UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

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In the Matter of:	
J.S. OLIVER CAPITAL MANAGEMENT, L.P., IAN O. MAUSNER, and DOUGLAS F. DRENNAN	Administrative Proceeding File No. 3-15446

REPLY BRIEF OF J.S. OLIVER CAPITAL MANAGEMENT, L.P. AND IAN O. MAUSNER IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Other Authorities

Introduction

The briefs in this case frame a clear legal question: Does the requirement of consistency-across-cases impose *any* constraint on the Commission's penalty orders? Our opening brief contended that this requirement does constrain the Commission's penalty authority. The Division of Enforcement insists that it does not. Rather, the Division contends, as long as a Commission order considers factors that are legally relevant, the order's substance is immune from judicial review.

The Division's position is contrary to law. As the District of Columbia Circuit recently stated and reiterated, the Commission must explain how each penalty decision is consistent with those in other cases. *See Collins v SEC*, 736 F.3d 521, 526 (D.C. Cir. 2013); *Rapoport v. SEC*, 682 F.3d 98 ,104 (D.C. Cir. 2012); *accord Friedman v. Sibelius*, 686 F.3d 813, 827–28 (D.C. Cir. 2012) (applying the consistency test to reverse a sanctions order by the Department of Health and Human Services). In fact, just last year in *Collins v. SEC*, the D.C. Circuit rejected the same legal argument the Division now makes. 736 F.3d at 525–526.

The Division does not even try to show that this case could meet the consistency requirement. Instead, the Division uses the bulk of its brief to assert that the Initial Decision is valid because it considers legally-relevant factors in light of this case's unique "facts and circumstances"—a standard that is the polar opposite of consistency.

Section I of this reply recaps the consistency requirement as set out by the D.C. Circuit, then explains how the Division's brief confirms that the penalty ordered in the Initial Decision cannot meet that requirement. Section II addresses the Division's extensive "facts and circumstances" discussion; it explains how that discussion serves only to provide more evidence that the penalty in this case is an extraordinary one that is far out of line with Commission precedents.

Indeed, as we explain below, the Division's own arguments provide a powerful demonstration of why the consistency requirement is such an important protection for respondents in penalty cases. Mausner is challenging penalties totaling $18 million, on the ground that this figure exceeds penalties in similar cases—and does so many times over. Yet the Division contends in response, not only that Commission penalty orders are unreviewable for consistency, but that the Commission "appropriately" could have imposed a penalty more than 15 times larger—a penalty of literally more than *$300 million*. Opp. 18, 19 n.3.[1] In short, the Division contends, the Commission can impose colossal penalties that are not limited by a consistency requirement.

This contention would make nullities of the D.C. Circuit's decisions in *Collins*, *Rapoport*, and *Friedman*. The Division's contention is especially untenable in light of the increasing significance of administrative penalties.[2] Due-process protections for respondents are correspondingly more, not less, important. And here, the Division's own overreaching (*see*, *e.g.*, its $300-million example) shows why protection provided by the consistency requirement is

[1] This reply brief abbreviates our opening brief as "Br." and the Division of Enforcement's Memorandum of Points and Authorities in Opposition as "Opp."

[2] This increase is reflected in, for example, the 2010 expansion of the Commission's authority by the Dodd-Frank Act. Section 929P of that Act amended Section 8A of the Securities Act, Section 21B(a) of the Securities Exchange Act, Section 9(d)(1) of the Investment Company Act, and Section 203(i)(1) of the Investment Advisers Act to permit the imposition of civil monetary penalties in administrative proceedings. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). *See also* Sonia A. Steinway, *SEC "Monetary Penalties Speak Very Loudly," But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 Yale L. J 209, 209-10 (2014) (collecting statistics on the SEC's increased use of monetary penalties).

critical. The Commission should reject the Division's view of the law—and along with it the anomalous penalty ordered in the Initial Decision.

I. THE EXTRAORDINARY PENALTY IN THIS CASE CANNOT MEET THE D.C. CIRCUIT'S REQUIREMENT FOR CONSISTENCY WITH OTHER COMMISSION PENALTY CASES

A. The Commission Must Show Consistency With Penalties Imposed In Other Cases—Here, By Explaining Why This Case Justifies A Penalty That Is Extraordinary Relative To Penalties In Comparable Cases

The Division disputes our assertion that *Rapoport* and *Collins* impose a consistency requirement on Commission penalty orders. Yet the Division never addresses these authorities head-on: Its 29-page brief never quotes, addresses, or even acknowledges the operative language in those cases (which we quoted and discussed in our opening brief at 1, 7, 19–23). Yet these authorities indisputably impose this requirement on the Commission.

Rapoport says that the Commission must demonstrate that it "consistently" applies the law across its decisions—that it cannot "depart from [its] precedent without explaining why." *Rapoport*, 682 F.3d at 104. And *Collins* applies the consistency requirement directly to a Commission penalty. That court affirmed a penalty of $310,000 (less than 1.7 percent of the penalty in our case), but did so only after it had tested the decision for consistency by specifically comparing the penalty to those imposed in other cases. *Collins*, 736 F.3d a 525–26. The court made it clear that it will reverse the Commission if a penalty is "out of line with the agency's decisions in other cases." *Id.*

The *Collins* court highlighted this consistency message by citing *Friedman v. Sibelius*, a 2012 decision that reversed an agency penalty for failing the consistency requirement. 686 F.3d 813, 827–28 (D.C. Cir. 2012). In *Friedman*, the Department of Health and Human Services had used its statutory authority to bar three pharmaceutical executives from participation in federal healthcare programs. The agency had applied the relevant statutory factors and imposed an exclusion period of 12 years. *Id.* The executives challenged that term as arbitrary and capricious, arguing that a bar extending for 12 years was inconsistent with past agency decisions. *Id.* at 826.

The agency responded by contending that the consistency requirement did not apply to the agency's penalty order. 686 F.3d at 826. Notably, this is the same argument that the Commission made (unsuccessfully) in *Collins*, 736 F.3d a 525–26, and the Division of Enforcement now makes in our case. The Friedman court rejected that argument out of hand. It held that, under the Administrative Procedure Act, the consistency requirement applies to all agency decisions. 686 F.3d at 826. It held that the agency therefore was required to "provide a reasoned explanation for departing from agency precedent" by imposing the 12-year exclusion. *Id.* at 827. To determine whether the agency could meet this "reasoned explanation" test, the court conducted a detailed comparison with earlier cases. *Id.* at 827–28. (This is exactly the kind of comparison that, in our case, the Division contends is not warranted. Opp. 28.)

The *Friedman* court concluded that the agency could not make the required showing. *Friedman*, 686 F.3d at 828. The court reversed and remanded to the agency, but took pains to explain that it was not setting a substantive limit on sanctions: "We do not suggest the Appellant's exclusion for 12 years * * * might not be justifiable." *Id.* The problem, the court explained, was that the agency had not justified the sanction in terms of consistency with other cases: that the agency "did not justify it in the decision under review" because it did not identify specific, similar cases that "provide a reasoned explanation for the agency's apparent departure from precedent." *Id.* This is the same burden that the Initial Decision in our case cannot meet.

B. The Division Fundamentally Misunderstands D.C. Circuit Law When It Asserts That The Commission's Penalty Orders Are Not Subject To The Consistency Requirement

1. The Division's argument that Commission penalty orders are not subject to judicial review for consistency is the same argument the D.C. Circuit rejected last year in Collins v. SEC

As we pointed out above, the Division never directly addresses the consistency requirement. Instead it provides a lengthy discussion of a different topic: the multi-factorial nature of penalty decisions. Opp. 10–29. The gist of the Division's brief is the *non-sequitur* argument that, because penalty decisions involve multiple factors, it follows that those penalty decisions are not constrained by the consistency requirement. *Id.* at 12–13. Based on this *non sequitur*, the Division's legal position is that, as long as a penalty order applies legally-relevant factors to the unique "facts and circumstances" of the case at hand, the substance of the order is not reviewable and the Commission's discretion in setting penalties is, therefore, unbounded. *Id.* at 13–22, 26–27. (To this end, the Division's brief invokes "facts and circumstances" at least ten times. *Id.* at 2, 13, 23, 25, 27–28.)

The Division emphasizes, for example, that, as a general matter, the Commission is permitted to render different levels of sanctions in different cases. See Opp. 28. And it points out that sanctions cannot be determined precisely by comparison with action taken in other cases. *Id.* These principles are unremarkable, and we acknowledged them in our opening brief (at 13).

What is remarkable, and wrong as a matter of law, is the Division's contention that the Commission's discretion is absolute as long as it considers relevant factors. Equally remarkable, the Division cites *Collins* in support of this argument. Opp. 24. In fact, *Collins* expressly rejected the Commission's argument that penalty orders are not subject to the consistency requirement. In that case, the Commission argued that, because penalties need not follow "mechanical formulae," it followed that penalty decisions are not subject to review for consistency. 736 F.3d at 525–26 (quotation marks in original). The court pointed out that the Commission's argument was a *non sequitur*: "for a court not to require uniformity or 'mechanical formulae' is not the same as for it to be oblivious to history or precedent." *Id.* That is why, the court explained, a court will consider whether the decision at issue is "out of line" with other agency decisions. *Collins*, 736 F.3d at 525–26. *Accord Rapoport*, 682 F.3d at 104 (stating the consistency requirement); *Friedman*, 686 F.3d at 827–28 (stating that an agency must justify a departure from its precedents).

The Division's position is not saved by the citation to *Kornman v. SEC*, 592 F.3d 173, 186-88 (D.C. Cir. 2010). According to the Division, *Kornman* establishes that as a rule the court will *not* make comparisons across sanctions cases. Opp. 28. *Kornman* does not make a comparison, but it does not establish a rule against doing so. *Kornman* is simply a case where the court did not see a need to undertake a comparison. The court does not specifically say why it chose not to look at comparable cases, but *Kornman* was a routine challenge to an industry bar (with no penalty), and did not appear to raise the prima facie possibility that the sanction was out of line with other decisions. 592 F.3d at 186–88. *Kornman* certainly does not, as the Division contends, state a rule that courts will not make comparisons in penalty cases. *Id.* The Division's reading of *Kornman* cannot possibly be correct, becase the D.C. Circuit's later decisions in *Collins* and *Friedman* make exactly that kind of comparison.

2. The consistency requirement is especially important in penalty cases, which otherwise could involve ruinous penalties with no substantive review by a court

The Division's reading of the law—that penalty decisions are unreviewable as long as they discuss factors that are legally relevant—would nullify *Rapoport*, *Friedman,* and *Collins*.

And it would raise a particularly serious concern on appeal at a time when the Commission's imposition of penalties is receiving greater scrutiny. The sheer punitive force of a large penalty can, of course, be outright ruinous—far exceeding the effect of other possible sanctions.

This is a concern because the statute that authorizes these penalties does little or nothing, by itself, to constrain the their size. *See* 15 U.S.C. § 78u-2 ("Civil remedies in administrative proceedings"). Indeed, as a practical matter the statute does not even suggest an appropriate monetary range. It routinely would permit penalties in amounts that are "absurd." *See In the Matter of optionsXpress*, Initial Dec. Rel. No. 490, 2013 SEC LEXIS 1643, at *265 (June 7, 2013) (stating that the statute could lead to an "absurd result").

In *optionsXpress*, for example, a permissible calculation under the statute would have generated a penalty of $180 million. But the law judge imposed penalties of $2 million each on two respondents (about one percent of that permissible amount)—explicitly acknowledging that she chose this much-lower figure "[w]ith deference to *Rapoport* and a reasonable outcome." 2013 SEC LEXIS 1643 at *265. (This figure approximated gain to the respondents. See discussion at Br. 14.) Similarly, in *In the Matter of Raymond J. Lucia Co., Inc.*, the statute permitted penalties of at least $105 million. Again, however, the law judge imposed penalties of less than one percent of the permissible statutory figure—$300,000. Int'l Dec. No. 540, 2013 SEC LEXIS 3856 at 175, 175 n.41.

These examples show the importance of the constraint that the consistency test imposes on penalty orders. In fact, the hazard presented by the Division's unbounded-discretion argument is best illustrated by the Division's own brief, which argues that a far larger penalty would be permissible in our case. According to the Division, "the hearing officer could have appropriately found that each *day* * * * should be considered a separate violation," Opp. 18 (emphasis in original), and that under this "appropriate[]" approach civil penalties for trading violations would have exceeded $300 million, *id.* at 19 n.3. This assertion makes our point: A $300 million penalty is a staggering figure, wildly out of line with any number in this case as well as with the proportional relationships that hold in other cases. And the Division says that this huge number is not even the total penalty; it addresses only one of the two kinds of violation found in the Initial Decision. Opp. 18–19.

Under the Division's view of the law, however, such a colossal penalty would be perfectly "appropriate[]." Opp. 18. And worse, it would be impervious to appellate review as long as the Initial Decision discussed factors that are legally relevant. This outlandish scenario could not begin to pass muster under the D.C. Circuit's view of the law. The Division's $300 million example shows exactly why the consistency requirement is an important safeguard for respondents in administrative proceedings—including this one.

C. The Division Does Not Contend That The Initial Decision's Calculation Method Or Penalty Amount Can Satisfy The Consistency Requirement

We explained in our opening brief why the Initial Decision does not satisfy the consistency requirement. Br. 12–19. We showed in detail how the calculation methods in the Initial Decision are internally inconsistent, and are wholly unexplained in relation to the methods used in other cases. *Id.* at 9–12. We also explained, again in detail, that the huge excess of the penalty amount over other relevant dollar figures makes this case an extreme outlier among penalty cases. *Id.* at 12–19. Critically, the Division does not dispute our extensive demonstration that SEC penalty cases do, in fact, reflect proportionality among the dollar figures in each case.

Against this background, the *Collins* test—whether a penalty decision is "out of line with other cases"—means that the extraordinary penalty recommended in this case requires extraordinary justification. It means that, for the penalty to survive judicial scrutiny, the

Commission would have to explain how the penalty-calculation method and the resulting amount are consistent with other Commission penalty cases.

But the Division does not even try to make that showing.[3] It never says, for instance, "Here is a relevant precedent: a similar case where penalty exceeded benefit by more than $16.5 million or exceeded harm to investors by more than $7 million." Nor does it say, "Here are the ways that this case is far worse than all of the cases reviewed in Mausner's opening brief, at 13–19, thus justifying a penalty that is such an outlier."

The Division's silence on this topic—the topic that is central in this appeal—should resolve this matter. The Division's silence establishes that the extraordinary penalty ordered in the Initial Decision could not satisfy the consistency requirement, even if the law judge were given a second opportunity to justify it. A remand would, therefore, be pointless. For that reason, the Commission should not remand but should simply order the relief requested in our opening brief: It should set aside the recommended penalties and order a penalty no larger than the benefit to the respondents. Br. 5.

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[3] The Division does defend the Initial Decision's use of a per-month definition of violations for the trading violations by citing *SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1314–15 (S.D. Fla. 2007). Opp. 17. But the Division reads *K.W. Brown*'s references to a per-month approach as an endorsement, even though the court did not use that method. As we explained (Br. 9), *K.W. Brown* gives no such endorsement and, as the Division acknowledges, sets the penalty amount to match the defendant's pecuniary gain. 555 F. Supp. 2d at 1314–15.

The Division also defends the Initial Decision's internally inconsistent methodology for counting violations by pointing out that this case involved two different kinds of conduct—trading and soft-dollar expenditures. That is obviously so, but it simply restates our question. It says nothing about why this difference warrants different methods of counting violations. Nor does the Division say how this approach is consistent with approaches used in other cases. *E.g.*, Opp. 20.

D. The Division Misunderstands Mausner's Opening Brief, Which Does *Not* Argue That The Law Limits The Amount Of A Penalty To The Amount Of The Respondent's Gain

At some points in its brief, the Division's fundamentally misdescribes our consistency argument. According to the Division, our argument is that the law flatly limits penalties to the amount of the respondent's pecuniary gain. *E.g.*, Opp. 2 ("Respondents * * * seem to suggest that the Commission should limit the amount of the civil penalty to their pecuniary gain"); *see also id.* at 23. That is not what we said. To the contrary, our opening brief anticipated that our argument might be misconstrued and therefore expressly disclaimed this view, saying: "We do *not*, however, contend that governing authorities impose a dollar ceiling on penalties based on any particular relationships within a case." Br. 20 (italics in original). As we then explained at length (and reiterated above), the significance of proportionality is that it provides a basis to compare cases to each other for consistency. We even explained that "[a]n outlier penalty is permissible, but only if the Commission can justify it by laying the necessary predicate: by providing a detailed explanation that meets the requirements of *Rapoport*, *Steadman*, and related authorities." *Id.* 20 (discussing *Rapoport*, 682 F.3d at 104; *Steadman v. SEC*, 603 F.2d 1126, 1137 (5th Cir. 1979)). This is precisely the explanation of the consistency requirement that the D.C. Circuit gave in *Friedman*. *See* 686 F.3d at 828. And as explained above, the Division does not even contend that the Initial Decision can pass this test.

II. THE DIVISION'S DISCUSSION OF "FACTS AND CIRCUMSTANCES" DOES NOTHING TO MEET THE CONSISTENCY TEST—QUITE THE OPPOSITE—BUT IT DOES HELP SHOW THAT THE PENALTY IN THIS CASE IS AN EXTRAORDINARY ONE THAT CANNOT BE JUSTIFIED

A. The Precedents The Division Cites In Its "Facts And Circumstances" Discussion Further Show That The Penalty In Our Case Is An Extreme Outlier

As we explained in section I.B. above, the Division's legal position is that, as long as a penalty order discusses the "facts and circumstances" of the case at hand and applies standards that are legally relevant, the substance of the order is not otherwise reviewable. Opp. 13–22, 26–27. Because this is the Division's view of the law, the Division uses the bulk of its brief to discuss the facts of this case and to identify the standards that the Initial Decision applied. *Id.* The Division does *not*, however, try to show that the penalty ordered in the Initial Decision is in line with penalties in other cases. *Id.*

Because the Division ignores the consistency requirement, its entire discussion is irrelevant. But the discussion does usefully show that nothing about this case sets it apart from the numerous penalty cases that we summarized in our opening brief (at 13–19)—except, of course, that the penalty in this case is much higher. The Division provides a lengthy discussion of the Initial Decision's application of the various legal factors to the facts of this case. Thus, the Division reviews the Initial Decision's findings that conduct in this case was "egregious" (Opp. 15) and "recurrent" (*id.* at 13, 15), involved "a high degree of scienter" and the breach of fiduciary duties (*id.*), and caused "substantial losses for investors" (*id.* at 14). These included, the Division specifically notes, an elderly investor. *Id.* The Division points out that Mausner did not concede that his conduct was wrongful. *Id.* at 16. It also cites the need for deterrence. *Id.*

The Division's discussion of the Initial Decision does nothing to distinguish the violations in this case from those in the numerous cases described in our opening brief; those cases say the same things as the Initial Decision. Just like the Initial Decision, the cases cited in our opening brief refer to misconduct that was "recurrent" and "egregious," even "particularly egregious" (*e.g.*, *id.* at 13–14 (citing cases)), and that involved intentional fraud (*id.* at 13–19) and breaches of fiduciary duties (*e.g.*, *id.* at 14, 17). The cases involved substantial losses by investors (*id.* at 17), and these investors included numerous elderly clients, *Collins*, 736 F.3d at 526. The cases involved respondents who denied any wrongdoing. *E.g.*, Br. 14. Also like the

Initial Decision, the cases cite the need for deterrence.[4] Overall, the cases we described involve respondents who carried out many fraudulent transactions (*id.* at 13–19)—as many as 10,000 by one investment-advisor respondent (*id.* at 17–18). They involve misconduct that continued for multiple years—some twice or almost three times as long as the 18 months in our case (*id.* at 15 (citing *Raymond J. Lucia*, Rel. No. 540, (three years); Br. 16 (citing *K.W. Brown*, 555 F. Supp. 2d at 1315 (46 months)). The Division's discussion gives no reason to conclude that the conduct described in the Initial Decision is different from the conduct in the sample cases we discussed, much less that it involved misconduct so extraordinary that it warrants an extraordinary penalty.

The Division's discussion also cites some cases that we did not discuss in our brief. But the additional cases are entirely consistent with those we did cite, because they reflect the same proportionality (between penalty and other dollar figures in the case) described in our opening brief. In three of the four cases the Division cites in this discussion (Opp. 15–16), the penalty was substantially less than disgorgement and, if the case quantified injury to investors, the penalty was lower than that figure as well. We summarize those numbers in the accompanying footnote.[5] The fourth cited case involved a slightly different pattern, because the primary actor

[4] *See, e.g., In the Matter of Peter Siris,* Exchange Act Rel. No. 71068, 2013 SEC LEXIS 3924, at *48 n.72 (Dec. 12, 2013).

[5] In this discussion, the Division cited three additional cases (Opp. 15–16). One involved benefit to respondent (and disgorgement) of about $303,472 and a penalty of less than a third that amount, $100,000 (and did not quantify harm to investors). *In the Matter of James C. Dawson*, Advisers Act Rel. No. 3057, 2010 SEC LEXIS 2561 at *2,*17 (July 23, 2010). The second involved benefit to respondent (and disgorgement) of about $1.3 million and a penalty of about a third that amount, $450,000. It also involved an injury to investors of many times that figure; although the injury figure was not precisely quantified, investors had received "very little return on a total investment of about $24 million." *In the Matter of John Thomas Capital Management Group LLC*, Initial Decision Rel. No. 693, 2014 SEC LEXIS 4162, at *86 (Oct. 17, 2014). The third cited case involved benefit to respondent (and disgorgement) of about $1.2 million and a penalty of about an eighth that amount, $150,000 (and did not quantify harm to investors. *In the Matter of Angelica Aguilera*, Initial Decision Rel. No. 501, 2013 SEC LEXIS 2195, at *93 (July 31, 2013).

obtained no personal benefit and therefore paid not disgorgement. *SEC v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014). The case involved three corporate insiders who reported fraudulent revenue of $100 million. The defendant who had received no benefit was the primary wrongdoer, and he was penalized $780,000. *Id.* at 1338. This figure is proportional to other numbers in that case, since the other two defendants were ordered to pay penalties of $675,000 each and disgorgement of $300,000 and $150,000, respectively. And even the higher figure is completely out of line with the multi-million dollar figures in the Initial Decision in our case.

The Division also makes the separate, but similar, argument that Commission penalty decisions are valid as long as they are "proportionate to the gravity of the respondent's conduct." Opp. 23. But this "gravity of the conduct" discussion provides still further evidence that the penalty in our case is an outlier. The Division cites cases that it chose specifically to support a discussion about misconduct that was serious. *See* Opp. 23–25. Several of these cases involve penalties that exceed disgorgement. The cases are entirely consistent with our proportionality argument, however (*see* Br. 12–22), because no case involves a penalty that exceeds respondent gain or investor injury by more than about $627,000. In these cases, the excess of penalty over disgorgement is (slightly rounded) $30,000 and $30,000 (*Sisung*), $100,000 and $200,000 (*Todt*), $290,000 (*Montford*), $307,000 (*Collins*, though harm to investors was higher), $335,000 (*Bloomfield*), $567,000 (*Bloomfield*), and the largest figure, $627,000 (*Bloomfield again*).[6] None

[6] *In the Matter of Ronald S. Bloomfield, et al.*, Exchange Act Rel. No. 71632, 2014 SEC LEXIS 698, at *91 (Feb. 27, 2014), which involves three defendants, imposes penalties of $650,000 against each of two respondents, who were ordered to disgorge $83,136 and $23,465 respectively, and $335,000 and no disgorgement against a third. In *CFTC v. Levy*, 541 F.3d 1102, 1112 (11th Cir. 2008), the respondent profited by $20,000, harmed investors in the amount of $146,350, and was penalized $600,000. In *SEC v. Todt*, 2000 U.S. Dist. LEXIS 2087, at *38–40 (S.D.N.Y. Feb. 25, 2000), the defendants attempted an elaborate fraud but obtained no benefit and caused no harm; the court imposed penalties of $200,000 on one defendant and $100,000 on the other. In *In the Matter of Montford and Co., Inc.,* Investment Advisers Act Rel. No. 3829,

of these severe-misconduct cases remotely approaches our case's $7 million excess of penalty over harm to third parties, much less the $16.5 million excess of penalty over disgorgement.

Finally, one more Division argument further highlights the anomalous nature of the penalty in our case. The Division repeatedly asserts that a primary factor in setting a penalty amount, possibly the single most important factor, is harm to investors. The Division refers to this factor at least six times. Opp. 1, 2, 4, 15, 18, 25. The reason the Division chooses to emphasize this factor is obvious: because according to the Initial Decision, harm to investors in our case is $10.9 million. (We addressed this number in our opening brief, at 4, 18.) The Division therefore emphasizes this figure in an effort to justify the total penalty of $18.1 million (Opp. at 1,2, 25).

The Division's brief refers to two cases that involved multi-million dollar harm (though the Division does not note the harm figures). Neither case involved a penalty remotely similar to the one in our case. In *John Thomas Capital Management Group LLC*, 2014 SEC LEXIS 4162, at *86, the respondent misled investors about two hedge funds. The Initial Decision in that case stated that, though injury to investors was not quantified, investors had received "very little return on a total investment of about $24 million." *Id.* But disgorgement in that case was $1.3 million and the penalty less than half that amount, at $450,000. *Id.* at *101.

The other example is *K.W. Brown*, which is factually similar to our case because it involved "cherry picking"—except that the relevant conduct continued for more than twice as

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2014 SEC LEXIS 1529, *107–08 n.213 (May 2, 2014), the Commission ordered total disgorgement against firm and individual of $210,000, and penalties of $500,000 and $150,00, respectively. In *In the Matter of Sisung Securities Corp. and Lawrence J. Sisung, Jr.*, Exchange Act Rel. No. 56741, 2007 SEC LEXIS 2562, at *2, *33, *33 n.54 (Nov. 5, 2007), the Commission set aside the underlying violation but fined a firm and an individual $30,000 each. In *Collins*, 736 F.3d at 526, the respondent had a relevant benefit of $2,915, apparent harm to investors was about $519,000, *id.*at 523, and the penalty was $310,000, *id.*at 524.

long. 555 F. Supp. 2d at 1289–91, 1303–04. The *K.W. Brown* conduct caused investor losses of $9 million, but that court set the firm's penalty at the much lower number of $4.5 million, which the court chose based on the profit earned from the scheme. *Id.* at 1278.

Based on these examples, the penalty figure in our case is wildly out of line. *John Thomas Capital Management Group* imposed a penalty that was a minuscule fraction of apparent harm to investors, and less than half of the disgorgement amount. And despite *K.W. Brown*'s factual similarity to our case—and the much longer duration of the conduct—that court imposed a penalty in an amount $4.5 million *less* than harm to investors and precisely equal to the benefit to respondent. These numbers contrast with our case, where the Initial Decision imposes a penalty of $7 million *more* than harm to investors—and over $16.5 million *more* than benefit to the respondent. Like the other Division arguments we have discussed, the Division's "harm to investors" argument only serves to show, again, that the penalty in our case is extraordinary.

B. Although The Issues Are Not Directly Relevant To The Initial Decision's Inability To Pass The Consistency Test, The Division Also Misreads Some Of The Specific Factors And The Record In This Case

The Division's discussion of penalty factors reflects some misconceptions about relevant factors or the record in this case. Although these misunderstandings do not affect the outcome of this appeal—that is determined by the Initial Decision's inability to pass the consistency test—we address them here to resolve any possible confusion.

For example, in its effort to maximize the apparent scale of the trading violations found by the Initial Decision, the Division gives a description of the Initial Decision that is mistaken. The Division states that "the cherry-picking fraud 'comprised 98.6% of the dollar volume of all J.S. Oliver equity trading.'" Opp. 4 (citing Initial Decision 8–9). This sentence indicates that 98.6

percent of trades were fraudulent. That is not what the Initial Decision says. It does not say that "the cherry picking *fraud*" comprised this volume, it says that "the Favored and Disfavored *Accounts*" comprised this volume. Initial Decision 8–9. That is, it says that 98.6 percent of trading involved these accounts—*not*, as the Division indicates, that this percentage of *trades* was fraudulent. *Id.*

The Division also makes various assertions that are aimed at painting Mausner in a bad light but have nothing to do with the penalty issue, much less with passing the consistency test. For example, the Division's discussion of penalty factors asserts that "the need to deter [Mausner] is great." Opp. 16. But the need to deter Mausner is nonexistent, because he is barred from the securities industry. General deterrence is a factor, but that is true of every penalty case; it does nothing to justify an extraordinary penalty in this case.

Similarly, the Division contends that Mausner would present a risk of future violations if he continued as an investment advisor. Opp. 14. This "future risk" assertion could be relevant to a dispute about a bar from the industry, which is not at issue here, but it has nothing to do with the amount of the penalty. In the context of this appeal, these points are mere atmospherics—they do nothing to refute the arguments in our opening brief.

Finally, the Division labels "utterly false" (Opp. 27) our assertion that *Steadman,* 603 F.2d at 1137 identifies several elements of the Commission's burden, including to state why a less severe sanction would not suffice. Br. 8.[7] This "utterly false" charge is a dramatic

[7] The Division also challenges the application of some of the requirements that limit penalties. The Division disputes that the Commission also must explain why the penalty is warranted in light of other sanctions imposed. The Division disputes that the two cited cases stand for this proposition, but those cases do state this principle. *SEC v. Conaway*, 697 F. Supp. 2d 733, 772 (E.D. Mich. 2010) ("Considering the disgorgement and the substantial prejudgment interest on the disgorged amount, and for considerations noted below on the injunctive relief the SEC seeks, I believe that an appropriate penalty need not be as severe as the SEC seeks."); *SEC v. Universal*

overstatement, since this is exactly what *Steadman* says. *Steadman,* 603 F.2d at 1137. The Division's point is different, which is that some courts have rejected this specific *Steadman* factor. *See In the Matter of Lodavina Grosnickle*, Initial Decision Rel. No. 441, 2011 SEC LEXIS 3969, at *19–20 (Nov. 10, 2011). The other opinions cited by the Division authorities do not support the "false" charge; they simply do not include the factor in their analysis.[8] In any event, because the Initial Decision's inability to satisfy the consistency requirement resolves this case, the Commission will have no reason to consider this one penalty factor.

Conclusion

For the foregoing reasons, and those set forth in our opening brief, respondents JS Oliver and Ian O. Mausner respectfully request that the Commission set aside the penalties ordered in the Initial Decision, and that penalties ordered by the Commission on JS Oliver and Ian O. Mausner shall not exceed the total of $1,376,440. For the reasons explained above, in light of the Division's Opposition, Mausner and JS Oliver contend that a remand is not warranted.

Respectfully submitted,

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Express, Inc., 646 F. Supp. 2d 552, 568 (S.D.N.Y. 2009) ("the Court also considers the extent to which other aspects of the relief and/or judgment issued in this matter will have the desired punitive effect"). Nor are the cases irrelevant because they are in federal court. The factors governing penalties imposed by a court are the same, as Mausner's opening brief pointed out and the Division does not dispute. *See* Br. 16 and 16 n.3.

[8] *Lowry v. SEC*, 340 F.3d 501, 504 (8th Cir. 2003); *Vernazza v. SEC*, 327 F.3d 851, 862 (9th Cir. 2003); *Sheldon v. SEC*, 45 F.3d 1515, 1517 n.1 (11th Cir. 1995).

CERTIFICATE OF COMPLIANCE WITH RULE 450(d) OF THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION'S RULES OF PRACTICE

The undersigned counsel of record for Respondents, J.S. Oliver Capital Management, L.P. and Ian O. Mausner, certifies pursuant to Rule 450(d) of the United States Securities and Exchange Commission's Rules of Practice that the foregoing brief contains 5,917 words, excluding the parts of the brief exempted by Rule 450(c), according to the Word Count feature of Microsoft Word 2010.

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December 22, 2014

<u>By Federal Express</u>
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: JS Oliver Capital Management, L.P. and Ian O. Mausner (File no.3-15446)

Dear Office of the Secretary:

Enclosed for filling are the original and three copies of the Reply Brief (with Certificate of Compliance) of J.S. Oliver Capital Management, L.P. and Ian O. Mausner in Support of Petition for Review of Initial Decision.

If there are any questions regarding this filling, please contact the undersigned. Thank you for your assistance.

Very truly yours,

Andrew J Morris

Andrew J. Morris