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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16165

In the Matter of

DAVID SCOTT CACCHIONE,

Respondent.

Administrative Law Judge Jason Patil

DIVISION OF ENFORCEMENT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT DAVID SCOTT CACCHIONE

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I. PRELIMINARY STATEMENT

In its motion for summary disposition and opening memorandum, the Division of Enforcement ("Division") demonstrated the absence of any genuine dispute of material facts regarding Respondent David Scott Cacchione's ("Respondent" or Cacchione") seeking to become associated with an investment adviser. The Division also proffered overwhelming evidence that permanently barring Cacchione from the securities industry is appropriate in the public interest.

Respondent's opposition fails to present any evidence or articulate any valid reasons why the Division of Enforcement's motion should be denied. Accordingly, the Law Judge should grant the Division's motion for summary disposition against Cacchione.

II. ARGUMENT

A. Summary Disposition Standard

A motion for summary disposition should be granted when there is "no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." Rule of Practice 250(a); 17 C.F.R. § 201.250. Rule 250 also provides that "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true, *except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted.*" *Id.* (emphasis added). As the Commission has noted, "cases construing [Rule 56 of the Federal Rules of Civil Procedure] clarify the obligations a motion for summary disposition places on the party opposing it." *Jeffrey L. Gibson*, Exchange Act Rel. 57266, Advisers Act Rel. No. 2700, 2008 WL 294717, at *6 n.25 (Feb. 4, 2008), *pet. denied*, *Gibson v. SEC*, 561 F.3d 548 (2009). Accordingly, as "[u]nder Rule 56, once the moving party has carried its burden of establishing its entitlement to judgment on the factual record, 'its opponents must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The party opposing summary disposition "must set forth specific facts showing a genuine issue for a hearing and may not rest upon mere allegations or denials in its submissions to the judge to create a genuine issue." *Gibson*,

2008 WL 294717, at *6 n.25. In opposition, Cacchione did not set forth specific facts showing a genuine issue for a hearing and has merely rested on the allegations or denials in his submissions to the Law Judge. The Law Judge should grant the Division's motion for summary disposition.

B. The Evidence Proffered by the Division Establishes that Respondent is Seeking to Become Associated with an Investment Adviser.

In its motion and accompanying papers, the Division submitted ample evidence that Cacchione has and is "seeking to become associated" with an investment adviser. The Form-ADV for Montara Capital Management LLC ("Montara") signed and filed by Cacchione on June 25, 2014 showed that Cacchione was Montara's Chief Compliance Officer, Managing Member and at least 50 percent owner. (Exhibit M, Form ADV at 2, 32-33.) The Form-ADV also showed that Montara had one client, Montara Capital Fund, L.P., a private fund, and represented that it reasonably expected to raise at least $100 million in assets within 120 days of the filing. (*Id.* Part 1 at 5, 7.) Moreover, even after Cacchione had withdrawn Montara's Form-ADV, his counsel told the Division that Cacchione wants to continue his career in the securities industry and is looking for a way to remain associated with Montara or to associate with other investment advisers. (Declaration of Cary S. Robnett dated November 7, 2014 ("Robnett Decl."))[1] The Division further

[1] While Cacchione has separately moved to exclude the statements made by his counsel during a phone conference with the Division on July 22, 2014 on the ground that they were settlement offers, they are not subject to the protections of Rule 408 because they were not settlement offers and because they go to establish the Commission's jurisdiction to institute proceedings under Section 203(f), not to liability. In his reply in support of his motion to exclude evidence, Cacchione selectively quotes from an email on July 17, 2014 to argue that the Division invited his counsel to engage in settlement discussions and therefore, the discussion on July 22, 2014 was a settlement discussion. The full statements from which Cacchione extracted only a phrase do not bear Cacchione's distorted interpretation because those statements were made in regards to the parties' negotiation of deadlines, including Cacchione's deadline to make a Wells submission. (*See* Robnett Decl. Exhibit 3, page 2.) More importantly, Cacchione's view of Rule 408 is unfounded in the law. According to Cacchione, once any party utters the word settlement, or anything that resembles it, all subsequent discussions between the parties are protected settlement discussions. As the cases cited by the Division in its opposition to Cacchione's motion *in limine* show, Cacchione's view is simply not the law. Nevertheless, even if the Law Judge were to exclude Ms. Robnett's declaration, the remaining evidence proffered by the Division amply shows that Cacchione has and is seeking to become associated with an investment adviser.

submitted evidence that Montara's website was still live, even after Montara had withdrawn its Form-ADV. (Exhibit Q, Montara website capture as of August 8, 2014.)

While Cacchione argues that pursuant to Rule of Practice 250(a), the Law Judge must take as true his pleading that he was "no longer seeking to be a 'person associated with' an investment adviser," his invocation of the rule is fatally incomplete. Rule 250(a) provides that "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true, *except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted.*" *Id.* (emphasis added). The Division's proffered evidence suffices to support a reasonable inference that Cacchione has and is seeking to become associated with an investment adviser. Thus, the burden under Rule 250, shifted to Cacchione to proffer evidence that he is not seeking to associate. *See Kornman v. SEC*, 592 F.3d 173, 185 (D.C. Cir. 2010) ("Because the evidence proffered by the Division sufficed to support the reasonable inference that the hedge funds remained active until at least June 2005, the burden under Rule 250, as under Civil Rule 56, shifted to Kornman to proffer evidence that trading had ceased before the October 29, 2003 telephone call.") Cacchione has not borne his burden. In opposition, Cacchione elected not to submit any evidence at all, instead resting on his denials in his pleadings. Summary disposition should be granted on this reason alone.

Cacchione also presents several factual and legal arguments, none of which have merit.

1. The Withdrawal of Montara's Form-ADV Means Only that Cacchione Was No Longer Seeking to Register the Firm as an Investment Adviser with the Commission.

First, Cacchione argues that "Montara's withdrawal of its application to become a registered investment adviser means that [he] was no longer seeking to become associated with an investment adviser at the time the OIP was filed." (Resp.'s Opp. at 2 (capitalizations omitted)). But his very words reveal the flaw in his logic. As he notes, the application on a Form-ADV to the Commission is an application to become a *registered* investment adviser. (*Id.* (capitalizations omitted, emphasis added.)) Thus, the withdrawal of the Form-ADV means only that Cacchione

was no longer seeking to register Montara as an investment adviser with the Commission. In fact, in Montara's brochure submitted with the Form-ADV as Part 2A, Cacchione represented that "Montara is a registered investment adviser with the state of California."[2] (*Id.* Part 2 at Cover Page.) Therefore, it is not a reasonable inference to say that the withdrawal of the Form-ADV means that Cacchione is no longer seeking to associate with any investment advisers, registered and unregistered. This is especially so, since, the day after the Form-ADV was withdrawn, his counsel reached out to the Division and asked if Cacchione "could submit to an order that limits" Cacchione's activities, (*see* Declaration of Cary S. Robnett in Support of the Division's Opposition to Respondent's Motion in Limine at ¶ 5), including subjecting him to "heightened supervision program by a third-party investment adviser." (Declaration of Mauricio S. Beugelmans dated November 21, 2014 at ¶ 4.)[3] Moreover, contrary to Cacchione's allegation that he has abandoned Montara's operations, Montara's website is still live. (Division's Opp. to Cacchione's Mot. for Summary Disposition, Exhibit CC.) His firm's corporate entities, Montara Capital Management LLC and Montara Capital Fund, L.P., also remain active and in good standing. (*Id.* at Exhibits AA & BB.)

In short, the withdrawal of Montara's Form-ADV proves nothing more than that Cacchione currently has abandoned seeking registration of Montara as an investment adviser with the

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[2] The Division is aware that the California Department of Business Oversight is pursuing an action to bar Cacchione from associating with an investment adviser.

[3] In addition to the reasons articulated in the Division's Opposition to Cacchione's Motion in Limine to Exclude the Declaration of Cary S. Robnett, the statements by Cacchione's counsel are further not subject to the protections of Rule 408 here because they are offered not to establish liability but to rebut Cacchione's assertion that by withdrawing the Form-ADV, he was no longer seeking to associate with any investment adviser. *See Cochenour v. Cameron Savings and Loan, F.A.*, 160 F.3d 1187, 1190 (8th Cir. 1998) (holding that a statement in a settlement demand letter that plaintiff had been planning to retire at age 50 was admissible in employment discrimination suit because it was not offered to prove liability but was offered to rebut plaintiff's current claim that she had no plans to retire and that her employer had attempted to force her to retire early).

Commission. It does not demonstrate that Cacchione is no longer seeking to associate with any investment advisers. The rest of his arguments, however, proceed from the same flawed premise.

2. The Legislative History of Section 203(f) Supports the Commission's Assertion of Jurisdiction over Cacchione.

Cacchione next argues that the legislative history of Section 203(f) of the Advisers Act establishes that the Commission does not have jurisdiction over him. But the legislative history does not help him. In 1975, Congress narrowed the class of persons against whom Section 203(f) proceedings could be brought from "any person" to "any person associated or seeking to be associated with an investment adviser." Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 29, 89 Stat. 97, 168 (1975). In 1987, the 100th Congress, in considering further amendments to the Adviser Act, explained the reason for the 1975 amendments as follows:

> Apparently, objections were raised as to the logic and fairness of imposing these sanctions in administrative proceedings on persons who were not subject to regulation by the Commission as registered broker-dealers and investment advisers and had no intention of entering the businesses associated, or seeking to become associated, with or from which they might be suspended or barred. In apparent response to these objections, ... section 203(f) was changed to refer to 'any person associated or seeking to become associated with an investment adviser.

S. Rep. 100-105, at 2110-11 (1987). The 100th Congress, recognizing that certain respondents who were associated or seeking to become associated at the time of the fraud may distort a potential ambiguity in the language to escape the Commission's jurisdiction by stating that they were no longer associated or seeking to become associated with an investment adviser, added clarifying language to codify then existing law. *See id.* at 2110-11. The Senate Report noted:

> These interpretations would clearly be contrary to the purposes of the section, however, since they would allow persons who ha[ve] violated the federal securities laws to avoid administrative sanctions merely by leaving the business and stating that they were no longer associated with a broker-dealer, municipal securities dealer, or investment adviser and were not seeking to become so associated. This situation could arise, for example, if an employee charged with violations resigned his employment or, in the case of principals of a firm, resigned or caused the firm to cease doing business. It could also arise if someone who files a fraudulent application for registration abandons the application. ... These amendments make clear Congress' original intent that misconduct during a *past* association or attempt at association, as well as during a *present* or *prospective* association, sub[jects] a

person to administrative proceedings and sanctions under the Securities Exchange Act and the Investment Advisers Act.

Id. at 2111 (footnotes and citations omitted).

The legislative history of Section 203(f) condemns rather than ratifies Cacchione's arguments here. Foremost in Congress's concerns was the possibility that respondents could present arguments exploiting a potential ambiguity in the statute's language to avoid the Commission's enforcement actions simply by leaving his or her employment or stating that they were no longer seeking to associate. *Id.* Congress made clear that such arguments would be contrary to the purposes of Section 203(f). *Id.*

The outcome that Cacchione seeks here—dismissal of this action based on self-serving changes of position whenever it suits him—is the sort of gamesmanship that Congress sought to avoid through the 1987 amendments.[4] His recent activities since his release from prison and leading right up to the issuance of the OIP demonstrated that he seeks to get back into the securities industry. During the two-month period from the issuance of the Wells notice to the issuance of the OIP, neither Cacchione nor his counsel made it known to the Division that he was abandoning his efforts to re-enter the securities industry as an investment adviser. In fact, based on previous efforts by Cacchione, statements by his counsel and the evidence gathered by the Division that Montara remained in existence despite the withdrawal of the Form-ADV, the only reasonable inference was that he had not. But now that the OIP has been issued, he has changed his position

[4] Cacchione derides the Division's citation to a Supreme Court case *U.S. v. W.T. Grant*, 345 U.S. 629, 633 (1953) as being too dated and irrelevant. Cacchione has missed the point of the case entirely. First, given that the proposition for which *W.T. Grant* was cited has been repeated by the Supreme Court as recently as 2012, Cacchione's "too old" complaint is off base. *See Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed"). More importantly, Cacchione's effort to distinguish *W.T. Grant* on the ground that his voluntary withdrawal of Montara's Form-ADV was not cessation of *illegal* conduct is beside the point and focuses on the wrong conduct. The significance of *W.T. Grant* is that defendants should not be given an opportunity to evade an injunctive action by a law enforcement agency based on promises regarding their future conduct, much like Cacchione is doing here by his declaration that he is "no longer" seeking to associate. *See W.T. Grant*, 345 U.S. at 633 & n.5.

and apparently believes that all that is required to defeat this action is to make an unsworn statement that he is, "no longer seeking to associate." The congressional intent in enacting and amending Section 203(f) emphatically rejects such a view. Finally, although Cacchione lambasts the Division's concern that he is doing an end-run around Section 203(f) as "absurd" and "ridiculous," his very pleadings reveal that those concerns are justified.[5] (*See* Resp.'s Mot. for Summary Disposition at 11 (asserting that an industry bar would further punish him because it would "strip him of his livelihood," "destroy his career," and "temporarily or permanently strip him of the license necessary to continue his profession.").)

As shown, the Division has submitted sufficient evidence and set forth specific facts demonstrating that Cacchione is seeking to become associated with an investment adviser. None of Cacchione's arguments in opposition has merit. Moreover, Cacchione has chosen not to submit any evidence to raise a genuine dispute of material facts and has instead rested his defense on the allegations and denials in his pleadings. The Law Judge should therefore find that Cacchione is seeking to associate with an investment adviser.

C. A Permanent Associational Bar Against Cacchione Is Warranted to Protect the Public.

In its opening papers, the Division established that all six factors as articulated in *SEC v. Steadman,* 603 F.2d 1126, 1140 (5th Cir. 1979), weigh in favor of a permanent associational bar. The Division showed that Cacchione's misconduct was repeated, egregious, and committed with a high degree of scienter, the degree of harm to investors and victims was substantial and that his pattern of misconduct combined with current financial situation presents too high of a risk to the public. In opposition, Cacchione does not dispute, because he cannot, the above factors. Instead, Cacchione argues that his past misconduct is irrelevant. In doing so, he relies on outright

[5] While the Division acknowledges that a respondent mounting a vigorous defense to Section 203(f) proceedings, by itself, would not establish that he is seeking to associate with an investment adviser, the positions taken by Cacchione in this action reveal his insincerity regarding his intent to "no longer" seek to become associated with an investment adviser.

mischaracterization of the case law and the record in this case. Where Cacchione has no response to the evidence submitted by the Division—such as the large tax liens and the fact that he has paid only a miniscule portion of the restitution and none since his release from prison—he simply ignores them and pretends they are not there. While Cacchione may prefer that his criminal conviction and permanent injunction has no consequence in these proceedings, his attempts to sweep under the rug his past conduct and unfavorable evidence only strengthen the need to bar him completely from the securities industry.

1. Cacchione's Attempt to Increase the Division's Burden of Proof Fails.

Cacchione cites to *Steadman v. SEC*, 603 F.2d 1126 (1979) to argue that the Division must articulate why a lesser sanction would not serve to protect investors and absent that, no permanent bars may be imposed. (Resp.'s Opp. at 7, 13-14.) Cacchione misstates the law. As the *Steadman* court acknowledged, "[t]he fashioning of an appropriate and reasonable remedy is for the Commission, not this court, and the Commission's choice of sanction may be overturned only if it is found 'unwarranted in law or . . . without justification in fact.'" *Id.* at 1140. Thus, the *Steadman* court was only requiring that the Commission articulate sufficient grounds for its decision to impose permanent bars. *See id.*; *see also PAZ Securities, Inc. v. SEC,* 566 F.3d 1172, 1176 (D.C. Cir. 2009) ("The court in *Steadman* recognized … that it was limited to deciding whether the Commission has made 'an allowable judgment in its choice of the remedy," and we quoted *Steadman* only for the well-established rule that an agency must adequately explain its decisions.") (internal citations omitted). To guide the Commission in providing a "fuller explanation of the need for" permanent bars, the *Steadman* court set forth the factors that are now known as the *Steadman* factors. *See Steadman*, 603 F.2d at 1140. Accordingly, *Steadman* requires only that the Commission reasonably apply and articulate the *Steadman* factors in order to justify the imposition of permanent bars. Cacchione's argument that *Steadman* extends the Division's burden of proof beyond the public interest factors is, therefore, simply unfounded. *Cf. Brownson v. SEC*, 66 F. App'x 687, 688 (9th Cir. 2003) ("Brownson's plea agreement and criminal conviction are

substantial evidence supporting the SEC's conclusion that it is in the public interest to permanently bar Brownson from association with a broker-dealer.").

2. The *Steadman* Factors Compel Cacchione's Permanent Exclusion from the Industry.

Cacchione next argues that because the Division has "relie[d] exclusively on the severity" of his prior conduct, rather than analyzing his current conditions and his actual risk for future violations, the Division has not properly evaluated all of the *Steadman* factors. (Resp.'s Opp. at 9.) But his claim is just untrue. In its opening papers, the Division proffered evidence that Cacchione has $1.2 million in federal and tax liens. (Division's Mot. Exhibit P.) In addition, the Division showed that as of August 26, 2014, Cacchione has only paid $502.50 towards his restitution and has paid not a penny since his release from prison, while his still incarcerated co-defendant, William Del Biaggio has paid $4,454.03. (Division's Mot. Exhibit N.) Cacchione has no response to this evidence so he chooses to ignore it and omits it when describing the Division's evidence, in apparent hope that the Law Judge overlooks it too. Similarly, Cacchione's repetitive and unfounded accusation that the Division has not conducted a new investigation is a red herring, aimed only to distract attention from his egregious misconduct.[6]

While it may be true that an individual's past violations do not "*necessarily* demonstrate a 'likelihood of recurrence,'" (Resp.'s Opp. at 9 (emphasis added)), the past violations are not irrelevant as Cacchione seems to argue. In this regard, Cacchione's reliance on *SEC v. Commonwealth Chem. Sec.*, 574 F.2d 90, 100 (2d Cir. 1978) and *Steadman* is misplaced. In *Commonwealth*, the Second Circuit considered the appropriateness of the trial court's issuance of injunctions against four defendants. *See Commonwealth* at 99-100. While the court required the SEC "to go beyond the mere facts of past violations and demonstrate a realistic likelihood of

[6] Moreover, his complaints that the Division has moved too "expedit[iously]" are disingenuous given his alternative arguments are that this action has been brought too late and that the Commission has no jurisdiction over him because he has said that he is no longer seeking to become associated with an investment adviser as soon as the OIP was issued.

recurrence," it had no problems sustaining the injunctions against the principal defendants because their violations were "repeated and persistent" and because the entire transaction in which they were involved was "essentially fraudulent." *Id.* at 100. Similarly, the Fifth Circuit in *Steadman* cited the following examples as situations where permanent bars would be justified:

> The facts of a case might indicate a reasonable likelihood that a particular violator cannot ever operate in compliance with the law, *see SEC v. Blatt,* 583 F.2d 1325, 1334 (5th Cir. 1978), or might be so egregious that even if further violations of the law are unlikely, the nature of the conduct mandates permanent debarment as a deterrent to others in the industry.

Steadman, 603 F.2d at 1140. In *Blatt*, the case cited by the *Steadman* court as an instance in which there is a reasonable likelihood a particular violator cannot ever operate in compliance with the law, the defendants were found to have violated the securities laws by failing to disclose certain material facts. *See Blatt*, 583 F.2d at 1327-28. The Fifth Circuit had no trouble upholding the injunctions issued by the trial court, observing that one defendant was the mastermind of two violations and that while the other defendant was implicated in one violation, it was reprehensible fraud. *See id.* at 1334-35. As to the second defendant, the court further commented that "[h]is continuing interest in investment opportunities strengthens the inference from his past conduct that he is likely to commit future violations." *Id.* at 1335.

Likewise, Cacchione was involved in two distinct fraudulent schemes, committed over an extend period of time. Cacchione took an active and integral part in the first of the schemes which caused a staggering $47 million in losses. In the second scheme, Cacchione defrauded his own clients, putting his interests above theirs, to maximize his commission income. By his own admission, he abused his position as a broker and abused the trust placed in him by his clients. His entire disciplinary history, which includes an order by the NASD finding that he sold unregistered securities to the public without proper disclosure, shows a propensity to violate a multitude of securities laws and disregard of rules. Thus, even under the standards set forth by the cases relied on by Cacchione, the Division has satisfied its burden of showing that a permanent associational bar is warranted. But the record established here shows more, including evidence of Cacchione's

present financial condition. Given that an earlier financial difficulty had propelled Cacchione to commit his fraudulent schemes, his current financial condition, under the weight of a $47 million restitution order and $1.2 million in tax liens, combined with the pattern of his misconduct presents a significant risk that he would be lured to engage in future violations. No amount of quibbling by Cacchione will diminish the evidence in this case which overwhelmingly weighs in favor of a permanent associational bar.

3. Cacchione's Other Arguments Do Not Weigh in Favor of Lesser Sanctions.

Cacchione's remaining arguments to obtain a lesser remedy can be dismissed quickly.

First, Cacchione argues that his "substantial assistance" to the government shows that he has acknowledged the wrongfulness of his actions and that this factor weighs in favor of lesser sanctions. However, Cacchione's cooperation with the government was not completely borne out of selflessness. As part of his plea agreement, the United States Attorney's Office for the Northern District of California ("USAO") agreed that if Cacchione cooperated fully and truthfully, and provided substantial assistance to law enforcement, it would file a motion for a downward departure under the sentencing guidelines. (Division's Mot. Exhibit E at ¶ 19.) While the Division does not dispute that Cacchione has acknowledged his guilt, this alone does not override his egregious conduct over an extended time period.

Second, Cacchione next contends that because the injunction, broker-dealer bar, and the criminal convictions were entered five years ago, the age of the violations weighs against a permanent bar. He cites two decisions in support but neither helps him. Cacchione first cites *Proffitt v. FDIC*, 200 F.3d 855, 861-62 (D.C. Cir. 2000) for the proposition that "a long-past offense alone is not determinative of defendant's risk to the public." (Resp.'s Opp. at 12.) The D.C. Circuit actually said: "While a serious offense, even long past, *may* indicate Proffitt's current risk to the public, that offense cannot alone determine his fitness almost a decade later." *Id.* at 862 (emphasis added). Moreover, *Proffitt* is not germane to the analysis here. The *Proffitt* court's observation was made in reference to whether the FDIC's action was an action for penalties for

purposes of determining whether the five-year statute of limitations in 28 U.S.C. § 2462 applied, which, according to some courts, depends on whether the imposition of sanctions was based on the current unfitness of the respondent. *Id.* at 860-62. Ultimately, the court concluded that while the action was subject to a five-year statute of limitations, the FDIC had timely brought its action and dismissed the petition. Thus, *Proffitt* simply did not involve facts like here, where the respondent has sought to become associated with an investment adviser as soon as he has finished his 48-month sentence and where the Commission could not have brought a Section 203(f) action earlier than it did. *See id.* at 861 (observing that FDIC did not act for more than six years after Proffitt's misdeeds.) In the second case, *Robert Radano*, Advisers Act Rel. No. 2750, 2008 WL 2574440 (June 30, 2008), Cacchione suggests that the right to reapply after five years granted in *Radano* was because the conduct occurred approximately seven years earlier. (Resp.'s Opp. at 12.) However, the Commission's decision to grant the reapplication right was mainly motivated by Radano's "otherwise unblemished career in the securities industry." *Radano*, 2008 WL 2574440, at *8. Cacchione cannot make the same claim here.

Third, in urging for a lesser sanction than a bar, Cacchione states that "[t]he Division has ordered "less-than-permanent, non-collateral bars following criminal convictions," (Resp.'s Opp. at 12-13), and cites four administrative decisions as illustrative examples. But three of the four decisions Cacchione cites were based on civil injunctions, not criminal convictions. *See Jilaine H. Bauer*, Initial Dec. Rel. No. 483, 2013 WL 1646913 (Apr. 16, 2013) (proceedings brought under Commission Rule of Practice 102(e) based on finding of willful violations of securities laws in civil case brought by the Commission); *Ran H. Furman*, Initial Dec. Rel. No. 459A, 2012 WL 2339281 (June 20, 2012) (Rule 102(e) proceedings based on civil injunctions); *Martin B. Sloate*, Exchange Act Rel. No. 38373, 1997 WL 126707 (Mar. 7. 1997) (administrative proceedings based on civil injunction). And in the fourth case, the Commission modified the permanent bar imposed by the Law Judge because Rosenthal's conviction was "based on a single incident of wrongdoing, the conduct underlying the conviction is twelve years old, and this record contains no evidence of

either prior or subsequent disciplinary history" and because the criminal sanctions imposed on Rosenthal were relatively lenient. *See Alan E. Rosenthal*, Exchange Act Rel. No. 40387, 1998 WL 549558, at *3 (Sept. 1, 1998). Again, Cacchione cannot justifiably compare his situation to that of Rosenthal.

The Commission has found that, "absent 'extraordinary mitigating circumstances,' an individual who has been criminally convicted in connection with activities related to the purchase or sale of securities cannot be permitted to remain in the securities industry." *Jose P. Zollino*, Exchange Act Rel. No. 55107, Advisers Act Rel. No. 2579, 2007 WL 98919, at *6 (Jan. 16, 2007). Cacchione has presented no such extraordinary mitigating circumstances here. Indeed, Cacchione elected not to present any evidence, instead relying on unsound arguments and tortured reading of the case law.

Finally, Cacchione seeks to distance himself from the statements made on his behalf by his counsel in sentencing proceedings before the District Court as a "simpl[e] foreshadowing of the difficulty [he] would face (and now faces) in building back his life and regaining trust in a professional capacity." (Resp.'s Opp. at 14 n.7.) Those statements were not inconsequential laments but assurances made to the court in an effort to persuade the court that a lesser sentence was warranted. (Division's Mot. Exhibit D ("In ensuring that the sentence imposed adequately reflects the seriousness of the offense, fulfills the need to deter others, and to protect the public, we also ask that the Court consider that Mr. Cacchione has forever lost his means of livelihood.").) Having achieved his goal of reducing his sentence to 60 months from the 97-121 months sentencing range as calculated under the Sentencing Guidelines and even below the lower sentence recommended by the USAO, Cacchione now disclaims those statements. Cacchione's efforts to pretend that the statements made on his behalf to a District Court have no effect in these proceedings are perverse when one follows his logic. In 2009, before the District Court, he argued that because his livelihood as a financial services professional was forever lost, he was sufficiently deterred and that he deserved a lesser sentence. Now, before this Law Judge, he argues that he

should not be further "punished" by being held to his word and barred from the securities industry because his 48-month sentence served a sufficient deterrent. The Law Judge should not tolerate this or any of Cacchione's other equivocations.

III. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Law Judge grant its motion and issue an order permanently barring Respondent from associating with any investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Dated: December 3, 2014

Samantha J. Choe
Counsel
DIVISION OF ENFORCEMENT

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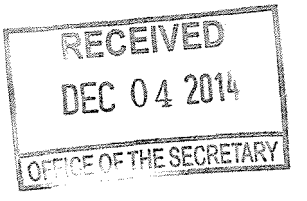

VIA Overnight Courier and Facsimile
(703) 813-9793

Office of Secretary
Securities and Exchange Commission
100 F Street, N.E.
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Re: In the Matter of David Scott Cacchione, File No. 3-16165

Dear Sir or Madam,

Enclosed please find the Division of Enforcement's Reply Memorandum in Support of Its Motion for Summary Disposition Against Respondent David Scott Cacchione. The opposition and the accompanying documents were also contemporaneously submitted via facsimile transmission at the number listed above.

Respectfully,

Samantha Choe
Staff Attorney

Enclosures

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Honorable Jason Patil
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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December 3, 2014

VIA Overnight Courier and Facsimile
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Office of Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Re: In the Matter of David Scott Cacchione, File No. 3-16165

Dear Sir or Madam,

Enclosed please find the Division of Enforcement's Reply Memorandum in Support of Its Motion for Summary Disposition Against Respondent David Scott Cacchione. The opposition and the accompanying documents were also contemporaneously submitted via facsimile transmission at the number listed above.

Respectfully,

Samantha Choe
Staff Attorney

Enclosures

[redacted]

cc: via email and UPS
alj@sec.gov

Honorable Jason Patil
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16165

In the Matter of

DAVID SCOTT CACCHIONE,

Respondent.

Administrative Law Judge Jason Patil

DIVISION OF ENFORCEMENT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT DAVID SCOTT CACCHIONE

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I. PRELIMINARY STATEMENT

In its motion for summary disposition and opening memorandum, the Division of Enforcement ("Division") demonstrated the absence of any genuine dispute of material facts regarding Respondent David Scott Cacchione's ("Respondent" or Cacchione") seeking to become associated with an investment adviser. The Division also proffered overwhelming evidence that permanently barring Cacchione from the securities industry is appropriate in the public interest.

Respondent's opposition fails to present any evidence or articulate any valid reasons why the Division of Enforcement's motion should be denied. Accordingly, the Law Judge should grant the Division's motion for summary disposition against Cacchione.

II. ARGUMENT

A. Summary Disposition Standard

A motion for summary disposition should be granted when there is "no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." Rule of Practice 250(a); 17 C.F.R. § 201.250. Rule 250 also provides that "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true, *except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted.*" *Id.* (emphasis added). As the Commission has noted, "cases construing [Rule 56 of the Federal Rules of Civil Procedure] clarify the obligations a motion for summary disposition places on the party opposing it." *Jeffrey L. Gibson*, Exchange Act Rel. 57266, Advisers Act Rel. No. 2700, 2008 WL 294717, at *6 n.25 (Feb. 4, 2008), *pet. denied*, *Gibson v. SEC*, 561 F.3d 548 (2009). Accordingly, as "[u]nder Rule 56, once the moving party has carried its burden of establishing its entitlement to judgment on the factual record, 'its opponents must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The party opposing summary disposition "must set forth specific facts showing a genuine issue for a hearing and may not rest upon mere allegations or denials in its submissions to the judge to create a genuine issue." *Gibson*,

2008 WL 294717, at *6 n.25. In opposition, Cacchione did not set forth specific facts showing a genuine issue for a hearing and has merely rested on the allegations or denials in his submissions to the Law Judge. The Law Judge should grant the Division's motion for summary disposition.

B. The Evidence Proffered by the Division Establishes that Respondent is Seeking to Become Associated with an Investment Adviser.

In its motion and accompanying papers, the Division submitted ample evidence that Cacchione has and is "seeking to become associated" with an investment adviser. The Form-ADV for Montara Capital Management LLC ("Montara") signed and filed by Cacchione on June 25, 2014 showed that Cacchione was Montara's Chief Compliance Officer, Managing Member and at least 50 percent owner. (Exhibit M, Form ADV at 2, 32-33.) The Form-ADV also showed that Montara had one client, Montara Capital Fund, L.P., a private fund, and represented that it reasonably expected to raise at least $100 million in assets within 120 days of the filing. (*Id.* Part I at 5, 7.) Moreover, even after Cacchione had withdrawn Montara's Form-ADV, his counsel told the Division that Cacchione wants to continue his career in the securities industry and is looking for a way to remain associated with Montara or to associate with other investment advisers. (Declaration of Cary S. Robnett dated November 7, 2014 ("Robnett Decl."))[1] The Division further

[1] While Cacchione has separately moved to exclude the statements made by his counsel during a phone conference with the Division on July 22, 2014 on the ground that they were settlement offers, they are not subject to the protections of Rule 408 because they were not settlement offers and because they go to establish the Commission's jurisdiction to institute proceedings under Section 203(f), not to liability. In his reply in support of his motion to exclude evidence, Cacchione selectively quotes from an email on July 17, 2014 to argue that the Division invited his counsel to engage in settlement discussions and therefore, the discussion on July 22, 2014 was a settlement discussion. The full statements from which Cacchione extracted only a phrase do not bear Cacchione's distorted interpretation because those statements were made in regards to the parties' negotiation of deadlines, including Cacchione's deadline to make a Wells submission. (*See* Robnett Decl. Exhibit 3, page 2.) More importantly, Cacchione's view of Rule 408 is unfounded in the law. According to Cacchione, once any party utters the word settlement, or anything that resembles it, all subsequent discussions between the parties are protected settlement discussions. As the cases cited by the Division in its opposition to Cacchione's motion *in limine* show, Cacchione's view is simply not the law. Nevertheless, even if the Law Judge were to exclude Ms. Robnett's declaration, the remaining evidence proffered by the Division amply shows that Cacchione has and is seeking to become associated with an investment adviser.

submitted evidence that Montara's website was still live, even after Montara had withdrawn its Form-ADV. (Exhibit Q, Montara website capture as of August 8, 2014.)

While Cacchione argues that pursuant to Rule of Practice 250(a), the Law Judge must take as true his pleading that he was "no longer seeking to be a 'person associated with' an investment adviser," his invocation of the rule is fatally incomplete. Rule 250(a) provides that "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true, *except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted.*" *Id.* (emphasis added). The Division's proffered evidence suffices to support a reasonable inference that Cacchione has and is seeking to become associated with an investment adviser. Thus, the burden under Rule 250, shifted to Cacchione to proffer evidence that he is not seeking to associate. *See Kornman v. SEC*, 592 F.3d 173, 185 (D.C. Cir. 2010) ("Because the evidence proffered by the Division sufficed to support the reasonable inference that the hedge funds remained active until at least June 2005, the burden under Rule 250, as under Civil Rule 56, shifted to Kornman to proffer evidence that trading had ceased before the October 29, 2003 telephone call."). Cacchione has not borne his burden. In opposition, Cacchione elected not to submit any evidence at all, instead resting on his denials in his pleadings. Summary disposition should be granted on this reason alone.

Cacchione also presents several factual and legal arguments, none of which have merit.

1. The Withdrawal of Montara's Form-ADV Means Only that Cacchione Was No Longer Seeking to Register the Firm as an Investment Adviser with the Commission.

First, Cacchione argues that "Montara's withdrawal of its application to become a registered investment adviser means that [he] was no longer seeking to become associated with an investment adviser at the time the OIP was filed." (Resp.'s Opp. at 2 (capitalizations omitted)). But his very words reveal the flaw in his logic. As he notes, the application on a Form-ADV to the Commission is an application to become a *registered* investment adviser. (*Id.* (capitalizations omitted, emphasis added.)) Thus, the withdrawal of the Form-ADV means only that Cacchione

was no longer seeking to register Montara as an investment adviser with the Commission. In fact, in Montara's brochure submitted with the Form-ADV as Part 2A, Cacchione represented that "Montara is a registered investment adviser with the state of California."[2] (*Id.* Part 2 at Cover Page.) Therefore, it is not a reasonable inference to say that the withdrawal of the Form-ADV means that Cacchione is no longer seeking to associate with any investment advisers, registered and unregistered. This is especially so, since, the day after the Form-ADV was withdrawn, his counsel reached out to the Division and asked if Cacchione "could submit to an order that limits" Cacchione's activities, (*see* Declaration of Cary S. Robnett in Support of the Division's Opposition to Respondent's Motion in Limine at ¶ 5), including subjecting him to "heightened supervision program by a third-party investment adviser." (Declaration of Mauricio S. Beugelmans dated November 21, 2014 at ¶ 4.)[3] Moreover, contrary to Cacchione's allegation that he has abandoned Montara's operations, Montara's website is still live. (Division's Opp. to Cacchione's Mot. for Summary Disposition, Exhibit CC.) His firm's corporate entities, Montara Capital Management LLC and Montara Capital Fund, L.P., also remain active and in good standing. (*Id.* at Exhibits AA & BB.)

In short, the withdrawal of Montara's Form-ADV proves nothing more than that Cacchione currently has abandoned seeking registration of Montara as an investment adviser with the

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[2] The Division is aware that the California Department of Business Oversight is pursuing an action to bar Cacchione from associating with an investment adviser.

[3] In addition to the reasons articulated in the Division's Opposition to Cacchione's Motion in Limine to Exclude the Declaration of Cary S. Robnett, the statements by Cacchione's counsel are further not subject to the protections of Rule 408 here because they are offered not to establish liability but to rebut Cacchione's assertion that by withdrawing the Form-ADV, he was no longer seeking to associate with any investment adviser. *See Cochenour v. Cameron Savings and Loan, F.A.*, 160 F.3d 1187, 1190 (8th Cir. 1998) (holding that a statement in a settlement demand letter that plaintiff had been planning to retire at age 50 was admissible in employment discrimination suit because it was not offered to prove liability but was offered to rebut plaintiff's current claim that she had no plans to retire and that her employer had attempted to force her to retire early).

Commission. It does not demonstrate that Cacchione is no longer seeking to associate with any investment advisers. The rest of his arguments, however, proceed from the same flawed premise.

2. The Legislative History of Section 203(f) Supports the Commission's Assertion of Jurisdiction over Cacchione.

Cacchione next argues that the legislative history of Section 203(f) of the Advisers Act establishes that the Commission does not have jurisdiction over him. But the legislative history does not help him. In 1975, Congress narrowed the class of persons against whom Section 203(f) proceedings could be brought from "any person" to "any person associated or seeking to be associated with an investment adviser." Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 29, 89 Stat. 97, 168 (1975). In 1987, the 100th Congress, in considering further amendments to the Adviser Act, explained the reason for the 1975 amendments as follows:

> Apparently, objections were raised as to the logic and fairness of imposing these sanctions in administrative proceedings on persons who were not subject to regulation by the Commission as registered broker-dealers and investment advisers and had no intention of entering the businesses associated, or seeking to become associated, with or from which they might be suspended or barred. In apparent response to these objections, ... section 203(f) was changed to refer to 'any person associated or seeking to become associated with an investment adviser.

S. Rep. 100-105, at 2110-11 (1987). The 100th Congress, recognizing that certain respondents who were associated or seeking to become associated at the time of the fraud may distort a potential ambiguity in the language to escape the Commission's jurisdiction by stating that they were no longer associated or seeking to become associated with an investment adviser, added clarifying language to codify then existing law. *See id.* at 2110-11. The Senate Report noted:

> These interpretations would clearly be contrary to the purposes of the section, however, since they would allow persons who ha[ve] violated the federal securities laws to avoid administrative sanctions merely by leaving the business and stating that they were no longer associated with a broker-dealer, municipal securities dealer, or investment adviser and were not seeking to become so associated. This situation could arise, for example, if an employee charged with violations resigned his employment or, in the case of principals of a firm, resigned or caused the firm to cease doing business. It could also arise if someone who files a fraudulent application for registration abandons the application. ... These amendments make clear Congress' original intent that misconduct during a *past* association or attempt at association, as well as during a *present* or *prospective* association, sub[jects] a

> person to administrative proceedings and sanctions under the Securities Exchange Act and the Investment Advisers Act.

Id. at 2111 (footnotes and citations omitted).

The legislative history of Section 203(f) condemns rather than ratifies Cacchione's arguments here. Foremost in Congress's concerns was the possibility that respondents could present arguments exploiting a potential ambiguity in the statute's language to avoid the Commission's enforcement actions simply by leaving his or her employment or stating that they were no longer seeking to associate. *Id.* Congress made clear that such arguments would be contrary to the purposes of Section 203(f). *Id.*

The outcome that Cacchione seeks here—dismissal of this action based on self-serving changes of position whenever it suits him—is the sort of gamesmanship that Congress sought to avoid through the 1987 amendments.[4] His recent activities since his release from prison and leading right up to the issuance of the OIP demonstrated that he seeks to get back into the securities industry. During the two-month period from the issuance of the Wells notice to the issuance of the OIP, neither Cacchione nor his counsel made it known to the Division that he was abandoning his efforts to re-enter the securities industry as an investment adviser. In fact, based on previous efforts by Cacchione, statements by his counsel and the evidence gathered by the Division that Montara remained in existence despite the withdrawal of the Form-ADV, the only reasonable inference was that he had not. But now that the OIP has been issued, he has changed his position

[4] Cacchione derides the Division's citation to a Supreme Court case *U.S. v. W.T. Grant*, 345 U.S. 629, 633 (1953) as being too dated and irrelevant. Cacchione has missed the point of the case entirely. First, given that the proposition for which *W.T. Grant* was cited has been repeated by the Supreme Court as recently as 2012, Cacchione's "too old" complaint is off base. *See Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed"). More importantly, Cacchione's effort to distinguish *W.T. Grant* on the ground that his voluntary withdrawal of Montara's Form-ADV was not cessation of *illegal* conduct is beside the point and focuses on the wrong conduct. The significance of *W.T. Grant* is that defendants should not be given an opportunity to evade an injunctive action by a law enforcement agency based on promises regarding their future conduct, much like Cacchione is doing here by his declaration that he is "no longer" seeking to associate. *See W.T. Grant*, 345 U.S. at 633 & n.5.

and apparently believes that all that is required to defeat this action is to make an unsworn statement that he is, "no longer seeking to associate." The congressional intent in enacting and amending Section 203(f) emphatically rejects such a view. Finally, although Cacchione lambasts the Division's concern that he is doing an end-run around Section 203(f) as "absurd" and "ridiculous," his very pleadings reveal that those concerns are justified.[5] (*See* Resp.'s Mot. for Summary Disposition at 11 (asserting that an industry bar would further punish him because it would "strip him of his livelihood," "destroy his career," and "temporarily or permanently strip him of the license necessary to continue his profession.").)

As shown, the Division has submitted sufficient evidence and set forth specific facts demonstrating that Cacchione is seeking to become associated with an investment adviser. None of Cacchione's arguments in opposition has merit. Moreover, Cacchione has chosen not to submit any evidence to raise a genuine dispute of material facts and has instead rested his defense on the allegations and denials in his pleadings. The Law Judge should therefore find that Cacchione is seeking to associate with an investment adviser.

C. A Permanent Associational Bar Against Cacchione Is Warranted to Protect the Public.

In its opening papers, the Division established that all six factors as articulated in *SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979), weigh in favor of a permanent associational bar. The Division showed that Cacchione's misconduct was repeated, egregious, and committed with a high degree of scienter, the degree of harm to investors and victims was substantial and that his pattern of misconduct combined with current financial situation presents too high of a risk to the public. In opposition, Cacchione does not dispute, because he cannot, the above factors. Instead, Cacchione argues that his past misconduct is irrelevant. In doing so, he relies on outright

[5] While the Division acknowledges that a respondent mounting a vigorous defense to Section 203(f) proceedings, by itself, would not establish that he is seeking to associate with an investment adviser, the positions taken by Cacchione in this action reveal his insincerity regarding his intent to "no longer" seek to become associated with an investment adviser.

mischaracterization of the case law and the record in this case. Where Cacchione has no response to the evidence submitted by the Division—such as the large tax liens and the fact that he has paid only a miniscule portion of the restitution and none since his release from prison—he simply ignores them and pretends they are not there. While Cacchione may prefer that his criminal conviction and permanent injunction has no consequence in these proceedings, his attempts to sweep under the rug his past conduct and unfavorable evidence only strengthen the need to bar him completely from the securities industry.

1. Cacchione's Attempt to Increase the Division's Burden of Proof Fails.

Cacchione cites to *Steadman v. SEC*, 603 F.2d 1126 (1979) to argue that the Division must articulate why a lesser sanction would not serve to protect investors and absent that, no permanent bars may be imposed. (Resp.'s Opp. at 7, 13-14.) Cacchione misstates the law. As the *Steadman* court acknowledged, "[t]he fashioning of an appropriate and reasonable remedy is for the Commission, not this court, and the Commission's choice of sanction may be overturned only if it is found 'unwarranted in law or . . . without justification in fact.'" *Id.* at 1140. Thus, the *Steadman* court was only requiring that the Commission articulate sufficient grounds for its decision to impose permanent bars. *See id.*; *see also PAZ Securities, Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) ("The court in *Steadman* recognized . . . that it was limited to deciding whether the Commission has made 'an allowable judgment in its choice of the remedy,' and we quoted *Steadman* only for the well-established rule that an agency must adequately explain its decisions.") (internal citations omitted). To guide the Commission in providing a "fuller explanation of the need for" permanent bars, the *Steadman* court set forth the factors that are now known as the *Steadman* factors. *See Steadman*, 603 F.2d at 1140. Accordingly, *Steadman* requires only that the Commission reasonably apply and articulate the *Steadman* factors in order to justify the imposition of permanent bars. Cacchione's argument that *Steadman* extends the Division's burden of proof beyond the public interest factors is, therefore, simply unfounded. *Cf. Brownson v. SEC*, 66 F. App'x 687, 688 (9th Cir. 2003) ("Brownson's plea agreement and criminal conviction are

substantial evidence supporting the SEC's conclusion that it is in the public interest to permanently bar Brownson from association with a broker-dealer.").

2. The *Steadman* Factors Compel Cacchione's Permanent Exclusion from the Industry.

Cacchione next argues that because the Division has "relie[d] exclusively on the seventy" of his prior conduct, rather than analyzing his current conditions and his actual risk for future violations, the Division has not properly evaluated all of the *Steadman* factors. (Resp.'s Opp. at 9.) But his claim is just untrue. In its opening papers, the Division proffered evidence that Cacchione has $1.2 million in federal and tax liens. (Division's Mot. Exhibit P.) In addition, the Division showed that as of August 26, 2014, Cacchione has only paid $502.50 towards his restitution and has paid not a penny since his release from prison, while his still incarcerated co-defendant, William Del Biaggio has paid $4,454.03. (Division's Mot. Exhibit N.) Cacchione has no response to this evidence so he chooses to ignore it and omits it when describing the Division's evidence, in apparent hope that the Law Judge overlooks it too. Similarly, Cacchione's repetitive and unfounded accusation that the Division has not conducted a new investigation is a red herring, aimed only to distract attention from his egregious misconduct.[6]

While it may be true that an individual's past violations do not "*necessarily* demonstrate a 'likelihood of recurrence,'" (Resp.'s Opp. at 9 (emphasis added)), the past violations are not irrelevant as Cacchione seems to argue. In this regard, Cacchione's reliance on *SEC v. Commonwealth Chem. Sec.*, 574 F.2d 90, 100 (2d Cir. 1978) and *Steadman* is misplaced. In *Commonwealth*, the Second Circuit considered the appropriateness of the trial court's issuance of injunctions against four defendants. *See Commonwealth* at 99-100. While the court required the SEC "to go beyond the mere facts of past violations and demonstrate a realistic likelihood of

[6] Moreover, his complaints that the Division has moved too "expedit[iously]" are disingenuous given his alternative arguments are that this action has been brought too late and that the Commission has no jurisdiction over him because he has said that he is no longer seeking to become associated with an investment adviser as soon as the OIP was issued.

recurrence," it had no problems sustaining the injunctions against the principal defendants because their violations were "repeated and persistent" and because the entire transaction in which they were involved was "essentially fraudulent." *Id.* at 100. Similarly, the Fifth Circuit in *Steadman* cited the following examples as situations where permanent bars would be justified:

> The facts of a case might indicate a reasonable likelihood that a particular violator cannot ever operate in compliance with the law, *see SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978), or might be so egregious that even if further violations of the law are unlikely, the nature of the conduct mandates permanent debarment as a deterrent to others in the industry.

Steadman, 603 F.2d at 1140. In *Blatt*, the case cited by the *Steadman* court as an instance in which there is a reasonable likelihood a particular violator cannot ever operate in compliance with the law, the defendants were found to have violated the securities laws by failing to disclose certain material facts. *See Blatt*, 583 F.2d at 1327-28. The Fifth Circuit had no trouble upholding the injunctions issued by the trial court, observing that one defendant was the mastermind of two violations and that while the other defendant was implicated in one violation, it was reprehensible fraud. *See id.* at 1334-35. As to the second defendant, the court further commented that "[h]is continuing interest in investment opportunities strengthens the inference from his past conduct that he is likely to commit future violations." *Id.* at 1335.

Likewise, Cacchione was involved in two distinct fraudulent schemes, committed over an extend period of time. Cacchione took an active and integral part in the first of the schemes which caused a staggering $47 million in losses. In the second scheme, Cacchione defrauded his own clients, putting his interests above theirs, to maximize his commission income. By his own admission, he abused his position as a broker and abused the trust placed in him by his clients. His entire disciplinary history, which includes an order by the NASD finding that he sold unregistered securities to the public without proper disclosure, shows a propensity to violate a multitude of securities laws and disregard of rules. Thus, even under the standards set forth by the cases relied on by Cacchione, the Division has satisfied its burden of showing that a permanent associational bar is warranted. But the record established here shows more, including evidence of Cacchione's

present financial condition. Given that an earlier financial difficulty had propelled Cacchione to commit his fraudulent schemes, his current financial condition, under the weight of a $47 million restitution order and $1.2 million in tax liens, combined with the pattern of his misconduct presents a significant risk that he would be lured to engage in future violations. No amount of quibbling by Cacchione will diminish the evidence in this case which overwhelmingly weighs in favor of a permanent associational bar.

3. Cacchione's Other Arguments Do Not Weigh in Favor of Lesser Sanctions.

Cacchione's remaining arguments to obtain a lesser remedy can be dismissed quickly.

First, Cacchione argues that his "substantial assistance" to the government shows that he has acknowledged the wrongfulness of his actions and that this factor weighs in favor of lesser sanctions. However, Cacchione's cooperation with the government was not completely borne out of selflessness. As part of his plea agreement, the United States Attorney's Office for the Northern District of California ("USAO") agreed that if Cacchione cooperated fully and truthfully, and provided substantial assistance to law enforcement, it would file a motion for a downward departure under the sentencing guidelines. (Division's Mot. Exhibit E at ¶ 19.) While the Division does not dispute that Cacchione has acknowledged his guilt, this alone does not override his egregious conduct over an extended time period.

Second, Cacchione next contends that because the injunction, broker-dealer bar, and the criminal convictions were entered five years ago, the age of the violations weighs against a permanent bar. He cites two decisions in support but neither helps him. Cacchione first cites *Proffitt v. FDIC*, 200 F.3d 855, 861-62 (D.C. Cir. 2000) for the proposition that "a long-past offense alone is not determinative of defendant's risk to the public." (Resp.'s Opp. at 12.) The D.C. Circuit actually said: "While a serious offense, even long past, *may* indicate Proffitt's current risk to the public, that offense cannot alone determine his fitness almost a decade later." *Id.* at 862 (emphasis added). Moreover, *Proffitt* is not germane to the analysis here. The *Proffitt* court's observation was made in reference to whether the FDIC's action was an action for penalties for

purposes of determining whether the five-year statute of limitations in 28 U.S.C. § 2462 applied, which, according to some courts, depends on whether the imposition of sanctions was based on the current unfitness of the respondent. *Id.* at 860-62. Ultimately, the court concluded that while the action was subject to a five-year statute of limitations, the FDIC had timely brought its action and dismissed the petition. Thus, *Proffitt* simply did not involve facts like here, where the respondent has sought to become associated with an investment adviser as soon as he has finished his 48-month sentence and where the Commission could not have brought a Section 203(f) action earlier than it did. *See id.* at 861 (observing that FDIC did not act for more than six years after Proffitt's misdeeds.) In the second case, *Robert Radano*, Advisers Act Rel. No. 2750, 2008 WL 2574440 (June 30, 2008), Cacchione suggests that the right to reapply after five years granted in *Radano* was because the conduct occurred approximately seven years earlier. (Resp.'s Opp. at 12.) However, the Commission's decision to grant the reapplication right was mainly motivated by Radano's "otherwise unblemished career in the securities industry." *Radano*, 2008 WL 2574440, at *8. Cacchione cannot make the same claim here.

Third, in urging for a lesser sanction than a bar, Cacchione states that "[t]he Division has ordered "less-than-permanent, non-collateral bars following criminal convictions," (Resp.'s Opp. at 12-13), and cites four administrative decisions as illustrative examples. But three of the four decisions Cacchione cites were based on civil injunctions, not criminal convictions. *See Jilaine H. Bauer*, Initial Dec. Rel. No. 483, 2013 WL 1646913 (Apr. 16, 2013) (proceedings brought under Commission Rule of Practice 102(e) based on finding of willful violations of securities laws in civil case brought by the Commission); *Ran H. Furman*, Initial Dec. Rel. No. 459A, 2012 WL 2339281 (June 20, 2012) (Rule 102(e) proceedings based on civil injunctions); *Martin B. Sloate*, Exchange Act Rel. No. 38373, 1997 WL 126707 (Mar. 7, 1997) (administrative proceedings based on civil injunction). And in the fourth case, the Commission modified the permanent bar imposed by the Law Judge because Rosenthal's conviction was "based on a single incident of wrongdoing, the conduct underlying the conviction is twelve years old, and this record contains no evidence of

either prior or subsequent disciplinary history" and because the criminal sanctions imposed on Rosenthal were relatively lenient. *See Alan E. Rosenthal*, Exchange Act Rel. No. 40387, 1998 WL 549558, at *3 (Sept. 1, 1998). Again, Cacchione cannot justifiably compare his situation to that of Rosenthal.

The Commission has found that, "absent 'extraordinary mitigating circumstances,' an individual who has been criminally convicted in connection with activities related to the purchase or sale of securities cannot be permitted to remain in the securities industry." *Jose P. Zollino*, Exchange Act Rel. No. 55107, Advisers Act Rel. No. 2579, 2007 WL 98919, at *6 (Jan. 16, 2007). Cacchione has presented no such extraordinary mitigating circumstances here. Indeed, Cacchione elected not to present any evidence, instead relying on unsound arguments and tortured reading of the case law.

Finally, Cacchione seeks to distance himself from the statements made on his behalf by his counsel in sentencing proceedings before the District Court as a "simpl[e] foreshadowing of the difficulty [he] would face (and now faces) in building back his life and regaining trust in a professional capacity." (Resp.'s Opp. at 14 n.7.) Those statements were not inconsequential laments but assurances made to the court in an effort to persuade the court that a lesser sentence was warranted. (Division's Mot. Exhibit D ("In ensuring that the sentence imposed adequately reflects the seriousness of the offense, fulfills the need to deter others, and to protect the public, we also ask that the Court consider that Mr. Cacchione has forever lost his means of livelihood.").) Having achieved his goal of reducing his sentence to 60 months from the 97-121 months sentencing range as calculated under the Sentencing Guidelines and even below the lower sentence recommended by the USAO, Cacchione now disclaims those statements. Cacchione's efforts to pretend that the statements made on his behalf to a District Court have no effect in these proceedings are perverse when one follows his logic. In 2009, before the District Court, he argued that because his livelihood as a financial services professional was forever lost, he was sufficiently deterred and that he deserved a lesser sentence. Now, before this Law Judge, he argues that he

should not be further "punished" by being held to his word and barred from the securities industry because his 48-month sentence served a sufficient deterrent. The Law Judge should not tolerate this or any of Cacchione's other equivocations.

III. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Law Judge grant its motion and issue an order permanently barring Respondent from associating with any investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Dated: December 3, 2014

Samantha J. Choe
Counsel
DIVISION OF ENFORCEMENT

UNITED STATES OF AMERICA
Before the
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