U.S. SECURITIES AND EXCHANGE COMMISSION

RECEIVED
OCT 29 2019
OFFICE OF THE SECRETARY

Matter of

CHRISTOPHER M. GIBSON, A.P. No. 3-17184

Respondent.

RESPONSE TO DIVISION'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent Christopher M. Gibson submits the following response to the Division's proposed findings of fact and conclusions of law, pursuant to the October 15, 2019 order in this proceeding.

I. RESPONSE TO DIVISION'S PROPOSED FINDINGS OF FACT

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.
8. Undisputed.
9. Disputed. The only purpose Gibson stated in April 2009 for the investment advisor registration with the State of Georgia and forming Geier Group as an investment advisory company and Geier Group filing Form ADV was to "achieve better pricing" (a fee reduction from 2.5% to .65%) for gaining access to the Rogers International Commodity Index. Div. Ex. 11. TR (Gibson) 82:1-21. The objective was to reduce management fees paid to third parties and had nothing to do with management fees to be paid to Geier Group. *Id.* TR (Gibson) 100:2-8 and 103:18-104:8. After GISF exited its commodities positions in 2010 there was no further purpose to achieve better pricing for access to Rogers International Commodities Index and the Geier Group ADV registration with the

State of Georgia was allowed to lapse. TR Gibson) 148:22- 149:1 (Gibson's explanation was stricken from the record presumably as not responsive to the question). The Geier Group formation documents and Form ADV executed by Gibson were prepared by Wayne Grovenstein, Hull's general counsel. Div. Ex. 11(last line of email); TR (Gibson) 89:10-12. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

10. Disputed in Part. At the time Geier Group was first formed and filed Form ADV in April 2009 the ownership of Geier Group was not yet clarified, but eventually Gibson owned 50%, Hull 35% and Gibson's father 15%. TR (Gibson) 100:2-8 and 103:18-104:8.

11. Disputed in Part. The Geier Group formation documents and Form ADV executed by Gibson were prepared by Wayne Grovenstein, Hull's general counsel, who is named as Counsel and the Contact Employee. Div. Ex. 11; Item 1, Div. Ex. 12; TR (Gibson) 89:10-12. Neither the Form ADV nor the testimony states who filed the Form ADV or with whom it was filed. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Undisputed. Laurie Underwood, Hull's assistant, was the organizer and Hull was the registered agent. Reference should be to ¶ 5 and not ¶ 7 of Div. Ex. 216.

16. Disputed in Part. Geier Group (not Gibson) was registered as an investment adviser. Div. Ex. 12-14.

17. Undisputed.

18. Disputed in Part. Seward & Kissel, the highest rated law firm in hedge fund formation in 2009, prepared the GISF formation documents to include its qualification in Georgia. TR. (John Gibson) 1091:8-16; (Gibson)1334:10-1335:5. Resp. Ex. 184. Div. Ex. 18, page 2.

19. Undisputed.

20. Undisputed.

21. Disputed in Part. Hull and Gibson used the offering documents.

22. Undisputed.

23. Undisputed.

24. Undisputed.

25. Undisputed.

26. Undisputed.

27. Undisputed.

28. Undisputed.

29. Undisputed.

30. Undisputed.

31. Undisputed. In 2015 Gibson described, "The substance of what I said was that – one phrase that we used in every meeting was that the volatility would light their hair on fire. That we were swinging for the fences, and that we weren't going for singles or doubles. That's the substance of what I said." Div. Ex 187 at 50: 7-11. Doug Cates confirmed this characterization. Resp. Ex. 57.

32. Undisputed.

33. Undisputed.

34. Undisputed.

35. Undisputed.

36. Undisputed.

37. Undisputed.

38. Undisputed.

39. Undisputed.

40. Disputed in part. Not alleged as a conflict of interest in the OIP. Hull viewed the loans as further aligning the interests of Gibson and Gibson's father with GISF. See Response 149.

41. Undisputed.

42. Undisputed.

43. Undisputed.

44. Undisputed.

45. Undisputed.

46. Undisputed.

47. Undisputed.

48. Disputed in part. Hull also communicated with investors on a regular basis. TR (John Gibson) 1187:23- 1189:2. Div. Ex. 59 (Hull opposes diversification proposed by Bert

Storey who then buys puts for 66% of Bert Storey's TRX exposure. Res. Ex. 189); Div. Ex.80. Res. Ex. 55.

49. Undisputed.

50. Undisputed.

51. Undisputed.

52. Undisputed.

53. Undisputed.

54. Disputed in part. Hull also communicated with investors, particularly the McKnight's with whom he had an especially close relationship, on a regular basis by telephone and email. TR (John Gibson) 1187:23- 1189:2. Div. Ex. 59 and 80. Res. Ex. 55.

55. Undisputed.

56. Undisputed.

57. Undisputed.

58. Undisputed.

59. Undisputed.

60. Undisputed.

61. Undisputed.

62. Undisputed.

63. Undisputed.

64. Undisputed.

65. Undisputed.

66. Disputed in Part. Hull Storey Retail Group accommodated Geier Group and Geier Capital by advancing Gibson's salary as a loan. TR. (Gibson) 247:22-248:2; 249:9-12. TR (Hull) 546:4-22. The loan for 2010 was repaid in 2011. Div. Ex. 46. Although the loan for 2011 was not repaid, Gibson testified, and there is no contrary evidence, that a decision not to collect the loan would have been known in 2011. TR (Gibson) 255:20-25. With each payment of salary Gibson was accruing an offsetting liability. "After we suspended management fees, I'm receiving a salary, I'm accruing the liability to repay the salary ... So the net effect is...I am effectively not receiving compensation." TR (Gibson) 1358:6-12; 1398:15-20. Hull confirmed the net effect "He wasn't getting a salary or getting notes at that time." TR (Hull) 610:1-2.

67. Disputed in part. See Response 66 above.

68. Disputed in part. See Response 66 above.

69. Disputed in part. See Response 66 above.

70. Disputed in part. See Response 66 above.

71. Disputed in part. See Response 66 above.

72. Disputed in part. See Response 66 above.

73. Disputed in part. See Response 66 above.

74. Disputed in part. See Response 66 above.

75. Disputed in part. See Response 9 above.

76. Undisputed.

77. Disputed in part. The footer in Gibson's email account identifying Geier Group as a registered investment adviser was intended to be deleted in 2011 as demonstrated by Gibson's 2011 emails at Div. Ex. 45,46, 47,48,55,67,72,73, 76,77,78,80,84, 86 & 93 that do not contain the subject footer. Only Div. Ex. 54 and 56 from 2011 contain the subject footer and Gibson's explanation for the footers in these two 2011 emails was stricken from the record presumably as unresponsive to Division counsel's question. TR (Gibson) 148:7-149:6. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

78. Disputed in part. See Response 77 above.

79. Undisputed. The Termination was executed by Hull.

80. Disputed. Gibson acknowledged in 2015 that relative to Hull, "...given that I had less commercial experience in the world..." and "I wouldn't have dissolved legal entities by myself..." and "I definitely would have spoken to Jim Hull about it." Div. Ex 187 at 235:24-25; Div. Ex. 188 at 510:19-20 and 511:3-4. Gibson further explained "I'm quite confident that these emails don't capture the full picture." Div. Ex. 188 at 510:12-14. "Again, I am confident I was having a back channel conversation with Jim about this ... and that's why I responded back to Laurie in writing. So I – in other words, I don't think this is capturing anything." Div. Ex 188 at 514:11-18. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

81. Disputed in part. Geier Capital's domicile was not specified in the Operating Agreement and was changed by Seward & Kissel to Delaware in a legally customary reincorporation. Div. Ex. 188 at 309:14- 310: 23 and 491:14-20; TR (John Gibson) 1092:4-25. Div. Ex. 21. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

82. Disputed. See Response 80 above.

83. Disputed in part. Section 3.01 of the Operating Agreement provides GISF will be managed by Geier Capital to which all powers of investment management are granted in

Section 3.02 and authorizes Geier Capital to retain Geier Group from time to time in its sole discretion.

84. Undisputed.

85. Disputed in part. Division counsel employed the word "false" whereas Gibson previously testified in 2015 , "I would say it's inaccurate." Div. Ex. 188 at 527:4. Gibson further explained "... this was drafted in consultation with counsel and I didn't – I made an oversight ... I didn't look at the entities... I looked at the – reviewed the numbers of the shares and perpetrated an oversight." Div. Ex. 188 at 524:9-11 and 529:23-25. "**Q... who helped you file this 13G?** A Seward & Kissel." "**Q Who helped you prepare this SEC Form 4?** A Seward & Kissel." Div. Ex. 188 at 530:3-5 and 535:6-7. The Division has not questioned the accuracy of the reported number of shares on the subject forms. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

86. Disputed in part. See Response 81. "**Q ... why was Geier Capital Delaware created?** A I do not know. **Q... When you signed this in December of 2011, who asked you to sign it?** A It would have either been Seward or Laurie Underwood and Jim Hull." Div. Ex. 188 at 491:14-20.

87. Disputed. See Response 81. The change in domicile was a commercially and legally customary reincorporation. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

88. Undisputed. See Responses 81 and 86.

89. Undisputed. See Responses 81 and 86.

90. Disputed. The cited portions of the transcript do not support the allegation that "Gibson decided to reduce GISF's commodities investments and increase its equity investments." The record is clear that Hull made the decision to invest in a single security. TR (Gibson)1365:8- 1367:14. TR (Hull) 540:2-7; 570:22-571:7; 575:19-576:1. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

91. Undisputed. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

92. Undisputed.

93. Undisputed.

94. Undisputed.

95. Undisputed.

96. Undisputed.

97. Undisputed.

98. Undisputed.

99. Disputed in part. Gibson antagonized TRX management with a view toward creating a sense of urgency to achieve improved performance. "My objective in communications with TRX management was antagonism... Jim Hull is a very antagonistic aggressive individual, and that's his general MO ... And I thought it my duty... to be as aggressive as possible... by antagonizing management ... get a marginally better outcome... in retrospect I do not think served an effective purpose." Div. Ex. 187 at 259:23- 260:18. "I had been involved in instilling a sense of urgency in Mr. Sinclair for months at that time." TR (Gibson) 1379:5-6. Gibson believed a greater sense of urgency would marginally help the TRX price better reflect its underlying value. TR (Gibson) 1380:4-1382:3. Hull agreed with this approach. TR (Hull) 694:22- 695:10. Hull testified, "... in real estate you talk the seller down and you talk the buyer up. That's how you do real estate. So the same thing." TR (Hull) 695:8-10.

100. Disputed in part. See Responses 99 and 101.This email on August 10, 2011 in fact follows the chain in Div. Ex. 77.

101. Disputed in part. The first link in the Div. Ex. 77 email chain at 3:09 pm starts "In London you said Buckreef would be producing ... 250k ounces/year beginning Fall 2012. David Duval continues to say production is not coming until June 2014 which he indicated to many people outside the company... What is the answer and please make sure David is on the same page." Sinclair responds in reference to the $30 million Casimir Capital raise, "... because we have the funds required, in the process of taking proposals..." TR (Gibson) 1348:8-12. Div. Ex 187 at 80:16-20. Gibson responds at 3:20 pm (computer time errors) "In London you indicated that you had already received proposals and that the day after the financing deal was announced, you would publicly announce a contract with a builder. Is this no longer correct?" At 3:22 pm Gibson writes, "EVERYTHING YOU SAY IS ALWAYS INACCURATE" AND AT 3:28 pm writes "We need to be mapping out a calendar or announcements for the next six weeks. We need to be planning a roadshow. We need to be PRODUCING... We need to be announcing." Gibson advised GISF investors on September 23, 2011 that the TRX price did not reflect its underlying value "Having other professional investors who have each recently invested 40 million plus sums in TRX confirms my view of the tremendous fundamental value of the assets owned ...by TRX... "Div. Ex. 81. Gibson explained "There is a distinction between price and value. Price is what you pay and value is what you get." TR (Gibson) 1381:19-21. Irrelevant to the OIP's allegations of three instances of alleged wrongdoing.

102. Disputed in part. See Responses 99-101. The cited email chain begins with TRX management agreeing to do a roadshow and Jim Sinclair referencing a press release "For on the ground matters that might be matters of release I am working as hard and fast as possible" to which Gibson responds "Thank you. We are running on fumes..."

103. Undisputed. See Responses 99- 102.

104. Undisputed. In the cited email chain, Jim Sinclair apparently responding to Gibson's desire for urgency writes "This company will make itself on the ground... It will proceed to production."

105. Undisputed. See Responses 99 -104.

106. Disputed in part. See Response 66.

107. Undisputed.

108. Undisputed.

109. Disputed in part. The next line from Gibson's 2015 testimony at Div. Ex. 187 states "**Q Were there any other reasons to get out – for the Fund to liquidate its TRX position?** A No, no, no. Definitely not. Because my – to the degree I could control the structure and situation, I would have held it. I had a desire to hold." Div. Ex 187 at 79:2-6. "**Q And you took that as Mr. Hull's instruction that GISF should sell its shares at a good price, correct?** A Potentially. Not necessarily. We had been through this process before just a month earlier. We had gotten a bid and Mr. Hull rejected it. On Thursday and Friday, Mr. Hull proposed buying more shares, so I would characterize it as a position of ***equipoise*** whereby we were continually reevaluating whether we would buy or sell. But no, I would not say that there was any significant event where we were all of a sudden going to sell shares. We were going to start exploring it again." (emphasis added) TR (Gibson) 217:20- 218:9. Res. Ex. 52 (Hull inclined to purchase more TRX @ $4.58); Res. Ex 54 (Hull inclined to purchase more TRX @ $4.04); Res Ex. 103 (Hull not inclined to sell more TRX @ $3.46).

110. Disputed in part. See Response 109.

111. Disputed. See Response 109.

112. Disputed. The OIP at paragraphs 4 and 6 alleges that Gibson alone "...over the weekend of September 24-25, 2011 ... ***determined*** to sell GISF's entire holdings of TRX. Determined is defined as "Having made a firm decision and being resolved not to change it." https://www.lexico.com/en/definition/determined. Lexico.com is a collaboration between Dictionary.com and Oxford University Press. No such irreversible determination was ever made to liquidate the TRX position and Gibson could not control the decision. See Response 109. Any decision to sell required Hull's consent. "...I'm known as somewhat of an irascible person and, you know, have that desire to be involved and, you know, to have things go the way I want them to go... I was –insistent on understanding and of major decisions... I insisted that any major decision, that I would be a party to it and have approval of it... and then if I approved his decision, we would go forward. If I didn't, then we wouldn't." TR (Hull) 568:17 -571:7. Hull directed that communications be limited because of the concerns about John Engler, the McKnight boys cousin, and Engler's communications to Will Snelling who may have had a short position in TRX. "...I also recollect discussing John Engler and the we need to be careful with our

communications because if he's back-dooring information to his good friend, Will Snelling..." TR 694:3-7 (Hull). See Response 154.

113. Disputed in part. Gibson solicited interest and there is no order to sell. TR (Bystrom) 1556:4- 1560:25. The Division did not produce evidence from Richard Sands to rebut the testimony of Hull and Gibson.

114. Disputed in part. See Response 113.

115. Disputed. Immediately following the quotation which is within the context of examination about the November 10, 2011 sale and not the September 26, 2011 sales, the Division acknowledges the earlier exchange and context, "**Q ...not to belabor the point – but you generally expect the share price of a stock to drop when you sell a large portion of the shares?** A Yes **Q Okay. And that's mitigated by what you described earlier**..." Div. Ex 187 at 108:18-21. Gibson testified earlier, "**Q And what, if anything, happened to the share price?** A It collapsed. **Q Did you expect that to happen?** A No. I had three base case scenarios...One was the base case.... we're going to go in hard... and we're going to effectively get out without the stock materially dipping below 3.... The second case was that the stock did go below 3 ... But once they got... the message... The cavalry would come ... and we would close around 3 or higher... And the third case was a chaotic outcome, which is what materialized." Div. Ex. 187 86:4- 88:19. See Response 135.

116. Undisputed.

117. Undisputed.

118. Undisputed.

119. Undisputed.

120. Undisputed.

121. Disputed in part. The POM provides that the Affiliated Parties may hold separate accounts and invest in the same securities as the Fund and take action in such accounts different from the Fund. Div. Ex. 24 at Page 19. The Operating Agreement also provides that affiliates may take or liquidate the same investment positions in outside accounts as the Fund. Div. Ex. 21 at Section 3.01.

122. Undisputed See Response 113. The subject emails begin at 6:41 pm after the market close and after the subject sales.

123. Undisputed. See Response 113.

124. Undisputed. See Response 113.

125. Undisputed. See Response 113.

126. Undisputed. See Response 113.

127. Disputed.

128. Disputed in part. In the testimony cited Gibson makes no reference to paying his Hull debt and testified "**Q What did you decide to sell some shares?** A ... I had no assets, liquidity or means to take care of myself and meet my obligations ... I no longer had an income that I could rely upon... prudent to provide liquidity in order to meet my near-term obligations." TR (Gibson) 1394:15-25. In 2015 Gibson testified, **"Q Okay. So why did you sell all of your personal shares on September 26, 2011?** A ... basically needed for very, very short-term liquidity needs." Div. Ex 188 at 658:2-8

129. Undisputed. See Responses 109 and 112.

130. Undisputed. The 5,900,000 shares specifically includes Hull's 680,636 shares with Sequeira stating "My client wants to make sure you don't have any outhers (sic) shares to sell". Res. Ex. 94 Sequeira repeats this demand and requires that Gibson confirm in a document that it includes all affiliate shares. Res Ex. 93.

131. Undisputed.

132. Undisputed.

133. Undisputed.

134. Undisputed.

135. Disputed in part. There is no demonstrable correlation between high volume and the price of TRX. On October 17, 2011 volume was 943,595 shares. In both 2011 and 2012 there were 14 days each year with volumes in excess of 1 million shares traded. In 2011 the price rose on 6 days, fell 7 days and was flat on one. In 2012 the price rose on 8 days, fell on 5 days and was flat on one. Joint Ex. 1.

136. Undisputed.

137. Undisputed.

138. Undisputed.

139. Undisputed.

140. Disputed in part. The POM does not specify a "block" price for purchase and sale transactions which the POM specifically authorizes between the Fund and affiliates, but instead provides for the "current market price". Div. Ex. 24 at Page 19. The Operating Agreement at Section 6.02(b) provides a detailed definition of market value. Neither the POM nor the Operating Agreement make any reference to a "block" price. Div. Ex. 21 and 24.

141. Undisputed.

142. Disputed. See Response 135. Also, as it is undisputed that Gibson owned 81% of GISF, he was effectively selling 81% of the 680,636 shares (*i.e.* 551,315 shares) to

himself, and thus would have actually sold only 19% of the 680,636 shares (*i.e.* 129,320 shares) into the trading market, thus increasing the 490,626 share volume that day by 26%, not by 139%.

143. Disputed. TR (Gibson) 1440:20-1441:19.

144. Disputed. GISF never paid any sales commission for any investor.

145. Disputed. See Responses 140 and 144.

146. Undisputed.

147. Disputed.

148. Disputed.

149. Disputed. The POM and Operating Agreement authorized Gibson to provide investment advice to others. Div. Ex. 24 at 19 and Div. Ex 21 at 3.01. Hull viewed the loans to Gibson and his father as increasing Gibson's alignment with the Fund. "**Q...What was your intent with this alignment of interest?** A I wanted Chris and John and his father, my business partner, to have skin in the game and to be totally focused on this fund being successful...**Q Did you loan money to Christopher to invest in the fund?** A I did." TR (Hull) 674:16- 675:3.

150. Disputed. See Responses 140 and 154

151. Disputed. See Response 183. The McKnight's first cousin John Engler, who works with the McKnight boys, had been communicating with a fund manager who had taken a short position in TRX and redeemed half of his GISF investment in August 2011. TR (Hull) 677:6-14; 692:7-694:9; 728:20- 732:2. Res. Ex. 209-213. The McKnight boys testimony, offered by the Division to suggest that the McKnight boys were not offered or were unaware of their right to redeem under Sections 8.01 and 8.02 of the Operating Agreement when their own cousin with whom they work redeemed, is not credible. Div. Ex. 21.

152. Undisputed.

153. Undisputed.

154. Disputed in part. See Response 112. The POM provides "The Managing Member, in its sole discretion, may permit the Company to disclose some or all of its positions on a select basis to certain Members if it determines there are sufficient confidentiality agreements and procedures in place... the Company generally will not disclose all of its positions to Members on an ongoing basis." Div. Ex. 24 at 17. *See Goldstein v. SEC*, 451 F.3d 873, 875 (D.C. Cir. 2006) ("hedge funds typically remain secretive about their positions and strategies, even to their own investors").

155. Undisputed.

156. Undisputed.

157. Undisputed.

158. Undisputed.

159. Undisputed.

160. Disputed in part. Gibson testified that he could have tapped the assets of the Fund to purchase more protective put options for the Fund that would have helped him and the Marzullos, but that would not have been in the best interest of the Fund. "**Q ...Did you ever think about buying protective puts for the entire fund?** A I did, but it would have been wrong to do so... Because these had a cost to them. I expected them to expire worthless." TR (Gibson) 1450: 7-12. **"Q ...you get this email from Laurie Underwood...I'm almost insolvent... Ah, I've got an idea. I'll have the fund buy puts for everybody. Would that have been right to serve you and the Marzullos?** A That would have served me and the Marzullos and that wouldn't (would've) have hurt every other member of the fund for me to buy a security that I expected not to have value in order to protect myself from a risk that I did not believe was likely to materialize." (Corrective parenthetical added) TR (Gibson) 1451:19- 1452:8.

161. Undisputed.

162. Disputed in part. Gibson spoke to his father on November 8th after his father had lunch with Hull and John Gibson communicated with PNC Trust on November 8th. TR (John Gibson) 1107:15- 1109:2. Div. Ex. 104 shows John Gibson's account as of November 8th with PNC's notations. The first trade took place at 10:42 am on November 9th (15:42 GMT). Res. Ex. 192 at page 1. John Gibson only spoke to PNC Trust managers and never had any communication whatsoever with any "broker" and PNC Trust and PNC Trust's brokers failed to execute as instructed. TR (John Gibson) 1125:15-18. The trade tickets with "BlackRock" have only the name of John Gibson's relationship manager at PNC Trust, Chris Young, on them and John Gibson's name does not appear on any trade ticket. Res. Ex. 192 at pages 2-21. PNC account statements confirm the purchase and sale dates for the put options were both Novembers 9th. Res. Ex. 32 at pages 10,12 & 14; Res. Ex. 190 at pages 10.11 & 13; Res. Ex 192 at page 1 is a ledger with a PNC notation that the "Stmt" shows a trade date of November 9th. John Gibson's account was in the trust division of PNC (and not the brokerage division) and handled exclusively by PNC Trust officers. Res. Ex. 196, 197,198,200 & 203. Res. Ex. 223 records the Division's investigative effort, "We're looking for anything ... as to why his account statement would mistakenly show the trade date as executed on 11/9." The Division produced no evidence and did not call Chris Young or any witness from PNC Trust or BlackRock to rebut John Gibson's testimony.

163. Undisputed.

164. Disputed in part. Gibson, his parents and the Marzullos only suffered losses. Res. Ex. 205.

165. Disputed. In the exchange that segued to the Division's introduction of the amorphous phrase "short bet" the Division demonstrated unfamiliarity with the difference between a short and a long position and how strike prices then determine whether the position is bearish or bullish: **"Q And $8 January 2012 calls? Do you recall owning those?** A Yes. Those might have been short though. We might have sold those calls... **Q And does that mean that your view of TRX had changed from bullish to bearish?** A No. I was bullish but I think we sold calls at like $8 strikes. I didn't think the stock was going to triple over that period of time... **Q Okay. Did you typically exercise the options that you purchased or sell them before they expired?** A We would typically – well, with the short put options, we had contemplated that there would be no exercising. We'd just be collecting the premiums... **Q And so you sold the puts thinking that the price is going to rise. It didn't. And they were put to you?** A yes, sir. **Q And you purchased them?** A That's right. **Q Did that happen in every time that you bought a long option prior to November 10, 2011, did you have to exercise them?** A Every time I bought a long option? Well, the calls expired worthless. **Q Okay.** A So no. But – and there were only two examples, as I recall, where we were short puts, and both of the times we had the put to us also. **Q Okay. Well, they were long puts I thought you said. You were long on that investment, right?** A I WAS CONFUSED WITH THE TERMINOLOGY. We sold a put at a high – at a strike price higher than the market price. **Q Because you thought the market price would pass the strike price, right?** A Correct. So it's a bullish bid." (Emphasis Added) Div. Ex. 187 at 103:23 -106:21. Having now demonstrated its bewilderment and confused Gibson with its terminology, the Division, not Gibson, then launches the term "short bet" into this sea of confusion. Gibson adopts the Division's confused terminology in his subsequent testimony "**Q... I think you described it as a hedge, is that right?** A Yes... And the amount by which I reduced my long positions still left me extraordinarily long and far longer than anyone else in the fund." Div. Ex. 187 at 118:12-13 and 120:5-7. The phrase "short bet" is nowhere defined in the leading text on options (Res. Ex. 183) and does not appear in the OIP which uses only the well-defined term "short position" which is described both in the leading text (Res. Ex. 183 p. 789) and by the Division for the clarity of the record. "Q And for the clarity of the record, George (Bagnall) had thrown out the terms "short position" ... MR. BOHR: *To be borrowing stock and selling stock in the **hope that the stock's price will decline.*** Div. Ex. 174 at 15-16. The Division has provided no definition for its term "short bet" and no evidence of a "short position."

166. Disputed in part. Gibson expected to attend a meeting arranged by Casimir where GISF would receive an offer from Platinum Partners to take out its remaining TRX position in a privately negotiated offer. No testimony or evidence supports the allegation that Gibson knew GISF would be exiting the TRX position through market transactions until after the meeting with Casimir and Platinum and before Gibson spoke to Hull on the evening of November 9, 2011. Gibson testified in 2015, "**Q Did anybody else on November 10, 2011, know that GISF was going to liquidate its GISF position?** A The day before or two days before I had had a meeting with Platinum where they were scheduled to deliver us an offer to stabilize the stock. We thought it was going to be an

offer to purchase our shares. Instead, it was an offer to lock our shares up and to agree not to sell them in exchange for a premium of $10,000 a month for them for six months. Effectively it gives them the right to make their decision ahead of us, which we didn't find attractive, and I reported that to Jim. He said, 'Well, I think the best move is to – let's call their bluff. Let's hit them in the market and see how that goes.'" Div. Ex. 187 at 109:21 – 110:9. TR (Gibson) 1456:12-1458:22.

167. Disputed in part. See Response 162.

168. Disputed in part. See Response 115 and 166. Hull and Gibson together developed the strategy to exit the TRX position. TR (Hull) 727:1-728:5.

169. Disputed. See Response 115 and 166.

170. Undisputed. See Response 115 and 166.

171. Disputed. See Response 115 and 166.

172. Disputed. See Response 115 and 166.

173. Undisputed.

174. Undisputed.

175. Disputed in part. See Response 162.

176. Disputed. See Response 162. John Gibson testified that PNC Trust's failure to execute as instructed reduced his proceeds by $5,000. TR (John Gibson) 1213:12-15.

177. Disputed. There were no profits, only losses. Res. Ex. 205.

178. Disputed. There were no profits, only losses. Res. Ex. 205.

179. Disputed. There were no profits, only losses. Res. Ex. 205.

180. Disputed. There were no profits, only losses. Res. Ex. 205.

181. Disputed. See Response 121

182. Disputed. See Response 160.

183. Disputed in part. Gibson advised McKnight not to buy additional TRX, "I think it is a great buy at current levels, but we already have a very large position..." Div. Ex. 47. Neither Div. Ex. 47 nor Div. Ex. 72 supports the allegation that Gibson advised the McKnight's to buy TRX in their personal accounts.

184. Disputed. The Marzullos were a single economic unit and Francesca was a full-time graduate student at Columbia University living at home and the only child and sole heir of her elderly parents. Res. Ex. 208. TR (Gibson) 1336:20-1337:13. The Division offered no evidence from the Marzullos or otherwise to overcome the presumption that Giovani Marzullo was the beneficial owner of the subject account which he funded.

185. Undisputed.

186. Disputed in part. The Marzullos were the beneficial owners of the Schwab account at all times.

187. Undisputed. Irrelevant to the allegations of the OIP.

188. Disputed in part. See Response 66. Irrelevant to the allegations of the OIP.

189. Undisputed.

190. Disputed in part. Sequeira confirmed his intent to take control of TRX, "I don't think, you know, that Jim will have the same attitude with guys who, you know, who can eat his company for breakfast...They'll buy it...they'll buy it... They'll buy it." Div. Ex. 183A at 7-8.

191. Undisputed. Irrelevant to the allegations of the OIP.

192. Undisputed. Irrelevant to the allegations of the OIP.

193. Undisputed. See Response 66. Irrelevant to the allegations of the OIP.

194. Undisputed. Irrelevant to the allegations of the OIP.

195. Undisputed. See Response 66. Irrelevant to the allegations of the OIP.

196. Undisputed. Irrelevant to the allegations of the OIP.

197. Undisputed. Irrelevant to the allegations of the OIP.

II. RESPONSE TO DIVISION'S PROPOSED CONCLUSIONS OF LAW

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Disputed. Whether a person had more than one investment adviser is not a legal conclusion.

5. Disputed. The authority cited by the Division of Enforcement, *SEC v. Berger*, 244 F. Supp. 2d 180 (S.D.N.Y. 2001), does not support the broad statement that "An individual may be an investment adviser even if serving as an officer, employee or representative of an entity. The Division of Enforcement omits the premise for the court's conclusion that the individual defendant was an investment adviser within the meaning of Section 202(a)(11). The court stated that "In light of the foregoing, summary judgment is appropriate on the SEC's Advisers Act claim upon a showing that Berger was an 'investment adviser' under the Advisers Act. The text of the Investment Advisory Agreement between MCM and the Fund establishes that MCM

'undertakes to act as investment advisor' of the Fund, and in such capacity, shall 'direct the investments of the [Fund].' The agreement further specifies the compensation for such advisory services. *Because Berger effectively controlled MCM and its decisionmaking,* Berger is also properly labeled an investment adviser within the meaning of the Advisers Act." (emphasis supplied). *Id.* at 193-93.

6. Disputed. The Division of Enforcement's reliance upon *SEC v. Juno Mother Earth Asset Management, LLC*, 2012 WL 685302 (S.D.N.Y. Mar. 2, 2012), is misplaced, as the court merely denied the defendants' motion to dismiss. The denial of a motion to dismiss has no precedential value. The Division of Enforcement's reliance on *United States v. Jensen,* 573 Fed. Appx. 863, 877 (11th Cir. 2014) is also misplaced. In *Jensen,* the court considered whether a sentence in a criminal proceeding could be subject to a 4-level enhancement if the offense involved "a violation of securities law, and at the time of the offense, the defendant was . . .(iii) an investment advisor, or a person associated with an investment advisor." *Id.* at 876. The court stated that "Jensen, as the vice president of ASM, exercised control over investors' funds, and acted in more than a ministerial capacity." *Id.* at 877. The court did not conclude that Jensen acted as an investment adviser as that term is defined in the Advisers Act. Moreover, the court observed that Jensen acted more than in a ministerial capacity, a concept that is utilized in the definition of the term "associated person." *See,* Section 202(a)(17) Thus, the court was not required to and did not conclude that Jensen acted as an investment adviser as a conclusion that Jensen acted as an associated person of an investment adviser would permit the 4-level sentencing enhancement.

7. Disputed. The Division of Enforcement states that "an investment adviser is subject to the antifraud provisions of the Advisers Act regardless of whether he or she controlled an advisory firm, and cites *SEC v. The Nutmeg Group,* 162 F. Supp. 3d 754 (N.D. Ill. 2016). In *The Nutmeg Group,* the court described the individual defendant who was charged with primary violations of Section 206 by the SEC as one of two founders who subsequently became the sole owner and managing member and who oversaw the firm's operations, opened brokerage accounts, identified investment opportunities and made investment decisions. *Id.* at 765. The court further stated that the sections of the Advisers Act under which the SEC seeks primary liability only apply to an 'investment adviser' as defined in the Act." After setting forth the definition of the term "investment adviser" the court stated as follows: "This definition encompasses anyone who manages the funds of others for compensation or controls an investment advisory firm." *Id.* at 772. While the court stated that "it is undisputed that Nutmeg and Randall were investment advisers who could commit primary violations," *id.* at 772, the court did not state the basis for its conclusion that the individual defendant met the definition of investment adviser and it did not state that "an investment adviser is subject to the antifraud provisions of the Advisers Act regardless of whether he or she controlled an advisory firm.

8. Disputed in part. The Division of Enforcement's proposed conclusion that "an investment adviser receives 'compensation' if the adviser receives any 'economic benefit' for advisory services" is incomplete. The authority for the Division of Enforcement's proposed conclusion of law, IA Release No. 1092, 52 Fed. Reg. 38400-01, 1987 WL 154624 (October 16, 1987), provides as follows: "This compensation element is satisfied by the receipt of any economic benefit, whether in the form of an advisory fee or some other fee relating to the total

services rendered, commissions, or some combination of the foregoing. It is not necessary that a person who provides investment advisory and other services to a client charge a separate fee for the investment advisory portion of the total services. The compensation element is satisfied if a single fee is charged for a number of different services, including investment advice or the issuing of reports or analyses concerning securities within the meaning of the Advisers Act. As discussed above, however, the fact that no separate fee is charged for the investment advisory portion of the service could be relevant to whether the person 'is in the business' of giving investment advice." *Id.* at 38403.

9. Disputed. The cited case is distinguishable because the compensation arrangement there provided for contingent payment. In the present case, the asset management fee ceased.

10. Undisputed.

11. Undisputed.

12. Disputed in part. The Supreme Court, in *SEC v. Capital Gains Research Bureau, Inc.* 375 U.S. 180 (1963), stated that "Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." *Id.* at 194 (citing Prosser, Law of Torts (1955), 534-535, Keeton, Fraud-Concealment and Non-Disclosure 15 Texas L. Rev. 1 and 1 Harper and James, The law of Torts (1956), 541). In *Capital Gains,* the Supreme Court held that "the Investment Advisers Act of 1940 empowers the courts, upon a proper showing, such as that made here, to require an adviser to make full and frank disclosure of his practice of trading ahead of his recommendations." *Id.* at 197.

13. Disputed in part. The Division of Enforcement's Proposed Conclusion of Law is incomplete. In its release regarding the standard of conduct for investment advisers, the Commission stated that "An investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. . . .This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the 'best interest' of its client at all times. IA Release No.5248 at p.8, 2019 WL 3779889 at *3 (June 5, 2019).

14. Disputed in part. The Division of Enforcement's quotation from *Capital Gains* is inaccurate. The Court did not state that "an investment adviser has a duty under Section 206 to disclose, among other things, 'all conflicts of interest which might incline an investment adviser - - consciously or unconsciously - - to render advice which is not disinterested." The Court stated that "The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested." 375 U.S. at 191-92.

15. Disputed in part. The Division of Enforcement's statement that "conflicts of interest are material facts" is overbroad. In its release regarding the standard of conduct for investment advisers, the Commission indicated that "an adviser must eliminate or at least expose through

full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested. IA Release No.5248 at 23, 2019 WL 3779889 at *8 (June 5, 2019).

16. Undisputed.

17. Undisputed.

18. Undisputed.

19. Disputed in part. Section 206(1) provides that it shall be unlawful for any investment adviser . . . to employ any device, scheme or artifice to defraud any client or prospective client. Section 206(1) has been construed as requiring proof that the defendant or respondent acted with scienter in employing a device, scheme or artifice to defraud. *SEC v. Robare,* 922 F.3d 468, 472 (D.C. Cir. 2019) ("A violation of Section 206(1) requires proof of 'scienter,' that is, proof of an 'intent to deceive, manipulative, or defraud.'").

20. Disputed in part. Section 206(2) provides that it shall be unlawful for any investment adviser . . . to engage in any transaction, practice, or course of conduct which operates as a fraud or deceit upon any client or prospective client. Section 206(2) has been construed as requiring proof that the defendant or respondent acted in a negligent manner in engaging in a transaction, practice, or course of conduct which operated as a fraud or deceit on a client or prospective client. *SEC v. Robare,* 922 F.3d 468, 477 (D.C. Cir. 2019) ("Negligence is the failure to 'exercise reasonable care under all the circumstances.'").

21. Disputed in part. In order to establish a violation of Section 206(1), the Division of Enforcement was required to prove, among other things, that Respondent employed a device, scheme or artifice to defraud a client or prospective client. Mere proof of a breach of fiduciary duty does not constitute proof of fraud.

22. Disputed in part. In order to establish a violation of Section 206(2), the Division of Enforcement was required to prove, among other things, that Respondent engaged in an act, practice or course of business which operated as a fraud or deceit upon any client or prospective client. Mere proof of a breach of fiduciary duty does not constitute proof of fraud or deceit.

23. Disputed. Section 215(a) does not provide that an investment adviser's federal fiduciary duties under Section 206 may not be waived. Section 215(a) provides that compliance with provisions of the Advisers Act may not be waived. In the Commission's release regarding the standard of conduct for investment advisers, IA Release No. IA-5248, 2019 WL 3779889 (June 5, 2019), the Commission distinguished between a waiver of fiduciary duties generally and the application of fiduciary duties in light of scope of the advisory relationship. The Commission stated that "A contract provision purporting to waive the adviser's federally fiduciary duty generally, such as (i) a statement that the adviser will not act as a fiduciary, (ii) a blanket waiver of all conflicts of interest, or (iii) a waiver of any specific obligation under the Advisers Act, would be inconsistent with the Advisers Act, regardless of the sophistication of the client." *Id.* at 10-11, 2019 WL 3779889 at *4. In that regard, the Commission further stated that "Because an

adviser's federal fiduciary obligations are enforceable through section 206 of the Advisers Act, we would view a waiver of enforcement of section 206 as implicating section 215(a) of the Advisers Act, which provides that 'any condition, stipulation or provision binding any person to waive compliance with any provision of this title. . . shall be void." *Id.* at *4 and n. 29 With respect to the application of fiduciary duties in light of scope of the advisory relationship, the Commission stated "The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent." *Id.* at 9, 2019 WL 3779889 at *3.

24. Disputed in part. The Division of Enforcement's Proposed Conclusion of Law is comprised of various statements from the Commission's release regarding the standard of conduct of an investment adviser. Although the statements were drawn from the Commission's release, the statements are mere excerpts that have been rearranged in an effort to limit the Commission's pronouncement. The Division of Enforcement argues that the Investment Advisers Act imposes federal fiduciary duties on investment advisers and such duties cannot be waived or modified. The only qualification that the Division of Enforcement acknowledges is that specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client. The Division of Enforcement refuses to acknowledge that the Commission has unmistakably confirmed that an investment adviser may disclose, and a client may consent to, conflicts of interest. In that regard, the Commission has stated that "Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict." *Id.* at 8, 2019 WL 3779889 at *3. And that "The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent." *Id.* at 9, 2019 WL 3779889 at *3.

25. Disputed in part. The Division of Enforcement's Proposed Conclusion of Law is comprised of various statements from the Commission's release regarding the standard of conduct of an investment adviser. Although the statements were drawn from the Commission's release, the statements are mere excerpts that have been rearranged in an effort to limit the Commission's pronouncement.

26. Disputed. As authority for its proposed definition of front running, the Division of Enforcement cites a district court order denying a motion for summary judgment and a treatise regarding investment management. As a denial of motion for summary judgment, the district court's memorandum opinion and order in *SEC v. Yang,* 999 F. Supp. 2d 1007 (N.D. Ill. 2013) have no precedential value. See, *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966) ("the denial of a motion for summary judgment because of unresolved issues of fact does not settle or decide anything about the merits of a claim. It is strictly a pretrial order that decides only one thing-that the case should go to trial.") Similarly, the citation to a treatise has no binding effect. *Compare 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."); *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").

27. Disputed. The Division of Enforcement's Proposed Conclusion of Law is merely a statement of its view regarding front running. As authority for its statement, the Division of Enforcement cites *SEC v. Capital Gains Research Bureau, Inc.* 375 U.S. 180 (1963). However, *Capital Gains* did not involve frontrunning. The Supreme Court's decision concerns "scalping." ("The answer to this question turns on whether the practice-known in the trade as 'scalping'--- 'operates as a fraud or deceit upon any client or prospective client' within the meaning of the Act.") *Id.* at 181. The Division of Enforcement's reliance upon *SEC v. Yang,* 999 F. Supp. 2d 1007 (N.D. Ill. 2013) is also misplaced as it is merely a denial of a motion for summary judgment and has no precedential value. *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.,* 385 U.S. 23, 24 (1966) ("the denial of a motion for summary judgment because of unresolved issues of fact does not settle or decide anything about the merits of a claim. It is strictly a pretrial order that decides only one thing-that the case should go to trial.")

28. Undisputed.

29. Undisputed.

30. Undisputed.

31. Disputed. Rule 206(4)-8(a)(1) provides that it shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act . . . . for any adviser to a pooled investment vehicle to: (1) make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle.

32. Disputed. Rule 206(4)-8(a)(1) provides that it shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act . . . . for any adviser to a pooled investment vehicle to: (2) otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

33. Undisputed.

34. Disputed. The authority cited by the Division of Enforcement, *SEC v. Research Automation Corp.,* 585 F. 2d 31, 35-36 (2d Cir. 1978), involved an offering of securities, the proceeds from which were diverted to officers of the corporate defendant. The court's statement regarding materiality was made in the context of the diversion of offering proceeds to officers of

the issuer. The court did not state that any misstatement or omission regarding the use of investor funds is material as a matter of law.

35. Undisputed.

36. Disputed in part. Rule 10b-5 provides, in relevant part, that it shall be unlawful for any person (a) to employ any device, scheme or artifice to defraud; (b) to make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate upon any person, in connection with the purchase or sale of a security.

37. Disputed. In order to establish liability for a violation of Rule 10b-5, there must be proof that the defendant engaged in conduct proscribed by the rule in connection with the purchase or sale of securities. For example, Rule 10b-5 liability does not extend to conduct that is not in connection with the purchase or sale of securities and necessarily does not extend to potential investors who do not purchase or sell a security.

38. Undisputed.

39. Undisputed.

40. Undisputed.

41. Undisputed.

42. Disputed. The Division cites *Olagues v. Icahn,* 866 F. 3d 70 (2d. Cir. 2017) in an effort to tergiversate the Division's definition of a "short position" and to separate the put options from a long position in the same security. The Second Circuit affirmed the district court's decision, which eviscerates the Division's position. In *Olagues,* the defendant simultaneously wrote put options and purchased call options and paid the Section 16(b) penalty upon the simultaneous exercise of the put and call options, but the plaintiff challenged the calculation of the penalty by seeking to bifurcate the transactions and manufacture a greater "profit". The district court methodically and at length critiques as artificial and contrived the effort at dividing the two transaction as "...hypothetically separating them into two separate legs with characteristics that deviate significantly from the economic substance of the actual transactions." Id. at 22 The Second Circuit's general description of a purchaser of a naked put option as being "short" with a bearish position was *dicta* and not dispositive of the Icahn case or the case at bar.

43. Disputed in part. For a bar under Section 203(f) of the Investment Advisers Act, the Division must also show that the person was "at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser." The "time of the alleged misconduct" here is said to be between 9/26/2011 and 11/10/2011, involving three incidents, and as to this time period relevant for relief under the statute, the Division has not identified an investment adviser with which Gibson was associated. Where there is a statutory basis for a remedy under Section 203(f), in assessing whether an industry suspension or bar is "in the public

interest" under the statutory standard, "the Commission considers the *Steadman* factors: the egregiousness of the respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of her conduct; and the likelihood that the respondent's occupation will present opportunities for future violations." *Matter of Martin*, 2015 WL 1004876, at *22 (I.D., Mar. 9, 2015). In addition, the Commission considers "the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and deterrence." The overall inquiry "is flexible, and no one factor is dispositive." *Id.*

44. Undisputed.

45. Disputed. In applying the *Steadman* factors, the Commission considers "the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and deterrence." The overall inquiry "is flexible, and no one factor is dispositive." *Matter of Martin*, 2015 WL 1004876, at *22 (I.D., Mar. 9, 2015). Here the alleged violation occurred eight years ago, in 2011. Gibson's challenged transactions were small, and his overall losses from GISF were very large.

46. Disputed in part. In applying the *Steadman* factors, the Commission considers "the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and deterrence." The overall inquiry "is flexible, and no one factor is dispositive." *Matter of Martin*, 2015 WL 1004876, at *22 (I.D., Mar. 9, 2015).

47. Disputed in part. Negligent conduct is not willful conduct. *The Robare Group, Ltd. v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019).

48. Disputed in part. A "court may exercise its equitable power only over property causally related to" a violation of the federal securities laws. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. Jones*, 476 F. Supp. 2d 374, 386 (S.D.N.Y. 2007). Separately, the Supreme Court has recently raised the question whether the Commission may seek disgorgement. In the context of holding that "SEC disgorgement constitutes a penalty," the Court left for future consideration "whether courts possess authority to order disgorgement in SEC enforcement proceedings," and whether disgorgement principles have been "properly applied" in SEC cases. *Kokesh v. SEC*, 137 S.Ct. 1635, 1642 and n. 3 (2017).

49. Undisputed.

50. Disputed. "[T]he Commission distinguishes between amounts earned through legitimate activities and those connected to violative activities, and it falls on the Division to show what a reasonable approximation of the salary or fees was unjust enrichment." *Matter of Riad*, 2014 WL 1571348, at *32, I.D. Rel. 590 (Apr. 21, 2014). Where "the Division failed to meet its initial burden of presenting a 'reasonable approximation' of the profits connected to the

violations," as in the present matter, "no disgorgement will be ordered." *Matter of Natural Blue Resources, Inc.*, at *33, I.D. Rel. 863 (Aug. 18, 2015).

51. Disputed. The loss-avoided measure stated in *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995), should be limited to insider trading cases.

52. Undisputed.

53. Undisputed.

54. Undisputed.

55. Disputed. Any penalty calculation must be supported by meaningful explanation and cannot be superficial and arbitrary. *See Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012) ("SEC must provide some meaningful explanation for imposing sanctions"); *Rockies Fund,* Inc. *v. SEC*, 428 F.3d 1088, 1099 (D.C. Cir. 2005) ("SEC's analysis was not just superficial; it was nonexistent" and "arbitrarily and capriciously imposed" penalties). There should be no penalty here, but if there were to be a penalty, it should be limited to a single "course of action." *E.g. Matter of Havanich*, 2016 WL 25746, at *11, I.D. Rel. 935 (Jan. 4, 2016); *Matter of Natural Blue Resources, Inc.*, , at *33, I.D. Rel. 863 (Aug. 18, 2015); *Matter of Riad*, 2014 WL 1571348, at *34, I.D. Rel. 590 (Apr. 21, 2014).

Dated: October 25, 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 25, 2019, I caused the foregoing to be sent: **(1)** 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