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' REPLY BRIEF IN SUPPORT OF REVIEW OF THE INITIAL DECISION**

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I. INTRODUCTION

The Division of Enforcement (the "Division") argues in support of the Initial Decision by relying on the conclusory, unsupported findings in the Initial Decision as well inapplicable and distinguishable case law. The Division spends the bulk of its brief repeating, yet again, the facts from 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"), which Respondents have accepted and agreed to on a "neither admit nor deny" basis. [Div. Br.[1] at pp. 2-12.]

The Division loses sight of the fact that the purpose of sanctions is to protect the investing public and the integrity of the markets, not to punish Respondents. The Initial Decision falls squarely into the punitive category. Quite simply, the Initial Decision is erroneous and should be reversed. Respondents Horter Investment Management, LLC ("HIM") and Drew K. Horter ("Horter") did not minimize the wrongful nature of their conduct simply by defending against the charges against them, and the two-year supervisory bar assessed against Respondent Horter is not supported. Moreover, the Initial Decision erroneously found that Respondents' actions were reckless without support in the record for purposes of assessing third-tier monetary penalties.

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

[1] All references to "Div. Br." are to the Division of Enforcement's Opposition to Respondents' Brief on Review of the Initial Decision, submitted on June 30, 2023.

II. LEGAL ANALYSIS

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

In response to Respondents' arguments that the Initial Decision erroneously held that "[c]onsistent with a vigorous defense of the charges against them, Respondents have minimized the wrongful nature of their conduct," the Division provides two main arguments. [Initial Decision at 6, Div. Br. at 13-14.] First, the Division argues that the Initial Decision was not required to give Respondents "credit" for accepting responsibility for their actions. Specifically, the Division asserts,

> The Initial Decision specifically states that "[a]ll arguments and proposed findings and conclusions that are inconsistent with this ID were considered and rejected." The ALJ, therefore, fully considered and rejected crediting Respondents for recognizing the wrongful nature of their conduct . . . .

[Div. Br. at 13.] That argument rings hollow. The inclusion of that language does not somehow obliviate the fact that the Initial Decision (1) used Respondents' defense of the matter as a factor in assessing sanctions, and (2) gave no credence to the fact that they accepted responsibility.

A Commission decision that uses a "verbatim copy of reasons given for upholding different sanctions in other cases involving different violations, circumstances, mitigating factors, and harm to the trading public" does not provide sufficient support to justify sanctions. *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005). The Initial Decision's "considered and rejected" language is mere boilerplate language, signifying nothing. Moreover, the Initial Decision's language that "consistent with a vigorous defense of the charges against them, Respondents have minimized the wrongful nature of their conduct" is similar copy-and-paste verbatim language from myriad cases and cannot be used to justify

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the sanctions here. *See*, e.g., *In the Matter of Roy Dekel*, SEC Rel. No. ID-1157, 2017 WL 5839629, at *6 (July 28, 2017) ("Consistent with vigorous defense of the charges, he has minimized the wrongful nature of his conduct . . . ."); *In the Matter of Clarence Friend*, SEC Rel. No. ID-352, 2008 WL 2744867, at *4 (July 14, 2008) (same); *In the Matter of Hui Feng, et al.*, SEC Rel. No. ID-1373, 2019 WL 1615055, at *4 (Apr. 15, 2019) (same); *In the Matter of Norman T. Reynolds, Esq.*, SEC Rel. No. ID-1411, 2021 WL 4400548, at *7 (Sept. 21, 2021) (same); *In the Matter of Randall Goulding, Esq.*, SEC Rel. No. ID-1404, 2020 WL 6487997, at *7 (Oct. 29, 2020) (same), etc.

Second, the Division attempts to distinguish the holding of *In re Eugene Terracciano*, SEC Rel. No. ID-1388, 2019 WL 5513382, at *1 (Oct. 22, 2019) by stating that entering into a settlement order "does not ***by itself*** establish" that Respondents recognized the wrongful nature of their conduct. [Div. Br. at 14.] The Division points out that the respondent in *Terracciano* testified at hearing that his actions "were insufficient" and that he "would not now seek or accept a position with AML reporting responsibilities," which allowed the ALJ to determine Terracciano recognized the wrongful nature of his actions. [*Id.*] The Division fails to acknowledge that <u>there was no hearing in this matter at which Respondents could testify</u> because there was a settlement order. Moreover, since February 2022, Respondent Horter no longer has overall supervisory responsibility of HIM's investment advisor representatives, and both Respondents have "adopted reforms that reduce the likelihood of violations." [Initial Decision at p. 4, 6.] Therefore, Respondent Horter has done more than a mere "promise" not to have supervisory functions; he made that change himself. Horter recognized the wrongfulness of his actions, and voluntarily removed himself from supervisory responsibility.

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The Initial Decision should have noted that Respondents recognized the wrongful nature of their conduct, and it should be amended.

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

In response to Respondents' arguments that the two-year supervisory bar was improperly punitive, the Division merely restates facts from the Initial Decision and then argues that *Steadman* "does not require the ALJ to justify why a less severe sanction would not protect investors" because *Steadman* applies only to actions involving a permanent bar. [Div. Br. at 16.] That is not the holding of *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979) Respondents acknowledge that the facts of *Steadman* involved a permanent bar, but the reasoning and holding are not limited to those specific facts.

Steadman holds, "when Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why a less severe action would not serve to protect investors." *Steadman*, 603 F.2d at 1137 (emphasis added). It did not hold that only the most severe remedy of a permanent bar is subject to the heightened burden, but rather the most "drastic remedies," which includes a multi-year bar, are subject to the burden. In fact, courts continue to apply the *Steadman* analysis to cases that do not involve only a permanent bar. *See*, e.g., *Thorton v. SEC*, 199 F.3d 440 (Oct. 22, 1999) (holding that a three-year bar is a severe section that might appear punitive and therefore "the Commission has an obligation specifically to articulate why a less severe sanction would not suffice").

Here, the Initial Decision failed to articulate why a less severe sanction than a two-year supervisory bar—which is certainly punitive—would not suffice. As also 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." *Steadman*, 603 F.2d. at 1141.

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.

C. 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 Division argues that the Initial Decision properly found that Respondents were "reckless." [Div. Br. at 19.] In support of that conclusion, the Division points to "red flags that would have alerted [Respondents] to Hannan's fraud." [*Id.*] Because Respondents "ignored multiple red flags" here, the Division argues that recklessness is supported, pointing to two decisions: *Graham v. SEC*, 222 F.3d 994 (D.C. Cir. 2000) and *In the Matter of John A. Carley*, SEC Rel. No. 34-888, 2008 WL 268598 (Jan. 31, 2008). The cases do not support the Division's argument.

First, the Division posits that in *Graham*, the "back office broker acted recklessly by ignoring abundance of red flags." [*Id.* at 20.] However, what the Division fails to recognize is that the Respondent in Graham that was noted as being "extremely reckless" was not charged with failure to supervise. Rather, he was charged with aiding and abetting fraud—meaning actually providing some assistance with the fraud and "red flags"—and was given only a two-month suspension. *Graham*, 222 F.3d at 999, 1004. The respondent charged with failure to supervise was not found to be "reckless" and was given a three-month

suspension. *Id.* at 999. The *Graham* decision did not involve monetary penalties and provides no support for the Division's position.

Second, the Division argues the decision in *Carley* supports a finding of recklessness for supervisors where "red flags" are apparent. [Div. Br. at 20.] That decision also does not support the Division's position because the respondent charged with failing to supervise was only assessed second-tier penalties, not third-tier penalties like the Respondents here. *Carley*, 2008 WL 268598, at *26.

Quite simply, 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. If the Division believed Respondents were reckless or had actual knowledge, it could have asserted an intent-based claim. However, the Division only asserted negligence-based claims against Respondents, and the Initial Decision jumps to straight to the conclusion of "reckless" without any analysis or consideration.

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

III. 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.

Dated: July 14, 2023

Respectfully submitted,

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I hereby certify that I caused a true copy of the foregoing *Respondents' Reply Brief in Support of Review of the Initial Decision* on the following on this 14th day of July 2023 via email as indicated below:

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