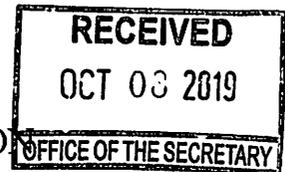


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U.S. SECURITIES AND EXCHANGE COMMISSION

Matter of

CHRISTOPHER M. GIBSON,

A.P. No. 3-17184

Respondent.

Judge James E. Grimes

RESPONDENT'S REPLY TO DIVISION'S OPPOSITION TO
RESPONDENT'S MOTION TO STRIKE

October 7, 2019

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1. **The record is what it is and the Division's assertions do not change it.**

Not often does one observe counsel school a judge on what he heard, but that is precisely what the Division does in its Opposition brief in suggesting the ALJ did not actually hear the Division state at the hearing it could prove tax fraud "if it wanted to." Plus, the Division makes no reference in its Opposition brief to its gossamer veiled continuation of tax fraud allegations in its post hearing filings: "Gibson's current activities (e.g., using foreign, alter ego d/b/a entity to pay personal expenses and its corresponding account statements reflecting suspicious transactions,"¹ and "incredible testimony regarding the funds passing through his business account... claiming as business expenses dozens of fast-food meals".² The Division fails to address CPA Doug Cates' affidavit stating that his review of the subject statements and transactions gives rise to no "suspicions" or even a "scintilla" of evidence of tax fraud. He stated further that all of the subject transactions were for periods of time for which no tax returns have yet even been filed.³ The Division

¹ Div. Post Hearing Brief at 39.

² Div. Reply Brief at 20-21.

³ See also Publication 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad (For use in preparing 2018 Returns) (January 25, 2019) at page 19:"Exclusion of Meals and Lodging: You don't include in your income the value of meals and lodging ... on the business premises... the business premises of your employer is wherever you work." The tax rules for US citizens living abroad are different from US citizens living in the US.

has had Gibson's tax returns, credit card, bank and financial statements including prior filed Form D-A's for months and years, and now suggests that given time they could certainly prove something. Eight years after the sale of TRX by the Fund, the Division is still promising to find proof to support its ipse dixit allegations.

2. The unsupported allegations of tax fraud continues a pattern of a troubling "win at any cost" approach to this case.

There are several examples of this disturbing approach to this case. It all began with misstatements to Mr. Hull and in the OIP that Gibson held "short positions" and made "illicit profits" by short selling TRX stock. This was simply untrue.⁴

The Division tried to support its broad allegations of short selling by relying on Gibson's use of the words "short bet" in 2015 in his effort to communicate with the Division attorney who appeared to be confused as to what the difference was between short and long positions.⁵ The Division's "short" allegations were overwhelmingly refuted. It's expert expert Dr. Taveras agreed that Gibson was "long exposed to the stocks throughout his involvement..." (PFF, ¶ 78). Gibson's expert Mr. Bystrom testified that the puts were hedges/insurance and that Gibson

⁴ "And for the clarity of the record...To be borrowing stock and selling stock in the hope that the stock's price will decline." Div. Ex. 174 at 15-16. (emphasis added).

⁵ DE 187:120.

was always “bullish” on TRX and aligned with the Fund. (PFF, ¶ 77). Furthermore, the experts acknowledged the authority of *Options, Futures and other Derivatives*, 7th Ed., John C. Hull, that defines short selling as “selling in the market shares that have been borrowed from another investor.” *Id.* at p. 789. (What the Division lawyers told Jim Hull). His treatise further defined “protective puts” as a “put option combined with a long position in the underlying asset.” *Id.* at p. 787. The Division’s effort to use Gibson’s March 19, 2015 answer to its confusing questions to transform what were long investments into short selling when none existed can be aptly described by a phrase used by the D.C. Circuit Court: “No matter how much lipstick...applies to this particular pig, it is still a pig.” *Day v. Trump*, 680 F.3d 686, 690 (D.C. Cir. 2017.).

Another example is the Division’s overzealous and unfounded assertion that Gibson assisted his father in timing the sale of puts on November 10, 2011, to John Gibson’s advantage. Yet the documents from a third party, PNC, show that John Gibson did not time the sale of puts to make a “profit.” The puts only had value because PNC botched the instructions given to it. Though aware of a lack of documents to support its allegation, the Division continued to pursue it.⁶

A further example is the Division’s insistence, despite the evidence and the law, that the Marzullo investments should be deconstructed to avoid the reality that

⁶ TR. 1107-1113; Res. Exs. 190, 191, 192.

they were owned and controlled by Mr. Marzullo. The district court decision in *Olagues v. Ichan*, 2016 W.L. 1178777, *22 (S.D. NY 2016), rejected as artificial and contrived an effort to reconstruct transactions contrary to their economic substance. Furthermore, the Division has misstated the Single Client Rule in its Post-Hearing Brief at p. 30, n. 10. On the very same page, 76 FR 43011, cited by the Division for the proposition that the Single Client Rule was abolished, the Commission provided a “transition rule. If you ... are not registered in reliance on, section 203(b)(3) ...you are exempt... until March 30, 2012...”. More importantly, the Division fails to note that this single economic unit concept was in fact ratified by the Commission when it simultaneously adopted the Single Client Rule for foreign private advisers and noted approvingly:

...our proposed rule... was designed to apply a well-developed body of law to give effect to a statutory provision with a similar purpose. New rule 202(a)(30)-1 allows an adviser to treat as a single client a natural person and ... (ii) any relative... who has the same principal residence... Investment Advisers Act Release No. 3222 at p. 104.

Moreover, the Commission’s guidance for completing Form ADV:Item 5.D (updated Septemebr29, 2017) provides, “... you may rely on rule 202(a)(30)-1 for determining who may be deemed a single client.”

CONCLUSION

Unfortunately, the Division has demonstrated a troubling practice of elevating accusations or suspicions as a substitute for proof. That propensity must have led it

to assert and continue to maintain the tax fraud allegations against Gibson. The other unsupported assertions that relate directly to the three transactions charged in the OIP against Gibson should be resolved in Gibson's favor in the Judge's final ruling. The scandalous and impertinent tax fraud accusations should be dealt with in response to this motion so they will not continue to exist in the records of this proceeding.

This 7th day of October, 2019.

s/s David E. Hudson _____
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CERTIFICATE OF SERVICE AND FILING

Pursuant to Rule 150(c)(2), I certify that on October 7, 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.

Dated: October 7th, 2019.

s/s David E. Hudson