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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON

Judge James E. Grimes

DIVISION OF ENFORCEMENT'S POST HEARING BRIEF

September, 13 2019

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Bines, Harvey E. and Thel, Steve, *Investment Management Law and Regulation*, 2d. ed.
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INTRODUCTION

The Division of Enforcement ("Division") hereby submits its post-hearing brief and, separately, its proposed findings of fact and conclusions of law ("Div. Findings"). The evidence admitted during the hearing on July 29-August 2, 2019, establishes conclusively that Respondent Christopher Gibson repeatedly engaged in fraudulent conduct intended to benefit himself and those close to him. This fraudulent conduct breached Gibson's fiduciary duties as an investment adviser to the Geier International Strategies Fund, LLC ("GISF" or "Fund"), and therefore, violated Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 206(4)-8 thereunder, and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5(a) and (c) thereunder.

These violations stemmed from Gibson's decision to invest virtually all of GISF's funds in shares of Tanzanian Royalty Exploration Corporation ("TRX"), a small, thinly-traded gold-exploration company. By late September 2011, TRX's share price had fallen dramatically, resulting in an approximately $30 million reduction in the value of the Fund's holdings. Gibson spoke with GISF's largest investor, James Hull, over the weekend of September 24-25, 2011, and decided that GISF would exit its entire position in TRX. But first, Gibson used his knowledge of GISF's intended TRX sale to benefit himself, his girlfriend, his father, and Hull. On September 26, 2011, the first market day after the decision to sell GISF's sizeable TRX holdings, Gibson sold all the TRX shares in his personal account, his girlfriend's account, and another account he controlled before he executed any trades on GISF's behalf. This is called front running and ensured that Gibson would obtain a better price than the Fund. Then, in mid-October 2011, Gibson had GISF buy all the TRX shares in Hull's personal account at an above-market price even though the Fund had decided to exit its TRX position. Finally, in late October and early November 2011, Gibson repeatedly used his knowledge of the anticipated sale of

GISF's remaining TRX shares to benefit himself, his girlfriend, and his father by purchasing, or recommending the purchase of, $4 TRX put options. These options increased in value as Gibson sold the massive remaining block of GISF's TRX stock on November 10, 2011. As set forth in more detail below, all of this misconduct violated the fiduciary duties Gibson owed to GISF as an investment adviser and the federal securities laws.

STATEMENT OF FACTS[1]

On April 14, 2009, Gibson formed Geier Group, LLC ("Geier Group") in Georgia and registered it as an investment adviser ten days later by filing a Form ADV with FINRA. Div. Exs. 11 and 12. The Form ADV disclosed that Geier Group would provide "[p]ortfolio management for individuals and/or small businesses" and "[p]ortfolio management for businesses or institutional clients (other than investment companies)." Div. Ex. 12. The ADV also identified Gibson as the "person responsible for supervision and compliance" at Geier Group and as its "President." Id. Gibson owned 50% of Geier Group, Hull owned 35%, and Gibson's father owned 15%. Div. Ex. 216 ¶4.

Also in Spring 2019, Gibson took and passed the Series 65 exam, and at the time held Series 7 and 63 licenses. 7/29/19 Tr. 77:8-78:24. The following month, Hull formed Geier Capital, LLC ("Geier Capital") in Georgia. Div. Ex. 15. The ownership interests in Geier Capital were the same as in Geier Group, Div. Ex. 216 ¶9; it was never registered as an investment adviser. Div. Findings ¶16.

Gibson created GISF in Delaware on December 16, 2009. Div. Ex. 17. GISF's private offering memorandum, operating agreement, and subscription agreement were distributed to potential investors beginning in January 2010. Div. Findings ¶20. The offering memorandum

[1] A more detailed description of the relevant facts are included in the Div. Findings.

identified Geier Group as GISF's "Investment Manager," and identified Gibson as Geier Group's "managing member." Div. Ex. 24 at 1. It identified Geier Capital as GISF's "Managing Member" and identified Gibson as Geier Capital's "Managing Director." Div. Ex. 24 at 1. The offering memorandum also stated that Geier Group was "registered in the State of Georgia as an investment adviser." Div. Ex. 24 at 1. Gibson used GISF offering materials describing this fund structure to solicit and obtain investor funds from December 2009 through March 2011. Div. Findings ¶21. In early 2011, however, Gibson made fundamental changes to this structure without disclosing them to GISF's investors or amending the Fund's documents. 7/29/19 Tr. 150:25-151:3, 154:2-4. Specifically, in January 2011, Gibson allowed Geier Group's investment adviser registration to lapse. Div. Findings ¶75. Then, in April 2011, Gibson dissolved Geier Group. Div. Findings ¶82.

In late 2010, Gibson began investing GISF's assets in TRX. Div. Findings ¶93. TRX performed well in early 2011, and on April 29, 2011, TRX closed at $7.26 per share and GISF owned approximately 9.7 million shares, representing over 10% of TRX's outstanding shares. Div. Ex. 216 ¶¶15-16.

By August 2011, however, TRX was not performing as well. Joint Ex. 1 (TRX trading between $5-6 per share). While issuing optimistic projections to GISF's investors at the time (see e.g., Resp. Ex. 51 (repeatedly expressing confidence/belief in TRX), Gibson privately conveyed the opposite view to TRX. For example, on August 10, 2011, Gibson told TRX management that he was "physically ill" over TRX's stock price, and "[v]ery soon it will make sense to exit our positions. There is no time left." Div. Ex. 76. On August 15, 2011, Gibson told TRX management, "[w]e are running on fumes" (Div. Ex. 78), and on September 22, Gibson wrote that TRX might not last more than "4 more days," and urged management to seek a buyer. Div. Findings ¶104.

The September Front Running

By Friday, September 23, 2011, TRX's share price had dropped to $4.58. Div. Findings ¶107. Gibson sent an email to GISF's investors acknowledging TRX's poor performance and notifying them that, as a result, he was suspending management fees beginning October 1, 2011. Div. Ex. 81. Despite his statements to TRX management, in the same email Gibson also told the investors that there was "tremendous fundamental value" in "the assets owned and business operated by TRX" and stated that he believed in the "reputation, character, and integrity" of TRX's Chairman." Id. Notably, Gibson also wrote: "[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 statements, Gibson and Hull decided to liquidate GISF's entire TRX position at "good prices." Div. Ex. 187 at 77:24 to 78:5. On September 25, 2011, Gibson emailed Casimir Capital to begin that liquidation. Div. Findings ¶113. None of GISF's investors (besides Hull) were told of this change in strategy. 7/29/19 Tr. 22:12-18.

At the time, Gibson held TRX shares in his personal brokerage account and two other accounts he controlled; an account in the name of his then-girlfriend, Francesca Marzullo, and an account in Geier Group's name. On Monday, September 26, 2011 – the first trading day after making the decision to liquidate GISF's TRX position – Gibson sold all the TRX shares in each of the three accounts for approximately $4.04 per share: 2,000 in his account; 18,900 in Marzullo's account; and 1,000 shares in Geier Group's account. Div. Ex. 216 ¶¶26-28; Div. Ex. 184 (Taveras Expert Report) at 8-10." Gibson never disclosed these personal trades (hereinafter the "September Front Running") to GISF or its investors. Div. Findings ¶121. The next day, September 27, Gibson consummated the GISF TRX transaction he had been negotiating since September 25, and sold approximately 3.7 million TRX shares at an average price of $3.50 per share. Div. Ex. 184 at 8-10. GISF's large block sale dropped TRX's share price to $3.50 – a 5.3% drop from its price just two minutes earlier. Id. at 9-10 & ex. 4. TRX fell to a low of $3.40 and closed at $3.54. Joint Ex. 1. By trading ahead of GISF based on his foreknowledge of GISF's intended sale, Gibson was able to sell all of the TRX shares in his personal account and two accounts he controlled at a share price more than $0.50 higher than the price he obtained for GISF the following day. Div. Ex. 216 ¶¶22-24; Div. Ex. 184 at ex. 6.

The Hull Buyout Transaction

After GISF's September 27 TRX sale, Gibson continued to seek buyers for GISF's approximately 5.4 million remaining TRX shares. Div. Findings ¶129. In fact, on October 17, Gibson sold 364,495 TRX shares into the market, obtaining an average price of $3.42 per share – and as Gibson sold this volume into the market, over the course of two minutes, TRX's share price dropped. Id. ¶135. The very next day, Gibson caused GISF to buy Hull's remaining personal TRX position – 680,636 shares – for $3.60 per share for a total cost of over $2.45 million (hereinafter "Hull Buyout Transaction" or "HBT"). Id. ¶137.

The terms of the HBT favored Hull at GISF's expense. Gibson did not seek a block discount for GISF as is customary for transactions of this nature and did not charge Hull a commission; in November GISF paid a commission to sell the same shares. Div. Findings ¶140-41, 143. Moreover, Hull avoided the price-depressing impact of a large sale on the public market. If Hull had sold his shares into the market on October 18, it would have increased the market volume by 139% and depressed TRX's share price, id. ¶142, which is what happened the prior day when Gibson sold over 360,000 of GISF's TRX shares into the market. When GISF sold the same shares less than one month later, on November 10, the average price was $2.02. Div. Ex. 184 at 10-11. Thus, GISF lost $1.58 per share, or $1,074,902, because of the HBT. Id.

At the time of the HBT, Gibson was providing investment advice to Hull; Hull's real estate business was paying Gibson a $148,700 annual salary for Gibson's advisory services to GISF, which was his only source of income; and Gibson owed Hull over $600,000. Div. Findings ¶¶ 36, 40, 66, 106. Yet, Gibson never disclosed these financial conflicts of interest, or that he was using GISF funds to purchase Hull's personal TRX shares, to GISF or its other investors. Id. ¶74, 145, 149-50.

The October/November Front Running

In late October and early November 2011, Gibson again used his foreknowledge of GISF's anticipated TRX sales to obtain a financial benefit for himself, Marzullo, and his father. During this period, TRX shares were generally trading between $3.40 and $4.07. Div. Ex. 184, Exhibit 15a. Knowing that he would soon dump GISF's remaining 4.9 million TRX shares into the market and that doing so would depress TRX's share price (Div. Ex. 188 at 108:12-109:10), Gibson bought put option contracts (hereinafter "puts") on TRX with a strike price of $4. Between October 28 and November 8, he purchased 565 puts in his own account and 1,604 in Marzullo's account – then, on November 8 or 9, Gibson advised his father to purchase the same $4 TRX puts and to immediately sell all the TRX shares he held in his personal IRA account (hereinafter the "October/November Front Running"). Div. Findings ¶¶155-57, 159, 162. Gibson's father directed his broker to sell the shares and buy the puts that same day. Id. ¶¶162, 167. The broker sold 10,000 of John Gibson's TRX shares and purchased 350 puts on November 9. Id. ¶ 167, 175. The transaction secured a higher price for Gibson's father for the 10,000 shares than he obtained selling his remaining TRX shares the next day as GISF dumped its position and TRX's stock price fell. Div. Findings ¶¶175-76.

On November 10, 2011, while preparing to liquidate GISF's TRX position, Gibson emailed GISF's broker "[W]e are going to potentially tank this stock." Div. Ex. 105. Gibson then dumped GISF's remaining 4.9 million TRX shares into the market. The share price immediately began to plummet, declining from $3.41 (open) to $2.99 by 9:45 AM. Div. Findings ¶172. At 9:52 AM, the NYSE halted trading in TRX for five minutes due to the dramatic price drop. Id. Because the puts gave Gibson, Marzullo, and Gibson's father the right to require the sellers of the puts to buy 251,900 shares of TRX at $4 per share, regardless of the prevailing market price, the puts became much more valuable as TRX's share price fell. Id. ¶163. 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 TRX puts in his account. Id. ¶173. Two minutes later, he sold all of the puts in his girlfriend's account, and at 11:40 AM, the puts in his father's IRA account were sold. Id. ¶¶174-75. Gibson knew that GISF's sales would depress the value of TRX. Indeed, he believed "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." Id. ¶171.

Consequently, as GISF lost money because of the declining value of TRX shares, Gibson, Marzullo, and his father profited on the put transactions in their personal accounts. Div. Findings ¶¶177-80. The October/November Front Running yielded profits of $81,930 for Gibson, $254,380 for Marzullo, and $43,240.01 for Gibson's father, in their personal accounts, for a total profit, of $379,550.01. Id. ¶¶177-78. Gibson did not disclose the put transactions to GISF or its investors (other than his father). Id. ¶181.

ARGUMENT

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

Advisers Act 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). The Supreme Court has long held that these provisions establish "federal fiduciary standards to govern the conduct of investment advisers." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979).

Sections 206(1) and (2) prohibit any conduct by an investment adviser that, in view of the adviser's fiduciary obligations, would constitute a fraud or deception on the client. Section 206(1) is violated when the adviser engages in such deceptive conduct with scienter, which includes recklessness. SEC v. Blavin, 760 F.2d 706, 711-12 (6th Cir. 1985). Simple negligence is sufficient to establish a Section 206(2) violation. Robare Grp., Ltd. v. SEC, 922 F.3d 468, 472 (D.C. Cir. 2019). For purposes of Section 206 liability, the Commission need not prove that the investment adviser's violation caused injury to the client, SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963), though as discussed herein Gibson's Section 206 violations did harm GISF.

To establish that Gibson violated Advisers Act Section 206(1), the Division must show that Gibson (i) was an investment adviser, (ii) breached his fiduciary duties through nondisclosure of material facts or otherwise engaged in a scheme to defraud, 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). For a Section 206(2) violation, the Division must establish the same elements, but need only show that Gibson acted at least negligently.[2] Id. Here, the evidentiary record establishes each of these elements and demonstrates conclusively that Gibson repeatedly violated Sections 206(1) and (2).

A. Gibson Was an "Investment Adviser"

Pursuant to Section 202(a)(11) of the Advisers Act, 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 or her title or position. See In re John J. Kenny, Admin. Proc. No. 3-9611, 2003 WL 21078085, at n.54 (May 14, 2003). As set forth below, in the present case, Gibson meets the statutory definition of an investment adviser because he (1) provided investment advisory services (2) for compensation.

1. Gibson Provided Investment Advisory Services to GISF

Gibson does not dispute that he provided investment advisory services during the relevant period, including (1) pitching investors to join GISF (7/29/19 Tr. 133:25-134:3); (2) negotiating transactions on behalf of GISF and controlling what purchases and sales were made with its funds (id. at 186:18-21); (3) communicating with TRX management (id. at 186:22-24); (4) monitoring the relevant markets and trends (id. at 184:24-185:4); (5) communicating directly with GISF's brokers (id. at 187:3-5); and (6) tracking performance and providing updates to

[2] The Division was also required to show that Gibson's conduct involved use of the mails or an instrumentality of interstate commerce. Gibson used telephones and the internet (email, e.g. Div. Ex. 81) in the course of the misconduct at issue here, and both telephone service and the internet are instrumentalities of interstate commerce. See, e.g., United States v. Nader, 542 F.3d 713, 717 (9th Cir. 2008).

GISF investors (id. at 185:8-23). SEC v. Ahmed, 308 F. Supp. 3d 628, 652 (D. Conn. 2018) (citing similar conduct as constituting advisory services).[3]

To rebut this overwhelming evidence, Gibson claims that Hull, not he, controlled GISF. Prehearing Brief (hereinafter "Resp. Br.") at 27. This claim is not supported by the evidentiary record. All of the aforementioned advisory services were provided solely by Gibson – none were provided by Hull. Regardless, even if Hull could be considered 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 GPs who managed limited partner's funds were each investment advisers under Advisers Act); SEC v. Bolla, 401 F.Supp. 2d 43, 61 (D.D.C. 2005) ("each client . . . had three or four investment advisers").

Gibson also endeavors to argue that Geier Capital and Geier Group were GISF's investment advisers, at least until September 2011, and that Gibson was merely a non-controlling associated person. Resp. Br. at 33-35. This argument is a red herring. Nothing in the Advisers Act, the relevant regulations, Commission policy, or industry practice dictates or even suggests that an investment adviser cannot also be a "person associated with" an investment adviser. As defined in Section 202(a)(17), the term "person associated with an investment adviser" includes any partner, officer, director, or employee of an investment adviser and anyone who controls or is controlled by an investment adviser. While not all "associated persons" are investment advisers, the respective definitions reach overlapping conduct and are not mutually exclusive.

[3] Gibson's provision of advisory services to GISF is consistent with the disclosures in GISF's offering documents. In addition to identifying Gibson as the "managing member" of Geier Group (GISF's Investment Manager), the offering memorandum expressly stated that GISF's success specifically depended on Chris Gibson's performance. Div. Ex. 24 at 1, 17 ("Reliance on Chris Gibson"). By contrast it did not reference Hull. Id.

Finally, Gibson cannot escape Advisers Act liability by claiming that Geier Group and Geier Capital were GISF's investment advisers. Again, Gibson exclusively provided the aforementioned advisory services and neither Geier Group nor Geier Capital had any employees. 7/29/19 Tr. 129:4-9, 184:20-186:7. Moreover, Gibson was the 50% owner of both entities (Div. Ex. 216, ¶¶4, 9), and he was Geier Group's managing member and Geier Capital's Managing Director. Div. Ex. 24 at 1. Gibson controlled GISF assets on a day-to-day basis. Gibson made daily trading decisions, implemented those decisions, gave instructions to brokers, and negotiated potential purchases and sales. 7/29/19 Tr. 186:18-187:5. In short, Gibson exercised extensive, indeed exclusive, control over the entities through which he provided investment advisory services to GISF. See e.g., SEC v. Berger 244 F. Supp. 2d 180, 185, 193 (S.D.N.Y 2001) (finding defendant who was president and secretary of, and who was "solely responsible for overseeing [advisory firm]'s day-to-day operations" "effectively controlled" that advisory firm).

Gibson cannot use the existence of entities he controlled to evade liability for his own conduct. Even if Gibson provided advisory services as an agent of Geier Group or Geier Capital, he would be liable under Section 206. See SEC v. The Nutmeg Group, 162 F. Supp. 3d 754, 772 (N.D. Ill. 2016) (finding that it was "undisputed" that both entity and individual acting on its behalf could commit primary violations of Advisers Act Section 206). Whether an individual is an adviser subject to Section 206 turns on the advisory services performed by that individual, not whether the individual controls the entity through which the services are provided. See SEC v. Juno Mother Earth Asset Mgmt., LLC, No. 11- CIV-1778, 2012 WL 685302, *5-6 (S.D.N.Y. Mar. 2, 2012) (complaint stated a claim under Section 206 against portfolio manager who had 25% interest in the advisory entity and shared responsibility with two other individuals for managing the entity and the fund's investments); United States v. Jensen, 573 Fed. Appx. 863, 877 (11th Cir. 2014) (entity VP was investment adviser because she exercised "control over investor's funds" and "acted in more than a ministerial capacity"; no finding of control of entity). Thus, Gibson was an investment adviser because he provided advisory services to GISF.

2. Gibson Received Compensation For His Investment Advisory Services

Gibson received (and at all relevant times was entitled to receive) compensation for the investment advisory services he provided to GISF. First, Gibson testified that Hull Storey Gibson paid him a $148,700 salary in 2010 and 2011 for investment advisory services to GISF. 7/29/19 Tr. 249:17-19, 251:21-252:6.[4] Second, GISF paid Geier Capital (and thus, Gibson) a 10% incentive allocation fee in 2010 pursuant to the terms of the offering memorandum. Div. Findings ¶¶63-65.[5] Lastly, GISF paid $295,005 in management fees to Geier Capital through the end of September 2011, and Gibson reinvested his 50% share of those fees in GISF. Id. ¶62.

B. Gibson Was Subject To Federal Fiduciary Duties Under Section 206

As an investment adviser, pursuant to Advisers Act Sections 206(1) and (2), Gibson owed GISF (his client), 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" clients. Capital Gains, 375 U.S. at 194; see also, SEC v. Moran, 922 F. Supp.

[4] To the extent Gibson attempts to disavow his testimony and argue that his salary was for services provided to another client (Hull), not GISF, Gibson would still be receiving compensation and thus qualify as an investment adviser. See 76 Fed. Reg. 39646 (July 6, 2011) at 39669 ("once a person meets that definition (by receiving compensation from any client to which it provides advice), the person is an adviser"); see also, Investment Advisers Act Release No. 1092 (October 16, 1987), 52 Fed. Reg. 38400, 38402 (compensation need not come directly from the advisee).

[5] 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 adviser compensation element. SEC v. Fife, 311 F.3d 1, 10-11 (1st Cir. 2002) (defendant found to be an investment adviser where "he understood that he would be compensated . . . based on a percentage of the profits from the investments, if successful").

867, 895-96 (S.D.N.Y. 1996), aff'd, 587 F.3d 553 (2d Cir. 2009). Gibson also had a duty under Section 206 to disclose to his clients, among other things, "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."). The Commission "has long held that'[f]ailure by an investment adviser to disclose potential conflicts of interests to its clients constitutes fraud within the meaning of Sections 206(1) and (2).'" Robare Grp., Ltd. 922 F.3d at 472 (quoting Fundamental Portfolio Advisors, Inc., Advisers Act Release No. 2146, 2003 WL 21658248, *15 & n.54 (July 15, 2003)).

An investment adviser's duties of care, loyalty, full and fair disclosure and to act in good faith are well established. Div. Ex. 185 at 10-14 (reciting authorities). For example, the NASAA Investment Adviser Guide provides, inter alia: that advisers have a duty to act as fiduciaries in dealings with clients; that duty requires the adviser to hold the client's interest above its own in all matters; that conflicts of interest should be avoided at all costs; and that if conflicts arise the adviser must take great pains to clearly and accurately describe those conflicts to his clients. Id. at 13, n.19 & Ex. II (citing and attaching NASAA, Investment Adviser Guide).

1. Gibson's Fiduciary Duties Were Not Modified or Eliminated by GISF's Offering Documents

Gibson endeavors to evade the fiduciary obligations he owed to GISF by arguing that they were modified or eliminated by GISF's offering memorandum. Resp. Br. at 29-30; 8/1/19 Tr. 1342:6 to 1343:7 (citing Div. Ex. 24 at 19). However, Gibson's federal fiduciary duties under Section 206 could not be and were not waived, pursuant to Advisers Act Section 215(a), which provides in relevant part: "[a]ny condition, stipulation, or provision binding any person to waive compliance with any [other Advisers Act provisions or rules thereunder] shall be void." 15 U.S.C. § 80b-15(a). Indeed, the very authority that Gibson relies on to support his flawed argument, SEC Release No. IA-5248, 2019 WL 3779889 (June 5, 2019) (the "IA Release"), *affirms* Section 215's anti-waiver provision: "[w]hile the application of the investment adviser's fiduciary duty will vary with the scope of the relationship, the relationship in all cases remains that of a fiduciary to the client" and "[i]n other words, 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." IA Release at *4. Gibson's argument misinterprets and misappropriates the relevant IA Release provision, which stands only for the proposition that you can shape the adviser-client relationship by agreement based on the actual 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"); 7/31/19 Tr. 942:10-943:2 (e.g., "best-execution" duty would not apply if adviser-client agreement provided that adviser would not trade). 7/31/19 Tr. 942:10-943:2.

Moreover, nothing in the offering memorandum's Potential Conflict of Interest provision eliminated, waived, or modified the fiduciary duties Gibson owed GISF. Div. Ex. 24 at 19; 8/1/19 Tr. 1436:1-7 (Gibson acknowledging that GISF's organizing documents "delineated how [he] was to maintain [his] duty of loyalty, [his] duty of care and [his] duty of faith and my fiduciary responsibility"). Tellingly, Gibson has failed to articulate which specific fiduciary duties were actually eliminated, waived, or modified by the Potential Conflicts of Interest provision. Resp. Br. at 30 (stating only generally that "the Fund investors specifically authorized the establishment and trading in the outside accounts and defined the scope of the relationship between the investors and Respondent and the other Fund affiliates."). Nor could he, as that provision disclosed only that there *may* be conflicts in the future. See IA Release at *9 ("disclosure that an adviser 'may' have a particular conflict, without more, is not adequate"; "use of 'may' would be inappropriate if it simply precedes a list of all possible or potential conflicts"). In short, nothing in GISF's offering documents stated or implied that Gibson was authorized to front run GISF or ignore his best execution obligations in order to financially benefit the creditor who was paying his salary.

2. GISF's Offering Documents Did Not Satisfy Gibson's Fiduciary Disclosure Obligations

Gibson also argues that even if his federal fiduciary obligations were not waived or voided by the GISF offering documents, the documents satisfied his obligation to disclose conflicts of interest. 8/1/19 Tr. 1342:6 to 1343:7. In essence, Gibson claims that the statement to investors in January 2010 that conflicts *might* arise was sufficient disclosure of the actual conflicts that subsequently materialized over 18 months later. In making this argument, Gibson does not dispute that investors never knew the details of his personal trading or that he negotiated the Hull Buyout Transaction even though Gibson owed Hull $600,000 and Hull was his only source of income. This argument has no support in the law. Indeed, one of an investment adviser's most fundamental duties under Section 206 is to fully disclose all conflicts of interest. Capital Gains, 375 U.S. at 191. This includes not only disclosure of potential conflicts that might arise, but also prompt and complete disclosure of any actual conflicts that do arise. See IA Release at *8-10 (discussing full and fair disclosure of all conflicts of interest in context of duty of loyalty). Thus, Gibson had a fiduciary duty to fully disclose his actual conflict of interest when he negotiated a transaction between GISF and his sole source of income (Hull) and obligated GISF to pay above market prices (and all of the other conflicts that stemmed from his decision to front run GISF).

C. Gibson Violated Sections 206(1) and (2) Through the September Front Running

The facts of Gibson's September Front Running are set forth above. See supra at 4-5; Div. Findings ¶¶107-128. Through the September Front Running, Gibson obtained $0.50 per share more than the price he obtained for GISF the following day. Thus, Gibson avoided the losses he, his girlfriend, and Geier Group would have suffered if they had sold with GISF the next day. As set forth below, Gibson engaged in front running, with scienter, and failed to disclose that front running or the financial conflicts of interest (it created) to GISF or its investors, when he had a duty to do so.

1. Front Running

Front running involves an investment adviser's use, with expectation of personal benefit, of material, non-public information concerning an anticipated transaction likely to impact the value of a security. SEC v. Yang, 999 F. Supp. 2d 1007, 1016 (N.D. Ill. 2013) (front running is an attempt by an adviser "to profit personally by secretly authorizing personal trades in anticipation of much larger trades he knew that he would be authorizing"); see also, Bines, Harvey E. and Thel, Steve, *Investment Management Law and Regulation*, 2d. ed. (March 14, 2006), at 807 (front running is the illicit practice of "using advance knowledge of impending client action to secure advantage"). Front running creates a conflict of interest between the adviser and the client, undermines the integrity of the market, and is recognized as a violation of fiduciary duties and Sections 206(1) and (2) of the Advisers Act. See Capital Gains, 375 U.S. at 196-97 (Advisers Act requires adviser to "make full and frank disclosure of his 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.

Dr. Gibbons confirmed that the definition of front running offered by the Division is commonly accepted by industry practitioners. Citing a variety of industry authorities, Dr. Gibbons pointed out that the key aspect of front running is "advance knowledge of impending client action," Div. Ex. 185 at n.38, and/or knowledge of "the intention of a large investor to execute a trade," id at 21. Gibson's suggestion that front running can occur only after a client has placed a firm order (with knowledge of price, time, volume, and all other material terms) is belied by case law and industry authority that focus on the client's intention to trade in determining whether an adviser is barred from trading in front of the client. Id. at 21-22. This makes sense. If Gibson's definition of front running were adopted, 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 and agreeing to the last material term after his or her personal trading was complete.

2. The Illicit Trades and Financial Conflicts of Interest That Gibson Failed To Disclose Were Material

In failing to disclose the September Front Running to GISF and its investors, Gibson failed to disclose material facts for purposes of the Advisers Act. Vernazza, 327 F.3d at 859 (indisputable that conflicts of interest are material facts).[6]

3. Gibson Acted With Scienter In Connection With the September Front Running

In connection with the September Front Running, Gibson acted with scienter, by knowingly or recklessly[7] violating his fiduciary duties and specifically, by engaging in front

[6] Likewise, the materiality standard is satisfied with respect to Gibson's failure to disclose the HBT and October/November Front Running, for purposes of both the Advisers and Exchange Acts.

[7] The Division emphasizes herein that 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. However, the evidentiary record – specifically, the repeated, extensive, and

running and failing to disclose his illicit trades or the conflicts of interest he created to GISF and its investors. 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, which is defined as 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." Blavin, 760 F.2d at 711-12.

The September Front Running that Gibson orchestrated and failed to disclose was an extreme departure from the duty of ordinary care he, as an investment adviser, owed to his client, GISF. Div. Ex. 185 at 12-13 (front running violation of duty of loyalty; best execution required per duty of care; "[n]eed to disclose all actual and potential conflicts of interest"). Indeed, courts have found that investment advisers act at least recklessly when they, like Gibson did here, fail to disclose material information to their investors. Blavin, 760 F.2d at 712 ("[a]t minimum, [investment adviser] recklessly failed to disclose that he was trading in stocks that his newsletter recommended" and thus acted with scienter).

Evidence of Gibson's scienter is bolstered by his knowledge that GISF's block sale of 3.7 million TRX shares would likely depress TRX's share price. Indeed, when asked under oath if he would "generally expect the share price of a stock to drop when you sell a large portion of the

egregious nature of Gibson's self-dealing and favoritism carried out to benefit himself and those close to him (or to whom he owed substantial money) – demonstrates that Gibson acted *intentionally*.

shares", Gibson answered, "Yes." Div. Ex. 187 at 108:12-21. Given this testimony, any suggestion that GISF was simply unlucky on September 27 is not credible. Gibson traded ahead of a price drop he anticipated and knew what he was doing was wrong. Indeed, by Fall 2011, Gibson was well aware of the concept of front running based on his prior work and training. See e.g., Div. Ex. 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. On September 23, a day after telling Sinclair that TRX had "4 more days" to live (Div. Ex. 79), Gibson assured GISF and its investors that he was committed to TRX. Div. Ex. 81. Just a day or two later, Gibson and Hull decided GISF would exit its TRX position at good prices. But rather than inform investors of that decision or wait to sell his personal TRX shares (or those of his girlfriend and Geier Group) until after GISF had sold, Gibson – on the first available trading day after the decision – liquidated every single TRX share held personally by him, his girlfriend, and Geier Group. This was no accident or mistake, and there is no excuse for this "wanton disregard for his fiduciary duties." Div. Ex. 185 at 27.

Gibson offered various excuses to explain away his misconduct. Gibson claimed that he sold his TRX shares on September 26, because he needed "liquidity." 8/1/19 Tr. 1394:18-25. However, there is no evidence that Gibson had any particular need for "liquidity" on September 26, 2011, other than Gibson's self-serving testimony. Throughout this period, Gibson was receiving bi-weekly salary payments from Hull's business. 7/29/19 Tr. 252:2-6. Moreover, Gibson never withdrew any sale proceeds from his personal account to address liquidity needs. Instead, Gibson reinvested his TRX sale proceeds in Ishares Silver Trust Index Fund in the same account. Div. Ex 86. Lastly, Gibson's "liquidity" argument conveniently ignores that he did not just sell TRX from his account – but from those of his girlfriend (and Geier Group). Gibson has neither argued nor shown that TRX-sale proceeds in his girlfriend's account had any impact whatsoever on *his* "liquidity." In fact, the evidence shows that those proceeds were simply reinvested in other securities. Div. Exs. 87, 102.

Likewise, Gibson's violations of his fiduciary duties, in connection with his September Front Running, necessarily represented a deviation from the ordinary standard of care for an investment adviser – and thus, Gibson also acted negligently for purposes of Section 206(2). Specifically, Gibson acted with culpable carelessness by engaging in and not disclosing these illicit front-running trades to GISF or its investors. Robare Grp. Ltd., 922 F.3d at 477 ("a reasonable adviser with knowledge of the conflicts would not have committed such clear, repeated breaches of its fiduciary duty"). Accordingly, Gibson engaged in fraudulent conduct (at least) negligently, under Section 206(2).

D. In Carrying Out the HBT, Gibson Violated Section 206(1) and (2)

Gibson also breached his fiduciary duties and violated Section 206(1) by knowingly and/or (at least) recklessly failing to disclose material facts to GISF or its investors regarding the HBT, which favored one of Gibson's advisory clients (Hull) over another (GISF). See supra at 5-6; Div. Findings ¶¶129-151. Gibson acted with scienter in failing to disclose *four* material facts.

First, Gibson was at least reckless in failing to disclose that at the time of the HBT, GISF's strategy was to exit its TRX position; a process that began in late September (as described above). Despite telling investors that he and the Fund would remain invested in TRX on September 23, 2011 (Div. Ex. 81), Gibson decided during the weekend of September 24-25 that GISF would exit its TRX position, while still seeking favorable prices. Div. Ex. 187, 77:24-

78:5. Gibson never told GISF or its other investors about this change in strategy or his efforts to carry it out, including actually selling large TRX blocks held by GISF. 7/29/19 Tr. 220:12-18; 221:1-12; see e.g., Div. Ex. 93 ("please do everything you can to get us able to sell 5,945,000 TRX shares starting ASAP."); Div. Ex. 227 (October 17 sale of 364,495 TRX shares). Despite this change in strategy with respect to TRX, Gibson caused GISF to take on *more* TRX through the HBT. As Dr. Gibbons explained, through the HBT, Gibson "dumped a disadvantageous trade on GISF," by burdening the Fund with additional TRX shares and shifting the market risk of owning those shares from Hull to GISF, even though GISF had already decided it no longer wanted to own *any* TRX shares. Div. Ex. 185 at 23-24.

Second, Gibson was at least reckless in failing to disclose that he used GISF funds to purchase Hull's shares at an above-market price, which violated the "Potential Conflicts of Interest" provision in GISF's offering memorandum requiring such transactions to occur at the current market price. Div. Ex. 24 at 19. The price the Fund paid to purchase Hull's 680,636 shares in the off-exchange HBT was the closing market price on October 18 but was *not* the "current market price" because it was neither the correct market price, nor the correct large-block price. For one, $3.60 was the closing market price for only the 490,625 TRX share-volume that actually traded on October 18 Joint Ex. 1; Div. Ex. 185 at 23. Hull's 680,636 shares would have caused a 139% increase to the day's market volume, the price Gibson caused GISF to pay did not account for the impact that a sale of Hull's shares would have on the market price for a thinly-traded stock like TRX – a fact Gibson knew by virtue of his sale of over 360,000 of GISF's TRX shares the day prior. Div. Findings ¶¶135, 142.

Additionally, for this exact reason, when large blocks of stock like Hull's are sold through the "upstairs" market, it is customary for the buyer to receive a large-block discount, which Respondent's own expert acknowledged. Resp. Ex. 228 at 5 ("Without a buyer having a natural fit for the other side, market participants may show a bid that is at a discount to current market prices in order to be compensated for providing this liquidity."). Yet, in carrying out the HBT, Gibson did not seek and GISF did not receive a large-block discount, even though he knew such discounts were typically required. See e.g., Resp. Ex. 177 at 2. At the hearing, Gibson claimed that $3.60 was the "current market price" pursuant to Section 6.02(b) of the Operating Agreement. 8/1/19 Tr. 1437:3-12. However, that provision has nothing to do with affiliated-party transactions but relates only to the "Determination of Net Profits and Losses." Div. Ex. 22 at 5-6 (defining only the "market value of positions in securities"). As such, Gibson recklessly failed to disclose that GISF paid an above-market price (compared to both the market and "upstairs" market) for Hull's shares.

Third, Gibson was at least reckless in failing to disclose that the HBT enabled Hull to avoid paying a commission and required GISF to ultimately pay an "extraordinary commission" (it would not have otherwise had to pay) when it sold Hull's shares on November 10, 2011. Gibson knew that the seller would typically be required to pay a commission for transactions like the HBT. For example, pursuant to a September 30, 2011 agreement Gibson signed, the Fund agreed to pay Roheryn Investments a 4-cent per-share commission for the anticipated sale of 5.9 million TRX shares. Resp. Ex. 92. The $6,866.36 in commissions paid by GISF to sell Hull's shares, Div. Findings ¶143, constituted an extraordinary[8] commission under (and violated) the offering memorandum's Potential Conflicts of Interest provision. Div. Ex. 24 at 19 ("no

[8] The Merriam-Webster online dictionary defines "extraordinary" as "a: going beyond what is usual, regular, or customary <extraordinary powers>[;] b: exceptional to a very marked extent <extraordinary beauty>[;] c: of a financial transaction : nonrecurring . . . ." www.merriam-webster.com/dictionary/extraordinary (last visited September 11, 2019).

extraordinary brokerage commission or fees . . . shall be paid"). Obviously it is customary for GISF to pay commissions when it sells its own stock. The issue here, though, is that GISF was forced to pay the sales commission to sell Hull's shares. Moreover, Gibson did not disclose to GISF or its other investors that he had caused the Fund to pay Hull's commission, and they never agreed to do so. 7/30/19 Tr. 765:7-20.

Fourth, Gibson was at least reckless in failing to disclose that – including at the time of the HBT – Hull was paying Gibson a $148,700 annual salary for advisory services provided to GISF, and that Hull had extended a loan in excess of $600,000 to leverage Gibson's investment in GISF and align Gibson's interests with Hull's. 7/29/19 Tr. 249:17-19; Div. Ex. 188 at 450:4-451:4; Div. Ex. 138 at -2030; 7/30/19 Tr. 765:25-766:3 (loan). This created a financial conflict of interest that Gibson never disclosed to GISF or its investors. 7/29/19 Tr. 254:22-25; 255:20-256:3; 7/30/19 Tr. 765:21-24; 828:3-7. In his sworn testimony, Hull repeatedly referred to the 2010 and 2011 payments from Hull as salary, not loans. 7/29/19 Tr. 251:19-252:6; Div. Ex. 188 at 450:17-450:21. His testimony is consistent with the fact that these payments were reported on Gibson's Form W-2 as "Wages, Tips, and other compensation," and Gibson's treatment of them as income on his 2011 tax return. Div. Exs. 128, 138 at 13. The payments were processed through "Insperity PEO Services, L.P.," a human resources company that Hull's business used to handle salary payments to its employees. Div. Ex. 128; Div. Ex. 191 at 450:4-450:25. Even if the salary payments were a loan, they would simply magnify the conflict created by the undisclosed, $600,000-plus loan from Hull. Before causing GISF to purchase Hull's personal TRX holdings, Gibson was required to disclose – and was reckless in not disclosing – that Hull was paying Gibson's salary and loaning him funds, because those financial conflicts certainly "might incline [Gibson] – consciously or unconsciously – to render advice that was not disinterested." Capital Gains, 375 U.S. at 191.

As demonstrated, Gibson acted with scienter – that is, knowingly or at least recklessly – in deciding and causing the Fund to buy out Hull's personal TRX position and in failing to disclose the material facts discussed above. Gibson's conduct was an extreme departure from the standard of ordinary care that 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 educational pedigree, training, and prior work experience at Deutsche Bank and elsewhere. See Div. Findings ¶¶2-5.

Any argument by Gibson that the transaction was somehow intended to benefit GISF is belied by common sense. GISF ultimately lost over a $1 million by purchasing hundreds of thousands of shares of a security Gibson had already decided to jettison. If the HBT benefitted anyone, it only benefitted Gibson and Hull. See e.g., Div. Ex. 94. Any 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" (8/2/19 Tr. 1567:1-4; Resp. Ex. 228 at 6) is a benefit only to Gibson and Hull – not GISF. Consolidating Hull's TRX shares with GISF's was not a stated objective of the fund, nor did the fund need to purchase Hull's TRX shares to enter into a block transaction to sell its TRX shares. 8/2/19 Tr. 1621:1-1622:4. Gibson's conduct related to the Hull Buyout Transaction was wholly inconsistent with the above-described investment advisory duties, and as a result, represented an extreme departure from the standards of ordinary care. SEC v. Trabulse, 526 F. Supp. 2d 1008, 1014 (N.D. Cal. 2007) (recklessness satisfies scienter requirement and constitutes "highly unreasonable conduct that amounts to an extreme departure from standards of ordinary care"). Thus, Gibson was at least reckless when he relieved Hull of his TRX investment and in his failure to disclose the four aforementioned material facts.

Gibson violated Section 206(1) through a scheme to defraud GISF by (i) favoring Hull's interest over the Fund's and (ii) failing to disclose his (material) conflicts of interest with Hull to GISF or its other investors – both of which constituted violations of the fiduciary duties of good faith, care, loyalty, and full and fair disclosure that he owed GISF. Gibson allocated an unfavorable trade from Hull to GISF, and essentially "dumped a disadvantageous trade on GISF." Div. Ex. 185 at 23. Favoring one advisory client over another in this way constitutes a fraud in violation of Section 206(1). See e.g., SEC v. K.W. Brown & Co., et al., 555 F. Supp. 2d 1275, 1308-09 (S.D. Fla. 2007) (defendant violated Section 206 through, and by failing to disclose cherry picking scheme that favored defendant's interest over that of his clients).

Gibson's reckless failure to disclose the four material facts discussed above supports the finding that Gibson violated Section 206(1). See Malouf v. SEC, 933 F.3d. 1248, 1260-62 (10th Cir. 2019) (affirming SEC decision finding Malouf acted with scienter in failing to disclose financial conflicts of interest for purposes of SEC's claim under 206(1)); Vernazza, 327 F.3d at 859 (affirming SEC decision finding advisers were reckless in failing to accurately and completely disclose conflicts of interest); K.W. Brown, 555 F. Supp. 2d at 1308-09 (advisers violated Section 206 by "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]"). As a result of his fraudulent and reckless conduct – done in a manner completely inconsistent with the standard of care imposed on Gibson as a fiduciary – Gibson violated Section 206(1). And, although the Division need not show harm, Gibson's conduct resulted in GISF losing as much as $1,074,902.

Even accounting for Hull's 80% Fund ownership, GISF lost $214,980.40, as a result of the HBT. Div. Ex. 184 at 6 & Ex. 7.

Likewise, Gibson's conduct in connection with the HBT was at least negligent and thus violated Section 206(2), because Gibson failed to "exercise the standard of care that a reasonably prudent person would have exercised in a similar situation" and acted with "culpable carelessness." In re Lisa B. Premo, Init. Dec. Release No. 476, 2012 WL 6705813, *22, n.34 (Dec. 26, 2012). Here, the applicable standard of care is set forth in Capital Gains and its progeny: all investment advisers have fiduciary duties to their clients, including the duties of good faith, full and fair disclosure, and reasonable care, and to avoid misleading clients and provide disinterested advice. 375 U.S. at 194-98; see also, SEC v. Treadway, 430 F.Supp. 2d 293, 338 (S.D.N.Y. 2006) (Section 206 "establishes a statutory fiduciary duty for investment advisers to act for the benefit of their clients, requiring advisers to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients."). In causing the HBT and failing to disclose the material facts discussed above to GISF or its investors, Gibson failed to exercise the standard of care that a reasonably prudent investment adviser would have exercised in a similar situation. See e.g., Robare Grp. Ltd., 922 F.3d at 477 (adviser's failure to disclose known conflicts was unreasonable). Therefore, Gibson engaged in fraudulent conduct (at least) negligently, under Section 206(2).

E. Gibson's October/November Front Running Violated Sections 206(1) and (2)

After the HBT, Gibson continued trying to sell GISF's remaining TRX position, knowing that doing so would likely depress TRX's share price. Div. Findings ¶¶115, 153. Indeed, Gibson had already experienced the adverse market impact from the earlier, September 27th and October 17th block sales. In advance of GISF's liquidation of its TRX position, Gibson engaged in the

October/November Front Running. See supra at 6-7; Div. Findings ¶¶152-186. Through this misconduct, Gibson placed his own financial interest, and the financial interests of Marzullo and his father, in direct conflict with the interests of GISF. Because the puts would become more valuable if TRX's share price declined, Gibson and two persons close to him would benefit if his client's major investment (GISF's TRX holdings) fell in value. Gibson never disclosed to GISF that he intended to or did create this conflict of interest. On November 10, 2011, Gibson carried out the anticipated liquidation of GISF's TRX holdings. As GISF dumped 4.9 million TRX shares into the market, the share price plummeted.[9] Gibson then sold all of his and Marzullo's puts, and the puts of Gibson's father (having sold 10,000 of his personal TRX shares the day prior) were sold soon thereafter. The put transactions yielded total illicit profits (in all three personal accounts) of $379,550.

1. Gibson Acted With Scienter In Connection With the October/November Front Running

As discussed above, Gibson was well aware that selling a large block of shares of in a thinly-traded company like TRX was likely to depress the market price – as it had on September 27th and October 17th. Indeed, Gibson admitted as much previously, testifying under oath that he "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." Div. Ex. 187 at 108:12-17. Notwithstanding that admission, Gibson claimed at the hearing that on November 10, he expected TRX's share price (after initially falling) to quickly rebound due to large buyers coming into the market to protect their own TRX investments. This argument fails for several reasons. For one, any expectation Gibson may have had for a TRX

[9] It was not an unfortunate coincidence that TRX's share price fell so drastically on November 10. In fact, GISF's massive selling on November 10 contributed to the drastic decline in share price. Div. Findings ¶¶171-73.

market rebound was completely speculative, and his purported belief that TRX would rebound above $4 per share on November 10 (making the puts worthless) is not credible. Additionally, Gibson's argument acknowledges that he expected at least a short-term price decline upon selling GISF's remaining TRX block into the market, and his conduct on November 10 demonstrates that he was fully prepared to take advantage of that decline, i.e., he sold when TRX was near its low for the day (when the puts were most valuable). Finally, Gibson acknowledged that he purchased the puts to mitigate his Fund-related losses in the event TRX's price declined, Div. Ex. 187 at 127:21-128:3, effectively admitting that he traded ahead of GISF to obtain a benefit (loss-mitigation) for himself. Div. Ex. 105.

Accordingly, and for the same reasons set forth regarding the September Front Running, supra at 17-20, Gibson acted with scienter, in connection with the October/November Front Running and therefore violated Section 206(1). Likewise, and for the same reasons set forth regarding the September Front Running, Gibson – in violating his fiduciary duties (the ordinary standard of care) – necessarily acted negligently in connection with the October/November Front Running and thus violated Section 206(2).

2. Whether Gibson Was "Net Long" Or His Puts Were "Protective" Is Irrelevant.

Gibson argues that even after purchasing the puts (in his account) he was "net long TRX" through his investment in the Fund and thus had no motivation to drive the TRX share price down. But Gibson's overall financial interest in TRX is irrelevant to whether he engaged in front running, i.e., whether he traded on the foreknowledge of his clients intended trades, or violated the fiduciary duties he owed as an investment adviser. Gibson purchased the puts to obtain a profit in his personal account (where, after he purchased them, he was "short TRX"), which would mitigate or offset his share of any GISF losses caused by GISF's sale of its remaining 4.9

million TRX shares. That Gibson hoped not to need that protection is irrelevant. Moreover, Gibson's repeated explanation that he purchased the puts to protect Hull, his creditor, 8/1/19 Tr. 1446:10-21, only highlights the severity of the multiple conflicts of interest that Gibson created in his management of GISF.

Gibson now disavows his prior sworn testimony that the puts represented a "short bet" against TRX in his personal account (Div. Ex. 187, 119:6-16) and argues that because he was net "long" or "bullish" he could not have had a "short position" in TRX in his personal account. 7/29/19 Tr. 300:23-303:5. The Division has never claimed that Gibson was *not* net long in TRX through his ownership in the Fund – only that the puts in his (and his then-girlfriend's) accounts represented a "short position" in TRX. OIP ¶¶9, 45. That the puts in the personal accounts represent a short position or bet 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)."); Div. Ex. 186 at 8-12 (reciting authority). Even Gibson's expert testified that Gibson's use of the term "short bet" referred to the "options portion of the portfolio", i.e., the puts. 8/2/19 Tr. 1639:21-23.

Similarly, Gibson unduly emphasizes the fact that his puts were "protective" not "naked." This quibbling over the classification of puts is irrelevant. Regardless of their classification, the puts increased in value as TRX's stock price dropped, which is exactly what happened on November 10, 2011 when Gibson sold the Fund's remaining TRX position. As his client was selling its major investment and suffering catastrophic losses, Gibson – focusing on himself and Marzullo – sold the puts to mitigate his TRX-related losses that day and generate profits for Marzullo. See 8/2/19 Tr. 1632:25-1633:14 (Bystrom on protective puts: "[y]ou mitigate your loss below the strike price of the option"). As an investment adviser, Gibson's fiduciary duties required him to put the interests of his client ahead of his own. By taking steps to mitigate his own losses – without disclosing those steps to his client or taking any steps to mitigate his client's losses – Gibson created an undisclosed financial conflict of interest that breached his fiduciary.

Likewise the October/November Front Running cannot be excused, as Gibson contends, on the basis that he bought the puts for Marzullo (who was not a GISF investor) to protect her parents – one of whom (her father) had invested in GISF. 8/1/19 Tr. 1448:2-11. The presiding ALJ rightly questioned whether Marzullo's puts could constitute protection of her father's investment, since she had no interest in GISF. 8/2/19 Tr. 1675:23-1676:25.[10] Indeed, Gibson's own argument is undermined by the fact that instead of actually protecting the Marzullos (by providing them with the put profits), Gibson kept those profits in Marzullo's account (which was solely in her name). 7/29/19 Tr. 330:21-331:2; Div. Ex. 190 at 114:19-24.

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

Gibson also violated Advisers Act Section 204(4) and Rule 206(4)-8 thereunder, which prohibits investment advisers to pooled investment vehicles (like GISF)[11] from engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative. 17 C.F.R. § 275.206(4)-8; see also Investment Advisers Act Release No.2628, 2007 WL 2239114, *3 (Aug. 3, 2007) (hereinafter "IA-2628"). Rule 206(4)-8(a)(1) prohibits such an adviser from making an

[10] Gibson's argument that Marzullo and her parents constituted a single advisory client and his reliance on Rule 203(b)(3)-1(a)(1)(ii) (Resp. Br. at 6) are misplaced. That rule applies only to whether an adviser could count family members as one unit for purposes of qualifying for a registration exemption – an exemption that was abolished by Dodd-Frank. 76 FR 42950 (SEC later rescinded rule), 43011, July 19, 2011.

[11] Because GISF was a "fund through which the assets of its Members will be utilized to invest, hold, and trade . . . in securities" (Div. Ex. 21 at -3069), it was such an investment vehicle. IA-2628 at *3 ("rule applies to advisers to hedge funds . . . and other types of privately offered pools that invest in securities").

untrue or misleading statement regarding a material fact to investors or prospective investors in the vehicle, while subsection (a)(2) prohibits an adviser from engaging in "fraudulent, deceptive, or manipulative" conduct with respect to any investor or prospective investor in the vehicle. To establish Gibson's violation, the Division need only show that he acted negligently. SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992) (Steadman II); IA-2628 at *5. The standard of materiality is the same as under Exchange Act Section 10(b), Blavin, 760 F.2d at 710-713, i.e. if a reasonable investor would consider the information important, Basic v. Levinson, 485 U.S., 224, 231-232 (1988).

Gibson violated Rule 206(4)-8(a)(2), through his September and October/November Front Running and the HBT, which were all deceptive, fraudulent, and manipulative. Both instances of front running were inherently deceptive because Gibson misused undisclosed and confidential, non-public information to benefit himself, his then-girlfriend, and his father. Gibson's front running was also manipulative, because he controlled GISF's block sales on September 27th and November 10th, and that control enabled Gibson to trade ahead of GISF on both sets of transactions. Through his conduct, Gibson also "picked winners and losers" among GISF investors who held TRX personally, and protected only those close to him. For example, he caused GISF to buy Hull's personal TRX shares and he told his father to sell his TRX shares and buy $4 TRX puts (7/31//19 Tr. 1108:13-22; Div. Ex. 117) in advance of the November 10th GISF sale, which Gibson knew would "potentially tank" TRX's stock price. Div. Ex. 105. Other investors who (Gibson knew or should have known) owned TRX outside the Fund, including the McKnights, received no such protection. 7/30/19 Tr. 762:10-763:14; Div. Exs. 47, 72. Gibson's front running also created direct and obvious conflicts of interest between Gibson and GISF's investors, , and his failure to disclose those conflicts was likewise deceptive. See Capital Gains, 375 U.S. at 196-97, 201 (1963); Yang, 999 F. Supp. 2d at 1016.

Gibson's front running also violated Rule 206(4)-8(a)(1). By stating only generally that Gibson could engage in outside activities and provide advice to others but failing to disclose that he would use that authority to benefit himself and those close to him by front running, the GISF offering documents omitted material facts, making them misleading. For example, although the Potential Conflicts of Interest provision stated in general terms that Gibson and others affiliated with GISF might engage in outside businesses and manage outside accounts, Div. Ex. 24 at 19, that provision did not disclose that Gibson would, in fact, use his foreknowledge of GISF's anticipated trades to front run the Fund. No GISF investor could have known from the offering documents that Gibson actually engaged in transactions that front ran the Fund. After the decision was made to exit GISF's TRX position, Gibson was obligated to (i) refrain from trading on that information for his personal account or (ii) provide GISF's investors specific and timely notice of his intention to trade on that information. Div. Ex. 185 at 22. Gibson ignored both options and instead engaged in the September and October/November Front Running. This rendered the information available to investors in the offering documents (i.e. that Gibson would comply with his legal obligations and fiduciary duties to GISF) materially misleading, but Gibson never revised those documents or otherwise provided investors accurate, current information. Div. Ex. 188 at 3:13:19-25, 314:18-21.

Gibson's fraudulent and deceptive conduct in connection with the HBT also violated Rule 206(4)-8(a)(2), because it was contrary to GISF's offering documents and was not disclosed to GISF's investors. As demonstrated above (Section I.D), Gibson was at least reckless in failing to disclose four material facts concerning the HBT, including that GISF paid more than the "current market price" and that GISF (not Hull) ultimately paid the commission to sell Hull's remaining personal TRX shares. Div. Ex. 24 at 19 (requiring affiliate transactions to take place at "current market price" and without "extraordinary commission"). Moreover, Gibson never disclosed the HBT (or that it was contrary to the offering memorandum's requirements) to GISF investors. Div. Findings ¶¶145, 150.

Moreover, through the HBT, Gibson also violated Rule 206(4)-8(a)(1), by omitting, and failing to disclose, the material facts described above when he had a duty to disclose them, which made the statements regarding affiliated transactions in the offering documents misleading. The omissions regarding the use of GISF funds to purchase Hull's TRX shares were material. SEC v. Research Automation Corp., 585 F.2d 31, 35-36 (2d Cir. 1978) (misleading statements and omissions about the use of investor funds were material as a matter of law). A reasonable investor would consider it important that Gibson used $2.45 million of GISF's funds to pay Hull an above-market price for his shares and, ultimately, paid the commission on Hull's sales to exit his personal TRX position. Basic, 485 U.S. at 231-232; see also, 7/30/19 Tr. 766:4-10 (Mason McKnight did not know about HBT and would have wanted the same opportunity to sell his personal TRX shares).

Gibson acted at least negligently with respect to his front running and the Hull Buyout Transaction. As discussed above (see supra at 20, 26, 28), Gibson's conduct in connection with the front running and HBT was at minimum negligent. For example, with respect to the HBT, Dr. Gibbons concluded that, in the industry, Gibson's use of the GISF funds to purchase Hull's TRX shares would be considered "patently abusive" and a violation of "the duties of good faith, care, loyalty, obedience, and full and fair disclosure." Id. In short, Gibson failed to exercise the care of a reasonably prudent investment adviser. Likewise, Gibson acted at least negligently in front running the Fund. In addition, his omissions and failures to disclose these transactions or his conflicts of interest constituted a glaring departure from what was required of him as an investment adviser – and thus were negligent. (Indeed, as demonstrated above, he acted at least recklessly in connection with the September Front Running, the HBT, and the October/November Front Running; and the fact that he never disclosed this misconduct or the related financial conflicts of interest he created indicates *intentional* concealment.) At minimum, Gibson's conduct represented an extreme departure from the standard of ordinary care he owed to GISF.

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

Gibson's front running conduct also violated Exchange Act Section 10(b) and Rules 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. This liability extends to those "who had knowledge of the fraud and assisted in its perpetration." SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1471 (2d Cir. 1996).

As with Rule 206(4)-8, Rule 10b-5(a) and (c) liability need not be based solely on fraudulent conduct against GISF (as Gibson's client), as opposed to GISF's investors. SEC v. Lauer, 478 Fed. Appx. 550, 556 (11th Cir. 2012) (court did not err in holding 10(b) applied to conduct aimed at investors as opposed to hedge fund defendant managed).

Additionally, as with Section 206 liability, the Division need not establish that Gibson's conduct harmed GISF or its investors. Graham v. SEC, 222 F.3d 994, 1001-02 (D.C. Cir. 2000) (injury to purchaser need not occur to establish 10(b) liability). Gibson's status as an investment adviser is also relevant for purposes of Section 10(b), because he was "a fiduciary and therefore ha[d] an affirmative duty of utmost good faith to avoid misleading clients" and that "duty include[d] disclosure of all material facts and all possible conflicts of interest." Laird v. Integrated Res., Inc., 897 F.2d 826, 833-34 (5th Cir. 1990); SEC v. Zanford, 535 U.S. 813, 824 (2002) (fiduciary liable for fraud under 10(b) for trading on and non-disclosure of misappropriated confidential information); Geman v. SEC, 334 F.3d 1183 (10th Cir. 2003) (same); Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 11-12 (1971) (fiduciary who disregards trust relationship can be held liable under Section 10(b)). "[S]ilence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b)" where, as here, there is "a duty to disclose arising from a relationship of trust and confidence . . . ." Chiarella v. U.S., 445 U.S. 222, 230 (1980).

Gibson's September and October/November Front Running violated Rule 10b-5(a) and (c)[12] because, by trading for his, Marzullo's, and Geier Group's accounts (and directing his father to make trades) based on his foreknowledge GISF's imminent large block sales, Gibson used a "device, scheme, or artifice to defraud" within the scope of Rule 10b-5(a) and engaged in acts and practices that operated as a fraud within the scope of Rule 10b-5(c). Gibson's secret misappropriation of GISF's confidential information to benefit himself and those close to him also deceived GISF and its investors – and constituted a fraud. See e.g., Malouf, 933 F.3d. at 1260-61 (SEC reasonably found Respondent's failures to disclose financial conflict of interest constituted improper conduct under Rule 10b-5(a) and (c)). As noted, GISF's offering documents did not disclose the actual conflicts of interest that Gibson created by trading ahead of

[12] The interstate commerce element is satisfied here, see supra at n.2, as is the "in connection with" element because Gibson sold and purchased TRX securities. SEC v. Levine, 671 F. Supp. 2d 14, 31 (D.D.C. 2009) (any activity "touching sale of securities" suffices).

the Fund in the personal accounts. Nor did Gibson otherwise disclose these conflicts of interest to GISF or its investors.

Lastly, as demonstrated supra at 17-20, 28, Gibson acted with scienter, i.e. knowingly or at least recklessly, when he engaged in the September and October/November Front Running. See Malouf, 933 F.3d at 1261-62 (SEC reasonably found scienter where respondent was aware of, did not disclose, and sought to exploit, conflict).

IV. Gibson Was Not Credible

As evidenced by his hearing testimony (and highlighted at various points herein), Gibson is more than willing to offer self-serving falsehoods or unreliable hearsay to justify or excuse his misconduct. On multiple occasions, Gibson's testimony was inconsistent with his prior investigative and hearing testimony, contradicted by the documentary evidence, or simply not credible given the facts in evidence. Below is just one prominent example that highlights the danger of basing any findings of fact on Gibson's self-serving statements that lack evidentiary support.

Gibson falsely testified that his statements promoting TRX's prospects to investors were true. However, in August and September 2011, Gibson repeatedly told Sinclair that TRX was performing very poorly and was on the verge of failing. Div. Ex. 76 ("physically ill over our performance"); Div. Ex. 77 ("This is TRX failing."); Div. Ex. 78 (" running on fumes"); Div. Ex. 79 ("trying to think of ways to save the company"). Gibson made similarly negative comments to Sinclair regarding Sinclair's character. Div. Ex. 77 ("everything you say is always inaccurate"); Div. Ex. 103 ("life's goal to ensure your children know you were a crook"). At the same time, however, Gibson was giving GISF's investors favorable reports on TRX and Sinclair. Resp. Ex. 51 ("I believe very strongly we are in the right company in the right asset class at the right time"); Div. Ex. 81 ("my view of the tremendous fundamental value of the assets owned and business operated by TRX" and "confirms my view . . . of the reputation, character, and integrity of Mr. Sinclair"). When questioned about these simultaneous yet contradictory statements, Gibson testified that he had made false statements to Sinclair to advance GISF's interests. 8/1/19 Tr. 319:14 to 320:11. Gibson's testimony that his statements to investors were true is contradicted by the fact that Gibson sold all of his personal TRX shares just three days later after he promoted TRX's prospects to investors.

Moreover, during his sworn hearing testimony, Gibson stood by his prior testimony that Sinclair was "honorable" and a "great leader." 8/1/19 Tr. 1490:24-1492:7. The evidence shows that this testimony is false. Gibson wrote to GISF investors in late September 2011, and stated that his analysis verified the "reputation, character, and integrity" of Sinclair. In February 2012, however, Gibson explained in a recorded telephone call that Mr. Sinclair had been lying to him *for a year*, and then savagely disparaged Sinclair, calling him a "complete crook" and a "liar" – the very same language Gibson used in earlier email communications with Sinclair. Div. Findings ¶190.

V. Remedies

A. Cease-and-Desist Order

The factors considered in determining whether a cease-and-desist order is warranted are: the egregiousness of the misconduct; the isolated or recurrent nature of infractions; the degree of scienter; assurances against future violations; recognition of the wrongful nature of conduct; and the likelihood of future violations. Steadman I, 603 F.2d at 1140; In re KPMG Peat Marwick LLP, Init. Dec. Release No. 157, 2000 WL 45725,*34 (Jan. 21, 2000), aff'd sub nom, KPMG v.

SEC, 289 F.3d 109 (D.C. Cir. 2002). In the present case, these factors weigh heavily in favor of imposing a cease-and-desist order against Gibson.

First, Gibson's conduct was egregious. 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. Second, this conduct was not isolated. Gibson violated the law in connection with three separate transactions and, for two of the transactions, violated the law several times to financially benefit multiple people at the expense of the Fund he advised. Third, as set forth above, Gibson engaged in this misconduct with a high degree of scienter and acted knowingly or at least recklessly. Fourth, there are no assurances against future violations. Indeed, as set forth above, Gibson continues to maintain that conflicts do not have to be disclosed to investors when they materialize. Fifth, Gibson has in no way acknowledged the wrongful nature of his conduct. To the contrary, as set forth in Section IV above, Gibson continues to contort the facts of what happened in order to evade responsibility for his misrepresentations and omissions to GISF and its. Finally, Gibson is relatively young, has held several jobs in the financial sector and thus the likelihood of future violations is high.

B. Permanent Collateral Bars

Gibson should be permanently barred from the industry under Advisers Act Section 203(f) and Investment Company Act Section 9(b). The factors to be considered in determining whether a permanent bar is warranted are: the egregiousness of the misconduct; the isolated or recurrent nature of infractions; the degree of scienter; assurances against future violations; respondent's recognition of the wrongful nature of conduct; and the likelihood of future violations. Steadman I. 603 F.2d at 1140. For the same reasons discussed above, these factors weigh heavily in favor of imposing the full range of collateral bars available against Gibson.

Gibson was a trained professional who held series 7, 63 and 65 licenses. Gibson knew what his obligations were. 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 failed to disclose material conflicts of interest and – because of those conflicts – he negotiated a transaction to purchase Hull's stock at a premium and committed the Fund to pay additional commissions to exit its TRX position. Then he made a "short bet" against TRX before directing the Fund to sell a large block of shares, which essentially ensured that the puts Gibson, his girlfriend, and his father had just purchased would be profitable. And they were. These are not the actions of someone who should be trusted to serve as a fiduciary overseeing others' investments.

Gibson's conduct is even more problematic because of his lack of candor about his own past statements (see Section IV) and his failure to acknowledge that material conflicts of interest should be disclosed. Gibson's current activities (e.g., using foreign, alter-ego d/b/a entity to pay personal expenses and its corresponding account statements reflecting suspicious transactions, see 8/1/19 Tr. 1492:8-1504:4), in no way assuage the concerns raised by his repeated violations of the federal securities laws. Given Gibson's willful violations of the antifraud provisions of the Advisers and Exchange Acts, the egregious and repeated nature of the violations, and his failure to accept responsibility for his actions, the Court should impose a permanent collateral bar against him.

C. **Disgorgement**

Gibson should also be required to disgorge his ill-gotten gains, stemming from his front running, and pay prejudgment interest ("PJI") thereon. See Exchange Act § 21C(e); Investment Company Act § 9(f)(5); and Advisers Act § 203(k)(5). "Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (finding no indication in the language or legislative history of the Exchange Act limiting courts' equitable remedies). "The SEC is entitled to disgorgement upon producing a reasonable approximately of a [respondent]'s ill-gotten gains" and "[t]he burden then shifts to the [respondent] to demonstrate that the SEC's estimate is not a reasonable approximation." SEC v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004). "Exactitude is not a requirement" and "any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." Id. (citing SEC v. Warde, 151 F.3d 42, 50 (2d Cir. 1998)).

The Division is seeking disgorgement of $82,088, representing Gibson's profits from the put transactions in his account and the losses he avoided by selling his TRX shares on September 26, 2011. See e.g., SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995) (losses avoided is a proper measure of disgorgement). The Division calculated PJI from November 10, 2011, yielding $27,012,48. See SEC v. Merchant Capital, LLC, 486 Fed. Appx. 93, 97 (11th Cir. 2012) ("Without prejudgment interest, [violators] would have benefitted from what in effect amounts to interest-free loans of the ill-gotten funds.") (citing SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1476 (2d Cir. 1996)).

As the following charts demonstrate, the disgorgement and PJI that the Division is seeking here represents a fraction of the benefit Gibson conferred to himself and others at the expense of the Fund:

September Front Running					
Account Owner	No. of Shares	9/26 Average Sale Price	9/27 Average Sale Price	Price Difference	Losses Avoided
Gibson	2,000	$4.04	$3.50	$0.54	$1,080
Marzullo	18,900	$4.04	$3.50	$0.54	$10,206
Geier Group	1,000	$4.05	$3.50	$0.55	$550
See Div. Ex. 184 at 8-10 & Exhibit 6					$11,836

October/November Front Running				
Account Owner	No. of Contracts	Weighted Average Purchase Price	Weighted Average Sale Price	Put Profits
Gibson	565	$0.36	$1.81	$81,930
Marzullo	1,604	$0.31	$1.90	$254,380
Gibson's Father	350	$0.52	$1.76	$43,240
See Div. Ex. 184 at 22-24 & Exhibit 7b; Div. 185 at 45 (Exhibit X)				$379,550

John Gibson's November 9 TRX Sales			
Account Owner	No. of Shares	Average Difference Between 11/9 and 11/10 TRX Sale Prices	Loss Avoided
Gibson's Father	10,000	$1.32	$13,157
Div. Ex. 184 at 25 & n.43			$13,157

Thus, the total illicit gain resulting from Gibson's front running schemes above, and the HBT (at least $216,341.67), was $620,884.67.[13] Under these circumstances, it is more than equitable that Gibson be required to disgorge the $82,088 – the losses he avoided by front running GISF in September 2011 and his profits from the put transactions in October and November 2011.

D. Civil Penalties

Gibson should also be required to pay civil penalties under Advisers Act Section 203(i)(1)(B) and Exchange Act Section 21B(a)(2). Advisers Act Section 203(i)(1)(A) authorizes the imposition of penalties in administrative proceedings if they are in the public interest and based on a willful violation of the Advisers Act, Exchange Act, or the rules thereunder. For violations occurring in 2011, the maximum per-violation penalties under both statutes are: $7,500 for a Tier I violation (non-fraud); $75,000 for a Tier II violation (fraud); and $150,000 for a Tier III violation (fraud and substantial losses or risk thereof). 17 C.F.R. § 201.1001; 15 U.S.C. § 80b-3(i)(2); 15 U.S.C. § 78u-2(b).

The Commission has broad discretion in determining the penalty, which may be calculated based on the number of violations, the number of statutory or regulatory provisions violated, or the disgorgement amount. Here, the civil penalty can appropriately be calculated with reference to "each act or omission", 15 U.S.C. §§ 77h-1(g)(2)(C), 78u-2(b)(3), 80b-3(i)(2)(C), i.e. the number of times Gibson engaged in conduct that violated the securities laws. See, e.g., In re Stanley Jonathan Fortenberry, Init. Dec. Release No. 748, 2015 WL 860715, *38

[13] For purposes of the non-put front running, the gain is the difference between the share price obtained on the day the front running occurred and the price the next day when GISF's block sales were publicly known. See SEC v. Happ, 392 F.3d 12, 18 (1st Cir. 2004) ("[T]he proper amount of disgorgement is generally the difference between the value of the shares when the insider sold them while in possession of the material, nonpublic information, and their market value a reasonable time after public dissemination of the inside information.").

(Mar. 2, 2015) (finding nine distinct fraudulent acts or omissions for purposes of calculation penalty amount). The Division submits that this is an appropriate penalty measure because much of Gibson's misconduct was designed to confer substantial benefits on third parties he was close to (his father and girlfriend) or on whom he was financially dependent by virtue of the promissory note and salary payments (Hull).

Through the September Front Running, Gibson violated the securities laws on three occasions – when he sold all the TRX shares in (1) his account, (2) Marzullo's account, and (3) Geier Group's account. These were Tier II violations because they involved "fraud, deceit, manipulation." Consequently, an appropriate penalty for Gibson's September Front Running would be $225,000 (3 x $75,000). Through the HBT, Gibson committed a Tier III violation, because it involved fraud and a substantial (over $1 million) loss. Thus, for this conduct, Gibson should be penalized $150,000. Finally, through the October/November Front Running, Gibson engaged in at least six acts that violated the securities laws – two instances purchasing puts for his girlfriend, three instances of purchasing puts for himself, and one instance of directing his father to sell his TRX shares and buy puts. Each one of these acts involved fraud, deceit, or manipulation, and thus were Tier II violations. Consequently, an appropriate penalty for Gibson's October/November Front Running is $450,000 (6 x $75,000). Thus, the Division requests total civil penalties of $825,000.

The Division respectfully suggests that, given the number of times that Gibson violated the securities laws and the substantial financial benefits he conferred on third parties (which the Division is not seeking as disgorgement), the full $825,000 penalty should be imposed. A significant penalty is appropriate in this case because Gibson has not acknowledged his wrongdoing or shown any remorse or empathy for the GISF investors he deceived.

CONCLUSION

Wherefore, the Division requests an order finding Gibson liable for the violations, and granting the relief, set forth above.

September 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September 2019:

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

(ii) a copy of the foregoing Division of Enforcement's Post-Hearing Brief was sent to Stephen J. Crimmins, counsel for Respondent, via email to Stephen.Crimmins@mmlawus.com and via UPS next day delivery to:

Stephen J. Crimmins, Esq.
Murphy & McGonigle
1001 G Street, NW
Washington, D.C. 20001; and

(iii) a copy of the foregoing Division of Enforcement's Post-Hearing Brief was provided to James E. Grimes, Administrative Law Judge, via email to *ALJ@sec.gov.*

Nicholas Margida