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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **Toby G. Scammell,** **Respondent.**	**The Honorable Carol Fox Foelak**

DIVISION OF ENFORCEMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR REVIEW OF RESPONDENT TOBY G. SCAMMELL

February 25, 2014

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I. INTRODUCTION

The Division of Enforcement ("Division") opposes the petition for review filed by respondent Toby G. Scammell ("Scammell"). The Initial Decision dated November 7, 2013 appropriately determined that, based on Scammell's consent to the entry of a permanent injunction against him for insider trading and the factors identified in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), Scammell should be permanently barred from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization.

On August 11, 2011, the Commission filed a civil injunctive action in the Central District of California alleging that Scammell violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. Appendix, Ex. 1 (Complaint). The complaint alleged that, in August 2009, Scammell engaged in insider trading after he misappropriated from his girlfriend material non-public information about the impending acquisition of Marvel Entertainment, Inc. ("Marvel") by the Walt Disney Company ("Disney"). *Id.*, ¶¶ 2-8, 30. By purchasing highly speculative, short-term Marvel call options in the three weeks before the announcement, Scammell made an illegal profit of more than $192,000 from an initial investment of less than $5,500. *Id.*, ¶¶ 31-34. Scammell consented to a judgment permanently enjoining him from violations of the antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Scammell was recently indicted for the same conduct as alleged in the complaint.

The Division subsequently instituted an administrative proceeding against Scammell. On cross-motions for summary disposition, Administrative Law Judge Carol Fox Foelak considered the *Steadman* factors and properly found that "Scammell's conduct was egregious and recurrent and involved at least a reckless degree of scienter." Initial Decision, p. 6. She also found that

Scammell's previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. *Id.* Based on these findings, Judge Foelak determined it was in the public interest to bar Scammell from the securities industry. *Id.*, p. 7.

In his opening brief, Scammell attacks the Initial Decision by trying improperly to relitigate the factual allegations of the complaint. Indeed, throughout the opening brief, Scammell argues, as he did in connection with the parties' motions for summary disposition, that the complaint against him was "circumstantial, weak, and based on a highly questionable legal theory." Opening Br., pp. 1, 16-28. Based on these arguments, Scammell asserts that his conduct "was not so bad as to warrant a lifetime collateral bar." *Id.*, p. 20. But Scammell's attempts to create the impression that the complaint is without factual basis are wholly improper and constitute a violation of his consent to the entry of judgment.

In addition, Scammell asserts on appeal that Judge Foelak improperly failed to admit Scammell's extrinsic evidence. Opening Br., p.2. But Scammell's request to admit extrinsic evidence flies in the face of the terms of the consent he signed and are contrary to the standards governing a motion for summary disposition. Nevertheless, if Scammell's extrinsic evidence is deemed admitted, the Division respectfully requests that the Commission grant its protective cross-appeal and consider the evidence submitted by the Division, which is necessary to rebut Scammell's false statements. For example, Scammell represents to the Commission that, at the time he insider traded, he "had received a vacation payout, expense reimbursements, and a final bonus" from his previous employer." Opening Br., p. 7. In fact, Scammell was not excepting to receive these payouts until the end of August 2009, and he therefore used his brother's funds to make the initial investment in Marvel because he "had very limited cash at the time" but could not wait because he believed it was necessary to invest in Marvel "before the end of August."

Compl., ¶¶ 5, 47; App., Exs. 27-30. As another example, Scammell claims that "the evidence establishes that no such history" of Scammell sharing business confidences with his girlfriend "existed." Opening Br., p. 24. Not so. The Division presented evidence that Scammell often discussed his girlfriend's work projects at Disney, was aware that his girlfriend was working on a large acquisition there, and even obtained confidential Bain documents from his girlfriend after he no longer worked there and had signed an agreement acknowledging that such documents were "confidential and proprietary." Compl., ¶ 28; App., Exhs. 20, 21. As discussed in more detail below, any implication that his girlfriend had no knowledge of the Marvel acquisition until July 24 is also false. It is undisputed that Scammell's girlfriend learned all about the Marvel acquisition in a meeting in late June 2009, weeks before Scammell began searching the internet for Marvel, and by June 30 she had already sent him a detailed email discussing it, although not identifying Marvel by name. *See infra*, pp. 11-12. Scammell also claims that there is "no allegation or proof that [Scammell] was aware of the applicability of the [misappropriation] theory when he traded." Opening Br., p. 25. But it is undisputed that Scammell extensively researched insider trading law before making the majority of his Marvel purchases and Scammell admitted in testimony that when his girlfriend told him she could not tell him Disney's acquisition target because it was confidential, "the message was well heard" by him and he understood he should not trade on such information. App., Ex. 19.

Scammell also claims on appeal that the Commission lacks jurisdiction over him because of the recently enacted "Family Office Rule," which did not even exist until nearly two years after Scammell traded using inside information. The Family Office Rule, which became effective in 2011, removed certain family offices from the definition of investment adviser. But Judge Foelak properly found that in 2009, when Scammell engaged in insider trading, his

employer, Madrone Advisors LLC ("Madrone"), was an investment adviser as defined by the Advisers Act of 1940 and had not sought any exemption from this definition. Because Scammell was associated with an investment adviser at the time of his insider trading, the entry of a bar against him was proper.

Finally, the Commission should affirm Judge Foelak's finding that the *Steadman* factors support a permanent securities industry bar against Scammell. A permanent collateral bar against Scammell is in the public interest for the reasons set forth below.

II. FACTUAL BACKGROUND

A. Scammell's Insider Trading and Consent to the Entry of a Permanent Injunction

1. Scammell's insider trading

The allegations of the Complaint demonstrate that Scammell engaged in insider trading after misappropriating material nonpublic information from his girlfriend. Scammell's girlfriend worked on Disney's acquisition of Marvel in mid-2009 while she was an extern in Disney's corporate strategy department. Compl., ¶¶ 20-26. Beginning in June 2009, she learned confidential information about the deal, including that Disney would pay $50 per share and that the deal would be announced by Labor Day 2009. *Id.*, ¶¶ 26, 29. By June 30, she had already emailed Scammell and described the deal in detail, although not mentioning Marvel by name. Scammell misappropriated this information from his girlfriend. *Id.*, ¶ 30.

Between August 13 through August 28, 2009, Scammell purchased 659 highly speculative and risky Marvel call option contracts for less than $5,500. Compl., ¶¶ 31-33. Scammell purchased short-term Marvel call options with strike prices of $50 and $45, even though he knew that Marvel had never traded above $41.74. *Id.*, ¶¶ 31, 36-38. Nearly all of the Marvel options Scammell purchased were set to expire worthless on September 19, 2009, just

weeks after Scammell purchased them, unless Marvel's stock price rose dramatically in a very short time. *Id.*, ¶ 39. Scammell's trades were so unusual that his option purchases frequently represented over 90% of the daily market volume of the option series that he purchased, and sometimes represented 100% of the daily market volume. *Id.*, ¶ 36. Scammell had never invested in Marvel before he began acquiring the Marvel call options in August 2009. *Id.*, ¶ 35.

On August 16, 2009, before making the vast majority of his purchases of the Marvel options, Scammell searched the internet for the terms "insider trading," "tender offer," "Williams Act," "Rule 10b-5," and "material, non-public information," and he read online articles regarding those topics. *Id.*, ¶ 48.

Because Scammell admittedly had limited personal funds at the time he purchased the Marvel options, he secretly used the funds of his older brother to purchase more than half of the options. Compl., ¶¶ 33, 45-47. Scammell had been given authority over his brother's finances when his brother was deployed to serve in Iraq with the United States Army in March 2006. *Id.*, ¶ 33. Scammell's brother never authorized Scammell to purchase risky, short-term call options for his account. On the contrary, one week before Scammell's initial purchase of Marvel call options, Scammell's brother emailed Scammell and instructed him to "sell some stocks" so that the brother would have $1,000 to $2,000 in his account to cover "various expenses." *Id.*, ¶ 46. Scammell never told his brother that he had invested his money in Marvel or, after the acquisition was announced, that his brother's account had generated more than $100,000 in profits from the sale of Marvel call options. *Id.*, ¶¶ 33, 45, 51. Instead, Scammell diverted $100,000 of his brother's profits into a new account. *Id.*, ¶ 51. Although Scammell had previously arranged for his brother to receive automatic updates of his financial accounts each week by email, Scammell did not link the new account, into which he had transferred the

$100,000 proceeds of the trades, to his brother's automatic email update. *Id.* Scammell's brother did not learn of the Marvel trades made in his account or the resulting $100,000 in profits in his account until several months later when Scammell's brother was contacted as part of the Commission's investigation. *Id.*

On August 31, 2009, Disney announced that it planned to acquire Marvel, and Marvel's stock price immediately shot up more than 25%. *Id.*, ¶ 34. Scammell sold all of the Marvel options in his account and his brother's account in the days following the August 31 acquisition announcement. *Id.*, ¶ 34. In less than one month, Scammell made more than $192,000, or a return of over 3,000% on his initial investment of less than $5,500, by trading on material nonpublic information. *Id.*, ¶¶ 7, 34.

2. Scammell's consent to the entry of a judgment against him

On June 6, 2012, Scammell consented to the entry of a judgment against him imposing a permanent injunction and ordering him to pay disgorgement, prejudgment interest, and civil penalties in amounts to be determined by the court. Appendix, Ex. 2 (Consent). The district court entered the judgment against Scammell on June 15, 2012. Appendix, Ex. 3 (Judgment). As part of his settlement, Scammell expressly agreed not to contest the factual allegations of the Complaint in any subsequent disciplinary proceeding based on the entry of the injunction.[1] Consent, ¶ 11. Scammell also agreed not to make or permit any statement that creates the impression, in any context, that the complaint is without factual basis. *Id.*, ¶ 12.

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[1] Scammell's Consent states:

> "...in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Defendant Scammell understands that he shall not be permitted to contest the factual allegations of the complaint in this action....Defendant Scammell understands and agrees to comply with the Commission's policy 'not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.' 17 C.F.R. § 202.5. In compliance with this policy, Defendant Scammell agrees...not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis...." Consent, ¶¶ 11, 12.

III. ARGUMENT

A. The Initial Decision Correctly Sets Forth its Basis for Sanctions against Scammell

In the Initial Decision, Judge Foelak found that: (1) Scammell has been permanently enjoined from any conduct or practice in connection with the purchase or sale of any security (Initial Decision, pp. 3-4); (2) Scammell, at the time of the insider trading, was a person associated with an investment adviser (*id.*); and (3) it is in the public interest to impose the sanction sought by the Division, namely a permanent securities industry bar, against Scammell (*id.*, pp. 5-6). Because these findings are more than supported by a preponderance of the evidence, the Commission should affirm the Initial Decision.

B. The Commission Should Reject Scammell's Attempts to Relitigate the Allegations of the Complaint and Should Affirm Judge Foelak's Decision to Exclude Scammell's Exhibits

1. The Commission should reject Scammell's attempts to relitigate the factual allegations of the complaint against him

The Commission should deny Scammell's improper attempts to relitigate the factual allegations of the complaint because Scammell's arguments plainly violate the clear terms of his consent to entry of judgment against him. As an initial matter, the fact that Scammell consented to a judgment of permanent injunction in the underlying civil action, rather than the trier of fact making findings of fact following summary judgment or a trial, is irrelevant to this proceeding. Because of his Consent, Scammell is barred from relitigating the factual allegations of the complaint. *See, e.g., In the Matter of Peter Siris*, Advisers Act Rel. No. 3736, 2013 SEC Lexis 3924, at *33 (Dec. 12, 2013) ("We have repeatedly held that 'where, as here, respondents consent to an injunction, they may not dispute the factual allegations of the injunctive complaint in [a subsequent] administrative proceeding'"); *In the Matter of Marshall E. Melton*, Advisers Act Rel. No. 2151, 2003 SEC Lexis 1767 at *25 (July 25, 2003) ("the Advisers Act and

Exchange Act draw no distinctions between injunctions entered after litigation or by consent"). The Consent to which Scammell agreed expressly provides that, in an administrative proceeding, Scammell "shall not be permitted to contest the factual allegations of the complaint," and it prohibits Scammell, in any context, from "denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis." Consent at ¶¶ 11, 12; *see also In the Matter of Alfred Clay Ludlum, III*, Advisers Act Rel. No. 3628, 2013 SEC Lexis 2024, at *12 and n.28 (July 11, 2013) (language in consent of respondent, which is identical to the language in Scammell's Consent, prohibited respondent from contesting factual allegations of complaint).

Here, Scammell's attacks, particularly on the evidence of the egregiousness of his conduct and of his scienter, constitute improper attempts to relitigate the allegations of the complaint, and the Commission should reject them. This case is strikingly similar to *In the Matter of Peter Siris*, a recent insider trading case in which the respondent consented to the entry of an injunction and later tried to offer arguments similar to Scammell's. 2013 SEC Lexis 3924. In *Siris*, the respondent attacked the evidence of his scienter and of his possession of material nonpublic information, arguing that he "did not understand" that certain information he received constituted material nonpublic information and asserting that "it is far from evident that it did." *Id.* at *36-37. He further argued that his trades amounted to "mistakes," but that they did not provide evidence of the possession of material, nonpublic information. *Id.* at *37-38. The respondent explained that, in making these assertions, he was not improperly contesting the factual allegations of the complaint, but merely "informing the Commission of the facts and circumstances surrounding [his] conduct." *Id.* at 39.

Recognizing the severe and wide-ranging policy implications of allowing such an

argument to be made, the Commission soundly rejected the respondent's argument in *Siris*. The Commission found that the respondent was "plainly violating his consent" by denying the allegations in the complaint and creating the impression that the complaint was without factual basis. *Id.* at *40. "Without scienter or the possession of material, non-public information there can be no illegal insider trading. Far from merely providing mitigating evidence relating to the 'circumstances surrounding' the alleged violations, Siris is impermissibly collaterally attacking the basis for the underlying injunctive action in the district court." *Id.*

Scammell tries to attack the underlying action against him in the same way that the respondent in *Siris* did, and the Commission similarly should reject Scammell's efforts. For example, Scammell tries to dispute the egregiousness of his conduct by claiming that "there is no direct evidence that [Scammell] obtained nonpublic information," and that the evidence against him is "weak" and "circumstantial." Opening Br., pp. 1, 21. Indeed, Scammell tries unabashedly to cast doubt upon the facts regarding his insider trading, arguing that he "infer[red]," rather than obtained material nonpublic information regarding, the Marvel acquisition, and claiming that "every suspicious circumstance" regarding his trading "had an explanation." *Id.*, pp. 6-8. He further asserts that"[i]t is particularly difficult to ascribe scienter" to Scammell and, based on his arguments, contends that "the reality of what happened here...was not so bad...." Opening Br., pp. 20, 23-24.

As with *Siris*, the Commission should deny Scammell's attempts to relitigate the underlying action against him and to create the impression that the Complaint is without merit. Scammell's consent to the entry of the injunction against him establishes conclusively, for purposes of this proceeding, all of the elements of the Commission's insider trading claim, including scienter and Scammell's trading on material nonpublic information. Because

Scammell stipulated to these facts, the Commission should unequivocally reject Scammell's attempts to relitigate any of these issues.

2. The Commission should affirm Judge Foelak's decision to exclude Scammell's exhibits because Scammell offers them to relitigate the allegations of the Complaint

Scammell argues that the Commission should admit "forty-three exhibits and six declarations demonstrating the weak nature of the Division's evidence." Opening Br. at p. 16. Scammell improperly offered the exhibits and declarations in support of his efforts to relitigate the allegations of the complaint, in direct contravention of his consent. Indeed, many of Scammell's exhibits are simply excerpts of his self-serving deposition testimony. Judge Foelak correctly rejected these exhibits. Initial Decision, p. 2; *see, e.g.*, *Siris*, 2013 SEC Lexis 3924, at *40 and n.60 (Commission disregarded respondent's evidence which "consisted largely of uncorroborated, self-serving assertions from his own investigation testimony . . .). Because, as described above, Scammell should not be permitted on appeal to argue that the evidence of Scammell's insider trading was "weak," or that the allegations of the complaint against him were without merit, the Commission should not consider Scammell's exhibits that purport to support such claims.

3. If Scammell's exhibits are deemed admitted, the Division's cross-appeal should be granted so that its exhibits are admitted as well

If the Commission admits Scammell's exhibits into evidence, it should also admit the remainder of the Division's exhibits, which are necessary to demonstrate that Scammell's assertions are deliberately misleading and, in most instances, patently false.

For example, in his opening brief Scammell implies that he purchased the Marvel call options because a coworker purportedly had told him that "Disney had been trying to acquire Marvel for years." Opening Br., pp. 4-5. Such a comment, even if it had been made, would not

lead one to believe that an acquisition was imminent (or that it would even happen at all) and it certainly does not explain why Scammell purchased Marvel call options that were set to expire worthless just a few weeks later. But more importantly, Scammell's Google search history shows that he searched "Marvel" at least five times on July 13, more than a week before the meeting in which he claims the comment was made, making it clear that the comment did not spark Scammell's interest in Marvel as he claims. Appendix, Exhs. 24, 25, 26. In addition, Scammell testified under oath that, after hearing the purported comment, he did "some research and hadn't been able to find anything" and therefore concluded that the comment was "BS." App., Ex. 26. Scammell's attempts to use this excluded evidence to challenge the sufficiency of the allegations against him is, at best, misleading, and only further evidences why Scammell's exhibits were properly excluded.

Similarly, in what appears to be another attempt to mislead the Commission and imply that Scammell was considering investing in Marvel before he could have learned about the impending acquisition from his girlfriend, Scammell states that "[e]ven before [his girlfriend] was staffed on that 'big project'...[Scammell] continued researching Marvel" and further states that Scammell researched Marvel on July 22 and 23, but '[t]he girlfriend was not assigned to it, and she had not received any documents about it, until July 24." Opening Brief, pp. 5-6. Scammell's assertions grossly distort the facts and are deliberately misleading. In fact, Scammell's girlfriend, who was an extern in Disney's corporate strategy department, learned about the pending acquisition of Marvel during a Disney staff meeting on June 30, 2009, weeks before Scammell searched the Internet for Marvel. Compl., ¶¶ 9, 22. On June 30, following the Disney staff meeting, Scammell's girlfriend sent an email to Scammell, who was vacationing in Africa at the time, and immediately informed him that there was "this opportunity at work to get placed on a

really cool project" that would "give [her] a lot of finance/valuation experience," would look "great on [her] resume," and would give her "exposure to all parts of the process of this thing." *Id.*, ¶ 23. She added that it would "provide steady staffing for the next 3+ months." *Id.* She told Scammell that "[i]t would be something that people would recognize right away," and added that she could not tell him more because of "confidentiality" but noted that the opportunity was "very recognizable and nothing I've mentioned before." *Id.* She added that the "downside" to the project would be that it would involve "super tough, crazy hours, and working with not such a great team." *Id.* She further told Scammell that it would be staffed "in the next day or two" and "it could be a pretty amazing experience." *Id.* She wrote him a few hours later explaining that "[i]t looks like this deal's too big for my first gig, a bit of a disappointment but we'll see." *Id.* Just a few weeks later, on July 24, the Marvel deal heated up at Disney and Scammell's girlfriend was assigned to work on it. Compl., ¶ 25. She immediately sent Scammell a text message that morning cryptically telling him that she had been "pulled on 'the big project.'" *Id.*

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

For the reasons stated above, the Commission should not permit Scammell to relitigate the allegations of the complaint, and thus the Commission should affirm Judge Foelak's decision not to admit Scammell's exhibits. If the Commission were to admit Scammell's exhibits, however, it should also admit the remainder of the Division's exhibits, which refute the misleading inferences that Scammell tries to draw.

C. The Commission Should Affirm Judge Foelak's Finding that Scammell Was Associated with an Investment Adviser at the Time He Engaged in Insider Trading

Section 203(f) of the Advisers Act permits the Commission to bar a person who, at the time of the alleged misconduct, was associated with an investment adviser.[2] When Scammell traded using inside information, he was employed by Madrone Advisors LLC ("Madrone"), which, at the time, was an unregistered investment adviser. It is irrelevant whether Madrone was later exempted from the definition of an investment adviser by the Family Office Rule because there is no dispute that Scammell was employed by - and therefore "associated with" - Madrone at the time he engaged in insider trading, e.g., "at the time of the alleged misconduct." Scammell now argues that he should not be subject to a bar because, nearly two years after he traded using inside information, the Commission repealed an exemption from registration set forth in Section 203(b) of the Advisers Act, 15 U.S.C. § 80b-3(b), and, in its place, allowed those entities that meet all of the requirements set forth in newly-enacted Rule 202(a)(11)(G)-1 of the Advisers Act ("Family Office Rule") to fall outside of the definition of an investment adviser. 17 C.F.R. § 2175.202(a)(11)(G)-1; Opening Br., pp. 10-16. Scammell's argument lacks merit.

1. Madrone was an investment adviser at the time Scammell engaged in insider trading

As threshold matter, Madrone unquestionably met the definition of an investment adviser under Section 202(a)(11) because it was engaged in the business of advising an affiliate regarding the advisability of investing in, purchasing, or selling securities in exchange for compensation.[3] Appendix 4, Patterson Decl., ¶¶ 2-3. Notably, Scammell does not dispute that

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[2] Pursuant to Section 202(a)(17) of the Advisers Act, the term "person associated with an investment adviser" specifically includes "any employee" of an investment adviser. 15 U.S.C. § 80b-2(a)(17).

[3] Thomas Patterson, Managing Member of Madrone Capital Partners, declared that since at least August 2009, Madrone has "provided advice about securities" to certain entities collectively known as the "Madrone Investment Funds" and has been "engaged in the business of advising the Madrone Investment Funds concerning the

Madrone was an investment adviser in 2009 as that term is defined under Section 202(a)(11). It is irrelevant whether Madrone meets that definition today.

It is irrelevant whether or not Madrone was exempt from *registration* with the Commission at the time Scammell engaged in insider trading. The Commission can sanction someone associated with an investment adviser at the time of a violation, regardless of whether or not the investment adviser was registered. *See, e.g., In the Matter of Tzemach David Netzer Korem*, Exchange Act Rel. 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 Rel. No. 3610, 2103 WL 2246025 (May 22, 2013); *see also In the Matter of Martin A. Armstrong*, Advisers Act Rel. No. 2926, 2009 WL 2972498, at *3 and n.7 (Sept. 17, 2009); *In the Matter of Vladislav Steven Zubkis*, Exchange Act Rel. No. 52876, 2005 WL 3299148, at *6 (Dec. 2, 2005); *In the Matter of Alexander V. Stein*, Advisers Act Rel. No. 1497, 1995 WL 358127, at *2 & n.10 (June 8, 1995); *In the Matter of Feeley & Wilcox Asset Mgmt. Corp.*, Securities Act Rel. No. 8249 (July 10, 2013), 56 S.E.C. 616, 618, 647, *motion for reconsideration denied*, Securities Act Rel. No. 8303 (Oct. 9, 2003), 56 S.E.C. 1264.

Scammell hypothesizes that most family offices, including Madrone, "did not bother" to

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advisability of investing in or purchasing securities, and the disposition of securities held by the Madrone Investment Funds." Appendix, Ex. 4 (Patterson Decl.), ¶¶ 2-3. In exchange for these services, an affiliate, Madrone Capital, paid Madrone "a service fee, based on a fixed percentage of the capital commitments or net asset value of the applicable fund." *Id.*, ¶ 3. Neither Madrone Capital nor Madrone was registered with the Commission at the time Scammell traded on insider information, despite the fact that each entity had sufficient assets under management to require registration with the Commission. *Id.*, ¶ 5. Instead, Madrone Capital and Madrone relied upon the exemption from registration under Section 203(b) of the Advisers Act of in order to avoid having to register with the Commission, since each entity had fewer than 15 clients and met the other requirements of this provision. *Id.* Despite the fact that Madrone and Madrone Capital were not required to register with the Commission, both entities still fell squarely within the definition of an investment adviser under Section 202(a)(11) of the Advisers Act at the time Scammell engaged in insider trading. 15 U.S.C. § 80b-2(a)(11).

seek an exemptive order "because they were already excluded from the Act under an exemption for investment advisers with fewer than fifteen clients." Opening Br. at pp. 11-12. But this argument conflates the issue of exemption *from registration* with exceptions to *the definition of an investment adviser*. Even if Madrone was not required to register with the Commission, it was still an investment adviser and an industry bar against Scammell is therefore proper.

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

Judge Foelak correctly ruled that Scammell "cannot rely on [the Family Office Rule] to argue that his employer was not an investment adviser at the time of his violation." Initial Decision, p. 4. 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. Opening Br., pp. 13-14. Instead, Scammell incorrectly asserts that "because the Advisers Act was never intended to apply to family offices, Section 203(f) cannot be a basis for barring Scammell." *Id.* at 16. Scammell is wrong.

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. Opening Br., p. 13; 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 Rel. 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.").

Despite this, 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. Opening Br., p. 13. 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, 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 [the predecessor to Section 202(a)(11)(G)] 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). Indeed, "[i]n view of the many variables that may be pertinent to the appropriateness of the relief 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."[4] *Id.*

Had Madrone sought an exemptive order under Section 202(a)(11)(G) rendering it outside the definition of an investment adviser, 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*, 1991 WL 176655, at *1. And, contrary to Scammell's assumption 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,* 1991 WL 176655, at *1. It is nothing more than pure speculation to claim that Madrone would have received an exemptive order had it applied for one.

Further, the statutory language and history of the new Family Office Rule make it clear that Madrone would not automatically have been deemed a family office in 2009. The Family Office Rule provided that it was effective 60 days after its publication in the Federal Register, which would be inconsistent with applying it to conduct prior to that date.[5] SEC Rel. No. IA-

[4] 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.,* Appendix, Exhs. 35, 36, 37.

[5] Although the Family Office Rule was enacted on June 22, 2011, the Commission provided entities with over nine months, until March 30, 2012, either to meet the requirements of the new Family Office Rule or to register with the Commission. (SEC Release No. IA-3220.) Moreover, entities were given until December 31, 2013 to comply with the new provisions of the Family Office Rule regarding charitable organizations. (Final Rule, 17 C.F.R. Part 275, p.

3220 (June 22, 2011). Additionally, in commentary regarding both the proposed rule dated October 18, 2010 and the final rule enacted on June 22, 2011, the Commission specifically noted that "[f]amily offices typically are considered to be investment advisers under the Advisers Act" and unless exempted are required to register with the Commission. SEC Rel. No. IA-3220; Fed. Reg. Vol. 75, No. 200, at 63754 (Oct. 18, 2010). The Commission also noted in the final published rule that it was "troubled by comment letters... that appear to acknowledge that their clients were operating as unregistered investment advisers, although they were not eligible for the private adviser exemption and had not obtained an exemptive order from us." Final Rule, 17 C.F.R. 275, p. 3, fn 6. In the event the Commission intended for such entities automatically to be deemed exempt from the provisions of the Advisers Act, the Commission would not have expressed any concern regarding family offices that failed to seek exemptive orders and instead were operating as unregistered investment advisers.

Finally, it is not disputed that, if the Division had been able to institute this proceeding immediately after Scammell's insider trading (before the enactment of the Family Office Rule), there would have been no question regarding the Court's jurisdiction to order a bar. Applying the Family Office Rule from its effective date, rather than deeming it to have automatic effect back to 2009 and earlier, would avoid the inconsistent result sought by Scammell.

D. The Commission Should Affirm Judge Foelak's Finding That It Is In The Public Interest To Issue A Permanent Bar Against Scammell

"Ordinarily, and in the absence of evidence to the contrary, it is in the public interest to bar a respondent who is enjoined from violating the antifraud provisions." *In the Matter of Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC Lexis 2155 at *16 (July 26, 2013). Although Scammell argues that a permanent bar is not appropriate because he

18.) These deadlines are also inconsistent with applying the Family Office Rule automatically to conduct that occurred in 2009.

"has not been convicted of a crime," antifraud injunctions, like the one the district court entered against Scammell, "merit the most stringent sanctions," and the court's "foremost consideration must be whether the sanction protects the trading public from further harm." *In the Matter of James C. Dawson*, Advisers Act Rel. No. 3057, 2010 SEC Lexis 2561 at *21 (July 23, 2010); *see also In the Matter of Tzemach David Netzer Korem*, Initial Decision Rel. No. 427, 2011 SEC Lexis 2717 at *13-14 (Aug. 5, 2011) ("The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business"); *In the Matter of Stefan H. Benger*, Initial Decision No. 499, 2013 SEC Lexis 2158 (July 25, 2013). In particular, the Commission treats insider trading very seriously, and deserving of severe sanctions. *See In the Matter of Robert Bruce Lohmann*, Advisers Act Rel. No. 2141, 2003 WL 21468604 (June 26, 2003) ("[i]nsider trading constitutes clear defiance and betrayal of basic responsibilities of honesty and fairness to the investing public").

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

> ... the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman, 603 F.2d at 1140. The inquiry, however, "into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive." *In the Matter of Conrad P. Seghers*, Advisers Act Rel. No. 2656, 2007 SEC Lexis 2238, at *13 (Sept. 26, 2007), *aff'd*, 548 F.3d 129 (D.C. Cir. 2008). The Court may use the entire record to determine what sanction is in the public interest, and "conduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions." *Id.* at *9

Here, Judge Foelak, after reviewing the *Steadman* factors, correctly determined that Scammell's conduct warrants severe sanctions. Initial Decision, p. 6. The Commission should affirm Judge Foelak's decision to bar Scammell permanently from the securities industry.

1. Scammell's violations were egregious

In the Initial Decision, Judge Foelak found that Scammell's conduct was egregious. Initial Decision, p. 6. Scammell misappropriated material, non-public information from his girlfriend, whom he considered his best friend, and used that information to engage secretly in highly profitable insider trading. Scammell used the funds in his brother's account, with which Scammell had been entrusted when his brother was deployed to Iraq, to buy more than half of the Marvel call options he purchased, but never told his brother about this risky investment. Compl., ¶¶ 42, 46. Scammell also never told his brother about the more than $100,000 in resulting profits in his brother's account, even when his brother pointedly asked Scammell on September 12, 2009 why there was "a lot of $" in his account. App., Exhs. 38, 39. Instead, Scammell quickly moved the $100,000 into a new account that was not linked to the account summary that Scammell's brother automatically received each week via email. *Id.*, ¶ 51. 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." App., Ex. 40. Scammell's betrayal of two of the people closest to him in order to turn a quick profit evidences the egregious nature of his conduct.

The caselaw is clear that conduct such as Scammell's constitutes egregious conduct. Indeed, the very nature of insider trading involves a "serious violation of the federal securities laws; in no sense is it merely technical," and the seriousness of insider trading violations is an aggravating factor that courts consider in assessing the egregiousness of a respondent's violations. *See SEC v. Gunn*, 2010 U.S. Dist. Lexis 88164 at *17 (N.D. Tex. Aug. 25, 2010). And contrary

to Scammell's absurd contention that "there is no allegation that any investors were harmed" by his insider trading, there were, of course, parties on the other side of Scammell's option trades that suffered losses that matched the magnitude of Scammell's gains.[6] Opening Br., p. 20.

When a court, in evaluating the *Steadman* factors, concludes that a defendant's violation of the federal securities laws is not egregious, "one of two mitigating factors is almost always present: either the defendant did not personally profit from his violation, or the defendant's personal profits from the violation were *de minimis*." *Gunn*, 2010 U.S. Dist. Lexis 88164, at *14. In *Gunn*, the egregiousness of the insider trader's conduct was reinforced by the fact that he earned a profit of more than $100,000, "which he was able to earn only by liquidating his other stock holdings and investing as much money into [the company being acquired] as he could raise." *Id.*

Here, similarly, Scammell "appears to have made every effort to maximize the profit he earned from trading on the material nonpublic information." *Id.* at *17-18. Scammell used effectively all of his available funds, along with the funds with which his brother had entrusted him, to purchase the speculative Marvel call options. On August 17, in the midst of his options purchases, Scammell told a friend that he had to return a camera because he was "running out of money." Appendix, Exh. 29, at pp. 925:12-927:13. Scammell admitted that he "had very limited cash at the time" of his trades, but he believed it was necessary to invest in Marvel "before the end of August." *Id.*, p. 292:23-26. Scammell earned profits of more than $192,000 on an initial investment of $5,500, in less than a month, by purchasing highly speculative, short-term call options. Indeed, the court found conduct in *Gunn* to be egregious where the insider

[6] Indeed, Scammell's antifraud violations would be considered egregious even if the facts were different and his violations did not cause harm to other investors. *See, e.g., James C. Dawson*, Advisers Act Release No. 3057, 2010 SEC Lexis 2561, at *11 ("our finding that [respondent's] conduct was egregious is based on the nature of the violation itself, not solely on any calculation of financial harm to his clients"); *Tzemach David Netzer Korem*, Exchange Release No. 70044, 2013 SEC Lexis 2155, at *18 ("[a]lthough the record does not contain evidence of direct investor harm, our focus is on the welfare of investors generally and the threat one poses to investors and markets in the future").

trader generated a return of "more than 98 percent in just two weeks' time." Here, Scammell realized a return of more than 3,400% in less than a month, which strongly supports a finding that his conduct was egregious. *Gunn*, 2010 U.S. Dist. Lexis 88164 at *18.

The Commission has held that "the egregiousness of such dishonest conduct is compounded when it involves a 'false statement to Commission staff during an ongoing investigation.'" *In the Matter of John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC Lexis 3855 at *12 (Dec. 13, 2012) (noting that "[w]e have consistently held that such attempts to deceive regulatory authorities justify a bar and 'have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business.'"). Here, Scammell engaged in further misconduct after the Commission began its investigation regarding his trading by making misstatements to the staff under oath regarding his trading. For example, Scammell falsely claimed in a PowerPoint produced to the staff that he purchased Marvel call options with a strike price of $45 on August 17, 2009 for $0.15 because they had traded for $0.25 earlier that day. Appendix, Exh. 8. Scammell repeated this claim on at least nine separate occasions during three days of testimony with the staff in an attempt to validate his assertion that his trades were made at prices that were consistent with the market for those option contracts.[7] After he was later shown a Bloomberg printout proving that no such trade at $0.25 had occurred, Scammell's counsel sent the staff a letter stating that Scammell had been "mistaken." Appendix, Exh. 12.

Similarly, in his testimony and in his Wells Submission to the Commission, Scammell claimed that he made "an almost absurdly tiny purchase of Marvel options – for a grand total of

[7] The transcripts of Scammell's investigative testimony, in which he repeated his claim regarding the purported $0.25 trade, are attached to the Appendix as Exhibits 9, 10, and 11. The specific transcript pages at which Scammell makes those claims are 582:10-23, 583:1-10; 584:1-16; 585:4-5, 9-12, 24-25; 599:20-22; 601:4-9, 12-13; 21-25; 603:15-16; 616:13-14; 619:15-16, 24-25; 620: 1-2 (Exh. 9), 642:10-13; 668:12-14 (Exh. 10), and 1020:19-21; 1021:19-22, 1026:5-11 (Exh. 11).

just $31" on August 14, 2009 when he purchased just two Marvel option contracts. Appendix, Exh. 13, p. 16. He claimed this "test" trade was made "in order to verify the quality of bid and ask data" on Ameritrade, and asserted that it would have made "utterly no sense" for him to make "such a tiny trade if he knew that Marvel was about to be acquired" and instead it would have made "far more sense for him to pile [o]n, buying more options on the cheap." *Id.* Contrary to Scammell's story, Scammell's Ameritrade records show that he did try to "pile on" -- he placed limit orders on August 13 to purchase 125 option contracts in his account and another 90 option contracts in his brother's account, for a total of 215 Marvel option contracts, but only two of those orders were successful on August 14 because of the limited and illiquid market in the risky, short-term, out-of-the-money Marvel call options. App., Exhs. 14, 15. Scammell's misstatements in attempting to misdirect the Commission staff away from the true nature of his trades provides additional evidence of the egregiousness of his conduct and further supports the imposition of a permanent bar against him. As it did in *Siris*, the Commission should reject Scammell's argument that his conduct was "not so bad..." Opening Br., p. 20. *See Siris*, 2013 SEC Lexis 3924 at *43 (Commission rejecting respondent's argument that his insider trading was "less worthy of sanctions than other forms of insider trading").

2. Scammell's violations were recurrent

Judge Foelak properly found that Scammell's conduct was recurrent. Scammell's trading in Marvel call options was not limited to a one-time occurrence or a temporary lapse in judgment. Shortly after Scammell's girlfriend learned about the acquisition of Marvel, Scammell began placing limit orders to purchase Marvel call options. Although not all of his limit orders were successful, he purchased Marvel option contracts on six separate days throughout August 2009. Compl., ¶ 31. Scammell continued to place limit orders and purchase Marvel call options until his frenzied trading on August 28, 2009, the last trading day before the

acquisition announcement. *Id.*, ¶¶ 31, 40. On that date alone Scammell placed ten separate limit orders to purchase Marvel call options and canceled each one within less than a few hours when it was not successful, and then increased his bid. *Id.*, ¶ 40. He was finally able to purchase call options with a strike price of $40 just a few minutes before the trading window closed. *Id.*

As set forth above, Scammell's violations continued after he traded. He actively concealed his trading in Marvel – and the $100,000 profit that resulted in his brother's account – from his brother and he then provided false information and testimony to the Commission staff during the investigation. And Scammell's complete disregard of his legal obligations continues to this day as he has failed to file any state or federal income tax returns since he engaged in insider trading over four years ago. *See* Appendix, Exh. 16; *Lowry v. SEC*, 340 F.3d 501, 505 (8th Cir. 2003) (upholding permanent investment adviser bar where respondent "committed a series of knowing acts" including using investor funds to purchase a house, "soliciting investments before and after the 'loan' without disclosing his intent and actions" and "attempting to conceal his conduct by failing to provide the promissory note to the Commission investigator in their initial audit . . ").

3. Scammell acted with a high degree of scienter

Scammell argues that the evidence of his scienter is weak because the Commission's case against him was "based on a highly questionable legal theory." Opening Br., p. 1. But, having consented to the judgment against him, Scammell cannot try to deny his scienter now. *See Siris*, 2013 SEC Lexis 3924 at *36.

In any event, Scammell's actions evince a high degree of scienter. *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC Lexis 2155 at *22 ("Exchange Act § 10(b) and Rule 10b-5 charges underlying the judgment to which [respondent] consented, required knowing, willful, or, at the very least, reckless conduct"); *see also Gunn*, 2010 U.S. Dist. Lexis 88164 at *20. Here, Scammell had been educated and trained about the prohibition

of trading based upon inside information. Compl., ¶ 65. Scammell's girlfriend expressly told Scammell that the acquisition target she was working on at Disney was confidential and Scammell understood this. *Id.*, ¶ 67. Indeed, Scammell researched insider trading law on August 16, 2009, just before he purchased the majority of his Marvel call options, and searched the internet using the terms "insider trading," "tender offer," "Williams Act," "Rule 10b-5," and "material, non-public information." *Id.*, ¶ 48. After trading on inside information, Scammell then hid the profits he made in his brother's account from his brother. *Id.*, ¶ 52. All of these facts evidence a high level of scienter by Scammell in engaging in his insider trading.

4. Scammell has refused to acknowledge the wrongfulness of his conduct and his assurances against future violations should not be credited

Scammell's unwillingness to accept the wrongful nature of the conduct and his failure to offer any assurances against future misconduct also support barring Scammell from the securities industry. Scammell refuses to acknowledge his wrongdoing. At no time has Scammell expressed any remorse for his actions, nor has he offered any meaningful assurances that he will not engage in future violations. To the contrary, immediately after the Commission filed its Complaint against him, Scammell started an internet blog (which he authored at the internet domain "secfail.com") in which denied engaging in insider trading and instead blamed the Commission staff for his predicament. Appendix, Exh. 17. Scammell belatedly professed assurances against future violations - but only did so years after he was charged and when he was facing the possibility of a permanent bar. Opening Br., p. 25. In determining whether or not to credit a respondent's assurances against future violations, a court may consider "the totality of the circumstances." *SEC v. Lorin*, 76 F.3d 458, 461 (2d Cir. 1996). For several reasons, the Court should discredit Scammell's purported assurances.

One of the clearest bases for the court to reject Scammell's purported assurance against future violations is his failure to acknowledge the wrongfulness of his insider trading violations. *See, e.g., In the Matter of John W. Lawton*, Advisers Act Release No, 3513, 2012 SEC Lexis 3855, at *48 and n.64 ("we treat a refusal to acknowledge wrongdoing as an aggravating factor" in determining an appropriate sanction). *SEC v. Gowrish*, 2011 U.S. Dist. Lexis 76114 (N.D.Cal. July 14, 2011) is instructive. There, the defendant, who had been found liable for insider trading, acknowledged only that his conduct was "unwise," but insisted that his "tips" were merely "careless statements that the tippees then used to trade without his knowledge." *Id.* at *18-19. The Gowrish court held that "[a] person's lack of remorse can be apparent in the person's continued insistence on the validity of his conduct," which could support a finding of likelihood of future violations.

Here, similarly, Scammell has never acknowledged engaging in insider trading, and refuses to do so now. As just one example, in his opening brief, Scammell conceded only "making options trades that would, in hindsight, obviously **appear** to be based on improperly obtained information regardless of whether they actually were." Opening Br., p. 9 (emphasis added). Indeed, Scammell devotes most of his opening brief in this appeal to attacking the Division's so called "aggressive" legal theory and professing falsely that, with regard to his trading, "every suspicious circumstance had an explanation." *Id.* at 8. The fact that Scammell continues to advance supposed innocent explanations for his insider trading casts serious doubt on the sincerity of any assurances against future violations. *See, e.g., Gunn*, 2010 U.S. Dist. Lexis 88164 at *23 (defendants' "persistent refusals to admit any wrongdoing made it rather dubious that they are likely to avoid such violations of the securities laws in the future"); *see also Geiger v. SEC*, 363 F.3d 481, 489 (D.D.C. 2004) (in order affirming Commission decision ordering

broker-dealer bar, court found that respondent "still thinks he did nothing wrong, which casts doubts on his promise that he will mend his ways."); *Gowrish*, 2011 U.S. Dist. Lexis 76114, at *18-19 ("[p]romising to stop doing wrong while denying any wrongdoing is the wrong way to establish that wrongdoing will not reoccur"). Scammell's "failure to recognize the wrongfulness of his conduct presents a significant risk that, given th[e] opportunity, he would commit further misconduct in the future." *Michael J. Markowski*, Exchange Release No. 34-44086, 2001 SEC Lexis 502, at *17 (Mar. 20, 2001); *see also In the Matter of Peter Siris*, Exchange Rel. No. 477, 2012 WL 6738469, at *5 (Dec. 31, 2012) (imposing permanent bar and noting that while the respondent was remorseful, he also "blames others.").

Additionally, a reasonable likelihood of future violations can be inferred where a respondent "is dishonest, exhibits a lack of candor, or offers inconsistent testimony during the course of the action." *See Siris* at *30 (finding that respondent had not meaningfully recognized the wrongful nature of his conduct because he maintained that his conduct did not in fact amount to violations of the securities laws as alleged in the complaint); *Gunn*, 2010 U.S. Dist. Lexis 88164 at *26; *see also Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 SEC Lexis 2024 at *18 ("efforts to frustrate Commission investigations are 'especially serious' and 'justify strong sanctions'"). Here, Scammell's purported assurances against future violations should be further discredited because of his conduct during the investigation and litigation of this action, as described more fully above. [8]

[8] Scammell also tried to impede the Commission's investigation through a lack of candor in responding to the staff's questions. For example, in response to basic questions regarding his residence address during the investigation, Scammell stated he was living with his mother, brother and girlfriend, but claimed he did not know any of their addresses. App., Ex. 32, pp. 783:23-784:20. During the litigation of the injunctive action, Scammell testified he was living in Woodside, California, but again said he did not know his address. App., Ex. 33, p. 6:6-24. When asked he how was able to get home, he testified that he would "drive down the 280 and I turn off

5. The nature of Scammell's employment presents an ongoing opportunity to violate federal securities laws

Judge Foelak found that Scammell's employment in the securities industry could present opportunities for future violations. Initial Decision, p. 6. Scammell's young age of 28, coupled with his lifelong interest in the securities industry, present substantial opportunities for Scammell to violate the federal securities laws in the future. Scammell claims he started investing when he was only fifteen and, throughout high-school and college, he continued to study the markets and analyze stocks, making investments whenever possible. Appendix, Exh. 13, pp. 19-20. At age 16, according to Scammell, he became interested in event-based trading after the events of September 11, 2001. *Id.*, p. 20. A year later, Scammell created an email-based investment newsletter in which he "made trading recommendations based on technical, fundamental, and political factors" and, in the summer of 2004, he wrote TerrorPlaybook – How to Prepare For and Respond to the Financial Impacts of Terrorism, a 129-page publication that "made suggestions about which companies' securities to buy and sell given certain terror scenarios." *Id.*, p. 20. Later, Scammell continued to pursue a career in the securities field through his work on behalf of investment advisers Madrone Advisors and Madrone Capital, where, among other things, he researched investment opportunities and performed related financial analyses of potential investments.

Currently, Scammell is actively engaged in soliciting investors in two start-up companies, Womply, Inc. and Oto Analytics, Inc., of which he is the founder and CEO. Womply and Oto Analytics advertise that they "build groundbreaking products on top of massive amounts of data"

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on Woodside Road, and then I drive in the driveway." *Id.*, p. 6:18-20. Notably, months earlier, Scammell was able to recall his Woodside address in his invitation to friends "for BBQ and Bourbon" and he gleefully boasted that, "[i]n case you haven't heard, I'm a pretty good trader so I just picked up a new house in Woodside. My address is..." App., Ex. 34.

and "partner with merchant-facing companies including credit card processors." Appendix, Exh. 18. Scammell's violations of the federal securities laws, coupled with his intense interest in the securities market, show that the permanent injunction alone may not deter him. Imposing a permanent bar will further limit Scammell's ability to reenter the profession and the securities industry. Collateral associational bars are the remedies best suited to serve the public interest and to ensure Scammell cannot commit additional violations.

Finally, contrary to Scammell's unsupported assertion, there is no requirement that, to warrant a bar, Scammell's insider trading had to involve a breach of duty of confidentiality to his employer. Opening Br., p. 29-30. "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 Rel. 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 Rel. 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 Rel. No. 52858, 2005 SEC Lexis 3072 (Nov. 30, 2005) (sustaining NYSE's imposition of a five-year bar on a member who forged his doctor's name on a blank prescription drug form).

6. The Commission should impose the full range of collateral bars against Scammell

Despite Scammell's complaints that he "has already suffered severe consequences" as a result of his insider trading (Opening Br., p. 28), the full range of associational bars against Scammell is necessary to protect the investing public. The Commission has flatly rejected the

argument that imposing a bar is unnecessary in light of other sanctions that have already been imposed. In *In the Matter of Vladimir Boris Bugarski*, Exchange Act Rel. No. 66842, 2012 SEC Lexis 1267, at *17-18 (April 20, 2012), the respondents argued that "the imposition of additional remedial action against them would be simply adding to the severe sanctions that have already been imposed and would not be in the public interest." In imposing the full range of permanent associational bars against the respondent, the Commission soundly repudiated their argument:

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

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

IV. CONCLUSION

For the reasons set forth above, the Division respectfully requests that the Commission affirm the Initial Decision

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Respectfully submitted,

DIVISION OF ENFORCEMENT

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