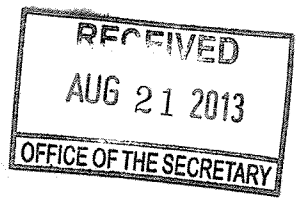
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15271

In the Matter of

Toby G. Scammell

Respondent.

REPLY IN SUPPORT OF MOTION BY DIVISION OF ENFORCEMENT FOR SUMMARY DISPOSITION PURSUANT TO COMMISSION RULE OF PRACTICE 250(a); DECLARATION OF DAVID J. VAN HAVERMAAT

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I. INTRODUCTION

In its motion for summary disposition, the Division of Enforcement ("Division") sets forth compelling reasons that a permanent bar is appropriate against respondent Toby G. Scammell ("Scammell") as a result of the entry of a judgment of permanent injunction against him for insider trading. Scammell was associated with an investment adviser at the time of his insider trading, and the Division requests that, to protect the investing public, Scammell be barred permanently from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.[1]

In his opposition, just as he had done in his cross-motion for summary disposition, Scammell once again attempts to relitigate the factual allegations of the complaint against him for insider trading. He not only argues, for example, that the Division's case against him "is entirely circumstantial," but also that "*it might be wrong*." Resp. Opp. at 2 (emphasis in original). It is as if Scammell has forgotten that he already consented to judgment in the underlying enforcement action and, more importantly, that his Consent bars him from denying liability. As the Division noted in its opposition to Scammell's cross-motion, a respondent cannot relitigate before the Commission the issues that were already addressed in the prior civil proceeding against him, whether by consent,

[1] The parties have filed cross-motions for summary disposition and, consequently, many of the reasons why a permanent bar is appropriate against Scammell have already been addressed in the Division's previous filings. Rather than repeating the same arguments here, the Division incorporates herein its Motion for Summary Disposition (cited as "Division Br.") and its Opposition to Respondent's Motion for Summary Disposition (cited as "Division Opp."), and cross-references those briefs where appropriate. Similarly, Respondent's Memorandum of Law in Support of Motion for Summary Disposition is cited as "Resp. Br." and his Opposition to the Division's Motion for Summary Disposition is cited as "Resp. Opp." Additionally, to avoid repetition, the Division relies upon the Declarations of David J. Van Havermaat ("Van Havermaat Decl.") filed on July 22 in support of the Division's motion (with attached Exhibits 1-18), and on August 5 in support of the Division's opposition (with attached exhibits 19-34), as well as the Van Havermaat Decl. filed concurrently herewith (with attached exhibits 35-50).

summary judgment, or trial. *See* Division Opp. at 4-14. Scammell completely ignores not only his Consent, but also this well-established prohibition. Indeed, that he continues to so forcefully deny any wrongdoing not only violates the terms of his Consent, it also weighs heavily in favor of imposing a permanent bar against him since he clearly has not acknowledged the wrongfulness of his illegal conduct.

Scammell also incorrectly argues that he should not be subjected to an industry bar because the investment advisory firm he worked for when he insider traded – Madrone Advisors LLC ("Madrone") – was a family office, and not an "investment adviser" as that term is defined under the Investment Advisers Act of 1940 ("Advisers Act"). But Scammell's argument only has to do with whether Madrone was exempt from *from registration* with the Commission. See Resp. Opp. at 3-4. It has nothing to do with whether or not the firm was excepted from the definition of "investment adviser" under the Advisers Act. *See* Division Br. at 5-9; Division Opp. at 14-16. In any event, Scammell concedes, as he must, that the Family Office Rule that now exempts family offices from the Advisers Act was not enacted when he engaged in insider trading in 2009, and so the only way Madrone could have been considered exempt is if the Commission had granted an exemption through an exemptive order. Madrone never made such an application, and no such order was ever issued. Instead, Scammell argues that Madrone somehow automatically fell within the investment adviser exemption without ever seeking an exemptive order. That rank speculation should be disregarded. The mere fact is that Scammell was associated with an investment adviser when he insider traded, and thus should be subject to a bar.

II. ARGUMENT

A. Madrone Was An Investment Adviser When Scammell Insider Traded

1. It is undisputed that Madrone met the investment adviser definition under the Advisers Act

As threshold matter, Madrone satisfied the definition of an investment adviser under Section 202(a)(11) of the Investment Advisers Act of 1940 ("Advisers Act") (15 U.S.C. § 80b-2(a)(11)) when Scammell engaged in insider trading. As set forth in the Declaration of Thomas A. Patterson ("Patterson Decl.") (attached as Exhibit 4 to the Van Havermaat Decl.), Madrone unquestionably met the definition of an investment adviser under Section 202(a)(11) because it was engaged in the business of advising a Madrone affiliate regarding the advisability of investing in, purchasing, or selling securities in exchange for compensation. Patterson Decl., ¶¶ 2-3; Division Br. at 6. Notably, Scammell does not dispute that Madrone was an investment adviser in 2009 as that term is defined under Section 202(a)(11).

Because Madrone was an investment adviser when he worked for the firm and insider traded in 2009, that means he can be subject to an industry bar. It is irrelevant whether or not Madrone was exempt from registration at the time. The Commission can sanction someone associated with an investment adviser, regardless of whether or not the investment adviser was registered. *See, e.g., In the Matter of Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC Lexis 2155 at * 32 (July 26, 2013) ("[i]t is well established that [the Commission is] authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding"); *see also In the Matter of George Elia*, Advisers Act Release No. 3610, 2103 WL 2246025 (May 22, 2013) (barring person associated with unregistered investment adviser from the securities industry); *In the Matter of Martin A. Armstrong*, Advisers Act Release No. 2926, 2009 WL 2972498, at *3 & n.7 (Sept. 17, 2009)

(barring, pursuant to Advisers Act §§ 203(e) and (f), an associated person of an unregistered investment adviser from associating with any investment adviser, based on conviction and injunction regarding securities laws violations); *In the Matter of Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 WL 3299148, at *6 (Dec. 2, 2005) (barring, pursuant to Exchange Act § 15(b)(6)(A), an associated person of an unregistered broker-dealer from associating with any broker-dealer and from participating in any penny stock offering, based on injunction prohibiting securities laws violations); *In the Matter of Alexander V. Stein*, Advisers Act Release No. 1497, 1995 WL 358127, at *2 & n.10 (June 8, 1995) (finding that the Commission's authority to institute follow-on administrative proceedings under § 203(f) of the Investment Advisers Act rests on whether the respondent acted as an investment adviser regardless of respondent's registration status); *In the Matter of Feeley & Wilcox Asset Mgmt. Corp.*, Securities Act Release No. 8249 (July 10, 2013), 56 S.E.C. 616, 618, 647 (barring a person associated with an unregistered investment adviser from association with an investment adviser), *motion for reconsideration denied*, Securities Act Release No. 8303 (Oct. 9, 2003), 56 S.E.C. 1264.

Scammell seems to ignore this basic point. Instead, throughout his opposition, he conflates the issue of exemption *from registration* with the issue of exceptions to *the definition of an investment adviser*. But even if Madrone had been exempt from the Advisers Act registration requirements, as Scammell seems to suggest, that does not mean Madrone was not an investment adviser. And since it is not disputed that Madrone was, in fact, an investment adviser back in 2009 and that Scammell was associated with that firm when he insider traded, the Commission can impose an industry on him.

2. **Because the Family Office Rule did not exist until years after Scammell engaged in insider trading, it does not exempt him from an industry bar**

Having ignored this basic point in his opposition, Scammell crafts his own interpretation of what Congress intended the definition of "investment adviser" to cover back in 2009. At the core of his argument is the new Family Office Rule, which was enacted in 2011 – two years after his misconduct took place. Scammell concedes that this rule was not in effect when he worked at Madrone in 2009 and that he is not arguing that the Rule should be applied retroactively to his misconduct. Resp. Opp. at 4-5. Instead, Scammell incorrectly asserts that "the plain language" of Section 202(a)(11)(G) of the Advisers Act in effect at the time of his insider trading excluded Madrone from the definition of an investment adviser because the "purpose" of the later-enacted Family Office Rule "was to prevent family offices ... from having to seek an exemptive order." *Id.* at 4. He is wrong.

In actuality, the "plain language" of Section 202(a)(11)(G) only excluded from the definition of an investment adviser "such other persons not within the intent of this paragraph, *as the Commission may designate by rules and regulations or order.*" 17 C.F.R. § 272.202(a)(11)(G) (emphasis added). In 2009, no rule, regulation or order exempted Madrone from the definition of an investment adviser. In fact, both Scammell and Madrone readily concede that Madrone never sought or obtained an exemptive order from the Commission excluding Madrone from the definition of an investment adviser. Resp. Opp. at 4, fn. 6; Patterson Decl., ¶ 6. Madrone therefore fell squarely within the definition of an investment adviser when Scammell engaged in insider trading, which is the relevant date for determining the Commission's jurisdiction over him. *See, e.g., In the Matter of Gary M. Kornman,* Advisers Act Release No. 2840, 2009 SEC Lexis 367 (Feb. 13, 2009) ("the relevant date for purposes of our jurisdiction over [respondent] is...the date on which he provided his false statement to Commission investigators. As determined above,

[respondent] was an associated person of...the investment adviser...on that date.").

Yet Scammell argues that Madrone somehow automatically came within the investment adviser exception set forth in Section 202(a)(11)(G) without ever seeking an exemptive order because he thinks that is what Congress intended. Resp. Opp. at 3. This argument is meritless. If Scammell were correct, there would have been no need for Congress and the Commission to issue the Family Office Rule, because, according to Scammell, all entities that considered themselves a family office would already have been exempt pursuant to Section 202(a)(11)(G). 17 C.F.R. § 275.202(a)(11)(G)-1.

Contrary to Scammell's assertion, however, the Commission has made it clear for decades that an entity cannot, on its own, choose to come within the exception set forth in Section 202(a)(11)(G). Rather, an entity must submit an application to the Commission and obtain an exemptive order specific to that entity. *See First Commerce Investors, Inc.*, SEC No-Action Letter, 1991 WL 176655, at *1 (Jan. 31, 1991) (noting that "[t]he Commission staff does not have the authority under 202(a)(11)(F)[2] to exclude a person from the definition of investment adviser by interpretive or no-action response" and explaining that "[t]he proper procedure for obtaining an order of the Commission requires the filing of an exemptive application with the Commission"); *see also A.I.L. Securities Co. Inc.*, SEC No-Action Letter, 1976 WL 10391, at *3, (April 3, 1976) ("You refer to the Commission's . . . specific authority in Section 202(a)(11)(F) to exclude from the definition of investment adviser such other persons not within the intent of this paragraph . . . Such a determination would be made only after the filing of a formal application. There can be no assurances, of course, that the Commission would grant any application for an order . . . "). Indeed, "[i]n view of the many variables that may be pertinent to the appropriateness of the relief

[2] Section 202(a)(11)(F) previously contained the very same language that is currently set forth in Section 202(a)(11)(G).

sought, the customary procedure followed by persons seeking an exclusion from the Act . . . is to file an application relating to a specific person or persons which describes their activities in sufficient detail to enable the Commission to give adequate consideration to the matter." *The College for Financial Planning*, SEC No-Action Letter, 1975 WL 11485, at *2 (Dec. 17, 1975). Therefore, the "application must include facts supporting the contention that the persons requesting the exclusion are not within the intent of the Act's definitional section."[3] *Id.*

Had Madrone sought an exemption under Section 202(a)(11)(G), it would have been required to submit a detailed application describing facts such as Madrone's structure, compensation, ownership, key employees and why it should not be considered within the intent of the Advisers Act. *Id.* Before being considered, a notice would have been published in the Federal Register giving any interested persons an opportunity to request an administrative hearing on the proposed relief sought by Madrone. *See* Advisers Act Rule 0-5(a); *see also First Commerce Investors, Inc.*, 1991 WL 176655, at *1. And, contrary to Scammell's representation that the Commission would have automatically granted Madrone an exemptive order had it applied for one, the Commission has been clear that there can never be assurances "that an application, if filed, would be granted." *See First Commerce Investors, Inc.*, SEC No-Action Letter, 1991 WL 176655, at *1 (Jan. 31, 2991). It is nothing more than wild speculation to claim that Madrone would have

[3] Indeed, a cursory review of the applications for family office exemptive orders demonstrates that all applicants were required to describe the office seeking an exemption in detail and make various representations to the Commission, which Madrone never did. *See, e.g.,* Application For Exemptive Order By WLD Enterprises, Inc. (Ex. 35 to Van Havermaat Decl.) (ten page application describing in detail founders, stock ownership, key employees, history, compensation and structure of family office seeking exemption) ; Application For Exemptive Order By Woodcock Financial Management Company, LLC (Ex. 36 to Van Havermaat Decl.); Application For Exemptive Order By Slick Enterprises, Inc. (Ex. 37 to Van Havermaat Decl.).

received an exemptive order had it applied for one.[4]

Scammell claims that "the vast majority of family offices never applied for exemptive orders. But those family offices were still family offices." Resp. Opp. at 4. Scammell's argument completely misses the point. Those entities, like Madrone, that relied upon the private adviser exemption were still investment advisers as defined by the Advisers Act, they simply were not required to register with the Commission.[5] The commentary surrounding the issuance of the new Family Office Rule confirms as much. For example, the Commission specifically noted that "[f]amily offices typically are considered to be investment advisers under the Advisers Act" and are required to register with the Commission unless they have historically met the 15-client exemption that was repealed by the Dodd-Frank Act. Van Havermaat Decl., Exh. 6, SEC Release No. IA-3220; Fed. Reg. Vol. 75, No. 200, at 63754 (Oct. 18, 2010); Van Havermaat Decl., Exh. 7, SEC Release No. 11-134, 2011 WL 2467909 (June 21, 2011). The Commission also noted in the final published Family Office 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

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[4] For example, it is far from clear that Madrone Capital Partners would have qualified as a family office given that it admittedly "operated for a profit." Patterson Decl., ¶ 25 (Ex. 4 to Van Havermaat Decl.). *Compare with Notice of Application by Adler Management, LLC*, Rel. No. 803-187 (March 21, 2006), ¶ 4 (noting that "Applicant represents that the fees it receives cover only its costs and are not intended to generate a profit"); *Notice of Application by Parkland Management Company, LLC*, Release No. 803-179 (Feb. 24, 2005) ¶ 4 (stating that "Applicant represents that the fees it receives have not generated, and are not intended to generate, a profit for Applicant.").

[5] Scammell's argument that there is "no case in which this Court has exercised jurisdiction over a family office and no case in which a 203(f) bar was based on employment with a family office" is also not persuasive. Resp. Opp. at 2. A family office that obtained an exemptive order from the Commission or, more recently, that met all of the requirements of the new Family Office Rule, would be exempt from the definition of an investment adviser. As a result, it not surprising that Scammell cannot find instances in which a bar was issued against someone associated with a family office.

us." Van Havermaat Decl., Exh. 5, 17 C.F.R. Part 275, p. 3, fn 6, SEC Release No. IA-3220 (June 22, 2011). If the Commission had already viewed such entities as family offices that were exempt from the definition of an investment adviser, the Commission would not have expressed any concern whatsoever regarding their failures to seek exemptive orders..

B. A Permanent Bar Against Scammell Is In The Public Interest, And Scammell's Arguments To The Contrary Are Without Merit

Much of Scammell's argument regarding the *Steadman* factors relies on his attempts to relitigate the factual allegations of the complaint. *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979). For example, Scammell continues to assert that the Commission's case is "premised on an aggressive legal theory." Resp. Opp. at 7. But as the Division has pointed out several times, the Commission does not permit a respondent to relitigate in an administrative proceeding issues that were addressed in the underlying civil injunctive action.[6] *See, e.g., In the Matter of Stefan H. Benger*, Initial Decisions No. 499, 2013 SEC Lexis 2158 (July 25, 2013); Division. Opp. at 4-14.

Additionally, Scammell's argument that collateral bars are only warranted when the misconduct "flows across" various securities professions is wrong. Resp. Opp. at 14. Indeed, the Commission has found that collateral bars resulting from prior misconduct provide proscriptive relief from harm to investors and the markets. *See In the Matter of John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC Lexis 3855 at *25-27 (Dec. 13, 2012) Here, Scammell's conduct,

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[6] As another example, Scammell argues that he and his girlfriend "did not share business confidences," as purported evidence of the Division's "aggressive" legal theory. Resp. Opp. at 7. But the Division has pointed out that Scammell's argument ignores Rule 10b5-2(b)(2), which does not require a history of sharing business confidences. Rule 10b5-2(b)(2) 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 information expects that the recipient will maintain its confidentiality." 17 C.F.R. § 240.10b5-2(b)(2). *See* Division Opp. at 5-7. Moreover, even if the law were different and required a showing of sharing business confidences, the Division has set forth abundant facts that Scammell and his girlfriend did exactly that. Division Opp. at 7-8.

which he is prohibited from contesting, establishes without question that it is in the public interest for the Court to enter the full range of permanent, collateral bars against Scammell. *See, e.g.*, *Tzemach David Nester Korem*, 2013 SEC Lexis 2155 at *16 ("[o]rdinarily, 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.").

1. Scammell's violations were egregious.

Scammell contends that his conduct was not egregious because every insider trading case based upon the misappropriation theory "*necessarily* involves a so-called 'betrayal.'" Resp. Opp. at 6. Scammell misses the point.

Scammell argues that his antifraud violations constituted "ordinary" insider trading violations, and he attempts to minimize his duplicity with respect to his girlfriend and his brother. Resp. Opp. at 6-9. Scammell did not just betray anyone, Scammell admittedly betrayed the two people closest to him – his older brother who entrusted Scammell to oversee his finances when he was deployed by the Army to serve in Iraq and his girlfriend of two years, whom Scammell also described as his best friend. Complaint, ¶ 33 (attached as Exh. 1 to the Van Havermaat Decl.) Scammell did so in order to make a quick buck, even though he had just joined Madrone, where he would be well compensated, and despite his extensive knowledge and training about the prohibitions of insider trading. *Id.*, ¶ 65. On numerous occasions throughout August 2009, Scammell placed limit orders in his account and in the account of his brother in order to purchase Marvel call options, fully aware each time he did so that he was putting in jeopardy his girlfriend's career at Disney and Bain, as well as his brother's current position with the NCIS. Additionally, Scammell never told his brother – who earned a salary of approximately $3000 per month at the time – about the $100,000 in profits made in his brother's account as a result of Marvel trades, even when his brother pointedly asked Scammell on September 12, 2009 why there was "a lot of

$" in his account.[7] Van Havermaat Decl., Exhs. 38, 39, Scammell Tr. at 275:23-277:19. Instead, Scammell signed his brother's name on an application for a new Ameritrade account, moved the $100,000 in profits into this new account and ensured that this new account was not linked to the financial summary Scammell's brother received each week by email. *Id.*, Scammell Tr. at 277:6-278:10; Complaint, ¶ 51. Scammell's brother only learned of the trading in his account, and the resulting six figure profit, when he was contacted by the Commission staff. *Id.* In testimony, Scammell's brother admitted he found Scammell's conduct surprising and stated he "would have thought that he would tell me about a six-figure gain in my account." Scammell's brother's testimony transcript, attached as Exh. 40 to the Van Havermaat Decl. at 116:24-117:5. There can be no question that Scammell's conduct is egregious and his betrayal of both his brother and girlfriend demonstrates that Scammell should never be trusted to act as an investment adviser, or be associated with one.

Scammell also tries to downplay his repeated and deliberate misrepresentations to the Commission staff. Resp. Opp. at 9-10. But, contrary to Scammell's argument, his misrepresentations, which occurred over the course of one year, do not amount to simply one "single" "innocent (and immaterial) mistake." Nor is Scammell correct when he claims he testified truthfully and the staff is simply taking "issue with an argument Toby's lawyer used" in his Wells Submission.

Scammell's purchase of risky, short-term, out-of-the-money Marvel call options was highly unusual. After learning that the Commission staff, through its own independent investigative efforts, had discovered that Scammell's girlfriend worked on the Marvel acquisition and that the staff planned to issue a subpoena to Madrone, Scammell, working by himself and using data and

[7] There was approximately $10,000 more in Scammell's brother account during this month, which led his brother to question Scammell about the increase.

records from Ameritrade, put together an elaborate PowerPoint presentation, dated February 3, 2010, purportedly in order to explain his trades to Madrone, his then-employer. *See* Van Havermaat Decl., Exh. 8. Although Scammell withheld this PowerPoint presentation from the Commission staff for months, he eventually conceded it was not privileged and produced it to the staff.

In an attempt to explain why he purchased 125 Marvel call options for $0.05 on August 13 with a strike price of $50, Scammell developed an elaborate theory, which he first set forth in his PowerPoint presentation. Scammell wrote in his PowerPoint presentation that he "thought the bid/ask info must have been wrong" and, therefore, he wrote that on August 14, 2009 he placed a "[m]arket order for tiny volume to test whether bid/ask data was accurate." *See* Van Havermaat Decl., pp. 24-26 of Exhibit 8. It is not surprising that Scammell would feel the need to explain this trade. The $50 strike price was the precise share price Disney had agreed to pay for Marvel, and Marvel's share price had never before reached above $41.74, making it extremely unlikely that call options with a $50 strike price could ever be profitable, especially before they expired on September 19, 2009. *See* Complaint, ¶¶ 1, 3, 37, 38 (Exh. 1 to Van Havermaat Decl.); Van Havermaat Decl., Exh. 9, Scammell Tr. at 599:8-15. Scammell's purchase of these options for $0.05 per contract was also odd because the last trade for this series of options occurred just two days before, on August 11, when someone paid $0.01 per contract for them. *See* Van Havermaat Decl., Exh. 41.

Scammell repeated the story from his PowerPoint presentation throughout his testimony, claiming that he only purchased the call options with a $50 strike price due to a "data issue" from Ameritrade. *See* Van Havermaat Decl., Exh. 42, Scammell Tr. at 567:2-7. Scammell purported to bolster his argument by further claiming in testimony that it was only because of this "data issue," that on August 14 he placed a market order for just two contracts, which was "just a tiny, $31 kind

of test that I've described as a test trade" and he added that because of the high fees he incurred for such a small trade, "there's absolutely no reason you would ever do something like this unless you have found something in the market that is kind of strange to you." *Id.*, Exh. 43, Scammell Tr. at 710:2-711:1. Scammell represented that this "test trade" was the result of a market order (as opposed to a limit order) in his PowerPoint presentation and he repeated this claim throughout several days of his testimony. *Id.*, Exhs. 44, 45, 46, 47, Scammell Tr. at 147:3-21; 587:19-588:7; 936:4-13; 1029:3-7. Scammell reiterated this argument again in his Wells Submission, explaining that if he knew Marvel was going to be acquired, rather than placing a market order for two contracts, it would have made "far more sense for him to pile [o]n, buying more options on the cheap." Van Havermaat Decl., Exh. 13 (Scammell Wells Submission), p. 16. Contrary to his repeated representations to the Commission staff, Scammell's trade on August 14 was not a "tiny test trade" that resulted from a market order. Rather, it was the result of a limit order in which he did try to pile on, placing an order for 125 option contracts in his account and another order for 90 option contracts in his brother's account. *See* Division Br. at 10-12.

Scammell's claim that his testimony was otherwise accurate and it was instead his attorney who is responsible for misstatements in his Wells Submission is unavailing. Resp. Opp. at 10. As set forth above, it was Scammell's own misrepresentations that his lawyer merely repeated in his Wells Submission. In his Opposition, Scammell now claims that if he had wanted to pile on "he could have easily done so by purchasing *market* orders, which are orders to buy a set number of contracts at any price, instead of *limit* orders, which are orders to purchase up to a certain number of contracts but only at an agreed upon low price." Resp. Opp. at 10, fn. 41. Again, Scammell disregards his own sworn testimony in this matter. When he was specifically asked whether he placed market orders or limit orders to purchase Marvel options, he was very clear that with the sole exception of the purported "test trade" on August 17, he always used limit

orders. He explained that "it's really dangerous with very small dollar increments to start playing around with market trades" and "you don't want to mess around with that...[y]ou just want to fix your price" and, therefore, "limit orders were really the only safe way to go." Van Havermaat Decl., Exhs. 44, 45, 46, 47, Scammell Tr. at 587:22-588:7; 147:3-21; 936:4-13; 1029:3-7. Scammell recognized that when purchasing extremely thinly-traded options, such as the short-term, far out of the money Marvel options that Scammell was amassing, there was a significant risk that if he placed a large volume market order, he could easily have had to pay vastly inflated prices for the options. Thus, Scammell's claim in his Opposition that he could have placed a market order if he had wanted to "pile on," is simply another misrepresentation.

Scammell made similar misstatements to the staff regarding his claim that the Marvel call options with a strike price of $45 sold for $0.25 on August 17, 2009. Scammell now tries to minimize these misrepresentations by ignoring the facts and misstating the record. Although Scammell tries to claim his false testimony was because he was unable to review documents during his testimony, this is patently false.[8] Scammell first made this misrepresentation in his February 3, 2010 PowerPoint presentation, not during testimony, when he wrote that he purchased Marvel call options with a strike price of $45 for $0.15 on August 17 "after options hit $0.25 on [that] day." Van Havermaat Decl., Ex. 8 (PowerPoint presentation), p. 26. Scammell

[8] Scammell attempts to further mislead the Court by claiming the Commission staff "pushed him" and "repeatedly refused to let Toby look at documents." Resp. Opp. at 9. This is false. The staff painstakingly reviewed every page of Scammell's PowerPoint with him, in addition to reviewing hundreds of other documents during Scammell's testimony. Although Scammell cites a portion of his testimony to make it appear he was uncertain about the $0.25 trade, Scammell testified "actually I can do this from memory. Don't even need to look at the documents. If there's some error, it's because I'm not looking at the data." Declaration of Charlene Koski, Exh. 26 at p. 43:16-18. Scammell then went on to testify that he initially paid $0.10 for the $45 strike price options but later paid $0.15, which is correct. The portion of the testimony cited by Scammell in which he stated he was "not looking at the data" has nothing to do with any of his misrepresentations about the $0.25 sale on August 17, 2009 and Scammell never expressed any doubt about the trade for $0.25.

testified that he had full access to his Ameritrade records and data when he prepared his PowerPoint and he explained that "the only reason why I put this on the slide is if the data that I saw when I built this slide showed me that it hit 25 cents on that day." Van Havermaat Decl., Exh. 48, Scammell Tr. at 1026:5-11.

Scammell knew that the purchases of these short-term, $45 strike price call options on August 17 were highly suspicious. Scammell purchased out-of-the-money Marvel call options for the first time on Thursday, August 13, when Marvel's stock price closed at $39.01 per share, he purchased more on Friday, August 14, when the stock closed at $38.73, and more on Monday, August 17, when the stock closed at $37.76. Van Havermaat Decl., Exh. 49. Thus, he purchased these options at a time when Marvel's stock price was declining. In addition, the purchase of options with a $45 strike price was odd since Marvel stock had never risen above $41.74. Complaint, ¶ 3. In addition, investors who purchased options with a $45 strike price on August 7, 12 and 14 paid between $0.08 and $0.10 per contract, far less than Scammell's purchase of the same series of options on August 17 for $0.15 per contract. Van Havermaat Decl., Exh. 18. Moreover, on August 17, the same date Scammell paid $0.15 per contract for options with a strike price of $45, others paid just $0.05, making it unlikely Scammell could sell his options at a profit. *Id.*

In an attempt to cover up his insider trading and come up with a justification for why he purchased these options at a price far higher than those who previously purchased them, Scammell repeatedly claimed in testimony from July through November 2009 that the options sold for $0.25 on that date, making his purchase for $0.15 seem like a savvy investment, rather than the result of insider trading. Although Scammell now tries to paint the $0.25 trade as a single, off-handed comment, in testimony it was a key explanation that he repeated at least nine times. Van Havermaat Decl., Exhs. 9, 10, 11. Scammell now claims he "warned the Division" it

was likely he would make a mistake about the data. Resp. Opp. at 10. This is also incorrect. As explained above, Scammell first made this misrepresentation in a PowerPoint that he prepared with full access to all of his records and trading data. And, when talking about the August 17 trade for $0.25 in testimony, Scammell expressed nothing but certitude: "I'm certain I saw it on the day . . . because that's something you definitely look at . . . When you see that, you're going to get conviction around your position because it says a very small move in the stock resulted in a 66 percent . . . increase, and that's not . . . theoretical. . . . That's the actual trade that happened. So it's powerful." *See* Scammell Tr. at 584:7-16; Exh. 9 to Van Havermaat Decl. When his own counsel asked whether the PowerPoint slide referred to an actual trade at $0.25 or to "bid-ask" data, Scammell confirmed that it was "not bid-ask" data he was referring to and he instead testified that "options changed hands at 25 cents on Monday, the 17th" and "[s]omebody bought it; somebody sold it." Scammell Tr. at 585:8-12; Exh. 9 to Van Havermaat Decl. On November 5, 2009, when Scammell was shown data from Bloomberg that no $0.25 trade took place on August 17, 2009, Scammell did not correct his mistake and instead testified that there must be "some data discrepancy" with the Bloomberg data and he reiterated that he did not believe there was an error in his PowerPoint slide because "I checked this pretty carefully." Van Havermaat Decl., Exh. 48, 50, Scammell Tr. at 1024:7-10; 1026:5-17. On February 11, 2011, over three months after his November 5, 2010 testimony and ***more than one year*** after he put together his PowerPoint presentation, Scammell finally admitted that no trade for $0.25 occurred on August 17, 2009. Van Havermaat Decl., Ex. 12. Of course, given that Scammell had access to Ameritrade data throughout the investigation, it is unclear why he waited so long to make this clarification.

2. Scammell's violations were not isolated

The Division has set forth strong evidence that Scammell's violations were not isolated. *See* Division Br. at 12-13; Division Opp. at 19-21. Scammell purchased Marvel call options on six separate days in August 2009, including August 28, the last trading day before the Marvel acquisition announcement, when he submitted ten separate orders. *Id.* After his insider trading, Scammell hid the proceeds from his brother, provided false information to the Commission staff, and to this day he has not filed any tax returns regarding the proceeds. *Id.* Scammell's conduct reflects a series of knowing acts, not merely an isolated act of negligence, and supports the imposition of a permanent bar against him. *See Lowry v. SEC*, 340 F.3d 501, 505 (8th Cir. 2003) ("*Steadman* stands for the proposition that the sanction of complete bar should not apply in a case of isolated negligence on the part of an investment advisor. However, [respondent] does not present such a case").

3. Scammell's consent to the permanent injunction is dispositive on the issue of Scammell's high level of scienter

Despite Scammell's continuing arguments to the contrary, his consent to the judgment permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 is conclusive on the issue of his high level of scienter in committing his insider trading violations. *See, e.g., Tzemach David Nester Korem*, 2013 SEC Lexis 2155 at *22 (respondent's consent to judgment permanently enjoining him against 10(b) violations establishes that he acted with "knowing, willful, or, at the very least, reckless conduct"). The Complaint sets forth ample further evidence – including Scammell's education and training regarding trading on inside information, his understanding that his girlfriend's project was confidential, his internet searches regarding insider trading, his hiding the profits from his brother – that clearly establishes that

Scammell did not merely act recklessly, he acted with the highest level of scienter when he traded on inside information. *See* Division Br. at 13; Division Opp. at 21-22; Complaint, ¶¶ 64-68.

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

The Division has submitted ample evidence to establish that Scammell has not acknowledged the wrongfulness of his insider trading and set forth compelling reasons that his assurances against future violations should not be credited. *See* Division Br. at 13-14; Division Opp. at 22-25. Scammell has never even acknowledged engaging in insider trading. He has danced around the issue and tried to take credit by stating that he "regrets the lapse in judgment that allowed him to make 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. He provided false statements and misleading and inconsistent testimony during the investigation of his insider trading. Division Opp. at 23-25. And, remarkably, he still clings to the argument that "no one got hurt" by his insider trading, even though Scammell undoubtedly recognizes that the counter parties to Scammell's call option purchases necessarily suffered losses commensurate with Scammell's gains of over $192,000. Resp. Br at 3; Resp. Opp. at 2.

Two of the arguments Scammell makes in his opposition warrant specific replies. First, contrary to Scammell's arguments, Scammell is not entitled to any credit for purported "cooperation" in the investigation or litigation of his insider trading. Scammell provided false explanations to the Commission staff during his testimony and in a PowerPoint presentation he produced to the staff, which did not have the effect of assisting the staff but instead required additional time and effort be spent on the investigation. Scammell consented to a judgment regarding liability only, and therefore the staff is now required to conduct discovery regarding his financial condition and to file a motion asking the Court to set the disgorgement and penalty

amounts. Moreover, Scammell only agreed to consent to liability after his motion to dismiss and his motion to change venue were denied by the Court and after the Commission staff spent significant resources propounding discovery and taking depositions in the litigation of this matter. Nor, contrary to Scammell's assertions, has Scammell ever agreed to pay any amount to settle this matter; at most he has offered to stipulate to a judgment, with the representation that Scammell does not have money to pay it, for less than the full amount of disgorgement and penalties in exchange for not having to produce documents the Commission requested from him in January 2013. Scammell's conduct here clearly does not involve any "cooperation" that would mitigate the seriousness of his conduct. *See, e.g., Gary M. Kornman*, 2009 SEC Lexis 367 at * 35-36.

Second, Scammell should not receive any credit for taking down the "secfail.com" website, in which he denied he engaged in insider trading and instead attacked the Commission as "the financial equivalent of the DMV," "filled with bumbling lawyers who don't understand the first thing about the markets they're charged with regulating." Van Havermaat Decl., p. 3 of Exh. 17. Scammell acknowledges that he took down the website after consenting to the judgment in the underlying injunctive action. Resp. Br. at 19. But the consent that Scammell signed set forth 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 allegation in the complaint." Van Havermaat Decl., ¶ 12 of Exh. 2. By signing the Consent, Scammell explicitly agreed "not to take any action or 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." *Id.* Scammell kept the "secfail" website up for ten months, and only took it down because if he did not do so, he would have been in breach of the terms of his Consent.

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

The Division has set forth compelling facts showing that Scammell will have opportunities for future violations if he is allowed to work again in the securities industry. *See* Division Br. at 14-15; Division Opp. at 26-27. Two of Scammell's arguments in his opposition merit brief responses.

First, contrary to Scammell's unsupported assertion, there is no requirement that, to warrant a bar, Scammell's insider trading had to be the result of information misappropriated from his employer. "Indeed, the importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business." *Gary M. Kornman*, 2009 SEC Lexis 367 at *23; *see also In the Matter of Ahmed Mohamed Soliman*, Advisers Act Release No. *1482*, 1995 SEC Lexis 968 (Apr. 17, 1995) (revoking registration and imposing associational bars for submitting false documents to the IRS); *In the Matter of Benjamin Levy Securities, Inc.*, Advisers Act Release No. 613, 1978 SEC Lexis 2430 (Jan. 12, 1978) (barring associated person based on conviction for making false statements in a loan application); *In the Matter of Paul K. Grassi, Jr.*, Exchange Act Release No. 52858, 2005 SEC Lexis 3072 (sustaining NYSE's imposition of a five-year bar on a member who forged his doctor's name on a blank prescription drug form).

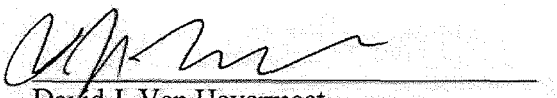
Second, Scammell's representations that he has "no intention" of working again as a securities professional does not preclude the issuance of a bar against him. Indeed, if Scammell is truthful in making such statements, a bar would not impact him. *See, e.g., Tzemach David Nester Korem*, 2013 SEC Lexis 2155 at *23-24 ("if, however, [respondent's] promise to remain out of the securities industry is sincere, a bar imposes no substantial burden on him while prophylactically protecting the investing public").

III. CONCLUSION

For the reasons set forth herein, and to protect the investing public, the Division's motion for summary disposition should be granted and Scammell should be barred from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Dated: August 19, 2013

Respectfully submitted,



David J. Van Havermaat
Senior Trial Counsel, Division of Enforcement
Teri Melson
Senior Counsel, Division of Enforcement
Securities and Exchange Commission
5670 Wilshire Boulevard, 11th Floor
Los Angeles, CA 90036
(323) 965-3866 (telephone) (Van Havermaat)
(323) 965-3964 (telephone) (Melson)
(323) 965-3908 (facsimile)
Email: vanhavermaatd@sec.gov
Email: melsont@sec.gov