ADMINISTRATIVE PROCEEDING
FILE NO. 3-15271

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **TOBY G. SCAMMELL,** **Respondent.**	**RESPONDENT'S OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION**

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I. INTRODUCTION

This matter is appropriate for summary disposition, but the relief sought by the Division of Enforcement (the "Division") should be denied. The undisputed facts establish that Respondent Toby Scammell worked for what has always been a family office, and barring someone under Section 203(f) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b (the "Advisers Act" or the "Act"), based on affiliation with a family office appears to be unprecedented. The undisputed facts also establish that it would not be in the public interest to bar Toby for a single episode of trading unrelated to his employment with the family office that occurred when he was twenty-four.

There was a more plausible explanation for why Toby thought Marvel options were a good investment than that he stole information from his girlfriend. Toby gave that explanation in four days of cross-examination by the Division.[1] The Division implicitly concedes it cannot disprove his explanation because it has pointed to only a single instance of purportedly false testimony by Toby during his lengthy cross-examination. That instance was an innocent mistake on an immaterial point that Toby subsequently corrected, but the Division now makes it a centerpiece of its contention that his conduct was so egregious he should be barred not only from working for an investment adviser but also for any other entity subject to the SEC's regulation – *forever*.

The Division's motion gives Toby no credit for his extensive cooperation in their investigation. It gives him no credit for settling the civil case without putting the Division to its proof. It gives him no credit for agreeing to pay disgorgement and penalties. It evinces no understanding of what this has already cost him, what it will cost him, or of the impact it will have on him whether or not he is barred. It ignores that his trading, even under the Division's theory,

[1] The explanation is summarized in the Memorandum of Law in Support of Respondent's Motion for Summary Disposition ("Scammell Mem.") at 3-8. That memorandum and its supporting papers are incorporated herein in opposition to the Division's motion for summary disposition; and this memorandum and supporting papers should also be considered in support of respondent's motion for summary disposition.

had nothing to do with his work at the purported investment adviser. It shows no recognition of the reality that the Division's case is entirely circumstantial *and it might be wrong*. It seeks the maximum conceivable penalty, a penalty that would be appropriate for a serial offender who engaged in lengthy misconduct that was actually related to SEC-regulated employment and where investors got hurt – but none of that is true of Toby or his conduct. Consequently, even if 203(f) can be applied to someone who was working for a family office at the time of the alleged misconduct (and it cannot), it should not be applied to impose a bar, much less a lifetime bar, and much less a collateral lifetime bar.

II. MADRONE WAS A FAMILY OFFICE AT THE TIME OF THE ALLEGED MISCONDUCT AND THUS BEYOND THE SCOPE OF THE ACT

i. Madrone Was A Family Office Based on What it Did and For Whom Regardless of Whether it Obtained an Exemptive Order

The Division does not, because it cannot, argue that Toby's employer, Madrone Advisors ("Madrone"), was not a family office at the time of the alleged misconduct. Research has revealed no case in which this Court has exercised jurisdiction over a family office and no case in which a 203(f) bar was based on employment with a family office. The Division cites no such case. That is expected because the Securities & Exchange Commission (the "Commission") has long held that family offices are "not the sort of arrangement that Congress designed the Advisers Act to regulate."[2] The Act's purpose is to protect the "national public interest" from the adverse affects

[2] 75 Fed. Reg. 63753-01, 63754 (Oct. 18, 2010); *see also* S. REP. NO. 111-176, at 75 (2010) (Conf. Report) (Attached as Ex. 19 to the Declaration of Charlene Koski in Opposition to the Division of Enforcement's Motion for Summary Disposition filed concurrently herewith ("Koski Opp. Decl.")) ("Since the enactment of the Investment Advisers Act of 1940, the SEC has issued orders to family offices declaring that those family offices are not investment advisers within the intent of the Act . . . The Committee believes that family offices are not investment advisers intended to be regulated under the Advisers Act."); *see also* H.R. 2225, 112th Cong. (1st Sess. 2011) (noting that "Family offices are not of national concern" and that "since the Investment Advisers Act of 1940 was enacted, the Securities and Exchange Commission has regularly issued orders to individual family offices exempting them from all provisions of the Investment Advisers Act of 1940"); *see also* SEC orders exempting family offices (*In re WLD Enters., Inc.*, Rel. No.

of fraud in the securities industry.[3] Congress has recognized that because family offices distribute information "only to persons who are members of a particular family," they are not of national concern and thus beyond the scope of the Act.[4]

The Division's position is that the only way in which Madrone as a family office could be exempt from the Act prior to the promulgation of the Family Office Rule, 17 C.F.R. § 275.202(a)(11)(G)-1(b) (the "Rule"), is if Madrone had obtained its own exemptive order. But that is inconsistent with the unambiguous intent of Congress and the Commission's own policies. It is also belied by the plain language of the statutory definition of "investment adviser" at the time Toby traded.

The function of a family office in advising a single family – not the public – is why it is not the "sort of arrangement" Congress intended the Act to regulate, not its exemption. Madrone and other similarly structured family offices would have qualified for an exemptive order if they had applied for one.[5] Madrone did not apply because it did not have to – it was already excluded

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2807, 2008 WL 5600304 (S.E.C. Nov. 14, 2008); *In re Woodcock Fin. Mgmt. Co.*, Rel. No. 2787, 2008 WL 5084855 (S.E.C. Sept. 24, 2008); *In re Slick Enters. Inc.*, Rel. No. 2745, 2008 WL 4240010 (S.E.C. June 20, 2008); *In re Gates Capital Partners, LLC*, Rel. No. 2599, 2007 WL 1001551 (S.E.C. Mar. 20, 2007); *In re Adler Mgmt., LLC*, Rel. No. 2508, 2006 WL 1028874 (S.E.C. April 14, 2006); *In re Riverton Mgmt., Inc.*, Rel. No. 2471, 2006 WL 119133 (S.E.C. Jan. 6, 2006); *In re Parkland Mgmt. Co.*, Rel. No. 2369, 2005 WL 1498457 (S.E.C. Mar. 22, 2005); *In re Longview Mgmt. Grp. LLC*, Rel. No. 2013, 2002 WL 192323 (S.E.C. Feb. 7, 2002); *In re Kamilche Co.*, Rel. No. 1970, 2001 WL 1739962 (S.E.C. Aug. 27, 2001); *In re Bear Creek, Inc.*, Rel. No. 1935, 2001 WL 327593 (S.E.C. April 4, 2001); *In re Moreland Mgmt. Co.*, Rel. No. 1705, 1998 WL 102669 (S.E.C. Mar. 10, 1998); *In re Pitcairn Co.*, Rel. No. 52, 1949 WL 35503 (S.E.C. Mar. 2, 1949); *In re Roosevelt & Son*, Rel. No. 54, 1949 WL 35524 (S.E.C. Aug. 31, 1949); *In re Donner Estates, Inc.*, Rel No. 21, 1941 WL 37931 (S.E.C. Nov. 3, 1941)).

[3] *Securities & Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 189 (1963).

[4] *See* H.R. 2225.

[5] *Id.* (noting that as a result of Dodd-Frank, "many family offices" that had relied on the private adviser exemption would be forced to seek exemptive orders); *see also* Patterson Decl. ¶ 8 (Madrone did not have to make any changes to its structure or operations to qualify as a family office under the Rule).

under an additional exemption because it had fewer than 15 clients.[6] In fact, the vast majority of family offices never applied for exemptive orders.[7] But those family offices were still family offices.[8]

The Division's simplistic argument that Madrone fit the definition of "investment adviser" because it provided investment advice[9] ignores the plain language of 15 U.S.C. § 80b-2(a)(11)(G) as it defined "investment adviser" prior to the Dodd-Frank amendment. Even before the amendment, subparagraph (G) of that definition excluded family offices by expressly excluding "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."[10] The Commission used both of those methods to designate such intent: it routinely granted orders exempting family offices with the characteristics of Madrone[11] and, in 2011, codified that policy by rule. Thus, at the time of the alleged misconduct, Madrone as a family office would have been excluded from the definition of "investment adviser" and Toby cannot be barred for having been a Madrone employee.

ii. Toby is Not Seeking Retroactive Application of the Rule

No retroactive application of the Family Office Rule is required to recognize that 203(f)

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[6] *See, e.g.*, Patterson Decl. ¶ 6 (testifying that Madrone "never sought or obtained from the Commission an exemptive order under Section 202(a)(11)(G) of the Investment Advisers Act declaring those entities not to be investment advisers as, it is my understanding, both entities were already exempt from registration under Section 203(b)").

[7] *See* 75 Fed. Reg. 63753-01, 63754 (noting that there are approximately 2,500 to 3,000 single family offices managing more than $1.2 trillion in assets, many of which were structured to take advantage of the private adviser exemption, and that the Commission has issued about a dozen exemptive orders since the 1940s); *see also* a chronological list of notices and orders of applications filed under the Advisers Act since January 1, 2006, *available at* http://www.sec.gov/rules/iareleases.shtml#chron.

[8] 75 Fed. Reg. 63753-01, 63754 ("many family offices" relied on the private adviser exemption).

[9] *See* Division of Enforcement's Motion for Summary Disposition ("Division Mem.") at 6-7.

[10] 15 U.S.C. § 80b-2(a)(11)(G) (Sept. 29, 2006). After the Dodd-Frank amendment, that language was moved to subparagraph (H) and the new subparagraph (G) explicitly addressed family offices. *See* 15 U.S.C. §§ 80b-2(a)(11)(G) & (H) (July 21, 2010).

[11] *See supra* n.2.

does not apply where the respondent worked for what was indisputably a family office. What is required is the application of 15 U.S.C. § 80b-2(a)(11)*(G)* (excluding persons not within the intent of the statute from the definition of "investment adviser") *as it existed at the time of the alleged conduct* and which the Division has ignored. The Division cannot foreclose the use of the Family Office Rule and its commentary as evidence of the Commission's intent by characterizing such use as a retroactive application – particularly where the Rule was required to codify prior practice.[12]

As already noted, the Rule did not create a new benefit; it protected an existing one.[13] Because the Rule was required to and does reflect the Commission's historical policies and practices,[14] it (and the commentary around it) simply help establish that Madrone was a family office at the time of the alleged misconduct.[15]

Retroactivity is not required and the Division's arguments on this point are irrelevant. If, however, this Court disagrees, then it should apply the Rule retroactively. The question of retroactive application "essentially reduces to the question of whether such application would impair vested rights."[16] The Rule's purpose was to prevent family offices that had relied on a

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[12] Dodd-Frank Act § 409(b) (instructing that the Rule be "consistent with the previous exemptive policy of the Commission"); 76 Fed. Reg. 37983-01, 37984 (June 29, 2011) (noting that "section 409 of the Dodd-Frank Act instructs that any family office definition the Commission adopts should be 'consistent with the previous exemptive policy' of the Commission" and that the Rule is in fact consistent with that policy).

[13] Notably, that protection was only necessary in the first place so that Congress could increase regulation of hedge funds, which did actually pose a threat to the national interest. *See* 75 Fed. Reg. 63753-01, 63754.

[14] *Supra* n.12.

[15] *See* 17 C.F.R. § 275.202(a)(11)(G)-1(b) (defining family office); *see also generally* Patterson Decl. (describing Madrone's structure, which at the time of the alleged misconduct met, and still meets, the Rule's definition).

[16] *In re John Jantzen*, Rel. No. 472, 2012 WL 5422022, at *7 (S.E.C. Nov. 6, 2012) (citing cases).

statutory exemption from having to seek an exemptive order.[17] The Division would have this Court act in direct conflict with that purpose. That the Rule went into effect 60 days after its publication and allowed time for family offices to comply says nothing about the reliance of offices like Madrone, who needed no changes to fit the Commission's definition. If retroactivity is required, then *not* applying the Rule retroactively would impair the justifiable expectation of Madrone, other family offices, and their employees to remain beyond the scope of the Act.

III. A BAR IS NOT IN THE PUBLIC INTEREST

Any sanction this Court imposes must be supported by a preponderance of the evidence, a standard that has not been met here.[18] The Division pulls facts out of context in an effort to make the conduct seem worse than it was and even worse than it was alleged to be. The Complaint's allegations are insufficient to warrant a lifetime bar as are the Commission's new contentions.

i. The Alleged Violations Were Not Egregious

Toby's motion for summary disposition demonstrates why the alleged violations were not egregious.[19]

In an attempt to turn the ordinary into the egregious, the Division concocts a tale of "betrayal." What the Division nowhere explains is that *every* alleged case of insider trading under the misappropriation theory (which is the theory relied on here)[20] *necessarily* involves a so-called "betrayal." The premise of the theory is that the trader breached a fiduciary-like duty in obtaining

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[17] *See* 75 Fed. Reg. 63753-01, 63754 (purpose of the Rule was to avoid making it necessary for family offices that had been relying on a statutory exemption to seek an exemption order after Dodd-Frank repealed that exemption); 76 Fed. Reg. 37983-01, 37983 (noting that Dodd-Frank repealed the private adviser exemption "upon which many family offices currently rely" and created in its place a specific exemption for family offices).

[18] *Steadman v. Securities & Exchange Commission*, 450 U.S. 91, 101-04 (1981); *Jantzen*, 2012 WL 5422022, at *2.

[19] *See* Scammell Mem. at 14.

[20] *See* Declaration of Charlene Koski in Support of Toby G. Scammell's Motion for Summary Disposition Ex. 4 ¶ 11 (alleging Toby misappropriated material nonpublic information from his girlfriend).

information and trading on it without telling the person from whom the information was obtained.[21] Any breach of such a duty can be labeled a "betrayal," so even if there were a betrayal here, that would not move the alleged conduct from ordinary insider trading to egregious insider trading. The notion of betrayal here is especially thin: not only because the Division cannot say how the "betrayal" purportedly happened,[22] but also because the purported "betrayal" of the girlfriend is premised on an aggressive legal theory. The facts establish, as the Division concedes,[23] that Toby and his girlfriend did not share business confidences.[24] As explained in Toby's cross-motion, a history of sharing such confidences has been essential to inferring a cognizable duty from a romantic relationship.[25] While Toby regrets having put his girlfriend in the position he did,[26] the allegations amount to no more than ordinary insider trading.

Nor is Toby's behavior with respect to his brother fairly described as "betrayal." It is a curious perception of its duties for the Division to purport to be policing relationships between brothers. That is especially bizarre here where there is no indication Toby's brother perceived himself as betrayed. To concoct the tale of fraternal betrayal, the Division resorts to taking facts out of context and omitting critical elements of the history. While it is true that Toby's brother told him, in part, to "sell some stocks" due to "various expenses," that sound-bite lacks the context that demonstrates Toby did exactly what his brother asked. Toby's brother actually said:

> Can you please sell some stocks, etc., so that I have about $1,000-2,000 in my account to cover upcoming expenses ($700 check to Adriana for the Toyota issues, $110 for my student loan, and some other stuff – not to mention some excessive

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[21] *United States v. O'Hagan*, 521 U.S. 642, 662-66 (1997); 17 C.F.R. § 240.10b5-2.

[22] *See* Scammell Mem. at 8-9.

[23] *See* Division Mem. at 13 (citing Van Havermaat Decl. Ex. 1 ¶ 67).

[24] *See* Scammell Mem. at 17-18 (Toby and his girlfriend did not live together in the traditional sense, did not have a history or pattern of sharing confidential business information with each other, and for most of the relevant time period lived in different cities).

[25] Scammell Mem. at 17.

[26] Declaration of Toby G. Scammell in Support of Motion for Summary Disposition ("Scammell Mem. Decl.") ¶¶ 7-8.

credit card bills).[27]

Toby, who managed his brother's finances and had his brother's permission to use his money and accounts however he saw fit,[28] checked his brother's financial situation and responded:

> Looked at your finances. Think you have enough cash to cover all those items. Car costs have already come out (and I will pay half). You have 2500 ready plus 1500 next week. Let me know if anything else.[29]

Toby's brother testified that his only concern was being able to pay his bills and that he trusted Toby to figure out the best way to make that happen.[30] Toby did exactly what his brother wanted him to do – nothing about this conversation suggests egregiousness, betrayal, or anything close to it. In fact, it suggests the opposite.

Nor was it unusual (or egregious) that Toby did not tell his brother about the Marvel trades and profits. Toby did not typically discuss trades with his brother, including those made on his brother's behalf.[31] Nor did Toby move the profits from the Marvel trades to a separate account in an act of "betrayal." He made significantly more money on the trades than expected so wanted to keep those funds separate, sort out tax implications, and possibly invest them.[32] He also immediately recognized an investigation was possible and he wanted to avoid further exposing his

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[27] Koski Opp. Decl. Ex. 20; *see also* Koski Opp. Decl. Ex. 27 at 228:13-232:21 (In response to his brother's email, Toby checked his brother's account, determined that there would be $4,000, and assured his brother his expenses would be covered, which they were).

[28] Koski Opp. Decl. Ex. 28 at 31:3-33:1 ("Typically, if [Toby]'s talking to me about stocks, I just let him do everything for me. So if he says he wants to do something, I trust him fully to do it and I don't really pay too much specific attention to any particular trades . . . Toby has done all my investments formally since 2006. He controls all my finances, all the investing. And I think any of our discussions, it's really just a courtesy on his part to let me know, hey, what do you think about this? And I defer to his judgment and knowledge in the matter.").

[29] *See* Koski Opp. Decl. Ex. 20.

[30] *See* Koski Opp. Decl. Ex. 28 at 43:19-44:14 ("I just know that when I go to pay a bill, there's money in my checking account to pay it. And if for some reason I have bills that exceed my – the norm, I give Toby a heads up and then he puts money in the account. But I don't know where that money comes from.").

[31] *Id.* at 32:24-33:1 (Toby did not typically let his brother know about investments he made on his behalf).

[32] Koski Opp. Decl. Ex. 25 at 276:25-278:25, 271:10-272:18.

brother and girlfriend to involvement in that investigation.[33]

The Division knows that Toby did not lie under oath, but it nevertheless recklessly asserts that Toby attempted to "misdirect the Commission staff" and "provided false information" in "complete disregard of his legal obligations . . . ."[34] The Division is wrong, and in so contending it demonstrates a misapprehension of the difference between lies and innocent (and immaterial) mistakes and between fact and argument.

The Division describes a single immaterial "misstatement" made during four days of testimony during which the Division repeatedly refused to let Toby look at documents.[35] As the Division pushed him to describe the market for his call option purchases, Toby said: "If there's some error, it's because I'm not looking at the data."[36] When Toby and his counsel later reviewed the data, they recognized that Toby had mistakenly testified that he remembered seeing Marvel call options on August 17 for 25 cents. In reality, although the options had been priced at 25 cents on other days that month, on August 17 there had been an offer to sell at 20 cents.[37] Through his lawyer, Toby informed the Commission of the error,[38] even though it was immaterial. Toby's explanation for his trades was not dependent on a 25-cent price that day.[39] At 15 cents, Toby's

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[33] *See id.* at 298:7-301:3, 303:12-25, 313:19-317:8 (Toby recognized that the trades were suspicious on their face so did not discuss them with his brother or girlfriend, who were likely to "get personally dragged into an investigation by the SEC." He testified that he did not want there to be "any ambiguity" about what his brother and girlfriend knew "because they've known nothing the whole way through.").

[34] Division Mem. at 12.

[35] *See, e.g.*, Koski Opp. Decl. Ex. 26 at 43:13-46:21, 116:9-120:14; Koski Opp. Decl. Ex. 25 at 282:7-15; 292:2-22; *see also* Van Havermaat Decl. Exs. 9 , 10, 11.

[36] Koski Opp. Decl. Ex. 26 at 43:13-46:21.

[37] *See* Van Havermaat Decl. Ex. 12.

[38] *See id.*

[39] *See* Van Havermaat Decl. Ex. 11 at 1021 ("the options probably traded up to 20-25 cents, and when I bought them at 15 cents, I was probably thinking I was getting a bargain on the day"). Nor was that price the only relevant indicator of the market value that day. *See* Koski Opp. Decl. Ex. 26 at 44:20-45:3 ("I bought [the $45 strike price options] at ten cents. I sold it at 15 or I bought some more at 15 cents, which suggests the market had moved up").

purchases were consistent with the market. That innocent mistake – which Toby warned the Division was likely, which Toby corrected, and which did not even matter – is what the Division stoops to calling an "attempt to misdirect" in "complete disregard of his legal obligations." It was neither and did not make his alleged conduct egregious.

The Division cites no other inaccuracies in Toby's testimony. Instead, it takes issue with an argument Toby's lawyer used in responding to the Division's *Wells* notice and attempts to tie that argument to Toby's actual testimony that he made a small test trade on August 14. There is no dispute that Toby's testimony was true: he only bought $31 worth of options on August 14.[40] The Division's disagreement with the argument Toby's lawyer made based on that true testimony is irrelevant to assessing whether Toby's alleged misconduct was egregious.[41]

The case on which the Division relies further supports Toby's position that his single innocent "misstatement" did not render his alleged conduct egregious. In *In re John W. Lawton*, Rel. No. 3513, 2012 WL 6208750, at *2 (S.E.C. Dec. 13, 2012) the defendant had actually created and produced false accounting sheets in response to the Commission's inquiry, intentionally misstating his firm's assets. By contrast, here the Division cites a single immaterial error in four days of testimony and an argument of counsel with which it disagreed. There is simply no comparison to falsifying documents as occurred in the *Lawton* case. The Division has failed to demonstrate that the alleged misconduct was egregious.

[40] Koski Opp. Decl. Ex. 21.

[41] And Toby's lawyer was right. The Division's assertion that the Ameritrade limit order data for August 13 and 14 suggests Toby tried to "pile on" is also refuted by the evidence. If Toby had wanted to "pile on" as many options as possible he could have easily done so by purchasing *market* orders, which are orders to buy a set number of contracts at any price, instead of *limit* orders, which are orders to purchase up to a certain number of contracts but only at an agreed upon low price. But that's not what Toby did. He used limit orders to test the market and, in the end, only two of his orders were at a price the market would accept. That trading strategy is entirely inconsistent with the notion that he knew when or at what price the Marvel deal would occur.

ii. The Alleged Violation Was Not Recurrent

For reasons stated in Toby's cross-motion, his Marvel trades were not recurrent.[42] They were all conducted over a short period of time, involved a single company's options, and, even under the theory the Division alleged, related to a single acquisition. The Division's allegation that Toby concealed his trading and provided false information and testimony to the Commission staff are addressed *supra*. Toby's tax filings have no bearing whatsoever on whether the alleged violation was recurrent, but regardless, the Division's allegations on this point are also unfounded. Toby has not violated any tax laws. At the direction of his counsel, Toby has filed extensions with the IRS since 2010. Last year, he paid $4,000 toward any tax obligation he might have ($2,000 on his own behalf and $2,000 on his brother's).[43] He has been consulting with tax and legal experts and has every intention of recording the profits accurately and paying whatever remaining taxes and penalties he owes.[44] The Division cannot seriously contend that in delaying his filings, Toby is attempting to cover-up his trades. The amount of his profits are a matter of public record, contained in the Commission's own press releases,[45] and have been covered in the news.

iii. Toby Did Not Act with a High Degree of Scienter

For reasons articulated in his cross-motion,[46] Toby did not act with a high degree of scienter. The internet searches the Division cites fail to establish otherwise. The evidence shows that those searches occurred over a very short period of time on a single day after Toby read a

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[42] *See* Scammell Mem. at 16 (no history of securities or other violations and the purchases all related to a single event); *see also Securities & Exchange Commission v. Johnson*, 595 F. Supp. 2d 40, 44 (D.D.C. 2009) (a single incident can be composed of "several different actions all designed to achieve the same goal").

[43] Koski Opp. Decl. Ex. 22.

[44] *See generally* Declaration of Toby G. Scammell in Support of Respondent's Opposition to the Division of Enforcement's Motion For Summary Disposition filed concurrently herewith.

[45] Koski Opp. Decl. Ex. 23.

[46] *See* Scammell Mem. at 16-18.

story in the Wall Street Journal about an insider trading case brought against Mark Cuban.[47] The searches demonstrate nothing more than Toby's reading pattern that day and, if anything, suggest that his intention was to *not* violate insider trading laws. Also, as explained *supra* and in Toby's cross-motion, not telling his brother about the trades was consistent with their arrangement and Toby's desire to keep his brother out of the investigation. This factor weighs against the imposition of a bar.

iv. Toby Has Acknowledged the Wrongfulness of his Conduct and Has Made Assurances Against Future Violations

Toby has not been found guilty of violating securities laws. But he did agree to pay disgorgement and penalties and he settled the Division's civil case. He has accepted the wrongful nature of his conduct and has provided sincere assurances against future violations.[48] He has also explained and apologized for posting the "secfail.com" website.[49] The website was posted before Toby entered into a consent agreement with the Division. As it has nothing to do with his behavior since, it should have no bearing on this case. Toby has made clear that he regrets his actions, he has agreed to be penalized for them, and he has taken steps to minimize the risk of any future wrongdoing. This factor weighs against the imposition of a bar.

v. The Nature of Toby's Work Does Not Present An Ongoing Opportunity to Violate Federal Securities Laws

Even as alleged, Toby's purported misconduct had nothing to do with his employment at Madrone at the time of his trades. He is not alleged to have misappropriated from his employer; he is alleged to have misappropriated from his girlfriend. Thus, a bar limiting his employment in any way is an utter *non sequitur* in this case.

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[47] *See* Koski Opp. Decl. Ex. 27 at 185:21-191:21 (describing the searches); Koski Opp. Decl. Ex. 24.

[48] *See* Scammell Mem. Decl. ¶¶ 7, 8.

[49] *Id.* ¶ 9.

The Division cites no legal support for its proposition that founding a start-up company is the type of activity that presents an ongoing opportunity to violate securities laws or that such activity warrants a bar of any sort.[50] Toby does not work in the securities industry and does not provide professional advice on the securities market. Furthermore, he is already subject to a permanent injunction and has *already* been deterred. He no longer trades on his own behalf and he voluntarily quit managing his brother's finances. He has for all practical purposes removed himself from the securities market. Furthermore, as the Division previously threatened and now points out, it has the authority to seek a bar later if Toby ever seeks to associate with an investment adviser in the future.[51] There is no reason it needs one now, and there is no basis for one.

vi. A Lifetime Collateral Bar is Not Appropriate

The mere existence of a past violation, without more, is an insufficient basis for a bar.[52] The Division cites to no case in which a bar was imposed and the *Steadman* factors were not satisfied, as is the situation here. The Division's suggestion that this Court can ignore the weight of evidence and impose the maximum penalty based on the fact that a Complaint was filed or that Toby consented to being enjoined is belied by the case law and the fact that this proceeding is necessary in the first place. Toby is not attempting to relitigate or challenge facts set forth in the Complaint.[53] He merely contends that, taken as true, those allegations are insufficient to support a

[50] The Division's assertion that Toby runs two start-up companies is incorrect. Oto Analytics, Inc. is Toby's company. It does business under the name "Womply." They are for all effective purposes one and the same. *See id.* ¶ 12.

[51] *See* Division Mem. at 9.

[52] *Lawton*, 2012 WL 6208750, at *9.

[53] Unlike cases the Division cites, no evidence was ever presented or litigated and Toby was never found to have violated the securities laws. *See In re Michael C. Pattison, CPA*, Rel. No. 434, 2011 SEC LEXIS 3450, at *13 (S.E.C. Sept. 29, 2011), *In re Robert Sayegh*, Rel. No. 41266, 1999 SEC LEXIS 639, at *11 (S.E.C. Mar. 30, 1999), *In re James E. Franklin*, Rel. No. 56649, 2007 SEC LEXIS 2420, at *11 (S.E.C. Oct. 12, 2007), *In re Michael T. Studer*, Rel. No. 50411,

bar – especially in light of all of the facts. That is an argument he is entitled to make and the Division cites no law to the contrary.

A collateral bar is only warranted where the *alleged misconduct* "is of the type that, by its nature, 'flows across' various securities professions and poses a risk of harm to the investing public in any such profession."[54] Most of the Division's arguments on this point are addressed *supra*. The Division offers no support for its argument that founding a private start-up company years after the alleged misconduct occurred is the type of activity that warrants a collateral bar. Toby is accused of making a personal trade based on nonpublic insider information alleged to be related to a single deal. The nature of the alleged misconduct does not "flow across" various securities professions. A collateral bar is therefore unwarranted. [55]

The Division further argues that Toby had a "life-long interest in providing investment advice," and therefore poses a public threat. Aside from the fact that the statement is inaccurate – Toby has long been interested in the stock market, not necessarily providing investment advice – Toby has already given up trading. If anything, the fact that he voluntarily surrendered this life-long interest demonstrates a sincere commitment to avoiding subsequent violations.[56] This Court regularly imposes less than a lifetime collateral bar even where, unlike the case at hand, securities

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2004 SEC LEXIS 2135, at *6 (S.E.C. Sept. 20, 2004) and *In re Demitrios Juilius Shiva*, Rel. No. 38389, 1997 SEC LEXIS 561, at *5 (S.E.C. Mar. 12, 1997).

[54] *Sayegh*, 1999 SEC LEXIS 639, at *18-19.

[55] This Court has held that prior to Dodd-Frank, there was no associational bar or similar provision with respect to municipal advisors, so at a minimum that bar may not be applied to conduct that occurred prior to Dodd-Frank. *See Jantzen*, 2012 WL 5422022, at *7 (as to association with municipal advisors, prior to Dodd-Frank, there was a right approximating an "'immediate fixed right of present or future enjoyment'") (quoting *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 n.10 (2006)).

[56] *See* Scammell Mem. Decl. ¶ 8.

violations have been proven.[57] The test, as articulated above, is whether the *Steadman* factors have been met.[58] Here, they have not.

IV. CONCLUSION

For reasons stated herein and in Toby's cross-motion, and based on the entire record in this case, this Court should deny the Division's Motion and grant Toby's.

DATED: August 5, 2013

Respectfully submitted,

Leo P. Cunningham
Charlene Koski
Attorneys for Respondent Toby G. Scammell
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
Telephone: (650) 493-9300

[57] *See, e.g.*, *In re Jilaine H. Bauer*, Rel. No. 483, 2013 WL 1646913 (S.E.C. April 16, 2013) (seven-month suspension following civil court's finding that defendant committed insider trading); *Jantzen*, 2012 WL 5422022 (five-year bar in follow-on proceeding related to insider trading); *In re Thomas C. Bridge*, Rel. No. 60736, 2009 WL 3100582 (S.E.C. Sept. 29, 2009) (three-year bar, five-year bar); *In re Ran H. Furman*, Rel. No. 459A, 2012 WL 2339281, at *7 (S.E.C. June 20, 2012) (seven-year bar); *In re Martin B. Sloate*, Rel. No. 38373, 1997 WL 126707, at *3 (S.E.C. Mar. 7, 1997) (overturning initial imposition of one-year bar and deciding that in light of the circumstances, a five-year bar was more appropriate; rejecting imposition of collateral bar for same reasons); *In re Richard J. Puccio*, Rel. No. 37849, 1996 WL 603681, at *1 (S.E.C. Oct. 22, 1996) (five years); *In re Robert Radano*, Rel. No. 2750, 2008 WL 257440, at *1 (S.E.C. June 30, 2008) (five years).

[58] For example, in cases cited *supra* n.57, the difference of length in bars was due to variations in the strength and quantity of *Steadman* factors satisfied.

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15271

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **TOBY G. SCAMMELL,** **Respondent.**	**DECLARATION OF CHARLENE KOSKI IN SUPPORT OF RESPONDENT'S OPPOSITION TO DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION**

DECLARATION OF CHARLENE KOSKI IN SUPPORT OF TOBY G. SCAMMELL'S MOTION FOR SUMMARY DISPOSITION

I, Charlene Koski, declare:

1. I am admitted to practice law before the highest court of the State of Washington. I am an associate with the law firm Wilson Sonsini Goodrich & Rosati, P.C. ("WSGR") and represent Respondent Toby G. Scammell in this proceeding. I submit this Declaration in Support of Respondent's Opposition to Division of Enforcement's Motion for Summary Disposition. I have personal knowledge of the facts set forth in this declaration.

2. Attached hereto as Exhibit 19 are excerpts from a true and correct copy of S. REP. NO. 111-176 (2010) (Conf. Report).

3. Attached hereto as Exhibit 20 is a true and correct copy of an email exchange between Toby G. Scammell and his brother dated August 5-6, 2009, introduced as Exhibit 81 during the investigation of Toby G. Scammell.

4. Attached hereto as Exhibit 21 are excerpts from a true and correct copy of Ameritrade, Inc. Confirmation Notices for Toby Scammell and his brother.

5. Attached hereto as Exhibit 22 is a true and correct copy of Toby G. Scammell's bank statements and TurboTax emails reflecting payment and extension of taxes, produced in *Securities & Exchange Commission v. Toby G. Scammell*, Case No. LACV-11-DSF (MRWx)and bates-labeled Scammell_SEC 000763-000768 and Scammell_SEC 000331-000336.

6. Attached hereto as Exhibit 23 is a true and correct copy of a Securities & Exchange press release dated August 11, 2011, *available at* http://www.sec.gov/litigation/litreleases/2011/lr22066.htm.

7. Attached hereto as Exhibit 24 are excerpts from a true and correct copy of Google web history for Toby G. Scammell, introduced as Exhibit 238 during the investigation of Toby G. Scammell.

8. Attached hereto as Exhibit 25 are excerpts from a true and correct copy of the deposition transcript of Toby G. Scammell taken on July 30, 2010.

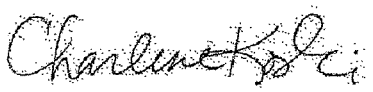
9. Attached hereto as Exhibit 26 are excerpts from a true and correct copy of the deposition transcript of Toby G. Scammell taken on September 16, 2010.

10. Attached hereto as Exhibit 27 are excerpts from a true and correct copy of the deposition transcript of Toby G. Scammell taken on November 5, 2010.

11. Attached hereto as Exhibit 28 are excerpts from a true and correct copy of the deposition transcript of Toby G. Scammell's brother, [redacted], taken on March 18, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 5, 2013 in Seattle, Washington.



Charlene Koski

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15271

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **TOBY G. SCAMMELL,** **Respondent.**	**DECLARATION OF TOBY G. SCAMMELL IN SUPPORT OF RESPONDENT'S OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION**

DECLARATION OF TOBY G. SCAMMELL

I, Toby G. Scammell, declare as follows:

1. I am 28 years old and fully able to make this declaration. Everything contained herein is based on my personal knowledge.

2. Since 2010, I have met with tax advisors, preparers, and my attorneys to figure out the best way to proceed with regard to my taxes.

3. Since 2010, at the advice of legal counsel, I have filed for tax extensions.

4. Last year, in addition to filing for an extension, I paid $2,000 to the U.S. Treasury on my own behalf and $2,000 on my brother's behalf. These payments are reflected in my bank statements, which were produced to the Securities & Exchange Commission in February 2013 and are attached to the Declaration of Charlene Koski as Exhibit 22.

5. I have every intention of filing all of my tax returns and paying whatever taxes and penaltics I might owe on both my behalf and my brother's. I plan to do this as soon as my attorneys determine which filing method I should use and advise me to file.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 5, 2013 in Palo Alto, California.

Toby G. Scammell

EXHIBIT19

Calendar No. 349

111TH CONGRESS, 2d Session | SENATE | REPORT 111–176

THE RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2010

APRIL 30, 2010.—Ordered to be printed

Mr. DODD, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 3217]

The Committee on Banking, Housing, and Urban Affairs, having considered the original bill (S. 3217) to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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89–010

the last year, nor does it pose a future systemic risk to our world financial markets or retail investors."[148] Section 407 directs the SEC to define "venture capital fund" and provides that no investment adviser shall become subject to registration requirements for providing investment advice to a venture capital fund.

Section 408. Exemption of and record keeping by private equity fund advisers

The Committee believes that private equity funds characterized by long-term equity investments in operating businesses do not present the same risks as the large private funds whose advisers are required to register with the SEC under this title. Private equity investments are characterized by long-term commitments of equity capital—investors generally do not have redemption rights that could force the funds into disorderly liquidations of their positions. Private equity funds use limited or no leverage at the fund level, which means that their activities do not pose risks to the wider markets through credit or counterparty relationships. Accordingly, Section 408 directs the SEC to define "private equity fund" and provides an exemption from registration for advisers to private equity funds.

Informed observers believe that in some cases the line between hedge funds and private equity may not be clear, and that the activities of the two types of funds may overlap. We expect the SEC to define the term "private equity fund" in a way to exclude firms that call themselves "private equity" but engage in activities that either raise significant potential systemic risk concerns or are more characteristic of traditional hedge funds. The section requires advisers to private equity funds to maintain such records, and provide to the SEC such annual or other reports, as the SEC determines necessary and appropriate in the public interest and for the protection of investors.

Section 409. Family offices

Family offices provide investment advice in the course of managing the investments and financial affairs of one or more generations of a single family. Since the enactment of the Investment Advisers Act of 1940, the SEC has issued orders to family offices declaring that those family offices are not investment advisers within the intent of the Act (and thus not subject to the registration and other requirements of the Act). The Committee believes that family offices are not investment advisers intended to be subject to registration under the Advisers Act. The Advisers Act is not designed to regulate the interactions of family members, and registration would unnecessarily intrude on the privacy of the family involved. Accordingly, Section 409 directs the SEC to define "family office" and excludes family offices from the definition of investment adviser Section 202(a)(11) of the Advisers Act.

Section 409 directs the SEC to adopt rules of general applicability defining "family offices" for purposes of the exemption. The rules shall provide for an exemption that is consistent with the

[148] *Capital Markets Regulatory Reform: Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office: Testimony before the U.S. House Committee on Financial Services*, 111th Congress, 1st session, p.15 (2009) (Testimony of Mr. Terry McGuire).

SEC's previous exemptive policy and that takes into account the range of organizational and employment structures employed by family offices. The Committee recognizes that many family offices have become professional in nature and may have officers, directors, and employees who are not family members, and who may be employed by the family office itself or by an affiliated entity. Such persons (and other persons who may provide services to the family office) may co-invest with family members, enabling them to share in the profits of investments they oversee, and better aligning the interests of such persons with those of the family members served by the family office. The Committee expects that such arrangements would not automatically exclude a family office from the definition.

Section 410. State and federal responsibilities; asset threshold for federal registration of investment advisers

Section 410 increases the asset threshold above which investment advisers must register with the SEC from $25,000,000 to $100,000,000. States will have responsibility for regulating advisers with less than $100,000,000 in assets under management. The Committee expects that the SEC, by concentrating its examination and enforcement resources on the largest investment advisers, will improve its record in uncovering major cases of investment fraud, and that the States will provide more effective surveillance of smaller funds. In a letter to Chairman Dodd and Ranking Member Shelby, the North American Securities Administrators Association stated that "State securities regulators are ready to accept the increased responsibility for the oversight of investment advisers with up to $100 million in assets under management. The state system of investment adviser regulation has worked well with the $25 million threshold since it was mandated in 1996 and states have developed an effective regulatory structure and enhanced technology to oversee investment advisers. . . . An increase in the threshold would allow the SEC to focus on larger investment advisers while the smaller advisers would continue to be subject to strong state regulation and oversight." [149]

In a letter to Senate Banking Committee staff in October 2009, Professor Mercer Bullard stated, "I support the $100 million threshold. This merely restores the distribution of advisers between the SEC and states that existed at the time they were split by [the National Securities Markets Improvement Act]."

Section 411. Custody of client assets

Section 411 requires registered investment advisers to comply with SEC rules for the safeguarding of client assets and to use independent public accountants to verify assets. The SEC has recently adopted new rules imposing heightened standards for custody of client assets. Mr. James Chanos, Chairman of the Coalition of Private Investment Companies, wrote in testimony for the Committee that "Any new private fund legislation should include provisions to reduce the risks of Ponzi schemes and theft by requiring money managers to keep client assets at a qualified custodian, and

[149] North American Securities Administrators Association, letter to Chairman Dodd and Ranking Member Shelby, November 17, 2009.