

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 71191 / December 26, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3748 / December 26, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15663

In the Matter of

INSTINET, LLC

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS,
PURSUANT TO SECTION 15(b) OF
THE SECURITIES EXCHANGE ACT
OF 1934 AND SECTION 203(k) OF THE
INVESTMENT ADVISERS ACT OF
1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS
AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Instinet, LLC (“Instinet” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“ Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that

SUMMARY

1. From January 2009 through July 2010, Instinet paid approximately \$430,000 in client commission credits called "soft dollars" as requested by its customer, J.S Oliver Capital Management, L.P. ("JS Oliver"), a San Diego-based investment adviser, for expenses that JS Oliver had not properly disclosed to its clients. The improper payments included \$329,365 to the ex-wife of JS Oliver's president, Ian O. Mausner; thirteen months of increased rent payments totaling \$65,000 for JS Oliver's offices at Mausner's home; and two payments totaling \$40,094.54 for upkeep on Mausner's New York City timeshare. Instinet made the payments pursuant to JS Oliver's requests even though the information JS Oliver had provided to Instinet when requesting approval of the payments presented significant red flags and clear suggestions of irregular conduct that each payment was improper.

RESPONDENT

2. **Instinet, LLC** is a Delaware limited liability company with its principal place of business in New York, NY. Instinet is a broker-dealer registered with the Commission.

OTHER RELEVANT ENTITY AND INDIVIDUAL

3. **J.S. Oliver Capital Management, L.P.** is a California limited partnership with its principal place of business in San Diego, California. JS Oliver registered with the Commission as an investment adviser in 2004 and has approximately \$115 million in assets under management. **Ian O. Mausner** has been the president, head portfolio manager, and control person of JS Oliver since 2004. On August 30, 2013, the Commission instituted an administrative and cease-and-desist proceeding against JS Oliver and Mausner alleging that they violated the antifraud and other provisions of the federal securities laws for engaging in cherry-picking and soft dollar schemes. See *In the Matter of J.S. Oliver Capital Management, L.P., et al.*, Advisers Act Rel. No. 3658 (Aug. 30, 2013).

FACTUAL BACKGROUND

4. In January 2009, Instinet and JS Oliver entered into an agreement whereby JS Oliver could accumulate commission credits called "soft dollars" on its clients' equity

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

and option trades executed through Instinet. Pursuant to the arrangement, Instinet generally agreed to give JS Oliver a soft dollar credit of \$0.0225 for every \$0.03 of brokerage commissions generated per share by JS Oliver clients' equity trades; soft dollar credits for option trades varied. JS Oliver, through Instinet, used soft dollar credits for expenses that fell both within and outside the safe harbor provided in Section 28(e) of the Exchange Act ("Section 28(e) safe harbor") for the use of commission credits for certain research and brokerage expenses.

5. Instinet's commission management services ("CMS") department was in charge of administering soft dollar arrangements with its customers, including the approval of all soft dollar payments. Before approving a soft dollar payment that a customer requested, the CMS department's practice included reviewing the related invoice, any relevant back-up documentation or information in support of the payment request, and the adviser's soft dollar disclosures for non-Section 28(e) safe harbor payment requests.

6. The soft dollar disclosures JS Oliver provided to Instinet included, among other things, that soft dollars may be used for "evaluating potential investment opportunities (including travel, meals and lodging related to such evaluation) ... and may even include such 'overhead' expenses as office rent, salaries, benefits and other compensation of employees or of consultants to the Investment Manager"

Payment To Mausner's Ex-Wife

7. In June 2009, Instinet, pursuant to JS Oliver's request, paid JS Oliver \$329,365 using soft dollar credits for a payment to Mausner's ex-wife based on JS Oliver's representations to Instinet that the payment was for employee compensation. The payment was not employee compensation and was not properly disclosed to JS Oliver's clients. As a result, JS Oliver's use of soft dollars to make this payment violated (among other provisions) Sections 206(2) and 206(4) of the Advisers Act, and Rule 206(4)-8 thereunder.

8. An Instinet CMS employee knew of significant red flags that the payment to Mausner's ex-wife was improper because it was not compensation to a JS Oliver employee but rather was to satisfy Mausner's personal obligation. These red flags included that (1) the recipient of the payment was Mausner's ex-wife; (2) the payment was purportedly relating to the Mausners' parting ways professionally after their divorce; (3) JS Oliver gave Instinet a series of inconsistent justifications for the payment, first stating that Mausner's ex-wife would provide future work as a consultant to JS Oliver for tax and compliance issues, then stating that the payment was to terminate a pre-existing employment agreement for her advice on organizational and accounting issues; (4) despite Instinet's requests, JS Oliver never provided Instinet with the purported employment agreement or a legal opinion from outside counsel stating that the use of soft dollars for the payment was proper; and (5) JS Oliver provided Instinet only an excerpt of the purported employment agreement that, although materially altered by JS Oliver in an attempt to hide that the payment was Mausner's personal obligation, did not indicate that Mausner's ex-wife had conducted any work for JS Oliver after 2006 and did not substantiate the amount of JS Oliver's request to pay \$329,365.

9. Despite these red flags, that Instinet CMS employee approved the payment.

Payments For Increased Rent

10. In July 2009, Instinet, pursuant to JS Oliver's request, agreed to use soft dollars to pay a 50% increase in rent (from \$10,000 to \$15,000) on JS Oliver's behalf for its offices in Mausner's home. Since January 2009, Instinet had paid JS Oliver's rent of \$10,000 per month using soft dollars. The increased rent payments of \$15,000 continued through July 2010. The rent payments were inflated, made for Mausner's personal financial benefit, and not properly disclosed to JS Oliver's clients. As a result, JS Oliver's use of soft dollars for these payments violated (among other provisions) Sections 206(2) and 206(4) of the Advisers Act, and Rule 206(4)-8 thereunder.

11. An Instinet CMS employee knew of significant red flags that the increased rent payment was improper because it was for Mausner's personal financial benefit. These red flags included that (1) JS Oliver rented office space in Mausner's personal residence; (2) the lease agreement requested by Instinet clearly indicated that Mausner owned the company to which Instinet paid the rent; (3) JS Oliver had already provided Instinet with invoices for all of 2009 that indicated monthly rent of \$10,000; (4) the increase in rent was a significant, 50% increase; and (5) JS Oliver's business address had not changed at the time JS Oliver sought the rent increase.

12. Despite these red flags, that Instinet CMS employee approved the payments.

Payments For Mausner's Personal Timeshare Property

13. In January and December 2009, Instinet, pursuant to JS Oliver's request, used soft dollars to make two payments totaling \$40,094.54 on JS Oliver's behalf that were purportedly for Mausner's travel expenses related to evaluating "potential investment opportunities." In fact, these payments were for maintenance, taxes and fees on Mausner's personal timeshare in New York City, and thus were for Mausner's own financial benefit and were not properly disclosed to JS Oliver's clients. As a result, JS Oliver's use of soft dollars to make these payments violated (among other provisions) Sections 206(2) and 206(4) of the Advisers Act, and Rule 206(4)-8 thereunder.

14. An Instinet CMS employee knew of significant red flags that the timeshare payments were improper because they satisfied Mausner's personal expenses. These red flags included that (1) only the invoice JS Oliver prepared for each payment request indicated that the expenses were related to travel; (2) the January 2009 bill JS Oliver provided to Instinet was in Mausner's name from the St. Regis New York, payable to Fifth & Fifty-Fifth Residence Club Association, Inc., and described the expenses as "2009 Maintenance Fee" and "2009 Real Estate Taxes"; and (3) the December 2009 bill JS Oliver provided to Instinet was in Mausner's name from the Fifth & Fifty-Fifth Residence Club Association, Inc., described the expenses as "2010 Maintenance Fee" and "2010 Replacement Reserves" and provided that "owners delinquent in the payment of maintenance fees may be denied use of their fractional interest."

15. Despite these red flags, that Instinet CMS employee approved the payment.

VIOLATIONS

16. As a result of the conduct described above, Instinet willfully aided and abetted and caused JS Oliver's violations of Sections 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon a client or prospective client, and Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibit fraudulent conduct by an investment adviser to pooled investment vehicles.

UNDERTAKINGS

Respondent has undertaken to:

17. Retain, not later than thirty (30) days after the date of this Order, at its expense, an independent consultant not unacceptable to the Commission's staff (the "Independent Consultant"). Instinet shall require the Independent Consultant to (a) conduct a comprehensive review of Instinet's policies, procedures, and practices related to its payment of soft dollars as part of its client commission services (collectively, "Policies and Procedures"); and (b) make recommendations for changes in or improvements to the Policies and Procedures to prevent Instinet from aiding and abetting and causing an investment adviser's violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder with respect to soft dollars.

18. No later than ten (10) days following the date of the Independent Consultant's engagement, provide to the Commission staff a copy of an engagement letter detailing the Independent Consultant's responsibilities pursuant to paragraph 16 above. To ensure independence, Instinet shall not have the authority to terminate the Independent Consultant without prior written approval of the Commission's staff.

19. Arrange for the Independent Consultant to issue its report within one hundred twenty (120) days after the date of this Order. Within ten (10) days after the issuance of the report, Instinet shall require the Independent Consultant to submit to C. Dabney O'Riordan of the Commission's Los Angeles Regional Office a copy of the Independent Consultant's report. The Independent Consultant's report shall describe the review performed and the conclusions reached and shall include any recommendations deemed necessary to make the Policies and Procedures adequate and address the findings set forth in Section III of the Order.

20. Within thirty (30) days of receipt of the Independent Consultant's report, adopt all recommendations contained in the report and remedy any deficiencies in its Policies and Procedures; provided, however, that as to any recommendation that Instinet believes is unnecessary or inappropriate, Instinet may, within fifteen (15) days of receipt of the report, advise the Independent Consultant in writing of any recommendations that it considers to be unnecessary or inappropriate and propose in writing an alternative policy or procedure designed to achieve the same objective or purpose.

21. With respect to any recommendation with which Instinet and the Independent Consultant do not agree, attempt in good faith to reach an agreement with the

Independent Consultant within thirty (30) days of receipt of the report. In the event that Instinet and the Independent Consultant are unable to agree on an alternative proposal acceptable to the Commission's staff, Instinet will abide by the original recommendation of the Independent Consultant.

22. Cooperate fully with the Independent Consultant and provide the Independent Consultant with access to its files, books, records and personnel as reasonably requested for the Independent Consultant's review.

23. Require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Instinet, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Instinet, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

24. Certify, in writing, compliance with the undertaking(s) set forth above. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to C. Dabney O'Riordan, Assistant Regional Director, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Instinet's Offer.

Accordingly, pursuant to Section 15(b) of the Exchange Act and Section 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Instinet shall cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

B. Respondent Instinet is censured.

C. Respondent Instinet shall, within ten (10) days of the entry of this Order, pay disgorgement of \$378,673.76, prejudgment interest of \$59,607.66, and a civil money

penalty in the amount of \$375,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. 3717. Payment must be made in one of the following ways: (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer / Fedwire instructions upon request; (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Instinet as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Marshall S. Sprung, Co-Chief of the Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Floor, Los Angeles, CA 90036.

D. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the disgorgement, interest and penalties referenced in Paragraph C above. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within thirty (30) days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to

change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

E. Respondent shall comply with the undertakings enumerated in Paragraphs 17-24 above.

By the Commission.

Elizabeth M. Murphy
Secretary