to other persons; any unjust enrichment; any prior violations; deterrence; and such other matters as justice may

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[17] The Division recommended a higher penalty, and still believes a higher penalty is warranted and in the public interest. *See* Div. Br. at 42-43 (recommending $75,000 Tier II penalties for each of Gibson's 9 instances of front-running and a $150,000 Tier-III penalty for the HBT, totaling $825,000).

require. 15 U.S.C. §§ 78u-2(c), 80b-3(i)(3). The overwhelming majority of these factors weigh heavily in favor of imposing substantial penalties here:

- *Scienter*. It cannot be disputed that Gibson's violations constituted fraud and that Gibson acted with scienter, as set forth in the Initial Decision and herein.
- *Harm*. The HBT resulted in GISF losing over $1 million, and paying $6,866 in unnecessary commissions, when it sold Hull's personal TRX shares on November 10, and Gibson's front-running harmed the market, ID-63.
- *Unjust enrichment*. Gibson's front-running unjustly enriched Gibson, Marzullo, and his father.
- *Deterrence*. Given Gibson's refusal to acknowledge his wrongdoing or show any remorse for GISF or its investors, the penalties imposed are, at minimum, warranted to deter him from future violations. "[O]thers in the industry must realize that front running is a serious offense that is actionable under the securities laws." ID-67.

Accordingly, the Commission should assess the $825,000 penalty recommended by the Division, but if it chooses not to do so it should affirm the penalty assessed by the ALJ.

E. <u>Inability To Pay</u>

Gibson has failed to "file . . . a sworn financial disclosure statement containing the information specified in Rule 630(b)," which Gibson promised to file "with his opening brief." Gibson instead asks the Commission to rely on a Form D-A filed August 25, 2019. That outdated Form D-A was not admitted into evidence, and the Division did not have an opportunity to cross-examine Gibson regarding its completeness or veracity. *See* ID-69 (noting deficiency of credit-card and tax documentation) and n.463 (noting discrepancy in credit-card debt identified on the Form D-A and RX- 240). Gibson should be required to file a current and complete Form D-A, per 17 C.F.R. § 201.630(b), or be deemed to have waived his inability-to-pay claim.

Regardless, Gibson has not met his burden, *Philip A. Lehman*, S.E.C. Rel. No. 2565, 2006 WL 3054584, at *4 (Oct. 27, 2006), as his 2019 Form D-A demonstrates his ability to pay monetary sanctions. For example, the Form D-A shows that, as of August 2019, he owned an

[REDACTED] Form D-A at 3, 22; *see also*, ID-69 (Gibson "has a large securities investment that alone could be sold to pay a significant percentage of the [ordered] disgorgement and penalties"). Additionally, his 2018 income exceeded [REDACTED] and [REDACTED] *Id.* Moreover, the amount he owes pursuant to the [REDACTED]. Tr. 1227-28. Gibson has also had opportunities to pay portions of this debt but chose not to. *Id.* at 1503-1504. Lastly, Gibson is young and, based on his education and experience, clearly has prospects to generate future earnings to pay monetary sanctions.

CONCLUSION

The Division respectfully requests that the Commission affirm the Initial Decision, finding Gibson liable for violating Advisers Act Section 206(1), (2), and (4) and Rule 206(4)-8, and Exchange Act Section 10(b) and Rule 10b-5(a) and (c); and granting the sanctions requested by the Division in its post-hearing briefing and specified herein.

July 1, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I certify that, on July 1, 2020, I caused the foregoing to be filed with the Commission via electronic mail to apfilings@sec.gov (pursuant to the Commission's March 18, 2020 order, Rel. Nos. 33-10767, 34-88415, IA-5467, and IC-33820), and that pursuant to the parties' March 23, 2020 stipulation, I caused the foregoing to be served on Stephen J. Crimmins and Thomas A. Ferrigno via electronic mail to Stephen.Crimmins@mmlawus.com and Thomas.Ferrigno@mmlawus.com, respectively.

/s/ Gregory Bockin

CERTIFICATE OF COMPLIANCE

I certify, pursuant to 17 C.F.R. § 201.450(d), that the Division's opposition brief contains 13,927 words, excluding the cover, table of contents, table of authorities, and certificates of service and compliance, and based on Microsoft Word's word-count function.

/s/ Gregory R. Bockin