INITIAL DECISION RELEASE NO. 516
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15271

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	INITIAL DECISION
TOBY G. SCAMMELL	:	November 7, 2013

APPEARANCES: David J. Van Havermaat and Teri M. Melson for the Division of Enforcement, Securities and Exchange Commission

Leo P. Cunningham and Charlene Koski of Wilson Sonsini Goodrich & Rosati for Respondent Toby G. Scammell

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Toby G. Scammell (Scammell) from the securities industry. He was previously enjoined from violating the antifraud provisions of the federal securities laws.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on April 10, 2013, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The undersigned granted the parties leave to file motions for summary disposition at a May 10, 2013, prehearing conference, pursuant to 17 C.F.R. § 201.250(a). Toby G. Scammell, Admin. Proc. No. 3-15271 (A.L.J. May 10, 2013) (unpublished). The parties timely submitted their motions for summary disposition, oppositions, and replies on July 22, August 5, and August 19, 2013, respectively.

This Initial Decision is based on the pleadings and Scammell's Amended Answer to the OIP (Answer). There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Scammell was enjoined were decided against him in the civil case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and

proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Scammell was enjoined on June 15, 2012, from violating the antifraud provisions of the federal securities laws, in SEC v. Scammell, No. 2:11-cv-6597 (C.D. Cal. June 15, 2012), based on insider trading in August and September 2009. The Division of Enforcement (Division) urges that he be barred from the securities industry. Scammell argues that at the time of his alleged misconduct, he worked for a "family office" that was not subject to the Advisers Act, pursuant to which this proceeding was authorized; that his conduct was unrelated to his work for the family office; and that he consented to a judgment against him notwithstanding weak and circumstantial evidence concerning a single episode of insider trading when he was twenty-four years old. Accordingly, Scammell argues, the proceeding should be dismissed.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report and the court's orders in SEC v. Scammell.

2. Exhibits Admitted into Evidence

The following items, which are included in the Division's Motion for Summary Disposition at Exhibits 1, 2, 3, and 4, are admitted as Division Exhibits 1, 2, 3, and 4:

August 11, 2011, Complaint, SEC v. Scammell (Div. Ex. 1);

June 6, 2012, Consent of Defendant Toby G. Scammell, SEC v. Scammell (Div. Ex. 2);

June 15, 2012, Judgment of Permanent Injunction and Other Relief as to Defendant Toby G. Scammell, SEC v. Scammell (Div. Ex. 3); and

June 13, 2013, Declaration of Thomas A. Patterson, Managing Member, Madrone Capital Partners, LLC (Div. Ex. 4).

3. Collateral Estoppel

The Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against a respondent, whether resolved by consent, like SEC v. Scammell; by summary judgment; or after a trial. See Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2108 (injunction entered by consent); John Francis D'Acquisto, 53 S.E.C. 440, 444 (1998) (injunction entered by summary judgment);

James E. Franklin, Exchange Act Release No. 56649 (Oct. 12, 2007), 91 SEC Docket 2708, 2713 (injunction entered after trial); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997). In cases in which the injunction was entered by consent, the Commission considers the facts alleged in the injunctive complaint. Marshall E. Melton, 56 S.E.C. 695, 698-700 (2003).

II. FINDINGS OF FACT

Scammell, 28, is a resident of California. Answer at 3. Scammell was (and is) permanently enjoined from violating the antifraud provisions of the federal securities laws – Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Div. Ex. 3. He was also ordered to pay disgorgement of ill-gotten gains plus prejudgment interest and a civil penalty in amounts to be determined. Div. Ex. 3. Scammell's Consent in SEC v. Scammell provided, "in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Defendant Scammell understands that he shall not be permitted to contest the factual allegations of the complaint in this action." Div. Ex. 2 at 3-4.

Scammell's violation was unlawful insider trading in the securities of Marvel Entertainment, Inc. (Marvel), just a few weeks before the August 31, 2009, announcement that the Walt Disney Company (Disney) planned to acquire Marvel for $50 a share. Div. Ex. 1 at 2. Specifically, between August 13 and 28, 2009, Scammell purchased call options of Marvel at strike prices between $40 and $50. Div. Ex. 1 at 2. Scammell spent a total of $5,465 to purchase the call options, using his own funds and funds from his brother's account, over which he had trading authority. Div. Ex. 1 at 2-3. Over the next few days following the August 31 announcement, Scammell sold all of the Marvel option contracts for a total profit of $192,497. Div. Ex. 1 at 3. Scammell obtained material nonpublic information shortly before purchasing the call options by misappropriating it from his girlfriend, who was working at Disney's corporate strategy department and had been assigned to work on the Marvel acquisition. Div. Ex. 1 at 3. Scammell is now remorseful.

Scammell was employed as an associate by Madrone Advisors, LLC, from August 3, 2009, to February 12, 2010 (Relevant Period). Answer at 1. He conducted due diligence on potential investment opportunities and performed financial analyses of existing and potential portfolio companies. Div. Ex. 4 at 2. His work was for the benefit of Madrone Advisors, LLC, and Madrone Capital Partners, LLC. Answer at 3. During the Relevant Period, both entities provided advice about securities to certain investment funds, and, in exchange for those services, Madrone Capital Partners, LLC, received a percentage of the investment funds' returns, from which it paid Madrone Advisers, LLC, a service fee. Div. Ex. 4 at 1. Each entity had fewer than fifteen clients during the Relevant Period. Div. Ex. 4 at 2. As such, each was exempt from the registration requirements of Advisers Act Section 203(b). Neither ever sought or obtained from the Commission an order under Advisers Act Section 202(a)(11)(G) declaring it not to be an investment adviser. Div. Ex. 4 at 2; Official Notice.

III. CONCLUSIONS OF LAW

Respondent has been permanently enjoined "from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security" within the meaning of

Sections 203(e)(4) and 203(f) of the Advisers Act. The Advisers Act authorized the Commission to bring this proceeding against Scammell because Madrone Advisors, LLC, and Madrone Capital Partners, LLC, were investment advisers within the meaning of Advisers Act Section 202(a)(11), (16), and Scammell was a person associated with an investment adviser within the meaning of Advisers Act Section 202(a)(17).[1]

Scammell urges that the Commission lacks the authority to bar him from the securities industry because he worked for a so-called family office, which, he argues, the Commission had never regulated under the Advisers Act. Scammell notes that the definition of "investment adviser" was recently amended to explicitly exclude family offices, which, he argues, reflects the Commission's long-held position that family offices are not within the scope of the statute. However, this provision became effective on August 29, 2011. See 17 C.F.R. § 275.202(a)(11)(G)-1 (2011) (stating that a family office, as defined in the rule, is not considered to be an investment adviser for purposes of the Advisers Act); Family Offices, 76 Fed. Reg. 37,983 (June 29, 2011). This was two years after Scammell's violations, and he cannot rely on it to argue that his employer was not an investment adviser at the time of his violation.

The evidence shows that Madrone Advisors, LLC, and Madrone Capital Partners, LLC, were investment advisers that were exempt from registration.[2] Neither had been declared not to be an investment adviser.[3] Therefore, Scammell's argument is rejected.

Scammell also argues that his injunction cannot form the basis for a bar under the Advisers Act because his misconduct was unrelated to his employment at Madrone Advisors, LLC. To the contrary, the Commission has long barred individuals based on convictions involving dishonesty that are not even securities-related. See Kornman v. SEC, 592 F.3d 173, 180 (D.C. Cir. 2010) (citing with approval the Commission's policy that "the importance of honesty for a securities professional is so paramount that [the Commission has] barred individuals even when [a respondent's] conviction was based on dishonest conduct unrelated to

---

[1] It cannot be questioned that the Commission has authority to bar persons from association with investment advisers, whether registered or unregistered, or otherwise sanction them under Section 203 of the Advisers Act. Teicher v. SEC, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

[2] At the time of Scammell's insider trading, Section 203(b) of the Advisers Act contained a "private adviser exemption" that exempted from registration any adviser that during the course of the preceding twelve months had fewer than fifteen clients and neither held itself out to the public as an investment adviser nor advised any registered investment company or business development company. 15 U.S.C. § 80b-3(b)(3) (2009); see also Family Offices, 76 Fed. Reg. at 37,983.

[3] Historically, family offices that were not exempt from registration had sought an order from the Commission declaring the particular family office not to be an investment adviser within the intent of Section 202(a)(11) of the Advisers Act. Family Offices, 76 Fed. Reg. at 37,983-84 ("We note that an adviser may not 'rely' on exemptive orders issued to other persons."); 15 U.S.C. § 80b-2(a)(11) (2009).

securities transactions or securities business") (quoting Gary M. Kornman, Exchange Act Release No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14256); Don Warner Reinhard, Exchange Act Release No. 63720 (Jan. 14, 2011), 100 SEC Docket 36940, 36948-49 & n.27 (holding conviction for tax violation relevant to determine whether an individual is fit to work in an industry where honesty and rectitude concerning financial matters is critical); Ahmed Mohamed Soliman, 52 S.E.C. 227, 227-31 (1995) (revoking registration and imposing broker-dealer and investment adviser bars based on a misdemeanor conviction for submitting false documents to the Internal Revenue Service); Bruce Paul, 48 S.E.C. 126, 128-29 (1985) (imposing broker-dealer bar with right to reapply for conviction of making false statements on income tax returns); Benjamin Levy Sec., Inc., 46 S.E.C. 1145, 1146-47 (1978) (imposing broker-dealer and investment adviser bars and other sanctions based on conviction for making false statements in a loan application). The securities business is "a field where opportunities for dishonesty recur constantly." Soliman, 52 S.E.C. at 231.

IV. SANCTION

As the Division requests, a collateral bar will be ordered.[4]

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See Section 203(f) of the Advisers Act. The Commission considers factors including:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. at 698. Additionally, the Commission considers the extent to which the

[4] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which became effective on July 22, 2010, provided collateral bars in each of the several statutes regulating different aspects of the securities industry. Scammell's wrongdoing occurred before July 22, 2010. However, the Commission has determined that sanctioning a respondent with a collateral bar for pre-Dodd-Frank wrongdoing is not impermissibly retroactive, but rather provides prospective relief from harm to investors and the markets. John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722; see also Alfred Clay Ludlum, III, Advisers Act Release No. 3628 (July 11, 2013), 2013 WL 3479060; Johnny Clifton, Securities Act Release No. 9417 (July 12, 2013), 2013 WL 3487076; Tzemach David Netzer Korem, Exchange Act Release No. 70044 (July 26, 2013), 2013 WL 3864511.

sanction will have a deterrent effect. See Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46.

In proceedings based on an injunction, the Commission examines the facts and circumstances underlying the injunction in determining the public interest. See Marshall E. Melton, 56 S.E.C. at 698. "An injunction, by its very nature, is predicated on conduct that . . . violate[s] laws, rules, or regulations." Id. at 709. The Commission considers an antifraud injunction to be particularly serious. Id. at 710, 713. The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. See Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

B. Sanctions

Scammell's conduct was egregious and recurrent and involved at least a reckless degree of scienter. Although he is remorseful, his previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. The violations are recent. The degree of harm to investors and the marketplace is indicated in the $192,497 profit on an initial investment of $5,465. Further, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). A bar is also necessary for the purpose of deterrence. Arthur Lipper Corp., 46 S.E.C. at 100.

Scammell points to various factors, such as his youth at the time of his violation, to support his argument that the proceeding should be dismissed. He does not, however, cite any follow-on case in which a respondent had been enjoined against violations of the antifraud provisions and received no sanction or a sanction less than a bar. None exists. From 1995 to the present, there have been over thirty-five follow-on proceedings based on antifraud injunctions in which the Commission issued opinions. All of the respondents were barred[5] – thirty-three unqualified bars and three bars with the right to reapply after five years.[6]

[5] The historic cases imposed industry-specific bars, such as a bar from association with an investment adviser on a respondent who had been associated with an investment adviser at the time of his violation.

[6] Those three were Richard J. Puccio, 52 S.E.C. 1041 (1996), Martin B. Sloate, 52 S.E.C. 1233 (1997), and Robert Radano, Advisers Act Release No. 2750 (June 30, 2008), 93 SEC Docket 7495. The Commission's opinions do not make clear the factors that distinguished these cases from those in which unqualified bars were imposed, but there is little difference between a "bar" and a "bar with the right to reapply in five years."

V. ORDER

IT IS ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80(b)-3(f), TOBY G. SCAMMELL IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

____
Carol Fox Foelak
Administrative Law Judge