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,

Respondent.

DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF

December 20, 2016

H. Michael Semler
Gregory R. Bockin
Paul J. Bohr
George J. Bagnall
U.S. Securities and Exchange Commission
Division of Enforcement
100 F Street, N.E.
Washington, D.C. 20549

Counsel for Division of Enforcement

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INTRODUCTION

The Division of Enforcement ("Division") hereby replies to the post-hearing brief filed by Respondent Christopher Gibson ("Gibson").[1]

The Division demonstrated in its initial post-hearing brief[2] that at all relevant times Gibson was an investment adviser subject to Section 206 of the Investment Advisers Act of 1940 ("Advisers Act"), that he owed fiduciary duties to the Geier International Strategies Fund ("GISF"), that GISF's offering documents did not disclose that Gibson would front run GISF or favor the interests of another client over those of GISF, and that Gibson violated his fiduciary duties and engaged in fraud in September, October, and November 2011 by front running GISF's sales of TRX shares and favoring the interests of his primary investor and benefactor, James Hull ("Hull"), over the interests of GISF. The Division established that Gibson, his girlfriend, and his father obtained more than $404,000 in illicit gains from Gibson's front running, and that Hull benefited by more than $216,000 as a result of Gibson's use of GISF's funds to overpay for Hull's TRX shares.

Gibson's post-hearing brief denies that he was an investment adviser, had any fiduciary duties, engaged in front running or favoritism, or profited from the conduct at issue. Gibson attempts to deflect responsibility by blaming Hull, denigrating investors he defrauded, and portraying himself as an unfortunate victim of circumstances rather than the perpetrator of the fraud. In the same vein, Gibson argues that no monetary relief should be imposed, even if he is

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[1] Respondent Christopher Gibson's Post-Hearing Brief ("Resp. Post-Hearing Br."), November 29, 2016.

[2] Division of Enforcement's Post-Hearing Brief ("Div. Post-Hearing Br."), October 24, 2016.

found liable, because he did not gain enough from his fraud to offset his share of the losses incurred by GISF due to his extraordinarily reckless and self-interested misconduct.

There is no factual or legal basis for Gibson's effort to avoid responsibility for his egregious breaches of his obligations to GISF and its investors. Based on the evidentiary record and the well-established legal duties of investment advisers (confirmed in the Commission's recent Robare decision[3]), there can be no doubt that by repeatedly engaging in undisclosed front running and by favoring Hull's interests over the interests of GISF without disclosing that he was doing so, Gibson violated Sections 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8 thereunder. Additionally, Gibson's undisclosed front running, contrary to the representations made to investors, violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder.

THE FACTUAL RECORD

The facts established during the September 12-16, 2016, hearing were summarized in the Division's initial post-hearing brief, Div. Post-Hearing Br. at 5-15, and set out comprehensively in the Division's proposed findings of fact.[4] Many of the Division's proposed findings are undisputed.[5]

[3] In the Matter of The Robare Group, Ltd., et al, IAA Rel. No. 4566, 2016 WL 6596009 (November 7, 2016) (reaffirming that investment advisers have a fiduciary duty to make full disclosure of all conflicts of interest).

[4] Division of Enforcement's Proposed Findings of Fact and Conclusions of Law ("Div. Findings"), October 24, 2016, at 1-38.

[5] See Respondent Christopher M. Gibson's Proposed Findings of Fact and Conclusions of Law ("Resp. Findings"), November 29, 2016, at 71-76.

In conjunction with this reply brief, the Division is also responding to Gibson's proposed findings of fact and conclusions of law.[6] Where Gibson's proposed findings are inaccurate, misleading, or unsupported by the record, the Division has identified the basis for its disagreement and cited the record evidence supporting the Division's position.

ARGUMENT

I. Gibson Violated Sections 206(1) and (2) of the Advisers Act

Gibson does not dispute the Division's description of the elements required to establish violations of Section 206(1) and (2), Div. Post-Hearing Br. at 15-16, but denies that the Division has made the required evidentiary showing. As demonstrated below, Gibson's opposition brief fails to call into question any aspect of the Division's Section 206(1) and (2) claims.

A. Gibson Was An Investment Adviser

The Division has shown that throughout the relevant period Gibson was an "investment adviser" to GISF within the scope of Section 202(a)(11) of the Advisers Act. The GISF offering documents identified Gibson as the "managing member" of the Investment Manager, GISF's investors understood that Gibson was making investment decisions for GISF, and Gibson managed GISF's investments on a day-to-day basis, doing so personally because neither Geier Group nor Geier Capital had any employees. Id. at 17-20. Gibson continued to manage GISF's investments after the dissolution of Geier Group in April 201, id. at 19-20, and throughout the relevant period he was compensated as an investment adviser, id. at 7-8. Consequently, Gibson was an investment adviser to GISF, regardless of Hull's role in making strategic decisions and regardless of whether Hull was also an investment adviser. Id. at 20- 21.

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[6] Division of Enforcement's Responses To Gibson's Proposed Findings and Conclusions, December 20, 2016.

Gibson argues that he was not an investment adviser for three reasons, none of which has any merit. First, Gibson argues that because he managed GISF's funds in the name of a legal entity (originally Geier Group and subsequently Geier Capital), he was not an investment adviser but a "person associated with an investment adviser." Resp. Post-Hearing Br. at 46-47. In essence, Gibson denies that an individual providing investment advice to clients on behalf of an investment advisory firm can be an "investment adviser."[7] As shown in the Division's initial brief, Gibson's argument is inconsistent with the statutory language and Commission guidance[8] and is contrary to numerous Commission decisions holding that individuals who provided advisory services on behalf of a legal entity were investment advisers subject to Section 206. Div. Post-Hearing Br. at 21-23.

Second, Gibson argues that where the Commission has found an "associated person" to be an investment adviser, the individual held "a senior position" and had "a significant ownership interest" in the advisory entity. Resp. Post-Hearing Br. at 47-48. Gibson then asserts that he did not "control" Geier Group or Geier Capital and was not the alter ego of those entities and consequently was not an investment advisor. Id. at 47-49. But the Commission has repeatedly held that whether an individual acting on behalf of an advisory firm is an investment adviser depends on whether the individual manages client funds, provides investment advice to clients, or otherwise performs advisory services, not on whether the individual controls (or is the alter

[7] The only support cited by Gibson for this argument is a single decision from 2003, In re Russell W. Stein, Admin. Proc. No. 3-9309, 2003 WL 1125746 (March 14, 2003). See Resp. Post-Hearing Br. at 47. On reconsideration, the Commission dismissed the proceeding in Stein. Admin. Proc. No. 3-9309, 2004 WL 1778889 (August 9, 2004). The Division has found no indication that Stein has been relied on in any subsequent Commission decision.

[8] See, e.g., Div. Post-Hearing Br. at 21-23, n.18 (citing guidance issued in 2013 by the SEC's Division of Investment Management stating that "individuals who are employed by advisers fall within the definition of 'investment adviser'").

ego of) the entity. Div. Post-Hearing Br. at 24 and n.20 (citing Commission decisions in which "non-control" individuals were found to be investment advisers). Whether Gibson controlled Geier Group and Geier Capital, and the degree of influence Hull may have exercised due to his investment in GISF and his loans to Gibson, are irrelevant to whether Gibson was an investment adviser. Id. at 20-21.

Moreover, Gibson indisputably did hold "a senior position" and have "a significant ownership interest" in Geier Group and Geier Capital. Gibson was the 50% owner of both Geier Group and Geier Capital, and together with his father he held a majority interest in each entity. He was also "the managing member" of Geier Group, the Managing Director of Geier Capital, and the only person associated with either entity who had any experience in the securities industry or held the Series 65 qualification to function as an investment adviser. Id. at 23. Even under Gibson's reading of the Commission's decisions dealing with principals of investment advisory entities, Resp. Post-Hearing Br. at 47-48, Gibson was an investment adviser to GISF.

Third, Gibson claims that even if he was an investment adviser until September 30, 2011, he shed that status as of October 1, 2011, because he voluntarily suspended collection of the quarterly investment management fee. Id. at 45-46, 49-50. That argument has no impact on the Division's claims relating to Gibson's front running on September 26, 2011. Further, the Division has shown that the suspension of management fees had no impact on Gibson's status as an investment adviser even after September 30, 2011, because (i) he told investors that he would continue to manage GISF's investments and in fact did continue to manage GISF's investments, (ii) he had the right to resume collection of investment management fees at any time, (iii) he had the right to receive an annual incentive allocation after the end of 2011 if earned by his performance

during 2011, and (iv) he continued to receive biweekly salary payments from Hull for managing GISF's investments. Div. Post-Hearing Br. at 28-32.

Gibson asserts that his right to receive fees after September 30, 2011, is irrelevant because an individual or entity is an investment adviser only when actually receiving compensation. Resp. Post-Hearing Br. at 45-46. Gibson attempts to support this narrow and unrealistic interpretation of Section 202(a)(11) solely by reference to a 1987 Commission release (Rel. No. IA-1092), id. at 46, but that document does not address whether a right to compensation satisfies the compensation element. In contrast, expert testimony offered by the Division established that "as it is 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. The case law confirms that even a contingent right to receive fees is sufficient to meet the compensation element. See SEC v. Fife, 311 F.3d 1, 10-11 (1st Cir. 2002) (defendant was an investment adviser because "he understood that he would be compensated . . . based on a percentage of the profits from the investments, if successful); SEC v. Murray, No. 12-cv-01288-EMC, 2016 WL 6893880 at *6 (N.D. Cal. November 23, 2016) ("the 'for compensation' element . . . can be satisfied by mere entitlement to compensation"); SEC v. Eldridge, No. 1:05-CV-0735-CC, 2007 WL 7654404 at *8 (N.D. Ga. March 20, 2007) (defendant was investment adviser because it "was to receive" compensation, including 0.5% of annual profits). Thus, Gibson's continuing right to receive management fees, as well as his right to an annual incentive allocation if earned, were each sufficient "compensation" to make him an investment adviser even after September 2011.

Additionally, Gibson received biweekly payments from Hull (through Hull's real estate business) for managing GISF's investments. The Division has shown that (i) those payments were treated by Gibson as income rather than as loans, (ii) the payments were an economic benefit to Gibson regardless of whether they were salary or loans, and (iii) by at least the last half of 2011 the payments were being provided to Gibson primarily in return for the investment advisory services he provided to GISF. Div. Post-Hearing Br. at 30-31.[9] These payments from Hull to Gibson, which continued throughout September, October, and November 2011 (and beyond), were likewise sufficient in themselves to satisfy the compensation element of the "investment adviser" definition.[10]

B. Gibson Had A Federal Fiduciary Duty To Disclose Conflicts of Interest

The Division has shown that Gibson had a federal fiduciary duty to disclose potential and actual conflicts of interest, and that his disclosure obligations were not reduced or eliminated by the GISF offering documents. Div. Post-Hearing Br. at 32-34. In response, Gibson denies that he had any fiduciary duties to GISF, contending that all such obligations were eliminated by the GISF operating agreement, a private contractual agreement under Delaware law. Resp. Post-Hearing Br. at 57-65. Gibson's argument rests on multiple incorrect and unsupported assertions.

Gibson claims that federal law is unclear regarding an adviser's disclosure obligations and consequently advisers should be free to define their obligations via private agreements under state

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[9] Gibson does not take a firm position on whether the biweekly payments were salary or loans and does not dispute that by at least mid-2011 the majority of Gibson's time was devoted to managing GISF's investments rather than performing services for Hull's business. Resp. Post-Hearing Br. at 49-50.

[10] Additionally, even if the biweekly salary payments had been for managing Hull's personal accounts, Gibson would have continued to be an investment adviser subject to Section 206 with regard to all of his clients, including GISF, regardless of whether he received compensation from clients other than Hull. Div. Post-Hearing Br. at 31-32.

law. Id. at 57-58.[11] However, there is no uncertainty regarding an adviser's disclosure obligation under the Advisers Act. The courts and the Commission have long made clear that an adviser's federal fiduciary duties include the obligation to make full disclosure of all material conflicts of interest, in sufficient detail that investors can evaluate the significance of the conflict. While the substance of the required disclosures will necessarily vary depending on the factual situation, since at least the 1963 decision in Capital Gains[12] there has been no doubt that an investment adviser has a federal fiduciary duty to make full disclosure of all material conflicts of interest. Div. Post-Hearing Br. at 32-34. See also The Robare Group, 2016 WL 6596009 at *6 ("An investment adviser must 'disclose any potential conflicts of interest accurately and completely'").[13]

Nor is there any basis for Gibson's claim that an investment adviser may nullify federal disclosure obligations by private agreement. Contrary to Gibson's suggestion,[14] the fact that an

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[11] Gibson attempts to support this argument by citing a 2011 report by Commission staff discussing potential rulemaking to impose fiduciary duties on securities brokers for the first time and to create a uniform set of standards covering brokers and investment advisers. Resp. Post-Hearing Br. at 55-56. Nothing in that report suggested that the existing fiduciary duties of investment advisers are unclear or that any proposed rulemaking would reduce or eliminate those duties. To the contrary, the report stated that even if the rulemaking went forward and resulted in a uniform standard, the existing fiduciary duties of investment advisers as defined by the case law and Commission guidance would continue to apply: the "fiduciary duty, as developed primarily through Commission interpretive pronouncements under the antifraud provisions of the Advisers Act, and through case law and numerous enforcement actions, will continue to apply." Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Jan. 2011) at vi-vii.

[12] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963).

[13] See also IMS/CPAs & Associates, Exchange Act Rel. No. 45019, 2001 WL 1359521, at *8 ("Economic conflicts of interest, such as undisclosed compensation, are material facts that must be disclosed."), aff'd sub. nom. Vernazza, v. SEC, 327 F.3d 851 (9th Cir. 2003).

[14] Gibson also discusses several Commission releases (IA-1092, IA-2711, and A-3060) and two provisions of the Advisers Act (Sections 211(g) and (h)) in an effort to support his argument that by satisfying the disclosure obligations and obtaining client consent, advisers may engage in conduct that presents a conflict of interest. Resp. Post-Hearing Br. at 53-57. But nothing cited by Gibson suggests that an adviser may reduce or eliminate his duty to disclose such conflicts.

adviser may engage in certain conduct involving conflicts of interest after the conflicts have been fully disclosed does not reflect any uncertainty regarding an adviser's duty to make the appropriate disclosures, and does not suggest that an adviser may eliminate his disclosure obligations by contract. Div. Post-Hearing Br. at 35-36.[15]

Further, Gibson fails to point to any authority for his assertion that state law determines whether an investment adviser's obligations under Section 206 may be modified or eliminated. Even Gibson's expert witness on Delaware law, Myron Steele, expressly declined to address the relationship between state law and federal law in this area. The Delaware provisions cited by Gibson deal with modification of the state law duties of a managing member toward other members of a limited liability company -- an issue unrelated to the duties imposed by federal law on investment advisers in their dealings with advisory clients. Div. Post-Hearing Br. at 34-36. With regard to the duty most directly at issue here -- the duty to disclose conflicts of interest -- Gibson is simply wrong in asserting that "the relevant limited liability company agreement will determine whether otherwise applicable fiduciary duties have been modified, restricted, or eliminated." Resp. Post-Hearing Br. at 58.[16]

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[15] Gibson also claims that contractual "hedge fund clauses" have not been prohibited and that this shows that an adviser's fiduciary obligations can be waived or modified. Resp. Post-Hearing Br. at 54. That argument ignores key differences between such hedge fund clauses and the nullification of fiduciary duties Gibson advocates here, e.g., the hedge fund clauses do not limit the duties imposed by Section 206 and do not affect the Commission's ability to enforce those duties. Div. Post-Hearing Br. at 36 n. 34.

[16] Gibson mistakenly claims that Division expert witness Dr. Gary Gibbons was wrong in stating that it is widely understood in the investment community that an adviser's federal fiduciary duties cannot be eliminated or reduced. Resp. Post-Hearing Br. at 93-95, referring to Dr. Gibbons' report, Div. 185, at 18. Dr. Gibbons' statement was directed to the facts of this case, where the issue is Gibson's failure to disclose. Consequently, Dr. Gibbons' testimony was addressed primarily to Gibson's claim that an adviser's federal disclosure obligations could be nullified by private contract. Gibson has offered nothing suggesting that Dr. Gibbons inaccurately reflected the views of the investment community on that issue. (Gibson withdrew the report of his investment adviser expert, Charles Porten, and offered no expert testimony regarding the duties of investment advisers). Thus, there is no basis for Gibson's challenge to Dr. Gibbons' conclusions or credibility.

C. Gibson Failed To Disclose Material Conflicts Of Interest

Gibson devotes several pages of his post-hearing brief to arguing that investment advisers may engage in conduct involving conflicts of interest if the conflicts are fully disclosed and the client consents. Resp. Post-Hearing Br. at 2-4, 53-57, 62. That argument is irrelevant here because Gibson did not disclose the conflicts he created and exploited, i.e., he did not disclose when GISF was created in January 2010 that he might engage in front running and favor Hull's interests over the interests of the Fund, and he did not disclose in late 2011 that he was about to engage in front running and favoritism.[17]

Gibson does not claim that he disclosed his front running or favoritism at any time or in any way other than through the offering documents.[18] Gibson's defense rests on the assertion that the Confidential Private Offering Memorandum ("offering memorandum") and/or the Operating Agreement ("operating agreement") were sufficient to fully and permanently satisfy his disclosure obligations, regardless of the specific nature, extent, timing, financial impact, or other features of the potential conflicts that existed in January 2010 or of the actual conflicts as they emerged in late 2011. In support of that argument, Gibson does no more than repetitively recite the broad language in the offering documents, id. at 58-57, 63, and then boldly declare that those provisions disclosed potential conflicts "in great detail and unequivocal language." But Gibson's assertions do not make

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[17] Because front running by an investment adviser is recognized as an abusive practice that is contrary to ethical standards and damaging to the securities market itself, Div. Post-Hearing Br. at 46-47, it is not clear that Gibson could properly have engaged in front running GISF even if his intention to do so had been disclosed. See Div. Ex. 185 (Expert Report of Dr. Gary Gibbons) at 22. But that question need not be resolved in this case because neither Gibson's intention to front run GISF nor the fact that he was doing so was disclosed.

[18] It is undisputed that Gibson did not disclose in late 2011 that he was about to engage in front running and favoritism or that he was doing so. Nor has Gibson argued that his obligation to make appropriate disclosures to GISF was satisfied merely because he was himself GISF's primary representative and was aware of his own conduct. See Div. Post-Hearing Br. at 37 n.35. Under the circumstances here, Gibson's obligations could only have been satisfied by disclosure directly to GISF's investors.

it so.

The Division has shown that what the "Potential Conflicts Of Interest" provision in the offering memorandum and the "Management of the Company" provision in the operating agreement actually disclosed was only that Gibson might engage in other business activities and manage other investments and might do so using strategies different from the strategies used in managing GISF's investments. Div. Post-Hearing Br. at 37-39. Nothing in the offering documents stated or implied that Gibson was authorized to conduct such other businesses, or manage his personal investments, in a way that violated his fiduciary duties to GISF. The only reference to "conflicts" in the text of the offering documents was the generic, wholly uninformative statement that "the Affiliated Parties may have conflicts of interest." Id. at 39, quoting Div. Ex. 24 at 19 (second full paragraph).

The offering documents failed to identify even the potential that Gibson might trade for his own benefit based on his foreknowledge of GISF's anticipated trades or use GISF's funds to buy shares from another advisory client (such as Hull) at an above-market price when GISF was seeking to rid itself of shares in the same company. As a result, the offering documents failed to satisfy Gibson's disclosure obligation regarding potential conflicts. See, e.g., Robare, 2016 WL 6596009 at *6-9 (although investment adviser's disclosures contained "boilerplate" language regarding "possible" sales commissions and noted that the advisor "may" receive certain sales-related compensation, the disclosures were inadequate to alert investors to the adviser's financial incentives and other potential conflicts of interest).

Further, because the actual conflicts at issue here were created (by Gibson's own conduct) more than 18 months after GISF came into existence, the specific nature, timing, and financial impact of the eventual front running and favoritism could not have been known when the offering

documents were signed. The Division has shown that once Gibson created these actual conflicts, he was obligated to disclose them fully and in detail. Div. Post-Hearing Br. at 39-41. Because Gibson failed to do so, GISF investors such as Mason McKnight and Matthew McKnight were unaware in late 2011, when their investment in GISF was rapidly losing value, that GISF's investment adviser was trading for his own account based on an undisclosed plan to liquidate GISF's only asset and was using GISF's funds to benefit Hull and disadvantage GISF. 9/13/16 Tr. 418:15-419:20; 488:7-489:10. There is simply no basis for Gibson's contention that he had no duty to disclose these actual conflicts. Div. Post-Hearing Br. at 40-41.

Unable to show that he disclosed the conflicts at issue here, Gibson resorts to mischaracterization of the Division's position. Gibson implies that it is the Division's position that Gibson violated Section 206 merely by trading in the same securities held by GISF. Resp. Post-Hearing Br. at 62-65. But the Division has made clear that it does not claim that Gibson was barred from all such trading -- or from engaging in other businesses in the securities industry, maintaining other accounts for himself or others, advising other persons or entities regarding investments, or engaging in transactions on behalf of GISF with affiliated parties. Div. Post-Hearing Br. at 44. The Division's claim is only that on the particular occasions at issue in this case, Gibson engaged in personal trading, and a transaction with an affiliated party, under conditions that created material conflicts with GISF and failed to disclose those conflicts, thereby violating his fiduciary duties and Section 206. Id.

Similarly, Gibson misleadingly conflates the question of whether an adviser must disclose material conflicts with the separate question of whether an adviser may engage in conflicted conduct after full disclosure. Resp. Post-Hearing Br. at 62. Contrary to Gibson's suggestion, the Division does not argue that even full disclosure would be insufficient to permit

an adviser to engage in at least certain conduct involving a conflict of interest -- as noted, that question is not at issue in this case. The Division's fundamental position here is that Gibson's duty under Section 206 to disclose potential and actual conflicts was not nullified by the GISF offering documents. See Part I.B above and Div. Post-Hearing Br. at 34-35. While an adviser's duty to disclose cannot be eliminated, it can be satisfied by making appropriate disclosures. But Gibson never did so.[19]

D. Gibson Engaged In Front Running On September 26, 2011

The Division has demonstrated that Gibson engaged in undisclosed front running on September 26, 2011, by selling all the TRX shares in his own account, his girlfriend's account, and the Geier Group account based on his access to material, non-public information, i.e., his knowledge that GISF would soon sell a large block of TRX shares. This enabled Gibson, his girlfriend, and Geier Group to sell their TRX shares for at least 50 cents more per share than what they could have obtained if they sold the following day, when GISF's block of TRX shares was sold into the market. Div. Post-Hearing Br. at 44-50.

Gibson contends that his conduct on September 26, 2011, was not front running because (i) the "elements" of front running are not authoritatively defined, Resp. Post-Hearing Br. at 4-5, 66-67, and 71-73, and (ii) when selling the TRX shares on September 26, he did not know the exact terms of GISF's anticipated block sale and that sale was not "imminent." Id. at 69-70, 73-74. Gibson also summarily denies he acted with scienter. There is no merit to any of these arguments.

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[19] Gibson also engages in ill-informed speculation regarding the potential significance of Section 215 of the Advisers Act with regard to conflicts that are properly disclosed. While Section 215 bars an investment adviser from enforcing a contractual provision waiving the adviser's disclosure obligations, the Division has not argued that Section 215 bars an adviser from engaging in at least certain conflicted conduct after making full disclosure.

1. Elements of Front Running

In SEC v. Yang, 999 F. Supp. 2d 1007, 1016 (N.D. Ill. 2013), Judge Kennelly accurately described front running as an attempt by an adviser "to profit personally by secretly authorizing personal trades in anticipation of much larger trades that he knew he would be authorizing on behalf of" his client. Gibson mistakenly asserts that this judicial description of front running must be disregarded because it was included in a ruling denying summary judgment. Resp. Post-Hearing Br. at 71. The description of front running in Yang was not tied to disputed factual issues, and there is no reason it should be disregarded. Moreover, the front running claim against Yang subsequently went to trial, he was found liable under Section 206 of the Advisers Act and Section 10(b) of the Exchange Act for front running, and his post-trial motion for judgment as a matter of law was denied. See SEC v. Yang, No. 12-C-2473, 2014 WL 2198323 at *1 (N.D. Ill. May 27, 2014) ("the market was harmed in the sense that Yang traded based on information (regarding [his advisory client's] impending large purchases) to which only he had access"). The judgment finding Yang liable for front running was affirmed on appeal. See SEC v. Yang, 795 F.3d 674, 677 (7th Cir. 2015) (describing front running as "a practice that involves trading for one's personal gain in advance of trades for one's client").[20]

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[20] See also SEC v. Bergin, No. 3:13-CV-1940-M, 2015 WL 4275509 at *1 (N.D. Tex. July 15, 2015), where the defendant investment adviser engaged in "illegal front running" of trades by his firm's client on more than 130 occasions. Like Gibson, the defendant "was privy to material, non-public information regarding the size and timing of securities trades [his firm] intended to make for its clients" and breached his duties to his firm and its clients by "using [the firm's] confidential trading information to trade on and ahead of . . . client trades."

Brokers are also prohibited from engaging in front running. See SEC Rel. No. 15743 (May 18, 1998) describing an action filed by the SEC against brokers for engaging in front running, SEC v. The Oakford Corp., No. 98 Civ. 1366 (S.D.N.Y.). The SEC release stated that a broker "could receive a large customer order and, before executing the customer order, purchase or sell shares of the same security for his own account, thereby benefiting from the price movement that follows execution of the customer's order. This practice is commonly known as frontrunning."

Gibson also argues that the Supreme Court's foundational decision in Capital Gains, 375 U.S. 180 (1963), provides no guidance regarding front running because the adviser in that case violated his fiduciary duties by "scalping," i.e., selling stocks from his personal account after pushing the price up by recommending those stocks to his clients. Resp. Post-Hearing Br. at 72. But "scalping" and front running are merely variations on the same fraudulent practice -- the essential feature of both is that the adviser trades based on the anticipated impact of the trades he is recommending to his clients. See Div. Ex. 185 at 21, n.37.

Gibson points out that the industry authorities cited by the Division do not use exactly the same words in describing front running. Resp. Post-Hearing Br. at 73. But it is the striking similarity among these definitions that is most notable. Common to all of the authorities cited on this issue by the Division -- the judicial decisions, the treatises, the ethics codes, and the Division's expert witness -- is the understanding that in the advisory context, front running occurs when an adviser, seeking a personal benefit, trades on material, non-public information concerning an anticipated client transaction. Div. Post-Hearing Br. at 46-47; Div. Ex. 185 at 21-22. That is exactly what occurred on September 26, 2011, when Gibson traded on the basis of his knowledge that GISF was arranging to sell a large block TRX shares.

In short, there is no uncertainty regarding the nature or elements of front running. Moreover, it is widely recognized, and apparently undisputed by Gibson,[21] that undisclosed front running is a violation of an adviser's fiduciary duties, a "pernicious form of insider trading," "a personal trading abuse," and "illegal." Div. Ex. 185 at 21.

[21] See Resp. Post-Hearing Br. at 72, n.31 (citing authority referring to front running as a "manipulative technique") and 67 (quoting 1988 SEC statement describing front running as a "serious trading abuse that can adversely affect the integrity of the markets").

2. Gibson's Knowledge of GISF's Anticipated Block Sale

Gibson also argues that when he placed the orders to sell all the TRX shares in his personal account, his girlfriend's account, and the Geier Group account on September 26, 2011, he was not certain that GISF would be able to sell a block of TRX shares immediately and did not know the terms on which the sale would be completed. On this basis, Gibson contends that his sales from the personal accounts could not have been front running because "there was no imminent transaction," Resp. Post-Hearing Br. at 69, and he did not have "advance knowledge of impending client action," id. at 73. These arguments essentially reiterate the discredited pre-trial assertions of Gibson's expert witness Dr. James Overdahl, who originally claimed that there could be no front running unless all aspects of the anticipated client transaction were fixed in place and known to the investment adviser. However, during his hearing testimony Dr. Overdahl admitted that he was not an expert in this area, the definition on which his testimony rested was provided by Gibson's attorney and did not actually apply to Gibson's trading, and even that definition did not limit front running to situations in which all the terms of the client transaction had already been determined. Div. Post-Hearing Br. at 46-47. Thus, there is no expert testimony or other evidentiary support for Gibson's assertion that he could not have engaged in front running on September 26, 2011, because the terms of the GISF's block sale were not yet in place.[22]

In contrast, the Division's expert on investment advisory issues, Dr. Gary Gibbons, testified that as understood in the industry, front running was not limited to situations in which all terms of the client's sale were already determined, and that knowledge of the client's intention to trade was sufficient to bar the adviser from trading in front of the client. Div. Post-Hearing Br. at 47-48; Div. Ex. 185 at 21-22. See also SEC v. Bergin, 2015 WL 4275509 at *1 (imposing sanctions for

[22] Not surprisingly, Gibson's post-hearing brief never mentions Dr. Overdahl's report or hearing testimony regarding front running.

adviser's front running based on his knowledge of trades his firm "intended to make" for its clients").

Similarly, there is no basis for Gibson's claim that he did not engage in front running because GISF's block sale of TRX shares was not "imminent." Resp. Post-Hearing Br. at 69. On September 26 GISF's block sale was indeed very imminent -- it was being negotiated by Gibson that day and actually took place the next day, September 27, 2011. Moreover, there is no basis for Gibson's argument that front running can occur only immediately before the client trades. As noted, front running takes place when an adviser trades for his own account based in his knowledge how his client intends to trade, SEC v. Bergin, 2015 WL 4275509 at *1, regardless of whether the client trade takes place immediately. See also Div. Post-Hearing Br. at 47-48.[23]

3. Gibson Acted With Scienter

The Division's initial brief demonstrated that in front running his own client on September 26, 2011, Gibson acted at least recklessly, i.e., his conduct was "highly unreasonable" and constituted "an extreme departure" from the applicable standard of care. Div. Post-Hearing Br. at 50-53. Because he was an investment adviser subject to fiduciary duties, the applicable standard of care included affirmative duties of utmost good faith and full and fair disclosure of all material conflicts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients. Id. at 51. Gibson violated each of these duties by misappropriating his client's material, non-public information, trading on that information in non-GISF accounts he controlled, and failing to disclose his conduct or the conflicts of interest his conduct created, all in order to gain an

[23] The Division's post-hearing brief also established that on September 26, 2011, Gibson understood that GISF's block sale of TRX shares was likely to depress the TRX share price, Div. Post-Hearing Br. at 48-49, and that Gibson's assertion that he sold his TRX shares because he needed liquidity is not credible, id. at 49-50. Gibson does not dispute or otherwise respond to those arguments.

illicit financial benefit for himself and his girlfriend. As illustrated by the decisions cited in the Division's initial brief, the courts have found such conduct to be an extreme departure from the standard of care required of investment advisers and highly unreasonable. Id. at 51-54. Thus, the Division has shown that Gibson acted with scienter in front running GISF on September 26, 2011.

Additionally, Gibson is liable under Section 206(2) in connection with the undisclosed September 26, 2011, front running based on his negligence. "Negligence is 'the failure to exercise reasonable care or competence.'" Robare, 2016 WL 6596009 at *9. Gibson was required to use "the degree of care a reasonably careful person would use under like circumstances" to understand his obligations and ensure that they were fulfilled. Id. See also Div. Post-Hearing Br. at 66-67. Gibson should have known that he had an obligation to disclose conflicts of interest, that his front running created such conflicts, and that those conflicts had not been disclosed. If Gibson failed to take reasonable care to understand his disclosure obligations or if he understood those obligations but failed to reasonably fulfill them, in either event he was at least negligent. See Div. Ex. 185 at 16-17 ("as an investment adviser, Gibson had an affirmative duty to educate himself as to the exact nature of his fiduciary duties," including how those duties were or were not impacted by the offering documents).

Gibson has made no substantive response to the Division's arguments regarding scienter. Gibson's 98-page brief devotes less than one page to the scienter issue and merely reasserts his position that the offering documents constituted adequate disclosure. Resp. Post-Hearing Br. at 91. Gibson does not challenge the Division's showing that he (i) knew he was misappropriating his client's material non-public information, (ii) knew that GISF's block sale of TRX shares was likely to depress the market price of TRX shares, and (iii) acted to secure a financial benefit by selling before the decline in share price, not because he had any pressing need for personal "liquidity."

Div. Post-Hearing Br. at 52-53. Significantly, Gibson has not claimed that he consulted with or relied on anyone else in connection with his decision to front run GISF on September 26, 2011.[24]

In sum, nothing in Gibson's post-hearing brief calls into question the Division's showing that Gibson's front running on September 26, 2011, violated Sections 206(1) and (2).

E. Gibson Favored Hull's Interests Over GISF's Interests By Using GISF's Funds to Purchase Hull's TRX Shares in October 2011

The Division has demonstrated that Gibson also violated Sections 206(1) and (2) when he failed to disclose at least four material facts relating to GISF's purchase of Hull's personal TRX shares in an off-exchange transaction on October 18, 2011 ("Hull Buyout Transaction"), a transaction that improperly favored Hull over GISF. Div. Post-Hearing Br. at 54-66.[25] Gibson's post-hearing brief challenges the Division's conclusion on multiple grounds, none of them valid.

First, Gibson claims that the Division cited no authority showing that Gibson was obligated to disclose the material facts surrounding the Hull Buyout Transaction.[26] Resp. Post-Hearing Br. at 74-81. But the Division has cited numerous cases holding that Sections 206(1) and (2) prohibit an investment adviser from breaching his fiduciary duties through nondisclosure

[24] Throughout the investigation of this matter and continuing through the hearing, Gibson asserted the attorney-client privilege and refused to respond to questions or provide documents relating to any communications he may have had with counsel. Indeed, after Gibson briefly referred to such communications early in his trial testimony, apparently inadvertently, he stipulated that those references would be stricken from the record. See Div. Ex. 192 (stipulating that portions of his testimony would be stricken and that "he will not introduce any testimony, documents, or other evidence identifying the content of such communications with counsel"). Thus, Gibson has not argued, and could not argue, that he relied on the advice of counsel in connection with the conduct at issue in this case.

[25] Gibson asserts that this transaction did not harm GISF because Hull himself owned eighty percent of GISF. This ignores the smaller investors who together owned the remaining 20% of GISF and whose interests were adversely impacted by the Hull Buyout Transaction. Further, the Division is not required to prove that Gibson's failure to disclose this transaction caused harm.

[26] The Division's brief made clear that Gibson improperly failed to disclose that (i) at the time of the Hull Buyout Transaction, the Fund's trading strategy was to exit its TRX position, (ii) GISF was paying Hull an above-market price; (iii) the transaction was likely to cause GISF to pay a commission it would not otherwise incur, and (iv) Gibson was receiving a salary from Hull's real estate business.

of material facts. Div. Post-Hearing Br. at 15-16 and 54-67. Before acquiring Hull's TRX shares, Gibson should have disclosed that it had been decided (by Gibson and Hull over the weekend of September 24-25, 2011) that GISF would liquidate its TRX position. Two days earlier, Gibson had told GISF's investors just the opposite, i.e., that GISF would hold TRX "until the bull market matures over the coming years." Div. Ex. 81. Gibson had an obligation to disclose the Fund's change in strategy in order to make his September 23, 2011 statement not misleading and to acknowledge that acquisition of Hull's shares would be contrary to GISF's strategy. Div. Post-Hearing Br. at 55-56.

In addition, Gibson was required to disclose that the Hull transaction occurred at above-market prices and would ultimately lead to payment of a commission that GISF would not otherwise have been required to pay. GISF and its investors had been told in no uncertain terms in the offering memorandum that any GISF transactions with affiliated parties would occur at "the current market price" and that "no extraordinary brokerage commissions" would be paid. If Gibson planned to engage in a transaction on terms materially different than those described in the offering memorandum, he had a duty to disclose that fact. Id. at 32, 56-62. Gibson was also required to disclose that his living expenses were being covered by Hull through biweekly payments from Hull's real estate business, which created a conflict of interest when Gibson decided to have GISF purchase Hull's personal TRX shares. Id.

Second, Gibson now claims that the portion of the offering memorandum requiring that any transaction between GISF and another Gibson advisory client take place at current market prices and not include extraordinary commissions did not apply to the Hull Buyout Transaction. Resp. Post-Hearing Br. at 75. Gibson argues that the broad language in Section 3.02(h) of the operating agreement was the relevant provision and allowed him to engage in the Hull Buyout

Transaction, despite the more targeted and more restrictive provisions in the offering memorandum. Id. The relevant portion of the offering memorandum specifically addressed transactions between GISF and entities or accounts in which persons affiliated with GISF (such as Hull) had an interest:

> . . . 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). Unlike Section 3.02 of the operating agreement, this provision in the offering memorandum addressed the specific type of transaction at issue here and thus was the controlling language. Banca Cremi, S.A. v. Alex Brown & Sons, Inc. 132 F.3d 1017, 1031 (4th Cir. 1997) ("general statement creates less justifiable reliance than would a specific statement"). The general language of Section 3.02 of the operating agreement did not excuse Gibson from his fiduciary obligation to either comply with the applicable provision in the offering memorandum or disclose that he planned to take action contrary to that provision.[27]

Third, Gibson attempts to avoid the impact of his own expert's admissions by claiming – for the first time – that the controlling provision in the offering memorandum is a mere "guideline" that allows "leeway in its interpretation." Resp. Post-Hearing Brief at 77. While that provision (quoted above) includes the word "guideline," that term is followed by two clauses that use the imperative "shall," i.e., transactions between GISF and affiliates "shall be effected

[27] Additionally, it is far from clear that Section 3.02 of the GISF operating agreement was of any significance in late 2011, since that section discusses the powers of Geier Capital LLC, a Georgia entity, in its role as the Managing Member of GISF. But that entity had been dissolved in March 2011, and there is no credible evidence that any other entity had been installed as the Managing Member of GISF. See Div. Ex. 63.

for cash consideration at the current market price," and "no extraordinary brokerage commissions . . . shall be paid . . . ." Div. Ex. 24 at SEC-KRFS-E-0002378 (emphasis added). The Merriam Webster Dictionary defines the term "shall" as "will have to" and states that "shall" is used "to express what is mandatory."[28] Gibson cannot escape the fact that he caused GISF to pay above-market prices and an extraordinary commission, after telling GISF and its investors that he would not do so, by claiming years later that the governing statement in the offering memorandum was really nothing more than a suggestion.

Fourth, Gibson also argues that "any difference in the price at which the Hull Transaction was completed and the price at which the transaction would have been completed had a block discount been applied would not be material and would not need to be disclosed." Resp. Post-Hearing Brief at 77. Gibson is again incorrect. Misrepresentations and omissions about the use of investor funds are necessarily material. SEC v. Research Automation Corp., 585 F.2d 31, 35-36 (2d Cir. 1978).

Gibson also contends that any claim based on his failure to disclose the payments he was receiving from Hull's business is barred by the statute of limitations, on the theory that the time period began running when the investors made their initial investment in the Fund. Resp. Post-Hearing Br. at 79-80. But the Division's claim is based on Gibson's failure to disclose the specific conflict of interest Gibson created in October 2011 when he arranged for and implemented GISF's purchase of Hull's personal TRX shares. The OIP was issued in March 2016, well before the five-year statute of limitations period expired in October 2016.

Finally, Gibson has summarily denied, without discussion, that he acted with scienter with regard to any of the conduct at issue in this case. Id. at 91. However, the Division has

[28] The Merriam-Webster Online Dictionary, http:/merriam-webster.com (last visited Dec. 6, 2016).

established that Gibson acted recklessly in failing to disclose four material facts relating to the Hull Buyout Transaction, Div. Post-Hearing Br. at 64-66, and nothing in Gibson's post-hearing brief refutes that showing.[29]

F. Gibson Engaged In Front Running In October And November 2011 Using Put Option Contracts

Gibson also violated 206(1) and (2) in late October and early November 2011 when he traded in put option contracts on TRX shares in front of GISF's liquidation of its remaining TRX shares. As Gibson dumped GISF's large TRX holdings into the market on November 10, 2011, and the share price plummeted, he sold the option contracts he had purchased for his own account and for his girlfriend's account (and his father sold the option contracts Gibson had recommended), resulting in profits of approximately $379,550 in the three accounts. Id. at 67-70. Gibson does not address the October/November front running separately and makes the same arguments as he did with regard to the September front running. Resp. Post-Hearing Br. at 66-74. The Division has shown in Part I.D above that those arguments are without merit.[30] Gibson has not attempted to refute the Division's arguments that (i) he purchased the call options so that he and his girlfriend would profit in their private accounts if the TRX share price fell, and thereby created a conflict of interest with GISF, regardless of whether he was "net long TRX,"

[29] By failing to disclose material information regarding the Hull Buyout Transaction, Gibson breached his duty to exercise "the degree of care a reasonably careful person would use under like circumstances.". Robare, 2016 WL 6596009 at *9. Consequently, Gibson is also liable under Section 206(2) in connection with the Hull Buyout Transaction based on his negligence in failing to disclose material facts regarding that transaction. Div. Post-Hearing Br. at 66-67.

[30] Gibson also claims that he is not responsible for the put transactions by his father, John Gibson, because the Division failed to prove that he and his father had an advisory relationship. Resp. Post-Hearing Br. at 91. However, Gibson admitted that he had an investment advisory relationship with his father. Div. Ex. 191 at 615:2-3. But regardless of whether or not his father was his client, Gibson violated his fiduciary duties to GISF by passing GISF's material, non-public information to his father and directing his father to use that information to front run GISF.

and (ii) whether his front running was intended enable him to pay his debt to Hull or to protect his father or his girlfriend's parents is irrelevant. Div. Post-Hearing Br. at 68-70.

Similarly, Gibson has failed to make any substantive response to the Division's argument that he acted with scienter in front running GISF. Because his front running in October and November 2011 was an extreme departure from the applicable standard of care, he acted with scienter. Additionally, because he failed to exercise even reasonable care, his conduct was also negligent for purposes of Section 206(2). See Part I.D.3 above.

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

Gibson's front running in September, October, and November 2011, as well as his use of GISF's funds to purchase Hull's personal TRX shares in October 2011, violated his obligations to the individual investors under Section 206(4) of the Advisers Act and Rules 206(4)-8(a)(1) and (2) thereunder. Div. Post-Hearing Br. at 70-77. Rules 206(4)-8(a)(1) and (2) governed Gibson's conduct toward GISF investors individually, regardless of his conduct toward the client entity.

Gibson notes that Rule 206(4)-8 does not impose an affirmative duty to make statements to individual investors. Resp. Post-Hearing Br. at 85. But whether Gibson had such an affirmative duty is not relevant here because Gibson did make numerous statements to GISF's investors, e.g., in the GISF offering memorandum. Having done so, he was obligated to ensure that investors were not misled by those statements. The Division has shown that Gibson violated Section 206(4) and Rules 206(4)-8(a)(1) and (2) because his conduct in late 2011 made his prior statements to investors materially misleading and he never amended those statements, Div. Ex.

191 at 313:19-25 and 314:18-21, or otherwise informed investors of his front running and favoritism toward Hull, Div. Findings ¶230, Div. Post-Hearing Br. at 71-72.[31]

Gibson is liable for failing to notify GISF's investors of his front running and favoritism because he acted with scienter, as discussed above. Further, even negligence is sufficient to create liability under Section 206(4) and Rules 206(4)-8(a)(1) and (2). Div. Post-Hearing Br. at 71. Because Gibson's failure in late 2011 to disclose his front running and favoritism was at least a "failure to exercise reasonable care or competence," Robare, 2016 WL 6596009 at *9, he was negligent. id. at 73. Gibson's brief makes no response to the Division's showing that he was negligent.

III. Gibson's Front Running Violated The Exchange Act's Antifraud Provisions

Gibson's front running in September, October, and November 2011 also violated Exchange Act Section 10(b) and Rule 10b-5. Div. Post-Hearing Br. at 77-79. Gibson's response to the Section 10(b)/Rule 10b-5 claim reiterates the same arguments he made regarding his front running violations under Section 206 and then asserts that he did not engage in any manipulative or deceptive conduct.[32] Resp. Post-Hearing Br. 86-90. His arguments are similarly unpersuasive with regard to the Exchange Act claims. Thus, the Division has established that by engaging at

[31] In order to satisfy his fiduciary duty under Section 206(1) and (2), Gibson was required to disclose his front running and favoritism directly to GISF's investors because his disclosure obligations to GISF could not have been satisfied by disclosure to himself as an agent of GISF. See Div. Post-Hearing Br. at 37-38, n.35 and note 17 above.

[32] Gibson claims that his September 2011 front running transactions were "disclosed to market participants and therefore [were] not non-public information of which someone could take advantage." Resp. Post-Hearing Br. at 89. However, there is no credible evidence showing that the Casimir representative (Richard Sands) discussed GISF's interest in selling with anyone, much less that he disclosed that GISF was the potential seller or that GISF wanted to sell its entire TRX position. Gibson's own expert admitted that he was merely speculating when he opined that Sands had disclosed GISF's trading intentions to the market. 9/15/16 Tr. 986:4-986:14, Resp. Ex. 62.

least recklessly in undisclosed front running on multiple occasions, Gibson engaged in manipulative and deceptive conduct that violated the Exchange Act's antifraud provisions.

IV. The Division Is Entitled To The Relief Requested

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

The Division has shown that a cease and desist order is appropriate here under the Steadman factors, Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), and that a permanent industry bar is appropriate pursuant to the comparable considerations applicable under Section 203(f) of the Advisers Act, see J.S. Oliver, 2014 SEC LEXIS 2812 at *142-43 (Aug. 5, 2014). In response, Gibson briefly refers to three factors that he contends make a cease-and-desist order and industry bar inappropriate.[33]

Although Gibson asserts that he "did not harm the Fund," that is clearly not the case: GISF lost $1,074,902 as a result of the Hull Buyout Transaction, Div. Ex. 184 at 10-11; Div. Post-Hearing Br. at 59-60, and paid approximately $6,751 in commissions that it would not otherwise have had to bear, Div. Post-Hearing Br. at 60. Further, the harm was not limited to GISF -- front running is widely recognized as harmful to the securities market itself. See SEC v. Yang, 2014 WL 2198323 at *1 ("the market was harmed in the sense that Yang traded based on information (regarding [his advisory client's] impending large purchases) to which only he had access").

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[33] Gibson also argues that Section 203(f), which applies to persons "associated with an investment adviser," cannot be the basis for an industry bar against him if he was an investment adviser. Resp. Post-Hearing Br. at 51 ("Respondent cannot be found deemed [sic] to be an investment adviser and an associated person of an investment adviser at the same time"). However, the Division has shown that the term "person associated with an investment adviser" includes all or almost all individuals associated with an investment advisory firm, including those who are themselves investment advisors. Div. Post-Hearing Br. at 25-27. Thus, Section 203(f) is an appropriate basis on which to seek industry bars against investment advisers, and the Commission routinely bars advisers under Section 203(f). Id.

Gibson also claims that his activities were "isolated rather than recurrent in nature." Resp. Post-Hearing Br. at 97. However, Gibson violated the securities laws on at least ten occasions over a period of approximately six weeks. On September 26, 2011, Gibson arranged for the sale of TRX shares out of three separate accounts to front run GISF and his conduct with regard to each account was a separate violation. Div. Post-Hearing Br. at 94. The Hull Transaction constitutes a fourth violation. In front running GISF in October and November 2011, Gibson engaged in six separate purchases of put option contracts. Id.

Finally, Gibson asserts that he engaged in front running GISF and subordinating GISF's interests to Hull's interest "with the understanding that they were permitted " by the offering documents. Resp. Post-Hearing Br. at 97. But remedies will be considered only after the Hearing Officer finds that Gibson acted recklessly or negligently, i.e., that at the very least, his conduct was unreasonable. One of an investment adviser's fundamental obligations is to take reasonable care to understand his obligations, but there is no evidence in the record that Gibson ever did so. Div. Post-Hearing Br. at 94. Under these circumstances, Gibson's purported ignorance is additional evidence of his misconduct, not a mitigating factor.

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

The Division has shown that disgorgement, with prejudgment interest, is appropriate to deprive Gibson of the financial gain generated by his misconduct, and that the appropriate disgorgement amounts are $404,543 with regard Gibson's front running and the $216,341.67 benefit conveyed to Hull as a result of the Hull Buyout Transaction. Id. at 92.

Gibson's brief does not specifically address the Division's demand for disgorgement, other than to claim "inability to pay." But ability to pay is not relevant to determining the appropriate disgorgement amount. See SEC v. Kokesh, 834 F.3d 1158, 1165 (11th Cir. 2016);

SEC v. Warren, 534 F.3d 1368, 1370 n.2 (11th Cir. 2008). Thus, disgorgement should be ordered in the amounts requested by the Division, with prejudgment interest.

C. Gibson Should Be Required To Pay Civil Penalties

The Division's post-hearing brief indicated that an appropriate penalty would be $825,000, consisting of (i) $225,000 for three Tier II violations on September 26, 2011, (ii) $150,000 for the Tier III violation associated with the Hull Buyout Transaction in October 2011, and (iii) $450,000 for six Tier II violations in October and November 2011. Div. Post-Hearing Br. at 92-95.

Gibson opposes the imposition of penalties on the same grounds he opposes a cease and desist order, and the flaws in those arguments have been discussed above. Gibson also asserts, without discussion, that the evidence establishes his "inability to pay" a penalty. Resp. Post-Hearing Br. at 97. But the extremely limited information in the record regarding Gibson's finances does not establish an inability to pay.

First, the only written statement of Gibson's financial condition submitted into evidence in this matter is an unsigned, unsworn, one-page statement, Resp. Ex. 145.[34]

Second, that "financial statement" lists Gibson's "annual income" in 2015 as $, but Gibson's federal tax return for 2015 shows that his business generated $ in income in 2015. See Resp. Ex. 141 at Form 1040, page 1. Gibson has not provided any explanation for the $ in unidentified "contractor expenses" that apparently enables him to claim only $ as income.

[34] More than one month after the hearing was completed, Gibson submitted a signed Form D-A regarding his financial condition. That Form D-A was not admitted into evidence, and the Division has never had an opportunity to question Gibson regarding the completeness or accuracy of the information therein. Gibson's brief does not discuss or cite the completed Form D-A.

Third, Gibson claims to have paid his apartment rent in advance by $45,500 ("Prepaid Apartment Rent"). Resp. Ex. 145. This appears to be an effort to reduce his cash position in advance judgment in this matter.

Fourth, less than three months before the hearing, Gibson transferred assets worth $423,896 to this father, see Resp. Ex. 145, again suggesting an effort to reduce his assets.

Fifth, Gibson is able to draw on an apparently unlimited "line of credit" from his father, with no apparent repayment schedule. As shown in Resp. Ex. 144, Gibson has "borrowed" more than $200,000 from his father during the last 16 months. Thus, Gibson has ready access to substantial funds, and he has chosen to use those funds to defend against the Division's claims, and continues to do so. It is wholly inconsistent for Gibson to simultaneously contend that he would be unable to pay an appropriate penalty.

These factors strongly suggest that there is no legitimate basis for Gibson's cursory reference to an "inability to pay." On the facts in evidence, the penalty proposed by the Division is appropriate.[35]

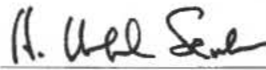
[35] Gibson summarily asserts at the conclusion of his brief that no relief may be imposed because this administrative proceeding violates his Constitutional rights in several regards. Resp. Post-Hearing Br. at 97. Gibson offers no argument in support of that one-sentence assertion. Consequently, the Division does not discuss the constitutionality issue here, other than to note that the Commission has already rejected the same arguments in other proceedings. See, e.g., Charles L. Hill, Exchange Act Rel. 79459 (Dec. 2, 2016); David F. Bandimere, Securities Act Rel. No. 9972, 2015 WL 6575665, at *19-21 (Oct. 29, 2015).

Gibson also asserts in the same final paragraph, without any supporting facts or argument, that "claims are barred by the applicable statute of limitations." Resp. Post-Hearing Br. at 97. However, all of the Division's claims arose late 2011 and the five-year statute of limitation period had not yet run when the the OIP was issued in March 2016.

CONCLUSION

Wherefore, the Division requests that the Hearing Officer enter an order (i) finding that by repeatedly engaging in undisclosed front running, and by favoring Hull's interests over the interests of GISF without disclosing that he was doing so, Gibson violated Sections 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8 thereunder, (ii) finding further that Gibson's undisclosed front running, contrary to the representations made to investors, violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and (iii) imposing the relief requested in the Division's initial post-hearing brief.

Respectfully submitted,



December 20, 2016

H. Michael Semler (202) 551-4429
Gregory R. Bockin (202) 551-5684
Paul J. Bohr (202) 551-4899
George J. Bagnall (202) 551-4316
U.S. Securities and Exchange Commission
Division of Enforcement
100 F Street, N.E.
Washington, D.C. 20549

CERTIFICATE OF SERVICE

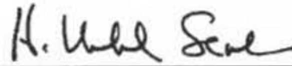
I hereby certify that on this 20th day of December 2016:

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

(ii) A copy of the foregoing reply brief was sent to Thomas A. Ferrgino and Paul Enzinna, counsel for Respondent, via email to TFerrigno@brownrudnick.com and penzinna@ellermanenzinna.com, and via UPS next day delivery to:

Thomas A. Ferrigno
Brown Rudnick LLC
601 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005; and

(iii) A copy of the foregoing reply brief was provided to Brenda P. Murray, Chief Administrative Law Judge, via email to ALJ@sec.gov.



H. Michael Semler