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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 REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR REVIEW

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March 20, 2015

The Division of Enforcement ("Division") respectfully submits this Reply Brief in further support of its Petition for Review, dated December 4, 2014.

PRELIMINARY STATEMENT

Notwithstanding Judge Grimes's presumption that a thorough decision cataloging the egregious and repeated fraud violations by Respondent Thomas C. Gonnella ("Gonnella") would "disabuse[Gonnella] of any notion that he did nothing wrong," Initial Decision, dated Nov. 13, 2014 ("ID"), at 35, Gonnella continues to shrug off that misconduct as an "ordinary and mundane workplace peccadillo." Gonnella Br. in Opp'n to Div. Pet. for Review, dated Mar. 6, 2015 ("Resp. Opp'n"), at 11. His failure to recognize that he fraudulently deceived his employer by engaging in a scheme that was designed to benefit him and cost his employer money strongly suggests the need for a permanent collateral bar. Indeed, Gonnella's failure to understand that his actions were illegal makes it extremely likely that he will again engage in unlawful acts if given the opportunity.

The Division will not reiterate here the evidence supporting the conclusion that Gonnella violated the antifraud provisions of the federal securities laws with a high degree of scienter. We, however, respond to the following arguments made by Gonnella: (1) he is not aware of an instance in which the Division appealed to the Commission seeking a lengthier bar and obtained it, *id.* at 1-3; (2) he has failed to recognize that he violated the federal securities laws because the Division utilized "a theory of liability that had never been seen as actionable as fraud until [Judge Grimes's] decision below," *id.* at 4-5; (3) the egregiousness of his conduct should be assessed in terms of his motive, not his actions, *id.* at 6; and (4) Gonnella's twelve month suspension and the three-year bar imposed on Ryan King ("King") are not comparable because

"[t]he three-year ban was a contrivance of the Division's," *id.* at 8-9. None of these arguments present a serious challenge to the relief sought by the Division.

ARGUMENT

A. The Commission Routinely Imposes Greater Sanctions When Appropriate

Gonnella mistakenly believes that the Commission does not conduct an independent review of a determination by an Administrative Law Judge ("ALJ") of the length of a suspension or bar, and he is aware of no case in which the Commission "in [the ALJ's] stead imposed a more severe sanction." Resp. Opp'n at 1-3.

The Commission, however, routinely has imposed longer sanctions based on its independent review. In *Abraham and Sons Capital, Inc. and Brett G. Brubaker*, SEC Rel. No. 1956, 2001 WL 865448, at *2-3 (July 31, 2001) (Commission opinion), for example, the Division did "not challenge the law judge's findings but argue[d] that the sanctions are too lenient." Based on "an independent review of the record," the Commission rejected the six month suspension imposed by the ALJ and instead ordered a permanent bar with a right to reapply after five years. *Id.* at *2, *10; *see also, e.g., In re Ted Harold Westerfield*, SEC Rel. No. 41126, 1999 WL 100954, at *3-5 (Mar. 1, 1999) (Commission opinion) (ALJ barred respondent from associating with a broker or dealer with a right to reapply after five years; Commission imposed permanent industry-wide bar); *In re Richard D. Chema*, SEC Rel. No. 40719, 1998 WL 820658, at *6 (Nov. 30, 1998) (Commission opinion) (ALJ imposed eight-month suspension for aiding-and-abetting violation; Commission increased suspension to one year); *In re Martin B. Sloate*, SEC Rel. No. 38373, 1997 WL 126707, at *3 (Mar. 7, 1997) (Commission opinion) (Commission increased sanction from a bar with a right to reapply after one year to a bar with a right to reapply after five years); *In re Richard H. Morrow*, SEC Rel. No.

40392, 1998 WL 556560, at *8-9 (Sept. 2, 1998) (Commission opinion) (ALJ suspended respondent for sixty days; Commission imposed one-year suspension sought by the Division).

Notably, in some of these cases the Commission specifically noted that the respondent's unwillingness to accept the wrongfulness of his conduct was a factor militating in favor of an increased sanction. *See Abraham and Sons Capital, Inc. and Brett G. Brubaker*, 2001 WL 865448, at *10 ("shar[ing] the law judge's concern about the continuing threat [r]espondents pose to the investing public" because one "failed to appreciate the seriousness of these offenses"); *Ted Harold Westerfield*, 1999 WL 100954, at *4 (noting that law judge concluded respondent "made no assurances against future violations" and "discounts the wrongful nature of his fraudulent conduct and sees himself as a victim of the legal system"); *Richard D. Chema*, 1998 WL 820658, at *6 (imposing lengthier suspension "to awaken Chema to his responsibilities as a securities salesman").

B. Gonnella Oddly Blames the Division for His Failure to Acknowledge Wrongdoing

Gonnella defends his failure to recognize the wrongfulness of his conduct because he purportedly is "challenging the Division on the viability of a theory of liability that has never been seen as actionable as fraud until Judge Grimes's decision below." Resp. Opp'n at 4.

There is nothing new about the Division's theory of liability. The Division alleged, and Judge Grimes found, that Gonnella committed fraud when he breached the fiduciary duties he owed to Barclays by engaging in trades designed to benefit himself at Barclays's expense while deceiving Barclays concerning the very same transactions. This unmistakably is fraudulent conduct irrespective of the fact that it also violated Barclays's internal policies. Breaches of fiduciary duty and deceit in connection with securities transactions have long been held to constitute violations of the antifraud provisions of the federal securities laws. *See, e.g., In re*

Orlando Joseph Jett, Exch. Act Rel. No. 49366, 2004 WL 2809317 (Mar. 5, 2004) (Commission opinion); *SEC v. Zandford,* 535 U.S. 813, 820-21 (2002) ("[E]ach time respondent 'exercised his power of disposition for his own benefit,' that conduct, 'without more,' was a fraud." (citation omitted)); *Chiarella v. U.S.*, 445 U.S. 222, 228-30 (1980); *Superintendent of Ins. of N.Y. v. Banker's Life & Cas. Co.*, 404 U.S. 6, 11-12 (1971).

Judge Grimes also found, and the evidence supports, that Gonnella engaged in a parking scheme. Parking securities has also long been held to violate the securities laws. *See, e.g., In re W.N. Whelen & Co., Inc.*, Exch. Act Rel. No. 28390, 1990 WL 312067 (Aug. 28, 1990) (Commission opinion); *In re Capital Secs. Co.*, Admin. File No. 3-1031, 1968 WL 86056 (Mar. 14, 1968) (Commission opinion); *U.S. v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991); *SEC v. First City Fin. Corp., Ltd.*, 688 F. Supp. 705 (D.D.C. 1988), *aff'd*, 890 F.2d 1215 (D.C. Cir. 1989).

Try as Gonnella might in his constant mischaracterizations of the Division's case as resting on a violation of Barclays internal policies, there is nothing novel about the Division's theory of liability: fraud is fraud. The fact that Gonnella continues to minimize his deceptive conduct as nothing more than a mere "peccadillo" is highly probative of whether he should be permanently barred from the securities industry. Resp. Opp'n at 11; *see In re Toby G. Scammell*, SEC Rel. No. 3961, 2014 WL 5493265, at *6 n.52 (Oct. 29, 2014) (Commission opinion) (citing previous Commission decisions "stating that respondent's failure to recognize the wrongful nature of his actions or to show remorse indicates a significant risk of further misconduct").

Even if the Division's theories were not well-established – which they were – that would still fail to serve as a valid justification for Gonnella's failure to acknowledge wrongdoing. For example, in *John P. Flannery & James D. Hopkins*, Exch. Act Rel. No. 34-73840, 2014 WL 7145625, at *1 (Dec. 15, 2014) (Commission opinion), the Division appealed findings that

respondents did not violate the antifraud provisions. Although the respondents were agreeing with a previous ruling that they did not violate the antifraud provisions, the Commission stated that their failure to acknowledge the wrongful nature of their conduct weighed in favor of imposing a suspension. *Id.* at *38.

C. Gonnella Incorrectly Measures Egregiousness in Terms of Motive, Not Conduct

Gonnella insists that a "view of the conduct as egregious depends on the fiction that Mr. Gonnella was somehow motivated by his own self-interest . . . ." Resp. Opp'n at 6. In deciding whether a bar is appropriate, however, the Commission considers whether the actions, not the motivations, are egregious. *See In re Peter Siris*, Exch. Act Rel. No. 34-71068, 2013 WL 6528874, at *5 (Dec. 12, 2013) ("In analyzing the public interest we consider, among other things: the egregiousness of the respondent's actions . . . ."), *aff'd, Siris v. SEC*, 773 F.3d 89 (D.C. Cir. 2014).

Gonnella's actions clearly were egregious. Indeed, he "intended to abuse his position of trust and to defraud Barclays" and "also made extensive efforts to hide [his] scheme from Barclays." ID at 31; *see In re James C. Dawson*, Advisers Act Rel. No. 3057, 2010 WL 2886183, at *4 (July 23, 2010) (Commission opinion) (Commission "consistently viewed misconduct involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary . . . as egregious."); *SEC v. Bankosky*, 716 F.3d 45, 49 (2d Cir. 2013) (affirming ten year officer and director bar because, among other reasons, his "conduct betrays an impulse to place self-interest ahead of his employer's"). Unable to downplay this egregious conduct – which included lying to his supervisor and a compliance officer, going offline to evade detection, and secretly using his employer's money to make a counterparty whole – Gonnella instead faults the Division for allegedly failing to prove the motives that animated his scheme. ID at 6-7;

Resp. Opp'n 7-8. As Judge Grimes correctly concluded, Gonnella's motivations are irrelevant because he "[p]lainly [] acted as though the aged-inventory charges would have had some negative impact on his compensation." ID at 24; *see John P. Flannery & James D. Hopkins*, 2014 WL 7145625, at *38 ("Respondents also note that they were not shown to have benefited personally from the fraud. But that is not a requirement for imposing a suspension and, in any event, we find that their misconduct was (at the very least) in furtherance of their lucrative careers as securities professionals."); *Richard D. Chema*, 1998 WL 820658, at *3 ("It is not necessary to find that Broumas acted with manipulative intent . . . . It is sufficient if Broumas engaged in a course of conduct that operated as a fraud or deceit . . . .").[1]

D. King's Three-Year Bar Is Relevant to the Commission's Determination

Gonnella contends that the three-year bar imposed on his co-conspirator, King, is not relevant because it "was a contrivance of the Division's; it was not the product of a reasoned assessment by an independent hearing officer or the Commission itself, both of which may well have concluded that a shorter period of suspension was in order, if any." Resp. Opp'n at 8-9. While Judge Grimes's factual findings, which are amply supported by the record, provide reason enough to impose a permanent bar, Gonnella's attempts to cast King's bar as irrelevant are wide of the mark for two reasons.

First, Gonnella ignores the fact that the Commission approved the settlement with King after due consideration of the facts and circumstances of his particular case, and the Order barring King from association emanates from the Commission, not the Division. *See In re Ryan*

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[1] Gonnella further seeks to divert attention from the egregiousness of his conduct by stating that he "has already suffered the loss of an extremely lucrative position [and] the loss of millions of dollars in compensation." Resp. Opp'n at 11. The Commission has "held, however, that the '[f]inancial loss to a wrongdoer as a result of his wrongdoing does not mitigate the gravity of his conduct.'" *In re Montford & Co., Inc.*, SEC Rel. No. 3829, 2014 WL 1744130, at *20 (May 2, 2014) (Commission opinion) (citation omitted).

C. King, Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Feb. 4, 2014. Second, while the Commission clearly is not bound in this matter by any of the factual findings or legal conclusions reached with respect to King, the fact remains that the Commission found a three-year bar to be appropriate and in the public interest with respect to a less culpable participant in the same scheme at issue here. If three years was appropriate and in the public interest with respect to King, a cooperating witness who played a supporting role in the fraud, then the Division respectfully submits that a permanent bar is appropriate with respect to Gonnella, who instigated and masterminded the fraud and has never acknowledged wrongdoing. *See In re Robert Sayegh*, Exch. Act Rel. No. 34-41226, 1999 WL 172659, at *4 (Mar. 30, 1999) (Commission opinion) (stating "it is well established that respondents who offer to settle may properly receive lesser sanctions than they otherwise might have" and ruling ALJ appropriately gave cooperating witnesses lesser sanctions than non-cooperating witness), *modified by* Exch. Act Rel. No. 34-41762, 1999 WL 627532 (Aug. 19, 1999).

CONCLUSION

For the reasons set forth herein and in the Division's other moving papers, the Commission should affirm the factual findings and legal conclusions in the ID, all of which are amply supported by evidence in the record, but the Commission should modify the ID to impose a permanent industry-wide or collateral bar against Gonnella, or 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.

Dated: March 20, 2015
New York, New York

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CERTIFICATE OF SERVICE

I certify that on March 20, 2015, I have served the Division of Enforcement's Opposition Brief by facsimile and overnight mail on the following:

[redacted]

I further certify that on March 20, 2015, I have served the Division of Enforcement's Opposition Brief by electronic mail on the following:

[redacted]

Daniel Michael