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 RESPONSES TO RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

October 4, 2019

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The Division of Enforcement ("Division") hereby responds to Respondent Christopher Gibson's ("Gibson") September 13, 2019 Proposed Findings of Fact and Conclusions of Law ("Gibson' PFFs"). The paragraph numbers in this document correspond to the paragraph numbers in Gibson's PFFs. As set forth in the Division's Post-Hearing Reply Brief, filed in conjunction with these responses, the Division objects to, and moves to strike, those of Gibson's PFFs that contain argument prohibited by the Post-Hearing Order dated August 5, 2019 (the "Post-Hearing Order"). That order stated: "Argument is not permitted in proposed findings and conclusions. I will strike findings or conclusions that contain argument." Post-Hearing Order at 2. The Division objects to all of Gibson's PFFs containing impermissible argument, including but not limited to those it has identified herein as containing "Impermissible Argument."[1]

I. Division's Responses To Gibson's Proposed Findings of Fact

1. Disputed in part. Gibson's proposed fact omits that in April 2009, Gibson began providing investment advice to James Hull ("Hull") regarding Hull's personal investments. Div. Proposed Findings of Fact ("Div. Findings") at ¶ 7.

2. Disputed in part. John Gibson's thoughts and concerns about how Gibson ended up working for James Hull are irrelevant.

3. Disputed in part. Gibson's age in 2011 is not part of the transcript citations.

4. Disputed in part. On April 14, 2009, Gibson formed Geier Group LLC, a Georgia limited liability company, to function as an investment advisory firm. On June 16, 2009, Geier Capital was formed as a Georgia limited liability company. Div. Findings at ¶¶ 9, 15.

[1] So as not to prejudice its case or allow Gibson's flawed, misplaced, and erroneous arguments to go unrebutted, herein the Division, where necessary, has provided counterarguments and countervailing record and case cites.

5. Disputed in part. The Division objects to the extent Respondent's reference to Seward & Kissell impermissibly asserts or implies a reliance on counsel defense, which Respondent expressly agreed he would not do in this case. *See* Div. Ex. 189 (Parties Joint Stipulation re: Advice of Counsel/Privilege Issues).

6. Undisputed.

7. Disputed in part. Gibson testified that salary payments from Hull's business from 2010 through 2013 were for Gibson's investment advisory services to GISF. Div. Findings at ¶¶ 71-73.

8. Undisputed.

9. Disputed in part. Gibson's contention that Hull "strongly, strongly urged" him to borrow funds from Hull contradicts his investigative testimony. Div. Ex. 187 at 28:10-15 and 29:15-30 ("Jim asked me – he did not demand, but it was clear to me, because he asked several times, that it was important to him.")

10. Disputed in part. This Division disputes that the rest of the Fund was owned by Hull's closest business associates and friends. Gibson invited the Marzullos and Tim Strelitz into the Fund, they were not friends of Jim Hull. 7/29/19 Tr. 134:19-20; Div. Ex. 187 at 48:1-4. In addition, Hull's testimony that neither he nor Gibson would do anything contrary to the interest of their long term friends is incorrect. Gibson's actions were contrary to their interests. Div. Findings at ¶¶107-186.

11. Disputed in part. The Division notes that "9% investors" do not exist; there are simply GISF investors. Div. Findings at ¶¶ 31-35. The Division alleges that Gibson, not Hull, acted contrary to the investors' interests. Div. Findings at ¶¶107-186.

12. Undisputed. The Division notes, however, that the naming of the Georgia Cyber Center and that Hull and the McKnights made money together previously are irrelevant.

13. Disputed in part. See paragraph 11 above.

14. Disputed in part. The Division disputes that the conflict of interest disclosures were adequate. Gibson's contentions in ¶ 14 of his PFFs are irrelevant to that issue. *See* Div. Findings at ¶¶ 34, 40, 41, 54, 55, 74, 88, 89, 149, 150, 151, 181, 183.

15. Disputed. Gibson's contention that Hull was "personally involved in decision making at GISF" contradicts his hearing testimony. Div. Findings at ¶¶ 41-57. In addition, Hull denied in his investigative testimony that he was personally involved in GISF decision making. Div. Ex. 174 at 23:19-25. ("Q. So is there some more limited characterization that you were perhaps responsible for making the critical decisions for GISF? A. I would characterize it as I was more responsible for the initial investments. And after that, he [Gibson] was responsible for the operational aspects of those investments.")

16. Disputed. Gibson's contention of Hull's "belief" that the other GISF investors were aware that he had approval authority over any major investing decision in the fund contradicts the testimony of investors (Mason McKnight IV and Matthew McKnight), who understood that Gibson was investing and managing GISF funds. Div. Findings at ¶¶ 54, 55.

17. Disputed in part. Cates was simply one of the investors in GISF, and was not part of any "9% investors." Div. Findings at ¶¶ 34, 35. Whether Cates would have invested in GISF if Hull "had not been involved" is irrelevant.

18. Disputed in part. Gibson's contention that Cates "reviewed such investments by his accounting clients" is misleading, and contradicts Cates' hearing testimony. Cates testified that he does not practice as an investment adviser. 8/1/19 Tr. 1306:24-1307:1.

19. Disputed in part. Gibson's contention that Hull had a role in the original investment thesis for the Fund is contradicted by Hull's investigative testimony. Div. Ex. 174 at 16:11-13. ("Q. Understood. And who generated that investment thesis? A. Chris Gibson.")

20. Disputed. Gibson's contention that his role as an investment adviser was diminished and that Hull was "making those calls" in 2011 contradicts Gibson's hearing testimony. Gibson testified that his role as an investment adviser in 2011 remained the same as it had been in 2010. *See* Div. Findings at ¶44. This contention is also contradicted by Hull's investigative testimony, during which Hull denied making operational decisions for GISF. Div. Ex. 174 at 23:19-25.

21. Disputed in part. Gibson's contentions that he "could not have resisted Hull's desire to concentrate GISF in a single stock" and that "his only option would have been to resign" are unsupported, self-serving speculation.

22. Disputed. Gibson's contention that "Hull favored investing in a 'junior' mining company" is contradicted by Hull's investigative testimony. Div. Ex. 174 at 35:5-8. ("Q. Can I – may I just ask you, can you tell us what else you know about this company, TRX? I think you mentioned it was a mining company. A. I don't really know that much about it.")

23. Disputed. Gibson's contention that none of the investors asked for more information after February 6, 2011 is inaccurate. Mason McKnight asked for further information regarding TRX on June 21, 2011. Div. Ex. 72; 7/30/19 Tr. 757:15 to 759:24.

24. Undisputed.

25. Disputed. Although Gibson told GISF investors that TRX remained a good investment, in private e-mails with TRX management, he shared his true, very negative view, stating that: "[t]his is TRX failing," (Div. Ex. 77); "[w]e are running on fumes," (Div. Ex. 78); and

asking whether TRX "should engage an investment bank to sell [itself]," (Div. Ex. 79). *See* Div. Findings at ¶¶ 102, 104. Despite Gibson's claimed belief in Sinclair and TRX, he nevertheless sold all of his personal TRX shares, Francesca Marzullo's TRX shares, and Geier Group's TRX shares on September 26, 2011. Div. Ex. 86 at 3, Div. Findings at ¶¶ 117-119.

26. Undisputed.

27. Disputed. See paragraph 25 above.

28. Disputed. Gibson's self-serving description of his actions in August 2011 is contradicted by his activity at the time, when he was continually disparaging TRX. On August 10, 2011, for example, Gibson wrote an email to TRX Chairman James Sinclair saying that Gibson was "physically ill" over the performance of TRX's stock price and "[v]ery soon it will make sense to exit our positions. There is no time left. TRX will go to $3 if we are not at $8 in September." Div. Ex. 76. Later that same day, Gibson wrote Sinclair that "[o]ur share price is a disaster . . . . This is TRX failing." Div. Ex. 77. Gibson also wrote: "Everything You Say Is Always Inaccurate." *Id.* On August 15, 2011, Gibson wrote another email to TRX management stating: "[w]e are running on fumes" and "it is a now or never do or die moment. If the share price falls any further at any point in the next few days or weeks it will be irrecoverable." Div. Ex. 78; 7/29/19 Tr. 204:21-206:8. See Div. Findings at ¶¶ 100-102. In his August 22-23 email to Sands, Gibson stated that he has a "short" that is "offering [him] a premium" (Resp. Ex. 177) – a fact unsupported by the evidentiary record. Gibson makes a "firm order" at $6.25 per share for GISF's 9 million TRX shares, and Sands is unable to find a prospective buyer willing to pay that price. *Id.*

29. Disputed. There is nothing in the evidentiary record to support Gibson's testimony regarding any other TRX investors in August and September of 2011.

30. Undisputed.

31. Disputed. Rather than remaining "very bullish" on TRX, Gibson was looking to sell the company to investment bank and despaired about TRX's valuation – writing to Sinclair, on September 22, 2011, that he was "trying to think of ways to save [TRX]" and wondering whether TRX "should engage an investment bank to sell [itself]." Div. Ex. 79; 7/29/19 Tr. 210:20 to 211:6. In the same email, Gibson wrote: "[a]t the rate of value destruction we can only go lower for 4 more days." Div. Ex. 79. See Div. Findings at ¶ 104. Gibson's contention about being bullish on TRX is also belied by the fact that he sold all of his, Marzullo's, and Geier Group's TRX shares just days later.

32. Disputed. In the same email to GISF investors, Gibson wrote that (i) there was "tremendous value" in the "assets owned and business operated by TRX"; (ii) he believed the stock price would rise to "significantly higher levels"; and (iii) he believed in "the reputation, character and integrity of Mr. Sinclair." Div. Ex. 81. Gibson's testimony that Hull "[e]xpressed a greater desire to purchase more shares," 8/1/19 Tr. 1390:7-8, is otherwise unsupported by the evidentiary record. In any event, in the next two days, Hull and Gibson decided to get out of the Fund's TRX position subject to obtaining good prices. Div. Findings at ¶ 109.

33. Disputed in part. The Division does not dispute the changes in TRX's stock price as reflected in Joint Exhibit 1, but notes that there is no credible evidence in the record to support Gibson's testimony about his "judgement at the time" that the "two-day stock drop reflected what he called a 'bear raid.'"

34. Undisputed. The Division notes, however, that the sale of 78,000 TRX shares on September 23, 2011, and the absence of a "pending order" that day, are irrelevant.

35. Disputed. Gibson previously testified that over the weekend of September 24-25, 2011, Gibson spoke with Hull, who indicated that he had no tolerance for further losses, which

Gibson understood to be an instruction for GISF to sell its TRX shares, subject to obtaining a good price. Div. Ex. 187 at 78:2-79:1. *See* Div. Findings at ¶ 109.

36. Disputed in part. The Division disputes ¶ 36 of Gibson's PFFs to the extent it attempts to characterize the OIP, which speaks for itself.

37. Undisputed.

38. Disputed. Gibson testified that he knew that selling a large block of stock was likely to depress the price of that stock. Div. Ex. 187 at 108:12-21 (one would "generally expect the share price of a stock to drop when you sell a large portion of the shares"). *See also*, Div. Findings at ¶ 115. Although the remainder of the paragraph accurately quotes Bystrom's testimony, that testimony is his opinion, not a proposed finding of fact. The Division does not dispute Bystrom's testimony to the extent he opined that no one can predict the future, including TRX's price, with certainty. That opinion, however, does not excuse or negate the fact that Gibson thought it likely that large GISF block sales of a thinly-traded stock like TRX would depress TRX's stock price.

39. Disputed in part. The Division does not dispute that Gibson's email to Sands, Resp. Ex. 62, is accurately quoted in ¶ 39 of Gibson's PFFs. On Sunday evening, September 25, 2011, Gibson began his efforts to sell GISF's TRX position by emailing Richard Sands at Casimir Capital to ask if he had a buyer. Resp. Ex. 62 at 8. ("Is Platinum or another buyer interested in increasing their position? ... [W]e're concentrated in TRX so if there is a buyer that sees current prices as very compelling as we otherwise would, please let me know.") Sands responded that he would "work on it tomorrow." *Id.* at 7. Bystrom's testimony that "[t]here is no order at that point" is opinion, not fact, and it is irrelevant.

40. Disputed in part / Impermissible Argument. That there was "no pending order" on September 26, 2011, is irrelevant. The Division does not dispute that Gibson's counsel asked Division expert, Dr. Gibbons, hypothetical questions about events that did not actually happen, and that in answering those questions, Dr. Gibbons also testified that he was not aware of anything "forcing" GISF to sell "other than the decision to sell" Gibson made the weekend of September 24-25. 7/30/19 Tr. 500:2-7. Dr. Gibbons also testified that although "there was no telling when a block purchaser would appear," what mattered was that Gibson/GISF "had the intention to sell." *Id.* at 501:8-10.

41. Disputed in part. Gibson's claim that he believed TRX's share price was going to increase in value is belied both by the communications he had directly with TRX management and the fact that felon September 26, Gibson sold every one of the TRX shares from his, Marzullo's, and Geier Group's accounts. Div. Findings at ¶¶ 104, 116.

42. Disputed in part. Whether there was an order at this time is irrelevant, and in any event, Bystrom's testimony reflects his opinions, not facts.

43. Disputed in part. The Division does not dispute that, on September 26, 2011, Gibson sold the 1,000 TRX shares in Geier Group's account – in which Gibson had an interest. Div. Ex. 216 ¶ 24; 7/29/19 Tr. 232:8-11; Div. Ex. 88 at 7 (Geier Group). As of that date, however, Gibson did not have a 50% interest in Geier Group, as it no longer existed. Div. Findings at ¶ 82. Gibson simply kept using the account after the entity was terminated. 7/29/19 Tr. 231:20-22. The same day, Gibson also sold 18,900 shares held in the personal Schwab account owned by and in the name of Francesca Marzullo – not her father, Giovanni Marzullo, a GISF investor. Div. Findings at ¶ 116. The Division disputes that the Marzullos could or can be treated as a single entity, including as a single advisory client or account holder. That Gibson coincidentally sold his,

Marzullo's, and Geier Group's shares for approximately "the same $4.04 price that GISF had just obtained in selling 78,000 of its shares on Friday, the previous trading day" is irrelevant. *See* 7/31/19 Tr. 1004:7-13 (Gibson's counsel noting this is mere "coincidence"). Dr. Gibbons' and Dr. Taveras' expert testimony does not support any of Gibson's contentions, only that Gibson's math was correct.

44. Disputed. Gibson's proposed counterfactual about what he could have done is irrelevant and inconsistent with the evidentiary record. Gibson sold 2,000 TRX shares, not 2,500 (as proposed by Gibson), from his personal account on September 26, 2011, and the same day he sold 1,000 TRX shares from a Geier Group account in which Gibson had a 50% interest. Div. Findings at ¶ 116. Again, the Division disputes Gibson's treatment of Francesca Marzullo (who owned TRX shares and, later, $4 TRX put option contracts in her personal account) and her father, Giovanni Marzullo (who was a GISF investor) as a single entity – advisory client, account holder, or otherwise.

45. Disputed. There is no corroborating evidence to support Gibson's self-serving testimony that Marzullo's father opened or funded her personal Charles Schwab account. The account was in her name only, and Gibson controlled the account. Div. Findings at ¶ 116; Div. Ex. 87. Gibson's contention that he reported her account trades to Giovanni Marzullo on a "daily" basis is contradicted by Gibson's administrative testimony. *See* Div. Ex. 187 at 113:5-23. (Gibson testifying that he "did not have time to adequately inform" Marzullo's parents about trading in her account, including his purchase of naked puts).

46. Disputed. Gibson sold 2,000 TRX shares from his personal account, not 2,500 shares as Gibson claims, and he sold 1,000 TRX shares from Geier Group's account in which he had a 50% interest. In total, Gibson sold 21,900 TRX shares on September 26, 2011, including all

of his, Marzullo's, and Geier Group's TRX holdings. The Division disputes that Gibson had no income at the time, as he continued to receive his bi-weekly salary throughout the remainder of 2011 and through 2013. Div. Findings at ¶¶ 68, 74.

47. Disputed. For purposes of Gibson's front running, again, whether there was an order is irrelevant. And any testimony from Bystrom about what *could* happen (with certainty) in the future is speculative opinion and not based on what actually happened here. By trading ahead of GISF's September 27th large block sale of approximately 3.7 million TRX shares, Gibson avoided for himself and those close to him the risks inherent in or posed by any uncertainty concerning TRX's share price.

48. Disputed in part. The Division does not dispute TRX trading data reflected in Joint Exhibit 1. Again, whether there was an order at the time Gibson sold his personal TRX shares, or Marzullo's and Geier Group's, on September 26, is irrelevant. What matters is Gibson's intention to trade for his client GISF and the foreknowledge of his client's trade, which occurred on September 27, 2011. Div. Findings at ¶¶ 124-127.

49. Disputed in part. Bystrom's testimony that it "could be weeks or later" about what a prospective seller may know about a potential bid, is speculation, not fact, and it is irrelevant.

50. Disputed in part. Bystrom's conclusion that GISF was not responsible for the decrease in the price of TRX stock is unsupported by any analysis. Resp. Ex. 228; 8/2/19 Tr. 1594:14-24.

51. Disputed in part. Bystrom's testimony "[t]hat constitutes an order" and "the first we see of an order" is unsupported opinion, not fact, and it is irrelevant. 8/2/19 Tr. 1594:14-24.

52. Disputed in part / Impermissible Argument. Gibson's contention that he did not have the authority to conclude the sale of that size (approximately 3.7 million shares) and

coordinated with Hull about Sands' offer is contradicted by Hull's investigative testimony. Hull claimed he did not know Richard Sands. Div. Ex. 174 at 93:6-7. More importantly, Gibson's contention that he did not have such authority is contradicted by GISF's organizing documents, which do not mention Hull but identify Gibson by name as *the* individual upon whom GISF's success significantly depended. Div. Findings at ¶¶ 27-30.

53. Undisputed.

54. Disputed in part. Gibson mischaracterizes the import of Dr. Gibbons' testimony here. Dr. Gibbons testified he did not know the size of the exposure, the notion of "over 220,000 shares of TRX" came from Gibson's counsel. 7/31/19 Tr. 874:9-14.

55. Disputed. Gibson sold 21,900 TRX shares on September 26, 2011, including all of his personal TRX holdings. Gibson's reference to Mason McKnight IV's testimony is misleading because he was not asked about Gibson's sale of Marzullo's 18,900 shares. 7/30/19 Tr. 795:10-16.

56. Undisputed.

57. Disputed. Other than Gibson's self-serving testimony, there is no reliable corroborating evidence regarding what Sequeira wanted. In addition, Gibson's claimed reason for the Hull Buyout Transaction ("HBT") is contradicted by contemporaneous evidence, including that Gibson told Hull that combining Hull's and GISF's TRX shares "might help me for regulatory and other reasons, and Geier no longer charges fees." Div. Ex. 94.

58. Disputed in part. Gibson's purported thesis that there was tremendous value in TRX at the time is contradicted by contemporaneous evidence that he was doing everything he could to unload GISF's remaining TRX shares after the weekend of September 24-25, 2011, and that he sold all of his personal TRX shares, Marzullo's shares, and Geier Group's shares on September 26, 2011. Div. Findings at ¶¶ 68, 74, 109-136.

59. Disputed. Gibson's contentions regarding Hull's uncertainty about selling GISF's TRX shares is misleading and contradicted by contemporaneous evidence and by Gibson's prior testimony. Div. Findings at ¶ 110. As discussed in paragraph 58 above, Gibson was doing everything he could to unload GISF's remaining TRX shares after the weekend of September 24-25, 2011. Div. Findings at ¶¶ 109-136. In addition, Gibson previously testified that from September 24, 2011 onward, the guidance was "to get out of TRX at good prices." Div. Ex. 187 at 78:2-5.

60. Disputed in part. Hull's claim that he had to view any proposal to make sure it was "a good price" is not consistent with his investigative testimony, where Hull recalled a conversation with Gibson during which Gibson wanted to sell TRX, and shortly thereafter they sold their TRX position. Div. Ex. 174 at 108:11-21. The testimony of Division expert, Dr. Gibbons, does not confirm or verify that GISF's October 17, 2011 block TRX sale was "privately negotiated" or "at market price." *Cf.* Div. Exs. 226, 227.

61. Undisputed. The Division notes, however, that the OIP speaks for itself.

62. Disputed in part / Impermissible Argument. Despite Gibson's contention that it is "undisputed" that GISF did not pay a commission related to Mr. Hull's shares, the Division disputed that contention at the hearing, presented evidence regarding commissions paid, and disputes the contention now. The Division presented evidence that GISF paid a sales commission on Hull's behalf of approximately $6,866.36. Div. Findings at ¶ 143.

63. Disputed. Gibson's contention *now* (at the hearing) that this was a joint idea between he and Hull is directly contradicted by Gibson's prior sworn testimony, Div. Ex. 187 at 710:16-20, and contemporaneous documents, *see* Div. Ex. 94.

64. Disputed. See paragraph 63 above. Bystrom's testimony on this point is also unreliable as he is not an investment adviser and had no basis to, and in fact did not, opine on whether the purported "ease[]" it (that is, combining Hull's and GISF's TRX shares) created comported with Gibson's fiduciary duties as GISF's investment adviser.

65. Disputed. See paragraph 63 above. There is no reason that a "clean up" transaction could not have occurred from shares held in two accounts. *See* 7/31/19 Tr. 959:16-960:9. (Dr. Gibbons testifying that "[t]hey could have entered one block trade and sold all the shares at one time and then delivered . . . from any number of account instead of one block trade with everybody participating in the trade.") *See also*, Resp. Ex. 92; 8/1/19 Tr. 1429:19-1430:1.

66. Disputed / Impermissible Argument. The $3.60 closing price on October 18, 2011 was not the market price for Hull's personal TRX shares. Div. Findings ¶ 142; *see* also, *id* ¶¶ 135, 140. Moreover, Bystrom's testimony to the contrary is unreliable because he is not an investment adviser and has no basis to opine on the meaning of GISF's organizing documents.

67. Disputed in part. Gibson's speculation about what Hull might have done if he had not sold his shares to GISF is irrelevant speculation. What actually happened is that Hull sold his 680,636 personal shares to GISF on October 18, 2011 and received $2,450,589.60 for those shares. Div. Findings at ¶¶ 138-139.

68. Disputed. Gibson's contention about the hypothetical amount Hull could have received if he sold his shares into the market is irrelevant speculation. Again, what actually happened is that Hull sold his shares to GISF and received $2.45 million for them. Div. Ex. 95.

69. Disputed. The reliable evidence offered by the Division shows that the GISF paid a commission of $6,866.36 to sell Hull's shares. Div. Findings at ¶143. Gibson's self-serving testimony that the rate was $0.002 is not supported in the record. Moreover, Bystrom did not

testify that the commission rate was $0.002; that information was given to him by Gibson's counsel in the question asked at the portion of transcript Gibson cited. In fact, Gibson's counsel essentially did all the testifying during its direct examination of Bystrom, who merely added that the attorney's testimony "sound[ed] right." *See, e.g.*, 8/2/19 Tr. 1570:20 - 1571:5.

70. Disputed. Gibson did not cause GISF to pay the market price for Hull's personal TRX shares and any hypothetical question asked of Mason McKnight IV to the contrary is irrelevant. Moreover, whether Mr. McKnight was offended by the conduct during the hearing in 2019, the fact remains that Gibson had a duty to disclose the HBT and financial conflicts of interest he created *before* carrying out the HBT in October 2011 – but Gibson never did so. Div. Findings ¶ 145.

71. Disputed in part. Gibson mischaracterizes Dr. Gibbons' testimony. Dr. Gibbons' testified: "So they're negotiating a price that *they're saying* is at or near the market." 7/31/19 Tr. 884:11-14 (emphasis added). In response to the Court's question, Dr. Gibbons repeated what Respondent's counsel had said; he did not testify that GISF's TRX shares were sold on November 8 and 9, 2011, at the market price. Whether the shares were sold at the market price is a question of fact, not opinion.

72. Undisputed.

73. Disputed. Bystrom's report and testimony on this point is devoid of any supporting legal or industry authority and, as he admitted, reflects his "amateurism." 8/2/19 Tr. 1599:20-1600:1. The Division has cited references supporting its position that the puts represented a short bet against or short position vis-à-vis TRX. Div. Findings at ¶ 165; Div. Ex. 185; Div. Ex. 187 at 118:4-119:20. Most importantly, Bystrom's opinion directly contradicts Gibson's own testimony

that the purchase of the puts in his and Marzullo's personal accounts constituted a "short bet" against TRX. Div. Findings at ¶ 165.

74. Disputed. Bystrom's testimony completely ignores the fiduciary duties owed by investment advisers like Gibson is therefore unreliable and irrelevant. The issue in this case is not what put options can be used for in managing a portfolio, but whether Gibson's use of put options to protect himself, his girlfriend, and his father violated the fiduciary duties he owed as an investment adviser to GISF. Dr. Gibbons' personal trading is completely irrelevant in this case.

75. Disputed / Impermissible Argument. See paragraph 74 above.

76. Disputed in part / Impermissible Argument. The Division disputes that the Marzullos are treated as one economic unit; only Giovanni Marzullo was invested in GISF and only Francesca Marzullo held the relevant Schwab account. Div. Ex. 87; Div. Findings at ¶ 118.

77. Disputed. Bystrom's testimony completely ignores the fiduciary duties owed by investment advisers like Gibson is therefore unreliable and irrelevant. The issue in this case is not what put options can be used for in managing a portfolio, but whether Gibson's use of put options to protect himself, his girlfriend, and his father violated the fiduciary duties he owed as an investment adviser to GISF. Bystrom confirms that Gibson bought the puts to protect himself, but says nothing about whether this was lawful conduct for an investment adviser like Gibson.

78. Disputed in part. The Division and all the witnesses agree that Gibson bought puts to protect himself, but the witnesses other than Dr. Gibbons did not, and could not, testify as to whether that was permissible for an investment adviser. Dr. Gibbons' testimony was unequivocal that, in the industry, Gibson's conduct in this regard is considered an egregious violation of his fiduciary duties. Gibson grossly mischaracterizes Dr. Taveras's testimony regarding his purchase of puts in Marzullo's account; she did not offer testimony confirming that Gibson bought puts in

Francesca Marzullo's account to protect Giovanni Marzullo's GISF investment, but rather responded to a question in which Gibson's counsel asked her to "assume" that fact. 7/31/19 Tr. 1065:19 – 1066:10 ("Q: So *assume* it's 400,000 shares plus or minus that they have long exposure to, *the Marzullos, through* the interest in the fund." (emphasis added)) She made clear, as well, that her answer was premised on that assumption. *Id.* ("And I guess *I take your representation* that they owned shares through GISF so they were long for 100,000 shares so it's less than 50 percent." (emphasis added)). Moreover, Gibson's statements regarding what the testimony "appeared" to be, and whether views "appeared" to be the same, are not facts.

79. Disputed in part. The Division agrees that Gibson began buying puts after being asked to sign an updated promissory note for Hull and believes that it illustrates one of Gibson's many undisclosed conflicts of interest. As explained in paragraph 76 above, the Marzullos may not be treated as one economic unit. The put options that John Gibson purchased on his son's advice were, in effect, a short position in TRX for the reasons explained in paragraph 73 above.

80. Disputed. This case is not about hypothetical situations that did not occur; it concerns Gibson's actual conduct. These contentions directly contradict Gibson's sworn testimony. Gibson testified that buying the puts reduced his alignment of interest with Hull and mitigated his losses in ways that he did not offer to the other investors. In fact, he did not even disclose his conduct to GISF or its investors. Div. Findings at ¶¶ 181, 183. Gibson also admitted that selling a large block of stock was likely to depress the price of that stock and that he thought GISF's sale of stock on November 10 did in fact cause the stock price to drop. Div. Findings at ¶115. TRX's stock price in March 2012 is irrelevant to this case.

81. Disputed. See paragraph 80 above.

82. Dispute / Impermissible Argument. Gibson's erroneous description of the Division's "position" are not facts. Bystrom is not an investment adviser and for the reasons stated throughout this response, his testimony is therefore baseless and irrelevant. Contrary to his testimony, GISF's investors were "impacted" when the investment adviser to GISF breached his fiduciary duties and secretly protected himself and those close to him – including a select few of GISF's investors – while the Fund suffered massive losses as a result of Gibson's poor financial advice.

83. Disputed / Impermissible Argument. Hull's testimony on these topics are not facts, but rather irrelevant opinions offered by a fact witness with no basis to offer such opinions. This entire paragraph is nothing more than argument shoddily disguised as a "fact." Moreover, even Hull's opinion testimony is contradicted by his earlier email communications with Mr. McKnight. Div. Ex. 204 ("I agree with SEC's front-running allegation or assertion against Christopher, and I don't think what Christopher did in that regard was right.")

84. Disputed in part. Gibson's contention in this paragraph contradicts his prior testimony. Gibson previously testified that the meeting with Platinum happened "the day or two days before" the trade took place on November 10, 2011, not the evening before. Div. Ex. 187 at 109:21-110:4.

85. Disputed. Gibson previously testified that the decision to exit TRX was made, with Hull, on the weekend of September 24-25, 2011. Div. Findings at ¶¶110-111.

86. Disputed. Gibson's self-serving testimony about his understanding of what would happen in the market is contradicted by contemporaneous evidence. On November 10, Gibson wrote to his broker stating "we are going to potentially tank this [TRX] stock." Div. Ex. 105 at 1.

Gibson also previously testified that he knew liquidating GISF's large position was likely to depress TRX's share price. Div. Ex. 187 at 108:12-109:10; Div. Findings at ¶¶169, 171.

87. Disputed. See paragraph 86 above.

88. Disputed in part. Hypotheticals about what *might* have happened in March 2012 if Gibson had not sold GISF's remaining 4.9 million shares on November 10 are irrelevant; this case concerns Gibson's actual conduct in the fall of 2011.

89. Disputed / Impermissible Argument. Gibson's self-serving denial that he was breaching fiduciary duties is not a proposed finding of fact, but it does reinforce the Division's contention that Gibson has never accepted responsibility for any of his misconduct.

90. Disputed / Impermissible Argument. The HBT unquestionably impacted GISF and its investors, as the Fund lost $1.58 per share (or $1,074,902) as a result of that transaction. Div. Findings ¶ 148. In addition, whether Gibson's front running impacted the value of investors' holdings is irrelevant, and does not excuse Gibson's failure to fully and fairly disclose his illicit trades and the financial conflicts of interest he created through those trades.

91. Disputed / Impermissible Argument. Mr. Cates was a fact witness and is not permitted to offer opinion testimony about whether the Marzullos can be treated as a unit. As set forth in the Division's Reply, there is no legitimate basis to support Gibson's claimed insolvency and/or inability to pay a penalty. Div. Reply at 20-21.

92. Disputed in part / Impermissible Argument. See paragraphs 90 and 91 above.

II. Division's Responses To Gibson's Proposed Conclusions of Law

93. Undisputed.

94. Undisputed.

95. Undisputed.

96. Undisputed.

97. Undisputed.

98. Undisputed.

99. Undisputed.

100. Undisputed.

101. Undisputed.

102. Undisputed.

103. Undisputed.

104. Undisputed.

105. Undisputed.

106. Undisputed.

107. Disputed in part / Impermissible Argument. Section 3.02 of the Operating Agreement does not establish that Geier Capital engaged Geier Group to serve as the Investment Manager for the Fund in January 2010, but rather only makes clear that Geier Capital had the power to take that action. Div. Ex. 22. Geier Group may have been an investment adviser to GISF, but it was not the only such adviser; at all times relevant to this proceeding Chris Gibson served as an investment adviser to GISF.

108. Disputed / Impermissible Argument. GISF's organizing documents, including the CPOM and its *potential* conflicts of interest disclosures, did not make full and fair disclosure of the many *actual* conflicts of interest that Gibson created through is financial dealings with Hull and the personal trading he engaged in to protect himself and those close to him from the financial harm caused by the poor investment advice he gave to GISF. Moreover, none of the disclosures in GISF's organizing documents modified or waived – nor could they have waived – the fiduciary

duties that Gibson owed to his advisory clients, including the Fund. *See* Div. Reply at 3-5; Div. Proposed Conclusions of Law ("CoL") at ¶¶ 23-25.

109. Disputed / Impermissible Argument. For the reasons explained in paragraph 108 above, GISF's operating agreement did not adequately disclose Gibson's many, *actual* conflicts of interest or modify or waive the fiduciary duties he owed to his advisory client, GISF.

110. Disputed / Impermissible Argument. For the same reasons described in paragraphs108-109 above, the GISF organizing document provisions quoted by Gibson did not fully or fairly disclose the *actual* conflicts of interest Gibson created through his misconduct. Moreover, the members of the Fund did not agree, and could not agree, to waive the fiduciary duties Gibson owed to the Fund as its investment adviser. Div. CoL at ¶¶23-25.

111. Disputed / Impermissible Argument. See paragraphs 108-110 above.

112. Disputed / Impermissible Argument. Contrary to Gibson's claim, Gibson can, and should be, found liable for violating both the Advisers and Exchange Acts, as a result of his multiple instances of front running. *See* Div. Reply at 5-8, 12-14. As an investment adviser, Gibson had a duty to fully and fairly disclose the *actual* conflicts of interest he created and his generic disclosure of *potential* conflicts of interest made many months before the misconduct at issue in this proceeding are inadequate as a matter of law. Div. CoL ¶¶ 23-25. Moreover, that GISF's organizing documents list categories of transactions that are often lawful does not mean that those transactions are *always* lawful, particularly when a fiduciary – like Gibson – is involved. *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 11-12 (1971) ("The Congress made clear that 'disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web' along with manipulation, investor's ignorance, and the like. Since practices 'constantly vary and where practices legitimate for some purposes may be

turned to illegitimate and fraudulent means, broad discretionary powers' in the regulatory agency 'have been found practically essential.'" (quoting H.R. Rep. No 1383, 73d Cong., 2d Sess., 6.)).

113. Disputed / Impermissible Argument. GISF's organizing documents did not waive or modify the fiduciary duties that Gibson owed to GISF as its investment adviser and, therefore, he is liable for the multiple breaches of those duties he made in connection with the HBT. *See* Div. Reply at 8-12. Similarly, as explained in paragraph 112 above, the mere fact that GISF's organizing documents generically listed categories of transactions does not mean that those transactions were necessarily lawful when a fiduciary like Gibson was involved in them.

114. Disputed in part. Although neither the Adviser Act nor the Exchange Act contain a definition of "front running," that conduct is specifically prohibited by the broad antifraud provisions of both Acts. *See, e.g. SEC v. Capital Gains*, 375 U.S. 180, 195 (1963) ("Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes."); *see also In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 1961 SEC LEXIS 385 at *10 (Nov. 8, 1961) ("These anti-fraud provisions are not intended as a specification of particular acts or practices which constitute fraud, but rather are designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others."). *See also*, Div. CoL ¶¶ 26-27.

115. Disputed. Gibson's citation to the Division of Market Regulation's letter is misleading because it: (i) omits key portions of the memorandum that actually support the Division's allegations; and (ii) does not take into account the case law and industry authority governing and analyzing such trading that has been issued in the 31 years since the memorandum was written – all of which forms the basis of the Division's proposed definition of front running.

First, Gibson replaces with ellipses two sentences that demonstrate the seriousness of the misconduct and that the memorandum expressly considered the very misconduct at issue here to constitute front running. His first ellipsis omits the following: "The Commission, since the development of standardized individual equity options, has viewed frontrunning [sic] as a serious trading abuse that can adversely affect the integrity of the markets." Memorandum Prepared by the Division of Market Regulation in Response to the Questions Contained in the Letter of March 4, 1988 from the Honorable John D. Dingell and the Honorable Edward J. Markey Regarding Short Selling and Front Running, at 11 (Mar. 13, 1988) (available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1988_0513_RuderShort.pdf) (last visited Oct. 1, 2019). The second ellipsis omits the memorandum's example of front running that was essentially identical to Gibson's misconduct at issue here: "For example, instances of a broker-dealer trading in derivative markets to take advantage of the market impact of a customer's stock order might be addressed as a form of misappropriation of material non-public market information in breach of a fiduciary obligation of trust and confidence . . . ." *Id.* at 12. As explained by the Division, current case law and industry treatises make clear that 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. Div. CoL ¶ 26 (citing *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").

116. Disputed. In the portion of *D'Alessio v. SEC* quoted by Gibson, the Second Circuit was describing New York Stock Exchange Rule 92 ("NYSE Rule 92"), a stock exchange rule applicable to brokers, not investment advisers, that no longer exits. 380 F.3d 112, 114 (2d Cir. 204). On February 11, 2011, the Commission approved FINRA Rule 5320, which consolidated NYSE Rule 92 and the National Associate of Securities Dealers, Inc.'s (NASD) Manning Rule (NASD IM-2110-2). FINRA Notice 11-24, 2011 WL 1884771, *1 (May 12, 2011). The Division submits that the definition of front running proposed by it at Div. CoL ¶ 26, which cites existing law and is applicable to investment advisers, is the definition that should be adopted and applied in this proceeding.

117. Disputed in part. Gibson does not provide a citation to any legal or industry authority to support his definition of front running. The Division disputes any definition of front running that is inconsistent with or contradictory to its proposed definition. *See* Div. CoL ¶ 26.

118. Disputed / Impermissible Argument. As set forth in its Reply, the Division disputes Gibson's argument that he did not front run GISF on September 26, 2011. *See* Div. Br. at Section I.B (demonstrating, *inter alia*, that: Gibson's definition of front running is overly restrictive and unworkable; Gibson had sufficient authority and control to consummate GISF's September 27 sale of 3.7 million TRX shares; and regardless, Gibson and Hull made the decision to exit GISF's TRX position 1-2 days before Gibson's front running).

119. Disputed / Impermissible Argument. Any market-participant's knowledge of potential GISF transactions involving TRX prior to September 24-25, 2011 (when Gibson and Hull decided to exit GISF's TRX position) are irrelevant. Although market participants may have been aware that GISF was exploring potential sales of TRX, they – unlike Gibson – did not control GISF's trading or possess material, non-public information about the imminent trade, *i.e.*, the

timing and size of GISF's September 27, 2011 trade. Gibson used that control and the material, non-public information to sell his, Marzullo's, and Geier Group's TRX shares on September 26, 2011, ahead of the Fund's trade, to avoid losses.

120. Disputed / Impermissible Argument. That GISF sold 78,000 shares on September 23 for a per-share price that was approximately the same as the price Gibson obtained for himself, Marzullo, and Geier Group on September 26, 2011, is irrelevant. Gibson's contention that he was "unaware of when or if the Fund would again sell TRX securities" is contradicted by the very email on which he relies so heavily – his September 25, 2011 email to Sands, Resp. Ex. 62, which demonstrates Gibson's foreknowledge of the imminent block sale of GISF's TRX shares and the concrete steps Gibson took to carry out that sale.

121. Disputed / Impermissible Argument. Gibson's breaches of his fiduciary duties are material as a matter of law. Div. CoL ¶ 15 (citing *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.")).

122. Disputed / Impermissible Argument. Gibson relies on an incorrect, overly-restrictive definition of front running. Div. Reply at 5-7. Nor was Gibson "required" to obtain Mr. Hull's approval before he traded. *Id.*

123. Disputed / Impermissible Argument. See paragraph 119 above.

124. Disputed / Impermissible Argument. That Gibson and his father had long interest in TRX through their GISF investment is irrelevant to this case, as is quibbling over how to describe the puts he and his father purchased. *See* Div. Reply at 28-30. The Division also disputes that Marzullo and her father are one economic unit or constitute a single client. *See supra* at ¶¶ 44-45, 76, and 78-79.

125. Disputed / Impermissible Argument. The purchase of the puts, indeed, did create a material conflict of interest. Div. CoL ¶ 15 (citing *Vernazza*, 327 F.3d at 859). Each of the purchasers, other than Marzullo, mitigated the losses they incurred because of the poor investment advice Gibson gave the Fund. 8/2/19 Tr. 1632:25-1633:14 (Bystrom testimony that with protective puts, "[y]ou mitigate your loss below the strike price of the option"); *see also*, Div. Findings ¶¶ 163-165, 173, 175. As an investment adviser that owed fiduciary duties to the Fund, Gibson had a duty to disclose his trading in TRX puts, but never did so. Despite the fact that, in his September 23 email, Gibson told GISF's investors that he planned to maintain his and the Fund's investments in GISF at "current levels," Gibson never corrected that disclosure after he made the decision two days later to liquidate the Fund's TRX holdings. Div. Findings ¶ 181. Accordingly, the other members of the Fund never knew that the Fund's investment adviser was buying puts in advance of dumping the Fund's massive TRX holdings, which were two critically important pieces of information that they needed in order to, as Gibson argues, "deem such securities to be appropriate."

126. Disputed in part. Although the Division agrees that an investment adviser that favors one client over another violates the antifraud provisions of the Advisers Act, the Commission previously vacated its *J.S. Oliver* opinion. *In re: Pending Administrative Proceedings*, Securities Act of 1933 Release No. 10536, 2018 WL 4003609, *1-*3 (Aug. 22, 2018). The Division also disputes any suggestion or inference by Gibson that the HBT did not prevent him from providing disinterested investment advice. *See Capital Gains*, 375 U.S. at 191 (advisers have a duty to disclose to clients "all conflicts of interest which might incline an investment adviser – consciously or unconsciously – to render advice which was not disinterested").

127. Disputed / Impermissible Argument. For the same reasons set forth in paragraphs 108-111 above, the GISF organizing-document provisions quoted in Gibson PFF ¶ 127 did not waive, eliminate, or modify Gibson's fiduciary duties to GISF. *See also*, Div. CoL ¶¶ 25, 28. Nor did those provisions disclose Gibson's actual conflicts of interest with respect to Hull and the HBT. *See* Div. Findings ¶¶ 136-151.

128. Disputed / Impermissible Argument. See paragraph 127 above. *See also*, Div. Findings ¶¶ 139-144.

129. Disputed / Impermissible Argument. See paragraphs 127-128 above.

130. Disputed / Impermissible Argument. Gibson cites no evidence in the record to support his impermissible arguments that the purpose of the HBT was to "avoid adverse consequences" that might develop from Hull selling in the market at that time as the Fund and that "Hull entered into the transaction in order to accommodate the Fund." To the extent the HBT benefitted anyone, it was only Gibson and Hull – Gibson's other advisory client who was paying his salary and to whom he owed a significant amount of money. Specifically, as Gibson's own expert testified, any interest that Gibson and/or Hull had in combining Hull's and GISF's TRX shares was not a stated or implied objective of the Fund and GISF did not need to purchase Hull's TRX shares to enter into a block transaction to sell its shares. 8/2/19 Tr. 1621:1-1622:4. This fact was confirmed by Dr. Gibbons' testimony. 7/31/19 Tr. 959:16-960:9 ("They could have entered one block trade and sold all the shares at one time and then delivered . . . from any number of accounts instead of one block trade with everybody participating in the trade."). Gibson knew from his dealings with Sands in September and with Luis Sequeira in October that Hull's shares did not need to be physically consolidated with GISF's in one account to facilitate their collective sale because Gibson included both Hull's and GISF's shares in negotiations with both men while

the shares were held in separate accounts. Resp. Ex. 92; 8/1/19 Tr. 1429:19-1430:1. Additionally, Gibson's speculation that Hull could have sold his shares in the market, instead of the Fund, is not based on what actually happened and therefore is irrelevant. In addition, that Hull benefitted *only* by $500,000 does not negate that he benefitted. Nor does it excuse Gibson's failure to disclose to GISF or its investors the many financial conflicts of interest raised by the HBT, including that Gibson owed Hull over $600,000, received an annual salary from Hull's company, and used $2.45 million of GISF's funds to enable another advisory client to exit his personal TRX shares. Div. Findings ¶¶ 36, 66, 136, 149. Lastly, the evidentiary record also shows the HBT was in Gibson's interest as well. *See* Div. Ex. 94 (Gibson email to Hull: combining shares "might help me for regulatory and other reasons").

131. Disputed / Impermissible Argument. The HBT did in fact favor Hull to the Fund's detriment. For one, as Gibson conceded at the hearing, the Fund did not receive a block discount in its purchase of Hull's personal TRX shares, 7/29/19 Tr. 262:3-5, even though Gibson knew block discounts were typically required to sell large blocks of stock in the upstairs market. Resp. Exs. 177, 228 (Bystrom Report at 5). Accordingly, Gibson did not obtain the "current market price" for an upstairs market transaction. As for a market transaction, Gibson did not obtain the "current market price" because he could not have obtained $3.60 (the HBT contract price) for all of Hull's shares – which he knew based on his market sale of over 360,000 TRX shares on October 17. *See* Div. Exs. 226, 227 (showing TRX share price dropped $.19 during approximately two minutes it took Gibson to sell the shares). Lastly, Gibson conceded at the hearing that GISF had to pay a commission (it would otherwise not have paid) to sell Hull's shares along with GISF's remaining TRX shares on November 10, 2011. 8/1/19 Tr. 1440:10-1441:15. As a result of the HBT, GISF lost approximately $1.58 per share, or $1,074,902. Div. Findings ¶ 148. It was the

Fund that was harmed as a result of Gibson's misconduct. That Gibson, his family, and Hull made up approximately 90% of the Fund does not excuse or diminish that fact.

132. Disputed / Impermissible Argument. Prior to the HBT, the Fund had never paid a sales commission for the sale of one of its investor's personal shares, Div. Findings ¶ 144, and therefore the commission paid by GISF to sell Hull's shares on November 10 was "extraordinary." *See* Div. Post-Hearing Br. at 22, n. 8 (quoting Merriam-Webster definition of "extraordinary" as "going beyond what is usual, regular, or customary"). Gibson did not disclose to GISF or its 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.

133. Undisputed.

134. Undisputed.

135. Disputed in part / Impermissible Argument. Through his misconduct, Gibson violated Adviser Act Section 206(4) and Rule 206(4)-8 because, by failing to disclose his myriad financial conflicts of interest, the statements he made to GISF's investors in the Fund's organizing documents, including the offering memorandum's "Potential Conflicts of Interest" provision and the operating agreement's "Management of the Company" provision, were rendered materially misleading and fraudulent. In addition, Gibson's statements to investors in the September 23 email that he and GISF would maintain their investments in TRX "at current levels" was rendered materially false and misleading when he subsequently changed made the decision to liquidate both his own and GISF's TRX holdings and, with respect to the latter, purchased put options to protect himself and benefit those close to him before dumping GISF's remaining 4.9 million TRX shares. *See* Div. Reply at 15-18. Nevertheless, the dissolution of Geier Group and Geier Capital, two entities repeatedly referenced in GISF's organizing documents, was material.

136. Disputed / Impermissible Argument. See response to paragraph 135, above. Moreover, Gibson offers no basis for his contention that any such claim would be barred by the statute of limitations.

137. Disputed in part / Impermissible Argument. As explained above in paragraph 135, the Division's Section 206(4) and Rule 206(4)-8 claims involve situations where Gibson chose to make statements to GISF's investors and therefore had a duty to correct those statements when his misconduct rendered them false and misleading. *See* Div. Post-Hearing Br. at 30-34. Moreover, although Section 206(4) may not itself create a fiduciary duty, Gibson's status as an investment adviser is relevant in assessing whether his conduct was negligent because it informs the standard of ordinary care with which a person in Gibson's position should have acted. Div. Post-Hearing Br. at 20, 26, 33-34 (demonstrating that Gibson failed to exercise the care of a reasonably prudent investment adviser and thus acted at least negligently with respect to his front running and in carrying out the HBT).

138. Disputed / Impermissible Argument. See paragraphs 108-111 and 127 above. Nowhere in GISF's organizing documents did Gibson disclose his actual financial conflicts of interest or the actual front running or favoritism (to another advisory client) he would engage in approximately 18 months later.

139. Disputed / Impermissible Argument. See paragraphs 112 and 114-125 above, demonstrating that Gibson engaged in front running and was required to disclose the financial conflicts of interest he created through that front running.

140. Disputed / Impermissible Argument. See paragraphs 126-132 above, demonstrating that GISF's organizing documents did not disclose or authorize the HBT and that

Gibson was required to but did not disclose the actual financial conflicts of interest raised by and at issue with the HBT.

141. Disputed in part. Respondent's descriptions of what is required to demonstrate scienter and negligence are accurate but incomplete. *See* Div. CoL at ¶¶19-22, 30, 41.

142. Disputed / Impermissible Argument. As set forth extensively in the Division's Post-Hearing Brief Gibson acted at least recklessly (and thus with scienter) in connection with the September Front Running (Div. Post-Hearing Br. at 17-20), the HBT (*id* at 20-26), and the October/November Front Running (*id* at 27-28). Likewise, the Division has established that Gibson also acted negligently in connection with his illicit front running the HBT. *Id.* at 20, 26, 28, 33-34. Additionally, Gibson's argument that he did not act with scienter or negligently completely ignores his fiduciary duties as an investment adviser, in particular his duty to fully and fairly disclose the actual financial conflicts of interest he created through his front running and the HBT. His failure to do so was an extreme departure from the ordinary standard of care he owed to GISF, and therefore he acted (at least) recklessly and negligently. *See* Div. CoL ¶¶ 19-20.

143. Disputed / Improper Argument. See paragraphs 112, 114-132, and 139-40 above.

144. Undisputed.

145. Disputed / Impermissible Argument. See paragraphs 112, 114-132, 139-140, and 143 above.

146. Disputed / Impermissible Argument. There have been no allegations of misconduct by Respondent since 2011, because he has not worked in the industry and therefore has not had an opportunity to engage in similar misconduct. 7/31/19 Tr. 1146:3-13 (John Gibson testifying that his son is "not in the securities business").

147. Disputed / Impermissible Argument. See paragraphs 142 and 143 above. In addition, as set forth in its Post-Hearing Brief, the Division need not prove harm for Gibson to be found liable for his violations of the Advisers and Exchange Acts. Div. Br. at 34 (citing *Graham v. SEC*, 222 F.3d 994, 1001-02 (D.C. Cir. 2000)).

148. Disputed / Impermissible Argument. There is no evidence in the record that Gibson had recognized his conduct was wrong. Gibson claims he "has taken extraordinary steps" but does not identify what those steps are. Any claim by Gibson that his assurances against future misconduct are sincere is undermined by his complete lack of credibility and willingness to renounce his prior sworn testimony to serve his own interests. *See* Div. Post-Hearing Br. at 36-37.

149. Disputed / Impermissible Argument. As demonstrated in its Post-Hearing Brief and Reply, the remedies sought by the Division for Gibson's egregious violations of the Advisers and Exchange Acts are appropriate and in the public interest. *See* Div. Post-Hearing Br. at 37-44; Div. Reply at 18-21. Lastly, there is no legitimate basis to support Gibson's claimed inability to pay a penalty. Div. Reply at 20-21.

150. Disputed / Impermissible Argument. Gibson was at all relevant times both an investment adviser and a person associated with an investment adviser. *See* Div. Post-Hearing Br. at 10-12; Div. Reply at 19.

October 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October 2019:

(i) An original and three copies of the foregoing Division of Enforcement's Responses to Respondent's Proposed Findings of Fact and Conclusions of Law 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 Responses to Respondent's Proposed Findings of Fact and Conclusions of Law was sent to Stephen J. Crimmins, counsel for Respondent, via email to Stephen.Crimmins@mmlawus.com; and

(iii) a copy of the foregoing Division of Enforcement's Responses to Respondent's Proposed Findings of Fact and Conclusions of Law was provided to James E. Grimes, Administrative Law Judge, via email to ALJ@sec.gov.

/s/ Gregory R. Bockin
Gregory R. Bockin
Counsel for Division of Enforcement