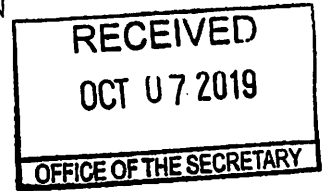


U.S. SECURITIES AND EXCHANGE COMMISSION



Matter of

CHRISTOPHER M. GIBSON,

A.P. No. 3-17184

Respondent.

RESPONDENT'S POST-HEARING REPLY BRIEF

Thomas A. Ferrigno
Stephen J. Crimmins
Murphy & McGonigle PC
1001 G Street NW, 7th floor
Washington DC 20001
202.220.1923 (Ferrigno)
202.661.7031 (Crimmins)
tferrigno@mmlawus.com
scrimmins@mmlawus.com

David E. Hudson
Hull Barrett PC
Sun Trust Bank Building
801 Broad Street, 7th floor
Augusta GA 30901
706.722.4481
dhudson@hullbarrett.com

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As discussed below, after scoring a 100% return in metals trading for GISF during 2010, Chris Gibson followed the directions of GISF's 81% owner and in early 2011 invested in a single mining stock, TRX, that showed promise, but that ultimately disappointed. **(Point A)** below) In selling a small amount of the stock on 9/26/2011, Gibson did not "frontrun" a bid for a vastly greater number of shares that GISF first received the following afternoon. **(Point B)** In consolidating the 81% GISF owner's stock into GISF's portfolio to make it more marketable on 10/18/2011, Gibson did not defraud GISF, particularly as the TRX stock price rose solidly over the following weeks. **(Point C)** And Gibson's partial hedging of his own TRX exposure through protective puts did not frontrun GISF's later liquidation of the stock. **(Point D)**

The Division has simply failed to prove that this young man, 27-years old at the time in question, was a securities fraud violator. **(Point E)** There is no basis for any sanction here, and he should be allowed to come home to Augusta and resume his life with family and friends. **(Point F)** This case should be dismissed.

A. GISF'S INVESTMENT IN TRX STOCK

The Division says that, in early 2011, it was "Gibson's decision to invest virtually all of GISF's funds in" TRX. (Div-Br-1) The record shows that, after a very profitable 2010 investing in metals, GISF's 81% owner James Hull pushed GISF into a single-stock investment in 2011:

- GISF's "original investment thesis" was to "invest in gold and other commodities." During its first year, 2010, GISF was "very successful, made over 100 percent return." (Hull Tr. 539-45, 673)
- Unhappy with metals-investing tax consequences, GISF's 81% owner wanted GISF to switch to equities. (Hull Tr. 540, 575-76, 673) Hull wanted GISF invested in a single stock, which Gibson could not resist. (C. Gibson Tr. 1365-66, 1509-10)

- Hull wanted GISF 100% in TRX because “the underlying assets of TRX had ... great value.” (Hull Tr. 575-76, 673-74) Gibson recommended TRX because its 46 mining properties offered diversification, and its “royalty model” let it team with larger and better-capitalized companies. (C. Gibson Tr. 1351)

The Division says that, in August 2011, Gibson expressed negative views concerning TRX. (Div-Br-3-4, 36-37) The record shows that Gibson and Hull expected more of TRX’s CEO but continued to believe in TRX’s fundamentals:

- TRX’s stock price peaked at \$7.46 on 6/1/2011, but then declined. (JX-1) Gibson could not understand this, as gold was doing well, and TRX won a valuable Tanzanian mining property and got a \$30 million capital infusion. (C. Gibson Tr. 1373, 1377-79)
- On 8/5/2011, Gibson emailed Hull that TRX’s strategy demonstrated “a game plan ... that will succeed.” (DX-75) But they “were very concerned about Jim Sinclair,” TRX’s president, “not doing the exploration” that was needed. (Hull Tr. 582) And Sinclair’s failures in communicating with the market. (C. Gibson Tr. 1380-81)
- On 8/10 and 8/15/2011, Gibson sent angry emails to Sinclair that Gibson hoped would succeed in “instilling a sense of urgency.” (DX-76, 77, 78; C. Gibson Tr. 1379-80) Gibson “would rant and rave about different things, including Sinclair. (Hull Tr. 584)
- Hull still liked TRX based on its “huge underlying assets.” (Hull Tr. 586-87) And Gibson felt Sinclair’s delays “had no impact on the 46 [TRX mining] properties, their economic value and the value of the company.” (C. Gibson Tr. 1381-82)
- On 8/22/2011, Gibson emailed GISF investors giving reasons to stay in TRX: TRX’s “unique and diversified” business model “that limits its downside risks and offers tremendous leverage to the gold price”; TRX’s royalty agreements offering potential of income streams without responsibility for exploration and development costs; TRX’s successful “exploration for its own book”; TRX’s move into production on four projects and “extensive long-standing relationships with senior government officials” in Tanzania. (RX-51)

Additionally, the record shows that, on 8/23/2011, investment bank Casimir Capital bid the then \$5.85 market price for GISF’s full 9.8 million-share TRX position, but Hull and Gibson determined to reject the bid as it offered no premium above market price. (RX-177; C. Gibson Tr. 1386). The bid and rejection are confirmed in a Casimir email a month later. (RX-62; C. Gibson Tr. 1386-88)

- Gibson felt a premium was possible, as short sellers then needed to buy TRX stock to cover their positions, and some large TRX holders wanted shares for a possible takeover. (C. Gibson Tr. 1385) The Division's expert agreed that a premium for a block is possible where a large short seller needs to close out a position, or where a buyer wants to assemble a large block of shares, perhaps for a takeover. (Dr. Gibbons Tr. 487-88)
- Recent big buyers of TRX around this time included: (i) hedge fund Platinum Partners investing \$30 million in newly-issued TRX shares, with about 7 million shares; (ii) a UAE investor (advised by Roheryn Investments SA) owning another 10 million shares; and (iii) Portuguese bank BPI, owning another 10 million shares. (C. Gibson Tr. 1348, 1372, 1353; DX-81)
- During the month following Gibson's 8/23/2011 rejection of Casimir's bid for all of GISF's TRX shares at the \$5.85 market price, TRX stock stayed essentially flat, trading in the \$5.70s and \$5.80s. (JX-1) GISF's 81% owner Hull still "believed the underlying assets of TRX were tremendously undervalued," and felt GISF "had no reason to have to sell." (Hull Tr. 588)

However the record shows that, the very next month, TRX suffered a sharp and unexpected share price decline:

- On Thursday 9/22/2011, TRX stock dropped dramatically. After closing at \$5.57 the day before, it opened at \$5.42, hit a low of \$4.41, and closed at \$4.58, thus losing about 18% of its value in just 24 hours, on exceptionally high volume of 1,449,738 shares. (JX-1) Hull reacted by asking whether to "put another [\$]500,000 in TRX if it's in the low [\$]5s." (RX-52) Gibson promptly reported the drop to GISF investors. (DX-81)
- On 9/23/2011, TRX dropped again. After opening at \$4.55, it dropped to a low of \$3.93, before closing at \$4.07, again on exceptional volume of 1,266,357 shares. (JX-1) Gibson's judgment was that this two-day drop reflected a "bear raid," where short sellers undermine sentiment in a security that they're short by "selling a large amount of shares in order to push the share price lower on no news." (C. Gibson Tr. 1400)
- Around the end of the 9/23/2011 trading day, GISF sold approximately 78,000 TRX shares, at \$4.04. (RX-17; Dr. Taveras Tr. 990-91, 1000-01, 1072-73; C. Gibson Tr. 1391) At the end of that day, there was no pending order for any other GISF sale of TRX shares. (Dr. Gibbons Tr. 497-98)

B. NO FRONTRUNNING ON 9/26/2011

The Division says that, over the 9/24-9/25/2011 weekend, "Gibson determined to sell GISF's entire holdings of TRX." (OIP ¶4; Div-Br-1) The record shows that no such "determination" was made, and that Gibson lacked decision-making power:

- As GISF's 81% owner, Hull "insisted" that "any major decisions would first have to be approved by me," and "if I approved [Gibson's] decision, we would go forward. If I didn't, then we wouldn't." (Hull Tr. 569-71) By his own admission, Hull was "an irascible person" who wanted "to have things go the way I want them to go." (Hull Tr. 568)
- Over the weekend, Hull was "not in favor of liquidating the fund's position in TRX." (Hull Tr. 602-04) But Hull gave Gibson "a general guidepost to get out of TRX at good prices." (Hull Tr. 604-05)
- Gibson decided to "solicit a bid" and give Hull "an array of options to consider," but Gibson's "judgment was that, as occurred the previous month, [Hull] would reject" a bid to sell GISF's TRX shares. (C. Gibson Tr. 1393)

The Division says: that, on Sunday 9/25/2011, "Gibson emailed Casimir Capital to begin that liquidation," and that Gibson then "anticipated" that GISF's sales would cause a TRX "price drop." (Div-Br-4, 19) The record shows that Gibson did not then begin liquidating or anticipate a price drop:

- Gibson's 9/25/2011 email told Casimir that GISF "believe[d] in" TRX and "contemplate[d] waiting it out." But as GISF was "concentrated in TRX," Casimir should advise "if there is a buyer that sees current prices as very compelling as we otherwise would." (RX-62) Gibson was "intending to solicit a bid for our position while at the same time clarifying that we are not a motivated seller." (C. Gibson Tr. 1401) "There is no order at that point" for GISF to sell TRX. (Bystrom Tr. 1556-57)
- The Division's expert admitted that, as of Monday 9/26/2011: There was at the opening still no pending order for GISF to sell TRX. A bid from a block purchaser could appear that day, or two weeks later. Nothing was forcing GISF to sell, and by holding GISF would have seen TRX reach \$5 by March. GISF's acceptance of a bid would depend on its size, price and timing. And a bidder could walk away and not consummate. (Dr. Gibbons Tr. 499-501, 504)
- On 9/26/2011, Casimir asked how many shares GISF could sell, and Gibson replied all its shares or anything less, as GISF was "trying to do what is best" for its investors and "return their money at a profit," even though Gibson believed TRX was a "ten bagger," *i.e.* worth 10 times its trading price. (RX-62) This was to "further emphasize" to Casimir that GISF was "not a motivated seller" and was "very price sensitive," and "that if the price isn't good, we're not going to transact." (C. Gibson Tr. 1405-06)

- Later on 9/26/2011, Casimir thought it could only get 3-5 million shares sold and could not state a price for GISF's TRX stock. (RX-62) There was still "no order" for GISF to sell TRX shares "by the end of the day on Monday." (Bystrom Tr. 1557-59)

The Division says that, on 9/26/2011, Gibson sold TRX shares in three non-GISF accounts he controlled "before he executed any trades" for GISF's account, and that this "ensured that Gibson would obtain a better price than the Fund." (Div-Br-1, 4) The record shows that, in selling a small percentage of his TRX exposure on 9/26/2011, Gibson could not know prices in the future:

- After selling his 2,500 TRX shares, Gibson remained "significantly long" in his TRX exposure through GISF – and "the only member of the fund who had all of their net worth in" GISF. (C. Gibson Tr. 1398)
- At the end of the day on Monday 9/26/2011, "no one knew what the price would be on Tuesday." (Bystrom Tr. 1563) The Division's expert acknowledged that Gibson would need a crystal ball to know the next day's price; that TRX could have gone back up to \$5.42, its price just two trading days before; and that Gibson did not know on Monday evening whether a block buyer would appear and make an offer on Tuesday. (Dr. Gibbons Tr. 510-11)

The Division says that, on 9/27/2011, GISF's sale of 3.7 million shares "dropped TRX's share price to \$3.50. (Div-Br-5) The record shows that TRX closed at \$4.11 on 9/26/2011, rose the next day (9/27/2011) to \$4.34, and then sank to \$3.70, all without any market participation by GISF:

- On Tuesday 9/27/2011, after closing at \$4.11 the night before, TRX opened at \$4.24 and then rose to \$4.34. (JX-1) However with the price at \$4.34, GISF still did not know the amount Casimir could sell, or the price and timing. (RX-62) Gibson still did not know whether Hull would approve a sale at whatever price and size Casimir might bid. (C. Gibson Tr. 1415) With price and size unknown, there was still no order for GISF to sell TRX shares. (Bystrom Tr. 1559)
- GISF was seeking a bid in the "upstairs market," meaning a negotiated transaction away from the exchange floor, where a bid may not come until "days or weeks later." And even with "a firm order on one side," it is "certainly not uncommon" that a transaction is not consummated or delayed for some time. (Bystrom Tr. 1563-64)
- After hitting \$4.34 in the morning, TRX dropped to \$3.70 at 3 pm. (Dr. Taveras Tr. 1007-08) But GISF was not in the market until 3:01 pm. (Dr. Taveras Tr. 1009) With GISF not trading until that point, GISF was not responsible for the TRX price dropping from \$4.34 to \$3.70. (Bystrom Tr. 1562-63)

- On Tuesday afternoon, with the TRX already at or approaching \$3.70, Casimir proposed a sale of 3.7 million shares at a price of \$3.50. Gibson lacked authority to conclude a sale of that many shares without specific confirmation from Hull. (Hull Tr. 569-71) Gibson phoned Hull “to alert him that we had a bid,” and “in Jim’s judgment, we should take it.” With “Casimir on one phone and Jim on the other,” they “made a determination I think in one minute to accept it.” (C. Gibson Tr. 1422-23)
- Minutes later, Casimir reported back that 3,734,395 TRX shares had been sold for GISF at an average price “somewhat above 3.50.” (DX-82) TRX then closed the day up slightly at \$3.54, and traded with less volatility over the next five trading days, closing at \$3.54, \$3.70, \$3.59, \$3.51, and \$3.28. (JX-1)

The record shows that Gibson continued to have huge personal exposure to TRX after his 9/26/2011 sales, that his sales did not impact TRX pricing when GISF sold on 9/27/2011, that his personal 9/26/2011 proceeds were very small, and that other GISF investors were not bothered by his 9/26/2011 sales:

- Gibson continued to have personal exposure to TRX stock through his GISF ownership. For Gibson this was “the equivalent of 220,000 shares of TRX value,” meaning exposure to the price of TRX. (Dr. Gibbons Tr. 874)
- Gibson had no indication that the 2,500 TRX shares he sold on Monday, or the 18,900 shares he sold for the Marzullo account, had any impact on the TRX market price on Tuesday. (C. Gibson Tr. 1424) And it would not have been in Gibson’s interest to engage in a transaction that would adversely affect his much larger exposure to TRX through his interest in GISF.
- Even using the Division’s theory, by selling his 2,500 TRX shares outside GISF on 9/26/2011 at \$4.04, Gibson made only \$1,350 more than if he had waited to sell until GISF sold 3.7 million TRX shares at \$3.50 after 3:01 pm on 9/27/2011 – *i.e.* \$4.04 minus \$3.50, times 2,500 shares. (Dr. Taveras Tr. 1018-19)
- GISF investor Mason McKnight IV testified it did not “bother” him that Gibson “made \$1,350 without letting ... the other investors know.” (Mason McKnight Tr. 795) GISF’s largest investor Hull called it the sale of “an incidental or small amount of shares” done for “probably good reasons.” (Hull Tr. 608-10)

There are very few reported cases that define “frontrunning.” For a definition here, the Division solely relies (Div-Br-16) on *SEC v. Yang*, 999 F.Supp.2d 1007 (N.D. Ill. 2013), which charged that an adviser used a company’s inside information to buy its securities for both himself and his fund before the company announced a going-private transaction with a 46% premium. The case separately charged only the adviser with “frontrunning” because he began placing his personal buy orders a day before he began placing the orders of a fund he controlled, though

completing the purchases for both before the going-private announcement. In moving for summary judgment on the frontrunning charge, the adviser argued simply that he did not buy for his personal account. The court denied the motion because it saw sufficient evidence for “a reasonable jury [to] conclude” that the adviser placed personal orders. 999 F.Supp.2d at 1016. (As a denial of a summary judgment motion, the decision has no precedential value.)

While the *Yang* court did not rule on what constitutes frontrunning, it characterized the complaint’s frontrunning allegation as “trying to profit personally by secretly authorizing personal trades in anticipation of much larger trades that he knew he would be authorizing on behalf of” his fund. *Id.* The court cited only *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 181-83, 196 (1963), which held that the publisher of an investment newsletter (an adviser) who bought stock for himself before recommending it in his publication, a practice called “scalping,” should have disclosed his practice to his 5,000 readers.

This leaves the Division relying on a trial court’s characterization of its own complaint’s definition of frontrunning in another case. For an actual judicial definition of frontrunning, the Division could have looked instead to the Second Circuit’s definition of the term in *D’Alessio v. SEC*, 380 F.3d 112 (2d Cir. 2004):

... A broker “trades ahead” or “frontruns” when he or she receives a large order for a particular security from an institutional client and, before executing the larger trade, first executes trades in that security for an account in which the broker had an interest so as to anticipate and exploit the movement in price the larger trade is likely to cause. ...

380 F.3d at 114. *Compare U.S. v. Mahaffy*, 693 F.3d 113, 120-21 (2d Cir. 2012) (“frontrunning” where existing customer block-trade orders were leaked to another firm to allow it to trade ahead of the orders and profit by the price impact once the block orders were executed); *SEC v. Pasternak*, 561 F.Supp.2d 459, 509 (D.N.J. 2008) (“A focal point in improper front-running is that the conduct is to the detriment of the customer”).

Key to the judicial definition of frontrunning is the existence of an actual order on which the broker can profit by trading ahead. Here, as discussed above, this element was absent:

- On 9/25/2011, Hull gave Gibson only a “general guidepost” to sell “at good prices,” Gibson solicited a bid from Casimir that Gibson expected Hull to reject – based on Hull’s rejection of Casimir’s 8/23/2011 market-price bid for GISF’s entire position, and based on Hull’s 9/24 and 9/25/2011 consideration of buying more TRX while the price was low. And in soliciting a bid on 9/25/2011, Gibson stressed to Casimir that GISF was not a motivated seller and could “wait it out” till TRX rose in price.
- On 9/26/2011, Gibson sold a small amount of TRX for himself and the Marzullo account, which had no impact on TRX’s price, and remained extremely long-exposed to TRX. By

the end of the day Gibson still had no order for GISF to sell, did not know when he would get a bid from Casimir, and could not know whether the next day the volatile TRX would bounce back to \$5.42, its price just a couple of days earlier.

- On 9/27/2011, TRX rose to \$4.34 and then sank to \$3.70 – all without GISF participating in the market. After the price thus declined, Casimir came up with a bid for 3.7 million of GISF’s TRX shares, but before Gibson could accept this bid, he needed to and did obtain permission from GISF’s 81% owner Hull.

Thus, Gibson’s small 9/26/2011 sales for himself and the Marzullo account did not frontrun GISF’s sale of 3.7 million shares through Casimir in the upstairs market on 9/27/2011. The OIP alleges that Gibson knew, was reckless in not knowing, and should have known, that without disclosing to GISF his conflict of interest and obtaining GISF’s consent, he was improperly exploiting the fact that GISF would be selling a substantial portion of its TRX position to benefit himself and his then-girlfriend. The Division did not prove that Gibson failed to disclose a conflict of interest. Specifically, at the time of his sales of TRX stock, he could not exploit the “fact that the fund would be selling a substantial portion of its TRX stock.” The record is unequivocal that at the time he sold TRX stock an order did not exist and Hull had not approved a sale. Moreover, the information he did possess regarding a potential sale of TRX stock was not material and was not non-public.

C. GISF’S PURCHASE FROM HULL ON 10/18/2011

The record shows that, after selling part of its TRX position on 9/27/2011, GISF remained interested in selling additional TRX stock, but at prices that would satisfy GISF’s 81% owner Hull:

- On Friday 9/30/2011, Gibson obtained an agreement by Roheryn Investments SA to facilitate an “open market sale” of 5.9 million shares of TRX for GISF at price of \$3.50, with the sales to be conducted over the five trading days during the following week, *i.e.* 10/3-10/7/2011. (RX-92)
- By 10/5/2011, Gibson told Hull there would be “no deal” with Roheryn. Gibson said GISF was “going to very likely be best served holding our position,” he assumed “for the next several months.” (RX-102) Hull told Gibson to “try to get a higher price for bulk sale of our shares.” (RX-102) On 10/14/2011, Gibson and Hull confirmed there would be no sale to Roheryn. (RX-104; Hull Tr 616-18)
- On 10/17/2011, Gibson asked GISF’s brokers at Garwood Securities to “get us able to sell” its remaining 5.9 million TRX shares. (DX-93) But this was subject to Hull viewing any proposal as being at “a good price.” (Hull Tr. 618-19) That day, GISF was able to sell a block of 364,495 TRX shares in a privately-negotiated transaction at market price. (Dr. Gibbons Tr. 879)

The Division says that, on 10/18/2011, “Gibson had GISF buy” Hull’s 680,636 TRX shares “at an above-market price” of \$3.60 in order to personally benefit Hull; that Hull thus avoided the “price-depressing impact” of selling “on the public market”; and that GISF lost \$1,074,902 “because of” the transaction, or “accounting for Hull’s 80% Fund ownership, GISF lost \$214,980.40.” (Div-Br-1, 5-6, 25-26) The record shows: that the price was at market, and that the shares soon increased in price:

- The \$3.60 price for Hull’s shares was in fact the closing market price on 10/18/2011. (JX-1) Executing the transaction “at the closing price of the market on that day ... is the most equitable way to cross that stock.” (Bystrom Tr. 1625) “[T]here was no premium or discount to either party.” (Bystrom Tr. 1627)
- The GISF private offering memorandum specified that “purchase and sale transactions ... may be effected between” GISF “and any other entities or accounts,” if “for cash consideration at the current market price of the particular securities.” (RX-8, p. 19) By purchasing TRX shares from Hull at the closing market price on the day of the transaction, GISF was acting consistently with this provision. “That is exactly what that means.” (Bystrom Tr. 1569-70)
- Within a short time, the shares increased in value. TRX closed at \$3.64 on 10/21/2011, at \$3.92 on 10/25/2011, at \$3.94 on 10/26/2011, and at \$3.96 on 10/27/2011. (JX-1)
- In the one week following the 10/18/2011 purchase from Hull at \$3.60, GISF saw the price of TRX rise to \$4.09 on 10/25/2011 before closing that day at \$3.92, so GISF was up at that point. (Dr. Gibbons Tr. 891-92)
- Hull could have obtained a better result if he had not sold to GISF but instead “sold the shares on the open market” and benefitted from the rise in the price of TRX stock. (Hull Tr. 624; Bystrom Tr. 1571-73)
- Over the ensuing weeks, GISF did market sales at market prices, including on 11/3/2011 when it sold 485,397 shares, 289,100 shares and 8,200 shares. (Dr. Gibbons Tr. 879-80; C. Gibson Tr. 1455) On 11/8/2011, GISF did another negotiated “upstairs market” block sale of 500,000 shares at or near the market price. (Dr. Gibbons Tr. 880-81, 884) On 11/9/2011, GISF did a sale of 119,971 shares at a price that was near the market price. (Dr. Gibbons Tr. 885)

The record shows that the purpose of the 10/18/2011 Hull transaction was not to benefit Hull, but instead to assemble a more attractive block that would include the only sizable amount of shares held by a GISF affiliate. There is no contrary evidence.

- In connection with the 9/27/2011 sale of a portion of GISF's TRX shares, Casimir that day required the transfer of "all" of GISF's shares to Casimir so that potential buyers would be assured that there would not be subsequent sales that would adversely affect the market for TRX shares. (RX-62)
- When GISF tried to sell the remainder of its shares to Roheryn on 9/30/2011, GISF had to include Hull's 680,000 shares. To foreclose possible follow-on sales," Roheryn demanded a "certification" that GISF was also selling shares of its "affiliates," meaning Hull. (RX-93; C. Gibson Tr. 1429-30, 1435)
- Hull "wanted to put ... my shares together with the fund shares to have a larger block." (Hull Tr. 627) "[A]s a larger block of shares, ... we would have a much greater opportunity to get" a "substantially increased price" in selling GISF's block of TRX shares. (Hull Tr. 624) The goal was for GISF "to try to find a motivated buyer," and "in preparation for putting a big block together to entice a buyer." (Hull Tr. 638-39)
- Respondent's expert Bystrom confirmed that "this action [was] to consolidate the shares in one place, which greatly simplifies the process of entering into a block transaction." Bystrom explained that "the buyer would want to know that he's seeing the whole piece for sale and that would include any affiliates. So getting all of that into one place certainly would make it easier ... to then transact." And with Hull as a "significant affiliate" owning 81% of GISF, this made it "just far cleaner to then put up a block or negotiate the price for a block if those shares are all combined." (Bystrom Tr. 1567-68)
- "When negotiating a block transaction, it's important that the seller in this case be able to show to ... the broker and to the buyer that he represents all of the holdings of the entities, and that what they were shopping was what they call a cleanup transaction or they might say I need to see the whole picture. And so in order to see the whole picture, you would have to look at them in combination." (Bystrom Tr. 1622) A cleanup transaction "means there is no more for sale." This includes from a large affiliate like Hull, who owned 81% of GISF and had about 680,000 TRX shares in his personal account. (Bystrom Tr. 1650) It would not include a GISF investor who had only a few thousand TRX shares in a personal account. (Bystrom Tr. 1650-51)
- GISF investor Mason McKnight IV testified that it would not "offend" him if, to help GISF market its TRX stock, Hull "sold his shares to the fund for market price," and that he would not consider this to be a "disservice to ... the other investors." (Mason McKnight Tr. 795-96)

The record shows that, as GISF's almost-81% owner, Hull was effectively selling most of the shares to himself, and paying himself with mostly his own money.

- Hull was essentially selling about 80% of his 680,636 shares (or 544,809 of these shares) back to himself. Consequently, he was really disposing of only 135,827 shares (680,636 minus 544,809). (Bystrom Tr. 1573; Dr. Taveras Tr. 1030) As the market could easily have absorbed 135,827 shares without price impact, Hull “believe[s] firmly that I could have sold my 136,000 shares in the open market and ended up in exactly the same place.” (Hull Tr. 625)
- Likewise the money GISF paid was mostly Hull’s own money as its 81% owner. (Hull Tr. 706; Bystrom Tr. 1573; Dr. Taveras Tr. 1030; Dr. Gibbons Tr. 904-05; C. Gibson Tr. 1439) Throughout, Hull maintained a long exposure to TRX, and his interests remained aligned with GISF, as they were “both rooting for the same outcome,” for TRX to go up. (Bystrom Tr. 1568)

The record shows that, assuming a FIFO and not a LIFO approach, when GISF ultimately sold these 680,636 shares upon liquidation of its remaining TRX position, it paid a commission of \$0.002 per share to its broker Garwood Securities. (C. Gibson Tr. 1440-41) Simple math shows that GISF’s commission as to these shares was about \$1,360, and that the 9% investors (those apart from Hull and the Gibson group) thus paid about \$120 in commissions on the ultimate sale of their portion of the shares bought from Hull weeks earlier on 10/18/2018. (Bystrom Tr.1570-71; C. Gibson Tr. 1441)

The OIP alleges that Gibson knew, was reckless in not knowing, and should have known, that his conduct created an undisclosed conflict of interest that benefitted himself and Hull over his other clients including GISF. However the Division failed to prove the existence of a conflict or a benefit to Gibson or Hull. The record establishes that the transaction was consummated in order to better enable GISF to sell its remaining TRX shares. The Division failed to offer any proof that the transaction resulted in any benefit to Gibson. His position remained the same, he did not receive any greater compensation after the transaction, and he did not benefit in any other way. Similarly Hull was disadvantaged by the transaction as he could have reduced his exposure to TRX, and it largely remained the same.

D. USE OF PUT OPTIONS

The Division says that, on 10/27, 10/28, 11/2 and 11/8/2011, Gibson “used his knowledge of the anticipated sale of GISF’s remaining TRX shares” by purchasing put options. (Div-Br-1-2) The Division also contends, contrary to its own experts, that “the put contracts represented a short position” in TRX. (OIP ¶45) The record shows that Gibson was long TRX, not short, and that these were “protective” puts of only a portion of his long position, a common hedging technique to manage risk:

- After buying TRX puts on 10/27, 10/28, 11/2 and 11/8/2011, Gibson “was long exposed to the stock through his involvement in the Fund.” (Dr. Taveras Tr. 1060) The puts Gibson bought can thus be “characterize[d] ... as a protective put,” and could be

“characterize[d] as a hedge.” (Dr. Taveras Tr. 1061) A “protective” put protects an investor’s long exposure in the underlying asset. (Dr. Taveras Tr. 1070) Gibson’s puts protected about a third of his long exposure to the stock. (Dr. Taveras Tr. 1064-65)

- Gibson “was buying protective puts to hedge his risk on his exposure through the fund to TRX stock,” and that would be “hedging.” (Dr. Gibbons Tr. 929-30) The Division’s expert agreed that “[o]ption contracts ... provide insurance. They offer a way for investors to protect themselves against adverse price movements in the future while still allowing them to benefit from favorable price movements.” (Dr. Gibbons Tr. 912-13)¹
- Puts are “very commonly used” as a hedge. (Bystrom Tr. 1575). As such, they demonstrate “good risk management” and “were in fact invented as a market hedging mechanism.” When “used against a long position,” puts “can mitigate loss below certain price points while allowing” an investor “to maintain long exposure, particularly through bouts of volatility.” Puts act like an insurance policy. (Bystrom Tr. 1574-75)
- Gibson also bought puts in the Francesca Marzullo account where Gibson was “exclusively responsible for the trades.” (C. Gibson Tr. 1396-97) Francesca would be viewed as an economic unit with her parents. (Bystrom Tr. 1649)
- The Division argues that nominal title is dispositive of the question of beneficial ownership of the put options purchased for Francesca’s account. However Commission rules and guidance show that, on this record, her father Giovanni Marzullo was the beneficial owner of these puts. As the Court noted (Tr. 1675-76), at least one Advisers Act rule allows aggregation of relatives who live together for certain purposes. *See* Rule 202(a)(30)-1 (foreign private adviser “may deem ... to be a single client ... [a] natural person, and ... [a]ny relative ... who has the same principal residence”). And for all advisers preparing their core Form ADV disclosure concerning their clients (Item 5D), the Investment Management Division’s current online guidance provides that, in “count[ing] clients” the adviser may count “multiple members of the same family ... as a single client”).² Answering the Court’s question (Tr. 1676), it makes sense to aggregate Giovanni and Francesca in determining these to be “protective” puts. Giovanni Marzullo,

¹ Thus, both of the Division’s experts agree that Gibson used puts as insurance to hedge a portion of his long TRX exposure through GISF. The Division cites *Olagues v. Icahn*, 866 F.3d 70, 72 n.1 (2d Cir. 2017), for *dicta* that the buyer of a naked put has a “short” position – a case where the Second Circuit affirmed a lower court determination rejecting an attempt at “fragmentation” of a transaction into “two separate hypothetical transactions,” 2016 WL 1178777 at *11 (S.D.N.Y. 2016).

² <https://www.sec.gov/divisions/investment/iard/iardfaq.shtml#item5d>. *See also* Exchange Act Rule 16a-1(a)(2)(ii)(A) (presumption that “beneficial ownership” includes “immediate family sharing the same household”). Fifty years ago, the Commission said “generally the same principles apply” under all six securities statutes in establishing that “absent countervailing facts, it is expected that securities held by relatives who share the same home as the reporting person will be reported as being beneficially owned by such person.” Rels. IA-196, IC-4516, 33-4819, 34-7825, available at 1966 WL 85229 (2/14/1966).

a GISF investor with long TRX exposure, opened and solely funded the Francesca account in 2009 in the name of his only child, who lived with her parents while a full-time art history Ph.D. student at Columbia.³ Gibson discussed the account's trading "daily" with Giovanni, and from 2009 onward, Gibson lived "for many years" with the Marzullos. Uncontroverted evidence thus proves that, apart from name, this could not have been any more Giovanni's account. (C. Gibson Tr. 135-36, 1336-37, 1395-97; J. Gibson Tr. 1098, 1169-70)

- Ultimately Gibson's net loss on his TRX exposure was \$724,660. (RX-205) The Marzullo puts protected only about 30% of their exposure, leaving them exposed to what was still a bullish bet on TRX. (Dr. Taveras Tr. 1066-67; 1076-77) Ultimately, the Marzullos, who "had all of their liquid assets in" GISF, lost \$965,318 on their TRX exposure. (RX-205; C. Gibson Tr. 1448) Gibson had also advised his father, GISF investor John Gibson, to buy puts, but ultimately Gibson's parents lost \$1,399,053 on their TRX exposure. (RX-205; J. Gibson Tr. 1100, 1103-04, 1143-44)
- "The protective puts purchased by [Christopher] Gibson did not impact the other investors." (Bystrom Tr. 1606) GISF's 81% owner Hull testified that Gibson's put purchases were "both morally and legally permissible." (Hull Tr. 534) Buying puts did not change Gibson's "bullish" alignment with GISF investors, as if TRX stock went up, it was good for GISF, Gibson and the Marzullos. (Bystrom Tr. 1584) Gibson's put purchases did not deprive other GISF investors from buying TRX puts as "there was no scarcity to those puts," and buying protective puts did not hurt GISF. (Bystrom Tr. 1583-84)

The Division says that, on 11/10/2011, Gibson emailed GISF's broker that GISF would "potentially tank" TRX stock, and that Gibson then sold GISF's remaining 4.9 million shares in market transactions that Gibson knew "would depress the value of TRX." (Div-Br-7) The record shows that GISF's 11/10/2011 sale resulted from information learned the evening before, and that it represented an ultimately unsuccessful strategy to save GISF from further losses on its TRX investment:

- On the evening of 11/9/2011, Gibson learned that hedge fund Platinum Partners would not make the bid for GISF's TRX stock that Gibson had been expecting. Instead, Platinum offered to pay GISF not to sell any TRX for six months. This alarmed Gibson and Hull, who thought Platinum would try to sell its own much larger TRX position before GISF could sell its shares. (C. Gibson Tr. 1456-58)
- GISF's responsive strategy was to sell out its position in market transactions in the belief that Platinum and other large TRX holders, including three with positions twice the size

³ Columbia confirmed this to the Division. (RX-208)

of GISF's, would defend the stock price and their own positions by purchasing the shares GISF was selling. (Hull Tr. 658-59; C. Gibson Tr. 1458)

- For GISF's strategy to potentially work, Gibson sent his "tank the stock" email to GISF's broker at Garwood. (DX-105) Gibson wanted Garwood to understand that GISF did not want the order "worked" to get best execution for GISF. Instead, GISF wanted to "sell aggressively in order to signal to the other large shareholders that we were selling and that they needed to make a decision as to whether or not they were going to buy or sell under the theory that given our superior position at the table with far fewer shares than they did, that they would be forced to go ahead and buy our shares." (C. Gibson Tr. 1461-62)
- GISF's 11/10/2011 strategy did not work. After opening at \$3.41, TRX rose slightly to \$3.44, but then dropped to \$1.56 before closing up at \$2.29. (JX-1) "Other market participants were selling too," as GISF's 4.9 million share sales were about 29% of the domestic volume and 22% of the worldwide volume that day. (Dr. Taveras Tr. 1052) GISF sold at an average price of around \$2.02. (Dr. Taveras Tr. 1051) Had GISF waited to sell, its TRX shares would have been trading substantially higher, at over \$5 per share, four months later, in March 2012. (JX-1; C. Gibson Tr. 1463-64)

The unrebutted evidence shows that what happened on 11/10/2011 was not a cynical effort to make profits on puts. Rather, Gibson was aligned with GISF and was hurt when the strategy to entice bids for GISF's TRX shares failed. Gibson suffered serious losses.

E. FAILURE OF PROOF

The Division has failed to prove that the then 27-year old Chris Gibson's 2011 TRX transactions made him a fraudster. *See Matter of Hill*, Rel. ID-1123, 2017 WL 1381889 at *21 (4/18/2017).

- Gibson's modest TRX sales of 21,900 shares in three separate accounts on 9/26/2011 at \$4.04 (following his sale of 78,000 shares at \$4.04 in GISF's account the previous trading day), did not somehow "frontrun" the bid for 3.7 million shares that Casimir first presented to GISF the following afternoon after the market had already moved to \$3.70.

At the time Gibson sold on 9/26/2011, he "did not have a firm order to sell" GISF's shares, "nor did he have the sole authority to decide when to sell" without Hull. While he had contacted Casimir, "a future sale could be days, weeks or months away." Given TRX's volatility, it "could have been materially higher or lower in a short amount of time and Gibson had no way of knowing where it was headed." After rising to \$4.34 on 9/27/2011, "[t]he fact that the stock went lower does not then define the first decision to sell personal shares as putting his interests ahead of those of the Fund." (Bystrom Report, RX-228, p. 6)

- Hull agreed to consolidate his separate 680,000 TRX shares with GISF's block to allow GISF to market its TRX position more effectively. Hull thus passed on the opportunity available to liquidate his separate TRX position at that point, as he was essentially selling most of the shares to himself as GISF's 81% owner. The shares increased materially in price after the transaction, giving GISF a paper profit.

At the time Hull sold to GISF on 10/18/2011, "it is still unknown as to where the price of TRX is headed." After rising after the sale, nobody knew it "was going to continue to trade down, so this decision should not be viewed with the hindsight bias of where it ended up. ... This was not a deal that was made to favor Hull." (Bystrom Report, RX-228, p. 7)

- The experts on both sides of this case agree that Gibson bought "protective" puts that hedged only a portion, well under 50%, of his large long TRX exposure. Gibson's losses were substantial as, contrary to the Division's now-discredited contention (OIP ¶45), the puts did not represent a short position in TRX.

"[B]ecause the stock continued to drop after" Gibson began buying puts, "Gibson continued to lose money on his exposure to TRX." GISF's subsequent liquidation "does not determine that Gibson was engaged in front running by purchasing puts. Gibson was not aware at the time of the put purchase that this would be the path of TRX over time." The "volatility of TRX ... suggests that, within 1-standard deviation (a normal expectation of future outcomes), the stock could be materially higher or lower in a relatively short amount of time." (Bystrom Report, RX-228, p. 8)

And no one has come into Court to testify that Gibson defrauded them. Not Hull, who owned 81% of GISF. Not Cates, a GISF investor who is a CPA, who does the tax work for both the Gibsons and the McKnights, and who himself passed the Series 65 Uniform Investment Adviser Law Exam. And not the young McKnight witness, who was "not bothered" that Gibson made \$1,350 by selling TRX shares on 9/26/2011, and "not offended" by Hull's sale of 680,000 shares to GISF.

This failure of proof of fraud, standing alone, compels dismissal of this case. This is, of course, before we get to GISF's Offering Memorandum and Operating Agreement, discussed in our opening brief. *See* "Interpretation Regarding Standard of Conduct for Investment Advisers," Rel. IA-5248, at 9-10 (6/5/2019) (fiduciary duty owed to a particular client must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client).

F. NO SANCTIONS

The record and Form D/A show that Chris Gibson is now a 35-year old living alone in a middle-class apartment in Montevideo, Uruguay, and dining at remote outposts of American

fast-food joints. He is 14-hours from family in Augusta, and makes a modest living doing non-securities consulting work. On these facts, there is no basis to impose a cease-and-desist order or an industry bar.

He has been insolvent since 2011. After getting GISF a gain over 100% through metals trading in 2010, he personally lost \$724,660 on TRX, his parents lost \$1,399,053, and the Marzullios with whom he was living lost \$965,318. (RX-205) On these facts, there is no basis to impose disgorgement or penalty. Nor should there be findings that he engaged in fraud.

CONCLUSION

The Division has failed to prove the violations charged, and the proceeding should be dismissed.

Dated: October 4, 2019

/s/ Thomas A. Ferrigno
Thomas A. Ferrigno
Stephen J. Crimmins
Murphy & McGonigle PC
1001 G Street NW, 7th floor
Washington DC 20001
202.220.1923 (Ferrigno)
202.661.7031 (Crimmins)
tferrigno@mmlawus.com
scrimmins@mmlawus.com

David E. Hudson
Hull Barrett PC
Sun Trust Bank Building
801 Broad Street, 7th floor
Augusta GA 30901
706.722.4481
dhudson@hullbarrett.com

Certificate of Service and Filing

Pursuant to Rule 150(c)(2), I certify that on October 4, 2019, I caused the foregoing to be sent: **(1) By Facsimile** transmission and by **FedEx (original and 3 copies)** directed to the Office of the Secretary, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-1090, with a copy by **email** to apfilings@sec.gov. **(2) By email** to the Honorable James E. Grimes, Administrative Law Judge, Securities and Exchange Commission, at alj@sec.gov. **(3) By email** to Gregory R. Bockin and Nicholas C. Margida, Securities and Exchange Commission, at bocking@sec.gov and margidan@sec.gov.

/s/ Thomas A. Ferrigno

Certificate of Compliance

The undersigned certifies that, exclusive of case caption, signature block, Certificate of Service, and Certificate of Compliance, this brief contains 6,999 words, based on the word-count function of the Microsoft Word software used to prepare the brief.

/s/ Thomas A. Ferrigno