INITIAL DECISION RELEASE NO. 706
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15737

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	INITIAL DECISION
THOMAS C. GONNELLA	:	November 13, 2014

APPEARANCES: Daniel Michael and Nicholas A. Pilgrim representing the Division of Enforcement, Securities and Exchange Commission

Andrew J. Frisch and Jeremy B. Sporn representing Respondent Thomas C. Gonnella

BEFORE: James E. Grimes, Administrative Law Judge

SUMMARY

This Initial Decision finds that Respondent Thomas C. Gonnella violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act of 1934, and Rule 10b-5 thereunder, and aided and abetted and caused Barclays Capital's[1] violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. The Initial Decision orders Gonnella to cease-and-desist from further violation and suspends him from the securities industry and from participating in an offering of a penny stock for twelve months. Additionally, the Initial Decision orders Gonnella to pay civil penalties totaling $82,500.

I. INTRODUCTION

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on February 4, 2014, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940. The OIP alleges that Gonnella violated Section 17(a)(1) and (3) of the Securities Act, and

[1] During the relevant time period in this Initial Decision, Barclays's investment banking division was known as "Barclays Capital." In 2012, Barclays Capital changed its name to "Barclays."

Sections 10(b) and 17(a) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted and caused Barclay Capital's violations of Exchange Act 17(a) and Rule 17a-3 thereunder.

I held a hearing in this matter in New York, New York, over five days in July 2014. During the hearing, the Division of Enforcement called five witnesses, including Gonnella. Gonnella called two witnesses, including himself. I admitted 101 of the Division's exhibits and five of Gonnella's exhibits.[2]

II. FINDINGS OF FACT

I base the following findings of fact and conclusions on the entire record and the demeanor of the witnesses who testified at the hearing, applying preponderance of the evidence as the standard of proof.[3] *See Steadman v. SEC*, 450 U.S. 91, 100-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this decision are rejected. I find the following facts to be true.[4]

A. Background

From October 2008 until November 2011, Gonnella worked at Barclays Capital as a trader.[5] Tr. 472; *see* Answer at ¶ 5. As Gonnella conceded in response to the OIP, he owed Barclays fiduciary duties of care, candor, and loyalty. *See* Answer at ¶ 5. Barclays entrusted Gonnella with $300 million to invest on its behalf. Tr. 487. Gonnella traded on Barclays's behalf among a relatively small universe of traders in what the parties described as "esoteric asset-backed

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[2] I admitted Division Exhibit 201, which contains investigative testimony of Ryan King, for impeachment purposes only. Transcript ("Tr.") 431. Division Exhibits 63 and 64 were admitted for limited purposes. Tr. 1051-53, 1060-61.

[3] Citations to the Division's Exhibits and Gonnella's Exhibits are noted as "Div. Ex. ___," and "TG ___," respectively. Gonnella's and the Division's posthearing briefs are noted as "Resp. Br. at ___" and "Div. Br. at ___," respectively. Citations to Gonnella's and the Divison's proposed findings of fact and conclusions of law are notes as "Resp. Proposed Findings at ___" and "Div. Proposed Findings at ___," respectively.

[4] In reviewing the transcript, I have noticed instances in which the transcript does not reflect what I said. For instance, the transcript reflects that I used the phrase "cognitive dissidence," Tr. 911, when I actually used the phrase "cognitive dissonance." Similarly, the transcript reflects that I asked a witness whether he "tr[ied] to cultivate the impression among your subordinates that you [were] on a mission, that you knew what they were doing at all times." Tr. 1172. In fact, I asked the witness whether he tried to cultivate the impression that he was omniscient.

[5] Gonnella graduated from Amherst College in 2006. Tr. 870. While there, he was an academic all-American and captain of the swimming and water polo teams. *Id.*

securities."[6] *See* Tr. 374, 934, 950, 956. The market for esoteric asset-back securities is very illiquid. Tr. 214, 938, 950.

In addition to being "very young . . . compared to [his] peers," Tr. 788, Gonnella was well-liked and successful, Tr. 937-38; *see* Tr. 1319. Among seven traders supervised at Barclays by Matthew Miller, Gonnella's profits in 2011, which were about $17 million, Tr. 792, exceeded the second best trader's by "at least $10 million," Tr. 794. In 2009, Barclays paid Gonnella a base salary of $85,000 and an incentive bonus of $365,000. Div. Ex. 9. In 2010, his base salary jumped to $95,000 and his incentive bonus to $900,000. Div. Ex. 10.

During the relevant time periods, Barclays had an "aged-inventory policy." By its terms, the policy provided that if a trader held a security in his trading book in excess of three months, the trader's trading book would accrue monthly charges. *See* Tr. 472-73; Div. Ex. 24, part 1; Div. Ex. 44, part 2. If the trader sold the security within seven months of having purchased it, the charges would be refunded. Div. Ex. 24, part 1; Div. Ex. 44, part 2. The charges became irreversible on the last day of the seventh month after the security in question was purchased.[7] *See* Tr. 102; Div. Ex. 24, part 1; Div. Ex. 44, parts 1-2. Gonnella was aware of this policy. Tr. 472-74. Indeed, he received monthly e-mails reminding him of the policy and informing him of the securities in his book that were approaching various deadlines under the policy. *See* Div. Ex. 24, parts 1-3; Div. Ex. 26, parts 1-3; Div. Ex. 34, parts 1-3; Tr. 595-96.

In 2011, Ryan King worked as a trader at Gleacher and Company. Tr. 179, 187. Gleacher entrusted King with $20 million and, like Gonnella, he was responsible for trading asset-backed securities. Tr. 188-89. King described Gleacher as "very small" in relation to other market participants. Tr. 195. Its smaller size worked to Gleacher's and King's disadvantage because having more capital enables a firm to engage in more transactions and thus leads to more business. Tr. 195-96. Having more capital also leads to greater access to market information. Tr. 195-97.

B. The prologue: Gonnella and King engage in bond trades in May and June, 2011

Prior to May 31, 2011, Gonnella and King had interacted socially and at conferences. Tr. 204-06. In mid-May 2011, King contacted Gonnella about purchasing a bond backed by airplane leases. Tr. 208-10. In response, Gonnella "educate[d]" King about a particular bond designated as ACST 07-1A G1 and sold it to Gleacher.[8] Tr. 208-11; Div. Ex. 11A at 44.

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[6] Gonnella's supervisor, Matthew Miller, testified that Barclays used the term "esoteric" to refer to "areas that were not liquid enough for Barclays to have a specific desk to cover them." Tr. 950. This meant that Gonnella dealt with "small business securitizations, air[craft] lease securitizations, and . . . other securitizations backed by various asset groups." Tr. 934.

[7] The policy also provided for the forfeiture of the bond to the management book after seven months. Div. Ex. 1; Div. Ex. 24, part 2. In practice, however, the bond-forfeiture provision was not enforced. Tr. 872, 1099.

[8] Unable to find any buyers, King eventually sold this bond back to Barclays on June 23, 2011, at a loss to Gleacher. *See* Tr. 239-40, 618; Div. Ex. 14.

On May 31, 2011, Gonnella possessed two bonds in his trading book that were approaching Barclays's seven-month deadline. *See* Tr. 107; Div. Ex. 400, slide 7. These bonds were designated as BAYC 05-2A M5 and BAYC 05-2A M6.[9] On May 31, Gonnella contacted King via Bloomberg chat and said:

> Hey kinger...not sure you've ever traded bayc's, or looked at them, but have 4 small bonds that i'm looking to turnover today for good ol' month end/aging purposes...i'll shoot them over. If any look interesting to you or you want take a stab at any, let me know....i like these bonds, own lot of different bayview mezz/sub position, and would more than likely have a higher bid for these later this wk when the calendar turns……[10]

Div. Ex. 20.

Later on May 31, Gleacher purchased BAYC 05-2A M5 and BAYC 05-2A M6,[11] which were two of the bonds Gonnella offered, at respective prices of $56 and $54.[12] Div. Ex. 23; *see* Div. Ex. 11A at 44. At that time, King felt certain that Gonnella would repurchase the bonds in a short time frame at a price above that which Gleacher paid. Tr. 221-23. King recognized that engaging in pre-arranged trades—buying with the understanding that the seller would quickly repurchase at a higher price—was prohibited. Tr. 232-33. He nonetheless agreed to engage in the trades because he viewed them as riskless ways to turn a quick profit. Tr. 233. King also believed that engaging in prearranged trades with bigger firms worked to his advantage because being on good terms with traders in bigger firms could give him access to market information and to

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[9] "BAYC" refers to Bayview, the issuer of the bond. Tr. 65, 73. "05" refers to the year the bond was issued and "2A" refers to the series. Tr. 73-74. The designations "M5" and "M6" refer to tranches or "slices" into which the underlying securitization was "carved." Tr. 74. The most senior tranche has first claim to principal and interest payments, and more junior tranches are subordinated to the more senior tranches. Tr. 75. According to Dr. Kapil Agrawal, a securities examiner employed by the Division, "M" refers to "a mezzanine tranche," which is a tranche that is "somewhere in the middle." Tr. 74; *see* Div. Ex. 400, slide 3.

[10] Many of the conversations discussed in this Initial Decision occurred via Bloomberg chats. Except where indicated, I have preserved the original grammar, capitalization, and punctuation.

[11] As the names relate to the securities transactions at issue in this proceeding, I use King and Gleacher interchangeably and Gonnella and Barclays interchangeably.

[12] These dollar figures relate to a formula by which actual cost to the buyer is derived. To calculate the cost of purchasing a bond, one first determines the amount of principal currently outstanding. Tr. 76. To do that, one multiplies the original face value amount of the bond by the "factor," which is listed by Bloomberg. *See* Tr. 76-77. One then multiplies the current face amount by the offered price, $56 or $54 in this case, and divides that number by 100. Tr. 78-79. The resulting figure is the purchase cost to the buyer. Tr. 78-79.

favorable terms in future transactions. Tr. 225-26, 233-34. He also conversely worried that declining such an offer would lead to fewer opportunities to engage in legitimate trades. Tr. 234-35.

As Gonnella had suggested the day before, on June 1, he repurchased the bonds at respective prices of $57 and $55. Div. Ex. 11A at 44. The difference between what Gleacher paid for the bonds on May 31, 2011, and what Barclays paid on June 1, 2011, was approximately $23,000. Div. Ex. 401. Between June 2 and August 29, 2011, Gonnella and King did not engage in any trades with each other.

C. The main event: Gonnella sells King eight bonds at the end of August 2014.

Gonnella's supervisor, Matthew Miller, took a two week vacation from late August through early September 2011. Tr. 990-91. On August 29, Gonnella contacted King via Bloomberg chat, writing "let's talk tmrw. Have some aged bonds that I might offer you, if you're game...maybe do what we did a few months ago w/ some of those bayc's." Div. Ex. 27. The two agreed to discuss the matter the next day. *Id*. On August 30, the two discussed the upcoming baseball playoffs before King asked, "so I can [sic] help you with some aged items today?" Div. Ex. 28. Gonnella responded positively and said "here are a few [bonds] that are aged that I'm trying to turn over." *Id*. He then offered (1) BAYC 07-4A A1 at $72; (2) BAYC 06-1A A2 at $73; and (3) BAYC 05-4A M5 at $40. *Id*. Each of these bonds was approaching the seven-month deadline under Barclays's aged-inventory policy. *See* Div. Ex. 26, part 3; Div. Ex. 400, slide 7. As will become evident, Gonnella would eventually come to regret offering to sell BAYC 07-4A A1. After King asked "when would you be looking to purchase something similar? end of the week?," Div. Ex. 28, Gonnella answered, "yes" and "most likely," *id*.

Later that day, Gonnella sold the three bonds to Gleacher at the prices he offered King. Div. Ex. 11A at 48. Having sold Gleacher what amounted to $10 million of original face value of BAYC 07-4A A1, Gonnella thereafter contacted King and asked whether he had sufficient capital to purchase an additional $9.65 million of original face value of the bond. Div. Ex. 31. This would "finish [Gonnella's] axe on the bond." *Id*. Gonnella then said "[s]ame situation…thx." *Id*. After King agreed, *id.*, Gonnella sold the remainder of the bond to Gleacher, Div. Ex. 11A at 48.

The next day, August 31, Gonnella offered a "swap prop" to King. *See* Div. Ex. 32. Gonnella proposed to repurchase BAYC 06-1A A2 and BAYC 05-4A M5, two of the three bonds he sold the day before, "[i]f you havent already sold" them. Div. Ex. 32, 33. Gonnella also offered to sell King five other bonds. *See* Div. Ex. 32, 33. Specifically, he offered King: (1) BAYC 04-3 M2 at $64; (2) BAYC 07-1 M1 at $40; (3) BAYC 07-1 M2 at $35; (4) BAYC 07-1 M3 at $30; and (5) CBAC 05-1A A at $52. Div. Ex. 33.

After King accepted the proposal, Div. Ex. 33, Gonnella repurchased BAYC 06-1A A2 and BAYC 05-4A M5, each for $.75 more than Gleacher paid for them the day before, Div. Ex. 11A at 48. The total difference between what Gleacher paid for these two bonds on August 30, and what Barclays paid to repurchase them on August 31, was approximately $48,000. Div. Ex. 401. On August 31, Gonnella also sold King the five bonds the two had discussed, at the prices

Gonnella had offered King. Div. Ex. 11A at 48. Each of these bonds was at the seven-month deadline under Barclays's aged-inventory policy. *See* Div. Ex. 26, part 3; Div. Ex. 400, slide 7.

Two days later, King contacted Gonnella via Bloomberg chat to ask when Gonnella would repurchase the bonds King had purchased. Specifically, King said "any clarity on the BAYCs that I own? I heard you might be a buyer." Div. Ex. 35; Tr. 263. Gonnella responded with bids for the five bonds he sold to Gleacher on August 31, 2011.[13] Div. Ex. 36; Tr. 264.

After King accepted Gonnella's bids, *see* Div. Ex. 37, Gonnella repurchased the five bonds at the following prices, which were all in excess of what Gleacher paid to acquire them: (1) BAYC 04-3 M2 at $64.375; (2) BAYC 07-1 M1 at $40.625; (3) BAYC 07-1 M2 at $35.50; (4) BAYC 07-1 M3 at $30.50; and (5) CBAC 05 1A A at $52.50. Div. Ex. 11A at 48. The aggregate difference between the August 31, 2011, sales prices of these bonds and the September 2, 2011, repurchase cost was approximately $84,000. Div. Ex. 401.

At this point, Gleacher still owned the BAYC 07-4A A1 bond that Gonnella sold it on August 30, 2011. On September 7, 2011, King sent Gonnella an e-mail in which he said, in reference to that bond, "I've got a BAYC bond with your name on it. maybe. if you're a buyer of that type of thing." Div. Ex. 40. Gonnella responded, saying "[y]oooooooo! Haven't forgotten about you, bud . . . . working on selling around 10mm of [another bond] and i'll be back w/ a bid on the bayc's." Div. Ex. 41. Later that day, Gonnella contacted King via Bloomberg chat and

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[13] King testified that he and Gonnella used "coded" language designed to hide their true intent. *See* Tr. 220-21, 246, 263, 269-70, 367. He thus explained, for example, that by asking for "clarity on the BAYCs that I own," and stating that he heard Gonnella "might be a buyer," he was asking when Gonnella would repurchase the Bayview bonds Gleacher owned. Tr. 263. For his part, Gonnella testified no code was used and that King was simply "a little offbeat and humorous in" his manner. Tr. 551-52, 561, 828.

Having observed King's demeanor and reviewed all of the communications between King and Gonnella, I agree with Gonnella's assessment of King. King's long beard, reminiscent of former Washington Nationals' first baseman Adam LaRoche, nose piercing, *see* Tr. 818-19, and somewhat odd way of phrasing things, struck me as unconventional. In context, however, 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. When King asked Gonnella—without explanation—for "clarity" on the bonds *King* owned, he was plainly asking when Gonnella was going to repurchase. *See* Div. Ex. 35. As evidenced by his quick response with bids, Gonnella understood what King was asking and the context in which he was asking it. Furthermore, review of all of the communications between King and Gonnella shows that Gonnella similarly often used phrases in an intentionally vague manner that was calculated so that he could claim that he and King were not operating pursuant to an arrangement. *See* Div. Ex. 28, 47, 48. Circumlocutions of this nature are seen in cases involving similar circumstances. *See SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1219-20 (D.C. Cir. 1989); *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 597-98 (S.D.N.Y. 1993) (concerning "a shorthand dubbed 'Wall Street-ese'"), *aff'd sub nom. SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994).

asked, "can I buy 12mm BAYC 07-4A A1 from you today at 72-04.[14] If you still have it? I think you own 19.65mm total, right?" Div. Ex. 42. King responded that Gonnella was correct and that he was willing to sell at the price Gonnella offered. *Id*.

Gonnella repurchased the referenced portion of BAYC 07-4A A1 at $72.125. Div. Ex. 11A at 49. The repurchase at this figure represented an approximately $14,000 gain for Gleacher. *See* Div. Ex. 400 at 11. Gonnella's repurchase left Gleacher holding what amounted to $7.65 million of original face value of the bond. Answer at ¶ 24.

Four of Gonnella's August 31 and September 2, 2011 transactions with King caused a "parking" alert in Barclays's internal monitoring system. Tr. 555-56, 1208-11; Div. Ex. 38. In general terms, parking entails "the sale of securities subject to an agreement or understanding that the securities will be repurchased by the seller at a later time and at a price which leaves the economic risk on the seller." *Dale E. Barlage*, Exchange Act Release No. 38061, 1996 SEC LEXIS 3441, at *4 n.2 (Dec. 19, 1996). According to Louis Giglio, a former advisory compliance officer within Barclays's securitized products group, Tr. 1183-84, Barclays's monitoring system generated a parking alert if, near the end of a month, transactions occurred in which "approximately the same quantity" of a security was bought and sold, or vice versa, "with the same counterparty," Tr. 1211.

In September 2011, Giglio investigated the alerts generated with respect to Gonnella's transactions, Tr. 1218-19, and asked Gonnella whether "there was a reasonable explanation for the [trading] activity" at issue, Tr. 1219; *see* Tr. 737-39 (Gonnella confirming that he spoke to Giglio). Gonnella said that he repurchased the bonds "in hopes of repackaging [them] and then selling them . . . to a different client." Tr. 1220; *see* Div. Ex. 39; Tr. 740. Gonnella did not tell Giglio about his electronic discussions with King or about the four other bonds he sold to King in late August. *See* Tr. 1220-32, 1243-44. Giglio presented Gonnella's explanation to Giglio's supervisor, who responded "that it was okay to close" the investigation "with a comment" Giglio placed in the internal monitoring system regarding what Gonnella told him. Tr. 1221; *see* Div. Ex. 38, comment.

D. The aftermath: Gonnella's "package bid," crafted in order to repurchase BAYC 07-4A A1, leads to his termination from Barclays.

On September 22, 2011, King contacted Gonnella via Bloomberg chat. Div. Ex. 43. After an extended discussion about the late-season collapse of the Atlanta Braves, he said, "soooo[.] I would like to divest myself of some BAYC paper if at all possible." *Id.* Gonnella responded that he could not offer a bid at that time and asked King to "have patience, if you can." *Id.* He added, "[s]till like them, and eventually want them….but not in September...i need to sell some first, which I will do by sept month end." *Id*. This prompted King to ask whether Gonnella could

[14] Bonds are "[g]enerally [quoted] in dollars and fractions." Tr. 71. The denominator in the fraction is always 32 and each thirty-second is referred to as a "tick." *Id*. Thus, a bid at 72-04 is an offer to pay $72 and 4 ticks, or $72.125.

repurchase by the end of September but Gonnella said that he could not. *Id*. Gonnella then pointed out that Gleacher would receive "a principal payment" on the bond on September 25.[15] *Id*.

On October 3, 2011, King and Gonnella again corresponded via Bloomberg chat. Div. Ex. 45. Although the bulk of their discussion concerned the baseball playoffs, during the discussion, King asked whether Gonnella had "some love for BAYC today?" *Id*. Gonnella responded, "Not yet but don't worry. Will get there eventually. Just can't add right now at that right level. You have 7.65mm right?" *Id*. King confirmed that he did. *Id*.

Eight days later on October 11, 2011, King asked Gonnella via a Bloomberg chat whether Gonnella could repurchase BAYC 07-4A A1 by the close of business on the following Thursday. Div. Ex. 46. Despite a Barclays policy barring the use of personal cell phones to conduct business, *see* Tr. 588, Gonnella responded by saying, "[c]heck your text in like 3 minutes,"[16] Div. Ex. 46. King responded, "haha, ok ... sneaky, sneaky." *Id*.

Gonnella then sent King a text message in which Gonnella offered to sell King two other bonds so that King could combine BAYC 07-4A A1 with the two new bonds in order to sell them back to Gonnella as a package. Tr. 290. King and Gonnella were aware that BAYC 07-4A A1 had declined in value. Tr. 290-91; Answer at ¶ 26. As King explained, Gonnella proposed that by purchasing the two other bonds and reselling them at a profit, King would be able to cover the loss Gleacher sustained by purchasing and holding BAYC 07-4A A1.[17] Tr. 290-91. King responded by text from his personal phone. Tr. 290. Several minutes later, he sent Gonnella a Bloomberg message in which he said he "would need somethin' somethin' by the end of that week, the 28th." Div. Ex. 46.

King's testimony about his conversation with Gonnella was borne out by subsequent events. Later in the day on October 11, 2011, Gonnella sent to King via Bloomberg chat, "Ok, here's what I have for you….. when you sell these later this month, mark down the 07-4s accordingly . . . [l]et me know what u think." *Id*. He then provided specific terms as to four bonds he proposed to sell to King. *Id*.

After King confessed that he did not "have nearly [enough] balance sheet" to purchase the bonds Gonnella offered, Div. Ex. 46, Gonnella offered to sell King bonds designated as PALS

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[15] Gleacher received a principal payment of $54,613. Div. Ex. 401.

[16] Gonnella testified that Miller monitored his Bloomberg chats. Tr. 624-25. He testified that he used a text message, even though doing so was contrary to Barclays's policy, because Miller would have thought he was "too soft," in respect to his dealings with King. Tr. 700-701. During investigative testimony, however, Gonnella said he did not know why he used a cell phone. Tr. 625-26; Div. Ex. 200 at 72. As is discussed below, I do not credit Gonnella's explanation for why he used a cell phone.

[17] Gonnella testified that the "gist" of what he said was that he "would want to buy back [BAYC 07-4A A1] eventually because the price was lower." Tr. 592. He added that he "had four other aged bonds to offer [King], and that [he] wanted to maintain a good relationship." *Id*.

01-1A A1 and LBSBC 05-2A M3, *id*. These bonds would have hit Barclays's seven month aged-inventory deadline at the end of October. Div. Ex. 44, part 3; Div. Ex. 400, slide 7. During the discussion, Gonnella commented that the bonds "look attractive" and offered that King "should be able to mark th[em] up eventually, and use the proceeds to mark down 07-4 accordingly." Div. Ex. 46. King responded, "will do upon the sale, will do." *Id*. That same day, Gonnella sold King the PALS 01-1A A1 bond at $39.50 and the LBSBC 05-2A M3 bond at $30. Div. Ex. 11A at 49.

The next day, October 12, 2011, Gonnella contacted King via Bloomberg chat and said that he was "looking to add stuff like that the last wk of October…. with the bayc 07-4s as well! On 10/24-10/25." Div. Ex. 47. King's response that he would "check in with you then," prompted Gonnella to remark, "[p]ackage bid…. sweet."[18] *Id*.

Two weeks later, on October 25, 2011, Gonnella and King had an extended discussion via Bloomberg chat about vacations and college football. Div. Ex. 48. In the midst of the discussion, Gonnella said that he would "have some bids for you this wk. Like the lbsbc's, pals, and the bayc 07-4s." *Id*. King responded positively to this news. *Id*.

The next day, Gonnella offered King a "35-16 bid for" LBSBC 05-2A M3 and asked whether King was interested in selling at that price.[19] Div. Ex. 49. King readily confirmed that he was. *Id*. Gonnella then said "[a]nd pls do what we discussed before on them…. gonna take a look at the pals and bayc's next, ok? thx." *Id*. Showing his ignorance of the bonds he held, King responded "yes, which one mostly? bayc's, right? pals are still ok?" and Gonnella said, "Correct." *Id*. King responded, "that's done, thanks." *Id*. On October 26, 2011, King sold Gonnella the LBSBC 05-2A M3 bond for $35.50, or $5.50 more than King paid for it on October 11. Div. Ex. 11A at 50.

After King completed the sale of LBSBC 05-2A M3, his supervisor, Robert Tirschwell, spoke to him. Tr. 331. Tirschwell had noticed the profit King made by selling the LBSBC 05-2A M3 bond and asked why King had not recorded a profit in his book. Tr. 331. King told Tirschwell "that 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*. King recalled that Tirschwell

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[18] Gonnella testified that his use of the phrase "package bid" simply reflected his "hope to eventually buy back all three bonds." Tr. 633. In the context of all of Gonnella's actions, it is clear that he did not merely hope to buy the bonds back. Rather, buying them back was his plan from the start.

[19] Gonnella testified that a strong remittance report was issued on October 25, 2011, regarding LBSBC 05-2A M3. Tr. 636, 686. A remittance report is a monthly report about a bond's performance. Tr. 428. Given that Gonnella had already planned to repurchase this bond—he and King discussed Gonnella buying it back as part of a "package"—I find that the remittance report merely afforded Gonnella cover to do that which he had been planning to do since October 11— repurchase LBSBC 05-2A M3.

appeared satisfied with that answer. Tr. 332. Thereafter, King arranged to phone Gonnella. Div. Ex. 50.

Meanwhile, Miller spoke to Gonnella. Tr. 628-31, 636-37, 1043-46. On October 26, 2011, Miller expressed his concern that Gonnella's purchase that day of LBSBC 05-2A M3 "didn't look good." Tr. 628-29, 636-37. King and Gonnella spoke later that evening. Tr. 335-36. Gonnella was nervous during the discussion, telling King that "somebody at Barclays had noticed the [LBSBC 05-2A M3] trade and was asking questions." Tr. 336. Gonnella told King that he was unsure whether he could repurchase the two remaining bonds that he had sold Gleacher. Tr. 336.

The next morning, Miller told Gonnella that on second thought, he believed the trades that had already occurred were "fine," but that Gonnella should not "do it again." Tr. 637; *see* Tr. 1043-46. Gonnella would later testify that he thought "'[d]on't do it again,' meant do not sell aged bonds, seven months aged and then buy them back shortly thereafter" from the same counterparty. Tr. 637-38. In other words, Gonnella expressed his belief that Miller's instructions did not bar him from repurchasing bonds that he had sold Gleacher before October 27, 2014, including PALS 2001-1A A1. As is discussed more fully in the discussion section below, I do not believe Gonnella's explanation because it is nonsensical.

Meanwhile, King was rattled by Gonnella's statement that he might not be able to buy back the two remaining bonds. During the morning of October 27, 2011, while Miller was telling Gonnella "don't do it again," King spoke to Tirschwell and "told him everything." Tr. 336. Tirschwell was displeased. Tr. 337. He eventually issued an ultimatum: call Gonnella and tell him to repurchase the bonds or Tirschwell would call Gonnella's supervisor and "then you guys are both going to be out of business." Tr. 339-40.

Just past noon on October 27, 2011, King arranged to have a phone conversation with Gonnella. Div. Ex. 51; Tr. 340-42. During that subsequent phone discussion, Gonnella first apologized for overreacting the night before. Tr. 342. King responded that "it's too late for that," and conveyed the substance of Tirschwell's ultimatum. Tr. 342, 639.

Gonnella testified that although Miller had said the trades were "fine," he was nonetheless concerned because "customer complaints are pretty serious." Tr. 640. As a factual matter, this statement is only partially truthful. No doubt, "customer complaints are pretty serious." As Miller testified, receiving positive feedback from clients was a factor in determining Gonnella's compensation. Tr. 942. Equally true however is that Gonnella did not want Miller to know the full extent of his dealings and communications with King. Gonnella was thus stuck between Miller's instruction not to "do it again," and Tirschwell's ultimatum. Being stuck forced Gonnella to profess a strained understanding of Miller's instruction that allowed him to repurchase the last two bonds.

Later in the day, Gonnella arranged to contact King by cell phone, again violating Barclays's policy. Tr. 345-46; Div. Ex. 53. During the subsequent phone conversation, Gonnella told King that he could buy the PALS 01-1A A1 bond that day and that repurchase of the BAYC 07-4A A1 bond would have to wait until the end of the week. Tr. 346, 641. King was being

pressed by Tirschwell and thus pushed Gonnella to repurchase. Tr. 345. In a Bloomberg chat later in the afternoon, King pressed Gonnella, who responded "[w]orking on a few things, but a little slow going." Div. Ex. 52. Thirty-five minutes later, King asked whether Gonnella had "any g[au]ge on the likelihood of getting those few things done?" *Id.* Gonnella replied that he was "[w]orking" and that "[t]iming is an issue." *Id.* Thirty-four minutes after that, King remarked "I need a sense on where the stuff that you're working on can be cleared currently." Div. Ex. 53. Gonnella responded that he would call King in five minutes. *Id.*

Gonnella subsequently offered to repurchase the PALS 01-1A A1 bond, which had an original face value of $9,000,000. Tr. 641; *see* Div. Ex. 11A at 50. Because Tirschwell directed King to use an intermediary, the parties executed the trade through a third party, who was paid "two ticks." Tr. 643, 645; Div. Ex. 54. King thus sold the bond for $42 to a third party who sold it to Barclays for $42.0625. Tr. 348-50, 644-46; Div. Ex. 55. Shortly, after acquiring the PALS 01-1A A1 bond, Gonnella sold a portion of it representing $5,000,000 of original face value for $42.125. Div. Ex. 11A at 50; Tr. 845.

Gonnella instructed King to contact an interdealer broker named Frank Mistero regarding selling the remaining BAYC 07-4A A1 bond. Tr. 351-52. King contacted Mistero by Bloomberg chat on November 3, 2011, and offered to sell him the bond at "64-18." Div. Ex. 58. Mistero then contacted Gonnella who offered to buy at "64-00." Div. Ex. 57. After Mistero offered King a "64-00" bid, King countered at "64-16." Div. Ex. 58. Mistero relayed the counter to Gonnella, who agreed to the price and said that he would pay Mistero "a tick on top.. If that works." Div. Ex. 57. Mistero then agreed to buy the bond, Div. Ex. 58, and paid Gleacher $64.50 for it, Div. Ex. 59, 60. Later on November 3, Gonnella acquired the bond from Mistero for $64.53125.[20] Div. Ex. 11A at 50, 62.

When Gonnella sold BAYC 07-4A A1 on August 30, 2011, Barclays received $11,494,457 from Gleacher. Div. Ex. 401. In total, Barclays paid $11,007,204 to repurchase. *Id.* Barclays's gain thus amounted to approximately $487,000. *Id.* While holding BAYC 07-4A A1, Gleacher received principal and interest payments totaling $57,164. *Id.* Gleacher's loss thus amounted to approximately $432,000. *Id.* Barclays received $3,534,708 for the October 11, 2011, sale of PALS 01-1A A1, and paid $3,764,017 to buy it back. *Id.* Barclays thus lost over $229,000 on the sale and repurchase. *Id.* Including an accrued interest payment, Gleacher netted just under $227,000 on the PALS 01-1A A1 transactions. *Id.* Barclays received $1,170,965 for the sale of LBSBC 05-2A M3 on October 11, 2011, and paid $1,385,642 to repurchase it. Div. Ex. 401. Barclays thus lost, and Gleacher conversely gained, over $214,000 on the LBSBC 05-2A M3 transactions. *Id.* In the aggregate, Barclays paid about $43,000 less to repurchase these three bonds than it received when it sold them.

[20] It is unclear whether these discussions represented actual price negotiation or were arranged to be appear as actual negotiation. *See* Tr. 351. King testified that he and Gonnella spoke before the trade occurred and that Gonnella assured King that the trade would occur. Tr. 351-52. King could not remember whether the two discussed price. Tr. 352.

As a result of these transactions, Barclays fired Gonnella.[21] *See* TG 54. Gleacher fired King, as well, after King told Tirschwell that Gonnella had been fired. Tr. 360-61.

In total, Barclays paid approximately $111,000 more for the twelve bonds in question than it received when it sold them. Div. Ex. 400, slide 15; Div. Ex. 401. Dr. Agrawal calculated that the "total economic impact" on Barclays of Gonnella's trades with King was approximately $174,000. Div. Ex. 400, slides 15, 16. This latter figure includes principal and interest payments that Barclays would have received had Gonnella not sold the bonds. *See id*. The entire purpose of the aged-inventory policy, however, was to cause traders to sell securities. Saying that Barclays would have received principal and interest payments for bonds it encouraged its traders to sell is speculative. I therefore rely on the lower figure of $111,000 as a starting point for determining Barclays's loss.[22]

Determining Barclays's loss is complicated by other factors.[23] First, as Miller testified, it is possible that market movements could account for some of the price changes between Barclays's sale and repurchase of the bonds. *See* Tr. 984-85, 1025-29, 1047-48, 1164-65. Second, in the case of PALS 01-1A A1, Gonnella was able to quickly sell a portion of the bond representing $5,000,000 of original face value for more than what Barclays paid to reacquire it from King. Div. Ex. 11A at 50; Tr. 845. This offset a small portion of Barclays's loss on its repurchase of the bond.[24] Given these factors, although I am confident that, as Miller said, Gleacher profited at Barclays expense, Tr. 995, I cannot say with any confidence what the exact amount of Barclays's loss was.

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[21] In February 2012, Gonnella was hired by KGS-Alpha Capital Markets, a broker-dealer that focuses on securitized products. Tr. 731. He was put on leave in February 2014 when the OIP was issued. Tr. 732.

[22] Dr. Agrawal calculated the amount of aged-inventory charges that Gonnella avoided as to each of the relevant bonds, *see* Tr. 106-22, and concluded that Gonnella avoided $725,824 in aged-inventory charges, Tr. 122; Div. Ex. 400, slide 14. Miller explained that such charges were taken out of a trader's book and transferred to the management book. Tr. 966-67. In other words, Barclays did not lose money when a trader avoided an aged-inventory charge; whether a trader accrued an aged-inventory charge had no effect on Barclays bottom line. *See* Tr. 967 ("no money actually [left] the firm").

[23] Gonnella faulted Dr. Agrawal's analysis because it assumed his trades were improper. Tr. 873. Gonnella opined that multiple factors went into to deciding whether a given trade caused a loss, not simply the difference between the sell and repurchase price. Tr. 866-67. By way of example, he noted that funds received from a sale could be used to purchase other bonds that might generate revenue through interest or principal payments. Tr. 868. Inasmuch as I find that Gonnella violated the antifraud provisions, his criticism of Dr. Agrawal's calculations is not material.

[24] Gonnella sold Gleacher $9 million of original face value of PALS 01-1A A1 on October 11 at $39.50. Div. Ex. 11A at 49. He repurchased it on October 27 at $42.0625 and resold $5 million of original face value that day at $42.125. *Id*. at 50.

III. ISSUES

1. Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5 thereunder prohibit fraudulent practices in connection with the offer, purchase, or sale of a security. Gonnella arranged to sell bonds held in his book at Barclays and quickly repurchased the bonds. He did so in order to avoid aged-inventory charges incurred under Barclays policies. Gonnella dictated that repurchase prices, paid with Barclays's capital, would be higher than the earlier sales prices, thereby committing Barclays's capital so that he could avoid the effect of the aged-inventory policy, yet retain the bonds. Did Gonnella engage in fraudulent practices in connection with the purchase or sale of a security and consequently violate the antifraud provisions of the federal securities laws?

2. Section 17(a)(1) of the Exchange Act and Rule 17a-3(a)(2) thereunder require broker-dealers to keep records that accurately "reflect[] all assets and liabilities, income and expense and capital accounts." Gonnella did not record in Barclays's records his arrangement with King to repurchase the bonds he sold Gleacher. Did Gonnella aid and abet and cause Barclays's violation of its record keeping requirements?

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Antifraud liability

1. Legal principles

Gonnella is charged with violating the antifraud provisions of Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5. In relevant part, Section 17(a) of the Securities Act of 1933 provides that:

> It shall be unlawful for any person in the offer or sale of any securities . . . directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> . . .
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). As used in Section 17(a), the term "sale" refers to "*every* contract of sale or disposition of a security or interest in a security, for value," and the term "offer" refers to "*every* attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. § 77b(a)(3) (emphasis added). Because these terms are "define[d] broadly," they "encompass the entire selling process, including the seller/agent transaction." *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

Section 10(b) of the Exchange Act makes it:

> unlawful for any person, directly or indirectly. . . –
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5 makes it:

> unlawful for any person, directly or indirectly . . .
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. Together, "Section 10(b) and Rule 10b-5 prohibit fraudulent practices in connection with the purchase or sale of a security." *United States v. Bilzerian*, 926 F.2d 1285, 1297 (2d Cir. 1991).

Although Section 10(b) "applies to acts committed in connection with a *purchase or sale of* securities," Section "17(a) applies to acts committed in connection with an *offer or sale* of securities." *SEC v. Bauer*, 723 F.3d 758, 768 (7th Cir. 2013) (quoting *SEC v. Maio*, 51 F.3d 623, 631 (7th Cir. 1995)). This distinction is not material in this case, however, because both situations are presented herein. *Cf. Naftalin*, 441 U.S. at 778 ("the two Acts prohibit some of the same conduct"); *Bauer*, 723 F.3d at 768 ("treat[ing] the proscriptions contained in § 17(a), § 10(b) and Rule 10b-5 as 'substantially the same'"); Resp. Prehearing Br. at 6 n.2. In order to establish liability under Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act, the Division must show that Gonnella "acted with scienter."[25] *Gregory O. Trautman*, Exchange Act Release No. 61167, 2009 SEC LEXIS 4173, at *52 (Dec. 15, 2009); *see Aaron v. SEC*, 446 U.S.

[25] Because "[t]he scope of Rule 10b-5 is coextensive with the coverage of §10(b)," *SEC v. Zandford*, 535 U.S. 813, 816 n.l (2002), I simply refer to Section 10(b).

680, 695-97 (1980). To show a violation of Section 17(a)(3) of the Securities Act, the Division need only show negligence. *Aaron*, 446 U.S. at 696-97; *Trautman*, 2009 SEC LEXIS 4173 at *52.

It follows from the foregoing that in order to establish liability under Section 17(a) and Section 10(b), the Division must show that Gonnella "engaged in fraudulent conduct, that such conduct was in connection with the offer, sale, or purchase of securities, and that he acted with scienter," or in the case of Section 17(a)(3), with negligence. *Trautman*, 2009 SEC LEXIS 4173 at *52. To show that Gonnella "engaged in fraudulent conduct," the Division was required to show the he:

> (1) made an untrue statement of material fact; (2) omitted a fact that made a prior statement misleading; or (3) committed a deceptive or manipulative act as part of a scheme to defraud.

Id. at 53. Action by a fiduciary that is contrary to the obligations the fiduciary owes his principle can give rise to a claim of fraud. *See Zandford*, 535 U.S. at 820-21; *Chiarella v. United States*, 445 U.S. 222, 228, 230 (1980).

The phrase "in connection with the purchase or sale of any security" in Section 10(b) applies broadly. *Zandford*, 535 U.S. at 819-20. "[F]raudulent activity meets the 'in connection with' requirement of § 10(b) whenever it 'touches' or 'coincides' with a securities transaction." *SEC v. Pirate Investor LLC*, 580 F.3d 233, 244 (4th Cir. 2009) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006) and *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co*., 404 U.S. 6, 12-13 (1971)).

"The term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). The term "includes recklessness, defined in this context as 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'" *Trautman*, 2009 SEC LEXIS 4173 at *61 (quoting *Makor Issues & Rights, Ltd. v. Tellabs Inc*., 513 F.3d 702, 704 (7th Cir. 2008)). "Scienter may be inferred from circumstantial evidence." *Brian A. Schmidt*, Exchange Act Release No. 45330, 2002 SEC LEXIS 3424, at *31 (Jan. 24, 2002) (relying on *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983)).

A fiduciary who violates his fiduciary responsibilities and trades to the detriment of his principal can be liable under the antifraud provisions. *See Bankers Life*, 404 U.S. at 11-12. When, in the course of exercising his delegated authority to trade, a fiduciary acts "'for his own benefit,'" the fiduciary commits fraud. *Zandford*, 535 U.S. at 821 (quoting *United States v. Dunn*, 268 U.S. 121, 131 (1925)); *id*. at 822-23. In cases involving a fiduciary relationship, therefore, "silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b)." *Chiarella*, 445 U.S. at 230. As a result, "a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide" will fall within the ambit of Section 10(b), *Zandford*, 535 U.S. at 825, because the "'disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web' along with manipulation, investor's ignorance, and the like," *Bankers Life*, 404 U.S. at 11-12 (citation omitted).

Congress's repeated use in Sections 17(a) and 10(b) of the word "any" reveals a clear intent to be "inclusive." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972). These statutes should thus "be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Id*. (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)). As a result, one should look to substance rather than form or labels when determining whether a given act constitutes a violation of the antifraud provisions. *See Bankers Life*, 404 U.S. at 12 ("Since practices 'constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers' in the regulatory agency 'have been found practically essential.'") (citation omitted). In this regard, Section 10(b) covers "not just 'garden type variet[ies] of fraud' but also 'unique form[s] of deception' involving '[n]ovel or atypical methods.'" *VanCook v. SEC*, 653 F.3d 130, 138 (2d Cir. 2011) (quoting *Bankers Life*, 404 U.S. at 11 n.7).

2. Gonnella violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act.

Bearing the foregoing principles in mind, I find 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. The 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. Gonnella accomplished his scheme by engaging in transactions that served no real purpose other than to allow him to reset the aged-inventory clock on the securities that were the subject of the transactions. 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) and Section 10(b).

Context is important to my finding that Gonnella violated the antifraud provisions. While any one of his actions or transactions alone might have an innocent explanation, considered as a whole they show that he acted to further his scheme to defraud Barclays.

As the evidence reveals, the heart of this case concerns eight bonds Gonnella sold King on August 30 and 31, 2011, while Gonnella's supervisor was on vacation. The prologue for these transactions occurred in May and June 2011 when Gonnella and King exchanged two bonds in a back-and-forth arrangement.

When Gonnella offered King two bonds on May 31, he stated that he "would more than likely have higher bid for these later this wk when the calendar turns." Div. Ex. 20. True to his word, Gonnella repurchased the bonds the next day, giving King and Gleacher a profit of approximately $23,000. 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. In other words, there was no need for King to worry because Gonnella was offering a quick way to earn an easy profit at no risk. *See* Tr. 221-23, 233-34. This foundation was crucial for what later transpired because Gonnella's later behavior demonstrated that, when operating under the terms of their implicit

arrangement, discussed in more detail below, he was obligated to repurchase at a price that would benefit King.[26]

Having confirmed that King was willing to go along with the arrangement, Gonnella did not immediately employ King again. Instead, he waited until his supervisor, Miller, was on vacation to engage in the trades at the heart of this case. The fact that Gonnella sold King eight of the first ten bonds at issue when Miller was on vacation circumstantially weighs against an innocent explanation for Gonnella's trades.

On August 29, 2011, while Miller was on vacation, Gonnella contacted King, said that he had "some aged bonds that I might offer," and suggested that the two might "do what we did a few months ago w/ some of those bayc's." Div. Ex. 27. In other words, he was telling King that as was the case before, if King were to help him, King could make a quick, easy, risk-free profit.

Tellingly, when King contacted Gonnella the next day he asked whether he could "*help* [Gonnella] with some aged items today?" Div. Ex. 28 (emphasis added). Notably, King did not say anything about price or any particular bond. As he testified, Tr., 222-23, he did not care what Gonnella was selling because it did not matter; whatever Gonnella was selling, King was buying because he knew Gonnella would repurchase at a profit to King.

When on August 30, 2011, Gonnella offered King three BAYC bonds, including the fateful BAYC 07-4A A1, King made sure the two were operating under the terms of their previous arrangement whereby King would only be holding bonds until Gonnella quickly repurchased them. King thus asked "*when* [Gonnella] would . . . be looking to purchase something similar? end of the week?" Div. Ex. 28 (emphasis added). Of course, if there were no arrangement, one might expect Gonnella to question what King was asking by using the word "when." Gonnella, however, knew exactly what King was asking and confirmed that he would repurchase the three bonds soon. Div. Ex. 28.

Specifically, in response to King's question about when—not whether—Gonnella would repurchase, Gonnella responded by saying "yes" and "most likely" he would purchase by the end

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[26] King explained that the sort of arrangement he had with Gonnella was, while not "standard practice," not completely extraordinary in his industry. Tr. 457. Apparently based on experience with the practice, he testified that he was unconcerned about price terms because he was certain that Gonnella would repurchase within a short time frame at a price that would result in a profit to Gleacher. Tr. 221-23. Although Gonnella's counsel demonstrated that there were valid reasons to doubt King's testimony, *see infra*, the course of King's and Gonnella's conduct supports King's testimony. Indeed, when Gonnella first contacted King, he said, without need for explanation, that he had bonds he was "looking to turnover today for good ol' month end/aging purposes" and "would more than likely" repurchase. Div. Ex. 20. This shows that Gonnella too was aware of the practice and its terms. The fact, therefore, the two did not discuss specific prices on the back-end repurchase transactions is not significant because all that mattered was that the back-end price would exceed the front-end price. *See SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1226 (D.C. Cir. 1989) (rejecting the argument that a lack of "discussion of price and quantity" was determinative of whether a parking arrangement existed).

of the week. Div. Ex. 28. In the context of all of Gonnella's actions, the phrase "most likely" reveals his actual intention to repurchase by the end of the week. This is similar to the facts in *First City Financial*, where a broker interpreted the statement "It wouldn't be a bad idea if you bought Ashland Oil here," as an instruction to buy for another entity "at their risk." 890 F.2d at 1219-20.

True to form, Gonnella repurchased two of the bonds the very next day, netting Gleacher a profit of approximately $48,000. Div. Ex. 401.

Gonnella also sold King five more bonds on August 31, while Miller was still away. Two days later, King asked what would be considered an odd question in an arms-length transaction. He asked Gonnella whether Gonnella had "any clarity on the BAYCs that" *King* owned, and said "I heard you might be a buyer." Div. Ex. 35. As King testified, his question amounted to an intentionally vague way of asking when Gonnella was going to follow through on their deal and repurchase the bonds. In other words, King was saying "we have a deal. You need to buy back these bonds." It is thus not surprising that within twenty minutes, Gonnella responded with bids for the five bonds he sold to Gleacher on August 31. Div. Ex. 36. As before, all bids were at prices that benefitted Gleacher such that it netted approximately $84,000 on the purchase and resale of the five bonds. Div. Ex. 401.

At this point, Gonnella had repurchased nine out the ten bonds he sold Gleacher. All repurchases followed shortly on the heels of the original sales and all resulted in profits to Gleacher. Gonnella dictated all prices; none of the sales or repurchases involved any price negotiation. Tr. 250, 260, 267. The combination of these factors shows that Gonnella and King were operating pursuant to a prearranged scheme.

If there were any doubt about Gonnella's true motives, that doubt is dispelled by what took place over the next two months. When King contacted Gonnella on September 7, 2011, to inquire about Gonnella's repurchase of BAYC 2007-4A A1, the one bond that Gleacher still held, Gonnella responded that he had not "forgotten about" King and assured King that he would "be back w/ a bid on the bayc's." Div. Ex. 41. Unless King and Gonnella understood that Gonnella needed to repurchase the bond, Gonnella's statement that he had not forgotten about King makes no sense.

Indeed, if Gonnella did not think the two were operating under an understanding, his behavior is inexplicable. If there were no understanding, one might characterize King's actions as pestering and expect Gonnella to tell King to find another buyer. After all, in an arms-length sale, King could have had no expectation that Gonnella would repurchase and Gonnella would have little reason to constantly mollify King.[27] Gonnella's actions revealed his actual thoughts about the matter.

On September 22, 2011, King again reminded Gonnella that he needed to repurchase the remaining BAYC bond, saying that he wanted to "divest" himself of it. Div. Ex. 43. Again,

[27] True enough, Gonnella would want to keep his clients happy. *See* Tr. 626-27. His efforts here, however, went well beyond achieving that goal.

Gonnella could have told King that his desire was fascinating and that he should find another buyer. Instead, he asked King to be patient. *Id.* When King asked whether Gonnella could repurchase by the end of September, *id*., Gonnella yet again did not respond by telling King to find another buyer. Instead, Gonnella said that he could not repurchase in September and tried to placate King by reminding him that Gleacher would soon receive a principal payment on the bond. *Id*.

This pattern continued. On October 3, King asked whether Gonnella might repurchase that day and Gonnella told King not to "worry" and that the two of them would "get there eventually." Div. Ex. 45. If there were no agreement, it would be appropriate to wonder why Gonnella did not tell King to stop bothering him and to suggest that perhaps he should find employment in another industry. By saying he would "get there eventually," Gonnella evidenced all the more that he felt obliged to repurchase.

Possibly the most damning incident occurred next. On October 11, when King once again contacted Gonnella, Gonnella intentionally violated Barclays's policy and arranged to discuss a transaction by cell phone. Div. Ex. 46. Gonnella testified that he used his cell phone because he did not want Miller to see the terms he offered King because he feared Miller would think he was not being "cut throat enough." Tr. 624. At best, this is an understatement. It is also an example of Gonnella only being truthful up to a point. There is no doubt that if he knew what Gonnella had offered King, Miller would not have thought the terms were "cut throat enough."

I do not credit Gonnella's explanation, however, for why he decided to discuss the trades by cell phone. First, Gonnella gave investigative testimony about this matter in October 2012. *See* Div. Ex 200. At that point, only one year after the events in question, Gonnella said he did not have a reason for communicating with King using his cell phone. Tr. 625-26; Div. Ex. 200 at 72. Second, King's testimony and later events show that Gonnella used his cell phone to propose a package deal that would help King cover what turned out to be a nearly half million dollar loss on his purchase of BAYC 07-4A A1. Given the fiduciary duty Gonnella owed to Barclays, it is apparent that the reason Gonnella used his cell phone was not because he was worried that Miller would think he was "soft." He did it in an attempt to prevent Miller 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.

Gonnella's proposal to King via his cell phone and the actions he took to carry out his proposal further show the degree to which he was obligated to compensate King to Barclays's detriment. Knowing that BAYC 07-4A A1 was dropping in price,[28] Gonnella proposed to make King whole by selling him two other bonds, PALS 2001-1A A1 and LBSBC 2005-2A M3, that King could sell back to Barclays at a profit. Div. Ex. 46. Gonnella proposed that this profit would offset the loss on BAYC 07-4A A1 when King sold back that bond to Gonnella. Gonnella then told King that King "should be able to mark . . . up [the two new bonds] eventually, and use the proceeds to mark down 07-4 accordingly." *Id.* Of course, it was not Gonnella's job to ensure that

[28] In his answer to the OIP, Gonnella admitted that he knew the price of the bond was dropping. *See* Answer at ¶ 26.

someone in another firm was able to mark down securities. *See* Tr. 1006. It also was not his job to sell securities in order to help another trader offset a loss with Barclays's capital.

True to his word, Gonnella repurchased PALS 2001-1A A1 and LBSBC 2005-2A M3, at prices he dictated in order to compensate King.[29] Although Gleacher lost approximately $489,000 on the BAYC 07-4A A1 trades, the prices Gonnella set on the other two bonds meant that Barclays respectively lost approximately $229,000 and $215,000 on the PALS 2001-1A A1and LBSBC 2005-2A M3 transactions. When combined with the principal and interest payments Gleacher received on BAYC 07-4A A1, Gonnella had effectively made King whole. Of course, absent the agreement he had with King, there was no reason for Gonnella to repurchase PALS 2001-1A A1and LBSBC 2005-2A M3.[30]

Indeed, the whole point of selling PALS 2001-1A A1and LBSBC 2005-2A M3 in the first place was to later generate a profit for Gleacher. From the start on October 11, Gonnella intended that he would repurchase these bonds at a price that would necessarily cost Barclays money. In other words, he set the prices in order to further his plan. *See* Tr. 1038 ("what does seem very obvious . . . is [that] the dispersion between the buy and the sell prices was set to cover the loss on the [BAYC 07-4A A1]").

Gonnella was also at pains to cover his tracks at Barclays. Despite his fiduciary duty of candor, when Giglio questioned him about four of the bonds he sold on August 31 and repurchased on September 2, he said nothing about his communications and understanding with King, or the four other bonds he transacted around the same time with King. Tr. 1226-32, 1242. Instead, he said the reason he repurchased the four bonds Giglio asked about was because he wanted to repackage and sell them to a different client. Tr. 1220. Gonnella did not volunteer that he actually engaged in the round-trip transactions because he wanted to evade the aged-inventory policy. Of course, he never said anything about these facts to Miller, either.

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[29] King testified that he was happy on September 7, 2011, when Gonnella stated that he would repurchase a portion of BAYC 2007-4A A1 because King had "[no]where else to go" with the bond. Tr. 274. He was also relieved on October 26, 2011, when Gonnella repurchased LBSBC 05-2A M3 "because the process of divesting [him]self of" the last "three bonds was beginning." Tr. 329. Gonnella argues these statements show there was no agreement because if there were an agreement, there would be no reason for King to feel relief. Resp. Br. at 12. To the contrary, it is hardly surprising that King, who was in a relatively weak position, would feel relief that Gonnella would follow through on his end of the bargain, even if he did so belatedly. King's feelings hardly evidence a lack of an agreement. As is discussed below, the fact that market forces might cause the back-end purchaser to delay a repurchase does not detract from a determination that there was an arrangement to repurchase. *See United States v. Bilzerian*, 926 F.2d 1285, 1290 (2d Cir. 1991). It just means that unexpected obstacles to the repurchase arose.

[30] Gonnella claimed that a strong remittance report prompted him to repurchase LBSBC 2005-2A M3. Tr. 636, 686. But because he had always planned to buy it back, the remittance report merely provided a convenient opportunity to carry out his plan.

Indeed, when Miller later asked him about the August and September transactions, Gonnella said that Barclays's compliance office had "signed off on them." Tr. 1063-65. While this was literally true, Gonnella knew that Giglio "signed off" without knowing the full picture.

Additionally, on October 27, 2011, after Gonnella repurchased LBSBC 2005-2A M3, Miller told Gonnella not to "do it again." Tr. 637. In response, Gonnella adopted a nonsensical interpretation of Miller's instruction, pursuant to which he was permitted to repurchase PALS 2001-1A A1 at a loss and BAYC 07-4A A1. Tr. 637-38. Specifically, the "it" to which Miller referred was Gonnella's repurchase on October 26, 2011, of a bond— LBSBC 2005-2A M3— Gonnella sold to Gleacher on October 11, 2011, and which resulted in a loss exceeding $200,000. It does not make sense that Gonnella would think that Miller's admonition meant he could repurchase another bond— PALS 2001-1A A1—that he also sold to Gleacher on October 11, 2011, and which also resulted in a loss exceeding $200,000. In other words, it is nonsensical to interpret "don't do it again" as "do exactly the same thing again." Of course, Gonnella was stuck between the Scylla of Miller's instruction and the Charybdis of Tirschwell's ultimatum. Something had to give. Given his options, Gonnella had no choice but to repurchase and then develop a rationalization for his actions.

And, the "package" scheme to offset King's loss on BAYC 07-4A A1 is akin to the scheme in *Bilzerian*. There, the defendant parked shares of a security with the broker-dealer Jeffries & Company. 926 F.2d at 1290. Similar to Gonnella's understanding with King, Bilzerian had assured Jeffries that "he would repurchase the stock." *Id*. Because "the stock price fell substantially in the interim" Bilzerian refused to repurchase, causing Jeffries to suffer a loss. *Id*. As with the drop in price of BAYC 07-4A A1, Bilzerian needed a way to offset Jeffries's loss. To do so, Bilzerian generated commissions for [Jeffries] and caused Jeffries to send "Bilzerian a false invoice . . . for 'financial services' that were never performed." *Id*.

Here, there was no reason for Gonnella to engage in the round-trip transactions other than to evade Barclays's aged-inventory policy and to reset the clock under that policy. As Miller put it, "Gleacher made money at Barclays's expense and Barclays was left with the same securities" that it had before the trades with Gleacher. Tr. 995. Notably, had Gonnella simply sold the bonds at issue in an arms-length transaction, no violation would have occurred. Indeed, Barclays's policy was designed to encourage him to do just that. But, when Gonnella entered into an arrangement with King that obligated Gonnella to repurchase the bonds at a price that protected King to Barclays detriment, Gonnella violated the antifraud provisions.[31]

As noted, fraudulent conduct can consist of making "an untrue statement of material fact" or "committ[ing] a deceptive or manipulative act as part of a scheme to defraud." *Trautman*, 2009 SEC LEXIS 4173 at *53. Gonnella's actions fit either criterion. In the context of the fiduciary

[31] Gonnella is mistaken in claiming that he was charged with fraud based on the fact that his trades with King were not profitable. Resp. Br. at 27. Had Gonnella merely made poor trading decisions, there would be no issue. The fact the trades cost Barclays money was, however, a necessary and intended consequence of his scheme. From the start, the scheme involved profit to King and Gleacher with loss to Barclays, but not Gonnella.

relationship Gonnella had with Barclays, there is no distinction between omissions and affirmative misrepresentations. *See Zandford*, 535 U.S. at 823. Miller and Giglio both testified that knowing the full context of Gonnella's communications and arrangement with King would have been material to Barclays. Had Gonnella's superiors known about the communications and arrangement, the trades would not have occurred. Gonnella's failure to give his superiors this information while continuing to trade thus amounts to a continuing series of untrue statements of material facts.

The same is true of Gonnella's omissions when talking to Giglio. Gonnella knew that Giglio sought out Gonnella in Giglio's role as a compliance officer. Giglio told Gonnella that he was asking about four of the eight bond transactions that occurred in August and September. When Gonnella failed to disclose the other four bond transactions and failed to disclose to Giglio his communications and arrangement with King, his omissions amounted to untrue statements of material fact.[32] *See Zandford*, 535 U.S. at 820-23.

Moreover, as stated above, 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." For the reasons already stated, Gonnella's acts were deceptive. *See Zandford*, 535 U.S. at 820-21. The acts were also part of a scheme to defraud. Gonnella's efforts necessarily involved round-trip transactions that served no purpose other than to benefit him. In order to carry out the scheme, Gonnella had to commit Barclays's capital to repurchasing bonds that, but for Gonnella's scheme, Barclays would already have owned but at a lower cost.

Gonnella's conduct plainly satisfies the requirement that his conduct be "in connection with the offer, sale, or purchase of securities." As in *Zandford*, "each sale [and repurchase] was made to further [Gonnella's] fraudulent scheme." 535 U.S. at 820. Indeed, the facts that (1) "a securities sale was necessary to the completion of the fraudulent scheme; and (2) "the parties' relationship was such that it would necessarily involve trading in securities," supports the determination that Gonnella's fraud was "in connection with" a securities transaction. *See U.S. SEC v. Pirate Investor LLC*, 580 F.3d 233, 244 (4th Cir. 2009).

Finally, Gonnella acted intentionally. His conduct and his communications with King demonstrate that he intended to abuse his position of trust and to defraud Barclays. In this regard, the timing and price of the bonds is quite relevant. As noted, the main event in this case occurred in late August and early September 2011. It is impossible to ignore the fact that Gonnella sold eight of the twelve bonds at issue when Miller was on vacation. After all, Gonnella testified that he thought Miller read all of his Bloomberg communications.

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[32] Gonnella says that "he did not defraud the market," arguing that his "conduct was not material to any investment decision." As discussed above, however, Gonnella's conduct was material. Had Barclays known of his arrangement with King, it would have prevented him from engaging in transactions with King. It goes without saying that Gonnella's omissions regarding the fact of his unauthorized trades were material. The fact the harm related to Barclays and not an unconnected investor is of no moment. *See Bankers Life*, 404 U.S. at 10-12.

One additional set of related factors weighs against Gonnella. Barclays was larger than Gleacher and Gonnella had much more capital at his disposal than King. Tr. 572-73. Among possibly ten traders of Bayview bonds in the market in 2011, Gonnella ranked himself in the top three in terms of knowledge. Tr. 746. Gonnella demonstrated that he had a knowledge advantage over King in general when it came to trading in the "space" represented by the bonds the two bought and sold between each other. *See* Tr. 573-74, 614, 622-24; *see also* Tr. 266 (King stating "I wasn't familiar enough with these bonds or the space to know how that compared to the prevailing market prices"). Gonnella thus "educated" King about a bond when they first started trading together, Tr. 573, and later offered him advice about other bonds, Tr. 614, 622-23.

And Gonnella knew he had a knowledge advantage over King. On October 26, he offered King a bid on LBSBC 05-2A M3 and told King to "do what we discussed before on them," Div. Ex. 49, *i.e*., "mark th[em] up eventually, and use the proceeds to mark down 07-4 accordingly," Div. Ex. 46. He also said he would "take a look at the pals and bayc's next, ok?" Div. Ex. 49, referring to the two bonds Gleacher still held. King responded "yes, which one mostly? bayc's, right? pals are still ok?," *id*., thus letting Gonnella know that King was ignorant about the bonds he held and was relying on Gonnella's knowledge of the bonds *he* (meaning King) held.

Additionally, there was no dispute that the market for the bonds Gonnella traded was illiquid. Tr. 938, 950. In an illiquid market, it is reasonable to expect increased price negotiation.[33] *See* Stephen M. Mcjohn, *Default Rules in Contract Law as Response to Status Competition in Negotiation*, 31 Suffolk U. L. Rev. 39, n.83 (1997) (relying on David D. Haddock & Fred S. McChesney, *Bargaining Costs, Bargaining Benefits, and Compulsory Nonbargaining Rules*, 7 J. L. Econ. & Org. 334, 334 & n.1 (1991)); *see also* Tr. 943-44.[34]

Given these facts, one would expect that in arms-length transactions, King and Gonnella would engage in price negotiation and that Gonnella would use his firm's size and his experience and knowledge to his advantage. Yet, these things did not occur. To the contrary, Gonnella dictated the price for every transaction but did not do so to Barclays's advantage. With the exception of BAYC 2007-4A A1, Gonnella consistently repurchased the bonds on Barclays's behalf at prices that were higher than that at which he sold them. While market forces could easily account for the repurchase price as to any one bond in isolation, there was no price negotiation because Gonnella set the price of the twelve bonds he sold and repurchased. That Gonnella dictated prices to which King acquiesced further shows that the transactions were part of a sham. *See Joel L. Hurst*, Exchange Act Release No. 41165, 1999 SEC LEXIS 506, at *4 (Mar. 12, 1999) ("Hurst dictated the prices on the parking transactions. The other firms acquiesced in these price setting transactions. Therefore, the trades involving the other dealers were fictitious, non-bona fide

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[33] Gonnella said that negotiation occurred with respect to less than half of his trades. Tr. 566, 776. Even accepting this assertion, the complete lack of price negotiation involved in King's and Gonnella's trades would be suspicious.

[34] The transcript incorrectly reflects that Miller responded "[a]lmost by definition, yes," when asked whether "esoteric, ABS [was] in a liquid market." Tr. 943-44. In context, it is plain that the transcript contains a stenographic error and that Gonnella was actually asked whether the market for asset-backed securities was *illiquid*. *See* Tr. 938 ("he traded a very illiquid product"), 950.

transactions"). This final set of factors thus evidences Gonnella's bad faith and that he was trading for his own benefit with Barclays's capital.

Gonnella, however, says that it would not make sense for him to engage in predetermined trades with King because there was no reason for him to try to avoid the aged-inventory policy. Resp. Br. at 25. He conceded that he did not want to incur aged-inventory charges but explained that those charges would have had no or "very minimal" impact on the calculation of his compensation. Tr. 790-93. In this regard, Dr. Agrawal, the Division's expert, calculated that at the time of the sales in question, Gonnella was facing charges against his book in excess of $700,000. Tr. 791. At the time Gonnella was fired, his total profit for 2011 was about $17 million. Tr. 792. Gonnella explained that even accepting Dr. Agrawal's calculation, his profits for 2011 would have been about $16.3 million. Tr. 792. Given the multiple factors that Gonnella said influenced the calculation of his compensation, he opined that a $700,000 charge against his book would have made very little difference. Tr. 792.

Miller similarly discussed a number of factors that were considered in determining a trader's compensation. Among these factors were profits and losses and market share. Tr. 940, 967-68. Working well with others and receiving positive feedback from clients were also factors, as was effectively managing risk. Tr. 942. Miller explained, however, that reaching a compensation decision was not a "formulaic" process. Tr. 941.

Ultimately, the degree to which aged-inventory charges would have affected Gonnella's compensation does not matter. Those charges would have had some impact on his compensation and, even if there would have been no impact, the fact remains that through his actions and words—specifically, his words directed at King—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. As Miller testified, avoiding aged-inventory charges was one way a trader could maximize his profits. Tr. 967-68. Whatever Gonnella's motivation—perhaps he thought the risk of detection was small—he 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.

Gonnella also argues that imposing liability places the Commission in the position of regulating employer policies and employee misconduct. Resp. Br. at 28-29. As Gonnella correctly notes, the primary purpose of the antifraud provisions is to protect the investing public. *Id*. at 28-29. He argues that the Division seeks to impose liability for nothing more than a violation of Barclays's internal policy. *Id.* While "preserving the integrity of the securities markets" was among Congress's goals, that was not its only goal. *Zandford*, 535 U.S. 821-22. The antifraud provisions protect firms from the malfeasance of their fiduciaries when that malfeasance relates to the purchase or sale of securities. *Bankers Life*, 404 U.S. at 10-12. Furthermore, regardless of whether Gonnella violated Barclays's internal policies—and I make no findings as to that question—he violated the antifraud provisions.

Given the foregoing, I hold that Gonnella violated Section 17(a)(1) and (3) of the Securities Act and Section 10(b) of the Exchange Act.[35]

3. Gonnella engaged in parking

Gonnnella argues that in order to demonstrate antifraud liability, the Division must show that he engaged in parking. Resp. Br. at 1. Absent evidence of parking, he believes he is not liable for violating the antifraud provisions. *Id.* I disagree. No matter how parking is defined, the antifraud provisions are sufficiently broad to encompass Gonnella's conduct. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *VanCook v. SEC*, 653 F.3d 130, 138 (2d Cir. 2011). Nonetheless, for the sake of completeness, I explain below why Gonnella's conduct amounted to parking.

In the securities industry, "parking" is a term of art that refers to certain "activities not specifically prohibited by statute." *Bilzerian*, 926 F.2d at 1302. Because the term covers a variety of behaviors, its meaning will vary "depending on the context." *See* Lewis D. Lowenfels & Alan R. Bromberg, *Securities Market Manipulations: An Examination and Analysis of Domination and Control, Frontrunning, and Parking*, 55 Alb. L. Rev. 293, 339 (1991). In general, parking entails "the sale of securities subject to an agreement or understanding that the securities will be repurchased by the seller at a later time and at a price which leaves the economic risk on the seller." *Dale E. Barlage*, Exchange Act Release No. 38061, 1996 SEC LEXIS 3441, at *4 n.2 (Dec. 19, 1996); *see David E. Lynch*, Exchange Act Release No. 46439, 2002 SEC LEXIS 3416, at *7 n.14 (Aug. 30, 2002).

A firm or an individual might engage in parking for a variety of reasons. For example, a firm might do so in order to achieve "technical compliance with its net capital requirements." *Sec. Investor Prot. Corp. v. Vigman*, 74 F.3d 932, 933 n.3 (9th Cir. 1996). One might also do so in order to evade the reporting requirements in Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d).[36] *First City Fin. Corp.*, 890 F.2d 1215. To park a security, a firm "sells" shares of a security "from its own account to a customer at market price" and then later "'buys' the shares back from the customer, usually at the same price at which it 'sold' the stock, plus interest." *Vigman*, 74 F.3d at 933 n.3. The sale and repurchase of the security proceed in accordance with "a secret agreement providing the 'seller' with the right to repurchase them at a later date." *Yoshikawa v. SEC*, 192 F.3d 1209, 1212 (9th Cir. 1999) (quoting *United States v. Jones*, 900 F.2d 512, 515 (2nd Cir. 1990)).

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[35] Because violation of Securities Act Section 17(a)(3) requires a lesser mental state than Section 17(a)(1), it follows that Gonnella's violation of Section 17(a)(1) with scienter also establishes a violation of Section 17(a)(3). Section 17(a)(3) differs slightly from Section 17(a)(1) in that the former requires a showing of fraud on a "purchaser." Here, that element is satisfied because the fraud was against Gonnella's employer, Barclays, and Barclays actually purchased the securities.

[36] Anyone who acquires beneficial ownership of at least five percent any entity's registered securities is required to report the fact of that ownership. 15 U.S.C. § 78m(d); Exchange Act Rule 13d-1, 17 C.F.R. § 240.13d-1.

According to the Ninth Circuit,

> securities "parking" is, at a minimum, comprised of the following elements:
>
> (1) a pre-arrangement to sell and then buy back securities (to conceal true ownership);
> (2) on the same, or substantially the same, terms (thus keeping the market risk entirely on the seller);
> (3) for a bad-faith purpose, accomplished through a sham transaction in which nominal title is transferred to the purported buyer while the economic incidents of ownership are left with the purported seller.

Yoshikawa, 192 F.3d at 1214.

Using *Yoshikawa* as a guide, Gonnella engaged in securities parking.[37] As is discussed above, Gonnella and King had an arrangement for Gonnella to sell and then repurchase the bonds at issue. Under that arrangement, Gonnella was to repurchase bonds at a price that would "compensate" King. That is, Gleacher was to receive more than it paid for the bonds, thereby keeping the market risk with Barclays.

Further, the transactions were entered into in bad faith. First, given the illiquid nature of the market for the bonds and Gonnella's relative advantages, one would have expected price negotiation at terms favorable to Barclays. Instead, Gonnella set the prices at terms that favored Gleacher. As Giglio testified, the fact "prices are set . . . so that the counterparty makes money on the trade" is "a key indicator" of parking. Tr. 1230. Indeed, this lack of price negotiation combined with prices set by Gonnella shows that the transactions in question were illegitimate. *Cf. David E. Lynch*, 2002 SEC LEXIS 3416, at *8 ("Lynch dictated the prices on at least some of the parking transactions. The contra-dealers acquiesced in the price set by Lynch, resulting in fictitious, non-bona fide transactions that did not indicate or reflect the actual market value of those securities."); *Joel L. Hurst*, 1999 SEC LEXIS 506 at *4 ("Hurst dictated the prices on the parking transactions. The other firms acquiesced in these price setting transactions. Therefore, the trades involving the other dealers were fictitious, non-bona fide transactions").

Second, there was no legitimate economic reason for the transactions. Third, Gonnella sold at or shortly before the seven-month deadline before quickly repurchasing. As the court said in *Yoshikawa*, bad faith can be inferred from evidence that a given transaction "occurred just prior to" a relevant deadline. 192 F.3d at 1214 n.6.

Gonnella disputes that his actions involved parking, arguing that "beneficial ownership of the bonds truly passed to Gleacher." Resp. Br. at 21. Gonnella, however, elides the word "beneficial," which refers to "a right that derives from something other than legal title." Black's

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[37] The Commission has not held that the Division must prove any particular set of "elements" in order to establish securities parking.

Law Dictionary (9th ed. 2009). While Gleacher obtained actual legal ownership of the bonds, Barclays—through Gonnella—retained beneficial ownership by virtue of Gonnella's arrangement with King. Barclays retained control and the ability to repurchase and thus beneficial ownership. *See Yoshikawa*, 192 F.3d at 1212 (describing parking as involving "a secret agreement providing the 'seller' with the right to repurchase . . . at a later date"); *cf. SEC v. Savoy Indus., Inc*., 587 F.2d 1149, 1163 (D.C. Cir. 1978) (explaining that the "use of 'any,' 'understanding,' 'relationship,' and 'other arrangement,'" whether "formal or informal, written or unwritten," "express" or implied, sufficed to establish beneficial ownership for purposes of Exchange Act § 13(d)(3)).

This distinction is illustrated by reference to well-known parking cases. In *Bilzerian*, the court described Bilzerian's scheme as parking despite the fact that Bilzerian reneged on his repurchase agreement and offset his counterparty's losses through other means. 926 F.2d at 1290. Likewise in this case, Gonnella reneged on the agreement to quickly repurchase BAYC 07-4A A1, and like Bilzerian arranged to offset King's loss through other means—the package bid scheme.

In *SEC v. Drexel Burnham Lambert, Inc*., Ivan Boesky was encouraged to accumulate a target company's stock and was repeatedly told he would be made whole as a result of his efforts. 837 F. Supp. 587, 591 (S.D.N.Y. 1993), *aff'd sub nom. SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994). After the market price of the stock dropped, Boesky, like King in September and October 2011, "kept up a regular and repeated demand for a takeout from the parking arrangement." *Id*. at 592. Months later, Boesky, like King, was made whole through purchase of the security in question, at a loss, and through the execution of "certain bond trades which resulted in profits to the Boesky organization." *Id*. at 592-93.

In both cases, one party held legal title in a security and was potentially subject to losses if the other party to the parking scheme did not live up to his end of the arrangement. Like King, these parties holding legal title were worried that they might be left with losses for their troubles. As with King and Gonnella, in both instances, the party holding legal title was made whole, either through repurchase and other arrangements, or through other arrangements alone.

These cases also show that, contrary to Gonnella's assertion, Resp. Br. at 23, "a fixed and definite commitment to repurchase" is not required to prove parking. Rather, the fact that two parties have an arrangement that is somewhat amorphous does not save them from parking liability. *See also First City Fin. Corp., Ltd*., 890 F.2d at 1226 (rejecting the argument that a lack of "discussion of price and quantity" was determinative of whether parking occurred). Indeed, intervening market events can and do cause a party to renege on a back-end repurchase agreement leaving the front-end purchaser waiting and hoping to made whole. *See Bilzerian*, 926 F.2d at 1290-91; *Drexel Burnham Lambert, Inc.*, 837 F. Supp. at 592.

4. King's testimony was more credible than Gonnella's testimony.

During cross-examination, Gonnella's counsel ably discredited King. Among other things, King agreed during cross that he preferred committing "fraud rather than risk having another trader say something bad about [him] in the community" of traders. Tr. 384. He also testified pursuant to a cooperation agreement. Tr. 394. Although these matters and others developed by counsel are valid reasons to question King's credibility, I nonetheless credit his testimony. First,

much of what King testified about was corroborated by Gonnella's actions and the course of conduct between the two. Second, Gonnella had credibility problems of his own.

In this latter regard, 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. As to unbelievable aspects of Gonnella's testimony, Gonnella's current interpretation of Miller's instruction, "don't do it again," is not credible in light of the circumstances that gave rise to the instruction. Gonnella's testimony that it was just a coincidence that King profited from their trades, Tr. 615, 634, is not reconcilable with what he said in his communications with King. And given the advantages Gonnella had, suffering losses on eleven out of twelve bonds is more than suspicious. When viewed in the context of the Bloomberg chats between Gonnella and King, it is clear that Gonnella testified falsely when he said it was a coincidence that King profited from their trades. King's profits were a necessary and intended component of the scheme.

Gonnella said the five dollar spread between the sale and purchase prices of the LBSBC 05-2A M3 bond was not "intended to allow [King] to mark down [his] loss on the [BAYC 07 4A A1] bond." Tr. 636. Rather, he offered that the price increase reflected the previous day's strong remittance report and the bond's volatility. Tr. 636, 686. But this testimony conflicts with what Gonnella said to King when he proposed the buy and sell arrangement concerning LBSBC 05-2A M3 and PALS 01-1A A1. It also conflicts with King's testimony.

Gonnella also testified that his use of the phrase "package bid" with respect to the last three bonds Gleacher held simply reflected his "hope to eventually buy back all three bonds." Tr. 633. But the evidence shows that Gonnella did not merely hope to buy the bonds back; he planned to buy them back when he sold them to Gleacher.

As to Gonnella's tendency to shade the truth, Gonnella's testimony that he traded with King in order to comply with Barclays's aged-inventory policy, Tr. 474-75, 788-90, is a half-truth. Selling complied with the policy. Selling as a part of a prearranged, round-trip trade did not. Gonnella knew this, yet persisted in his actions. As noted, Gonnella said that aged-inventory charges would have had little impact on the calculation of his compensation. Whether that is true is less than clear. 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. And Gonnella's efforts to have it both ways led to the charges in this case.

Gonnella claimed that a strong remittance report prompted him to repurchase LBSBC 2005-2A M3. Tr. 636, 686. This is also only half-true because he had already planned to repurchase this bond. The remittance report was thus a convenient justification for what he planned to do all along.

Gonnella said he used a cell phone to communicate with King because he feared Miller would think the deal he offered King was not "cut throat enough." Tr. 624. As discussed above, this is at best an understatement. Even if this was a factor in his deciding to communicate with King by cell phone, Gonnella's dominant motivation was his fear that Barclays would learn of his arrangement with King.

Finally, Gonnella testified that in early November 2011, he was summoned to a meeting with Tom Hamilton, the head of securitized products, Scott Wede, who was Miller's boss, Chris Haid, the head of asset-backed securities, *see* Tr. 797, and a representative from compliance, Tr. 713-16. According to Gonnella, Hamilton was "[h]ugely important" at Barclays. Tr. 786. Understandably, Gonnella was terrified. Tr. 716. What is not so understandable is that, although he demonstrated remarkable recall about exhibits and other events during the hearing, his recollection of this singular meeting—which ended with his trading privileges being suspended—was "hazy" and not "vivid." Tr. 714, 716, 718. It is difficult to believe that Gonnella could have such sharp recall about other facts in his case yet have a "hazy" memory of a singular meeting with his superiors.[38]

B. Records liability

Section 17(a)(1) of the Exchange Act requires that "[e]very . . . broker or dealer who transacts a business in securities through" any of a number of entities "shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate." 15 U.S.C. § 78q(a)(1). Implicit in this provision is the requirement that the records at issue be accurate and correct. *Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971). In accordance with Section 17(a)(1), the Commission promulgated Exchange Act Rule 17a-3(a)(2), which requires registered broker-dealers to "make and keep current . . . [l]edgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts." 17 C.F.R. § 240.17a-3(a)(2).

The Commission has described the record keeping rules as "a keystone of the surveillance of brokers and dealers by [the Commission's] staff and by the security industry's self-regulatory bodies." *Edward J. Mawod & Co.*, Exchange Act Release No. 13512, 1977 SEC LEXIS 1811, at *16 n.39 (May 6, 1977). The Commission has explained that "a broker-dealer should have current books and records to enable it to fulfill its obligations and responsibilities to other broker-dealers with whom business is transacted." *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, Exchange Act Release No. 10756, 1974 SEC LEXIS 3290, at *2 (Apr. 26, 1974). "Scienter is not required to" establish a primary violation of "Exchange Act Section 17(a)(1) and the rules thereunder." *Orlando Joseph Jett*, Exchange Act Release No. 49366, 2004 SEC LEXIS 504, at *75 (Mar. 5, 2004).

To establish aider and abettor liability for a books and records violation, the Division must show:

> (1) a violation of the books and records provisions occurred; (2) the respondent substantially assisted the violation; and (3) the respondent provided that assistance with the requisite scienter.

[38] Gonnella claims that Miller had an incentive to testify falsely. Resp. Br. at 16-19. Specifically, Gonnella relies on Miller's testimony that he was concerned that he might be liable for failing to properly supervise Gonnella. *See* Tr. 851, 1139-40; *see also* 15 U.S.C. § 78*o*(b)(4)(E). While this might give Miller an incentive to change his testimony, to the extent his testimony differed from Gonnella's testimony, I find Miller's testimony more reliable.

Eric J. Brown, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *33 (Feb. 27, 2012). The knowledge or awareness requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or active participant. *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1010 & n.9 (11th Cir. 1985); *IIT v. Cornfield*, 619 F.2d 909, 923 (2d Cir. 1980). "[O]ne who aids and abets a primary violation is necessarily 'a cause of' that violation." *Brown*, 2012 SEC LEXIS 636 at *33. "An individual can be a cause of a broker-dealer's violations of the books and records provisions 'if he was responsible for an act or omission that he knew or should have known would contribute to the violation.'" *Id.* at *32 (citation omitted).

The determination that Gonnella engaged in securities parking leads to the determination that he aided and abetted and caused violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. *See* Resp. Prehearing Br. at 6 n.2. As the Commission has explained, "parking transactions . . . [are] essentially oral contracts, the terms and conditions of which were not recorded on written confirmations, order tickets or otherwise." *Smith Barney*, Exchange Act Release No. 18665, 1982 SEC LEXIS 1860, *10 (Apr. 19, 1982). Gonnella's "failure to properly record [his] parking transactions . . . caused [Barclays's] records to be incomplete and inaccurate." *Id.*; *see Joel L. Hurst*, 1999 SEC LEXIS 506, at *4. By engaging in parking transactions with King, Gonnella "willfully aided and abetted and was a cause of the violations of Section[] . . . 17(a) of the Exchange Act" and Rule 17a-3(a)(2) thereunder. *Id.* at *5. He is thus liable for violating Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.

V. SANCTIONS

The Division requests a cease-and-desist order, first and third-tier civil penalties totaling $327,500, and a permanent collateral and penny-stock bar. Div. Br. at 36-40; Div. Proposed Findings at 54-56. As is discussed below, Gonnella (1) is ordered to cease-and-desist from committing or causing 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; (2) will receive a twelve-month collateral and penny-stock suspension; and (3) is ordered to pay (a) a second-tier penalty of $75,000 for violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and (b) a maximum first-tier penalty of $7,500 for aiding and abetting and causing violations of Section 17(a) of the Exchange Act and Rule 17a-3(a) thereunder.

A. Sanction Considerations

In determining the appropriateness of any remedial sanction in this proceeding, I am guided by the public interest factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, *22 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010). These factors include:

> 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.

Kornman, 2009 SEC LEXIS 367 at *22. The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Ralph W. LeBlanc*, Exchange Act Release No. 48254, 2003 SEC LEXIS 1793, *26 (July 30, 2003). Additionally, in conjunction with other factors, the Commission considers the extent to which the sanction will have a deterrent effect. *Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, *48 n.72 (Dec. 12, 2013). The "'inquiry into the appropriate sanction to protect the public interest is . . . flexible . . . and no one factor is dispositive.'" *See Kornman*, 2009 SEC LEXIS 367 at *22 (quoting *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015 (Dec. 21, 2007)). The determination of what is in the public interest "extends . . . to the public-at-large," *see Christopher A. Lowry*, Investment Company Act Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003), "the welfare of investors as a class[,] and . . . standards of conduct in the securities business generally," *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975).

Here, the public interest factors weigh in favor of a moderate sanction against Gonnella. 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 (Jul. 23, 2010) ("[W]e have consistently viewed misconduct involving a breach of fiduciary duty . . . as egregious."). Moreover, 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. Gonnella has shown no recognition of the wrongfulness of his conduct. Instead, he persists in denying that his conduct was actionable. Gonnella also has not provided any assurances that he will not engage in wrongful conduct in the future. In addition, 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.[39] Resp. Br. at 4; Tr. 731-32.

On the other hand, the facts that Gonnella has the confidence of his current employer and continues to enjoy the respect of his former superiors at Barclays are positive factors in Gonnella's favor. *See* Tr. 1286-87, 1318-19. Further, apart from the conduct at issue in this matter, Gonnella has no history of securities violations. Resp. Pre-Trial Br. at 1.

[39] Although 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: the prologue, the main event, and the aftermath. 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.

B. Sanctions

1. Cease-and-Desist

Sections 8A of the Securities Act and 21C of the Exchange Act authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of those Acts or rules thereunder.[40] In deciding whether to issue a cease-and-desist order, I must consider whether there is a reasonable likelihood of future securities violations. *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *101 (Jan. 19, 2001), *recon. denied*, Exchange Act Release No. 44050, 2001 SEC LEXIS 422 (Mar. 5, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002). "Absent evidence to the contrary," a single past violation ordinarily suffices to establish a risk of future violations. *Id*. at *102; *see id*. at 102-03 ("evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist"). The showing necessary to demonstrate the likelihood of future violations is "significantly less than that required for an injunction." *Id*. at *114. In evaluating the propriety of a cease-and-desist order, the Commission considers the *Steadman* factors, as well as the recency of the violation, the resulting harm to investors, and the effect of other sanctions. *Id.* at *116.

Evaluating the relevant factors, I find that a cease-and-desist order is necessary and appropriate. Gonnella's violation of his fiduciary position is a serious matter. His actions were intentional. Gonnella has not shown an appreciation for the wrongfulness of his conduct. Although the violations occurred approximately three years ago, I place weight on Gonnella's intended future employment in the securities industry and the fact that he will have the opportunity to repeat his violations. I conclude that it is necessary and appropriate to order Gonnella to cease and desist from committing or causing violations of Securities Act Section 17(a) and Exchange Act Sections 10(b) and 17(a) and Rules 10b-5 and 17a-3 thereunder.

2. Civil Penalties

Securities Act Section 8A(g), Exchange Act Section 21B, Investment Company Act Section 9(d), and Advisers Act Section 203(i) authorize the Commission to impose civil monetary penalties against any person where such penalties are in the public interest and the person has violated certain provisions of the securities laws. *See* 15 U.S.C. §§ 77h-1(g), 78u-2, 80a-9(d), 80b-3(i). The statutes set out a three-tiered system for determining the maximum civil penalty for each act or omission. 15 U.S.C. §§ 77h-1(g), 78u-2(b), 80a-9(d), 80b-3(i). For the time period at issue, the maximum first, second, and third-tier penalty for each violation for a natural person is

[40] Section 9(f) of the Investment Company Act permits the issuance of a cease-and-desist order in relation to violations of "any provision of this *title.*" 15 U.S.C. § 80a-9(f)(1) (emphasis added). As used in the Investment Company Act, the word "title" refers to that Act. *See* 15 U.S.C. § 80a-51. The upshot of this is that a violation of the Investment Company Act is a necessary predicate to the issuance of a cease-and-desist order under Section 9(f). 15 U.S.C. § 80a-9(f)(1). Because I have not found that Gonnella violated that Act, I do not issue a cease-and-desist order under Section 9(f).

$7,500, $75,000 and $150,000, respectively. 15 U.S.C. §§ 77h-1(g), 78u-2(b), 80a-9(d), 80b-3(i); 17 C.F.R. § 201.1004 (adjusting the statutory amounts for inflation).

A maximum third-tier penalty is permitted if: (1) the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and (2) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. §§ 77h 1(g), 78u-2, 80a-9(d), 80b-3(i). Second-tier penalties may be imposed if the misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. 15 U.S.C. §§ 77h 1(g), 78u-2(b), 80a-9(d), 80b-3(i). First-tier penalties may be imposed simply for each violation. 15 U.S.C. §§ 77h 1(g), 78u-2(b), 80a-9(d), 80b-3(i). Although the tier determines the maximum penalty, "each case 'has its own particular facts and circumstances which determine the appropriate penalty to be imposed'" within the tier. *SEC v. Opulentica*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007) (quoting *SEC v. Moran*, 944 F. Supp. 286, 297-97 (S.D.N.Y. 1996)); *see also SEC v. Kern*, 425 F.3d 143, 153 (2d Cir. 2005).

Six factors may be considered in determining whether a penalty is in the public interest. These include: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 15 U.S.C. §§ 78u-2(c), 80a-9(d)(3), 80b-3(i)(3).

The Division requests assessment of maximum third-tier penalties for Gonnella's violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Div. Br. 37-38. It also requests a maximum first-tier penalty for aiding and abetting and causing violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(2) thereunder. *Id*. I find that the statutory factors above weigh in favor of issuing a moderate civil penalty to Gonnella. While his actions involved fraud, Barclays did not suffer "substantial" losses. Gonnella also was not unjustly enriched and did not enjoy "substantial pecuniary gain." Third-tier penalties are thus not warranted.

Because Gonnella's actions involved fraud, deceit, and manipulation, however, a second-tier penalty is warranted. As the Division suggests, Div. Br. at 38, Gonnella's trades at issue in this case constitute a single course of conduct. Considering the above factors, Gonnella's previously unblemished regulatory record and the need to deter others, I find that sanctioning Gonnella with a maximum second-tier penalty of $75,000 for his violation of the anti-fraud provisions of the Securities Act and the Exchange Act is warranted and in the public interest. With regard to having aided and abetted and caused a books and records violation under Section 17(a) of the Exchange Act and Rule 17-a-3(a)(2) thereunder, I find that the factors discussed above demonstrate that a single first-tier penalty of $7,500 is appropriate.[41]

[41] Although Gonnella caused books and records violations each time he traded with King, because I regard his actions as a single course of conduct, I impose a single penalty for the books and records violation.

Accordingly, under the totality of the circumstances, I find that a total civil penalty of $82,500 is warranted. This amount is sufficient to deter Gonnella from future misconduct and will also have the remedial effect of deterring others from engaging in the same misconduct.

3. Collateral and Penny-Stock Bar

The Division requests a permanent collateral and penny-stock bar against Gonnella. Div. Proposed Findings at 55; Div. Br. at 38-40. Collateral bars are authorized by Sections 15(b)(6) of the Exchange Act, 203(f) of the Advisers Act, and 9(b) of the Investment Company Act. 15 U.S.C. §§ 78*o*(b)(6), 80a-9(b), 80b-3(f).

In *Ross Mandell*, the Commission directed that before imposing an industry-wide bar, an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities." Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-8 (Mar. 7, 2014) (internal quotation marks omitted). The administrative law judge's analysis "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." *Id.* at 8 (internal quotation marks omitted). 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. This factor alone supports the imposition of a sanction. On the other hand, Gonnella's scheme was necessarily limited in scope. Additionally, I cannot ignore the fact that his 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.

The Division suggests that Gonnella's youth is a factor that weighs against him because he will have years of opportunity to engage in future violations. 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.

I therefore hold that the factors discussed above weigh in favor of a collateral and penny-stock bar against Gonnella, albeit not a permanent one.[42] Having considered all the

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[42] Section 15(b)(6)(A) of the Exchange Act permits me to impose the full range of collateral bars, including the penny-stock bar, against Gonnella if, at the time of his misconduct, he was "associated . . . with a broker or dealer, *or* . . . was participating[] in an offering of any penny stock." 15 U.S.C. § 78o(b)(6)(A) (emphasis added); *see Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, *19-20 (Dec. 12, 2013) (imposing full range of permanent bars based on respondent's participation in an offering of penny stock at the time of the alleged misconduct, without requiring a separate broker-dealer nexus). Although Commission precedent could be read as implying, as a predicate to imposing a penny-stock bar, the requirement that a respondent have participated in "an offering of any penny stock," *see Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, *9-10 (Apr. 20, 2012), the plain language of Section 15(b)(6)(A) does not contain such a requirement. Inasmuch as Gonnella was

evidence and testimony in this case, I find that a twelve-month collateral and penny-stock suspension will serve as an appropriate deterrent and be in the public interest. Although "[c]ourts have held that the existence of a past violation, without more, is not a sufficient basis for imposing a bar[,] . . . 'the existence of a violation raises an inference that it will be repeated.'" *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *24 n.50 (July 26, 2013) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)) (alteration in internal quotation omitted). Gonnella has offered no evidence to rebut that inference, especially considering his failure to acknowledge the wrongfulness of his conduct. By this Initial Decision, he is presumably disabused of any notion that he did nothing wrong. Under the circumstances of this proceeding, I find that imposing a twelve-month collateral and penny-stock suspension best comports with the statutes' remedial purpose and is in the public interest for the reasons discussed and the public interest factors weighed above.

VI. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the Record Index issued by the Secretary of the Commission on October 24, 2014.

VII. ORDER

IT IS ORDERED THAT, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent Thomas C. Gonnella shall CEASE AND DESIST from committing or causing any violations or future violations of Securities Act Section 17(a) and Exchange Act Sections 10(b) and 17(a) and Rules 10b-5 and 17a-3 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 15(b) of the Exchange Act, Section 203(f) of the Advisers Act, and Section 9(b) of the Investment Company Act, Thomas C. Gonnella is SUSPENDED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization for 12 months.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Exchange Act, Thomas C. Gonnella is SUSPENDED from participating in an offering of penny stock, including acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, for 12 months.

IT IS FURTHER ORDERED that, pursuant to Securities Act Section 8A(g), Exchange Act Section 21B, Investment Company Act Section 9(d), and Advisers Act Section 203(i), Thomas C. Gonnella shall PAY A CIVIL MONEY PENALTY in the amount of $82,500.

"associated . . . with a broker or dealer . . . at the time of [his] misconduct," the statutory prerequisite for imposition of a penny-stock bar is satisfied.

Payment of penalties shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent and Administrative Proceeding No. 3-15737, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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James E. Grimes
Administrative Law Judge