UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15271

In the Matter of Toby G. Scammell Respondent.	DIVISION OF ENFORCEMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

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I. INTRODUCTION

Respondent Toby G. Scammell ("Scammell") was permanently enjoined from violations of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder as a consequence of the Securities and Exchange Commission's ("Commission") action against him for insider trading. At the time that Scammell engaged in insider trading, he was employed by Madrone Advisors LLC ("Madrone Advisors"), which was an unregistered investment adviser. The Division of Enforcement ("Division") has filed a motion for summary disposition against Scammell, seeking an order barring Scammell from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. [1]

The Commission's complaint alleges that Scammell engaged in insider trading in the stock of Marvel Entertainment, Inc. ("Marvel") in August 2009. Scammell learned from his girlfriend, who was working as an extern with the Walt Disney Company ("Disney"), that Disney planned to acquire Marvel for $50 per share, substantially above its then-current share price, before Labor Day. Throughout the latter half of August 2009, Scammell spent effectively all of his available funds on speculative, out-of-the-money, Marvel call options that would expire worthless the next month unless Marvel's stock price rose quickly and dramatically. Scammell had limited funds at the time, but he had been entrusted with managing the finances of his brother, who had been deployed to serve in Iraq with the United States Army, and he secretly used his brother's money to purchase more than half of the Marvel options. Marvel's stock price did rise dramatically on August 31,

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[1] To avoid repetition, the Division relies upon the Declaration of David J. Van Havermaat filed on July 22 in support of the Division's motion for summary disposition and exhibits 1-18 thereto in opposing respondent's motion. The Division is filing a separate Declaration of David J. Van Havermaat in opposition to respondent's motion, but to avoid confusion has started the numbering of exhibits of the new declaration with exhibit 19, where the previous declaration left off.

2009, when the announcement was made that Disney would acquire the company. Scammell profited by more than $192,000 in less than a month on his initial investment of $5,465. Until the Commission investigated his trading, Scammell never told his girlfriend or his brother about his trading or the profits that he realized.

Scammell has filed a motion for summary disposition. For a variety of reasons, Scammell's motion must be denied. First, Scammell's motion reflects an attempt to relitigate improperly the facts regarding his insider trading and the permanent injunction to which he consented. Such efforts are prohibited by the terms of Scammell's consent, and moreover are contrary to the factual record. In addition, Scammell's factual arguments, even if they were to be credited, raise genuine issues of material fact, and Scammell's motion should be denied on that basis alone. Next, the "Family Office Rule" upon which Scammell purports to rely to avoid a bar did not even exist until June 22, 2011, nearly two years after Scammell committed his violations. At the time that Scammell engaged in insider trading, his employer, Madrone Advisors, unquestionably was an investment adviser as defined by the Investment Advisers Act of 1940 ("Advisers Act"). Finally, all of the factors that courts look to in determining the appropriate sanction in the public interest support a permanent bar against Scammell. Scammell's antifraud violations were egregious and made with a high degree of scienter. Moreover, Scammell has refused to acknowledge the wrongfulness of his conduct, and his dubious assurances against future violations should be viewed with great skepticism. Additionally, Scammell has been intensely interested in the securities industry since he was fifteen, and he now is actively engaged in soliciting investors in two start-up companies, and thus it is likely that he will have future opportunities to violate the securities laws. For all these reasons, as described more fully below, Scammell's motion should be denied.[2]

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[2] In the introduction to his motion, Scammell complains that the Division has continued to

II. ARGUMENT

A. The Court Should Reject Scammell's Attempts To Relitigate The Factual Allegations Of The Complaint

The Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against a respondent, whether by consent, summary judgment, or trial. *See In the Matter of Stefan H. Benger*, Initial Decisions No. 499, 2013 SEC Lexis 2158 (July 25, 2013); *see also In the Matter of Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC Lexis 1767, at *25 (July 25, 2003) ("the Advisers Act and Exchange Act draw no distinction between injunctions entered after litigation or by consent"). But Scammell attempts to do exactly that, attacking the Commission's district court case, and the judgment of permanent injunction entered against him, on the purported bases that the Commission's case against him was "circumstantial" and based upon an "aggressive" legal theory. Resp. Br. at 1, 3.[3] Scammell even tries to relitigate the facts regarding his insider trading, arguing that he "infer[red]," rather than obtained material non-public information regarding, the Marvel acquisition, and claiming that "every suspicious circumstance" regarding his trading "had an explanation." Resp. Br. at 6, 9. Scammell's arguments must be rejected because they are both procedurally improper and factually wrong.

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conduct discovery regarding the appropriate amounts of monetary relief in the underlying civil injunctive action. But the injunctive action is in the asset-discovery phase, and the judgment to which Scammell consented expressly permits the parties to conduct discovery. Van Havermaat Decl.,¶ 20. Indeed, Scammell has propounded numerous document requests to the Commission regarding the Commission's motion to set the amounts of monetary relief. *Id.* Moreover, although Scammell has raised substantial amounts from investors in his startup companies Oto Analytics, Inc. and Womply, Inc., Scammell produced a valuation that purports to value them at a fraction of the amount raised. *Id.* Because Scammell's financial condition is so closely tied to the financial condition of Oto Analytics and Womply, the Division has needed to propound discovery on these key issues in preparation for its motion to set the amounts of monetary relief. *Id.*

[3] References to Scammell's Memorandum of Law in Support of Respondent's Motion for Summary Disposition are abbreviated herein as "Resp. Br."

1. Scammell cannot contest the allegations in the Commission's Complaint

As part of the settlement of the insider trading case against him, Scammell unambiguously agreed not to contest the factual allegations of the Commission's Complaint in any subsequent disciplinary proceeding based on the entry of the injunction.[4] *See In the Matter of Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 SEC Lexis 2024, at *12 and n.28 (July 11, 2013) (language in consent of respondent, which is identical to the language in Scammell's Consent, prohibited respondent from contesting factual allegations of complaint). Scammell is bound by the terms of the Consent not to challenge the assertions in the Complaint. *See In the Matter of James C. Dawson*, Advisers Act Release No. 3057, 2010 SEC Lexis 2561 at *11 (July 23, 2010); *In the Matter of Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC Lexis 1267 at *14 (April 20, 2012) ("when an injunction has been entered by consent, it is appropriate to prohibit Respondents from contesting the factual allegations of the complaint"). Scammell's attempts to relitigate the factual underpinnings of the complaint should be rejected, and the Court should consider only the facts as alleged in the Commission's injunctive complaint. *See Stefan H. Benger*, Initial Decisions No. 499, 2013 SEC Lexis 2158, at *4.

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[4] Scammell's Consent states:

"...in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Defendant Scammell understands that he shall not be permitted to contest the factual allegations of the complaint in this action....Defendant Scammell understands and agrees to comply with 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. In compliance with this policy, Defendant Scammell agrees...not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis...." Declaration of David J. Van Havermaat ("Van Havermaat Decl."), Exh. 2.

2. Scammell's factual arguments, even if permitted, would raise genuine issues of material fact

Even if the Court were to ignore the language of Scammell's consent, which prohibits him from contesting the factual allegations of the complaint, Scammell's motion would fail because his argument purports to introduce multiple genuine issues of material fact. *See* Commission Rule of Practice 250(b), 17 C.F.R. § 201.250(b) ("The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact.") Scammell purports to raise genuine issues with respect to, among other things, the timing of his girlfriend's work on the Marvel acquisition, the purported reasons for his interest in Marvel, whether he obtained material, nonpublic information regarding the Marvel acquisition, and his financial condition at the time of his insider trading. *See* Resp. Br. at 3-10. These genuine issues of material fact would defeat Scammell's motion. *See, e.g.*, *In the Matter of Glenn M. Barikmo*, Initial Decisions Release No. 436, 2011 SEC Lexis 3573 at *9-10 (Oct. 13, 2011) (denying respondent's motion for summary disposition, and granting the Division's motion for summary disposition, because "[t]he only arguments presented in [respondent's] motion are factual disputes").

3. Even if Scammell's arguments were to be considered by the Court, his legal arguments are wrong and his factual assertions are misleading

Not only are Scammell's disputes with the allegations of the complaint prohibited by the terms of his Consent, they also are legally wrong and factually misleading. To the extent that the Court would be inclined to consider any of Scammell's assertions to warrant less than an unqualified bar against him, the evidence is clear that Scammell's arguments involve misstatements of the law and distortions of the factual record and therefore should be disregarded.

a) <u>The Commission's insider trading case against Scammell was based upon a well-established theory of liability</u>

First, Scammell contends that the Commission's action was "premised on the startling

legal theory that a boyfriend owes a fiduciary duty to a girlfriend even where there is no proof that they have a history of sharing business confidences." Resp. Br. at 1. Scammell apparently is unaware that over ten years ago the Commission enacted Rule 10b5-2(b)(2), which provides that a duty exists "[w]henever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality." 17 C.F.R. §240.10b5-2(b)(2). The Commission adopted Rule 10b5-2 in October 2000 in response to criminal insider trading decisions that did not "fully recognize the degree to which parties to close family and personal relationships have reasonable and legitimate expectations of confidentiality." Although litigants have challenged Rule 10b5-2 in the past, those challenges have been soundly rejected. *See, e.g., SEC v. McGee*, 895 F. Supp. 2d. 669, 677 (E.D. Pa. 2012) (noting that defendant's challenge of Rule 10b5-2 is "not a novel argument" as "[i]t has been made and rejected in numerous cases" and holding that the Commission sufficiently alleged that broker and insider had history of sharing confidences where they were both members of Alcoholics Anonymous and confided in each other).

Thus, far from being a "startling," "aggressive," "exotic," or "questionable" legal theory, Rule 10b5-2 expressly provides that a history, pattern or practice of sharing confidences is sufficient to impose a duty on the recipient of material, non-public information not to trade on that information. Several courts have recognized this well-established theory of liability, and applied it to situations involving friends and spouses. *See, e.g., SEC v. Conradt*, 2013 U.S. Dist. Lexis 78381, at *15-16 (S.D.N.Y. June 4, 2013) (denying a motion to dismiss insider trading case based upon Rule 10b5-2(b)(2) where "the sensitive nature of many of the personal and

professional confidences shared between [two friends] bespeak an implicit mutual understanding of confidentiality."); *United States v. Corbin*, 729 F. Supp. 2d 607 (S.D.N.Y. 2010) (finding indictment sufficiently alleged a duty of trust and confidence among spouses under misappropriation theory of insider trading based upon Rule 10b5-2(b)(2) and (3)); *SEC v. Northern*, 598 F. Supp. 2d 167, 174 (D. Mass. 2009) (denying defendant's motion for summary judgment and finding that the Commission could rely on Rule 10b5-2(b)(2) where defendant had previously "attended Treasury press conferences subject to temporary embargos and maintained the confidentiality of the information released for the requisite amount of time.").

Scammell apparently relies solely on the outdated pre-rule case law that focused on instances in which the parties were required to have had a history of sharing business confidences. *See, e.g., United States v. Reed*, 601 F. Supp. 685 (S.D.N.Y.), *rev'd on other grounds*, 773 F.2d 477 (2nd Cir. 1985) (indictment sustained against son who traded based on information learned from father where there was history of sharing business confidences); *see also SEC v. Yun*, 327 F.3d 1263 (11th Cir. 2003) (stating that after defendants engaged in trading, the SEC enacted Rule 10b5-2, and expressly noting that "the SEC's new rule goes farther than we do in finding a relationship of trust and confidence."). None of these cases apply now that Rule 10b5-2 is in effect.

In addition to the abundant evidence of their history of sharing confidences, which establishes that Scammell knew he should not trade on inside information he learned through his girlfriend, Scammell admitted that when his girlfriend told him that she could not tell him Disney's acquisition target because it was confidential, "the message was well heard" by him and he understood he should not trade on such information. Van Havermaat Decl., Exh. 19. And, although not required by Rule 10b5-2(b), Scammell ignores the abundant evidence that

Scammell and his girlfriend did share business confidences. For example, they often discussed his girlfriend's work projects at Disney, and Scammell was aware that his girlfriend was working on a large acquisition at Disney, as alleged in the Commission's complaint. Complaint, ¶ 28. Additionally, when Scammell left Bain Consulting, where Scammell and his girlfriend worked before Scammell's employment with Madrone Advisors, Scammell agreed, in writing, that he would not use any Bain materials and he "expressly acknowledge[d] and agree[d] that any information posted on [Bain's networks, systems and databases] is confidential and proprietary to Bain, and will not be taken by me from Bain in any form." Van Havermaat Decl., Exh. 20. Nevertheless, shortly after leaving Bain, Scammell requested that his girlfriend, who still worked there at that time, provide him with information from Bain's internal intranet, which she did. The information was labeled "confidential" on its face. *Id.*, Exh. 21. Scammell admitted that by giving him this work product, his girlfriend was "probably violating some form of the confidentiality agreement." *Id.*, Exh. 22. On another occasion after Scammell left Bain, his girlfriend sent him Bain materials regarding business school statistics, asking him to "promise not to redistribute." *Id.*, Exh. 23. Scammell noted that she shouldn't send the information around in a PowerPoint format to anyone else because "the file has your name and Disney embedded in it" and he recommended if she did send it out, she "should create a pdf first." *Id.*

b) <u>The Commission's reliance on circumstantial evidence to prove Scammell's insider trading is proper</u>

Similarly, Scammell's argument that the Commission's insider trading case against him was based on "entirely circumstantial" evidence is of no significance. Resp. Br. at 9. Insider trading can be demonstrated through reasonable inferences drawn from circumstantial evidence. The Commission generally is not required to present direct evidence of insider trading because "the specific facts are peculiarly within the knowledge of the defendants." *SEC v. Aragon*

Capital Mgmt., LLC, 2008 U.S. Dist. Lexis 3786, at *8 (S.D.N.Y. Jan. 16, 2008); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n. 30 (1983) (noting that "circumstantial evidence can be more than sufficient" to demonstrate scienter in securities fraud case); *SEC v. Blackwell*, 291 F. Supp. 2d 673, 691 (S.D. Ohio 2003) ("To require the SEC to state exactly what was said in each of these private conversations would be to 'demand clairvoyance.'"); *SEC v. Sargent*, 229 F.3d 68, 74-75 (1st Cir. 2000) ("As is often true in securities fraud cases, the Commission was unable to produce direct testimony establishing that Shepard communicated nonpublic information to Sargent" and therefore "[i]t pointed to Sargent's behavior following his dinner with Shepard as evidence that Sargent must have been proceeding on something more than a hunch"); *SEC v. Singer*, 786 F. Supp. 1158, 1165 (S.D.N.Y. 1992) (holding that a direct confession from either the tipper or the tippee is not required and instead "circumstantial evidence such as suspicious timing of trades, contacts between potential tippers and tippees, and incredible reasons for such trades provide an adequate basis for inferring that tipping activity has occurred").

Scammell consented to a judgment in this case because he was faced with overwhelming circumstantial evidence that he engaged in insider trading. Namely, the evidence established that:

- Scammell's girlfriend and "best friend" of two years knew that Disney planned to acquire Marvel and she began working on the deal before Scammell traded (Complaint, ¶¶ 20-30);
- Scammell had access to information about the Marvel acquisition through his girlfriend, with whom he lived with until August 2 and thereafter spoke with by telephone several times each day (*id.*, ¶¶ 10, 29);
- Scammell began purchasing Marvel call options within a few weeks of his

girlfriend being assigned to the Marvel acquisition and just three days after she told him her deal would be completed by Labor Day (*id.*, ¶¶ 29, 31);

- Scammell's trading was unusual given that he had never traded in Marvel before, he purchased out-of-the-money call options that were to expire within a few weeks, many of his trades made up 100% of the market for those series of call options, he used his brother's funds to purchase more than half of the options, he purchased an increased number of options during the last three trading days before the acquisition announcement, and he did not place any limit orders to sell the options until after the acquisition was announced (*id.*, ¶¶ 35-44, 57);
- Scammell attempted to hide the $100,000 profit he made in his brother's account and he did not tell anyone – including his girlfriend and his brother – about his Marvel research or his extremely profitable trades until after the Commission staff contacted his brother in November 2009 (*id.*, ¶¶ 45, 51); and
- Scammell repeatedly lied during the investigation about the reasons for his trades (*see infra*, pp. 21-22).

This evidence, while circumstantial, was more than sufficient to find him liable had he chosen to litigate the matter. But now that he consented to the judgment and agreed not to deny the allegations, he cannot dispute his liability now.

c) Scammell's purported explanations for his interest in Marvel are contradicted by the evidence

Scammell claims that he originally became interested in investing in Marvel because he believed that Marvel's comic content was undervalued and that Marvel DVDs were more likely to be purchased, rather than rented, by consumers. Resp. Br. at 4-5. But this argument contradicts both Scammell's testimony under oath and the allegations of the Complaint. In fact,

Scammell admitted the allegations in the Commission's Complaint that he performed little or no research on Marvel characters and, more importantly, he admitted that although Marvel "may be better positioned than other players . . . they're going to suffer from the same ultimate demise of their DVD sales" and in "seven years, they won't even make DVDs." Complaint, ¶ 54. The fact that Scammell believed that Marvel's DVD sales would decline at a slower rate over time than the DVDs sold by its competitors (such as Disney), cannot explain his purchase of risky Marvel call options that were to expire within a month and were far out of the money.

Scammell also claims that he purchased Marvel call options because a Bain employee told him that "Disney had been trying to acquire Marvel for years." Resp. Br. at 5; Van Havermaat Decl., Exh. 25. First, such a comment – even if made – would not lead one to believe an acquisition was imminent and does not explain why Scammell purchased Marvel call options that were set to expire just a few weeks later.[5] Second, Scammell's Google search history indicates that he searched for Marvel at least five times throughout the day on July 13, more than a week before the meeting in which he claims the comment was made. Van Havermaat Decl., Exhs. 24, 25. Third, Scammell testified that after hearing the purported comment, he had done "some research and hadn't been able to find anything" and therefore believed it to be "BS," and

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[5] Scammell's claim that he purchased Marvel call options because he believed that even if Disney acquired a company other than Marvel, Marvel's stock would somehow rise high enough to make his $50 Marvel call options profitable, is also suspect. Resp. Br. at 7. Scammell claimed that even a small increase in the Marvel stock price would result in a "significant increase" in the price of Marvel call options he purchased. In testimony he explained that this might occur "for a few seconds during the day." Complaint, ¶ 57. Nevertheless, Scammell did not have any limit orders in place to sell his Marvel call options prior to the public announcement that Disney would acquire Marvel. *Id.* Thus it was highly unlikely that any of his call options could be sold at a profit even if Marvel's stock price temporarily increased during an intraday price swing. *Id.* Scammell's claim is also undermined by the fact that even ***after*** it was announced that Marvel would be acquired at $50 per share, sending the price of Marvel stock up more than 25%, to $48.37 on August 28, 2009, Scammell still failed to make a profit on some of his Marvel call options that had a $50 strike price. Van Havermaat Decl., Exhs. 14, 15.

when he asked his girlfriend, who was working at Disney at the time, whether she had "ever heard that Marvel was a target for Disney that couldn't get closed," she claims she told him she had not heard that, all of which makes it highly suspicious that Scammell would rely on the purported comment to purchase high risk, out-of-the-money Marvel call options set to expire within a few months.[6] *Id.*, Exh. 26.

d) Scammell's arguments regarding the timing of his girlfriend's work on the Marvel acquisition are misleading

In what appears to be an attempt to mislead this Court and imply that Scammell was considering investing in Marvel before he could have learned about the acquisition from his girlfriend, Scammell claims that "[e]ven before [his girlfriend] was staffed on that 'big project'. . . Toby continued researching Marvel" and that Scammell researched Marvel on July 22 and 23; but "[t]he girlfriend was not assigned to it, and she had not received any documents about it, until July 24." Resp. Br. at 6.

Once again, Scammell's assertions are contrary to the allegations of the Complaint as well as his sworn testimony and other evidence in this case. In fact, there is no dispute that Scammell's girlfriend, who was an extern in Disney's corporate strategy department, learned about the upcoming acquisition of Marvel during a Disney staff meeting on June 30, 2009 – weeks before Scammell ever searched the internet for Marvel. Complaint, ¶¶ 9, 22. On June 30,

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[6] Even Scammell's claim that his trading in Marvel resulted, in part, from his project at Bain regarding the decline of DVD sales and from a purported statement during a business meeting at Bain that "Disney had been trying to acquire Marvel for years," is troubling. In connection with his departure from Bain, Scammell was required to sign an agreement acknowledging his confidentiality obligations and, in signing it, he "agree[d] not to use to my own advantage or for my personal benefit...any confidential matter related to the business of Bain itself or the business of any past or present Bain client." Scammell signed this agreement on July 29, 2009, weeks after he began searching the internet for Marvel and two weeks before he first purchased Marvel call options. *See* Rule 10b5-2(b)(1) (imposing a duty against insider trading "[w]henever a person agrees to maintain information in confidence.")

following the staff meeting, Scammell's girlfriend sent an e-mail to Scammell, even though he was vacationing in Africa at the time, and immediately informed him that there was "this opportunity at work to get placed on a really cool project" that would "give [her] a lot of finance/valuation experience," would look "great on [her] resume," and would give her "exposure to all parts of the process of this thing." *Id.*, ¶ 23. She added that it would "provide steady staffing for the next 3+ months." *Id.* She told Scammell that "[i]t would be something that people would recognize right away." *Id.* She added that she could not tell him more because of "confidentiality" but noted that the opportunity was "very recognizable and nothing I've mentioned before." *Id.* She added that the "downside" would involve "super tough, crazy hours, and working with not such a great team." *Id.* She further told Scammell that it would be staffed "in the next day or two" and "it could be a pretty amazing experience." *Id.* She wrote him a few hours later explaining that "[i]t looks like this deal's too big for my first gig, a bit of a disappointment but we'll see." *Id.*

Just a few weeks later, on July 24, the Marvel deal heated up at Disney and Scammell's girlfriend was assigned to work on it. Complaint, ¶ 25. She immediately sent Scammell a text message that morning telling him that she had been "pulled on 'the big project.'" *Id.*

It is therefore clear that even before Scammell's girlfriend was staffed to work on the Marvel acquisition, both she and Scammell were very aware of the existence of the "big project." Three days before he began purchasing Marvel call options Scammell learned from his girlfriend that the acquisition she was working on would be announced by Labor Day. *Id.*, ¶ 29.

e) Scammell's assertions regarding his financial condition at the time of the insider trading are false

Scammell is incorrect when he claims that "[a]t the time he invested, he had received a vacation payout, expense reimbursements, and a final bonus from Bain and was starting a job at

Madrone where his salary was more than $3,000 every two weeks." Resp. Br. at 7. In fact, as alleged in the Complaint, Scammell was not expecting to receive these payouts from Bain until the end of August 2009, and therefore he had limited personal funds at the time he purchased the Marvel call options. Complaint, ¶¶ 5, 47. Indeed, on August 17, 2009, he explained to a friend that he had returned a $1,600 camera a few weeks earlier "not because I didn't like it but because I was running out of money." Transcript of Testimony of Toby G. Scammell ("Scammell Tr."), attached to the Van Havermaat Decl. as Exh. 29, pp. 925:12-927:13; Van Havermaat Decl., Exhs. 27, 28. Scammell explained that he used his brother's funds to make the initial investment in Marvel because he "had very limited cash at the time" but he believed it was necessary to invest in Marvel "before the end of August." *Id.*, Exh. 30; Scammell Tr., p. 292:23-26.

B. Scammell Was Associated With An Investment Adviser At The Time He Engaged In Insider Trading

In addition to disputing the evidence against him, Scammell also argues that he cannot be barred because Madrone Advisors "was a family office" at the time of his insider trading. That is flatly wrong. Indeed, the Family Office Rule upon which Scammell purports to rely did not even exist until June 22, 2011, nearly two years after Scammell committed his violations. 17 C.F.R. § 275.202(a)(11)(G)-1. Although private adviser exemptions were available at the time on an *ad hoc* basis, Madrone Advisors never applied for nor received any such exemption. Rather, it relied upon the exemption from registration under Section 203(b) of the Advisers Act since it had fewer than 15 clients and met the other requirements of that provision. But that provision only provided exemption **from registration** with the Commission, not exemption from the definition of an investment adviser. 15 U.S.C. § 80b-3(b). Consequently, Madrone Advisors unquestionably was an investment adviser, as the term was defined by the Advisers Act, when Scammell engaged in insider trading. *See* Section 202(a)(11) of the Advisers Act, 15 U.S.C. § 80b-2(a)(11).

In his opening brief, Scammell does not even argue that the Family Office Rule should be applied retroactively. Even if he were to make such an argument, it would be without merit. There is a strong presumption against retroactive application of a statute absent a clear contrary indication from Congress. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001). Here, the statutory language and history of the new Family Office Rule make it clear it was never intended to apply retroactively. The Family Office Rule provided that it was effective 60 days after its publication in the *Federal Register*, which would be inconsistent with applying it to Scammell's conduct in 2009.[7] SEC Release No. IA-3220 (June 22, 2011). Additionally, in commentary regarding both the proposed rule dated October 18, 2010 and the final rule enacted on June 22, 2011, the Commission specifically noted that "[f]amily offices typically are considered to be investment advisers under the Advisers Act" and unless exempted are required to register with the Commission. SEC Release No. IA-3220; Fed. Reg. Vol. 75, No. 200, at 63754 (Oct. 18, 2010). The Commission also noted in the final published rule that it was "troubled by comment letters... that appear to acknowledge that their clients were operating as unregistered investment advisers, although they were not eligible for the private adviser exemption and had not obtained an exemptive order from us." Final Rule, 17 C.F.R. § 275, p. 3, fn 6. In the event the Commission intended for the new Family Office Rule to apply retroactively, the Commission would not have expressed any concern regarding family offices that failed to seek exemptive orders and instead were operating as unregistered investment advisers. Finally, it is not disputed

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[7] Although the Family Office Rule was enacted on June 22, 2011, the Commission provided entities with over nine months, until March 30, 2012, either to meet the requirements of the new Family Office Rule or to register with the Commission. SEC Release No. IA-3220. Moreover, entities were given until December 31, 2013 to comply with the new provisions of the Family Office Rule regarding charitable organizations. Final Rule, 17 C.F.R. Part 275, p. 18. These deadlines are also inconsistent with applying the Family Office Rule retroactively to conduct that occurred in 2009.

that, if the Division had been able to institute this proceeding immediately after Scammell's insider trading, there would have been no question regarding the Court's jurisdiction to order a bar. Applying the Family Office Rule from its effective date, rather than two years retroactively, would avoid the inconsistent result sought by Scammell.

C. A Permanent Bar Against Scammell Is In The Public Interest

"Ordinarily, and in the absence of evidence to the contrary, it is in the public interest to bar a respondent who is enjoined from violating the antifraud provisions." *In the Matter of Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC Lexis 2155 at *16 (July 26, 2013). Antifraud injunctions "merit the most stringent sanctions," and the court's "foremost consideration must be whether the sanction protects the trading public from further harm." *James C. Dawson*, Advisers Act Release No. 3057, 2010 SEC Lexis 2561 at *21; *see also In the Matter of Tzemach David Netzer Korem*, Initial Decision Release No. 427, 2011 SEC Lexis 2717 at *13-14 ("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"); *Stefan H. Benger*, Initial Decision No. 499, 2013 SEC Lexis 2158 at *9-10 ("From 1995 to the present there have been over thirty follow-on proceedings based on antifraud injunctions in which the Commission issued opinions. All of the respondents were barred – thirty-two unqualified bars and three bars with the right to reapply after five years."). In particular, the Commission treats insider trading very seriously, and deserving of severe sanctions. *See In the Matter of Robert Bruce Lohmann*, Advisers Act Release No. 2141, 2003 WL 21468604 (June 26, 2003) ("[i]nsider trading constitutes clear defiance and betrayal of basic responsibilities of honesty and fairness to the investing public"). Here, Scammell's conduct establishes unquestionably that it is in the public interest for the court to bar him permanently

from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979).

The Commission typically considers the following factors in determining the appropriate sanction in the public interest:

> 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.

Id. The inquiry, however, "into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive." *Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 SEC Lexis 2024 at *17.

Nevertheless, as set forth below, each of the *Steadman* factors favoring relief is present here. A thorough discussion of these facts and how they weigh in favor of a bar, is included in the Division's motion for summary disposition. Given how heavily these factors weigh in favor of a bar, permanent bar is appropriate against Scammell.

1. Scammell's insider trading violations were egregious

In his opening brief, Scammell asserts that his conduct is "not sufficiently egregious to warrant a bar." Resp. Br. at 14. But the case law is clear that Scammell's violations of the antifraud provisions warrant severe sanctions. When a court, in evaluating the *Steadman* factors, concludes that a defendant's violation of the federal securities laws is not egregious, "one of two mitigating factors is almost always present: either the defendant did not personally profit from his violation, or the defendant's personal profits from the violation were *de minimis*." *SEC v. Gunn*, 2010 U.S. Dist. Lexis 88164, at *14 (N.D. Tex. Aug. 25, 2010). In *Gunn*, the

egregiousness of the insider trader's conduct was reinforced by the fact that he earned a profit of more than $100,000, "which he was able to earn only by liquidating his other stock holdings and investing as much money into [the company being acquired] as he could raise."

Here, similarly, Scammell "appears to have made every effort to maximize the profit he earned from trading on the material nonpublic information." *Gunn*, 2010 U.S. Dist. Lexis 88164 at *17-18. Scammell used effectively all of his available funds to purchase the speculative Marvel call options. On August 17, in the midst of his options purchases, Scammell told a friend that he had to return a camera because he was "running out of money." Van Havermaat Decl., Exh. 29, Scammell Tr., pp. 925:12-927:13. Scammell admitted that he "had very limited cash at the time" of his trades, but he believed it was necessary to invest in Marvel "before the end of August." *Id.*, p. 292:23-26. Scammell used the funds of his brother, with which he had been entrusted when his brother was deployed to Iraq with the United States Army, to purchase more than half the Marvel options. Complaint, ¶ 5. He never told his brother about the profits that he had realized by using the brother's funds, but rather Scammell hid the proceeds by transferring them into a different account. *Id.*, ¶ 51. Scammell earned profits of more than $192,000 on an initial investment of $5,500, in less than a month, by purchasing highly speculative, short-term call options. Indeed, whereas the insider trader in *Gunn* generated a return of "more than 98 percent in just two weeks' time," supporting a finding that his conduct was egregious, Scammell realized a return of more than 3,400% in less than a month. *Gunn*, 2010 U.S. Dist. Lexis 88164 at *18.

Additional aggravating factors strongly support the conclusion that Scammell's conduct was egregious. For example, the very nature of insider trading involves a "serious violation of the federal securities laws; in no sense is it merely technical," and the seriousness of insider trading violations is an aggravating factor that courts consider in assessing the egregiousness of a

respondent's violations. *See Gunn*, 2010 U.S. Dist. Lexis 88164 at *17. Moreover, contrary to Scammell's absurd claim that "no one was harmed" by his insider trading, there were, of course, parties on the other side of Scammell's option trades that suffered losses that matched the magnitude of Scammell's gains.[8] Resp. Br. at 15.

Scammell misappropriated material, non-public information from his girlfriend – whom he considered his best friend – and used that information to engage in highly profitable insider trading. Complaint, ¶¶ 20-31. Scammell secretly used funds that his brother, who had recently been deployed to serve in Iraq with the United States Army, to buy more than half of the Marvel call options he purchased. *Id.*, ¶¶ 42, 46. Scammell never told his brother about the more than $100,000 in resulting profits in his brother's account, but instead hid the profit from both his girlfriend and his brother. Complaint, ¶ 51. Scammell's betrayal of two of the people closest to him in order to turn a quick profit evidences the egregious nature of Scammell's conduct.

2. Scammell's violations were not isolated

Contrary to Scammell's argument, his violations were not "isolated in nature." Resp. Br. at 16. Scammell's trading in Marvel call options was not limited to a one time occurrence or a temporary lapse in judgment. Shortly after Scammell's girlfriend learned about the acquisition of Marvel, Scammell began placing limit orders to purchase Marvel call options. Although not all of his limit orders were successful, Scammell purchased Marvel option contracts on six

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[8] Indeed, Scammell's antifraud violations would be considered egregious even if the facts were different and his violations did not cause harm to other investors. *See, e.g., James C. Dawson*, Advisers Act Release No. 3057, 2010 SEC Lexis 2561, at *11 ("our finding that [respondent's] conduct was egregious is based on the nature of the violation itself, not solely on any calculation of financial harm to his clients"); *Tzemach David Netzer Korem*, Exchange Release No. 70044, 20123 SEC Lexis 2155, at *18 ("[a]lthough the record does not contain evidence of direct investor harm, our focus is on the welfare of investors generally and the threat one poses to investors and markets in the future").

separate days throughout August 2009. Complaint, ¶ 31. Scammell continued to place limit orders and purchase Marvel call options until August 28, 2009, the last trading day before the acquisition announcement. *Id.*, ¶¶ 31, 40. Indeed, on that date alone Scammell placed ten separate limit orders to purchase Marvel call options and canceled each one within less than a few hours when it was not successful, and then increased his bid. *Id.*, ¶ 40. He was finally able to purchase call options with a strike price of $40 just a few minutes before the trading window closed. *Id.* Scammell's violations continued after he traded. He actively concealed his trading in Marvel – and the $100,000 profit that resulted in his brother's account – from his brother and he then provided false and misleading information and testimony to the Commission staff during the investigation. *See infra*, pp. 21-22.

In addition, it is important to note that Scammell did not voluntarily cease his violations, as he suggests. *See* Resp. Br. at 16. He stopped only because the window for profiting on his inside information closed when the announcement of the Marvel acquisition was made. Indeed, Scammell continued to purchase Marvel call options right up until his frenzied trading activity of August 28, the last possible trading day before the announcement. In light of his conduct, it is quite likely that the only reason Scammell has not engaged in further violations is because he has not again come into possession of material nonpublic information. *See, e.g., Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC Lexis 2155, at *20-21 (Commission held that the fact that respondent's misconduct was of limited duration "carries little weight" because it stopped only after it was detected by regulators).

Finally, Scammell's argument that he has no history of securities violations is of no import. *See* Resp. Br. at 16. The determination of whether to bar a respondent focuses on whether such relief is in the public interest, and status as a first-time offender is not a mitigating circumstance.

See, e.g., In the Matter of Eric R. Majors, Initial Decisions No. 409, 2010 SEC Lexis 4003 (Dec. 1, 2010); *see also SEC v. Gowrish*, 2011 U.S. Dist. Lexis 76114 (N.D.Cal. July 14, 2011) ("[f]irst offenders are not immune from injunctive relief"); *see also SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1229 (D.D.C. 1989) (affirming issuance of injunction, and holding "[t]hat this is [defendant's] first section 13(d) violation is no bar to the issuance of an injunction").

3. Scammell acted with a high degree of scienter

Scammell also argues that it cannot be said that he acted with a high degree of scienter "given the exotic legal theory the Commission resorted to here." Resp. Br. at 17. But, as discussed above, the legal theory is far from exotic. And, having consented to the judgment against him, Scammell cannot now try to deny his liability.

In any event, Scammell's actions evince a high degree of scienter. *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC Lexis 2155 at *22 ("Exchange Act § 10(b) and Rule 10b-5 charges underlying the judgment to which [respondent] consented, required knowing, willful, or, at the very least, reckless conduct"); *see also Gunn*, 2010 U.S. Dist. Lexis 88164 at *20. Here, Scammell had been educated and trained about the prohibition of trading based upon inside information. Complaint, ¶ 65. Scammell's girlfriend expressly told Scammell that the acquisition target she was working on at Disney was confidential and Scammell understood this. *Id.*, ¶ 67. Remarkably, Scammell researched insider trading law on August 16, 2009, just before he purchased the majority of his Marvel call options, and searched the internet using the terms "insider trading," "tender offer," "Williams Act," "Rule 10b-5," and "material, non-public information." *Id.*, ¶ 48. After trading on inside information, Scammell then hid the profits he made in his brother's account from his brother. *Id.*, ¶ 52. And contrary to Scammell's assertions in his opening brief, the Commission's theory of liability against

Scammell was far from "exotic." *See* supra, pp. 6-7. All of these facts evidence a high level of scienter by Scammell in engaging in his insider trading.

4. Scammell has not acknowledged the wrongfulness of his insider trading and his assurances against future violations should not be credited

Scammell's professed assurances against future violations consist solely of his self-serving statement that he has "stopped trading altogether" and has stopped managing his brother's finances. Declaration of Toby G. Scammell, ¶ 8. In determining whether or not to credit a respondent's assurances against future violations, a court may consider "the totality of the circumstances." *SEC v. Lorin*, 76 F.3d 458, 461 (2d Cir. 1996). For several reasons, the Court should discredit Scammell's purported assurances.[9]

One of the clearest bases for the court to reject Scammell's purported assurance against future violations is his failure to acknowledge the wrongfulness of his insider trading violations. *See, e.g., In the Matter of John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC Lexis 3855, at *48 and n.64 (July 30, 2013) ("we treat a refusal to acknowledge wrongdoing as an aggravating factor" in determining an appropriate sanction). *SEC v. Gowrish*, 2011 U.S. Dist. Lexis 76114 (N.D.Cal. July 14, 2011) is instructive. There, the defendant, who had been found

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[9] Despite Scammell's consent to an injunction, it is questionable whether he has learned anything or has been "chastened and deterred" as a result of his prior conduct. Resp. Br. at 3. For example, Scammell recently admitted that he used funds from the bank account of Oto Analytics, the startup for which Scammell is currently raising funds from investors, to pay his prior SEC counsel, despite the fact that his counsel never performed work for Oto Analytics and his representation was limited to the Commission's investigation of Scammell. Van Havermaat Decl., ¶ 15. Although the Commission sought a declaration from Scammell's counsel confirming that he had not performed any work for Oto Analytics, Scammell directed his counsel not to sign the declaration, which left the Commission staff with no choice but to notice the deposition of Scammell's prior counsel. *Id.* Finally recognizing that the identity of a client and the amount paid by a client are not privileged matters, Scammell and his former counsel begrudgingly stipulated that Scammell used funds from Oto Analytics to pay Scammell's former counsel, including a transfer of over $5,000 from Oto Analytics' bank account to Scammell's prior SEC counsel after he was enjoined by the district court. *Id.*

liable for insider trading, acknowledged only that his conduct was "unwise," but insisted that his "tips" were merely "careless statements that the tippees then used to trade without his knowledge." *Id at *18-19.* The *Gowrish* court held that "[a] person's lack of remorse can be apparent in the person's continued insistence on the validity of his conduct," which could support a finding of likelihood of future violations.

Here, similarly, Scammell has never acknowledged engaging in insider trading, and he refuses to do so now. As just one example, in his moving brief he only concedes "making options trades that would, in hindsight, obviously ***appear*** to be based on improperly obtained information regardless of whether they actually were." Resp. Br. at 9 (emphasis added). Indeed, Scammell devotes almost half of his opening brief to attacking the Division's legal theory and professing falsely that, with regard to his trading, "every suspicious circumstance had an explanation." Resp. Br. at 9. (As described above, Scammell's purported "explanations" are not supported by the record and are distortions of the factual record.) The fact that Scammell continues to advance supposed innocent explanations for his insider trading casts serious doubt on the sincerity of his assurances against future violations. *See, e.g., Gunn*, 2010 U.S. Dist. Lexis 88164 at *23 (defendants' "persistent refusals to admit any wrongdoing made it rather dubious that they are likely to avoid such violations of the securities laws in the future"); *see also Geiger v. SEC*, 363 F.3d 481, 489 (D.D.C. 2004) (in order affirming Commission decision ordering broker-dealer bar, court found that respondent "still thinks he did nothing wrong, which casts doubts on his promise that he will mend his ways."); *Gowrish*, 2011 U.S. Dist. Lexis 76114, at *18-19 ("[p]romising to stop doing wrong while denying any wrongdoing is the wrong way to establish that wrongdoing will not reoccur").

Additionally, a reasonable likelihood of future violations can be inferred where a

respondent "is dishonest, exhibits a lack of candor, or offers inconsistent testimony during the course of the action." *See Gunn*, 2010 U.S. Dist. Lexis 88164 at *26; *see also Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 SEC Lexis 2024 at *18 ("efforts to frustrate Commission investigations are 'especially serious' and 'justify strong sanctions'"). Here, Scammell's purported assurances against future violations should be further discredited because of his conduct during the investigation and litigation of this action. As he concedes, he created a website to discredit the Commission and its investigation of him.

Moreover, as described more fully above, Scammell has been less than forthcoming regarding his purported explanations for his interest in Marvel and the timing of his girlfriend's learning of the Marvel acquisition. *See supra*, pp. 8-11. During the investigation of his insider trading, Scammell also made false statements and offered inconsistent testimony regarding his trading. For example, Scammell falsely claimed in a document produced to the staff that he purchased Marvel call options with a strike price of $45 on August 17, 2009 for $0.15 because they had traded for $0.25 earlier that day. Van Havermaat Decl., Exh. 8. The purported $0.25 trade was an important piece of Scammell's "explanation" for his trading activity; Scammell repeated this claim on at least nine separate occasions during three days of testimony with the staff in an attempt to validate his assertion that his trades were made at prices that were consistent with the market for those options. *Id.*, Exhs. 9-11. After he was shown a Bloomberg printout proving that no such trade occurred, Scammell's counsel sent the staff a letter stating that Scammell had been "mistaken." *Id.*, Exh. 12.

Scammell also tried to mislead the staff in his testimony and in his Wells Submission regarding a purported "test" trade. Scammell claimed that he made "an almost absurdly *tiny* purchase of Marvel options – for a grand total of just $31" on August 14, 2009 when he

purchased just two Marvel option contracts. *Id.*, Exh. 13, p. 16. He claimed this "test" trade was made "in order to verify the quality of bid and ask data" on Ameritrade. *Id.* Scammell asserted that it would have made "utterly no sense" for him to make "such a tiny trade if he *knew* that Marvel was about to be acquired" and instead it would have made "far more sense for him to pile [o]n, buying more options on the cheap." *Id.* In contrast to Scammell's story, Scammell's Ameritrade records show that he did, in fact, try to "pile on" – he placed limit orders on August 13 to purchase 125 option contracts in his account and another 90 option contracts in his brother's account, for a total of 215 Marvel option contracts, but only two of those orders were successful on August 14 given the limited and illiquid market in risky, short-term, out-of-the-money Marvel call options. *Id.*, Exhs. 14, 15.

Scammell also tried to impede the Commission's investigation through a lack of candor in responding to the staff's questions. For example, in response to basic questions regarding his residence address during the investigation, Scammell stated he was living with his mother, brother and girlfriend, but claimed he did not know any of their addresses. Van Havermaat Decl., Exh. 32, Scammell Tr., pp. 783:23-784:20. During the litigation of the injunctive action, Scammell testified he was living in Woodside, California, but again said he did not know his address. Transcript of Toby G. Scammell on behalf of Womply, Inc., attached to the Van Havermaat Decl. at Exh. 33, p. 6:6-24.) When asked he how was able to get home, he testified that he would "drive down the 280 and I turn off on Woodside Road, and then I drive in the driveway." *Id.*, p. 6:18-20. Notably, months earlier, Scammell was able to recall his Woodside address in his invitation to friends "for BBQ and Bourbon" and he gleefully boasted that, "[i]n case you haven't heard, I'm a pretty good trader so I just picked up a new house in Woodside. My address is..." Van Havermaat Decl., Exh. 34.

5. Scammell's occupation will present opportunities for future violations

Despite Scammell's statement that "at this time [he] has no intention of working in the securities industry" (Resp. Br. at 20), the possibility that he may seek future employment in the securities industry supports the imposition of a bar. *See In the Matter of David W. Baldt*, Initial Decisions Release No. 418, 2011 SEC Lexis 1391, at *74 (April 21, 2011). Scammell's young age of 28, coupled with his lifelong interest in the securities industry, present substantial opportunities for Scammell to violate the federal securities laws in the future. Scammell claims he started investing when he was only fifteen and, throughout high-school and college, he continued to study the markets and analyze stocks, making investments whenever possible. Scammell's Wells Submission, attached as Exh. 13 to the Van Havermaat Decl., pp. 19-20. At age 16, according to Scammell, he became interested in event-based trading after the events of September 11, 2001. *Id.*, p. 20. A year later, Scammell created an email-based investment newsletter which "made trading recommendations based on technical, fundamental, and political factors" and, in the summer of 2004, he wrote *TerrorPlaybook – How to Prepare For and Respond to the Financial Impacts of Terrorism*, a 129-page publication that "made suggestions about which companies' securities to buy and sell given certain terror scenarios." *Id.* Later, Scammell continued to pursue a career in the securities field through his work on behalf of investment advisers Madrone Advisors and Madrone Capital Partners, LLC, where, among other things, he researched investment opportunities and performed related financial analyses of potential investments.

Currently, Scammell is actively engaged in soliciting investors in two start-up companies, Womply, Inc. and Oto Analytics, Inc., of which he is the founder and CEO. Womply and Oto Analytics advertise that they "build groundbreaking products on top of massive amounts of data" and "partner with merchant-facing companies including credit card processors." Van Havermaat

Decl., Exh. 18. Scammell's violations of the federal securities laws, coupled with his intense interest in the securities market, show that the permanent injunction alone may not deter him. Collateral associational bars are the remedies best suited to serve the public interest and to ensure Scammell cannot commit additional violations if he again seeks employment in the securities industry.

6. Permanents bars are needed against Scammell to protect the investing public

Despite Scammell's complaints that his insider trading has already caused him "severe consequences" (Resp. Br. at 10), the full range of associational bars against Scammell is necessary to protect the investing public. The Commission has flatly rejected the argument that imposing a bar is unnecessary in light of other sanctions that have already been imposed. In *In the Matter of Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC Lexis 1267, at *17-18 (April 20, 2012), the respondents argued that "the imposition of additional remedial action against them would be simply adding to the severe sanctions that have already been imposed and would not be in the public interest." In imposing the full range of permanent associational bars against the respondent, the Commission soundly repudiated their argument:

> "We reject this argument. While the sanctions imposed by the district court – the permanent injunction, disgorgement, and third-tier civil penalties – are severe, this simply underscores the seriousness of Respondents' misconduct. Indeed, conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws."

Id. Here, as with the respondents in *Bugarski*, barring Scammell from the securities industry "provides an important layer of protection to the public beyond the sanctions imposed by the district court."[10]

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[10] Contrary to his assertions in his declaration and opening brief, Scammell has never stated a willingness to pay any disgorgement or penalty amount in the Commission's injunctive action. Scammell's settlement offer consisted of nothing more than his agreement to the entry of a monetary judgment against him, which his counsel stated would not involve any actual payment of funds, in

III. CONCLUSION

"The Commission has stated that antifraud violations merit the severest of sanctions when considering the public interest." *Alfred Clay Ludlum, III*, Initial Decisions Release No. 447, 2012 SEC Lexis 33, at *14-15. Scammell willfully violated the antifraud provisions of the federal securities laws and has been permanently enjoined from future violations. Moreover, Scammell's conduct established that permanent bars against him are in the public interest. Because Scammell's future participation in the securities industry would pose an unacceptable risk of future harm to the investing public, the Court should deny Scammell's motion for summary disposition, and, instead, as requested in the Division's motion for summary disposition, should issue permanent associational bars against Scammell.

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exchange for Scammell being relieved of his obligation to produce documents that were ordered by the Court. Van Havermaat Decl., ¶ 19. Moreover, when he was informed that the staff would recommend his offer be accepted but that he would still need to comply with the Court's order to produce the documents covered by the Court's order, Scammell withdrew his offer. *Id.*