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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15737

In the Matter of	
THOMAS C. GONNELLA,	
Respondent.	

DIVISION OF ENFORCEMENT BRIEF IN SUPPORT OF PETITION FOR REVIEW

Nicholas A. Pilgrim
Senior Trial Counsel
Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street
New York, NY 10281-1022
Tel. (212) 336-0924
pilgrimn@sec.gov

Daniel Michael
Assistant Regional Director
Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street
New York, NY 10281-1022
Tel. (212) 336-1313
michaeld@sec.gov

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Pursuant to the Order Granting Petitions for Review and Scheduling Briefs, dated January 5, 2015, the Division of Enforcement ("Division") seeks review under Rule of Practice 411(b)(2)(ii)(C) of the length of the collateral and penny-stock suspensions imposed against Respondent Thomas C. Gonnella ("Gonnella").

INTRODUCTION

This proceeding concerns a parking scheme undertaken by Gonnella, who, at the time of the conduct, was a bond trader at Barclays Capital ("Barclays"), specializing in esoteric asset-backed securities. To avoid incurring aged inventory charges, which could adversely impact his bonus, Gonnella pre-arranged to sell and then quickly repurchase twelve bonds at prices designed to compensate the counterparty for holding the parked bonds. Gonnella also concealed from his supervisors the pre-arranged nature of the trades, which resulted in guaranteed profits for his counterparty at the expense of Barclays. In all, the sham trades, which were conducted over the course of six months, cost the firm at least $111,000.

After a hearing, Administrative Law Judge James E. Grimes issued an Initial Decision ("ID") finding that "Gonnella engaged in a fraudulent scheme in which he abused his fiduciary position in order to engage in trades that benefitted him to Barclays's detriment." ID at 16.

Based on this illicit conduct, Judge Grimes found that Gonnella violated Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder, and aided and abetted and caused Barclays's violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. The ID ordered Gonnella to cease-and-desist from future violations and to pay civil penalties totaling $82,500, and imposed twelve month collateral and penny-stock suspensions.

While Judge Grimes correctly found that time away from the industry was in the public interest, the Division respectfully submits that the length of the suspension is inadequate in light

of the the extent of Gonnella's misconduct – which involved repeated violations of the antifraud provisions of the federal securities laws – the degree of scienter involved, and Gonnella's failure to recognize the wrongfulness of his conduct.

Specifically, Judge Grimes found that Gonnella: 1) "breached his fiduciary duty in the course of intentionally defrauding Barclays"; 2) "acted with a high degree of scienter"; 3) "intended to abuse his position of trust to defraud Barclays for his own benefit"; 4) "made extensive efforts to hide this scheme from Barclays"; 5) "has shown no recognition of the wrongfulness of his conduct"; 6) "persists in denying that his conduct was actionable"; 7) "has not provided any assurances that he will not engage in wrongful conduct in the future"; and 8) "will have the opportunity to commit similar wrongful acts in the future." ID at 31.

In light of Judge Grimes's findings, twelve month collateral and penny-stock suspensions are insufficiently protective of the public interest. By engaging in egregious misconduct (ID at 31), Gonnella has shown himself unfit to participate in the securities industry; by failing to recognize the wrongfulness of his actions and providing no assurances that he will not engage in the same or similar conduct, Gonnella poses a high risk of committing future violations.

Judge Grimes found that the "most significant factor weighing against Gonnella is the fact that he intentionally abused his fiduciary position to trade for his own benefit to the detriment of his employer" and concluded that "[t]his factor alone supports the imposition of a sanction." ID at 34. Nonetheless, Judge Grimes imposed a short suspension because "the scheme was necessarily limited in scope" and because Gonnella's former superiors at Barclays supposedly "continue to hold Gonnella in high regard." ID at 34. In fact, the scheme was limited only because Gonnella's former superiors at Barclays discovered the misconduct – despite Gonnella's attempts to conceal it by using his personal cell phone to "cover his tracks"

(ID at 20) and by lying to Barclays compliance personnel, his supervisor, and others – and fired him. As Judge Grimes noted: "[B]ecause Gonnella professes that he did nothing wrong, it is likely that he would have engaged in other similar transactions had he been able to do so." ID at 31 n.39.

Judge Grimes also viewed Gonnella's youth as a mitigating factor "influencing his lack of complete appreciation for the wrongfulness of his conduct" and as a positive attribute that "giv[es] him the chance to learn from his experience and to not engage in future violations." ID at 34. The record, however, demonstrates that Gonnella has not learned anything from his experience, as he continues three years later to deny the wrongfulness of his conduct with explanations that Judge Grimes found "shade the truth as to critical points" and are "not credible," "unbelievable," and "nonsensical." ID at 10, 21 & 28.

For the reasons set forth herein, the Division respectfully requests that the Commission impose permanent collateral and penny-stock bars on Gonnella or, in the alternative, impose permanent bars with a right to reapply after a sufficiently lengthy period of time to effectuate the bars' remedial purpose and protect the public interest. Gonnella engaged in deliberate fraudulent conduct; a permanent or lengthy bar is appropriate and necessary to deter future misconduct and to adequately protect the integrity of the markets.

FACTS

In the ID, Judge Grimes made the following factual findings, all of which are firmly supported by evidence in the record.

A. Background Facts

Gonnella worked at Barclays as a trader from October 2008 until November 2011, and traded "esoteric asset-backed securities," the market for which is very illiquid. ID at 2-3.

Barclays entrusted Gonnella with $300 million to invest on its behalf, and Gonnella owed Barclays fiduciary duties of care, candor, and loyalty. ID at 2. Gonnella was very successful as a trader, generating profits of about $17 million in 2011, and was compensated accordingly. ID at 3. In 2009, Gonnella earned a base salary of $85,000 and an incentive bonus of $365,000. In 2010, his base salary was $95,000 and his incentive bonus was $900,000. ID at 3.

Gonnella's trading book was subject to Barclays's aged-inventory policy, which provided that if a trader held a security in his book for more than three months, the book would accrue monthly charges. ID at 3. The charges would be refunded if the trader sold the security within seven months of having purchased it, but the charges became irreversible thereafter. *Id.* Gonnella knew about this policy and received monthly e-mails reminding him about it, and informing him which securities in his book were approaching deadlines. *Id.* Gonnella's supervisor at Barclays testified that profits and losses in the trader's book were a factor in determining the trader's compensation, and Judge Grimes concluded that Gonnella "[p]lainly [] acted as though the aged-inventory charges would have had some negative impact on his compensation." ID at 24.

B. The Scheme

At the end of May 2011, Gonnella had bonds in his trading book that were approaching the seven-month aged-inventory deadline. ID at 4. On May 31, Gonnella contacted Ryan King ("King"), a trader at Gleacher and Company ("Gleacher"), whom Gonnella knew socially and from conferences, and had previously done at least one trade with. ID at 3-4. In a Bloomberg chat message, Gonnella stated that he had some bonds that he was "looking to turnover today for good ol' month end/aging purposes" and that "i like these bonds . . . and would more than likely have a higher bid for these later this wk when the calendar turns." ID at 4.

In response, Gleacher purchased two of the bonds Gonnella offered, at prices of $56 and $54, respectively. *Id.* King testified that, at the time of the purchases, he was certain that Gonnella would quickly repurchase the bonds at a higher price than Gleacher paid. *Id.* King also testified that he knew that engaging in such pre-arranged trades was prohibited, but agreed to do so because he viewed them as riskless ways to turn a quick profit and conversely worried that declining such an offer would lead to fewer opportunities to engage in legitimate trades with a bigger firm. *Id.* As agreed, Gonnella repurchased the same bonds the next day at prices of $57 and $55 respectively, earning Gleacher approximately $23,000. ID at 5. "Gonnella thus established his *bona fides* and the understanding he had with King: if King were to do Gonnella the favor of buying bonds and holding them for Gonnella's repurchase, Gonnella would make it worth King's effort." ID at 16.

At the end of August 2011, Gonnella and King again engaged in pre-arranged round-trip parking transactions designed to allow Gonnella to keep certain bonds in his trading book without incurring aged-inventory charges. Significantly, these transactions took place while Gonnella's supervisor was on vacation. ID at 5. Specifically, on August 29, Gonnella contacted King by Bloomberg chat, and told him: "Have some aged bonds that I might offer you, if you're game . . . maybe do what we did a few months ago . . . ." *Id.* The two men discussed the transactions the next day, and Gonnella offered to sell Gleacher three bonds that were approaching Barclays's seven-month aged inventory deadline. *Id.* Later that day, Gleacher purchased the bonds at the offered prices. *Id.*

The next day, August 31, Gonnella repurchased two of the three bonds, each at a price slightly higher than he had sold it the day before, costing Barclays approximately $48,000. *Id.* At the same time, Gonnella offered to sell Gleacher five other bonds that were reaching the

seven-month aged-inventory deadline, and King accepted the offer and purchased those bonds. ID at 5-6. Two days later, King contacted Gonnella via Bloomberg chat to find out when Gonnella would repurchase the bonds, and Gonnella responded with bids for the five bonds he sold to Gleacher on August 31. ID at 6. Gonnella repurchased the five bonds at prices that were again slightly higher than the sale price, costing Barclays approximately $84,000. *Id.*

Following these repurchases, Gleacher still owned one of the three bonds that Gonnella sold it on August 30, 2011. On September 7, 2011, King sent Gonnella an e-mail reminding him about the outstanding bond, and later that day Gonnella repurchased about two-thirds of the face value of the bond, again at a price slightly higher than he had sold it, resulting in a gain of approximately $14,000 for Gleacher. ID at 6-7. The repurchase left Gleacher holding the remainder of that one bond, amounting to $7.65 million of original face value. ID at 7.

Three weeks later, King contacted Gonnella about repurchasing the remainder of the last bond. Gonnella replied that he could not repurchase at the time and asked King to "have patience, if you can." *Id.* On October 3, 2011, King again asked Gonnella whether he could repurchase the bond, and Gonnella again declined, but he also reassured King of his intention to do so, responding: "Not yet but don't worry. Will get there eventually." ID at 8.

C. The Compliance Alerts

Four of the late August and early September transactions generated a "parking alert" in Barclays's internal compliance system. ID at 7. A "parking alert" is generated when securities of approximately the same quantity are bought and then sold, or vice versa, with the same counterparty near the end of a month. *Id.* A compliance officer investigated the alerts and asked Gonnella for an explanation. *Id.* In response, Gonnella told the compliance officer that he had repurchased the bonds in question because he wanted to repackage them and sell them to another

client. *Id.* Significantly, Gonnella did not tell the compliance officer "about his electronic discussions with King or about the other four bonds he sold to King in late August." *Id.*

D. The Scheme Unravels

By early October 2011, the bond that Gleacher still owned had declined in value. *Id.* On October 11, King contacted Gonnella by Bloomberg chat and asked whether Gonnella could repurchase the bond by the close of business on the following Thursday. *Id.* Gonnella responded by telling King that he would send him a text message shortly. *Id.* In violation of Barclays's policy barring the use of personal cell phones to conduct business, Gonnella sent King a text message in which Gonnella offered to sell King two other bonds so that King could combine the old bond with the two new bonds in order to sell them back to Gonnella as a package. *Id.* The purpose of doing a package transaction like this was to cover the loss Gleacher sustained due to the decline in value of the original bond. *Id.*

Later that day, Gonnella followed up by offering to sell King two new bonds that were nearing the seven-month aged-inventory deadline. ID at 8-9. While making the offer, Gonnella specified that King "should be able to mark th[em] up eventually, and use the proceeds to mark down [the old bond] accordingly." ID at 9. King accepted the offer and that same day, Gonnella sold King the two new bonds. *Id.* The next day, Gonnella indicated that he should be able to do some repurchasing by the last week of October. *Id.*

On October 26, Gonnella offered to repurchase one of the two new bonds at a significant mark-up. *Id.* King stated that he was interested in the offer, and Gonnella replied "[a]nd pls do what we discussed before on them. . . . gonna take a look at the [two remaining bonds] next, ok? thx." *Id.* Later that day, Gonnella repurchased the bond he had sold King on October 11 at

$35.50, which was an increase of $5.50 over what King had paid for it, *id.*, resulting in a net gain for Gleacher of over $216,000. (Division Exhibit 401).

After King completed the sale of that bond, his supervisor, who had noticed the profit King made on the transaction, spoke with King and asked him why he had not recorded the profit in his book. King told his supervisor: "I had a bond that I bought – that I was going to sell back, but it had fallen in price and I needed to mark it down, so that's what this was." ID at 9. Gonnella's supervisor also noticed the transaction and told Gonnella that the repurchase "didn't look good." ID at 10. That evening Gonnella spoke with King and told him that "somebody at Barclays had noticed the trade and was asking questions." *Id.* Gonnella also told King that he was unsure whether he could repurchase the two remaining bonds that Gleacher still held. *Id.* The next morning, Gonnella's supervisor told Gonnella that he should not "do it again." *Id.*

In the meantime, King became very worried about Gonnella's statement that he might not be able to buy back the two remaining bonds. *Id.* On October 27, 2011, King spoke to his supervisor and "told him everything." *Id.* The supervisor was upset and told King to tell Gonnella that he had to repurchase the bonds or he (the supervisor) would call Gonnella's supervisor and "then you guys are both going to be out of business." *Id.* Later that day, King conveyed the ultimatum to Gonnella. *Id.* In a series of subsequent communications, at least one of which was over Gonnella's cell phone in violation of Barclays's policy, King continued to press Gonnella to quickly repurchase the bonds. ID at 10-11.

That same day, Gonnella offered to repurchase one of the two bonds. ID at 10-11. The transaction was conducted through a third party intermediary. ID at 11. Gonnella also repurchased the final bond – the one Gleacher purchased in August that had declined in value –

the following week. ID at 10-11. This transaction was also conducted through a third party intermediary. ID at 11. The price Gonnella paid to repurchase the two new bonds he sold Gleacher on October 11 was almost $445,000 more than he received when he sold him, and was designed to make up for the loss that Gleacher had sustained on the final bond. ID at 11.

Overall,after netting out gains on the bond that had declined in value and losses on the other, Barclays paid approximately $111,000 more for the twelve bonds at issue than it received when it sold them. ID at 12. As a result of these transactions, Barclays fired Gonnella and Gleacher fired King. *Id.*

E. Judge Grimes's Factual Conclusions

Judge Grimes found that "Gonnella and King were operating pursuant to a prearranged scheme" (ID at 18) and that buying back the bonds was part of the "plan from the start." ID at 9 n.18. For Gonnella, "[t]he object of the scheme was to both avoid aged-inventory charges that were implemented under Barclays's internal policy and yet to retain the securities that were subject to the policy." ID at 16. For King, the scheme offered "a quick way to earn an easy profit at no risk." *Id.* With respect to the October package transaction, Judge Grimes found that "[f]rom the start . . . Gonnella intended that he would repurchase these bonds at a price that would necessarily cost Barclays money." ID at 20. In what was "[p]ossibly the most damning incident," Gonnella used his cell phone in violation of company policy to set up the package transaction "in an attempt to prevent [his supervisor] from learning about the trades with Gleacher and the fact that he was committing Barclays's capital to compensate King and Gleacher as part of his scheme to evade the aged-inventory policy." ID at 19. Finally, Gonnella was "at pains to cover his tracks at Barclays" and failed to disclose his actual motives or the true facts when questioned about the trades by a Barclays compliance officer. ID at 20.

F. Judge Grimes's Assessment of Gonnella's Credibility

Judge Grimes found that at the hearing Gonnella's "credibility suffered because certain aspects of his testimony were not believable and because he tended to shade the truth as to critical points when it benefitted him." ID at 28. Specifically, Judge Grimes found that Gonnella's purported explanation for why he did not follow his supervisor's directive to not "do it again" was "unbelievable" and "not credible in light of the circumstances." *Id.* Judge Grimes also found that, given the communications in evidence, "Gonnella testified falsely when he said it was a coincidence that King profited from their trades." *Id.* With respect to other matters, Judge Grimes found that Gonnella had a tendency to give answers that "shaded the truth" or were "half-truths" that omitted the critical facts. *Id.*

G. Judge Grimes's Conclusions of Law

Judge Grimes concluded that the sale and repurchase of the bonds were not arms-length transactions, but rather were done pursuant to a pre-arranged scheme that obligated Gonnella to repurchase the bonds from King at a price that both protected Gleacher from loss and was designed to generate a profit for Gleacher at Barclays's expense. ID at 16-25. Because Gonnella had a fiduciary relationship with Barclays, his failure to disclose to his superiors the communications and arrangement he had with King constituted untrue statements of material fact. ID at 21-22. Gonnella's misstatements were even more glaring given that he was questioned about some of the trades by a compliance officer, but failed to reveal their actual purpose or the true nature of the arrangement. ID at 20-21. Moreover, Judge Grimes concluded that "each step Gonnella took in furtherance of his arrangement with King amounted to 'a deceptive or manipulative act as part of a scheme to defraud.'" ID at 22. In particular,

Gonnella's use of his cell phone to propose the package deal to King was a deceptive act designed to prevent his supervisor from learning about the illicit arrangement. ID at 19.

In sum, Judge Grimes found that Gonnella "engaged in a fraudulent scheme in which he abused his fiduciary position in order to engage in trades that benefitted him to Barclays's detriment. . . . In order to carry out this scheme he committed to repurchasing securities at prices that protected his counterparty from loss but which cost Barclays money that it would not otherwise have spent. The scheme was in connection with the offer, sale, and purchase of securities. Because Gonnella acted intentionally, he violated both Section 17(a) [of the Securities Act] and Section 10(b) [of the Exchange Act]." ID at 16.

Judge Grimes also found that Gonnella's scheme constituted securities parking (ID at 25-27), and that the failure to properly record these oral parking arrangements caused Barclays's books and records to be incomplete and inaccurate. ID at 29-30. As a result, Judge Grimes found that Gonnella aided and abetted and caused Barclays's violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. ID at 30. The ID ordered Gonnella to cease-and-desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act, and Sections 10(b) and 17(a) of the Exchange Act and Rules 10b-5 and 17a-3 thereunder. ID at 32. The ID also ordered Gonnella to pay civil penalties of $82,500. ID at 34.

Finally, the ID also suspended Gonnella from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, for a period of twelve months. ID at 34-35. It is only this component of the remedial sanctions ordered by Judge Grimes that the Division takes issue with. Given the conduct at issue, and Judge Grimes's own findings and conclusions regarding Gonnella's scienter, Gonnella's failure

to recognize the wrongfulness of his actions, and the opportunities Gonnella has for further wrongdoing, a twelve month industry suspension is plainly inadequate.

ARGUMENT

A. The Standard of Review and Legal Standard

Section 15(b)(6) of the Exchange Act, Section 9(b) of the Investment Company Act, and Section 203(f) of the Investment Advisers Act of 1940, collectively, authorize the Commission to impose an industry-wide or collateral bar as well as a penny-stock bar against certain persons, if it finds that the person has willfully violated (or willfully aided and abetted a violation of) the federal securities laws,and that s uch bar or suspension is in the public interest.

Where, as here, the Division appeals an administrative law judge's ruling concerning a bar or suspension, the standard of review is "an independent review of the record, except with respect to those findings not challenged on appeal." *In re John W. Lawton*, SEC Rel. No. 3513, 2012 WL 6208750, at *1 (Dec. 13, 2012) (Commission Opinion).

In conducting an independent review to determine whether the public interest requires sanctions, the following factors are to be considered: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*,450 U .S. 91 (1981).

The selection of an appropriate sanction includes an assessment of the deterrent effect it may have in upholding and enforcing standards of conduct in the securities business. *See In re Mark S. Parnass*, Exch. Act Rel. No. 65261, 2011 WL 4101087, at *3 (Sept. 2, 2011) ("the

function of a bar order is not limited to merely preventing future identical violations, but is more broadly designed to achieve the goals of deterrence, both specific and general, to address the risks of allowing a respondent to remain in the industry").

B. Every *Steadman* Factor Clearly Weighs in Favor of a Permanent Bar

Applying the *Steadman* factors to the conduct at issue here supports the imposition of a permanent bar. Indeed, Judge Grimes's own findings and conclusions with respect to each of the *Steadman* factors support a stronger sanction than the one he imposed.

The conduct was egregious: Judge Grimes found that "Gonnella breached his fiduciary duty in the course of intentionally defrauding Barclays. Violating the trust placed in a fiduciary amounts to egregious behavior. *See James C. Dawson*, Advisers Act Release No. 3057, 2010 SEC LEXIS 2561, at *15-16 (July 23, 2010) ("[W]e have consistently viewed misconduct involving a breach of fiduciary duty . . . as egregious.")." ID at 31; *see also id.* at 34 ("The most significant factor weighing against Gonnella is the fact that he intentionally abused his fiduciary position to trade for his own benefit to the detriment of his employer.").

Judge Grimes also found that Gonnella intentionally evaded Barclays's aged-inventory policy in order to benefit himself as part of a scheme that was designed to cost his employer money. In addition, Judge Grimes found that Gonnella went to great lengths to avoid detection, including using his cell phone to arrange the most egregious and costly transactions, and he was dishonest with both a compliance officer and his direct supervisor when questioned about the transactions, many of which were undertaken at a time when Gonnella's supervisor was on vacation.

The Commission has imposed a permanent bar where a trader engaged in a parking scheme "for his own benefit, not the firm's, and his improper trading . . . cost the firm substantial

sums of money." *In re Amsel*, Exch. Act Rel. No. 37092, 1996 WL 169430, at *5 (Apr. 10, 1996). A similar bar is appropriate here. As the Commission explained, a respondent's conduct is "no less serious because the firm was his victim rather than public investors." *Id.*

The ID's twelve month suspension fails to capture the egregious nature of Gonnella's misconduct. Indeed, the co-conspirator in Gonnella's parking scheme, who has acknowledged that he engaged in fraudulent conduct, has taken full responsibility for the wrongfulness of his actions, and has cooperated in the investigation and litigation of this action, settled charges against him by agreeing to the entry of an order that included, among other sanctions, a permanent collateral associational and penny-stock bar with a right to apply for reentry after three years. *See In re Ryan C. King*, Exch. Act Rel. No. 34-71471, 2014 WL 409322, at *6 (Feb. 4, 2014) (settled proceedings). A cooperating and settling defendant who was less culpable and acknowledges wrongdoing should not receive a more severe sanction than the ringleader who continues to deny wrongdoing. *See In re Robert Sayegh*, SEC Rel. No. 118, 1997 WL 629669, at *4-10 & n.12 (Oct. 10, 1997) (Murray, C.J.) (participant in fraudulent scheme including stock parking who did not acknowledge wrongful nature of actions received life-time bar, while other participant who expressed regret and cooperated with the Division did not).

Gonnella's conduct was not isolated: As Judge Grimes found, "[a]lthough Gonnella's conduct was not recurrent, I cannot find that it was isolated. On the one hand, the relevant events were limited to three sets of trades . . . . On the other hand, because Gonnella professes that he did nothing wrong, it is likely that he would have engaged in other similar transactions had he been able to do so." ID at 31 n.39.

Indeed, Gonnella's scheme consisted of a dozen parking transactions undertaken over a period of six months and only stopped because it was discovered by his employer.

Gonnella acted with a high degree of scienter: Judge Grimes concluded that "Gonnella acted with a high degree of scienter. His conduct and communications with King demonstrate that he intended to abuse his position of trust to defraud Barclays for his own benefit. He also made extensive efforts to hide this scheme from Barclays." ID at 31.

Gonnella has not recognized the wrongful nature of his conduct: As Judge Grimes found, "Gonnella has shown no recognition of the wrongfulness of his conduct. Instead, he persists in denying that his conduct was actionable." ID at 31. Gonnella continues to insist that at most his conduct violated Barclays's internal policies, and that this case elevates "the workplace misstep of a blossoming star into a violation of law in much the same way that a bulldozer might be used to prune a rose." Cross-Petition for Review on Behalf of Respondent Thomas C. Gonnella at 3.

Gonnella's failure "to recognize the significance of his wrongful conduct . .. gives rise to serious doubts about his future ability to refrain from engaging in such conduct." *SEC v. Sayegh*, 906 F. Supp. 939, 948 (S.D.N.Y. 1995), *aff'd sub nom., SEC v. Militano*, 101 F.3d 685 (2d Cir. 1996). *See also Lawton*, 2012 WL 6208750, at *12 (Respondent "attempts to minimize [his] conduct" and "such 'failures to recognize the wrongfulness of his conduct present[] a significant risk that, given the opportunity, he would commit further misconduct in the future.'"); *In re Jose P. Zollino*, Exch. Act Rel. No. 34-55107, 2007 WL 98919, at *16 (Jan. 16, 2007) (Commission Opinion) ("Zollino's failure to acknowledge guilt or show remorse indicates that there is a significant risk that, given the opportunity, Zollino would commit further misconduct in the future."); *In re Ross Mandell*, Exch. Act Rel. No. 34-71668, 2014 WL 907416, at *5 (Mar. 7, 2014) (Commission Opinion) (Respondent's "attempts to deflect responsibility for his fraudulent scheme demonstrate either a fundamental misunderstanding of his responsibilities as a securities professional or that he 'hold[s] those obligations in contempt.' In either case, these attempts

reveal a serious risk he would commit further misconduct if permitted in any area of the industry." (citations omitted)).

Gonnella has not provided any assurances against future violations: As Judge Grimes found, "Gonnella also has not provided any assurances that he will not engage in wrongful conduct in the future." ID at 31; *see In re Jeffrey A. Liskov*, SEC Rel. No. 498, 2013 WL 3817858, at *5 (July 24, 2013) (Initial Decision) (respondent's "failure to understand that his actions were wrongful is troubling and makes it difficult to accept any assurances that he would avoid misleading future clients"); *see also In re Harding Advisory LLC & Wing F. Chau*,S EC No. 734, 2015 WL 137642, at *89 (Jan. 12, 2015) (respondent "provided repeated, unbelievable explanations for emails evidencing clearly inappropriate conduct, which suggests a likelihood of violations in the future").

Gonnella's occupation presents opportunities for future violations: Judge Grimes found that "the fact that Gonnella was quickly hired by his current employer, KGS-Alpha Capital Markets, demonstrates that he will have the opportunity to commit similar wrongful acts in the future." ID at 31; *see Sayegh*, 906 F. Supp. at 948 (defendant's "occupation will present opportunities for future violations of the securities laws").

C. Judge Grimes's Rationales for a Short Suspension Are Not Compelling

Despite making findings against Gonnella with respect to every *Steadman* factor, Judge Grimes concluded that something short of a permanent bar was appropriate. Judge Grimes offered four rationales for limiting the sanction to a twelve month suspension, none of which are compelling in light of the strong countervailing factors.

First, Judge Grimes noted that "Gonnella's scheme was necessarily limited in scope." ID at 34. In fact, the scheme went on for almost six months, and involved a dozen separate parking arrangements. Moreover, any limitation was entirely fortuitous and due to the fact that the

scheme was uncovered despite Gonnella's myriad efforts to keep it hidden. As Judge Grimes himself noted, "it is likely that he would have engaged in other similar transactions had he been able to do so." ID at 31 n.39. Indeed, Gonnella continued to engage in prearranged trades even after his supervisor told him not to do it again. ID at 10, 21.

Second, Judge Grimes put great store in the fact that Gonnella's "former superiors at Barclays – his victim – continue to hold Gonnella in high regard, thereby suggesting that Gonnella's violations are less serious than might otherwise be the case when a fiduciary violates the trust reposed in him." ID at 34. The record, however, does not support this proposition. Whatever they may think of Gonnella personally, his superiors immediately fired him when they discovered the scheme, which is a good indication that they thought his misconduct was quite serious. This is particularly true given that Gonnella was otherwise a top performer at Barclays who had generated profits of some $17 million in 2011 alone. ID at 3. Presumably, if they felt the violations were less than serious, his superiors would have done everything possible to retain him. Instead, Gonnella's former superiors summarily fired him and then took it upon themselves to inform FINRA that Gonnella "was not forthright during his interview when asked to explain the trades." (Division Ex. 65 at 2.) Moreover, the only Barclays supervisor who testified at the hearing candidly described his disappointment and loss of trust in Gonnella. *See,e .g.*, Miller Tr. 1006:25-1007:15 ("as a manager, it almost hurts my feelings to see somebody going so far out of their way to avoid being upfront with what was happening"); 1083:16-18 (Q: "Did Mr. Gonnella live up to his obligations as an employee?" A: "In hindsight, no."). Judge Grimes, however, ignored all of this and instead relied on the testimony of Gonnella, whom he found to be not credible on any other topic.

In any event, the seriousness of the conduct stands or falls on its own, and as detailed above, Judge Grimes himself found that Gonnella's conduct was egregious and undertaken with a high degree of scienter. Breaching a fiduciary duty in the course of committing fraud is serious misconduct even if individual employees of the victim (Barclays) retain fond feelings for the perpetrator. The purported views of some of Gonnella's former superiors are of no moment with respect to the length of the industry bar, which is aimed at protecting the integrity of the financial markets, the public interest, and the investing community generally, not just the particular victim of a wrongful act. *See, e.g., In re Sherwin Brown and Jamerica Fin. Inc.*, SEC Rel. No. 3217, 2011 WL 2433279, at *7 (June 17, 2011) (Commission Opinion) (on appeal of a permanent bar, the Commission noted that respondent "also states that many of his clients 'have stood and are continuing to, stand by me.' Whether some of his clients continue to support [respondent] is not dispositive. 'We look beyond the interests of particular investors in assessing the need for sanctions, to the protection of investors generally.'" (citations omitted)); *In re James C. Dawson*, SEC Rel. No. 392, 2009 WL 4885590, at *7 (Dec. 18, 2009) (Initial Decision) (imposing a permanent bar and reasoning: "The eleven letters from Dawson's clients, a sister and ten friends, indicate that they respect Dawson and want him to continue to manage their investments. However, the Commission's purpose is to protect all investors, and, in making public interest determinations, it evaluates the welfare of investors as a class and not the interests of a particular set of investors." (citations omitted)).

Third, Judge Grimes treated Gonnella's youth as a reason for limiting the length of the bar. The Division had argued the opposite – that Gonnella's youth is a factor that militates in favor of a permanent bar – because Gonnella will have many opportunities to engage in future violations. *See In re Thomas C. Bridge James D. Edge & Jeffrey K. Robles*, Exch. Act Rel. No.

34-60736, 2009 WL 3100582, at *22 (Sept. 29, 2009) (Commission Opinion) (imposing a five year bar because, among other reasons, respondent's "relative youth would permit him to reenter the industry at any time, and for some time to come"). Judge Grimes disagreed: "I do not view Gonnella's age in the same manner as the Division. Instead, I view his relative youth both as influencing his lack of complete appreciation for the wrongfulness of his conduct and as giving him the chance to learn from his experience and to not engage in future violations." ID at 34.

This reasoning carves out a dangerous exception to the Commission's pronouncement that "[p]articipants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements." *In re Thomas C. Kocherhans*, Exch. Act Rel. No. 34-36556, 1995 WL 723989, at *3 (Dec. 6, 1995) (Commission Opinion) (citing *In re Kirk A. Knapp*, Exch. Act Rel. No. 34-31556, 1992 WL 365568, at *13 (Dec. 3, 1992) (Commission Opinion)). The reason the Commission refused to acknowledge exceptions to this rule is obvious: "Participation in the industry carries with it substantial responsibilities to the public who entrust their funds." *Knapp*, 1992 WL 365568, at *13. These substantial responsibilities exist for all participants, and excusing some due to youth or immaturity needlessly puts the public at risk. Indeed, the Commission has stated in affirming the length of a bar that "[y]outh or inexperience does not excuse a registered representative's duty to his clients." *In re Scott Epstein*, Exch. Act Rel. No. 59328, 2009 WL 223611, at *21 (Jan. 30, 2009) (Commission Opinion) (quoting *SEC v. Hasho*, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992)), *aff'd sub. nom., Epstein v. SEC*, 416 F. App'x 142 (3d Cir. 2010). Moreover, even assuming youth and inexperience were mitigating factors, they are clearly outweighed by the countervailing factors in this case, including the egregiousness of the conduct and the degree of scienter. *See In re Toby*

G. Scammell, SEC Rel. No. 3961, 2014 WL 5493265, at *8 (Oct. 29, 2014) (Commission Opinion) (upholding a permanent bar, ruling that "the mitigating impact, if any" of youth and inexperience was outweighed by other factors such as the egregiousness of the conduct, the degree of scienter, and the failure to recognize the seriousness of the violations).

Fourth, in imposing sanctions generally, Judge Grimes relied on the fact that "apart from the conduct at issue in this matter, Gonnella has no history of securities violations." ID at 31. However, the Commission has found that "lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional." *In re Philippe N. Keyes*, Exch. Act Rel. No. 54723, 2006 WL 3313843, at *6 (Nov. 8, 2006) (Commission Opinion); *see also In re Alfred Clay Ludlum, III*, SEC Rel. No. 3628, 2013 WL 3479060, at *5 (July 11, 2013) (Commission Opinion) (respondent's violations warranted a permanent bar even though he "worked on Wall Street for over 20 years with a perfect record").

For these reasons, Judge Grimes's four rationales for the twelve-month suspension, which are at many times inconsistent with Commission precedent, are not compelling. The facts established at the hearing show that Gonnella breached his fiduciary duties and intentionally engaged in deceptive conduct as part of a fraudulent stock parking scheme designed to benefit himself at the expense of his employer. Moreover, Gonnella still refuses to recognize the wrongfulness of his conduct, has not taken responsibility for his misconduct, gave sworn testimony that was "not believable" and "not credible," and has provided no assurances that he will not commit violations in the future. Under these circumstances, a permanent bar is warranted.

CONCLUSION

The Commission should impose a permanent industry-wide or collateral bar against Gonnella. In the alternative, the Commission should impose a permanent bar with a right to reapply after a period of years sufficient to ensure that Gonnella is not in a position to engage in further misconduct in the immediate future.

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DIVISION OF ENFORCEMENT

Nicholas A. Pilgrim
Daniel Michael
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street, Suite 400
New York, New York 10281
Tel: 212.336.0924
Email: pilgrimn@sec.gov