INITIAL DECISION RELEASE NO. 1253
ADMINISTRATIVE PROCEEDING
FILE NO. 3-18250

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

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| In the Matter of | : | |
| | : | INITIAL DECISION |
| MARK MEGALLI | : | MAY 31, 2018 |

APPEARANCES: M. Graham Loomis and Pat Huddleston, II, for the Division of Enforcement, Securities and Exchange Commission

Paul N. Monnin and Andrew T. Sumner, of Alston & Bird LLP, for Respondent Mark Megalli

BEFORE: Carol Fox Foelak, Administrative Law Judge

## SUMMARY

This Initial Decision suspends Mark Megalli from association with an investment adviser for twelve months. He was previously enjoined against violations of the antifraud provisions of the federal securities laws.

## I. INTRODUCTION

### A. Procedural Background

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on October 12, 2017, pursuant to Sections 15(b) of the Securities Exchange Act of 1934 and 203(f) of the Investment Advisers Act of 1940. The proceeding is a follow-on proceeding based on *SEC v. Megalli*, No. 1:13-cv-3783 (N.D. Ga. Dec. 15, 2015), in which Megalli was enjoined against violations of the antifraud provisions of the federal securities laws. The Division of Enforcement and Respondent filed motions for summary disposition on December 15, 2017, pursuant to Commission Rule of Practice 250(b), 17 C.F.R. § 201.250(b), and the parties timely filed oppositions and replies.

This Initial Decision is based on the pleadings, Megalli's Answer to the OIP, and public official records of which official notice has been taken, pursuant to 17 C.F.R. § 201.323. 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 Megalli was enjoined were decided against him in the civil case on which this proceeding is based and in the related criminal case, *United States v. Megalli*, No. 1:13-

cr-442 (N.D. Ga.). 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 Megalli was enjoined against violations of the antifraud provisions of the federal securities laws in *SEC v. Megalli*. The Division urges that he be barred from association with any investment adviser. Megalli urges that the Commission waived, and is otherwise estopped from, any claim to an associational bar as a result of its representations to the court in *SEC v. Megalli* and argues that he has already been punished enough.

## C. Procedural Issues

### 1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 (Rule 323) is taken of the Commission's public official records and of the docket reports and the court's orders in *SEC v. Megalli* and *United States v. Megalli*. Selected materials from the docket in those cases and Megalli's habeas corpus action are attached to the parties' filings, and official notice pursuant to Rule 323 is taken of each of them. Official notice is taken of Financial Industry Regulatory Authority, Inc. (FINRA), records, as well. *See Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *1 n.1 (Apr. 18, 2013), *pet. denied*, 575 F. App'x 1 (D.C. Cir. 2014).

### 2. Collateral Estoppel

It is well established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by consent, by summary judgment, or after a trial. *See Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *10 (Feb. 4, 2008) (injunction entered by consent), *pet. denied*, 561 F.3d 548 (6th Cir. 2009); *John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 SEC LEXIS 91, at *1-2 & n.1, *7 (Jan. 21, 1998) (injunction entered by summary judgment); *James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 & nn.13-14 (Oct. 12, 2007) (injunction entered after trial), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Demitrios Julius Shiva*, Exchange Act Release No. 38389, 1997 SEC LEXIS 561, at *5-6 & nn.6-7 (Mar. 12, 1997); *see also Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *2-10, *22-30 (July 25, 2003). Nor does the Commission permit criminal convictions to be collaterally attacked in its administrative proceedings.[1] *See Ira William Scott*, Advisers Act Release No. 1752, 1998 SEC LEXIS 1957, at *8-9 (Sept. 15, 1998); *William F. Lincoln*, Exchange Act Release No. 39629, 1998 SEC LEXIS 193, at *7-8 (Feb. 12, 1998).

[1] There are no pending appeals of Megalli's injunction or conviction, but the pendency of an appeal would not preclude the Commission from action based on an injunction or conviction. *See Joseph P. Galluzzi*, Exchange Act Release No. 46405, 2002 SEC LEXIS 3423, at *10 n.21 (Aug. 23, 2002); *Charles Phillip Elliott*, Exchange Act Release No. 31202, 1992 SEC LEXIS 2334, at *11 (Sept. 17, 1992), *pet. denied*, 36 F.3d 86 (11th Cir. 1994).

## II. FINDINGS OF FACT

On July 8, 2014, Megalli was convicted on his plea of guilty of conspiracy to commit securities fraud (insider trading), in violation of 18 U.S.C. § 371.[2] *United States v. Megalli*, ECF Nos. 1, 3-1, 9, 29, 31. At his sentencing hearing, Megalli expressed remorse and promised not to reoffend. *United States v. Megalli*, ECF No. 31 at 22-23.[3] The court found these assurances to be sincere, stating, "You've not been a person committing crimes all your life to this point and I don't expect you to commit another one from this point forward." *Id*. at 26. The court sentenced Megalli to twelve months and one day of imprisonment,[4] followed by three years of supervised release[5] and 100 hours of community service, and ordered him to pay $50,000 in restitution. *Id.*, ECF No. 29 at 2-3, 5. Megalli had already paid the $50,000 into the registry of the court at the time he was sentenced. *Id*., ECF No. 31 at 26. The court – and the prosecution – deemed his advance payment of the restitution to be praiseworthy. *Id*., ECF No. 31 at 4, 26.[6]

In December 2015, Megalli was enjoined against violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and was ordered to pay $19,790 in disgorgement, plus prejudgment interest of $3,633.71, and $38,580 in civil penalties. *SEC v. Megalli*, ECF Nos. 62-63, 65-66. The conduct underlying *SEC v. Megalli* was the same as that underlying *United States v. Megalli*. *SEC v. Megalli*, ECF No. 48 at 1, 12.[7] The conduct occurred from September 2009 to July 19, 2010 – Megalli's last violative act was his July 19, 2010, short sale of Carters, Inc., based on actual knowledge of inside information. *SEC v. Megalli*, ECF No. 29-2 ¶¶ 31-33; ECF No. 39-1 ¶¶ 31-33; ECF No. 48 at 2-4.

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[2] Megalli subsequently filed a petition under 28 U.S.C. § 2255 (habeas corpus petition), which the U.S. District Court for the Northern District of Georgia denied. *See Megalli v. United States*, No. 1:13-cr-442 (N.D. Ga. Sept. 25, 2017), ECF Nos. 68-69, *certificate of appealability denied*, No. 17-14529 (11th Cir. Dec. 28, 2017). *See* 28 U.S.C. § 2253(c)(1)(B) ("an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under Section 2255" unless the court "issues a certificate of appealability").

[3] ECF No. 31 is attached to the Division's Motion for Summary Disposition as Ex. E. It is the transcript of the July 8, 2014, sentencing hearing in *United States v. Megalli*.

[4] U.S. Bureau of Prison records, of which official notice pursuant to 17 C.F.R. § 201.323 is taken, show that Megalli completed the term of imprisonment and was released on July 22, 2015. *See* Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc/ (search "Find by Name" for "Mark Megalli") (last visited May 29, 2018).

[5] On February 16, 2018, the court granted Megalli's Motion for Early Termination of Supervised Release, effective immediately. *United States v. Megalli*, ECF Nos. 77, 79.

[6] The prosecution stated, "That's tremendous demonstration of acceptance of responsibility and attempting to make amends for his misconduct." *United States v. Megalli*, ECF No. 31 at 4.

[7] ECF No. 48 is published as *SEC v. Megalli*, 157 F. Supp. 3d 1240 (N.D. Ga. 2015).

Megalli was employed by Level Global Investors, L.P., between August 2009 and March 2011. *SEC v. Megalli*, ECF No. 29-2 ¶ 8; ECF No. 39-1 ¶ 8. Level Global was an unregistered investment adviser that managed hedge funds with approximately $4 billion of assets in 2010.[8] *SEC v. Megalli*, ECF No. 29-2 at ¶ 9; ECF No. 39-1 at ¶ 9. Level Global was also not registered as a broker-dealer. *See* FINRA, BrokerCheck, https://brokercheck.finra,org (search for "Level Global Investors" as "Firm Name") (last visited May 29, 2018).

Megalli has never been registered with FINRA in any capacity. *See* https://brokercheck.finra,org (search for "Mark Megalli" as "Name") (last visited May 29, 2018). He worked in the hedge fund industry for approximately ten years, starting in 2003, and encompassing his August 2009 to March 2011 association with Level Global. *SEC v. Megalli*, ECF No. 67 at 8-9, 93, 108-09.[9] As part of his community service, Megalli has been a guest speaker at Yale Law School, his alma mater, in a course entitled "Ethics in Financial Markets." *Id*., ECF No. 67 at 7, 112; Resp. Reply at Ex. B.

*Adjudicated Misconduct*

The following facts were found in the court's September 24, 2015, order on the parties' motions for summary judgment, *SEC v. Megalli*, ECF No. 48 at 2-4: On September 14, 2009, Megalli, on behalf of Level Global, entered an agreement with a consulting firm owned by a former officer of Carter's, Inc. Megalli, correctly, assumed that the former officer continued to have relationships at Carter's. An insider friend of the former officer disclosed inside information to the former officer, who passed it on to Megalli, who then made trades in Carter's stock based in part on the insider information between September 2009 and July 2010. For example, on October 23, 2009, the former officer telephoned Megalli and disclosed inside information, recommending that Megalli sell any stock he had in Carter's. While still on the telephone call, Megalli sent a message to Level Global's head of trading to liquidate Level Global's holdings in Carter's, which were valued at nearly $9 million. Megalli relied on the insider information along with other information in deciding to sell. In July 2010 Megalli sold short positions in Carter's based on inside information from the former officer, generating profits for Level Global of $648,655.[10] All told, Megalli's insider trading in Carter's helped Level Global avoid losses of $2,034,000 and gain profits of $648,655. Throughout the time between September 2009 and July 2010 Megalli consciously avoided knowledge concerning the source of the former officer's insider information.

[8] In 2013, in a case unrelated to Megalli, Level Global was enjoined against violations of the antifraud provisions and ordered to pay the Commission a total of $21,514,275.63 in disgorgement, prejudgment interest, and a civil penalty. *SEC v. Adondakis*, No. 1:12-cv-409 (S.D.N.Y. May 31, 2013), ECF No. 88. That May 31, 2013, Final Judgment was vacated on January 26, 2016, and the Commission was ordered to repay $21,514,275.63 to Level Global. *Id*., ECF No. 141.

[9] ECF No. 67 is attached to Respondent's motion for summary disposition as Ex. A, to his opposition as Ex. A, and to his reply as Ex. B. It is the 138-page transcript of the three-and-a-half-hour October 27, 2015, hearing on sanctions in *SEC v. Megalli* that followed the court's September 24, 2015, grant of the Commission's motion for summary judgment as to liability, ECF No. 48.

[10] The profits of $648,655 were realized when Level Global covered its short position on July 29, 2010. *SEC v. Megalli*, ECF No. 29-2 ¶ 34; ECF No. 39-1 ¶ 34.

## III. CONCLUSIONS OF LAW

Megalli has been enjoined "from engaging in or continuing any conduct or practice in connection with any [investment adviser] activity [and] 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 and has been convicted within ten years of the commencement of this proceeding of a felony that "involves the purchase or sale of any security" and that "arises out of the conduct of the business of a[n] . . . investment adviser" within the meaning of Sections 203(e)(2)(A), (B) and 203(f) of the Advisers Act. Level Global was an investment adviser, and Megalli was a person associated with an investment adviser. *See* Section 202(a)(17) of the Advisers Act. 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. *See Teicher v. SEC*, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999) (superseded on other grounds by statute).

## IV. SANCTION

The Division requests a bar from association with any investment adviser.[11] Div. Opp. at 15. Megalli requests that the proceeding be dismissed, but, if it is not, that any sanction take account of the degree to which he has already been punished. He argues that the Division has waived, or is estopped from, seeking a bar, based on representations it made to the court in *SEC v. Megalli* that it was not seeking a bar. In opposition, the Division points to instances of Megalli's advocacy in *United States v. Megalli* and *SEC v. Megalli*, including counsel's statements that he would be barred and would be out of the industry.

### A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. § 80b-3(f). 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.

[11] Originally, the Division requested a collateral bar, that is – in addition to a bar from associating with any investment adviser – a bar from associating with any broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock. However, it withdrew its request for a collateral bar in light of the court's ruling in *Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017), that a collateral bar cannot be imposed when the violative conduct on which a follow-on proceeding was based ended before the July 22, 2010, effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Megalli's violative conduct ended on July 19, 2010.

*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)), *aff'd on other grounds*, 450 U.S. 91 (1981). 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*, 2003 SEC LEXIS 1767, at *5. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006). 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 Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 n.26 (Apr. 20, 2012); *Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976).

To the extent that Respondent suggests that he should not be barred because of the other sanctions and penalties already imposed on him in light of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), Sections 15(b) of the Exchange Act and 203(f) of the Advisers Act specifically authorize administrative proceedings like this one. *See* Exchange Act Section 15(b)(4)(B)(i), (ii), (C) and (6)(A)(ii), (iii); Advisers Act Section 203(e)(2)(A), (B) and (4) (authorizing such a proceeding against a respondent who "has been convicted within ten years . . . of any felony or misdemeanor . . . [that] involves the purchase or sale of any security" or who "is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice in connection with any [investment adviser] activity, or in conjunction with the purchase or sale of any security."

*Waiver and Estoppel*

Megalli argues that the Commission has waived its right to seek an industry bar through clearly and unambiguously stated judicial admissions, while acknowledging such a claim of waiver is legally disfavored. Resp. Mot. for Sum. Disp. at 9 (citing U.S. District Court and Environmental Protection Agency administrative cases). He also argues that the Commission is judicially estopped from pursuing administrative debarment.[12] *Id.* at 13-17. In this case, waiver and estoppel both involve the Commission's allegedly taking two inconsistent positions – telling the District Court that it was not seeking to bar him and then initiating this proceeding to do so. To constitute a waiver the Commission must have clearly and unambiguously waived its right to seek a bar, while for judicial estoppel a court must have relied on the earlier position. In this case, the Commission's original representation was not completely unambiguous so as to constitute a waiver, and the record of the original case does not show that the court relied on it so as to constitute judicial estoppel.

[12] Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000). The Court describes it as a discretionary equitable doctrine that typically requires several factors: a party's later position must be clearly inconsistent with its earlier position; a court's acceptance of the earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled – absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations; whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposition if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 749-751 (2001).

Specifically, Megalli urges that the Commission waived, and is otherwise estopped from, any claim to an associational bar as a result of its representations to the court in *SEC v. Megalli*: "Given the fact that we are not seeking to bar the man from the securities industry, nor are we seeking an order to bar him from being an officer or director of a public company, which is on the table in some of our cases, we believe that injunctive relief is even more proper in this case as it will be the only court order that has a chance of restraining him." *SEC v. Megalli*, ECF No. 67 at 119; *see also id*., ECF No. 67 at 3-4 (colloquy between the court and Commission counsel in which counsel clears up the court's misunderstanding that the Commission is asking for debarment). Megalli terms this an "unequivocal expression of administrative intent" that is a waiver "enforceable under . . . well-settled legal authority." Resp. Mot. for Sum. Disp. at 13. The Division claims that the quoted language only refers to the relief the Commission was seeking in *SEC v. Megalli*, which did not include seeking a bar from the securities industry (which is available only in an administrative proceeding) or an officer and director bar. While the Division's interpretation of its language as to an industry bar is somewhat strained, Megalli's argument that the quoted language is a representation that the Commission would not institute an administrative proceeding seeking to bar Megalli from the securities industry is somewhat inconsistent with his counsel's statement later in the same hearing: "He recognizes that it's misconduct. But he's paid very dearly for it. I mean, he's gone to prison. He's pled guilty. *He's going to be out of the industry*."[13] *SEC v. Megalli*, ECF No. 67 at 130 (emphasis added).

In *SEC v. Megalli*, the Commission also ventured its view that Megalli's counsel told the *United States v. Megalli* court that Megalli "is going to be barred from the securities industry" and that Megalli "got an unduly light sentence because of misrepresentations he had made about the relief the SEC was seeking and about the defendant's intent to enter into a settlement with the SEC." *Id*. at 118-19. However, Megalli's counsel did not misrepresent the relief that the SEC was seeking in the parallel civil case. At the July 24, 2014, sentencing hearing in *United States v. Megalli*, Megalli's counsel stressed the other forms of punishment he was likely to receive – possible disgorgement in the civil proceeding of Level Global's institutional gain[14] of over $3 million[15] and disbarment[16] – and represented that they were "going to work through a settlement

[13] This statement can be interpreted as an opinion that a reputable financial firm would not hire someone convicted of securities fraud rather than a prediction that Megalli would be barred.

[14] The Commission's November 14, 2013, complaint requested, *inter alia*, "An order requiring the disgorgement by Defendant of all ill-gotten gains or unjust enrichment (*including amounts received by Level Global as a result of Megalli's actions*) with prejudgment interest." *SEC v. Megalli*, ECF No. 1 at 15; Div. Mot. for Sum. Disp. Ex. F at 15 (emphasis added).

[15] Counsel referred to the then-recent decision of the U.S. Court of Appeals for the Second Circuit in *SEC v. Contorinis*, 743 F.3d 296, 304 (2014) that "district courts possess discretion to allocate disgorgement liability for insider trading to those responsible for the illegal acts, including to those with investment power over third-party accounts used to make illegal investments" and that district courts *may* (but not *must*) "impose disgorgement liability for insider trading upon wrongdoers when the gains accrue to innocent third parties." As counsel predicted, the Commission cited *Contorinis* in *SEC v. Megalli* in reiterating its request for disgorgement of Level Global's institutional gain of almost $3 million ($2,034,000 in losses avoided plus $685,000 of profits), as well as a civil penalty of three times that amount. *SEC v. Megalli*, ECF No. 67 at 114-17, 120-21 (transcript of Oct. 27,

with the SEC that is going to involve permanent debarment from the industry."[17] *United States v. Megalli*, ECF No. 31 at 8-9, 21. The Commission sought disgorgement from Megalli of Level Global's institutional gain, amounting to almost $3 million, and continued to press for this even after the court rejected that approach in its September 24, 2015, order as inconsistent with controlling Eleventh Circuit precedent limiting disgorgement to the "direct gain accruing to the wrongdoer." *SEC v. Megalli*, ECF No. 1 at 15 (Nov. 14, 2013, complaint), No. 48 at 24-25 (Sept. 24, 2015, Order), No. 67 at 114-17, 120-21 (transcript of Oct. 27, 2015, hearing).

The *United States v. Megalli* court noted that Megalli would be deterred from securities violations because "you won't be able to work in this field," but that a custodial sentence was necessary. *United States v. Megalli*, ECF No. 31 at 26, 28. In imposing sentence, the court stated: "In light of the restitution and the other matters that I fully expect you are going to have to do with the SEC I will not impose a fine or cost of incarceration." *Id*. at 29. The Commission placed this last statement by the *United States v. Megalli* court before the *SEC v. Megalli* court to bolster its argument that Megalli should be ordered to pay the maximum possible disgorgement and civil penalty. *SEC v. Megalli*, ECF No. 67 at 105-06.

In *SEC v. Megalli*, the Commission sought, in addition to an injunction, disgorgement of $2,682,655 (the sum of Level Global's losses avoided and profits gained), and a civil penalty of three times that amount as a lodestar, *i.e.*, financial sanctions totalling more than $10 million, as Megalli's counsel had predicted. *Id*., ECF No. 1 at 15-16, No. 67 at 120-21. Megalli maintained that he should be liable for disgorgement only of a sum he personally realized and that sum should be the lodestar for any civil penalty. *Id*., ECF No. 67 at 122-23, 126. As noted above, the court held that Eleventh Circuit precedent limited disgorgement to the "direct gain accruing to the wrongdoer," concluded that $19,790 was "an appropriate and reasonable approximation of the personal gain accruing to [Megalli] as a result of his illegal conduct," and ordered disgorgement of that amount. *Id*., ECF No. 62 at 4. The court concluded that the lodestar amount for the civil penalty was Megalli's personal gain, not Level Global's institutional gain, and ordered a civil penalty of $39,580, twice Megalli's personal gain. *Id*., ECF No. 62 at 10-12.

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2015, hearing). The court had rejected that approach in its September 24, 2015, order as inconsistent with controlling Eleventh Circuit precedent limiting disgorgement to the "direct gain accruing to the wrongdoer." *Id*., ECF No. 48 at 24-25.

[16] The New York State Unified Court System Attorney Registration data base shows the status of Mark Megalli, Registration Number 4055620, as Suspended, effective January 30, 2017, with a Next Registration date of April 2020. *See* N.Y. Unified Ct. Sys., Attorney Search, http://iapps.courts.state.ny.us/attorney/AttorneySearch (search by "First Name" using "Mark" and "Last Name" using "Megalli") (last visited May 29, 2018). There is no publicly available information explaining the suspension.

[17] The record reflects settlement negotiations that ultimately were not fruitful. *SEC v. Megalli*, ECF No. 61-2 at 7-8; Resp. Reply at Ex. A.

In arguing for a low civil penalty, Megalli's counsel stressed the other forms of punishment he received for his misconduct and reiterated the expectation that he would be barred: "He recognizes that it's misconduct. But he's paid very dearly for it. I mean, he's gone to prison. He's pled guilty. He's going to be out of the industry." *SEC v. Megalli*, ECF No. 67 at 130. Megalli said: "I would have loved to have settled with the SEC if they would have been amenable to settle for an amount I could pay. *Id*., ECF No. 67 at 104.

In sum, in *SEC v. Megalli*, the Commission counsel made statements that could be construed as representing that it was not seeking a bar in that proceeding or, in the alternative, that it would not seek a bar in any proceeding. Such equivocal statements fall short of a clear and unambiguously stated judicial admission that the Commission would not seek to bar Megalli. Nor did Megalli's counsel understand it as such. In *United States v. Megalli* and *SEC v. Megalli*, he consistently articulated the expectation that Megalli would be barred. Finally, there is no indication in the docketed materials in *SEC v. Megalli* that the court relied on any representation that the Commission would not seek to bar Megalli from the securities industry in a venue where this is authorized, nor did the Commission obtain an advantage from the putative representation that it would not seek to bar Megalli. The Commission sought more than $10 million (disgorgement plus civil penalty of three times disgorgement), but the court ordered Megalli to pay about $62,000 (disgorgement plus prejudgment interest plus civil penalty of two times disgorgement).

### B. Sanction

As described in the Findings of Fact, Megalli's conduct was egregious and recurrent. The conspiracy to commit securities fraud included two separate insider trades nine months apart, and helped his employer avoid losses of $2,034,000 and gain profits of $648,655. The violative conduct ended in July 2010, about seven years before this proceeding was instituted. His degree of scienter was a conscious avoidance of knowledge concerning the source of his tipper's insider information. His previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, he could re-enter the securities industry in association with an investment adviser. The degree of direct financial harm to investors by the conspiracy is quantified in the $2,034,000 in losses avoided and $648,655 in profits gained, and, 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*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *pet. denied*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975), *pet. granted in part on other grounds*, 547 F.2d 171 (2d Cir. 1976). A conviction involving dishonesty weighs in favor of a bar, because of the Commission's obligation to ensure honest securities markets. However, there are exigent countervailing considerations that weigh in favor of a lesser sanction. Megalli has affirmatively recognized the wrongful nature of his conduct. Further, the court, when sentencing him, in *United States v. Megalli* found his expression of remorse and promise not to reoffend to be sincere: "I don't expect you to commit another [crime] from this point forward."[18] *United States v. Megalli*,

[18] The court also commented on Megalli's lack of a disciplinary record: "You've not been a person committing crimes all your life to this point." *United States v. Megalli*, ECF No. 31 at 26. However, this is not an impediment to imposing sanctions for a respondent's first adjudicated disciplinary violation. *See Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 SEC

ECF No. 31 at 26. Later, about two and a half years after he was released from prison, the court terminated Megalli's supervised release five months early. On balance, considering the court's finding that Megalli is unlikely to reoffend and that his remorse is sincere,[19] a twelve-month suspension is an appropriate sanction.

## V. ORDER

IT IS ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), MARK MEGALLI IS SUSPENDED from associating with any investment adviser for a period of twelve months.

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 a 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.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

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LEXIS 3171, at *15-17 (June 26, 2003); *Martin R. Kaiden*, Exchange Act Release No. 41629, 1999 SEC LEXIS 1396, at *29-31 (July 20, 1999); *see also Mitchell M. Maynard*, Advisers Act Release No. 2875, 2009 SEC LEXIS 1621, at *42 (May 15, 2009) ("[T]he absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws."); *accord Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *32 & n.40 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

[19] The undersigned has given preclusive effect to the court's sentencing findings that Megalli is unlikely to reoffend and that his remorse is sincere. The court referenced these findings in discussing its consideration of the 18 U.S.C. § 3553 factors that led it to impose a sentence (twelve months and a day) that was less than the forty-one months recommended by the Federal Sentencing Guidelines. *United States v. Megalli*, ECF No. 31 at 32. Such defensive collateral estoppel of sentencing findings is distinguished from offensive collateral estoppel based on sentencing findings. *See Monarch Funding Corp.*, 192 F.3d 295, 302, 304-06 (2d Cir. 1999) (rejecting, as unfair, in a subsequent civil proceeding, offensive preclusion of an "inferential determination" from a sentencing finding).