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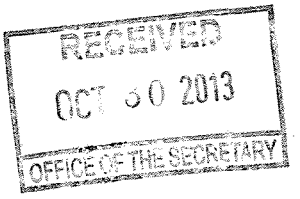
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15308

In the Matter of

JOSEPH CONTORINIS,

Respondent.



RESPONDENT JOSEPH CONTORINIS'S MEMORANDUM OF LAW IN OPPOSITION TO DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY AFFIRMANCE

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Respondent Joseph Contorinis submits this memorandum of law in opposition to the Division of Enforcement's (the "Division's") October 3, 2013 motion for summary affirmance (the "Motion"). Mr. Contorinis respectfully requests that the Motion be denied and that the Securities and Exchange Commission (the "Commission") grant his September 12, 2013 petition for review (the "Petition") of the Initial Decision issued by the presiding Administrative Law Judge ("ALJ") on August 22, 2013 (the "Initial Decision").

PRELIMINARY STATEMENT

It is rare for the Commission to grant a motion for summary affirmance, and this Motion does not present the unusual case in which such relief is warranted. Mr. Contorinis has raised important legal issues in his Petition, and he deserves the opportunity to be heard fully on those issues. Thus, as set forth in Mr. Contorinis's Petition and herein, the Commission should deny the Division's Motion and grant Mr. Contorinis's Petition for at least two reasons.

First, reconsidering the Commission's prior 28 U.S.C. § 2462 precedents in light of the Supreme Court's recent decision in *Gabelli* v. *SEC*, 133 S. Ct. 1216 (2013), is an "important" legal issue that "the Commission should review." Rule 411(b)(2). The reasoning of *Gabelli* calls into question the Division's arguments and the Commission's prior decisions that a follow-on proceeding is timely if commenced within five years—or even ten years—of a conviction or injunction, regardless of the length of time that has passed since the underlying misconduct. Such a rule has the improper effect of replacing the "fixed date when exposure to the specified Government enforcement efforts ends" with an "additional uncertain period [of Government enforcement efforts] into the future." *Gabelli*, 133 S. Ct. at 1221, 1223. This is precisely what *Gabelli* instructs is improper.

Second, in the Initial Decision, the ALJ misapplied the *Steadman* factors to the facts and circumstances of Mr. Contorinis's case, resulting in the imposition of an unwarranted lifetime associational bar. The ALJ erroneously concluded that the conduct at issue was egregious and recurrent. But the trades at issue were made openly, in a single stock, on a few days, over a period of a few weeks, in Mr. Contorinis's otherwise unblemished, twenty-year career in the financial services industry. The Initial Decision also rests on the misplaced conclusion that the respondent's past occupation, and not the actual likelihood of future violations, is more relevant under *Steadman*. This error lead the ALJ to disregard the conclusion of the district court judge who presided over Mr. Contorinis's two-week criminal trial that: "*I don't think there is any chance that you [Mr. Contorinis] are going to commit crimes in the future*." Finally, the ALJ failed to seriously consider imposing any sanction less than a permanent bar.

FACTUAL BACKGROUND

The relevant factual and procedural background is set forth in Mr. Contorinis's Petition. (*See* Petition at 2–5.) After the Petition was filed on September 12, 2013, the Bureau of Prisons transferred Mr. Contorinis from the Federal Correctional Institution Schuylkill in Minersville, Pennsylvania to the Federal Correctional Institution Beckley in Raleigh County, West Virginia, where he currently remains incarcerated. In addition, on October 7, 2013, the Court of Appeals for the Second Circuit heard oral argument in *SEC* v. *Contorinis*, No. 12-1723 (2d Cir.).

ARGUMENT

I. THE STANDARD FOR GRANTING SUMMARY AFFIRMANCE

Granting "[s]ummary affirmance is rare, given that generally [the Commission has] an interest in articulating [its] views on important matters of public interest and the parties

have a right to full consideration of those matters." *Reinhard*, File No. 3-13280, 2010 WL 421305, at *3 (SEC Feb. 4, 2010) (quoting *Cannistraro*, File No. 3-9140, 1998 WL 2614, at *2 n.3 (SEC Jan. 7, 1998)). As a matter of policy:

> [t]he Commission grants virtually all petitions for review. Although Commission review in a particular case can be time consuming, it establishes authoritative precedent applicable to other cases and promotes accountability for, and confidence in, the Commission's adjudicatory process.

60 Fed. Reg. 32,738, 32,774 (June 23, 1995). In fact, the Commission has granted summary affirmance "only a handful of times in the last 30 years." *Urban*, File No. 3-13655, 2010 WL 5092728, at *2 (SEC Dec. 7, 2010) (internal quotation marks omitted). "The Commission will decline to grant summary affirmance upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review." Rule 411(e)(2).

The Division has not met its burden of showing that summary affirmance should be granted here.

II. THESE PROCEEDINGS ARE TIME BARRED UNDER 28 U.S.C. § 2462.

The Division is mistaken in asserting that the Supreme Court's recent decision in *Gabelli* "has no bearing on" the issue presented in Mr. Contorinis's Petition. (Motion at 9.) Rather, *Gabelli* is instructive and persuasive as to the application of statutes of limitations generally, as well as in examining the application of § 2462 and when a claim accrues for the purposes thereof.

The Division does not, and cannot, dispute that the Commission could have initiated an administrative proceeding against Mr. Contorinis in January 2006, when the Fund closed out its position in Albertsons. Under § 2462, that is "the date when the claim first

accrued," and which thus started the Commission's five-year clock. (*See* Resp't Joseph Contorinis's Mem. of Law in Supp. of Mot. for Summ. Disposition ("Contorinis Mem.") at 8; Petition at 8.) Yet, the Division contends that the Commission's cause of action *re-accrued* at the time of Mr. Contorinis's conviction and then again at the time of the injunction. (Motion at 9.) But the Division's re-accrual argument is wholly inconsistent with the spirit of the Supreme Court's recent holding in *Gabelli*. As the Supreme Court just recently affirmed, the standard "first accrual" rule must be applied to § 2462 in order to protect the purpose of statutes of limitations. In *Gabelli*, the Supreme Court explained the importance of starting the limitations period with the misconduct itself, which "sets a *fixed date* when exposure to the specified Government enforcement efforts ends" and advances "the basic policies of all limitations provisions." *Id.* at 1221 (emphasis added and internal quotation marks omitted). The *Gabelli* Court rejected the SEC's proposed discovery rule because "[i]t would leave defendants exposed to Government enforcement action not only for *five years after their misdeeds*, but for an *additional uncertain period into the future*." *Id.* at 1223 (emphasis added).

The rule applied in the ALJ's July 3, 2013 order denying Mr. Contorinis's Motion for Summary Disposition, and also advocated by the Division's Motion, would have a similar effect to applying the discovery rule to § 2462. Such a rule would impermissibly expand the Commission's ability to commence proceedings at an indeterminate date. This is what the Supreme Court flatly rejected in *Gabelli*.

The Division is also incorrect in claiming that applying a "first accrual" rule, consistent with the holding in *Gabelli*, would occasion "significant inefficiency" by "forcing the same facts to be simultaneously litigated" in court and before the Commission. (Motion at 9 n.4.) There is no reason that once commenced, this administrative proceeding could not have

been stayed pending the outcome of the criminal action. Indeed, the Commission's Rules of Practice explicitly authorize stays of administrative proceedings pending parallel criminal proceedings. *See* Rules 210(c)(3), 360(a)(2). In any case, the Commission could have commenced this administrative proceeding following Mr. Contorinis's criminal conviction while still doing so within five years of the underlying misconduct.[1] (*See* Contorinis Mem. at 10–11.)

Based on the foregoing, Mr. Contorinis respectfully submits that any prior decisions on the issue of when a claim for an associational bar accrues should be revisited in light of *Gabelli*. To the extent these proceedings are based on the injunction imposed on Mr. Contorinis, reconsidering the Commission's prior § 2462 precedents in light of *Gabelli* is an important legal issue that the Commission should review. Moreover, while Mr. Contorinis acknowledges that the Commission has concluded that § 2462 is not applicable to associational bar proceedings based on a criminal conviction, *see, e.g.*, *Wall*, File No. 3-11529, 2005 WL 2291407, at *3 (SEC Sept. 19, 2005), Mr. Contorinis respectfully submits that these prior decisions, too, warrant reconsideration. Not every statutory temporal restriction supplies an alternate statute of limitations to that provided by § 2462. *See, e.g.*, *Proffitt* v. *FDIC*, 200 F.3d 855, 862 (D.C. Cir. 2000) (finding that a six-year statutory restriction on the FDIC's jurisdiction

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[1] The Division also errs by suggesting that the "public policy rationale" of *Gabelli* is "not as compelling where, as here, causes of action are based on an underlying criminal conviction or civil injunction," because a respondent in a follow-on proceeding "would have already litigated the relevant facts during the applicable statute of limitations period." (Motion at 9 n.4.) As an initial matter, the appropriateness of an associational bar is a "relevant fact[]," and that fact would never be litigated in a criminal or injunctive proceeding. The respondent also would not necessarily have litigated other relevant facts during the limitations period because the Commission routinely argues that follow-the-law injunctions, such as the injunction here, are not governed by *any* statute of limitations. (*See* Contorinis Mem. at 9–10 (citing Brief of the SEC, *SEC* v. *Quinlan*, 373 F. App'x 581 (6th Cir. 2010) (No. 08-2619), 2009 WL 1209317; *SEC* v. *Kelly*, 663 F. Supp. 2d 276, 286 (S.D.N.Y 2009)).)

to initiate certain proceedings does not fall within the "as otherwise provided by Act of Congress" exception in § 2462).

III. A LIFETIME ASSOCIATIONAL BAR IS NOT WARRANTED.

For the reasons set forth in the Petition and herein, the Motion also should be denied and the Petition granted because the ALJ's determination that permanently barring Mr. Contorinis from the industry is in the "public interest" was erroneous. Rule 411. (*See* Petition at 9–13.)

A. There Is No Likelihood of Future Violations.

Both the Initial Decision and the Division's Motion characterize the final *Steadman* factor as the "likelihood that the respondent's *occupation* will present opportunities for future violations," rather than the "likelihood of future violations." (Initial Decision at 8 (emphasis in original); *see also* Motion at 14–15.) Contrary to the emphasis added by the Initial Decision and the Division's assertions, it is the actual likelihood of future violations, and not just the respondent's former occupation, that is—and should be—the touchstone of this *Steadman* factor. *See, e.g.*, *Gunderson*, File No. 3-12653, 2009 WL 4981617, at *5–6 (SEC Dec. 23, 2009) ("The fact that [respondent] continued to violate the federal securities laws, in defiance of the district court's permanent injunction and penny stock bar, demonstrates a strong likelihood of [respondent] committing future violations. As the district court found, 'there is . . . much cause to expect future misconduct by [respondent].'"); *Michaud*, File No. 3-7613, 1992 WL 198035, at *2 (July 20, 1992) (Murray, A.L.J.) (imposing an associational bar "to prevent a reoccurrence of these illegal activities"). Any respondent challenging the imposition of a lifetime associational bar is necessarily interested in employment connected to the securities industry. Accordingly, any respondent's occupation would necessarily "present opportunities for future violations" of

the securities laws, thus rendering this *Steadman* factor as interpreted by the ALJ and the Division virtually meaningless.

Moreover, in Mr. Contorinis's specific case, there is insufficient evidence in the record to conclude that there is *any* likelihood of future violations, regardless of Mr. Contorinis's occupation. (Petition at 10–12.) As Judge Sullivan stated at Mr. Contorinis's sentencing hearing: "I don't think there is any chance that you are going to commit crimes in the future. . . . There is not much dispute about that." (Declaration of Farrah R. Berse, dated July 19, 2013 ("Berse Decl. II") Ex. 3 at 56.[2]) And the staleness of the underlying conduct weighs strongly against any suggestion that Mr. Contorinis poses a present threat to the public that would warrant imposing a lifetime associational bar. *See, e.g.*, *Proffitt*, 200 F.3d at 861–62 (concluding that a long-past offense alone is not determinative of a defendant's risk to the public). Here, *more than seven years* have passed since the conduct at issue ended in January 2006, and with no further incident, even though the government did not take any action against Mr. Contorinis until three years later, in February 2009.

Where, as here, there is no risk of future violations and no risk is posed to the public, it makes no sense to conclude that this *Steadman* factor weighs in favor of a permanent bar based solely on the nature of the respondent's occupation. Thus, the proper interpretation and application of this factor—both in Mr. Contorinis's case and more broadly—warrants review.

B. The Initial Decision Does Not Adequately Address a Lesser Sanction.

In the Initial Decision, the ALJ erred in imposing a lifetime associational bar, rather than a bar for a term of years. (Petition at 12.) The ALJ rejected a bar for a term of years

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[2] References are to documents that were part of the record below. Mr. Contorinis can provide copies of any of these documents at the Commission's request.

on the ground that a five-year bar "would be no bar at all, because it would run essentially concurrently with [Mr. Contorinis's] imprisonment." (Initial Decision at 8.) As Mr. Contorinis's projected release date is December 27, 2015, or approximately two years from now, and his actual release date could be even earlier—facts that the Division does not and cannot dispute (*see* Motion at 11 n.5)—the ALJ's conclusion that a five-year bar would run concurrently with Mr. Contorinis's imprisonment and therefore be "no bar at all" was erroneous and warrants review.

The ALJ's erroneous conclusion further warrants review because he did not explain why any sanction other than a lifetime associational bar would not be sufficient to discourage others from engaging in the same conduct as Mr. Contorinis. This is particularly the case where, as here, the bar is being imposed on top of the 72 months' incarceration, 24 months' supervised release, and significant monetary sanctions already imposed on Mr. Contorinis, including at least $427,875 in forfeiture and a $1,000,000 civil penalty, as well as other potential amounts that are currently on appeal or under review on remand (including $7.26 million in disgorgement, $2.485 million in prejudgment interest, and possible additional criminal and civil penalties).

The Commission has ordered less-than-permanent, non-collateral bars following criminal convictions. *See Rosenthal*, File No. 3-8642, 1998 WL 549558 (SEC Sept. 1, 1998) (imposing a five-year, non-collateral bar); *Paul*, File No. 3-6271, 1985 WL 548579 (SEC Feb. 26, 1985) (modifying bar to permit right to reapply after two years in a non-proprietary, non-supervisory capacity). The ALJ's failure seriously to consider any sanction other than a lifetime associational bar is a fundamental error warranting review.

C. The Conduct Was Not Egregious or Recurrent.

The ALJ's findings that Mr. Contorinis's misconduct was egregious and recurrent are erroneous. (*See* Petition at 12–13.) The conduct at issue here was an anomalous episode, involving a single stock, that spanned a very short period in Mr. Contorinis's otherwise unblemished, twenty-year career in the securities industry.[3] Mr. Contorinis did not engage in any deception or effort to conceal any of the relevant conduct—neither the underlying communications nor the trading itself. And as the Honorable Richard J. Sullivan stated at Mr. Contorinis's sentencing hearing:

> There is no indication, as is the case in other cases in this courthouse, where people have persistently over time repeatedly for years engaged in a steady practice of insider trading. There is no evidence really of that in this case here. It was relatively isolated.

(Berse Decl. II, Ex. 3 at 58.) Overall, the conduct at issue does not reflect those characteristics that often accompany insider trading and that would elevate the conduct to the level of recurrent or egregious.[4]

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[3] Prior to the actions underlying this proceeding, Mr. Contorinis had never been the subject of disciplinary action of any kind: regulatory, civil, or criminal.

[4] In its Motion, the Division contends that Mr. Contorinis's conduct was recurrent based on purported tips regarding Albertsons that were not alleged in the OIP and on which Mr. Contorinis was not convicted of trading. (*See* Motion at 13.) The Division cites Mr. Stephanou's testimony relating to communications on November 28, 2005; December 7, 8, 21, and 22, 2005; and January 11 and 17, 2006. (*See id.*) But, Mr. Contorinis was convicted only of trades on December 22 and January 11. (*See id.* at 4 (citing Division Ex. F).) Indeed, the Division fails to mention that Mr. Contorinis was *acquitted* of the two counts related to trades on December 7, the only other trades for which he was charged. (Division Ex. F.)

CONCLUSION

For the foregoing reasons and those stated in the Petition, Mr. Contorinis respectfully requests that the Commission deny the Division's Motion and grant his Petition.[5]

Dated: New York, New York
October 29, 2013

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[5] Mr. Contorinis also reserves his right to seek judicial review on the Dodd-Frank retroactivity issue. (*See* Petition at 5 n.3.)