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United States of America

Before the Securities and Exchange Commission

Administrative Proceeding File 3-15737

In the Matter of Respondent Thomas C. Gonnella

BRIEF OF RESPONDENT THOMAS C. GONNELLA IN REPLY TO THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S PETITION FOR REVIEW

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March 20, 2015

Respondent Thomas C. Gonnella respectfully submits this memorandum in reply to the opposition filed by the Division of Enforcement on March 6, 2015, and in accordance with the Commission's Order and briefing schedule, dated January 5, 2015. In its opposition brief, the Division suddenly recaptures the extreme deference to Judge Grimes' findings that it all but abandoned in its own petition for review of the penalty assessed by Judge Grimes. But slavish adherence to the ALJ's findings and reasoning is not the function of the Commission on a petition for review. The Division accuses Mr. Gonnella of "attacking Judge Grimes" and his "integrity," but despite the incendiary allegation [Div. Br. at 20-21], Mr. Gonnella has advanced only arguments that the ALJ's findings cannot withstand scrutiny on a legal or factual level, and cannot be squared with the entirety of the record. If that approach constitutes an attack, then the Division is taking issue more with Mr. Gonnella's right to pursue Commission review, and the Commission's independent review of the record.

The Division proceeds on sophistry and speciousness. For example, whereas it claims [Div. Br. at 13] that Mr. Gonnella testified at the hearing that he understood the aged inventory policy, in apparent tension with arguments in his brief that the policy was not clear (to him or otherwise), plainly Mr. Gonnella *lacked* an understanding of how the aged inventory policy worked and was to be applied. This entire affair is based on and dependent on his failure to appreciate that the trades with Mr. King violated the aged inventory policy. Thus, his belief that he understood the policy is evidence not that it actually *was* clear, but to the contrary, that he lacked the fraudulent intent that Judge Grimes and the Division ascribe to him, or that any violation of the securities fraud statutes was willful. In any event, the Division's argument here is a canard because the testimony it cites establishes only that Mr. Gonnella understood at the

time that the aged inventory charges would accrue and no longer be reversible at the seven-month deadline, which is not and never was in doubt; it says *nothing* about whether he understood that selling aged bonds to a counter-party with the intention of buying them back shortly thereafter actually violated the policy. T 472-74.

The Division likewise contends that Mr. Gonnella is mischaracterizing the record by offering selective or misleading pieces of evidence, but it is more so that the evidence Mr. Gonnella cites is unadorned by the inculpatory spin that the Division attributes to it, and that it requires in order to uphold Judge Grimes' finding of liability. For example, as to Mr. Miller's acknowledgment that Mr. Gonnella's intentions are plain for all to see in the initial Bloomberg message to King ("It looks like [Mr. Gonnella] is trying to – exactly what he says. He's looking to turn over positions for month end/aging purposes." T 793; Div. Br. at 6), the Division faults Mr. Gonnella for not including Mr. Miller's subsequent testimony that what Mr. Gonnella proposes in the same message "smells" like parking. But other than turning over bonds for month end/aging purposes, there was nothing else remotely inculpatory in that message. Thus, omitting Mr. Miller's professed concern that it smelled like parking is neither incomplete nor misleading. Nor does it rebut Mr. Gonnella's uncontested belief that Barclays monitored and retained his communications and could review them at any time. If it makes little sense that Mr. Gonnella attempted to defraud his employer by doing "exactly what he says" in monitored communications, the fault is structural as to the foundations of the Division's case. Evidence favorable to the respondent is neither misleading or selective merely because it favors the respondent.

Similarly, the Division disputes the significance of Barclays' language in the form that accompanied Mr. Gonnella's termination, and quibbles with Mr. Gonnella' s language that refers to it. Div. Br. at 7. While it is true (as the Division points out) that Barclays' findings carry no weight as a matter of law, the Division cites no justification for ignoring them altogether (even as it elsewhere trumpets what Barclays reported to FINRA, *see* Div. Br. at 11), and provides no reason to dismiss Barclays' responses that Mr. Gonnella was not under any review for, or accused of, fraud or having violated the statutes or rules that govern fraudulent conduct, such as the precise ones underpinning his liability here. *See* Respondent Exhibit 54. If even the alleged victim of Mr. Gonnella's conduct does not recognize it as fraudulent, it is difficult to see how the Commission should form a different view. The Division's argument about the Form U-5 also ignores that Barclays had every reason to throw Mr. Gonnella under the proverbial bus and absolve itself of any wrongdoing. Barclays failed to conclude (or even allege) that Mr. Gonnella committed fraud for the simple reason that he did not commit any fraud.

The Division appears to have shifted from Mr. Gonnella's use of "coded" language with King to their use of "vague" language, upon the realization that the implementation of a "code" was substantially overblown. Div. Br. at 16. Either way, the inference is no more favorable to the Division's view of Mr. Gonnella's conduct than to his own: the language was "vague" precisely because Mr. Gonnella was loathe to commit himself to purchasing the bonds he sold to King without foreknowledge of how circumstances would develop further. There was nothing nefarious about it.

The "wiggle room" that the Division evokes *was* present, but to preserve flexibility vis-a-vis *Gleacher*, not to deny a parking scheme with Barclays down the line.

Moreover, the Division's litany of King's "vague" messages were nothing more than King's whimsical manner of expressing himself, or as Mr. Gonnella explained, just "Ryan being Ryan." T 552. And all of the Division's examples (Div. Br. at 16 n.10) were *King*'s, over whom Mr. Gonnella had no control as to how he chose to express himself in their (monitored) Bloomberg messages. Further, the Division did not proffer any of King's messages with other counter-parties to show how his messages with Mr. Gonnella might have been out of the norm. Vagueness, in the particular context of the facts here, is no more an indicator of a pre-arrangement or agreement than the lack of one. Nothing was truly prearranged, guaranteed or foreordained. The Division uses the fact of the outcome to prove somehow the fact of a prearrangement to reach that purportedly ineluctable outcome, but ignores all the contingencies that would have prevented it.

Over multiple rounds of briefing, the Division has still failed to rebut one of the central premises of Mr. Gonnella's argument - the lack of any real benefit to him from the trading activity at issue, and how that infirmity impacted his state of mind to violate the securities laws. The Division attempts to sidestep the latter question by downplaying the extent to which it was required to prove willfulness (Div. Br. at 8-12). The question, however, is not whether the securities laws can be violated by anything less than willful intent to defraud (they can). Instead, it is whether lesser violations were proven when the Division focused so unrelentingly on what it perceived as Mr. Gonnella's knowing violations of the law in order to substantially enrich himself at Barclays' expense, a theory of the case which does not stay true to what the record revealed. *Cf. SEC v. Ginder*, 752 F.3d 569, 576 (2d Cir. 2014) (reversing finding of liability for negligently violating Section 17(a)(3) because evidence, attuned to defendant's willfulness, did

not permit a finding of breach of standard of care). Even if Mr. Gonnella were incorrect in his belief that aged inventory charges did not have a material effect on his bonus or compensation, his understanding is determinative in this context because it is the only explanation for a conscious decision to violate the law. T 474-78; 517; 787-92.

Again, the Division's cases (e.g., Div. Br. at 13-15, 17, 20) reveal incongruously more serious conduct than what is at issue here.

- *SEC v. Zandford*, 535 U.S. 813, 825 n.4 (2002) (defendant convicted criminally after breaching fiduciary duty owed to investor clients by making personal use of proceeds entrusted to him by vulnerable investors, but noting that breadth of "in connection with" language "does not transform every breach of fiduciary duty into a federal securities violation");
- *United States v. DeMizio*, 741 F.3d 373, 384 (2d Cir. 2014) (criminal deprivation of employee's honest services where he arranged for kickbacks to relatives for non-existent work in conjunction with stock loans and short sales);
- *SEC v. First City Fin. Corp. Ltd.*, 688 F. Supp. 705 (D. D.C. 1988) (defendants used third-party nominee accounts to disguise transactions, conceal changes in corporate control, and evade the Williams Act' disclosure requirements when investors accumulate beneficial ownership of 5% or more of equity securities, allowing for artificially low share price);
- *In re Orlando Joseph Jett*, Exchange Act Rel. No. 49366, 2004 WL 2809317 (Mar. 5, 2004) (upholding finding of securities fraud based on scheme manipulating employer's computer system to generate illusory profits based on wholly fictional transactions,

thanks to which Jett obtained increased compensation, promotions, and multimillion dollar bonuses);

- *In re W.N. Whelen & Co., Inc.*, 1990 SEC LEXIS 3029 (Aug. 28, 1990) (fraud subverted a regulatory protocol meant to ensure the proper reporting of net capital requirements);
- *In re Refco Capital Markets*, 2007 U.S. Dist. LEXIS 68082, at *4-8 (S.D.N.Y. May 13, 2007) (detailing allegations of securities fraud against defendants who purportedly engineered sales of securities held by a subsidiary for the benefit of investor clients, and used proceeds of the sales to improperly provide loans to other corporate affiliates).

Mr. Gonnella will not belabor the point by discussing each case and how and why it is different and incalculably more serious than the trading activity here. The larger point is that what the Division offers as reasonable yardsticks by which to measure Mr. Gonnella's conduct are anything but appropriate reference points. They contribute not to an understanding of how Mr. Gonnella committed securities fraud, but rather to a confusion of why the Division chose to bring an enforcement action against Mr. Gonnella for conduct out of all lockstep with the seriousness of the previous cases it has brought. The lack of any case with conduct truly similar to Mr. Gonnella's is not reflective of any lack of diligence on the Division's part, but more so that such cases simply do not exist.

The Commission's mandate should remain regulation of the integrity of the markets and protection of the investing public. It should not be expanded to unlimited oversight of the workplace and breaches of ambiguous internal policies, and to prosecution of conduct that has been addressed at the employer level, and which brought the respondent no gain but only termination of employment. If the mandate is broadened to address the latter, it must be

accompanied by safeguards to prevent the seemingly arbitrary exercise of the Division's discretionary power that, for whatever reason, has resulted in this enforcement action. The Commission should reverse the Initial Decision, dismiss this matter and allow Mr. Gonnella to get back to work.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 20, 2015, I served or caused to be served the respondent Thomas C. Gonnella's brief in reply to the Division of Enforcement's opposition, attached, on the following parties, as indicated:

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March 20, 2015

BY FEDERAL EXPRESS

The Honorable Brent J. Fields
Office of the Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: In the Matter of Respondent Thomas C. Gonnella
Administrative Proceeding File No. 3-15737

Dear Secretary Fields:

On behalf of Mr. Gonnella and pursuant to the Commission's Rules of Practice, I am enclosing an original and three copies of Mr. Gonnella's brief in reply to the Division of Enforcement's Opposition. Counsel for the Division of Enforcement has been served electronically. Thank you for your consideration.

Respectfully submitted,

Jeremy B. Sporn

Enclosures