HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16712

In the Matter of

Gilles T. De Charsonville,

Respondent.

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

HERBERT SMITH FREEHILLS NEW YORK LLP
Scott S. Balber
David W. Leimbach
450 Lexington Avenue, 14th Floor
New York, NY 10017
Telephone: (917) 542-7600
Facsimile: (917) 542-7601
scott.balber@hsf.com
Attorneys for Gilles T. De Charsonville

Dated: December 21, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Pursuant to Rule 250 of the Commission's Rules of Practice, Respondent Gilles T. De Charsonville, by and through his counsel Herbert Smith Freehills New York LLP, respectfully submits this Memorandum of Law in opposition to the Motion for Summary Disposition filed by the Division of Enforcement (the "Division"). To impose a bar under Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act"), as the Division seeks, the Commission must find, "on the record after notice and opportunity for a hearing," that the bar is "in the public interest." *See* 15 U.S.C. § 78o(b)(6)(A). As explained below, further sanctions against De Charsonville would be gratuitous and contrary to the public interest.

STATEMENT OF FACTS

De Charsonville has worked in the securities industry for the entirety of his career, spanning nearly 30 years, and is the primary breadwinner in his family.[1] Other than in connection with his limited dealings with Michael Balboa in 2007 and 2008, De Charsonville has an unblemished record in the securities industry.[2] De Charsonville's business relationship with Balboa began in 2005.[3] Beginning in December 2006, at Balboa's request, De Charsonville provided to GlobeOp, an independent valuation agent, monthly mark-to-market pricing for a number of securities held in the Millennium Global Emerging Credit Fund.[4] Around March or April 2007, De Charsonville agreed with Balboa to use valuations supplied by Balboa for two esoteric and illiquid securities, the Uruguayan and Nigerian warrants. While De Charsonville knew from the outset that he was misrepresenting to GlobeOp that he was the source of the list of

---

1 *See* transcript of the second trial in *United States v. Balboa*, 12 Cr. 196 (PAC) (S.D.N.Y.), which took place in December 2013 ("2d Trial Tr."), at 448:18–25; 449:1–2; 485:7–19, excerpts attached as Exhibit A to Declaration of Scott S. Balber, executed December 18, 2015 ("Balber Decl.").

2 Declaration of Gilles T. De Charsonville, dated December 19, 2015 ("De Charsonville Decl."), ¶ 5.

3 Balber Decl., Ex. A, 2d Trial Tr. 488:24–489:1.

4 *Id.* at 493:21–24.

marks when in fact they originated with Balboa, he was not aware until much later, sometime in mid-2008, that the marks provided from the Nigerian and Uruguayan warrants were inflated.[5]

While it is true that, when initially confronted by the SEC, De Charsonville tried to conceal his wrongdoing, he subsequently acknowledged his misconduct, accepted responsibility for his acts and took substantial steps to assist the Government in its investigation. Indeed, De Charsonville was critical to the DOJ's successful prosecution of Balboa.[6] De Charsonville was a key witness for the Government, appearing in not one, but two trials in New York, for numerous days, providing many hours of testimony. Prior to testifying at both trials, De Charsonville participated in numerous meetings with the Government preparing for his testimony, and an SEC staff attorney was present for each such meeting.[7] De Charsonville, who is not a United States citizen, traveled on multiple occasions to New York, from his home in Madrid, Spain to assist the Government in its prosecution of Balboa.[8] De Charsonville also provided the Government with documents that were key to the successful prosecution of Balboa, notably documents which demonstrated Balboa's efforts to conceal his misconduct. These documents were not in the Government's possession and could not have been obtained without De Charsonville's assistance, as they were sent to and from private email accounts to which the Government did not have access.[9]

De Charsonville's misconduct has cost him dearly. De Charsonville lost his employment at BCP Securities shortly after the SEC's complaint was filed and he remained unemployed for more than a year.[10] During that time he and his family lived off of their savings.[11] Although he

---

[5] *Id.* at 513:1–8.
[6] *Id.* at 35:21–36:7.
[7] *Id.* at 478:2–479:15.
[8] *Id.* at 444:15–16; 445:1–3.
[9] *Id.* at 592:22–593:13; 597:1–12.
[10] *Id.* at 446:19–20; 447:3–4.

obtained employment in January 2013, he has not come close to replicating his prior income, earning (before taxes) just €81,000 in 2013 and €59,000 in 2014, compared to $1,180,000 in 2010, his last full year of employment before the SEC filed its complaint.[12] In addition to the economic costs of his misconduct, De Charsonville continues to bear the reputational damage arising from his role in Balboa's scheme.

The Division commenced a civil action against De Charsonville and Balboa in the Southern District of New York on December 1, 2011 (the "Civil Action"). In deciding to impose a $260,000 civil penalty against De Charsonville—instead of the $2.6 million penalty sought by the Division—the United States District Court for the Southern District of New York expressly found:

> this is De Charsonville's first violation; even though he stumbled initially, he ended by cooperating extensively with the SEC and the Department of Justice; the fraud was limited in time; and he is already paying a significant disgorgement award. . . . The Court believes **such a penalty is sufficient to deter future such conduct and to penalize De Charsonville for his violations, without imposing undue hardship.**[13]

The District also awarded disgorgement of $297, 174 and prejudgment interest of $67, 261.46 and issued a permanent injunction, which De Charsonville did not oppose, against future violations of the anti-fraud provisions of the securities laws.[14]

---

[11] *Id.* at 449:3–6.

[12] De Charsonville Decl. ¶ 4.

[13] *See* Declaration of Nancy A. Brown, executed November 19, 2015 ("Brown Decl."), Ex. C, Opinion and Order, dated July 6, 2015 ("SJ Op."), at 10–11 (emphasis added).

[14] *Id.* at 6, 11.

ARGUMENT

I. DE CHARSONVILLE DOES NOT SEEK TO RELITIGATE FACTS DETERMINED BY THE DISTRICT COURT

Contrary to the Division's suggestions otherwise, the doctrine of collateral estoppel has limited application here. De Charsonville does not dispute that he has been enjoined from violating the antifraud provisions of the Exchange Act and the Investment Advisers Act of 1940 ("Advisers Act"), nor, for purposes of this proceeding, does he dispute the facts determined by the District Court in its summary judgment decision. De Charsonville does, however, strongly dispute that the imposition of an industry bar by the Commission would be "in the public interest" in this particular case. De Charsonville is not collaterally estopped from raising that issue because the District Court did not address it, nor several issues of fact relevant to it. Indeed, the District Court began its analysis as follows:

> De Charsonville concedes liability and does not oppose a permanent injunction against future violations . . . . Accordingly, **the Court considers only the appropriateness of the disgorgement award and the civil penalties sought by the SEC.**[15]

As a matter of fundamental due process and fairness, the doctrine of collateral estoppel has limits. Collateral estoppel applies only where (i) an issue of fact or law is actually litigated and determined by a judgment, (ii) the determination is essential to the judgment, and (iii) the party sought to be precluded had an adequate incentive to obtain a full and fair adjudication of the issue in the initial action. *See* Restatement (Second) of Judgments §§ 27, 28(5)(c); *Gates v. D.C.*, 66 F. Supp. 3d 1, 13 (D.D.C. 2014) ("Issue preclusion attaches only to issues or questions of fact actually litigated and determined, not those that merely lurk in the record before the

[15] Brown Decl., Ex. C, SJ Op. at 6 (emphasis added).

court.").[16] De Charsonville did not oppose the injunction sought by the SEC in the Civil Action because it required De Charsonville to do no more than what he was already obligated to do—*i.e.*, to obey the law. *See United States v. Campbell*, 897 F.2d 1317, 1324 (5th Cir. 1990) ("A permanent injunction against future violations of a statute is permitted because such merely requires the enjoined party to obey the law."). In other words, De Charsonville had little or no incentive to litigate against the imposition of the injunction; consequently, many issues of fact relevant to the "public interest" finding in this proceeding were neither litigated before nor determined by the District Court. By contrast, in this proceeding, the imposition of an industry bar will likely have drastic consequences for De Charsonville. Therefore, a determination of whether such a sanction is in the public interest requires thorough consideration of the relevant facts.

For many of the assertions in its "Statement of Facts," the Division improperly cites only to its own Local Rule 56.1 Statement of Undisputed Facts, submitted in support of its Motion for Summary Judgment in the Civil Action, without any additional supporting exhibits. The Division claims disingenuously, "De Charsonville admitted all of the facts set out in the Commission's 56.1 Statement." In reality, De Charsonville's Counterstatement to the Division's 56.1 Statement stated, "**For purposes of this motion**, Defendant **does not dispute** the facts asserted in the

[16] *See also Charter Fed. Sav. Bank v. United States*, 87 F. App'x 175, 178 (Fed. Cir. 2004) ("Collateral estoppel is inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding."); *Appley v. W.*, 832 F.2d 1021, 1026 (7th Cir. 1987) ("Critical to the application of collateral estoppel is the guarantee that the party sought to be estopped had the opportunity and the incentive to litigate the issue aggressively."); *Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading, Pa.*, 873 F.2d 229, 233 (9th Cir. 1989) ("[D]iscrepancies in amounts at issue between two actions may make application of collateral estoppel inappropriate."); *Missouri-Indiana Inv. Grp. v. Shaw*, 699 F.2d 952, 956 (8th Cir. 1983) ("[Collateral estoppel] would not preclude redetermination of an issue when the prior proceeding did not present a fair opportunity and an appropriate incentive to litigate the issue.").

SEC's statement."[17] A party's decision not to dispute a fact in an adversary's Rule 56.1 statement does not constitute a general admission of that fact throughout the same action, let alone in a separate proceeding. *See* Southern District of New York Local Civil Rule 56.1(c) ("Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted **for purposes of the motion** unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party." (emphasis added)). Therefore, De Charsonville objects to the admission of the Division's own 56.1 Statement—which has no evidentiary value—into evidence, and, accordingly, to this Court's reliance on any of the Division's factual assertions to the extent they are supported only by citation to the Division's own 56.1 Statement.

II. AN INDUSTRY BAR WILL NOT SERVE THE PUBLIC INTEREST

Any further measures against De Charsonville would only serve to unbalance the District Court's carefully calibrated decision. In determining whether a bar is in the public interest, the Commission considers (1) the egregiousness of the respondent's actions, (2) the isolated or recurrent nature of the infraction, (3) the degree of scienter involved, (4) the sincerity of the respondent's assurances against future violations, (5) the defendant's recognition of the wrongful nature of his conduct, and (6) the likelihood that the respondent's occupation will present opportunities for future violations. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Contrary to the Division's assertions, the *Steadman* factors do not all weigh in favor of an associational bar. Indeed, most of these factors militate against the issuance of a bar in the context of the specific facts and circumstances present here.

[17] Balber Decl., Ex. B (emphasis added).

A. De Charsonville Did Not Initiate the Fraud, Was Not the Primary Wrongdoer, and Was Initially Unaware of the Full Extent of the Fraud

De Charsonville did not design or instigate the fraudulent scheme and was not the primary beneficiary of the scheme. Indeed, he personally stood to receive no direct monetary gain. Furthermore, for much of the time that De Charsonville was involved in Balboa's scheme, De Charsonville was unaware that the marks he had provided were inflated. Instead, De Charsonville was only aware that he was representing that he marked the securities when in reality he was forwarding marks prepared by Balboa.[18] Initially, De Charsonville trusted Balboa when Balboa told him that he had quotes from two other brokers, and that Balboa only needed De Charsonville to provide a third opinion.[19] It was only midway through 2008 that De Charsonville became aware that the marks for the Nigerian and Uruguayan marks were inflated.[20] These facts, combined with De Charsonville's extensive cooperation with the Government, mitigate, at least to some degree, the egregiousness of his conduct. *See SEC v. 800america.com, Inc.*, No. 02 CIV 9046 HB, 2006 WL 3422670, at *12 (S.D.N.Y. Nov. 28, 2006) ("Although the Defendant knowingly engaged in the fraud, it appears that she was influenced to enter and continue the scheme by her co-conspirator. She also cooperated with the Government, at least to the extent of a guilty plea, which mitigates, to some extent, the egregiousness of her conduct. Consequently, I decline to heap additional penalties on the head of an already drowning defendant. The concept the SEC might think more about is that justice, even viewed from the perspective of a prosecutor, prospers on evenhandedness.").

[18] Balber Decl., Ex. A, 2d Trial Tr. 513:1–8.
[19] *Id.* at 511:17–512:11; 513:1–7.
[20] *Id.* at 528:3–13.

B. De Charsonville's Misconduct Was an Isolated Occurrence in an Otherwise Long and Unblemished Career

As the District Court found, "this is De Charsonville's first violation" and his role in the fraud "was limited in time." Prior to the conduct at issue in this action, for over 20 years, De Charsonville had an entirely unblemished career in the securities industry. As a well-respected and law-abiding professional, he had never been charged with a securities violation. In fact, not a single complaint had been lodged against him during his entire career.[21] De Charsonville's regrettable and costly lapse in judgment—allowing himself to become involved with Balboa's fraudulent scheme—was an isolated occurrence. Although the SEC delineated the different steps De Charsonville took in aiding and abetting Balboa, they all related to one underlying scheme, and only toward the end did De Charsonville realize that the marks were not just procedurally, but also substantively, flawed. This is not the kind of systematic wrongdoing that warrants an industry bar. The district court's reasoning in *SEC v. Benger* is germane:

> [The SEC] hopes to use all the transactions Mr. Powers handled while he was not registered to paint him as a repeat offender and thus likely to commit further violations in the future. But there is a subtle and significant flaw in that mode of analysis. Securities violations are not like bank robberies—isolated events, limited in time and space. They are often complex affairs, spanning extended periods of time, with multiple players. If the SEC's view is right, all securities law violators are automatically repeat offenders on the second and succeeding days of the scheme.

No. 09 C 676, 2014 WL 3954235, at *6 (N.D. Ill. Aug. 13, 2014); *see also SEC v. Dibella*, No. 3:04CV1342 (EBB), 2008 WL 6965807, at *13 (D. Conn. Mar. 13, 2008) *aff'd*, 587 F.3d 553 (2d Cir. 2009) ("Although the SEC argues that DiBella's conduct was not an 'isolated occurrence', the Court is unpersuaded that DiBella's conduct involved the type of 'systematic wrongdoing' that would make a permanent injunction particularly appropriate. Although the

[21] De Charsonville Decl. ¶ 5.

SEC delineates the different steps DiBella took in aiding and abetting the primary violators in this case, DiBella's acts were all committed in a relatively short time period, and all related to the one underlying fraud—his fraudulent finder's fee. This distinguishes DiBella's conduct from cases where courts have found a defendant's systematic wrongdoing to warrant a permanent injunction."); *SEC v. 800america.com, Inc.*, 2006 WL 3422670, at *11 (denying permanent injunction after finding that SEC failed to demonstrate that two-and-one-half year fraudulent scheme was "more than an isolated incident"); *Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 957 (7th Cir. 2004) (finding sanctions imposed by SEC excessive where misconduct took place over eight-month period several years prior, "making it a fairly isolated occurrence and suggesting that the likelihood of a future violation is slight").

In addition to De Charsonville's long unblemished career preceding the misconduct, the years that have passed since the misconduct without further incident deserve weight. *See SEC v. Dibella*, 2008 WL 6965807, at *13 ("[T]he passage of nearly 10 years without another violation weighs heavily against an injunction."); *SEC v. Jones*, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007) ("The Court also notes that several years have passed since Defendants' alleged misconduct apparently without incident. This fact further undercuts the Commission's assertion that Defendants pose a continuing risk to the public.").

C. De Charsonville Has Offered Assurances against Future Violations

In the civil action, De Charsonville could offer no stronger assurance against future violations than his decision not to contest the obey-the-law injunction sought by the Division. Furthermore, De Charsonville expressly offers further assurances against future violations in his declaration submitted herewith.[22] The need to assess, through a hearing, the sincerity of De

[22] De Charsonville Decl. ¶ 1.

Charsonville's assurances is one of the many issues of fact that make summary disposition inappropriate in this case.

D. De Charsonville Has Acknowledged the Wrongful Nature of His Conduct and His Cooperation Was Critical to the Criminal and Civil Cases against Balboa

De Charsonville has fully confessed his liability and displayed deep remorse during his testimony at Balboa's trial. The candor, contrition, and shame in his trial testimony are self-evident.[23] De Charsonville has not only acknowledged the wrongful nature of his conduct, but has also extensively cooperated with the Government, providing key documents and testimony, which directly resulted in the successful prosecution of Balboa, the chief architect and beneficiary of the fraudulent scheme.[24] "Few facts available to a sentencing judge are more relevant to the likelihood that a defendant will transgress no more . . . than are those relating to the defendant's cooperation with authorities." *United States v. Frazier*, 971 F.2d 1076, 1085 (4th Cir. 1992) (citing *Roberts v. United States*, 445 U.S. 552, 557–58 (1980)).

The Division implies that De Charsonville's defense in the Civil Action is inconsistent with his acceptance of responsibility. Division Br. at 17. That is not so. De Charsonville admitted his wrongdoing, while arguing that the civil penalties and disgorgement sought by the Division were excessive under the applicable laws. *See* Brown Decl., Ex. F ("De Charsonville has taken full responsibility for his conduct and does not dispute his liability for the causes of action set forth in the SEC's motion for summary judgment. However, the SEC has failed to meet its burden of demonstrating its entitlement to the extraordinary, plainly punitive relief sought by its motion."). Notably, the District Court agreed that the civil penalties sought by the Division were excessive. In addition, De Charsonville's ability to satisfy the civil judgment has been delayed by

---

[23] *See, e.g.*, Balber Decl., Ex. A, 2d Trial Tr. 479:12–480:10; 513:1–3; 516:13–22; 541:23–542:3; 737:24–738:3; 603:19–23.

[24] *Id.* at 35:21–36:7; 592:22–593:13; 597:1–12.

the need to liquidate some of his family's assets, including his home, in order to satisfy the judgment.[25] Contrary to the Division's suggestions, De Charsonville's inability to satisfy the civil judgment immediately with cash on hand should not be viewed as grounds to bar him from the securities industry permanently. The Division is seeking retribution, not advancement of the public interest.

E. De Charsonville No Longer Provides Marks in His Occupation and Attests That He Will Not Do So Again

De Charsonville lost his employment at BCP Securities shortly after the SEC's complaint was filed and he remained unemployed for more than a year.[26] During that time he and his family lived off of their savings.[27] Although he obtained employment in January 2013, he has not come close to replicating his prior income, earning (before taxes) just €81,000 in 2013 and €59,000 in 2014, compared to $1,180,000 in 2010, his last full year of employment before the SEC filed its complaint.[28] In addition to the economic costs of his misconduct, De Charsonville continues to bear the reputational damage arising from his role in Balboa's scheme.

The essence of De Charsonville's misconduct was passing off marks as independent when in fact they were not. In his current occupational role, De Charsonville no longer provides any mark-to-market services, nor is he closely involved with the marking of any securities to market. Moreover, De Charsonville is willing to stipulate that he will not provide mark-to-market services in his occupation going forward.[29] De Charsonville's change in his occupational role weighs against the imposition of an associational bar. *See SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 90 (S.D.N.Y. 1970) (denying injunction against defendant, even though he had

---

[25] De Charsonville Decl. ¶ 3.
[26] Balber Decl., Ex. A, 2d. Trial Tr. 446:19–20; 447:3–4.
[27] *Id.* at 449:3–6.
[28] De Charsonville Decl. ¶ 4.
[29] *Id.*, ¶ 2.

violated Section 10 and Rule 10b-5, because he was no longer in the employ of same company and no longer privy to material inside information); *SEC v. Luna*, No. 2:10-CV-2166-PMP-CWH, 2014 WL 2960451, at *4 (D. Nev. June 27, 2014) (finding likelihood of future violations insufficient to support permanent injunction where defendants changed occupations); *SEC v. McGinnis*, No. 13-CV-1047 AVC, 2013 WL 6500268, at *5 (D. Conn. Dec. 11, 2013) (finding that SEC failed to prove reasonable likelihood of future violations where "the act was isolated in the sense that it was in one stock, in a company in which [defendant] is no longer employed. In other words, the fox is out of the henhouse and the henhouse is now locked.").

F. A Bar Is Not Needed to Achieve Appropriate Deterrence

Collateral estoppel is a two-way street. In the Civil Action, the Division advanced the same deterrence arguments in support of its request for $2.6 million in penalties, and the District Court expressly found that a $260,000 civil penalty was "sufficient to deter future such conduct and to penalize De Charsonville for his violations, without imposing undue hardship."[30] The Division cannot now re-litigate the District Court's findings on this issue. De Charsonville made a mistake, which has cost him dearly. No one looking at his circumstances would conclude that it was a worthwhile risk to aid and abet Balboa's fraud. The Division emphasizes the belatedness of De Charsonville's cooperation and argues for the need for a strong deterrent effect. The Division should, however, also consider the value to the public interest of incremental deterrence and of rewarding extensive cooperation—even if belated—with leniency. *See SEC v. Inorganic Recycling Corp.*, No. 99 CIV. 10159 (GEL), 2002 WL 1968341, at *5 (S.D.N.Y. Aug. 23, 2002) ("Such cooperation is important to the investigation, prosecution and punishment of frauds of this kind, and should be rewarded.").

[30] Brown Decl., Ex. C., SJ Op. at 11.

III. THE SANCTIONS SOUGHT BY THE DIVISION ARE BARRED BY THE FIVE-YEAR STATUTE OF LIMITATIONS UNDER 28 U.S.C. § 2462

The wrongful conduct attributed to De Charsonville in the OIP occurred in 2007 and early 2008, more than seven years before this this proceeding was commenced. Under 28 U.S.C. § 2462, a "proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." In *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013), the Supreme Court unanimously held that § 2462 applies to the Commission's administrative proceedings enforcing the securities laws. Here, the sanction sought by the Division is a civil "penalty, or forfeiture," within the meaning of § 2462. In *Gabelli*, the Supreme Court explained that penalties "are intended to punish, and label defendants wrongdoers," as opposed to remedial actions "to extract compensation or restore the status quo." *Id.* at 1223. Barring De Charsonville will neither extract compensation nor restore the status quo; instead, it will further punish him and label him a wrongdoer. *See Johnson v. SEC*, 87 F.3d 484, 485 (D.C. Cir. 1996) ("[A] Securities and Exchange Commission ('SEC') proceeding resulting in a censure and a six-month disciplinary suspension of a securities industry supervisor was a proceeding 'for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise,' within the meaning of § 2462.").

The Division might argue that, because this is a follow-on proceeding, its claim did not accrue until the District Court issued a final judgment; however, this argument is fundamentally flawed. Section 2462 requires the Commission to commence the proceeding "within five years from the date when the claim **first** accrued." 28 U.S.C. § 2462 (emphasis added). In *Gabelli*, the Supreme Court explained that "an action *accrues* when the plaintiff has a right to commence it" and that § 2462 "sets a **fixed date** when exposure to the specified Government enforcement efforts ends," so that defendants are exposed to Government action "only for five years **after**

their misdeeds." 133 S. Ct. at 1221, 1223 (emphasis added). The statute on which the Division's claim rests—15 U.S.C. § 78o(b)(6)(A)—permits the Commission to issue a bar after finding that a person *either* is subject to a securities-related injunction *or* has willfully aided and abetted a violation of the Advisers Act or the Exchange Act. *See* 15 U.S.C. § 78o(b)(6)(A)(i), (6)(A)(iii), and (4)(E). Thus, the Commission could have commenced a proceeding regarding the same relief under the same statute for the same misconduct anytime in the five years following the alleged wrongdoing, but it elected not do so.[31] Consequently, the sanction sought by the Division is time-barred.

IV. THIS ADMINISTRATIVE PROCEEDING VIOLATES THE DUE PROCESS CLAUSE AND THE APPOINTMENTS CLAUSE.

The Appointments Clause of the Constitution provides that "Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Court of Law, or in the Heads of Department." U.S. Const. art. II, § 2, cl. 2. SEC ALJs are vested with significant authority and, as illustrated by the instant proceeding, have the power to issue life-altering decisions. Because SEC ALJs function as inferior officers and are not appointed by the SEC Commissioners, this administrative proceeding is unconstitutional. *See Duka v. SEC*, No. 15 CIV. 357 RMB SN, 2015 WL 4940083, at *3 (S.D.N.Y. Aug. 12, 2015); *Gray Financial Group, Inc. v. SEC*, 15-cv-492-LMM, Dkt. 56 (N.D. Ga. Aug. 4, 2015); *Hill v. SEC*, No. 1:15-CV-1801-LMM, 2015 WL 4307088, at *19 (N.D. Ga. June 8, 2015).

[31] The Division references the parties' stipulation to stay the Civil Action pending a judgment in the criminal action against Balboa. However, that stipulation has no bearing on whether the Commission could have commenced an administrative proceeding against De Charsonville seeking a bar pursuant to 15 U.S.C. § 78o(b)(6)(A) before expiration of the five-year limitations period under 28 U.S.C. § 2462. *See* Brown Decl., Ex. D.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court either (1) find that no additional sanctions against De Charsonville—or, at most, a censure or temporary suspension—are in the public interest or (2) deny summary disposition so that a hearing may proceed regarding what additional sanctions, if any, would be in the public interest.

Dated: New York, New York
December 21, 2015

Respectfully submitted,

HERBERT SMITH FREEHILLS NEW YORK LLP

By: _____

Scott S. Balber
David W. Leimbach
450 Lexington Avenue, 14th Floor
New York, NY 10017
Telephone: (917) 542-7600
Facsimile: (917) 542-7601
scott.balber@hsf.com
Attorneys for Gilles T. De Charsonville

HARD COPY

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

ADMINISTRATIVE PROCEEDING
File No. 3-16712

In the Matter of

Gilles T. De Charsonville,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served true copies of the foregoing Memorandum of Law in Opposition to the Division's Motion for Summary Disposition, as well as the accompanying Declaration of Gilles T. De Charsonville and Declaration of Scott S. Balber, with exhibits, on the following by electronic mail on December 21, 2015:

The Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-2557
Email: alj@sec.gov

Nancy A. Brown
Division of Enforcement
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street, Suite 400
New York, NY 10281
Email: BrownN@sec.gov

Dated: New York, New York
December 21, 2015

David Leimbach

David W. Leimbach

HERBERT
SMITH
FREEHILLS

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Fax: 703-813-9793

Herbert Smith Freehills New York LLP
450 Lexington Avenue, 14th floor
New York, NY 10017
USA
T +1 917 542 7600
F +1 917 542 7601
D +1 917 542 7826
E david.leimbach@hsf.com
www.herbertsmithfreehills.com

Our ref
30952454
Your ref

Date
December 21 2015

By Federal Express

In the Matter of Gilles T. De Charsonville, Admin. Proc. File No. 3-16712

Dear Mr. Fields:

We represent the Respondent, Gilles T. De Charsonville, in this matter. Enclosed please find the Respondent's Memorandum of Law in Opposition to the Division of Enforcement's Motion for Summary Disposition, accompanied by the Declaration of Gilles T. De Charsonville and the Declaration of Scott S. Balber, with exhibits. Copies of the same were transmitted by facsimile to 703-813-9793 on December 21, 2015.

Respectfully,

David Leimbach

David W. Leimbach