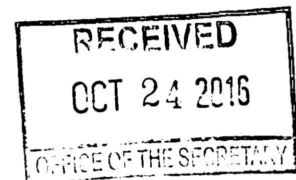
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceeding
File No. 3-17184

In the Matter of

CHRISTOPHER M. GIBSON



DIVISION OF ENFORCEMENT'S POST- HEARING BRIEF

October 24, 2016

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INTRODUCTION

The Division of Enforcement ("Division") hereby submits its post-hearing brief pursuant to the orders of September 16 and October 11, 2016. The Division is also separately submitting proposed findings of facts and conclusions of law.[1] As shown in these documents, the evidence admitted during the hearing on September 12-16, 2016, establishes conclusively that Respondent Christopher Gibson ("Gibson") engaged in fraudulent conduct and violations of his fiduciary duties while acting an as investment adviser to the Geier International Strategies Fund, LLC ("GISF" or "Fund").

From January 2010 until early 2013, Gibson was an investment adviser to the GISF, a private investment fund that at times had more than $70 million in assets under management. Gibson was also the 50% owner and managing director of the entity that served as GISF's managing member. GISF's private offering memorandum told investors that "the success of the Company [GISF] is significantly dependent upon the expertise and efforts of Chris Gibson."

As an investment adviser, Gibson owed fiduciary duties to GISF under Section 206 of the Investment Advisers Act of 1940 ("Advisers Act"), including the obligations to act for the benefit of GISF, put the interests of GISF before his personal interests, and act honestly and fairly in dealing with GISF. Section 206 (1) and (2) of the Advisers Act prohibited Gibson from engaging in any conduct regarding GISF that, in view of his fiduciary duties, constituted a "device, scheme, or artifice to defraud" or "operate[d] as a fraud or deceit." Further, Gibson's conduct toward GISF's investors was subject to Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibited Gibson from making untrue or misleading statements to GISF's

[1] Division Of Enforcement's Proposed Findings Of Fact And Conclusions Of Law, filed October 24, 2016 ("Div. Findings").

investors or engaging in any conduct that was fraudulent, deceptive, or manipulative with respect to investors. Additionally, Gibson's conduct relating to the purchase and sale of securities was also subject to the anti-fraud provisions in Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder.

Gibson violated each of these provisions in late 2011, when the share price of GISF's sole investment was collapsing. Gibson had earlier invested virtually all of GISF's funds, approximately $70 million, in the shares of Tanzanian Royalty Exploration Corporation ("TRX"), a small, thinly-traded company specializing in the exploration for gold reserves in Africa. By late September 2011, the TRX share price had fallen dramatically and the Fund's holdings were down approximately $30 million from their peak. Nevertheless, on September 23, 2011, Gibson told GIFS's investors that TRX was a good investment with strong prospects, and that he and the Fund would continue to hold TRX for the long term. But after talking with GISF's largest investor (James Hull) over the weekend of September 24-25, 2011, Gibson decided that GISF would dramatically reverse course and sell its entire position in TRX. No investors (other than Hull) were told of this decision. But Gibson immediately began using his knowledge of GISF's intended sale of TRX to benefit himself, his girlfriend, his father, and Hull.

First, Gibson traded ahead of his client GISF based on his foreknowledge of GISF's intended sales, i.e., he engaged in "front running." On Monday, September 26, 2011, the first market day after making the decision to sell GISF's large TRX holdings, Gibson sold all the TRX shares in his personal account, his girlfriend's account, and another non-GISF account he controlled. Then the following day, September 27, 2011, Gibson sold 3.7 million TRX shares held by GISF. By trading for himself and his girlfriend on September 26 based on the anticipated market impact of the sale he would be making for GISF, Gibson and his girlfriend

secured a higher price for their TRX shares than GISF received the following day. Additionally, by selling all the TRX shares he controlled outside the Fund, Gibson eliminated the risk that he and his girlfriend would be hurt by any decline in the TRX share price due to the other large sales of TRX he expected to make on GISF's behalf in the near future. GISF investors were not told of Gibson's September 26 front running.

Second, in mid-October, 2011, Gibson favored Hull's interests over the interests of the Fund by arranging for GISF to buy all the TRX shares in Hull's personal account, thereby enabling Hull to exit a souring investment at an above-market price, without paying a sales commission. In addition to being GISF's largest investor, Hull was paying Gibson a salary for advisory services to GISF and was being advised by Gibson with regard to his personal accounts. Although acquiring additional TRX shares was directly contrary to GISF's plan to exit its TRX position, Gibson directed the Fund to purchase over 680,000 TRX shares from Hull for approximately $2.45 million, a higher price than Hull could have obtained in the market. When GISF sold all its remaining TRX shares three weeks later, GISF lost approximately $1 million on the shares purchased from Hull. GISF's buyout of Hull's personal shares was not disclosed to other investors.

Third, in late October and early November 2011, Gibson repeatedly used his knowledge of the anticipated sale of GISF's remaining TRX shares to benefit himself, his girlfriend, and his father. Knowing that liquidating GISF's large TRX position was likely to depress the share price, Gibson bought $4 put option contracts on TRX for his personal account and the account of his girlfriend. He also advised his father to purchase the same option contracts, and his father did so. This meant that if the TRX share price fell below $4, Gibson, his girlfriend, and his father would profit on the put options in their personal accounts. Then on November 10, 2011,

Gibson dumped all of GISF's remaining TRX shares into the market (approximately 4.9 million shares). As TRX's price dropped, the option contracts quadrupled in value. When the price of TRX shares was near its lowest point, Gibson sold all of his and his girlfriend's $4 option contracts, and his father sold on November 10 as well. This resulted in over $375,000 in profits for Gibson, his girlfriend, and his father in their respective personal accounts. In contrast, GISF lost more than $6 million on November 10, 2011. Gibson's use of put option contracts to front run the Fund was not disclosed to GISF investors, other than Gibson's father.

In sum, Gibson repeatedly engaged in intentional, sophisticated, and fraudulent conduct intended to benefit himself and several persons close to him through misuse of GISF's confidential, non-public information and through undisclosed favoritism toward GISF's major investor, all in violation of Gibson's fiduciary duties. By front-running GISF in September, October, and November 2011, and by favoring Hull to the disadvantage of GISF in October 2011, Gibson violated Sections 206(1), (2), and (4) of the Advisers Act, as well as Rule 206(4)-8. Each instance of front-running also violated Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder.

The Division requests that the Hearing Officer enter a cease and desist order and permanent associational bar against Gibson, as further specified in Part V.B below. Gibson should also be ordered to disgorge the more than $600,000 in ill-gotten gains his violations generated, with prejudgment interest, and required to pay civil penalties commensurate with his serious and repeated violations.

STATEMENT OF FACTS[2]

From June 2006 to February 2009, Gibson was an asset securitization analyst at Deutsche Bank Securities in New York, where he was involved in complex financial and securities transactions, including securitization and valuation of mortgage-backed securities. 9/12/16 Tr. 16:7-9 and 17:25 to 18:6; Div. Ex.190 at 15:9-15 and 15:22 to 16:14.[3] Gibson passed the Series 7 and Series 63 exams in 2006, and the Series 65 exam for investment advisers in 2009. 9/12/16 Tr. 25:22 to 26:1 and 33:7-11; Div. Ex. 189 at ¶ 2; Div. Ex. 190 at 41:13-16.

Gibson Creates Geier Group As An Investment Adviser

Shortly after leaving Deutsche Bank, Gibson began providing investment advice to James Hull, members of Hull's family, and two private investment funds (the "Hull Fund" and the "Gibson Fund") holding money invested by Hull, Hull business associates and friends, Gibson, Gibson's father (John Gibson), and others. Div. Ex. 10; 9/12/16 Tr. 19:18 to 20:1 and 28:11 to 29:5.

On April 14, 2009, Gibson formed Geier Group, LLC ("Geier Group") as a Georgia entity. Div. Ex. 11 He registered Geier Group as an investment adviser under Georgia law on April 24, 2009, by filing Form ADV with the Financial Industry Regulatory Authority ("FINRA"). Div. Ex. 12. That Form ADV stated that Geier Group would provide "[p]ortfolio management for individuals and/or small businesses" and "[p]ortfolio management for

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[2] The facts relating to the Division's claims are set out in greater detail in the Division's proposed findings of fact. Div. Findings ¶¶ 1-252.

[3] The Division's exhibits are cited as "Div. Ex. __." Respondent's exhibits are cited as "Resp. Ex. __." The hearing transcript is cited by the date of the testimony, the designation "Tr.," and the pages and lines at which the cited testimony appears. Designated portions of Gibson's investigative testimony are cited by the exhibit number assigned to the transcripts containing the Division's designations (Div. Exs. 190 and 191) and the pages and lines at which the cited testimony appears.

businesses or institutional clients (other than investment companies)." Id. The ADV stated that Geier Group or a related party had discretionary authority to determine the "securities to be bought or sold for a client's account" and "the amount of securities to be bought or sold for a client's account." Id. Geier Group's Form ADV identified Gibson as the "person responsible for supervision and compliance" and as "President." Id. Gibson owned 50% of Geier Group, Hull owned 35%, and Gibson's father owned 15%. Div. Ex. 189 at ¶4.

Gibson, Hull, and Gibson's father also owned a parallel Georgia entity, Geier Capital, LLC ("Geier Capital"), which was created in June 2009. Div. Ex. 15 The ownership interests in Geier Capital were the same as in Geier Group. Div. Ex. 189 at ¶9. Geier Capital never registered as an investment advisor.

Gibson Creates GISF As A Pooled Investment Fund

Gibson created GISF on December 16, 2009, as a Delaware limited liability company. Div. Ex. 17. Hull assisted in the formation of GISF, providing administrative support and encouraging business associates and friends to invest in GISF. 9/12/16 Tr. 27:15 to 28:5, 46:2-14, 22:10-12, and 22:21 to 23:3. Investors in the Hull Fund and the Gibson Fund transferred their interests to GISF. 9/12/16 Tr. 51:24 to 52:3; Div. Ex. 190 at 23:5-12.

GISF's private offering memorandum, operating agreement, and subscription agreement were distributed to potential investors in January 2010. Div. Findings ¶ 22. The private offering memorandum ("POM" or "offering memorandum") identified Geier Capital as the "Managing Member" of GISF and identified Gibson as "the Managing Director" of Geier Capital. Div. Ex. 24 at 1.

The offering memorandum identified Geier Group as the "Investment Manager," with Gibson as "the managing member" of the Investment Manager. Div. Ex. 24 at 1. The offering

memorandum also told investors that Geier Group was "registered in the State of Georgia as an investment adviser." Div. Ex. 24 at 1.

In early 2010 GISF raised approximately $32 million through a Regulation D private placement. Div. Ex. 31 at ¶1. Hull was the Fund's largest investor. 9/12/16 Tr. 129:11-17. Other investors included members of the McKnight family of Georgia, other Georgia business associates and friends of Hull, Gibson's parents, and the father of Gibson's then-girlfriend. Div. Findings ¶ 39. Gibson secured additional investments, including from new investors, through early 2011. Div. Ex. 33; 9/12/16 Tr. 54:11 to 55:2.

Gibson Was An Investment Adviser To GISF

Gibson acted as an investment adviser to GISF from its inception in January 2010 through early 2013. Gibson identified himself as an investment adviser, accepted discretionary control of GISF's funds, determined GISF's investment strategy (in consultation with Hull), directed GISF's trading on a daily and often minute-by-minute basis, selected GISF's brokers, opened brokerage accounts in GISF's name, transferred GISF funds among brokers and financial institutions, tracked the performance of GISF's investments, communicated with investors regarding GISF's performance, and provided market analysis and projections to GISF's investors.[4] Div. Findings ¶¶48-68.

Gibson was compensated for his services as an investment adviser to GISF in the form of management fees, incentive fees, and salary. Pursuant to GISF's offering memorandum and GISF's operating agreement, Geier Group was entitled to an annual investment management fee equal to 1% of assets under management. Div. Ex. 189 at ¶12. GISF paid Geier Group investment

[4] Gibson also signed the reports filed with the Commission on Forms D, 13G, 4 and 5 on behalf of GISF (and Geier Group and Geier Capital). Div. Exs. 31, 50 and 132 (Forms D); Div. Exs. 39, 53, 69, and 109 (Schedules 13G); Div. Ex. 70 (Form 3); Div. Ex. 71 (Form 4).

management fees of $223,351 in 2010 and $295,005 in 2011. Div. Ex. 191 at 402:7-13; 403:1-20; 457:4-16; and 461:12 to 462:12. As 50% owner of Geier Group, Gibson received 50% of those fees. Div. Ex. 191 at 461:12-16.

GISF was also obligated to pay Geier Capital a 10% "incentive allocation" if GISF achieved an annual return in excess of a designated rate ("hurdle rate"). 9/12/16 Tr. 43:18 to 44:4. In 2010, GISF paid Geier Capital an incentive allocation of $3,147,283. 9/12/16 Tr. 84:13 to 85:8. As 50% owner of Geier Capital, Gibson received 50% of that incentive allocation, i.e., $1,573,642. 9/12/16 Tr. 84:13 to 85:8.

Gibson also received a salary from Hull for advisory services to GISF. The amounts Gibson received in salary were: $73,953.51 in 2010,[5] $148,718.31 in 2011, $148,395.53 in 2012, and $6,271 in 2013. Div. Exs. 43, 128, 147, and 156.

GISF's Performance

At the end of 2010, GISF held assets valued at approximately $88.9 million. After discussions with Hull regarding the tax treatment of gains on commodities, Gibson decided in late 2010 to greatly reduce GISF's gold and silver holdings and instead invest most of GISF's assets an equity security related to gold. Gibson then began concentrating the Fund's investments in in the common stock of Tanzanian Royalty Exploration Corporation ("TRX"). 9/12/16 Tr. 85:9 to 86:18; 9/12/16 109:18 to 112:7; Div. Ex. 190 at 67:8 to 68:6. By late April 2011, GISF held

[5] Because Geier Group later repaid Hull $75,000 to cover Gibson's 2010 salary, and Gibson was a 50% owner of Geier Group, Gibson's effective salary benefit in 2010 was approximately $38,953. Div. Ex. 191 at 419:5 to 420:2.

approximately 9.7 million TRX shares.[6] 9/12/16 Tr. 90:1 to 93:1; Div. Ex. 69; Div. Ex. 189 at ¶¶15-16.

Although TRX had never been profitable, Gibson told investors that TRX shares could be expected to appreciate in response to an increased demand for gold. 9/12/16 Tr. 112:9-25. However, after April 2011 the price of TRX's stock moved in the opposite direction, declining throughout the summer. 9/12/16 Tr. 112:21-25. The value of GISF's holdings, which consisted entirely or almost entirely of TRX shares, fell correspondingly. 9/12/16 Tr. 113:1-5.

While issuing optimistic projections to the investors, Gibson told TRX management in private communications that the company was failing. Div. Ex. 76, 77, 78, 79 and 103. On August 10, 2011, Gibson told TRX management that he was "physically ill" over TRX's stock price and "[v]ery soon it will make sense to exit our positions. There is no time left." Div. Ex. 76. The same day Gibson told James Sinclair, TRX's Chairman, that "everything you say is always inaccurate." Div. Ex. 77. On August 15, 2011, Gibson told TRX management that "[w]e are running on fumes." Div. Ex. 78. In an email on Thursday, September 22, 2011, Gibson

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[6] In addition to altering GISF's investment strategy and holdings, in early 2011Gibson made fundamental changes regarding GISF's investment manager (Geier Group) and GISF's managing member (Geier Capital):

Geier Group: Gibson allowed Geier Group's registration as an investment adviser to lapse in January 2011. GISF's investors were never told that Geier Group was no longer a registered investment adviser. Div. Findings ¶¶ 96-99. Then in April 2011, at Gibson's direction, Geier Group was dissolved. Gibson never told GISF's investors that the entity designated as the investment adviser had been dissolved. Gibson continued to make filings with the SEC in the name of Geier Group until at least November 2011. Gibson also continued to use a brokerage account in the name of Geier Group long after that entity ceased to exist, including in connection with his front running. Div. Findings ¶¶ 103-106.

Geier Capital: Geier Capital, the Georgia entity identified in the offering documents as the managing member of GISF, was dissolved on March 28, 2011, at Gibson's direction. Gibson never told GISF's investors that the managing member of GISF had been dissolved and continued to use the name "Geier Capital" until early 2013. Div. Findings ¶¶ 100-103. Gibson claims that Geier Capital was replaced as GISF's managing member by a Delaware entity also named Geier Capital, with same members and ownership structure. Div. Findings ¶¶ 103-111. See also note14 below.

stated that the company might not last for more than "4 more days" and urged management to seek a buyer. Div. Ex. 79.

On Friday, September 23, 2011, Gibson sent an update to investors acknowledging GISF's poor performance and stating that management fees would be suspended beginning October 1, 2011, and "until further notice." Div. Ex. 81. But in contrast to his statements to TRX management, Gibson told the investors that there was "tremendous fundamental value" in "the assets owned and business operated by TRX" and that he believed in the "reputation, character, and integrity" of TRX's Chairman, James Sinclair. Id. Gibson further stated that he expected the TRX stock price to rise to "significantly higher levels." Finally, Gibson assured investors that "[p]ersonally, I will not redeem my interest in Geier and TRX until the bull market matures over the coming years." Id.

Gibson's "Front-Running" On September 26, 2011

After a conversation with Hull over the weekend of September 24-25, 2011, Gibson decided to liquidate GISF's entire TRX position. 9/12/16 Tr. 130:7-21. Apart from Hull, none of the investors were told of this decision. 9/12/16 Tr. 131:3-7 and 133:30-15.

Gibson had previously purchased TRX shares in his personal brokerage account and two other accounts he controlled, i.e., an account in the name of his then-girlfriend (Francesca Marzullo) and an account in the name of the defunct Geier Group. On Monday, September 26, 2011 (the first trading day after he assured investors that he would not redeem his interest in TRX for years), Gibson sold all of the TRX shares in his personal brokerage account (2,000 shares), Div. Ex. 189 at ¶ 22, Marzullo's account (18,900 shares), Div. Ex. 189 at ¶ 23, and Geier Group's account (1,000 TRX shares). Div. Ex. 189 at ¶ 24. Gibson sold these 21,900 TRX shares for approximately $4.04 per share. Div. Ex. 184 (Taveras Expert Report) at 8-10.

Then the next day, September 27, 2011, Gibson caused GISF to sell approximately 3.7 million TRX shares at an average price of $3.50 per share. Div. Ex. 184 at 8-10. TRX's share price opened at $4.24 on September 27 and declined 14% that day, closing at $3.54 per share. Div. Ex. 184 at 8.

By "front running" GISF's trading, Gibson exploited his position as GISF's investment adviser to personally benefit himself and his then-girlfriend (Marzullo). By trading ahead of his client based on his foreknowledge of the Fund's intended sale of TRX shares, Gibson was able to sell all of the TRX shares in his personal account and two accounts he controlled at a price more than $0.50 per share higher than the price he obtained for GISF the following day. He did so without disclosing his intention to trade ahead of the Fund or the conflict of interest it would create, and without obtaining the consent of his client, GISF. Div. Findings ¶ 142; Div. Findings ¶¶ 129-158.

Unfair Trade Allocation/Favoritism Toward One Investor in October 2011

After GISF's September 27 sale, Gibson continued to seek buyers for GISF's approximately 5.4 million remaining TRX shares. 9/12/16 Tr. 171:23 to 172:9. Nevertheless, by agreement dated October 18, 2011, Gibson agreed to use GISF's funds to buy all 680,636 TRX shares Hull held personally. Div. Ex. 95. GISF paid $3.60 per share, for a total cost to GISF of over $2.45 million. Id. The shares were delivered to GISF on October 20, 2011, and GISF paid $2,450,589.60 to Hull on the same day. 9/12/16 Tr. 181:18 to 182:10 and 217:23 to 218:2.

This transaction enabled Hull to exit his entire personal TRX position at a known and favorable price, without the price-depressing impact of a large sale on the public market. Div. Findings ¶ 177. It also allowed Hull to avoid paying a sales commission. By purchasing Hull's TRX shares, Gibson shifted the market risk and the commission cost from Hull to GISF. When

Gibson sold GISF's entire remaining block of TRX shares in the market on November 10, 2011, the shares purchased from Hull were among those sold at a severely depressed price, i.e., an average price of $2.02. Div. Ex. 184 at 10-11. Thus, GISF lost $1.58 per share, or $1,074,902, as a result of the October 2011 transaction with Hull. Div. Ex. 184 at 10-11. Additionally, GISF paid a sales commission it would not otherwise have incurred. 9/15/16 Tr. 1042:1-4. See Div. Findings ¶¶ 166-196.

At the time of this transaction, Hull's real estate business was paying Gibson a salary of approximately $148,000 per year for Gibson's advisory services to GISF. Div. Ex. 128; Div. Findings ¶¶81-90. At the same time, Gibson was providing personal investment advice to Hull and Hull's family members. Div. Ex. 191 at 630:11 to 632:10 (advice to Hull); 9/13/16 Tr. 563:13-19 (advice to Hull's daughters); 9/12/16 Tr. 183:8-20; Div. Ex. 35; Resp. Ex. 46. GISF's other investors were never told of Gibson's salary from Hull, or that Gibson was providing investment advice to Hull regarding his personal accounts. Div. Ex. 191 at 439:6-15. Under these circumstances, Gibson's use of GISF funds to relieve Hull of the TRX shares in his personal account created a fundamental conflict of interest. But Gibson arranged for and executed GISF's purchase from Hull without disclosing the transaction to GISF or GISF's investors. 9/12/16 Tr. 197:1 to 197:14; Div. Ex. 191 at 723:8 to 723:11.

Front Running In October and November 2011

In late October and early November 2011, Gibson again used his foreknowledge of anticipated GISF large block trades to obtain a financial benefit for himself and his girlfriend, and in this instance his father as well. During this period, TRX shares were generally trading between $3.40 and $4.07. Div. Ex. 184 at Exhibit 15a. Knowing that he would soon be dumping GISF's remaining TRX shares into the market, and also knowing that liquidating GISF's large position was

likely to depress the share price, Gibson bought put option contracts on TRX with a strike price of $4 for his girlfriend's account on October 27, and then for his personal account and his girlfriend's account on October 28. Gibson bought additional put contracts for his own account on November 2 and November 8. On November 9, Gibson told his father to likewise buy $4 put contracts, and his father did so that day. Div. Findings ¶¶ 201-205.

These option contracts gave Gibson, his girlfriend, and his father the right to require the sellers of those contracts to buy 251,900 shares of TRX at $4 per share, regardless of the prevailing market price. This meant that as GISF lost money because of the declining value of TRX shares, Gibson, his girlfriend, and his father would profit on their options contracts. Div. Ex. 190 at 118:4 to 119:20.

The next day, November 10, 2011, as Gibson prepared to liquidate GISF's TRX position, he told his broker that "we are going to potentially tank this stock." Div. Ex. 105 at 1. Gibson then dumped GISF's remaining 4.9 million TRX shares into the market. The share price, which opened at $3.41, immediately began to plummet, declining to $2.99 by 9:45 AM. At 9:52 AM, the New York Stock Exchange halted trading in TRX for five minutes due to the dramatic price drop. At 10:00 AM, shortly after the trading halt was lifted and with TRX's share price down to $2.02, Gibson sold all the $4 TRX put contracts in his account. Two minutes later, he sold all of the $4 TRX put contracts in Marzullo's account. At 11:40 AM, Gibson's father sold all of his remaining $4 TRX put contracts. Div. Findings ¶¶ 218-222.

Gibson's front-running scheme resulted in illicit profits on the $4 put options in the personal accounts of $81,930 for Gibson, $254,380 for his girlfriend, and $43,240.01 for Gibson's

father.[7] The total profit on the $4 put option contracts was $379,550.01.[8] Div. Findings ¶¶ 223-224.

Gibson's Management Of GISF's Investments After November 10, 2011

Gibson continued to manage GISF's investments in late 2011. 9/12/16 Tr. 243:10-21. He falsely claimed to Hull in December 2011 that he had worked tirelessly for GISF's investors, "placing their interests ahead of mine." He continued to be paid a salary at the rate of approximately $148,000 per year, but did not take the 1% management fee after September 30, 2011, and did not earn an incentive fee for 2011. Div. Ex. 128.[9]

Gibson likewise managed GISF's investments throughout 2012. 9/12/16 Tr. 243:22 to 244:2; Div. Ex. 131; Div. Ex. 140; Div. Ex. 142; Div. Ex. 143. In May 2012, GISF had 20 investors and over $7 million under management. Div. Ex. 139. Gibson was paid a salary of $148,000 for his advisory services to GISF in 2012. Div. Ex. 147.

Gibson continued to manage GISF's investments in early 2013 as GISF sold its remaining holdings. 9/12/16 Tr. 245:23 to 246:10; Div. Ex. 148; Div. Ex. 149; Div. Ex. 154. On April 10, 2013, Gibson sent letters to 13 investors returning the remainder of their investments. Div. Ex. 154. By that date, GISF had ceased trading and Gibson 's role as investment manager ended.

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[7] Gibson on November 9, 2011, also told his father to sell all the TRX shares in his father's personal account. Gibson's father began liquidating his TRX position on November 9, 2011, selling 10,000 shares at prices higher than he would have obtained for those shares on November 10 after GISF dumped its shares. Div. Findings ¶¶ 209-210.

[8] These figures reflect profits prior to commissions. After factoring in the commissions paid, the total net profit on the $4 option contracts was $374,711.68. Div. Ex. 185 at 45.

[9] On December 22, 2011, Gibson dissolved Geier Capital, the Delaware entity he contends was GISF's managing member during the last half of 2011. Div. Ex. 127. The dissolution was never disclosed to investors, and Gibson continued to use the name Geier Capital until at least April 2013. Nevertheless, Gibson continued to hold investors funds, make investment decisions, and otherwise act as an investment adviser with regard to those funds. Div. Findings ¶¶ 243-249.

9/12/16 Tr. at 246:25 to 247:13. Gibson was paid $6,270 for his advisory services to GISF in early 2013. Div. Ex. 191 at 473:9 to 474:5; Div. Ex. 156.

GISF currently holds assets for a small number of investors associated with the Gibson and Marzullo families, but is largely inactive. Div. Ex. 190 at 36:19 to 37:5. Gibson maintained a significant financial interest in GISF until recently, but has now transferred that interest, valued at $423,896, to his father. Resp. Ex. 145.

Gibson is currently the managing director of Weiji Capital LLC, a firm he founded to provide merger and acquisition consulting internationally. Div. Ex. 190 at 39:13 to 41:12.

ARGUMENT

I. Gibson Violated Sections 206(1) and (2) Of The Advisers Act

Section 206(1) of the Advisers Act makes it unlawful for an investment adviser "to employ a device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Section 206(2) makes it unlawful for an investment adviser to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2). The Supreme Court has long held that these provisions establish "'federal fiduciary standards' to govern the conduct of investment advisers." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979) ("no doubt that Congress intended to impose enforceable fiduciary obligations").

Section 206(1) and (2) prohibit any conduct by an investment adviser that, in view of the adviser's fiduciary obligations, would constitute a fraud or deception on the client. Section 206(1) is violated where the adviser engages in such deceptive conduct with scienter, which includes recklessness. SEC v. Blavin, 760 F.2d 706, 711-12 (6th Cir. 1985). Simple negligence is sufficient to establish a Section 206(2) violation. SEC v. Capital Gains Research Bureau, Inc., 375

U.S. 180, 195 (1963); SEC v. Seghers, No. 06-CIV-11146, 2008 WL 4726248 at *328 (5th Cir. Oct. 28, 2008).

To establish that Gibson violated Section 206(1), the Division was required to show that Gibson (i) was an investment adviser, (ii) breached his fiduciary duties through nondisclosure of material facts or otherwise engaged in a scheme to defraud, and (iii) acted at least recklessly. To establish that Gibson violated Section 206(2), the Division was required to show that Gibson (i) was an investment adviser, (ii) breached his fiduciary duties through nondisclosure of material facts or otherwise engaged in a transaction or practice that operated as a fraud, and (iii) acted at least negligently.[10] The evidentiary record compiled during the September 12-16, 2016 hearing satisfies each of these elements[11] and demonstrates conclusively that Gibson violated Sections 206(1) and (2) on at least ten occasions in September, October, and November 2011.

A. Gibson Was An "Investment Adviser" Subject To Section 206

Pursuant to Section 202(a)(11) of the Adviser's Act, the term "investment adviser" includes, inter alia, any person "who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11). Whether an individual is an investment adviser depends on the individual's actual conduct, not his or her title or position. See In re John J. Kenny, Admin. Proc. No. 3-9611, 2003 WL 21078085, at n.54 (May 14, 2003). If an individual

[10] The Division was also required to show that Gibson's violative conduct involved use of the mails or an instrumentality of interstate commerce. Gibson used telephones and the internet in the course of the misconduct at issue here, and both telephone service and the internet are instrumentalities of interstate commerce. See, e.g., United States v. Nader, 542 F.3d 713, 717 (9th Cir. 2008); Utah Lighthouse Ministry v. Foundation for Apologetic Inf. & Research, 527 F.3d 1045, 1054 (10th Cir. 2008).

[11] In an action under Section 206, the Commission need not prove that the investment adviser's violation caused injury to the client. Capital Gains, 375 U.S. at 195 ("Congress . . . did not intend to require proof of . . . actual injury to the client"). See also Aaron v. SEC, 446 U.S. 680, 693 (1980).

provides investment advisory services for compensation, he or she is an investment adviser subject to the obligations and prohibitions of Section 206.

1. Investors Were Told That Gibson Would Provide Investment Advice To GISF

Afer creating and registering Geier Group as a vehicle for providing investment advisory services, [12] Div. Findings ¶¶ 9-15, Gibson in December 2009 organized the Geier International Strategies Fund as a pooled investment vehicle that would be advised by Geier Group, i.e., by Gibson himself. Div. Ex. 17; Div. Ex. 24 at 1. With the assistance of James Hull, Gibson then solicited potential investors. 9/12/16 Tr. 37:9-11. Each investor was provided a copy of the "offering memorandum" describing GISF. 9/12/16 Tr. 39:6-13. The offering memorandum told investors that Geier Group would be the "Investment Manager" of GISF and that "Chris Gibson is the managing member" of the investment manager. Div. Ex. 24 at 1. Further, the offering memorandum stated that GISF's success depended on Gibson's performance as Managing Director of the Investment Manager:

> Reliance on Chris Gibson
>
> The success of the Company is significantly dependent upon the expertise and efforts of Chris Gibson. While the Investment Manager has other employees, there could be adverse consequences to the Company in the event Chris Gibson ceases to be available to the Company.

Id. at 17. In contrast, the offering memorandum made no reference whatsoever to James Hull or Gibson's father. Div. Ex. 190 at 187:17 to 187:21. In particular, nothing in the offering

[12] Gibson was the 50% owner and the Managing Director of Geier Group. 9/12/16 Tr. 103:1-7. The minority owners (James Hull and Respondent's father, John Gibson) were Georgia real estate developers. Id. Geier Group had no other officers or members, and never had any employees. 9/12/16 Tr. 45:21-46:1. Gibson was at all relevant times the only member or representative of Geier Group eligible to provide investment advisory services.

memorandum suggested that Hull or Gibson's father had any interest in Geier Group or played any role in Geier Group's activities as GISF's investment manager.

Thus, investors were told from the very outset that Gibson would be providing investment advice to GISF. The offering memorandum was never amended, 9/12/16 Tr. 39:6-21, and investors were never provided any information indicating that Gibson was not continuing to provide investment advisory services to GISF.

Investors understood throughout the relevant period that Gibson was providing investment advisory services to the Fund. Mason McKnight IV, a Georgia construction contractor, testified that after meeting with Gibson, he made an initial investment in GISF (through a loan from his father) of $50,000 and subsequently invested an additional $50,000 of his own funds, all on the understanding that Gibson would be the primary person making investment decisions for the Fund:

> Q. Okay. Who did you think would be deciding what investments GISF would make with the money that you invested in the Fund?
>
> A. I mean it was my understanding that Chris would be the main one making those decisions.

Tr. 9/13/16 at 414:4-8. Mason McKnight also testified that he expected that it would be Gibson who would answer any questions he had about his investment, that he believed Gibson would be GISF's investment adviser, and that his understanding of Gibson's role and responsibilities never changed. Id. at 414:9 to 414:1.

Similarly, Matthew McKnight testified that after receiving the offering memorandum and hearing a PowerPoint presentation led by Gibson, he invested $50,000 (through his father) and then $100,000 of his own funds in GISF. Matthew McKnight also testified that he understood that Gibson would be managing the GISF's funds:

> Q. Okay. When you invested in GISF, who did you understand would be investing and managing the money on GISF's behalf?
>
> A. Chris Gibson.

Id. at 484:14-16. Matthew McKnight testified further that his understanding of Gibson's role and responsibilities never changed. Id. at 485:12-18.

2. Gibson Provided Investment Advice To GISF Throughout The Relevant Period

Gibson did in fact provide investment advice and related advisory services to GISF from January 2010 throughout the period at issue in this case. Gibson accepted discretionary control of GISF's funds, determined GISF's investment strategy (in consultation with Hull), directed GISF's trading on a daily and often minute-by-minute basis, selected GISF's brokers, opened brokerage accounts in GISF's name, transferred GISF funds among brokers and financial institutions, tracked the performance of GISF's investments, communicated with investors regarding GISF's performance, and provided market analysis and projections to GISF's investors.[13] 9/12/16 Tr. 105:17-106:19. Div. Findings ¶¶ 48-68. Because Geier Group (and Geier Capital) never had any employees, Gibson performed these duties personally.

Gibson continued to perform all of these investment advisory functions even after Geier Group was dissolved in April 2011. 9/12/16 Tr. 105:13-16. Gibson testified that by at least April 2011, a new Delaware entity also named Geier Capital had been "substituted in" as the Managing Member of GISF, in place of Geier Capital of Georgia, which was dissolved. 9/12/16 Tr. 103:8-12. Gibson testified that the Delaware entity serving as GISF's Managing Member thereafter provided all of GISF's investment advisory services, with no separate outside adviser. Gibson was

[13] Gibson also signed the reports filed with the Commission on Forms D, 13G, 4 and 5 on behalf of GISF (and Geier Group and Geier Capital). Div. Exs. 31, 50 and 132 (Forms D); Div. Exs. 39, 53, 69, and 109 (Schedules 13G); Div. Ex. 70 (Form 3); Div. Ex. 71 (Form 4).

the 50% owner and the Managing Member of Geier Capital (Delaware), just as he had been of Geier Group and Geier Capital (Georgia). 9/12/16 Tr. 103:1-7. Geier Capital (Delaware), like its predecessor entities, never had any employees. Gibson testified that he provided investment advisory services to GISF after April 2011 in the same manner and to the same degree as he had before that time.[14] 9/12/16 Tr. 105:7-16.

In short, the record establishes that Gibson provided investment advisory services to GISF throughout the period at issue here. Because he did so for compensation, as discussed in Part I.A.5 below, Gibson was an investment adviser throughout the relevant period.

3. Gibson Was An Investment Adviser Regardless Of Hull's Role In Making Strategic Decisions And Establishing "Guideposts"

Because James Hull was GISF's largest investor, he exercised influence over the direction of the Fund. Gibson testified that Hull established "guideposts" that set the general strategy of the Fund, e.g., Hull determined that GISF should shift from investing primarily in gold to investing in equities tied to gold and that GISF should not diversify. But Gibson also testified that Hull's "guideposts" set strategic direction only, and that Gibson himself was responsible for all facets of the implementation of the broad strategies. As a result, Gibson himself provided all of the day-to-day investment advisory services to GISF.

[14] Although Gibson claims that by at least April 2011 the new Delaware entity named Geier Capital had been "substituted in" as the Managing Member of GISF in place of the Georgia entity, nothing in the record indicates that such a substitution actually occurred. GISF's investors were never told that the Managing Member of GISF had been dissolved or replaced. If the Georgia entity was not properly replaced, GISF itself should have been wound down in early 2011. Thus, after April 2011, Gibson may have been providing investment advice to GISF solely in his personal capacity, rather than on behalf of the new Geier Capital entity or any other entity. However, even if Geier Capital was substituted in as the managing member of GISF, Gibson was an investment adviser subject to Section 206, as demonstrated below.

Gibson does not deny that he managed GISF's investments, but argues that Hull did so as well ("Respondent Gibson did not manage the Fund by himself").[15] But if an individual provides investment management services for compensation, that individual is an investment adviser subject to Section 206 regardless of whether or not any other individual also provides advisory services to the same client. See e.g., Abrahamson v. Fleschner, 568 F.2d 862, 869-70 (2d Cir. 1977) (three general partners who managed the limited partners' funds were each investment advisers within the scope of Section 206);[16] SEC v. Bolla, 401 F.Supp. 2d 43, 61 (D.D.C. 2005) ("each client . . . had three or four investment advisers"); In re Alan Gavornik, IAA Rel. No. 3972 (November 24, 2014) (three principals of investment advisory firm were investment advisers under Section 206; settled matter). Thus, Gibson was an investment advisor subject to Section 206 regardless of whether Hull also provided investment advice or is deemed to have been an investment adviser.

4. Gibson Was An Investment Adviser Even If He Acted In The Name Of Geier Group And Then Geier Capital

Gibson argues that when Geier Group was dissolved in April 2011, Geier Capital (the Delaware entity) became GISF's investment adviser ("During April 2011 . . . the management of the Fund's investments reverted to Geier Capital").[17] Gibson was the organizer and 50% owner

[15] Respondent Christopher M. Gibson's Prehearing Brief ("Resp. Prehearing Br.") at 14.

[16] Abrahamson was subsequently overruled in part on other grounds by Transam. Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), but its holding that investment managers are investment advisers subject to Section 206 remains a fundamental principle of investment adviser regulation. United States v. Everett C. Miller, No. 15-CV-2577, 2016 WL 4254367 (3d Cir. Aug. 12, 2016).

[17] Resp. Prehearing Br. at 21. Respondent further states that "Geier Capital acted as the investment adviser to the Fund for a period of time and ceased acting as the investment adviser in September 2011." Id. That argument, based on the erroneous claim that by suspending management fees Geier Capital ceased to be an investment adviser, is addressed in Part I.A.5 below.

of both Geier Capital (Delaware), 9/12/16 Tr. 103:1-7, which had no employees. 9/12/16 Tr. 45:21-46:1. Any investment advisory services provided to GISF after April 2011 in the name of Geier Capital were provided largely or exclusively by Gibson himself.

Nevertheless, Gibson argues that he was not an investment adviser for purposes of Section 206 because he provided advisory services to GISF in the name of a legal entity, i.e., Geier Group and then Geier Capital (Delaware). Gibson denies that an individual providing investment advice on behalf of the entity can be an investment adviser, and contends that in those situations only the entity is an adviser. While Gibson admits that Geier Capital was an investment adviser to GISF during September 2011, and even though Gibson personally provided the advisory services to GISF during that period (and received 50% of the investment management fees), he claims that he was not an investment adviser because he acted in the name of an entity he had created, i.e., Geier Capital.

Gibson's argument ignores both how legal entities function and the relevant statutory language. Because an entity can only act through individuals, an entity functioning as an investment adviser necessarily provides its services through its officers, employees, and other representatives. Under Section 202(a)(11) of the Adviser's Act, "any person" who provides such investment advice for compensation is an investment adviser. Thus, the fact that an individual providing investment advisory services does so on behalf of a partnership, limited liability company, or other legal entity does not mean the individual is not an investment adviser. If an individual violates Section 206 while acting on behalf of an entity, both are liable. See, e.g., SEC v. The Nutmeg Group, No. 09-CV-1775, 2016 WL 690930 at *17 (N.D. Ill., Feb. 18, 2016) (both entity and individual acting on its behalf violated Section 206); SEC v. Nadel, 97 F. Supp.

3d 117, 126 (E.D.N.Y. 2015) (same); SEC v. Haligiannis, 470 F. Supp. 2d 373, 378-79, 383 (S.D.N.Y. 2007) (same).[18]

Gibson also claims that he was not an investment adviser because he did not "control" the entities (Geier Group until April 2011 and Geier Capital after that date) through which he was providing advisory services.[19] That claim is both factually wrong and irrelevant to whether Gibson was subject to Section 206. Gibson was the 50% owner of both Geier Group and Geier Capital. He was also "the managing member" of Geier Group and "the Managing Director" of Geier Capital. Gibson's father owned 15% of each entity, so that the Gibsons' joint 65% interest outweighed Hull's 35% interest. Only Gibson held the Series 65 qualification required to provide investment advisory services, only Gibson had any experience in the securities industry, and only Gibson was identified in the offering memorandum as crucial to GISF's success. Additionally, only Gibson controlled GISF's assets on a day-to-day basis, made daily trading decisions, implemented those decisions, gave instructions to brokers, negotiated potential purchases and sales, and dealt with vendors. When Geier Capital (Delaware) was dissolved in December 2011, it was Gibson who signed the dissolution papers. Div. Ex. 127. In short, Gibson exercised extensive control over the entities through which he provided investment advisory services to GISF. That Hull was GISF's largest investor and had loaned Gibson money may have given Hull considerable influence with Gibson, but did not diminish Gibson's control over Geier Group or, during the part of 2011 most relevant here, over Geier Capital.

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[18] See also Investment Adviser Regulation Office, Division of Investment Management, SEC, *Regulation of Investment Advisers by the U.S. Securities and Exchange Commission* (March 2013), at page 17 ("individuals who are employed by advisers fall within the definition of 'investment adviser'").

[19] See Resp. Prehearing Br. at 24 ("When an individual such as Respondent Gibson does not demonstrably control the investment adviser, he does not meet the definition of investment adviser.")

Most fundamentally, Gibson was subject to duties and obligations under Section 206 regardless of whether he "controlled" Geier Group before April 2011 and Geier Capital thereafter. Whether an individual is an adviser subject to Section 206 turns on the advisory services performed by that individual, not whether the individual controls the entity through which the services are provided. See SEC v. Juno Mother Earth Asset Mgmt., LLC, No. 11-CIV-1778, 2012 WL 685302, at *5-6 (S.D.N.Y. Mar.2, 2012) (complaint stated a claim under Section 206 against portfolio manager who had 25% interest in the advisory entity and shared responsibility with two other individuals for managing the entity and the fund's investments); United States v. Jensen, 573 Fed. Appx. 863, 877 (11th Cir. 2014) (vice-president of entity was investment adviser because she exercised "control over investor's funds" and "acted in more than a ministerial capacity;" no finding of ownership or control of entity); United States v. Elliot, 62 F.3d 1304, 1306-11 (11th Cir. 1995) (officer with no ownership interest in advisory entities violated Section 206; no finding of control over the entities); SEC v. Gotchey, No. 91-CV-1855, 1992 WL 385284 at *2 (4th Cir., Dec. 28, 1992) (president/50% owner of investment advisory entity was an investment adviser subject to Section 206; no discussion of control).[20] Thus, Gibson was an investment adviser under Section 206 whether or not he controlled Geier Group or Geier Capital.

[20] The Commission has also concluded in settled matters that an officer or employee of an advisory firm was an advisor subject to Section 206 even in the absence of any finding that the officer or employee controlled the advisory entity. See, e.g., In re West Coast Asset Management, Inc. and Lance W. Helfert, Admin. Proc. No. 3-15660, 2013 WL 6731831 (Dec. 23, 2013) (president and 40% owner of advisory entity liable as investment adviser under Section 206); In re Ronald Speaker, Invest. Adv. Act Rel. No. 1605 (Jan. 13, 1997) (one of many portfolio managers employed by large advisory entity found liable as investment adviser under Section 206 for personal trading on information gained as adviser); In re Alan Gavornik, IAA Rel. No. 3972 (November 24, 2014) (each of three principals in advisory firm liable as investment adviser under Section 206).

Gibson also argues that he could not have been an investment adviser because one of the remedies now sought by the Division is an order barring him from the securities industry under Section 203(f), which is applicable to "persons associated with" an investment adviser, rather than under Section 203(e), which authorizes the Commission to suspend or revoke an adviser's registration. Gibson's argument confuses the liability determination with relief issues and distorts the statutory scheme.

Section 206 applies uniformly to all individuals and entities providing investment advice for compensation within the scope of Section 202(a)(11), regardless of whether registered or unregistered. In contrast, other portions of the Adviser's Act impose different requirements on different advisers, e.g., not all investment advisers must register, and some who must register can do so with a state rather than with the Commission. None of these registration-related distinctions affect the coverage of Section 206.[21]

The Division is seeking a cease and desist order, disgorgement of Gibson's illicit gains with prejudgment interest, and civil penalties. None of those remedies is related to, or dependent on, Section 203(e) or (f). Additionally, the Division seeks to bar Gibson from involvement in certain aspects of the securities industry. If Gibson is found liable under Section 206, which would necessarily include a finding that he was an investment adviser, the Division could seek to limit Gibson's future role in the securities industry under either Section 203(e), which provides primarily for suspension or revocation of an investment adviser's registration, or Section 203(f), which authorizes the Commission to bar any person who was been associated with an investment adviser from future involvement in aspects of the securities industry. In view of the broad bar

[21] See Teicher v. SEC, 177 F.3d 1016, 1018 (D.C. Cir. 1999) ("Under the Act some rules apply to registered investment advisers, some to unregistered investment advisers and some to both . . . . For example, the Act prohibits fraud by 'any' investment adviser, regardless of registration.").

available under Section 203(f), the Division has chosen in this case, as in most similar cases, to pursue a bar under Section 203(f).

Relying on the legal arguments of attorney Thomas Harman, Resp. Ex. 148, Gibson contends that by seeking a bar under Section 203(f), the Division has indicated that Gibson was not an investment adviser but only a "person associated with" an investment adviser. But nothing in the Advisers Act, the relevant regulations, Commission policy, or industry practice suggests an investment adviser cannot also be a "person associated with" an investment adviser, i.e., the provisions are not mutually exclusive. As defined in Section 202(a)(17), the term "person associated with an investment adviser" includes any partner, officer, director, or employee of an investment adviser and anyone who controls or is controlled by an investment adviser. While not all "associated persons" subject to Section 203(f) are investment advisers, many are.[22]

If the "associated person" argument advanced by Gibson were adopted, even principals and senior officers of advisory firms, who are "associated persons" for purposes of Section 203(f) but routinely provide investment advice, would not be subject to the anti-fraud provisions of the Advisers Act. Clearly that is not the case. The Commission has frequently held that one of the remedies it may impose on an investment adviser is an industry bar under Section 203(f). See, e.g., In re Dennis Malouf, Admin. Proc. No. 3-15918, IAA Rel. No. 4463 (July 27, 2016) (investment adviser barred under Section 203(f)); ZPR Investment Management, Inc., Admin. Proc. No. 3-15263, IAA Rel. No. 4249 (October 30, 2015) at 2, 37 (same); Raymond J. Lucia Companies, Inc., Admin. Proc. No. 3-15006, IAA Rel. No. 4190 (September 3, 2015) at 1 n.1, 34 (same). Thus,

[22] Whether an individual adviser must register can depend on whether that individual is a sole proprietor or works for a larger organization. While a sole practitioner providing investment advice might be required to register, an individual providing the same services as an employee of a registered entity may not need to register individually, despite functioning as an investment adviser and being subject to Section 206. Div. Ex. 185 at note 8.

the Division's decision to request that Gibson be barred under Section 203(f) does not suggest that he was not an investment adviser throughout the relevant period.[23]

5. Gibson Was an Investment Adviser Even After Suspending Management Fees Beginning October 1, 2011

The compensation element of the investment adviser definition "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." Investment Advisers Act Release No. 1092 (October 16, 1987), 52 Fed. Reg. 38400, 38402. The adviser's compensation need not come directly from the advisee; the only requirement is that the compensation is received by the adviser. Id. Nor must the compensation be "specifically earmarked as payment for investment advice." United States v. Everett Miller, 2016 WL 4254367 (3d Cir., Aug. 12, 2016) at 13. See also United States v. Elliot, 62 F.3d 1304, 1311 n.8 (11th Cir. 1995) (interpreting the compensation requirement in accordance with the Commission's "any economic benefit" standard).

Gibson received management fees, incentive fees, and salary for his services as an investment adviser to GISF. Gibson has stipulated that he was "entitled to 50% of any incentive fee or management fee" paid by GISF. Div. Ex. 189 (Stipulations of the Parties) at ¶ 13.

In 2010, GISF paid Geier Group an investment management fee of $223,351. Div. Ex. 191 at 402:7-13 and 403:1-20. Gibson received 50% of that fee, or approximately $111,675. 9/12/16 Tr. 44:5-13 and 84:3. Additionally, due to GISF's successful performance in 2010, GISF

[23] Harman also claims that to bring Gibson within the definition of "investment adviser,"the Division is improperly treating Gibson as the "alter ego" of Geier Capital. However, the Division argues that Gibson is an investment adviser based on the actual advisory activities he engaged in, regardless of whether he was acting individually or on behalf of Geier Capital, and regardless of whether he would be considered the alter ego of Geier Capital.

paid Geier Capital an incentive fee of GISF of $3,147,283. 9/12/ 16 R. 84:23 to 85:3. Gibson received 50% of that incentive allocation, i.e., $1,573,642. 9/12/ 16 R. 85:4-8. Thus, Gibson received over $1.6 million for his investment advisory services to GISF in 2010 (in additional to the salary he received from Hull, discussed further below). That Gibson reinvested most of these fees back into the Fund does not change the fact that he received an economic benefit.

In 2011, GISF paid Geier Capital an investment management fee of $295,005 for the period January through the end of September 2011. Div. Ex. 191 at 457:4-16. It is undisputed that Gibson was entitled to 50% of that fee, or approximately $147,502. Div. Ex. 191 at 461:12 to 462:12. Thus, Gibson clearly received compensation for providing investment advice to GISF through the end of September 2011. This includes September 26, 2011, when Gibson engaged in "front running" based on his foreknowledge of GISF's intention to sell a large block of TRX shares.

Gibson contends that he was not an investment adviser after September 30, 2011, even though he continued to manage GISF's funds, because he suspended collection of the management fee as of the end of September, and because he was never subsequently successful in earning an incentive fee. That argument fails on multiple grounds.

First, although Gibson voluntarily suspended the investment management fee, he could have resumed collecting that fee at any time. Geier Capital, as GISF's managing member, had a contractual right to collect the management fee even after September 30, 2011, and Gibson was entitled to 50% of any fee collected. Gibson simply suspended collection of the investment management fee "until further notice." Div. Ex. 81 (first paragraph). His notice to investors indicated that they could expect to resume paying a management fee "when Geier Fund performs at acceptable levels." Id.

Second, GISF was also obligated to pay Geier Capital a 10% "incentive allocation" if the Fund earned an annual return in 2011 in excess of the designated "hurdle rate." Gibson never suspended or revoked the right to receive that incentive allocation -- he did not receive an incentive fee at the end of 2011 simply because he did not achieve a return high enough to earn the fee for 2011. Had his investment strategies been sufficiently successful to generate an annual return in 2011 that exceeded the hurdle rate, Gibson would have received 50% of the incentive fee. Such a right to compensation, even if not yet earned by performance, satisfies the compensation element. See SEC v. Fife, 311 F.3d 1, 10-11 (1st Cir. 2002) (defendant found to be an investment adviser where "he understood that he would be compensated . . . based on a percentage of the profits from the investments, if successful"). Further, Division expert witness Dr. Gary Gibbons testified that "as . . .understood in the investment advisory industry, the potential to earn a fee, and the client's obligation to pay it, when earned, determines if an investment adviser is being compensated." Rebuttal Report of Dr. Gary Gibbons, Div Ex. 188 at 8. Dr. Gibbons also testified that there are many investment advisers whose compensation is solely based on performance and "such advisers are not understood to cease to be advisers if they fail to earn a fee in any quarter due to poor performance." Id.

Third, Gibson represented to investors that he would continue to advise the Fund. In the September 23, 2011, email announcing the suspension of management fees, Gibson also provided investors his analysis of the market factors affecting the price of TRX shares, stated that he expected to be meeting individually with each investor, and invited investors to call him "to discuss TRX, Geier Fund or the general investment climate." Div. Ex. 81 (fourth paragraph). Gibson did not tell GISF's investors that he would no longer be managing GISF's investments, and in fact he continued throughout 2011 (and beyond) to provide investment management services to GISF just as he had

before announcing that management fees were suspended. Indeed, much of the evidence introduced during the hearing documented Gibson's role in managing the GISF's TRX holdings during October and early November 2011, e.g., his negotiations with potential buyers of GISF's shares, his communications with broker/dealers regarding the timing, price, and volume of sales and potential sales, and his decision to use GISF's funds to purchase all of Hull's TRX shares. There can be no doubt that Gibson continued to manage GISF's funds after September 30, 2011, and Gibson has admitted that he did so. 9/12/16 Tr. 105:7 to 108:20 (regarding all of 2011) and 243:13-21 (regarding the period after November 10, 2011).[24]

Fourth, throughout 2011 Gibson received a salary (at times described by Gibson as a loan) of approximately $148,700 per year from Hull (through Hull's real estate business) for providing advisory services to GISF. 9/14/16 Tr. 780:12 to 784:23. Because the investment management and incentive fees Gibson earned from GISF were reinvested in the Fund (to maintain the "alignment of interest" preferred by Hull), the bi-weekly payments from Hull covered Gibson's living expenses.[25] During his investigative testimony, Gibson testified that these payments from Hull were solely in return for the advisory services he provided to GISF.[26] Gibson's pretrial brief claimed that these

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[24] GISF's investors had every reason to believe not only that Gibson continued as an investment adviser to the Fund after September 2011, but also that his services were being provided through a registered investment adviser entity. The private offering memorandum stated that Gibson would be providing advisory services to GISF in his role as "the managing member" of Geier Group, and that Geier Group was a registered investment adviser. GISF's investors were never told that Geier Group was dissolved in early 2011. Div. Findings ¶¶ 96 - 97.

[25] The salary was paid by Hull's business, rather than directly by Geier Group or Geier Capital, so that Gibson would have health care insurance coverage.

[26] Div. Ex. 191: 421:13 – 422:16 (payments from Hull in 2010); 450:4 – 451:4 (payments from Hull in 2011).

payments were for financial consulting relating to Hull's real estate business.[27] However, during the hearing, Gibson reaffirmed that in 2011 the vast majority of his time and effort was related to GISF matters, not Hull's real estate business, and the bi-weekly payments from Hull (regardless of whether deemed a salary or a loan) were largely or exclusively for advisory services to GISF. 9/14/16 Tr. 733:16-21 and 733:9-21.[28]

Fifth, during 2011 Gibson also provided investment advice to several individuals, including Hull, regarding their personal or family accounts. During his investigative testimony, Gibson testified that he provided this advice without compensation. There is nothing in the record to the contrary. But even if Gibson was paid for the advice he provided Hull, receiving compensation from any client for advisory services made Gibson an investment adviser within the scope of Section 206 with respect to all his clients, even those from whom he did not receive compensation. See 76 Fed. Reg. 39646 (July 6, 2011) at 39669 ("once a person meets that definition [of investment adviser] (by receiving compensation from any client to which it provides advice), the person is an adviser, and the Advisers Act applies to the relationship between the adviser and any of its clients (whether or not the adviser receives compensation from them."). Consequently, even if the bi-weekly payments from Hull to Gibson after September 30, 2011, had been in exchange for management of Hull's personal and family

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[27] In 2009, prior to the creation of GISF, Gibson received a small salary from Hull's business while providing general financial advice to Hull's real estate business, advising Hull and his family on their personal investments, and laying the groundwork for the creation of GISF. After GISF began operating in January 2010, Gibson's salary rose to approximately $73,000 in 2010 and to approximately $148,700 in 2011 and 2012, and was paid primarily as compensation for his efforts relating to GISF.

[28] In 2010 Geier Group repaid Hull's business for the bi-weekly payments Hull made to Gibson, confirming that Gibson's services were provided in connection with GISF rather than Hull's real estate business. Regardless of whether the payments from Hull's business are deemed salary (as reflected on Gibson's W-2 forms) or loans (repaid in 2010; nothing repaid after 2010), they were paid to Gibson for his investment advisory services to GISF.

accounts, Gibson would still have remained subject to the duties and prohibitions imposed by Section 206 in his dealings with all his clients, including GISF.[29]

In sum, Gibson was an investment adviser to GISF within the scope of Section 206, including throughout the last half of 2011, regardless of whether he was managing the Fund's investments in his individual capacity or in his role as the Managing Director of Geier Capital.

B. As An Investment Adviser, Gibson Was Subject To Federal Fiduciary Duties And Prohibitions Under Sections 206(1) and (2)

1. Sections 206(1) and (2) Impose Federal Fiduciary Duties And Prohibit Fraudulent Conduct Toward Any Advisory Client

Sections 206(1) and (2) impose "'federal fiduciary standards' to govern the conduct of investment advisers," Transamerica Mortgage Advisors, Inc., 444 U.S. at 17, including affirmative obligations to exercise "utmost good faith,"make "full and fair disclosure of all material facts," and "employ reasonable care to avoid misleading clients." SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963). See also SEC v. DiBella, No. 04-CV-1342, 2007 WL 2904211, at *12 (D. Conn. Oct. 3, 2007); SEC v. Moran, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996), aff'd, 587 F.3d 553 (2d Cir. 2009).

An investment adviser also 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 was not disinterested." Capital Gains, 375 U.S. at 191.

[29] In his report submitted on behalf of Gibson, attorney Thomas Harman speculates that if the payments from Hull were for advisory services, "a reasonable inference would be" that they were for advisory services to Hull, not GISF. Such an inference would be wholly unreasonable, because the only evidence on this subject is Gibson's unambiguous testimony that he provided advice to Hull for free, without compensation. Harman was apparently unaware of that testimony because, according to Harman's report, Harman read only 8 pages of Gibson's 782 pages of investigative testimony, see Resp. Ex. 148 at 18, para. 55(h), and the testimony in those 8 pages (pages 42-49) does not address the terms on which Gibson provided advisory services to clients other than GISF.

See also Vernazza v. SEC, 327 F.3d 851, 859 (9th Cir. 2003) ("It is indisputable that potential conflicts of interest are 'material' facts . . . ."); Steadman v. SEC, 603 F.2d 1126, 1130 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).[30]

During the hearing, the Division called Dr. Gary Gibbons to testify regarding, inter alia, the nature of an investment adviser's fiduciary duties as those duties are understood in the investment advisory industry. Dr. Gibbons, who holds a Ph.D in finance, has been a registered investment adviser for more than 40 years and continues to serve clients in that capacity as head of his own advisory firm . Dr. Gibbons is also an associate professor at the Thunderbird School of Global Management at Arizona State University and the Academic Director of the Thunderbird Private Equity Center. Dr. Gibbons was the only investment adviser who testified as an expert in this matter.[31]

Dr. Gibbons testified that it is universally recognized in the investment advisory community that an investment adviser owes fiduciary duties to the client, and that this understanding is reflected in numerous standards, codes of conduct, and similar guidelines developed by the industry's professional associations and governing bodies. Expert Report of Dr. Gary Gibbons ("Gibbons Expert Report."), Div. Ex. 185 at 10-11. After discussing several of these industry standards,[32] Dr. Gibbons testified that

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[30] In an effort to show that state law determines whether he owed fiduciary duties as an investment adviser, Gibson at times cites cases under federal statutes other than the Advisers Act. See Resp. Pretrial Br. at note 15. But unlike other federal statutes, the Advisers Act has long been held to itself impose federal fiduciary duties, through Section 206(1) and (2).

[31] Gibson withdrew the report of the individual (Charles Porten) who was to testify on Gibson's behalf regarding investment advisory issues, and Mr. Porten never testified.

[32] See, e.g., Gibbons' Expert Report at note 18 (discussing the standards in the "Investment Adviser Guide" issued by the North American Securities Administrators Association) and note 19 (discussing the "Code of Ethics" and of the "Standards of Professional Conduct" issued by the CFA Institute).

> [w]ith regard to investment advisers, the core fiduciary duties recognized in the industry are: duty to act in good faith; duty of care; duty of loyalty; duty to follow the law; duty of obedience; and duty of full and fair disclosure.

Id. at 11. Dr. Gibbons then identified the actual obligations imposed by each of the standards, as generally understood in the industry, id. at 11-13, and noted that these obligations "apply to all investment advisers, regardless of size," id. at 11. Of particular significance here, Dr. Gibbons testified that the duty to act in good faith requires that investment advisers "be truthful and accurate in all communications," "avoid all avoidable conflicts of interest," and "avoid favoritism of one client over another." Id. Dr. Gibbon also testified that the duty of loyalty requires that advisers "sequence a client's trade ahead of their own," that the duty of obedience requires the adviser to "adhere to the terms of any governing trust or organic legal document," and that the duty of full and fair disclosure requires that the adviser "disclose all actual and potential conflicts of interest." Id. at 11-13.

During the hearing, Gibson did not contest Dr. Gibbons' testimony regarding an investment adviser's fiduciary duties. Nor did he offer any expert testimony of his own on this subject. Instead, Gibson argues that whatever his duties might otherwise have been, they were eliminated or satisfied by provisions in GISF's offering documents. But nothing in those documents (and nothing surrounding the creation of those documents or of GISF itself) relieved Gibson of his fiduciary duties to GISF under Section 206, as shown below.

2. Gibson's Duties And Obligations Under Section 206 Were Not Reduced Or Eliminated By The GISF Offering Documents

Gibson contends that his fiduciary duties and other obligations under Section 206 were reduced or eliminated, in all regards relevant to this matter, when GISF's investors agreed to the terms in the offering documents. That argument ignores both the federal, statutory nature of the Division's claims and the actual language of the offering documents.

Gibson notes that Delaware law permits the members of a limited liability company to waive certain state law and contractual duties of a managing member. On the basis of that Delaware law, Gibson claims that the duties and prohibitions imposed by Section 206 can be minimized or nullified by private contractual agreement. That argument ignores the fundamental difference between duties of a managing member under state law or private contract and the statutory duties imposed on investment advisers under federal law. An investment adviser's federal statutory duties under Section 206 cannot be nullified by private agreement, or by the interaction of state law and private agreement. See generally Burks v. Lasker, 441 U.S. 471, 479 (1979) (federal securities laws displace state law where the state law would permit action prohibited by federal law); SEC v. Keating, No. 91-CV-6785, 1992 WL 207918 at *4 (C.D. Cal. July 23, 1992) ("[I]t would be impermissible to allow . . . a creation of state law, to supersede the requirements, prohibitions and policies of the federal securities laws).[33]

Further, Section 215 of the Advisers Act confirms that Congress did not intend that investment advisers could shed their duties under the Act via contract language. Pursuant to Section 215, any contract provision purporting to waive an adviser's compliance with the Act is void, even as to a private investor who signed the contract. Gibson's waiver argument is even more far-fetched, and indeed nonsensical, with regard to enforcement actions on behalf of the Commission, which of course was not a party to the GISF offering documents. Regardless of

[33] In support of his contractual waiver argument, Gibson submitted the expert report of Myron Steele addressing Delaware law relating to limited liability companies. Resp. Ex. 150. Mr. Steele's report is entirely irrelevant to the issues in this matter because it is limited to matters of Delaware law and expressly does not consider, or offer any opinion regarding, the impact of Delaware law or any contract entered into under Delaware law on Gibson's obligations, status, or liability under federal securities law.

what the GISF offering documents stated, they would not bar the Commission from enforcing the anti-fraud provisions of Section 206.[34]

Finally, the relevant language in the GISF offering documents did not even purport to reduce or waive Gibson's fiduciary duties or his other obligations under Section 206. The two provisions most at issue are the "Potential Conflicts Of Interest" provision in the GISF private offering memorandum, Div. Ex. 24 at 19, and the "Management of the Company" provision in the GISF Operating Agreement, Div. Ex. 21 at 2. The Potential Conflicts of Interest provision stated that Gibson and others associated with Geier Group, Geier Capital, or GISF "could conduct any other business, including business within the securities and commodities industries, whether or not such business is in competition with" GISF. Div. Ex. 24, at 19, first full paragraph. That provision also stated that Gibson and the other associated parties could make investments in their own names or through other entities, that such investments could have objectives or strategies similar or different from GISF's, and that they could give advice or take action that differed from the advice given or action taken with regard to GISF. Id. Apart from the title of the section, the only reference in this provision to "conflicts of interest" was the statement that Gibson and the other associated parties "may have conflicts of interest" in allocating their time and activity, in allocating investments, and in effecting transactions. Id., in second full paragraph. The "Management of the Company" provision in the Operating

[34] Gibson's pretrial brief notes that the Commission has not prohibited certain contract language purporting to limit an adviser's liability to sophisticated clients ("hedge fund clauses") and argues that this shows that an adviser's fiduciary obligations can be waived or modified. Resp. Prehearing Br. at 28. However, such hedge fund clauses do not limit the duties and prohibitions imposed on the adviser by Section 206 and do not affect the Commission's ability to enforce those duties and prohibitions. Further, even with regard to the relationship between adviser and client, such clauses do not diminish the adviser's fiduciary duties, but merely limit the adviser's liability, under certain circumstances, to claims by clients arising out of violation of those duties.

Agreement was shorter but contained comparable language, and also stated that it might not be possible or consistent with the investment objectives of the various parties to take or liquidate the same positions at the same time. Div. Ex. 21 at 2, Section 3.01.

These provisions noted that Gibson might engage in other business activities and manage other investments for himself and others, and might do so using strategies and timing that differed from actions he took with regard to GISF. But nothing in these provisions stated or implied that Gibson was authorized to conduct such other businesses, or make personal investments, in a way that violated his federal fiduciary duties to GISF. Certainly these provisions did not authorize Gibson to "front run" GISF's intended trading or favor certain investors over GISF. Thus, even if Gibson's federal statutory obligations under Section 206 could have been reduced or eliminated by private agreement (which is not the case), the waiver language that Gibson claims to find in these provisions is simply not there.

3. Gibson's Disclosure Obligations Were Not Satisfied By The GISF Offering Documents

Gibson has also argued that even if his federal fiduciary obligations were not waived or voided by the GISF offering documents, his obligation to disclose conflicts of interest was satisfied, once and for all time, by those documents. In essence, Gibson claims that the statement to investors in January 2010 that conflicts might potentially arise was sufficient to give him free rein to create and exploit actual conflicts 18 months later, without further notice or investor consent.[35] However, the front running and favoritism at issue here was not adequately disclosed

[35] Gibson has not argued, and could not argue, that his disclosure obligations were satisfied simply because he was aware of his own misconduct and was an agent of GISF, directly or through Geier Capital. An agent's knowledge is not attributable to the principal when the agent is acting contrary to the interests of the principal. DiBella, 587 F.3d at 563 (agent's knowledge "not imputed to the principal when the agent is acting adversely to the principal's interest"). This "adverse interest exception" to general agency principles applies where "an agent is in reality acting . . . for his own personal interest and

in GISF's offering documents, or at any time during the relevant period, and investors never knew of Gibson's misconduct or the multiple conflicts of interest that conduct created.

(a) The Purported Disclosures: One of an investment adviser's most fundamental duties under Section 206 is to fully disclose all conflicts of interest. Capital Gains, 375 U.S. at 191. This includes not only disclosure of potential conflicts that might arise, but also prompt and complete disclosure of any actual conflicts that do arise. As stated by the Division's expert witness, Dr. Gary Gibbons:

> [I]t is well understood by industry professionals that "before-the-fact" disclosure of potential conflicts does not remove or satisfy the obligation to disclose and avoid actual conflicts whenever possible. Additionally, if over time actual conflicts of interest cannot be avoided, an investment adviser must provide new or updated disclosures as new conflicts arise or previously disclosed potential conflicts become actual conflicts.

Expert Report of Dr. Gary Gibbons, Div. 185 at 19. Disclosure of both potential and actual conflicts must be specific and timely. Id.

Gibson asserts that GISF's offering documents identified the potential conflicts "in great detail and clear and unequivocal language." Resp. Pretrial Br. at 29. It takes no more than a cursory reading of the relevant provisions to see that this is not the case. As discussed above, both the Potential Conflicts of Interest provision in the offering memorandum and the Management of the Company provision in the operating agreement are couched in general terms, referring

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adversely to the principal." Ruberoid Co. v. Roy, 240 F. Supp. 7 (E.D. La. 1965). See also Bank of China v. NBM LLC, 359 F.3d 171, 179 (2d Cir. 2004); Restatement (Second) of Agency § 282(1). Delaware law recognizes the adverse interest doctrine. See Lincoln National Life Insurance Co. v. Snyder, 722 F. Supp. 2d 546, 555 (D. Del. 2010).

Gibson was acting contrary to the interests of his client, GISF, when he traded ahead of GISF on September 26, 2011, and on multiple occasions in October and November 2011. Likewise, he improperly favored Hull over GISF when he used GISF's funds to purchase Hull's shares in October 2011. Consequently, Gibson's knowledge of his own misconduct cannot be attributed to GISF, and he could not have consented of behalf of GISF to his own front running or favoritism of Hull over Fund.

summarily to types of businesses Gibson and others might engage in and authorizing them to have or manage outside accounts. In essence, the offering documents stated little more regarding conflicts of interest than that "the Affiliated Parties may have conflicts of interest. " Div. Ex. 24 at page 19, second full paragraph. No specifics were provided. This is true even for conflicts that had already moved from potential to actual, e.g., the offering documents did not disclose that Gibson was simultaneously serving as an investment advisor to Hull, was receiving a salary from Hull to cover his living expenses, and was borrowing from Hull to invest in the Fund, all of which created actual conflicts of interest that should have been disclosed.

Most important here, there was no reference whatsoever in the offering documents to the possibility that Gibson might use his foreknowledge of GISF's anticipated trades to front run the Fund, or that he might use GISF's funds to buy shares from Hull at an above-market price when GISF was seeking to rid itself of similar shares. No GISF investor could have discerned from the offering documents that there was any possibility that Gibson would consider, much less secretly engage in, conduct so directly contrary to his duties to GISF. Further, it is undisputed that Gibson did not notify GISF investors when the actual conflicts at issue here emerged in September, October and November 2011, i.e., when Gibson began front running GISF and when he agreed to use GISF's funds to buy Hull's TRX shares. Consequently, Gibson failed to satisfy his fiduciary duty to fully disclose all actual and potential conflicts of interest. As stated by Division expert witness Dr. Gary Gibbons:

> The disclosures in GISF's POM and OA were neither specific nor timely with respect to Gibson's front running and unfair trade allocations. . . . . GISF was owed the duty of full and fair disclosure of all actual conflicts at the time those conflicts arose (in this case, when Gibson created those conflicts). What it received was vague and partial disclosure of potential conflicts, more than eighteen months before the actual conflicts arose.

Expert Report of Dr. Gary Gibbons, Div. 183 at 19-20.

(b) Thomas Harman's Arguments: Gibson has submitted Thomas Harman's report in an effort to support the claim that the offering documents provided adequate disclosure. Harman first argues that if investment advisers make adequate disclosures, they can engage in conduct that creates conflicts of interest even if that conduct would otherwise be prohibited. Resp. Ex. 148 at ¶¶ 39-43. But the question here is not whether adequate disclosure would have permitted Gibson's conduct, but whether there ever was adequate disclosure. The Commission enforcement actions cited by Harman offer nothing on this point because they arose from situations in which there was no disclosure, i.e., cases in which the Commission punished an investment adviser for not disclosing.[36] Id. at ¶¶ 41-43. While those matters illustrate that the Commission can and does sanction advisers for failing to disclose conflicts (just as the Division proposes in this case), they offer no insight into the interpretation of disclosure documents in general or the GISF offering documents in particular.[37] Thus, Harman fails to address the real issue here, i.e., whether the GISF offering documents disclosed that Gibson might engage in front running and favoritism.[38]

Second, Harman denies that advisers must disclose actual conflicts of interest as they arise, and consequently denies that Gibson was obligated to disclose in late 2011 that he intended

[36] Harman misleadingly paraphrases the holdings in the five settled enforcement actions he cites, implying that they were affirmative holdings that the investment adviser could engage in the conduct at issue. Resp. Ex. 148 at ¶¶ 41-43. These Commission actions actually impose sanctions on the advisers for failing to disclose, and do not address the question of what disclosures, if any, would have been sufficient to permit the advisers to engage in the conduct at issue.

[37] In addition to the Commission enforcement actions based on failure to make disclosure, Harman cites two no-action letters indicating that no action would be taken against advisers if they provide full and fair disclosure to clients. Resp. 148 at ¶ 40. These no-action letters likewise provide no guidance regarding whether the GISF offering documents provided adequate disclosure.

[38] Harman instead opines broadly that the GISF disclosure documents disclosed that Gibson and other principals affiliated with GISF "need not put the Fund's interests ahead of their own." Resp. 148 at 15, para. 46. None of the decisions cited by Harman support that conclusion.

to front run the Fund and favor Hull over the Fund. But Harman's opinion rests on assumptions that are contrary to the facts here. For example, Harman's opinion covers only situations in which there was full initial disclosure of potential conflicts, i.e., he opines that "[t]here is no reason for . . . [subsequent disclosures of actual conflicts] when . . . the adviser already provided to its investors clear disclosure of the conflicts it could face." Id. at ¶ 51. But there was no such full initial disclosure here. Harman's opinion also rests on the assumption that the adviser is updating disclosures annually in Form ADV filings. Id. at ¶ 51. But Gibson made no Form ADV filings after May 2009 (on behalf of himself or any entity). Thus, the disclosures in the GISF offering documents were not only inadequate from the outset, but by late 2011 had never been updated by Form ADV filings. Still further, although Harman acknowledges that an adviser's disclosures must be updated when a material change occurs, he assumes without discussion that Gibson's decisions in late 2011 to front run the Fund and to favor Hull over the Fund were not material changes. But there can be no dispute that a reasonable investor would have considered information regarding Gibson's self-dealing and favoritism to be material. Had Harman actually addressed the facts of this case, rather than resting his opinion on assumptions not applicable here, his own criteria should have led to the conclusion that Gibson was required to disclose the actual conflicts he created in late 2011. As stated by the Division's expert witness Dr. Gary Gibbons:

> There is no merit to Harman's argument that disclosures of conflicts need not be timely in order to be adequate. It is only through timeliness that disclosure can be specific. . . . An unspecific, general disclosure eighteen months before the fact could hardly provide the client with the requisite information. . . . Gibson's front running and dumping represented serious and material conduct that should have been disclosed and, absent informed client consent, avoided.

Div. Ex. 188 at 10-11.

Finally, Harman asserts that he as seen "a number" of private placement memoranda, that those memoranda addressed potential conflicts similar to those addressed in the GISF offering documents, and that the provisions in the GISF documents were "as detailed as these types of disclosures customarily are." Resp. Ex. 148 at ¶ 47. These summary statements are offered without any detail or support. Harman does not suggest that he reviewed any offering memoranda (apart from the GISF documents) in connection with this matter and there are no offering documents identified on his list of "Documents Reviewed." Nor does he identify, or quote from, any of the offering memoranda on which his conclusion is purportedly based. Harman does not identify, even approximately, the number of offering memoranda he has reviewed, or the number containing language similar to the language in the GISF documents. Nor is there anything in Harman's report indicating that he made any meaningful analysis of the terms of other offering documents. Further, Harman does not even claim that the unidentified offering documents he refers to were ever found by the Commission or the courts to constitute sufficient disclosure -- of conflicts generally or of the front running and favoritism at issue here. In short, Harman's opinion lacks both an identified factual basis and a reliable methodology.

Harman's conclusion is directly contrary to the opinion offered by the Division's expert, Dr. Gibbons. Unlike Harman, Dr. Gibbons is an investment adviser, and has long experience in the industry. Dr. Gibbons testified that the conflict of interest provisions in the GISF offering documents would not have been understood in the investment advisory community to constitute adequate disclosure with regard to Gibson's front running and favoritism toward Hull:

> No competent professional in the investment advisory industry would have thought that these provisions in the GISF's Private Offering Memorandum ("POM") and GISF's Operating Agreement ("OA") eliminated or lessened the fiduciary duties Gibson, as an investment adviser, owed to the Fund or permitted him to engage in front running, unfair trade allocations, and other misconduct. Nor would anyone in the industry accept that these general provisions regarding

potential conflicts constituted adequate notice of the actual conflicts Gibson subsequently created and exploited.

Div. Ex. 185 at 5.

In sum, Harman's purportedly "expert" opinions regarding the adequacy of the disclosures in the GISF offering documents are neither reliable nor probative, but are merely additional attorney advocacy and should be disregarded.

(c) Alleged Understanding Between Gibson and Hull: Gibson has at times implied that regardless of the actual language of the offering documents, those documents should nevertheless be deemed to have disclosed that Gibson might front run the Fund because (according to Gibson) he and Hull had agreed that Gibson would be able to trade in his personal accounts without restriction. But Gibson's fiduciary duties under Section 206(1) and (2), including his disclosure obligations, ran from Gibson to the Fund, not to Hull individually, and could not have been eliminated or satisfied by a private understanding with Hull. Nor could Hull waive those duties on behalf of the Fund, his large investment notwithstanding. Thus, any conversations or understandings Gibson may have had with Hull regarding Gibson's "alignment of interest" with the Fund or management of the loans from Hull could not have relieved Gibson of his fiduciary obligation to disclose to GISF and it's investors all potential and actual conflicts of interest, and could not have satisfied those disclosure obligations.

Moreover, it is undisputed that there was never any understanding between Hull and Gibson that Gibson could front run the Fund. During the hearing Gibson claimed for the first time that in connection with the creation of GISF, Hull acknowledged that Gibson could use his personal accounts to "hedge" the risk created by his leveraged investment in GISF. 9/14/16 Tr.

at 744:21 to 746:22. That claim is contradicted by Gibson's prior testimony.[39] But even if such a conversation occurred, "hedging" is far different from front-running, i.e., hedging does not involve trading on the basis of an adviser's foreknowledge of the client's anticipated trades. The Division has not alleged that Gibson violated the securities laws simply by maintaining personal accounts or by trading in TRX in those accounts, even if intended as a hedge against other risks. The Division's front running claims target only those specific occasions when Gibson traded for personal accounts based on his foreknowledge of GISF's intended trades. Regardless of any conversation he may have had with Hull regarding hedging, there is no evidence that he never discussed potential front running with Hull. Indeed, Gibson ultimately admitted during the hearing that the offering document documents did not allow him to trade on his foreknowledge of the Fund's trading intentions: "No. You're not - no, it does not allow someone to use foreknowledge in order to benefit themselves." 9/14/16 Tr. at 766:3 to 766:7 and 760:14 to 760:18.

C. Gibson Violated Sections 206(1) and (2) By "Front Running" His Client Fund On September 26, 2011

In April 2011 GISF was invested exclusively in TRX, an investment valued at approximately $70 million. By late September 2011, the TRX share price had fallen substantially, resulting in a loss of approximately $30 million to the Fund and a substantial personal loss for Gibson. Over the weekend of September 24-25, 2011, after discussion with Hull, Gibson decided that the Fund would liquidate its large TRX position.

[39] During his investigative testimony, Gibson denied that he had any discussions with Hull regarding how he could trade in his personal accounts. Div. Ex. 190 at 29:15 to 30:7 ("No we did not specifically address this").

The next day, Monday, September 26, 2011, Gibson sold all of the TRX shares in his personal brokerage account, the account of his girlfriend Francesca Marzullo, and an account in the name of Geier Group. Gibson sold these 21,900 TRX shares for approximately $4.04 per share. Then the following day, September 27, 2011, Gibson directed that GISF sell approximately 3.7 million TRX shares. Predictably, GISF had to sell this large block of non-controlling shares at a discount, obtaining only $3.50 per share on average. By front running GISF, Gibson was able to sell the shares in his personal account and two accounts he controlled at over $0.50 per share higher than the price GISF obtained the following day. Thus, Gibson avoided the loss in value he and his girlfriend would have suffered the next day in their personal accounts (and he would have suffered in the Geier Group account) due to GISF's large block sale. Gibson never told anyone of his intention to front run GISF's block sales, or of the fact that he did so.

As a fiduciary to his client GISF, Gibson was not permitted to use his knowledge of GISF's intended sale to benefit himself or those close to him. The Division alleges that by using his foreknowledge of GISF's intended sale to front run that sale, Gibson's violated his fiduciary duties to GISF, defrauded his client in violation of Section 206(1), and engaged in a transaction which operated as fraud in violation of Section 206(2).

Gibson does not dispute the key facts regarding the transactions on September 26 and 27, 2011, but has argued that he did not engage in front running because (i) the final terms of the anticipated GISF block sale were not yet fixed on September 26 when he sold the personal shares he controlled, (ii) he did not know that GISF's sale of TRX shares would depress the share price, and (iii) he sold his personal TRX shares to meet a need for "liquidity," rather than to obtain a benefit related to the sale of GISF's shares. There is no merit to these claims, and because Gibson

acted with scienter, see Part I.C.4 below, his trading on September 26, 2011, was clearly front running.

1. Trading Based On Knowledge Of A Client's Intention To Trade Constitutes Front Running

"Front running" refers to the illicit practice of "using advance knowledge of impending client action to secure advantage."[40] The distinguishing feature of front running is an investment adviser's use, with the expectation of personal gain, of material, non-public information concerning an anticipated transaction likely to impact the value of a security.[41] See SEC v. Yang, 999 F. Supp. 2d 1007, 1016 (N.D. Ill. 2013) (describing front running as an attempt by an adviser "to profit personally by secretly authorizing personal trades in anticipation of much larger trades he knew that he would be authorizing"). Front running creates a conflict of interest between the adviser and the client, undermines the integrity of the market, and is universally recognized as a violation of fiduciary duties and Sections 206(1) and (2) of the Advisers Act. See Capital Gains, 375 U.S. at 196-97, 201 (1963); SEC v. Yang, 999 F. Supp. 2d at 1016.

Gibson argues for an extremely narrow and unrealistic definition of "front running." Relying on the expert report of Dr. James Overdahl, Gibson has argued that there can be no front running unless all aspects of the anticipated client transaction (e.g., price, time, and volume) are fixed in place and are known to the investment adviser before the adviser places the front running trade. But Overdahl, who is an economist rather than an investment adviser, testified

[40] Bines, Harvey E. and Thel, Steve, *Investment Management Law and Regulation*, Second Edition (March 14, 2006), Aspen Publishers, at page 807.

[41] Beare, Margaret E., *Encyclopedia of Transnational Crime and Justice* (Apr 24, 2012), SAGE Publications, at page 147. See also FINRA Rule IM-2110-3 and its superseding Rule 5270, both of which prohibit trading when the party subject to the rule "has material non-public market information concerning an imminent block transaction."

that he was not an expert on the definition of front running and that he was using a definition provided by Gibson's attorney. 9/15/16 Tr. 962:24 to 964:14. When questioned regarding that definition (drawn from FINRA policy statement IM-2110-3), Overdahl admitted that it did not apply to Gibson's personal trading in TRX because, inter alia, it did not cover the type of trading that Gibson engaged in and did not consider the fiduciary duties applicable to investment advisers. 9/15/16 Tr. at 990:6 to 1000:7. Dr. Overdahl also acknowledged that even FINRA IM-2110-3 did not limit front running to situations in which all the terms of the anticipated block transaction were agreed to before the abusive trading occurred. Dr. Overdahl testified that even pursuant to FINRA IM-2110-3, front running could include trading based on "knowledge of less than all of the terms of the block transaction, so long as there is knowledge that all of the material terms of the transaction have been or will be agreed upon imminently." 9/15/16 Tr. 1000:8 to 1001:6; Div. Ex. 188 at 13. Thus, the only expert testimony offered by Gibson with regard to front running contradicted Gibson's assertion that front running can only take place if all the terms of the anticipated large block transaction have already been established.[42]

Dr. Gibbons, the Division's expert on investment advisory issues, testified that the accepted understanding of front running is much broader than Gibson claims. Citing a variety of industry authorities, Dr. Gibbons pointed out that the key aspect of front running has been identified as "advance knowledge of impending client action," Div. Ex. 185 at n.37, and as knowledge of "the intention of a large trader to execute a trade," id at 21 and n.39. Dr. Gibbons noted that a code of ethics issued by Gibson's prior employer, Deutsche Bank, expressly stated that front running included trading based on knowledge of, inter alia, a client's "plans" or "strategies." Id. at 22 n.40. None of these industry authorities suggest that front running can

[42] Apart from Dr. Overdahl, Gibson offered no other expert testimony regarding front running.

occur only after a client has placed a firm order.[43] To the contrary, Dr. Gibbons testified that it is widely understood in the advisory community that knowledge of the client's intention to trade, rather than knowledge of the exact terms of the proposed transaction, is sufficient to bar the adviser from trading in front of the client. Id. at 21-22.

Thus, to prove that Gibson improperly front ran GISF on September 26, 2011, the Division was not required to show that all the terms of GISF's anticipated block sale were already in place on that date. Gibson's September 26 sales constituted front running because he sought to obtain a benefit by trading based on his foreknowledge that GISF intended to sell a large block of TRX shares on September 27 or soon thereafter.

2. Gibson Understood That GISF's Large Block Sale Of TRX Shares Was Likely To Depress The TRX Share Price

Gibson's claim that he did not expect TRX share price to be depressed by the anticipated GISF block sale is not credible. Gibson had a degree in economics and by late 2011 had worked in the financial industry for five years, passed the investment adviser's exam (Series 65) and other professional exams, and served as the primary trader for a Fund with over $70 million in assets. In view of Gibson's training and experience, it must have been clear to him that selling a large block of shares of in a thinly-traded company like TRX was likely to depress the market price. In fact, Gibson testified that he understood exactly that. Div. Ex. 190 at 108:12-21 (Q: "you generally expect the share price of a stock to drop when you sell a large portion of the shares? A: Yes."). Similarly, Gibson's expert economist, Dr. Overdahl, testified that the $3.50 price GISF received for its 3.7 million TRX shares on September 27 reflect a "block discount" and that such a discount

[43] In fact, any such requirement would be so restrictive as to essentially eliminate the prohibition against front running altogether, since an investment adviser intending to trade in front of his client could easily delay finalization of the client's trade order until the adviser's personal trade was in place.

would have been expected under the circumstances. 9/15/16 Tr. 1002:9 to 1007:13 ("You would expect that there would be some discount for the block").

Gibson's claim that he nevertheless expected to sell GISF large block of TRX shares at the current market price is simply not credible. While Gibson contends that he had been told by Casimir Capital that the sale would be at the current market price, there is no evidence of any such assurance. As Gibson knew and his own expert has confirmed, the TRX share price was likely to be depressed by the anticipated GISF large block sale. Whether Gibson accurately foresaw the amount of that adverse price impact, or the amount of the loss he could avoid by trading ahead, is irrelevant to whether he front ran the Fund.

3. Gibson's Claim That He Sold His Personal TRX Shares Because He Needed "Liquidity" Is Contrary To The Evidence And Not Credible

Gibson has claimed that he sold his personal TRX shares on September 26 because he needed "liquidity" (i.e., ready access to funds), rather than because he wanted to avoid holding TRX shares that were likely to decline in value as a result of GISF's anticipated sale of a large block of TRX shares. 9/12/16 Tr. 151:18 to 153:10. However, there is no evidence that Gibson had any particular need for "liquidity" on or about September 26, 2011. Throughout this period, Gibson was still receiving bi-weekly salary payments from Hull's business. Moreover, Gibson continued to keep more than $1 million in the Fund (including his portion of the 2010 and 2011 management fees and most of his portion of the 2010 incentive fees), rather than withdrawing any of those fees for liquidity needs. Further, Gibson had no immediate need for cash to repay the funds coming from Hull, even if those payments had been loans rather than salary payments. Gibson had not previously made any such repayments in 2011 and was not being pressed by Hull to make repayment. In fact, Gibson never did repay any of the money paid to him by Hull in 2011. 9/14/16 Tr. at 780:12 to 787:21.

After selling all of the TRX shares in his personal account on September 26, 2011, Gibson did not withdraw the proceeds of that sale, but reinvested those proceeds in another security. 9/14/16 Tr. at 780:12 to 787:21. There is no reason to believe that the new security was any more "liquid" than his TRX shares, which could have been sold for cash at any time. Thus, even with regard to his own account, Gibson's liquidity argument is contrary to the evidence and is not credible.

Additionally, Gibson's "liquidity" argument is wholly inapplicable to his sale of the TRX shares in his girlfriend's account. Gibson has neither argued nor shown that the proceeds of the sale of the TRX shares in his girlfriends account flowed to him. In fact, the evidence shows that those proceeds were retained in his girlfriend's account and invested in other securities.

Even if Gibson had been experiencing a pressing need for cash on September 26, 2011, it would not have justified his decision to front run the Fund. An investment adviser's need for cash for daily living expenses obvious would not justify a breach of the adviser's fiduciary duties. But the facts here make clear that Gibson did not sell his shares on September 26 because he needed liquidity, but because he wanted to avoid holding TRX shares that were likely to decline as soon as GISF completed it block sale.

4. Gibson Acted With Scienter

Gibson acted with scienter in front running GISF on September 26, 2011. Scienter is a mental state embracing intent to deceive, manipulate, or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n. 12 (1976). Scienter includes recklessness, defined as conduct that is "highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the

defendant must have been aware of it." SEC v. Espuelas, 579 F. Supp. 2d 461, 470 (S.D.N.Y. 2008) (citing Novak v. Kasaks, 2016 F.3d 300, 308 (2d Cir. 2000)).

"[T]he standard of care to which an investment adviser must adhere imposes '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." Blavin, 760 F.2d at 711-12. "Material misstatements and omissions violate the antifraud provisions [of the Securities, Exchange, and Advisers Acts]; the standard of materiality is whether a reasonable investor would have considered the information important in deciding whether to invest." J.S. Oliver, 2014 LEXIS SEC at *98-99. "It is indisputable that potential conflicts of interest are 'material' facts . . . ." Vernazza v. SEC, 327 F.3d 851, 859 (9th Cir. 2003).

Courts have found that investment advisers act at least recklessly when they fail to disclose material information to their investors. Blavin, 760 F.2d at 712; see also SEC v. Donovan, No. 08-CA-10649-RWZ (D. Mass. Nov. 20, 2009) (trader knowingly violated Section 10(b) and Rule 10b-5 by using his mother's account to trade ahead of his client's orders without disclosing that fact to his client); SEC v. Daniel Bergin, Civil Action No. 3:13cv1940-M (N.D. Tex. July 15, 2015) (settlement where investment adviser charged with violating 10b-5(a) and (c) for front running client trades for benefit of wife's account). The same is true if an investment adviser favors certain clients over others. In the Matter of J.S. Oliver Capital Management., Admin. Proc. No. 3-15446, 2014 LEXIS SEC at *123-24 ("only logical inference . . . is that Mausner allocated trades after the market close to benefit certain accounts to the detriment of others"). In insider trading cases involving fiduciaries, courts have similarly held that "[a] person acts with scienter when he knew or should have known that the information on which he traded was misappropriated." SEC v. Yang et al., 999 F. Supp. 2d 1007, 1017 (N.D. Ill. 2013).

As noted earlier, and as reflected by the testimony of the Division's investment adviser expert, Dr. Gary Gibbons, the standard of care required of an investment adviser originates from the fiduciary duties owed to the clients, including "the duty to act in good faith; duty of care; duty of loyalty; duty to follow the law; duty of obedience; and duty of full and fair disclosure." Div. Ex. 185 at 11. As Dr. Gibbons noted, "Gibson manifestly fell far short of what the industry requires of an investment adviser. He not only failed to avoid conflicts, he deliberately created conflicts, failed to disclose those conflicts, and ultimately exploited his position as an investment adviser through front running and unfair trade allocation." Div. Ex. 185 at 27. The facts introduced at the hearing confirm Dr. Gibbon's assessment on this point.

Here, on September 23, 2011, Gibson informed all of the Fund's investors that he would not redeem his interest in TRX "until the bull market matures over the coming years . . ." Div. Ex. 81. Two days later, however, after a conversation with Hull, Gibson and Hull decided that GISF would be selling its massive TRX position, subject to favorable prices. Div. Ex. 191 at 77:13-78:5. Rather than informing the Fund of this significant change in strategy, on the very first trading day after telling the Fund's investors that he planned to maintain his investment in TRX, Gibson liquidated all the personal TRX shares in his personal account and two other accounts that he controlled. The very next day, Gibson caused GISF to sell a massive amount of its TRX shares, which unsurprisingly caused a significant drop in the market price for TRX. As Dr. Gibbons noted "[h]is conduct demonstrated a wanton disregard for his fiduciary duties." Div. Ex. 185 at 27.

Moreover, Gibson knew that he was misappropriating his client's material, non-public information and that such information could be used to front run GISF. Div. Ex.68 (Gibson telling broker in advance of a big trade in April 2011: "Do not speak to any other individual

about this order request . . . I do not want anyone to know and possibly front run us"). The only logical inference from the evidence adduced at the hearing is that Gibson knew exactly what effect GISF's large TRX trades would have on TRX's market price, and he used that understanding to secure a personal benefit. Div. Ex. 105 (writing to his broker before liquidating GISF's remaining TRX holdings on November 10, 2011: "We are going to potentially tank this stock."). Gibson's front running was neither isolated nor mistaken; it was recurrent and intentional. Gibson engaged in front running over the course of several weeks, had ample opportunity to disclose the practice to his client and its investors, and never did so.

Finally, Gibson's defenses of his conduct are not credible, and therefore, do nothing to negate his reckless behavior. First, Gibson claims that he needed to sell his shares on the first trading after the conversation with Hull due to liquidity needs. 9/12/16 Tr. 151:18 to 153:10. As explained in Part I.C.3 immediately above, that was not true. Second, Gibson argues that he believes his conduct was somehow disclosed through the generic disclosures in the POM, Resp. Prehearing Br. at 26. As we have discussed previously, it is clear that these disclosures were wholly inadequate. See In the Matter of Ronald Speaker and Janus Capital Corp., SEC Rel. No. IA-1605 (Jan. 13, 1997) (holding that portfolio manager breached his fiduciary duty to a fund by taking an investment opportunity without disclosing the opportunity to the fund even though "[a]t the time of the trades at issue the fund's prospectus generally disclosed that portfolio managers . . . may engage in personal trading of securities."). Furthermore, Gibson admitted in his investigative testimony that he did not consult those disclosures prior to engaging in the conduct described above. Div. Ex. 190 at 203:15-204:8. Nor did Gibson consult with anyone to determine whether these disclosures were indeed appropriate. Id.

Accordingly, Gibson's conduct was wholly inconsistent with the above-described investment advisory duties, and as a result, represented an extreme departure from the standards of ordinary care. Gibson was at least reckless when he misappropriated his client's material, non-public information regarding large block trades, front ran the Fund, and benefited himself and those close to him by doing so. As a result of Gibson's fraudulent and reckless conduct – done in a manner completely inconsistent with the standard of care imposed on Gibson as a fiduciary – Gibson avoided losses of $11,836 for himself, his girlfriend, and Geier Group.

D. Gibson Violated Section 206(1) by Arranging for GISF to Purchase Hull's Personal TRX Shares in October 2011 Without Disclosing Material Facts

Gibson violated Section 206(1) when he breached his fiduciary duties to GISF by failing to disclose material facts to GISF or its investors regarding the purchase of Hull's private TRX shares in an off-exchange transaction on October 18, 2011 (the "Hull Buyout Transaction"), a transaction that favored one of Gibson's advisory clients (Hull) over another (the Fund). Gibson failed to disclose at least the following four material facts to GISF or its investors: (1) that at the time of the Hull Buyout Transaction, the Fund's trading strategy was to exit its TRX position; (2) that Gibson caused GISF to purchase Hull's personal TRX shares at an above-market price; (3) that Gibson caused GISF to pay an extraordinary commission when it subsequently sold Hull's personal TRX shares; and (4) that at the time of the Hull Buyout Transaction, Gibson was receiving a salary from Hull's real estate business for the investment advisory services he was providing to GISF. When Gibson favored Hull over GISF by causing GISF to purchase Hull's personal shares, without disclosing these material facts, Gibson violated his fiduciary duties to GISF and Section 206(1). Each of Gibson's reckless failures to disclose is discussed below.

1. Gibson Recklessly Failed To Disclose That At The Time Of The Hull Buyout Transaction, The Fund's Strategy Was To Exit Its TRX position

Gibson did not disclose to the Fund or its investors that at the time of the Hull Buyout Transaction, GISF's trading strategy was to exit its TRX position, a change in strategy that was made over the weekend of September 24 and 25, 2011. On Friday, September 23, 2011, Gibson told investors that he was holding on to his personal TRX shares, as well those TRX shares he owned through his investment in the Fund, stating that "[p]ersonally, I will not redeem my interest in Geier and TRX until the bull market matures over the coming years at what I strongly believe will be significantly higher levels." Div. Ex. 81. However, rather than holding TRX shares until the bull market matured, Gibson and Hull decided during the weekend of September 24 and 25, 2011, that GISF would exit its TRX position, while still seeking favorable prices. Div. Ex. 190, 77:24-78:5. Gibson never told GISF or its other investors about this change in strategy. 9/12/16 Tr. 131:3-131:5; 9/14/16 Tr. 656:17-656:19.

Despite his unequivocal statement to GISF investors that both he and the Fund would maintain their TRX positions, Gibson sold all of his personal TRX shares on the next available trading day. 9/12/16 Tr. 136:13-136:20; Div. Ex. 189. On September 26, 2011, Gibson sold all of his personal TRX shares as well as all of Francesca Marzullo's and Geier Group's TRX shares. Div. Ex. 189.

On September 27, 2011, still without having disclosed any change in investment strategy to GISF's investors, Gibson sold 3.7 million of GISF's TRX shares. Resp. Ex. 64; Tr. Tr. 674:1-676:16.) During the next two weeks, Gibson continued to try to sell the remainder of TRX's shares. For example, on October 16, 2011, Gibson advised one of GISF's brokers that "[w]e will be closing our TRX position in the next few weeks with a pre-arranged buyer beginning

tomorrow AM." Div. Ex. 92. On October 17, 2011, Gibson told this same broker to "please do everything you can to get us able to sell 5,945,000 TRX shares starting ASAP." Div. Ex. 93.

It is against this backdrop of a clear change in strategy that Gibson nevertheless caused GISF to purchase Hull's personal TRX shares. Div. Ex. 94, 95; Tr. 1011:15-1011:17. As Dr. Gibbons explained, a fund adviser "may not give preferential treatment to any other party over the interests of the fund when executing trades in a particular security." Div. Ex. 185 at 23. When Gibson purchased Hull's shares, he shifted the market risk of owning those TRX shares from Hull to the Fund, when the Fund had already decided it no longer wanted to own TRX shares. Div. Ex. 195 at 24. Gibson recklessly failed to disclose this material fact to GISF, in violation of Section 206(1).

2. Gibson Recklessly Failed to Disclose That He Purchased Hull's Personal TRX Shares At Above-Market Prices

When Gibson used GISF's funds to purchase Hull's TRX shares on October 18, 2011, he failed to disclose to GISF or its investors that he did so at an above-market price, which violated the "Potential Conflicts of Interest" provision in GISF's offering memorandum requiring such transactions to occur at the current market price. The relevant portion of that provision provided:

> In addition, purchase and sale transactions (including swaps) may be effected between the Company and the other entities or accounts subject to the following guidelines **(i) such transactions shall be effected for cash consideration at the current market price of the particular securities**, and (ii) no extraordinary brokerage commission or fees (i.e. except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction.

Div. Ex. 24 at 19 (emphasis added).

Although the offering memorandum required transactions between GISF and affiliated parties like Hull to occur at the "current market price," when Gibson caused GISF to purchase Hull's personal TRX shares, it was not at the current market price. Instead, GISF purchased

680,636 shares from Hull for $3.60 per share in an off-exchange transaction, using the closing market price for TRX shares from October 18, 2011. Div. Ex. 95. There are two reasons why $3.60 was not the current market price for Hull's shares: it was neither the correct market price, nor the correct large-block price.

First, $3.60 was the market price for only the 490,625 TRX shares that actually traded on October 18, 2011, i.e., the total volume for TRX shares reported to the market that day. Div. Ex. 185 at 23-24. Gibson drafted the contract to purchase Hull's shares after the market closed on October 18, 2011; it was the only way he could have known what the closing price was for that trading day. 9/15/16 Tr. at 1013:2-1013:23; Div. Ex. 95. Thus, Hull's 680,636 shares would have caused a 139% increase to the day's market volume. Div. Ex. 185, 23-24. Dr. Overdahl testified that if Hull had sold his shares through the market on October 18 rather than to GISF, such an increase to the market volume would have made it unlikely that Hull would have received $3.60 per share for his additional 680,636 TRX shares. 9/15/16 Tr. 1015:7-1017:9. Dr. Gibbons agreed that the price Gibson caused GISF to pay Hull did not account for the impact that a sale of Hull's shares would have on the market price for a thinly-traded stock like TRX. Div. Ex. 185 at 23-24. Therefore, it is clear that the closing price of $3.60 on October 18, which included only 490,625 shares, was not the true "current market price" for Hull's 680,636 shares.

Second, when blocks of stock like Hull's 680,636 TRX shares are not sold directly through the market, but are sold instead through the upstairs market, it is customary for the buyer to receive a large-block discount. When Gibson caused GISF to purchase Hull's personal TRX shares, he did not seek, and GISF did not receive, a large-block discount. Gibson knew that a large-block discount was required because he had just given one three weeks earlier, on September 27, 2011, when he caused GISF to sell 3.7 million TRX shares in the upstairs market.

Resp. Ex. 64. For that sale, the buyer demanded a twelve percent (12%) large-block discount. Resp. Ex. 64; 9/14/16 Tr. at 674:1-676:16. Before agreeing to that sale, both Gibson and Hull discussed the transaction and agreed to give the large-block discount. Resp. Ex. 64; Tr. 674:1-676:16. However, when it came to the Hull Buyout Transaction, Gibson did not ask Hull for a large-block discount. Div. Ex. 95; Tr. 1022:5-1022:8.

Indeed, Gibson's expert, Dr. Overdahl, testified that after the September 27, 2011 transaction, Gibson would have known that an appropriate large-block discount was required for the sale of 680,636 TRX shares in an off-market transaction. Resp. Ex. 149, pg. 35; Tr. 1021:12-1022-4. Dr. Overdahl testified further that if Gibson had brought a block of shares of this size to the upstairs market after September 27, 2011, it was foreseeable that a large-block discount would be necessary. Tr. 1026:18-1027:3; 1028:2-1028:7. Dr. Overdahl even went so far as to calculate several large-block discounts that Gibson should have considered when causing GISF to purchase Hull's TRX shares, all of which were approximately seven to ten percent less than what Gibson actually caused GISF to pay for Hull's shares. Resp. Ex. 149 at 78 and Exhibit 13; 9/15/16 Tr. at 1028:10-1033:10.

Even using the calculation that is most favorable to Gibson (and least favorable to GISF), Dr. Overdahl suggested a large-block discount of 7.21%, which would have resulted in GISF paying $176,877 less for Hull's shares than it actually paid. Resp. Ex. 149 at 78 and Exhibit 13. In other words, after applying the requisite large-block discount, Dr. Overdahl calculated that the correct market price for Hull's shares in an off-market transaction was $2,273,713. Resp. Ex. 149, page 78, Chart Exhibit 13; Tr. 1030:6-1030:8. Because Gibson failed to secure such a discount for GISF, the actual price of $2,450,590 (i.e., $3.60 per share) GISF paid for Hull's TRX shares was also not the current market price for a large block of TRX shares in the upstairs

market. And because Gibson caused GISF to pay an above-market price (compared to both the market and the upstairs market) for Hull's TRX shares, that price was not the current market price as was required by GISF's offering documents. Thus, Gibson recklessly failed to disclose a material fact to GISF and its investors regarding how GISF's funds were being used in transactions between the Fund and affiliated parties. GISF lost $1.58 per share, or $1,074,902, as a result of the Hull Buyout Transaction.[44] Div. Ex. 184 at 10-11.

3. Gibson Recklessly Failed to Disclose That He Caused GISF To Pay An Extraordinary Commission when It Sold Hull's Personal TRX Shares

Gibson also failed to disclose to GISF and its investors that the Hull Buyout Transaction caused GISF to pay a sales commission that it would not otherwise have to pay (and allowed Hull to avoid paying that commission) when it sold Hull's shares approximately three weeks later. There is no evidence GISF was in the practice of paying the sales commissions when its investors sold their personal shares; this was the only time it occurred in the GISF's entire existence. Therefore, when GISF ultimately paid the sales commission on the shares purchased from Hull, it was an extraordinary commission.[45] This, too, violated the Potential Conflicts of Interest provision in GISF's offering memorandum because that provision also governed the commissions that could be paid in such transactions:

> In addition, purchase and sale transactions (including swaps) may be effected between the Company and the other entities or accounts subject to the following guidelines (i) such transactions shall be effected for cash consideration at the

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[44] It is also the case that, by causing GISF to purchase Hull's shares at an above-market price, Gibson rendered false and misleading the disclosure to GISF and its investors that such transactions would occur at the current market price.

[45] The Merriam-Webster online dictionary defines "extraordinary" as "a: going beyond what is usual, regular, or customary <extraordinary powers>[;] b: exceptional to a very marked extent <extraordinary beauty>[;] c: *of a financial transaction : nonrecurring* . . . ." www.merriam-webster.com/dictionary/extraordinary (last visited October 5, 2016) (emphasis added).

current market price of the particular securities, and **(ii) no extraordinary brokerage commission or fees (i.e. except for customary transfer fees or commissions) or other remuneration shall be paid in connection with any such transaction.**

Div. Ex. 24 at page 19 (emphasis added).

Even Gibson' own expert, Dr. Overdahl, opined that GISF had suffered harm (and Hull had received a benefit) through Gibson's decision to allow GISF to pay the sales commission for Hull's personal TRX shares. He estimated that there was a $0.05[46] per share commission, for a total harm/benefit of $34,032. Resp. Ex. 149 at 34 and note 78; Exhibit 13; Tr. 1037:15-1037:17. Although Dr. Overdahl discounted the harm/benefit to reflect Hull's 80% ownership stake in GISF, he still opined that GISF's investors other than Hull paid approximately $6,751.95 in commissions to sell Hull's private shares.

The extraordinary nature of this sales commission, and thus Gibson's fraud, is not rendered moot by virtue of its relatively small amount. As noted, there is no evidence GISF ever paid the commissions when any of its other investors sold their personal securities. Gibson testified that the commission paid when Hull's shares were sold was "highly customary" and that the cost to GISF's investors was "immaterial." 9/14/16 Tr. 697:9-697:10 ("highly customary"); 9/12/16 Tr. at 198:4 to 198:5 ("immaterial"). This view, however, makes the Potential Conflict of Interest provision in the offering documents meaningless. Obviously it is customary for GISF to pay sales commissions when it sells its own shares of stock. As Gibson well knows, though, the issue here is that GISF and its other investors were paying the sales commission to sell Hull's shares, not its own shares. Moreover, GISF's other investors did not even know Gibson had caused the Fund to pay Hull's commission, and they certainly never agreed to it. Tr. 427:19-

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[46] Dr. Overdahl overestimated the sales commission GISF paid; it was only $0.01 per share, not $0.05. Div. Ex. 188 at 5 and n.10. Overdahl's estimate used the closest comparable upstairs market commission available, the $0.05 commission GISF paid on September 27, 2011. Resp. Ex. 149, pg. 34, FN 78.

427:25; 496:12-496:19. In this regard too, Gibson recklessly failed to disclose a material fact to GISF and its investors regarding how GISF's funds were being used.[47] In doing so, Gibson defrauded GISF and its investors. Div. Ex. 188 at 5 and note 10.

4. Gibson Recklessly Failed to Disclose That Hull's Real Estate Business was Paying Him a Salary at the Time of the Hull Buyout Transaction

When GISF purchased Hull's personal TRX shares, Hull's real estate business was paying Gibson a salary of approximately $148,000 per year for the advisory services he provided to GISF.[48] Div. Ex. 191 at 450:4-451:4; Div. Ex. 138 at CB0002030. This created a financial conflict of interest, particularly as it relates to the Hull Buyout Transaction. If a reasonable investor had known about the salary when Gibson caused GISF to purchase Hull's personal TRX shares, he could have concluded that Gibson's investment advice regarding the transaction was not disinterested But Gibson never disclosed this salary to GISF or its investors. Gibson 9/13/16 Tr. 428:1-428:4.

Gibson claimed during the hearing that the 2011 salary payments from Hull's business were loans and not salary, but the facts do not bear out his claim. First, Gibson refers to the payments as a salary in his prior sworn testimony and at times during the hearing. Div. Ex. 191 at 450:17-450:21; Gibson 9/14/16 Tr. 730:18-730:20. Second, the salary was reported to Gibson on an IRS Form W-2 as "Wages, Tips, and other compensation" and Gibson treated them as such on Line 7 of his 2011 income tax return. Div. Exs. 128 and 138 at 13. The payments were

[47] Like the provision regarding current market price, it is also the case that, by causing GISF to pay the sales commission for the sale of Hull's personal shares, Gibson rendered false and misleading the disclosure to GISF and its investors that no extraordinary commissions would be paid on such transactions.

[48] Although Gibson testified that a portion of this salary was for financial analysis he conducted for Hull's real estate business, Gibson admitted that the majority of his work he performed during the relevant period was in connection with his efforts to sell GISF's TRX shares. Gibson 9/14/16 Tr. 732:16-25; 733:9-21.

processed through "Insperity PEO Services, L.P.," a human resources company that Hull's business used to handle salary payments to its employees. Div. Ex. 128; Div. Ex. 191 at 450:4-450:25. Loans are generally not considered income to be reported on tax returns. Even if the payments could somehow be called a loan, Gibson never repaid the $148,714 he received in 2011. Gibson Tr. 152:22-152:25. Finally, and most importantly, even if the payments are ultimately considered to be a loan from Hull's business, Gibson was still required to disclose them because a loan from Hull would have created the same financial conflict of interest as a salary.

The undisclosed six-figure salary from Hull gave Gibson motivation to ensure that Hull was favored over Gibson's other advisory clients, including the Fund. Thus, using the Fund's assets to purchase Hull's personal TRX shares also benefited Gibson because it allowed him to retain favor with Hull. Div. Ex. 188 at 5, note 8. "When, in the course of exercising his delegated authority to trade, a fiduciary acts 'for his own benefit,' . . . the fiduciary commits fraud." <u>In the Matter of Thomas C. Gonnella</u>, Initial Decision Release No. 706, 2014 WL 5866859 at *13 (Nov. 13, 2014). Under these circumstances, Gibson's use of GISF's funds to relieve Hull of the TRX shares in his personal account created a fundamental, undisclosed conflict of interest that ultimately defrauded GISF, and Gibson was reckless in not disclosing this material fact to GISF or its investors.

5. Gibson Acted Recklessly When he Failed to Disclose These Four <u>Material Facts to GISF or Its Investors</u>

Gibson was also at least reckless when he decided to use GISF funds to buy Hull out of his personal TRX position. Here, too, Gibson's conduct was an extreme departure from the standard of ordinary care that an investment adviser owes as a fiduciary. Gibson did not disclose to GISF and its investors the material facts related to the Hull Buyout Transaction– that there had

been a change in GISF's investment strategy, the Fund paid above-market prices and an extraordinary commission, and Gibson was receiving a salary from Hull – as he was required to do. Instead, Gibson used Fund assets to favor one advisory client over another, which "was an unfair allocation of trade and a failure to safeguard client assets." Div. Ex. 185 at 23. As Dr. Gibbons explained, "[t]here can be no doubt that for Gibson to use the Fund's resources to buy from an affiliated individual (for whom he was also managing personal funds) was patently abusive, especially when the client whose funds he was using to buy had already committed to sell the security. There is no defense to this misconduct." Id. at 25.

Indeed, as a result of the salary Gibson was receiving from Hull, Dr. Gibbons noted that "Gibson had ample motive to treat Hull more favorably than his other clients, including GISF." Div. Ex. 188 at 5 and n.8. Moreover, Gibson's defense that the Hull Buyout Transaction benefited the Fund is not credible. It cannot reasonably be argued that the Fund was not harmed by this transaction, having lost over a $1 million because of it. And, when Gibson solicited Hull to sell his personal shares, the only benefits Gibson described in the email to Hull were to Gibson and Hull. Div. Ex. 94 ("might help me for regulatory and other reasons and Geier no longer charges fees").

Accordingly, Gibson's conduct related to the Hull Buyout Transaction was wholly inconsistent with the above-described investment advisory duties, and as a result, represented an extreme departure from the standards of ordinary care. Gibson was at least reckless when he relieved Hull of his personal TRX investment. As a result of Gibson's fraudulent and reckless conduct – done in a manner completely inconsistent with the standard of care imposed on Gibson as a fiduciary – Gibson harmed the Fund, and provided a benefit to Hull, in the amount of

$1,081,708.36, which when accounting for Hull's 80% ownership stake in the Fund reduces the amount to $216,341.67.

6. Gibson Violated Advisers Act Section 206(1) by Defrauding GISF When he Favored Hull's Interest over the Fund

Gibson violated Section 206(1) by engaging in a scheme to defraud GISF by favoring Hull's interest over the Fund's. Section 206(1) makes it unlawful for an investment adviser to employ any device, scheme, or artifice to defraud clients or prospective clients or to engage in any transaction, practice, or course of business that defrauds clients or prospective clients. SEC v. Trabulse, 526 F. Supp. 2d 1008, 1013 (N.D. Cal. 2007). Favoring one advisory client over another, particularly in connection with material misstatements and omissions, constitutes a fraud in violation of Section 206(1). J.S. Oliver, 2014 SEC LEXIS 2812 at *102-05.

In J.S. Oliver an investment adviser engaged in a fraudulent "cherry picking" scheme, allocating profitable trades to certain favored accounts while allocating unprofitable trades to disfavored accounts. Id. at *11-12. The favored accounts included accounts in the adviser's name as well as accounts held by other advisory clients, while the disfavored accounts were all held by other advisory clients. Id. The Court found strong evidence that the adviser "systematically allocated a disproportionately large share of equity trades with positive first-day returns . . . to six favored client accounts . . . , and systematically allocated a disproportionately large share of equity trades with negative first-day returns . . . to three other client accounts . . . ." Id. In finding that favoring certain advisory clients over others constituted a violation of Section 206(1), the Court noted that the fraud involved material misstatements and omissions to the adviser's clients because the practice of favoring certain clients over others was never disclosed to the clients. Id. at *104 ("Under the federal securities laws, an investment adviser is a fiduciary and therefore has an affirmative obligation of utmost good faith to avoid misleading clients; this

duty includes disclosure of all material facts, possible conflicts of interest, and the adviser's personal interests when making recommendations to clients. ... The failure to disclose the practice of allocating favorable trades to certain accounts to the detriment of other accounts violates the antifraud provisions.")

Here, Gibson recklessly engaged in similar fraudulent conduct by favoring one advisory client (Hull) over another (the Fund), allocating an unfavorable trade from Hull to the Fund. Div. Ex. 185 at 22-25 ("The [Hull Buyout Transaction] was an unfair allocation of trade and a failure to safeguard client funds. Essentially, Gibson dumped a disadvantageous trade on GISF.") The investors in GISF, such as Mason McKnight, had trusted Gibson based upon friendship and a long history of family connections. 9/13/16 Tr. 465:21-466:13. Gibson's fraud violated that trust, just as Mausner did in J.S. Oliver. Oliver at *22-23. Gibson's fraud was also similar to J.S. Oliver's in that it too involved material misstatements and omissions; like J.S. Oliver, and as discussed above, Gibson never disclosed that he would favor one advisory client over another and the disclosure he did make regarding this type of transaction omitted material facts. Thus, just like the adviser in J.S. Oliver, Gibson's fraudulent conduct related to the Hull Buyout Transaction also violated Section 206(1) of the Advisers Act. Moreover, like J.S. Oliver's, Gibson's violation was willful because he intentionally caused GISF to engage in the Hull Buyout Transaction. Id. at *105 ("a finding of willfulness does not require intent to violate the law, but merely intent to commit the act which constitutes the violation") (citing Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

Gibson's reckless failure to disclose the salary he was receiving from Hull's real estate business at the time of the Hull Buyout Transaction, in particular, supports the finding that Gibson's fraudulent conduct violated Section 206(1). In SEC v. K.W. Brown and Co. et al., the

investment advisers were found to have violated Section 206(1) by engaging in a cherry picking scheme that favored certain accounts over their advisory clients' accounts. 555 F. Supp. 2d 1275, 1308-09 (S.D. Fla. 2007). Notably, the advisers had a financial interest in at least one of the favored accounts, an account the Court referred to as "the Brown Trading Account." Id. at 1280. In holding that the advisers' fraudulent practice of allocating profitable trades to the Brown Trading Account violated Section 206(1), the court stated "[t]he Advisers violated Sections 206(1) and 206(2) of the Advisers Act by failing to disclose their practice of allocating favorable trades to [sic] Brown Trading Account at the expense of their clients and failing to disclose the conflict of interest created by Defendant [sic] financial interest in the Brown Trading Account." Id. at 1308 (emphasis added). Accordingly, like the advisers in K.W. Brown and Co., Gibson's reckless failure to disclose his financial conflict of interest arising from the salary he was receiving from Hull's real estate business also supports a finding that Gibson's fraudulent conduct related to the Hull Buyout Transaction violated Section 206(1).

7. Gibson Also Violated Section 206(2) by Arranging for GISF To Purchase Hull's Personal TRX Shares Without Disclosing the Material Facts

Section 206(2) makes it unlawful for an adviser to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2). Simple negligence is sufficient to establish a Section 206(2) violation. Capital Gains, 375 U.S. at 195; SEC v. Seghers, 2008 WL 4726248 at * 328 (5th Cir. Oct. 28, 2008) . Negligence is "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . . The term denotes culpable carelessness." In re Lisa B. Premo, 2012 SEC LEXIS 4036, at *68 n.34 (Dec. 26, 2012).

The Section 206(2) analysis simply involves applying the negligence standard to the facts described in detail above. When Gibson purchased Hull's personal TRX shares on October 18,

2011, he was negligent in that he failed to exercise the standard of care that a reasonably prudent investment adviser would have exercised in a similar situation because he failed to disclose the four material facts discussed above to GISF or its investors. Therefore, Gibson engaged in a scheme to defraud the Fund by favoring Hull's interests over the Fund's.

E. Gibson Violated Section 206(1) and (2) By Front Running In October and November 2011 Using Put Option Contracts

After the Hull Buyout Transaction in mid-October, Gibson continued to try to sell GISF's remaining TRX holdings as a block, knowing that liquidating GISF's large position was likely to depress TRX's share price. Div. Ex.190 at 108:12 to 109:10. Gibson had already experienced the adverse market impact from a comparable GISF sale two months earlier, when the sale of 3.7 million TRX shares on September 27, 2011, sharply depressed TRX share prices.

On five dates in October and November 2011, Gibson again engaged in front running his own client. Because he had already sold all the TRX shares in his personal account and his girlfriend's account, Gibson could not trade in front of the Fund's anticipated sale by selling personal TRX shares. Instead, Gibson used put option contracts. On October 27 and October 28, 2011, Gibson purchased $4 put option contracts on TRX for the personal account of his girlfriend Francesca Marzullo. On October 28, November 2, and November 8, Gibson purchased identical option contracts for his own account. Then on November 9, he advised his father to purchase the same option contracts, and his father did so. Through these option contract purchases, Gibson placed his own financial interest, and the financial interests of his girlfriend and father, in direct conflict with the interests of his client, GISF. Because the option contracts would become more valuable if the price of TRX shares declined, Gibson and two persons close to him would profit if his client's major investment (the Fund's TRX holdings) fell in value. Gibson never disclosed to GISF or its investors that he intended to create this conflict of interest, or that he had done so.

On November 10, 2011, Gibson carried out the anticipated liquidation of GISF's TRX holdings. As GISF's 4.9 million TRX shares were dumped into the market, the share price plummeted. Gibson then sold all the $4 TRX option contracts in his account. Two minutes later, he sold all of the $4 TRX option contracts in Marzullo's account. Gibson's father sold all his $4 TRX put contracts soon thereafter. This front-running scheme resulted in illicit profits totaling approximately $379,550 in all three personal accounts.

1. Gibson Knew That Dumping GISF's Remaining TRX Shares On The Market Might Depress The TRX Share Price

As discussed above in connection with Gibson's front running on September 26, 2011, Gibson was well-aware that selling a large block of shares of in a thinly-traded company like TRX was likely to depress the market price. See Section I.C.2 above. Nevertheless, Gibson claims that on November 10, 2011, he expected that although the TRX share price would fall initially, it would quickly rebound due to large buyers coming into the market to protect their own investments in TRX. This argument fall short for several reasons. First, when Gibson purchased put options on October 27 and 28 and on November 2 (and perhaps also on November 8), he did not know how or under what conditions GISF would sell its remaining shares, and thus there was no reason to believe that a sale would not depress the stock price. Second, any expectation Gibson may have had for a market rebound in TRX to above $4 per share on November 10 was completely speculative and unfounded, as the actual events demonstrated. That Gibson actually believed TRX would rebound to above $4 per share on November 10 (and make the put options worthless) is not credible. Third, Gibson acknowledges that in any event he expected at least a short-term decline in the TRX share price as soon as he put the TRX shares into the market, and his conduct on November 10 demonstrates that he was fully prepared to take advantage of that price decline, i.e., he sold his and his girlfriend's put options shortly after the

market opened and just when the TRX share price was near its low for the day (when the put options were most valuable). Finally, and most significantly, Gibson admits that he knew that regardless of his expectations, the TRX share price might decline, and that the put options were purchased to mitigate his overall losses if that occurred. Thus, Gibson has admitted that by trading in front of the Fund he sought to obtain a benefit (mitigation of losses) for himself and his girlfriend (and indirectly his father) if events unfolded in a certain way.

2. Whether Gibson Was "Net Long TRX" Or Wanted The TRX Share Price To Increase Is Irrelevant

Gibson has also argued that because he had a greater financial interest in TRX through his investment in the Fund than he did in his own account, he was "net long TRX" even after purchasing the put option contracts. On this basis, Gibson claims he had no motivation to drive the TRX share price down, and in fact wanted the share price to increase, which would make the put options worthless. But Gibson's overall financial interest in TRX is irrelevant to whether he engaged in front running, i.e., whether he traded on the foreknowledge of his clients intended trades. As noted, Gibson admittedly purchased the options in order to obtain a profit in his personal accounts (where he was "short TRX") that would offset his share of any GISF losses arising from a decline in the value of the Fund when he liquidated its TRX shares. That Gibson hoped not to need that protection is irrelevant.

3. Gibson's Front Running Violated Section 206 Even If He Was Seeking To Also Benefit Certain Others

Gibson has also argued that he purchase the put options not only, or even primarily, to benefit himself, but also to protect certain others who were advisory clients and/or were close to him. Gibson claims that he purchased the $4 TRX puts to protect his creditor, Hull. 9/14/16 Tr. 748:9-19. But this is simply a embellishment of the fact that Gibson was protecting his own

financial self-interest. Moreover, there is no evidence that Gibson used any of the proceeds from his trading in the $4 TRX puts to repay any of the money he borrowed from Hull.

Gibson has argued that he purchased the put options in his the account of his girlfriend, Francesca Marzullo, who was not a GISF investor, in order to protect her parents, who had invested in GISF. 9/12/16 Tr. 202:21 to 205:24. But Marzullo's parents never received any of the proceeds from the sale of the $4 TRX put options in her account. The proceeds were kept in Francesca Marzullo's account (which was solely in her name), were reinvested by Gibson, and were ultimately lost. Div. Ex. 190 at 114:19-24.

Gibson has attempted to characterize his front running in the Marzullo account, and his instructing to his father to sell TRX shares and buy put options just before the GISF sale on November 10, as efforts to make "suitable" investment decisions for individual investors. That argument ignores Gibson's fiduciary duties and is an obvious rationalization for his favoritism to a few persons personally close him. As a fiduciary, Gibson's duties under Section 206(1) and (2) were to the Fund, not individual investors, and those duties were far more stringent and extensive than the "suitability" standard applicable to broker/dealers. By favoring some investors over others, and favoring his non-investor girlfriend over the Fund, would have been a clear violation of his fiduciary duties even if his conduct had not also involved front running violations.

II. Gibson Violated Section 206(4) and Rules 206(4)-8(a)(1) and (2)

Gibson also violated Advisers Act Section 206(4), which prohibits an investment adviser from engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. Rule 206(4)-8 thereunder prohibits investment advisers to pooled investment

vehicles such as GISF[49] from defrauding investors or prospective investors. 17 C.F.R. § 275.206(4)-8; see also Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Advisers Act Rel. No. 2628, 2007 WL 2239114, at *3 (Aug. 3, 2007) (adopting release for Rule 206(4)-8). Specifically, subsection (a)(1) of Rule 206(4)-8 prohibits such an adviser from making an untrue or misleading statement regarding a material fact to investors or prospective investors. Subsection (a)(2) of Rule 206(4)-8 provides that it is a fraudulent practice for such an adviser to engage in "fraudulent, deceptive, or manipulative" conduct with respect to any investor or prospective investor in the pooled vehicle.

To establish a violation of Section 206(4) and Rule 206(4)-8, the Division need only show that the adviser acted negligently. SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992); Advisers Act Rel. No. 2628, 2007 WL 2239114, at *5. The standard of materiality under the Advisers Act is the same as under Exchange Act Section 10(b). SEC v. Blavin, 760 F.2d 706, 710-713 (6th Cir. 1985). Misrepresentations or omissions are material under Section 206(4) and Rule 206(4)-8 if a reasonable investor or prospective investor would consider them important. Basic, 485 U.S. at 231-232.

A. Gibson's Front Running On September 26, 2011, Violated Section 206(4) And Rule 206(4)-8(a)(1) and (2)

Gibson's front running on September 26, 2011, violated Section 206(4) and Rule 206(4)-8(a)(1) because his conduct made his prior statements to investors materially misleading and Gibson never amended those misleading statements, Div. Ex. 191 at 313:19-25 and 314:18-21,

[49] Under Rule 206(4)-8, a "pooled investment vehicle" is defined as, inter alia, "any company that would be an investment company under section 3(a) [of the Investment Company Act of 1940] ... but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act." GISF was a "pooled investment vehicle." The GISF operating agreement stated that the purpose of the company was to "serve as a fund through which the assets of its Members will be utilized to invest, hold, and trade . . . in securities and other financial instruments." Div. Ex. 21, Section 1.03 at SEC-KRFS-E-0003069.

or otherwise informed investors of his front running. Div. Findings ¶230. As discussed in Part I.B.2 above, the portions of the GISF offering documents that referred to potential conflicts of interest (the "Potential Conflicts of Interest" provision in the GISF offering memorandum and the "Management of the Company" provision in the GISF operating agreement) stated in general terms that Gibson and others affiliated with GISF might engage in outside businesses and authorized them to have or manage outside accounts. Div. Ex. 24 at SEC-KRFS-E-0002378. But there was no reference in the offering documents to the possibility that Gibson might use his foreknowledge of GISF's anticipated trades to front run the Fund. No GISF investor could have known from the offering documents that Gibson would consider front running the Fund. To the contrary, a reasonable investor would have understood from those documents that Gibson would comply with his legal obligations and his duties to GISF.[50]

After it was decided over the weekend of September 24-25, 2011, that GISF would sell its TRX shares, Gibson was obligated to either (i) refrain from trading on that information for his personal account or (ii) provide GISF's investors specific and timely notice of his intention to trade on that information. Div. Ex. 185 (Gibbons Expert Report) at 22. Such a notice would necessarily have disclosed both GISF's intention to exit TRX and Gibson's intention to front run GISF's sales in his personal accounts (and the accounts of his girlfriend and Geier Group). Gibson failed to give investors such notice. Nor did he disclose his September 26 front running after the fact. This rendered the information available to investors in the offering documents materially misleading, but Gibson never revised those documents or otherwise corrected that

[50] Gibson admits that GISF's offering documents did not allow him to front run the Fund. 9/14/16 Tr. 766:3-7 (operating agreement "does not allow someone to use foreknowledge in order to benefit themselves"); 9/14/16 Tr. 760:14-18 (offering memorandum does not authorize trading based on knowledge of the Fund's intended trading).

information, although he had a duty to do so. This failure was at least negligent, and the fact the Gibson never provided any GISF investor with information regarding his front running strongly suggests that he intentionally concealed that information. By failing to provide investors material information necessary to make the prior statements not misleading, Gibson violated subsection (1) of Rule 206(4)-8(a).

Gibson's September 26, 2011, front running also violated subsection (2) of Rule 206(4)-8(a)(2) because it was an "act" that was "fraudulent" and "deceptive" with respect to GISF's investors. As discussed above, the GISF offering documents indicated to investors that Gibson, as GISF's investment manager, would comply with his duties and obligations, and contained no suggestion that Gibson would use his personal accounts to trade on confidential information related to the Fund's trading strategy. For Gibson to nevertheless secretly misappropriate the Fund's confidential information for his own benefit and the benefit of his girlfriend was a deception of GISF's investors and a fraud. Moreover, Gibson's front running created a conflict between Gibson's interests and the interests of GISF's investors, see Capital Gains, 375 U.S. at 196-97, 201 (1963), SEC v. Yang, 999 F. Supp. 2d at 1016, and his failure to disclose that conflict was likewise deceptive. Gibson engaged in the front running and the failure to disclose the associated conflict of interest at least negligently. Thus, Gibson also violated subsection (2) of Rule 206(4)-8(a)(1).

B. Gibson Violated Section 206(4) and Rule 206(4)-8(a)(1) and (2) By Using GISF's Funds To Buy Hull's TRX Shares On Terms Inconsistent With GISF's Offering Documents And Without Disclosure To Investors

The GISF offering documents required that any transaction between GISF and an affiliated party such as Hull take place at the "current market price" and without an "extraordinary commission." Div. Ex. 24 at SEC-KRFS-E-0002378. When Gibson used GISF's

funds to purchase Hull's personal TRX shares in an off-exchange transaction on October 18, 2011, he did so on terms that were contrary to the requirements of the offering documents because GISF paid Hull more than the "current market price" and GISF, not Hull, ultimately paid the sales commission associated with the sale of these shares. But Gibson carried out the Hull buyout transaction without notifying investors that he was acting contrary to the GISF's governing documents. Indeed, Gibson never disclosed the Hull buyout transaction, or the terms of that transaction, to investors. 9/12/2016 Tr. 197:1-3. By failing to disclose this information, Gibson failed to state a material fact when he had a duty to disclose, and misled investors to believe that the Fund was operating within the framework set out in the offering documents.

Those omissions regarding the use of investor funds were material. SEC v. Research Automation Corp., 585 F.2d 31, 35-36 (2d Cir. 1978) (misleading statements and omissions about the use of investor funds were material as a matter of law). Certainly a reasonable investor or prospective investor would consider it important to know that Gibson was using $2.45 million in GISF funds to pay Hull more than the market price and was, indirectly, paying commissions to help Hull exit his TRX position. Basic, 485 U.S. at 231-232. In fact, Mason McKnight IV and Matthew McKnight, testified that they thought the Hull Buyout Transaction was something they would have wanted to know about (and they would have liked the same opportunity to sell their personal TRX shares to GISF). 9/13/16 Tr. 428:5-428:13; 496:20-497:5.

Gibson was at least negligent in failing to disclose to investors that he was acting contrary to the GISF offering documents and contrary to the best interests of GISF. As described above, Division expert Dr. Gibbons concluded that Gibson's use of the GISF's funds in the Hull Buyout Transaction was "patently abusive," Div. Ex. 185 at pp. 24-25, and that Gibson "violated the duties of good faith, care, loyalty, obedience, and full and fair disclosure." Id. at 25. Dr.

Gibbons also testified that Gibson's failure to disclose the terms of the Hull transaction, he failed to exercise the care that a reasonably prudent investment adviser would have exercised in a similar situation. Id.

Thus, by arranging for and implementing an undisclosed transaction with an affiliated party on terms that were contrary to GISF's offering documents, Gibson rendered the information in those prior statements to investors misleading, in violation of Section 206(4) and Rule 206(4)-8(a)(1), and engaged in an act or course of business that was fraudulent, deceptive, or manipulative in violation of Section 206(4) and Rule 206(4)-8(a)(2).

C. Gibson's Front Running In October and November 2011, Violated Section 206(4) and Rule 206(4)-8(a)(l) and (2)

Gibson's use of put option contracts to front run his Fund on multiple occasions in October and November 2011 violated Section 206(4) and Rule 206(4)-8(a)(1) and (2) for the same reasons discussed in Part II.A above with regard to his front running on September 26, 2011. Nothing in the offering documents told GISF's investors that Gibson might front run the Fund. Consequently, as GISF sought to sell its large remaining block of TRX shares in late October and early November, 2011, Gibson was obligated to either (i) refrain from trading for his personal account based on his knowledge of the Fund's trading plans, or (ii) notify investors of his intention to trade for his and his girlfriend's accounts (and to instruct his father to trade) based on his knowledge of the Fund's intended sales. Gibson ignored those options and instead, over a period of approximately two weeks, repeatedly purchased options that would become more valuable if the TRX share price fell. This rendered the information available to investors in the offering documents materially misleading, but Gibson never revised those documents or otherwise provided investors accurate, current information.

Similarly, for Gibson to secretly misappropriate GISF's confidential information regarding its intended trading and use that information for his own financial benefit (and the benefit of his girlfriend and his father) was a deception of GISF's investors and a fraud. It also created a direct and obvious conflict of interest between Gibson and the interests of GISF's investors, and Gibson's failure to disclose that conflict was likewise deceptive.

Because Gibson repeatedly front ran the Fund in October and November, failed to disclose the conflicts of interest created by that front running, and failed to provide investors the information required to make the Fund's offering documents not misleading, all while acting at least negligently, Gibson violated Section 206(4) and Rule 206(4)-8(a)(1) and (2) also in connection with his October and November 2011 front running.

By front running GISF's sale on November 10, Gibson used his position as GISF investment adviser, and specifically his foreknowledge of GISF's anticipated sale of its TRX shares, to benefit himself, his then-girlfriend, and his father. Thus, Gibson's front running through the option contracts violated Gibson's fiduciary duties to GISF and Section 206(1) and 206(2). And, for the same reasons explained above in Part I.C.4, Gibson acted at least recklessly when he front ran GISF again in October and November 2011; here, too, his conduct represented an extreme departure from the standard of ordinary care Gibson owed to his client as a fiduciary. Gibson never disclosed his intentions to front run the Fund even though he had ample opportunity to do so since his scheme lasted almost three weeks. Dr. Gibbons explained that Gibson's trading in the puts "created a direct, undisclosed financial conflict between Gibson and his client, the Fund." Div. Ex. 185 at 25. "Gibson's purchase of the $4 put contracts was clearly front running because he used foreknowledge of his client's planned sale of TRX shares to

initiate positions for himself and two persons close to him" and that "constituted a serious breach of the duties of good faith, loyalty, care, and full and fair disclosure." Id. at 26.

Accordingly, Gibson's conduct was wholly inconsistent with the above-described investment advisory duties, and as a result, represented an extreme departure from the standards of ordinary care. Gibson was at least reckless when he misappropriated his client's material, non-public information regarding large block trades, front ran the Fund, and benefited himself and those close to him by doing so. As a result of Gibson's fraudulent and reckless conduct – done in a manner completely inconsistent with the standard of care imposed on Gibson as a fiduciary – Gibson generated profits on the $4 TRX puts of $379,550 for himself, his girlfriend, and his father. He also allowed his father to avoid additional losses in the amount of $13,157 related to his father's sale of TRX common stock on November 9.

III. Gibson's Front Running Violated The Anti-Fraud Provisions Of The Exchange Act

Gibson's front running in September, October, and November 2011 also violated the anti-fraud provisions of the Exchange Act. Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rules 10b-5(a) and (c) thereunder, 17 C.F.R. § 240.10b-5(a) and (c), make it unlawful for any person, by use of any means or instrumentalities of interstate commerce and with scienter, to "employ any device, scheme, or artifice to defraud" or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person" in connection with the purchase or sale of any security. These provisions create what is commonly referred to as "scheme liability." See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008); SEC v. Brown, 740 F.Supp.2d 148, 172 (D.D.C. 2010); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1471-72 (2d Cir. 1996). Scheme liability extends to those "who had knowledge of the fraud and assisted in its perpetration." First Jersey Sec., Inc., 101 F.3d at 1471.

To establish that Gibson violated the "scheme liability" provisions of Rule 10b-5, the Division need not show that Gibson's misconduct was directed to GISF itself; liability can also be based on conduct addressed to or impacting GISF's investors or any other person. Nor must the Division establish that Gibson's conduct resulted in any harm to GISF, any investor, or to the investing public. Additionally, for purposes of Rule 10b-5, the Division need not show that Gibson was an investment adviser. However, because Gibson was an investment adviser, his fiduciary duties are considered in evaluating his potential liability under Rule 10b-5. "For the purpose of Rule 10b-5, an investment adviser is a fiduciary and therefore has an affirmative duty of utmost good faith to avoid misleading clients. This duty includes disclosure of all material facts and all possible conflicts of interest." Laird v. Integrated Res., Inc., 897 F.2d 826, 833-34 (5th Cir. 1990). See also In the Matter of Marc N. Geman, 2001 WL 124847 (Feb. 14, 2001), aff'd, Geman v. SEC, 334 F.3d 1183 (10th Cir. 2003).

A. Gibson Engaged In A Scheme To Defraud And In Acts And Practices That Operated As A Fraud

By secretly trading for his own account and accounts he controlled (and advising his father to make similar trades) based on his knowledge of confidential information regarding GISF's intended large block sales, Gibson used a "device, scheme, or artifice to defraud" within the scope of Rule 10b-5(a) and engaged in acts and practices that operated as a fraud within the scope of Rule 10b-5(c).[51] As discussed in detail above, GISF's offering documents did not

[51] The "in connection with" requirement of Section 10(b) of the Exchange Act is a broad and flexible standard and any activity "touching [the] sale of securities" will suffice. SEC v. Levine, 671 F. Supp. 2d 14, 31 (D.D.C. 2009) (citing Superintendent of Ins., 404 U.S. at 12-13). The Supreme Court has consistently embraced an expansive reading of the "in connection with" requirement. See SEC v. Zandford, 535 U.S. 813, 819 (2002); SEC v. Gorsek, 222 F. Supp. 2d 1099, 1111 (C.D. Ill. 2001). Here, Gibson sold TRX securities in connection with the front running scheme on September 26, 2011 and November 10, 2011.

disclose that Gibson might use his foreknowledge of GISF's anticipated trades to front run the Fund. In fact, Gibson has testified that those documents did not permit him to front run the Fund. But Gibson repeatedly did so in September, October, and November, first by selling the TRX shares in accounts he controlled and then, when he controlled no more TRX shares in personal accounts, by buying put options that would increase in value as the TRX share price fell.

Gibson failed to notify investors of his intention to front run the Fund, and failed to later report that he had done so. This rendered the information available to investors materially misleading. Further, for Gibson to secretly misappropriate the Fund's confidential information for his own benefit and the benefit of those close to him was a deception of GISF and GISF's investors and a fraud. As part of this fraudulent scheme, Gibson did not disclose his conduct, which enabled him to continue the scheme for approximately six weeks, until GISF no longer had TRX shares to sell.[52]

B. Gibson Acted With Scienter

The scienter requirement and its application to Gibson's front running has been discussed in Part I.C.4 above, in connection with the Division's claims under Section 206(1). That discussion is equally applicable here, and establishes that Gibson acted with scienter, i.e, with intent to defraud or recklessly, when he engaged in front running.

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[52] Gibson utilized the instrumentalities of interstate commerce when conducting his fraud. Gibson frequently used e-mail, see, e.g., Div. Ex. 81 and 105, and the telephone, see, e.g., 9/14/16 Tr. at 674:20 to 675:6, in conducting his fraud, and he regularly wired money to, from and between various accounts, see, e.g., Div. Ex. 100 at 4. SEC v. Huff, 758 F. Supp. 2d 1288, 1353, 1354 (S.D. Fla. 2010) (telephone calls, facsimiles, interstate wire transfers, and the negotiation of checks in other states are all sufficient evidence of interstate commerce); Lopes v. Vieira, 543 F. Supp. 2d 1149, 1175 (E.D. Ca. 2008) (use of telephone sufficient).

IV. Gibson Was Not A Credible Witness

Gibson's testimony during the hearing confirmed what the documentary evidence suggested: Gibson has no regard for the truth, or even for consistency, and is more than ready to make inaccurate, self-serving statements to advance his personal interests, justify his actions, and/or hide the truth. On multiple occasions, Gibson's hearing testimony was inconsistent with his investigative testimony, inconsistent with other statements he made during the hearing, contradicted by the documentary evidence, or simply not credible given the facts in evidence. A few examples follow.

False statements regarding TRX : On several occasions in August and September 2011, Gibson stated to the Chairman of TRX, James Sinclair, that the company was performing very poorly and was on the verge of failing. Div. Ex. 76 ("physically ill over our performance"); Div. Ex. 77 ("Our share price is a disaster. ... This is TRX failing."); Div. Ex. 78 ("[w]e are running on fumes"); Div. Ex. 79 ("I am trying to think of ways to save the company – should we engage an investment bank to sell ourselves?")

But at the same time, Gibson was giving GISF's investors highly favorable reports on TRX. Resp. Ex. 51 at 5-7 ("I believe very strongly we are in the right company in the right asset class at the right time"); Div. Ex. 81 ("confirms my view of the tremendous fundamental value of the assets owned and business operated by TRX and is a verification to me of my analysis of TRX's underlying value").

When questioned about these essentially simultaneous but contradictory statements, one set of which had to be false, Gibson claimed that the statements he made about the company to Sinclair were false, while the statements he made to investors were true. Gibson testified that he thought it was appropriate to use false statements to advance the interests of the Fund. 9/12/16

Tr. 116:7 to 117:14 (Gibson attempted to justify using false statements explaining that, "In fact, I believed the exact opposite."). His testimony that his statements to investors reflected his actual beliefs was both self-serving and contrary to by his own contemporaneous conduct. Soon after making these statements Gibson sold all of his personal TRX shares and then had GISF dump its millions of TRX shares. Div. Ex. 192.

False Statements Regarding James Sinclair: Gibson engaged in essentially the same pattern of conduct in making statements about James Sinclair personally in late 2011. When addressing Sinclair, Gibson disparaged both Sinclair's performance and his character. Div. Ex. 103 ("life's goal to ensure your children know you were a crook"); Div. Ex. 78 ("If the share price falls any further at any point in the next few days or weeks, it will be irrecoverable.").

But in emails to investors during the same period, Gibson lavished praise on Sinclair. Div. Ex. 81 (willingness of large funds to invest in TRX "confirms my view . . . of the reputation, character and integrity of Mr. Sinclair").

When questioned about these contradictory statements, Gibson again claimed that the statements he made to Sinclair were false and defended his use of falsehoods. His claim that he actually believed that Sinclair was honest and capable (as he told investors) is directly contradicted his statements in the late 2011 recording discussed below. Div. Ex. 183A.

Hearing Testimony v. Recorded Phone Call: On the first day of the hearing, Gibson claimed that Jim Sinclair was a man of good character and integrity. Gibson testified that Sinclair was "honorable and -- and a great leader." 9/12/16 Tr. 128:6-17. But later in the hearing, the court the recording of a December 2011 call between Gibson and Luis Sequiera. In that call, Gibson savagely disparaged Sinclair. Div. Ex. 183A at 4:23-25 ("That fucking asshole

is a complete crook and he is not going to have a smile on his face let alone a pulse at the end of next year.").

After the tape was played, Gibson claimed that after he sold GISF's shares on November 10, he researched Sinclair further and learned "very bad things about Mr. Sinclair." 9/14/16 Tr. at 818:13 to 818:17. However, Gibson was unable to explain how the negative information he said he learned in at the end of 2011 regarding Sinclair could be reconciled with his hearing testimony, only a few days earlier, in which he had praised Sinclair greatly. Here too the only explanation seems to be that Gibson testified favorably regarding Sinclair at the hearing, despite what he really believes, because Gibson thought such testimony would help him in defending against the Division's claims.

Status as an Investment Adviser: During his investigative testimony, Gibson did not deny that he was an investment adviser to GISF. See, e.g., Div. Ex. 190 at 268:19 to 268:22. During the hearing, Gibson denied that he had been an investment adviser to GISF. When asked "Did you think at the time you were an investment advisor to the fund?" he replied "No." 9/12/16 Tr. at 69:11 to 69:25.

Impact of "Alignment of Interest": During his investigative testimony, Gibson admitted that he never specifically spoke with Hull about the effect of Gibson "alignment of interest" on his personal trading: "No, we did not specifically address this." Div. Ex. 190 at 29:15 to 30:7. However, during the hearing Gibson claimed that he and Hull had spoken about it and that the conversation was crucial to the drafting of the offering memorandum, stating "this was perhaps the singular consideration and concern that we had in drafting the offering memorandum." 9/14/16 Tr. at 766:11 to 768:20.

$4 TRX Puts "Short" Position: During his investigative testimony, Gibson admitted that he held a "short bet" against TRX in his personal account by virtue of the $4 TRX puts. (Q.: So in your personal account, you had a short bet against TRX"? A.: Gibson responded "Correct." Div. Ex. 190 at 118:24 to 119:16. But at the hearing he claimed he had "a long bullish position." 9/14/16 Tr. at 702:11 to 702:22.

Market Impact Of Selling Hull's TRX Shares: On the first day of the hearing, Gibson testified that he did not think Hull selling his personal TRX shares on the market would have driven TRX's share price down: "I would not think it would drive the share price down at all." 9/12/16 Tr. at 189:23 to 190:4. Two days later he changed his story, testifying that Hull's selling would drive the price down: "[i]t could drive the price down substantially." 9/14/16 Tr. at 693:22 to 694:1.

Salary From Hull: Gibson claimed during the hearing that the payments he received from Hull's real estate business were "a loan" and not a salary. 9/12/16 Tr. at 152:6-11. However, the salary payments were reported to Gibson on a W-2, Social Security and Medicare taxes were withheld, and he included them as income on his tax returns. Div. Exs. 128 and 138 at 13. Moreover, Gibson never repaid Hull's business for the payments he received in 2011. 9/14/16 Tr. 784:20-25.

Bought the $4 TRX Puts To Protect Hull: During the hearing, Gibson claimed that he purchased the $4 TRX puts in his personal account to protect his creditor, Hull: "I would need to adopt a position in order to protect my creditor and avoid insolvency." 9/14/16 Tr. 748:9-19. However, there is no evidence he ever used any of the proceeds to repay any of the money he borrowed from Hull. Instead, his father paid Hull to cover Gibson's outstanding debt, long after the events at issue here. 9/14/16 Tr. 722:24 to 723:8; see also Resp. Ex. 145.

Liquidity Needs On September 26, 2011: Gibson testified during the hearing that he sold his personal TRX shares on September 26, 2011 because he needed liquidity. 9/12/16 Tr. 151:18 to 153:10. But in fact he reinvested the proceeds from the sale of his personal TRX stock, purchasing shares of Ishares Silver Trust Index Fund in the same personal account. 9/14/16 Tr. 783:3-5; 786:11-18; Div. Ex. 86. In addition, there is no evidence that Gibson had any pressing liquidity needs because he was still receiving bi-weekly salary payments from Hull's business to cover his living expenses. 9/14/16 Tr. at 780:12 to 787:21. Finally, Gibson had no need for cash to repay Hull (even assuming the payments from Hull were loans) because he had not made any repayments in 2011 and was not being pressed to make repayment. Id. Ultimately, Gibson never repaid any of the salary Hull paid him in 2011. Id.

No Profit On $4 TRX Puts: During the hearing, Gibson claimed that he did not profit on the $4 TRX puts he purchased in his personal account. 9/12/16 Tr. 207:23 to 208:9. However, Gibson sold the $4 TRX puts for $81,930 more than he paid for them. Div. Ex. 184 (Taveras Expert Report) at 23 ("the $4 puts were sold for a profit of $81,930 on November 10th").

V. Remedies Sought By The Division

A. Gibson Should Be Ordered To Cease And Desist

Advisers Act Section 203(k) and Exchange Act Section 21C empower the Commission to order a person who has violated those Acts to cease and desist from such violations and any future violations. The factors considered in determining whether a cease-and-desist order is warranted are similar to those considered with regard to issuance of an injunction, Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), albeit with added emphasis on the possibility of future violations. In re KPMG Peat Marwick LLP, File No. 3-9500 (Jan. 19, 2001), aff'd sub nom KPMG v. SEC, 289 F.3d 109 (D.C. Cir. 2002). Those factors are: (i) the egregiousness of

a respondent's actions; (ii) the isolated or recurrent nature of his infractions; (iii) the degree of scienter involved; (iv) the respondent's assurances against future violations; (v) whether the respondent recognizes the wrongful nature of his conduct; and (vi) the likelihood the respondent's occupation will present opportunities for future violations. Steadman, 603 F.2d at 1140. No one factor controls. SEC v. Fehn, 97 F.3d 1276, 1295-96 (9th Cir. 1996). The severity of the sanction appropriate in a particular case depends on the facts of that case and the likely value of the sanction in preventing recurrence. Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); In the Matter of Leo Glassman, File No. 3-3758, 1975 WL 160534 at *2 (Dec. 16, 1975).

The following factors weigh strongly in favor of imposing a cease-and-desist order against Gibson: (i) his actions were highly egregious, and his misrepresentations, omissions and deceptive conduct caused GISF and its investors significant losses; (ii) Gibson's fraudulent conduct was recurrent, spanning at least three months and including multiple illicit transactions; (iii) Gibson's conduct was willful; (iv) Gibson abused his position of trust as fiduciary by misusing Fund assets and misappropriating confidential Fund information for his own benefit when he traded on the market effect of his advice to his client; (v) Gibson has refused to acknowledge any wrongdoing; and (vi) Gibson is young and still works in finance, which means there is ample opportunity for him to commit future violations. Accordingly, a cease-and-desist order is appropriate here on each of the claims brought by the Division.

B. Gibson Should Be Permanently Barred From The Securities Industry

Advisers Act Section 203(f) authorizes the Commission to bar or suspend a person from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO") for willful violations of the Securities Act, Exchange Act, or Advisers Act. At the time Gibson

committed the violations at issue in this matter, he was acting as an investment adviser to GISF and certain individuals and was a "person associate with an investment adviser" within the scope of Section 203(f). Additionally, Investment Company Act Section 9(b) authorizes the Commission to bar or suspend a person from serving in a variety of positions with a registered investment company as a sanction for willful violations of the Securities Act, Exchange Act, or Advisers Act. Several factors weigh in favor of imposing the full range of collateral bars available under these provisions.

First, Gibson's fraud was egregious and his misconduct resulted in substantial losses to GISF and its investors. Gibson acted at least recklessly when he failed to disclose (or refrain from) his front running in September, October, and November 2011, as well as when he failed to disclose the material facts related to the Hull buyout transaction. As stated by Division expert Dr. Gary Gibbons:

> Gibson manifestly fell far short of what the industry requires of an investment adviser. He not only failed to avoid conflicts, he deliberately created conflicts, failed to disclose those conflicts, and ultimately exploited his position as an investment adviser through front running and an unfair trade allocation. His conduct demonstrated a wanton disregard for his fiduciary duties. I am certain that the conduct at issue here would universally be considered highly improper in the investment adviser community and would not be tolerated by true professionals.

Div. Ex. 185 at 27. Gibson's actions demonstrated a total disregard for GISF and its smaller investors. Courts have found that a permanent bar is appropriate in similar cases where an investment adviser favored one investor over another, or where the advisers made material misrepresentations or omissions. J.S. Oliver, 2014 SEC LEXIS 2812 at *142-43 (Aug. 5, 2014) ("the Commission has 'repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities

laws.'") (quoting In re Peter Siris, 2013 SEC LEXIS 3924 at *23, Dec. 12, 2013). Like the respondents in J.S. Oliver and Siris, Gibson should be barred permanently.

Second, Gibson's conduct was willful. Throughout September, October, and November 2011, Gibson intentionally engaged in multiple transactions that benefited himself and those close to him at the expense of the Fund and its investors. Nothing more is required to show that Gibson acted willfully. Id. at *105 ("a finding of willfulness does not require intent to violate the law, but merely intent to commit the act which constitutes the violation") (citing Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000)). It is clear that Gibson's misconduct was undertaken with the requisite scienter to support a permanent collateral bar.

Third, by front running his own client, Gibson abused his position of trust as a fiduciary by misappropriating confidential Fund information for his own benefit. Likewise, he misused client funds when he had GISF's overpay for Hull's TRX shares and assume the burden of paying the commission when these shares were ultimately sold in the market. GISF's investors, including Mason McKnight IV, has allowed Gibson to manage their investment in GISF because they trusted him, based upon friendship and history of family connections. 9/13/16 Tr. at 465:21-466:13. A permanent collateral bar is needed to ensure that Gibson can never again take advantage of investors.

Finally, Gibson has never acknowledged that he did anything wrong, stridently claiming that his conduct was proper. Gibson has offered unreliable, contradictory, and self-serving testimony in an attempt to avoid the consequences of his actions. Indeed, Gibson continues to deny even the obvious, i.e., that he was acting as an investment adviser. 9/12/16 Tr. at 56:5-6. Given Gibson's willful violations of the antifraud provisions of both the Advisers and Exchange Acts, the egregious and repeated nature of the violations, and his failure to accept responsibility

for his actions, the Court should permanently bar Gibson from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or NRSRO and from serving or acting in any position listed in Investment Company Act Section 9(b).

C. Gibson Should Be Ordered To Disgorge His Ill-Gotten Gains

The Commission is entitled to disgorgement and prejudgment interest pursuant to Section 203(j) of the Advisers Act and Sections 21B(e) and 21C(e) of the Exchange Act, see J.S. Oliver, 2014 SEC LEXIS 2812 at *150, and Section 9(e) of the Investment Company Act. Id. Disgorgement is an equitable remedy intended to "depriv[e] violators of the fruits of their illegal conduct." SEC v. Contorinis, 743 F.3d 296, 301 (2d Cir. 2014). The amount disgorged "'need only be a reasonable approximation of profits causally connected to the violation.'" SEC v. Warde, 151 F.3d 42, 50 (2d Cir. 1998) (quoting SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995). "'[A]y risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'" Id.; see also J.S. Oliver, 2014 SEC LEXIS 2812 at *151-52. Disgorgement is not punitive, but "as it operates to make the illicit action unprofitable for the wrongdoer, disgorgement need not serve to compensate the victims of the wrong doing." Contorinis, 743 F.3d at 301 (citing FTC v. Bronson Partners, 654 F.3d 359, 374 (2d Cir. 2011)). See also SEC v. Kokesh, No. 15-2087, slip op. at 11 (10th Cir. August 23, 2016).

Gibson violated both the Advisers and Exchange Acts in connection with three sets of transactions: (i) front running the Fund on September 26, 2011; (ii) using the GISF's funds to buy Hull's shares in October 2011, and (iii) front running the Fund again in October and November 2011 via put option contracts. The Division is entitled to disgorgement, with prejudgment interest, of the proceeds of each of these transactions, as identified below.

1. Illicit Gains From Front Running

By selling all of the TRX shares in his personal account, his girlfriend's account, and Geier Group's account on September 26, 2011, one day before GISF completed a large block sale of TRX shares, Gibson avoided the loss in value of $0.54 to $0.55 per share that occurred the next day. The total loss avoided in connection with the 21,900 shares sold by Gibson on September 26 was $11,836:

September 26, 2011 Front Running					
Account Owner	No. of Shares	9/26 Average Sale Price	9/27 Average Sale Price	Price Difference	Losses Avoided
Gibson	2,000	$4.04	$3.50	$0.54	$1,080
Marzullo	18,900	$4.04	$3.50	$0.54	$10,206
Geier Group	1,000	$4.05	$3.50	$0.55	$550
See Div. Ex. 184 at pages 8-10 and Exhibit 6.					$11,836

Similarly, when Gibson bought $4 put options on TRX in his account and his girlfriend's account in October and November 2011 in anticipation of GISF's sale of its remaining TRX shares (and told his father to do the same) and then sold those options on November 10, Gibson, his girlfriend, and his father reaped $379,550 in illicit profits:

October and November 2011 Front Running				
Account Owner	No. of Contracts	Weighted Average Purchase Price	Weighted Average Sale Price	Put Profits
Gibson	565	$0.36	$1.81	$81,930
Marzullo	1,604	$0.31	$1.90	$254,380

Gibson's Father	350	$0.52	$1.76	$43,240
See Div. Ex. 184 at pages 22-24 and Exhibit 7b, and Div. 185 at page 45 (Exhibit X).				$379,550

Additionally, Gibson's father avoided a loss in value in his personal account of $13,157 by selling his TRX shares on November 9 as directed by Gibson:

John Gibson's November 9, 2011 Sale Of TRX Shares			
Account Owner	No. of Shares	Average Difference Between 11/9 and 11/10 TRX Sale Prices	Loss Avoided
Gibson's Father	10,000	$1.32	$13,157
Div. Ex. 184 at page 25 and n.43.			$13,157

Thus, the total illicit gain obtained by Gibson, his girlfriend, his father, and Geier Group (in which Gibson and his father together held the majority interest) as a result of Gibson's front running was $404,543 ($11, 836 plus $13,157 plus $379,550).[53]

Gibson should be required to disgorge all of these ill-gotten gains, including the gains obtained by his girlfriend and his father. See Kokesh, No. 15-2087, slip op. at 11 (affirming a district court's order that an investment adviser pay disgorgement even for ill-gotten gains that

[53] With regard to Gibson's September 26 front running and his father's sale of TRX shares on November 10, 2011, the proper measure of their gains is the difference between the share price obtained on the day of the TRX shares were sold and the share price the next day when GISF's block sales were publicly known. See. e.g., SEC v. Happ, 392 F.3d 12, 18 (1st Cir. 2004) (quoting SEC v. MacDonald, 699 F.2d 47, 54-55 (1st Cir. 1983) ("the proper amount of disgorgement is generally the difference between the value of the shares when the insider sold them while in possession of the material, nonpublic information, and their market value 'a reasonable time after public dissemination of the inside information.'").

With regard to Gibbon's purchase and subsequent sale of the $4 put options for his account and his girlfriends account, and with regard to his father's purchase of $4 put options, the measure of the gains is the price at which the options were sold minus the cost of the options.

went to third parties: "there is nothing punitive about requiring a wrongdoer to pay for all the funds he caused to be improperly diverted to others as well as to himself").[54]

2. Hull Buyout Transaction In October 2011

Gibson should also be required to disgorge the financial benefit he secured for Hull by using GISF's funds to help Hull exit his TRX position. The Division believes that for disgorgement purposes the benefit to Hull (and the harm to the Fund) consisted of (i) the $1,074,902_difference between what GISF paid Hull for his shares and what GISF was able to sell the shares for shortly thereafter, plus (ii) the $6,886.36 in sales commission Hull avoided, for a total of $1,081,708.36. Div. Ex. 184 (Expert Report of Dr. Carmen Traveras) at pages 10-11and Exhibit 7; Div. Ex. 188 (Rebuttal Expert Report of Dr. Gary Gibbons) at 5 and n.10. However, if that total were reduced by 80% to reflect Hull's approximately 80% interest in the Fund, the benefit to Hull would be $216,341.67. The Division requests that in connection with the Hull buyout transaction, Gibson be ordered to disgorge not less than this $216,341.67, with prejudgment interest.[55]

Gibson's expert witness Dr. James Overdahl testified that the benefit to Hull could be estimated by taking approximately 80% of (i) the amount GISF overpaid for the Hull shares and

[54] Gibson's front running is analogous in many ways to insider trading: Gibson had material, non-public information, knew that the information was likely to negatively affect TRX's share price, and exploited that knowledge to benefit himself and those close to him by trading (and advising his father to do the same). In insider trading cases, violators are often required to disgorge gains obtained by others. See SEC v. Warde, 151 F.3d at 49-50; SEC v. Clark, 915 F.2d 439, 454 (9th Cir. 1990). Gibson should likewise be required to disgorge not only his own gains, but those of his girlfriend and his father as well.

[55] It would also be appropriate to require Gibson to disgorge the salary he received in 2011 in exchange for advisory services to GISF, i.e., $148,718.31. Div. Ex. 191 at 450:4 to 451:4; Div. Exs. 128 and 138 at 13. The Commission has ordered investment advisers to disgorge the income they earned in return for their advisory services after those advisers violated the Advisers Act. See, e.g., In the Matter of American Pegasus LDG, LLC et al., Securities Act Release No. 9167 (December 21, 2010) (ordering disgorgement of $850,000 representing improper advisory fees).

(ii) the transaction costs Hull avoided. Using that approach, Dr. Overdahl estimated that the benefit to Hull (and harm to the Fund) of the Hull buyout transaction, after reduction for Hull's 80.16% interest in the Fund, was between $41,841 to $61,359. Resp. Ex. 149 at Exhibit 13. If Gibson is not required to disgorge the $216,341.67 mentioned above, the Division requests that Gibson be ordered to disgorge not less than the $41,841 identified by Dr. Overdahl the lowest reasonable estimate of Hull's benefit from the Hull buyout transaction, with prejudgment interest.[56]

3. Pre-Judgment Interest

Prejudgment interest "on a disgorgement amount is intended to deprive the wrongdoer of the benefit of holding the illicit gains over time by reasonably approximating the cost of borrowing such a gain from the government." Contorinis, 743 F.3d at 307-08. "Whether or not a party personally enjoyed the gains from the illegal action does not alter this principle." Id. (citing Warde, 151 F.3d at 50). Prejudgment interest is routinely awarded in Commission proceedings. See, e.g., J.S. Oliver, SEC LEXIS 2812 at *156 n.63. Thus, Gibson should also be required to pay prejudgment interest on the disgorgement amount, running from the date of the violations in 2011.

D. Gibson Should Be Required To Pay Civil Penalties

Section 203(i)(1)(B) of the Advisers Act authorizes the Commission to impose civil penalties in a cease and desist proceeding against, inter alia, any person who has violated that act

[56] Gibson cannot avoid a disgorgement order on the ground that he is unable to pay, for even insolvency does not preclude an order requiring disgorgement. See Kokesh, No. 15-2087, slip op. at 12 ("the likelihood of the government's recovery is irrelevant to determining whether . . . disgorgement order is punitive or remedial because it does not change the nature of the sanction. The disgorgement order does not require [Kokesh] to do more than he is capable of.").

or any regulation thereunder.[57] Likewise, Section 21B(a)(2) of the Exchange Act authorize the Commission to impose civil penalties in a cease and desist proceeding against, inter alia, any person who has violated the Exchange Act or a regulation thereunder. Both the Advisers Act and the Exchange Act establish the same three penalty tiers: Tier I for violations not involving fraud; Tier II for violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;" and Tier III for violations satisfying the Tier II requirements and resulting in "substantial losses or . . . a significant risk of substantial losses to other persons." See Section 203(i)(2) of the Advisers Act, 15 U.S.C. § 80b-3(i)(2), and Section 21B(b) of the Exchange Act; 15 U.S.C. § 78u-2(b).

The maximum penalty for each penalty tier has been adjusted upward over time to reflect inflation. For violations occurring in 2011, the maximums under both the Advisers Act and the Exchange Act are set out at 17 C.F.R. § 201.1004 (Table IV) (civil penalty tiers for violations after March 3, 2009 but before March 5, 2013). The maximum per-violation penalties under both statutes for an individual for violations during 2011 are: $7,500 for a Tier I violation; $75,000 for a Tier II violation; and $150,000 for a Tier III violation. Id.

These penalty provisions afford the Commission broad discretion in determining the appropriate penalty. The penalty may be calculated based on, inter alia, the number of violations, the number of statutory or regulatory provisions violated, or the disgorgement being required. The Division believes that in this case the civil penalty can appropriately be calculated

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[57] Section 203(i)(1)(A) of the Advisers Act authorizes the Commission to impose civil penalties in an administrative proceeding if such a penalty is in the public interest and is based on a willful violation of, inter alia, the Advisers Act, the Exchange Act, or the rules thereunder.

with reference to the number of times Gibson engaged in conduct that violated the securities laws.[58]

As part of the September 26, 2011 front running, Gibson violated the securities laws on three occasions, i.e., when he directed that all TRX shares in his account be sold, when he directed that all TRX shares in his girlfriend's account be sold, and when he directed that all TRX shares in Geier Group's account be sold. These three violations were Tier II violations because they involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" but did not involve substantial losses or create the risk of a substantial loss. Consequently, an appropriate penalty for Gibson's front running violations on September 26, 2011, would be $225,000 (3 x $75,000 = $225,000).

By arranging to use GISF's funds to buy Hull's TRX shares on October 18, 2011, Gibbon committed a single violation. But this was a Tier III violation because it involved fraud and a substantial loss or risk of a substantial loss. Thus, Gibson should be penalized $150,000 in connection with the Hull buyout transaction.

Finally, in front running the Fund in October and November 2011, Gibson engaged in six separate acts that violated the securities laws. On two occasions (October 27 and 28) he purchased $4 TRX put options for his girlfriends account. On three occasions (October 28, November 2, and November 8) he purchased $4 TRX put options for his own account. Then on November 8 or 9 he instructed his father to sell his TRX shares and buy $4 TRX put options. Each of these six acts was a Tier II violation because each involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" but did not involve substantial

[58] See, e.g., In the Matter of J.S. Oliver Capital Management, 2014 SEC LEXIS 2812, at *162-163 (penalties against multiple respondents, including a $390,000 penalty on investment adviser for three Tier III violations).

losses or create the risk of a substantial loss. As a result, an appropriate penalty for Gibson's front running in October and November 2011 would be $450,000 (6 x $75,000 = $450,000).

In sum, the Division requests that the Hearing Offer impose a civil penalty of $825,000. This penalty should be in addition to Gibson's disgorgement (with prejudgment interest) obligation.

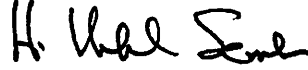
Gibson knowingly violated his fiduciary duties and the anti-fraud provisions of Section 206 and Section 10(b) on at least ten occasions over a period of six weeks, all in an effort to obtain financial benefits for himself and a few individuals close to him. These violations were not inadvertent or unknowing, but were part of an intentional, sophisticated effort by Gibson to misuse his position of trust to protect himself and a few favored individuals from the massive losses imposed on GISF and its investors due to his egregious mismanagement of their funds. Gibson continues to attempt to justify his misconduct and has shown no remorse. Gibson's testimony during the hearing was not credible in many regards and he showed little or no empathy for those who he deceived. As of this day, Gibson shows no appreciation of the seriousness of his violations. On the facts in evidence here, a substantial civil penalty is appropriate.

CONCLUSION

Wherefore, Division requests that Hearing Officer enter an order (i) requiring Gibson to cease and desist from violating Section 206 of the Advisors Act and Rule 206(4)-8 thereunder, as well as Section 10(b) of the Exchange Act and subsections (a) and (c) of Rule 10b-5 thereunder; (ii) barring Gibson from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally significant statistical rating agency and from serving or acting in any position listed in Section 9 (b) of the Investment Company Act;

(iii) requiring Gibson to disgorge all ill-gotten gains resulting from his violations, with prejudgment interest; and (iv) requiring Gibson to pay civil penalties commensurate with the fraudulent nature of his violations.

Respectfully submitted,



October 24, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October 2016:

(i) An original and three copies of the foregoing Division of Enforcement's Post-Hearing Brief were filed with the Office of the Secretary, SEC, 100 F Street, N.E., Washington, D.C. 20549-9303;

(ii) a copy of the foregoing Division of Enforcement's Post-Hearing Brief was sent to Thomas A. Ferrgino, counsel for Respondent, via email to TFerrigno@brownrudnick.com and via UPS next day delivery to:

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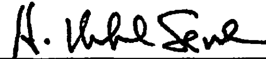
Washington, D.C. 20005; and

(iii) a copy of the foregoing Division of Enforcement's Post-Hearing Brief was provided to Brenda P. Murray, Chief Administrative Law Judge, via email to *ALJ@sec.gov.*



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