

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20531

In the Matter of

**Horter Investment Management, LLC
and Drew K. Horter,**

Respondents.

**DIVISION OF ENFORCEMENT’S OPPOSITION
TO RESPONDENTS’ MOTION FOR POSTPONEMENT OF PROCEEDINGS**

Respondents Horter Investment Management, LLC (“HIM”) and Drew K. Horter have moved, pursuant to Rule 161 of the Commission’s Rules of Practice, for their petition for review to be postponed until the Supreme Court issues its decision in *SEC v. Jarkesy*, Case No. 22-859, which concerns the constitutionality of the SEC’s administrative enforcement proceedings. The Division of Enforcement (“Division”) opposes this request. Respondents, who are represented by counsel, neglect to inform the Commission that they explicitly waived all objections, including but not limited to constitutional objections, to these proceedings. Accordingly, the Supreme Court’s decision in *SEC v. Jarkesy* has no bearing on this matter.

PROCEDURAL HISTORY

On September 8, 2021, the United States Securities and Exchange Commission (“Commission”) filed an Order Instituting Proceedings (“OIP”) against HIM and Horter pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), alleging that HIM and Horter failed reasonably to supervise Hannan within the meaning of

Sections 203(e)(6) and 203(f), and HIM willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. Specifically, the OIP alleged that HIM, a registered investment adviser, and Horter, HIM's founder and CEO, failed reasonably to supervise Hannan, a HIM IAR who, from November 2015 to March 2107, misappropriated \$728,001 from HIM clients purportedly for his outside business activities. (OIP ¶¶ 1-3.) HIM and Horter, through their counsel, filed an Answer on October 6, 2021. HIM and Horter did not raise the constitutionality of the administrative proceeding as an affirmative defense in their Answer.

On September 22, 2022, HIM and Horter submitted an Offer of Settlement, in which they admitted to “the jurisdiction of the Commission over them and over the matters set forth in the Order Making Findings and Imposing a Cease-and-Desist Order . . . and Ordering Continuation of Proceedings (‘Order’).” (Offer of Settlement § II, attached hereto as Exhibit 1.) In the Offer of Settlement, HIM and Horter also stated:

Respondents hereby waive all objections, including but not limited to, constitutional, timeliness, and procedural objections, to the public administrative proceedings and cease-and-desist proceedings instituted against Respondents on September 8, 2021, and to continued proceedings pursuant to the Order.

(Offer of Settlement § VI, attached hereto as Exhibit 1.) Horter, who was represented by counsel, signed the Offer of Settlement on his own behalf and on behalf of HIM. These signatures were notarized and supported by a HIM company resolution. (*Id.* at 16-17.)

On November 3, 2022, the Commission accepted Respondents' Offer of Settlement and issued the Order. (Rel. No. IA-6182, 2022 SEC LEXIS 2976 (Nov. 3, 2022) (hereinafter, “Order”).) In the Order, the Commission ordered HIM to cease and desist from committing or causing any violation and any future violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder. (*Id.* at 13). The Order also specified that HIM and Horter

agreed to continued proceedings to determine (a) what, if any, civil penalties are appropriate and in the public interest under Section 203(i) of the Advisers Act, and (b) what, if any, other remedial actions are appropriate and in the public interest under Sections 203(e) and (f) of the Advisers Act, and that, in connection with those proceedings, the findings of the Settlement Order “shall be accepted and deemed true by the hearing officer.” (*Id.*)

Since then, the parties briefed the appropriate civil penalties and remedial actions and, on March 20, 2023, the ALJ issued an Initial Decision in which she found facts established in the Order, as well as some additional findings of fact, and ordered: (a) HIM censured; (b) Horter barred from associating in a supervisory capacity, with the right to reapply after a period of two years; and (c) HIM and Horter to pay third-tier civil penalties of \$250,000 and \$125,000, respectively. (Initial Decision at 6-8, Rel. No. 1414 (Mar. 20, 2023).) In their briefing, Respondents never raised the constitutionality of these proceedings.

On April 10, 2023, Respondents filed a petition for review of the Initial Decision by the Commission, which was granted on May 1, 2023. Respondents did not challenge the ALJ’s decision to censure HIM. Respondents’ petition for review is now fully briefed. Again, Respondents did not raise the constitutionality of these proceedings in their briefing on review.

ARGUMENT

In determining whether to grant a postponement under Rule of Practice 161, the Commission considers: (i) the length of the proceeding to date; (ii) the number of postponements, adjournments or extensions already granted; (iii) the stage of the proceedings at the time of the request; (iv) the impact of the request on the hearing officer’s ability to complete the proceeding in the time specified by the Commission; and (v) any other such matters as justice may require. 17 C.F.R. § 201.161(b)(1). The Commission “strongly disfavors” such requests

unless the “requesting party makes a strong showing” that denial would “substantially prejudice their case.” *Id.* “A pending appeal—particularly an appeal to which Respondent is not a party—is generally ‘an insufficient basis upon which to prolong a Commission proceeding.’”

Christopher M. Gibson, Rel. No. IA-4690, 2017 WL 142543, at *1 (Apr. 21, 2017) (denying motion to stay petition for review pending Court of Appeals’ determination of constitutionality of appointment of Commission’s ALJs) (quoting *Paul Free*, Rel. No. 34-66260, 2012 WL 266986, at *2 (Jan. 26, 2012)).

Here, HIM and Horter have explicitly waived “all objections, including but not limited to, constitutional, timeliness, and procedural objections, to the public administrative proceedings and cease-and-desist proceedings instituted against Respondents on September 8, 2021, and to continued proceedings pursuant to the Order.” (Ex. 1, Offer of Settlement § VI.) This knowing and voluntary waiver was part of the Offer of Settlement which the Commission accepted and is now binding on all parties. The Division knows of no reason, and Respondents have cited none, that would permit Respondents to get the benefit of a future Supreme Court decision concerning a subject matter about which they have explicitly waived all objections.

Moreover, HIM and Horter would not be substantially prejudiced by the Commission’s ongoing review. The Initial Decision “cease[d] to have any force or effect” when HIM and Horter filed their petition for review. *Gibson*, 2017 WL 142543, at *1. Further, “the adjudicatory process does not itself constitute irreparable harm, even when the propriety of the proceedings has been called into question.” *Id.* If a final Commission decision were adverse to HIM and Horter, it would be subject to judicial review in the Court of Appeals under Section 213 of the Advisers Act. However, even if HIM or Horter were to attempt to raise a constitutional objection to these administrative proceedings in the Court of Appeals, the court would hold that the

objection had been waived – both by the express terms of the Offer of Settlement and their failure to raise the issue below – and affirm the Commission’s decision. *See, e.g., Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996) (“As a general rule, claims not presented to [an] agency may not be made for the first time to a reviewing court.”); *Nat’l Wildlife Fed. v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) (“It is well established that issues not raised in comments before the agency are waived and this Court will not consider them.”).

Accordingly, there is no basis whatsoever to postpone these proceedings.

CONCLUSION

The Division respectfully requests that the Commission deny Respondents’ Motion for Postponement of Proceedings.

Dated: July 21, 2023

Respectfully submitted,

/s/ Alyssa A. Qualls

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Division of Enforcement's Opposition to Respondents' Motion for Postponement of Proceedings to be served on the following on this 21st day of July, 2023, in the manner indicated below:

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Dated: July 21, 2023

/s/ Alyssa A. Qualls
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