UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15057

In the Matter of

PETER SIRIS,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

Unable to raise any actual issue of material fact precluding summary disposition, Respondent Peter Siris instead seeks to create one. Siris brushes aside his Consent to a final judgment in an action alleging widespread fraudulent conduct. Siris devotes the bulk of his 53-page Opposition to mischaracterizing the evidence and claims against him and attacking legal elements that were established as part of the prior civil action. Siris does so under the guise that such matters involve genuine issues of material fact relevant to this proceeding. Siris is wrong.

The relevant material facts in this proceeding establish that the Court should bar Siris from the securities industry. *Siris does not dispute* that the Commission filed suit against him for violations of the federal securities laws, including multiple infractions of, among others, the antifraud provisions for insider trading, and misrepresentations and omissions in a securities purchase agreement and to investors in his funds. *Siris does not dispute* that during the relevant period of his misconduct, which spanned several years and generated over half a million dollars of illicit gains, Siris acted as a securities broker in connection with a penny stock offering and as an investment adviser. Further, *Siris does not dispute* that he consented to the District Court injunction against him for future violations of, among others, the antifraud provisions.

Siris has not produced any evidence that would raise a genuine issue as to any material fact. Instead, while Siris voluntarily consented on a neither-admit-nor-deny basis to multiple insider trading claims, he now incredibly argues that issues of fact exist with respect to fundamental legal elements including materiality and intent. Though Siris purports to qualify his arguments by stating that he is not denying the factual allegations of the Complaint, but rather he is providing a more fulsome record for this proceeding, Siris impermissibly ignores the undisputed material facts

of the Complaint. The allegations of the Complaint include that Siris "*intentionally or recklessly*" traded while in possession of *material*, non-public information. Siris cannot now argue that the information he traded on was immaterial, nor can he illogically assert that he lacked any intent in the face of allegations and numerous claims that include scienter. Siris's Consent expressly prohibits him from doing so. The Court should not countenance Siris's arguments.

Siris further tries to create issues of fact respecting his acknowledgment of wrongdoing, the sincerity of his assurances against future violations, and whether his corrective measures sufficiently protect the public interest. None of these supposed fact issues save Siris from the requested relief. Even accepting Siris's alleged "facts" as true—that Siris has acknowledged his misconduct, taken corrective action to prevent future violations, and sincerely assures that no future violations will occur—does not change the public interest concerns and other *Steadman* factors that militate in favor of the requested sanctions. Indeed, nothing changes the fact that the public interest still requires that Siris be barred based on the egregiousness of his recurrent violations and the reckless or knowing misconduct exhibited by his pattern of various antifraud violations. In the absence of the Division's requested relief, Siris could return to unrestricted association with an investment adviser. Siris would still be free to, among other things, continue managing others' money, which creates a serious risk to the investing public in spite of his claimed present good intentions.

Accordingly, and as detailed in the Division's opening papers, collateral and penny stock bars against Siris are appropriate in the public interest.

ARGUMENT

I. SIRIS'S ATTEMPT TO RELITIGATE THE CLAIMS AGAINST HIM IS MISGUIDED AND DOES NOT RAISE ANY ISSUE OF MATERIAL FACT.

The Division is entitled to summary disposition as a matter of law due to Siris's failure to raise any genuine issue of material fact. Rule 250, Commission's Rules of Practice, 17 C.F.R. § 201.250. Use of summary disposition without a hearing, particularly in a follow-on administrative proceeding based on an injunction, is appropriate here. *See Gibson v. SEC*, 561 F.3d 548 (6th Cir. 2009) *citing In the Matter of Conrad P. Seghers*, Advisers Act Rel. No. 2656, 2007 SEC LEXIS 2238 (Sept. 26, 2007) (Commission opinion upholding investment adviser bar on summary disposition).

A. Siris settled numerous violations of the securities laws and he is prohibited from now relitigating the existence of the legal elements supporting those charges.

The vast majority of Siris's lengthy Opposition contests the allegations underlying the District Court Complaint in an apparent attempt to improperly relitigate issues that were addressed in a previous civil proceeding, *SEC v. Siris, et al.*, 12-CV-5810 (S.D.N.Y. July 30, 2012).

Siris settled the claims against him in that action and expressly agreed to and acknowledged the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." (17 C.F.R. § 202.5, Consent ¶ 10.) Siris nonetheless submits to this Court that genuine issues of fact exist regarding "(1) whether there was material nonpublic information [relating to his numerous insider trading violations]; [and] (2) whether Siris understood he was in possession of material nonpublic information and, if so, intended to trade on it." (Opposition at 33.) Siris further argues in his Opposition and 39-page Answer that he lacked scienter. (*E.g.*,

Answer at 2, "There was no scienter;" Opp. at 3, conduct was negligent; Opp. at 14, n.15, there was no deception; Opp. at 47, Siris "made ignorant and careless mistakes and ran a sloppy business.")

In other words, Siris now asserts that two central legal elements of insider trading were lacking: namely, (1) that he had no scienter, and (2) that he did not have, nor did he understand himself to have, material, non-public information.[1]

To prove insider trading in violation of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, as well Section 17(a)(1) of the Securities Act of 1933, the Commission had to show: (1) a duty via an insider relationship or other similar relationship of trust; (2) possession or knowledge of material, nonpublic information prior to purchasing or selling; and (3) scienter. *Chiarella v. United States*, 445 U.S. 222, 227-35 (1980). Scienter is a "mental state embracing the intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 n.12 (1976). In the Second Circuit, scienter is established by knowing or reckless conduct. *See Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000); *see also IIT v. Cornfeld*, 619 F.2d 909, 923 (2d Cir. 1980). A person who is not an insider or consultant to an issuer violates Section 10(b) of the Exchange Act and Rule 10b-5 and Section 17(a)(1) of the

[1] Siris also makes allegations that in effect he lacked a duty to not trade (*E.g.*, Opp. at 14, n.15, 17, 25, 35); in respect to his fraud in a securities purchase agreement he alleges that he did not have any deceptive intent (*i.e.*, scienter) (Opp. at 26); and that in respect to his misrepresentations and omissions to investors in his funds he alleges that "it is far from clear whether any disclosure was required" (Opp. at 49). However, the Complaint alleges that Siris had and breached a duty by trading while in possession of material, non-public information; that he "knowingly or recklessly made and disregarded the representations made" in the securities purchase agreement; and further that he "deprived his investors of information concerning his role with the now-failed company and gave the false and misleading impression that others should be sued for the very conduct in which Siris himself engaged." (*E.g.*, Compl. ¶¶17, 90, 99-100, 103, 133.) In any event, for the same reasons mentioned herein, Siris is precluded from making such arguments by the terms of his Consent.

Securities Act by misappropriating, with scienter, for his or her own benefit material, nonpublic information, in breach of a fiduciary or similar duty of trust or confidence. *See U.S. v. O'Hagan*, 521 U.S. 641, 642 (1997); *Dirks v. SEC*, 463 U.S. 646, 655 (1983); *SEC v. Softpoint Inc.*, 958 F. Supp. 846, 863-64 (S.D.N.Y. 1997).

1. Siris's outrageous attempt to relitigate issues of materiality and whether he had *any* scienter fails to create genuine issues of material fact here.

Siris should not be permitted to use this proceeding to attempt to relitigate claims resolved in the District Court action. As this Court recently observed, "the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against a respondent, whether resolved by summary judgment, *by consent*, or after a trial." *In the Matter of Stanley C. Brooks*, Initial Decisions Rel. No. 475, 2012 SEC LEXIS 3804, at *5 (Dec. 11, 2012) (citations omitted) (emphasis added) (granting Division's motion for summary disposition and barring respondent); s*ee also In the Matter of Marshall Melton*, Advisers Act Rel. No. 2151, Exchange Act Rel. No. 48228, 2003 SEC LEXIS 1767, at *28 (July 25, 2003) (Commission opinion upholding bars in proceeding instituted following consent injunction; ruling that: "For purposes of consent injunctions that are agreed to and entered by a court . . . , we will construe the 'neither admit nor deny' language as precluding a person who has consented to an injunction in a Commission enforcement action from denying the factual allegations of the injunctive complaint in a follow-on proceeding ....").

All material facts that concern the activities for which Siris was enjoined were decided against him in the District Court action and consent final judgment on which this proceeding is based. Clearly, the Commission could not have charged Siris with illegal insider trading if he did

not trade while in possession of material, non-public information. As alleged in the Complaint, Siris *repeatedly* traded securities while in possession of material, non-public information and in violation of a duty not to trade.

Nor could the Commission have charged Siris with his serial insider trading if he lacked scienter, as he now asserts. Despite Siris's hope to shoehorn all of his "mistakes" into violations of Rule 105 of Regulation M, which does not require scienter, Siris's many violations of the securities laws as alleged in the Complaint include scienter-based claims, such as his extensive insider trading (not to mention his misrepresentations and omissions in a securities purchase agreement). The Complaint establishes that Siris "intentionally or recklessly" engaged in repeated insider trading (*see, e.g.*, Compl. ¶ 127), and this fact cannot be disputed or relitigated here.

2. Siris's conduct was not "isolated to Offerings" as he asserts, rather it exhibited a pattern of illegal actions.

Siris's conduct demonstrates a pattern of illegal insider trading both in advance of news concerning one of his consulting clients (during late February and early March 2009) and ahead of *ten* confidential securities offerings (spanning the period from July 2009 to November 2010). The Commission charged Siris with not just one instance of insider trading, nor two instances, rather, the Commission charged Siris with double-digit instances of insider trading that generated hundreds of thousands of dollars in illicit gains.

Moreover, the Commission charged Siris with a host of other securities law violations. His vast misconduct, which was far different from being "isolated to Offerings" as he now asserts (Opp. at 2), crossed a spectrum that included unregistered sales of securities, violations of broker-dealer registration requirements, and misrepresentations and omissions to his investors.

To now argue that he lacked any scienter, after voluntarily consenting to the claims on a neither-admit-nor-deny basis, and in the face of the myriad violations alleged against him, is disingenuous and runs afoul of Siris's Consent.[2] *See In the Matter of James C. Dawson,* Exchange Act Rel. No. 3057, 2010 SEC LEXIS 2561, at *17-18 (July 23, 2010) (Commission opinion upholding investment adviser bar on summary disposition, and stating that "Dawson argues that he had no scienter ... this argument contradicts the allegations in the Complaint ... that Dawson engaged in scienter-based offenses, and Dawson is precluded by the terms of the Consent Agreement from making such a claim.").

B. Siris should honor his Consent.

Siris cannot ignore his agreement to not contest or deny the allegations of the Complaint. He expressly acknowledged that the entry of an injunction may have collateral consequences. (Consent ¶ 9, stating in part that defendant "acknowledge[s] that the [District] Court's entry of a permanent injunction may have collateral consequences.")

Siris's arguments in his Opposition that his conduct did not "remotely resemble purposeful insider trading" that merits a bar—as if insider trading ahead of ten offerings and in the securities of one consulting client somehow qualifies as a lesser grade of insider trading—miss the mark. Siris tries to distinguish the authority cited by the Division by essentially arguing that Siris's widespread misconduct committed over a three-year period that generated over half a million dollars in ill-gotten gains was not that bad because Siris's conduct was really the result of

[2] Further, as alleged in the Complaint, Siris formerly worked as an investment columnist for a New York publication, where he authored several articles concerning the pitfalls of insider trading. (Compl. ¶¶ 2, 74). Notwithstanding his improper attempt to address issues of materiality and his supposed lack of scienter, it is difficult to understand how Siris can now plausibly claim his conduct was merely attributable to oversight in light of his sophistication and the repeated nature of his "mistakes" that demonstrate *at least* recklessness.

oversight, ignorance, and sloppy operations. (Opp. at 42-44.) These arguments are, at their core, contrary to the consented to allegations in the Complaint against Siris and should not be heard.

Further, contrary to Siris's assertion that the Division believes he should be mute in this proceeding (Opp. at 48), the Division merely submits that as a settling defendant he should honor his agreement in settlement, which he entered into voluntarily.

II. OTHER SUPPOSED ISSUES OF FACT DO NOT MILITATE AGAINST THE PUBLIC INTEREST CONCERNS THAT REQUIRE SIRIS BE BARRED.

Along with his impermissible attempt to relitigate issues resolved during the District Court action, Siris argues that summary disposition is inappropriate here because issues of fact exist concerning "(3) whether Siris has acknowledged his misconduct which the Division disputes; (4) the sincerity of Siris's assurances against future violations which the Division disputes; (5) whether Siris's precautions are sufficient to protect against future violations and (6) whether permitting Siris to orderly wind down the Funds will jeopardize the investing public as the Division contends." (Opp. at 33-34.)

Siris's supposed issues of material fact fail to save him from the requested sanctions. In administrative disciplinary proceedings such as this one, the Court reviews a number of factors, with no one factor being dispositive. *In the Matter of Gary M. Kornman*, Exchange Act Rel. No. 59403, Advisers Act Rel. No. 2840, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009).

Even taking the "facts" of Siris's pleadings as true as set forth under Rule 250(a)—that he has acknowledged his misconduct, taken corrective measures, and assures no future violations will occur—does not change the conclusion that Siris should be barred.[3]

[3] Although Siris acknowledges "mistakes," he shirks all intent, which is a staple of securities fraud. Further, Siris's acknowledgement of his wrongdoing and assurances against future

Each of these supposed fact issues raised by Siris does not militate against the public interest concerns resulting from his egregious and recurrent misconduct. The very nature of Siris's violations establishes that his conduct was egregious, and the length of time in which his acts occurred shows that his conduct was far from isolated. Moreover, the large number of Siris's violations of the antifraud provisions, along with his other misconduct, demonstrates his level of scienter. Each of these factors weighs in favor of the Division's requested relief. Siris should not be allowed to continue in the securities industry given that 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." *In the Matter of Tzemach David Netzer Korem*, Initial Decisions Rel. No. 427, 2011 SEC LEXIS 2717, at *13-14 (Aug. 5, 2011) (citation omitted). Indeed, Siris remains in an occupation, and in a unique position managing multimillion dollar portfolios, that will present opportunities for future violations.

Moreover, Siris's other assertions cannot preclude summary disposition in favor of the Division. Siris makes the conclusory allegation without any evidence that a suspension or bar would not further protect the investing public, but would instead put *his* investors at risk, as well as the market, because of the many thinly-traded Chinese stocks Siris's funds hold. (Opp. at 3.) As noted in the Division's opening papers, in reviewing the *Steadman* factors, courts look beyond the interests of particular investors and to the protection of investors generally. *Dawson*, 2010 SEC LEXIS 2561, at *14. Siris offers no evidence that he, and only he, possesses the know-how to

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violations are undermined by his papers in this proceeding that demonstrate a "troubling indication[] of a failure to appreciate the seriousness of his violation[s]." *See Dawson*, 2010 SEC LEXIS 2561, at *18. In addition, Siris's alleged corrective measures, apparently geared towards trading, do not prevent Siris from other violations of the law from which he has been enjoined, including acting as an unlicensed securities broker or from making misstatements and omissions to his investors.

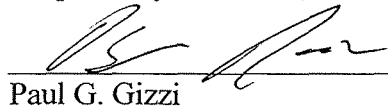
wind-down his funds, nor that the market would be put at risk. Siris's Opposition references at least one employee who seemingly could facilitate the orderly wind-down of his funds, given that Siris claims he is in a limited sell-only mode. (Opp. at 51.) Further, Siris has not offered any evidence nor explained how giving him more time to wind-down his funds benefits the public interest. From his Opposition, Siris appears to have begun the process at least in January 2012, the Complaint was filed in July 2012, and this proceeding was instituted in September 2012. We are now at year's end. Siris has essentially had a year to wind-down, but asserts that more time is necessary. Siris's last-ditch effort to continue managing others' money does not comport with the public interest.

CONCLUSION

Despite the size of Siris's filings in this proceeding, Siris has not offered any evidence that outweighs the public interest in barring him. For the reasons discussed in the Division's papers, the Division respectfully requests that in the public interest the Court impose collateral and penny stock bars against Siris.

Dated: New York, New York
December 21, 2012

Respectfully submitted,



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