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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-14536

In the Matter of	:
MONTFORD AND COMPANY, INC.	
d/b/a MONTFORD ASSOCIATES,	:
and	:
ERNEST V. MONTFORD, SR.,	:
Respondents.	
	:

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' BRIEF ON THE MERITS

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Pursuant to Rule of Practice 450, the Division of Enforcement ("Division") respectfully submits this Opposition to Respondents' Brief on the Merits ("Respondents' Brief). As demonstrated below, the findings of fact, findings and conclusions of law, and determinations regarding the public interest made by Chief Administrative Law Judge Brenda P. Murray (the "ALJ") in the Initial Decision are sound, appropriate judgments on this record, and should be affirmed.

I. INTRODUCTION

This case involves an investment adviser that accepted undisclosed compensation from a fund manager in exchange for recommending the fund to advisory clients. Respondent Ernest V. Montford, Sr., ("Montford") and Respondent Montford and Company, Inc. d/b/a Montford Associates ("Montford Associates"), an Atlanta, Georgia-based registered investment adviser (collectively, "Respondents") concede that they accepted a fee of $210,000 from SJK Investment Management, LLC ("SJK"), a money manager recommended by Respondents, and failed to disclose it on the firm's Forms ADV for both 2009 and 2010.[1] [T. 6-10.] Respondents also admit they did not tell their clients about this payment at any point prior to January 2011. In addition, during those same years, Respondent Montford Associates affirmatively represented to investors in Schedule F to its Form ADV Part II, which was prepared and approved by Respondent Montford, that the firm "**do[es] not accept any fees from investment managers . . . .**" (Emphasis added.) [Exs. 28 and 29.]

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[1] Exhibits from the trial will be identified by their exhibit number ("Ex. __" for the Division's exhibits; "R-__" for Respondent's exhibits). The transcript of the trial will be identified as "T. __."

Respondents' acceptance of the $210,000 fee, therefore, was contrary both to the responses Respondents gave to conflict-related questions on their Forms ADV, and to Respondents' voluntary and unqualified use of the language "any fees" in Schedule F to those Forms. The end result is that Respondents (a) took money *after* having affirmatively represented to their clients that they did not accept any fees from investment managers, and (b) *continued to represent*, throughout 2010, that they did not accept any fees from investment managers when, in fact, they had made an agreement for payment with an investment manager in 2009 and been paid $130,000 (the first of two payments under that agreement) by that investment manager in January 2010. Succinctly stated, the statement "[w]e do not accept any fees from investment managers . . ." from Schedule F to the firm's Form ADV Part II became untrue during 2009, yet was never amended, and was *false when made* in 2010. These facts are admitted and/or were not contested at the hearing.

On appeal, Respondents offer a handful of implausible arguments controverting the ALJ's findings that Montford Associates violated Sections 206(1), 206(2), 204 and 207 of the Investment Advisers Act of 1940 ("Advisers Act"), as well as Rule 204-1(a)(2) thereunder, and that Montford violated Sections 206(1), 206(2) and 207 of the Advisers Act, and aided and abetted and caused Montford Associates' violations of Section 204 of the Advisers Act and Rule 204-1(a)(2) thereunder.[2] For example, Respondents contend that the $210,000 was to compensate them for time spent on administrative work while transferring their clients' accounts to SJK. Yet, Respondents kept no record of the time they spent on these "services" – indeed,

[2] The Commission should note that Respondents do not contest the Division's claims under Section 204 and Rule 204-1(a)(2).

they never even gave Kowaleski an estimate of time spent. Despite (according to Montford) having demanded the money in the first place due to the overwhelming amount of work involved, Respondents allowed SJK to unilaterally determine how much would be paid. Respondents further profess to have no understanding of how he calculated the amount. Yet, the payment for transferring approximately 10 accounts from one money manager to another was so large it constituted 25% of the firm's total revenue in 2010. As the ALJ correctedly concluded, "Respondents' position that . . . Montford Associates earned $210,000 for administrative work for Kowalewski is unreasonable on its face." In the Matter of Montford and Company, Inc., et al., Initial Decision Rel. No. 457 (Apr. 20, 2012) ("Initial Decision') at 20.

Instead, Respondents' true focus lies in two areas: one is the ALJ's denial of Respondents' Motion to Dismiss Out-Of-Time OIP, which was based on Section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), codified as Section 4E of the Securities Exchange Act of 1934 ("Exchange Act") at 15 U.S.C. § 78d-5. The Commission has already considered this argument on Interlocutory Review and correctly noted that the ALJ found that the staff obtained an extension of the Dodd-Frank deadline. In the Matter of Montford and Company, Inc., et al., Advisers Act Rel. No. 3311 (Nov. 9, 2011), p.5. Moreover, even if the Division had not complied with the Dodd-Frank provision, it provides no substantive rights to Respondents. Brock v. Pierce County, 476 U.S. 253 (1986).

Respondents' other area of focus is contesting the ALJ's public interest determinations regarding disgorgement and civil penalties. The $210,000 disgorgement ordered here, however, is absolutely appropriate. As the ALJ noted, and the record reflects, "[t]he $210,000 has all the indicia of ill-gotten gains or unjust enrichment." Initial Decision at .21. And the statutory

factors set forth in Section 203(i) of the Advisers Act support the Third Tier civil penalties the ALJ imposed. Respondents' fraudulent conduct, which harmed others and resulted in Respondents' unjust enrichment, and for which they have accepted no responsibility, clearly satisfies the criteria for determining whether civil penalties are in the public interest. Moreover, among the tiers of penalty available, the Third Tier is appropriate here because of the fraudulent conduct (and high degree of scienter) combined with the substantial pecuniary gain - $210,000 – reaped by Respondents. The record fully supports the ALJ's findings and the penalty amounts imposed: $150,000 for Montford and $500,000 for Montford Associates.[3]

Accordingly, the Commission should affirm the findings of fact, the findings and conclusions of law, and the determinations regarding the public interest made by the ALJ in the Initial Decision.

II. FACTS

A. Background on Montford and Montford Associates

Respondent Montford resides in Atlanta, Georgia. Montford is President, Chief Executive Officer, Chief Compliance Officer, and 100% owner of Respondent Montford Associates. Montford Associates is a registered investment adviser with its principal place of business in Atlanta, Georgia. Montford founded Montford Associates in April 1989 and has been working in the investment advisory business for twenty-three years. [T. 14-15.] He began working in the securities industry as a registered representative with Merrill Lynch in 1972 and

[3] Respondents attempt to portray the civil penalty amounts assessed by the ALJ as extreme by pointing to the Division's request of a lesser amount in its Post-Hearing Brief. The Court, however, is always the ultimate arbiter of sanctions. While the Division may make a suggestion, the ALJ has discretion to go above or below that suggestion, especially in a case where it determines the Respondent did not acknowledge wrongdoing, acted with a high degree of scienter and his assurances against further violations were not credible. Initial Decision, p.18-19.

thus is nearly a forty-year veteran of the securities industry. [Ex. 2; T. 15-18.] During 2009-2010, Montford Associates had approximately 30 clients and $800 million under management. [T. 20.] At that time, Montford Associates' clients primarily included pension plans, school endowments, and various non-profit organizations. [Ex. 11; T. 33.] Montford Associates' clients are typically institutional investors that are conservative, risk averse and place value on stability and consistency. [T. 20-21.] Montford Associates provides a range of investment advisory services to institutional investors, including: (1) assessing investment objectives; (2) advising on appropriate asset allocation; (3) recommending investment managers; and (4) monitoring portfolio and manager performance. [T. 20.] Montford Associates does not manage clients' investments directly, nor does it have the authority to execute client trades. Instead, Montford Associates identifies and recommends investment managers who then invest in various securities for the benefit of Montford Associates' clients. Montford Associates charges clients an annual fee, paid quarterly, based on assets under management. The annual fee ranges, depending on various factors, from 8 to 20 basis points of the client's assets. [T. 19.] In 2009, Montford Associates' gross revenues were approximately $600,000. In 2010, Montford Associates' gross revenues were $830,000, approximately $620,000 of which was in the form of fees for providing investment advisory services to clients. [T. 21.] As discussed more below, the remaining $210,000 in revenue – approximately 25% of the firm's total revenue in 2010 – was in the form of undisclosed fees paid by SJK.

B. Montford Associates' Forms ADV Disclosure and Promotional Materials

Montford attracted clients in part by touting its independence. During 2009-2010 (and before), Montford Associates prominently and repeatedly claimed to provide "independent"

investment advice. Montford Associates' Forms ADV during the relevant period included several representations regarding the firm's independence. This included Part I of Montford Associates' Form ADV filed on May 8, 2009. [Ex. 59.] In that document, which was signed by Montford, Item 8.A.2 is filled out to indicate that Montford did not buy or sell for himself securities that were also recommended to advisory clients. [T. 23.] Additionally, Item 8.B.3 reflects that Montford "did not have any sales interest in the securities recommended." [T. 23-24.] The following year's Part I of Form ADV, filed on March 26, 2010, included the same responses to Items 8.A.2 and 8.B.3. [Ex. 5.] Montford Associates' pattern of claiming independence also extended to its Form ADV Part II, which Montford testified he helped prepare and approved. [T. 30.] Specifically, Montford Associates' Forms ADV Part II, as filed with the Commission on March 4, 2009 [Ex. 28] and March 29, 2010 [Ex. 29], each stated under Item 13.A that Montford and Montford Associates received no economic benefit from non-clients in connection with giving advice to clients. [T. 24-25; 29-30.] Schedule F of those same filings represented that Montford Associates would "disclose to clients ... all matters that reasonably could be expected to impair [the firm's] ability to make unbiased and objective recommendations." Also in Schedule F, both the 2009 and 2010 Forms ADV specifically represented that "[w]e do not accept **any** fees from investment managers or mutual funds." (Emphasis added.) Montford testified that disclosure has been a part of the firm's Form ADV for as long as it has been operating. [T. 26; 30.] Montford testified that Respondents did not amend Montford Associates' 2009 Forms ADV Part I or II between the time of their filing in 2009 and the filing of the 2010 versions in March 2010. [T. 26-27.]

Furthermore, Montford Associates' promotional materials also included claims regarding the firm's independence. Montford Associates' website advertised the firm as "a source of independent investment advice for institutional investors." [Answer, ¶7.] The website also contained articles touting the benefits of an "independent" investment adviser. In one such article, Montford Associates states "[t]he best investment advisors are *independent* – without affiliations to ... money managers." [Ex. 10 (emphasis in original); T. 31.] That article concludes with the following statement: "In sum, the *benefits* of having an impartial investment evaluator are several, but at the core of the concept is expert, experienced advice to the fiduciary without concern about conflicts of interest which occur with managers, banks, insurance firms, and brokers." [Ex. 10 (emphasis in original); T. 32.] In another entitled "Montford Associates Offers Expert Independent Guidance," Respondent Montford is quoted as saying that clients "need a strategy they can trust, because investments ... should be based on merit, not ... undisclosed compensation." [Ex. 11; T. 33.]

Respondents' efforts to create the appearance of independence were successful. Many of Respondents' clients whose representatives testified at the hearing emphasized the importance of Montford's purported independence in their decision to retain or discharge Montford Associates. [T. 194:18-20 (Monroe); 222:1-3 (Albert); 256:23 (Barrow).]

C. Montford's Historical Relationship with Kowalewski and SJK

From at least 2002 through 2010, Stanley J. Kowalewski ("Kowalewski") was an investment manager. Respondent Montford testified that he was first introduced to Kowalewski in 2002. Respondent Montford began recommending Kowalewski as a manager of a "fund of funds" to Montford Associates' clients beginning in late 2003, and four or five of them invested

in Kowalewski's fund. [T. 34-35.] Montford Associates' clients transferred their investments to remain with Kowalewski after he became affiliated in 2005 with Columbia Partners, a registered investment adviser based in the Washington, D.C. area, and several additional Montford Associates clients also invested at some point prior to July 2009. [T. 36-37.] By July 2009, ten of Montford Associates' clients were invested with Kowalewski at Columbia Partners for a total of approximately $50 million. Those clients were: St. Joseph's/Candler Hospital (which included separate accounts for three entities, the Candler Depreciation Fund, Geechee Reinsurance, and the Wachovia Defined Benefit Retirement Plan), Sea Island Company retirement plan, the Community Foundation for Northeast Georgia, Fieldale Farms, Georgia Ports Authority, Holy Family Hospital Foundation, Resort Hotel Insurance Company, the Tallulah Falls School Endowment, Savannah Country Day School, and Piedmont College. [T. 37-39.]

D. Kowalewski and SJK Paid Montford Associates to Recommend SJK to Montford Associates' Clients

In June 2009, Kowalewski told Montford that Kowalewski might leave to start his own firm. [T. 39.] In July 2009, Kowalewski in fact left Columbia Partners and created SJK. [T. 43.] Through Montford's knowledge of his clients, he understood that they were concerned about changing their investments to follow Kowalewski. Montford testified that Montford Associates' clients were conservative, risk-averse, and generally uncomfortable with change. [T. 42-43.] Montford's clients were also suspicious of hedge funds at that time, just a few months after the Madoff scandal became public. [T. 39.] Montford believed it would be challenging to convince his clients to switch to Kowalewski's new firm, but he recommended that all ten of the Columbia clients follow Kowalewski anyway. [T. 43-46.]

Also in July 2009, Columbia Partners notified Montford's clients that it intended to exit the "fund of funds" business. [Ex. 49.] Around that time, Montford began meeting with the ten clients who were invested with Kowalewski at Columbia Partners to recommend that they transfer their investments to SJK. [T. 66-67; 149-150.] Montford also agreed to help Kowalewski in convincing Montford Associates' clients to invest with SJK and to aid in the administrative process of transferring the investments. [T. 47-48.] Montford counseled Kowalewski on how to best present himself and his strategy to Montford's clients, but Montford did not disclose that fact to the clients themselves. [T. 48-53.] With the exception of Piedmont College, all of Montford Associates' clients that were invested with Kowalewski at Columbia Partners agreed, upon Montford's recommendation, to move their investments to SJK. Montford testified that he and Montford Associates performed substantial administrative "work" in connection with that transfer, and in August 2009, he demanded payment from Kowaleski for it. Kowalewski agreed to pay Montford. [T. 55-58.] During the summer of 2009, Kowalewski set the initial amount of the fee at $130,000.[4] The amount to be paid was not negotiated with Montford, but was instead unilaterally decided by Kowalewski, and Montford had no understanding of how the amount was determined. [T. 58-59; 61.] Neither Montford nor anyone at Montford Associates kept track of their time spent on the work for SJK, and Montford did not communicate to SJK any estimate of time spent on the alleged administrative work. The agreement was not memorialized in any way. [T. 73.]

[4] Despite Montford's contention at the hearing that the "summer" could include "late October or the first of November," the Division demonstrated that during the investigation, Montford unequivocally testified that Kowalewski told him in "the summer of '09" that Montford would receive $130,000. [T. 58-59.]

The "work" that Montford provided in exchange for the fee consisted of two categories. First, Montford met with his clients on behalf of SJK to recommend continuing to do business with SJK. [T. 61-66.] At the hearing, Montford admitted meeting with his clients to recommend SJK, but denied that those meetings were part of what he was paid for. [T. 61-67.] But his investigative testimony – which was identified by Montford as his prior sworn testimony – clearly demonstrates that on December 17, 2010, a time much closer to the events in question, he testified that those meetings were covered by the money from Kowalewski:

> [Murnahan:]. Okay. Would you please take a look at Exhibit 61, flip to page 108. Starting on line 19, read that question, please.
> [Montford:]. "Let me ask a question to make sure I understand the universe of services you provide. In connection with this $130,000, you met – is it fair to say that you met with [your] clients on behalf of SJK to recommend continuing to do business with SJK?"
> "It is fair, yes."
> "Is that accurate?" Question.
> "Yes."

[T. 62.] At the hearing, Montford attempted to suggest that the client meetings were exclusively about the alleged "administrative nightmare" caused by the Columbia Partners during the transition. [T. 62.] Those efforts were unpersuasive. Montford later testified that he and his staff divided up the nine or ten clients involved and met with each of them to talk about Columbia Partners' decision to exit the fund of funds business **and "talked with them about SJK . . . ."** [T. 66-67 (emphasis added).] Those meetings took place between July 10, 2009 and the middle of August 2009. [Id.] Most of them were via telephone and they did not last more than an hour or two. [Id.] Montford then confirmed that those meetings were part of the "work" that SJK's fee covered. [T. 67.]

The other component of the supposed administrative work Montford and Montford Associates provided to SJK in exchange for the money was negotiating with Columbia Partners on behalf of the clients. Montford never met with any representatives of Columbia Partners in person, but he spoke with them on the phone and corresponded with them over a three month period during the summer and fall of 2009. [T. 68.] Montford acknowledged that he and the firm were already being paid $600,000 in advisory fees by their clients during that year. When asked why he charged Kowalewski for interactions with Columbia that were ostensibly on behalf of Montford Associates' clients, Montford testified that "it was appropriate, I felt, that Stan pay us for our work because he was going to get some benefit from it eventually." [T. 71.] Similarly, when asked why he did not seek to charge his clients for work purportedly done on their behalf, Montford conceded that his clients would not have paid for it because in their minds, such work was already Montford's responsibility: "I'm not going to call them up unnecessarily and say, I want you to do all this. They'll say, are you crazy? I'm not going to do that, why don't you do it." [T. 72.]

On September 24, 2009, Will Monroe, the chair of the Savannah Country Day School endowment committee, sent an e-mail to Montford raising several "concerns" about the investment advice received from Montford – which was to invest with SJK – and emphasizing that the committee was seeking Montford's independent judgment (". . . as our paid consultant I do not want to dictate what you say."). [T. 83-90; Ex. 34.] One of the concerns Monroe raised was expressly about news reports involving Kowalewski. Montford responded to Monroe's concern about those news reports on September 28, 2009, but he did not mention the fee arrangement with Kowalewski. That was three days before Savannah Country Day School's

initial investment transferred into the SJK fund on October 1, 2009. [T. 83-90; Ex. 35.] Thus, at the time Montford responded to a specific question about Kowalewski and did not disclose the fee arrangement, Savannah Country Day School was not yet invested with SJK.[5] Monroe testified that the endowment committee would have wanted to know about such an arrangement because Savannah Country Day School was "paying for independent advice. We didn't want his judgment to be clouded in any way." [T. 194.]

E. Montford Had Other Undisclosed Conflicts

The evidence presented at the hearing demonstrated that Respondent Montford was subject to other undisclosed conflicts of interest that were likewise contrary to his representations of independence. Montford testified that during 2009, Kowalewski took Montford on a three-day fishing trip to Bozeman, Montana. Montford testified that Kowalewski paid for transportation, hotel, food and fishing guides. Montford conceded that he never disclosed the trip to his clients. [T. 74-75.]

Similarly, at some point prior to July 30, 2010, Montford invested a personal IRA rollover with SJK. [Ex. 19.] The value of the account was $235,000. Montford never disclosed his investment with SJK to his clients, and failed to amend his disclosure on Form ADV Part I, Item 8.A.2, which expressly asks whether the adviser or any related person buys or sells for themselves securities that they also recommend to advisory clients. In addition, with respect to that same IRA investment, Montford conceded that SJK stopped charging him management or

[5] Savannah Country Day School was not the only client victimized by Montford's omissions in 2009. The evidence at the hearing showed that on October 15, 2009, Piedmont College's investment committee met to make its final decision with respect to Montford's advice. [T. 102-103; Ex. 68.] Although Piedmont College decided not to invest with SJK, Montford admitted that he attended the meeting and reiterated his advice – without, of course, disclosing the fee arrangement with SJK. As an advisory client, Piedmont College was entitled to that material information, irrespective of the fact that they ultimately declined to follow Montford's advice.

incentive fees starting with the performance period ended July 30, 2010, thus putting him in the same investment pool with his clients (the same pool he had recommended to them) but on more favorable terms. Montford never disclosed that fact to his clients. [T. 75-77.]

F. Montford Invoiced SJK for $130,000 in November 2009 But Failed to Disclose that Fee Arrangement in Contemporaneous Client Communications

Montford sent an invoice for $130,000 to SJK on November 2, 2009. [Ex. 8.] The face of the invoice reflected that it was for "consulting services for the SJK Investment Management, LLC launch," and Montford testified that he considered that a "fee" for consulting. [T. 90.] Upon receipt, Kowalewski asked Montford to change the description on the invoice and resubmit it. [T. 90.] Montford resubmitted the invoice for $130,000 on November 30, 2009 using the description "marketing and syndication fee for the SJK Investment Management, LLC launch." [Ex. 4, p. CC-6; T. 92.] Montford claimed at the hearing that the language was dictated by Kowalewski and was not an accurate description of his services. However, Montford conceded that he agreed to include it on the invoice, and he essentially admitted that he had previously testified that the description was accurate. [T. 92-93.]

Also in November 2009, Kowalewski promised Montford that he would pay Montford additional fees beyond the $130,000. Kowalewski explained that he was going to pay Montford the $130,000 at the end of 2009, and the remainder of the fee after SJK finished its first year in business. Montford claimed that Kowalewski did not indicate how much Montford would be paid at the end of that year. [T. 93.]

During this same time, Montford was communicating with clients – and advising further investment with SJK – without ever disclosing the growing fee arrangement between him and Kowalewski. On November 10, 2009, Montford followed up the November 2, 2009 invoice by

e-mailing Kowalewski and asking whether SJK could pay Montford by wire transfer. [Ex. 66.] On November 11, 2009, Kowalewski replied to Montford acknowledging receipt of the November 2, 2009 invoice and advising that it would be processed. [Id.] Montford wrote back the same day, in the midst of correspondence specifically about when and how he would be paid the $130,000, and told Kowalewski "[b]y the way, we are advising Fieldale Farms to give you another $800,000." [Ex. 66.] Yet these concurrent communications between Montford and Kowalewski and between Montford and his clients at Fieldale Farms never resulted in a disclosure of the fee arrangement. [T. 94-95.]

Similarly, on November 17, 2009, Montford and another Montford Associates employee attended via teleconference a meeting of the board of the Resort Hotel Insurance Company. [T. 97.] The minutes of the meeting reflect that there "was a discussion held regarding the possibility of hiring an additional fund of fund manager or replacing the existing fund of fund manager (SJK Absolute Return Fund, LLC)." [Ex. 64.] This meeting took place only two weeks after Montford sent Kowalewski the November 2, 2009 invoice for $130,000, so the materiality of the fee amount was fresh in his mind. While his client considered whether to keep SJK or replace it, however, Montford stayed silent, never mentioning his considerable financial relationship with SJK or his expectation of additional money in the future.

Also on November 17, 2009, Montford sent an e-mail to his clients invested with SJK regarding "Transition of Funds." [T. 98-100.] In that message, which was sent only two weeks after the November 2, 2009 invoice and about a week after Montford's e-mail exchange with Kowalewski asking to be paid by wire transfer, Montford wrote to "update [his clients] on [their] investment with SJK Absolute Return Fund of Funds." [Ex. 15.] Montford provided substantial

information about the status of the funds being transferred from Columbia Partners, but again failed to mention the significant financial transaction with Kowalewski. Additionally, Montford included the statement that "Stan Kowalewski's SJK Investment Management, LLC includes the team that has worked with him in Greensboro for years, and they are taking care of the details in the transition," yet omitted any reference to the purportedly arduous work that his firm performed in connection with it. [Ex. 15; T. 55, 57-58; 68-70]

G. Having Received $130,000 in January 2010, Montford Recommends Additional Investments with SJK Without Disclosing the Conflicts

In early January 2010, Montford received payment of $130,000 from SJK in satisfaction of the invoice sent on November 30, 2009. [T. 104; Ex. 4, p. CC-6.] At the hearing, Montford admitted that after receiving that payment, he continued to recommend that his clients invest additional funds with SJK without disclosing it. [T. 105.] As a result, between the spring and early fall of 2010, three of Montford's clients made additional investments of approximately $10 million in the Absolute Return Funds based on Montford's recommendation.

For example, in the spring of 2010, Montford Associates' client Tallulah Falls School received approximately $1 million that previously had been invested with Wachovia and Citigroup. [T. 106-107.] These funds were the remainder of a larger investment that Tallulah Falls School had redeemed earlier. [Id.] The bulk of the funds had been returned by Wachovia and Citigroup prior to 2010 and invested in an account at Columbia Partners. [Id.] By the spring of 2010, however, Tallulah Falls School no longer had that account, and as Montford admitted at the hearing, the school had an independent investment decision to make, as it could have done anything with that money. [Id.] Montford recommended that Tallulah Falls School invest the money with SJK, and Tallulah Falls School followed Montford's advice. [Id.] During the

course of giving that advice, Montford did not disclose the fee arrangement he reached with Kowalewski in August 2009, the $130,000 he received from SJK in January 2010, or the expectation he had of receiving even more money from Kowalewski later that same year. [Id.]

Similarly, in June 2010, at Montford's recommendation, Fieldale Farms moved $1.5 million it had invested in equities to SJK. [T. 107-108.] Montford pitched this change to his client as a "rebalancing" of Fieldale Farm's holdings, but irrespective of the characterization, the end result was that Fieldale Farms invested $1.5 million additional dollars with SJK that had been invested somewhere else.[6] [Id.] Montford failed to disclose any of his conflicts of interest to Fieldale Farms while encouraging the firm, apparently over several months, to increase its investment with SJK. [Id.]

Additionally, in September 2010, Montford recommended that St. Joseph's/Candler Hospital invest an additional $7.4 million with SJK, this time into the SJK Long/Short Equity Fund. [T. 108-110; Ex. 31.] The two St. Joseph's/Candler Hospital entities that were advised to participate were the Funded Depreciation account and the Geechee Reinsurance. As reflected on the face of Exhibit 31, Montford's written recommendation of the investment, the SJK Long/Short Equity Fund was a new fund started by SJK on July 1, 2010, and Montford expressly noted that "[w]e have worked with SJK Partners for many years and we are impressed with their experience, knowledge and expertise." The document did not mention, however, Montford's fee arrangement with SJK, and of course, Montford conceded that he never told any of his clients about his financial relationship with Kowalewksi before January 2011. This conduct is

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6 This investment appears to be the culmination of the advice Montford signaled to Kowalewski in his November 11, 2009 e-mail message, which read ". . . we are advising Fieldale Farms to give you another $800,000. It is a rebalancing." [Ex. 66.]

particularly egregious given both the amount of money involved and the fact that the end of SJK's first year in business was approaching and Montford was aware that Kowalewski had promised to send him even more money at that time. On Montford's recommendation, St. Joseph's/Candler Hospital invested more than $7 million in the SJK Long/Short Equity Fund in October 2010.[7]

Also in September 2010, Montford convinced another client, Savannah Country Day School, to reverse its decision to withdraw its more than $1.3 million investment from SJK. The school's endowment committee had, at a meeting in April 2010 at which Montford was not present, voted to fire SJK and withdraw its investment. [T. 111-114; Ex. 24.] When Montford was informed of the decision, he wrote a lengthy e-mail dated April 12, 2010 to the endowment committee that referenced – in the first sentence – Montford Associates' "fiduciary responsibility" and "express[ed] our disagreement with the change." [Ex. 24.] Montford went on to identify in bullet points "the reasons SJK Partners matters to SCDS: . . . ." Montford did not list the fee arrangement with SJK, the $130,000 he had already received, or the expectation he had of receiving more money later in 2010. However, Montford forwarded the message to Kowalewski on April 15, 2010. The endowment committee apparently tabled action and the matter came back up in September 2010. [T. 117.]

In September 2010, Montford asked for a meeting with the endowment committee to reiterate in person his advice that SJK not be terminated. [T. 117-18.] In anticipation of that meeting, Montford sent another e-mail to the endowment committee. [Ex. 25.] In that message,

7 These events were very close in time, October 2010 is the same month that, according to Montford, Kowalewski called him and said "I owe you some more money," referencing the second payment. [T. 120-21.]

dated September 3, 2010, Montford reminded the committee of Montford Associates' role as their investment advisor, writing that "[w]hile the committee has the final decision we participate and advise in the investments for SCDS. As your advisor that is what we are engaged to do." Montford also reaffirmed his recommendation of SJK: "An upcoming change is also a factor in our position of keeping SJK." The message indicated that the meeting Montford requested was scheduled for the following week.[8] Montford testified that he attended that meeting, that he recommended keeping SJK, and that the committee voted to keep SJK on the basis of that recommendation. [T. 120.] As with all the investment decisions on which he gave advice in 2010, he did not disclose his fee arrangement with Kowalewski, the $130,000 he received in January 2010, the promise Kowalewski made to pay him more in late 2010, the Bozeman, Montana fishing trip Kowalewski treated Montford to, or the fact that, by this time, Montford was an investor in the same funds as his clients but under more favorable terms.

Savannah Country Day School endowment committee chair Will Monroe testified that, at a meeting in September 2010, Montford was asked whether he was paid anything by money managers and that Montford responded that the only revenue he received was from his clients such as Savannah Country Day School. [T. 188-89, 199-202.] The official minutes from the endowment committee's meeting of September 23, 2010 also reflect that statement, reading "[Montford] stated the only revenue he receives is from his clients like us and no managers pay him anything." [Ex. 57, p. SEC-SCDS-000860.]

[8] Exhibit 25 shows on its face that Montford also forwarded this message to Kowalewski, just as he had forwarded Exhibit 24.

H. Montford Invoiced SJK a Second Time in November 2010 and Receives $80,000, Bringing Montford Associates Total 2010 Revenue from a Money Manager to $210,000

In late October 2010, Kowalewski called Montford and, as Kowalewski had promised in the fall of 2009, told Montford to send another invoice to SJK because SJK had been operating for approximately a year. [T. 120-22.] Montford testified that Kowalewski said "I owe you some more money" and Montford replied "great, what is it?" Kowalewski unilaterally set the amount at $80,000, and, according to Montford, the money was to compensate Montford for the same services Montford had conferred in 2009 and for which Montford already had been paid $130,000. Montford testified that he did not know how Kowalewski calculated the amount of the payments. Yet Montford agreed to submit the invoice with the same language as before and, on November 1, 2010, sent an invoice to SJK in the amount of $80,000 for "Marketing and Syndication Fee for the SJK Investment Management LLC Launch." [Ex. 17.] SJK wired the funds to Montford Associates in November 2010. [T. 123.]

Montford testified that Montford Associates' total revenue for 2010 was approximately $830,000. Of that, $620,000 was for giving investment advice to clients such as St. Joseph's/Candler Hospital, Fieldale Farms, Tallulah Falls School and Savannah Country Day School. The remaining $210,000 came from SJK Investment Management, LLC, the same money manager that Montford had recommended to those clients and others in 2009 and 2010.

I. Montford's Clients Viewed His Omissions as Material

Prior to January 6, 2011, Respondents did not disclose to clients or prospective clients in direct communications or in Montford Associates' Forms ADV that: (1) Montford and Kowalewski went on a three-day fishing trip to Montana in 2009, for which Kowalewski paid for

the transportation, lodging, food, and guides; (2) on August 30, 2009, Montford told Kowalewski that he would have to pay Montford Associates for the work it performed; (3) Montford invested $235,000 of his retirement funds with SJK at the start of 2010, and SJK subsequently waived its management fee with respect to Montford's account; and (4) Montford Associates received a total of $210,000 from Kowalewski in 2010 - $130,000 on January 4, 2010, and $80,000 in November 2010. [Tr. 60, 75-77, 103, 146, 214, 288-89; Ex. 19.] After each of these events, Respondents continued to recommend that clients invest additional funds with Kowalewski; they recommended that a client not withdraw its investment from SJK, without disclosing their financial dealings with him; and they did not update or revise Montford Associates' Forms ADV. [Answer at 3-4; Tr. 8, 74, 105.]

Respondents' clients whose representatives testified at the hearing indicated that Montford's independence was a critical issue for them when weighing his advice, and that they would have wanted to know about any fee arrangement with a money manager, irrespective of what the payments were for. [T. 188, 194, 202 (Monroe for Savannah Country Day School); 220-21 (Albert for St. Joseph's/Candler Hospital); 256-258 (Barrow for Sea Island and Resort Hotels); 274 (Roberts for Georgia Ports Authority); 287-88 (Short for the Community Foundation for Northeast Georgia).]

J. Montford Failed to be Forthcoming and Truthful with Commission Staff or Clients Regarding His Fee Arrangement with SJK

On December 9, 2010, the Division's investigative staff sent Montford a subpoena in connection with an investigation of SJK. [Ex. 1.] The subpoena attachment included only four document requests. One of them was "[a]ll documents regarding any payment or other benefit (travel, entertainment, etc.) provided to you by Kowalewski, SJK or any investment fund advised

by Kowalewski or SJK." When Montford responded to the subpoena on December 15, 2010, he did not produce his November 1, 2010 invoice to SJK for $80,000. [Ex. 17; T. 127-29.] At the hearing, Montford conceded that his response to the SEC's subpoena came only six weeks after he had sent the second invoice to SJK, but his explanation was essentially that he forgot about it. [T. 127-28.] Moreover, when Montford provided testimony before the staff on December 17, 2010, he was asked numerous questions about the initial payment from SJK, yet he never mentioned that he had received another payment of $80,000 from SJK just seven weeks earlier. Montford finally produced the additional invoice in February 2010, after he had engaged counsel.[9]

Montford also concealed this additional payment from his clients. On January 21, 2011, Montford sent an e-mail to Wade Herring, chair of the board of directors at Savannah Country Day School. [T. 131; Ex. 41.] In the e-mail, which was sent after the school had fired Montford Associates in the wake of the SEC's action against SJK, Montford writes "I'm told SCDS has decided to let us go because we charged SJK a business consulting fee in 2009" and he goes on "to explain the facts about the fee . . . ." In so doing, however, Montford makes the statement that "SJK needed assistance in transferring the accounts to its own operations. My company agreed to assist in that process, **for a negotiated fee of $130,000.**" At the hearing, Montford conceded that the assertion in the message that the fee was negotiated was contrary to sworn

[9] On January 6, 2011, the Commission filed an emergency civil injunctive action charging Kowalewski and SJK with securities fraud and obtaining a temporary restraining order and asset freeze in an action styled SEC v. Kowalewski, Civil Action No. 1:11-CV-0056-TCB (N.D.Ga.). Respondents assert that Kowalewski's April 2010 investigative testimony showed that he was defrauding clients, and that Respondents' failure to disclose the payments from SJK somehow should be excused because, according to Respondents, the SEC could or should brought an action earlier. As correctly ruled by Judge Murray at the hearing, however, the timing of the SJK fraud action is irrelevant to the claims against Montford.

testimony he had given earlier that same day, and he had no explanation for why he failed to mention the additional $80,000 he received from SJK only a couple months before. [T. 130-31.]

In addition, Montford took no action to inform his clients about the $210,000 even after he got his Wells Notice from the staff and these proceedings were instituted. Thus, even after being informed that the Division intended to bring fraud claims against him for his failure to disclose the Kowalewski payments, Montford still withheld the facts regarding the payments from clients – some of whom learned about them for the first time when called by the staff in preparation for the hearing. [T. 289 (Short).]

K. The Commission Institutes Administrative Proceedings Against Respondents

Commission staff served written Wells notices on Respondents on March 4, 2011. On August 19, 2011, the staff submitted to the Division Director a request, pursuant to Section 929U(a)(2) of the Dodd Frank Act (codified at 15 U.S.C. § 78d-5(a)(2)), to extend the initial 180-day deadline to institute enforcement proceedings against Respondents in the investigation styled "In the Matter of SJK Investment Management, Inc." Declaration of Michael J. Cates ("Cates Decl."), ¶ 2, attached to the Division's Memorandum of Law in Opposition to Respondents' Motion to Dismiss Out-Of-Time OIP as Exhibit A. On August 19, 2011, the staff of the Division Director provided the Chairman of the SEC with notice of the Division Director's intent to extend the initial 180-day deadline for instituting an enforcement proceeding against Respondents. Cates Decl., ¶ 3. On August 22, 2011, the Division Director authorized a member of his staff to sign on his behalf the ARO's request for an extension that the Division Director previously approved on August 19th. Cates Decl., ¶ 4. On August 23, 2011, the Division Director's staff notified the ARO staff that the Division Director had approved their request,

extending the deadline to institute enforcement proceedings against Respondents from August 30, 2011 until September 9, 2011. Cates Decl., ¶ 5. The OIP was instituted on September 7, 2011.

III. DISCUSSION

A. Respondents Are Not Entitled to Dismissal Based on Section 929U of Dodd-Frank

1. Division Staff Properly Obtained an Extension of the Deadline

Respondents argue this administrative proceeding should be dismissed because the Division's claims were time-barred by Section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), codified as Section 4E of the Securities Exchange Act of 1934 ("Exchange Act") at 15 U.S.C. § 78d-5. That law states in pertinent part:

> (1) IN GENERAL.--Not later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.
>
> (2) EXCEPTIONS FOR CERTAIN COMPLEX ACTIONS.--Notwithstanding paragraph (1), if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to the Chairman of the Commission, extend such deadline as needed for one additional 180-day period.
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> * * *

15 U.S.C. § 78d–5(a).

Contrary to Respondents' assertions, the Division in this case complied with Section 929U. The Division served written Wells notices on Respondents on March 4, 2011. On August 19, 2011, the staff submitted to the Division Director a request, pursuant to Section 929U(a)(2),

for an extension of the initial 180-day deadline under Dodd-Frank. See Declaration of Michael Cates ("Cates Decl."), ¶ 2, filed with the Division's Opposition to Respondents' Motion to Dismiss Out-Of-Time OIP. Later the same day, the Division Director notified the Chairman of the SEC of his intent to grant the request. Cates Decl., ¶3. On August 22, 2011, the Division Director authorized a member of his staff to sign on his behalf the staff's request for an extension that the Division Director previously approved on August 19th. Cates Decl., ¶ 4. On August 23, 2011, the Division Director's office notified the staff that the Division Director had approved their request, extending the deadline to institute enforcement proceedings against Montford from August 30, 2011 until September 9, 2011. Cates Decl., ¶ 5. The OIP was instituted on September 7, 2011.

Because the Division Director granted the extension and the OIP was instituted within the extended period, there is no question that the staff complied with the requirements of Section 929U. In the Matter of Gualario & Co., LLC, et al., Admin. Proc. Rel. No. 680, 2011 LEXIS 2806 (August 11, 2011) (denying respondents' motion for summary disposition because "the Division Director authorized the extension in compliance with [Section 929U], and the proceeding was instituted within the authorized period"). The ALJ found as much in her October 5, 2011 Order, which the Commission has already acknowledged in its denial of Respondents' suggestion for Interlocutory Review ("the law judge implicitly found that the Division Director had made the required complexity determination . . . ."). In the Matter of Montford and Company, Inc., et al., Adviser Act Rel. No. 3311 (Nov. 9, 2011), p. 5.

Respondents also contend that that the Division has not provided sufficient "evidence" that the Division Director made the complexity determination required by Section 929U when

extending the Dodd-Frank deadline. Respondents, however, offer no authority for the proposition that they are entitled to such transparency with respect to that process. Moreover, even if the Commission or a court were inclined to allow it, Section 929U does not provide sufficient standards for review. Section 929U creates no obligation for the Division Director to articulate, memorialize, or otherwise preserve for subsequent review the reasoning or basis for making a decision that an investigation is "complex." Section 929U provides no criteria on which that determination must, or even should, be based. As such, the Division Director's determination of complexity in any particular case, being committed to his sound discretion, is not subject to challenge by a respondent. See Heckler v. Chaney, 470 U.S. 821, 828 (1985) (matter committed to agency discretion is not subject to judicial review); Webster v. Doe, 486 U.S. 592, 599-600 (1988) (where a statute provides not meaningful standard of review, judicial review is inappropriate).

2. Supreme Court Precedent Holds that the Dodd-Frank Deadline Provides No Substantive Rights to Respondents

Respondents also contend that the Division's argument, based largely on Brock v. Pierce County, 476 U.S. 253 (1986) – i.e., that Dodd-Frank provides no substantive rights to Respondents – is incorrect, and that the case in fact supports Respondents' assertion that the enforcement action against them is untimely.[10] Respondents misread Brock, which holds that in the absence of a consequence for non-compliance (or clear legislative history) showing that

[10] Contrary to Respondents' assertion that the Division cited a single case below, as reflected in the Division's Memorandum of Law in Opposition to Respondents' Motion to Dismiss Out-Of-Time OIP, the Division cited a number of cases for the same proposition, including United States v. James Daniel Good Real Property, et al., 510 U.S. 43, 62-65 (1993); United States v. Barberis, 887 F. Supp. 110, 115-116 (D.Md. 1995); see also In the Matter of Gualario & Co., LLC, et al., Admin. Proc. Rel No. 680, 2011 LEXIS 2806 at *3-4 (August 11, 2011).

Congress intended to remove an agencies' jurisdiction for missing a statutory deadline, compliance with such deadlines does not affect their ability to act.

The Division cited Brock in the briefing below because Respondents' original argument (tellingly abandoned here) was that because Section 929U of Dodd-Frank uses the verb "shall," Congress must have meant that the Division's failure to comply with the statute would result in a loss of jurisdiction. Brock expressly rejects that notion. In Brock, the Supreme Court addressed a provision of the Comprehensive Employment and Training Act ("CETA") that provided that the Secretary of Labor "'shall' issue a final determination as to the misuse of CETA funds by a grant recipient within 120 days after receiving a complaint alleging such misuse." Brock, 476 U.S. at 254-55. The Court held "that CETA's requirement that the Secretary 'shall' take action within 120 days does not, standing alone, divest the Secretary of jurisdiction to act after that time." Id. at 266.

In discussing when such statutory time limits might result in a loss of jurisdiction, the Supreme Court acknowledged a line of appellate decisions holding that in order for a governmental agency to lose the power to act, a statutory deadline must include a consequence for non-compliance:

> . . . Government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute "'***both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply** with the provision.'"

476 U.S. at 259 (citations omitted; emphasis added). Section 929U provides no consequence for failure to comply and, thus, has no jurisdictional reach.

Respondents attempt, to no avail, to make the leap that Section 929U provides a consequence for non-compliance: "the statute is explicit, and gives the Commission two options:

file the complaint within 180 days or dismiss the action." Respondents' Brief, p.25. Respondents cite no authority for the second "option" because there is none. Nowhere does Section 929U say anything about dismissing an action. It provides a time limit for the staff to either file an action or notify the Division Director of its intent not to, but it provides no consequence if the staff fails to do either.[11]

Most importantly, Respondents fail to acknowledge the distinction drawn by the Supreme Court throughout the opinion between public and private actors, and the public policy behind statutes like CETA and Dodd-Frank. For example, in their attempt to distort Brock, Respondents quote a portion of the opinion noting that the CETA statute at issue there required the relevant agency to resolve the entire dispute within 120 days, which was said to be a more substantial task than filing a complaint. Respondents' Brief, p.25. In so doing, Respondents fail to include the sentence *immediately* following, which states: "Second, Mohasco[Corp. v. Silver, 447 U.S. 807 (1980), a contrasting case] involved a private right of action, and the plaintiff's failure to file a complaint prejudiced only that plaintiff. **In the present case, by contrast, public rights are at stake, and the Secretary's delay, under respondent's theory, would prejudice the rights of the taxpaying public.**" 476 U.S. at 261. The Supreme Court also cited the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." Id. at 260. The Brock Court went on to say it was "most reluctant to conclude that every failure of an

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[11] The Commission and Division Director may impose their own internal remedies for any staff failure to comply with the Section 929U deadlines. No such remedy was appropriate in this case, however, as the staff complied with the extension provisions set forth in Section 929U(a)(2).

agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." Id.; see also Barnhart v. Peabody Coal Co., et al., 537 U.S. 149, 158-59 (2003) ("Nor, since Brock, have we ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later"). The relevance of these passages to the instant case could not have been lost on Respondents, yet they attempt to mislead the Commission by failing to even acknowledge them.

Similarly, Respondents assert that Congress must have intended compliance with Section 929U to be a jurisdictional hurdle because the provision, entitled "Deadline for completing enforcement investigations and compliance examinations and inspections," uses the word "deadline." 15 U.S.C.A § 78d-5. Such shallow analysis ignores the undeniable fact that one of the primary purposes of Dodd-Frank was to expand the Commission's authority and power to curb securities fraud. Indeed, using Respondents' own logic, Title IX of H.R. 4173, the Dodd-Frank Bill, which contains Section 929U, is entitled "Investor Protections and Improvements to the Regulation of Securities." H.R. 4173, 111th Cong., 2d. Sess. (2010). Moving a level closer, Subtitle B of Title IX, Section 929U's subtitle, is entitled "Increasing Regulatory Enforcement and Remedies." Id. As with the CETA provision at issue in Brock, it would be "very odd" to read Section 929U as cutting off prematurely the Commission's ability to bring fraud actions given the clear congressional intent to increase the SEC's regulatory enforcement remedies. Brock, 476 U.S. at 265. This is particularly true in light of the fact that Congress provided a

separate, 5-year, statute of limitations (28 USC § 2462) to certain Commission claims and did not even reference that statute within Section 929U.[12]

Thus, Respondents' efforts to hijack Brock ultimately fail. Like the CETA 120-day period at issue in Brock, Section 929U's 180-day time period is "clearly intended to spur the [Commission staff] to action, not to limit the scope of [the Commission's] authority." 476 U.S. at 265. Accordingly, while the record reflects (and the ALJ correctly found) that the staff complied with the Dodd-Frank deadline, even if it had not, Respondents would not be entitled to dismissal.

B. Third Tier Sanctions Against Respondents are Justified by the Record

Respondents make several arguments challenging the ALJ's imposition of Third Tier sanctions in this case. Based on the record in this case, however, Third Tier sanctions are appropriate. As demonstrated below, the ALJ's decision correctly identifies factors supporting the imposition of Third Tier penalties and Respondents' conduct warrants them.

Respondents' first and second arguments assert that the ALJ did not properly consider the factors set forth in the statute, 15 U.S.C. § 80b-3(i), when finding that civil penalties against Respondents are in the public interest, and when determining that Third Tier penalties should be imposed. Respondents assert that the Initial Decision discusses instead the factors set forth in in Steadman v. SEC, 603 F.2d 1126, 1140 (5t Cir. 1979).

Section 203(i) of the Advisers Act allows the Commission to impose a civil penalty in these proceedings. Section 203(i)(3) lists six factors that the Commission *may* consider when

[12] 28 U.S.C. § 2462 applies only to civil penalty claims by the Commission. It does not apply to any equitable relief sought by the Commission, including cease-and-desist orders and disgorgement. See SEC v. Kelly, 663 F. Supp.2d 276, 286 (S.D.N.Y. 2009); see also, SEC v. Pentagon Capital Management PLC, 612 F. Supp.2d 241, 267 (S.D.N.Y. 2009); SEC v. Powers, 525 F. Supp.2d 415, 426-427 (S.D.N.Y. 2007).

determining whether civil monetary penalties are in the public interest: (1) whether the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) direct or indirect harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. The list is not exhaustive, and "[n]ot all factors may be relevant in a given case, and the factors need not all carry equal weight." In the Matter of Robert G. Weeks, Admin. Proc. File No. 3-9952. Addressing the maximum amount of penalty, Section 203(i)(2)(C) provides that a Third Tier penalty may be imposed if the conduct "involved fraud, . . .; and such act or omission . . . resulted in substantial pecuniary gain to the person who committed the act or omission."

The ALJ did not err by imposing Third Tier penalties in this case – indeed, the record shows that they are more than appropriate. Reviewing the public interest factors set forth in Section 203(i)(3) (which, of course, are nearly coextensive with the Steadman factors), it is plain that the conduct here was fraudulent, it harmed other people (including, as noted by the ALJ, Respondents' particularly sympathetic victims), and it resulted in unjust enrichment to Respondents. In addition, there is no doubt, in light of Respondents' flat refusal to acknowledge wrongdoing, of the need to deter Respondents and others from similar conduct. Thus, civil penalties against Respondents are in the public interest.

Regarding the decision to impose Third Tier penalties, Respondents' conduct involved fraud, and it resulted in substantial pecuniary gain to the person committing the violation in the form of the $210,000 fee Respondents received from SJK. That says nothing of the obvious significant risk of loss to Respondents' clients that resulted from Respondents' decision to accept money from SJK without disclosing it. Several of those clients indicated at the hearing that

Montford's perceived independence was paramount and they would not have followed his advice if they had known it was compromised.

Respondents' third argument is that it was error for the ALJ to consider Third Tier sanctions because the Division, in its briefing, had sought only Second Tier sanctions. As stated earlier, Respondents' logic here is entirely flawed. In proceedings before a Court, the parties may make arguments and suggestions about what the findings and conclusions should be, but those in no way limit the discretion of the judge. The OIP plainly placed Respondents on notice that these proceedings were instituted to, among other things, determine what remedial action would be appropriate in the public interest in the event the Division's claims were proven, including civil penalties pursuant to Section 203 of the Advisers Act. OIP, Section III. There are no qualifiers or limitations in Section III of the OIP. Thus, Respondents were not misled as to the possibility of sanctions more severe than those recommended by the Division.

Respondents' fourth argument is that "the ALJ made a number of evidentiary rulings that were incorrect" in Respondents' view. Respondents' Brief, p.30. The Rules of Practice give the ALJ broad discretion with respect to receiving evidence and a review of the record demonstrates that the evidence on which Respondents' complaint here is based reveals that it was properly excluded as irrelevant and immaterial. Rule of Practice 320. For example, Respondents complain at length about the timing of the SEC's action against SJK, which was brought in January 2011, arguing that the ALJ should have permitted to introduce "evidence" that the staff "knew" of SJK's fraud in April 2010 (which is untrue) because that would somehow exonerate Respondents. This evidence is totally irrelevant to whether Respondents violated their fiduciary duty and defrauded their clients by accepting $210,000 from SJK during 2009 and early 2010,

but Respondents' rhetoric once again shows that they do not accept responsibility or acknowledge wrongdoing: "Commission staff knew that Montford, like the S.E.C., had been fooled by SJK, knew that **Montford was a victim himself**, and knew that **the real culprit in all of this was SJK. Montford was another victim, not a perpetrator, of the fraud. . . . In the true picture of these events, SJK fills the entire frame, and Montford . . . [is a] bit player[].**" Respondents' Brief, pp.30-31 (emphasis added).

Respondents' fifth argument, like their third, asserts that the ALJ erred by imposing sanctions greater than those recommended by the Division. As stated, the ALJ based the amount of civil penalty on the facts in the record, which plainly support Third Tier penalties such as those imposed in the Initial Decision. Respondents' sixth argument is that when imposing a civil penalty of $150,000 against Montford, the ALJ exceeded the statutory cap imposed by 15 U.S.C. § 80b-3(i)(2), and that the ALJ incorrectly stated the maximum sanction for other than natural persons as $725,000. Respondents' argument ignores the Commission's implementation, pursuant to 17 CFR Part 201, of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. Accordingly, after March 3, 2009, the maximum penalty for natural persons under 15 U.S.C. § 80b-3(i)(2) was adjusted for inflation to $150,000 and for other persons it was adjusted to $725,000. Advisers Act Rel. No. 2845. Accordingly, the ALJ did not err by imposing a sanction above the statutory amount, nor did she incorrectly state the maximum amount applicable to corporations and entities other than natural persons.

C. <u>Disgorgement of the $210,000 Respondents Received from SJK is Absolutely Appropriate</u>

Respondents allege that the ALJ erred in ordering disgorgement of $210,000 against Respondents. Ignoring the facts in the record, which overwhelmingly support the ALJ's findings of fact and law, Respondents complain that the $210,000 "is the amount that Montford received from SJK for the work Montford did assisting SJK set up his new company. . . . [T]he disgorgment of the $210,000 was incorrect because Montford did nothing wrong by receiving the $210,000; . . . ."[13] Respondents' Brief, p.33.

Several facts debunk Respondents' claim that the money was simply to pay for time spent "assisting SJK set up his new company." First, neither Montford nor anyone at Montford Associates kept track of their time spent on the work for SJK. It simply is not credible that the money was meant to compensate Montford and his employees for their time if no one kept a record of how much time was spent. Second, the fee arrangement accounted for ¼ of the firm's total revenue in 2010, but was never reduced to writing. The sizable amount of the fee is totally incongruent with the informality of an unwritten agreement, and this fact belies the argument that the money was for a legitimate purpose. Third, Montford claims he demanded the money, but did not request a particular amount and had no idea how the amount was determined. Letting Kowalewski unilaterally control the methodology and the amount is inconsistent with Montford's contention that this was an above-board, arms-length transaction that he *insisted* on. Fourth, the invoices for which Montford was ultimately paid were for "Marketing . . . ." And, as

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[13] Respondents set forth several additional arguments attempting to show that disgorgement is inappropriate in this case. Those additional arguments are based on rigid readings of boilerplate statements of law that do not acknowledge the flexible nature of an equitable remedy such as disgorgement and therefore fail.

reflected by key excerpts of Montford's investigative testimony that were introduced during the hearing, in December 2010, Montford admitted under oath that part of what he was paid for was meeting with his clients on behalf of SJK to recommend continuing to do business with SJK. Respondents simply refuse to accept that their claim that the $210,000 was a legitimate fee unrelated to recommending SJK is not credible, but as the ALJ correctly concluded, it is "unreasonable on its face." Initial Decision at 20. Thus, the record here supports the finding that the $210,000 Respondents received from SJK was unjust enrichment and/or ill-gotten gains.

Disgorgement in an investment adviser case based on a failure to disclose a conflict of interest caused by improper compensation is equal to the amount paid under the agreement – this prevents Respondents from "keep[ing] the fruits of their fraud." In the Matter of IMS/CPAS & Associates, et al., Admin. Rel. No. 119, 1998 WL 7448 at *14 (Jan. 12, 1998); see also SEC v. Washington Co. Utility Dist., et al., 676 F.2d 218, 227 (1981) (reversing district court decision denying disgorgement; "[b]ecause we hold [Defendant] liable for the failure to disclose those payments, we conclude that the district court should order [Defendant] to disgorge a sum of money equal to the total value of all the payments he received . . . .") This is the best measure of ill-gotten gains or unjust enrichment under these circumstances. In this case, Respondents, who touted their independence and made disclosure denying accepting fees from money managers, concede they were paid $210,000 by money manager SJK. Their failure to disclose receipt of that money is the fraud and, as such, the money should be disgorged. IMS/CPAS, 1998 WL 7448 at *14; Washington Co. Utility Dist., et al., 676 F.2d at 227. Accordingly, disgorgement in this case should be $210,000, just as the ALJ ruled in the Initial Decision.

D. Far from Isolated, Respondents' Violative Conduct Between August 2009 and January 2011 Warrants an Industry Bar Against Montford

Respondents next argue that the ALJ's decision to bar Montford from industry association under Section 203(f) of the Advisers Act was unwarranted and that the ALJ failed to take into account Montford's purported lack of past violations of the securities laws.

Section 203(f) of the Advisers Act authorizes the Commission to impose sanctions on persons associated with an investment adviser, including barring such person from being associated with an investment adviser, under the appropriate circumstances. The established criteria for determining what sanctions are appropriate in the public interest include deterrence and:

> the 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), *aff'd on other grounds*, 450 U.S. 91 (1981); see also In the Matter of Richard C. Spangler, Inc., 46 S.E.C. 238, 254 n.67 (1976).

The record here reflects that Respondent Montford acted with a high degree of scienter, his actions were egregious, he has not accepted wrongdoing, and his infraction was consistent and recurrent – he repeatedly failed to disclose his relationship with Kowalewski even when presented with opportunities to do so on multiple occasions by several of his clients. In fact, even when queried by his clients in January 2011 about the Commission's lawsuit against Kowalewski, Montford failed to disclose the $210,000 payment. [T. 266 (Barrow).] Moreover, when later confronted by counsel for Savannah Country Day School with evidence of the initial $130,000 payment Montford received from Kowalewski, Montford failed to disclose that he had

received an additional $80,000 from Kowalewski. [Ex. 41.] Montford has no explanation for this lack of candor. [T. 130.] Perhaps most disturbing, however, is that Montford told his clients nothing about the $210,000 after he got his Wells Notice from the staff and these proceedings were instituted. Thus, even after being informed that the Division intended to bring fraud claims against him for his failure to disclose the Kowalewski payments, Montford still did not tell his clients about the payments. [T. 289 (Short).]

Montford's pattern of omitting to provide information about the Kowalewski payments also occurred in his interactions with the Division staff. Montford failed to produce the second Kowalewski invoice for $80,000, even though all records of payments by Kowalewski were specifically sought by the Division's subpoena. The notion, proferred by Respondents below, that Montford failed to produce the document inadvertently is not credible. The $80,000 payment was almost 10% of his entire 2010 income and was received on November 1, 2010, less than six weeks before his receipt of the Division's subpoena. [Ex. 1; Ex.17.] Thus, Respondents' infraction was essentially continuous for a year and a half, and *all* of the other Steadman factors cut against him.

Respondents also contend that the industry bar is not supported because Montford acted at worst negligently and thus lacked the proper state of mind. That assertion is contrary to the evidence, which, as cited by the ALJ, shows that Montford "had a high degree of scienter, any remorse is only because of the results to him personally and professionally, and he does not acknowledge wrongdoing." Initial Decision at 18. Given Montford's continuing lack of candor and that his current occupation will present opportunities for future violations, the Commission

should bar Montford from associating with any investment adviser, just as the ALJ did in the Initial Decision.

E. Montford and Montford Associates Violated Section 206 of the Advisers Act

Respondents contend that "Montford did not violate [Section 206 of the Advisers] Act because the payments Montford received from SJK were not 'fees' and did not, as a matter of fact and as a matter of law, cause or reflect any conflict of interest." Respondents' Brief, p.35. Respondents' theory appears to be that, in order to have created a conflict of interest, the $210,000 SJK gave Respondents had to haven been given in exchange for "advice," meaning a quid pro agreement of money for advice, presumably dictated by SJK and different from that which Respondents would have otherwise given.

To the contrary, Respondents were clearly subject to a conflict of interest – they received $210,000 from a money manager they were recommending to clients. Respondents claim that the key issue under the Supreme Court's decision in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 187 (1963), is whether "'advice to a client might result in financial benefit to the adviser – other than the fee for his advice.'" Respondents' Brief, p.35, quoting Capital Gains, 375 U.S. at 187. Capital Gains is clear, however, that any financial benefit to the adviser (other than the fee from his client) creates a conflict, whether deliberately given in exchange for advice or not. 375 U.S. 187-92. In fact, the Supreme Court in that decision repeatedly emphasizes that a financial conflict could be subconscious, and that the subconscious motivation to favor one's own financial interest (such as maximizing bogus payments or growing a relationship that includes thinly-veiled arrangements for kickbacks) was as much a concern behind the Advisers Act as "deliberate intent:"

> This concern was not limited to deliberate or conscious impediments to objectivity. Both the advisers and the Commission were well aware that whenever advice to a client might result in financial benefit to the adviser-other than the fee for his advice-'that **advice to a client might in some way be tinged with that pecuniary interest (whether consciously or) subconsciously motivated * * *.'** The report quoted one leading investment adviser who said that he 'would **put the emphasis * * * on subconscious' motivation in such situations. It quoted a member of the Commission staff who suggested that a significant part of the problem was not the existence of a 'deliberate intent' to obtain a financial advantage, but rather the existence 'subconsciously (of) a prejudice' in favor of one's own financial interests.**

375 U.S. at 188 (emphasis added; footnotes omitted); see also Id. at 195-97. This passage highlights why Respondents' theory that a quid pro quo arrangement is necessary fails – the notion that only a deliberate exchange of money for tainted advice qualifies as a conflict is utterly inconsistent with the Court's emphasis on the risk posed by "subconscious" motivations.

Respondents further argue that the Division was required to show direct evidence of that arrangement and failed to do so. In Capital Gains, however, the Supreme Court indicated that requiring the SEC to directly show an improper agreement so easily hidden would defeat the purpose of the statute. 375 U.S. at 200. The Supreme Court stated that, due to human nature, in the realm of fiduciaries, even the temptation to violate the trust relationship is a problem, and that when shown to be present, such a temptation is enough because improper conduct is typically hidden:

> This Court, in discussing conflicts of interest, has said: 'The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and **considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them. * * *'** * * * In Hazelton v. Sheckells, 202 U.S. 71, 79, 26 S.Ct. 567, 568, 50 L.Ed. 939, we said: **'The objection [to conflicts of interest] * * * rests in their**

> **tendency, not in what was done in the particular case. * * * The court will not inquire what was done. If that should be improper it probably would be hidden, and would not appear."** United States v. Mississippi Valley Generating Co., 364 U.S. 520, 550, 81 S.Ct. 294, 309, 5 L.Ed.2d 268, n. 14.

Id. The Court went on to apply this principle in that case, stating that "**[t]o impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty** as a condition precedent to protecting investors . . . **would effectively nullify the protective purposes of the statute**. Reading the Act in light of its background we find no such requirement commanded." 375 U.S. at 200. Thus, under Capital Gains, direct evidence of an improper arrangement is not necessary.

The ruling in Capital Gains notwithstanding, however, the Division in fact presented evidence that Montford's advice to his clients resulted in a financial benefit to Montford apart from his advisory fees. First, as stated above, at the hearing, Montford conceded that he had an expectation of additional payment in the fall of 2010. His incentive to influence Kowalewski to maximize that payment by continuing to bring new investment funds to SJK is, as noted by the Supreme Court, simply human nature. Moreover, the Division effectively showed that Montford testified – in December 2010, virtually in real time – that part of the "work" he performed for SJK in exchange for the money was meeting with his clients on behalf of SJK to recommend investing with SJK. [T. 61-66.]

Respondents' argument that they did not violate Section 206 also fails because they flatly ignore the Division's misrespresentation claims. Even if everything Respondents asserted in their papers were true (and the truth in nearly every instance is just the opposite), Respondents would still be liable under Sections 206(1) and 206(2) because they knowingly made material misrepresentations about a material fact in their 2009 and 2010 Forms ADV: "We do not accepts

any fees from investment managers . . . ." False and misleading statements and omissions are actionable under Section 206 (1) and (2). SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985); SEC v. Bolla, 401 F. Supp.2d 43, 70 (D.D.C. 2005). Respondents weakly assert that "the payments Montford received from SJK were not 'fees,'" but that is contrary to Montford's testimony and the documents in evidence. Montford testified that he considered the money from SJK to be a "fee," and the invoices submitted by Montford indicated on their face that they were for "Marketing and Syndication Fee for the SJK Investment Management LLC Launch." [T. 90; Ex. 4, p. CC-6; Ex. 17.] The statement in Respondents' 2010 Form ADV claiming they accepted no fees from investment managers was false when made, and Respondents have no defense.

F. Montford and Montford Associates Violated Section 207 of the Advisers Act

Respondents spend a paragraph arguing that that they did not violate Section 207 of the Advisers Act. Respondents' Brief, p.37. Respondents claim that the Division has failed to show, under Item 13.A. of the firm's 2010 Form ADV Part II, that the economic benefit received from SJK was conferred "in connection with" giving advice to clients. Respondents also assert that the Division cannot base its Section 207 claim on the representation contained in Schedule F of that same form that the firm did "not accept any fees from investment managers . . ." because Montford subjectively intended "any fees" to mean a finder's fee or commission. Respondents are incorrect.

Section 207 of the Advisers Act makes it unlawful for any person willfully to make any untrue statement of a material fact or omit to state any material fact required to be stated in an application or report filed with the Commission. Montford Associates' 2010 Form ADV Part II was prepared by Montford and deemed filed with the Commission on March 29, 2010. [Ex. 29.]

Item 13.A of Form ADV Part II stated that Montford and Montford Associates received no economic benefit from a non-client in connection with giving advice to clients. That response was materially false and misleading – even accepting, *arguendo*, Montford's version of events as true, he concedes that the administrative services he allegedly provided in exchange for the money were necessary to effectuate the advice he gave to his clients to invest with SJK. Thus, SJK, a non-client, provided an economic benefit in connection with that advice. This position is supported by Montford's (admittedly convoluted) testimony that the services he provided in exchange for the money were done on behalf of his clients, but paid for by SJK – it is precisely that sort of ethically precarious arrangement that Item 13.A. is designed to expose. [T. 71-72.]

Additionally, Respondents' 2010 Schedule F stated that Montford Associates would "disclose to clients ... all matters that reasonably could be expected to impair [the firm's] ability to make unbiased and objective recommendations." [Ex. 29.] Tellingly, Respondents offer no argument against this allegation, which clearly calls for disclosure of the fee arrangement with SJK. Also in Schedule F, the Forms ADV expressly represented that the firm did "not accept any fees from investment managers . . . ." Montford now claims that when he included the phrase "any fees," in his mind, he intended to limit the meaning to "a finder's fee or a commission." Respondents' Brief, p.37. Respondents' argument is not persuasive, as the representation in the disclosure document speaks for itself. In addition, the Division notes that even if Montford subjectively intended the meaning Respondents now advance, the use of the modifier "any" makes the language false and misleading and thus a sufficient basis for finding a violation.

All of the identified statements materially misstated the facts at the time and, as such, the 2010 Form ADV was false when filed in violation of Section 207. The Initial Decision's finding that Respondents violated Section 207 should be affirmed.

G. A Cease-and-Desist Order Against Respondents is Warranted

Respondents argue that the ALJ erred by issuing a cease-and-desist order because the Division has not sufficiently shown a risk of future violations. Respondents' Brief, p. 37. Respondents also argue that the cease-and-desist order is unenforceable, citing SEC v. Smyth, 420 F.3d 1225 (11th Cir. 2005). Id.

As the Commission has stated, "[t]hough 'some' risk [of future violations] is necessary, it need not be very great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation. To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist." In re KPMG Peat Marwick, LLP, 74 S.E.C. 357, 2001 WL 47245 at *24 (Jan. 19, 2001). Thus, Respondents' argument with respect to the risk of future violations fails because Respondents have already violated the securities laws and their assurances against future violations are not sincere.

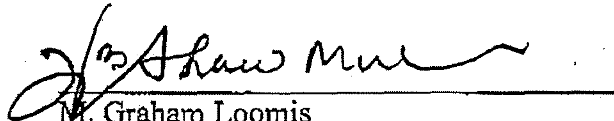
Regarding Respondents' argument that the cease-and-desist order is unenforceable because it simply requires them to "obey the law," Respondents argument and caselaw are based on injunctions issued by district courts. Here, Section 203(k) of the Advisers Act authorizes the Commission to order violators to cease and desist from committing such violations, and any future violations, of the same provisions of the Advisers Act that have been violated. Courts have long upheld the Commission's discretion to enter cease-and-desist orders that are based on

those provisions. Ponce v. SEC, 345 F.3d 722, 740-41 (9th Cir. 2003); KPMG, LLP v. SEC, 289 F.3d 109, 122-23 (D.C. Cir. 2002). Respondents' reliance on Smyth is misplaced, as that court predicated its concerns on SEC injunctions based on Fed.R.Civ.P. 65(d), which requires injunctions to specify "the act or acts restrained or required," 420 F.3d at 1233, fn.14. That rule has no application in these administrative proceedings.

IV. CONCLUSION

For the foregoing reasons, and based on the evidence presented by the Division at the hearing, the Initial Decision should be affirmed.

This 25th day of July, 2012



M. Graham Loomis
W. Shawn Murnahan
Michael J. Cates
Attorneys for the Division of Enforcement
Securities and Exchange Commission
950 East Paces Ferry Road, N.E., Suite 900
Atlanta, Georgia 30326-1382
murnahanw@sec.gov
(404) 842-7669 (Murnahan)
(404) 842-7666 (fax)