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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.

RESPONDENT DAVID SCOTT CACCHIONE'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR SUMMARY DISPOSITION

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Pursuant to Rule 250 of the Rules of Practice of the Securities and Exchange Commission ("Commission") and to the Order of Judge Patil, dated October 21, 2014, Respondent David Scott Cacchione ("Respondent" or "Mr. Cacchione") respectfully submits this Reply Memorandum of Law in support of his motion for summary disposition ("Respondent's Motion"), filed on November 10, 2014, to dismiss all of the claims against him set forth in the Order Instituting Administrative Proceedings pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("OIP"), and in response to the opposition to Respondent's Motion ("Division's Opposition") filed by the Division of Enforcement ("the Division") on November 24, 2014.

PRELIMINARY STATEMENT

The Division plainly lacked (and lacks) the basic statutory authority to initiate this proceeding against Mr. Cacchione, pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("the Advisers Act"). The Division has not and cannot demonstrate that Montara Capital ("Montara") ever met the definition of an investment adviser, since Montara never received a dollar of compensation and never provided investment advice to anyone. Further, the Commission has submitted no evidence that at the time the OIP was filed Mr. Cacchione was "associated with" or "seeking to be associated" with an investment adviser.

Determined to proceed regardless, the Division has resorted to hyperbole, distortions and fabrications to fill this wide evidentiary gap. As detailed below, all of these devices fail to provide the Division with the basic jurisdiction it needed to initiate the proceeding. Further, the OIP is also barred by the doctrine of *res judicata* and the five-year statute of limitations pursuant to 28 U.S.C. §2462.

As such, and as fully set forth in Respondent's Motion, the OIP should be dismissed in its entirety.

ARGUMENT

I. THE DIVISION LACKS AUTHORITY TO PROCEED UNDER SECTION 203(f) OF THE ADVISERS ACT.

Section 203(f) limits the Division's authority to bring actions seeking remedial relief to individuals who are ***"associated"*** or ***"seeking to become associated"*** with an investment adviser. 15 U.S.C. §80b-3(f) (emphasis added). Since the Division cannot demonstrate that Mr. Cacchione is either "associated" or "seeking to become associated" with an investment adviser, it lacked jurisdiction to bring this action and still lacks it now. Thus, this action should be dismissed.

A. Montara Does Not Meet the Statutory Definition of an Investment Adviser.

The Division's purported basis for jurisdiction under 203(f) is Mr. Cacchione's actions with respect to Montara. However, on July 21, 2014 – over two months prior to the filing of the OIP – Montara withdrew its application with the Commission. As previously detailed, Montara has no present business operations, ***has never performed any investment advisory services, and has received no revenue since it was founded.*** Thus, Montara is not an investment adviser as that term is defined in Section 202(a)11 of the Advisers Act[1] and was not an investment adviser at the time the OIP was filed.

Montara's ADV filings further support the fact that it does not meet the definition of an investment adviser. Montara's initial ADV filing notes that it had ***zero dollars in assets under management***; it had ***zero dollars in client funds***; and that the private fund it was planning on

[1] The Advisers Act defines an investment adviser as, "any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities ..." *See* Section 202(a)11 of the Advisers Act.

being the adviser to had a ***gross asset value of zero***. (*See* Montara's Form ADV, pgs. 12, 25 and 18, attached as exhibit M to the Division's motion for summary disposition (emphasis added)). Further, Montara's Form ADV-W that it submitted on July 21, 2014 – just 26 days after its Form ADV was submitted – explicitly stated that the reason for its withdrawal was, "***Did not engage in advisory business.***"[2] (*See* Montara's Form ADV-W, p. 3, attached as exhibit R, to the Division's motion for summary disposition (emphasis added)).

The Division attempts to rely on additional Montara documents, but these other materials are irrelevant. The screenshot of "Montara's website" – which is the only page on the website – shows a 64 year-old quotation from a long-dead former baseball executive. It has nothing whatsoever to do with providing investment advice for compensation.

The fact that Montara and the Montara Capital Fund are still "active" is also immaterial, since maintaining an entity by itself establishes nothing. Rather, the Division must show that Montara is engaged in the investment advisory business for compensation. However, the Division has not and ***cannot establish that Montara ever received a dollar in compensation***. Further, the Division has not and cannot establish that Montara ever advised ***anyone,*** "as to the advisability of investing in, purchasing, or selling securities." Therefore, Montara has not met either part of the investment adviser definition under 202(a)(11).

[2] Moreover, while the Division argues in its' Reply in Support of its Motion for Summary Disposition, that "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," Division's Reply in Support of Motion for Summary Disposition, p. 4, in fact, Montara's clear statement on the ADV-W that it, "Did not engage in advisory business," clearly does support this inference. Moreover, the Division has submitted no evidence demonstrating any attempts by Mr. Cacchione to associate with any unregistered investment advisers, nor any evidence that Montara provides any investment advisory services as an unregistered investment adviser.

B. Since Montara Withdrew its Application to Become a Registered Investment Adviser, Mr. Cacchione Was No Longer Seeking to Become Associated With an Investment Adviser at the Time the OIP Was Filed.

Moreover, once Montara withdrew its application with the Commission, by filing a Form ADV-W on July 21, 2014, Montara (and Mr. Cacchione) was no longer seeking to become associated with an investment adviser. Section 203(f) does not authorize actions against individuals who had ***sought to become associated*** with an investment adviser. Thus, Mr. Cacchione past efforts – in July 2014 or earlier – are insufficient; they do not provide the Division with 203(f) jurisdiction.

Mr. Cacchione has made no efforts to associate with any other investment advisers since his release from prison. Accordingly, Mr. Cacchione is not "associated with" an investment adviser nor is he "seeking to be associated" with an investment adviser. Thus, the Division lacked statutory authority to institute this action under Section 203(f) of the Advisers Act.

C. Congress Specifically Narrowed the Division's Jurisdiction Under 203(f).

While the Division speculates about what Congress' intent was regarding Section 203(f), the actual history of the statute demonstrates that Congress clearly intended to limit the Division's jurisdiction to bring 203(f) actions. As originally enacted, Section 203(f) authorized the Division to censure, or to suspend or bar from association with an investment adviser, "any person" who had, for example, been convicted of certain crimes. Investment Company Amendments Act of 1970, Pub. L. 91-547, 84 Stat. 1432. However, in 1975, Congress narrowed the class of persons against whom 203(f) proceedings could be brought by changing, "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, 89 Stat. 168. In 1987, 203(f) was amended further to refer to, "any person associated, seeking to become associated, or,

at the time of the alleged misconduct, associated or seeking to be associated with an investment adviser." Securities and Exchange Commission Authorization Act of 1987, Pub. L. No. 100-181, 101 Stat. 1263.

Thus, as demonstrated by the legislative history, Congress intended to and did establish a gateway test: the Division cannot institute a 203(f) action against any person (even if they previously committed certain crimes); only a person either associated with an investment adviser, or seeking to be associated with an investment adviser can be the subject of a 203(f) action. Since, the Division cannot pass this gateway test, it does not have the jurisdiction it needs to bring this action. [3]

Further, it is not Mr. Cacchione's "whims" that prevent the Division from taking action here, it is Congress' clear actions. If Congress had wanted the Division to have the power to bring 203(f) actions against persons "***previously seeking to be associated*** with an investment adviser" or persons "***who had sought to become associated*** with an investment adviser," it would have drafted the revisions to 203(f) accordingly. Alternatively, Congress could have simply left 203(f) in its' 1970 form, whereby the Division could have brought a 203(f) action against any person convicted of certain crimes, regardless of their connection to an investment adviser.

However, Congress choose neither of these options, and instead limited 203(f)'s reach to individuals "associated" or "seeking [present tense] to become associated" with an investment adviser. Since Congress choose to narrow the scope of persons subject to 203(f) actions, that decision must be given meaning.

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[3] The sixty-one year-old Supreme Court case that the Division cites to is completely irrelevant. As the Division notes, the *W.T. Grant* case concerned the voluntary cessation of "allegedly ***illegal conduct.***" (Division Opposition, p. 3, n.3) (emphasis added). Montara and Mr. Cacchione's voluntary withdrawal of Montara's legal application to register as an investment adviser can in no way be equated with any sort of cessation of illegal conduct.

D. <u>The Division's Additional Jurisdictional Arguments Also Fail.</u>

The Division continues[4] (without success) to try and use Mr. Cacchione's pleadings and legal representation as evidence of Mr. Cacchione's purported intent to be associated with an investment adviser that it otherwise cannot demonstrate.

First, the Division misleadingly combines an argument from Respondent's Motion with a citation to a Supreme Court ruling to exaggerate Mr. Cacchione's assertions in his motion.[5] Next, the Division argues that Mr. Cacchione's hiring of counsel and participating in settlement discussions with the Division somehow provides the Division with "indisputable evidence" that Mr. Cacchione is seeking to be associated with an investment adviser.

The goal of these meritless arguments is that Mr. Cacchione should just voluntarily consent to an ***additional <u>lifetime</u> bar*** – despite the fact that the Division has no relevant or admissible evidence to demonstrate it has jurisdiction to bring this proceeding. Indeed, the Division's outrageous arguments attempt to penalize Mr. Cacchione for entering into settlement discussions with the Division and for exercising his legal right to present a defense and require the government to prove its case. –

Further, the Division misleadingly seeks to compare Mr. Cacchione's purported present intentions with his concerns over an additional ***lifetime*** bar. The Law Judge should disregard this improper and troubling argument.

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[4] *See* Respondent's Opposition to the Division of Enforcement's Motion for Summary Disposition, part I(E) (discussing the Division's attempt to use Mr. Cacchione's "vigorous defense of these proceedings" as demonstrating his intent to become associated with an investment adviser); *see also* Division of Enforcement's Motion for Summary Disposition, p. 11.

[5] The Division states that Mr. Cacchione, "complains 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.'" Division Opposition, p. 3 (emphasis added). However, two of these three "statements" were made by Mr. Cacchione in Respondent's Motion as a citation to the Supreme Court's ruling in the *Gabelli* case, rather than as factual assertions relating as to this proceeding's impact on Mr., Cacchione. *See* Respondent's Motion, p. 11.

The Division next relies on a completely speculative hypothetical, arguing that:

> "If Cacchione were to defeat these proceedings simply based on his self-serving statement that he 'no longer' seeks to become associated with an investment adviser, which he may change at will, nothing will prevent him from resuming his efforts to associate once these proceedings are complete. Indeed, the above statements in his motion seem to indicate that this is his plan. This in turn would force the Division to expend further Commission resources to investigate and bring another enforcement action which Cacchione can then defeat again with another declaration that he 'no longer' seeks to associate."

(Division's Opposition, p. 3). In addition to being unfounded and purely speculative, this hypothetical is absurd. The notion that Mr. Cacchione would seek to play some sort of game of continuously seeking to be associated and then withdrawing this intent, just as the Division brings another enforcement action is ridiculous. This hypothetical argument with non-existent and unsupported concerns should be completely disregarded by the Law Judge.[6]

In short, Mr. Cacchione does not have to make "an end-run around Section 203(f) and these proceedings," since the Division has failed to establish the factual predicates it needs to have 203(f) jurisdiction in this matter. Since the Division has not demonstrated that Montara ever met the definition of investment adviser and has failed to submit any relevant or admissible evidence demonstrating that Mr. Cacchione "is associated" or "is seeking to be associated with an investment advisor," the OIP should be dismissed.

II. THE DIVISION'S CLAIM IS BARRED BY RES JUDICATA.

The Division alleges the doctrine of *res judicata* does not preclude this action because the Division was "essentially foreclosed" from seeking collateral bars pursuant to the decision by the D.C. Circuit in *Teicher v. SEC,* 177 F.3d 1016 (D.C. Cir. 1999). (Division's Opposition, pgs. 4-

[6] Moreover, as seen in this action, virtually the entire Division file is from Mr. Cacchione's earlier civil and criminal cases. Thus, while the speculative, hypothetical additional Division action would never occur, even if it did, it would undoubtedly be based on the same prior cases, requiring very little, if any, additional "investigation." Further, any purported burden from having to bring a hypothetical additional enforcement action should be disregarded since the Division did not have the statutory authority to bring this action in the first place. *See* Part I, *supra.* Moreover, since Mr. Cacchione was not providing any investment advisory services at the time of the OIP, there was no purported threat to the investing public that could possibly be cited to by the Division.

5). However, as outlined below, the Division is overstating the preclusive effect of the *Teicher* decision.

Prior to the Teicher decision, the Commission had clearly determined that it had authority to impose collateral bars. Specifically, the Commission held:

> "Section 15(b)(6) does not explicitly state that, in an administrative proceeding brought pursuant to that section, we can impose a bar from association with entities regulated under another securities statute. Nor does Section 15(b)(6) prohibit such a sanction. Rather, Section 15(b)(6) simply provides that we "may place limitations on the activities or functions" of persons who have committed certain acts. We believe that this "place limitations" language is broad enough by its terms to permit the imposition of a collateral bar."

In the Matter of Meyer Blinder, File No. 3-8305 (S.E.C. Oct. 1, 1997).

While the *Teicher* court disagreed with the Division's opinion that it had the authority to issue a collateral bar, the authority of the Commission to implement a collateral bar was not completely foreclosed by the *Teicher* decision.[7] For example, after *Teicher* and pre-Dodd-Frank,[8] there are several instances where the Division requested collateral bars under similar circumstances as the instant matter. *See Ghysels*, File No. 3-13481 (S.E.C. Dec. 11, 2009) (issuing a collateral bar based on Respondent's conviction involving fraud). Further, there are several matters where the Commission removed collateral bars and made no reference to the *Teicher* case, or to it being controlling precedent, despite the fact that at least one of individual respondents had cited to it. *See Lewis*, File No. 3-7370 (S.E.C. Jun. 10, 2005) (vacating a collateral bar on the basis of a Presidential pardon); *see also Comas*, File No. 3-9803 (S.E.C. June 18, 2004). If the *Teicher* case were as controlling or definitive as the Division now says it

[7] The *Teicher* opinion only applied to the D.C. Circuit of Appeals, it was not binding precedent on any of the other twelve circuit courts of appeals.

[8] The Dodd-Frank Act was enacted on July 21, 2010, and provided the Division with clear statutory authority to implement collateral bars under the Exchange Act and the Adviser Act. *See* Dodd Frank Act § 925. Thus, the *Teicher* opinion was overruled.

was, certainly such Commission decisions would have included an analysis, or at least a reference to the case.[9]

Because *Teicher* was not absolute controlling precedent, contrary to Division's contention otherwise, the Division could have sought a full collateral bar against Mr. Cacchione's as part of its 2009 administrative proceeding – however, it did not. Accordingly, the Division's claims are barred by the doctrine of *res judicata*, which prohibits the Division from re-litigating issues that could have been raised in a previous proceeding.

III. THE PROCEEDING IS TIME BARRED UNDER 28 U.S.C. §2462.

The Division argues that 28 U.S.C. §2462 does not apply to this action because the remedies sought are remedial. (Division's Opposition, pg. 6). Despite the subjective "remedial" label that the Division seeks to attach to this proceeding, the test for determining whether the proceeding seeks punitive sanctions (and therefore subject to a five year statute of limitations under §2462) is an objective one. If, viewed objectively, the proceeding is aimed at punishing and labeling the Respondent as a wrongdoer; or would stigmatize the Respondent and destroy his career, then the proceeding is one seeking punitive relief and is subject to § 2462's five-year statute of limitations. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013); *SEC v. Bartex*, 484 Fed. Appx. 949, 957 (5th Cir. 2012); *Johnson v. SEC*, 87 F.3d 484, 488-89 (D.C. Cir. 1996). "Penalties are intended to punish culpable individuals, not to extract compensation or restore the status quo." *Gabelli,* 133 S. Ct. at 1221 (citations and internal quotations omitted)). Further, sanctions that may be remedial in some cases are punitive in others. *See Bartex,* 484 Fed. Appx. at 957. Accordingly, the ALJ must consider whether a sanction is a penalty for purposes of §2462 on a case-by-case basis. *Id.*

[9] Compare the Commission's ignoring of the *Teicher* case with the repeated citations to the *Steadman* case and the *Steadman* factors in prior Commission decisions; if *Teicher* was definitive as the Division suggests, the Commission would have referenced it as so.

In the present matter, the Division purports to characterize the relief as "remedial" by asserting that their "case against Cacchione centers on his unfitness to remain in the securities industry and the significant risk he poses to the public." (Division's Opposition, pg. 7). But, this proceeding is not based on the likelihood of recurrence or need to protect the public – the Division has presented no evidence that a bar from the investment advisory industry is necessary to protect the public. Importantly, the Division did not conduct any interviews with Mr. Cacchione relating to Montara or his efforts to obtain employment in the investment advisory industry following his incarceration. Tellingly, the only new "evidence" submitted by the Division in this matter is Montara's now withdrawn Form ADV a two page print-out of Montara's (inactive) web home-page and a couple of (irrelevant) Montara licensing filings.[10] Further, the Division's voluminous investigation file consists almost entirely of documents from the 2009 proceedings.

Moreover, at the time of the filing of the OIP, neither Mr. Cacchione nor Montara were providing investment advisory to anyone. Thus, there was no purported risk to the public at the time the OIP was filed. Therefore, this proceeding has all of the characteristics of a punitive action seeking a penalty, and not a remedial one.

Further, while the Commission in the past has concluded that §2462 is not applicable to associational bar proceedings based on prior criminal convictions, Mr. Cacchione respectfully submits that these prior precedents should be reexamined in light of *Gabelli* and the clear punitive nature of this proceeding. Moreover, not every statutory time limitation supplies an

[10] The Division also attempts to use statements made by Mr. Cacchione's criminal attorney on the eve of his sentencing, about the damage that Mr. Cacchione had done to his career and speculating on what Mr. Cacchione's likely job prospects would be upon his release from prison, as some sort of commitment that he is now purportedly violating. The Division then goes further still stating that Mr. Cacchione's, "s[eeking] to re-enter the financial services industry as soon as he was out of prison," was "directly contrary to those assurances to the District Court," and labels this a "startling about-face." [Division's Opposition, pgs. 1 and 7]. This argument is absurd, distorts the nature of Mr. Cacchione's criminal counsel's comments and should be disregarded by the Law Judge.

alternate statute of limitations to that provided by §2462. *See Proffitt v. FDIC,* 200 F.3d 855, 862 (D.C. Cir. 2000) (holding that six-year statutory restriction on jurisdiction to initiate certain proceedings does not fall within the "as otherwise provided by Act of Congress" exception in §2462).

Finally, the Division's argument that the action is not time-barred because the Division's claim under Section 203(f) accrued, "only earlier this year, when Cacchione sought to be associated with an investment adviser" is false on its face, since the Division has not (and cannot) establish that Mr. Cacchione "sought to be associated with an investment adviser" this year. *See* Part I, *supra.*

As such, the Division's claim is barred by the statute of limitations pursuant to 28 U.S.C. §2462.

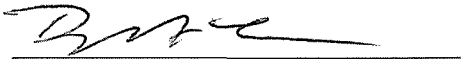
CONCLUSION

Accordingly, for the foregoing reasons, Mr. Cacchione respectfully requests that his motion for summary disposition of this action be granted against the Division pursuant to Rule 250 of the Commission's Rules of Practice, and that the Division's claim be dismissed in its entirety.

Dated: December 3, 2014

Respectfully submitted,

BEUGELMANS, PLLC

By: 

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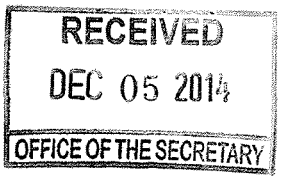

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December 3, 2014

Via Overnight Courier and Facsimile
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Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: In the Matter of David Scott Cacchione,
Administrative Proceeding File No. 3-16165

Dear Mr. Fields:

Pursuant to the above-captioned matter, enclosed is one (1) original and three (3) copies of Respondent David Scott Cacchione's Reply Memorandum of Law in Support of his Motion for Summary Disposition. The Reply was also contemporaneously submitted via facsimile transmission at the number listed above.

Sincerely,

Daren A. Luma

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