**ADMINISTRATIVE PROCEEDING**
**FILE NO. 3-15271**

**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

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| **In the Matter of**<br><br>TOBY G. SCAMMELL,<br><br>**Respondent.** | **RESPONDENT'S REPLY TO THE DIVISION OF ENFORCEMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION** |

# RESPONDENT'S REPLY TO THE DIVISION OF ENFORCEMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

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## I. INTRODUCTION

The undisputed facts establish that Toby Scammell worked for a family office at the time of his alleged violation. The issue is not whether family offices meet the general definition of "investment adviser" under the Investment Advisers Act of 1940, 15 U.S.C. § 80b (the "Advisers Act" or the "Act"). Such offices have always been deemed "not within the intent" of the Advisers Act and so have been excluded from the definition of "investment adviser."[1] That policy has existed since the 1940s. It is not an innovation under the recent Family Office Rule, 17 C.F.R. § 275.202(a)(11)(G)-1 (the "Rule"). It was a policy that was reflected in numerous exemption orders the Commission granted over several decades, and that long-standing policy was codified in the recent Rule. There is no dispute as to the characteristics of Madrone, Toby's employer at the time of the alleged misconduct, and those characteristics made it a family office. Consequently, it was not an "investment adviser" for purposes of the Act, Toby's motion for summary disposition should be granted, and this action should be dismissed.

Lacking the proof that would satisfy the *Steadman* factors and establish that a bar would be in the public interest, the Division of Enforcement (the "Division") relies on innuendo and half-truths to argue for lifetime bars. While Toby cannot, and does not, deny the allegations in the Complaint, indisputable facts round out the reality of what happened here and demonstrate it was not so bad as to warrant lifetime bars against a twenty-eight year-old with no prior wrongdoing. For example:

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[1] *See* 15 U.S.C. § 80b-2(a)(11)(G) (Sept. 29, 2006) (the definition of "investment adviser" does not include persons "not within the intent of this paragraph, as the Commission may designate by rules and regulations or order").

| THE DIVISION'S VERSION CONTENDS: | INDISPUTABLE EVIDENCE ESTABLISHES THAT THE REST OF THE STORY IS: |
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| Toby traded in his brother's account. | Toby not only had permission to do so, he had for some time, and his brother did not want to know about activity in his accounts. *See infra* at 10-11. |
| Toby did not tell his brother about the Marvel trades | That was consistent with the understanding and practice between Toby and his brother. *See infra* at 10-11. |
| Toby's trades were unusual | Toby had stopped most of his trading to avoid violating Bain's trading policies. Scammell Mem. at 4. But Toby had purchased even riskier options before the Marvel trades and continued purchasing options in a similar fashion after. *See infra* at 17-18. |
| Toby did not file his tax returns | Toby filed for extensions, made payments, and is acting on the advice of counsel. *See* Declaration of Toby G. Scammell in Support of Opposition to Respondent's Motion for Summary Disposition ("Scammell Decl."). |
| Toby was "aware that his girlfriend was working on a large acquisition at Disney" | That information was not confidential. *See infra* at 21-22. And the girlfriend testified she never told Toby the confidential details. *Infra* at 21. And the Division resorts to alleging alternative vague theories as to how Toby purportedly misappropriated the identity of the target, Marvel, because there is no proof whatsoever as to how that could have happened. *See infra* at 15 n.56. |

As alleged, the conduct was a one-time insider trading episode based on a single merger about which Toby opportunistically got information from a girlfriend. As alleged, it was completely unrelated to his work at Madrone, or its clients; and, as alleged, no investor was injured. To try to make that very ordinary alleged insider trading case seem like a villainous act by a monster, the Division resorts to unsupported innuendo in making serious accusations against Toby that are not true and were not alleged. *See, e.g.*, Division of Enforcement's Memorandum of Points and Authorities in Opposition to Respondent's Motion for Summary Disposition ("Division Opp.") at 2-3 n.2, in which, based on no evidence whatsoever, the

Division implies that Toby, and apparently an independent valuation company, produced fraudulent valuations of Toby's current company.[2] To try to vilify Toby as someone who somehow exploited his brother's military service when he did not, the Division misstates the timing of that service. *See infra* at 11. To make Toby appear dishonest when he is scrupulously honest, the Division exaggerates an innocent and immaterial mistake he made amidst days of cross-examination. *See* Scammell Opp. at 9-10; *infra* at 24. To tarnish the undisputable fact that Toby had lots of information (other than what he allegedly misappropriated) that supported his trading in Marvel, the Division invents a new theory that information from a prior employer was confidential – even though the Division never alleged that theory and it strains credulity to contend the information was material. *See infra* at 14 n.50. And to try to paint Toby as uncooperative in their investigation notwithstanding that he testified for four days and provided incredible amounts of personal information, the Division points to innocent memory lapses about trivial issues. *See infra* at 24-25. That the Division resorts to such inappropriate rhetoric underscores the paucity of its position in seeking a lifetime bar when the facts do not support it.

When Toby responds to the Division's contentions with actual evidence so that this Court can adjudicate the issue of what is in the public interest, the Division suggests adducing evidence is inconsistent with Toby's settlement. It is not. Toby's moving papers provide additional facts and evidence relevant to the *Steadman* factors, issues that have never been litigated. Nothing precludes that. The moving papers do not contest the factual allegations of

[2] The Division's reasoning that the amount of money invested in a company determines its value is too naïve (or disingenuous) to merit a substantive response.

the Complaint or create the impression the Complaint is without factual basis.[3] The moving papers do, however, demonstrate both that the Division's case was not as strong as it contends and that the hyperbole the Division employs in its zeal to notch a lifetime bar against Toby is not supported by a preponderance of the evidence. Taking the allegations in the Complaint as true and allowing that they are not to be litigated here, such allegations and evidence are insufficient to support the imposition of any bar whatsoever, let alone a lifetime collateral bar, in light of *all* the undisputed facts adduced by both sides in this litigation.

## II. THIS COURT LACKS JURISDICTION BECAUSE MADRONE WAS A FAMILY OFFICE AT THE TIME OF THE ALLEGED VIOLATION

The Division adduces no evidence – or even argument – that the nature, structure, or activities of Madrone prevented it from being a family office. The Division nevertheless argues that Toby can be barred because Madrone was not a family office at the time of the alleged violation[4] apparently because the Family Office Rule "did not even exist until June 22, 2011," while the alleged misconduct occurred in 2009.[5] But the undisputed characteristics of Madrone made it a family office in 2009.[6] The Rule did not create family offices; the Rule codified policy as it existed *prior to* the Rule, including in 2009.[7] Both the Securities &

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[3] *See* Declaration of Charlene Koski in Support of Toby G. Scammell's Motion for Summary Disposition ("Koski Decl.") Ex. 8 ¶ 12; *see also* Division Opp. at 4 n.4.

[4] Division Opp. at 14 (stating that Toby "argues that he cannot be barred because Madrone Advisors 'was a family office' at the time of his insider trading. That is flatly wrong.").

[5] *Id.*

[6] *See* Patterson Declaration ("Patterson Decl.") ¶¶ 7-8; *see also* Memorandum of Law in Support of Respondent's Motion for Summary Disposition ("Scammell Mem.") at 10-13. Toby's Opposition Brief ("Scammell Opp.") and supporting papers are incorporated herein in support of Toby's motion for summary disposition; and this memorandum and supporting papers should also be considered in opposition to the Division's motion for summary disposition.

[7] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), P.L. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code), § 409

Exchange Commission (the "Commission") and Congress have recognized, repeatedly, that family offices existed prior to the Rule's enactment.[8]

The Division's assertion that Madrone's status as a family office depended on whether it obtained an exemptive order so stating is also mistaken.[9] The question is whether at the time of the alleged conduct the Commission intended that family offices like Madrone be excluded from the Act.[10] It did. The Commission (and Congress) intended family offices like Madrone to be excluded entirely from regulation under the Act and manifested that intent in the orders the Commission regularly issued "exempting them from all of the provisions of the Investment Advisers Act of 1940."[11] Those orders did not, as the Division suggests, create a special policy only for certain offices. The orders "reflected" a broader policy that applied to family offices

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(instructing that the Rule must be "consistent with the previous exemptive policy of the Commission").

[8] *See, e.g.*, 75 Fed. Reg. 63753-01, 63754 (Oct. 18, 2010) ("many family offices" that had historically relied on the private adviser exemption would be forced to seek exemptive orders after the enactment of Dodd-Frank); *id.* (noting that since 1940, the Commission has considered "the typical single family office" as beyond the intended scope of the Act and observing that, in 2010, there were an estimated 2,500 to 3,000 single family offices in existence); 76 Fed. Reg. 37983-01, 37983 (June 29, 2011) ("Historically, family offices that fell outside the private adviser exemption have sought and obtained from us orders under the Advisers Act declaring those offices not to be investment advisers within the intent of section 202(a)(11) of the Advisers Act."); H.R. 2225, 112th Cong. (1st Sess. 2011) (since 1940, the Commission "has regularly issued orders to individual family offices" exempting them from all provisions of the Act). Copies of the federal register are *available at* http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR.

[9] The Division also inaccurately states that Madrone did not have a "private adviser exemption" and that such exemptions were only available on an *ad hoc* basis. Division Opp. at 14. Like most family offices, Madrone qualified under the private adviser exemption because it had fewer than 15 clients and, for that reason, did not seek an exemption order on the additional grounds that it was a family office. *See* Patterson Decl. ¶ 6; *see also* Division Mem. at 14 (noting that Madrone relied upon the private adviser exemption because it had fewer than 15 clients "and met the other requirements of that provision").

[10] *See* 15 U.S.C. § 80b-2(a)(11)(G) ("'investment adviser' . . . does not include . . . such other persons *not within the intent of this paragraph*, as the Commission may designate by rules and regulations or order") (emphasis added).

[11] H.R. 2225 (since 1940, the Commission has regularly issued orders to individual family offices exempting them from all provisions of the Act).

and has existed since the Act's enactment in 1940. The Dodd-Frank legislation requiring the Family Office Rule made that clear.[12]

The Commission's intent to exclude family offices from the reach of the Act since the '40s was also manifested in its commentary in connection with the Family Office Rule.[13] According to that commentary, the Commission concluded decades ago that "the typical single family office" is not within the intent of the Act.[14] Madrone is and was a typical single family office and the Division has no evidence to the contrary.[15] Consequently, Madrone did not fall within the intent of the Act and was excluded from the definition of "investment adviser."

Excluding Madrone from the definition of "investment adviser" does not depend on a retroactive application of the Rule. The Rule's purpose was to preserve and facilitate an existing policy, not create a new one.[16] The Division's assertion that the Commission stated that family offices "typically are considered to be investment advisers under the Advisers

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[12] *See* Dodd-Frank § 409 ("instructing that the family office rule must be "consistent with the previous exemptive policy of the Commission, *as reflected in* exemptive orders for family offices") (emphasis added).

[13] 75 Fed. Reg. 63753-01, 63754 (since the 1940s, the Commission "viewed the typical single family office as not the sort of arrangement that Congress designed the Advisers Act to regulate" and was "also concerned that application of the Advisers Act would intrude on the privacy of family members"); *see also* 15 U.S.C. § 80b-2(a)(11)(G) ("'investment adviser' . . . does not include . . . such other persons *not within the intent of this paragraph*, as the Commission may designate by rules and regulations or order") (emphasis added).

[14] 75 Fed. Reg. 63753-01, 63754 (since the 1940s, the Commission viewed the "typical single family office" as not within the intent of the definition of "investment adviser").

[15] *See* Patterson Decl. ¶¶ 7-8 (Madrone qualified as a family office under the Rule (which codified practice at the time of the alleged violation) without making any changes to its operations or structure); *see also* Scammell Mem. at 10-13.

[16] 75 Fed. Reg. 63753-01, 63754 (a potential consequence of Dodd-Frank was that many family offices that had historically relied on the private adviser exemption for offices with fewer than 15 clients would be forced to seek exemptive orders. "To prevent that consequence," Congress instructed the Commission to adopt a rule "consistent with the Commission's previous exemptive policy"); *see also* Scammell Opp. at 4-6.

time, Madrone could have sought and obtained an exemptive order excluding it from all provisions of the Act. Like most family offices, Madrone never obtained an order because it never had to.[22] If the Division had brought this action prior to the Rule's enactment, this argument would still apply but it would have been made without the Commission's acknowledgement concerning the history of the family office exclusion that was provided in connection with the Rule.

Congress never intended for family offices to be regulated under the Act,[23] a fact the Commission has always recognized and respected.[24] Ignoring that history to impose a bar in this case would be unprecedented and unwarranted.[25]

## III. A BAR IS NOT IN THE PUBLIC INTEREST

### i. Toby Is Entitled To Demonstrate That the Division Failed to Meet its Requisite Burden of Proof

Toby is not attempting to relitigate anything.[26] None of the relevant evidence has ever been presented to a court or litigated in any fashion. No court has ever considered, let alone

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"advisers" that failed to qualify for the private adviser exemption had also failed to apply for an exemptive order. *See* Division Opp. at 15-16. As already explained, *supra*, exemptive orders are not what made a family office a family office. Exemptive orders reflected the Commission's policy as it existed at the time – that the typical family office was not an "investment adviser" for purposes of the Act. Even if not all "advisers" would have qualified for an order, Madrone would have.

[22] Patterson Decl. ¶ 6 (Madrone never obtained an order "as, it is my understanding, both entities were already exempt from registration under Section 203(b)").

[23] *See* H.R. 2225 ("Family offices are not of national concern in that their advice, counsel, publications, writings, analyses, and reports are not furnished or distributed to clients on a retail basis, but are instead furnished or distributed only to persons who are members of a particular family").

[24] 75 Fed. Reg. 63753-01, 63754 (the Commission has regularly exempted family offices from the Act because they are "not the sort of arrangement that Congress designed the Advisers Act to regulate").

[25] If this Court determines retroactivity is required, it should apply the Rule retroactively. *See* Scammell Opp. at 5-6.

[26] *See id.* at 13-14.

determined, whether the Division's allegations are supported by a preponderance of the evidence. Toby cannot, so he does not, deny the allegations in the Complaint. But those allegations are insufficient to support a lifetime collateral bar, especially when considered with other indisputable facts, because the allegations fail to address the *Steadman* factors – much less establish those factors – by a preponderance of evidence. Nothing prevents describing additional facts for the purpose of supporting the denial of a bar, as long as the consent agreement has been honored, as it has.[27]

The Division asserts that its reliance on "circumstantial evidence" is proper and sufficient to support a lifetime bar. No one disputes that the Division is entitled to rely on "reasonable inferences" drawn from "circumstantial evidence" to sufficiently plead insider trading in a civil complaint.[28] But the question here is not whether insider trading has been sufficiently pled; it is whether the *Steadman* factors have been satisfied by a preponderance of evidence.[29] When the Division's evidence is placed in context and the inaccuracies corrected,

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[27] The Division presumes to know Toby's motivations for entering into a consent agreement, Division Opp. at 9-10, but the Division's assumptions on this point are wrong and demonstrate a disregard for the enormous toll the Division's investigations take and the incredible resources usually required to put up any kind of a defense.

[28] *See* Division Opp. at 8.

[29] None of the cases the Division cites are administrative decisions considering whether the *Steadman* factors have been satisfied. Even so, the evidence presented in those cases is more specific than the evidence presented here. For example, in *Securities & Exchange Commission v. Blackwell*, 291 F. Supp. 2d 673, 682 (S.D. Ohio 2003), the Division alleged that the defendant "visited the home of his father" on September 8, 1999, after a special Board meeting held to discuss a proposed merger and that during that visit, the father and son had a conversation during which the defendant disclosed material non-public information. The complaint also alleged that a second defendant had a telephone conversation with his father during which material nonpublic information was disclosed. The complaint further alleged that another defendant obtained material nonpublic information on August 31, 1999 and in subsequent meetings. Here, by contrast, the Division does not allege that Toby's girlfriend tipped him at all. Nor do they point to a conversation he might have overheard or a document he might have seen. In *Securities & Exchange Commission v. Aragon Capital Management, LLC*, No.CIV. 919, 2008 U.S. Dist. LEXIS 3786, at *3 (S.D.N.Y Jan. 16, 2008), the Division

it becomes clear that the Division's case against Toby falls far short of meeting that standard. The Division's inferences are not reasonable and its evidence, when placed in context, undercuts its position.

**ii. The Alleged Violation Was Not Egregious**

In attempting to render the alleged misconduct egregious enough to warrant a lifetime collateral bar, the Division strings together out-of-context facts and fills the gaps with speculative, inaccurate assumptions. The Division continues to emphasize the fact that Toby used his brother's money to make some of the Marvel trades without telling him.[30] But that undisputed fact ceases to be suspicious – much less egregious – when Toby's unusual, but undisputed, arrangement with his brother is understood.[31] Toby's brother did not *want* to know what Toby did with his brother's money; he just wanted to know that at the end of the month, there was enough in his account to pay the bills – which there was.[32] Toby had his brother's permission to use his money however he saw fit, including for personal investments or other uses.[33] The Division's implication that there was something egregious about Toby's use of his

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specified that the defendant had obtained material nonpublic information from a specific person, who had tipped him. Also, far from cooperating with the Division's investigation as Toby did, the defendant in *Aragon* had asserted his Fifth Amendment privilege, a fact the court emphasized in excusing a lack of detail in the Complaint.

[30] *See* Division Opp. at 1, 10, 14, 18-21.

[31] *See* Supplemental Declaration of Charlene Koski in Support of Toby G. Scammell's Motion for Summary Disposition ("Koski Reply Decl.") Ex. 41 at 31:24-33:1, 42:17-43:15, 121:10-17 (Toby managed his brother's finances without limitation or restriction and did not typically talk with his brother about investments).

[32] Koski Reply Decl. Ex. 41 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.").

[33] Koski Reply Decl. Ex. 41 at 120:15-23 (Toby's brother testified that if Toby "ever needs any money, he can take whatever he wants or needs.").

brother's accounts and funds is contradicted by the undisputed evidence of the actual nature of their relationship.

The Division's innuendo that Toby's brother was in, or *recently* back from, Iraq at the time of the trades is also untrue.[34] His brother returned from Iraq in July, 2007 – more than *two years* before the trades occurred – but continued to have Toby manage his finances.[35] The Division interviewed Toby's brother and is aware of all of this, yet distorts the truth as it strains to make something very ordinary seem egregious.

The Division has not identified any third parties harmed by Toby's alleged misconduct. Its off-hand comment that "parties on the other side" of his trades suffered losses matching the magnitude of Toby's gain is unsupported and should not be taken as true, particularly in light of the likelihood that the counterparties to the options trades were market makers employing complicated hedging strategies.[36] Toby was able to sell his Marvel options at a profit because they gained honest value in the marketplace. Toby is not accused of misleading the public, his employer, its clients, or any investors. Insider trading is undoubtedly harmful to the markets generally, but the lack of harm to identifiable third parties in this instance weighs against a finding of egregiousness.[37]

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[34] *See* Division Opp. at 1 (stating that Toby had been entrusted with the finances of his brother, "who had been deployed to serve in Iraq with the United States Army"); *see also id.* at 19 (noting that at the time of the trades, Toby's brother "had recently been deployed to serve in Iraq with the United States Army").

[35] *See* Koski Reply Decl. Ex. 41 at 21:1-11 (Toby's brother served in Iraq from March 2006 until July 2007). *See also id.* at 73:9-74:9 (Toby's was managing his brother's finances before he went to Iraq and continued managing them after he returned from Iraq).

[36] *See* Options and Hedges, *available at* http://lessons.tradingacademy.com/article/options-and-hedges/ (market makers "take on no risk at all related to movement of the stock price. They avoid that risk by using positions in the underlying stock itself as a hedge against their option positions.").

[37] *In re John Jantzen*, Rel. No. 472, 2012 WL 5422022, at *5-6 (S.E.C. Nov. 6, 2012) (rejecting permanent bar for insider trading, noting, *inter alia*, that respondent's misconduct did

The Division's suggestion that the only factors that matter in analyzing egregiousness are the amount of profit and Toby's personal gain is contrary to case law.[38] Also, unlike the defendant in *Gunn*, Toby did not liquidate any, let alone all, of his assets in order to maximize his profits.[39] To the contrary, despite the fact that he had thousands of dollars in his checking account, had received his first paycheck from Madrone, and had received thousands of dollars in payouts from Bain,[40] he purchased call options – which are inherently less expensive than other stock transactions[41] – and did not take advantage of the margin he had available. Toby's description of his financial situation is consistent with the Division's allegations. Toby does not deny he had "limited cash" at the time he made the Marvel purchases, but what "limited"

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not involve any of his clients or identifiable third parties); *cf In re James C. Dawson*, Rel. No. 3057, 2010 WL 2886183 (S.E.C. July 23, 2010) (barring defendant from association with investment advisers where Division had alleged in the Complaint that the defendant defrauded his clients).

[38] *See* Scammell Mem. at 14-16 (describing factors courts consider in deciding egregiousness and citing to cases); Scammell Opp. at 6-10 (demonstrating that the Division's allegations do not support a finding of egregiousness and citing to cases). Nor is the amount of profit, $192,000, so significant as to warrant a bar in light of all the other circumstances. *See, e.g.*, *Securities & Exchange Commission v. McGee*, 895 F. Supp. 2d 669, 675 (E.D. Pa. 2012) (scheme to commit insider trading reaped profits of $562,673); *Securities & Exchange Commission v. Nothern*, 598 F. Supp. 2d 167, 170 (D. Mass. 2009) (seeking disgorgement of $3.1 million under misappropriation theory of insider trading); *Dawson*, 2010 WL 2886183, at *1 (disgorgement of $303,472); *In re Stefan H. Benger*, Rel. No. 499, 2013 WL 3832276, at *6 (S.E.C. July 25, 2013) (disgorgement of $422,004.10); *see also* Scammell Mem. at 15; Scammell Opp. at 15 nns. 57-58.

[39] *See Securities & Exchange Commission v. Gunn*, No. 3:08-cv-1013, 2010 U.S. Dist. LEXIS 88164, at *14 (N.D. Tex. Aug. 25, 2010).

[40] Koski Reply Decl. Ex. 39 at 260:7-261:12 (Toby received a paycheck from Madrone on August 14 and by the end of the month had also received Bain payouts); *see also* Koski Reply Decl. Ex. 31.

[41] *See* the Options Industry Council website (recommended on the Commission's webpage), *available at* http://www.optionseducation.org/content/oic/en/getting_started/options_overview/what_is_an_option.html (noting that options transactions "generally require less capital than equivalent stock transactions").

means is in the eye of the beholder. That he returned an expensive camera on or before July 21 is wholly irrelevant to determining his available cash a month later.[42]

The Division's assertion that Toby's theory on DVDs does not "explain his purchase of risky Marvel call options" is based on the false assumption that it needs to.[43] Contrary to the Division's allegation, Toby never said he originally became interested in investing in Marvel "because he believed Marvel's comic content was undervalued and that Marvel DVDs were more likely to be purchased, rather than rented, by consumers."[44] His DVD theory led him to believe Marvel could be attractive to movie companies, but he did not become interested in investing until weeks later.[45] Nor did Toby ever say his DVD theory had anything to do with his decision to purchase the type of call options he ultimately purchased.[46] And the fact that he acknowledged that DVDs would be obsolete in seven years was *consistent with* his theory, the entire premise of which was that all DVDs were losing value, but that some would retain value longer than others. Toby did not need to research Marvel characters.[47] He was simply trying to identify companies whose DVD value might decline more slowly than others. There is nothing contradictory between his DVD theory and his testimony or the Division's evidence.

The Division also mischaracterizes the evidence in asserting that Toby said "he purchased Marvel call options because a Bain employee told him that 'Disney had been trying

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[42] *See* Koski Reply Decl. Ex. 40 at 156:3-16 (describing why he returned camera). In August, Toby had thousands of dollars in his checking account, started receiving paychecks from Madrone, and received payouts from Bain.

[43] Division Opp. at 10-11.

[44] *Id.*

[45] Koski Reply Decl. Ex. 38 at 141:10-143:3 (Toby first started considering Marvel as an investment on August 4, 2009 and did not decide to invest until just before he first placed an order to invest).

[46] Toby's investment theory is a separate issue and the Division's misstatements on that point are addressed *infra*.

[47] Koski Reply Decl. Ex. 38 at 117:24-120:24, 121:7-128:12.

to acquire Marvel for years.'"[48] Toby's decision to purchase Marvel call options was based on many factors.[49] He never said the comment he heard in the meeting was the sole basis for his trades.[50] The indisputable point is that immediately after hearing that comment in a meeting, Toby researched Marvel on Google. Toby repeatedly testified, as the Commission points out, that he did not initially believe the comment. His opinion changed later after conducting more independent research.[51] Toby's version of events is consistent with the Division's evidence.

Nor does it matter that he searched for Marvel five times on July 13, before the meeting took place.[52] Toby never said that the first time he conducted online Marvel searches was after that meeting – to the contrary, the evidence shows he conducted online Marvel research as early as October 2008.[53] Toby has said, however, that he spent July conducting research related to his DVD theory and that he has periodically monitored Marvel.[54] Both statements are consistent with the fact that he conducted online research related to Marvel on July 13.

The Division also accuses Toby of improperly "implying" that he was "considering investing in Marvel before he could have learned about the acquisition from his girlfriend" by

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[48] Division Opp. at 11-12.

[49] Van Havermaat Decl. Ex. 8 (explaining basis for Toby's trades).

[50] The Division cites nothing to support its suggestion that the off-hand comment was a "confidential matter" for purposes of Bain's confidentiality policy. *See* Division Opp. Mem. at 12 n.6. Moreover, Toby informed Bain that the statement was one of many factors that contributed to his eventual decision to invest in Marvel. *See* Koski Decl. Ex. 3 at Appx. G p.13. Regardless, the Division never alleged, and cannot contend that the statement contained material information related to the Disney acquisition. Thus, it is unclear how the point is even relevant except as another unsupported contention the Division has used to create the illusion of evidence where evidence is, in fact, sorely lacking.

[51] Scammell Mem. at 5; Koski Reply Decl. Ex. 38 at 148:14-151:24 (Toby first heard Disney might be interested in acquiring Marvel during the meeting, but did not believe it until he conducted independent follow-up research).

[52] Division Opp. at 11.

[53] Koski Decl. Ex. 3 at Appx. A.

[54] Koski Reply Decl. Ex. 38 at 152:1-9 (Marvel was a company Toby followed prior to the July meeting).

pointing out that he conducted online research related to Marvel on July 22 and 23, before his girlfriend was staffed on the deal and before she received any documents related to it. The Division argues that Toby's position lacks merit because his girlfriend learned about the project as early as June 30. The Division misses the point. It is undisputed that Toby conducted online searches related to Marvel before his girlfriend was staffed on the project or had any documents related to it. What that evidence demonstrates, however, is that the Division has failed to meet its burden. There is no allegation that Toby's girlfriend *told* him nonpublic information about the deal either by telephone or email; this is not a tipping case, it is a purported misappropriation case. But his girlfriend did not have any documents for Toby to misappropriate until July 24. Toby is not allowed to deny that he traded on misappropriated information.[55] But to allow an assessment of how egregious that purported conduct was, it is fair to point out both the paucity of evidence the Division has as to how the information was purportedly misappropriated (leading the Division to avoid specificity),[56] and that Toby also had legitimate information that – to say the least – supported the trades.

In Footnote 5 of the Division's opposition brief, the Division appears to challenge Toby's underlying investment theory because he did not use limit orders.[57] The Division further points to the fact that some of Toby's $50 options failed to make a profit even after the Marvel acquisition was announced, ostensibly to support its position that Toby's explanation for his trades is "suspect."

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[55] *See* Koski Decl. Ex. 8.

[56] *See* Koski Decl. Ex. 4 ¶ 30 (alleging that Toby obtained material nonpublic information "whether through overhearing one or more of his girlfriends' Marvel-related conversations, by seeing electronic or paper documents in her possession related to the Marvel acquisition, or through her conversations with him").

[57] Division Opp. at 11 n.5.

Toby testified that he did not use limit orders because he was monitoring the stock and was not expecting to sell based on only a momentary increase in price.[58] It is also well-established that out-of-the-money options can be profitable, even if they remain out-of-the-money.[59] Far from suggesting otherwise, the fact that some of the $50 options expired worthless, even after the acquisition, suggests that Toby's Marvel purchases were *not* the sure bets they would have been under the Division's theory. Toby's explanation for his trades makes sense and is consistent with the evidence. The Division has failed to demonstrate that Toby's alleged misconduct was sufficiently egregious to warrant a lifetime collateral bar.

**iii. The Alleged Violation Was Isolated**

Toby made trades in a single security over a few-week period, and, under the Division's theory, in connection with a single acquisition about which Toby opportunistically took information from his girlfriend. There is no way that conduct can be characterized as recurrent.

In its effort to do so, the Division contends that Toby began placing limit orders to buy Marvel call options "shortly after" his girlfriend learned about the acquisition. While it is unclear what this has to do with whether the alleged violation was recurrent, the Division's point is nonetheless false. It argues elsewhere in its brief (and alleges in the Complaint) that Toby's girlfriend learned about the acquisition on June 30.[60] No one disputes that Toby first

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[58] Koski Reply Decl. Ex. 40 at 270:11-271:9 (Toby testified that he was "watching the stock and following the stock market completely," and was not looking for a "spike in the stock," but instead for a "general upward trend for September").

[59] *See* Options Clearing Corp., *Characteristics and Risks of Standardized Options*, 59 (Supp. 2008), *available at* http://www.optionsclearing.com/publications/risks/riskstoc.pdf (it is possible for an out-of-money options holder "to realize a profit by selling an option prior to its expiration for more than its original cost even though the option never becomes worthwhile to exercise.").

[60] Division Opp. at 12 (citing the Complaint and arguing that Toby's girlfriend learned about the acquisition on June 30, 2009 – "weeks before Scammell ever searched the internet for Marvel.").

attempted to buy Marvel call options in mid-August – about six weeks later. That is not "shortly after" June 30, an argument the Division itself makes on page 12 of its brief.[61]

That Toby placed a series of test orders on August 28 does not demonstrate that his alleged violation was recurrent. Toby was testing the market to find the lowest price because he wanted to spend a limited amount of money. He made multiple attempted purchases that were priced too low to be accepted by the market, so quickly cancelled them and moved to a higher price.[62] Toby was simply trying to avoid overpaying for an option. There's nothing recurrent or even suspicious about that. The Division's false allegations that Toby concealed his trades from his brother and lied under oath are addressed *supra* and *infra*, and have nothing to do with recurrence of the violation.

The Division's contention that the only reason Toby has not engaged in violations since trading in Marvel is that he has not come into possession of material nonpublic information is ludicrous. Contrary to the Division's assertion, Toby was *not* committing securities violations when the Commission began its investigation. The only violation he is accused of is trading on the Marvel acquisition – a single deal, and a one-time violation.[63] The Division has never suggested that any of Toby's many other trades – those made before Marvel or after – were improper, even though most of them were just as risky and speculative as the Marvel call options and even though by trading call options (other than Marvel's) Toby nearly doubled the

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[61] *Id.*

[62] *See* Koski Reply Decl. Ex. 40 at 274:23-280:1; *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").

[63] *See Jantzen*, 2012 WL 5422022, at *6 (a securities violation was isolated in nature where the Commission had not alleged any other acts of insider trading).

value of his IRA in just a few months.[64] Nonetheless, Toby has since voluntarily given up trading on his own behalf and managing his brother's finances.[65] He also lacks any history of securities violations, which *is* of import.[66] This factor weighs against the imposition of a bar.

**iv. Toby Did Not Act With a High Degree of Scienter**

As already explained in prior briefing, the Division has not alleged that Toby acted willfully and the evidence it relies on in an attempt to argue a high degree of scienter – Toby's August 16 internet searches (which were far from remarkable), and that Toby did not tell his brother about the trades (he was not expected to) – more plausibly suggest that Toby acted *without* scienter.[67]

In its effort to defend its questionable use of an unorthodox theory of liability, the Division argues that one need look no further than the plain text of Rule 10b-5(2) to understand everything there is to know about the breadth of insider trading laws. But federal insider

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[64] *See* Koski Decl. Ex. 3 at 26-30. After the Marvel trades and before he learned of the Commission's investigation, Toby made more than $261,000 in options purchases in short-term trades in seven different companies. Many of those trades were based on Toby's informed speculation about future events including acquisition speculation, earnings reports, and regulatory decisions. In fact, during just the three-month period between October 1 and December 31, 2009, Toby purchased out-of-the-money options 13 different times and increased the value in his IRA by approximately 86%, all by trading call options.

[65] Scammell Decl. ¶ 8.

[66] *See Johnson*, 595 F. Supp. 2d at 44 (determining that a securities violation was an "isolated incident" in part because the defendant "had never previously committed such fraudulent conduct or a violation of the Exchange Act . . . and there is nothing in the record to suggest that he had ever committed illegal acts or misled the public"); *see also Jantzen*, 2012 WL 5422022, at *6 (a securities violation was isolated in nature the defendant did not have a record of any securities violations).

[67] *See supra* Part III.ii (Toby was not expected to inform his brother about the trades and his management of his brother's finances was consistent with their arrangement); *see also* Scammell Mem. at 16; Scammell Opp. at 7-8, 11-12 (the internet searches were conducted over a very short period of time on a single day in response to an article Toby read that day in the *Wall Street Journal* about the Division's prosecution of Mark Cuban).

trading law is developed in the courts and, contrary to the Division's assertions, Rule 10b-5(2) did not vacate thirty years of precedent.[68]

The Division's legal theory is unorthodox in that the Complaint failed to allege that Toby and his girlfriend had a pattern or practice of sharing confidential *business* information and, in fact, the evidence establishes that they did not share such confidences. The Division attempts to downplay the problematic nature of this evidentiary gap, but the cases it cites in an attempt to show that its legal theory is not "startling," "aggressive," "exotic," or "questionable" further demonstrate that it is, in fact, all of those things.[69] In *Conradt*, the court found that two friends had exchanged "numerous *professional* confidences."[70] In *Corbin*, the court considered whether spouses had a "history, pattern, and practice of sharing *business* confidences" and determined that the indictment sufficiently alleged that the couple "had a *spousal* relationship that involved the repeated disclosure of *business* secrets."[71] In *Nothern*, the question was not whether the tipper and tippee shared the requisite relationship under Rule 10b-5(2); it was

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[68] For example, the Commission itself recognized the validity of *United States v. Reed*, 601 F. Supp. 685 (S.D.N.Y), *rev'd on other grounds by* 773 F.2d 477 (2d Cir. 1985) in its commentary describing the purpose of Rule 10b-5(2) by noting that *Reed*, along with other cases, "already establishes a regime under which questions of liability turn on the nature of the details of the relationships between family members, such as their prior history and patterns of sharing confidences." 65 Fed. Reg. 51716-01, 51729 (Aug. 24, 2000). The Division also argues that the Eleventh Circuit's "outdated" decision in *Securities & Exchange Commission v. Yun*, 327 F.3d 1263 (11th Cir. 2003) no longer applies "now that Rule 10b5-2 is in effect." But in that case, which was decided after Rule 10b5-2 took effect, the Eleventh Circuit explicitly recognized that its holding – that it was necessary to show that a husband and wife "had a history or pattern of sharing *business* confidences," – was consistent with Rule 10b5-2. *Id.* at 1273 n.23 (emphasis added) (noting that the SEC's language on the background of the new Rule supported the court's conclusion).

[69] *See* Division Opp. at 6 (quoting *Securities & Exchange Commission v. Conradt*, - F. Supp. 2d -, No. 12 CIV. 8876, 2013 WL 2402989 (S.D.N.Y. June 4, 2013); *United States v. Corbin*, 729 F. Supp. 2d 607 (S.D.N.Y. 2010); *Nothern*, 598 F. Supp. 2d at 174).

[70] 2013 WL 2402989, at *1 (emphasis added).

[71] 729 F. Supp. 2d at 616-17 (emphasis added).

whether the tipper owed a sufficient duty of trust and confidence to his employer.[72] The court noted that the tipper had a history of obtaining *embargoed press releases* (*i.e.*, business information), but found that "it is not entirely clear whether the SEC may rely on Rule 10b5-2(b) to prove that Davis had a relationship upon which Nothern's misappropriation liability may be required" and thus based its final decision on the existence of a confidentially agreement.[73] Notably, in doing so, the court cited *Yun*,[74] a case the Division suggests Rule 10b5-2 vacated, for the rule that "breach of an agreement to maintain *business* confidences" would suffice for purposes of the misappropriation theory.[75] Nor has Toby challenged the constitutionality of Rule 10b-5(2), which was the question presented in *McGee*.[76] The *McGee* Court did not decide whether a sufficient relationship existed for purposes of the rule.[77] It noted, however, that the complaint alleged that McGee and the insider "had an agreement to keep information about their personal and *professional* lives confidential."[78] Thus, to the extent *McGee* is even relevant, it supports Toby's position, not the Division's.

Toby and his girlfriend were not married, did not live together more than a few weeks when Toby was in-between apartments (and for much of the relevant period lived in separate cities), were not engaged, had not entered into any contracts or agreements with each other, and testified repeatedly that they did *not* have a pattern or practice of sharing confidential business

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[72] 598 F. Supp. 2d at 171.

[73] *Id.* at 175-76.

[74] 327 F.3d at 1263.

[75] *Nothern*, 598 F. Supp. 2d at 175 (emphasis added); *see also* Division Opp. at 7 (incorrectly stating that *Yun* no longer applies).

[76] *See* 895 F. Supp. 2d at 677.

[77] *Id.* at 682 ("Whether such a relationship of trust and confidence existed and whether the information was disclosed within the confines of that relationship are questions of fact. These are facts for the jury to decide.").

[78] *Id.* at 681 (emphasis added).

information with each other. When Toby's girlfriend told him about the "project," which turned out to be the Marvel acquisition, she also told him that she could not share any details due to confidentiality.[79] In one of her depositions, she expressly told the Division: "obviously I didn't tell him who the target was . . . Because I knew it was confidential."[80] The Division even concedes that Toby's girlfriend went so far as to lie to him when he asked whether she had ever heard that Marvel was a target for Disney. She told him no, even though she knew otherwise.[81] While she acknowledged that as co-workers at Bain, she and Toby (and everyone else who worked there) had access to some of the same confidential client information, she said they did not share confidential business information about their work post-Bain.[82] Consistent with his girlfriend's testimony, Toby told the Division that they "had no history of discussing finances, and it was kind of a wall in our relationship."[83] He also testified that he was "borderline paranoid sharing any information from Madrone. The only information that I would really discuss with [his girlfriend] about Madrone was personalities. I think it's probably similar to what [she] shared with me about Disney. But you know, personalities, very high level description of what I'm actually working on."[84] Which is exactly how his girlfriend described their communications.[85]

The Division's assertion that "abundant evidence" demonstrates a history of sharing business confidences fails when that evidence is placed in context. That Toby's girlfriend was

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[79] *See* Division Opp. at 12-13.

[80] Koski Reply Decl. Ex. 42 at 42:12-22.

[81] Division Opp. at 12; Koski Reply Decl. Ex. 42 at 90:7-20.

[82] *See* Koski Reply Decl. Ex. 43 at 201:5-15; Koski Reply Decl. Ex. 42 at 86:15-24, 121:1-22.

[83] Koski Reply Decl. Ex. 38 at 303:22-25.

[84] *Id.* at 307:19-308:9.

[85] Koski Reply Decl. Ex. 42 at 137:19-22 (asked whether she discussed things about Disney with Toby, his girlfriend replied: "Yeah, we would talk about people mostly, personalities.").

working on a "large acquisition at Disney"[86] was not confidential. When his girlfriend sent Toby the information from Bain's "internal intranet," and business school statistics,[87] she did not believe she was violating any confidentiality rules because the documents did not contain confidential information and because Toby was part of the "Bain network."[88] Bain also informed the Division that Toby did not violate confidentiality rules when he received Bain information from his girlfriend.[89]

A non-expert in this field could not have known that the relationship between Toby and girlfriend would support the application of the misappropriation theory. And an expert could dispute that it does. Consistent with his agreement, Toby does not dispute the applicability of the theory here. But there is no allegation or proof that Toby was aware of the applicability of the theory when he traded. Consequently, his purported scienter was weak, so this factor weighs against the imposition of a bar.

**v. Toby Has Acknowledged Wrongdoing and Has Made Sincere Assurances Against Future Violations**

The Commission falsely states that Toby has not acknowledged the wrongfulness of his actions. He has. Toby agreed to settle a weak Division case and to disgorge and pay penalties. Toby deeply regrets making the Marvel trades under the circumstances in which he made

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[86] Division Opp. at 8.

[87] Division Opp. at 8.

[88] Koski Reply Decl. Ex. 42 at 132:7-18, 118:13-121:22 (testifying that she thought it was fine to send information to Toby because he was part of the "Bain network."). The Commission has explained that a "duty of trust or confidence" is established by considering "facts and circumstances . . . based on the expectation of the parties in light of the overall relationship." 65 Fed. Reg. 51716-01, 51730. Therefore, even if Toby's girlfriend violated Bain's policies in sending Toby the information, that she did not think she had affirms that Toby and his girlfriend did not have a history, pattern, or practice of sharing business confidences.

[89] Koski Reply Decl. Ex. 29.

them.[90] He also regrets the suffering and humiliation his actions caused his friends and family.[91] To help make sure it never happens again, he stopped trading on his own behalf and quit managing his brother's finances.[92] He has learned from this process and has been deterred from making similar mistakes in the future.[93]

The cases the Division relies on to suggest that Toby's acknowledgements of wrongdoing fall short are inapplicable. In both cases, the defendants *had been found liable or pled guilty to* securities violations.[94] The Division is not entitled to more than it bargained for. Toby has settled and agreed to pay, and he has gone beyond that to admit wrongdoing. That he

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[90] Scammell Decl. ¶ 7; Scammell Mem. at 18-20; Scammell Opp. at 12.

[91] *Id.*

[92] Scammell Decl. ¶ 8; Scammell Mem. at 18-20; Scammell Opp. at 12.

[93] In Footnote 9 of its opposition brief, the Division suggests that "it is questionable" whether Toby has been deterred and notes that he used company money to pay his prior attorney's modest fees last year. In so asserting, the Division has both prejudged the propriety of an issue that it purports it is going to investigate, and, again, resorted to innuendo instead of proof in an effort to make Toby sound like a bad person deserving of a bar when the evidence is to the contrary. Moreover, Toby maintains that there was nothing improper about the manner in which he paid his former counsel. The Division ignored ethical limitations that prohibit lawyers from testifying against their client in demanding a declaration from Toby's former counsel and then subpoenaing him when the declaration was not immediately adduced. There was no lack of cooperation on Toby's part – he produced bank records that plainly disclosed the payments, *see* Koski Reply Decl. Ex. 30. The Division's declaration is wrong in asserting it had no choice but to subpoena the former lawyer; in fact, it had the choice to contact Toby's current lawyer for a stipulation on the issue – the solution proposed by current counsel to which the Division eventually agreed. *See Shelton v. Amer. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (before allowing an attorney deposition to be permitted, courts should consider whether "no other means exist to obtain the information than to depose opposing counsel"); *see also* Koski Reply Decl. Exs. 32-37 (showing that the Division ignored current counsel's repeated requests to stipulate); Van Havermaat Decl. Ex. 31.

[94] *See In re John W. Lawton*, Rel. No. 3513, 2012 S.E.C. LEXIS 3855, at *9-11 (S.E.C. Dec. 13, 2012) (Lawton plead guilty to criminal charges of mail fraud and making a false statement in a federal government investigation and specifically admitted overstating the value of investors' interests and preparing a falsified investigation statement); *Securities & Exchange Commission v. Gowrish*, No. C 09-5883, 2011 U.S. Dist. LEXIS 76114, at *5-7 (N.D. Cal. July 14, 2011) (a jury found defendant liable on all three claims of insider trading in violation of Section 10(b) of the Securities and Exchange Act and Rule 10b-5).

refuses to confess to a violation he has never been found to have committed should not be held against him.

Toby never lied under oath. Nor did he display a lack of candor. The Division's allegation regarding Toby's admitted mistake about seeing a 25 cent trade on August 17 and its allegation regarding the test trade made on August 14 are addressed in Toby's Opposition brief.[95] Neither statement was a lie and the mistake he made regarding trading prices on August 17 was immaterial.

The Division suggests that Toby's inability to remember his and his family's addresses evidences a lack of candor.[96] Toby turned over his entire internet search history, sat for four days of depositions, never asserted his constitutional right to decline to answer questions, produced all of his bank records, all of his communications with his girlfriend, communications with his friends and family members, and numerous other documents to aid the Division in its investigation. Nonetheless, the Division's argument on this point is meritless. It is not surprising Toby could not remember the address of the Woodside house. He did not own the house – it belonged to a friend and Toby stayed there periodically – and Toby used a different mailing address. Nor is it surprising or unusual that Toby could not remember his family's addresses, which he offered to look up for the Division.[97] The email the Division cites fails to demonstrate that Toby memorized the Woodside address. He could easily have looked it up, which was not an option during his deposition. And Toby was not "gleefully boasting," in the email, as the Division states. He was joking around with friends. One of the recipients of the "nerd dinner" email group is, in fact, the son of the Woodside house's owner and Toby's

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[95] *See* Scammell Opp. at 9-10.

[96] Division Opp. at 25.

[97] *See* Van Havermaat Decl. Ex. 32 (testifying that he did not know his family members' addresses and offering to get them for the Division during a break in the interview).

roommate. That the Division would accuse Toby of a lack of cooperation or candor based on this, after he patiently gave four days of testimony, shows how hard they must strain to try to justify a bar.

Despite the vast quantity of evidence produced in this case, the Division's argument that Toby is insincere in his assurances against wrongdoing boils down to three accusations: (1) Toby could not remember his address during an interview; (2) Toby made a single immaterial mistake in four days of testimony; and (3) Toby's lawyer made an argument in the Wells response that the Division disagrees with. These facts fail to demonstrate that Toby's assurances are anything but sincere. To the contrary, when placed in context, the facts lack even a hint of mendaciousness and suggest the exact opposite – that Toby is sincere, cooperative, and well-intentioned. This factor weighs against the imposition of a bar.

**vi. Toby's Occupation Does Not Present An Opportunity for Future Violations**

All of the Division's arguments on this point are addressed in Toby's opposition brief.[98] The Division cites to no legal support for its position that founding a start-up company is the type of activity that presents an ongoing opportunity to violate securities laws. The alleged misconduct had nothing to do with Toby's employment at Madrone and he has for all practical purposes removed himself from the securities market. There is no reason the Division needs a bar now, and there is no basis for one.

**vii. A Permanent Collateral Bar is Not Appropriate**

The Division fails to justify its request for a permanent collateral bar,[99] the most severe sanction available. Instead, the Division suggests that this Court is not allowed to consider

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[98] *See* Scammell Opp. at 12-15.

[99] *See* Division Opp. at 27.

relevant circumstances in determining whether such a bar is necessary,[100] a position that is untenable under the law.[101] The Division continues to imply that the mere fact that Toby has been enjoined is sufficient to impose a lifetime collateral bar against him.[102] That is simply untrue.[103] In the case the Division cites to support its position,[104] the court considered whether a bar would be in the public interest in light of the *Steadman* factors.[105] That is all that this Court is required to do.

The Division's assertion that Toby "has never stated a willingness to pay any disgorgement or penalty amount in the Commission's injunctive action" is false.[106] Toby has always maintained that he is willing to pay and, in signing the consent agreement, agreed to do so.[107] He has also made clear from the beginning that he currently lacks the financial means to pay in full. He has offered to make payments, to have a judgment entered against him, or to

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[100] *See id.* at 27 (suggesting that this court may not consider the "severe consequences" Toby has experienced in determining whether he has already been deterred).

[101] *See Steadman v. Securities & Exchange Commission*, 450 U.S. 91, 101-04 (1981) (preponderance of evidence standard applies to administrative proceedings); *Jantzen*, 2012 WL 5422022, at *2 (applying preponderance of evidence standard to *Steadman* factor analysis in follow-on proceeding); *see also* Scammell Mem. at 14-18 (citing cases); *Securities & Exchange Commission v. Bauer*, No. 03-C-1427, 2012 WL 2217045, at *3 (E.D. Wis. June 15, 2012) (considering *Steadman* factors and declining to award a civil penalty in insider trading case because of "the totality of the circumstances and the court's belief that the litigation alone is an adequate deterrent in this case"); *see also In re Jilaine H. Bauer*, Rel. No. 483, 2013 WL 1646916 (S.E.C. Apr. 16, 2013) (considering whether violation was egregious in follow-on summary disposition proceeding and concluding that a seven-month suspension from appearing or practicing before the Commission was appropriate "in the circumstances"); *see also In re Eric J. Brown*, Rel. No. 3376, 2012 WL 625874, at *12 (S.E.C. Feb. 27, 2012) (the inquiry into whether the *Steadman* factors have been satisfied is flexible and no one factor is dispositive).

[102] *See* Division Opp. at 9-10, 16, 27.

[103] *See Lawton*, 2012 WL 6208750, at *9 (the mere existence of a past violation, without more, is an insufficient basis for a bar); *see also* Scammell Opp. at 13-15.

[104] *In re Vladimir Boris Bugarski*, Rel. No. 66842, 2012 S.E.C. LEXIS 1267 (S.E.C. Apr. 20, 2012).

[105] *Id.* at *10-20.

[106] *See* Division Opp. at 27 n.10.

[107] Koski Decl. Ex. 8.

undertake whatever other solution exists for a person who cannot simply write a check for hundreds of thousands of dollars.

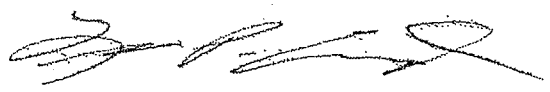
Toby is already subject to a permanent injunction based on his settlement of the civil case. He was twenty-four when the alleged misconduct occurred; he is twenty-eight now. He has been under constant Division scrutiny for nearly four years, and litigation is still ongoing. He has paid a high price, and will continue to pay a high price.[108] A bar on top of all that Toby has been subjected to, and will be subjected to, is overkill. A lifetime bar, and a collateral bar, would be outrageously disproportionate.

## IV. CONCLUSION

For reasons stated herein and in Toby's cross motion and opposition brief, and based on the entire record in connection with both parties' motions, this Court should deny the Division's motion for summary disposition and grant Toby's.

DATED: August 19, 2013

Respectfully submitted,



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[108] Scammell Decl. ¶ 11.