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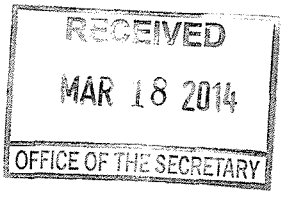

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of TOBY G. SCAMMELL

REPLY BRIEF IN SUPPORT OF TOBY G. SCAMMELL'S APPEAL OF INITIAL DECISION BY A HEARING OFFICER

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INTRODUCTION

To try to make a very ordinary alleged insider trading case seem like a villainous act, the Division resorts – as it has throughout these proceedings – to unsupported innuendo and misrepresentations. Yet when Toby Scammell responds to the Division's contentions with actual evidence, the Division suggests adducing evidence is inconsistent with his consent agreement. It is not. The Commission lacks jurisdiction over this matter because Toby's employer at the time of the alleged conduct was a family office, and both the Commission and Congress have long recognized that family offices are not within the intent of the Investment Advisers Act because they work with private families, not the public. If, however, the Commission exercises authority over this dispute, then Toby is entitled to present evidence demonstrating that a lifetime collateral bar is not in the public interest, and it is not.

I. TOBY IS NOT RELITIGATING THE ALLEGATIONS OF THE COMPLAINT AND HIS EVIDENCE SHOULD BE ADMITTED

The Division concedes that a "preponderance of the evidence" standard applies to this case.[1] But, inconsistent with that, the Division argues that allowing Toby to submit evidence to meet that standard equates to "relitigating" the allegations of the Complaint.[2] The Division would have the Commission apply the preponderance of evidence standard without any evidence – or at least without evidence from anyone other than the Division. That position is untenable, and unfair.

A. The Case Law the Division Cites Supports Admission of Toby's Evidence

For support, the Division relies almost entirely on a single case, *In re Peter Siris*.[3] In *Siris*, the respondent had signed a consent agreement that prohibited him from contesting the

[1] Division's Opposition Brief ("Opp.") at 7.
[2] *Id.* at 7-10.
[3] Rel. No. 3736, 2013 WL 6528874 (Dec. 12, 2013).

factual allegations of the complaint, as did Toby. Unlike Toby, however, Siris *denied the complaint's factual allegations*.[4] Toby has never denied the Complaint's allegations. He has argued that, in light of the facts and circumstances, those allegations do not warrant a bar and he has offered evidence in mitigation. *Siris* supports Toby. Not only did the Commission in *Siris* acknowledge that it is "well-established . . . that a respondent in a follow-on proceeding may introduce evidence regarding the circumstances surrounding the conduct that forms the basis of the underlying proceeding as a means of addressing whether sanctions should be imposed in the public interest,"[5] the conduct at issue in *Siris*, which the Commission deemed warranted a bar, was much more serious than the alleged conduct at issue here.

Siris was accused of "wide-ranging misconduct from 2007 to 2010" involving "numerous instances of insider trading" resulting in ill-gotten gains of more than a half million dollars.[6] Toby's alleged conduct, by contrast, was a one-time violation related to a single deal involving a personal investment of less than $6,000 and profits in an amount that were unforeseeable to Toby, and beyond his control, but were in the headline-grabbing amount of about $192,000. Siris was the founder and managing director of an investment advising company who defrauded his funds' investors.[7] Toby's alleged misconduct – which involved no third parties – had nothing to do with his position at Madrone (a family office not even within the intent of the Investment Advisers Act) or that company's clients. Siris had "long experience in the industry," and intended to remain in the securities industry.[8] Toby was twenty-four years old, had limited experience, and has stopped trading. He does not work in the securities industry and has no

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[4] *Id.* at *9-10.
[5] *Id.* at *8 (internal quotation marks and citations omitted).
[6] *Id.* at *1, 6.
[7] *Id.* at *1, 4.
[8] *Id.* at *6-7.

intention of doing so.[9] Siris did not acknowledge wrongdoing.[10] Toby did, and the hearing officer found that he was "remorseful."[11] Moreover, Siris's civil penalty was actually *less than* his ill-gotten gains,[12] whereas Toby has consented to pay a civil penalty *three times* his ill-gotten gains. Under *Siris*, Toby should be permitted to present evidence, and a bar is unwarranted.[13]

B. Toby Is Not Relitigating and His Evidence Should Be Admitted

The Commission may only impose a sanction supported by "relevant, reliable, and probative" evidence.[14] That standard has not been met, and Toby is entitled to submit evidence to demonstrate as much.[15] Doing so is not "relitigating." In its attempt to improperly block Toby's evidence, the Division resorts, as it has throughout these proceedings, to innuendo and misrepresentations, including:

1. The Division asserts that Toby's brother "never authorized Scammell to purchase risky, short-term call options for his account."[16] But the Complaint makes no such allegation and, as the Division is aware, Toby's brother authorized Toby to make whatever kind of trades

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[9] Ex. 45 ¶ 8.

[10] *Siris*, 2013 WL 6528874 , at *7.

[11] Ex. 45 ¶ 7; Initial Decision at 6.

[12] *Siris*, 2013 WL 6528874, at *1.

[13] Nor do the other two cases the Division cites support its position. In *In re Marshall E. Melton*, Rel. No. 2151, 2003 SEC Lexis 1767 (July 25, 2003), the court stated: "Of course, respondents have the opportunity to demonstrate that, notwithstanding the antifraud injunction, the public interest does not support revocation, suspension or a bar." *Id.* at *25. Furthermore, the respondent was attempting to "disprove" the complaint's allegations. *Id.* at *7. And, again, the alleged conduct at issue in *Melton* was far more substantial than the conduct at issue here. The Commission found "ample evidence of deliberate deception coupled with the deliberate misuse of investor funds." *Id.* at *22. The same is true of *In re Alfred Clay Ludlum, III*, Rel. No. 3628, 2013 WL 3479060 (July 11, 2013), in which the respondent failed to offer evidence "of circumstances that might mitigate the seriousness of his conduct," *id.* at *6, and was alleged to have "defrauded investors, including at least twenty-one advisory clients . . . out of approximately $852,000." *Id.* at *2. The respondent also made false statements to investors, *id.* at *7, showed no remorse, and intended to return to the securities industry. *Id.* at *5.

[14] *Steadman v. S.E.C.*, 450 U.S. 91, 100-01 (1981).

[15] *Siris*, 2013 WL 6528874, at *8.

[16] Opp. at 5.

he wanted from those accounts, without restriction.[17] And while it is true that Toby's brother told him, in part, to "sell some stocks" due to "various expenses," that sound-bite lacks the context that demonstrates Toby did what his brother asked. Toby's brother actually said:

> Can you please sell some stocks etc. so that I have about $1,000-$2,000 in my account to cover upcoming expenses ($700 check to Adriana for the Toyota issues, $110 for my student loan, and some other stuff – not to mention some excessive credit card bills).[18]

Toby, who managed his brother's finances,[19] checked his brother's accounts and responded:

> Looked at your finances. Think you have enough cash to cover all those items. Car costs have already come out (and I will pay half). You have 2500 ready plus 1500 next week. Let me know if anything else.[20]

Toby's brother testified that his only concern was being able to pay his bills and that he trusted Toby to figure out the best way to make that happen, which he did.[21]

2. The Division contends that saying Toby "had received a vacation payout, expense reimbursements, and a final bonus" from his previous employer is inconsistent with his having, as the Complaint alleges, "limited personal funds" at the time of the initial investment.[22] Toby's assertion is consistent with the Complaint. At the time of the initial investment, he had limited

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[17] Ex. 41 at 31:24-33:1, 42:17-43:15, 121:10-17 (Toby managed his brother's finances without limitation or restriction and did not typically talk with his brother about investments).

[18] Ex. 20; *see also* Ex. 27 at 228:13-232:21 (In response to his brother's email, Toby checked his brother's account, determined that there would be $4,000, and assured his brother his expenses would be covered, which they were).

[19] Ex. 28 at 31:3-33:1 ("Typically, if [Toby]'s talking to me about stocks, I just let him do everything for me. So if he says he wants to do something, I trust him fully to do it and I don't really pay too much specific attention to any particular trades. . . . Toby has done all my investments formally since 2006. He controls all my finances, all the investing. And I think any of our discussions, it's really just a courtesy on his part to let me know, hey, what do you think about this? And I defer to his judgment and knowledge in the matter.").

[20] *See* Ex. 20.

[21] *See* Ex. 28 at 43:19-44:14 ("I just know that when I go to pay a bill, there's money in my checking account to pay it. And if for some reason I have bills that exceed my – the norm, I give Toby a heads up and then he puts money in the account. But I don't know where that money comes from.").

[22] Opp. at 2-3.

cash, as he has testified, but by late August, he had plenty of cash to cover the investments.[23]

3. The Division argues that Toby implied "his girlfriend had no knowledge of the Marvel acquisition until July 24."[24] Toby has never implied that. Nor has he disputed the contents of the June 30, 2009 email the Division devotes an entire page to describing, which is perplexing because (1) that email lacks any details about the acquisition (which it does not even disclose is an acquisition), and (2) in that email Toby's girlfriend expressly tells him she cannot provide any details because they are confidential (further demonstrating they did not share business confidences).[25] Toby has, however, presented evidence that shows – consistent with the Complaint[26] – that his girlfriend was not *staffed on* the Marvel acquisition until July 24, and, contrary to the Division's insinuations,[27] did not have confidential Marvel documents Toby might have seen prior to that date.

4. The Division also contends it is "relitigation" to assert that the case against Toby was "circumstantial, weak, and based on a highly questionable legal theory," and that it was "not so bad as to warrant a lifetime collateral bar."[28] But these assertions are consistent with the Complaint, which acknowledges there is no direct evidence that Toby misappropriated nonpublic confidential information from his girlfriend by alleging, vaguely, that Toby must have "obtained the identity of the acquisition target from his girlfriend, whether through overhearing one or more of his girlfriend's Marvel-related conversations, by seeing electronic or paper documents in

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[23] Div. Ex. 1 ¶ 47 ("Scammell was expecting to receive several thousand dollars at the end of August 2009, but he used his brother's funds to make the initial" Marvel investment).
[24] Opp. at 3.
[25] *See id.* at 11-12.
[26] Div. Ex. 1 ¶ 25.
[27] *See, e.g.*, Opp. at 11-12.
[28] *Id.* at 2.

her possession related to the Marvel acquisition, or through her conversations with him."[29] Thus, Toby's position that the case is weak is consistent with, and supported by, the Complaint. It is also true that the facts, as alleged, are not so severe as to warrant a maximum sanction. And the Division's legal theory *is* highly questionable. The Division argues that the evidence (not the allegations in the Complaint) demonstrate Toby and his girlfriend shared confidential business information with each other. But the evidence, in context, actually shows they did not.[30]

5. Nor does Toby deny making any of the Internet searches the Division claims he made related to insider trading on August 16, 2009. But the evidence demonstrates that those searches were made in a single day, in a short period of time, and were directly related to an article Toby had read minutes before in the Wall Street Journal about the Division's investigation of Mark Cuban.[31] Contrary to the Division's assertion,[32] nothing Toby read would have informed him that he might be liable for insider trading based on his relationship with his girlfriend where they lacked any pattern, history, or practice of sharing confidential business information with each other. And the searches are more consistent with someone attempting to avoid liability, not commit a crime.

6. It is the Division (not Toby) that has implied the comment Toby heard that "Disney had been trying to acquire Marvel for years," is the reason he invested in Marvel.[33] Toby has always said he made the investment for many reasons, including that comment, and did not decide to invest until just before doing so.[34]

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[29] Div. Ex. 1 ¶ 30.
[30] *See infra* at 5 and *supra* at 12-13.
[31] *See* Ex. 27 at 185:21-191:21 (describing the searches); Ex. 24.
[32] Opp. at 3.
[33] *Id.* at 10-11.
[34] Ex. 38 at 148:14-152:9 (Toby first heard Disney might be interested in acquiring Marvel during the meeting, but did not believe it until he conducted independent follow-up research).

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

Not all insider traders can be subject to administrative sanctions. There must be a jurisdictional basis.[35] The purported basis here is Toby's employment by Madrone. But Madrone was a family office at the time of the alleged conduct and family offices have never been regulated by the Commission even though they otherwise fit the definition of investment adviser. The reason, as the Commission has recognized through both rule and order,[36] is that family offices distribute information "only to persons who are members of a particular family," not the public.[37] Sanctioning an insider trader who worked for a family office (not the public) is not a public interest sufficient to afford jurisdiction under the Act, and the Commission therefore lacks authority to impose a sanction against Toby.[38] This conclusion does not depend on speculation, conjecture or retroactive application of the Family Office Rule (the "Rule").[39]

Toby does not argue that Madrone was "somehow automatically" a family office. Nor is Madrone determining its family office status "on its own,"[40] or relying on retroactive application

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[35] 15 U.S.C. § 80b-3(f) (requiring that a proposed action under this section is "in the public interest").

[36] *See* Opening Br. at 11 nn.65, 66 (listing orders and rule).

[37] *See* H.R. 2225, 112th Cong. (1st Sess. 2011) ("Family offices are not of national concern in that their advice, counsel, publications, writings, analyses, and reports are not furbished or distributed to clients on a retail basis, but are instead furnished or distributed only to persons who are members of a particular family.").

[38] 15 U.S.C. § 80b-3(f) (requiring that a proposed action under this section is "in the public interest").

[39] 17 C.F.R. § 275.202(a)(11)(G)-1(b).

[40] Opp. at 16. Nor is Toby "hypothesizing" that most family offices, including Madrone, did not seek an exemptive order because they were already excluded from the Act under a different exemption. *Id.* at 14-15. The Commission itself has recognized as much, and the declaration submitted by Madrone does, as well. Div. Ex. 4 ¶ 6 (testifying that Madrone "never sought or obtained from the Commission an exemptive order under Section 202(a)(11)(G) of the Investment Advisers Act declaring those entities not to be investment advisers *as, it is my understanding, both entities were already exempt from registration under Section 203(b)*") (emphasis added); *see also* 75 Fed. Reg. 63753-01, 63754 (Oct. 18, 2010) ("many family offices" relied on the private adviser exemption).

of the Rule.[41] Toby and the Division *have submitted evidence* to establish that Madrone was a family office *at the time it employed Toby.*[42] And, in fact, that evidence demonstrates that Madrone was a family office.[43] The Division cites a long string of cases to support its contention that family offices without exemption orders automatically fall within the scope of the Act, but the Division has not identified a single instance in which the Commission has exercised jurisdiction over an investment adviser that was also a family office. This would be the first.[44]

Nothing in the Division's argument changes, or addresses, the fact that according to the evidence, Madrone was a family office at the time of the alleged conduct. That means that Madrone, regardless of whether it had an exemptive order, distributed information only to persons who are members of a particular family (not the public) and that Toby's work as an employee at Madrone is not what Congress intended to regulate when it enacted the IAA.[45]

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[41] *See* Opening Br. at 14. The Rule reflects the Commission's prior practice, so it is a useful tool in determining whether Madrone was a family office in 2009, but it need not be applied at all, let alone retroactively. Dodd-Frank Act § 409(b) (instructing that the Rule be "consistent with the previous exemptive policy of the Commission"); 76 Fed. Reg. 37983-01, 37984 (June 29, 2011) (codified at 17 C.F.R. pt. 275.202(a)(11)(G)-1)) (noting that "section 409 of the Dodd-Frank Act instructs that any family office definition the Commission adopts should be 'consistent with the previous exemptive policy' of the Commission" and that the Rule is in fact consistent with that policy).

[42] *See* Opening Br. at 12 n.72; Div. Ex. 4 at ¶¶ 12, 13, 18, 19. Madrone had no clients other than family clients, was wholly owned by family clients, exclusively controlled (directly or indirectly) by one or more family members and/or family entities, and did not hold itself out to the public as an investment adviser. *Compare* SEC orders exempting family offices listed in the Opening Br. at 11 n.65.

[43] *See id.*; Opening Br. at 12 n.72.

[44] 76 Fed. Reg. 37983-01, 37983-84 (recognizing that the typical single family office is "not the sort of arrangement that the Advisers Act was designed to regulate.") (referencing 75 Fed. Reg. 63753-01, 63754).

[45] 75 Fed. Reg. 63753-01, 63754 (since the 1940s, the Commission viewed the "typical single family office" as not within the intent of the definition of "investment adviser").

III. A LIFETIME COLLATERAL BAR IS NOT IN THE PUBLIC INTEREST

A. The Alleged Conduct is Not Egregious and Toby Has Not Lied

In an attempt to turn the ordinary into the egregious, the Division concocts a tale of "betrayal." What the Division nowhere explains is that *every* alleged case of insider trading *necessarily* involves a so-called "betrayal" because it requires a breach of fiduciary duty. "Betrayal" does not move the alleged conduct from ordinary insider trading to egregious insider trading. The notion of betrayal here is especially thin. The facts establish that Toby and his girlfriend did not share business confidences.[46] As explained in Toby's Opening Brief, a history of sharing such confidences has been essential to inferring a fiduciary duty from a romantic relationship.[47] Nor is Toby's behavior with respect to his brother fairly described as "betrayal." There is no indication that Toby's brother perceived himself as betrayed. To concoct the tale of fraternal betrayal, the Division resorts to taking facts out of context and omitting critical elements of the history.[48]

The Division's suggestion that the only factors that matter in analyzing egregiousness are the amount of profit and Toby's personal gain is contrary to case law.[49] And it should be: the

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[46] *See* Opening Br. at 23-25 (Toby and his girlfriend did not live together in the traditional sense, did not have a history or pattern of sharing confidential business information with each other, and for most of the relevant time period lived in different cities).

[47] *Id.*

[48] *See supra* at 3-4.

[49] *See* Opening Br. at 20-22 (describing factors courts consider in deciding egregiousness and citing to cases). Nor is the amount of profit, $192,000, so significant as to warrant a bar in light of all the other circumstances. *See, e.g.*, *In re David E. Ruskjer*, Rel. No. 489, 2013 WL 2390731, at *4 (June 3, 2013) (defendant's conduct was egregious because he misappropriated at least $5.5 million from investors and fraudulently raised approximately $16 million); *S.E.C. v. McGee*, 895 F. Supp. 2d 669, 675 (E.D. Pa. 2012) (scheme to commit insider trading reaped profits of $562,673); *S.E.C. v. Nothern*, 598 F. Supp. 2d 167, 170 (D. Mass. 2009) (seeking disgorgement of $3.1 million under misappropriation theory of insider trading); *In re James C. Dawson*, Rel. No. 3057, 2010 WL 2886183, at *1 (July 23, 2010) (disgorgement of $303,472); *In re Stefan H. Benger*, Rel. No. 499, 2013 WL 3832276, at *6 (July 25, 2013) (disgorgement of $422,004.10).

amount of personal gain is outside the control of the trader. Also, unlike the defendant in *Gunn*, Toby did not liquidate any, let alone all, of his assets in order to maximize his profits.[50] To the contrary, despite the fact that he had thousands of dollars in his checking account, and thousands of dollars coming in,[51] he purchased call options – which are inherently less expensive than other stock transactions[52] – and did not take advantage of the margin he had available. Toby's description of his financial situation is consistent with the Complaint's allegations. That he returned an expensive camera on or before July 21 is wholly irrelevant to determining his available cash a month later.[53]

To make Toby appear dishonest when he is scrupulously honest, the Division describes a single immaterial "misstatement" made during four days of testimony during which the Division repeatedly refused to let Toby look at documents.[54] When Toby and his counsel later reviewed the data, they recognized that Toby mistakenly testified that he remembered seeing Marvel call options on August 17 for 25 cents. In reality, although the options had been priced at 25 cents on other days that month, on August 17 there had been an offer to sell at 20 cents.[55] Through his

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[50] *See S.E.C. v. Gunn*, No. 3:08-cv-1013, 2010 U.S. Dist. LEXIS 88164, at *18 (N.D. Tex. Aug. 25, 2010).

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

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

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

[54] *See, e.g.*, Ex. 26 at 43:13-46:21, 116:9-120:14; Ex. 25 at 282:7-15, 292:2-22; Ex. 26 at 43:13-46:21 (Toby even told investigators at one point: "If there's some error, it's because I'm not looking at the data."); *see also* DE Exs. 9, 10, 11.

[55] *See* DE Ex. 12.

lawyer, Toby informed the Commission of the error,[56] even though it was immaterial because Toby's explanation for his trades was not dependent on a 25-cent price that day and Toby had already traded in Marvel on two separate days prior to this.[57] The case on which the Division relies further supports Toby's position that his single innocent mistake did not render his alleged conduct egregious. In *In re John W. Lawton*,[58] the defendant had actually created and produced false accounting sheets in response to the Commission's inquiry, intentionally misstating his firm's assets. The facts fail to compare.

The Division cites no other inaccuracies in Toby's testimony. Instead, it takes issue with an argument Toby's lawyer used in responding to the Division's *Wells* notice and attempts to tie that argument to Toby's actual testimony that he made a small test trade on August 14.[59] There is no dispute that Toby's testimony was true: he only bought $31 worth of options on August 14.[60] The Division's disagreement with the argument Toby's lawyer made based on that true testimony is irrelevant to assessing whether Toby's alleged misconduct was egregious.[61]

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[56] *See id.*

[57] *See* DE Ex. 11 at 1021 ("the options probably traded . . . up to 20-25 cents, and when I bought them at 15 cents, I was probably thinking I was getting a bargain on the day"). Nor was that price the only relevant indicator of the market value that day. *See* Ex. 26 at 44:20-45:3 ("I bought [the $45 strike price options] at ten cents. I sold it at 15 or I bought some more at 15 cents, which suggests the market had moved up").

[58] Rel. No. 3513, 2012 WL 6208750, at *2 (Dec. 13, 2012).

[59] Opp. at 22-23.

[60] Ex. 21.

[61] And Toby's lawyer was right. The Division's assertion that the Ameritrade limit order data for August 13 and 14 suggests Toby tried to "pile on" is also refuted by the evidence. If Toby had wanted to "pile on" as many options as possible 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. But that is not what Toby did. He used limit orders to test the market and, in the end, only two of his orders were at a price the market would accept. That trading strategy is entirely inconsistent with the notion that he knew when or at what price the Marvel deal would occur.

B. The Alleged Violation Was Not Recurrent

Toby made trades in a single security over a few-week period, and, under the Division's theory, in connection with a single acquisition about which Toby opportunistically took information from his girlfriend. That conduct cannot be characterized as recurrent. That Toby placed a series of test orders on August 28 to find the lowest market price does not demonstrate that his alleged violation was recurrent.[62] Toby's tax filings have no bearing on whether the alleged violation was recurrent, but regardless, the Division's allegations on this point are also unfounded. At the direction of his counsel, Toby has filed extensions with the IRS since 2010. He also paid $4,000 toward any tax obligation he might have ($2,000 on his own behalf and $2,000 on his brother's).[63] The Division cannot seriously contend that in delaying his filings, Toby is attempting to cover-up his trades. His profits are a matter of public record, contained in the Commission's own press releases,[64] and have been covered in the news.

C. The Degree of Scienter Weighs Against a Bar

Toby does not deny (or admit) that he acted with scienter, but the degree of scienter weighs against a lifetime bar. The Division has not alleged that Toby acted willfully and the evidence it relies on in an attempt to argue a high degree of scienter – Toby's August 16 internet searches (which were far from remarkable), and that Toby did not tell his brother about the trades (he was not expected to) – more plausibly suggest that Toby acted *without* scienter.[65] And

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[62] *See* Ex. 40 at 274:23-280:1; *see also S.E.C. v. Johnson*, 595 F. Supp. 2d 40, 44 (D.D.C. 2009) (a single incident can be composed of "several different actions all designed to achieve the same goal").

[63] Ex. 22.

[64] Ex. 23.

[65] *See supra* at 3-4 (Toby was not expected to inform his brother about the trades and his management of his brother's finances was consistent with their arrangement); *see also supra* at 6 (the internet searches were conducted over a very short period of time on a single day in response to an article Toby read that day in the *Wall Street Journal* about the Division's prosecution of Mark Cuban).

contrary to its claim, the Division has *not* presented evidence showing Toby and his girlfriend had a history, pattern, or practice of sharing confidential *business* information, as would be required for a duty to arise.[66] That Toby's girlfriend was working on a large acquisition at Disney[67] was not material or confidential,[68] and the Division's Complaint never alleged that it was. The Division has also failed to present evidence that Toby's girlfriend thought the "confidential Bain documents," it references in its brief (not the Complaint) were confidential, or that they in fact were. To the contrary, Toby's evidence demonstrates that his girlfriend thought it was fine to send Toby those documents because the data contained in them was "all scrubbed data and non-confidential," and "the purpose of these materials is to sell them to non-Bain employees for their use . . . there's no confidential data."[69]

D. Toby Has Acknowledged the Wrongfulness of His Conduct and Made Sincere Assurances Against Future violations

The Division falsely states that Toby has not acknowledged the wrongfulness of his actions. He has.[70] The Division demands a confession, but the cases the Division cites involve defendants who *had been found liable or pled guilty to* securities violations.[71] That Toby refuses

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[66] *See e.g.*, *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) ("entrusting confidential information to another does not, without more, create the necessary relationship and its correlative duty to maintain the confidence.").

[67] Opp. at 3.

[68] It was also no secret that Disney was considering any number of acquisitions. *See, e.g.*, Ex. 3, Appx. B at 5 (article from venturebeat.com in which Disney's games vice president was asked as part of a panel discussion whether "Disney was interested in any acquisitions," and responded that Disney was "talking to some really good people," but there was nothing he could announce).

[69] Ex. 42 at 132:7-18.

[70] Ex. 45 ¶ 7; *see also* Initial Decision at 6 (Toby is remorseful).

[71] *See Lawton*, 2012 WL 6208750, at *2 (Lawton plead guilty to criminal charges of mail fraud and making a false statement in a federal government investigation and specifically admitted overstating the value of investors' interests and preparing a falsified investigation statement); *S.E.C. v. Gowrish*, No. C 09-5883, 2011 U.S. Dist. LEXIS 76114, at *5-7 (N.D. Cal. July 14, 2011) (a jury found defendant liable on all three claims of insider trading in violation of Section 10(b) of the Securities and Exchange Act and Rule 10b-5).

to confess to a violation he has never been found to have committed should not be held against him. The Division also refuses to give Toby any credit for agreeing to settle the civil case and consenting to a judgment ordering him to pay disgorgement, prejudgment interest, and a three-time penalty. Toby never lied under oath, as explained *supra*. The Division seizes on the trivial and suggests that Toby's inability to remember his and his family's addresses evidences a lack of candor.[72] Toby turned over his entire internet search history, sat for four days of depositions, never asserted his constitutional right to decline to answer questions, produced all of his bank records, all of his communications with his girlfriend, communications with his friends and family members, and numerous other documents to aid the Division in its investigation. Yet the Division gives Toby no credit for his extensive cooperation in its investigation and not exercising his constitutional rights. Instead, incredibly, the Division argues he lacks candor. That argument is meritless. Moreover, it is not surprising Toby could not remember the address. The Woodside house is not his house – he only stayed there – and he used a different mailing address. Nor is it unusual that Toby could not remember his family's addresses, which he offered to look up for the Division.[73] And Toby was not "gleefully boasting," as the Division states. He was joking. One of the recipients of the email is, in fact, the son of the Woodside house's owner and was Toby's roommate. That the Division accuses Toby of a lack of candor based on this shows how hard they must strain to try to justify a bar.

E. Toby's Occupation Does Not Present an Opportunity for Future Violations

The Division cites no support for its proposition that founding a start-up company is the type of activity that presents an ongoing opportunity to violate securities laws or that such

[72] Opp. at 27 n.8.

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

activity warrants a bar of any sort. Contrary to the Division's assertion,[74] Toby has never said a bar depends on Toby's breach of a fiduciary duty to his employer. The Division's arguments on this point are addressed in Toby's Opening Brief.[75]

F. A Permanent Collateral Bar is Not Appropriate

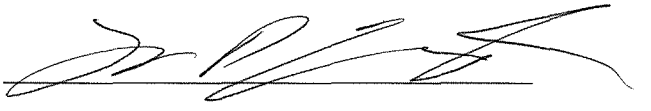
A permanent collateral bar is not appropriate here for the reasons stated in Toby's Opening Brief.[76] The Division wrongly suggests the Commission is not allowed to consider relevant circumstances in determining whether such a bar is necessary.[77] In the case the Division cites,[78] the court considered whether a bar would be in the public interest in light of the *Steadman* factors, which is all the Commission is required to do.[79]

CONCLUSION

For reasons stated herein and in Toby's Opening Brief, and based on the entire record in this case, this Court should deny the Division's Motion for Summary Disposition and grant Toby's.

DATED: March 17, 2014

Respectfully submitted,



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[74] Opp. at 29.
[75] *Id.* at 29-30.
[76] Opening Br. at 28.
[77] *See id.* at 29-30 (suggesting that this court may not consider the "severe consequences" Toby has experienced in determining whether he has already been deterred); *See Steadman*, 450 U.S. at 101-04 (preponderance of evidence standard applies to administrative proceedings).
[78] *In re Vladimir Boris Bugarski*, Rel. No. 66842, 2012 SEC LEXIS 1267 (Apr. 20, 2012).
[79] *Id.* at *10-20.