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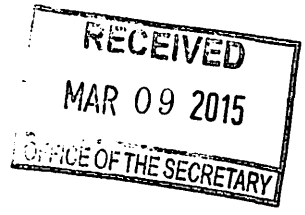

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15737

In the Matter of	
THOMAS C. GONNELLA,	
Respondent.	

DIVISION OF ENFORCEMENT'S BRIEF IN OPPOSITION TO RESPONDENT'S BRIEF IN SUPPORT OF HIS PETITION FOR REVIEW

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The Division of Enforcement ("Division") respectfully submits this Brief in Opposition to Respondent's Brief in Support of His Petition for Review ("Resp. Br.") of the Initial Decision by Judge James E. Grimes, dated November 13, 2014 ("ID"). For the reasons set forth herein, and in the Division's Brief in Support of Its Petition for Review, dated February 4, 2015, the Commission should affirm the factual findings and conclusions of law set forth in the ID, all of which are amply supported by the evidence in the record and meet the governing legal standards, but modify the sanction by imposing a permanent collateral industry and penny-stock bar on Respondent Thomas C. Gonnella ("Gonnella").

INTRODUCTION

The evidence adduced at the hearing firmly establishes that Gonnella, a former bond trader at Barclays Capital ("Barclays"), defrauded his employer and engaged in an illicit parking scheme to avoid incurring aged-inventory charges, which could adversely affect his year-end bonus. As the ID correctly found, Gonnella repeatedly concealed from his supervisors the prearranged nature of the trades, which were designed to guarantee profits for his counterparty. By engaging in this scheme, which benefitted himself at the expense of his employer, Gonnella abused the trust his employer had placed in him. The record fully supports the ID's legal conclusions that Gonnella breached his fiduciary duty, violated the antifraud provisions of the federal securities laws, and, by concealing the prearranged nature of the trades, aided and abetted and caused Barclays to violate certain record keeping provisions.

In his brief, Gonnella argues that he did not breach a fiduciary duty he owed to his employer, but merely violated an ambiguous internal policy; that even if he breached a fiduciary duty, his breach did not constitute a willful violation of the federal securities laws; and that he did not park bonds because there was no prearrangement and his counterparty temporarily

obtained legal ownership of the traded bonds. These contentions fly in the face of the evidentiary record and applicable case law, and rely on the same uncorroborated "half-truth[s]" and "unbelievable" testimony that Judge Grimes identified and correctly rejected. The facts show that Gonnella acted deliberately to avoid and evade Barclays's policies in order to benefit himself, and that he took great pains to conceal his conduct and mislead his supervisors. In short, he put his own personal interests ahead of his employer, hid his conduct, and carried out his scheme for over half a year until his supervisors caught wind of his activity, and fired him.

At the hearing held in this matter, the evidence firmly established that Gonnella engaged in a parking scheme with Ryan King ("King"), a trader at Gleacher and Company ("Gleacher"), pursuant to which Gonnella prearranged to sell and then quickly repurchase twelve bonds at prices designed to compensate Gleacher for holding the parked bonds. Gonnella engaged in the scheme to avoid incurring aged-inventory charges, which would become irreversible if he held the bonds for longer than seven months and could adversely impact his bonus. King – who has consistently admitted the existence of the prearranged sale and buyback scheme, and acknowledged his own misconduct – engaged in the scheme because he saw an opportunity to make a riskless profit while doing a favor for a trader at a larger, more influential firm. As the ID found and as the evidentiary record reveals, Gonnella concealed from his supervisors the prearranged nature of the trades on several occasions and gave misleading answers to his supervisor and compliance personnel when they learned about his trades.

In the most egregious part of the scheme, Gonnella arranged a "package bid" solely to compensate Gleacher for substantial losses that Gleacher had incurred with respect to one of the bonds Gonnella had traded. There is no plausible explanation for this transaction other than that Gonnella knew that he had committed himself at the time of the initial sale to buying back the

bond and that he was required by his understanding with King to ensure Gleacher against loss since the trades were made "for the sole purpose" of enabling Gonnella to avoid charges to his personal trading book. (Division Exhibit ("Div. Ex.") 66 at 7.)) Tellingly, when Gonnella proposed this package transaction to King to buy back the bond in question, he did so using a cell phone to avoid detection by his superior even though he knew at the time that this conduct was a direct violation of his employer's policies. Overall, the scheme, which was conducted over a six-month period and involved a dozen roundtrip trades, resulted in guaranteed profits for Gleacher and cost Barclays at least $111,000.

ARGUMENT

In his brief, Gonnella takes issue with five aspects of Judge Grimes's factual findings and legal conclusions. Gonnella contends that: 1) he did not willfully violate the law and had no motive to do so; 2) Judge Grimes erred in finding a breach of fiduciary duty and in concluding that such breach constituted a violation of the securities laws; 3) the evidence does not support a finding that Gonnella and King used coded language, thus undermining the conclusion that these were prearranged trades; 4) the ID's finding that he engaged in parking will "needlessly confuse traders" and is erroneous; and (5) Judge Grimes erred in allowing King to testify before a determination had been made concerning King's financial penalties. None of these arguments has merit. To the contrary,Gonn ella ignores the substantial evidence in the record of a deliberate fraudulent scheme and misconstrues the relevant legal standards.

A. Gonnella's Factual Account Relies On His Uncorroborated And Discredited Testimony And On Mischaracterizations Of The Record

1. Gonnella Fails To Rebut Judge Grimes's Credibility Determinations

Judge Grimes's finding that Gonnella lacked credibility is entitled to substantial deference. *See,e .g., In re Montford and Co., Inc.*, Advisers Act Rel. 3829,2014 WL 1744130,

at *19 (May 2, 2014) (Commission Opinion) ("We generally accord considerable weight and deference to the law judge's credibility determination and see no reason to depart from that determination here"). After listening to testimony and observing the witnesses' demeanor at the hearing, Judge Grimes concluded that 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. For example, 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 and the pattern of the prearranged trades, "Gonnella testified falsely when he said it was a coincidence that King profited from their trades." *Id.* Additionally, Judge Grimes found that Gonnella had a tendency to give answers that were "half-truths" and omitted the critical facts. *Id.*[1]

[1] Gonnella's "unbelievable" and evasive testimony includes his claim that,"[i]t was not like an important thing for me at the time, to boost my profits. Or that it would influence my profits." (Gonnella Tr. 477:9-25.) But his supervisor Matthew Miller, when asked why a trader might want to avoid the aged charges, answered without hesitation that "[a] trader would want to maximize their P&Ls. They wouldn't want to forfeit money." (Miller Tr. 967:21-25.) Gonnella also repeatedly contradicted himself at the hearing. For example, at one point he conceded that "everyone knows" that "[y]ou can't guarantee a customer against loss." (Gonnella Tr. 699:24-700:9.) However, when pressed previously with respect to whether he had violated his employer's policy against guaranteeing customers against losses, Gonnella implausibly stated that even an express guarantee by him to a customer would not violate this policy because "I don't know how you can even do that, actually, because – like, how are you going to be able to make sure that's the case? But, yes, I guess if you said, 'You will not lose money on this trade,' I don't know how much market risk there would be. Then again, you are only a trader, right, so if you offered – if you even said that, how would you even be able to guarantee it. . . . I'm saying I don't think any trader has the power to really guarantee that someone will not incur a loss on a trade." (Gonnella Tr. 696:8-699:2.) Gonnella also initially admitted that he knew that Barclays employees could not make representations that Barclays would resell or repurchase a security as an inducement to a customer to buy that security. (Gonnella Tr. 490:4-10.) However, when confronted with his own Bloomberg communications, Gonnella claimed that he did not know what the word "representation" meant. (Gonnella Tr. 491:24-492:4) ("Oh, I don't know what the definition is. I just think that that word is very vague, to be – just anything, basically.").

The Commission gives considerable weight and deference to credibility determinations by an administrative law judge, and such determinations can be overcome only if there is substantial record evidence for doing so. *In re Montford*, 2014 WL 1744130, at *19; *see also In re Robert M. Fuller*, Exch. Act Rel. No. 48406, 2003 WL 22016309, at *7 (Aug. 25, 2003) ("We give considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor. . . . Such determinations can be overcome only where the record contains 'substantial evidence' for doing so.") (internal quotation marks and citation omitted), *petition denied*, 95 F. App'x 361 (D.C. Cir. 2004).

Here, Gonnella has failed to put forth any record evidence to counter Judge Grimes's credibility determinations, let alone the substantial evidence required to overturn them. Instead, he merely asserts his opinion that witnesses called by the Division had a motive to lie and repeatedly cites to his own uncorroborated testimony in support of his current version of events. *See, e.g.*, Resp. Br. at 12 (claiming Gonnella sent an off-line text message "out of courtesy to Gleacher").[2] Because the ID overwhelmingly demonstrated how and why Gonnella was an

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Along similar lines, when asked whether his employer's "loss of confidence" in him indicated "loss of trust," Gonnella responded, "I don't know the definition of 'confidence.' (Gonnella Tr. 907:5-17.)

[2] In assessing Gonnella's credibility, or lack thereof, Judge Grimes was able to take stock of the fact that while Gonnella at the hearing claimed his motive for sending this off-line text message was to avoid his supervisor thinking he was "too soft and insufficiently cutthroat," Resp. Br. at 12, Gonnella had previously testified under oath that he had no motive to conceal his communications from his employer. (Div. Ex. 200 at 72:7-16) ("Q. Was there any reason to communicate with Mr. King via text instead of for example Bloomberg? A. Not that I know, not that I can recall. Q. Did you ever communicate with Mr. King via cell phone or text message with the intention that by so doing you might eliminate the possibility that your firm, Barclays, would see such communications or hear as the case may be? A. I don't remember having that motive I guess to do that as a reason why I would use text and/or cell phone conversation.") Judge Grimes also had the chance to evaluate and reject Gonnella's unbelievable explanation for his inconsistent testimony. (Gonnella Tr. 833:2-10 & 906:4-14.) ("I read that question [whether he had "any reason to communicate. . . via text"] to be, was there any legitimate reason, or -- I

unreliable witness who shaded the truth and gave incredible explanations, Gonnella's efforts to convince the Commission to embrace his self-serving testimony, which was contradicted by other witnesses and record evidence, should be rejected.

2. Gonnella Constantly Relies On Mischaracterizations Of The Record

In his brief, Gonnella broadly criticizes the overall findings concerning the illicit scheme, but does so by selectively and misleadingly quoting from the record while failing to address the overwhelming evidence concerning the scheme. For example, Gonnella claims that his supervisor, Matthew Miller ("Miller"), did not see evidence of prearrangement in a May 31, 2011 Bloomberg chat, (Div. Ex. 20), between Gonnella and King, and he supports this contention by selectively citing his supervisor's testimony that the Bloomberg communication "looks like [Mr. Gonnella is] trying to – exactly what he says. He's looking to turn over positions for month end/aging purposes." Resp. Br. at 10. This quote, by itself, is misleading because it conceals the important fact that, as to this very communication, Miller also testified: "If I had seen this chat at that point in time, I would have told him that this smells like parking and you can't do this." (Miller Tr. 974:18-20; *see also* Giglio Tr. 1224:6-1225:21 ("It looks like [Gonnella is] attempting to park the bonds and then buy them back higher.").)

Gonnella also claims that voluntarily seeking out Barclays compliance officer Louis Giglio ("Giglio") is an "irresistibly exculpatory and undisputed fact." Resp. Br. at 22. Gonnella sought out Giglio, however, after Miller confronted him about the trades and after Miller, upon receiving Gonnella's explanation, told Gonnella that he was going to "raise these [trades] up the ladder" at Barclays. (Miller Tr. 1062:25-1065:12.) Only after Miller told Gonnella that he was going to escalate the matter did Gonnella make an attempt at damage control by "voluntarily"

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don't know if I added that word," and that "I thought I was answering their question in terms of saying no, I did not have a legitimate reason to use text instead of, for example, Bloomberg.").

seeking out Giglio to get him to vouch for the trades. (Giglio Tr. 1239:22-12:41:24) ("He asked me if I could speak to Matt.") This is hardly exculpatory. Moreover, although Gonnella now tries to paint his approaching Giglio, after Miller told him he would escalate the trades, as evidence of his candor, when he spoke to Giglio he did not disclose that he had entered into the questioned trades "for the sole purpose" of avoiding aged-inventory charges,e ven though Giglio had just given a presentation reminding Gonnella and other Barclays traders that doing such trades would constitute impermissible parking. (Div. Ex. 63; Giglio Tr. 1239:10-1242:22.) Indeed, Gonnella never provided to either Miller or Giglio a true explanation of why and how he made the prearranged trades with Gleacher to avoid aged-inventory charges. (Giglio Tr. 1231:21-1232:14 & 1251:25-1252:21; Div. Ex. 39; Gonnella Tr. 629:22-25; 631:18-632:4; 632:23-633:16; 739:8-19; 741:16-19 & 743:4-8; Miller Tr. 1035:4-9.)[3]

A third misleading assertion by Gonnella is his repeated claim that Barclays "affirmatively f[ound] that he did not violate any securities statutes or regulations." Resp. Br. at 2; 18-19. Putting aside the fact that Barclays's alleged legal conclusions on violations carry no weight, this claim is factually incorrect. There is no evidence in the record that Barclays formed conclusions one way or the other as to whether Gonnella had violated securities laws: neither Miller nor Giglio (nor any other Barclays employees) ever testified that Barclays had determined that no securities law violations had occurred. Tellingly, there was no need for Barclays to reach a conclusion on that issue because, as Miller testified, "from [his] standpoint," the fact that

[3] Both Miller and Giglio testified that had Gonnella been forthright with them about the trades, they would have stopped the trades from being executed at Barclays's expense. (Miller Tr. 974:10-20; 993:18-994:10; 1009:6-20; 1036:4-12 & 1081:25-1082:16; Giglio Tr. 1204:19-1205:2; 1225:15-21 &1246:6-19.) Consistent with Giglio's and Miller's testimony, Barclays ultimately decided Gonnella's deception concerning his trading activity was material—material enough that the firm fired him after concluding that he had not been "forthright" about the trades. (Div. Ex. 65 at 1-2.)

Gonnella was not forthright during Barclays's internal investigation gave the firm sufficient grounds to fire him, which was enough to end the inquiry. (Miller Tr. 1148:8-18.) The Form U5 Gonnella cites as purported evidence of an "affirmative" finding by Barclays absolving him of securities law violations merely states that at the time of his termination Gonnella was not: (1) under internal review for fraud or violating investment-related statutes; or (2) the subject of any allegations accusing him of violating investment-related statutes or regulations. (TG 54 at 7B & 7F.) Gonnella's attempt to spin this document's representation that he was *not* under internal review for fraud or violating investment-related statutes prior to his termination into evidence that Barclays actually conducted such an internal review for securities law violations and affirmatively found no such violations is without merit.

B. The Record Fully Supports A Finding That Gonnella Acted With the Requisite Intent to Violate the Federal Securities Laws

Gonnella contends that the Division "needed to prove Mr. Gonnella's willfulness and his intent to violate the securities laws" and that "[t]he evidence did not permit the conclusion that Mr. Gonnella willfully violated the law for no tangible purpose and virtually no gain." Resp. Br. at 20-21. Gonnella's willfulness argument is wrong as a legal matter. It has long been clear that "civil liability follows from any violation of the securities laws regardless of whether the violation was willful."[4] *U.S. v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005).

[4] The concept of "willfulness" is, of course, important in determining the appropriate remedy for securities law violations. *See* 15 U.S.C. §§ 78o & 78u–2(a), 80a-9(d) & 80b-3(i)(2). However, "[i]t has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation" and does not mean that "the actor [must] also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)). There is no dispute that Gonnella intended to engage in the trades at issue; accordingly, the remedies ordered by Judge Grimes are warranted by the facts of this case. *See In re Donald L. Koch*, Exch. Act Rel. No. 72179, 2014 WL 1998524, at *13 n.139 (May 16, 2014) ("As the Division rightly points out,

The correct legal standard for civil cases involving violations of Section 17(a)(1) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"),a nd Rule 10b-5 thereunder, is scienter, while violations of Section 17(a)(3) of the Securities Act can be established by proof of negligence. *Aaron v. SEC*, 446 U.S. 680, 701-03 (1980). Scienter is a "mental state embracing intent to deceive, manipulate or defraud," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976), and can also be established by proof of recklessness. *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000).

The evidence adduced at the hearing amply shows that Gonnella acted with scienter. *See* ID at 31 & 32 (finding that Gonnella's efforts to deceive Barclays were intentional"). As Judge Grimes found, Gonnella breached the fiduciary duties he owed to his employer by engaging in deceptive trades that were designed to benefit himself at his employer's expense. ID at 15-16; 21-22. To further the scheme, Gonnella concealed the transactions from his supervisors and compliance personnel. *Id.* at 20-22. In one particularly telling example Gonnella used his cell phone to set up the "package bid" in which he committed to sell and repurchase two bonds at a significant mark-up to compensate his counterparty for a loss that was incurred on one of the earlier transactions. *Id.* at 7-11. As Judge Grimes found, Gonnella used his cell phone "in an attempt to prevent [his supervisor] from learning about his 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. Not only does the record support the ID's finding on this issue, Gonnella, when confronted at the hearing with his Bloomberg message directing his counterparty to "check [his] text in like 3 minutes," (Div. Ex. 46), admitted that he sent the text message on his private cellular phone because he was concerned his supervisor monitored

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however, such a finding [that respondents intended to make the trades that they did] is all that is required to show willfulness here.").

his Bloomberg chats.[5] Gonnella also was forced to concede that he took this step to evade supervision even though he knew his conduct violated his employer's policies. (Gonnella Tr. 588:9-18) (Q. You knew Barclays'[s] policy was that you couldn't use your private cell phones to discuss company business; correct? A. I did. Q. And yet you chose to violate that policy after [King] asked you about the BAYC; correct? A. I did.").

Even beyond his own admissions, the evidence in the record manifestly supports Judge Grimes's finding that Gonnella acted with scienter when he took deliberate measures to deceive his employer. Among other things, Gonnella gave incomplete and misleading answers when questioned about the transactions by compliance and legal personnel (Div. Ex. 39; Gonnella Tr. 739:8-740:13); he engaged in the majority of the transactions while his direct supervisor was on vacation,I D at 16-17; 22; and he gave incomplete and misleading answers when questioned by his supervisor upon Miller's return. (Miller Tr. 1031:25-1034:16.) Additionally, after he used his personal phone to send a text message that King recognized as "sneaky, sneaky," (Div. Ex. 46), Gonnella continued to use his private cell phone to conceal from Barclays what he was discussing with King concerning the package bid.[6] (Div. Ex. 50; 51 & 53.)

Although Gonnella *now* claims that he thought his decision to violate Barclays's policy prohibiting the use of personal phones to discuss company business was "a minor infraction," Resp. Br. at 10, during the hearing he acknowledged that he understood the policy was designed to serve important purposes; namely, to protect Barclays from liability or from secret trading activity. (Gonnella Tr. 592:10-593:5) ("Q. Many reasons, and one of those reasons is to protect

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[5] In particular, Gonnella testified that he deliberately violated Barclays's policy by texting King because he thought Miller monitored his Bloomberg chats and "reads a lot" of them. (Gonnella Tr. 624:6-13.)

[6] (Gonnella Tr. 706:7-13.)

Barclays from liability; correct? A. Correct. Q. Because they don't want traders who can spend up to 300 million of their capital making deals behind their backs; correct? A. Yes, they would not want that. Q. And you knew that at the time; correct? A. Correct.") & 705:9-706:13).)

Further support for the ID's finding that Gonnella deliberately deceived his employer comes from Barclays itself, which reported to FINRA that Gonnella "was not forthright during his interview when asked to explain the trades." (Div. Ex. 65 at 2). In short, Gonnella cannot reasonably contest that the facts in the record establish that he acted with the requisite scienter, which may explain why he is erroneously grasping for a different legal standard of "willfulness."

Like his willfulness argument, Gonnella's claims about his alleged lack of a motive, which he acknowledged the Division "was not required to prove," are similarly unavailing. Resp. Br. at 20. Undeniably, the aged inventory charges affected the profitability of Gonnella's trading book, which was a component in calculating his compensation. ID at 24; (Answer ¶ 7; Miller Tr. 939:16-942:13.).[7] Managing risk was also a factor in determining his compensation, and the aged-inventory policy was viewed as a "risk management tool." (Miller Tr. 939:16-942:13 & 962:6-965:12; Gonnella Tr. 795:9-16.) Moreover, the prearranged trades allowed Gonnella to continue to pursue long-term trading strategies with bonds that he "liked" and wanted to keep, contrary to his supervisors' instructions to avoid holding long-term investments, which increased risk, since his trading desk was in the "moving business, not [the] storage

[7] Dr. Kapil Agrawal testified during the hearing that by selling the bonds at issue to King before the aged-inventory charges became non-refundable, Gonnella avoided an estimated $725,824 in charges to his trading book's P&L. (Agrawal Tr. 121:24-122:5; Div. Ex. 400 at 14.) Through these prearranged trades, Gonnella also reset the aged-inventory clock, which allowed him to hold these bonds for another seven months without incurring monthly inventory charges of $140,646 per month. (*Id.* (sum of figures in 'Minimum of Two Estimates ($)' column).)

business, so to speak." (Gonnella Tr. 795:9-16.)[8] *See* ID at 28 ("What is clear is that Gonnella was trying to have his cake and eat it too. He wanted to keep the bonds but he did not want to face irreversible aged-inventory charges.").

At any rate, ultimately actions speak louder than the words now offered after the fact by Gonnella to whitewash his conduct. The ID correctly recognized that aged-inventory "charges would have had some impact on [Gonnella's] compensation and, even if there would have been no impact, the fact remains that through his actions and words ... Gonnella showed that he was trying to avoid the aged-inventory charges but yet retain the bonds in question. Plainly, he acted as though the aged-inventory charges would have had some negative impact on his compensation." ID at 24. Moreover, even assuming *ex arguendo* that the financial effect on Gonnella's compensation and the cost incurred by Barclays as a result of his prearranged trades were both small, the simple fact is that Gonnella engaged in a scheme to transfer a cost away from himself and place it on his employer. As Judge Grimes found, Gonnella "was acting in his own interest, contrary to Barclays's best interests, while misrepresenting his actions to Barclays. The fact Gonnella's actions might make little sense does not mean that he did not violate the antifraud provisions." *Id.*

C. Gonnella Violated Securities Laws When He Breached A Fiduciary Duty He Owed to Barclays In Connection With His Deceptive Trading Activity

Gonnella argues that he did not breach a fiduciary duty and that even if he did, the breach only concerned an internal policy and does not form the basis of a securities law violation. Resp. Br. at 32-34. This argument fails as both a factual and legal matter.

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[8] Miller explained that market-makers like Gonnella were not supposed to be engaged in long-term proprietary trading strategies in order to comply with various regulatory requirements. (Miller Tr. 962:6-965:12.)

First, Gonnella admits that he owed a fiduciary duty to Barclays arising from his employment relationship. (Answer ¶ 5.) This fiduciary duty required him to act at all times in Barclays's best interest, exercising "the utmost good faith and loyalty in the performance of his duties." *Design Strategies, Inc. v. Davis*, 384 F. Supp. 2d 649, 659-60 (S.D.N.Y. 2005) (citations omitted), *aff'd*, 469 F.3d 284 (2d Cir. 2006). Since it is undisputed that he owed his employer a fiduciary duty, Gonnella *now* claims that "the requirements of [the] aged-inventory policy were not clear to *him*." Resp. Br. at 20 (emphasis added). In support of this assertion, however, Gonnella curiously cites to the testimony of other witnesses' interpretations of this policy, and not his own. *Id.* The reason he does not cite his own testimony is because he testified that he clearly understood how the policy worked. (Gonnella Tr. 472:17-474:8.)

Second, even if evidence existed to support his claim that he did not understand the aged-inventory policy, this new attempt to evade responsibility for his conduct misses the point. The Division did not allege that Gonnella violated the antifraud provisions because he violated Barclays's aged-inventory policy. Rather, the Division argued that Gonnella violated the antifraud provisions because, *inter alia*, he deceived his employer and repeatedly breached his fiduciary duties by engaging in deceptive trades to benefit himself at his employer's expense where the trades: (1) violated his employer's policies concerning offers to repurchase, the sharing of customer losses, and the use of personal cell phones; (2) had no legitimate purpose; and (3) cost Barclays at least $111,000. (Miller Tr. 996:7-25.) As Barclays's compliance officer explained, the firm would lose substantial amounts of money if each of its traders did what Gonnella did: sell bonds to avoid aged-inventory charges to one's personal trading book and buy them back shortly afterwards at higher prices. (Giglio Tr. 1253:14-20.)

Third, Barclays entrusted Gonnella with investing up to $300 million of its capital in exchange for him agreeing that he would comply with the firm's policies against prearranged trading and not offer to repurchase as an inducement, share customer losses, or use his personal cell phone to conduct business. (Gonnella Tr. 488:10-22; 496:15-25; 588:11-18 & 696:8-14.) Gonnella knew his fiduciary obligations, (Gonnella Tr. 489:23-490:16; 696:8-14; 702:14-703:14; 706:7-13 & 707:8-709:19), but chose to violate them when he traded with King, at Barclays's expense, solely to avoid aged charges to his trading book. *See In re W.N. Whelen & Co., Inc.*, Exch. Act Rel. No. 28390, 1990 WL 312067, at *2 (Aug. 28, 1990) (Commission Opinion) ("When he effected parking transactions at [his employer's] expense, he not only disregarded just and equitable principles of trade but his fiduciary obligations."). Gonnella then lied about his conduct and took steps to conceal what he was doing from his supervisor, which prevented Barclays from timely detecting the scheme that cost it $111,000.[10] This deceptive conduct clearly establishes a fraudulent breach of his fiduciary duty. *See U.S. v. DeMizio,* 741 F.3d 373, 383-84 (2d Cir. 2014) (finding fraud where defendant concealed his kickback scheme from employer by speaking in "code because he didn't want the people seated next to him to hear").

Finally, Gonnella's claim that even if he breached his fiduciary duty to Barclays it does not rise to the level of securities fraud is unsustainable. It is well-established that a fiduciary

[10] Gonnella admitted that these trades imposed a cost on Barclays. (Gonnella Tr. 1367:14-1368:21.) These costs served no legitimate purpose, and the planned and actual outcome for them was that **"Gleacher made money at Barclays'[s] expense and Barclays was left with the same securities."** (Miller Tr. 995:12-18 & 1083:12-15) (emphasis added). Even if the Division were required to prove harm, which it is not, *see Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000), courts have long recognized that unnecessary or illegitimate costs are sufficient forms of harm. *See, e.g., Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 187 (2d Cir. 1998) (mark-ups); *In re Donald A. Roche*, Exch. Act Rel. No., 1997 WL 328870, at *6 (June 17, 1997) (churning). Indeed, in *In re Mayer A. Amsel*, Exch. Act Rel. No. 37092, 1996 WL 169430, at *4 (Apr. 10, 1996), the Commission found that a trader that sold and repurchased securities at unfavorable prices to benefit himself "improperly disadvantaged the firm." The facts clearly establish that Gonnella's breach of his fiduciary duty was not harmless.

who violates his obligations and trades to the detriment of his principal can be liable under the antifraud provisions. *See Superintendent of Ins. of N.Y. v. Bankers Life*, 404 U.S. 6, 11-12 (1971); *SEC v. Zandford*, 535 U.S. 813, 821-22 (2002) (fiduciary commits fraud when he acts for his own benefit in the course of exercising his delegated authority to trade); *In re Refco Capital Mkts., Ltd. Brokerage Customer Sec. Litig.*, No. 06 Civ. 643, 2007 WL 2694469, at *7 (S.D.N.Y. Sept. 13, 2007) ("Acceptance of a fiduciary duty creates an understanding that the fiduciary will behave in certain ways; if the fiduciary allows this understanding to continue while acting inconsistently with her obligations, she has deceived the victim."). A breach of fiduciary duties is actionable under Section 10(b) of the Exchange Act so long as the securities transactions and breaches of fiduciary duty coincide. *Zandford*, 535 U.S. at 825. It is also well-established that in cases involving a fiduciary relationship "silence in connection with the purchase or sale of securities may operate as a fraud" under Section 10(b). *Chiarella v. U.S.*, 445 U.S. 222, 230 (1980). Here, when Gonnella traded for his own benefit and to Barclays's detriment while feigning allegiance to Barclays and failing to disclose what he was doing, his breach of fiduciary duty coincides with the securities transactions. *See Zandford*, 535 U.S. at 825; *see also Troyer v. Karcagi*, 476 F. Supp. 1142, 1149 (S.D.N.Y. 1979) ("a Rule 10b-5 cause of action is adequately alleged as to instances of the purchase or sale of securities under circumstances where Karcagi failed to disclose self-interest [to clients to whom he owed a fiduciary duty]....").

D. Gonnella's Argument That He Did Not Park Bonds Fails

1. Gonnella's Claim That There Was No Prearangement With King Is Unpersuasive

Gonnella, who in the midst of a roundtrip trade reminded King to "pls do what we discussed before," (Div. Ex. 49), argues that Judge Grimes incorrectly found evidence of prearrangement. Resp. Br. at 22-27. Unable to seriously challenge the thoughtful analysis in the

ID on this issue or the countless Bloomberg messages and subsequent trades between himself and King revealing prearrangment, Gonnella can only criticize Judge Grimes for failing "to explain how two passing acquaintances like Mr. Gonnella and Mr. King could successfully implement a comprehensive code without any advance discussion." *Id.* at 23.

This argument relies upon a highly semantic and narrow interpretation of "coded language" that ignores Judge Grimes's findings on this issue and the reality of how King and Gonnella understood exactly how their prearranged trades should work without explicitly spelling out all of the details in their Bloomberg chats, which they both knew were recorded and subject to monitoring by supervisors and/or compliance personnel. (King Tr. 220:14-221:18; Gonnella Tr. 502:7-20; 624:8-13 & 739:24-740:2.) King testified that he and Gonnella used coded language to evade supervision. (*See,e .g.*, King Tr. 220:14-25; 246:14-19; 263:18-24 & 269:25-270:11.) By that, he did not mean that they had devised a secret "comprehensive code" as if they were Cold War spies, but simply that they spoke in intentionally vague terms to give them wiggle room to deny they were engaged in prohibited, prearranged transactions. (*See* King Tr. 246:20-24) ("Just wanted to be as vague as possible."). Judge Grimes accurately grasped this fact: "I interpret King's testimony that he and Gonnella spoke in code as simply indicating that they were intentionally vague in their communications with each other." ID at 6 n.13.[12]

[12] Some of the vague and coded language utilized by the parties in their Bloomberg discussions include: (1) "any clarity on the BAYCS that I own?"; (2) "I've got a BAYC bond with your name on it"; (3) "I would like to divest myself of some BAYC paper if at all possible"; (4) "got some love for BAYC today"; (5) "any chance you can take BAYC before Thursday EOD;" and (6) "any gauge on the likelihood of getting those few things done?" (Div. Ex. 35; 40; 43; 45; 46 & 52.) Although Gonnella allegedly believed that King was in the "universe of Bayview traders" and, therefore, traded an unknown quantity of BAYC bonds with other counterparties, each time King used this vague language, Gonnella understood exactly what BAYC bond or bonds King was referring to without King having to explicitly identify the bond he expected Gonnella to buy back. (Gonnella Tr. 574:3-23 & 746:11-13.) Moreover, on each occasion that King used this vague language, Gonnella not only correctly "assumed" exactly what bond or

In any event, the evidence adduced at the hearing firmly established that Gonnella and King prearranged for Barclays to repurchase the bonds at a slightly higher price. First, King testified that he understood from the outset that he would purchase bonds from Gonnella that Gonnella would then repurchase at a mark-up. (King Tr. 222:16-223:11 & 244:16-251:6); *cf. SEC v. First City Fin. Corp., Ltd*, 688 F. Supp. 705, 717 (D.D.C. 1988) ("the facts and events support a finding that [the trader holding the parked securities] correctly understood Belzberg's instructions"). King understood that the purpose of this parking arrangement was to allow Gonnella to evade Barclays's aged-inventory policy and that the scheme, which involved him doing a favor for a trader at a larger firm, would result in a "risk free" profit to him and Gleacher, his employer. (King Tr. 217:23-219:17; 221:22-224:25 & 248:2-251:6.) As discussed below in Section E., King consistently testified about the prearranged nature of the trades in both his investigative testimony and at the hearing, and, as Judge Grimes found, Gonnella's actions and his communications with King make no sense unless there was prearrangement. ID at 18.

Second, with respect to nine of the transactions, the repurchases were made shortly after the sales, but at higher prices that were dictated by Gonnella without any negotiation. *Id.* at 26-27. As Judge Grimes concluded, "[t]he combination of these factors shows that Gonnella and King were operating pursuant to a prearranged scheme." *Id.* at 18.

Third, the acts and communications leading up to the "package bid" designed for Gonnella to buy back the BAYC 07-4A A1 bond from King provide even more evidence of prearrangement. On September 7, 2011, after King inquired about the repurchase, Gonnella replied that he had not "forgotten about" King and that he would get back to him with a bid. *Id.*

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bonds King was referring to but also either promptly bought back the bonds he had sold to avoid aged-inventory charges or requested additional time to buy back the BAYC 07-4A A1 bond. (*See, e.g.*, King Tr. 269:9-270:7; Gonnella Tr. 560:9-561:7; 562:2-8; 569:8-18 & 588:2-588:6; Div. Ex. 41-43; 45-46.)

As Judge Grimes concluded, "[u]nless King and Gonnella understood that Gonnella needed to repurchase the bond, Gonnella's statement that he had not forgotten about King makes no sense." *Id.* The same day that Gonnella told King he had not forgotten about him, he repurchased $12 million original face of the bond at a price that created a gain for Gleacher. (Gonnella Tr. 562:2-8 & 569:8-18; Miller Tr. 994:18-995:18; Div. Ex. 15; 33; 42; 400 at 11; & 401.) This transaction left King still holding $7.65 million original face value of that bond. ID at 7.

Further, Judge Grimes correctly recognized that the package transaction that was eventually consummated to enable Gonnella to repurchase the remaining amount of this bond provides the most damning evidence of the illicit scheme. *Id.* at 19. Gonnella sold King two additional bonds that he immediately repurchased at a significant mark-up to compensate Gleacher for the loss it incurred when the BAYC 07-4A A1 bond had declined in value. *Id.* at 19-20. The prices Gonnella set (without any negotiation) to repurchase those two bonds was $444,000 more than the sale price, and effectively made Gleacher whole on the bond that had lost money. *Id.* at 20; (Miller Tr. 1038:20-23.) This transaction, which Gonnella proposed to King using his personal cell phone to avoid detection and in deliberate violation of Barclays's policies, only makes sense if there was a prearrangement. As Judge Grimes noted, it "was not [Gonnella's] job to sell securities in order to help another trader offset a loss with Barclays's capital." ID at 20.

Judge Grimes's conclusion that Gonnella and King engaged in prohibited prearranged trading designed to allow Gonnella to avoid aged-inventory charges while shielding King from loss is based not only on this overwhelming evidence, but on his thoroughly supported finding that "King's testimony was more credible than Gonnella's testimony." ID at 27-29; *see Zacharias v. SEC*, 569 F.3d 458, 470 (D.C. Cir. 2009) ("this court is 'least inclined to second

guess such [credibility] findings where, as here, the Commission affirmed the ALJ who, of course, heard the testimony in question.'" (citation omitted)); *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 601 (S.D.N.Y. 1993), *aff'd sub nom.*, *SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994) (finding that the candid witness was the one who "owned up to his transgressions" as opposed to the witness who "gave the appearance of someone who cannot, and therefore will not, accept the fact that he has done wrong"). Gonnella's self-serving and evasive testimony is insufficient to overcome the ID's findings on the prearranged nature of the trades. *Id.*

2. Parking, While Established, Is Not Required To Demonstrate A Securities Law Violation

Gonnella claims Judge Grimes's "relegation of stock parking to an alternative theory of liability" is "troubling" and erroneously argues that the securities laws prohibiting fraud can only be established if his trades constituted parking. Resp. Br. at 27-32. This contention overlooks a large body of law finding that deceptive trader conduct, including conduct "relating to employee compensation" is sufficient to establish Rule 10b-5 liability. *See In re Orlando Joseph Jett*, Exch. Act Rel. No. 49366, 2004 WL 2809317, at *13-14 (Mar. 5, 2004) (Commission Opinion). In *Jett*, the Commission found a trader liable under the same provisions charged here where the trader "devised a 'trading strategy' to create the appearance of improved performance" and the deceptive trading scheme enabled the trader to bolster his compensation at his employer's expense. *Id.* at *3, *14. *Jett* establishes that irrespective of whether Gonnella's conduct amounted to parking, he can be found liable if he engaged in a trading scheme that involved an intent to deceive or withhold material information from his employer at his employer's expense. Here, for the reasons discussed above, there is no question these elements are met. (*See, e.g.*, Miller Tr. 1007:4-15) ("[A]s 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.")

In addition to *Jett*, other cases have recognized that unauthorized trades or trades that mislead an employer to increase a trader's compensation constitute securities fraud. *See, e.g., SEC v. Lee*, 720 F. Supp. 2d 305, 318, 333-34 (S.D.N.Y. 2010) (trader committed securities fraud by mismarking the positions on his book which made him "eligible for salary increases and bonus payments."). And, as noted in a prior section, numerous courts have held that a breach of fiduciary duties can be the basis of Rule 10b-5 liability where the breach of fiduciary duties coincides with the sale or purchase of securities. *See Zandford*, 535 U.S. at 825; *In re Refco*, 2007 WL 2694469, at *7; *Karcagi*, 476 F. Supp. at 1149. Thus, even if Gonnella's trades with King did not constitute parking – which they clearly did – Gonnella would still be liable under the antifraud and books and records provisions because he defrauded his employer by engaging in improperly disclosed trades that had no legitimate purpose, and he did those trades with a clear intent to deceive Miller, Giglio, and others at Barclays.

In sum, Gonnella's "it's parking or it's a bust" arguments are not supported by case law and lack merit because the securities laws are broadly designed to prevent deceptive conduct that occurs in connection with the sale, purchase, or offer of sale of securities no matter whether a particular label is applied to that conduct. *See Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 151 (1972); *VanCook v. SEC*, 653 F.3d 130, 138 (2d Cir. 2011).

3. Gonnella Engaged In Parking To Facilitate His Long-Term Ownership Of Aged Bonds In Circumvention Of His Employer's Policies

To bolster his dubious challenge to the ID's finding that he engaged in parking, Gonnella reaches for inflammatory rhetoric and attacks Judge Grimes for adopting "myopic reasoning" and for purportedly acting as an "advocate" for the Division, thereby "undermining the presumptive deference to which the Judge's findings might otherwise be entitled." Resp. Br. at 4, 27 n.5. Notwithstanding his unwarranted attempt to smear both Judge Grimes's logic and

integrity (which is the same tactic he uses to besmirch his former supervisor, Miller, for that matter), Gonnella's argument that he did not engage in parking simply is not persuasive. Far from creating new case law that "would needlessly confuse traders and hinder legitimate trading," Resp. Br. at 32, Judge Grimes applied the existing body of case law on parking to the facts of this case and found that Gonnella had engaged in "sham" trades with King that temporarily concealed Gonnella's ownership of aged bonds but left "the market risk with Barclays." ID at 23 & 26. In short, Judge Grimes correctly found that Gonnella had engaged in conduct bearing all the traditional hallmarks of parking, i.e., temporary sales of securities designed to conceal ownership where the market risk remains with the purported seller. Gonnella concedes, as he must, that numerous courts have found such conduct to constitute illegal parking. Resp. Br. at 28 (noting that parking involves the "sham sale" or "temporary sale" of securities designed to "conceal true ownership").

Significantly, when stripped of rhetoric attacking Judge Grimes, Gonnella's argument that he did not engage in parking boils down to the fact that while King temporarily held legal ownership of the aged bonds, "Gleacher received principal and interest payments attendant to true ownership." Resp. Br. at 30. However, as Judge Grimes correctly found, parking, by definition, involves the temporary transfer of "actual legal ownership" to another party, which may come with interest payments that go to the nominal owner. ID at 27. By seeking to divert attention from the fact that market risk never effectively left Gleacher[13] to the fact that Gleacher received some interests payments while temporarily parking Gonnella's aged inventory, Gonnella attempts to escape liability for conduct several courts and the Commission have recognized constitutes illegal parking. *See* ID at 25-27. This attempt is unavailing for all the

[13] (*See, e.g.*,Miller Tr. 1041:3-6) ("When you sell a security, you are transferring risk, so the whole concept of true sale would be violated if you're not actually selling them the risk.")

reasons discussed in the ID's analysis and in the Division's Post-Hearing Brief (pages 26-35), which the Division respectfully refers the Commission to should Gonnella's "beneficiary ownership" arguments warrant further consideration.

Gonnella does not seriously challenge the fact that his sham trades with King exposed his employer to significant risks by secretly making Barclays responsible for absorbing losses on bonds that were parked, i.e., hidden on another firm's books (e.g., the BAYC 07-4A A1 bond that he ultimately compensated Gleacher for with the "package bid"). Instead, he argues King's windfall on the package trade and other roundtrip trades was fortuitous, an explanation Judge Grimes correctly found to be unbelievable. *See* ID at 16-18; 20. (*See also* Miller Tr. 1038:20-23) ("what does seem very obvious, sitting here, is the dispersion between the buy and the sell prices was set to cover the loss on the 07-4" bond).

Finally, Gonnella's argument that Judge Grimes's parking ruling will confuse traders and hinder legitimate trading is fatally flawed because: (1) this case does not involve legitimate trades; and (2) industry participants understand that the type of trading activity Gonnella engaged in constitutes illegal parking. Barclays, for example, instructed its traders that parking, i.e., "[h]olding or hiding securities in a . . . customer account . . . or another firm is strictly prohibited." (Div. Ex. 4 at 5.) Barclays's compliance personnel also provided presentations to the firm's traders defining parking as "[t]rades that lack a real shift in ownership risk or benefit, with the purpose of concealing the true ownership of the securities, particularly at the end of a reporting period." (Div. Ex. 63 at BARC0002656.) This definition of parking is, of course, entirely in line with Judge Grimes's holding. ID at 25-26. Additionally, under the rubric of "Parking," Barclays's compliance personnel reminded its traders that it was "strictly prohibited for an individual to avoid [the aged-inventory] policy by selling a security to a client with an

agreement to repurchase later." (Div. Ex. 63 at BARC0002656; Giglio Tr. at 1240:5-25; Miller Tr. 1061:25-1062:2.) Moreover, certain of Gonnella's August 30 sales to King triggered a compliance review by Barclays's internal systems, Mantis Actimize, which flagged the trades as potential parking scenarios.[15] (Div. Ex. 38.) It is certainly dubious for Gonnella to argue that traders will be confused by a legal ruling that his trades constituted impermissible parking when his firm's presentations, internal policies, trading monitoring system, supervising trader, and compliance officer all identified his conduct as indicative of parking. (Giglio Tr. 1224:6-1225:14 ("It looks like [Gonnella is] attempting to park the bonds and then buy them back higher."); Miller Tr. 973:12-974:20 ("If I had seen this chat at that point in time, I would have told him that this smells like parking and you can't do this."). And, of course, King, Gonnella's trading partner, also recognized from the start that they were engaged in impermissible prearranged trading. (King Tr. 220:14-25; 221:19-223:2 & 233:3-235:5.)

E. Gonnella's Argument That King Should Not Have Been Allowed To Testify Is Unsupported And Unpersuasive

In a pre-hearing motion, Gonnella sought to preclude King from testifying on the ground that King had entered into a cooperation agreement with the Division that deferred a determination of any penalty that King would pay in settlement of an action against him until after the Gonnella hearing. Judge Grimes considered this argument and rejected it. *See In re Thomas C. Gonnella*, Order on Motions in Limine, July 2, 2014. In his brief, Gonnella renews

[15] At the hearing, Giglio explained that Mantis Actimize was used to analyze trade information received from a data repository, and that if any transactions inputted by a trader appeared to match a particular scenario, an alert would be generated. (Giglio Tr. 1208:3-20.) Giglio also explained that a "Parking F1" scenario involved the computer system analyzing sales that occurred within a certain number of days before the end of a month followed by repurchases of the same security, or vice versa, in approximately the same quantity on the other side of the month. (Giglio Tr. 1211:2-10.)

this meritless argument claiming that the cooperation procedures somehow violated his due process rights as well as the basic principle of separation of powers because the prosecutorial power is allegedly in the same hands as the sentencing power. Resp. Br.a t 34-36.

Notably, Gonnella simply recycles his previously rejected arguments without addressing any of the reasons Judge Grimes gave for rejecting them. In ruling on the Motions in Limine, Judge Grimes noted that Gonnella was putting forth a policy argument that "proceeds from the false premise that the government prosecutes every cooperating witness and assumes, without support, that the procedures employed in criminal prosecutions must be employed in the administrative setting." Order on Motions in Limine at 3-4. This argument amounts "to an attack on the exercise of prosecutorial discretion and, more broadly, an attack on the administrative framework in which his case is being pursued." *Id.*a t 4. Judge Grimes rightly concluded that Gonnella's arguments challenging the administrative process and cooperation procedures lacked merit. *Id.* at 4 (*citing Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (discussing an agency's prosecutorial discretion); *Porter County Chapter of Izaak Walton League of America, Inc. v. Nuclear Regulatory Comm'n*, 606 F.2d 1363, 1371 (D.C. Cir. 1979) ("Even as to adjudications, the combination in one administrative body of adjudicative with other functions violates constitutional guarantees only when the combination 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'")

Gonnella also asserts that the cooperation agreement gave the cooperating witness an incentive to testify falsely and that King allegedly testified differently at the investigative stage than he did at the hearing. Resp. Br. at 15; 34-35. Gonnella's claim that King invented false testimony for purposes of the hearing ignores the fact that King has repeatedly and consistently

described the illicit nature and purpose of the prearranged trades. (*Compare* Div. Ex. 201 (King Investigative Test. Tr.) at 19:5-6 ("...at the time, yes, I thought there was something wrong with the trades"); 20:8-23 ("That there was an expectation when I purchased them that he would buy them back"); 25:5-26:20 & 68:4-19 ("From what I gathered, that he was selling me bonds that were aged and he would buy them back and it would restart that clock") *with* King Tr. 232:14-21 (recognizing that the prearranged trades were "a violation of securities rules and regulations"); 241:25-242:13 ("I read that to mean that he was referring to bonds that were on his book that had aged and that were getting expensive and he needed to reset the clock"); 248:2-24 ("I would buy these bonds that were aged around – before month end, and that I would be selling them back to him at some higher price shortly thereafter") & 444:2-449:2.).)[16]

Leaving aside the fact that the evidentiary record disproves Gonnella's contentions, any alleged inconsistencies in testimony or motives on the part of King to give slanted testimony were best addressed through cross-examination at the hearing and do not form a basis for rejecting the structure of cooperation agreements that bifurcate the penalty determination until after the witness testifies. Judge Grimes, as the fact-finder, fully considered what weight, if any, to give to King's testimony as a result of his cooperation agreement. *See* ID at 27-28 (acknowledging as a discrediting factor the fact that King "testified pursuant to a cooperation agreement"). Because Gonnella cannot contest that it is uniquely in the province of the fact-finder to evaluate how potential biases or motives might impact a witness's credibility, his argument that King should not have been allowed to testify solely by virtue of his cooperation agreement necessarily fails. *Cf. U.S. v. Torres*, 128 F.3d 38, 44 (2d Cir. 1997) (in the context of

[16] King testified under oath during investigative testimony before the Division on October 10, 2012. (Div. Ex. 201.) King signed a settlement offer with the Division and a cooperation agreement on or about January 6, 2014. (TG 35 & 36.)

evaluating jurors: "The trial judge has this broad discretion because a finding of actual bias 'is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.'") (citing *Wainwright v. Witt,* 469 U.S. 412, 428 (1985)).

CONCLUSION

The Commission should affirm the factual findings in the ID, all of which are firmly supported by evidence in the record. The Commission should also affirm the conclusions of law in the ID, all of which are supported by, and consistent with, the factual findings. However, as argued by the Division in its Brief in Support of Petition for Review, because of the egregious nature of the conduct at issue and the high degree of scienter involved, the Commission should impose a permanent industry-wide or collateral bar against Gonnella or, in the alternative, 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 and to deter similar misconduct.

Dated: March 6, 2015
New York, New York

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