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' BRIEF ON REVIEW OF THE INITIAL DECISION**

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Respondents Horter Investment Management, LLC ("HIM") and Drew K. Horter ("Horter") (collectively, "Respondents") hereby appeal an initial decision made by a hearing officer (the "ALJ"), Initial Decision Release No. 1414 (Mar. 20, 2023) (the "Initial Decision"). The Initial Decision is erroneous in its conclusions of law and raises important public policy issues, and it should be reversed. Respondents did not minimize the wrongful nature of their conduct simply by defending against the United States Securities and Exchange Commission's (the "Commission") charges against them. Second, the sanctions ordered by the Initial Decision are improperly punitive, and the two-year supervisory bar assessed against Horter is not supported. Finally, the Initial Decision erroneously found that Respondents' actions were "reckless" for purposes of imposing third-tier monetary penalties.

I. INTRODUCTION

Five years following the termination of Kimm Hannan ("Hannan") it should come as no surprise that HIM no longer resembles the firm it was in 2017. HIM has nearly 85% *fewer* registered investment advisers and manages less than 20% of the assets under management than it did during the same time frame. Stated differently, the risk profile of HIM has changed dramatically, and as a consequence, the likelihood of future violations has also been materially reduced or eliminated. HIM has implemented substantial compliance and supervisory improvements, and Respondent Horter has materially reduced his daily supervisory responsibilities.

Respondents have accepted responsibility for compliance program and supervisory deficiencies that may have enabled Hannan to further his conduct, but that does not mean that punishment should be without limits. Over the last six years, HIM and Horter have

suffered tremendous economic, business, and reputational harm as a consequence of Hannan's actions. The Initial Decision's assessment of overly punitive sanctions is little more than piling-on a business that continues to struggle for survival six years after the fact.

The purpose of sanctions is to protect the investing public and the integrity of the markets, not to punish Respondents. However, the Initial Decision falls squarely into the punitive category. First, despite accepting responsibility 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"), the Initial Decision erroneously held that Respondents "minimized the wrongful nature of their conduct" and sanctioned Respondents based on their "vigorous defense" of the claims made against them. Second, the Initial Decision's two-year supervisory bar against Horter is punitive and was made without the proper *Steadman* analysis and without consideration of all relevant factors. Finally, the third-tier civil penalties assessed against both Respondents are erroneous because they are based on a conclusory and unfounded determination that their actions were "reckless."

Respondents respectfully request that the Commission amend the Initial Decision to reflect proper and commensurate sanctions against Respondents.

II. FACTUAL BACKGROUND

As in the previous briefing to the ALJ addressing appropriate civil penalties and remedial actions, Respondents recognize that "the findings of fact set forth in the [Cease-and-Desist Order] are deemed true and incorporated [therein]." [Initial Decision at 3.] The Initial Decision also contained additional findings of fact that supplemented—and did not contradict—the Cease-and-Desist Order, which are summarized herein.

HIM today is a very different firm than it was in 2014 when Hannan was hired, or even 2017 when Hannan was terminated. The firm itself is smaller, with 15 employees in December 2022 compared with 41 employees in 2017. [Long Aff.[1] at ¶¶ 15, 16.] In addition, HIM has significantly reduced the number of registered investment adviser representatives ("IARs"). As of December 31, 2017, HIM had 220 registered IARs, 15 of whom were designated as high risk. [*Id.* at ¶ 18; Initial Decision at 4.] However, as of December 31, 2022, HIM had 35 total registered IARs, none of which were designated "high risk." [*Id.* at ¶ 19; *id*.] As of 2017, HIM had $1.383 billion in assets under management ("AUM"). [*Id.* at ¶ 21; *id*.] However, in December 2022, HIM had $260 million in AUM, less than 20% of the 2017 total. [*Id.* at ¶ 22; *id*.]

Although it is now a significantly smaller firm than it was, HIM has not lagged in its compliance efforts. HIM has spent hundreds of thousands of dollars implementing new compliance technology between 2017 and today. [Long Test.[2] at 43:10-44:9, 46:16-47:7; Long Aff. at ¶ 23; Initial Decision at 4.] In fact, Horter never declined a request for additional compliance resources for the HIM compliance department. [Roth Rep.[3] at 19; Long Aff. at ¶ 24.] New technologies including Smarsh (for social media and email monitoring), Sweet Process (a cloud-based process documentation tool), BasisCode (a suite of regulatory compliance software, including tracking of outside business activities), Riskalyze (software platform for analyzing investment risk), Zephyr OnDemand (a

[1] All references to "Long Aff." are the Affidavit of Jason D. Long, which was attached to the January 9, 2023 *Respondents' Brief Addressing Civil Penalties and Other Remedial Actions* ("Respondents' Penalty Brief") as Exhibit A and referred to in the Initial Decision as "Resp. Ex. A."

[2] All references to "Long Test." are to the investigative testimony of Jason D. Long, which was attached to Respondents' Penalty Brief as Exhibit E and referred to in the Initial Decision as "Resp. Ex. E."

[3] All references to "Roth Rep." are to the May 11, 2022 Expert Report of Lisa Roth, which was attached to Respondents' Penalty Brief as Exhibit F and referred to in the Initial Decision as "Resp. Ex. F."

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reporting tool for comparing risk and performance of a client's portfolio), Black Diamond (cloud-based compliance solutions), and IAS (performance reporting and IAR tracking) were adopted and deployed. [Roth Rep. at 19; Long Aff. at ¶ 25; Initial Decision at 4.] HIM also retained Oyster Consulting, a third-party compliance consultant, from February 2015 through April 2018. [Long Aff. at ¶ 26; Initial Decision at 4.]

In addition, HIM has engaged in ongoing enhancements of its policies and procedures and its compliance and supervisory structure. Although Horter is still the CEO and President of HIM[4], he no longer is responsible for day-to-day operations of HIM. [Horter Dep.[5] at 32:13-22.] Horter also is not the person with ultimate supervisory responsibility for HIM's IARs, this change being reflected in the IAR's ADV Part 2Bs. [*Id.* at 31:3-6; Long Aff. at ¶ 33.] As of February 2022, overall supervisory authority was vested in HIM's Compliance Committee (the "Compliance Committee"). [Long Aff. at ¶ 29; Initial Decision at 4.] The Committee is currently comprised of Jason Long (HIM's Chief Compliance Officer), Kevin Hetzer (HIM's Director of Operations) and Leslie Green and Patrick Hayes of Calfee Halter & Griswold—a compliance and supervisory firm retained to assist with policies and procedures, code of ethics, and the overall compliance department at HIM. [Horter Dep. at 21:19-22:1, 31:9-12; Long Aff. at ¶¶ 30, 31, Ex. A-2; Initial Decision at 4.] Importantly, Horter is <u>not</u> a member of the Compliance Committee. [Horter Dep. at 29:13-20; Long Aff. at ¶ 31; Initial Decision at 4.] The Compliance Committee is now a permanent addition at HIM and is tasked with all compliance responsibilities, including a top-down review of each of HIM's policies and procedures. [Horter Dep. at 24:7-25:4.] The

[4] This should come as no surprise inasmuch as Horter owns 100% of HIM's equity.

[5] All references to "Horter Dep." are to the May 25, 2022 Deposition of Drew K. Horter, which was attached to Respondents' Penalty Brief as Exhibit G.

Compliance Committee is also responsible for supervising all of HIM's IARs and providing ongoing monitoring and oversight of HIM's compliance program, and has independent authority to discipline IARs, up to and including termination. [Horter Dep. at 30:6-9; Long Aff. at ¶ 32.]

HIM and the Compliance Committee instituted a Branch Office Supervisory Program ("BOSP") the procedures for which have been incorporated into HIM's policies and procedures.[6] [*Id.* at 25:13-18; Long Aff. at ¶¶ 34-35, Ex. A-3.] Horter is not a member of, nor does he participate in the BOSP. [*Id.* at 23:8-12.] The BOSP is a four-part supervisory program for HIM's IARs. [*Id.* at 25:19-26:6; Long Aff. at ¶¶ 34-35, Ex. A-3.] The policy first provides for ongoing testing and monitoring from HIM's home office, which includes email review, trading/suitability reviews, compliance certification reviews, marketing reviews, etc. [Long Aff. at ¶ 26; Initial Decision at 4.] The second part of the BOSP provides for a pre-onsite exam review, which allows HIM to conduct an enhanced review of the information collected prior to the onsite review. [*Id.* at ¶ 37; Initial Decision at 4.] A questionnaire includes requests for information such as client reviews and suitability determinations, disclosures and privacy policies, books and records, and client transactions. [*Id.* at ¶ 38.] The pre-onsite review then includes compliance testing review of marketing, data privacy, code of ethics, email, etc. [*Id.* at ¶ 39.]

The third part of the BOSP is the actual on-site review of the IAR, which can be broken into routine reviews (completed on a 2-3 year cycle) or a "for cause" review, which is determined by risk rating of the office or previous compliance/regulatory issues. [*Id.* at ¶ 40.] The on-site review contains in-person interviews of the IAR and support staff,

[6] The Initial Decision summarizes the BOSP's work on Page 4, but Respondents provide the more complete description here so that the Commission understands the full reach of the Program.

trading/suitability testing/client file review, and a marketing materials review. [*Id.* at ¶ 41.] The final part of the BOSP is ongoing IAR training, including annual compliance training and periodic adviser training throughout the year. [*Id.* at ¶ 42.]

Finally—despite the Initial Decision ignoring this important step by Respondents—separate and apart from the significant internal compliance changes made to HIM, counsel for HIM also retained third-party compliance consulting firm ACA Foreside ("Foreside")—one of the world's largest and most respected compliance consulting firms—to complete an all-encompassing review of HIM's compliance program and assessment of the firm. [Horter Dep. at 27:2-20; Woods Aff.[7] at ¶¶ 23-24, Ex. B-5.] Foreside's scope of work included an assessment of HIM's compliance program, including onsite review and testing. The compliance assessment involved determining whether HIM's written compliance policies and procedures appropriately address regulatory requirements and to evaluate whether HIM's business and compliance practices are being implemented consistent with regulatory requirements and HIM's policies and procedures. [*Id.* at ¶ 26.]

Foreside was provided and reviewed all requested data and conducted numerous interviews of HIM personnel as part of its compliance program review, paying special attention to supervision and marketing, as those issues had been previously identified by the Commission in prior year exams. [*Id.* at ¶ 27.] Foreside completed its work in November 2022 and did not make any recommendations to HIM's compliance program, oversight, and/or supervision programs. [*Id.* at ¶ 28.]

Quite simply, HIM is a different firm than it was when Hannan was terminated in 2017 and Horter's role within HIM has changed dramatically from the information included

[7] All references to "Woods Aff." are to the Affidavit of Nicole R. Woods, which was attached to Respondents' Penalty Brief as Exhibit B.

in the Cease-and-Desist Order. HIM and Horter have accepted responsibility for any compliance and supervision deficiencies and proactively transformed the firm and its compliance program.

III. LEGAL ANALYSIS

A. Standards for Sanction Determination

The Commission has a range of sanctions available under the Investment Advisors Act of 1940 (the "Advisers Act"), which are discussed below. An important "purpose of sanctions is to serve as a deterrent against future violations by the individuals involved as for others in the securities industry." *In re Raymond James Fin. Svcs., et al.*, Rel. No. ID-296, 86 SEC Docket 604, 2005 WL 2237628, at *64 (Sept. 15, 2005) (initial decision became final on Nov. 21, 2005). Generally speaking, regardless of sanction, the Commission considers the following factors in determining which sanction is appropriate under the circumstances:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979). The Commission also considers the "age of the violation" and the "degree of harm to investors and the marketplace resulting from the violation." *In re Marshall E. Melton*, Advisers Act Rel. No. 2151, 80 SEC Docket 3701, 2003 WL 21729839, at *2 (July 25, 2003). Importantly, however, "when the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularly the facts and policies that support those sanctions and why less severe action would not serve to protect investors." *Steadman*, 603 F.2d at 1137. "It

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would be a gross abuse of discretion to bar an investment adviser from the industry on the basis of isolated negligent violations." *Id.* at 1141.

Respondents here have completed extraordinary remediation and cooperation, repaid harmed investors, and improved its governance. All of which leads to the conclusion that minimal, if any, penalties are appropriate in this matter, and the Initial Decision should be amended.

B. In Determining the Appropriate Sanction, The Initial Decision Erroneously Held That Respondents Minimized the Wrongful Nature of Their Conduct.

The Initial Decision held that "[c]onsistent with a vigorous defense of the charges against them, Respondents have minimized the wrongful nature of their conduct . . . ." [Initial Decision at 6.] Respondents do not dispute that they were defending the proceeding. A vigorous defense and acceptance of responsibility are not mutually exclusive. In fact, as the Commission has recognized previously, a respondent is "entitled to a robust defense" even when the respondent "has not admitted wrongdoing." *In re Lawrence M. Labine*, SEC Rel. No. ID-973, 2016 WL 824588, at *41 (Mar. 2, 2016) (citing, *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989)). "The securities laws do not require defendants to behave like Uriah Heep in order to avoid injunctions. They are not to be punished because they vigorously contest the government's accusations." *Id; see also*, *In re Laurie Bebo and John Buono, CPA*, SEC Rel. No. ID-1401, 2020 WL 4784633, at *98 (Aug. 13, 2020) (refusing to draw negative inference from respondent's vigorous defense to the charges because there is a "right to vigorously contest the SEC's violations"); *SEC v. Johnson*, 595 F.Supp.2d 40, 45 (D.D.C. 2009) (same).

Here, the facts are further in Respondents' favor. Not only are they entitled to a vigorous defense of the claims against them, but the Initial Decision does not give any credence to the fact that the Respondents have accepted responsibility for their actions by agreeing to the Cease-and-Desist Order. *In the Matter of Eugene Terracciano* involved a bifurcated process similar to this proceeding in that the respondent entered into an agreed cease-and-desist order and agreed to "additional proceedings to determine what, if any, 'remediation action is appropriate in the public interest.'" *In re Eugene Terracciano*, SEC Rel. No. ID-1388, 2019 WL 5513382, at *1 (Oct. 22, 2019) (Foelak, J.). In considering sanctions, the ALJ in *Terracciano* (the same ALJ that issued the Initial Decision here) noted that the respondent "recognized the wrongful nature of his conduct" in part because of his consent to the settlement order, which was done on a "without admitting or denying the findings herein" basis. *Id.* at *3; *see also*, *In re Eugene Terracciano*, Advisers Act Rel. No. 4956, 2018 WL 3344228, at *1 (July 6, 2018). The same conclusion should have been made here. Yet, the Initial Decision failed to do so and should be amended.

C. The Two-Year Supervisory Bar Assessed Against Horter by the Initial Decision is Improperly Punitive.

The Initial Decision ordered HIM to be censured and Horter "will be subject to a collateral supervisory bar with the right to reapply after two years." [Initial Decision at 7.] However, the two-year supervisory bar ordered against Horter is improperly punitive and should be revised.[8]

The Cease-and-Desist Order finds that Respondents "failed reasonably to supervise, within the meaning of Sections 203(e)(6) and 203(f) of the Advisers Act." [C&D Order at ¶ 86.] For failure to supervise, Advisers Act Section 203(e) authorizes the ALJ to "censure,

[8] Respondents are not seeking review of the censure ordered against HIM.

place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser . . . ." 15 U.S.C. § 80b-3(e). Section 203(f) similarly authorizes the ALJ to "censure or place limitations on the activities of any person . . . or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser . . . ." 15 U.S.C. § 80b-3(f).

Importantly, and missing from the Initial Decision, if the Commission seeks "the most drastic remedies at its disposal," such as a bar or suspension, it must show why a "less severe action would not serve to protect investors." *Steadman*, 603 F.2d at 1137. Moreover, it is important to stress that a suspension, revocation, or bar may be ordered as a remedy, but not as a penalty. *Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017). Those severe types of sanctions are at risk of being punitive because they do not provide anything to any victims to make them whole or remedy their losses. *Id.* Instead, suspensions, revocations, and bars should serve a prophylactic function of protecting investors and preserving the integrity of markets. As the Commission has recognized, "[t]he purpose of administrative sanctions is to remedy misconduct and protect the public, not to punish." *In re Lawrence M. Labine*, *supra*, 2016 WL 824588, at *42.

The Initial Decision "must do more than say, in effect, [respondents] are bad and must be punished." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1113 (D.C. Cir. 1988). Horter is the President, CEO, and sole owner of HIM. As was the case in *Blinder*, when the Commission's sanctions are affecting the "the livelihood of one commercial enterprise" and "the professional career of the firm's founder," the Commission is "not simply rendering a policy judgment; nor is it simply regulating the securities markets . . . ." *Id.* As such, "the

Commission must craft [the sanction] with care." *Id.* (remanding matter to the Commission to determine appropriate sanction, especially in light of argument that respondents had "been singled out for disproportionately harsh treatment").

For the Initial Decision to "say that past misconduct gives rise to an inference of future misconduct is not enough" for the severe sanctions it imposed. *Steadman*, 603 F.2d at 1140. As recognized by the Steadman court, "[i]t would be a gross abuse of discretion to bar an investment adviser from the industry on the basis of isolated negligent violations." *Id.* at 1141. Instead, "[w]hen the Commission imposes the most drastic sanctions at its disposal, it has a duty to articulate carefully the grounds for its decision, including an explanation of why lesser sanctions will not suffice." *Id.* at 1143 (emphasis added).

Following *Steadman*, the Initial Decision should not have ordered the punitive two-year supervisory bar against Horter. The Initial Decision failed to consider lesser sanctions than a two-year supervisory bar and contained no explanation whatsoever of why lesser sanctions would not suffice.

There are no allegations that Respondents' conduct involved fraud, deceit, or manipulation of any kind. The Cease-and-Desist Order contains no allegations whatsoever that Respondents acted recklessly. Moreover, there is no likelihood of opportunities for future violations. The allegations underlying the Cease-and-Desist Order could not occur in today's HIM firm, especially given the drastically reduced number of IARs and the new BOSP. Respondents also provided ample evidence of remediation and cooperation, including compliance assessments, an entire re-vamping of its compliance and supervisory structure, and repayment to the Hannan Clients.

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Given the foregoing, Respondents respectfully request that the two-year supervisory bar in the Initial Decision be reduced to a censure or a short suspension. Previous matters before the SEC support such a finding; e.g.: *In re SFX Fin. Advisory Mgmt. Enters., Inc.*[9], Advisers Act Rel. No. 4116, 111 SEC Docket 6264, 2015 WL 3653814 (June 15, 2015) (the firm's president misappropriated at least $670,000 in assets from three client accounts for his own personal use and sanctions did not include any suspension, revocation, or bar); *In re Ascension Asset Mgmt., LLC, et al.*, SEC Rel. No. ID-1400, 2020 WL 1699565 (Apr. 3, 2020) (Foelak, J.) (initial decision final as of Jan. 1, 2021) (issuing censure and finding it was in the public interest).

Despite the outcome of the Initial Decision, greater penalties are properly reserved for cases with a greater degree of scienter and where there was reckless conduct or actual knowledge. *See*, *In re Raymond James*, *supra*, 2005 WL 2237628 (issuing 90-day supervisory suspension to the CEO of the firm for allegations involving failure to supervise resulting in misappropriation of more than $16 million in investor funds where CEO relied on the compliance department and individual branch managers in carrying out his responsibilities); *In re Investment Placement Grp., et al.*, Advisers Act Rel. No. 3433, 102 SEC Docket 2621, 2011 WL 6541544 (Dec. 23, 2011) (consenting to a three-month supervisory suspension for firm's COO as a result of failure to supervise allegations with knowledge of problematic behavior by representative); *In re Jeffrey C. Young*, Advisers Act Rel. No. 2967, 97 SEC Docket 1791, 2009 WL 5125427 (Dec. 29, 2009) (consenting to a nine-month supervisory suspension of the vice president of supervision for failure to supervise a representative who

[9] Respondents are aware that settlement orders are not precedent for the ALJ or Commission. However, these citations are provided as examples of what sanctions the Commission found appropriate in those factual scenarios. Had the Commission required stricter sanctions, it could have sought them or litigated the matter.

executed unauthorized transactions, made unsuitable recommendations and churned customer's accounts where respondent had actual knowledge of wrongdoing); *In re Alexander R. Bastron*, Advisers Act Rel. No. 4362, 113 SEC Docket 4525, 2016 WL 1328925 (Apr. 5, 2016) (consenting to twelve-month supervisory suspension of IAR's direct supervisor arising from misappropriation of more than $300,000 in fees from 47 different clients). These type of actions and violations are absent here.

Because the Initial Decision failed to consider lesser sanctions and failed to articulate why lesser sanctions are not appropriate here, the two-year supervisory bar in light of the facts of this matter is punitive and erroneous. Given that the claims against Respondents are based solely in negligence—the Division did not allege any intent-based claims—the bar should be vacated, and the Initial Decision amended.

D. The Initial Decision Erroneously Imposed Third-Tier Monetary Penalties.

The Initial Decision erroneously ordered third-tier civil penalties of $250,000 against HIM and $125,000 against Horter. The public interest does not support a civil penalty against either HIM or Horter. First, the Initial Decision erroneously found that Respondents were "reckless" without any support whatsoever. Second, the Initial Decision erroneously held that Respondents were subject to strong penalties in part because they "failed to take action in response to Commission staff's earliest deficiency letters," which is markedly incorrect. [Initial Decision at 7.]

Advisers Act Section 203(i) authorizes the Commission to impose monetary penalties for willful violation of Sections 203(e) or 203(f) if the penalty is within the public interest or for violation of 203(k). 15 U.S.C. § 80b-3(i)(1). To determine whether a penalty is in the public interest, the ALJ may consider (a) whether the actions of respondents involved

"fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," (b) the harm to others caused by respondents' actions, (c) any unjust enrichment, (d) whether the person has been previously found by the Commission or other agency to have violated securities laws, (e) the need to deter respondents and others from committing similar acts, and (f) any other matters justice may require. 15 U.S.C. § 80b-3(i)(3)(A)-(F). "If the Commission applies the public interest factors listed in the Act and determines that some monetary penalty is warranted, the Commission must then decide which tier [of penalty] is appropriate." *ZPR Invest. Mgmt. Inc. v. SEC*, 861 F.3d 1239, 1256 (11th Cir. 2017).

The Initial Decision's assessment of Third-Tier monetary penalties is erroneous for two reasons. **First**, the Initial Decision found that Respondents' actions "evidence at least a reckless disregard for regulatory requirements." [Initial Decision at 7.] However, this conclusory finding is erroneous and not based on any actual facts.

The violations against Respondents do not involve fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. Importantly, the Cease-and-Desist Order (which the parties and the ALJ were bound by) does not contain any allegation the Respondents engaged in any of that type of reckless behavior. In fact, the Cease-and-Desist Order does not describe Respondents' behavior as reckless in any way.

Recklessness is "highly unreasonable conduct, 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.'" *In re Angelica Aguilera*, SEC Rel. No. ID-501, 2013 WL 3936214, at *25 (July 21, 2013) (quoting, *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1977)). In *Aguilera*, the

Commission found that Angelica Aguilera, the President and Financial & Operations Principal of a broker-dealer, acted recklessly in her supervision of two registered representatives who committed significant fraudulent acts related to two pension funds. In determining that Aguilera's supervision was reckless, the Commission noted that during the representatives' fraudulent activities, Aguilera's compensation went from "four to six thousand dollars per month" to approximately "$15,000 biweekly," and ultimately approximately $1.8 million in total for 2009. *Id.* at *14. Moreover, Aguilera was responsible for paying revenue commissions to the two representatives. She recalled numerous payments and transfers totaling hundreds of thousands of dollars in a matter of days. *Id.* She also recalled transferring $2.7 million on November 4, 2019; $2.25 million on November 24, 2009; and $1.25 million on November 25, 2009, as commission payments to a single representative, but never inquired as to why. *Id.* As such, Aguilera had direct knowledge of something happening with the representatives and was reckless in her supervision.

Although Respondents acknowledge their wrongful actions, there are no facts to support a finding that they were somehow reckless. Indeed, had the Division believed that either Respondent was truly reckless or had actual knowledge, it could have asserted an intent-based claim. However, the Division only asserted negligence-based claims against Respondents, The Initial Decision jumps to straight to the conclusion of "reckless" without any analysis or consideration. None of the facts or findings set forth in the Cease-and-Desist Order state or support a finding of recklessness by Respondents.

Second, in finding that third-tier penalties were appropriate, the Initial Decision found that Respondents "failed to take action in response to Commission staff's earliest deficiency letters." [Initial Decision at 7.] That determination is clearly erroneous and belied

by the Initial Decision's own findings of fact. The Initial Decision notes earlier that in response to a 2014 deficiency letter, HIM engaged a compliance consultant. [Initial Decision at 4.] Although not required to do so, HIM retained the consultant (Oyster) from February 2015 through April 2018. [Long Aff. at ¶ 26.] Importantly, despite working with HIM during the relevant time frame, Oyster also failed to identify Hannan's conduct. [*Id.* at ¶ 27.]

Respondents have taken great pains and paid significant sums to revitalize and rebuild its compliance and supervisory structure. Penalizing Respondents will not deter similar behavior because that behavior has already been deterred. It may well have the opposite since firms may see little benefit in investing in compliance improvements only to be met with punitive financial penalties.

Respondents respectfully request that the Initial Decision be amended to reduce the civil penalties to first-tier penalties in light of the above.

IV. CONCLUSION

As set forth above, after a review of the facts involved in this matter, including protection of investors, and in light of the extraordinary compliance and supervisory measures taken by HIM and Horter, Respondents respectfully request that the Commission amend the Initial Decision and find that less severe sanctions are appropriate, including a censure rather than a bar and Tier One civil penalties.

[Attorney signature on following page]

Dated: May 31, 2023

Respectfully submitted,

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I hereby certify that I caused a true copy of the foregoing *Respondents' Brief on Review of the Initial Decision* on the following on this 31st day of May 2023 via email as indicated below:

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Dated: May 31, 2023

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