UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON

Judge James E. Grimes

DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF

October 4, 2019

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INTRODUCTION

The Division of Enforcement ("Division") hereby replies Respondent Christopher M. Gibson's ("Gibson" or "Respondent") September 13, 2019 post-hearing brief (hereinafter "Gibson's Post-Hearing Brief" cited as "Resp. Br.").

The Division demonstrated in its post-hearing brief (hereinafter "Division's Post-Hearing Brief" cited as "Div. Br."), based on the evidentiary record adduced at the hearing in this matter, that:

- Gibson was an investment adviser to Geier International Strategies Fund ("GISF" or the "Fund") and thus owed fiduciary duties to GISF under Section 206 of the Investment Advisers Act of 1940 ("Advisers Act");
- Such fiduciary duties were not waived, modified, or satisfied by GISF's offering memorandum or operating agreement (collectively, "GISF's offering documents");
- Gibson violated his fiduciary duties and engaged in fraud by front running GISF on September 26, 2011 (the "September Front Running") and again via the purchase of $4 Tanzanian Royalty Exploration Corp. ("TRX") put option contracts ("puts"), for himself and his then-girlfriend, Francesca Marzullo ("Marzullo") (and advising his father to do the same) in late October and early November 2011 (the "October/November Front Running"), because those transactions created financial conflicts of interest that Gibson never disclosed to GISF or its investors;
- Gibson violated his fiduciary duties and engaged in fraud by causing GISF to purchase James Hull's personal TRX shares (the "Hull Buyout Transaction" or "HBT") because the transaction – consummated at a time when Hull was paying Gibson's salary and Gibson owed Hull over $600,000 – created financial conflicts of interest that Gibson never disclosed to GISF or its investors; and
- Gibson's front running misconduct yielded illicit gains (including losses avoided) of over $404,500, and the HBT benefited Hull by at least $216,000.

In rebuttal, Gibson's Post-Hearing Brief relies almost exclusively on his own, self-serving testimony. Much of that testimony is contradicted by Gibson's prior sworn statements – *e.g.*, that his and Marzullo's puts constituted a "short bet" against TRX. *See* Division's Proposed Findings and Conclusions of Law ("Div. Findings") ¶165. Similarly, Gibson's Post-Hearing Brief relies heavily on Hull's hearing testimony, which is contradicted by Hull's own prior

investigative testimony. Additionally, Gibson's Post-Hearing Brief extensively cites the testimony of Daniel Bystrom – Gibson's trading/portfolio management expert, who is not an investment adviser, did not opine on Gibson's fiduciary duties to GISF, and acknowledged that his expert report (containing zero citations to any evidentiary or industry authority) reflected his "amateurism." 8/2/19 Tr. 1594:21-1595:7, 1599:23-1600:1.

Ultimately, Gibson's Post-Hearing Brief does little more than make conclusory arguments that the Division failed to meet its burden, based on an impossibly restrictive definition of front running and without any meaningful citation to legal precedent. Simultaneously, Gibson continues his strident refusal to accept responsibility for his actions, deflecting responsibility to Hull; disparages the *other* 10% of GISF's investors that did not include himself, his family, or Hull; and portrays himself as the unfortunate victim of circumstances rather than what he is – an investment adviser who knowingly disregarded his fiduciary duties to benefit himself and those close to him.

THE FACTUAL RECORD

The facts established at the hearing are set out in the Division's Proposed Findings of Fact and Conclusions of Law. With this reply, the Division is also filing its responses to Gibson's proposed findings and conclusions ("Gibson's PFFs" cited as "Resp. PFFs"). The Division objects to, and moves to strike, those of Gibson's PFFs containing impermissible argument. Post-Hearing Order dated August 5, 2019, at 2.

ARGUMENT

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

A. GISF's Offering Documents Did Not Satisfy Gibson's Fiduciary Duties.

As set forth in the Division's Post-Hearing Brief: (1) as an investment adviser, Gibson owed fiduciary duties to GISF pursuant to Section 206 of the Advisers Act, Div. Br. at 12-13; (2) Gibson's fiduciary duties were not modified or eliminated by GISF's offering documents, *id* at 13-15; and (3) GISF's offering documents did not satisfy Gibson's fiduciary disclosure obligations, *id* at 15. Gibson's Post-Hearing Brief effectively takes issue only with the third prong.

Gibson does not dispute that, under federal law, an investment adviser owes his clients fiduciary duties, including the duties of care and loyalty, as well as a duty not to place his "own interests ahead of [his] clients'." Resp. Br. at 18 (citing SEC Release No. IA-5248, 2019 WL 3779889 (June 5, 2019) ("IA Release"); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963)). Likewise, Gibson concedes that GISF's offering documents did not waive or modify the fiduciary duties he owed to GISF. Resp. Br. at 20 (GISF offering documents "did not relieve fiduciary duties generally, waive all conflicts, or waive specific obligations under the Act"); *see also*, 8/1/19 Tr. 1436:1-7 (Gibson testifying that GISF's offering documents "delineated how I was to maintain my duty of loyalty, my duty of care and my duty of faith and my fiduciary responsibility"). Nor could Gibson argue otherwise, given that (i) that federal fiduciary duties may not be waived pursuant to Section 215(a) of the Advisers Act (15 U.S.C. § 80b-15(a); IA Release at *4), and (ii) Gibson proffered no evidence at the hearing indicating that (and if so, how) any fiduciary duties were modified by GISF's offering documents. In fact,

[1] Because Gibson's Post-Hearing Brief contains no discussion of his Exchange Act violations, Div. Br. at 34-36, he has constructively waived any defenses to those charges.

Gibson has offered no evidence demonstrating that GISF's offering documents shaped his adviser-client relationship with GISF in in any way that could have permissibly modified the fiduciary duties he owed GISF (*e.g.* where agreement expressly provides that adviser will not have custody of client funds, no custody-related fiduciary duty would apply; where agreement expressly provides that adviser will not trade, no best-execution duty would apply). 7/31/19 Tr. 942:1-943:2 (Dr. Gibbons' testimony).

Instead, Gibson argues that (i) the vague, general disclosures about *potential* conflicts contained in GISF's offering documents adequately disclosed the actual conflicts of interest *he created* 18 months later; and (ii) these disclosures evidence GISF's consent to his future misconduct. Resp. Br. at 17-20. That argument flies in the face of *Capital Gains*, 375 U.S. at 191 (requiring disclosure of actual conflicts), and is contradicted by the very IA Release on which Gibson primarily relies to support it. The IA Release expressly states that "[i]n order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent." IA Release at *8. Nowhere in GISF's offering documents did Gibson provide such specificity about the relevant conflicts in this case – *i.e.*, that he planned to trade ahead of GISF to benefit himself and those close to him – such that GISF and its investors could understand the conflict and provide informed consent. Nor did the sections of GISF's offering documents cited by Gibson contain any disclosure regarding the key facts that demonstrate the indisputable conflicts of interest inherent in the HBT, including that Hull was paying Gibson's salary and that Gibson owed money to Hull on a promissory note he used to leverage his investment in GISF.

Additionally, the IA Release expressly states that "disclosure that an adviser 'may' have a particular conflict" – like the "Potential Conflicts of Interest" provision in GISF's offering memorandum (Div. Ex. 24 at 19) – "without more, is not adequate," IA Release at *9, and "the use of 'may' would be inappropriate if it simply precedes a list of all possible or potential conflicts regardless of likelihood and obfuscates actual conflicts to the point that a client cannot provide informed consent" *id.* Accordingly, Gibson's argument that disclosing that he "*could* provide investment advice to others, maintain personal accounts, and transact in the same or different securities as GISF", Resp. Br. at 20 (emphasis added), effectively concedes that he did not fully or fairly disclose the actual conflicts of interest he created and that are described above. As an investment adviser, Gibson was required to fully and fairly disclose the actual conflicts when they arose in the Fall of 2011 – 18 months after he disseminated GISF's offering documents to investors – and through his failure to do so he violated both the fiduciary duties he owed GISF and Sections 206(1) and (2) of the Advisers Act.

B. Through, and By Failing To Disclose, the September Front Running, Gibson Violated His Fiduciary Duties and Engaged in Fraud.

The Division's Post-Hearing Brief explains that front running involves an investment adviser's use, with expectation of personal benefit, of a client's material, non-public information concerning an anticipated transaction likely to impact the value of a security. Div. Br. at 16 (citing *SEC v. Yang*, 999 F. Supp. 2d 1007, 1016 (N.D. Ill. 2013) and industry authority). Gibson, on the other hand, argues that an adviser can only front run a client's trade when he has, in hand, a firm order locking in place all material terms. Resp. Br. at 20-21. Gibson's expert testified – without citation to any authority – that, despite Gibson's ongoing efforts to sell GISF's TRX position, he did not engage in front running on September 26, 2011 when he sold his, Marzullo's, and Geier Group's TRX shares, because he did not then have a "firm order" for

GISF's TRX shares specifying a "price range and the exact number of shares." 8/2/19 Tr. 1609:20-1610:6. If this definition of front running were adopted, investment advisers with foreknowledge of, and the power to control, their clients' trading – like Gibson here – could trade ahead of their clients for personal gain, with impunity, simply by waiting to agree to the last material term of the client's trade until after their personal trading was completed.

Gibson's overly-restrictive definition of front running is acutely unworkable in situations where an adviser sells his client's securities through market transactions (as opposed to in the upstairs market), as Gibson did when he liquidated GISF's remaining 4.9 million TRX shares on November 10. In those situations, despite knowledge of an upcoming client transaction, the adviser could avoid all liability by completing his personal transactions before entering the client's market order. This clearly cannot be the law. Rather, the essential elements of front running are the adviser's foreknowledge of the client's anticipated trading and his actions to take advantage of that knowledge for personal benefit, Div. Ex. 185 at 21-22, both of which the Division has established with respect to Gibson's September (and October/November) Front Running. After deciding to exit GISF's TRX position, Gibson immediately reached out to Richard Sands at Casimir Capital, to begin the process of doing just that. The next day, while he continued to negotiate GISF's trade but before he had agreed to all the material terms, Gibson sold every single one of the TRX shares he owned personally – as well as the shares in his girlfriend's and Geier Group's accounts. Plain and simple, that is front running.

In addition, Gibson argues repeatedly that he could not have engaged in front running because he did not have the sole authority to consummate GISF's large-block sales of TRX on September 27 and November 10, 2011. That, however, is simply not what any reasonable investor would know from reading GISF's offering documents, which do not mention Hull once

but identify Gibson as the "managing member of the Investment Manager," the "Managing Director of the Managing Member," and as *the* individual upon whom GISF's success is "significantly dependent." Div. Ex. 24 at 1, 17; Div. Findings ¶¶54-55. To combat these unambiguous disclosures in GISF's offering documents, Gibson relies solely on Hull's hearing testimony – *e.g.* Hull's testimony that generally he had "tacit approval authority" for GISF's decision-making. 7/30/19 Tr. 735:7-736:1.[2] Hull's hearing testimony, though, is directly contradicted by his earlier investigative testimony, during which he testified that it "very much would" surprise him to learn that Gibson's counsel had represented to the Division that "[Hull] was the one actually making the decisions for GISF." Div. Ex. 174 at 22:12-16. Hull then testified that, as a large investor, he was "consulted" on decisions, which he described as being told "we're going to buy TRX stock," – but did not include "running and operating this fund, the . . . day-to-day investment decisions or operations." *Id.* at 24:3-24. Most relevant here, however, Hull testified repeatedly that it was Gibson's – not Hull's – decision to sell GISF's TRX holdings. *See id.* at 36:18-23, 73:21-25, 80:21-22, 101:9-10, and 108:13-21. Only *after* Gibson's father encouraged Hull to "tell the truth in a self serving [sic] way" in January 2018, Div. Ex. 198, did Hull change his sworn testimony about Gibson's role managing and making decisions for GISF. Notably, only Hull's prior sworn investigative testimony is consistent with GISF's offering documents; the same cannot be said for his hearing testimony. Still, even if Gibson needed Hull's authorization, the record established that Hull gave it over the weekend of September 24-25, when the two decided to exit GISF's TRX position at good prices. Div. Findings ¶109.

[2] "Tacit" means "implied or indicated . . . but not actually expressed," https://www.merriam-webster.com/dictionary/tacit (last visited Sept. 30, 2019), making clear that the only person imbued with any authority by GISF's offering documents was Gibson. Moreover, Hull had no recollection of ever communicating his tacit authority to any other investors. 7/30/19 Tr. 735:23-736:1.

Tellingly, Gibson offers no credible alternative explanation as to why he sold all of the TRX in his, Marzullo's, and Geier Group's accounts the day before GISF sold 3.7 million TRX shares. He simply makes an irrelevant observation that the price he obtained for the 21,900 TRX shares on September 26 ($4.04/share) happened to be the same price he sold 78,000 of GISF's TRX shares three days earlier on September 23. Resp. Br. at 22. This inconsequential coincidence does not excuse Gibson's front running on September 26. Most importantly, however, it does not take into account the critical intervening event between September 23 and 26 – Gibson's and Hull's decision that weekend to exit GISF's TRX position at good prices. Further, Gibson's lack of disclosure to GISF or its investors is particularly egregious considering that he told them all on September 23 that he and GISF would remain invested in TRX "at their current levels." Div. Ex. 81.

Gibson could have disclosed his personal trading to GISF and its investors in advance, or he could have waited to sell his (and Marzullo's and Geier Group's) TRX shares until after GISF had exited its TRX position. In failing to do either, Gibson violated his fiduciary duties and violated Sections 206(1) and (2) of the Advisers Act.

C. In Carrying Out and Failing To Disclose the HBT, Gibson Violated His Fiduciary Duties and Engaged in Fraud.

The Division's Post-Hearing Brief shows that, through the HBT, Gibson repeatedly failed to disclose conflicts of interest and breached his fiduciary duties. Div. Br. at 20-26. In response, Gibson argues, without justification or any reference to his fiduciary duties, that: (i) combining Hull's TRX shares with GISF's was not contrary to GISF's strategy, Resp. Br. at 25; (ii) GISF paid Hull "current market price;" (iii) GISF did not pay Hull's sales commission, *id* at 24-25; and (iv) his misconduct can be excused because Hull testified that Hull would never do anything to harm his lifelong friends and associates, *id* at 25.

Gibson's argument conspicuously lacks any discussion of his failure to disclose to GISF or its investors the many financial conflicts of interest at issue in that transaction. Specifically, Gibson was at least reckless in failing to disclose that, at the time of the HBT, he: received a [redacted] annual salary from Hull and owed Hull over $600,000; used GISF's funds to purchase Hull's personal TRX shares after the decision had already been made to exit GISF's TRX position; had GISF purchase Hull's personal TRX shares at an above-market price; and allowed Hull to avoid paying a commission – a cost GISF ultimately bore when it sold Hull's shares on November 10, 2011. Div. Br. at 20-26. Indeed, the single, vacated case Gibson cites in his argument concerning the HBT, *J.S. Oliver Capital Management, L.P.*, supports the Division, holding that an adviser's failure to disclose favoring one client to the detriment of another violates the antifraud provisions of the Advisers and Exchange Acts. Init. Dec. Release No. 649, 2014 WL 3834038, *35 (Aug. 5, 2014) ("The failure to disclose the practice of allocating favorable trades to certain accounts to the detriment of other accounts violates the antifraud provisions.").[3]

Gibson concedes he was required to act in the best interests of his client, Resp. Br. at 24, but argues that the HBT was in GISF's best interests because "the combination of [Hull's and GISF's TRX] shares was important to facilitate a sale of a large amount of shares in a negotiated transaction." *Id.* at 25. But, by any metric, the HBT was not in GISF's best interest and, if it benefitted anyone, it was only Gibson and Hull – Gibson's other advisory client who was paying his salary and to whom he owed over $600,000. Gibson's argument about combining shares was also undermined by his own expert. *See* 8/2/19 Tr. 1621:1-1622:4 (Bystrom testimony that consolidating Hull's and GISF's shares was not an objective of GISF; GISF did not need to

[3] The Commission vacated *J.S. Oliver* on August 22, 2018. *In re: Pending Admin. Proceedings*, Securities Act of 1933 Release No. 10536, 2018 WL 4003609.

purchase Hull's shares to enter into a block transaction to sell *its* shares). Dr. Gibbons also testified that Gibson did not need to consolidate Hull's and GISF's TRX shares to sell them all at one time. 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."). Moreover, Gibson *knew* from his dealings with Sands in September and with Luis Sequiera in October that Hull's shares did not need to be physically consolidated with GISF's in one account to facilitate their sale, because Gibson included both sets of shares in negotiations with both men while the shares were held in separate accounts. Resp. Br. at 7, 10; Resp. Ex. 92; 8/1/19 Tr. 1429:19-1430:1.

The HBT indisputably harmed GISF because GISF: (1) paid an above-market price for Hull's TRX shares; and (2) ultimately paid Hull's commission when it sold Hull's shares on November 10. At the hearing, Gibson conceded GISF did not receive a block discount for its $2.45 million purchase of Hull's personal TRX shares, 7/29/19 Tr. 262:3-5. But, Gibson knew block discounts were typically required to sell large blocks of stock in the upstairs market, Resp. Ex. 177 at 2, – and Gibson's expert agreed. Resp. Ex. 228 at 5. Gibson also knew from his market sale of over 360,000 TRX shares *the day before the HBT* that he did not obtain the "current market price" for Hull's 680,636 TRX shares. The 360,000 shares he sold on October 17 were approximately 38% of the market volume that day and, over the approximately two minutes it took Gibson to sell the shares, TRX's share price dropped approximately $0.19. Div. Ex. 227. The average share price Gibson obtained for the whole block was approximately $0.17 less than the share price the moment he started selling. Div. Exs. 226, 227. The next day, Hull's 680,636 shares would have increased the market volume by 139% and, thus, Hull would not

have been able to obtain $3.60 per share for all his shares. Div. Br. at 21; Div. Findings ¶¶135, 142.[4]

Gibson's argument that $3.60 was the "current market price" relies almost exclusively on his expert, Bystrom, who testified – without evidentiary or industry support – that the completion of the HBT at TRX's October 18, 2011 closing price was appropriate. *See* Resp. Br. at 12, 25. But Bystrom – who is not a registered investment adviser – offered only unsupported opinions from a trading and portfolio-management perspective. 8/2/19 Tr. 1590:19-21, 1592:5-16, 1595:4-7. He had no basis to opine on the import of any provision in GISF's offering documents or whether Gibson met or violated his fiduciary duties, including through the HBT.

As for GISF paying Hull's commission, Gibson admitted at the hearing that GISF paid a commission to sell Hull's shares, 8/1/19 Tr. 1440:10 -1441:15 – a fact he initially conceded in his brief, Resp. Br. at 12, but then later deemed a Division "fabrication," *id* at 25. In addition, Gibson's claim that GISF paid only $.002 per share is unsupported by the record. The actual commission paid, calculated from GISF's November 2011 account statement, was approximately $.01 per share – a total of $6,866.36. Div. Findings ¶143. Regardless of the size of the commission paid, however, its import lies in the fact that, as a result of the HBT, Gibson caused GISF to pay a commission it would otherwise not have paid.

Lastly, that *Hull* did not intend to harm his friends and associates, Resp. Br. at 25, is irrelevant. This case is not about Hull; it is about Gibson – a fiduciary who failed to disclose to GISF and its investors the HBT, the financial conflict of interest it represented, and the related

[4] Gibson's hypothetical argument that Hull could have sold his shares into the market after October 18, for a greater profit, Resp. Br. at 12 (citing TRX closing prices on five subsequent days), also fails. Hull would not have been able to obtain the closing market prices for all 680,636 of his personal shares on any of the days Gibson lists, for the same reasons explained above – for example, on October 21, Hull's shares would have increased TRX's market volume by 234%.

financial conflicts (*e.g.*, that he owed over $600,000 to another client who was paying his salary) in breach of his duties. Regardless, Hull's testimony can easily be set aside, given his obvious bias, as demonstrated by his longstanding friendship and business association with the Gibson family and the contradictory testimony, *supra* at 8, he gave after receiving John Gibson's prodding to "tell the truth in a self serving [sic] way," Div. Ex. 198.

D. Through, and By Failing To Disclose, the October/November Front Running, Gibson Violated His Fiduciary Duties and Engaged in Fraud.

Gibson does not dispute that he purchased puts for himself and Marzullo (or that he advised his father to sell his personal TRX shares and purchase the same puts) at a time when Gibson was actively pursuing the sale of GISF's remaining TRX position, or that the puts mitigated his and his father's GISF losses. Instead, Gibson argues that: (i) when he bought his and Marzullo's puts, he and Hull were merely negotiating the sale of GISF's remaining 4.9 million TRX shares and had not yet finalized a deal (with all material terms locked in); and (ii) he did not know dumping GISF's 4.9 million TRX shares would cause a significant price decline. Resp. Br. at 23. Gibson's first argument fails because, as discussed, *supra* at 6-7, it is based on an overly-restrictive, unworkable definition of front running.

Gibson's second argument is undermined by his own prior sworn testimony. When asked if he thought it was GISF's TRX sales on November 10 that caused TRX's share price to drop, Gibson answered, "Yes." Div. Ex. 187 at 108:12-14. Then, when asked why he believed that, Gibson testified: "Because we sold a large volume of stock that, generally speaking, would result in what occurred." *Id.* at 108:15-17. If that were not clear enough, Gibson then was asked: "[Y]ou generally expect the share price of a stock to drop when you sell a large portion of the shares" and he replied, "Yes." *Id.* at 108:18-21. Indeed, that testimony mirrored Gibson's contemporaneous beliefs and communications. *See* Div. Ex. 105 (telling GISF's broker that the

sale of 4.9 million TRX shares would "potentially tank" TRX's stock price). Moreover, the Division proffered unrebutted evidence that Gibson's actions on November 10 contributed to TRX's significant price decline. Div. Findings ¶172.

Additionally, Gibson expends considerable energy attempting to combat the OIP's allegation that his, Marzullo's, and his father's puts "in effect . . . 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." OIP ¶9. Yet again, Gibson's argument is contradicted by his own prior testimony. Div. Ex. 187 at 119:6-16 ($4 TRX puts represented a "short bet" against TRX in his personal account). Regardless, any hairsplitting over the classification of his or Marzullo's position, or whether the puts were protective or naked, is irrelevant. Div. Br. at 29. It is undisputed that, on November 10, as GISF sold its remaining TRX position and TRX's price dropped, Gibson's, Marzullo's, and John Gibson's puts increased in value. *See* 8/2/19 Tr. 1632:25-1633:14. As a result, upon the sale of their puts on November 10, Gibson and Marzullo profited in their personal accounts – and in Gibson's case, those profits mitigated his GISF losses. Div. Findings ¶¶173-74, 177-78. Likewise, by following his son's advice, John Gibson mitigated his GISF losses by purchasing $4 TRX puts in (and selling 10,000 TRX shares from) his PNC account. *Id.* ¶¶166-67, 175-78.

In an apparent attempt to excuse his misconduct, Gibson cites the losses that he caused for himself, his family, and Marzullo's parents through his mismanagement of GISF. Resp. Br. at 23. But, obviously, there is no exception for an investment adviser to breach his fiduciary duties if or when he (or those close to him) may suffer significant losses. Regardless, Marzullo was not a GISF investor and Gibson did not purchase her puts to protect her parents; in fact, he never gave Marzullo's parents any of the profits he generated through that illicit trading. *See*

Div. Br. at 30 (citing Gibson's testimony; 7/29/19 Tr. 330-31). Moreover, to support his contention that the Marzullos constitute a single client, he cites only the testimony of his family friend, Doug Cates, who said he treated the Marzullos' losses together for *tax* purposes "because they were a family." 8/1/19 Tr. 1313:7-14, 1327:16-1328:24; Resp. Ex. 205. Gibson did not, and could not, cite any legal authority to support his contention. *See* Div. Br. at 30, n.10.

As for Gibson's puts, his argument that he bought them "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," Resp. Br. at 14, only serves to highlight the fact that Gibson's advisory decision-making was impacted by the very financial conflicts he had a fiduciary duty to (but did not) avoid, eliminate, or disclose to GISF. *See Capital Gains*, 375 U.S. at 191 (advisers have 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"). Despite Hull's investigative testimony, Div. Ex. 174 at 138:7-14 ("those actions or those puts should have been . . . known to everybody"), and his communications with Mason McKnight IV, Div. Ex. 204 ("I don't think what [Gibson] did in that regard was right."), Gibson argues that Hull's *new* hearing testimony demonstrates that his puts were "both morally and legally permissible." *See* Resp. Br. at 15 (quoting Hull's hearing testimony). Notably, the change in Hull's testimony on this key point seems to stem directly from the fact that Hull was angered when his friends learned that many of Gibson's conflicts of interest involved dealings with Hull. 7/30/19 Tr. 628:22-24 ("[t]hey've already smeared my reputation"); 736:2-20 ("These are lifelong friends, business people. Augusta is a small community . . . and my reputation is worth a lot to me and I would do nothing that would injure my reputation in any way."). But, even assuming his hearing testimony was reliable, Hull is a fact witness and is utterly unqualified to

provide an opinion as to what is "morally and legally permissible" for an investment adviser like Gibson.

Regardless, this case is not about Hull's belief or reputation. This case is about whether an investment adviser can create severe conflicts of interest with his advisory client without disclosing them and obtaining the client's informed consent. Gibson did just that in order to mitigate losses that he and those close to him would suffer because of his poor investment advice. As a result, Gibson violated his fiduciary duties and the antifraud provisions of the Advisers and Exchange Acts.

II. Gibson Violated Advisers Act Section 206(4) and Rule 206(4)-8.

In defending the OIP's allegations that he violated Rule 206(4)-8, Gibson does not contest that he made material misstatements and omissions to, or that he engaged in deceptive, manipulative, or fraudulent conduct with respect to, GISF's investors. Instead, he argues that his client was GISF, not its investors; that he owed no fiduciary duties to GISF's investors; and thus, his lack of disclosure to GISF cannot form the basis of the Division's 206(4) claims. Resp. Br. at 26-27 (citing *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006) and SEC Release No. IA-2628 (Aug. 3, 2007) ("IA-2628")). This argument is defective for several reasons.

Contrary to Gibson's argument, the Division has never argued that Section 206(4) or Rule 206(4)-8 thereunder created a fiduciary duty, nor has it argued that the existence of such a duty is required to prove a violation of these provisions. *See SEC v. Quan*, No. 11-cv-723, 2013 WL 5566252, (D. Minn. Oct. 8, 2013), *16 n.10 ("existence of a fiduciary duty is not required to prove a violation of Rule 206(4)-8"). As demonstrated in the Division's Post-Hearing Brief, Gibson violated Rule 206(4)-8(a)(1) and (2) through both his front running and the HBT, because that conduct operated as a fraud against GISF's investors and rendered the statements he made to those investors through GISF's offering documents false and misleading. *See* Div. Br.

at 30-34. Specifically, Gibson violated Rule 206(4)-8(a)(1) because his undisclosed misconduct rendered (at least) the following provisions of GISF's offering documents materially false and misleading: (i) the Potential Conflicts of Interest provision of GISF's offering memorandum, Div. Ex. 24 at 19; and (ii) the Management of the Company provisions in GISF's operating agreement, Div. Ex. 21 at 2. Those statements in GISF's offering documents, which disclosed only *potential* conflicts of interest and required transactions between GISF and affiliated parties like Hull to use market prices, became materially misleading by omission once Gibson created the *actual* conflicts of interest in this case, including by front running GISF and carrying out the HBT. Gibson, therefore, had a duty to amend or otherwise correct those misleading statements but failed to do so.

In addition, Gibson violated Rule 206(4)-8(a)(2) because his front running and the HBT were deceptive, fraudulent, and manipulative vis-à-vis GISF investors. Through that misconduct, Gibson misused undisclosed confidential information to benefit himself, Marzullo, his father, and Hull. *See* Div. Br. at 31-33. For example, Gibson misused his foreknowledge of GISF's large block sale – which he began coordinating the evening of September 25 and which ultimately happened on September 27 – and engaged in undisclosed personal sales of TRX from his, Marzullo's, and Geier Group's accounts on September 26. The timing of these events was no mere coincidence; instead, it demonstrates Gibson's control and manipulation of circumstances to trade ahead of GISF and avoid losses for himself, his girlfriend, and his company.

Any reasonable investor would have considered it important and would have wanted to know that the above-described statements in GISF's offering documents were rendered false and misleading as a result of the fact that GISF's investment adviser, Gibson, was engaging in

deceptive, manipulative, and fraudulent conduct, including repeatedly front running GISF's trades to benefit himself and those close to him, and using Fund assets to favor another advisory client who was paying his salary and to whom he was massively indebted. *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985); *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988); *SEC v. Research Automation Corp.*, 585 F.2d 31, 35-36 (2d Cir. 1978) (misstatements and omissions re: use of investor funds material as a matter of law). Even Hull confirmed this obvious conclusion during his sworn investigative testimony. Div. Ex. 174 at 138:7-14 ("those actions or those puts should have been . . . known to everybody").

Tellingly, Gibson does not address, or thus contest, that his misconduct was "negligently deceptive." *See* IA-2628 at *5 (Commission stating that Rule 206(4)-8 "reach[es] conduct that is negligently deceptive as well as conduct that is recklessly or deliberately deceptive" and that "use of a negligence standard also is appropriate as a method reasonably designed to prevent fraud"). And the evidentiary record makes clear that Gibson acted at least negligently (not to mention recklessly), in failing to exercise due or ordinary care in his management of GISF and treatment of its investors. Div. Br. at 33-34.

Further, even if Gibson is correct in his argument regarding his disclosure failures to GISF, his reliance on *Goldstein* is misplaced because he was acting adversely to GISF. In order to satisfy his fiduciary duty to GISF under Sections 206(1) and (2) – as GISF's agent and the only individual actively working on behalf of Geier Group and Geier Capital – Gibson was required to disclose his front running and the HBT directly to GISF's investors, because he could not satisfy his disclosure obligations by disclosing his misconduct to himself. *See SEC v. DiBella*, 587 F.3d 553, 568 (2d Cir. 2009) (holding that "[t]hird party disclosure to an agent is not imputed to the principal when the agent is acting adversely to the principal's interest and the

third party has notice of this."). The "adverse interest exception" to general agency principles applies where, like Gibson here, "an agent is in reality acting . . . for his own personal interest and adversely to the principal." *Ruberoid Co. v. Roy*, 240 F. Supp. 7, 10 (E.D. La. 1965); *Bank of China v. NBM LLC*, 359 F.3d 171, 179 (2d Cir. 2004). Accordingly, because Gibson – through his front running and the HBT – was acting contrary to GISF's interests, his fiduciary duties to GISF could not have been satisfied unless and until he fully and fairly disclosed these transactions and conflicts of interest directly to GISF's investors.

Lastly, despite arguing initially that only GISF was his client and only GISF could be defrauded, Gibson also suggests that his misconduct was excusable because it mostly harmed himself, his family, and Hull, Resp. PFF ¶¶130-32. He cannot have it both ways. *See SEC v. Mannion*, 789 F. Supp. 2d 1321, 1338 (N.D. Ga. 2011) (rejecting similar argument; finding "fraud against a hedge fund is not ignored simply because the harm is indirectly borne by the fund's investors").

III. The Division Is Entitled To the Relief Requested.

Gibson's Post-Hearing Brief contains no argument addressing the relief requested by the Division, instead choosing to discuss relief – impermissibly – in Gibson's PFFs. To the extent Gibson's remedies arguments are considered, they must fail.

A. Gibson Should Be Ordered To Cease And Desist And Be Barred From the Industry.

As previously set forth by the Division, a cease-and-desist order and permanent collateral bars are appropriate and in the public interest, and the *Steadman* factors weigh heavily in favor of granting such relief. Div. Br. at 37-39. To rebut the egregiousness of his misconduct and his scienter, Gibson simply denies any misconduct and argues that his actions did not harm GISF, Resp. PFF ¶¶145-46, which is belied by the evidence in the record, showing GISF's $1,074,902, loss as a result of the HBT, Div. Findings ¶148. Additionally, to rebut the recurrent nature of his

numerous illicit trades and transactions, Gibson simply asks for credit because "there have been no allegations of misconduct by [him]" since 2011. Resp. PFF ¶146. To rebut the fact he has not once recognized the wrongful nature of his conduct, Gibson asserts he "has taken extraordinary steps" but does not identify what those steps are. *Id.* ¶148. The sincerity of Gibson's assurances against future misconduct, *id*, is undermined by his utter lack of credibility and repeated willingness to renounce his prior sworn testimony. *See* Div. Br. at 36-37.

Gibson's argument that "[s]anctions and relief predicated upon Section 203(f) of the Advisers Act is inappropriate" because he was not "associated or seeking to become associated with an investment adviser" at the time of his misconduct, Resp. PFF ¶150, must also fail. The Commission has expressly rejected this same argument. *In the Matter of Anthony J. Benincasa*, SEC Release No. IA-1923, 2001 WL 99813 at *2 ("By functioning as an investment adviser, in an individual capacity, [respondent] will be in a position of control with respect to the investment adviser, and therefore, he meets the definition of a 'person associated with an investment adviser.'"). Furthermore, the Commission has routinely held that one of the remedies it may impose on an investment adviser – whether associated or not – is an industry bar under Section 203(f). *See, e.g., In re: Dennis Malouf*, Admin. Proc. No. 3-15918, IAA Rel. No. 4463, at 36 (July 27, 2016), *aff'd, Malouf v. SEC,* 933 F.3d. 1248 (10th Cir. 2019); *ZPR Investment Management, Inc.*, Admin. Proc. No. 3-15263, IAA Rel. No. 4249, at 2, 37 (Oct. 30, 2015), *aff'd, ZPR Investment Mgmt. Inc. v. SEC*, 861 F.3d 1239, 1247 (11th Cir. 2017).

B. Gibson Should Be Ordered To Pay Disgorgement and a Civil Penalty.

Gibson does not challenge the Division's reasonable approximation of his ill-gotten gains – $82,088, representing the put profits from his own account, plus the losses he avoided via his personal TRX sales on September 26. Instead, Gibson claims, without citation, that he did "did not realize any profits in connection with his transactions involving TRX securities" and "suffered considerable losses on such transactions." Resp. PFF ¶149. That Gibson lost money through his GISF investment is immaterial; he avoided losses in his personal account through the September Front Running, and he mitigated his GISF losses via the October/November Front Running. Div. Findings ¶¶156, 159, 173, 177. Gibson bears the burden, and has failed, to show that the disgorgement amount sought by the Division is not a reasonable approximation of his ill-gotten gains. *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).

Gibson also claims that he is "unable to pay disgorgement or a civil penalty." Resp. PFF ¶149. Any inability to pay, however, is not relevant for purposes of, or applicable to, disgorgement. *SEC v. Warren*, 534 F.3d 1368, 1370 n.2 (11th Cir. 2008) ("A contrary rule would allow con artists to escape disgorgement liability by spending their ill-gotten gains – an absurd result."). Gibson's claimed inability to pay a penalty is specious for three reasons.

First, Gibson's Form D-A was not admitted into evidence, and the Division has not had an opportunity to cross-examine Gibson regarding its completeness and veracity – an important variable, given Gibson's demonstrated, casual relationship with the truth and his incredible testimony regarding the funds passing through his business account. *Compare* 8/1/19 Tr. 1493:9-1495:2 (claiming as business expenses dozens of fast-food meals) *with* 1496:9-1497:8

(explaining that he used the business account to pay at least [redacted] for an [redacted] [redacted]).[5]

Second, Gibson is able to pay an appropriate penalty, because, as discussed, he used at least [redacted] Accordingly, Gibson cannot claim, in good faith, that he is unable to pay a penalty.

Finally, Gibson is still young and clearly has prospects to generate future earnings he can use to pay a civil penalty. In fact, his Form D-A indicates that, in the most recent 12 months (including all of 2019), he earned [redacted]. Additionally, Gibson earned (at least) [redacted] in 2017, *id* at 1499:21-1500:3, and he testified that [redacted]. *Id.* at 1505:11-12 (emphasis added).

Consequently, there is no legitimate basis supporting Gibson's claimed inability to pay, and based on the record and reasons previously set forth, Div. Br. at 42-43, the proposed $825,000 penalty is appropriate and in the public interest.

[5] Gibson's Form D-A indicates that Gibson paid [redacted].

CONCLUSION

Wherefore, the Division requests an order finding Gibson liable for the violations alleged, and granting the relief requested, in the OIP.

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 Post-Hearing Reply Brief were filed with the Office of the Secretary, SEC, 100 F Street, N.E., Washington, D.C. 20549-9303;

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

/s/ Nicholas C. Margida
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