United States of America
Before the Securities Exchange Commission

Administrative Proceeding File 3-15737
In the Matter of Thomas C. Gonnella, Respondent

POST-HEARING BRIEF FOR
RESPONDENT THOMAS C. GONNELLA

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Introduction

Willfulness and parking are the *sine qua non* of this case. While the anti-fraud statutes can be violated by mental states that do not rise to willfulness, *see e.g.*, *Aaron v. SEC*, 446 U.S. 680, 686-87 (1980), the Division alleged only that respondent Thomas C. Gonnella willfully violated the law. Willfulness means that Mr. Gonnella, by his conduct, must have acted with knowledge that his actions were unlawful, and have thereby intended to violate the law. *See Ratzlaf v. United States*, 510 U.S. 135 (1994); *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005); *United States v. Dorge*, 961 F.3d 1030 (2d Cir. 1992). While the Division's failure to prove willfulness dooms its claim of parking against Mr. Gonnella, it also dooms the Division's ancillary allegations such as adjusted trading, inter-positioning (use of an inter-dealer broker), and general violations of fiduciary duty, all of which are inextricably intertwined with and predicated on the Division's insufficient evidence of parking. Instead, the Division repackaged Mr. Gonnella's purported circumvention of Barclays Bank's internal aged inventory policy, which even Barclays did not find to be a violation of the law after a careful investigation conducted by experienced compliance officials with an obligation and powerful incentive to identify and report any such violation.

Parking, like any prohibited practice, must be clearly defined so that market participants know what it is that they may not do, and so they are not held to task for conduct that no reasonable person, especially one as highly regarded as Mr. Gonnella, would recognize as illegal. The Division here invites a definition of parking that captures conduct that does not truly risk the harm for which the practice is prohibited, and is based on inaccurate and unrealistically

nefarious interpretations of everyday market activity that is best left to the supervision of broker-dealers.

The Division's inference of malfeasance is largely based on testimony at the hearing of Gleacher Descap's Ryan King, Mr. Gonnella's counter-party in the transactions at issue, and Matthew Miller, Mr. Gonnella's supervisor at Barclays. Notwithstanding the Division's reliance on Mr. King's testimony that he used coded language in certain of his messages to Mr. Gonnella to disguise parking, the Division introduced no messages of Mr. King in any other transaction to enable the Court to conclude that Mr. King's choice of language with Mr. Gonnella was any different from his usual way of communicating. Further, evidence at the hearing of *Mr. Gonnella's* messages to traders other than Mr. King, coupled with Mr. Gonnella's isolated resort to an off-line communication when he truly meant to keep something from his supervisors, establishes that he did not believe that he and Mr. King were speaking in code. As for Mr. Miller, the convoluted narrative and selective recalls to which he testified establish an attempt to protect himself from any claim that he failed properly to supervise Mr. Gonnella, not any true contemporaneous or subsequent belief that Mr. Gonnella was willfully violating the law; in fact, Mr. Miller expressly adopted Barclays' report to FINRA that Mr. Gonnella had violated only an internal policy.

This litigation may not be the proper forum to debate the line between properly vigorous regulatory enforcement which promotes compliance, and regulatory over-reaching and over-reaction which creates an atmosphere of uncertainty and fear. If the latter is occasionally a byproduct of the former, it helps explain at least some of the evidence in this case: Barclays' expeditious termination of Mr. Gonnella despite support for him among the senior executives in

his chain of command; Mr. Miller's self-serving rationalizations and fabrications under oath at the hearing to protect himself from regulatory action notwithstanding Barclays view that Mr. Gonnella did not violate the law; and Levent Kahraman's courageous decisions to hire Mr. Gonnella despite his termination for cause from Barclays, and to testify on Mr. Gonnella's behalf against the interests of the agency that regulates Kahraman's burgeoning business.

Whether the charges against Mr. Gonnella crossed the line between appropriate regulatory enforcement and counterproductive regulatory overreaching, the Division did not prove that Mr. Gonnella willfully committed any violation of the law, or that his attempt to comply with Barclays' aged inventory policy constituted the prohibited practice of parking.

A. Mr. Gonnella and Barclays Aged Inventory Policy

In 2011, Mr. Gonnella was a 26 year-old junior bond trader at Barclays [Tr. 546, 788], considered conscientious and fully compliant with Barclays' policies and regulations [Tr. 1223, 1255, 1266-67], and was trusted by his colleagues and clients. Tr. 935-38. Mr. Gonnella was so highly regarded that Morgan Stanley offered him a job with guaranteed compensation of at least $1 million, but Mr. Gonnella declined the offer because he liked his work and colleagues at Barclays. Tr. 797-98. Even after the conduct at issue in this matter came to light, senior people in Mr. Gonnella's chain of command did not want to fire him, but Barclays' compliance department left them no choice. Tr. 1319; *see* 859. Barclays' in-house counsel told Mr. Gonnella that, after interviewing his colleagues and supervisors, they were perplexed because the allegations against him were at such odds with the positive perception of Mr. Gonnella's integrity and good character. Tr. 856.

Notwithstanding Mr. Gonnella's termination for cause, he was thereafter hired by KGS Alpha, a prestigious trading firm founded by Mr. Kahraman, a long-time former Barclays employee [Tr. 1276-79], in part on the recommendation of Mr. Gonnella's former superiors at Barclays. Those Barclays executives, including Tom Hamilton, Scott Wede, Chris Haid, and John Cully, told Mr. Kahraman in substance that, "Tom is a great guy. Once the compliance officer, compliance guys took over, there was nothing you could do for him." Tr. 859, 1318-1319.

Mr. Gonnella's termination for cause from Barclays did not discourage Mr. Kahraman from hiring him for at least two reasons: Mr. Kahraman's view that the regulatory atmosphere over the last five years has resulted in an increasing number of arbitrary terminations for cause, and that firms sometimes terminate employees for cause to avoid paying deferred compensation. Tr. 1282-83. A significant part of Mr. Gonnella's compensation had been deferred, which he was not paid because of his termination. Tr. 1092-93. After Mr. Gonnella began working at KGS, his colleagues there were "blown away" by the Division's charges because they were so contrary to their firsthand impressions of Mr. Gonnella as an "exemplary employee." Tr. 1286. As Mr. Kahraman explained when asked about Mr. Gonnella's honesty, integrity and trustworthiness, "Well, I would take him back today [from his administrative leave upon the Division's filing of its charges]. I don't know what else to tell you, if that's enough. We would take him back today. Or if he decides to go into another business, I would invest in it." Tr. 1286-87.

At Barclays, Mr. Gonnella made markets in esoteric asset-backed securities [Tr. 679, 933-34], fixed income vehicles "collateralized by a specific or discrete pool of underlying

assets." Tr. 58. They were known as "esoteric" because they did not fit into other categories of asset-backed securities like mortgage or student loans or credit card debt, and were more of a catchall for other types of commercial obligations. Tr. 66-68, 933-34. The market for esoteric asset-backed securities was highly illiquid [Tr. 214, 245, 938, 943-44, 950-52], with a limited number of potential counter-parties and active traders.[1] Tr. 374-75, 956, 1130, 1385-86. For example, Mr. Gonnella estimated there were a total of ten traders at the time in Bayview bonds, one of the bonds at issue. Tr. 746. Among the traders supervised by Mr. Miller, Mr. Gonnella was the most profitable, and by a wide margin. Tr. 794. For example, his profits for 2011, up to his termination in early November, amounted to over $17 million, almost double the other traders in Mr. Miller's group. Tr. 790-94.

Barclays had an aged inventory policy which was expressly intended to encourage traders to trade or to "help optimize balance sheet usage through timely turnover of inventory" deemed "stale." DX 1. By definition, complying with the policy would mean avoiding the charge. Tr. 788-89, 794-95, 902. The policy in some respects was clear. For example, the policy clearly stated that, if a trader held a security for more than three months, he would accrue reversible charges against his profits. After seven months, the charge became irreversible and the trader incurred a monthly charge of .5% of the bond's market value. Tr. 102-104, 146; DX 1. In other respects, the policy was not clear. Kapil Agrawal, a Ph.D. employed as an analyst by the

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[1] Within this market, there was typically little or no negotiation over price because parties traded within the prevailing bid-ask spread. Tr. 507, 1164-65. Mr. Gonnella explained at the hearing that the absence of negotiation for esoteric securities was not unusual. Tr. 545, 566, 776-77. While Mr. Miller testified to his belief that negotiation over price was common [Tr. 944], he had not actually traded securities during the three years preceding the trades at issue and had little if any experience trading esoteric securities. Tr. 918-27, 1129-31, 1333, 1380-81.

SEC and himself a former experienced Barclays trader [Tr. 14-16], concluded, even with the benefit of the Division's investigation of this matter, that Barclays' memorializations of the aged inventory policy provided that aged securities were transferred to management after seven months [Tr. 99-103, DX 401], but Dr. Agrawal, notwithstanding his credentials and experience, misinterpreted the policy: only the charge levied for aged securities was so transferred. Tr. 129-38, 601, 966, 1097-99.

In fact, Mr. Gonnella held positions in securities for far longer than seven months, and sometimes sold such aged securities at substantial gains to Barclays [Tr. 129-38, 134-35, 137, 141-42, 762, 793, 796, 872; DX 11, 24], which vastly outweighed any aged inventory charge to his profits. Tr. 887-88. Further, notwithstanding various memorializations of the policy, Barclays found it necessary at an annual compliance meeting in early November 2011 to explain that a trader did not comply with the policy by selling a security before an aged inventory charge became irreversible, but then reacquiring the security thereafter. As explained below, that compliance meeting prompted Mr. Gonnella to flag the issue to his compliance officer, and it prompted Mr. Miller's escalation of the issue to his superiors and ultimately Mr. Gonnella's termination.

Aged inventory charges had no or virtually no effect on Mr. Gonnella's annual compensation reviews, which were based on a number of factors, including his age, title and tenure with the firm, and whether he supervised anyone. Tr. 474, 787, 792. Mr. Gonnella was not concerned about the effect of aged inventory charges to his compensation because his profits were so substantial. Tr. 477-78, 517. He sought to move securities before holding them for seven months because he understood that it was Barclays policy that he do so. Tr. 472, 476.

B. Mr. Gonnella's Dealings with Gleacher's Ryan King

Between May and November 2011, Mr. Gonnella sold to and later repurchased twelve bonds from Mr. King, the head trader of asset-backed consumer securities at Gleacher [Tr. 187-88], a regional broker-dealer. Mr. Gonnella and Mr. King never agreed that Mr. Gonnella would later purchase the bonds; Mr. King did not buy all the bonds offered him by Mr. Gonnella [Tr. 521-22; DX 20, 23]; they never discussed the price at which the bonds might be later purchased; and Mr. Gonnella always paid market prices for the bonds when he bought them back from Mr. King. Tr. 860-61, 1048. On one of the bonds, Gleacher took a loss after repeatedly asking if Mr. Gonnella intended to purchase the bond and threatening in substance to get him fired if he did not make the purchase. Tr. 634, 639; DX 35, 41, 401. Before the trades at issue, Mr. King and Mr. Gonnella had done one trade that Mr. King had initiated. Tr. 207-09. On that occasion, Mr. King expressed interest in trading in esoteric asset-backed securities and picked Mr. Gonnella's brain about an aircraft bond and "how it worked" before purchasing it, a trade on which Mr. King ultimately took a loss. Tr. 209-10, 238-40. That trade helped establish that Mr. King had a genuine interest in esoteric bonds, and was not perceived as just a temporary interest in them.

On May 31, 2011, Mr. King was one of at least five traders with whom Mr. Gonnella communicated, soliciting interest in purchasing four bonds issued by Bayview, referred to as "BAYC." The messages said, for example, that Mr. Gonnella "wanted to see if you had any interest in any of the 4 bonds I'm looking to turn over today . . . . just a month end thing, so I think I'll be higher on these bonds later in the wk" (DX 22), or that he was "looking to turn these 4 bonds over . . . so if any of them catch your eye, I'd likely sell them cheaper than usual today.

And be a higher bid later in the wk" (DX 21). Tr. 39, 487, 749-50, 754, 759-60, 763-66; DX 21 and 22, GX 5A and 5B. Mr. Gonnella did not believe it was unusual to indicate a likely bid shortly thereafter, nor that doing so created any agreement or pre-arrangement. Tr. 837. Because the universe of traders and potential counter-parties in the esoteric bonds was so small, it was not at all unusual to trade the same bonds back and forth with the same counter-parties. Tr. 772, 777-78. In fact, it was an inevitable consequence of the limited number of participating counter-parties.

In Mr. Gonnella's email to Mr. King (DX 20), he wrote as follows:

> Hey Kinger . . . not sure you've ever traded bayc's , or looked at them, but have 4 small bonds that I'm looking to turnover today for good ol' month end/aging purposes . . . I'll shoot them over. If any look interesting to you or you want take a stab at any, let me know . . . . I like these bonds, own a lot of different bayview mezz/sub position, and would more than likely have a higher bid for these later this wk when the calendar turns . . . .

Whether Mr. Gonnella believed that any particular Barclays employee might review his communications at any particular time, he knew that his various communications with Mr. King (and other counter-parties) were the subject of monitoring, retention of the communications, or both. Tr. 221, 502, 555, 624, 1234. Mr. Gonnella nonetheless made clear in communicating with Mr. King and others that his purpose was to move securities to comply with Barclays' aged inventory policy ("for good ol' month end/aging purposes"), and that he had an interest in reacquiring them quickly if permitted by circumstances (such as available capital, market price of the securities and a counter-party's continued retention of and willingness to sell them). Mr. Gonnella's expressions of purpose and intent were undisguised.

When Mr. Gonnella four months later ultimately meant to communicate something he wished to keep from his superiors, he did not use code, but texted Mr. King off-line. Tr. 624-25; DX 46. Mr. Gonnella knew that off-line communications violated Barclays' policy [Tr. 588], but believed it was a minor infraction that would not result in any significant sanction given the context of the transaction and text at issue and his exemplary performance as an able trader and conscientious employee. Tr. 912. Further, apart from the Division's failure to prove that Mr. King's style of language in his communications with Mr. Gonnella was any different from his communications with others in other contexts, the language used in the messages by Mr. King (and Mr. Gonnella for that matter) would have been far too transparent to the type of experienced professional presumably reviewing the communications to be reasonably considered a coded attempt at subterfuge. More, Mr. King did not even attempt to explain how Mr. Gonnella and he, who were only passing acquaintances and had only met a few times, successfully implemented a comprehensible code without ever indicating to one another beforehand that they were initiating it, and without raising the scrutiny of compliance personnel – who presumably would have recognized such coded language if it was so easily resorted to and understood.

The far more natural inference is that King's claim of coded language meant to disguise pre-arranged agreements was either invented or imagined. For example, Mr. King said that he interpreted Mr. Gonnella's initial message as "coded language that he would be wanting to sell the four small bonds, and then buy them back later this week, once it was no longer [May]" [Tr. 220], but Mr. Gonnella unequivocally expressed that intention; it was not code, nor

communicated off-line.[2] More, the parties had not agreed to price, and Gleacher was free to sell the bonds in the interim. Tr. 224. Similarly, Mr. King suggested that Mr. Gonnella's subsequent language expressing interest in September 2011 to buy the bonds "if you haven't already sold" them was an effort to avoid absolutes and leave room for the view that no agreement had been reached [Tr. 257; DX 32], and that Mr. Gonnella's use of words like "maybe," "if you're game" and "most likely" [in DX 28] were attempts to "distance oneself away from an actual absolute predefined trade" [Tr. 242, 247], but in fact Mr. Gonnella did not know whether King had sold the bonds or would resell them, and had no way of knowing without asking in precisely the way he inquired of Mr. King. Tr. 557, 564-65, 568, 574, 583, 827-28. The purportedly coded language could not reasonably have been perceived by even a marginally savvy trader as truly deceptive.

Absent real evidence of an actual agreement, Mr. King claimed that he believed he was not free to market bonds acquired from Mr. Gonnella based on Mr. King's purported subjective belief about an unspoken understanding that Mr. King's reputation or his ability to trade with Barclays generally would thereby be compromised. Tr. 225, 228-29, 245, 274-75, 317-18, 330. But Mr. King admitted that his impressions were not caused by any conversations with Mr. Gonnella [Tr. 229], or anyone else for that matter, nor did Mr. King adequately explain why he believed that Mr. Gonnella was sufficiently aware of Mr. King's purported fears to elevate their dealings into a meeting-of-the-minds necessarily attendant the type of pre-arrangement targeted by the prohibition on parking.

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[2] Even Mr. Miller testified that in DX 20, "it looks like [Mr. Gonnella is] trying to – exactly what he says. He's looking to turn over positions for month end/aging purposes." Tr. 973.

Indeed, it was not Mr. King who was concerned about Barclays, but *Mr. Gonnella* who was concerned about maintaining *his* relationship with Gleacher, one of the few potential counter-parties in the space. Thus, when Mr. King repeatedly asked Mr. Gonnella if and when he intended to buy BAYC-07-4 bonds that Mr. Gonnella had sold him at month's end in August 2011 and which were losing value (questions themselves at odds with a pre-arranged agreement), Mr. Gonnella repeatedly reassured him that he maintained an interest in buying the bonds [DX 45-46; Tr. 278, 592]. Indeed, Mr. Gonnella was sufficiently concerned with *his* standing with Gleacher that he sent Mr. King an off-line text message out of courtesy to Gleacher that Mr. Gonnella feared would be construed by his supervisors as too soft and insufficiently cutthroat. Tr. 624, 701, 830, 886, 901. Thus, Mr. Gonnella texted Mr. King that he could choose to buy one or more additional bonds (Mr. King ultimately chose to buy PALS and LBSBC bonds from a proffered list of four bonds); Mr. Gonnella would likely bid on the purchased bonds and the BAYC-07-4 as a "package;" and Mr. King could use any profits from the subsequent sale of the PALS and LBSBC bonds to mark down the BAYC 07-4s. Tr. 605-06, 614, 633, 688, 767. The Division at the hearing did not dispute (or did not dispute effectively) that it was common to mark down one bond and use trades in other bonds to affect profitability. Tr. 622, 838. Further, Mr. Gonnella made the offer without knowing which of the four bonds Mr. King might buy, and thus how Mr. King would ultimately fare.

In a moment of candor, Mr. King testified that, upon learning from Mr. Gonnella in October 2011 that he would buy back a partial of the BAYC 07-4A, he "was happy to divest myself of, what, 60 percent *of the position I owned. I was happy because I didn't have anywhere else to go with that bond, so the more I sold, the better*. Tr. 274 (emphasis added); DX 42.

Likewise, Mr. King testified that he was relieved when Mr. Gonnella repurchased the LBSBC bond "because the process of divesting myself of these three bonds was beginning, like we had laid out before." Tr. 329. Plainly, had there been a genuine agreement or pre-arrangement, there would have been little reason for Mr. King to have felt relief when Mr. Gonnella opted to make the purchases.

As for Mr. King's comments including that he had "heard [Mr. Gonnella] might be a buyer" [DX 35], and that "I've got a BAYC bond with your name on it, maybe, if you're a buyer of that type of thing" [DX 40], Mr. Gonnella explained that it was "just Ryan being Ryan. He is a little offbeat and humorous in a lot of his messages. 'I heard you might be a buyer,' I thought that's Ryan being Ryan, almost like a sarcastic comment there" [Tr. 551-52] . . . "this is sort of the way that he communicates every so often . . . he's like I'm chained to the desk for hours on a day, so he would try to give humor, or make it more of a humourous place to bring levity. . . . Kind of being like a wise guy potentially." Tr. 561, 818. Because the Division failed to produce Mr. King's messages in other contexts showing any different manner of expression, it cannot fairly take issue with Mr. Gonnella's view. Even Mr. King (who wore a nose ring when he testified) acknowledged a certain whimsy to his style: "It was my just being flippant. You were chained to the desk for large portions of the day, so I tried to amuse myself and others as much as possible." Tr. 450.

As Mr. Gonnella testified, he did not have any fixed intention to purchase bonds the next day or at any time after selling them to Mr. King, but liked the bonds and wanted to reacquire them depending on his own available capital, movement of the market and other variables. Tr. 802-04. As Mr. Gonnella explained, it was not uncommon for market participants

to make profits on a position bought and sold in a single day, or even over a course of a few minutes [Tr. 513-14]: "I think that the market moves very quickly, it's a fast paced market. If I say I'll more than likely have a higher bid for this bond, I think I was just trying to establish what I said before, that I liked these bonds and that I think they are bonds that will potentially go up in value. I don't think that's – that I would more than likely have a higher bid is saying that I will have a higher bid." Tr. 497-98. In fact, Mr. Gonnella's trades with other counter-parties executed after Gleacher's initial purchase created additional capital that enabled Barclays' subsequent purchase from Mr. King, and relatedly, Barclays generated significant profits on trades Mr. Gonnella was able to execute because of the capital raised by the sales to Gleacher. Tr. 866, 1365.

Similarly, Mr. Gonnella was not proposing more parking by referring in DX 31 to the "same situation" or in DX 27 that he and Mr. King "maybe do what we did a few months ago with some of the BAYCs," but rather was proposing that Gleacher could choose from a range of four or so bonds, which Mr. Gonnella liked and was not disingenuously trying to unload on an unsuspecting buyer. Tr. 521-22, 533, 809-10. Barclays ultimately interpreted the messages between Mr. Gonnella and Mr. King not as parking, but Mr. Gonnella dodging the aged inventory policy, an interpretation that was plain and which Mr. Gonnella made no effort to hide.

C. Mr. King's Supervisor Recognized that Gleacher Had Assumed the Risk of Ownership

After Mr. Gonnella told Mr. King that he might not be able to purchase two bonds bought by Gleacher at the end of August 2011, Mr. King informed his supervisor, Robert Tirschwell, of his transactions with Mr. Gonnella. Tr. 336. Mr. Tirschwell had himself on an

earlier occasion directed Mr. King to sell and repurchase a bond to circumvent *Gleacher's* aged inventory charge, itself undermining the Division's claim of parking against Mr. Gonnella. Tr. 406-07. Mr. Tirschwell told Mr. King that Gleacher bore the associated risk of owning the bonds,[3] directed Mr. King to research the market for other potential buyers, and called Mr. King an idiot (among other expletives) for buying the bonds. Tr. 338, 409. Mr. Tirschwell directed Mr. King to tell Mr. Gonnella that he needed to purchase the bonds, or that Mr. Tirschwell would inform Mr. Gonnella's supervisor, and Mr. Gonnella would lose his job. Tr. 340, 416-17, 639-41. Mr. Tirschwell directed that Mr. King's sale of the bonds to Mr. Gonnella be routed through inter-dealer brokers, but did not explain why. Tr. 347, 418, 645, 847. Mr. Gonnella complied with Gleacher's request without questioning it or believing that Mr. Tirschwell had ordered something illegal, and immediately indicated to Mr. Miller that an inter-dealer broker known as Euro Brokers had been used to purchase Bayview bonds he had earlier sold to Mr. King. Tr. 649-50, 847-48.

D. Mr. King's Changed Testimony After Agreeing to Cooperate

Like Barclays' termination of Mr. Gonnella, Gleacher did not fire Mr. King for parking or any other violation of the anti-fraud statutes, but for "failure to follow company instructions, including certain of the firm trading policies. Something along those lines." Tr. 188, 361. Mr. King never intended to remain in the financial industry long term [Tr. 425-26], and agreed to settle with the Division rather than fight the Division, as Mr. Gonnella elected.

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[3] Mr. Gonnella explained that he typically bought the bonds from Gleacher at a price slightly higher than the price at which he had sold them to compensate Gleacher for having assumed the risk of loss. Tr. 616-18, 634-36, 686-88, 693-95, 861. It was not unusual to compensate a party for assuming risk, which occurred for virtually every bid-offer spread. Tr. 779-82.

Despite testifying at the hearing to a contemporaneous understanding that the trades with Mr. Gonnella violated Gleacher's policies, Mr. King testified to the contrary at his deposition in 2012. Tr. 366-67. At the deposition, Mr. King was asked if, at the time of his trades with Mr. Gonnella, he was aware of any Gleacher policy that was violated, and he answered, "No." Tr. 366; DX 201 at 102. Similarly, contrary to Mr. King's testimony at the hearing about a pre-arranged agreement, he testified at his deposition that "simply, [Mr. Gonnella] had some aged bonds. I was buying them. And if he wanted them back, he could buy them." Tr. 370; DX 201. Mr. King testified at his deposition to an expectation that Mr. Gonnella would buy back the bonds at issue, but at the hearing that expectation was elevated to the status of an illegal agreement that Mr. King had used purportedly coded language to disguise. Tr. 390-91.

In agreeing to testify against Mr. Gonnella, Mr. King agreed to a three-year ban from the financial services industry, a largely symbolic sanction as Mr. King testified that he had no long-term intention to remain in the industry and no desire to return. Tr. 201, 425-26. While Mr. King agreed to disgorge $24,000 he had made from the trades at issue, his agreement with the Division left open the amount of his fine and provided that it would be determined after the Division had an opportunity to assess the value of his testimony to its case against Mr. Gonnella. Tr. 394; GX35. Mr. King's fine could exceed $125,000, a significant number for Mr. King, who testified that his post-Gleacher work for a start-up company had produced no income. Tr. 178-79.

E. Mr. Miller's Attempt to Insulate Himself from a Charge of Failure to Supervise

Barclays flagged Mr. Gonnella's late August/early September trades with Mr. King as possible parking violations. Tr. 556, 1211. In early September, Mr. Gonnella's compliance officer, Louis Giglio, asked Mr. Gonnella about the trades. Mr. Gonnella told Mr. Giglio that he liked the bonds and repurchased them thinking they would increase in value. Mr. Gonnella did not believe it necessary to mention the aged inventory policy because Mr. Giglio had not asked about his motivation in making the trades. Tr. 737, 740-42, 1209, 1213-15. In memorializing Mr. Gonnella's information, Mr. Giglio wrote that "Gleacher deals with many regional counterparties, and the [trading] desk was hoping to get more individuals involved in the bonds." Tr. 1220, 1236-37; DX 39. Mr. Giglio took Mr. Gonnella's explanation to a supervisor (not Mr. Miller), who directed Mr. Giglio to close the matter, which Mr. Giglio did. Tr. 1213-15, 1220-21. Mr. Giglio had never had an issue with Mr. Gonnella before, and apart from the trades at issue, had found him to be conscientious and compliant with Barclays policies and regulations. Tr. 1223, 1255, 1266-67.

Mr. Gonnella testified that he first discussed the trades with Mr. Miller on October 26, 2011, when Mr. Miller asked about his purchase of the LBSBC bond from Mr. King soon after selling it to him. Tr. 629. Mr. Miller said that the trades did not "look good." Tr. 629. Immediately thereafter, Mr. Gonnella told Mr. King that he might not be able to purchase other bonds that he had sold to him. Tr. 633-34. The next morning, October 27, 2011, Mr. Miller told Mr. Gonnella that on reflection, the trades were okay, but not to do it again, which Mr. Gonnella understood to be selling bonds just before the aged inventory's policy seven-month deadline and

then purchasing them from the same counter-party shortly thereafter. Tr. 637-38, 842-43. Mr. Gonnella testified that he did not have another conversation with Mr. Miller about Gleacher, except for his subsequent disclosure to Mr. Miller that a transaction involving Euro Brokers (that Mr. Miller would have seen on his daily report of Mr. Gonnella's trades) was Mr. Gonnella's purchase from Gleacher of a bond that Mr. Gonnella had previously sold to Mr. King. Tr. 649-50, 847-48.

Mr. Miller's recollection of his conversations with Mr. Gonnella was dramatically different and appeared to be Mr. Miller's fabricated attempt to explain why he took no action until the time of the Barclays compliance meeting in early November at which the aged inventory policy was discussed. Indeed, Mr. Miller did not deny that senior Barclays manager Tom Hamilton told him that Barclays would not have had to terminate Mr. Gonnella had Mr. Miller timely spotted and addressed the issue. Tr. 1112.

According to Mr. Miller, he first became aware of the trades in issue in late October or early November 2011. Tr. 1031. He recounted a purported conversation in which he asked Mr. Gonnella why he bought the LBSBC bond when Mr. Miller's earlier directive had been to reduce risk. Tr. 1032, 1110-11. Thereafter, Mr. Miller claimed that he reviewed more of Mr. Gonnella's trades, and became aware of earlier trades with Gleacher that appeared to have been executed to avoid aged inventory charges and "smelled" like parking. Tr. 1049, 1053-55.

Mr. Gonnella testified emphatically, however, that he had no conversation whatsoever with Mr. Miller about whether his purchase of the LBSBC bond was contrary to any earlier directive from Mr. Miller about reducing risk, or any conversation about reducing risk relating to Gleacher. Tr. 1330-31. Even Mr. Miller acknowledged on cross-examination that

success in reducing risk could not be evaluated on the basis of one purchase, but on a trader's portfolio considered in its entirety. Tr. 853, 1124-26.[4]

In early November 2011, Barclays held its annual compliance meeting, which both Mr. Gonnella and Mr. Miller attended. Tr. 707-08, 1170-71. The speakers explained that traders could not avoid aged inventory charges by selling securities to a counter-party and then buying them back. Tr. 1238-40. According to Mr. Miller, he had been reviewing Mr. Gonnella's trades just before that meeting and had been "struggling" over whether Mr. Gonnella's trades violated the aged inventory policy. Tr. 1062. According to Mr. Miller, he was relieved when Mr. Gonnella told him at that time that compliance had looked over the August/September trades and approved them. Tr. 1063-64.

But Mr. Gonnella testified that he never told Mr. Miller that compliance had signed off on the August/September 2011 trades. Tr. 1332. In fact, Mr. Giglio testified at the hearing that Mr. Gonnella approached him immediately after the November meeting, told him that Mr. Miller was concerned about the trades that Mr. Gonnella and Mr. Giglio had discussed in September, and asked Mr. Giglio if he would speak to Mr. Miller. Tr. 1241, 1261-62. At that point, Mr. Miller escalated the issue up the chain of command at Barclays. Tr. 1066-67, 1139.

During Barclays' internal investigation, it had access to all or virtually all of the relevant records, including the communications between Mr. Gonnella and Mr. King, except for Mr. Gonnella's off-line text. Tr. 720, 1334-35. Barclays terminated Mr. Gonnella, affirmatively

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[4] Paragraph 23 of the Division's complaint alleges a conversation between Mr. Miller and Mr. Gonnella in September 2011 in which Mr. Gonnella allegedly gave a "misleading" explanation about restructuring trades to sell to other investors. The Division did not elicit any testimony from Mr. Miller about any such conversation, and Mr. Gonnella testified that there was no such conversation with Mr. Miller. Tr. 1332.

finding that he did not violate any securities statutes or regulations (necessarily including parking, adjusted trading and inter-positioning), instead reporting on Form U5 that Mr. Gonnella was terminated for "loss of confidence involving activity related to internal policy for inventory holding periods." Tr. 726, 855, 1118-21, 1258; GX 54. Similarly, despite Mr. Miller's testimony that Mr. Gonnella's trades "smelled" like parking, he signed on to Barclays' representation to FINRA that, "[b]ased on the firm's investigation led by Barclays in-house litigation counsel, Barclays concluded that it was likely Mr. Gonnella structured certain trades for the primary purpose of evading Barclays' aged inventory policy and that he was not forthright during his interview when asked to explain his trades." Tr. 1103-06; DX 65.

F. Mr. Gonnella Did Not Engage in Parking

Parking is a prohibited practice because it can permit a market participant to maintain ownership of a bad or devalued asset while omitting it from records of the market participant's holdings. It can also serve, for example, to frustrate the disclosure required by the Williams Act by concealing a market participant's true ownership of an asset. Thus, the pivotal question is not whether market participants expect that an asset may be traded back and forth (which may be inevitable in an illiquid market with few potential counter-parties), but whether beneficial ownership (embracing risk of loss and the right to principal and interest payments) passes to the buyer at the time of the sale. Parking therefore has three essential elements: (1) the parties' pre-arranged agreement that the seller remains the owner of the security notwithstanding an apparent sale; (2) on terms that keep market risk entirely on the seller; and (3) for a bad faith purpose that enables the seller to retain economic incidents of ownership.

In *Yoshikawa v. SEC*, 192 F.3d 1209, 1210-11 (9th Cir. 1999), a broker engineered a series of five back-and-forth trades between his firm's inventory account, his personal trading account and his retirement account, usually with minor price differentials. The NASD found that the transactions were a sham to "conceal true ownership" of the stocks and impermissibly prevent the firm from falling below net capital requirements, thus misrepresenting the true state of the firm's finances. After reviewing numerous cases that discussed or dealt with parking in one form or another, the court distilled parking in essence to the three core elements set forth above. *See Yoshikawa*, 192 F.3d at 1211. The court found that only one of the five transactions possibly met the definition of parking – a trade where the broker admitted that his repurchase was effectuated merely to "return" the shares to the firm's inventory account after a "temporary" sale, which could have indicated a bad-faith pre-arrangement in the broker's mind. *See id.* at 1215.

Elsewhere, in *United States v. Jones*, the Second Circuit defined parking as essentially

> a purported transfer of ownership in securities combined with a secret agreement providing the "seller" with the right to repurchase them at a later date. The 'seller' receives the tax benefits of a loss realized by the 'sale'; the 'buyer' is compensated for the 'cost of carrying' the securities. Since the agreement to resell ensures that the 'seller' never loses control of the securities, the government considers 'parking' a form of tax and securities fraud.

900 F.2d 512, 515 (2d Cir. 1990). Thus, even though parking is not an activity explicitly proscribed by statute, if done in a certain way, it can violate certain statutory provisions the same as any fraudulent scheme might, even if not addressed in explicit terms. *See United States v. Bilzerian*, 926 F.2d 1285, 1299-1301 (2d Cir. 1991) (upholding conviction premised on parking relating to reporting requirements of beneficial ownership). Because parking serves to conceal the

true beneficial ownership of a security, it rises to the level of a statutory violation if it implicates the sorts of representations that bear on investment decisions.

Similarly, in *United States v. Russo*, the Second Circuit upheld a conviction for securities fraud premised, in part, on parking in the service of a larger stock manipulation:

> Petrokansky engaged in another method of "hiding" *Lopat* and *EAS* stock from the market. On instructions from Russo, Petrokansky placed *Lopat* or *EAS* with customers by guaranteeing them that K&C would buy the stock back in one or two weeks at a small profit of an eighth or sixteenth of a dollar per share. When the time came to buy back the stock, Petrokansky presented sell tickets reflecting a higher price than the customer had paid or than was posted on NASDAQ that day. Petrokansky would often immediately park the same stock with a new customer.
>
> Parking *Lopat* and *EAS* stock accomplished the same purpose as making unauthorized placements: it kept *Lopat* and *EAS* off the market and out of K&C's account. In so doing, the parking created a false impression of *Lopat*'s and *EAS*'s vitality on the market and freed K&C from responsibility for the stock. Unlike the unauthorized placements, however, the parking bore a cost to K&C, namely, the profits it paid out to the customers who held the stock.[5]

74 F.3d 1383, 1388 (2d Cir. 1996). The court in *Russo* did not offer a precise definition of what parking is and is not, but affirmed because the government's theory of parking remained constant: the broker-dealer employer of the defendants "perpetrated a fraud on the market by divorcing the financial risk of owning *Lopat* and *EAS* from legal ownership of the stock." *Id.* at 1393.

The evils and risks of parking are apparent on the face of the analyses of these cases in ways that are not present here. While Mr. Gonnella attempted to circumvent Barclays' aged inventory policy by selling bonds to Gleacher with an intention to reacquire them if circumstances permitted, beneficial ownership of the bonds truly passed to Gleacher. Gleacher

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[5] *Russo* also noted that parking may or may not rise to the level of a 10b-5 violation. 74 F.3d at 1393. If even certain forms of stock parking do not constitute a 10b-5 violation, then neither does Mr. Gonnella's conduct – which indisputably is not stock parking.

bore the risk of loss, as even Mr. Tirschwell realized, and was entitled to payments of principal and interest, which Gleacher actually received. Apart from the absence of indicia of parking, Mr. Gonnella's conduct did not defraud the market or the investing public. Mr. Gonnella arguably circumvented the spirit of his employer's internal policy, but he did not defraud the market both because the economic incidents of ownership in fact passed to Gleacher, but also because the conduct was not material to any investment decision.

To the Division, these differences between Mr. Gonnella's conduct and parking as discussed in the cases above are distinctions without a difference. But it is these types of pivotal distinctions that separate the prohibited from the permissible in all sorts of market activity, serve to assure that market participants have adequate notice of illegal conduct as a matter of constitutional due process, and sustain enforcement actions and criminal prosecutions only for activity that is truly a fraud on the market.

Further, while Mr. Gonnella may have expected to purchase the bonds back from Mr. King if conditions permitted, and while Mr. King may have expected that Mr. Gonnella would do so, there was no agreement – just an amorphous expectation. But expectations are insufficient to demonstrate parking, as an agreement is indispensable. Whatever Mr. King might have claimed at the hearing to have believed (as opposed to his testimony at his deposition), his subjective understandings cannot create an agreement in the mind of another, let alone justifying the inference that Mr. Gonnella willfully violated the law. Their communications are peppered with qualifiers like "maybe" and "more than likely," or "most likely," terms which are antithetical to the definite and precise language that characterizes contracts or agreements by sophisticated players in the commercial marketplace. No one receiving an assurance or representation that a

counter-party would "more than likely" take some course of action would believe that such an expression of intent would qualify as an agreement. Mr. Gonnella's explanations about his choice of language were credible and logical - he meant what he said in the messages, no more, no less. There was no pre-arrangement because nothing was agreed upon in advance, let alone the most important terms.

Whether or not an agreement in this context would be reduced to a written and enforceable memorialization, it would be a fixed and definite commitment to repurchase securities, without contingencies or qualifiers, and would be understood as such by the parties at the time they entered into it. Such an arrangement plainly did not exist on the facts here, where Mr. Gonnella did not commit Barclays to do anything, where unknown and unknowable market conditions in the interim would and did affect whether subsequent purchases occurred, where Gleacher ran the risk and obtained the benefits of legitimate ownership, and where a "meeting of the minds" was supplied exclusively by Mr. King's unsupported, irrational and contradicted inferences. Whatever an actual agreement to park securities might look like, it does not resemble what existed between Mr. Gonnella and Mr. King.

As the Court in *Yoshikawa* noted, merely because a transaction is entered into with a particular purpose in mind – whether that motive is to avoid an aged inventory charge or to prevent net capital levels from meeting a certain threshold – does not mean that the transaction is illegitimate, illegal, or that it constitutes parking. 192 F.3d at 1219. "There is nothing dishonorable about such conduct; if there were, securities trading could never take place." *Id.* The securities transactions become parking only when, independent of whether an improper motive exists, they are not "actual, bona fide transactions just like any other in the marketplace."

See id. Like in *Yoshikawa*, that Mr. Gonnella ended up repurchasing the bonds shortly after he sold them is not relevant or illegitimate in itself, absent proof that they were not genuine, bona fide trades in which Gleacher shouldered the risk and benefits of ownership for the periods in which it held the bonds.

The Division's failure to prove that Mr. Gonnella engaged in parking also compels the conclusion that it failed to prove that Mr. Gonnella aided and abetted the creation of false books and records, which the OIP alleges constituted a violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. Absent a finding of parking, the trades at issue transferred beneficial ownership and risk of the subject bonds from Barclays to Gleacher. Thus, Barclays' books and records regarding these transactions were accurate. Accordingly, absent sufficient proof of an underlying violation, there is no basis upon which to find aiding and abetting liability.

G. The Division Has Not Proven Mr. Gonnella's Willfulness

A goal of Barclays' policies was sufficient clarity to allow traders to understand what was expected of them. Tr. 1096-97. Nevertheless, Mr. Giglio acknowledged that there were gray areas where particular trades or practices might or might not have been permissible according to Barclays' memorialized policies. Tr. 1202-03. Thus, almost by definition, a trader who acts in a gray area lacks the sort of willful intent to defraud that the Division needed to prove. Even now, the evidence at the hearing, including Barclays' findings that Mr. Gonnella did not violate the law, helps prove an ambiguity as to the conduct at issue, both as to whether it was an actual violation and how they would have reacted to it, that is antithetical to the ascribed clarity of Mr. Gonnella's alleged willfulness. Tr. 973-74, 993-94, 1008-09, 1081, 1084, 1114-15, 1225, 1229. Similarly, the Division cannot create a willful violation of the securities laws on Mr. Gonnella's part from

the subjectivity of Mr. King's beliefs and understandings, even if reasonable and legitimately and sincerely held.

Dr. Agrawal calculated that for the universe of relevant trades with King, Mr. Gonnella avoided $725,824 in aged inventory charges, whereas until being terminated, Mr. Gonnella had earned $17 million in profits for 2011. Tr. 120-22, 790-92; DX 400. Thus, the $725,000 in aged inventory charges would have had minimal effect on his profits and even less effect on his overall compensation. Tr. 790, 792. The charges were simply immaterial in reference to Mr. Gonnella's overall trading profits – which themselves were only one factor (and not a significant one) affecting his compensation and bonus. Tr. 790. Accordingly, there is a great incongruity for Mr. Gonnella to have willfully made *material* misrepresentations in order to avoid charges that were *immaterial*. Mr. Gonnella would never have intentionally placed so much at risk to gain so little. It makes no sense that Mr. Gonnella engaged in an elaborate artifice and went to great lengths to use coded language and off-line communications in an effort to avoid charges that had so little effect if any on compensation.

Based on these incongruities, considered together with (1) Mr. Gonnella's sterling record and reputation, (2) the ambiguity surrounding the precise contours of Barclays' aged inventory policies, and (3) the distinctions between Mr. King's purported understandings and Mr. Gonnella's, the Division did not prove Mr. Gonnella's willfulness.

H. Ancillary Violations

While the Division alleged more than just parking, all of the subsidiary violations – adjusted trading, use of cell phones, violation of a fiduciary duty, and inter-positioning – either were not proven, or cannot by themselves rise to securities fraud without proof that Mr. Gonnella

acted willfully and/or illegally parked the bonds with Gleacher. Thus, for example, Mr. Gonnella participated in the use of inter-dealer brokers because he believed he had been directed to do so by Mr. Tirschwell, a supervisor with far more industry experience. Likewise, after the annual compliance meeting, Mr. Gonnella urged his compliance officer, Mr. Giglio, to speak to Mr. Miller, who had raised questions about trades with Gleacher on October 26, 2011. And Mr. Gonnella could not have willfully adjusted trades with Mr. King because he could not possibly have known at the time of his off-line text which of the offered bonds Mr. King might elect to buy, or how they might perform going forward.

I. There was No Loss to Barclays

Dr. Agrawal calculated what he called the "total Barclays loss" for the trades at issue at $174,530.47, by adding together what he called (1) Barclays' shortfall (the proceeds to Barclays upon selling the bond less the principal payment upon repurchase), (2) Barclays shortfall vs. holding the bond accrued interest (the difference between Barclays' accrued interest when selling the bond and what it paid when purchasing it), and (3) payments Gleacher received from the bonds' issuers. Tr. 91-93; DX 401. But that amount – roughly $174,000 – would only constitute loss to Barclays *if there had been an illegal parking agreement between Mr. King and Mr. Gonnella.* It is not independent proof of any violation, and only would become relevant once a violation has been proven or demonstrated in the first instance. Mr. Miller confirmed that without a prearrangement, the cost basis is reset without a loss to Barclays. Tr. 1136-37. Therefore, the concept or even the possibility of loss to Barclays is not proof of any violation, but is a consequence of it – *if* it has been independently proven.

The Division's view of what constitutes "loss" to Barclays is unreasonable (and wrong) because it essentially requires that Mr. Gonnella had to have realized a profit on every trade he executed. That view creates a perverse outcome in which Mr. Gonnella is charged with the intent to defraud his employer because certain trades, considered in isolation, did not realize a profit for Barclays but instead generated a small loss. It also neglects the reality that in an illiquid market with a limited number of participants, preserving good relations with a counter-party was worth more to Barclays in the long term than was the "loss" of $174,000. Third, it ignores the fuller picture of the profits Mr. Gonnella generated – $17 million for the year 2011 alone through the beginning of November, and the larger point that it was foolhardy to examine Mr. Gonnella's trades with Mr. King as if they occurred in a vacuum. If some trades were less profitable than others, and on still others, Barclays suffered a loss, none of that speaks to Mr. Gonnella's intent to defraud his employer. Mr. Gonnella never intended at the time of the initial sales to Mr. King for Barclays to incur a loss. Whether Barclays would have had $174,000 more if Mr. Gonnella had never sold the bonds to Mr. King, is simply not relevant to the inquiry of whether he intended to defraud Barclays of that amount or anything else.

Moreover, the proceeds of the sales to Gleacher went into Mr. Gonnella's trading account at Barclays and were available to him for the purpose of making additional investments and generating greater profits. Tr. 157-59. Mr. Gonnella in fact earned a profit on trades that he made as a result of capital that became available from sales to Gleacher. Tr. 1365. Dr. Agrawal's analysis of what constituted a loss to Barclays did not take into account the additional capital that Barclays had at its disposal because of the trades, and income that Barclays generated as a result of additional trades. Tr. 159-60, 163-66. Dr. Agrawal's analysis also did not take into account

that Mr. Gonnella used the proceeds of his sales to Mr. King to buy and sell other bonds, the profits realized on those trades, or that Barclays earned principal and interest on those bonds (as well as the underlying profit realized when it eventually sold them). Tr. 690-91, 864-65, 868.

J. Violation of Employer Policy in Lieu of a Section 10(b) or 17(a) Violation

Section 10b of the Exchange Act is not a catchall[6] to regulate all manner of deceptive conduct that occurs in an employer-employee context at a broker-dealer – even assuming that Mr. Gonnella's conduct was deceptive. Employment disputes and mundane violations of internal policies do not become securities fraud merely because they occur at a broker-dealer, as Section 10(b) and Rule 10b-5 (as well as Section 17a of the Securities Act) are not mechanisms to police activity that implicates an employer and its employee's compliance with internal policy. *See Rodriguez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92 (1st Cir. 2007). Using the statutes for that purpose would place the SEC in a position of regulating employer policies and would greatly increase the likelihood that its authority would be used in an arbitrary fashion. Instead, the primary purpose of Section 10b is to protect the investing public from trading practices inimical to fair dealing. *See Bilzerian*, 926 F.2d at 1297-98 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-78 (1977)); *Travis v Anthes Imperial, Ltd.*, 473 F.2d 515 (8th Cir. 1973); *Fox v Prudent Resources Trust*, 382 F. Supp. 81 (E.D. Pa. 1974); *SEC v. M. A. Lundy Associates*, 362 F. Supp. 226 (D. R.I. 1973).

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[6] Rule 10b-5 has been described as a "catchall anti-fraud provision" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983), though is has also been noted that what it "catches" must be fraud. *See Chiarella v. United States*, 445 U.S. 222, 232 (1980) (noting that "not every instance of financial unfairness constitutes fraudulent activity under Section 10b"). More, courts have limited the application of Rule 10b-5 to conduct that violated Section 10b. *E.g. United States v. O'Hagan*, 521 U.S. 642, 561 (1997); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976); *SEC v. Dorozhko*, 606 F. Supp. 2d 321, 328 (S.D.N.Y. 2008).

Section 10b was not designed to regulate or govern corporate management or mismanagement. *See Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971); *Acito v. IMCERA Group,* 47 F.3d 47, 54 (2d Cir. 2005); *St. Louis Union Trust Co. v Merrill Lynch, Pierce, Fenner & Smith, Inc.* 562 F. 2d 1040, 1048 (8th Cir. 1977) . Similarly, issues and conduct relating to employee compensation or incentives are not proper subjects of a Section 10b prosecution. *See Acito*, 47 F.3d at 54. Nor was the statutory scheme intended to bring within its ambit "every imaginable breach of fiduciary duty in connection with a securities transaction." *St. Louis Union*, 562 F.2d at 1048; *see also Santa Fe Indus.*, 430 U.S. at 477-78 (holding that Section 10b does not encompass breach of fiduciary duties without a showing that investors were deceived by the conduct at issue).

Liability for securities fraud can be derived from an employee's breach of duties owed to an employer, from misappropriation of material information, or from a deprivation of the employee's honest services. *E.g.*, *SEC v. Talbot*, 530 F.3d 1085 (9th Cir. 2008); *SEC v. Clark*, 915 F.2d 439, 443 (9th Cir. 1990); *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981). Those cases evince an independent violation of a regulatory statute in the context of an employee-employer relationship. Here, however, the Division's complaint wrongly seeks to convert an employee's breach of the employer's internal policy into an independent violation of an external statute.

K. Penalty and Industry Bar

Both the Second Circuit and the Commission emphasize that the purpose of an industry bar is remedial, not punitive. *See McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005); *In re Howard F. Rubin*, 58 S.E.C. Docket 1426, 1994 WL 730446, at *1 (Dec. 30, 1994) ("It is

well-settled that such administrative proceedings are not punitive but remedial. When we suspend or bar a person, it is to protect the public from future harm at his or her hands."). "Our foremost consideration must therefore be whether [the] sanction protects the trading public from further harm." *McCarthy*, 406 F.3d at 188. Here, the investing public does not need protection from Mr. Gonnella because he poses no threat. Accordingly, an industry bar would be more in the nature of a punitive or penal sanction than the remedial purpose that it is designed to achieve.

Among the factors used when deciding the propriety of an industry bar, are: (1) the egregiousness of the underlying securities law violation; (2) the defendant's repeat offender status; (3) the defendant's role or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur. *See SEC v. Patel*, 61 F.3d 37, 41 (2d Cir. 1995); *see also Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (outlining factors for courts to consider when weighing need for injunctive and disciplinary relief).

These factors all weigh decidedly in favor of a lenient penalty and against the need for a suspension or bar on Mr. Gonnella's association with a broker-dealer. At the time of the violation, Gonnella was accomplished, but young. Whether or not his misconduct should have remained a matter internal to Barclays and not become the subject of an enforcement proceeding, the investing public was not harmed and, on a spectrum of securities fraud, the conduct was not egregious. Aside from the instant infraction (if sustained), Mr. Gonnella has an unblemished record, and this violation was engendered by misinterpreting an ambiguous policy rather than venality, depredation or greed. Further, Mr. Gonnella derived no monetary benefit from the conduct at issue, and in fact, lost a significant amount of deferred compensation as the result of

his termination. The likelihood of similar misconduct resurfacing in the future is too negligible to warrant revocation of Gonnella's privileges of association or any other significant penalty.

L. Conclusion

For the foregoing reasons, and as expressed in the attached proposed findings of fact and conclusions of law, Mr. Gonnella respectfully submits that the Division has failed to sustain any of its charges against Mr. Gonnella. Accordingly, the Court should issue an initial decision under Rule 360 that rejects the Division's allegations in their entirety. In the alternative, the Court should impose a sanction that is lenient, fair, and permits Mr. Gonnella to continue to earn his livelihood in the securities industry.

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Respectfully submitted,

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