HARD COPY

RECEIVED
DEC 09 2014
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15446

In the Matter of **J.S. OLIVER CAPITAL MANAGEMENT, L.P., IAN O. MAUSNER, AND DOUGLAS F. DRENNAN,** **Respondents.**	**THE DIVISION OF ENFORCEMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR REVIEW OF RESPONDENTS J.S. OLIVER CAPITAL MANAGEMENT, L.P. AND IAN O. MAUSNER**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

Securities Exchange Act of 1934

Investment Advisers Act of 1940

FEDERAL REGULATIONS

I. INTRODUCTION

Respondents J.S. Oliver Capital Management, L.P. ("J.S. Oliver"), a registered investment adviser, and Ian O. Mausner ("Mausner"), J.S. Oliver's CEO, president, head portfolio manager, control person, and chief compliance officer (together, "Respondents"), petition for review only of the monetary penalty imposed by the Administrative Law Judge in the Initial Decision ("Initial Decision") issued on August 5, 2014.[1] The Division of Enforcement ("Division") supports the substantial penalties imposed on Mausner and J.S. Oliver, which appropriately reflect the egregious nature of Respondents' conduct, the high level of scienter involved, the substantial harm to investors caused by the fraud, and the need to deter such conduct and to impose high penalties in the public interest.

As extensively detailed in the Initial Decision and supported by the record, Mausner and J.S. Oliver engaged in two distinct frauds in breach of their fiduciary duty to clients. First, Mausner and J.S. Oliver engaged in a fraudulent "cherry-picking" scheme by allocating profitable trades to accounts of funds that Mausner managed, and allocating the losing trades to other, disfavored accounts. In doing so, he defrauded three clients who held these disfavored accounts, causing over $10.9 million in harm. One of the victims was a charitable foundation and another was a trust account for a widow in her late 70s. The cherry-picking scheme lasted over 18 months, with fraudulent allocations made on virtually a daily basis, involving tens of thousands and hundreds of millions of dollars of trades. Second, Mausner and J.S. Oliver misused over $1.1 million of "soft dollar" commission credits to pay Mausner's divorce settlement, to funnel cash into Mausner's pocket under the guise of office rent payments, to pay for Mausner's luxury timeshare apartment in New York City, and to pay the salary of one of Mausner's employees. To

---

[1] A third respondent, Douglas Drennan, who worked for Mausner and J.S. Oliver, has not petitioned for review of the Initial Decision or the penalties imposed against him.

perpetrate the soft dollar fraud, among other acts, Mausner fabricated documents and arbitrarily increased his "rent" payments to himself.

The hearing officer, Chief Judge Murray, properly ordered substantial penalties against Mausner and J.S. Oliver. For the cherry-picking violations, the hearing officer imposed a third-tier civil penalty of $2.5 million on Mausner and $12.3 million on J.S. Oliver, based upon a reasoned application of the relevant factors, the period during which the fraud persisted, and the public interest. The penalty is proportionate to the severity of the violations, as exhibited by the $10.9 million in harm Respondents inflicted on the disfavored accounts. For the soft dollar violations, the hearing officer imposed civil penalties of $2,675,000 on J.S. Oliver and $540,000 on Mausner, based on the same considerations.

In their petition for review, Respondents do not deny that they were properly found liable for engaging in this fraudulent conduct. Nor do they contest the findings of fact demonstrating the egregiousness of the fraud, or that, in perpetrating this fraud, they harmed their clients, acted with a high level of scienter, breached their fiduciary duties and violated the federal securities laws. Indeed, Respondents do not dispute that third-tier penalties, reserved for the highest level of fraud, are justified here.

Instead, Respondents argue that the penalties should be less, and seem to suggest that the Commission should limit the amount of the civil penalty to their pecuniary gain. But the disgorgement for the cherry-picking scheme is limited to $224,600 in performance fees earned in 2008 by J.S. Oliver, which is substantially less than the $10.9 million in investor harm imposed by the scheme. Therefore, a penalty equal to just Respondents' pecuniary gain would fail to address the gravity of their violations. Under the facts and circumstances here, and the substantial harm caused to investors from Respondents' conduct, a significantly higher civil penalty is well justified. Indeed, Respondents do not offer any legal authority that would justify limiting the civil penalty in such an egregious fraud to pecuniary gain, or explain how such a result is consistent with the fraud they committed or the harm they caused. With respect to the soft dollar fraud, Respondents callously breached their fiduciary duty and misused client assets to line Mausner's pockets, pay his personal expenses, and fraudulently pay his employee. Given the severity of Respondents' misconduct, a substantial penalty well in excess of Respondents' pecuniary gain is warranted and appropriate.

Accordingly, the Division urges the Commission to adopt and affirm the Initial Decision, and order a civil penalty of $3,040,000 against Mausner and a civil penalty of $14,975,000 against J.S. Oliver.

II. FACTUAL BACKGROUND

A. Background of J.S. Oliver and Its Operations

Mausner is the founder of J.S. Oliver and served as its president, head portfolio manager, control person, and chief compliance officer during the period at issue. (Initial Decision, pp. 2-3; Tr. 1205:7-8; 1205:21-1206:9.)[2] J.S. Oliver is a registered investment adviser that provides investment management services to separately-managed client accounts; its clients are varied, and include individuals, families, trusts, and charitable foundations. (Initial Decision, p. 2; Tr. 1205:4-6; 1207:5-23.) During the period at issue, Respondents managed four affiliated hedge funds: J.S. Oliver Investment Partners I, L.P., J.S. Oliver Investment Partners II, L.P., J.S. Oliver Offshore Investments, Ltd. (collectively, the "J.S. Partners Funds"), and J.S. Oliver Concentrated Growth Fund ("CGF") (together with the J.S. Partners Funds, the "J.S. Oliver Funds"). (Initial Decision, p. 2; Tr. 1235:6-14.) CGF began trading on June 1, 2008. (Initial Decision, p. 2; Tr. 1245:11-18; 1254:24-1255:15.) Mausner was ultimately responsible for all business decisions

[2] References to specific pages and lines of the hearing transcript are designated as "Tr. ___," and references to exhibits that were accepted into evidence are designated as "Div. Ex. __."

of J.S. Oliver and Mausner made all investment decisions for the J.S. Oliver Funds. (Initial Decision, p. 40; Tr. 1206:19-1207:4.)

B. Respondents Perpetrated an Illegal Cherry-Picking Scheme that Caused $10.9 Million in Investor Harm

In their petition, Respondents do not contest the findings in the Initial Decision that from at least June 2008 through November 2009, Mausner and J.S Oliver engaged in a fraudulent "cherry-picking" scheme in which they allocated profitable, favorable trades to J.S. Oliver's affiliated hedge funds and two other accounts (the "favored accounts") to the detriment of three client accounts (the "disfavored accounts"). Mausner used the cherry-picking scheme to enhance the apparent performance of J.S. Oliver's new fund, CGF, which was formed at the same time the cherry-picking scheme began, in an effort to attract new clients and generate management fees. (Initial Decision, p. 14.) At the time, the three older J.S. Partners Funds were well below their high water marks and not generating any fees. (*Id.*) While the cherry-picking scheme enhanced the apparent performance of CGF, it also caused harm of $10.9 million to the disfavored accounts, which included a charitable foundation and the trust account of a widow in her late 70s. (*Id.*, p. 41.) The hearing officer correctly found that because the cherry-picking fraud "comprised 98.6% of the dollar volume of all J.S. Oliver equity trading[,]" the scope of the fraud "involved the entire enterprise." (*Id.*, pp. 8-9.)

The evidence conclusively establishes Mausner's deliberate control of the cherry-picking scheme. To perpetrate the scheme, Mausner – who was the only person at J.S. Oliver who could make the determination to place a block trade – caused J.S. Oliver to execute block trades in omnibus accounts at different executing brokers. (Initial Decision, p. 4; Tr. 1209:14-1211:7.) J.S. Oliver then reported the block trades to its prime broker, BNP Paribas Prime Brokerage, Inc. ("BNP"), and then allocated the shares among the client accounts through BNP's online system. (Initial Decision, p. 4; Tr. 1211:9-22; Tr. 139:19-141:21; 148:5-14.) BNP's online system allowed an investment adviser to delay allocating trades until long after they had been executed. (Tr. 164:18-166:7.) Mausner then personally allocated the block trades among the favored and disfavored accounts, or else gave explicit direction to J.S. Oliver employees to make the allocations, often overriding previously determined allocation schema to manually allocate the trades. (Initial Decision, p. 4; Tr. 148:5-14; 1213:22-1214:1.)

Mausner's cherry-picking was quite blatant. Mausner simply waited to allocate trades for some time after execution which allowed him to assess accurately which trades were going to be profitable and which were not, and then Mausner put a disproportionate share of the profitable trades into favored accounts, and put a disproportionate share of unprofitable trades in the disfavored accounts. (Initial Decision, pp. 7-8; Div. Exs. 695A, ¶¶ 23-27, 601, 602.) When there were multiple trades in a single security over the course of a day, Mausner cherry-picked the most profitable trades and gave those to the favored accounts. (Initial Decision, p. 9; Div. Ex. 695A, ¶¶ 38-42.) The evidence also established that the greater the profitability of a trade, the more likely that Mausner would allocate it to one of the favored accounts and the less likely that he would allocate it to one of the disfavored accounts. (Initial Decision, p. 7; Div. Ex. 695A, ¶¶ 26-27 and Exs. 1, 2.)

The Division presented compelling statistical evidence through expert testimony that Mausner and J.S. Oliver systematically allocated a disproportionately large share of profitable equity trades to the favored accounts and allocated a disproportionately large share of unprofitable equity trades to the three disfavored accounts. (Tr. 121:11-18; Div. Ex. 695A, ¶¶ 12, 22-27 and Ex. 1.) The hearing officer analyzed and properly credited the expert testimony in reaching the conclusion that Respondents had engaged in an illegal cherry-picking scheme. (Initial Decision, pp. 5-11, 40-42.)

The evidence establishes that the size and scope of Respondents' cherry-picking scheme was pervasive during the 18-month period from June 2008 through November 2009. The hearing officer found that J.S. Oliver had high trading levels in 2009, ranging from ten to fifty trades a day. (Initial Decision, p. 5; Tr. 1064.) The trades in the favored and disfavored accounts comprised 98.6% of the dollar volume of all J.S. Oliver equity trading during the relevant period. (Initial Decision, pp. 8-9; Div. Ex. 695A, ¶ 12.) The Division produced expert testimony that the dollar volume of the cherry-picking trades allocated to the disfavored accounts over the relevant period was $974,343,695. (Div. Ex. 695a at Exhibit 13), so that the average monthly trading volume for those accounts during the relevant period was in excess of $54 million. To put the sheer volume of trades in context, the total value of one of the three disfavored accounts – the Sapling charitable foundation account – was approximately $30 million, which was to be invested long-term in high quality equities. (Initial Decision, pp. 10-11; Tr. 30, 35-36, 49-51, 69-70.)

In addition to the statistical evidence, the Division introduced convincing evidence that established Mausner's high level of scienter in carrying out his illegal cherry-picking scheme. For example, J.S. Oliver's prime broker BNP generated potential cherry-picking reports that it sent to investment adviser clients to alert them of potential problems. (Initial Decision, pp. 5.) While the record shows that BNP reported to Mausner at least one instance of potential cherry-picking in J.S. Oliver accounts during the relevant period, Mausner denied that he ever received such a report. (*Id.*) The hearing officer found Mausner's denial "disingenuous." (*Id.*, p. 41.) BNP also recommended that J.S. Oliver use average prices to allocate trades, but Mausner declined this advice. (*Id.*) Similarly, when the director of the Sapling Foundation, one of the three disfavored accounts, inquired concerning the disparity between Mausner's emails touting CGF's performance and the poor performance of the Sapling account, Mausner made material misrepresentations about Sapling's performance as compared to market benchmarks. (Initial Decision, pp. 11-14, 41; Div. Ex. 695a.)

C. Mausner and J.S. Oliver Misused over $1 Million of Client Soft Dollar Credits

Respondents do not contest the hearing officer's detailed findings that they fraudulently misused approximately $1.1 million of soft dollar credits to pay Mausner's personal obligations, to line his pockets, and to pay one of his employees under false pretenses, all in breach of Respondents' fiduciary duty to their clients.

Soft dollars, or client commission credits, are generated when an investment adviser negotiates to pay commissions that exceed the amount normally paid to compensate the broker for executing trades. Soft dollars are assets of the clients, not of the investment adviser. Under the "safe harbor" of Section 28(e) of the Securities Exchange Act of 1934 ("Exchange Act"), soft dollars may be used to pay for "brokerage and research services" for an investment adviser's managed accounts under certain circumstances without breaching its fiduciary duties to clients. Soft dollars may also be used to pay for other legitimate expenses of an investment adviser if the use of soft dollars is in the clients' best interest and is disclosed to clients with sufficient specificity so that the client can understand what benefit is being obtained with its soft dollars. But soft dollars cannot be used to pay personal expenses or to pay the salary of an employee under the guise of Section 28(e) research payments. (Initial Decision, pp. 42-43.)

The hearing officer found that "[t]his case shows a real world example of ... [the] use of soft dollars for purported non-Section 28(e) expenses" and that it "can be, as it is here, a travesty." (Initial Decision p. 42.) From January 2009 through November 2011, Mausner and J.S. Oliver misused over $1.1 million of client soft dollar credits: (1) to make a $329,365 payment that Mausner owed to his ex-wife under the terms of his divorce settlement, (2) to pay over $300,000 in rent to one of Mausner's companies for office space within his home at excessive rates, which allowed Mausner to funnel over $200,000 in cash into his own pocket, (3) to pay over $40,000 in maintenance fees on Mausner's personal timeshare at the St. Regis luxury hotel in New York City, and (4) to pay an employee, Douglas Drennan, more than $480,000 in salary and bonuses, under the guise of the Section 28(e) safe harbor for independent research. (Initial Decision, p. 16.)

The hearing officer correctly found that Mausner and J.S. Oliver misused client soft dollars with a high level of scienter. For example, after Mausner's entity, J.O. Samantha, received the first payments for $12,000 for two months of "rent" for office space at Mausner's residence for J.S. Oliver in February 2009, Drennan emailed Mausner with the subject line: "The eagle has landed in JO Samantha." (Initial Decision, p. 27.) The $12,000 soft dollar payment was promptly transferred from J.O. Samantha to Mausner's bank account. (*Id.*, pp. 27-28; Div. Ex. 424; Tr. 620-21.) Then, Mausner "retroactively" increased the rent from $6,000 to $10,000 a month from January 2009, and then to $15,000 a month beginning in July 2009, and the excess "rent" money was transferred from J.O. Samantha's account to Mausner's personal bank account. (Initial Decision, pp. 27-28.) The hearing officer found the rent payments "excessive" and without any "credible justification." (Initial Decision, pp. 44-45.) The hearing officer also found that "Mausner fraudulently and deliberately misappropriated client assets for his own benefit" when he transferred on a regular basis substantial sums of money from the excess rent payments – totaling over $200,000 – to his personal bank account. (Initial Decision, p. 45.)

Mausner did not simply line his own pocket with misused soft dollar funds, but also created a false document and deceived the soft dollar broker, Instinet LLC ("Instinet"), to procure a $329,365 soft dollar payment to pay a portion of Mausner's divorce settlement. (Initial Decision at 22-27.) There was substantial evidence that Mausner's ex-wife, Gina Kloes, had not worked at J.S. Oliver since 2005, and was not allowed to be anywhere near J.S. Oliver's offices since at least 2008. (Div. Ex. 24; Tr. 483-85, Initial Decision, pp. 22-23.) Nonetheless, in May 2009, Mausner falsely told Instinet that Ms. Kloes was an employee of J.S. Oliver, and Mausner worked with Drennan to create a fictitious document to procure a soft dollar payment of $329,365 from Instinet to J.S. Oliver. There is no dispute that this payment was to satisfy Mausner's obligation to his ex-wife under the terms of his divorce agreement. (Initial Decision, pp. 23-27.) The hearing officer found it "outrageous" that soft dollars were used to reimburse J.S. Oliver for this payment. (Initial Decision, p. 44.)

The hearing officer also found that Mausner engaged in a "blatantly fraudulent scheme and practice" when he arranged for the use of soft dollars to pay $40,094 for Mausner's St. Regis New York timeshare. (Initial Decision, p. 46.) This was a "misuse of client assets" with "no credible justification as a Section 28(e) soft dollar expense." (*Id.*)

Finally, the hearing officer correctly found that there is substantial evidence that Mausner deliberately rehired Drennan in 2009 solely because Drennan arranged to have his salary paid through a "sham entity" using soft dollars totaling approximately $480,000 under the guise of the Section 28(e) safe harbor. (Initial Decision, pp. 28-31, 45.) Mausner was happy to "get a great employee back for free." (*Id.*, p. 30.)

D. J.S. Oliver and Mausner Failed to Keep Required Records

Mausner and J.S. Oliver also failed to maintain certain records as required by the provisions of the Investment Advisers Act of 1940 ("Advisers Act"). First, J.S. Oliver failed to maintain records of trade blotters. (Initial Decision, p. 51; Tr. 1342:10-1344:11.) Second, J.S. Oliver failed to maintain originals of Mausner's email messages, and in particular, the persons to whom Mausner sent the email by blind (bcc) copy, in which he touted the performance of CGF and encouraged investments in that fund. (Initial Decision, p. 51; Tr. 1252:22-1253:8; 1256:1-6; 1257:17-24; 1259:25-1260:3; 1261:12-14.)

E. The Hearing Officer Did Not Find Mausner To Be a Credible Witness

At the hearing, Mausner showed no remorse for his conduct and did not take any responsibility for his actions. The hearing officer found Mausner "argumentative," showing a "lack of candor even when asked basic questions," and "disingenuous." (Initial Decision, p. 38.) With regard to the soft dollar payment to reimburse J.S. Oliver for Kloes's purported employee compensation, the hearing officer found that "[g]iven his education and background, Mausner's belief that there was a contract is simply incredible." (*Id.*, p. 44.) Instead, Mausner deliberately directed his colleague to create a fake contract. (*Id.*)

III. ARGUMENT

A. Given the Egregiousness of Respondents' Frauds, Third-Tier Penalties Were More than Warranted

The record of Respondents' pervasive and egregious fraud and Mausner's high level of scienter justifies the imposition of third-tier penalties under the Exchange Act and the Advisers Act. Respondents do not even contest the imposition of this tier of penalties, which are reserved for the highest level of fraud under the federal securities laws.

Section 21B(a) of the Exchange Act and Section 203(i) of the Advisers Act authorize the Commission to impose civil monetary penalties if doing so is in the public interest and a respondent has willfully violated any provision of, among other things, the Exchange Act or the Advisers Act. 15 U.S.C. §§ 78u-2(a)(1), 80b-3(i). These sections authorize the imposition of civil penalties where, as here, the proceeding was instituted pursuant to Section 21C of the Exchange Act or Sections 203(e), 203(f), or 203(k) of the Advisers Act. *Id.* A three-tier system establishes the maximum civil penalty that may be imposed for each violation. *Id.* Where a respondent's conduct involved fraud, deceit, or deliberate or reckless disregard of a regulatory requirement, and "resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain," the Commission may impose a third-tier penalty.

In determining whether an administrative sanction is in the public interest, the Commission generally focuses on the factors identified in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979). Those factors are: the egregiousness of the respondent's actions, the isolated or recurrent nature of the violations, the degree of scienter involved, the sincerity of the respondent's assurances, if any, against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. *In the Matter of Gary M. Kornman*, Exchange Act Rel. No. 59403, 2009 SEC Lexis 367, at *22 (Feb. 13, 2009). The Commission's "inquiry into the public interest is a flexible one, and no one factor is dispositive." *In the Matter of Toby G. Scammell*, Advisers Act Rel. No. 3961, 2014 SEC Lexis 4193, at *23 (Oct. 29, 2014).

In addition to the *Steadman* factors, the Commission also considers whether imposing penalties is in the public interest. *In the Matter of Raymond James Financial Services, Inc., J. Stephen Putnam, and David Lee Ullom*, Initial Decision Rel. No. 296, 2005 SEC Lexis 2368, at *197 (Sept. 15, 2005). The Commission's determination that a sanction is in the public interest is based on the particular circumstances and entire record of the case. *Id.* In determining whether a civil penalty is in the public interest, the Commission may also consider: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the resulting harm to other persons; (3) any unjust enrichment and prior restitution; (4) the respondent's prior regulatory record; (5) the need to deter the respondent and other persons; and (6) such other matters as justice may require. 15 U.S.C. §§ 78u-2(a), 80b-3(i). The Commission also considers the extent to which the sanction will have a deterrent effect. *In the*

Matter of David F. Bandimere and John O. Young, Initial Decision Rel. No. 507, 2013 SEC Lexis 3142, at *228-229 (Oct. 8, 2013).

Rather than contest the hearing officer's findings that their frauds warrant the imposition of third-tier penalties, Respondents argue only that the amounts of the penalties imposed against them are too high. Indeed, they could not have credibly contested the imposition of third-tier penalties even if they had wanted to. The Initial Decision is replete with findings that Respondents engaged in egregious conduct. Mausner and J.S. Oliver do not dispute any of these findings. For example, the hearing officer found that Mausner willfully cherry-picked favorable trades for certain favored accounts and allocated unfavorable trades to disfavored accounts (Initial Decision, pp. 40-41), that Mausner's reimbursement of his divorce settlement payment with client soft dollars was "outrageous" (*id.*, p. 44), that Mausner's scheme to use soft dollars to pay himself inflated "rent" was "a fraudulent scheme and practice in every sense" (*id.*), that Respondents' "use of soft dollars to pay Drennan through the sham entity Powerhouse ... was fraud" (*id.*, p. 45), that Mausner's use of client soft dollars to pay expenses for his timeshare was "a blatantly fraudulent scheme and practice" (*id.*, p. 46), that Mausner was not a credible witness, and was argumentative and showed a lack of candor even when asked basic questions (*id.*, p. 38), and that Mausner acted with a high level of scienter (*id.*, pp. 48-49). The hearing officer considered the lack of prior violations by Mausner and J.S. Oliver, but found that that factor did "not outweigh the other public interest considerations, given the egregious nature of Respondents' misconduct." (*Id.*, p. 61.) The hearing officer found that "a third-tier penalty is authorized because Respondents' violations involved fraud, deceit, manipulation, and deliberate and reckless disregard for regulatory requirements." (*Id.*, p. 60.) The record overwhelmingly supports the hearing officer's finding that third-tier penalties should be imposed against Respondents.

B. The Penalty Amounts Were Justified

Respondents' entire petition focuses exclusively on challenging the amount of the third-tier penalty awarded. The maximum third-tier civil penalty was $130,000 for a natural person and $650,000 for any other person for each violation prior to March 3, 2009, and $150,000 for a natural person and $725,000 for any other person for each violation after that date. 17 C.F.R. §210.1004, Subpt. E, Table IV.

In determining the appropriate amount of the penalty to be imposed, courts and the Commission consider several factors, in addition to the *Steadman* and related factors assessed in determining whether to impose a penalty. The "*Lybrand*" factors commonly used in determining the amount of the penalty are: (1) the egregiousness of the violations at issue; (2) the respondents' scienter; (3) the repeated nature of the violations; (4) the respondents' failure to admit to their wrongdoing; (5) whether the respondents' conduct created substantial losses or the risk of substantial losses to other persons; (6) the respondents' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to the respondents' demonstrated financial condition. *SEC v. Lybrand*, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003); *Bandimere*, 2013 SEC Lexis 3142 at **251-252. As with the determination of whether to impose a penalty, the analysis of what amount of penalty is appropriate is a flexible one, which depends heavily on the specific facts and circumstances of each case. *SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319, 311 (S.D.N.Y. 2007) ("[w]hile these factors are helpful in characterizing a particular defendant's actions, the civil penalty framework is of a 'discretionary nature' and each case 'has its own particular facts and circumstances which determine the appropriate penalty to be imposed'"); *see also Bandimere* at *251. As discussed below, when considering the relevant factors and the statutorily-prescribed considerations, the amounts of the penalties imposed by the hearing officer against Respondents for each of the two frauds was well justified by the record.

1. The hearing officer appropriately ordered substantial third-tier penalties against Mausner and J.S. Oliver for their cherry-picking violations

a. The *Steadman* and *Lybrand* factors support a high penalty amount

In ordering substantial third-tier penalties against Mausner and J.S. Oliver for their cherry-picking violations, the hearing officer correctly considered and applied the factors identified above. The hearing officer first reviewed the *Steadman* factors to find that the sanctions against Mausner and J.S. Oliver would be in the public interest. The hearing officer found that Mausner's and J.S. Oliver's violations were egregious, and that Mausner "acted with a high degree of scienter." (Initial Decision, pp. 54-55.) Indeed, the hearing officer specifically found that "Mausner received a top-notch business education and has high-level securities industry experience. The knowledge, demeanor, and understanding Mausner exhibited during this proceeding leave no doubt that he acted knowing that what he was doing personally, and through J.S. Oliver, was wrong." (*Id.*) The hearing officer further found that the cherry-picking violations were "repeated, and not isolated or technical offenses." (*Id.*) Additionally, the hearing officer found that "Mausner shows no remorse." (*Id.*) The hearing officer also found that, if Mausner were to continue in his present occupation, it would "undoubtedly" present an opportunity for future violations. (*Id.*) The hearing officer's analysis showed that all of the *Steadman* factors support substantial sanctions against Mausner and J.S. Oliver.

The hearing officer further considered the relevant factors in determining that substantial penalties against Mausner and J.S. Oliver were in the public interest. The hearing officer found that Respondents' cherry-picking "resulted in substantial losses for investors as well as substantial pecuniary gain to Respondents." (Initial Decision, p. 60.) Specifically, the hearing officer found that the cherry-picking violations "caused $10.9 million in harm to the three disfavored accounts." (*Id.*, pp. 60-61.) The hearing officer further found that the fact that J.S. Oliver and Mausner were investment advisers was of "paramount importance," in that they breached their fiduciary duties to put their clients' interests ahead of their own. (*Id.*, p. 61.) Based on the hearing officer's review of the relevant factors, including the egregiousness of the Respondents' conduct, the gains they received and the harm they inflicted on investors, their high level of scienter, their breaches of their fiduciary duties, and the repeated nature of their violations, the hearing officer concluded that all of these factors and the need for deterrence "counsels in favor of the maximum penalty." (*Id.*)

Focusing on the total amount of the penalty here, the evidence strongly supports the hearing officer's findings underlying the civil penalties of $12,300,000 against J.S. Oliver and $2,500,000 against Mausner as a result of their cherry-picking violations. Mausner's cherry-picking was brazen and egregious and perpetrated with high scienter. Mausner blatantly breached his fiduciary duties, misled his clients, and placed his personal interests ahead of those of his clients and fund investors. (Initial Decision, pp. 40-41.) Mausner enriched himself and his firm while causing millions of dollars of harm to his clients, which included a charitable foundation and a widow in her late 70s. His actions were not isolated, but rather involved multiple fraudulent allocations perpetrated over an 18-month period. Mausner's cherry-picking scheme required detailed preparation and evinces a high level of scienter, which "exacerbates the egregiousness of his misconduct." *See In the Matter of James C. Dawson*, Advisers Act Rel. No. 3057, 2010 SEC Lexis 2561 at *17 (July 23, 2010). When the owner of the disfavored Sapling account asked about the disparity between the performances of CGF and his foundation's account, Mausner lied to his client and provided him with "disingenuous explanations to cover-up" his conduct. (Initial Decision, p. 48.) Mausner's cherry-picking fraud constituted abhorrent conduct orchestrated with the highest level of scienter, and it warrants a severe penalty. *See, e.g., In the Matter of James C.*

Dawson, Initial Decision Rel. No. 392, 2009 SEC Lexis 4143, at *17 (Dec. 18, 2009) ("[t]here could not be a more blatant breach of a fiduciary duty or the exercise of a higher degree of scienter than deliberately establishing a separate account and deliberately allocating to that account trades [the respondent] knew were more profitable than the trades he allocated to the accounts of his clients…").

In addition, the need for deterrence, both with respect to Mausner and others, is great. *See, e.g., In the Matter of John Thomas Capital Management Group LLC*, Initial Decision Rel. No. 693, 2014 SEC Lexis 4162, at *95 (Oct. 17, 2014) ("[d]eterrence … requires a substantial penalty because of the abuse of the fiduciary duty owed by investment advisers"); *SEC v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014) ("[c]ivil penalties are intended to punish the individual wrongdoer and to deter him and others from future securities violations"). Notably, Mausner has never acknowledged the wrongfulness of his cherry-picking. On the contrary, in his post-hearing brief, Mausner argued that no cherry-picking occurred. (Respondents' Post-Hearing Brief, p. 24). Particularly in light of Mausner's failure to recognize the wrongfulness of his conduct, the need to deter him is great. *See In the Matter of Angelica Aguilera*, Initial Decision Rel. No. 501, 2013 SEC Lexis 2195, at *93 (July 31, 2013) ("the need to deter [respondent was] strong" because "she ha[d] not recognized the wrongful nature of her conduct").

The hearing officer's determination to order substantial third-tier penalties against Mausner and J.S. Oliver for their cherry-picking violations is abundantly supported. Given that Respondents have not challenged the application of the record to any of these findings, they should not be revisited.

b. Using each month as the "violative" act was appropriate and, in fact, was conservative

In calculating the appropriate amounts of civil penalties, the hearing officer made detailed findings regarding the number of violations committed by Mausner and J.S. Oliver. Specifically, Chief Judge Murray found that "because the cherry-picking activities of J.S. Oliver and Mausner occurred over the eighteen-month Relevant Period, from June 2008 to November 2009, each month of such continuous misconduct should count as one unit of violation," for a total of 18 violations related to the cherry-picking misconduct. (Initial Decision, p. 61.) Using the respective maximum penalties in effect for pre-March 3, 2009 and post-March 3, 2009 violations, the hearing officer calculated third-tier penalties of $2,500,000 against Mausner and $12,300,000 against J.S. Oliver related to the cherry-picking violations. (*Id.*)

The hearing officer's determination that each month that Mausner and J.S. Oliver cherry-picked more profitable trades for the favored accounts and dumped less favorable trades into the disfavored accounts constituted a separate violation was appropriate. For example, in *SEC v. K.W. Brown & Co.* – a cased cited by the hearing officer in making that determination – a district court imposed substantial penalties on a defendant found liable for cherry-picking trades. 555 F. Supp. 2d 1275, 1314-15 (S.D. Fla. 2007). The court expressly approved of using the months of the cherry-picking as a means to calculate the penalty, noting that it could "easily impose 46 third-tier penalties" against the defendants who, "every month for 46 months," had "caused substantial losses to investors since investors were losing approximately $200,000 a month." *Id.* at 1315. Ultimately, however, the court chose to impose a penalty equal to the defendants' "pecuniary gain" of $4.5 million. *See id.*; *see also In the Matter of OptionsXpress, Inc., Thomas E. Stern, and Jonathan I. Feldman*, Initial Decision Rel. No. 490, 2013 SEC Lexis 1643, at **265-66 (June 7, 2013) (ordering respondent broker-dealer to pay a separate civil penalty for each of 1,200 violations of Regulation SHO, and ordering a client to pay a separate civil penalty for each of 390 antifraud violations).

Respondents argue that the Initial Decision "misreads" *K.W. Brown*, stating that although "*K.W. Brown* does note in passing that the per-month approach would be compatible with the vague statutory word 'act,'... it does not say the per-month approach would be appropriate in that case – or ever." (Respondents' Opening Brief ("Resp. Br."), p. 9.) But it is Respondents' brief, not the Initial Decision, that misreads *K.W. Brown*. The *K.W. Brown* court specifically endorsed the "per-month approach," finding that it could "easily" impose a penalty for each month that the defendants engaged in cherry-picking. 555 F. Supp. at 1314-15. However, just because the *K.W. Brown* court ultimately ordered a civil penalty of $4.5 million based on the defendant's pecuniary gain does not mean that a penalty based on the number of months of the cherry-picking is inappropriate, as Respondents suggest. (Resp. Br., p. 9.) In stark contrast to *K.W. Brown*, where the defendants reaped significant gains from cherry-picking to their own accounts, the Respondents did not misallocate trades to their personal accounts, but only profited through increased fees of just under $225,000. As discussed below in Section III.C, to impose a penalty of that small an amount for an 18-month fraud that caused over $10 million in harm to clients would be far too small of a penalty. Focusing on the "proper amount" of the total penalty (Resp. Br., p. 9), the hearing officer was warranted in determining that each month that Respondents engaged in fraudulent cherry-picking constituted a separate violation.

In fact, determining civil penalties on a monthly basis is a relatively conservative approach under the facts of this case. As an alternative, the hearing officer could have appropriately found that each *day* over the course of the 18 months that Mausner fraudulently allocated profitable trades to the favored accounts and unprofitable trades to the disfavored accounts should be considered a separate violation of the antifraud provisions, since Mausner's "violative act" was his daily act of transmitting the fraudulent allocation information for that day's trades to J.S. Oliver's prime broker. Indeed, each day that Mausner engaged in cherry-picking required a conscious decision to commit further fraud.[3]

As in *K.W. Brown*, the hearing officer here adopted a more conservative approach that focused on the total penalty amount. In adopting this approach, the hearing officer determined that each separate month of cherry-picking constituted a separate violation, and therefore ordered civil penalties of $12,300,000 against J.S. Oliver and $2,500,000 against Mausner for their cherry-picking violations. The hearing officer's approach appropriately considers all of the factors relevant to a determination of an appropriate penalty, and also considers the gravity of the harm Respondents inflicted on their clients. This approach is also supported by the conclusions of the Division's cherry-picking expert, who offered a detailed analysis that calculated the disparity in performance between the favored and disfavored accounts during each of 18 months from June 2008 through November 2009. (*See* Div. Ex. 695a, at ¶ 35 and Ex. 5 thereto.)

2. The hearing officer appropriately ordered substantial third-tier penalties against Mausner and J.S. Oliver for their soft dollar violations

In ordering civil penalties against J.S. Oliver and Mausner as a result of their soft dollar violations, the hearing officer analyzed the same factors as were considered for assessing the penalties for the cherry-picking violations. The hearing officer made detailed findings regarding the egregiousness of Mausner's conduct, his high level of scienter, the recurrent nature of the violations, and the benefit to Mausner and J.S. Oliver by "using client assets to pay for inappropriate expenses." (Initial Decision, p. 55.) The hearing officer's findings regarding Mausner's failure to recognize the wrongful nature of his soft dollar abuses were unambiguous. "Mausner's failure to come to grips with what he did is shown by his futile attempts to blame a law

[3] Using a "per-day" approach, the civil penalties would have been more than $250 million against J.S. Oliver and more than $50 million against Mausner.

firm and executing brokers for his misconduct." (*Id.*) The hearing officer further found that each of the four categories of soft dollar misuses should be considered as a single unit of violation, which "results in four violations for J.S. Oliver and Mausner based on the [divorce settlement] payment, rent payments, Powerhouse payments, and timeshare payments." (*Id.*, p. 61.) The hearing officer calculated the third-tier penalties related to the soft dollar violations as $540,000 against Mausner and $2,675,000 against J.S. Oliver. (*Id.*)

Again, Respondents do not dispute the hearing officer's findings or the appropriateness of third-tier penalties with respect to their soft dollar violations. Instead, they argue that it was improper to use two different ways of defining the violative act for their two different frauds. The hearing officer defined the "violative act" for the soft dollar fraud as each of the four incidents, and, as discussed above, defined the violative act for the cherry-picking as each month the scheme took place. Relying on *Rapoport v. SEC*, 682 F.3d 98 (D.D.C. 2012), Respondents argue that it was wrong to "mix" the methods by treating their cherry-picking violations differently than their soft dollar abuses in determining the number of violations.

First of all, Mausner and J.S. Oliver engaged in two totally distinct frauds, and the mechanisms to accomplish these frauds were very different. They involved different schemes and different people. Indeed, the cherry-picking was carried out by Mausner alone. One of the respondents in this proceeding—Douglas Drennan, who did not appeal the Initial Decision—participated only in the soft dollar abuse, and was not even involved in the cherry-picking fraud. The soft dollar fraud involved Respondents misrepresenting facts and fabricating documents in their dealings with their executing broker, while the cherry-picking fraud involved fraudulent allocations submitted to their soft dollar broker. Moreover, the two different frauds did not occur over identical time periods. As the facts establish, the cherry-picking scheme occurred over an 18-month period from June 2008 through November 2009. Mausner did not start the soft dollar scheme until January 2009, and it persisted through November 2011. The cherry-picking and soft dollar frauds were carried out entirely independent of each other; the ability of Respondents to perpetrate one of the frauds had no bearing on their ability to perpetrate the other fraud. Accordingly, there is no basis in the facts to calculate the penalties equally for the two frauds.

Moreover, nothing in *Rapoport* or elsewhere in the law requires different frauds to be treated similarly for the purposes of determining the number of violations. *Rapoport* dealt primarily with a respondent's argument that the Commission inconsistently applied a rule of practice regarding setting aside defaults. *See, e.g., In the Matter of Donald L. Koch and Koch Asset Management LLC*, Exchange Act Rel. No. 72179, 2014 SEC Lexis 1684, at *51, n.141 (May 16, 2014). In addition to addressing that issue, the court in *Rapoport* remanded to the Commission the issue of calculating the appropriate civil penalty, finding that the hearing officer's reasoning was inaccurate "because he applied a faulty formula to calculate the penalties" and, specifically, because he never determined how many violations were attributable to each respondent. 682 F.3d at 107-8. The court held simply that, to impose penalties in an administrative proceeding, "the Commission must determine how many violations occurred and how many violations are attributable to each person, as the statute instructs." *Id.* at 108; *see, e.g., Bandimere*, 2013 SEC Lexis 3142, at *249 (citing *Rapoport* for the requirement that "[t]he Commission must determine how many violations occurred to impose civil penalties under the statute"). *Rapoport* requires only that the Commission provide "some meaningful explanation for imposing sanctions," but found that under the particular facts of that case, the hearing officer's penalty analysis in that case was improper because "it was nonexistent." *Id.*, p. 108.

Here, the hearing officer provided much more than "some meaningful explanation" for the penalties imposed against Mausner and J.S. Oliver, and in fact went into great detail regarding the relevant factors, including the egregiousness of their frauds, Mausner's high level of scienter and failure to acknowledge his wrongful conduct, the repeated nature of their violations, the gains to respondents and the losses they caused their clients, and the need for deterrence.[4] (Initial Decision, pp. 59-62.) The hearing officer found that Mausner stole client assets through the soft dollar abuses and he placed his personal interests ahead of those of his clients and fund investors. Examples of Mausner's high level of scienter with the soft dollar violations abound, from his fabrication of a purported contract excerpt and using that falsified document to claim reimbursement for his divorce settlement payment with client soft dollars, to repeatedly increasing the excessive purported "rent" paid with client soft dollars to an entity that he controlled. Respondents' soft dollar violations were not isolated, but rather involved multiple frauds perpetrated over an extended period. Indeed, Mausner's soft dollar fraud involved four separate forms of misuse of client soft dollars, which occurred over a two-year period and, in the cases of the misuse of client soft dollars for inflated "rent" to Mausner and to pay salary and bonuses to Drennan, were invoiced every month. Amazingly, not only does Mausner not accept any responsibility for his soft dollar violations, he has the audacity to blame others for his violations. For example, in his post-hearing brief, Mausner argued that "[t]he guilty parties here are [Mausner's counsel] and Instinet, not [J.S. Oliver]." Resp. Br., p. 51. Particularly in light of Mausner's failure to recognize the wrongfulness of his conduct, the need to deter him is great. *See Aguilera*, 2013 SEC Lexis 2195, at *93. All of these factors reinforce the hearing officer's

---

[4] Even though there is no factual or legal support for Respondents' argument, if there were a requirement to treat different kinds of frauds similarly for purposes of determining what constitutes a violation, the Division would recommend that each of the 24 months that Mausner caused his excessive "rent" to be paid with client soft dollars, or each of the 24 months that Mausner caused Drennan to be paid a salary or bonus with client soft dollars, be treated as a separate violation. (*See* Div. Exs. 140, 307, 708.) If consistency among Respondents' multiple frauds were the paramount factor, the Division would recommend that Mausner and J.S. Oliver be ordered to pay 24 separate third-tier penalties for each month of soft dollar violations, in addition to 18 separate third-tier penalties for each month of their cherry-picking violations.

determination to order substantial third-tier penalties against Mausner and J.S. Oliver for their soft dollar violations.

C. A Civil Penalty Should Be Proportionate to the Gravity of a Respondent's Conduct, not to the Amount of Pecuniary Gain

Respondents' argument that civil penalty amounts must be proportional "to other dollar figures in a case, particularly to the respondent's gain" is wrong. (Resp. Br., pp. 12-13). The statutory authorization to impose civil penalties specifically provides for penalties "without regard to defendants' pecuniary gain." *In the Matter of Ronald S. Bloomfield, Robert Gorgia, and John Earl Martin, Sr.*, Exchange Act Rel. No. 71632, 2014 SEC Lexis 698, at *91 (Feb. 27, 2014) (Commission Opinion). In *Bloomfield*, the Commission found that a penalty that was, in the case of one respondent, 27 times the amount of the respondent's pecuniary gain, was proper, finding that the respondent's egregious conduct justified the high penalties ordered against him. The Commission held that civil penalties "are not limited to the amount of profits derived from the violation" and concluded "that the facts and circumstances of this case demonstrate that limiting civil penalties to the amount of disgorgement would be inappropriate." *Id.; see also CFTC v. Levy*, 541 F.3d 1102, 1112 (11th Cir. 2008) (rejecting defendant's argument that $600,000 civil penalty was excessive because he received only $20,000 from the violations where statute authorized a $120,000 penalty for "each violation," and a penalty in the amount of defendant's profits would "utterly fail[] to account for the brazen, repeated, and intentional nature of" the defendant's violations); *SEC v. Todt*, 2008 U.S. Dist. Lexis 2087, at **39-40 (S.D.N.Y. Feb. 25, 2000) (imposing $200,000 civil penalty, or $50,000 for each of four attempted sales that violated the securities laws, despite the absence of any pecuniary gain, given "the audacity of the fraud, the magnitude of the sums involved, the repeated nature of the offenses, and the egregious explanations under oath…").

The Commission has clearly explained that civil penalties should "reflect the gravity of Respondents' misconduct." *In the Matter of Montford and Co., Inc.*, Advisers Act Rel. No. 3829, 2014 SEC Lexis 1529, at *107, 108, n. 213 (May 2, 2014); *see also In the Matter of Sisung Securities Corp. and Lawrence J. Sisung, Jr.*, Exchange Act Rel. No. 56741, 2007 SEC Lexis 2562, at *33 and n.54 (Nov. 5, 2007) (the Commission's ability to impose civil money penalties for securities law violations "greatly increases deterrence, while also providing the flexibility to tailor a remedy to the gravity of a situation") (*citing* H.R. Rep. No. 101-616, at 17 (1990)).

A recent case from the District of Columbia Circuit, *Collins v. SEC*, 736 F.3d 521, 526 (D.D.C. 2013), is instructive. In *Collins*, the respondent appealed the Commission's decision ordering him to pay civil penalties of $310,000, arguing that the penalty amount was too high when compared to his disgorgement of $2,915. The court rejected the respondents' argument, finding that "disgorgement obviously doesn't fully capture the 'harm' side of the proportionality test that Collins's reply brief invites us to consider..." *Id.* The court further recognized that harm caused by a respondent is only one of several factors that the Commission may consider in assessing an appropriate civil penalty. "[T]he relation between the civil penalty and disgorgement (and other measures of injury) is informative, particularly in comparison with other cases, but hardly decisive." *Id.* The court referenced several other factors that supported the substantial penalty against *Collins*, including the egregiousness of his conduct, exhibiting a "clear disregard for customers' interests," the fact that Collins falsified documents, and the Commission's interest in deterrence, and upheld the Commission's determination of the appropriate civil penalty against the respondent, even though it was more than 100 times his disgorgement amount, and greater than the harm that he inflicted on his victims. (*Id.*)

The analysis here is also analogous to that employed in *OptionsXpress*, in which the hearing officer determined that a broker-dealer and a trader should each be ordered to pay a civil penalty of $2 million based on their violations of Regulation SHO and other market manipulation activities, and consequently ordered that the broker-dealer pay $1,667 for each of 1,200 violations and that the client pay $5,128 for each of 390 violations. 2013 SEC Lexis 1643, at **265-66. As *Collins* and *OptionsXpress* show, the proper focus is on the total amount of the penalty, in light of the gravity of the respondent's misconduct, as evidenced by the specific facts and circumstances of each case. Even Mausner and J.S. Oliver appear to agree with that proposition. *See* Resp. Br. at p. 9 (citing *K.W. Brown* and recognizing that the court there "focused on the proper amount of the total penalty").

Indeed, most of the same factors that the *Collins* court identified as justifying the substantial penalty against the respondent there are present here. As in *Collins*, Respondents' conduct here was unquestionably egregious, and Mausner repeatedly exhibited a disregard for his clients' interests. Mausner falsified documents to facilitate his soft dollar fraud, as did the defendant in *Collins*. And as in *Collins*, the Commission has a strong interest in deterring future violations. Most importantly, the civil penalties ordered against Mausner and J.S. Oliver are commensurate with the harm that they inflicted on their clients. Respondents caused $10.9 million in harm to the disfavored accounts, including a charitable trust and an elderly widow, through their cherry-picking fraud. They also blatantly stole more than $1.1 million in client assets through their soft dollar fraud. But if Respondents had their way – and the penalty was capped at their gains – then, for example, they would only have to pay about $225,000 in penalties for their cherry-picking fraud that caused over $10 million in harm to a widow and a charity. Fortunately, that is not the law. The substantial civil penalties ordered against Respondents, which are commensurate with the harm they inflicted on their clients, are warranted.

D. The Initial Decision Provided Much More than a "Reasoned Explanation" for the Civil Penalties Ordered

Respondents' argument that the Initial Decision did not give a "reasoned explanation" for the civil penalties ordered is meritless. Only in the exceedingly rare case where the penalty analysis was "nonexistent" has a court found that a "reasoned explanation" for a civil penalty was not provided. *See Rapoport*, 682 F.2d. 98, 108 ("the Commission's analysis, via the ALJ, was not just superficial, it was nonexistent"); *see also Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1099 (D.D.C. 2005) (stating that the Commission "did not even cursorily explain" the elements of a third-tier violation, including how a respondents violations involved fraud, deceit or manipulation, or how their violations resulted in substantial losses to other persons or substantial gain to the respondent). In contrast to these aberrant cases, throughout the Initial Decision here the hearing officer described in great detail Respondents' multiple frauds and the many factors underlying the decision to impose substantial civil penalties against them. Respondents' claim that the Initial Decision lacks a "reasoned explanation" for the assessment of substantial civil penalties against Respondents is belied by any rational reading of the Initial Decision.[5]

In addition, contrary to Respondents' argument, there is no requirement that the Commission "explain why the penalty is warranted in light of other sanctions imposed, including why other sanctions imposed will have the desired punitive effect." (Resp. Br. at 7.) Neither of the two cases cited by Respondents stands for that proposition. Indeed, the cited cases are inapposite because neither of them involved an administrative proceeding. *SEC v. Conaway*, 697 F. Supp. 2d 733 (E.D. Mich. 2010); *SEC v. Universal Express*, Inc., 646 F. Supp. 2d 552 (S.D.N.Y.

---

[5] Even if the facts were different and the hearing officer's explanation of the appropriate penalty were inadequate, "any failure to articulate the proper standard by the law judge is cured by [the Commission's] *de novo* review." *In the Matter of Donald L. Koch and Koch Asset Management, LLC*, 2014 SEC Lexis 1684 at *51, n.141 (May 16, 2014).

2009). Instead, the cases each involved district court actions where a court was called upon to determine the appropriate penalty amount upon motion of the Commission. Although the courts in these two cases, under the specific facts and circumstances of those cases, focused on the deterrent effect of other sanctions imposed, there is absolutely no requirement that the Commission undertake the same analysis. Indeed, deterrent effect is only one of several factors relevant to a determination of whether a sanction is in the public interest, and the Commission can weigh the various factors as appropriate in each particular case. *See In the Matter of Robert G. Weeks,* Initial Decision Rel. No. 199, 2002 WL 169185, at *58 (Feb. 4, 2002) ("[n]ot all factors may be relevant in a given case, and the factors need not all carry equal weight").

Finally, Mausner's and J.S. Oliver's related assertion that the Commission must "expressly state why a 'less severe' sanction would not suffice" is utterly false. (Resp. Br. at p. 8.) "There is no requirement that the Commission must articulate why a less drastic remedy ... will not suffice." *In the Matter of Lodavina Grosnickle*, Initial Decision Rel. No. 441, 2011 SEC Lexis 3969, at **19-20 (Nov. 10, 2011); *see also Lowry v. SEC*, 340 F.3d 501, 504 (8th Cir. 2003) ("The court's role is to decide only whether, under the applicable statute and the facts, the agency made 'an allowable judgment in its choice of the remedy'"); *Vernazza v. SEC*, 327 F.3d 851, 862 (9th Cir. 2003) (reviewing sanctions only for abuse of discretion); *Sheldon v. SEC*, 45 F.3d 1515, 1517 n.1 (11th Cir. 1995) ("the Commission's choice of sanction may be overturned only if it is found 'unwarranted in law or . . . without justification in fact'") (quoting *Steadman*, 603 F.2d at 1140). As described throughout this brief, in light of their unconscionable conduct, there is ample justification for the substantial civil penalties that the hearing officer ordered against Mausner and J.S. Oliver.

E. The Amounts of Civil Penalties Depends upon the Facts and Circumstances of a Particular Case, not upon Sanctions Imposed in Previous Cases

Finally, Respondents' argument that the Initial Decision does not consider "history and precedent" also fails. Respondents cite *Collins* and *Rapoport* for the proposition that "history and precedent" demonstrates that "penalty amounts consistently reflect proportionality within cases." Resp. Br., p. 20. But "the Commission is not obligated to make its sanctions uniform," and it is not necessary to compare the sanction under the specific facts and circumstances of a particular case "to those imposed in previous cases." *Kornman v. SEC*, 592 F.3d 173, 188 (D.D.C. 2010); *see also Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 187 (1973) (holding that "[t]he employment of a sanction within the authority of an administrative agency is ... not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases"). Indeed, the Commission has specifically held that "imposing penalties in an amount greater than disgorgement in response to egregious misconduct is consistent with our precedent." *Bloomfield*, 2014 SEC Lexis 698, at *91. The Commission "consistently [has] held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases." *In the Matter of Kent M. Houston*, Exchange Act Rel. No. 71589, 2014 SEC Lexis 614, at *33, n.60 (Feb. 20, 2014).

Here, as described above, the hearing officer properly considered the facts and circumstances of this particular case, including the egregiousness of Respondents' conduct, their high level of scienter, the repeated nature of their violations, their refusal to acknowledge any wrongdoing, the need for deterrence, and the substantial amount of harm that they caused. In light of all of these factors, the civil penalties ordered by the hearing officer were appropriate, particularly given the gravity of the harm inflicted by Respondents.

IV. CONCLUSION

For the reasons set forth above, the Division respectfully requests that the Commission affirm the Initial Decision and order civil penalties of $3,040,000 against Mausner and $14,975,000 against J.S. Oliver.

Dated: December 8, 2014

Respectfully submitted,

David J. Van Havermaat
John B. Bulgozdy
Ronnie B. Lasky
[redacted]

<u>In the Matter of J.S. Oliver Capital Management, L.P., et al.</u>
Administrative Proceeding File No. 3-15446
<u>Service List</u>

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the attached:

THE DIVISION OF ENFORCEMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR REVIEW OF RESPONDENTS J.S. OLIVER CAPITAL MANAGEMENT, L.P. AND IAN O. MAUSNER

was served on December 8, 2014 upon the following parties as follows:

By Facsimile and Overnight Mail
Brent J. Fields, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549-1090
[redacted]
(Original and three copies)

By Email
Honorable Brenda P. Murray
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E., Mail Stop 2557
Washington, DC 20549-2557
Email: alj@sec.gov

By Email and U.S. Mail
Ian O. Mausner
[redacted]
Respondent

By Email and U.S. Mail
J.S. Oliver Capital Management, L.P.
c/o Ian O. Mausner
[redacted]
Respondent

By Email and U.S. Mail
Bahram Seyedin-Noor, Esq.
Alto Litigation, PC
[redacted]
Counsel for Respondent Douglas F. Drennan

Dated: December 8, 2014

Olivia Carnegie