

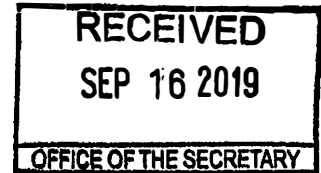
U.S. SECURITIES AND EXCHANGE COMMISSION

Matter of

CHRISTOPHER M. GIBSON,

A.P. No. 3-17184

Respondent.



RESPONDENT'S POST-HEARING BRIEF

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RESPONDENT'S POSTHEARING BRIEF

Respondent Christopher M. Gibson submits this posthearing brief, pursuant to the Post-Hearing Order and 17 C.F.R. §201.340.

I. STATEMENT OF FACTS

A. Respondent Christopher Gibson. Christopher Gibson graduated from Williams College in 2006 and then worked on securitization financing as a junior analyst at Deutsche Bank in New York until February 2009. He then returned to his home city of Augusta, Georgia and began working for James Hull, a shopping mall developer. His father, John Gibson, was Hull's business partner and wanted him to get into real estate. Gibson began by doing credit underwriting work evaluating Hull's shopping mall tenants. (PFF-1¹)

Hull also asked Gibson to review Hull's investment accounts at Goldman Sachs and other firms. Hull liked Gibson's investment ideas and, against the advice of John Gibson, moved about \$20 million of his personal funds away from professional managers and began getting advice from then 25-year-old Gibson. John Gibson did not think his son would have been placed in the position he held during the period at issue if John Gibson had not been Hull's business associate. John Gibson was concerned that, in investment matters, his son "didn't have a full staff, didn't have a mentor." (PFF-2)

During the 2011 period principally discussed in the OIP, Gibson was 26 and 27 years old. His office was located down the hall from Hull in Hull's corporate offices in Augusta. However Gibson was still spending time in New York, where he was living from 2009 onward with the Giovanni and Suejin Marzullo family, whose only child Francesca was Gibson's girlfriend since college and a full-time Ph.D. student at Columbia. (PFF-3)

¹ "PFF" references are to the numbered paragraphs in Respondent's Proposed Findings of Fact and Conclusions of Law filed with this brief. The cited PFF paragraphs contain detailed citations to specific hearing testimony and exhibits admitted in evidence, as well as quotations of relevant portions of the evidence.

B. Formation and Structure of GISF. This case involves Geier International Strategies Fund, LLC (“GISF” or the “fund”), which was an investment fund formed at the beginning of 2010. GISF’s “managing member” was Geier Capital, LLC. GISF’s “investment manager” was Geier Group, LLC, which was responsible for certain administrative and investment advisory matters at GISF. Respondent Christopher Gibson was Geier Capital’s managing director and Geier Group’s president. (PFF-4, 7)

GISF’s foundational documents consisted of a January 2010 Confidential Private Offering Memorandum and Operating Agreement. GISF’s legal counsel was Seward & Kissel LLP, a New York law firm, which created GISF’s fund structure. Gibson selected Seward & Kissel because he understood them to be the leading law firm in hedge fund formation. (PFF-5)

Geier Capital and Geier Group were owned 50% by Christopher Gibson, 35% by James Hull, and 15% by John Gibson. Geier Group’s address was the same as that of Hull’s company, which has been in business in Augusta for over 40 years. Hull’s company paid Gibson advances that Gibson or Geier Group would repay. (PFF-6, 7)

C. Concentrated Ownership of GISF. Hull and Gibson-related investors owned over 90% of GISF. Hull had personally invested approximately \$26 million in GISF, and thus owned over 80% of the fund. Respondent Christopher Gibson and those he represented owned about 10% of the fund. The Gibson-related investors included Gibson personally, his parents John and Martha Gibson, and his longtime girlfriend’s father Giovanni Marzullo, in whose home Gibson was then living. Hull was the largest investor, and Gibson’s parents were the second largest investors with the Marzullos third. (PFF-8) As 80% owner, Hull viewed it important that Gibson be invested in and aligned with Hull and GISF. Hull personally loaned money to Gibson to invest in GISF, and “strongly, strongly urged” this. Hull “pushed” for Gibson’s parents and the Marzullos to invest. (PFF-9)

Beyond the over 90% of GISF owned by Hull and Gibson-related investors, the remaining approximately 9% of GISF was mostly owned by Hull’s Augusta-based business associates and closest friends, people that Hull testified neither he nor Gibson would ever want to hurt. (PFF-10) These included Hull’s lifetime friends in the McKnight family, with whom he has partnered in business for 40 years; Hull’s company’s general counsel Wayne Grovenstein; Hull’s longtime employee John Hudson; Hull’s friend Doug Cates, an Augusta CPA; Hull’s “very close” friend Nick Evans; Hull’s 40-year real estate co-investor TR Reddy; Hull’s Augusta stockbroker Scott Benjamin; and Hull’s “40-year business partner” and “mentor” Bert Storey, recently deceased. (PFF-11, 12, 13)

Hull spoke personally with “every one” of the Augusta-based investors he knew before they invested, and made it “very clear” that GISF was a “high-risk type venture.” GISF’s offering memorandum stated that the fund involved “significant risks” and was “suitable only for those persons who can bear the economic risk of the loss of their investment” and had “limited

need for liquidity in their investment,” and that it was “a highly speculative investment” that was “designed only for sophisticated” investors. Hull called the other investors “sophisticated people that had a lot of different investments.” (PFF-14)

D. Decision-Making at GISF. Hull as 80% owner was personally involved in decision-making at GISF. Hull testified that “any major decisions would first have to be approved” by him and would not go forward without his approval. Hull called himself “an irascible person” with a “desire to be involved” and “have things go the way I want them to go.” (PFF-15)

Hull believed that the other GISF investors were aware that he had approval authority over any major investing decision in the fund as 80% owner, and that Hull had “a controlling personality.” Doug Cates, one of the 9% investors in GISF and an Augusta CPA for 40 years, was the accountant for both the McKnights and the Gibsons, and also for Geier Group and Geier Capital. Cates understood that Gibson would be “doing the research,” but that Hull “was going to make the decisions” for GISF. Cates testified he would not have invested if Hull “had not been involved.” In addition to being a CPA, Cates had taken the Series 65 FINRA-administered Uniform Investment Adviser Law Exam, and had personally invested in limited partnerships before and reviewed them for accounting clients. Cates understood that GISF “was a complete risk-taking investment.” (PFF-16, 17, 18)

Gibson generated GISF’s original investment thesis, which was to invest in gold and other commodities, and executed this strategy through intensive daily in-and-out trading, using complex strategies and arbitrage transactions. Hull agreed with this approach. During 2010, GISF’s first year, it made over a 100% return. But GISF encountered adverse income tax consequences from investing in metals, which had unfavorable tax treatment. Hull participated in the decision to have GISF instead go into equities in 2011. With GISF then concentrated in a single stock, as described below, its investment decisions were simply buy, hold and sell, and Hull was intensely engaged in that process and making those calls for GISF. (PFF-19, 20)

E. GISF’s Investment in TRX Stock. As a real estate developer accustomed to tax minimization opportunities, Hull wanted to move GISF into equities to benefit from their lower long-term capital gains taxation. As covering multiple equities would require additional personnel, Hull preferred the efficiency of the GISF’s lean staffing and wanted GISF to concentrate in a single stock. Gibson could not have resisted Hull’s wishes in this regard, and his only option would have been to resign. (PFF-21)

Gibson recommended Tanzanian Royalty Exploration Corporation (“TRX”) to Hull, who felt that TRX’s underlying assets had great value. Hull favored investing in a “junior” mining company because it offered more upside potential, and Gibson recommended TRX because it offered the diversification of 46 mining properties and a “royalty model” that allowed it to partner with larger and better-capitalized companies. (PFF-22)

Gibson's 2/6/2011 email informed GISF investors that "we are now highly concentrated in a single equity," that he "strongly believe[d] merit[ed] this positioning." Gibson identified the investment as TRX, "a junior mining, exploration and royalty company that controls approximately half of the land prospectable for gold in Tanzania." On hearing this, none of the GISF investors asked for more information or sought to redeem. (PFF-23)

After peaking at \$7.46 on 6/1/2011, TRX stock generally declined in price, even though the gold price was then doing well. On 8/5/2011, Hull emailed Gibson that GISF had "now lost a great deal of our gains last year," and that "none of our reasoning/predictions have come to bear." Gibson responded that, based on TRX's "strategy over the next months," he believed that "a game plan has been established that will succeed." (PFF-24)

Hull and Gibson were very concerned that James Sinclair, TRX's president, was not doing needed exploration. TRX's stock price was declining even though TRX won a Tanzanian auction for a valuable mining property, TRX got a capital infusion of \$30 million from Platinum Partners, and the gold price was increasing. Gibson reacted with a series of emails to Sinclair at TRX that Gibson hoped would succeed in "instilling a sense of urgency" in Sinclair." Gibson faulted Sinclair's failures in communication of information about TRX to the market. While Gibson was upset with Sinclair's delay in making announcements that Gibson felt would be constructive and support TRX, Sinclair's delays did not diminish the fact of TRX's 46 mining properties, their economic value and the value of the company. Hull saw Gibson as someone who would run very hot and cold, and "rant and rave" about different things, including about Sinclair. On occasion Gibson would advocate exiting GISF's position, but Hull would question this viewpoint in view of the "huge underlying assets" of TRX. (PFF-25, 26)

F. GISF's Rejection of 8/23/2011 Bid for All of Its TRX Stock. In his 8/22/2011 email to GISF investors, Gibson concluded that he "believe[d] very strongly we are in the right company in the right asset class at the right time," and that he was "confident that the miners [companies like TRX] will catch up this fall in a significant manner and in short order." As for TRX in particular, he cited TRX's "unique and diversified, although poorly understood, business model that limits its downside risks and offers tremendous leverage to the gold price." He noted TRX's "portfolio of royalty agreements [that] offers the potential of future income streams for which the company does not bear responsibility for exploration and development costs"; TRX's business of "exploration for its own book" that had proven successful; TRX's move into production on four mining projects; and TRX's "extensive long-standing relationships with senior government officials" in Tanzania, which Gibson had confirmed on his recent diligence visit to Tanzania, and which he believed would be valuable with upcoming auctions of additional mining properties. (PFF-27)

On 8/22 and 8/23/2011, Gibson had an email exchange with Richard Sands, an investment banker at Casimir Capital. Sands believed he had a buyer willing to take over GISF's entire position in TRX, but Gibson responded that he wanted a premium above the then \$5.85 market price. Sands then called Gibson and bid \$5.85 for GISF's full 9.8 million-share TRX

position, but Hull and Gibson determined to reject the offer. (Sands later complained in an email that GISF's rejection had made Sands "really look dumb" to the bidder he was representing.) Gibson felt it was possible to get a premium, as short sellers then needed to buy TRX stock to cover their short positions, and some large TRX holders desired to take over the company. The Division's expert Dr. Gibbons also acknowledged that, in selling a block of shares, it is possible to obtain a premium above market price, including in circumstances where the buyer is a large short seller that needs to close out a position, or where the buyer wants to assemble a large block of shares, perhaps to begin a takeover of the company. (PFF-28)

There were additional large investments in TRX around this time. Hedge fund Platinum Partners, advised by Casimir Capital, had recently made a \$30 million investment in newly-issued TRX shares, and by September owned about 7 million TRX shares. An investor in the United Arab Emirates, represented by Portuguese adviser Luis Sequeira, owned another 10 million TRX shares. And BPI, a Portuguese bank, owned yet another 10 million TRX shares. These were all recent investments in TRX. (PFF-29)

During the month following Gibson's 8/22/2011 email to GISF investors and 8/23/2011 rejection of the Sands-Casimir bid for all of GISF's TRX shares at the \$5.85 market price, TRX stock stayed essentially flat, trading around the \$5.70s and \$5.80s. Hull testified that, with over \$26 million invested in GISF, he was "certainly questioning everything" but said he "believed the underlying assets of TRX were tremendously undervalued and the stock was a good value." He said that GISF "had no reason to have to sell," and that "it was just a matter of hanging on." (PFF-30)

G. GISF's Response to TRX Stock Drop on 9/22 and 9/23/2011. A month later, on Thursday 9/22/2011, TRX stock dropped dramatically. After closing at \$5.57 the day before, it opened at \$5.42, hit a low of \$4.41, and closed at \$4.58, thus losing about 18% of its value in just 24 hours, on exceptionally high volume of 1,449,738 shares. Hull reacted by asking whether he should buy more TRX shares in light of the price drop. Gibson responded that he remained "very bullish" on TRX, but did not recommend then adding more. (PFF-31)

The following day, Friday 9/23/2011, Gibson reported to GISF investors that, with the TRX stock drop, GISF's value had "now declined to only slightly above original investments last year." Gibson told the investors that 90% of the investors would remain invested, including Hull and Gibson, but that management fees would be suspended. With the TRX price continuing to decline that day, Hull expressed a greater desire to buy more shares, but Gibson recommended that they pause to see developments. (PFF-32)

On 9/23/2011, TRX suffered another significant decline. After opening at \$4.55, it dropped to a low of \$3.93, before closing at \$4.07, again on exceptional volume of 1,266,357 shares. Gibson thought this two-day stock drop was a "bear raid," where traders "undermine the sentiment in a security that they're short" by "selling a large amount of shares in order to push the share price lower on no news." (PFF-33)

Around the end of the trading day, Gibson had GISF sell off a relatively small amount of its holdings in TRX, approximately 78,000 shares, at a price of \$4.04. According to the Division's expert Dr. Gibbons, at the end of the day on Friday, there was no pending order for any other GISF sale of TRX shares. (PFF-34)

Hull and Gibson spoke over the weekend of 9/24-9/25/2011. Gibson recommended selling TRX, but Hull was not in favor of liquidating GISF's TRX shares. By the end of the weekend, Gibson had a "general guidepost" to sell "at good prices." After first wanting to purchase more TRX shares on Thursday and Friday, Hull over the weekend expressed concern about more losses, and Gibson interpreted Hull as in a "potential posture to consider a sale." Gibson determined to "solicit a bid" and give Hull "an array of options to consider," but Gibson believed that, as occurred when GISF rejected the 8/23/2011 bid, Hull would again reject a bid. (PFF-35)

H. Gibson's 9/26/2011 Sale of TRX Shares. The first of the Division's three charges against Gibson in this matter is that, after deciding to sell GISF's TRX shares, he sold TRX shares on behalf of himself and a Marzullo account at \$4.04 on 9/26/2011, and then sold TRX shares on behalf of GISF at \$3.50 on 9/27/2011, when the market price was lower. (OIP ¶¶28-29) The Division charges that Gibson was thus "improperly exploiting the fact that the Fund would be selling a substantial portion of its TRX position." (OIP ¶31) (PFF-36)

Gibson has presented an expert report and testimony from Daniel Bystrom, who has worked 27 years in the securities industry, including as a portfolio manager at hedge funds with a focus on volatility, and as a trader at several banks and broker-dealers. Bystrom has traded options, and used options to hedge risk exposure. He presently oversees risk management at a New York registered investment adviser. (PFF-37)

Based on his experience and the TRX price-volume chart, Bystrom observed "quite a lot of volatility in TRX," and that as a "high volatility" stock, it would be "more reasonable to expect large moves" in its stock price. He therefore agreed that there would be "no way that you could predict future price" for TRX stock. (PFF-38)

On the evening of Sunday 9/25/2011, Gibson emailed Sands at Casimir Capital. He said GISF "believe[d] in" TRX and contemplated "waiting it out." Gibson mentioned that GISF was not leveraged or subject to redemption risk, it was "concentrated" in TRX. Gibson asked Sands to advise "if there is a buyer that sees current prices as very compelling as we otherwise would." Gibson was soliciting a bid while clarifying that GISF was "not a motivated seller." Bystrom considered this Sunday evening email and testified, based on his industry experience, that there was "no order at that point." (PFF-39)

According to the Division's expert Dr. Gibbons: (i) the next day, Monday 9/26/2011, there was still no pending order for GISF to sell TRX shares; (ii) at that point, GISF could sell its

TRX shares on the market or to a block purchaser; (iii) such a block purchaser could appear that day, two days later, or two weeks later; (iv) nothing was forcing GISF to sell, and it could have continued to hold as the shares rose, including to above \$5 by March; (v) there was on 9/26/2011 no telling when a block purchaser would appear; (vi) if a purchaser appeared with an offer not to GISF's liking, GISF did not have to take the offer and could have continued to hold; (vii) whether GISF would accept an offer would depend on the terms, including amount to be purchased, price and market conditions; and (viii) it was possible that a purchaser would agree to purchase a block and then walk away from completing a transaction. (PFF-40)

On Monday 9/26/2011, Sands at Casimir asked how many shares GISF had for sale, and Gibson responded that GISF could sell its "entire position which is 10,250,000 shares or anything less than that." In providing this number, Gibson "combined" both shares held by GISF and shares held separately by Hull, the only other significant block. Gibson's response told Sands that Gibson wanted what was best for GISF investors and wanted to "return their money at a profit," even though Gibson believed that TRX was a "ten bagger," meaning a stock worth ten times its trading price. Gibson said this to "further emphasize" that GISF was "not a motivated seller," and was "very price sensitive," so Sands would know that "if the price isn't good, we're not going to transact." (PFF-41)

Later on Monday, Sands emailed that he thought he was going to get 3 to 5 million shares sold. Bystrom considered the Monday emails between Gibson and Sands, and again testified, based on his industry experience, that there was still "no order" for GISF to sell TRX shares "by the end of the day on Monday." (PFF-42)

TRX stock remained relatively stable on Monday 9/26/2011, opening at \$4.07 and closing at \$4.11, on more typical volume of 475,514 shares. During this stable day for TRX, Gibson sold 2,000 TRX shares from his Schwab personal brokerage account, and 1,000 shares from Geier Group's Schwab account (in which Gibson had a 50% interest), meaning that Gibson effectively sold 2,500 shares for his own account on Monday. He also sold 18,900 shares in a Schwab account in the name of the Marzullo daughter. Gibson's sales were at approximately \$4.04. As noted above, this was the same \$4.04 price that GISF had just obtained in selling 78,000 of its shares on Friday, the previous trading day. (PFF-43)

Alternatively, Gibson could have withdrawn all or a portion of his interest in GISF at any time if he had chosen to do so. Gibson's personal sale of 2,500 TRX shares on 9/26/2011 represented a "little under 1 percent" of his overall exposure to TRX stock, considering his investment in GISF, and came at a time when he had no assets and management fees had just been suspended. The Marzullo account's sale of 18,900 shares that day represented approximately 4 percent of the total TRX shares beneficially owned by the Marzullos." (PFF-44)

Giovanni Marzullo opened and solely funded this account in the name of his daughter Francesca. Since 2009, Gibson was responsible for its trades, and reported and discussed trades

daily with Giovanni Marzullo. Gibson lived with the Marzullo family in New York from 2009 onward, while their only child Francesca was Gibson's "longtime girlfriend since college" and a full-time Ph.D. student at Columbia. (PFF-45)

After selling his 2,500 TRX shares, Gibson remained "significantly long" in his TRX exposure, and "more significantly long than any other GISF investor. Gibson was "the only member of the fund who had all of their net worth in" GISF, the only GISF member "who had extraordinary leverage" on his fund position (arising from his loan from Hull to invest in GISF), and "the only member of the fund with no income at that time" as with the management fee suspended, his monthly checks from Hull's firm were simply "accruing a liability to repay," thus increasing his debt. (PFF-46)

Throughout Monday, the day that Gibson sold his 2,500 shares and Marzullo's 18,900 shares, there was still "no order" from GISF to sell shares. At the end of the day on Monday, "no one knew what the price would be on Tuesday." The Division's expert Dr. Gibbons agreed that: (i) on Monday TRX closed at \$4.11, but it "doesn't have to open at the same price" the next morning; (ii) Gibson would not have known at the end of the day on Monday what it would open at the next morning, and TRX could have gone back up to \$5.42, where it had been trading just two trading days before; and (iii) Gibson did not know on Monday evening whether a block buyer would appear and make an offer on Tuesday. (PFF-47)

I. GISF's 9/27/2011 Sale of TRX Shares. The following morning, Tuesday 9/27/2011, after closing at \$4.11 the day before, TRX opened higher at \$4.24 and then rose further to \$4.34 during Tuesday morning. However with the price at \$4.34 on Tuesday morning, the amount of shares that could be sold by GISF was still unknown, only that it would "likely" be 3 to 5 million shares. And the price and timing of a transaction had still not been determined. Gibson at that point did not know whether Hull would approve a sale at whatever price and number of shares might be in Sands' bid. In the absence of a sale price and number of shares to be sold, there was still no order for GISF to sell TRX shares. (PFF-48)

Sands was trying to find a buyer for GISF's TRX shares in what is called the "upstairs market," meaning in a negotiated transaction matching seller and buyer away from the exchange floor. In the upstairs market, a prospective seller will not know when they will get a bid, and it could be days or weeks later. Based on dealing with the upstairs market over 27 years, Bystrom also noted that it is not uncommon that, even with a firm order on one side, there is not a transaction consummated. (PFF-49)

As trading in TRX stock continued on Tuesday, its price once again began to drop. After hitting \$4.34 in the morning, it appears to have dipped below \$4.00 at or shortly after 1:30 pm, stabilized around \$3.90 until some point after 2:30 pm, then dropped again to slightly below \$3.70 before rising to \$3.70 at 3 pm. Gibson and GISF were not trading TRX stock in the market until 3:01 pm on Tuesday. Gibson believed that traders taking short positions in TRX were responsible for pushing down the price from a high that day of \$4.34 to \$3.70 before

GISF's sale. With Gibson and GISF not trading until that point in the afternoon, based on his trading experience, Bystrom concluded that GISF was not responsible for the TRX price going from \$4.34 on Tuesday morning down to \$3.70 by 3 pm that afternoon. (PFF-50)

On Tuesday afternoon, with the TRX price then already at or approaching \$3.70, Sands asked Gibson for confirmation that GISF was willing to sell up to 5 million shares for \$3.50 or better. Sands said that he did not know if he could "get it all done," and that he would sell "more like 3.5mm shares or so." Bystrom testified that, at that point, there was still no order for GISF to sell TRX shares, but "[t]hat's exactly what [Sands was] asking for. He's asking for [Gibson] to give him the order." Gibson then responded to Sands by email and said "Confirm at 3.50 or better up to 5mm shares." Bystrom testified that "[t]hat constitutes an order." This email on Tuesday afternoon was "the first we see of an order." (PFF-51)

Sands then phoned Gibson with a specific proposed price of \$3.50 for a transaction in the amount of 3.7 million shares. Gibson did not have the authority to conclude a sale of that many shares without specific confirmation from Hull, as Hull confirmed. The context was that TRX's stock price had "declined 18 percent Thursday, 10 percent Friday, flat on Monday, a little up on Tuesday, then another very significant decline from 4.34 all the way down to 3.70, ... another 14 or 15 percent intraday on 2 million shares of volume." Gibson phoned Hull "to alert him that we had a bid and in the context of this ... perceived falling knife, we felt like it was a bid we should ... realistically consider and, in Jim's judgment, we should take it and I communicated that to [Sands at] Casimir and the transaction was consummated." Gibson "had Casimir on one phone and Jim on the other and ... it was take it or it's gone bid. They made that clear. So we had a couple of minutes at most to make a determination and we made a determination I think in one minute to accept it." (PFF-52)

Minutes later, Sands' firm Casimir reported back that 3,734,395 TRX shares had been sold for GISF at an average price "somewhat above 3.50." TRX then closed up slightly, at \$3.54, on Tuesday, and then traded with less volatility over the next five trading days, closing at \$3.54, \$3.70, \$3.59, \$3.51, and \$3.28 respectively. (PFF-53)

After 9/27/2011, Gibson continued to have personal exposure and risk to TRX stock through his ownership of an interest in GISF. Dr. Gibbons agreed that this gave Gibson an exposure that was "the equivalent of 220,000 shares of TRX value," meaning exposure to the price of TRX. Gibson had no indication that the 2,500 TRX shares he sold on Monday, or the 18,900 shares he sold for the Marzullo account, had any impact on the TRX market price on Tuesday. (PFF-54)

The Division contends that Gibson, by selling his 2,500 TRX shares outside GISF on 9/26/2011 at \$4.04, thereby made \$1,350 more than if he had waited to sell until GISF sold 3.7 million TRX shares at \$3.50 after 3:01 pm on 9/27/2011 – *i.e.* \$4.04 minus \$3.50, times 2,500 shares. Mason McKnight IV, a GISF investor called by the Division at the hearing, testified that it does not "bother" him that Gibson "made \$1,350 without letting ... the other investors know."

When confronted by the Division with the fact that he was not contemporaneously aware of Gibson's Monday sales, GISF's largest investor Hull responded that this "was an incidental or small amount of shares and that there were probably good reasons for him to do that," as Gibson "wasn't getting a salary." (PFF-55)

J. Possible Additional Sales by GISF. On Friday 9/30/2011, Gibson obtained an agreement by Roheryn Investments SA to facilitate an "open market sale" of 5.9 million shares of TRX for GISF at a price of \$3.50, with the sales to be conducted over the five trading days in the following week, *i.e.* 10/3-10/7/2011. Roheryn, with its principal Luis Sequeira, was the adviser to the United Arab Emirates investor who already owned "a significant position in TRX." (PFF-56)

Although the 9/30/2011 agreement was for 5.9 million TRX shares, GISF did not then have 5.9 million shares. In order to reach that number, Gibson had to include the approximately 680,000 shares that Hull held separately in a personal brokerage account separate from GISF. The reason for including the separate block of Hull's shares was that it can be important for a block purchaser to know that there will not be follow-on sales thereafter. Sequeira of Roheryn wanted GISF to be in a position to sell GISF's TRX shares and also its affiliates' TRX shares. (PFF-57)

But this sale transaction with Roheryn never happened. Gibson reported to Hull on Wednesday 10/5/2011 that there was "no deal" with Roheryn. Gibson opined that GISF was "going to very likely be best served holding our position," and that he "would assume we are where we are for the next several months." GISF's "thesis" was that there was "tremendous value" in TRX as a result of (i) the deviation between gold prices and gold shares; (ii) the deviation between other gold shares and TRX; (iii) the concentrated short position in TRX stock; and (iv) the prospect that the large inventory of shares GISF owned could provide value to a strategic buyer who sought to develop a controlling position in TRX. (PFF-58)

Hull replied to Gibson's 10/5/2011 email that GISF should "try to get a higher price for bulk sale of our shares." Hull explained his thinking was that "every day is a different day," and that GISF would try to get as much as it could "if we were going to" sell. This was not saying that he agreed to "any particular price," but that he would "take every situation and try to understand ... and evaluate it." If Hull "felt like we were getting good value," GISF "would try to sell it." Again on 10/14/2011, Gibson and Hull confirmed that they would not do a sale transaction with Roheryn, with Gibson emailing that "waiting for at least a few weeks ... looks like appropriate path." (PFF-59)

GISF's TRX shares were being held at Casimir Capital in connection with the 9/27/2011 block sale. On 10/17/2011, Gibson asked GISF's brokers at Garwood Securities to "get us able to sell" its remaining 5.9 million TRX shares. But Hull explained that this was subject to Hull viewing any proposal as being at "a good price." On 10/17/2011, GISF did a block sale of 364,495 TRX shares in a privately negotiated transaction at market price. (PFF-60)

K. GISF's 10/18/2011 Purchase From Hull. The second of the Division's charges against Gibson in this matter is that, despite plans to sell TRX shares, Gibson had GISF buy over 680,000 TRX shares from Hull personally. (OIP ¶33) The Division charges Gibson with "furthering his relationship with" Hull by letting Hull thus sell his shares "without the price depressing impact of a publicly executed sale," and as it was a private sale, allowing him to "avoid paying a sales commission." (OIP ¶¶34-36) (PFF-61)

It is not disputed that on 10/18/2011, GISF bought 680,636 TRX shares from Hull in a private transaction at \$3.60, which was the closing market price that day. It is also not disputed that, as this was a private transaction, neither Hull nor GISF paid a commission. Hull had sold about 70,000 TRX shares a week earlier in a market transaction (not to GISF) at higher prices. (PFF-62)

The Court asked whether Hull or Gibson had the idea for Hull to sell these shares to GISF, and Hull recalled that it was "our idea," and "certainly was in the context of what was best for the fund to dispose of the remaining shares." Hull explained that he "wanted to put ... my shares together with the fund shares to have a larger block." Hull's "thinking at the time" was "that as a larger block of shares, ... we would have a much greater opportunity to get" a "substantially increased price" in selling GISF's block of TRX shares. The "idea" of Hull's sale to GISF was "to try to find a motivated buyer" and was "in preparation for putting a big block together to entice a buyer." (PFF-63)

Respondent's expert Daniel Bystrom confirmed that "this action [was] to consolidate the shares in one place, which greatly simplifies the process of entering into a block transaction." Bystrom explained that "the buyer would want to know that he's seeing the whole piece for sale and that would include any affiliates. So getting all of that into one place certainly would make it easier ... to then transact." Further, "because Jim Hull is 81 percent of the fund, and then had this piece in his own account, he's ... a significant affiliate." This made it "just far cleaner to then put up a block or negotiate the price for a block if those shares are all combined," based on Bystrom's 27 years of securities industry experience. (PFF-64)

Bystrom further explained: "When negotiating a block transaction, it's important that the seller in this case be able to show to ... the broker and to the buyer that he represents all of the holdings of the entities, and that what they were shopping was what they call a cleanup transaction or they might say I need to see the whole picture. And so in order to see the whole picture, you would have to look at them in combination." A cleanup transaction "means there is no more for sale." This includes from a large affiliate like Hull, who owned 81% of GISF and had about 680,000 TRX shares in his personal account. It would not include a GISF investor who had only a few thousand TRX shares in a personal account. (PFF-65)

The GISF private offering memorandum specified that "purchase and sale transactions ... may be effected between" GISF "and any other entities or accounts," if "for cash consideration at

the current market price of the particular securities.” By purchasing TRX shares from Hull at the closing market price on the day of the transaction, GISF was acting consistently with this provision. “That is exactly what that means.” Executing the transaction “at the closing price of the market on that day ... is the most equitable way to cross that stock.”

Within a short time after GISF bought shares from Hull at \$3.60 on 10/18/2011, the shares had increased in value. For example, TRX closed at \$3.64 on 10/21/2011, at \$3.92 on 10/25/2011, at \$3.94 on 10/26/2011, and at \$3.96 on 10/27 and 10/28/2011. In the one week following the 10/18/2011 purchase from Hull at \$3.60, GISF saw the price of TRX rise to \$4.09 on 10/25/2011 before closing that day at \$3.92, so GISF was up at that point. Hull could have personally profited from this price rise if he had not sold to GISF but instead “sold the shares on the open market.” (PFF-67)

As the owner of over 80% of GISF, Hull was essentially selling 80% of his 680,636 shares (or 544,809 of these shares) back to himself. Consequently, he was really disposing of only 135,827 shares, the difference between the 680,636 being sold and the 80% that he would continue to own through the fund. Hull believed firmly that he could have sold his 136,000 shares in the open market and ended up in exactly the same place. And likewise, as Hull and experts on both sides agree, the money GISF paid Hull for these shares was 80% Hull’s own money as GISF’s 80% owner. Throughout, Hull maintained a long exposure to TRX, and his interests remained aligned with GISF, as both were in Bystrom’s words “both rooting for the same outcome,” for TRX to go up. (PFF-68)

When GISF ultimately sold these 680,636 shares upon liquidation of its remaining TRX position, it paid a commission of \$0.002 per share to its broker Garwood Securities. Simple math shows that GISF’s commission as to these shares was about \$1,360, and that the 9% investors (those apart from Hull and the Gibson group) thus paid about \$120 in commissions on the ultimate sale of their portion of the shares bought from Hull weeks earlier on 10/18/2011. (PFF-69)

Mason McKnight IV, an investor called by the Division at the hearing, was asked what his view would be if Gibson proposed having GISF buy Hull’s 680,000 TRX shares to help market the fund’s TRX portfolio, and then paid Hull the TRX closing market price that day. McKnight responded that it would not “offend” him if Hull “sold his shares to the fund for market price,” and that he would not consider this to be a “disservice to ... the other investors.” (PFF-70)

On 11/3/2011, GISF did sales of 485,397 shares, 289,100 shares and 8,200 shares of TRX. These sales were at the market price. And they were executed as market transactions. On 11/8/2011, GISF did another negotiated “upstairs market” block sale of 500,000 shares. (Dr. Gibbons Tr. 880-81) The negotiated price was at or near the market price. The sale was to BPI, the Portuguese bank referred to above. Again on 11/9/2011, GISF did a sale of 119,971 shares at a price that was near the market price. (PFF-71)

L. Gibson's Put Purchases. The third of the Division's charges against Gibson in this matter is that, in advance of GISF's sale of its remaining TRX shares on 11/10/2011 in market transactions, Gibson on 10/27, 10/28, 11/2 and 11/8 bought TRX \$4 put options for himself and the Marzullo daughter's account, and advised his father to buy put options. (OIP ¶43-44, 47) The Division contends that "the put contracts represented a short position" in TRX. (OIP ¶45) (PFF-72)

Buying puts are "not the same thing" as taking a short position. If the put option is a protective put, where the investor owns the underlying stock, you mitigate your loss below the option's strike price. So buying protective puts gives you much different exposure than short selling. One is long exposure, one is short exposure. (PFF-73)

Puts are very commonly used as a hedge. As such, they demonstrate good risk management and were invented as a market hedging mechanism. When used against a long position, puts can mitigate loss below certain price points while allowing an investor to maintain long exposure, particularly through bouts of volatility. Puts act like an insurance policy. The Division's expert Dr. Gibbons personally uses options for hedging, and agreed that "[o]ption contracts ... provide insurance. They offer a way for investors to protect themselves against adverse price movements in the future while still allowing them to benefit from favorable price movements." He further agreed that "a protective put is a put option combined with a long position in the underlying asset." (PFF-74)

A so-called "naked put" is where an investor buys only a put and does not have a long position in the underlying security. Buying a naked put indicates a "bearish" view on the stock. On the other hand, a "protective put" is where the investor buying the put also has a long position in the underlying security. Buying a protective put indicated a "bullish" view on the stock. The investor with the protective put continues, in Bystrom's words, to "root .. for higher stock prices, not lower stock prices," and the protective put acts as "the insurance policy." (PFF-75)

It is undisputed that Gibson had long exposure to TRX stock through GISF, that Giovanni Marzullo had long exposure to TRX stock through GISF, and that Gibson bought TRX \$4 puts in his account and in the Marzullo daughter's account on 10/27, 10/28, 11/2 and 11/8/2011. As noted above, the Marzullos were a family unit, and the daughter resided in the family home in New York City while attending graduate school at Columbia. It is also undisputed that, on his advice, his father Gibson bought protective puts. (PFF-76)

Buying a "protective put" is what Chris Gibson did. By buying the put, he protected his interest in the underlying TRX stock. Gibson's exposed long position to TRX was through GISF at this point and it was between 220,000 and 225,000 TRX shares. Assuming Gibson's puts covered about 20% of his TRX exposure, he partially protected his position, which Bystrom found similar to buying an insurance policy on 20% of a car. By hedging 20% of his TRX

exposure, Gibson was naked long. This didn't even take him to a neutral position, and certainly did not put him in a position contrary to other GISF investors. They all remained aligned and bullish. Bystrom called Gibson "very clearly" bullish. Ultimately Gibson's net loss on his TRX exposure was \$724,660. (PFF-77)

The Division's expert Dr. Taveras agreed that: (i) after buying puts on 10/27, 10/28, 11/2 and 11/8/2011, Gibson "was long exposed to the stock through his involvement in the Fund"; (ii) the puts Gibson bought can thus be "characterize[d] ... as a protective put," and could be "characterize[d] as a hedge"; (iii) a "protective" put protects an investor's long exposure in the underlying asset; (iv) Gibson's put purchases protected about a third of his long exposure to the stock; (v) the put purchases for the Marzullos protected about 30% of their exposure to the stock; and (vi) in the aggregate, it's still a bullish bet on TRX. The Division's other expert Dr. Gibbons likewise agreed that Gibson "was buying protective puts to hedge his risk on his exposure through the fund to TRX stock," and that would be "hedging." (PFF-78)

Gibson began buying the protective puts literally on the day following a 10/26/2011 email from Hull's assistant that required Gibson to sign an updated promissory note to Hull for around \$650,000, which focused Gibson on the fact that he was approximately a 50 cent TRX share price move away from being insolvent. Likewise the Marzullo puts protected only a percentage of their overall TRX exposure. As noted above, with the Marzullo daughter Francesca living with her parents in New York while attending graduate school, she would be viewed as an economic unit with the Marzullo parents, including the father Giovanni Marzullo, a GISF investor. The parents, Giovanni and Suejin Marzullo, were elderly, living on a fixed income, did not have an outside source of income, and had all of their liquid assets in GISF. Ultimately the Marzullos lost \$965,318 on their TRX exposure. Likewise Gibson's father did not have a short position, was net long in his exposure to TRX stock through GISF and TRX stock in his IRA account, and ultimately Gibson's parents lost \$1,399,053 on their TRX exposure. (PFF-79)

At any particular time during this period, Gibson could not have had any knowledge of the price direction of TRX stock. This was particularly true given the stock's volatility. Throughout the period, Gibson remained in alignment with the other GISF investors. By March 2012, TRX was trading above \$5, and nobody can know what tomorrow's stock price will be. (PFF-80)

Bystrom confirmed that Gibson's put purchases did not deprive other GISF investors from buying TRX puts as "there was no scarcity to those puts," and buying protective puts did not hurt GISF. Buying puts did not change Gibson's "bullish" alignment with GISF investors, as if TRX stock went up, it was good for GISF, Gibson and the Marzullos. (PFF-81)

The Division does not contend that Gibson had a duty at any point to advise GISF's individual investors to buy protective puts to protect their long exposure to TRX stock through GISF's concentrated ownership of TRX. The Division acknowledged to the Court that Gibson's

investment advisory clients were GISF itself plus Hull, Gibson's father and the Marzullos. But not the individual investors in GISF. The Division's position is that Gibson owed a fiduciary duty to the fund, and "within that" had to prioritize fund investors' interests and treat them equally. Bystrom confirmed that the protective puts purchased by Mr. Gibson did not impact the other investors. (PFF-82)

GISF's 81% owner Hull concluded that Gibson's October and November 2011 purchase of protective puts on a portion of his investment was "both morally and legally permissible." Hull pointed to the fact that Gibson "was a young man," who "was willing to bet a lot of money" on GISF but personally "didn't have a lot of money." Hull recognized that Gibson "had an overall long position and ... took a little bit of money off the table," and that it was "like insurance." Hull did not think that Gibson "harmed the fund or that his intention was to harm the fund." (PFF-83)

M. GISF's 11/10/2011 Sale of TRX Shares. On the evening of 11/9/2011, Sands of Casimir Capital summoned Gibson to meet with a representative of the Platinum Partners hedge fund. Sands said he had an offer that would make GISF "very pleased." However instead of an offer to buy GISF's TRX shares, Platinum was offering to pay GISF \$10,000 per month not to sell any TRX shares for six months. Gibson immediately reported this to Hull, and Gibson said they both were "shocked and disappointed." Hull was "very concerned for the reason that why would Platinum want to lock up our shares but for the reason that they may want to sell their shares before we would." (PFF-84)

GISF made a strategic decision to exit its position with the expectation that the other large holders who would be financially incentivized to purchase would come in and buy it. Hull had suggested a "divide and conquer" strategy to "orchestrate a 'competition' among the potential buyers for our shares," and saw this as a "unique opportunity." When the time came to sell GISF's remaining TRX shares on 11/10/2011, Gibson said that other large block holders would defend their shares by buying GISF's shares at an increased price. Hull understood this theory, but what actually happened was the opposite as the other large shareholders sold. (PFF-85)

Gibson and Hull considered that GISF had approximately half the shares that Platinum had, less than half the shares that BPI had, less than half the shares that the United Arab Emirates investor had. So that GISF would be in the best position to sell its remaining shares before those large holders. Their view was that if GISF sold its shares, the other larger holders would be forced to buy them to protect their position. (PFF-86)

Gibson conveyed his intentions to GISF's broker Dennis Gerecke at Garwood Securities. Gibson emailed that GISF was "going to potentially tank this stock." Gibson said that "a broker like Dennis ... would seek to conceal the footprint ... of its client in the market." If given an order, the expectation would be that the stock would be sold "slowly over time in order to get best execution." But that was "not how we are going to be selling ... in light of what we had

learned the previous evening” at the meeting with Platinum in Sands’ office. “The strategy that Mr. Hull and I determined was appropriate was for us to sell aggressively in order to signal to the other large shareholders that we were selling and that they needed to make a decision as to whether or not they were going to buy or sell under the theory that given our superior position at the table with far fewer shares than they did, that they would be forced to go ahead and buy our shares. In other words, what I’m trying to communicate to Dennis is ... that when we sell, it is going to be aggressive and it is not his duty in the context of this trade to seek a best execution, conceal our footprints. In fact it’s the exact opposite that we want to achieve.” (PFF-87)

The next day, 11/10/2011, was a busy day for TRX. After opening at \$3.41, it rose slightly to \$3.44, but then dropped to \$1.56 before closing up at \$2.29. GISF sold at an average price of around \$2.02. Other market participants were selling too, as GISF’s 4.9 million share sales were about 29% of the domestic volume and 22% of the worldwide volume that day. Had GISF waited to sell, its TRX shares would have been trading 150% higher, at over \$5 per share, four months later, in March 2012. (PFF-88)

At the hearing, Gibson admitted that there were some investment decisions taken for GISF that turned out not to be good. He admitted that the decision to go fully into one equity, TRX stock, was in hindsight a bad decision. He admitted that the decision to turn down the August 2011 offer to buy GISF’s full position in TRX at \$5.85, the then market price, was in hindsight a bad decision. He admitted that the decision on 11/10/2011 to flood the market with GISF’s TRX shares in the belief that other large owners would decide to support the TRX stock price by buying GISF’s shares did not achieve its intended purpose. But he denied thinking that he was breaching fiduciary duties or taking actions contrary to the best interests of GISF’s members. (PFF-89)

N. Financial Impact on Christopher Gibson. There were three sets of transactions involved in this matter – Gibson’s sale of a small number of separately held shares on 9/26/2011, Hull’s sale of about 680,000 TRX shares to GISF (owned 81% by Hull) on 10/18/2011, and Gibson’s purchase of “protective” puts covering only a portion of his TRX exposure (on which he suffered a substantial loss). None of these three sets of transactions adversely impacted the value of the other GISF investors’ holdings in the fund. (PFF-90)

Christopher Gibson has been wiped out financially. Ultimately his investment in TRX caused him to lose about \$725,000, caused his parents John and Martha Gibson to lose about \$1.4 million, and caused Gibson’s friends the Marzullios to lose about \$965,000. The Marzullios losses are treated as a unit because they were in every respect a family living together. As of 6/30/2019, Christopher Gibson was insolvent, with a negative net worth of \$605,073. Gibson said that “I’ve been insolvent every day since the 10th of November of 2011.” (PFF-91)

Gibson has also been wiped out professionally. In the words of his father, this proceeding has been “an economic death sentence” for Gibson, and “for the last five years, he has had great difficulty obtaining any form of employment and had to leave the country.” He

presently works in Montevideo, Uruguay in a non-securities consulting business engaged in marketing companies. (PFF-92)

II. THE DIVISION FAILED TO PROVE THAT RESPONDENT VIOLATED THE FEDERAL SECURITIES LAWS

The Division alleges that Gibson, acting as an investment adviser, breached fiduciary duties by failing to disclose conflicts and engaging in transactions that benefited himself and Hull. The Division argues that Gibson violated antifraud provisions of the Advisers Act and the Exchange Act (i) by “front-running” in selling TRX stock and buying TRX puts before GISF sold TRX stock; (ii) favoring GISF’s 81% investor Hull by having GISF buy TRX stock from Hull at favorable prices to supposedly further their relationship; and (iii) making misrepresentations and engaging in fraudulent practices impacting GISF investors. The Division has not carried its burden of proving the elements of its fraud charges. *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 104 (1981).

A. Failure of Proof on Conflict Disclosure and Front-Running

The Division attempted to prove that Gibson breached his duty of loyalty and failed to disclose conflicts largely through testimony from Gibson and the Division’s expert Dr. Gibbons. The Division elicited testimony from Gibson (Tr. 212-41) that (i) over the 9/24-9/25/2011 weekend Gibson and Hull considered whether to sell TRX stock at good prices; (ii) on 9/26/2011 Gibson sold TRX in his personal account, the Marzullo daughter’s account, and the Geier Group’s account; (iii) on 9/24/2011 GISF sold approximately 3.7 million TRX shares; and (iv) Gibson bought TRX puts in late October and early November 2011, before GISF sold its remaining TRX stock.

On fiduciary duties, Dr. Gibbons stated that “an investment adviser owes each client a duty to act in good faith, a duty of care, a duty of loyalty, a duty to follow the law, a duty of obedience, and a duty of full and fair disclosure . . . Advisers can never trade to their own advantage based on their knowledge of pending client trades.” (DX-185, p.5) On the disclosures regarding conflicts in GISF’s Offering Memorandum and Operating Agreement, Dr. Gibbons stated that “[a]lthough the POM and the OA provided that Gibson might engage in other business activities in the securities industry, and might give advice or take actions on behalf of others that was different from the advice given to GISF or the actions taken on behalf of GISF, nothing in those provisions authorized him to do so in a way that violated his fiduciary duties to GISF.” (*Id.*) On front-running, Dr. Gibbons stated that Gibson violated his fiduciary duties and committed front-running by selling TRX stock on 9/26/2011 and by purchasing TRX puts before GISF’s sales of TRX on 11/10/2011.

As discussed below, the evidence establishes that Gibson did not breach fiduciary duties by failing to disclose conflicts and did not engage in front-running. Gibson acted in accordance

with recent Commission guidance on fiduciary duties and disclosure of conflicts. Gibson did not sell TRX stock or buy puts before undisclosed, imminent trades by GISF.

Recent Commission's Interpretation. On 6/5/2019, the Commission issued its "Interpretation Regarding Standard of Conduct for Investment Advisers" (Rel. IA-5248) ("Interpretation") under the Advisers Act. The Commission began by citing Supreme Court holdings that that an investment adviser is a fiduciary and that the Advisers Act imposes federal fiduciary duties. *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963) (adviser is a fiduciary); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) (Advisers Act §206 "establishes federal fiduciary standards to govern the conduct of investment advisers"). The Commission confirmed: (i) that the Advisers Act and rules do not specifically define advisers' federal fiduciary duty, which instead flows from equitable principles fundamental to advisers' relationships with their clients; (ii) that the federal fiduciary duty is comprised of a duty of care and a duty of loyalty; and (iii) that an adviser thus may not place its own interests ahead of its clients.

Importantly for this matter, the Commission discussed at length the application of fiduciary duties to specific adviser–client relationships. The Commission unequivocally stated that an adviser's fiduciary duty "follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent." (Interpretation, p.9) "Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client." (Interpretation, pp.9-10)

The Commission stated that attempts to waive fiduciary duty generally (statements that the adviser will not act as a fiduciary), blanket waivers of all conflicts, or waivers of specific Advisers Act requirement would be inconsistent with the Act. (Interpretation, pp.10-11) The Commission cited Restatement (Third) of Agency, §8.06: "Thus, an agreement that contains general or broad language purporting to release an agent in advance from the agent's general fiduciary obligation to the principal is not likely to be enforceable. ... In contrast, when a principal consents to specific transactions or to specified types of conduct by the agent, the principal has a focused opportunity to assess risks that are more readily identifiable." (Interpretation, p.10 n.29)

The Commission stated that "an investment adviser must make full and fair disclosure ... of all material facts relating to the advisory relationship." (Interpretation, pp.21-22) Material facts include conflicts that might incline an investment adviser to render advice that is not disinterested such that a client can give informed consent to a conflict. (Interpretation, p.27 n.68) When allocating investment opportunities, an adviser may consider the nature and objectives of the client and the scope of the relationship, and "an adviser and a client may even agree that certain investment opportunities ... will not be allocated or offered to a client." (Interpretation, p.26 n.66)

GISF's Disclosures. The Division failed to prove that Gibson breached his fiduciary duty of loyalty to GISF. Following disclosures, GISF consented to conflicts relating to Gibson's providing investment advice to others and trading through accounts other than GISF's accounts. GISF's Offering Memorandum (DX-24) provided:

- “Under the ... Operating Agreement, the Managing Member, the Investment Manager, and each of their respective director, members partners, shareholders, officers, employees, agents and affiliates (hereinafter referred to as the ‘Affiliated Parties’) may conduct any other business, including any business within the securities and commodities industries, whether or not such business is in competition with the Company.”
- Affiliated Parties may act as, among other things, investment adviser or investment manager for others, may manage other funds or accounts, and may manage capital of others. The funds and accounts advised or managed by Affiliated Parties may have investment objectives or may implement investment strategies similar to or different than those of the Fund and may have interests in securities in which the Fund does not invest. Affiliated Parties may give advice or take action with respect to such other entities or accounts that differs from the advice given to the Fund.
- The Affiliated parties may have conflicts of interest in allocating their time and activity between the Company and other entities, in allocating investments among the Company and other entities and in effecting transactions for the Company and other entities, including ones in which the Affiliated Parties may have a greater financial interest.

The Division's expert Dr. Gibbons called this “standard language in a fund agreement that gives the managing members of the fund the right to do other things,” and confirmed it applied to Gibson and was “very broad,” as long as fiduciary duties were fulfilled. (Gibson Tr. 464)

GISF's Operating Agreement (DX-21) governed GISF's internal affairs. *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286, 291-92 (Del. 1999). It contained similar disclosures and provisions:

- “Nothing herein contained shall prevent the Managing Member (or any of its affiliates or employees) or any other Member from conducting any other business within the securities industry, whether or not it is in competition with the Company.”
- “Without limiting the generality of the foregoing, the Managing Member (or any of its affiliates or employees) may act as investment adviser or investment manager for others, and may serve as an officer, director, consultant, partner, stockholder of one or more investment funds, partnerships, securities firms or advisory firms.”

GISF's Offering Memorandum and Operating Agreement disclosed that the Affiliated Parties, including Gibson, could provide investment advice to others, maintain personal accounts, and transact in the same or different securities as GISF. Consistent with the Commission's 6/5/2019 Interpretation, they did not relieve fiduciary duties generally, waive all conflicts, or waive specific obligations under the Advisers Act.

Views of Dr. Gibbons. Dr. Gibbons' opinion that Gibson breached fiduciary duties and engaged in front-running should be disregarded: (i) As a non-lawyer, Dr. Gibbons lacks qualifications to opine on legal issues like fiduciary duties and front-running. (ii) He provided no basis for his statements on industry practice. (iii) His report failed to discuss the Commission's 6/5/2019 Interpretation on the standard of conduct for advisers, or its predecessor release proposing a standard.

His opinion that fiduciary duties may not be waived, modified or abrogated in any respect is plainly contradicted by the Commission's 6/5/2019 Interpretation, where the Commission unequivocally stated that the application of fiduciary duties is determined by the scope of the advisory relationship. "For example, the obligations of an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client (e.g., monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) will be significantly different from the obligations of an adviser to a registered investment company or private fund where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity (e.g., a mandate to manage a fixed income portfolio subject to specified parameters, including concentration limits and credit quality and maturity ranges)." (Interpretation, p.10) As noted above, an adviser and client "may even agree that certain investment opportunities will not be allocated or offered to a client." (Interpretation, p.26 n.65)

Failure of Proof on Front-running. The Division has failed to prove that Gibson engaged in "front-running," which is not specifically defined or proscribed by statute. The Second Circuit has explained that "[a] broker 'trades ahead' or 'frontruns' when he or she receives a large order for a particular security from an institutional client and, before executing the larger trade, first executes trades in that security for an account in which the broker has an interest so as to anticipate and exploit the movement in price the larger trade is likely to cause." *D'Alessio v. SEC*, 380 F.3d 112, 114 (2d Cir. 2004). The Commission has similarly explained to Congress that front-running is trading while aware of "an imminent block transaction that is likely to affect the price of the stock." (3/13/1988 "Memorandum Prepared by the Division of Market Regulation in Response to the Questions Contained in the Letter of March 4, 1988" from Representatives Dingell and Markey)

The Division's evidence fails to prove Gibson engaged in front-running, and fails to show he engaged in a scheme or artifice to defraud or engaged in act or practice that operated as a fraud. Additionally, it has not proven that Gibson acted with scienter under Advisers Act §206(1), Exchange Act §10(b) and Rule 10b-5, or negligence under Advisers Act §206(2).

B. Gibson's 9/26/2011 TRX Sales Not a Violation

The OIP alleges that “[a]fter a conversation with [Hull] over the weekend of September 24-25, 2011, Gibson determined to sell GISF’s entire holdings of TRX,” and “[a]fter a conversation with [Hull], Gibson decided over the weekend of September 24-25, 2011 to liquidate GISF’s entire TRX position.” (OIP ¶¶4, 26) The OIP alleges that after reaching this determination, Gibson sold TRX stock at \$4.04 on 9/26/2011 out of his personal account, Geier Group’s account, and the Marzullo daughter’s account, while GISF’s account sold TRX the next day at \$3.50. (OIP ¶¶5, 28) The OIP also alleges that Gibson “knew, was reckless in not knowing, and should have known that without disclosing to the Fund his conflict of interest and obtaining the Fund’s consent, he was improperly exploiting the fact that the Fund would be selling a substantial portion of its TRX position to benefit himself and his then-girlfriend.” (OIP ¶31)

The Division failed to prove that Gibson determined to sell GISF’s TRX stock or liquidate its position. Unrebutted evidence showed Gibson lacked authority to make decisions regarding sale of all or a substantial amount of the GISF’s holdings. Hull testified such transactions required his approval as GISF’s 81% owner. Hull testified he did not approve the sale of GISF’s TRX stock until GISF got a block bid from Casimir late in the 9/27/2011 trading day, the day following Gibson’s 9/26/2011 sales. Thus, when Gibson sold TRX stock in non-GISF accounts on 9/26/2011, he lacked information regarding an “imminent sale” by GISF.

Gibson lacked nonpublic information regarding a GISF sale of TRX stock at the time he sold TRX stock on 9/26/2011, and information he had was not material. Gibson had engaged in discussions with market participants about a sale of the Fund’s TRX securities more than a month before his 9/26/2011 sales. On 8/22-23/2011, Gibson emailed with Sands at Casimir Capital. Sands indicated that there was a buyer to acquire the Fund’s entire TRX position, but the Fund was unwilling to sell its TRX securities at the then current market price. Gibson instead wanted a premium. (RX-177) As market participants learned that GISF would consider offers for its TRX stock, it was no longer nonpublic information. (RX-17; Dr. Taveras Tr. 990-91, 1000-01, 1072-73; C. Gibson Tr. 1391)

Although GISF did not have a pending order (Dr. Gibbons Tr. 497-98), Gibson spoke with Hull regarding the Fund’s TRX position over the weekend of 9/24-9/25/2011. After speaking with Hull, Gibson emailed Sands Sunday evening that GISF “believe[d] in the company [TRX] and presently contemplate[d] waiting it out,” that GISF was not leveraged and not subject to a redemption risk, but as GISF was “concentrated in TRX,” Gibson asked to be advised “if there is a buyer that sees current prices as very compelling as we otherwise would.” (RX-62). While soliciting a bid, Gibson was signaling that GISF was not a motivated seller. (C. Gibson Tr. 1401) “There is no order at that point” for the Fund to sell TRX shares. (Bystrom Tr. 1556-57)

On Monday 9/26/2011, Sands asked the number of TRX shares GISF would be willing to sell and, without providing terms, indicated he might have buyers, and Gibson replied GISF's entire position or anything less. (RX-62) TRX opened at \$4.07 and volume was a typical 475,514 shares, which included Gibson's sales, and it closed at \$4.11. (JX-1; Dr. Taveras Tr. 1002) Gibson's sales included his 2,000 shares, Geier Group's 1,000 shares, and the Marzullo account's 18,900 shares. Gibson's sales were at approximately \$4.04. (Resp. Exs. 23, 26, and 29; C. Gibson Tr. 1394-95) As noted above, this was the price GISF obtained in selling 78,000 TRX shares on Friday 9/23/2011, the previous trading day. (RX-17; Dr. Taveras Tr. 1004; Dr. Gibbons Tr. 508-09)

After closing at \$4.11 on 9/26/2011, TRX opened higher at \$4.24 on Tuesday 9/27/2011 and then rose further to \$4.34. (JX-1) However with the price at \$4.34, GISF still did not know the amount it could sell, only that it would "likely" be 3 to 5 million shares, and did not know the price. (RX-62) And Gibson did not then know whether Hull would approve a sale at whatever price and number of shares might be in a bid Sands might communicate. (C. Gibson Tr. 1415) With no sale price for an unknown number of shares, there was still no sale order. (Bystrom Tr. 1559) On Tuesday afternoon, with the TRX price then already dropping to or approaching \$3.70, Sands asked Gibson to confirm GISF would sell up to 5 million shares for \$3.50 or better. Sands said that he did not know if he could "get it all done," and that he would sell "more like 3.5mm shares or so." (DX-82). At that point, there was still no order for GISF to sell, but "[t]hat's exactly what [Sands was] asking for. He's asking for [Gibson] to give him the order." (Bystrom Tr. 1560)

Gibson lacked authority to conclude the sale without specific confirmation from Hull, and called Hull "to alert him that we had a bid and in the context of this ... perceived falling knife, we felt like it was a bid we should ... realistically consider and, in Jim's judgment, we should take it and I communicated that to [Sands at] Casimir and the transaction was consummated." (Gibson Tr. 1421-22) Gibson "had Casimir on one phone and [Hull] on the other and ... it was take it or it's gone bid. They made that clear. So we had a couple of minutes at most to make a determination and we made a determination I think in one minute to accept it." (Gibson Tr. 1422-23) Gibson then responded to Sands by email saying "Confirm at 3.50 or better up to 5mm shares." (DX-82) Bystrom testified that "[t]hat constitutes an order." This email on Tuesday afternoon was "the first we see of an order." (Bystrom Tr. 1560-61) So before Gibson's call with Hull during the afternoon of Tuesday 9/27/2011, an order to front-run did not even exist, and the information Gibson possessed was not material.

The Division failed to prove that Gibson acted knowingly, recklessly or negligently in failing to disclose a conflict arising from use of material nonpublic information regarding a supposed "imminent" sale of GISF's TRX stock. State of mind is inextricably linked to whether a defendant actually knows, or recklessly or negligently disregards that a fact was material and fails to disclose it. *City Retirement System v. Waters Corporation*, 632 F. 2d 751 (1st Cir. 2011).

C. Gibson's Put Transactions Not a Violation

The OIP alleges that before selling GISF's remaining TRX stock, Gibson bought puts for himself and the Marzullo daughter's account (and recommended puts to his father). The OIP alleges that "in effect, Gibson's purchase of put contracts represented a short position, *i.e.*, a bet that TRX's share price would decline below \$4 before the put contract's November 19, 2011 expiration date,." and that this "was a likely result of his imminent sale of GISF's large remaining block of TRX shares." (OIP ¶ 9)

The Division failed to prove that Gibson front-ran GISF's sale of its remaining TRX stock; that he "used his knowledge of the Fund's impending sale of its TRX shares to benefit himself and persons close to him"; or that he knew that "a significant price decline was a likely result of his imminent sale of the large remaining block of the Fund's TRX shares." Gibson was continuing to explore the possibility of selling TRX shares through a negotiated "upstairs" transaction, but had not reached an understanding with anyone on price, volume or timing that he could present to Hull for his necessary approval. A negotiated sale through a transaction never happened, and instead GISF sold its in market transactions on 11/10/2011. Gibson first discussed these transactions with Hull only after another hedge fund thought to be a potential buyer of TRX stock unexpectedly on 11/9/2011 proposed a six-month standstill agreement. So Gibson could not have had material information about GISF's liquidation of its remaining TRX block when he bought the puts. And as GISF had sold a block on 9/27/2011 and continued to discuss negotiated transactions, GISF's consideration of additional sales was not nonpublic.

Gibson's puts were not a "short position." Gibson had a long position hedged with a "protective" put that protected the TRX stock Gibson beneficially owned through GISF. Respondent's expert Bystrom explained the purchase of a put as a long position, the use of protective puts, and the type of exposure provided by a protective put. Bystrom testified that the purchase of puts is "not the same thing" as taking a short position. (Bystrom Tr. 1575-76). And that if the put option is a protective put, where the investor owns the underlying stock, "[y]ou mitigate your loss below the strike price." (Bystrom Tr. 1633). "So buying protective puts gives you much different exposure than short selling. One is long exposure, one is short exposure." (Bystrom Tr. 1633-34).

The Division expert Dr. Taveras agreed that, after buying puts on 10/27, 10/28, 11/2 and 11/8/2011, Gibson "was long exposed to the stock through his involvement in the Fund." (Dr. Taveras Tr. 1060). The puts were "a protective put," and "a hedge." (Dr. Taveras Tr. 1061). A "protective" put protects an investor's long exposure in the underlying asset. (Dr. Taveras Tr. 1070). Gibson's put purchases protected about a third of his long exposure to the stock. (Dr. Taveras Tr. 1064-65)

Gibson ultimately lost about \$725,000 on his interest in the Fund, that his parents lost about \$1.4 million, and that the Marzulllos lost about \$965,000. (RX-205; Cates Tr. 1301-02) The Marzulllos losses are treated as a unit "because they were a family." (Cates Tr. 1328) As of

June 2019 , Respondent Gibson was insolvent, with a negative net worth of \$605,073. (RX-240; Cates Tr. 1303-04)

The Division had to prove that Gibson acted knowingly, recklessly or negligently in failing to disclose a conflict arising from use of material nonpublic information regarding GISF's imminent sale of TRX stock in buying puts. The evidence establishes that at the time of the put purchases Gibson did not have material nonpublic information regarding GISF's sale of TRX stock on 11/10/2011.

D. Gibson Not Favoring Hull Over GISF

The OIP alleges that Gibson favored Hull over GISF when he purchased TRX stock from Hull despite having determined to sell GISF's entire TRX holdings. The OIP alleges that GISF bought Hull's TRX shares at favorable prices, that the transaction furthered their relationship, that the private transaction let Hull avoid a commission, and the Fund was required to pay a commission when it sold the shares acquired from Hull, and that GISF ultimately lost \$1.1 million dollars when it sold the TRX shares acquired from Hull.

Favoring one client over another may constitute a violation of §§206(1) and (2). In *J.S. Oliver Capital Management, L.P.*, Securities Act Release No. 10100 (June 17, 2016), the Commission held that an adviser violated §§206(1) and (2) on findings that he favored certain clients over others (adviser "systematically allocated trades to favored accounts on a disproportionate basis with scienter"). However the Commission recently noted that "[a]n adviser need not have pro rata allocation policies, or any particular method of allocation, but, as with other conflicts and material facts, the adviser's allocation practices must not prevent it from providing advice that is in the best interest of its clients." (Interpretation, p.27)

Dr. Gibbons opined that the purchase price paid Hull was not tied to market price because the closing price was used. He further argued that a market execution would have cost less because the number of shares exceeded the stock's median volume. He also argued that GISF bought "near the high of the day and lost the opportunity to work into the trade," GISF paid the commission for Hull, the transaction was contrary to the GISF's desired strategy, the trade increased GISF's overall risk, the purchase increased GISF's losses, and the transaction was completed when "the trading window was closed for Hull."

The Division failed to prove that Gibson violated the securities laws by favoring Hull over GISF. Dr. Gibbons postulates that, if Hull had sold the shares to GISF through market transactions, GISF would have paid lower prices than a sale at the day's closing price. However GISF's Offering Memorandum provided that transactions such as the Hull Transaction shall be effected at the current market price – a provision designed to provide an objective price at which transactions between the Fund and persons such as Mr. Hull could be effected. The Offering Memorandum provided that "purchase and sale transactions (including swaps) may be effected between the Company and the other entities and accounts ... at the current market price of the

particular securities.” And the Operating Agreement (§3.02) provided that the Managing Member “shall have the power to enter into, make and perform any other contracts, agreements or other undertakings it may deem advisable in conducting the business of the Company, including but not limited to contracts, agreements, or other undertakings with persons, firms or corporations with which the Managing Member or any other Member is affiliated.” Neither the Offering Memorandum nor the Operating Agreement suggested that the transaction was required to be effected through market transactions. And Respondent’s expert Bystrom confirmed that the completion of the transaction at the closing price of the stock was appropriate. “That is exactly what that means.” (Bystrom Tr. 1569-70) Executing the transaction “at the closing price of the market on that day ... is the most equitable way to cross that stock.” (Bystrom Tr. 1625) “[T]here was no premium or discount to either party.” (Bystrom Tr. 1627)

The evidence contradicts Dr. Gibbons’ opinion that the transaction was contrary to GISF’s desired strategy, increased its overall risk, and increased its losses. The combination of Hull’s TRX shares with GISF’s TRX shares was not contrary to the Fund’s strategy as GISF was exploring the possibility of selling its TRX stock in a negotiated transaction in the upstairs market. The evidence established that the combination of the shares was important to facilitate a sale of a large amount of shares in a negotiated transaction. Bystrom explained that when negotiating a block transaction, it is important that the seller be able to show to the broker and the buyer that the seller also represents holdings of affiliated persons, which would include a large affiliate like Hull, who owned 81% of GISF and had about 680,000 TRX shares in his personal account. (Bystrom Tr. 1650). (Sands contemporaneously observed that “no buyer will buy that quantity if they know another 5mm is being sold behind it.” (RX-62)) As for GISF’s risk, as Hull’s interest exceeded 80% , he was essentially retaining the risk from the TRX shares he previously held in his personal brokerage account.

Further, Dr. Gibbons’ opinion that Gibson favored Hull over GISF in the Hull transaction is belied by Hull’s testimony. Hull was unequivocal that he offered interests in the Fund to his lifelong friends and business associates and that he would not have engaged in any transaction that would harm GISF in which they had invested. Further, Hull was not obligated to sell his TRX shares to the Fund and could have sold the shares in the market over time and would have benefited from the increase in the price of TRX shares in the weeks following completion of the Hull Transaction.

Dr. Gibbons’ contention that GISF paid the commission that Hull would have paid had he sold his TRX shares in the market is a fabrication. With respect to the Fund’s acquisition and disposition of TRX securities, certain transactions were executed in the market and certain transactions were executed in privately-negotiated transactions. Each purchase and sale of securities is a separate transaction, and neither the Division nor Dr. Gibbons offered any support for linking a purchase and sale and attributing a commission paid on one transaction to another transaction. Moreover, as Hull held an 80% interest in GISF, he effectively incurred 80% of any commissions or fees that GISF paid in connection with a later sale of the TRX shares.

E. No Violation of Section 206(4) and Rule 206(4)-8

The OIP's allegations concerning §206(4) and Rule 206(4)-8 are untenable. Because the OIP's allegations that Gibson failed to disclose to GISF his alleged front-running and favoring of Hull over GISF, such disclosure failures could not form the predicate for violations of §206(4) and Rule 206(4)-8. Further, to the extent that the OIP alleges that Gibson failed to disclose information regarding the lapse of Geier Group's registration with Georgia as an investment adviser or the termination of Geier Group and Geier Capital as Georgia limited liability companies to GISF investors, findings and conclusions that Gibson violated §206(4) and Rule 206(4)-8 would be precluded because such claims would be either be barred by the statute of limitations or would involve immaterial matters. Thus, the OIP simply is devoid of any viable allegation that Gibson failed to disclose information to GISF investors that was required to be disclosed by §206(4) and Rule 206(4)-8.

Section 206(4) prohibits an investment adviser from engaging in any act, practice, or course of business which is fraudulent, deceptive or manipulative. Rule 206(4)-8, adopted pursuant to Section 206(4) of the Advisers Act, prohibits an adviser to a pooled investment vehicle from (i) making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to any investor or prospective investor in a pooled investment vehicle; or (ii) otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

The Commission adopted Rule 206(4)-8 in response to the D.C. Circuit's decision in *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006), which concluded that the SEC could not adopt a regulation providing that hedge fund managers must count as clients the shareholders, limited partners, members, or beneficiaries of the fund for purposes of the Investment Advisers Act. In so holding, the court stated: "While the shareholders may benefit from the professionals' counsel indirectly, their individual interests easily can be drawn into conflict with the interests of the entity. It simply cannot be the case that investment advisers are the servants of two masters in this way." 451 F.3d at 881.

The Commission's adopting release for Rule 206(4)-8 states that the rule does not create a fiduciary duty to pooled investment vehicle investors not otherwise imposed by law. *See Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles*, SEC Release No. IA-2628, p.13 (Sep. 10, 2007). *See also SEC v. ABS Mgr., LLC*, 2014 WL 7272385, *4 (S.D. Cal. Dec. 18, 2014) (holding that hedge fund's manager's client generally is hedge fund itself, and not investors in fund because manager's fiduciary duties are owed to fund whose interests can diverge from fund's investors).

Gibson's alleged failure to disclose purported front-running and the Hull transaction to GISF cannot constitute violations of §206(4) and Rule 206(4)-8, as the *Goldstein* decision as

well as the Commission's adopting release make clear that, in the context of a private fund and its investors, an adviser's client is the *fund* and not its *investors* and a disclosure to a fund does not constitute a disclosure to the fund's investors.

Indeed, the only contentions in the OIP specifically addressing the Fund's individual investors relate to the immaterial failure to disclose the dissolution of Geier Capital and Geier Group in 2011. Specifically, the OIP alleges that Gibson did not inform GISF's investors: (i) that GISF's investment manager (Geier Group) "had been terminated, and continued to operate as though Geier Group still existed"; and (ii) that GISF's managing member (Geier Capital) had been terminated in December 2011. (OIP ¶¶14, 15) These allegations do not involve matters that are material in light of the allegations contained in the OIP. In the context of a §206 violation, a misrepresented or omitted fact may be deemed material if it would be significant to a reasonable client or prospective client's evaluation of the adviser's integrity or fidelity to his clients. *See SEC v. Householder*, 2002 WL 1466812, *6 (N.D. Ill. July 8, 2002); *Matter of Lloyd*, 2015 WL 4538153, *24 (Initial Dec. July 27, 2015). As the OIP alleges that "[f]rom January 2010 to early 2013, Gibson acted as the Fund's investment adviser, initially as the principal executive of Geier Group and then in his personal capacity after Geier Group's termination," the termination of Geier Group and Capital are immaterial.

To the extent that the OIP may be read to allege a violation of §206(4) and Rule 206(4)-8 based upon the solicitation of two investors to make or increase their GISF investments with materials inadvertently stating, as a result of copying matter from an earlier email, that Geier Group was registered as an investment adviser notwithstanding that its registration had lapsed, such a claim would be barred by the statute of limitations.

Conclusion

On consideration of the evidence admitted at the hearing, the Division has failed to prove a violation, and this proceeding should be dismissed.

Dated: September 13, 2019

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Certificate of Service and Filing

Pursuant to Rule 150(c)(2), I certify that on September 13, 2019, I caused the foregoing to be sent: **(1)** By **Facsimile** transmission and by **FedEx (original and 3 copies)** directed to the Office of the Secretary, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-1090, with a copy by **email** to apfilings@sec.gov. **(2)** By **email** to the Honorable James E. Grimes, Administrative Law Judge, Securities and Exchange Commission, at alj@sec.gov. **(3)** By **email** to Gregory R. Bockin and Nicholas C. Margida, Securities and Exchange Commission, at bocking@sec.gov and margidan@sec.gov.

/s/ Thomas A. Ferrigno

Certificate of Compliance

The undersigned certifies that, exclusive of the above Certificate of Service and Filing and this Certificate of Compliance, this brief contains 13,986 words, based on the word-count function of the Microsoft Word software used to prepare the brief.

/s/ Thomas A. Ferrigno