UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	**16 Civ. 1619 (BRM) (JAD)**
	:	
-against-	:	
	:	
GUY GENTILE,	:	
	:	
Gentile.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO GENTILE'S MOTION TO DISMISS

SECURITIES AND EXCHANGE COMMISSION
Jorge G. Tenreiro
Nancy A. Brown
Simona K. Suh
200 Vesey Street, Suite 400
New York, New York 10281-1022
(212) 336-9145 (Tenreiro)
tenreiroj@sec.gov

Attorneys for Plaintiff

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Plaintiff Securities and Exchange Commission (the "Commission") respectfully submits this Memorandum of Law in opposition to the motion of Defendant Guy Gentile ("Gentile") to dismiss, DE 81, the Amended Complaint, DE 47.

PRELIMINARY STATEMENT

Having raised the same statute of limitations argument in this case before and having lost on appeal, Gentile now tries to raise the argument again on yet another motion to dismiss, this time with additional window-dressing. This Court should deny Gentile's motion because it is both procedurally barred and substantively meritless.

The Amended Complaint details Gentile's central role, primarily from 2007 through 2008, in two highly profitable schemes involving penny stock manipulation, fraudulent promotions, and unlawful securities distribution. The Amended Complaint also alleges facts supporting a finding, at this stage, that, unless enjoined, Gentile is reasonably likely to violate the relevant federal securities laws in the future and therefore that injunctive relief is necessary to protect investors. Gentile does not challenge the plausibility of any of these allegations or their sufficiency to state a claim for relief.

Instead, the thrust of Gentile's latest motion is that the request for injunctive relief is time-barred—an issue the Third Circuit resolved in the Commission's favor before remanding for the Court to determine whether an obey-the-law injunction and a penny stock bar are appropriate. This time around, Gentile primarily contends, in substance, that to enter any kind of injunction a court must first issue a declaratory judgment, a form of relief that he claims is independently time-barred, even if an injunction or penny stock bar itself is not. Gentile also re-argues, as he did before, including on appeal, that neither an obey-the-law injunction nor a penny stock bar are proper because the Commission will not be able to prove he is about to violate the securities laws.

Yet these arguments, which Gentile explicitly made or could have made in his prior motion to dismiss, are procedurally barred for two reasons. First, to promote judicial economy and avoid

piecemeal litigation, including serial appeals, Federal Rule of Civil Procedure 12(g)(2) prohibits successive motions to dismiss and instead requires the consolidation of available defenses in a single motion. The Third Circuit has instructed district courts to strictly enforce that requirement. Second, the law of the case doctrine similarly bars litigants from re-litigating arguments already made—or that could have been made—in prior proceedings, absent extraordinary circumstances not present here. These procedural bars preclude Gentile from re-litigating his arguments.

Even if the Court reaches the merits of Gentile's arguments, it should reject them. Gentile's contention that the Court must issue a declaratory judgment (which the Commission does not seek) before entering an injunction is incorrect as a matter of law—Gentile points to no authority to support it, and the Commission knows of none. Nor, as the Commission has demonstrated before, does the passage of time alone suffice to deny a request for a prospective obey the law injunction or penny stock bar, particularly at this stage of the proceedings. The determination of whether injunctive relief is proper depends on the facts and circumstances of each case on a full record. Here, the Amended Complaint alleges sufficient facts—including Gentile's high degree of scienter, his recent violations of law and run-ins with financial services regulators after he ceased cooperating in a related criminal investigation, and his continued refusal to accept responsibility—that, if proven, would more than justify the imposition of the remedies the Commission seeks. For all these reasons, Gentile's latest motion to dismiss the Amended Complaint should be denied.

PROCEDURAL HISTORY

The Commission filed this action on March 23, 2016. DE 1. Gentile moved to dismiss. DE 34. On October 6, 2017, the Commission filed the Amended Complaint alleging that Gentile violated Sections 5, 17(a), and 17(b) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder and seeking an injunction

against further violations of these provisions under 15 U.S.C. §§ 77t(b) and 78u(d)(1); relief that "may be appropriate or necessary for the benefit of investors," under 15 U.S.C. § 78u(d)(5); and a penny stock bar under 15 U.S.C. §§ 77t(g) and 78u(d)(6)(A). Am. Compl. ¶ 10. Gentile renewed his motion to dismiss, contending that "the Amended Complaint . . . [w]as time-barred under [28] U.S.C. § 2462's five-year statute of limitations" because the relief sought was punitive, Mem. Supp. Mot. to Dismiss 9, Oct. 27, 2017 ("First MTD"), DE 50, and because "injunctive relief" is only permissible when a person "is engaged or about to engage" in securities laws violations, which, he argued, could not be established here. Id. at 19–23. Judge Linares granted the motion. DE 56, 57.

On September 26, 2019, the Third Circuit vacated the order, holding that "because 15 U.S.C. § 78u(d) does not permit the issuance of punitive injunctions, the injunctions at issue do not fall within the reach of § 2462." SEC v. Gentile, 939 F.3d 549, 552 (3d Cir. 2019). Gentile then sought a stay of the Third Circuit's mandate. Mot. to Stay Issuance of Mandate, SEC v. Gentile, No. 18-1242 (3d Cir. Nov. 18, 2019). Gentile argued that there was a "reasonable probability" that the Supreme Court would grant a writ of certiorari and that he had "completely exited the securities business, having shuttered his Bahamian Broker-Dealer, and no longer works in the securities industry in any manner, with no plans to return." Id. at 1, 8–9 & n.3. The Court of Appeals denied the stay motion, and Gentile filed a pending petition for certiorari. No. 19-878 (U.S. Dec. 23, 2019).

At a December 17, 2019 status conference before Judge Vasquez, Gentile renewed his bid to delay these proceedings by seeking a stay of discovery, based on his desire to file this motion to dismiss. See Tr. of Conference 4:9–11, Dec. 17, 2019 ("Tr."), DE 70. The Commission opposed the request and noted that, following the Third Circuit's ruling in Gentile, the district court should consider the "specific elements that [SEC v.] Bonastia, [614 F.2d 908 (3d Cir. 1980)] . . . instruct[s] the Court to take into account in making the determination of whether an injunction is properly

imposed." Id. at 5:7–14. In accordance with Gentile, the Commission also noted that "much of [this] cannot be assessed until there is a full evidentiary record before the Court." Id. Judge Vasquez agreed and denied Gentile's motion. DE 66. He noted that he "d[id] not think, in light of the Third Circuit's opinion, that this is a case that's going to be disposed of [by] dispositive motion practice at the beginning of the case, so I'm also going to order discovery to go forward at this time." Tr. 7:20–23; see also DE 66 (providing that "discovery is not stayed" and ordering Rule 16 conference). On February 4, 2020, in response to Supplemental Initial Disclosures, Gentile filed another (pending) request for stay of discovery, DE 77, which the Commission opposed. DE 78.

STATEMENT OF FACTS

I. THE AMENDED COMPLAINT'S RELEVANT ALLEGATIONS.

A. Gentile's Central Role in Two Stock Manipulation Schemes.

In 2007 and 2008, Guy Gentile engineered two fraudulent schemes to manipulate penny stocks. Am. Compl. ¶¶ 25–49, 57–70. At the time, Gentile owned a Commission-registered broker-dealer located in New York State. Id. ¶ 14.

First, in 2007, two stock promoters, Mike Taxon and Itamar Cohen, invited Gentile to join them in a scheme to manipulate the stock of Raven Gold Corporation ("RVNG"). Id. ¶ 25. To create an attractive—but fake—price and volume history and to disguise their connection to the trading, Gentile traded RVNG between various brokerage accounts in the names of brokerage firms where he, Taxon, and Cohen had or controlled accounts. Id. ¶¶ 2–5, 26–30. Gentile also offered free blocks of RVNG as kickbacks to others for open market purchases of RVNG. Id. ¶¶ 30–31.

Gentile further drove up the price of RVNG stock by creating and distributing a false and misleading "newsletter" touting RVNG (the "RVNG Mailer")—purportedly published by "Stock Trend Report," a fictional entity Gentile and his collaborators created to disguise their involvement.

Id. ¶ 32. The RVNG Mailer falsely heralded the company's appearance in various news publications, as if the company had been the subject of legitimate reporting; misleadingly attributed the stock's performance to the company's supposedly strong business prospects; and falsely stated that there was "high market demand for RVNG by institutional investors." Id. ¶¶ 4, 32–37. In reality, as Gentile knew or recklessly disregarded, the stock's only mention in publications had been in equally misleading paid advertisements placed by Gentile, Taxon, and Cohen; most of the touted market activity consisted of their manipulative trades; and no institutional investor demand existed. Id. As a result of all these actions, as well as coordination by Gentile, Taxon, and Cohen of the timing of positive press releases by RVNG itself, Gentile successfully manipulated the market for RVNG stock, including its price and trading volume. Id. ¶¶ 45–47.

Second, in 2007, two men who controlled Kentucky USA Energy, Inc. ("KYUS"), another penny stock issuer, enlisted Gentile's participation in another fraudulent stock manipulation campaign, this time involving KYUS stock. Id. ¶ 57. To perpetrate the scheme, the two men, Adam S. Gottbetter and Samuel DelPresto, and Gentile, Taxon, and Cohen bought the KYUS shell. Id. ¶ 53. They then transferred 75% of KYUS's purportedly unrestricted stock to accounts in the names of firms used by Gentile, Taxon, and Cohen (the "nominee accounts")—again to obscure Gentile's connection to the stock—and the other 25% to Gottbetter and DelPresto. Id. ¶¶ 58–59.

As they had done with RVNG, Gentile, Taxon, and Cohen then began "building the chart" for KYUS stock: fabricating an attractive price and volume history for the stock by executing trades between the nominee accounts and other accounts Gentile controlled and convincing acquaintances to buy KYUS stock in the open market, among other things. Id. ¶¶ 7, 57, 60–63. And again, as with RVNG, Gentile created and distributed a promotional mailer touting KYUS (the "KYUS Mailer")—distributed under the fake name "Global Investor Watch"—which falsely represented that it had

been funded by a fictional entity. Id. ¶¶ 64–65. In fact, Gentile funded the KYUS Mailer with proceeds from early sales of his, Taxon's, and Cohen's KYUS stock. Id. The manipulation and fraudulent promotion of KYUS stock succeeded: by May 31, 2008, Gentile had sold millions of KYUS shares at inflated prices and, with his assistance, Gottbetter and DelPresto continued selling their KYUS stock through November 2010.[1] Id. ¶¶ 66–68.

B. Gentile's Cooperation and Admissions in a Criminal Investigation.

On July 13, 2012, after the FBI arrested Gentile in connection with the RVNG and KYUS schemes, Gentile admitted his involvement and initially agreed to cooperate with the United States Attorney's Office for the District of New Jersey ("USAO") and the Commission in connection with investigations of other penny stock schemes. Id. ¶ 71; see also Mem. Opp. to Def. Mot. to Dismiss Indictment 5 ("Crim. Mem."), United States v. Gentile, 16 Cr. 155 (D.N.J.) (the "Parallel Criminal Action"), DE 19. On January 30, 2017, with Gentile's cooperation with the USAO at an end and after a grand jury had returned an indictment against Gentile, the District Court dismissed the indictment on statute of limitations grounds. Am. Compl. ¶ 72.

C. Gentile's Recent Conduct Relevant to Injunctive Relief.

Even after his central role in the alleged fraudulent schemes, Gentile continued to work in the financial services business and continued to flout industry regulations. In 2011, after his

[1] In related criminal proceedings, Taxon and Cohen pleaded guilty to charges arising out of their conduct in the RVNG and KYUS schemes and await sentencing. Id. ¶¶ 73–74; see also United States v. Taxon, 15 Cr. 249 (D.N.J.), DE 3; United States v. Cohen, 15 Cr. 248 (D.N.J.), DE 3. DelPresto similarly entered into a plea agreement covering his conduct in the KYUS scheme. See United States v. DelPresto, 15 Cr. 631 (JLL) (D.N.J.). Am. Compl. ¶ 78. In a related Commission action, SEC v. Gottbetter, et al., 15 Civ. 3528 (JLL) (D.N.J.), Gottbetter settled the claims against him arising from the KYUS scheme (among other misconduct). In doing so, he consented, without admitting or denying the Commission's allegations, to the entry of a judgment that permanently enjoined him from future violations of specified federal securities laws, imposed a penny stock bar, and ordered him to disgorge more than $4 million in unlawful gains. Am. Compl. ¶ 77.

schemes concluded, Gentile founded a Bahamas-based online brokerage firm. Id. ¶¶ 14, 82. As of October 6, 2017, when the Commission filed its Amended Complaint, Gentile had announced plans to expand his presence in the offshore securities industry, boasted to a journalist of his plans to grow his Bahamian broker-dealer, and predicted that his firm "will be the largest broker dealer in [the Bahamas] within six months." Id. ¶ 14.

Even more recently—after he ceased cooperating in the related criminal investigation—Gentile made public pronouncements disclaiming any culpability for his participation in the RVNG or KYUS schemes. For example, in a May 2017 interview with BloombergBusinessweek about the circumstances that led to his arrest in 2012, Gentile claimed he "did nothing wrong." Id. ¶ 80. Gentile has also declared on social media platforms that he "never scammed anyone!" Id.

Gentile has also demonstrated disdain for the regulatory and enforcement authority of the Commission and called himself the victim of a "witch hunt." Id. And, after Commission counsel submitted an April 26, 2017 letter to the Court, DE 18, confirming the Commission's intention to pursue its claims against Gentile, Gentile sent an email to Commission counsel, copying his own attorney as well as members of the press, threatening to render her unable to continue her employment as a lawyer. Id. ¶ 83.

II. MORE RECENT JUDICIALLY-NOTICEABLE FACTS RELEVANT TO INJUNCTIVE RELIEF.

Gentile recently told the Third Circuit, in seeking a stay of these proceedings, that he has exited the securities industry in the Bahamas. But this occurred only after the Bahamian securities regulators cited his firm for numerous violations. In August 2018, Gentile and his Bahamian broker-dealer firm acknowledged that his firm had failed to comply with certain provisions of the Bahamian Securities Industry Act of 2011 (the "Bahamas Securities Act"), including failing to notify the Securities Commission of the Bahamas ("SCB") that he had been charged in a criminal matter.

Decl. Nancy A. Brown, executed Apr. 3, 2020 ("Brown Decl.") ¶ 2; Ex. A. Pursuant to a settlement, Gentile's firm paid the SCB fines totaling $120,000. Brown Decl. ¶ 2; Ex. A.

In September 2019, after examining the broker-dealer's operations and finding further and continuing violations of the governing statute, the SCB issued a temporary suspension of Gentile's firm's operations. Brown Decl. ¶ 3; Ex. B. Gentile obtained an ex parte Order staying the SCB's suspension order but then announced that he was shuttering the business and transferring customer accounts to F1Trade, a company registered in St. Vincent and the Grenadines. Brown Decl. ¶ 4; Ex. C; see also Login, F1Trade, https://app.f1trade.com/login.

In February 2018, Puerto Rico's Office of the Commissioner of Financial Institutions ("Puerto Rico Commissioner") denied Gentile's application to organize and operate an "international financial entity." Brown Decl. ¶ 5; Ex. D at 1 (Mem. and Order, Mint Bank Int'l, LLC v. Office of the Comm'r of Fin. Insts. of Puerto Rico, Civil No. 18-1441 (JAG) (D.P.R. Mar. 31, 2019)), DE 20. The Puerto Rico Commissioner noted that Gentile "did not have the requisite 'commercial integrity' . . . and [had] omitted from [the entity's] application" the existence of this Commission action. Ex. D at 2.

STANDARD OF REVIEW

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint need only "state[] a plausible claim to relief." United States ex rel. Bookwalter v. UPMC, 946 F.3d 162, 168 (3d Cir. 2019) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)); see also Covington v. Int'l Ass'n of Approved Basketball Officials, 710 F.3d 114, 118 (3d Cir. 2013). "Even post-[Bell Atl. Corp. v.] Twombly[, 550 U.S. 544 (2007)], it has been noted that a plaintiff is not required to establish the elements of a prima facie case but instead, need only put forth allegations that 'raise a reasonable expectation that discovery will reveal evidence of the necessary element.'" Fowler v.

UPMC Shadyside, 578 F.3d 203, 213 (3d Cir. 2009) (citation omitted)). "[C]laims for fraud . . . must also meet [Fed. R. Civ. P.] 9(b)'s heightened pleading requirement." Bookwalter, 946 F.3d at 168. However, the SEC is not required "to anticipate" and plead around affirmative defenses (such as the statute of limitations, see Fed. R. Civ. P. 8(c)), "in [the] complaint." Gomez v. Toledo, 446 U.S. 635, 640 (1980); see also United States Gypsum Co. v. Indiana Gas Co., 350 F.3d 623, 626 (7th Cir. 2003) ("Complaints need not anticipate or attempt to defuse potential defenses.").

ARGUMENT

Gentile does not challenge the sufficiency of the allegations to state a claim of securities fraud, but only the Court's power to enjoin him, based on two arguments he made or could have made in connection with his prior motion. First, he argues that the Court must issue a "declaration" of liability prior to an injunction, but cannot do so because such declaration is punitive and therefore barred by 28 U.S.C. § 2462. Mot. to Dismiss ("Mot.") 11–13, 14–16, DE 81. Second, he argues that obey the law injunctions and penny stock bars are permitted only where a defendant "is engaged or about to engage" in securities laws violations, but that the passage of time precludes that finding. Id. at 13–14, 17–19. These arguments are procedurally barred under Federal Rule of Civil Procedure 12(g)(2) and the doctrine of "law of the case." Yet even if the Court were to reach the merits, these arguments are wrong for three reasons: (1) Gentile can cite no authority for his contention that a declaratory judgment is a prerequisite to an injunction; (2) determining whether an injunction is proper is premature without development of a full evidentiary record; and (3) penny stock bars—which are injunctions—are permitted by the terms of the statute based solely on past violations.

I. GENTILE'S SECOND MOTION TO DISMISS THE SAME AMENDED COMPLAINT IS PROCEDURALLY BARRED.

Gentile's motion should be denied because it violates Rule 12(g)(2)'s proscription against serial motions to dismiss on grounds previously available. Because refusing to entertain this second

bite at the same apple and requiring Gentile to answer will likely streamline discovery, it will serve the purpose of Rule 1 to secure the "just speedy, and inexpensive determination" of this action. Moreover, Gentile's motion either rehashes arguments he already lost before the Third Circuit or asserts grounds he could have asserted—but chose not to—on his earlier motion and on appeal and are thus barred under the law of the case doctrine.

A. Gentile's Motion to Dismiss Should Be Denied Under Rule 12(g)(2).

Rule 12(g)(2) bars a second motion to dismiss on Rule 12(b)(6) grounds "raising a defense or objection that was available to the party but omitted from its earlier motion." The Third Circuit has instructed courts to "enforce Rule 12(g)(2)." Leyse v. Bank of America N.A., 804 F.3d 316, 322 n.5 (3d Cir. 2015). And district courts have done so. E.g., Dzielak v. Whirlpool Corp., No. 12 Civ. 89, 2018 WL 6985013, at *3 (D.N.J. Dec. 21, 2018) (denying second motion to dismiss where grounds for motion were available to defendant at the time it filed earlier motion); K.J. v. Greater Egg Harbor Regional High School Dist. Bd. of Ed., No. 14 Civ. 145 (RBK), 2016 WL 7489046, at *4 (D.N.J. Dec. 30, 2016) (denying motion raising "a defense or objection that was available to the party but omitted from its earlier motion"); Oliver v. Roquet, No. 13 Civ. 1881 (JLL), 2014 WL 4271628, at *3 (D.N.J. Aug. 28, 2014) (same); cf. Allen v. N.J. State Police, No. 16 Civ. 1660 (BRM), 2017 WL 5714707, at *4 (D.N.J. Nov. 28, 2017) (allowing second motion against amended complaint where original complaint alleged insufficient facts to indicate that defense was available).

Rule 12(g)(2) eliminates unnecessary delay in resolution of civil actions. "This 'consolidation rule' is intended 'to eliminate unnecessary delay at the pleading stage' by encouraging 'the presentation of an omnibus pre-answer motion in which the defendant advances every available Rule 12 defense' simultaneously rather than 'interposing these defenses and objections in piecemeal

fashion.'" Leyse, 804 F.3d at 320 (quoting Charles Alan Wright & Arthur R. Miller, 5C Fed. Prac. & Proc. Civ. § 1384 (3d ed. 2014)).

Although Gentile could simply repackage these same arguments in a post-answer Rule 12(c) motion for judgment on the pleadings, Leyse, 804 F. 3d at 320-21, forcing him to do so by denying his improper motion to dismiss does not impede judicial economy, especially in this case. Gentile's answer may well narrow the need for discovery of many of the Complaint's factual allegations. Gentile was arrested and subsequently cooperated with the USAO. As Judge Vasquez noted, "[n]ormally when the U.S. Attorney's Office permits somebody to cooperate, in my experience, the first thing they want is somebody to admit they did something wrong." Tr. 9:16–20. Gentile apparently made those admissions in this case. Crim. Mem. 5 ("Gentile admitted his involvement in the pump-and-dump scheme"). Thus, if Gentile were required to answer the Amended Complaint's allegations of wrongdoing and to assert his substantive defenses, discovery in this case may be substantially limited to the extent he admits any of the Complaint's allegations.[2]

Granting Gentile's motion, by contrast, could require another appeal to the Third Circuit, further and unnecessarily delaying the proceedings. Although Gentile mentions the Court's "time and resources" in seeking dismissal, Mot. 20, it is Gentile who seeks endless delay in answering the allegations in the Amended Complaint and completing discovery, as evidenced not only by his piecemeal motions but also his other attempts to delay since the Third Circuit's decision. See supra at 3–4. The Court should therefore enforce Rule 12(g)(2), as the Third Circuit directed in Leyse.

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[2] At no time did Judge Vasquez "recognize[] that the SEC cannot establish a substantive securities law violation," as Gentile claims. Mot. 5. Rather, Judge Vasquez noted his anticipation that "there's going to be full discovery as to whether there was in fact a past violation," Tr. 8, and said to Gentile's counsel: "[O]bviously, if you have evidence that there was no violation in the first place, that's a very strong factor in your favor." Id. at 11.

B. Gentile Made—or Could Have Made—the Same Arguments Before.

Under the law of the case doctrine, a prior determination on the same legal issue in the same litigation remains binding for the remainder of the litigation absent certain "extraordinary circumstances" not present here, such as a change in intervening law or newly discovered facts. ACLU v. Mukasey, 534 F.3d 181, 188 (3d Cir. 2008); see also Minard Run Oil Co. v. U.S. Forest Serv., 549 F. App'x 93, 98 (3d Cir. 2013) (citing Mukasey, 534 F.3d at 188). Moreover, the Third Circuit has "consistently rejected . . . attempts to litigate on remand issues that were not raised in a party's prior appeal and that were not explicitly or implicitly remanded for further proceedings." Skretvedt v. E.I. DuPont de Nemours, 372 F.3d 193, 203 (3d Cir. 2004). Thus, "[u]nder the law of the case doctrine, matters that could have been raised in an appeal are waived upon remand." McKenna v. City of Phila., 511 F. Supp. 2d 518, 528–29 (E.D. Pa. 2007) (citing Skretvedt, 372 F.3d at 203). All of Gentile's arguments are precluded under this doctrine.

First, Gentile argues that imposing an injunction requires "a declaration (or finding) of liability," which "would be punitive, and therefore this Court is precluded from making such a finding or declaration." Mot. 2. Gentile contends that this is so as "a declaration would be a punitive sanction for a claim more than five years old . . . a 'penalty' under 28 U.S.C. § 2462, and is thus time-barred." Id. at 4, 6, 12–13, 17. But that is precisely the claim that he previously asserted in this Court and in the Third Circuit, that the Third Circuit rejected, and that he is pursuing in his pending petition for certiorari. See, e.g., First MTD 9–10 ("§ 2462 places a five-year limit on . . . injunctions and industry bars sought by the SEC," because they are "punitive"); Br. for Def., SEC v. Gentile, No. 18-1242, 2018 WL 3067954 ("Appeal Br."), *2, *4 (3d Cir. June 14, 2018) (arguing that "[t]his appeal hinges on the question of whether Section 2462 . . . bring[s] injunctions and industry bars within the statute's five-year limitations period" and that the remedies sought were "for

punitive purposes"); Mot., Ex. A (Pet. For Writ of Cert., Gentile v. SEC, No. 19-878 (U.S. Dec. 23, 2019) ("Cert. Pet.")) at 28 ("The Third Circuit erred in ruling that § 2462 does not apply to the 'obey the law' injunction and penny stock bar sought here"); see also Gentile, 939 F.3d at 555, 562 ("consider[ing] the question whether properly issued and framed . . . injunctions can be penalties subject to the [five-year] statute of limitations" and concluding that "SEC injunctions that are properly issued and valid in scope are not penalties and thus are not governed by § 2462").

Trying to skirt this issue, Gentile attempts to recast his "punitive therefore untimely" argument by claiming not that an injunction is punitive, but, rather, that a declaratory judgment is a necessary predicate to an injunction, that a declaratory judgment is punitive, and essentially therefore that an injunction is punitive. E.g., Mot. 2–4, 13. As explained below, Gentile is incorrect that a declaratory judgment is a necessary predicate to entering an injunction. See infra at II.A. But, even assuming that such a requirement existed, Gentile's argument that the requested relief is thereby precluded as punitive and time-barred is prohibited by the "law of the case" doctrine. Accepting Gentile's argument would lead to an absurd implication: that the Third Circuit deliberately held that a proper injunction is not subject to the five-year limitations period and that courts should make "this determination on a developed record," Gentile, 939 F.3d at 564, but that it remanded so that this Court could reach the very conclusion being vacated—that an injunction is subject to the five-year limitations period as a matter of law. At most, even assuming the Third Circuit somehow overlooked that injunctions are time-barred while simultaneously holding that injunctions are not time-barred, Gentile could have raised this argument as an alternative ground for affirmance, and, having failed to do so, has waived it on remand. See McKenna, 511 F. Supp. 2d at 528–29.[3]

[3] Gentile understood throughout the litigation that the SEC may and does at times seek declaratory judgment. See, e.g., First MTD 14 ("SEC's toolbox" of remedies includes "declaratory judgments"); Appeal Br. 25 (same).

Second, Gentile appears to argue that too much time has passed since his violations and that, therefore, neither injunction the Commission seeks is proper as a matter of the Court's equitable discretion. E.g., Mot. 13–14, 17–19. But the Third Circuit explicitly rejected this argument, specifically noting Gentile's "objection that his case does not rise to [the] standard" of seeking to "restrain imminent violations," but holding that the "proper showing" required by Bonastia and the Supreme Court's decision in Aaron v. SEC, 446 U.S. 680, 701 (1980), sufficed to alleviate that concern. Gentile, 939 F.3d at 565–66. Because the Court of Appeals has already disposed of this argument, and because Gentile has not presented any intervening change in law or fact that would warrant revisiting, that holding is the law of the case. See Mukasey, 534 F.3d at 188.[4]

Third, Gentile also appears to suggest that the Commission may not obtain an injunction not only because a "declaration" of liability is punitive and therefore time-barred, but because "a finding of a prior substantive securities law violation" is "punitive and time-barred" as well. Mot. 11, 13 (emphasis added); see also id. at 2 ("a declaration (or finding) of liability on any of the Commission's five claims . . . would be punitive, and therefore this Court is precluded from making such a finding or declaration"). Gentile offers no support for the contention that a "finding" of liability is time-barred. Nor could he. The Gentile panel understood that the Third Circuit has "h[eld] that a plaintiff must first establish a successful claim on the merits against a party before being eligible to obtain injunctive relief." United States v. EME Homer City Generation LP, 727 F.3d 274, 295 (3d Cir. 2013) (cited in Gentile, 939 F.3d at 564). Thus, if the predicate establishment of a successful

[4] And, if Gentile's argument in reality is that "obey-the-law" injunctions are categorically improper, his failure to "ask[ ] [the Third Circuit] to hold obey-the-law injunctions impermissible," Gentile, 939 F.3d at 564, waives that argument on remand. Skretvedt, 373 F.3d at 203. In any event, that argument is foreclosed by Bonastia itself. See Gentile, 939 F.3d at 564 (noting that "in Bonastia [the Third Circuit] reversed the district court's refusal to grant an obey-the-law injunction" (citing 614 F.2d at 910–11)).

claim on the merits were time-barred, the Third Circuit would not have remanded the case only to have it again dismissed on statute of limitations grounds. Accordingly, the Third Circuit necessarily rejected this contention and that, too, is the law of the case.

Unable to muster legal support for his now-foreclosed legal theory, Gentile again mischaracterizes the record (as he did in his prior motion to dismiss and before the Third Circuit and the Supreme Court) by claiming the Commission has "conceded" that a liability finding is time-barred. E.g., Mot. 13 ("the SEC has conceded [that] the court cannot issue any finding or declaration of liability related to" allegations of acts occurring in 2007 and 2008); see also Appeal Br. 1 (claiming that the Commission "acknowledges that its 'claims' are time-barred"); Cert. Pet. 6, 8 (alleging that the Commission has "admitted that all of its claims were time-barred"). In making this claim, Gentile appears to rely on nothing but his own prior brief, where he argued without substantiation that "the SEC already acknowledged to this Court that these exact five claims . . . are barred by the statute of limitations when it withdrew its prayer for relief of disgorgement and civil money penalties." First MTD 1. But the Commission has never suggested that a liability finding is time-barred—indeed, it is not—and Gentile appears to conflate legal claims with remedies. The Commission's filing of the Amended Complaint reflected the Commission's legally-correct position that injunctive relief and penny stock bars are still viable, timely remedies, available as long as the Commission establishes its claims that Gentile violated the relevant provisions of the securities laws.

II. GENTILE'S ARGUMENTS ARE SUBSTANTIVELY MERITLESS.

The Court should deny Gentile's Motion as procedurally barred as set forth above. But, even if the Court were to reach the merits of Gentile's contentions that a declaratory judgment is a prerequisite to the Commission's obtaining an injunction and that injunctions are not proper here, the Court should reject those arguments.

As a threshold matter, Gentile cites SEC v. Graham, 823 F.3d 1357, 1362 (11th Cir. 2016), and SEC v. Cohen, 332 F. Supp. 3d 575, 586, 588 (E.D.N.Y. 2018), for the proposition that declaratory judgments are punitive and thus subject to the five-year statute of limitations imposed by § 2462. See Mot. 13. But these cases are irrelevant, as the SEC does not seek a declaratory judgment here. See generally Am. Compl. ¶¶ 25–26. Moreover, the case law makes clear that both of Gentile's arguments are substantively wrong—a declaratory judgment is not prerequisite to obtaining injunctive relief, and it is premature to consider the Bonastia factors on this motion.

A. Declaratory Judgments Are Not Prerequisites to Injunctive Relief.

As an initial matter, "it is not true that a permanent injunction is invalid unless it recites that the defendants violated the law. The obvious counterexample is a permanent injunction entered pursuant to a consent agreement in which the defendants deny liability." Chathas v. Local 134 Int'l Brotherhood of Electrical Workers, 233 F.3d 508, 513 (7th Cir. 2000); see also Reynolds v. Roberts, 202 F.3d 1303, 1315 (11th Cir. 2000) ("A defendant who consents to the entry of an injunction (or other form of judgment) does not necessarily agree that it has committed the wrongful acts alleged in the plaintiff's complaint."). "Although Rule 65(d) does require that the order granting the injunction 'set forth the reasons for its issuance,' they need not take the form of findings that the defendant violated the law." Chathas, 233 F.3d at 513 (pointing out that injunctions entered on default judgments are also valid without any liability findings—findings that would be impermissible advisory opinions in the default context).

Where a defendant appears in a case and does not consent to an injunction, as here, however, a finding of liability is a prerequisite before a court may consider the relevant factors in fashioning appropriate injunctive relief, if any. See, e.g., EME Homer City, 727 F.3d at 295. Such

findings of liability may be made, for example, by the Court on summary judgment or after a bench trial or by the jury after a jury trial. See Fed. R. Civ. P. 38, 50(a), 52(a), 56(a).

By contrast, the Federal Rules of Civil Procedure specifically contemplate that a declaratory judgment is a "remedy" that is distinct from "[ ]other adequate remed[ies]." Fed. R. Civ. P. 57. Indeed, in Bonastia itself, the district court considered whether an obey-the-law injunction was proper "after it had granted summary judgment in favor of the [C]ommission," 614 F.2d at 910, where the Commission did not seek declaratory relief. Thus, Gentile is correct that a court deciding whether to impose an injunction in a Commission action proceeds in "two[ ]part[s]": determining first whether there has been a substantive securities law violation and, if so, whether "there is a 'reasonable likelihood'" of repetition. Mot. 15 (citing Bonastia, 614 F.2d at 912). But Gentile cites no case—and the Commission knows of none—for the proposition that "a substantive securities law violation [must] first be[ ] declared by a Court" through a declaratory judgment. Id. at 3; see also id. at 15–16 (arguing that a "declaration or a finding of liability" is a prerequisite (emphasis added)).

In fact, the cases Gentile cites throughout his brief, see, e.g., id. at 16, refute his argument that a declaratory judgment is a prerequisite to an injunction. For example, SEC v. Tourre and SEC v. Conaway involved the weighing of the relevant injunction factors after a jury verdict. Tourre, 4 F. Supp. 3d 579, 598 (S.D.N.Y. 2014); Conaway, 697 F. Supp. 2d 733, 773 (E.D. Mich. 2010) (not weighing passage of time). SEC v. Sprecher and SEC v. Glantz both involved an injunction imposed after the courts granted summary judgment. Sprecher, No. 92 Civ. 2860 (LFO), 1993 WL 544306, at *1 (D.D.C. Dec. 16, 1993); Glantz, No. 94 Civ. 5737 (LAP), 2009 WL 3335340, at *5 (S.D.N.Y. Oct. 13, 2009). And SEC v. Haswell involved the consideration of an injunction after a bench trial. No. 77 Civ. 408-B, 1977 WL 1074, at *1 (W.D. Okla. Oct. 19, 1977), aff'd sub nom., SEC v. Haswell, 654 F.2d 698 (10th Cir. 1981); see also SEC v. Teo, 746 F.3d 90, 95 (3d Cir. 2014)

(entry of injunction after a jury trial); SEC v. Fowler, No. 17 Civ. 139 (GHW), 2020 WL 906182, at *10–12 (S.D.N.Y. Feb. 25, 2020) appeal filed No. 20-1081 (2d Cir. Mar. 26, 2020) (same).[5]

B. The Court Cannot Determine Whether Injunctions Are Proper at this Stage.

Even if it were procedurally proper to consider Gentile's argument that too much time has elapsed to support the entry of injunctions as an equitable matter, the Court should not do so at the pleading stage. The Supreme Court has explained that plaintiffs are not generally required to plead around affirmative defenses in the complaint. Gomez, 446 U.S. at 640. This holding—as well as the courts' repeated admonitions that a determination of liability is a prerequisite to the entry of an injunction where a defendant has appeared and contests the case—necessarily implies that the proper time to make the determination is after liability has been established. Thus, the Supreme Court explained in Aaron that, to obtain injunctive relief from future violations, the Commission "must establish a sufficient evidentiary predicate to show that such a future violation may occur." Aaron, 446 U.S. at 701 (emphasis added). Similarly, the Third Circuit in this very case explained that "[c]ourts should make this determination on a developed record," i.e., based "on the facts and circumstances of each case." Gentile, 939 F.3d at 564 (citing SEC v. Gabelli, 653 F.3d 49, 61 (2d Cir. 2011), rev'd on other grounds, 568 U.S. 442 (2013)).

Gentile nevertheless argues that the passage of time, purportedly without intervening violations, alone warrants denying a request for an injunction. See, e.g., Mot. 18–19 (arguing that the Commission is "not currently in possession of any . . . information" indicating that he has violated the law since 2008); id. at 13–14. Gentile's argument ignores the language and structure of the

[5] Indeed, in Graham, 823 F.3d at 1361–1362, see Mot. 13, the court held that the Commission could proceed to seek injunctive relief, but ruled that the declaratory judgment it sought (unlike here) was time-barred, implicitly rejecting Gentile's contention that a declaratory judgment was a prerequisite to injunctive relief.

injunctive relief provisions of the Exchange Act. Contrary to Gentile's incorrect contention that a penny stock bar may only issue against a person who "is engaged or about to engage" in a securities law violation, Mot. 14, Section 21(d)(6) specifically gives the Court authority to issue a penny stock bar "against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock." 15 U.S.C. § 78u(d)(6) (emphasis added). Moreover, because this relief is "dependent on the action being brought under § [78u(d)(1)]," Mot. 14, it follows that the injunction contemplated by § 78u(d)(1) is not limited to situations where only future violations are alleged. See generally Gentile, 939 F.3d at 557.

Gentile also ignores that the cessation of illegal activity, even if proven, is but one of many factors Bonastia instructs courts to consider. See Pl.'s Mem. Opp. to Def.'s Mot. to Dismiss 19– 23 ("First SEC Br."), DE 38. Recently, for example, a district court in the Second Circuit considered and rejected a securities fraudster's "argument that the events at issue in the trial are now dated" such that an injunction was not warranted. Fowler, 2020 WL 906182, at *12. The court reached this conclusion because it noted its "hesita[tion]," based on "the evidence of the events proven at trial," to rely simply on the defendant's assurances that he had not violated the law, given that the jury did not credit the defendant's testimony and that "the SEC did not examine [the intervening] years." Id. The court also noted that the defendant's testimony at trial "reflected his continued belief in the propriety of his" illegal actions, and that because this "testimony dates from 2019, not 2014, [it] supports the Court's conclusion that injunctive relief remains necessary." Id.

Here, it is premature to determine whether Gentile's assurances of lack of violations in intervening years—during some of which he was under FBI supervision and none of which the Commission has examined—is a proper basis to decide whether to issue an injunction. See also SEC v. Lawson, 24 F. Supp. 360, 365 (D. Md. 1938) (from the dawn of the securities statutes,

recognizing that a "defendant's abandonment of the actions sought to be enjoined subsequent to the filing of the suit, will not bar the issuance of the injunction") (collecting cases in equity). At a minimum, the Amended Complaint alleges facts that support the need for an injunction at the relief stage. See generally First SEC Br. 17–23.[6] Judicially noticeable events since that time confirm that factors supporting injunctive relief can be proved. All support a finding that Gentile acted with a high degree of scienter and has continued to deny wrongdoing while getting himself in trouble with financial services regulators. Am. Compl. ¶¶ 30-44, 59, 62, 64-65, 80, 83; Brown Decl., Exs. A-D.[7]

Finally, and related to the foregoing, Gentile's argument appears to concede that injunctions against more "imminent" violations of the securities laws are not penalties for purposes of Section 2462. Mot. 14; see also Gentile, 939 F.3d at 565 ("Gentile concedes, as he must, that an injunction against an imminent violation is not a penalty"). It is not clear how Gentile defines imminence, but

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[6] Gentile seeks to draw a distinction between Sections 21(d)(1) and 21(d)(5) of the Exchange Act for purposes of determining whether injunctions are appropriate. E.g., Mot. 13–16. The Commission does not contend that different standards govern injunctions with respect to these two provisions. To the extent Section 21(d)(5) is relevant to injunctive relief, the statute provides that the Court may fashion injunctive relief tailored to the specific circumstances of this case—precisely the result the Third Circuit mandated. See Gentile, 939 F.3d at 559–60 (noting that courts "tailor[] injunctions" to make them non-punitive, and that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff" (citation omitted)).

[7] "To resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint." S. Cross Overseas Agency v. Wah Kwong Shipping Grp. Ltd., 181 F.3d 410, 426 (3d Cir. 1999) (considering judicial opinions on motion to dismiss and collecting cases); see also City of Pittsburgh v. W. Penn. Power Co., 147 F.3d 256, 259 (3d Cir. 1998) (considering regulatory proceedings on a motion to dismiss). More generally, courts specifically look at evidence beyond the allegations in a complaint to determine the propriety of injunctive relief. See, e.g., SEC v. Graulich, No. 09 Civ. 4355 (WJM), 2013 WL 3146862, at *6 (D.N.J. June 19, 2013) (considering defendant's behavior at sentencing allocution as relevant to determine propriety of injunction under Bonastia factors); SEC v. Teo, No. 04 Civ. 1815 (SDW), 2011 WL 4074085, at *9 (D.N.J. Sept. 12, 2011), aff'd, 746 F.3d 90 (3d Cir. 2014) (noting that the Court "ha[d] not received any assurances against future violations" and that defendant "ha[d] been connected with other inappropriate or illegal trades" beyond those pertaining to the violations at issue in awarding permanent injunctive relief).

additional factual and legal development might result in relief that satisfies even the test that Gentile advocates. Particularly given Gentile's undisputed, active involvement in the financial industry for decades, he could be "about to engage" in violations, which the discovery that Gentile has resisted providing may reveal. Making that determination is yet another reason why Gentile's arguments cannot be resolved on a motion to dismiss.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the Court deny Gentile's motion to dismiss the Amended Complaint.

Dated: New York, New York
April 3, 2020

Jorge G. Tenreiro
Nancy A. Brown
Simona K. Suh
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, New York 10281-1022
(212) 336-9145 (Tenreiro)
tenreiroj@sec.gov

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Plaintiff's Memorandum of Law in Opposition to Gentile's Motion to Dismiss, dated April 3, 2020, to be served on Gentile by emailing a copy of the same to Gentile's counsel, Adam Ford, at aford@fordobrien.com, this 3rd day of April of 2020.

Jorge G. Tenreiro