UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Admin. Proc. File No. 3-20531

In the Matter of HORTER INVESTMENT MANAGEMENT, LLC and DREW K. HORTER, Respondents.	**RESPONDENTS' PETITION FOR REVIEW OF THE INITIAL DECISION**

OS Received 04/10/2023

Pursuant to Commission Rules of Practice 410 and 411, Respondents Horter Investment Management, LLC and Drew K. Horter, by and through counsel, hereby respectfully petition the Commission for review of the Initial Decision rendered on March 20, 2023 (the "Initial Decision"). Respondents seek review of each and every part thereof and the issues will be further identified in their brief. *See*, 17 C.F.R. § 201.411(d).

Commission review is appropriate under the standards applicable to discretionary Commission review of initial decisions. Rule 411(b) states that the Commission will review an initial decision whenever the petitioner "makes a reasonable showing" either that "prejudicial error was committed in the conduct of the proceeding," or that the initial decision embodies a "clearly erroneous" finding of fact, an "erroneous" conclusion of law, or "[a]n exercise of discretion or decision of law or policy that is important and that the Commission should review." 17 C.F.R. § 201.411(b)(2)(i)-(ii). Here, the Initial Decision erred in its conclusions of law and raises important public policy issues that warrant Commission review. These errors include the following.

First, in determining appropriate sanctions in this matter, the Initial Decision found that "[c]onsistent with a vigorous defense of the charges against them, Respondents have minimized the wrongful nature of their conduct . . . ." A vigorous defense and acceptance of responsibility are not mutually exclusive. More importantly, the Initial Decision does not seem to recognize that Respondents <u>accepted responsibility</u> for their actions by agreeing to the *Order Making Findings and Imposing a Cease-and-Desist Order Pursuant to Sections 203(e), 203(f) ,and 203(k) of the Investment Advisers Act of 1940, and Ordering Continuation of Proceedings* (the "Cease and Desist Order"). Utilizing Respondents' defense of charges as a basis for increased sanctions—especially when Respondents' settled the liability portion of the

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matter—smacks of an improperly punitive outcome where a Respondent properly availed itself of its right of due process and instead rewards those who do not challenge the Division in any portion of the administrative procedure. Moreover, the Initial Decision ignores previous decisions wherein a bifurcated process similar to the instant matter where the ALJ held that a respondent recognized the wrongful nature of his conduct in part because he consented to a settlement order on liability. *In re Eugene Terracciano*, Advisers Act. Rel. No. 4956, 2018 WL 3344228 (July 6, 2018).

Second, the sanctions ordered by the Initial Decision are improperly punitive. The Division carried the burden of showing with particularity the facts that support more drastic remedies and why a less severe sanction would not serve to protect investors. The Initial Decision does not address a less severe option and erroneously concludes that punitive sanctions were appropriate. Sanctions must be crafted with care, especially when it appears—as it does here—that respondents are singled out for disproportionately harsh treatment. Importantly, a suspension may be ordered as a remedy but not as a penalty. *Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017). Severe sanctions (such as a bar) risk being punitive because they do not provide anything to any victims to make them whole or remedy losses. *Id.* Here, the Initial Decision imposes of a supervisory bar despite the wrongful conduct being more than six years ago and despite the multitude of improvements Respondents have made to the business (a number of which the Initial Decision seems to ignore) will not have a deterrent effect for others in the industry and will do nothing to protect investors. The Initial Decision's conclusion is merely punitive.

Third, the Initial Decision erroneously found that Respondents' actions were "reckless" for purposes of imposing third-tier monetary penalties. Importantly, the Cease

and Desist Order, from which factual findings are derived, made no mention or finding of any reckless behavior by Respondents. Instead, the Initial Decision stated in a plainly conclusory fashion, Respondents behavior "evidenced at least a reckless disregard for regulatory requirements." *Initial Decision* at 7. The Cease and Desist Order contains no facts that support a finding of recklessness, and the Initial Decision erred when it determined Respondents were reckless with no factual support whatsoever.

As a result of these and other erroneous legal determinations regarding the assessment of sanctions, the Initial Decision is flawed and warrants review by the Commission.

Dated: April 10, 2023

Respectfully submitted,

/s Matthew L. Fornshell

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I hereby certify that I caused a true copy of the foregoing *Respondents' Petition for Review of the Initial Decision* on the following on this 10th day of April 2023 via email as indicated below:

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Dated: April 10, 2023

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