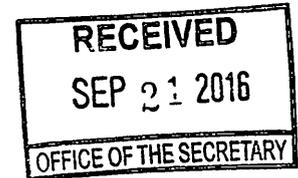


ORIGINAL

United States of America
Before the Securities Exchange Commission

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



RESPONDENT THOMAS C. GONNELLA'S
MEMORANDUM OF LAW FOR A STAY
OF CIVIL MONETARY PENALTY PENDING JUDICIAL REVIEW

Mr. Gonnella respectfully requests a partial stay of the civil monetary penalty imposed by the Commission for the reasons expressed below.

On August 10, 2016 the Commission issued an Opinion assessing, in part, a civil monetary penalty of \$82,500 against the Mr. Gonnella. *See* Comm'n Op. at 22. No later than October 10, 2016 Mr. Gonnella will file a written petition with the U.S. Court of Appeals for the Second Circuit requesting that the Commission's Opinion and Order be set aside under 15 U.S.C. § 78y. At this time, the Commission retains exclusive jurisdiction, and is empowered to issue a stay pending judicial review.

Under 15 U.S.C. § 78y(c)(2), "[t]he Commission may stay its order or rule pending judicial review if it finds that justice so requires." *See also* 5 U.S.C. § 705. Rule 401(c) of the Rules of Practice provides that "a motion seeking to stay the effectiveness of a Commission order pending judicial review may be made to the Commission at any time during which the Commission retains jurisdiction over the proceedings." Mr. Gonnella recognizes that a party requesting a stay pending appeal has the burden of establishing that a stay is justified. *See, e.g., Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Such determination is typically guided

by the traditional, four-factor standard: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 434.

While Mr. Gonnella certainly agrees with dissenting Commissioner Piwowar that serious concerns exists on due process and other grounds concerning the imposition of permanent investment company bar (Dissent at 1), Mr. Gonnella respectfully maintains that the Commission’s findings and conclusions of law present other serious due process concerns:

- Barclays, after a thorough internal investigation, said that it was neither deceived nor defrauded. Oral Arg. Tr. at 4-5;
- Demonstrating the absence of deception and his good faith belief that he was complying with Barclays aged inventory policy, Mr. Gonnella sent messages, knowing that they were either monitored or subject to monitoring, to counter parties explaining exactly what he was doing - i.e. turning over bonds at the month’s end.
- The conduct at issue did not at all affect his compensation, nor did he believe that it would, establishing that he believed he was complying with policy. Tr. at 6-7.
- Mr. Gonnella himself escalated the issue to his supervisors after a seminar in November 2011 when Barclays found it necessary to clarify its aged inventory policy. Tr. at 9.
- The trades at issue could not be considered stock-parking because beneficial ownership and risk of loss in fact passed, and the limited nature of the relevant market distinguished this case from true stock parking in far more liquid markets. Tr. at 14-15.
- After the principal witness testified against Mr. Gonnella, a counter party with whom he executed the subject trades, the Division entered into a cooperation agreement with the witness, arrogating to itself the power to decide his penalty after his testimony at Mr. Gonnella’s hearing - an unconstitutional protocol lacking the check on reliable fact-finding when, for example, Article III judges decide the penalty on cooperators used by federal prosecutors.

These legal issues, in conjunction with Commissioner Piwovar's due process concerns, strongly suggest that Mr. Gonnella has a likelihood of success on the merits of his appeal. Nevertheless, the Commission "has at times stayed monetary sanctions pending appeal without reference to the applicant's likelihood of success on the merits or the other components of the four-factor test." See *In the Matter of Dennis J. Malouf*, File No. 3-15918, Order Granting Partial Stay, dated August 31, 2016 available at <https://www.sec.gov/litigation/opinions/2016/33-10202.pdf>.

Mr. Gonnella, a young bond trader who self-reported the factual circumstances giving rise to the administrative action, presents another compelling occasion for the Commission to stay monetary sanctions pending appeal without reference to his likelihood of success on the merits.

On August 29, 2016, Respondent's counsel conferred with counsel for the Government, Mr. Daniel Michael and Mr. Paul Alvarez (Appellate Litigation Group), regarding this instant request for a stay of the \$82,500 civil monetary penalty.

The Government does not oppose this request.

We respectfully request that an appropriate order issue forthwith.

Dated: September 20, 2016



Andrew J. Frisch
Jason D. Wright
The Law Offices of Andrew J. Frisch
40 Fulton Street, 23rd Floor

New York, New York 10038
(212) 285-8000
(646) 304-0352 *facsimile*
afrisch@andrewfrisch.com
jwright@andrewfrisch.com

Counsel for Thomas C. Gonnella