ADMINISTRATIVE PROCEEDING
FILE NO. 3-15271

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the TOBY G. SCAMMELL	**TOBY G. SCAMMELL'S PETITION FOR REVIEW**

PETITION FOR REVIEW

Toby G. Scammell hereby petitions for review of an initial decision made by a hearing officer, Initial Decision Release No. 516 (Nov. 7, 2013) (the "Decision"). Commission's Rules of Practice ("Rule of Practice") 410. Review is warranted on multiple grounds. First, the hearing officer committed prejudicial error in the conduct of the proceeding by failing to admit any of Toby's evidence, even though there was no objection to it. Rule of Practice 411(b)(2)(i). Second, the Decision embodies erroneous conclusions of law and fact, including failure to consider whether the *Steadman* factors were satisfied by a preponderance of the evidence. Rule of Practice 411(b)(2)(ii)(B). The Decision reads as if maximum sanctions are automatic following an agreement to an antifraud injunction. If that is true, however, then any hearing on the matter is futile. Third, the Decision answers (incorrectly) an important question of law and policy regarding the application of the Investment Advisers Act of 1940 (the "Act") to family offices. Rule of Practice 411(b)(2)(ii)(C). If not reversed, family offices will be deemed to have fallen under the Act prior to 2011, despite the fact that Congress and this

Commission have stated that such offices have never been within the intent of the Act, and despite the fact that, historically, family offices have not been subjected to it.

I. Background

The Securities and Exchange Commission (the "Commission") instituted proceedings against Toby on April 10, 2013, pursuant to Section 203(f) of the Act. The action was premised on a judgment permanently enjoining Toby from violating Rule 10b-5. The Civil Complaint alleges that Toby misappropriated from his then-girlfriend, and traded on, information that Disney was going to acquire Marvel. The case was circumstantial, weak, and based on a highly questionable legal theory that a boyfriend owes a girlfriend a fiduciary duty even where there is no proof that they have a history of sharing confidential business information with each other. Toby consented to the entry of judgment against him without admitting liability. As part of that settlement, he also agreed that for purposes of certain related proceedings, including these administrative proceedings, he would not deny the allegations.

The hearing officer granted both parties leave to file cross-motions for summary disposition. The parties filed timely motions, oppositions, and replies, and submitted numerous exhibits. In his pleadings, Toby argued that at the time of the alleged misconduct, he worked for a "family office," so the Commission lacked jurisdiction. He also argued that the allegations, even taken as true, were supported by such weak evidence that the Division could not show that a lifetime collateral bar was justified by a preponderance of the evidence.

On November 7, 2013, the hearing officer issued an initial decision imposing a lifetime collateral bar against Toby. The Decision instructs that a party may file a petition for review within twenty-one days of service. Accordingly, Toby hereby respectfully requests that the Commission grant his petition for review, and reverse the Decision.

II. Basis for Review

A. The Hearing Officer Failed To Admit or Consider Toby's Evidence

Along with his pleadings filed in support of his motion for summary disposition, Toby submitted 43 exhibits demonstrating the weak nature of the Division's evidence. The Division did not object to the exhibits, yet the hearing officer failed to admit any of them. *See* Decision at 2. Instead, the hearing officer based her decision on the docket report, the court's civil orders, four exhibits submitted by the Division of Enforcement (the "Division"), and the facts alleged in the injunctive complaint. Decision at 2-3.

To be clear, none of the evidence or facts at issue in this case have been litigated, so the hearing officer's observation that "the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against a respondent" (Decision at 2) should not prevent Toby from arguing that the strength of the evidence supporting the Division's allegations is insufficient to support a bar. Indeed, it cannot, because the imposition of an administrative sanction must be found to be in the public interest by a preponderance of evidence. *See Steadman v. Securities & Exchange Commission*, 450 U.S. 91, 101-04 (1981); *see also In re John Jantzen*, Rel. No. 472, 2012 WL 5422022, at *2 (S.E.C. Nov. 6, 2012). The hearing officer's failure to admit any of Toby's exhibits into evidence was a prejudicial error that warrants further review.

B. The Hearing Officer Failed to Apply the Preponderance of Evidence Standard

The Commission's opinions make clear that the severity of the sanction imposed is tied directly to the strength of the evidence supporting it. *See, e.g., In re Robert Radano*, Rel. No. 2750, 2008 WL 2574440, at *1 (S.E.C. June 30, 2008); *In re Martin B. Sloate*, Rel. No. 38373, 1997 WL 126707, at *3 (S.E.C. Mar. 7, 1997); *In re Richard J. Puccio*, Rel. No. 37849, 1996

WL 603681, at *1 (S.E.C. Oct. 22, 1996); *see also Jantzen*, 2012 WL 5422022, at *2; *In re Ran H. Furman*, Rel. No. 459A, 2012 WL 2339281, at *7 (S.E.C. June 20, 2012).

Nonetheless, the hearing officer failed to consider whether a preponderance of evidence supported the sanction imposed against Toby. Instead, she imposed the maximum punishment available – a lifetime collateral bar – simply because since 1995, some form of bar has always been imposed in follow-on proceedings based on anti-fraud injunctions. Decision at 6. The hearing officer further noted, inexplicably, that "[t]he Commission's opinions do not make clear the factors that distinguished" cases that imposed less than a lifetime collateral bar from those that did not, and that "there is little difference between a 'bar' and a 'bar with the right to reapply in five years.'" Decision at 6 n.6.

In other words, the Decision concludes that the mere fact that Toby has been enjoined is sufficient to impose a lifetime collateral bar against him, a position that is untenable under the law. *See In re John W. Lawton*, Rel. No. 3513, 2012 WL 6208750, at *9 (S.E.C. Dec. 13, 2012); *see also In re Robert Sayegh*, Rel. No. 41266, 1999 SEC LEXIS 639, at *18-19 (S.E.C. Mar. 30, 1999) (describing circumstances that warrant a collateral bar). If the Decision is right, then an antifraud injunction on its own is always enough, which means the evidence does not matter, and the hearing is, apparently, an exercise in futility. This conclusion of law is erroneous and important, and thereby warrants further review.

C. The Hearing Officer Disregarded the Nature of Toby's Employment at the Time of the Trades

The hearing officer erroneously concluded that it did not matter for purposes of determining whether a sanction was in the public interest that the alleged violations had nothing to do with Toby's work for a purported investment adviser. Toby argued that the nature of his employment at the time of the trades in question should be considered in determining whether

the preponderance of evidence standard had been met. The hearing officer, however, appears to have concluded as a matter of law that such considerations should not be taken into account. *See* Decision at 4-5. To support this position, however, the Decision relies entirely on cases in which a respondent was barred based on criminal convictions involving dishonesty. But Toby has never been convicted of anything. Neither the hearing officer nor the Division cited any support for the argument that it is improper to consider the nature of the respondent's employment in considering whether a bar is in the public interest. And, in fact, courts regularly consider such details. *See, e.g.*, *Steadman v. Securities & Exchange Commission*, 603 F.2d 1126, 1139 (5th Cir. 1979) (considering likelihood that defendant's occupation will present opportunities for future violations), *aff'd*, 450 U.S. 91. Further review is warranted to correct this erroneous legal conclusion.

D. The Hearing Officer Determined that Prior to 2011, Family Offices Fell Within the Advisers Act

Contrary to both Congressional intent and the policy and practices of this Court, the Decision established that prior to 2011, family offices that structured themselves under the private adviser exemption fell within the intent of the Investment Advisers Act. Decision at 3-4. The Commission has never before exercised jurisdiction over a family office, regardless of the nature of its exemption. That is because the Commission concluded decades ago that family offices are not within the intent of the Act. 75 Fed. Reg. 63753-01, 63745 (Oct. 18, 2010) (since the 1940s, the Commission viewed the "typical single family office" as not within the intent of the definition of "investment adviser."). There is no question that at the time of the trades in question, Toby worked for a family office. That office could have sought an order of exemption from all provisions of the Act, but like the vast majority of family offices at the time, opted instead to simply structure itself under a different exemption. The fact that it did

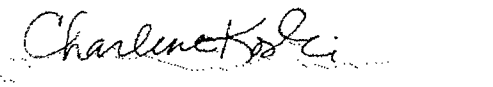
not seek an order of exemption does not change the fact that it was a family office. Family offices may meet the literal definition of investment adviser, but they have never been considered within the *intent* of that definition. The Decision appears to change that, and thus warrants further review.

III. Conclusion

Because the hearing officer committed a prejudicial error and because the decision embodies conclusions of law that are erroneous and important, Toby respectfully requests that the Commission grant his petition for review.

DATED: November 27, 2013

Respectfully submitted,



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