INITIAL DECISION RELEASE NO. 330
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12359

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
ANTHONY C. SNELL and	:	May 3, 2007
CHARLES E. LECROY	:	

APPEARANCES: Denise D. Colliers, Jack C. Easton, Amy J. Greer, Daniel M. Hawke, and Jennifer Furman Miller for the Division of Enforcement, Securities and Exchange Commission.

Elizabeth S. Fenton and Thomas H. Suddath, Jr., for Respondent Anthony C. Snell.

Lisa A. Mathewson and Catherine M. Recker for Respondent Charles E. LeCroy.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) against Anthony C. Snell (Snell) and Charles E. LeCroy (LeCroy) on July 7, 2006, pursuant to Sections 15(b)(6), 15B(c)(4), and 21C of the Securities Exchange Act of 1934 (Exchange Act). Snell and LeCroy (collectively, Respondents) jointly filed a timely Answer.

The OIP alleges that Snell and LeCroy have been convicted of felonies involving violations of 18 U.S.C. § 1343 (OIP ¶¶ II.C.3, C.14-C.17). Sections 15(b)(6)(A)(ii) and 15B(c)(4) of the Exchange Act empower the Commission to impose a sanction against a person associated with a broker, dealer, or municipal securities dealer if such person has been convicted of any offense specified in Section 15(b)(4)(B) of the Exchange Act within the past ten years and if such a sanction is in the public interest. Based on Snell's and LeCroy's guilty pleas to two counts of wire fraud each, as well as the Commission's guidance concerning the relevant public interest factors,[1] I granted partial summary disposition to the Division of Enforcement (Division)

[1] See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); see also Charles Trento, 82 SEC Docket 785, 791 (Feb. 23, 2004); John S. Brownson, 55 S.E.C. 1023, 1027 (2002), pet. denied, 66 Fed. Appx. 687 (9th Cir. 2003).

and barred Respondents from associating with any broker, dealer, or municipal securities dealer (collectively, municipal securities firms). Anthony C. Snell, 89 SEC Docket 380 (Oct. 18, 2006).

The OIP also alleges that Snell and LeCroy willfully violated Section 15B(c)(1) of the Exchange Act (OIP ¶ II.D.1). Section 15B(c)(1) prohibits municipal securities firms from effecting transactions in, or inducing or attempting to induce the purchase or sale of, any municipal security in contravention of any rule of the Municipal Securities Rulemaking Board (MSRB). The OIP accuses Snell and LeCroy of willfully violating MSRB Rule G-38 (OIP ¶ II.D.2).

If Snell and LeCroy willfully violated Section 15B(c)(1) of the Exchange Act and MSRB Rule G-38, then the OIP requires me to determine whether, pursuant to Section 21C of the Exchange Act, they should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15B(c)(1) and MSRB Rule G-38 (OIP ¶ III.C). In addition, the OIP requires me to determine whether, pursuant to Section 21B of the Exchange Act, Snell and LeCroy should be ordered to pay civil monetary penalties.

I held a five-day public hearing in Washington, D.C., during December 2006 to consider the charges under Section 15B(c)(1) and MSRB Rule G-38. The Division and Respondents have filed proposed findings of fact, proposed conclusions of law, and supporting briefs, and the matter is ready for decision. I base my findings and conclusions on the entire record and on the demeanor of the witnesses who testified at the hearing.[2] I applied "preponderance of the evidence" as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). I have considered and rejected all arguments, proposed findings, and proposed conclusions that are not specifically discussed in this decision.

MSRB RULE G-38

The MSRB is a self-regulatory organization created by Congress in 1975. Securities Act Amendments of 1975, Pub. L. No. 94-29, 87 Stat. 97. Pursuant to Section 15B(b)(2) of the Exchange Act, the MSRB has the exclusive authority to promulgate rules related to the municipal securities industry. Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve or disapprove of rules proposed by the MSRB.

[2] References in this Initial Decision to the hearing transcript, as amended by my Order of Jan. 16, 2007, are noted as "Tr. ___." The Division's exhibits and Respondents' exhibits will be cited as "DX ___" and "RX ___," respectively. The Division's Prehearing Brief will be cited as "Div. Prehear. Br. ___." The Division's Proposed Findings of Fact and Conclusions of Law will be cited as "Div. Prop. Find. ___." The Division's Brief and the Division's Reply Brief will be cited as "Div. Br. ___" and "Div. Reply Br. ___," respectively. Respondents' Proposed Findings of Fact and Conclusions of Law and Respondents' Posthearing Brief will be cited as "Resp. Prop. Find. ___" and "Resp. Br. ___," respectively.

In the early 1990s, regulators of the municipal securities markets began to investigate reports that municipal securities firms were engaging in a variety of ethically questionable practices in order to secure underwriting contracts. These practices, often lumped together under the label "pay to play," included the making of political contributions to state and local officials who may influence the choice of underwriters. Concerned that such practices were becoming more prevalent and were undermining the integrity of the municipal securities markets, the MSRB drafted several new rules, which the Commission then approved. See Blount v. SEC, 61 F.3d 938, 939-40 (D.C. Cir. 1995).

In 1994, the MSRB adopted a core set of disclosure requirements for third-party consultants as a part of MSRB Rule G-37. Within two years, the MSRB moved the consultant disclosure provisions into a separate rule, Rule G-38. In 2005, the MSRB eliminated the use of third-party consultants. The history of Rule G-38 is summarized below.

On January 17, 1996, the Commission approved MSRB Rule G-38 on consultants. Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Consultants, Exchange Act Release No. 36727 (Jan. 17, 1996), 61 Fed. Reg. 1955 (Jan. 24, 1996). The MSRB adopted the Rule because it was concerned about municipal securities firms' increasing use of consultants to obtain or retain municipal securities business, notwithstanding the requirements of: (1) MSRB Rule G-37 concerning political contributions and prohibitions on municipal securities business; (2) MSRB Rule G-20 concerning gifts and gratuities; and (3) MSRB Rule G-17 concerning fair dealing. Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Consultants, Exchange Act Release No. 36522 (Nov. 28, 1995), 60 Fed. Reg. 62275 (Dec. 5, 1995).

The original version of MSRB Rule G-38 (former Rule G-38) was effective between March 18, 1996, and August 28, 2005. The misconduct alleged in the OIP occurred during that interval. The current version of MSRB Rule G-38 took effect on August 29, 2005. By the time the Commission approved the current version of MSRB Rule G-38, the purported consultant in this proceeding had died, and Snell and LeCroy had been fired by their employer and convicted of wire fraud.

Former Rule G-38 did not impose any substantive restrictions on arrangements between municipal securities firms and consultants. Rather, it simply required municipal securities firms to memorialize their agreements with consultants in writing and disclose certain information about their consultants to issuers and the MSRB and, through the MSRB, to the public.

Former Rule G-38 defined a "consultant" as any person used by a municipal securities firm to obtain or retain municipal securities business through direct or indirect communication by such person with an issuer on behalf of the municipal securities firm where the communication was undertaken in exchange for, or with the understanding of receiving, payment from the municipal securities firm or any other person. Former Rule G-38(a)(i). The definition specifically excluded any person whose sole basis of compensation from the municipal securities firm was the actual provision of legal, accounting, or engineering advice, services, or assistance

in connection with the municipal securities business that the municipal securities firm was seeking to obtain or retain.

"Municipal securities business" had the same meaning in former Rule G-38 as in MSRB Rule G-37(g)(vii). As relevant here, the term included the purchase of a primary offering, as defined in MSRB Rule A-13(f), of municipal securities from an issuer in a negotiated underwriting. The definition excluded underwriting business awarded on a competitive basis, i.e., offerings in which a municipal issuer awarded the securities to the underwriting syndicate presenting the best bid according to stipulated criteria set forth in a notice of sale.

Former Rule G-38(b) required municipal securities firms that used a consultant to formalize the arrangement in writing. The written consultant agreement had to set out the specific terms of the consultant's responsibilities and compensation. The written consultant agreement was required to be in place before the consultant engaged in any direct or indirect communication with the issuer on behalf of the municipal securities firm.

Former Rule G-38(d) required each municipal securities firm to disclose its consultant arrangements to any issuer with which it was engaging or seeking to engage in municipal securities business. The Rule also required detailed disclosures in a quarterly report to the MSRB and, through the MSRB, to the public. Former Rule G-38(e). Beginning in 2001, each municipal securities firm that used a consultant was also required to obtain and disclose to the public information about certain political contributions made by its consultants to issuer officials and to state and local political parties. Former Rule G-38(c), (e).

On August 17, 2005, the Commission approved MSRB's proposal to delete former Rule G-38 on consultants and to replace it with a new Rule G-38 on solicitation of municipal securities business. Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to the Proposed Rule Change Relating to Solicitation of Municipal Securities Business under MSRB Rule G-38, Exchange Act Release No. 52278 (Aug. 17, 2005), 70 Fed. Reg. 49342 (Aug. 23, 2005). Among the reasons for drafting the new rule, MSRB expressed concern over whether municipal securities firms were uniformly making the required disclosure to issuers and whether they were undertaking the other required duties imposed by former Rule G-38 for all persons who by their actions should be considered consultants. Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change Relating to Solicitation of Municipal Securities Business Under MSRB Rule G-38, Exchange Act Release No. 51561 (Apr. 15, 2005), 70 Fed. Reg. 20782 (Apr. 21, 2005).

The current version of MSRB Rule G-38 went into effect on August 29, 2005. It prohibits any municipal securities firm from paying a non-affiliated person for soliciting municipal securities business on its behalf. Current Rule G-38(a). The new version of the Rule defines "solicitation" as a direct or indirect communication by any person with an issuer for the purpose of obtaining or retaining municipal securities business. Current Rule G-38(b)(i). Thus, the current version effectively eliminates the existence of paid third-party consultants in the municipal securities industry (DX 79 at 6).

The parties have not identified any prior proceedings—contested adjudications or settlements—interpreting or applying the current or former versions of MSRB Rule G-38. My own research has not identified any such proceedings, either.

FINDINGS OF FACT

Snell, age forty-seven and a resident of Smyrna, Georgia, was a vice president in the Atlanta, Georgia, office of J.P. Morgan Securities, Inc. (JPM), from January 1998 to March 2004 (Answer). Snell has held Series 7, 52, 53, and 63 securities licenses (Answer). Snell's primary responsibility at JPM was client development, i.e., building relationships with clients and securing business from them (Tr. 68, 249, 269-70).

LeCroy, age fifty-two and a resident of Winter Park, Florida, was Snell's direct supervisor and the managing director of JPM's southeast regional office in Orlando, Florida (Answer). LeCroy has held Series 7, 24, 53, and 63 securities licenses (Answer).

JPM is registered with the Commission as a broker, dealer, and municipal securities dealer (Answer). It is incorporated in Delaware and its principal place of business is in New York, New York (Answer). JPM is not a party to this proceeding, and the OIP does not allege that JPM engaged in any misconduct.

Snell and LeCroy were members of JPM's public finance group, a unit that works with city, county, and state officials across the country (Tr. 68, 75-76). The charges in the OIP relate to Respondents' actions between mid-2001 and the end of 2003, as they attempted to secure business for JPM in Philadelphia, Pennsylvania.

How the City of Philadelphia Selected Finance Teams When It Issued Debt

The OIP involves Snell's and LeCroy's efforts to obtain municipal securities business for JPM "from the City of Philadelphia" or "with the City of Philadelphia" (City or Philadelphia) (OIP ¶¶ II.C.2, C.8). It is therefore appropriate to consider how the City, as distinguished from the other municipal securities issuers located in Philadelphia, chose financial professionals to assist it in issuing bonds.

John F. Street was elected Mayor of Philadelphia in November 1999. He began a four-year term in January 2000 (RX 211 at JPMC 1750-51). Mayor Street appointed Janice Davis (Davis) as Finance Director for the City in May 2000, and she served until July 2004 (Tr. 114, 151-52). Davis was responsible for all financial aspects of City government, including budget, accounting, revenue, treasury, and debt (Tr. 114-15). She was a member of the Mayor's cabinet and reported directly to the Mayor (Tr. 16, 116).

The Finance Director is also responsible for appointing and supervising the City Treasurer (RX 211 at JPMC 1751). Folasade Olanipekun (Olanipekun) served as City Treasurer from April 2000 until January 2002 (Tr. 10, 35-36, 61). Olanipekun hired Corey Kemp (Kemp)

as a Deputy Treasurer in June 2000 (Tr. 13, 61; DX 1 ¶ 1.b). Kemp served as City Treasurer from April 2002 until November 2003 (DX 1 ¶ 1.b). Joseph Faraldo (Faraldo) served as acting City Treasurer between January and April 2002 and after November 2003 (Tr. 61, 116; RX 233 at A-4).

By custom, the City Treasurer is responsible for assisting the City and its agencies when they issue debt (Tr. 10-11, 25-26).[3] In performing this responsibility, the City Treasurer assembles a finance team, the group of professionals that carries out the process of issuing and selling bonds (Tr. 15). The professionals on a finance team typically include bond counsel, financial advisors for the issuer, an underwriting syndicate and underwriter's counsel, and financial printers (Tr. 15-16, 116). The City Treasurer then recommends the finance team to his/her supervisors. The City Treasurer does not have the power to award business, only to recommend (Tr. 66).

Mayor Street appointed George M. Burrell, Jr. (Burrell), as his Secretary for External Affairs in January 2000 (Tr. 16-17, 116-17; RX 233 at A-3). Burrell, like Davis, was a member of the Mayor's cabinet. He was responsible for interacting with persons and agencies outside of the City government (Tr. 116-17). Burrell and Mayor Street had final authority for selecting finance teams on bonds issued by the City and its agencies (Tr. 16, 117, 152).

The Treasurer would forward his/her recommendations concerning the composition of a finance team to Davis and Burrell (Tr. 16, 117). Olanipekun estimated that her recommendations on the composition of finance teams were approved 30% to 40% of the time on smaller transactions, and somewhat less on the larger ones (Tr. 49, 62-63). On the larger transactions, it was more likely that Olanipekun's supervisors would select the lead underwriter (Tr. 49). The record is silent as to Kemp's success ratio while he was City Treasurer. See infra p. 24.

The City of Philadelphia issues all its municipal debt on a negotiated basis, and not by soliciting competitive bids (Tr. 34, 63). In other words, the City assigns roles to the finance team professionals and fixes their fees (Tr. 435, 627, 727). In other parts of the country, a lead underwriter for a municipal bond offering might have discretion to select the underwriter's counsel and a financial printer, and to establish their fees (Tr. 94-95, 627, 727). That was not the case in Philadelphia from 2001 through 2003.

The City uses negotiated offerings to foster the "inclusion" of minority-owned and woman-owned firms, and to enable such firms to "grow their talent" (Tr. 63). The policy stems from the assumption that competitive bidding would "preclude" such firms from participation (Tr. 63). In composing finance teams, the City often would "pair up" financial service firms and law firms to increase the level of minority participation or to include regional entities in an

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[3] If there is a relevant provision in the Philadelphia Home Rule Charter or City Code, or a statutory basis for the City Treasurer's involvement in such matters, the parties did not identify it.

underwriting syndicate (Tr. 138, 406; RX 122 at 4-9).[4] The Finance Director is responsible for minority participation (Tr. 115).

How Other Philadelphia-Area Issuers
Selected Their Finance Teams

The Constitution of the Commonwealth of Pennsylvania (Commonwealth) caps the authorized debt that the City of Philadelphia may incur through a formula based on assessed property values in the City (RX 211 at A-33). Because Philadelphia's assessed property values are stagnant or increasing only incrementally, the City has often found itself at or near its debt limit (RX 211 at A-24, A-33). In these circumstances, it has turned to various independent Authorities to issue debt and borrow money in its place (Prehearing Conference of Oct. 31, 2006, at 10).[5] Olanipekun referred to this practice as "special types of debt that the City otherwise did not want to have on its books" (Tr. 24).

The OIP implies that the only relevant issuer is the City, acting on behalf of itself and its agencies. However, it quickly became obvious that the relevant transactions had several other issuers, wholly distinct from the City.[6] As illustrations, the OIP refers to Respondents' efforts to

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[4] The record is silent as to whether the City's affirmative action policy concerning the sale of debt was required by a relevant provision in the Philadelphia Home Rule Charter or City Code, whether it was merely a custom, and whether there were any limits on the City's exercise of discretion in this area. As we shall see, the City afforded JPM two opportunities to "pair up" with minority-owned and regional underwriting firms during 2003. See infra pp. 34-40, 43-46.

[5] Philadelphia is hardly unique in this regard. After certain financial embarrassments of the 19th century, most states adopted constitutional restrictions on government debt. The restrictions had the goal of curbing fiscal irresponsibility. G. Robert Morris, Jr., Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions, 68 Yale L.J. 234 (1958). In the 20th century, publicly financed public works became a matter of public policy for governments at all levels. To support public works projects without violating state constitutions, governments enacted legislation enabling the creation of public authorities. Id. Given that the very purpose of the authority device is to evade constitutional debt restrictions, there have been many legal challenges to arrangements between governments and authorities. Id. The Pennsylvania Supreme Court has rejected constitutional challenges to authority-financed construction and operation of schools, housing, and sports stadiums. See Consumers Educ. & Protective Assn. v. City of Philadelphia, 52 Pa. D & C 4th 167, 176-77, 2001 Pa. Dist. & Cnty. Dec. LEXIS 437, at *10-12 (Apr. 30, 2001) (collecting cases).

[6] The Philadelphia Gas Works, the Philadelphia Water Department, and the Philadelphia International Airport are City agencies (http://www.phila.gov) (official notice). I conclude that the City is the issuer of any debt instruments that may be offered by these agencies (RX 211 at A-18). I reject the OIP's implication that the Philadelphia School District, the Philadelphia Redevelopment Authority, the Hospitals & Higher Education Facilities Authority of Philadelphia, the Philadelphia Municipal Authority, and the Pennsylvania Convention Center

win business for JPM from the Philadelphia Municipal Authority (PMA) and the Pennsylvania Convention Center (misidentified in the OIP as the "Philadelphia" Convention Center) (OIP ¶¶ II.C.6-C.7). The Division asserted that transactions by such other issuers should be deemed to be within the scope of the OIP (Div. Prehear. Br. at 2-3). The Division reasoned that the Finance Director and the City Treasurer acted as "agents" of these other issuers or, at the very least, "assisted" or were "involved in" the selection of finance teams by these other issuers (Div. Prop. Find. # 450; Div. Br. at 2-3). The Division was still seeking to capture the right nuance in its Reply Brief (Div. Reply Br. at 7 (asserting that the Authorities "acted through" individuals in the Finance Department to select their finance teams)).

PMA constructs municipal solid waste disposal facilities and correctional facilities (RX 211 at A-5). It is governed by a five-member board, appointed by the Philadelphia City Council from nominations made by the Mayor of Philadelphia (RX 233 at 4). The members serve five-year staggered terms. The PMA appoints its own staff, supervised by an Executive Director, to execute its functions (RX 233 at 5). Bonds issued by PMA are not obligations of the City of Philadelphia (RX 233 at 2). Nonetheless, the documentary evidence supports the Division's claim that Kemp, Davis, and Burrell each played a significant role in recommending or selecting the finance team for the only PMA transaction that is relevant to the OIP.[7]

The Pennsylvania Convention Center Authority (PCCA) was created by the Commonwealth in 1986 to build and manage a convention center in Philadelphia. As its name suggests, it is a creature of the Commonwealth, not the City (Tr. 33, 54). See Gen. Bldg. Contractors Assn., Inc. v. City of Philadelphia, 762 F. Supp. 1195, 1196-97 (E.D. Pa. 1991). The City Treasurer and the Finance Director were not involved in putting together finance teams on any transactions for the PCCA (Tr. 33-34, 54, 130).[8]

Authority are City agencies, or that their decisions to issue debt constitute "City business" (OIP ¶¶ II.C.7-C.8). See infra pp. 27-30, 37-40.

[7] See DX 25 (Snell thanks Davis for selecting JPM to structure and execute the PMA transaction, and looks forward to the City's appointment of the balance of the finance team); RX 130 ("GB [George Burrell] needs to make a decision [on] the entire team. . . . Everyone appears to be waiting for the signal from the Mayor's office."); RX 233 at 16 (identifying the City's financial advisors for the PMA transaction, but not a separate financial advisor for PMA).

[8] Davis was an ex officio member of the PCCA's board of directors, and she observed that relations between the City and the Commonwealth were not good with respect to the Convention Center (Tr. 130-31). See City of Philadelphia v. Comm. of Pennsylvania, 575 Pa. 542 (2003) (finding that legislation changing the composition of the PCCA's board of directors was unconstitutional). Snell observed: "they were always in a state of flux over there" (Tr. 285).

Ronald A. White Attempts to Win Legal Work for
Himself and Influence the Composition of Finance Teams

The OIP focuses on Ronald A. White (White), a Philadelphia attorney with "close ties to senior City officials" (OIP ¶¶ II.C.1, C.4). White was engaged in the private practice of law and his firm employed six or seven attorneys. White had specialized in municipal financing transactions dating back to the mid-1990s (Tr. 35, 95, 363). White was a friend of and major fundraiser for Mayor Street (Tr. 41, 117, 366). Winning legal work for his law firm was one of White's primary interests in all financial transactions the City undertook (Tr. 149). Influencing the selection of underwriters to participate in finance teams was another of White's interests.

Shortly after Olanipekun became City Treasurer, White invited her to lunch. He shared with her what he claimed was Mayor Street's vision for the City of Philadelphia (Tr. 36). White told Olanipekun that he wanted to be the person responsible for selecting the professionals who would serve on the finance teams for various transactions (Tr. 36). That afternoon, Olanipekun informed her supervisors about White's comments (Tr. 36-37). Davis responded that assembling finance teams was the responsibility of the Treasurer (Tr. 37, 64-65). Burrell's reaction was more pointed: he said that there were only two branches of City government, the legislative and administrative branches, and that "there was no Ron White branch of government" (Tr. 37).

During the early part of Olanipekun's tenure as Treasurer, White suggested to Olanipekun a number of firms that he wished to serve as underwriters (Tr. 37-38, 42). As often as White advocated to include entities on finance teams, he advocated just as frequently to exclude other entities (Tr. 49). White stopped making suggestions of this nature to Olanipekun after she made it clear to him that, with respect to the selection of underwriters, she dealt only with Davis and Burrell (Tr. 37-38).

Olanipekun rebuffed White's efforts to become the de facto City Treasurer. There is no evidence that White ever approached acting Treasurer Faraldo with similar requests from January through April 2002. However, White was much more successful in co-opting Kemp between April 2002 and October 2003 (RX 107, RX 108, RX 110, RX 118, RX 125, RX 141, RX 144, RX 155, RX 163, RX 190). In July 2003, long after Olanipekun had left Philadelphia, she telephoned Kemp, whom she considered a friend, to warn him that he was becoming known as White's "puppet" and "boy" (DX 39 at 6). She also told Kemp that people knew that White had paid Kemp's way to the Super Bowl. Finally, she cautioned Kemp that White was "a lawsuit waiting to happen" (Tr. 38, 41-43, 65; DX 39 at 6-9). Olanipekun placed this call because she was concerned that Kemp was not exercising independent control of the City Treasurer's office (Tr. 43, 65).

White also communicated with Davis about composing finance teams for City transactions. Davis was open to White's overtures, particularly after Mayor Street scolded her for failing to accommodate White. Mayor Street told Davis that White was supposed to be bond counsel on all City transactions (Tr. 169-70; DX 18, Tab 1 at 77976; RX 193 at 1-2). On several occasions, Mayor Street instructed Davis to "[s]ee what you can do for Ron [White]. If it's something that Ron wants and it's not a problem, see that he has it" (Tr. 131). If White was

unhappy with Davis's decisions, he would generally contact the Mayor and the Mayor would page Davis (Tr. 221). As a result, Davis took the position (Tr. 166-67):

> I knew, essentially, the orders would come from across the street [i.e., City Hall, where Burrell's and Mayor Street's offices are located]. So it was never really my decision. I could put [someone recommended by White] in the deal, or not put them in the deal and they would still end up in the deal.

Davis confirmed that White often advocated strongly for including someone in a finance team (Tr. 117). Davis was also aware that White attempted to take work away from vendors who had fallen into disfavor (Tr. 150-51; RX 198 at 1). Davis occasionally "reshuffl[ed] the deck" at White's request (Tr. 226). She believed that keeping White satisfied was one of the unwritten parts of her job description (Tr. 221). Davis had an "open door" policy, and she met with a steady stream of prospective vendors that White brought to her office.

White and Burrell were rivals, and White occasionally challenged Burrell's decisions on the composition of finance teams (Tr. 166, 169-70, 226; RX 193 at 2). If White did not get his way with Burrell, he would approach Mayor Street, who then resolved the dispute (Tr. 166).[9]

2001: JPM Seeks New Business in Philadelphia

During the first twenty-two months of the Street administration, the City awarded very little investment banking business to JPM (Tr. 127, 267, 481; DX 8 at 142).[10] JPM did not even assign a registered representative to cover the Philadelphia market for a time in 2000 and 2001 (Tr. 81). The person previously assigned had not developed good relations with City officials (Tr. 127, 266-67; DX 8 at 142). By early 2001, JPM was anxious to expand its mandate in Philadelphia (Tr. 80). Its business development plan had three prongs.

First, JPM solidified its relationship with the law firm of Greenberg Traurig, LLP (Greenberg Traurig) (Tr. 369). JPM considered itself to be one of the leading firms in swaps and derivative financing (Tr. 365, 594). Greenberg Traurig wanted to become the derivative law firm for the City of Philadelphia (Tr. 590). JPM used the legal services of Greenberg Traurig on several transactions (Tr. 430, 441; DX 8 at 222-23, DX 61; RX 67). Leonard N. Ross (Ross), an

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[9] OIP ¶ II.C.6 alleges that White communicated on behalf of JPM with the City Treasurer and Finance Director. For that reason, the Division's effort to expand the scope of the OIP to include White's communications with Mayor Street and Burrell is arguably improper (Resp. Br. at 37 n.29; Div. Reply Br. at 4 n.8). In any event, there is no evidence that White's communications with Mayor Street or Burrell involved efforts to obtain or retain municipal securities business on behalf of JPM.

[10] JPM participated in only one such transaction between January 2000 and October 2001: a Philadelphia Gas Works revenue bond offering of approximately $120 million that closed in June 2001 (DX 18, Tab 5 at 78053-54). See infra p. 27.

attorney who was "of counsel" to Greenberg Traurig, also promoted JPM's interests in Philadelphia (Tr. 369-70; DX 8 at 223, DX 61).[11]

Second, JPM assigned Snell to renew his relationship with Davis. Snell had worked well with Davis when she was a municipal official in Dallas, Texas (Tr. 125, 154-56, 263-65, 446, 481-82; DX 8 at 138-39). Davis was very happy to hear from Snell and looked forward to working with him again in Philadelphia (Tr. 127). Early in 2001, Snell and LeCroy introduced Davis to the new JPM team that would be covering Philadelphia (Tr. 265-66; DX 8 at 142-43). A lawyer from Greenberg Traurig also attended the meeting (DX 8 at 143).

Third, Damon Smith (Smith), the chief operating officer of JPM's public finance group in New York, suggested that Snell contact White to determine if White could help JPM obtain business in Philadelphia (Tr. 259-60, 275; DX 8 at 143-44). Smith told Snell that JPM had already made a charitable contribution to an organization affiliated with White (DX 8 at 144).

At about the same time that Smith spoke to Snell about White, Stewart Wolmark (Wolmark), a swap adviser, told LeCroy that Wolmark's firm had used White's services and was happy with the relationship (Tr. 276-77, 427-28).

Olanipekun assured Snell that JPM could win City business without going through White (Tr. 57-60). In contrast, Davis informed Snell that both White and Ross had contacts with the Mayor's Office and that it was not a bad idea for JPM to have White and Ross on its side (Tr. 734-37; DX 8 at 224).

JPM and White Decide to Work Together, but not to Execute a Rule G-38 Consulting Agreement

In October 2001, Snell and LeCroy met White for the first time (Tr. 258-59, 358-59, 373-74; DX 8 at 145-46). LeCroy arranged the meeting (Tr. 258; DX 8 at 145). In connection with that meeting, Respondents sent White a memorandum listing JPM's outstanding proposals in Philadelphia (RX 10). All the proposed transactions listed on the memorandum were derivatives. At the meeting, Respondents spoke about JPM's interest in Philadelphia. White was receptive to helping JPM obtain business in Philadelphia because he thought JPM was capable of generating its own ideas and would not require him to do "heavy lifting" (Tr. 364-65,

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[11] Ross shared a law office with Mayor Street in the 1990s. In March 2000, Ross became "of counsel" to Greenberg Traurig (Tr. 369-70). Greenberg Traurig paid Ross $10,000 a month "for so long as John Street is Mayor of Philadelphia." See generally United States v. Ross, Crim. No. 05-690 (E.D. Pa.), Government's Guilty Plea Memorandum, filed Dec. 12, 2005, at 7, 11-13; Information ¶ 4, filed Dec. 6, 2005 (official notice).

LeCroy attempted to minimize JPM's reliance on Ross (Tr. 370, 428, 574, 588). In light of LeCroy's own e-mail traffic, this aspect of his testimony was not persuasive (DX 61) ("Borrowing an opening line from the movie Gladiator . . . 'On my command, release hell.' In other words, we send Len [Ross] back in to see the Mayor.").

689; DX 8 at 146-47). White impressed Snell with his knowledge of what was going on within the City (Tr. 275-76). The participants discussed the prospect that JPM might retain White as a Rule G-38 consultant (Tr. 80, 359-61, 371; DX 8 at 147-48).[12]

Under JPM's organizational structure, Smith and Peter J. Hill (Hill), the head of JPM's public finance department, had to approve any Rule G-38 consulting agreements (Tr. 360, 372). LeCroy met with White a second time to discuss the scope of the proposed relationship (Tr. 364). LeCroy then recommended that his supervisors engage White as a Rule G-38 consultant (Tr. 357).

In November 2001, LeCroy sent White a draft Rule G-38 consultant agreement (Tr. 357-60; DX 44). The draft called for White to represent JPM's interests in Philadelphia and elsewhere before all state, county, and local governmental entities (DX 44). It also required White not to advise or represent any other firms engaged in the municipal securities business. Finally, the draft required White to refrain from making political contributions for the purpose of obtaining or retaining municipal securities business on behalf of JPM.[13] In return, JPM proposed to pay White $10,000 per month (DX 44).

LeCroy arranged for White to meet Hill in December 2001 (Tr. 108; DX 45). After that meeting, JPM and White never executed the draft Rule G-38 agreement (Tr. 82; DX 8 at 149). White had three objections to JPM's offer. First, White had political action committees and wanted to continue making political contributions (Tr. 82-83, 366).[14] That desire conflicted with JPM's internal policies. Second, White did not wish to disclose these political contributions, as required by former MSRB Rule G-38 (DX 8 at 149). Third, White did not want to limit himself to an exclusive relationship with JPM (Tr. 83; DX 2 at 5, DX 3 at 7). For its part, JPM was concerned about possible conflicts of interest. JPM knew that White had existing relationships with some of its competitors in Philadelphia, and wanted comfort that White could fairly represent its interests (Tr. 486-87, 570-71). In addition, JPM believed that no consulting

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[12] LeCroy testified that, before the October 2001 meeting, he was unfamiliar with White's legal work, did not know that White had been bond counsel on several City transactions, and was unaware that White was politically active (Tr. 361, 366-68, 445). LeCroy also testified that he knew nothing of Philadelphia's politics as late as May 2002 (Tr. 444). In light of LeCroy's conversation with Wolmark, I consider this testimony dubious, at best.

[13] Former MSRB Rule G-38 did not preclude consultants from making political contributions (Tr. 83). It merely required municipal securities firms to disclose certain political contributions made by their consultants. See supra p. 3. Only an internal JPM policy forbade JPM's consultants from making political contributions (Tr. 83-84).

[14] The parties did not develop the record about these political action committees, or submit copies of the committees' periodic reports to the Federal Election Commission and the Pennsylvania Department of State. As a result, the record is silent as to who made contributions and who received them.

agreement would be possible if White intended to continue serving as underwriter's counsel for its competitors or bond counsel for various issuers (Tr. 489-90).[15]

JPM and White still wanted to develop a relationship of some sort (Tr. 365-66; DX 8 at 150). JPM considered White a good source of information about how issuers in Philadelphia worked (Tr. 364-65, 508). White was interested in expanding his law firm's practice in the areas of interest rate swaps and other derivatives (Tr. 364, 436, 508). As a result, JPM promised to include White as counsel on swap transactions, to cultivate an expertise for his firm in those complex matters (Tr. 101, 602). JPM next promised to engage White as its counsel on upcoming bond transactions where it had discretion to hire counsel (Tr. 363-64, 436, 580). It also agreed to continue making contributions to White's favorite charities (Tr. 581). Finally, JPM agreed to use a printing company with ties to White, RPC Unlimited, Inc. (RPC), on jobs where JPM had discretion to select the printer (Tr. 302-03, 520-21).

The record is sketchy about the precise bargain that JPM and White struck in December 2001. If there was a written agreement requiring White to perform specific duties and obligating JPM to pay specific compensation, it was not offered as an exhibit. The Division never questioned Hill about the alternative agreement he had negotiated on JPM's behalf after the Rule G-38 discussions collapsed, despite a statement in its witness list that it would do so.[16]

Within one week after Snell and LeCroy met White in October 2001, Davis knew that JPM and White were working together (Tr. 731, 794-95; RX 11). As early as November 28, 2001, White provided information to Snell and LeCroy about a pending transaction (DX 45). On December 12, 2001, LeCroy informed a colleague at JPM that White "carries a lot of stroke with the City and looks out for our interests on an ongoing basis" (Tr. 362-64; DX 70). LeCroy explained that his phrase "ongoing basis" meant that JPM began its relationship with White in October 2001 (Tr. 373-74). In view of LeCroy's detailed e-mail messages (DX 45, DX 70), I give minimal weight to Snell's recollection that JPM started its relationship with White at the beginning of 2002 (DX 8 at 152).

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[15] I give little weight to Hill's testimony that no one at JPM voiced any concerns about engaging White as a Rule G-38 consultant (Tr. 84). LeCroy offered a far more complete and persuasive summary of the concerns that Hill and Smith expressed about White (Tr. 486-90, 570-71).

[16] The Division argues that the failure of a municipal securities firm to reduce its arrangement with a consultant to writing does not negate the existence of a consultant arrangement that in fact existed (DX 79 at 6). I agree with that position. However, the converse is not necessarily true. Just because a municipal securities firm and a lawyer reach an arrangement, but do not reduce it to writing, there is no basis for assuming that the lawyer was functioning as an unlawful Rule G-38 consultant.

JPM Increases its Business in Philadelphia
between November 2001 and December 2003

JPM increased its business significantly in Philadelphia between November 2001 and December 2003 (DX 18, Tab 2 at 77999). The Division identified several transactions that successfully closed and two transactions that did not close during this interval (Div. Prehear. Br. at 2-3). White's law firm was the underwriter's co-counsel on two of the transactions that closed and co-bond counsel on three other transactions that closed (DX 18, Tab 1 at 77976). Each of the relevant transactions is addressed in more detail below. See infra pp. 27-41.

In February 2002, JPM contributed $20,000 to Wesleyan University in Connecticut, White's alma mater, for the Ronald A. White minority scholarship fund (DX 1 ¶ 102, DX 2 at 6, DX 3 at 7, DX 8 at 151, 173). In July 2002, JPM also donated $35,000 to the Youth Leadership Foundation (YLF), a charity that White had organized to benefit underprivileged children in Philadelphia (Tr. 156; DX 1 ¶ 102, DX 8 at 172-73). JPM contributed another $35,000 to YLF in September 2003 (Tr. 156; DX 1 ¶ 102, DX 2 at 6, DX 3 at 7). Snell was able to secure some printing work for RPC in Texas and Jefferson County, Alabama, during 2002 and 2003 (Tr. 302-03; DX 8 at 176-77).

The JPM-White Relationship Breaks Down

White provided useful background information to JPM about the City and other issuer entities (Tr. 275, 442-43). However, as time went on, White became increasingly unhappy with JPM's charitable contributions and the compensation he received from JPM.

JPM did not make charitable donations at the level White requested. For example, in both 2002 and 2003, JPM employees more senior than Snell and LeCroy decided that JPM would contribute $35,000 per year to YLF, not the $50,000 per year that White sought (Tr. 300, 395, 587, 675-77, 683, 691; DX 8 at 172-74, DX 54). JPM's senior managers did not process White's 2003 charitable contribution request for YLF as quickly as White, Snell, and LeCroy expected (Tr. 394-95, 397-98, 677-79; DX 66, DX 67, DX 69, RX 170, RX 189).

Nor did JPM award printing work to RPC with the frequency that White desired. RPC lost some printing jobs because it did not make a competitive bid, and because it was unable to disseminate its product electronically (Tr. 520-21).

Finally, JPM did not provide the steady stream of legal assignments that White anticipated. Some of this was due to the nature of the municipal bond business. JPM did search for appropriate legal work for White throughout the country (Tr. 512-13). It also used his legal services on several deals in Philadelphia, including a Philadelphia International Airport transaction in 2002 and the PMA transaction in 2003 (DX 80; RX 113).

However, municipal bond attorneys are customarily paid when a transaction closes, and not on an hourly basis (Tr. 432, 434). If a transaction is delayed, or fails to close, such attorneys do not get paid (Tr. 281, 514; DX 8 at 175). This tends to work a hardship on smaller law firms (Tr. 514). As illustrations, JPM engaged White's law firm as underwriter's co-counsel for a

transaction in which the issuer was the Texas Department of Housing and Community Affairs (Tr. 519-20). White purportedly worked on the matter for a long time, but he was not paid until December 2003, when the transaction finally closed (Tr. 281-82, 330-31, 519-20). JPM also hired White's law firm to draft a preliminary official statement for possible refunding bonds to be issued by PCCA (Tr. 289, 601-02). The PCCA transaction never closed (Tr. 288-90). Snell arranged for White to serve as underwriter's counsel for a transaction involving Southern University in Baton Rouge, Louisiana (Tr. 674). That transaction failed to close, as well (Tr. 674).

JPM's swap desk was reluctant to use White's law firm as lead swap counsel because it lacked appropriate experience in swaps (Tr. 599-600, 625-26, 743-46; RX 103). As a result, some of the assignments that JPM engaged White to perform in Philadelphia were routine. While these assignments were consistent with White's expressed desire to avoid "heavy lifting," White found it difficult to be content with the correspondingly low fees. For example, JPM paid White $25,000 in May 2002 to write a four-page opinion letter in connection with a Philadelphia International Airport transaction (Tr. 440-43, 566-67; DX 8 at 158, DX 55, DX 80). When White's firm wrote the opinion letter, the Airport transaction had already closed (Tr. 442, 456; DX 18, Tab 5 at 78073, DX 54, DX 55). It was particularly galling for White to learn that Ross's firm, Greenberg Traurig, had reaped substantially larger fees as lead swap counsel to JPM on the Airport transaction (Tr. 515). White found the prospect of "pairing up" his law firm with Greenberg Traurig to be unacceptable (Tr. 746).

During the latter half of 2002 and well into 2003, White frequently expressed to Snell his disappointment and frustration with JPM's failure to provide him with more legal work and for shortchanging his favorite charities (Tr. 319-20, 512-16, 674; DX 8 at 178). Snell discussed White's complaints with LeCroy and others at JPM (Tr. 278, 320, 512, 514-15, 686).

Kemp, at White's Urging, Stresses that Respondents Need to Work Through White

By early 2003, based on White's complaints, Snell and LeCroy were concerned that White could be an impediment to JPM's efforts to win business in Philadelphia (Tr. 320, 516, 585-86, 761; DX 8 at 178-79). Their misgivings were well founded.[17] On January 31, 2003,

[17] The Division's position about White's influence is inconsistent. On the one hand, the Division argues that White was almost omnipotent when dealing with City officials: Davis could not do her job because White had Mayor Street on speed dial. On the other hand, when Respondents argue that White threatened to block JPM's business opportunities in Philadelphia, the Division suggests that they are exaggerating (Div. Prop. Find. ## 235-45). I find that Respondents' concerns about White were objectively reasonable. On September 5, 2003, White urged Kemp to structure a finance team so that another investment banking firm, Morgan Stanley, would have to split its fee in half (Tr. 161-62; RX 190 at 2-4). White was unhappy with Morgan Stanley's financial support for YLF (RX 190 at 2-4).

Kemp informed White that he would soon be meeting with Snell and LeCroy.[18] The following conversation then occurred (RX 107 at 4-5) (emphasis added):

White:	. . . this is what I want you to do with [LeCroy], you know? . . . make sure that he knows that **ain't nothin' gonna happen without them comin' back to me.** That's important for you to tell him so he, so the white boy can go back to New York and let them guys know what's up. You know. . . I wanna make it clear to him.
Kemp:	Um hmm.
White:	That . . . Anthony [Snell] ain't got no hook in here, you know what I mean?
Kemp:	Right.
White:	. . . Anthony is empowered by us. Okay? And . . .
Kemp:	Right.
White:	. . . so they need . . . to listen to Anthony.
Kemp:	Um hmm.
White:	Okay? But when Anthony comes back and tell 'em that we said somethin', they need to know that it's real.
Kemp:	That's right. Okay.
White:	You see what I'm sayin'?
Kemp:	I feel that, I feel that.
White:	You need to really let . . . Charlie know what's up. You know, as far as I'm concerned.
Kemp:	Um hmm.
White:	You know?
Kemp:	Definitely.
White:	. . . and the way you can do that is to say . . . the way this process works is generally . . . the Finance Director . . . kind of talks to Ron, the Mayor has a lot of confidence in Ron in this area. You see what I'm sayin'?
Kemp:	Um hmm.

[18] The FBI intercepted thousands of telephone conversations between January and October 2003, pursuant to judicial authorization. The Division's exhibits include voice recordings and transcripts of four intercepted telephone conversations and Respondents' exhibits include another twenty-one such recordings and transcripts. Snell was a participant in four of the intercepted conversations and Davis was a participant in five. Most of the other intercepts in this record involve conversations between White and Kemp. When quoting these exhibits, I have carefully followed the transcripts prepared by the parties. The transcripts do not attempt to alter any informal, vernacular speech. This decision does not add a "sic" if a speaker omitted a word-ending consonant, dropped a verb, or otherwise deviated from standard English. Doing so would be distracting and would run the risk of altering the speaker's tone and meaning. Cf. United States v. Meek, 366 F.3d 705, 709 n.2 (9th Cir. 2004); United States v. Poehlman, 217 F.3d 692, 696 n.2 (9th Cir. 2000); President v. Ill. Bell Tel. Co., 865 F. Supp. 1279, 1289 n.17 (N.D. Ill. 1994).

White: And generally nothin' . . .gets pushed together without . . . consulting him about it. You . . . understand what I'm saying?
Kemp: Yeah, yeah, not a problem.
White: Yeah.
Kemp: Now . . . that's the conversation . . . I'll have with [LeCroy] . . .
White: Yeah.
Kemp: . . . and Snell.
White: And Snell, yes.
Kemp: Right.
White: Right.
Kemp: Got it.
White: Okay.

A few hours later, Kemp confirmed that he had delivered White's message to Snell and LeCroy (RX 108 at 2-3).

Snell and LeCroy responded by looking for possible transactions in which White could provide legal services for JPM, but there were no such transactions immediately available (Tr. 320, 683).

Respondents Fail to Secure Legal Work for White in Mobile, Alabama, but Cause JPM to Pay Him Anyhow

Snell and LeCroy intended to retain White's law firm in connection with a Mobile, Alabama, school district financing transaction, a matter for which LeCroy was responsible (Tr. 436, 516, 518, 670-74; DX 8 at 175-76; RX 124 at 2-4). However, they were unable to do so because the Alabama law firm serving as underwriter's counsel in the transaction refused to participate with White's firm (Tr. 436). The Alabama law firm did not want to share liability with an out-of-state law firm, and it did not want to split its fee (Tr. 591-92). As a separate matter, RPC had failed to submit the winning bid for printing on the Mobile transaction.

LeCroy suggested to Snell that they pay White out of JPM's proceeds from the Mobile transaction. Snell agreed. In April 2003, Snell asked White to submit an invoice to JPM in the amount of $50,000 as a fee for services as a special counsel on the Mobile transaction (DX 2 at 9, DX 3 at 10-11, DX 8 at 134, 180-85, DX 26). Respondents calculated the $50,000 figure based on legal fees that White had been expecting but had not received, and the shortfall in a requested charitable contribution (Tr. 519-20, 683-84).

White was not a party to the conversation in which Snell and LeCroy devised this fraudulent scheme (Tr. 282). White first learned of the $50,000 payment on April 4, 2003 (DX 26). White's surprise is evident from the recorded call of the conversation in which Snell told him the payment was coming (DX 26).

The necessary supervisory officials from JPM signed off on the invoice, and JPM paid White $50,000 in May 2003 (DX 2 at 10, DX 3 at 11-12, DX 5 at 25). White had not done any

legal work on the Mobile transaction, and both Respondents knew it (Tr. 521). They also knew that the invoice they submitted to JPM was fraudulent (Tr. 521; DX 8 at 134).

October 2003: The Philadelphia Police Department Discovers the FBI's Electronic Surveillance of Mayor Street's Office

On October 7, 2003, four weeks before the City's mayoral election, the Philadelphia Police Department discovered electronic listening devices in Mayor Street's City Hall office (Tr. 85, 87). The United States Attorney for the Eastern District of Pennsylvania and the FBI eventually acknowledged that they had planted the listening devices, pursuant to judicial authorization. News of the episode was reported nationwide. On November 4, 2003, Mayor Street was reelected to a second four-year term. Later in November 2003, Kemp resigned as City Treasurer (DX 1 ¶ 1.b).

JPM's compliance department and its outside legal counsel conducted a series of interviews to learn what happened in Mobile and Philadelphia (Tr. 93, 98-99). In March 2004, JPM fired Snell and LeCroy (Tr. 99, 249, 351-52). JPM did not discipline any other employees (Tr. 99).

June 2004-June 2005: Criminal Proceedings

In June 2004, a grand jury in the United States District Court for the Eastern District of Pennsylvania indicted Snell, LeCroy, and ten others (Answer). The indictment charged ten individuals with conspiracy to use the mails and interstate wires to deprive the citizens of Philadelphia of the honest services of City Treasurer Kemp, mail and wire fraud, making false statements to FBI agents, perjury, and other offenses. Snell and LeCroy were not charged with conspiracy (Prehearing Conference of Aug. 4, 2006, at 10-11). Rather, they were each charged with two counts of wire fraud in violation of 18 U.S.C. § 1343 in connection with the scheme to defraud JPM by submitting a $50,000 invoice for work that White did not perform.

In November 2004, the grand jury returned a superseding indictment (DX 1). The superseding indictment added new charges and new factual allegations against White and Kemp, but it did not add new charges or new factual allegations against Snell or LeCroy.

One day after the United States Attorney unsealed the superseding indictment, White died from cancer. On November 23, 2004, the district court granted the United States Attorney's motion to dismiss all charges against White in the original and superseding indictments. The district court also severed the case against Snell and LeCroy from the case against those defendants who were charged with conspiracy. United States v. Kemp, 2004 U.S. Dist. LEXIS 24189, at *16-21 (E.D. Pa. Dec. 2, 2004).

In January 2005, Snell and LeCroy each pleaded guilty to two counts of wire fraud (DX 1-DX 5, DX 8 at 133-35). Snell then appeared as a prosecution witness in the criminal trial of

the other defendants.[19] His testimony focused primarily on his relationship with White and on White's involvement with JPM's transactions in Philadelphia (DX 8).

LeCroy paid restitution of $50,000 to JPM before sentencing (DX 15). Snell did not need to pay restitution because LeCroy had already paid the full amount (RX 204 at 6). In June 2005, the court sentenced LeCroy to three months of incarceration, followed by two years of supervised release, including ninety days of home custody. It also ordered LeCroy to pay a $15,000 fine and a $200 special assessment (DX 6). The court sentenced Snell to ninety days of house arrest and three years of probation. It also ordered Snell to pay a $15,000 fine and a $200 special assessment.

Both Respondents have served their sentences for the wire fraud convictions (Answer). Neither Respondent is currently employed in the securities industry (Tr. 246-47, 348). Their securities licenses have lapsed (Tr. 469, 560, 721).

DISCUSSION AND CONCLUSIONS

Respondents concede that the relevant transactions involved negotiated underwritings. All other issues are contested.

A. The Division's Theory of the Case.

The Division contends that Snell and LeCroy—not JPM—are primary violators of former MSRB Rule G-38 and Section 15B(c)(1) of the Exchange Act (OIP ¶¶ II.D.1-D.2; Div. Prehear. Br. at 4-9).[20] It argues that Respondents arranged for White to receive the $50,000 payment for his past and future communications with Philadelphia officials to obtain or to retain municipal securities business on JPM's behalf. Under the Division's theory, Snell and LeCroy acted because they believed that JPM's arrangement with White had broken down (Div. Prop. Find. # 460). Once Respondents entered into their own consulting arrangement with White, it became their obligation—not JPM's—to reduce the arrangement to writing and to disclose it to the issuers and the MSRB (Div. Prehear. Br. at 6-7). The Division maintains that Respondents should have made the required disclosure to the municipal issuers no later than April 4, 2003, and to the MSRB no later than July 31, 2003 (Div. Prehear. Br. at 7-10).[21]

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[19] Following a lengthy trial, Kemp was convicted of conspiracy and twenty-six other substantive counts, but acquitted on eight counts. The other defendants were also convicted on some counts, but not all. See generally United States v. Kemp, 379 F. Supp. 2d 690 (E.D. Pa. 2005). Kemp is now serving a lengthy prison term. All of those who were convicted are appealing.

[20] The OIP specifically does not allege that Snell and LeCroy willfully aided and abetted or caused primary violations by JPM.

[21] I urged the Division to identify in its prehearing brief when a Form G-37/G-38 should first have been filed with the MSRB to disclose White's purported role as a consultant (Order of Nov. 3, 2006, at 2) (emphasis in original). The Division chose instead to identify the latest date on which such disclosure should have been made.

Although Snell and LeCroy were registered representatives of JPM, the Division considers them to have acted beyond the scope of their employment and in direct contravention of JPM's policies concerning former MSRB Rule G-38 when they devised and executed their fraudulent scheme. Consequently, in a fashion akin to rogue brokers effecting securities transactions away from and without the knowledge of their firms, the Division argues that Snell and LeCroy acted as brokers in this case (Div. Prop. Find. # 477; Div. Br. at 30-31) (citing Roth v. SEC, 22 F.3d 1108 (D.C. Cir. 1994), and SEC v. Ridenour, 913 F.2d 515 (8th Cir. 1990)).

The Division also relies on MSRB Rule D-11, which provides in relevant part: "Unless the context otherwise requires or a rule of the [MSRB] otherwise specifically provides, the terms 'broker,' 'dealer,' or 'municipal securities dealer' shall refer to and include their respective associated persons." The Division contrasts the wording of MSRB Rule G-37(g)(iii), which excludes associated persons from Rule G-37's definition of "brokers, dealers, and municipal securities dealers," with the wording of former MSRB Rule G-38, which is silent on the subject. It reasons that persons associated with municipal securities firms may be charged with direct violations of MSRB Rule G-38 (Div. Motion for Summary Disposition at 25 n.11; Div. Prop. Find. # 421; Div. Br. at 26-27).

The Division does not argue that Respondents violated former MSRB Rule G-38 because JPM contributed to White's favorite charities, or retained White's law firm on other transactions, or engaged RPC as a financial printer (Prehearing Conference of Oct. 31, 2006, at 19-20; Div. Prehear. Br. at 7 n.10; Div. Prop. Find. # 25 & n.2). Nor does it contend that JPM should have disclosed these payments to issuers and the MSRB as compensation (Div. Prehear. Br. at 7 n.10).

The Division acknowledges that White also advocated on behalf of other municipal securities firms that were active in the Philadelphia area, including Commerce Capital Markets, Loop Capital Markets, Janney Montgomery Scott, and UBS/Paine Webber (Div. Prop. Find. # 105). The OIP does not allege that these other municipal securities firms violated former MSRB Rule G-38.

On page 1 of its Reply Brief, the Division now tries to have it several different ways: "The Division has never contended that Respondents' fraudulent scheme to cause [JPM] to pay White an additional $50,000 was the beginning of White's consulting arrangement. To the contrary, . . . shortly after Respondents' met with White in October 2001, the parties reached an understanding . . ."

However, the Reply Brief is ambiguous about the identity of "the parties" who purportedly reached this understanding. See Div. Reply Br. at 2, lines 11-12 ("Respondents and White had reached an understanding"); Div. Reply Br. at 2 n.4 (referring twice to JPM and "its" understanding with White); Div. Reply Br. at 3, lines 10-11 (after making the $50,000 payment, "Respondents continued to compensate White"); Div. Reply Br. at 3, lines 16-17 (referring to "[JPM's] and the Respondents' decision to pay White").

B. The Doctrine of Collateral Estoppel Has Limited Application in this Proceeding.

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent proceeding an issue of fact or law that was decided in a prior proceeding. Under this judicially created doctrine, a party is collaterally estopped from relitigating an issue if a four-part test is met: (1) the issue in both proceedings must be identical; (2) the issue must have been actually litigated and decided in the previous proceeding; (3) the party must have had a full and fair opportunity to litigate the issue in the previous proceeding; and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits. See Boguslavsky v. Kaplan, 159 F.3d 715, 719-20 (2d Cir. 1998) (collecting cases); Levy v. Kosher Overseers Ass'n of Am., 104 F.3d 38, 41 (2d Cir. 1997).

It is permissible to use a prior criminal conviction as collateral estoppel in an administrative proceeding, but the agency must follow procedures similar to those established for the doctrine's use in judicial proceedings. See Chisholm v. Def. Logistics Agency, 656 F.2d 42, 45-51 (3d Cir. 1981) (reversing and remanding a decision of the Merit Systems Protection Board); Stephen M. Sundheimer, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,245 (CFTC Sept. 16, 1981) (concluding that a guilty plea to filing false tax returns collaterally estopped a respondent from denying that he had prearranged futures trades but did not collaterally estop him from denying that the transactions had resulted in market manipulation), aff'd, 688 F.2d 150 (2d Cir. 1982).

The Commission has frequently applied the doctrine of collateral estoppel to prevent a respondent from relitigating the factual findings or the legal conclusions of an underlying criminal proceeding in a follow-on administrative proceeding. See Jose P. Zollino, 89 SEC Docket 2598, 2604-05 & n.20 (Jan. 16, 2007); Ira William Scott, 53 S.E.C. 862, 866 (1998); William F. Lincoln, 53 S.E.C. 452, 455-56 (1998); Alexander V. Stein, 52 S.E.C. 296, 301 (1995); Charles Phillip Elliott, 50 S.E.C. 1273, 1276-77 & n.16 (1990), aff'd, 36 F.3d 86, 87 (11th Cir. 1994); Robert Blakeney Stevenson, 48 S.E.C. 89, 90 & nn.3-4 (1985).

Findings Made During the
Criminal Sentencing Proceedings

There are limits to the doctrine. A strong presumption exists against application of collateral estoppel when it is based on findings made during a criminal sentencing proceeding. SEC v. Monarch Funding Corp., 192 F.3d 295, 306 (2d Cir. 1999) (declining to adopt a blanket prohibition on the use of sentencing findings for purposes of offensive collateral estoppel, but holding that "precluding relitigation on the basis of such findings should be presumed improper" and "should be applied only in those circumstances where it is clearly fair and efficient to do so"). The burden is on the plaintiff in the subsequent civil case to prove these elements. Id. The Second Circuit cited several factors as to why findings in criminal sentencing proceedings may be unreliable or unfair for purposes of collateral estoppel in a subsequent action. Among these reasons were limited procedural and evidentiary safeguards, limited discovery, and the absence of an opportunity to present witnesses or hear evidence during the sentencing phase of a criminal proceeding. Id. at 305; see also 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an

offense which a court . . . consider[s] for the purpose of imposing an appropriate sentence."); United States v. Watts, 519 U.S. 148, 151-54 (1997) ("[A] sentencing court may consider conduct of which a defendant has been acquitted.").

In this proceeding, the Division has continually urged me to rely on findings made by the district court during Snell's and LeCroy's sentencing hearings. The Division's efforts in this regard were particularly aggressive at the summary disposition stage.[22] These efforts have also continued in the Division's posthearing pleadings.[23] However, the Division has treated the doctrine as if it were a matter of right, not an issue on which it bears the burden of proof. The Division did not overcome (or acknowledge) the Monarch presumption. Nor has the Division satisfied its burden of demonstrating that it would be "clearly fair and efficient" for me to apply the doctrine. Accordingly, I decline to give preclusive effect to any findings made during Snell's and LeCroy's criminal sentencing proceedings.[24]

Admissions Made During the
Change of Plea Hearings

Monarch does not apply to the use of admissions made by a criminal defendant during a change of plea hearing. Cf. Michael Lapp, 72 SEC Docket 109, 111 (ALJ) (Mar. 29, 2000) (holding that "the Monarch decision left long-standing precedent undisturbed with respect to guilty pleas").

Here, too, the doctrine has limits. Collateral estoppel extends only to questions "distinctly put in issue and directly determined" in an underlying criminal prosecution. Emich Motors Corp. v. Gen. Motors Corp., 340 U.S. 558, 569 (1951) (citing Frank v. Magnum, 237 U.S. 309, 334 (1915)); United States v. Wight, 839 F.2d 193, 195-96 (4th Cir. 1987). The standard applied for collateral estoppel is stringent when a party invokes the doctrine based on a guilty plea. United States v. Summers, 254 F. Supp. 2d 589, 593 (E.D. Pa. 2003), aff'd, 122 Fed. Appx. 599 (3d Cir. 2005). The court in the subsequent proceeding must examine the record of the criminal proceedings or plea colloquy to determine what issues were comprehended and

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[22] Div. Motion for Summary Disposition at 1 n.1, 2-3, 5, 6 n.6, 20-21, 24, 34; Div. Reply Memorandum in Support of Summary Disposition at 1, 5 n.2, 9, 17.

[23] Div. Prop. Find. ## 14-17, 19; Div. Br. at 38 n.33. The Division offered DX 6, the transcript of LeCroy's sentencing hearing, only against LeCroy (Tr. 356). Yet its pleadings inexplicably cite DX 6 against Snell, as well (Div. Prop. Find. ## 14, 17).

[24] One aspect of LeCroy's sentencing hearing warrants mention. The Probation Department asked the district court to enhance LeCroy's Sentencing Guideline calculation by four points on the grounds that LeCroy's offense involved a securities law violation. The United States Attorney and LeCroy jointly urged the district court not to do so. Among other reasons, they argued that MSRB Rule G-38 was not the sort of securities law violation that warranted a sentence enhancement. The district court agreed with the United States Attorney and LeCroy (DX 6 at 4-5, 12-13, 20-22).

decided. Id. (citing State Farm Mut. Auto Ins. Co. v. Rosenfield, 683 F. Supp. 106, 108 (E.D. Pa. 1988)); see also Chisholm, 656 F.2d at 50. "The party asserting collateral estoppel based on a guilty plea has the burden of showing precisely what facts the plea establishes." Goodridge v. Harvey Group, Inc., 728 F. Supp. 275, 279 (S.D.N.Y. 1990) (relying on Appley v. West, 832 F.2d 1021, 1026 (7th Cir. 1987)).

In applying this precedent here, I have followed the methodology the Commission used in Zollino, 89 SEC Docket at 2600-01 & n.3 (parsing a respondent's plea hearing testimony to determine the facts comprehended).

In January 2005, in preparation for the hearings at which Snell and LeCroy changed their pleas, the United States Attorney prepared two guilty plea memoranda (DX 2, DX 3).[25] The memoranda summarized the facts the prosecution was prepared to prove beyond a reasonable doubt if the cases against Snell and LeCroy were to proceed to trial. At the change of plea hearings, the United States Attorney identified the elements of the crime of wire fraud and again summarized the facts the prosecution would prove if the cases went to trial (DX 4 at 19-20, DX 5 at 21-25).

Snell and LeCroy each acknowledged to the district court judge that the United States Attorney could prove the facts alleged in the relevant counts of the superseding indictment, and summarized in the guilty plea memoranda, with one exception. Snell and LeCroy denied that they intended to circumvent MSRB Rule G-38 (DX 4 at 20-21, DX 5 at 25-26). The United States Attorney informed the district court that the exception did not relate to any element of the crime of wire fraud (DX 4 at 20, DX 5 at 27). On that basis, the district court accepted the changes of pleas. Later, while testifying in the Kemp criminal trial, Snell confirmed that he had admitted to the factual averments in the United States Attorney's guilty plea memorandum, with the exception of the MSRB Rule G-38 allegation (DX 8 at 198-200, 202-05). I must now determine what these events mean for the present case, recognizing that the Division has the burden of proving that the doctrine of collateral estoppel should be applied.[26]

Counts 26 and 27 of the superseding indictment alleged that Snell and LeCroy committed wire fraud in violation of 18 U.S.C. § 1343 when they engaged in a scheme to defraud JPM by submitting a false invoice seeking the payment of $50,000 to White for legal work that White had not performed (DX 1). These Counts also alleged that, to carry out their scheme, Snell, LeCroy, and White engaged in certain acts described in Paragraphs 1 and 102-109 of the superseding indictment.

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[25] The guilty plea memoranda are distinct from the "guilty plea agreements" and the "acknowledgement of rights," which are also part of DX 2 and DX 3.

[26] The criminal proceedings did not resolve the question of whether Snell and LeCroy violated MSRB Rule G-38 (Division's Reply Memorandum in Support of Summary Disposition, dated Oct. 16, 2006, at 5) ("The Division has never contended that the District Court found or that the Respondents admitted during the criminal proceedings that they violated MSRB Rule G-38.").

I agree with the Division that Snell and LeCroy are collaterally estopped from relitigating the acts set forth in Paragraphs 102 and 104 through 107 of the superseding indictment. However, I conclude that Respondents are not collaterally estopped from relitigating the matters alleged in Paragraphs 1.a, 1.c, 1.i, 103, 108, and 109 of the superseding indictment.

Paragraphs 1.a and 1.i of the superseding indictment describe Janice Knight (Knight) as the "paramour" of White and the "nominal" owner of RPC. The United States Attorney repeated these descriptions in his guilty plea memoranda (DX 2 at 6, DX 3 at 8). The Division now asserts that these are two of the facts that Snell and LeCroy admitted during their change of plea hearings. The Division argues that Respondents should be estopped from denying these facts in this administrative proceeding.

Counts 26 and 27 of the superseding indictment incorporated by reference the "acts" described in Paragraphs 1.a and 1.i of the superseding indictment, but not the descriptive phrases in Paragraph 1.a and 1.i. Descriptive phrases, such as "paramour" and "nominal" owner, are not acts by Snell or LeCroy. Moreover, Snell's and LeCroy's convictions for the crime of wire fraud did not turn on whether Knight was or was not White's "paramour" and RPC's "nominal" owner. Therefore, I reject the Division's argument.[27]

The same level of scrutiny is warranted as to Paragraph 1.c of the superseding indictment, which asserts that Kemp's recommendations for the appointment of financial service firms were "largely accepted." This also is not an "act" by Snell, LeCroy, or White that Counts 26 and 27 of the superseding indictment incorporated by reference. Nor is it an element of the crime of wire fraud. Respondents are not collaterally estopped from relitigating this "fact" in the administrative proceeding, either. See supra p. 6.

The references to "municipal securities regulations" in Paragraphs 103 and 108 of the superseding indictment fall squarely within the scope of the exception articulated by Snell and LeCroy at their change of plea hearings. Paragraph 109 of the superseding indictment alleged:

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[27] The OIP incorporated the "paramour" terminology, but it asserted that Knight "owned" RPC (OIP ¶¶ II.C.5, C.9). The OIP did not describe Knight as RPC's "nominal owner." Respondents denied knowing that Knight was White's "paramour," but admitted that Knight was the owner of RPC (Answer).

No testimony during the administrative hearing demonstrated that White had a "paramour" or, if he did, that Snell or LeCroy knew of it at the relevant times. If the Division is now claiming (contrary to the OIP) that Knight was not the actual owner of RPC, or that White held a concealed interest in RPC, it has failed to prove its allegation (Tr. 302). Snell, LeCroy, and JPM had no input into any financial printing work that the City of Philadelphia may have awarded to RPC (Tr. 727). Finally, with respect to printing work that RPC undertook for JPM in Texas and Alabama, there is no evidence in the administrative record that RPC failed to complete the work in a timely and professional manner, or that it overcharged for the work it performed.

> [JPM], which prior to its relationship with White had received scant business in Philadelphia, with White and defendant Corey Kemp's advocacy, received assignments to bond deals. A significant reward came in December 2003 when it received $423,963 as senior manager on a [PMA] deal on which Kemp, at White's direction, placed it.

The United States Attorney repeated the substance of this statement in his guilty plea memoranda, using similar, although not identical, language (DX 2 at 6, DX 3 at 7).[28] Again, the Division asserts that Snell and LeCroy admitted to Paragraph 109 of the superseding indictment during their change of plea hearings. It argues that Respondents should be precluded from denying these facts in this administrative proceeding.

Paragraph 109 of the superseding indictment refers to an act undertaken by White and Kemp, not an act by Snell or LeCroy. When Snell and LeCroy changed their pleas in January 2005, the district court had already dismissed all criminal charges against White because of his death.[29] Snell's and LeCroy's convictions for the crime of wire fraud did not turn on whether Kemp, at White's direction, placed JPM on the PMA transaction. The Division has not shown that this "fact" was necessary to support a valid and final judgment on the wire fraud charges.

Collateral estoppel involves a balance of fairness and efficiency: the fairness of ensuring a correct result, weighed against the efficiency of preventing relitigation of a discrete issue. United States v. U.S. Currency in the Amount of $119,984, 304 F.3d 165, 172 (2d Cir. 2002). Consideration of efficiency should be a threshold assessment, and if a court finds that the application of estoppel will not promote efficiency, it should feel free to deny preclusion for that reason alone. Id. at 173. I conclude that the risk of the application of collateral estoppel likely would have lengthened the change of plea hearings in the criminal case, without significantly shortening the present administrative proceeding.[30] For that reason, I deny preclusion as to Paragraphs 1.a, 1.c, and 1.i (to the extent discussed above), Paragraph 103 (in its entirety), Paragraph 108 (in its entirety), and Paragraph 109 (in its entirety) of the superseding indictment,

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[28] Respondents take the Division to task for misquoting the exact language of the guilty plea memoranda. Compare Div. Prop. Find. # 360; Div. Br. at 19; Div. Reply Br. at 10 with Resp. Br. at 55-56. I believe the wording of Paragraph 109 of the superseding indictment is every bit as important as the wording of the guilty plea memoranda.

[29] The parties have not briefed the issue of whether dismissal of the charges against White, akin to the concept of abatement ab initio, had any impact on Snell's and LeCroy's culpability for White's acts under Counts 26 and 27.

[30] It is difficult to imagine Snell and LeCroy, during their respective change of plea hearings, insisting that the district court conduct a mini-trial on the collateral issues of whether Knight was really White's "paramour," or only RPC's "nominal owner," or whether Kemp's success ratio in recommending financial service firms was equal to, better than, or worse than Olanipekun's 30% to 40% success ratio. The notion of such collateral litigation before a busy district court is far-fetched. It would not have furthered the interests of justice.

as well as the corresponding portions of the United States Attorney's guilty plea memoranda (DX 2 and DX 3).

There are additional reasons for declining to give preclusive effect to Paragraph 109 of the superseding indictment. Evidence introduced during the Kemp criminal trial and this administrative proceeding shows that the allegations in Paragraph 109 of the superseding indictment are, in fact, wrong. In the criminal trial, Snell testified about a conversation with Ross in which Ross stated that Mayor Street was going to place JPM in the PMA deal because the Mayor owed Ross (DX 8 at 223-24). In January 2005, Snell told the FBI about this conversation with Ross (DX 8 at 223-24).[31] In the administrative hearing, Respondents played the recording of an intercepted telephone conversation between White and Kemp. That conversation demonstrates that it was Davis, not White, who told Kemp to place JPM on the PMA deal (RX 125 at 3). She did so on or before February 26, 2003. The criminal scheme described in Counts 26 and 27 of the superseding indictment did not even commence until March 2003.

Factual error is not automatically a reason for refusing to give collateral estoppel effect to an admission. Monarch, 192 F.3d at 304 ("[T]he results of an earlier resolution of an issue may simply be wrong"). However, where fairness concerns are particularly strong, and efficiency gains are nonexistent, courts tend to refrain from applying collateral estoppel. I will follow that approach here as to Paragraph 109 of the superseding indictment.

C. The Weight of the Evidence Shows that White Communicated with Issuers on Five Transactions, Not Eleven.

OIP ¶ II.C.7 alleges that White "endorsed" JPM for "City business" on "at least" four transactions. The City was the issuer on some of these transactions, but not all.

During the October 31, 2006, prehearing conference, at 8-10, I attempted to simplify and clarify these issues. See Rule 221(c)(1) of the Commission's Rules of Practice. I then urged the Division to include in its prehearing brief a complete list of all municipal securities transactions subject to the jurisdiction of the MSRB it would actually put in issue for the hearing (Order of Nov. 3, 2006). The Division's prehearing brief identified eleven such transactions. The Division specifically omitted from its prehearing brief an April 2002 transaction involving the Philadelphia International Airport, a matter that had been described in the OIP.

[31] I do not consider Snell's prior testimony as evidence that Ross's statement was true. Rather, I consider it for the limited purpose of understanding what Snell was thinking in January 2005, when the FBI interviewed him. Although the evidence is hearsay, it has independent indicia of reliability. Snell's FBI interview occurred at approximately the time that he changed his plea, when his motivation to speak the truth should have been strong. Snell's statement to the FBI casts doubt over the Division's claim that Snell stipulated to a very different version of the facts at his change of plea hearing.

1. Six Deals Where the Weight of the Evidence Fails to Demonstrate that White Communicated with Issuers, Even Indirectly.

Philadelphia Gas Works Revenue Bonds: Third Series

In its prehearing brief, the Division identified three revenue bond transactions by the Philadelphia Gas Works (PGW). The first such transaction closed on June 28, 2001. See supra n.10. JPM was a co-senior manager and earned a fee of $73,828 (DX 18, Tab 2 at 77999). This transaction was completed more than three months before Snell and LeCroy had even met White. There is no proof that Respondents (or JPM) engaged White as a consultant for the purpose of obtaining or retaining a role in this transaction. The Division did not mention this transaction in its posthearing pleadings. I conclude that the Division has not sustained its burden of proof as to the June 28, 2001, PGW revenue bond transaction.

Water and Wastewater Revenue and Refunding Bonds

In its prehearing brief, the Division identified a $285 million Water and Wastewater Revenue and Refunding Bonds offering that closed on November 28, 2001, as a relevant transaction. The bonds were special or limited obligations of the City (RX 233 at 1). JPM served as co-senior manager and earned a fee of $209,953 (DX 18, Tab 2 at 77999). However, there is no proof that White communicated with the issuer about this matter. Respondents note that the Division barely mentions the transaction in its posthearing pleadings (Div. Prop. Find. ## 388-91; Resp. Br. at 31 n.25). I conclude that the Division has not sustained its burden of proof as to the November 28, 2001, Water and Wastewater Revenue and Refunding Bonds transaction.

Philadelphia School District General Obligation Bonds

The School District of Philadelphia (School District) issued $156 million in general obligation bonds on February 1, 2002 (RX 231). JPM was a co-manager on the transaction and White's law firm served as underwriters' co-counsel (DX 18, Tab 5 at 78069-70; RX 231 at 1, 3).

The School District is an agency of the Commonwealth and a legal entity that is distinct from the City of Philadelphia (RX 231 at 18-19). The City's power is limited with respect to the School District, and the City is specifically prohibited from assuming the debt of the School District (RX 231 at 19).

In ordinary times, the School District is governed by a nine-member Board of Education appointed by the Mayor of Philadelphia (RX 231 at 1). However, on December 21, 2001, the Secretary of Education of the Commonwealth declared the School District "distressed" (RX 231 at 13). During the period of distress, all the powers and duties of the Board of Education were suspended and the School District was governed by a five-member School Reform Commission (RX 231 at 1). The School Reform Commission exercised the power to incur debt (RX 231 at 11). I find as a fact that the School Reform Commission, acting on behalf of the School District, was the issuer of the general obligation bonds on February 1, 2002.

Neither Olanipekun nor Davis testified that White communicated with them about placing JPM on the School District transaction. During the time in question, Olanipekun refused to cooperate with White's efforts to become the de facto City Treasurer (Tr. 38). When Olanipekun was asked if she worked on a School District transaction toward the end of her tenure as Treasurer, she replied: "I don't recall. I don't believe so." (Tr. 33). When asked again, she gave the same answer: "I don't recall working on it" (Tr. 51).[32]

Davis was unable to add much detail. She testified (Tr. 129): "I'm trying to remember if we actually put this transaction together or not. And I'm not really certain. But since it was the City's money, we probably—the Treasurer's office had some involvement in it. I just don't remember how deeply." The Division never asked Davis whether White communicated with her to advance the interests of JPM on the School District transaction.[33]

Snell never asked White to communicate with City officials about the School Board transaction (Tr. 704). The Division relies heavily on a November 28, 2001, e-mail message from LeCroy to Hill (DX 45). In that message, LeCroy stated: "Just received a call from Ron [White]. We will be a co[-manager] in the Philly schools deal. Estimated $200-$300 MM." LeCroy's e-mail predates the Secretary of Education's declaration of distress by more than three weeks.

DX 45 is no "smoking gun." The e-mail reflects nothing more than White's communication with JPM, through Snell, to LeCroy (Tr. 371-72, 377). Although White presumably learned his information from somewhere, I decline to infer that he learned it because he had been communicating with the Board of Education or Davis or Olanipekun on JPM's behalf. The Division offered a great deal of evidence to establish how connected White was in the Philadelphia community. As a result, White likely would have had multiple sources of information about pending transactions. White's law firm was selected as underwriters' co-counsel on the School District transaction. It is equally likely that White received his information from the other members of the finance team or from the Board of Education once it had publicly announced its decision.[34]

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[32] Respondents then showed Olanipekun her testimony from the Kemp criminal trial. On that occasion, she testified that the City Treasurer's office did not have a role in putting White on the School District transaction (Tr. 53).

[33] Davis's testimony that "it was the City's money" conflicts with the preliminary Official Statement for the transaction. The School District received approximately 60% of its budgeted revenue from the Commonwealth and approximately 40% from local sources (RX 231 at 27). With respect to the latter sources, all School District local taxes were collected by the City's Department of Revenue (RX 231 at 26). However, even though the City held these funds overnight, they were at all times the property of the School District (RX 231 at 26). I credit the preliminary Official Statement over Davis's testimony.

[34] The record is silent as to whether the original decision about the composition of the finance team (presumably made by the Board of Education) was subject to de novo consideration by the School Reform Commission between December 21, 2001, and February 1, 2002.

Snell and LeCroy sent White a memorandum in October 2001 with a list of mandates that JPM was seeking from the City, but the School District transaction was not on the list (RX 10). I conclude that the Division has not sustained its burden of proving that White communicated with the Board of Education or the School Reform Commission or Davis or Olanipekun on behalf of JPM concerning the School District transaction.

Two Conduit Financings Arranged by the Hospitals & Higher Education Facilities Authority of Philadelphia

The Hospitals & Higher Education Facilities Authority of Philadelphia (HHEFA) constructs, finances, and operates hospitals, health-care facilities, and certain educational institutions (RX 237 at 6). HHEFA is governed by a Board consisting of five members, who are appointed by the Philadelphia City Council from nominations made by the Mayor of Philadelphia (RX 237 at 6). Payments of interest on HHEFA bonds come solely from revenues derived from the projects being financed (RX 237 at 7). HHEFA bonds are not debts of the City of Philadelphia (RX 237 at cover page, 22).

On July 31, 2002, HHEFA issued approximately $309 million in hospital revenue bonds on behalf of the Children's Hospital of Philadelphia and other obligated borrowers (RX 237). JPM served as the underwriter, trustee, and remarketing agent for the transaction (DX 18, Tab 5 at 78079; RX 237 at cover page, 50). On February 18, 2003, HHEFA issued another $52.5 million in hospital revenue bonds on behalf of the Children's Hospital of Philadelphia (RX 232). Once again, JPM served as the underwriter, trustee, and remarketing agent for the transaction (DX 18, Tab 5 at 78087).

HHEFA selected the lead underwriters for its own transactions and the City Treasurer "consistently honored" HHEFA's selection (Tr. 54-57). JPM used a separate unit within its public finance group to handle health-care financing (Tr. 107). LeCroy never worked on a health-care transaction for JPM (Tr. 478-79). Snell was JPM's primary coverage banker in Philadelphia for many issuers, but not for hospital financing (Tr. 107, 503). Snell never asked White to communicate with City officials about HHEFA bond transactions (Tr. 704-05).

Although the Division identified these two HHEFA transactions in its prehearing brief, it did not mention them in its posthearing pleadings. I conclude that the Division has failed to carry its burden of proving that White communicated with the issuer to obtain or retain a role for JPM in these two HHEFA bond transactions.

Abandoned Transaction by the Pennsylvania Convention Center Authority

OIP ¶ II.C.7 alleges that White advocated on behalf of JPM for inclusion in a "bond issue" involving the "Philadelphia" Convention Center, although the deal ultimately did not close. The OIP further identifies the proposed transaction as "City business." There is no Philadelphia Convention Center. There is a Pennsylvania Convention Center, which is managed

by PCCA. PCCA is a creature of the Commonwealth, not the City. Its transactions are not "City business."

The Division has shown that Snell asked White for information about PCCA, and that White provided it (Tr. 285-86; DX 49). However, it has not shown that White communicated with Davis on behalf of JPM (Tr. 130). On August 21, 2002, Snell wrote an e-mail message to his JPM colleagues, advising them that White had just informed him that JPM was going to get the PCCA mandate (DX 60). This does not warrant an inference that White obtained his information from the issuer or that White had been communicating with the issuer on behalf of JPM. At most, it demonstrates that Respondents used White to gather intelligence, not to engage in solicitation. To infer more would be speculative. In this respect, DX 60 is just like DX 45, LeCroy's e-mail concerning the Philadelphia School District transaction. See supra pp. 28-29.

JPM's proposal to PCCA had several iterations (Tr. 285). All the early versions of JPM's proposal consisted only of swaps or swaptions (Tr. 130, 285, 595, 598, 615-17; RX 67, RX 168).[35] By October 25, 2002, JPM's proposal had evolved to include the prospect that PCCA might eventually issue refunding bonds (Tr. 289, 601). Indeed, on that date, JPM engaged White to provide legal services in connection with the proposed refunding bonds (Tr. 289, 601). However, there is no evidence that JPM's proposal included a bond component two months earlier, when White communicated with Snell and Snell authored DX 60.

DX 60 will not support an inference that, as of August 21, 2002, JPM's proposal to PCCA involved municipal securities business subject to the jurisdiction of the MSRB. The Division scarcely mentions the abandoned PCCA transaction in its posthearing pleadings (Div. Prop. Find. ## 384-86; Div. Br. at 8). I conclude that the Division has failed to sustain its burden of proof on this transaction.[36]

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[35] Interest rate swaps are agreements to exchange fixed-rate and floating-rate interest obligations. Typically, each party agrees to make interest payments to the other calculated by reference to an agreed amount, the "notional amount." One party pays interest on the notional amount at a fixed rate; the other pays at a floating rate. When the agreement expires, the obligations are netted and the party owing the greater amount, if any, pays the excess. Swap agreements are used to manage interest rate risk or to speculate on interest rate movements. A swaption is an option to bring a swap agreement into effect (Tr. 20-21, 416-17). Caisse Nationale de Credit Agricole v. CBI Indus., Inc., 90 F.3d 1264, 1267 (7th Cir. 1996).

[36] The Division's posthearing pleadings improperly cite a PCCA-related document as substantive evidence when the document was used at the hearing only to refresh a witness's recollection (Div. Prop. Find. ## 58, 386; Resp. Br. at 4, 73-74). See infra p. 45.

2. Five Deals Where the Weight of the Evidence Demonstrates that White Communicated With Issuers.

Philadelphia Redevelopment Authority
Revenue Bonds

The Philadelphia Redevelopment Authority (PRA) works to eliminate blighted areas in the City of Philadelphia through urban renewal and slum clearance projects (RX 211 at 4). PRA is headed by a board of five members, who are appointed by the Mayor of Philadelphia (RX 211 at 4). PRA is an agency of the Commonwealth (RX 211 at 2). See 35 Pa. Stat. Ann. § 1709. Bonds issued by PRA are payable solely from revenues derived from the projects being financed (RX 211 at 4). PRA bonds are not obligations of the City of Philadelphia (RX 211 at 2, 5).

On May 9, 2002, PRA issued approximately $146 million in revenue bonds for a Neighborhood Transformation Initiative (DX 18; RX 211). JPM was a co-manager on the transaction, and earned fees of $69,629 (DX 18, Tab 2 at 77999, Tab 5 at 78071-72).[37] White's law firm was co-bond counsel and earned fees of $70,000 (DX 18, Tab 1 at 77976, Tab 5 at 78071-72).

The City Treasurer often assisted PRA in issuing debt by recommending a finance team (Tr. 25). However, there is no evidence that White communicated with Olanipekun or Davis about including JPM in the finance team for the May 2002 Neighborhood Transformation Initiative. Because Olanipekun had previously rebuffed White's overtures about becoming the de facto City Treasurer, it is unlikely that White communicated with her about the matter. There also is no evidence that White contacted acting Treasurer Faraldo about including JPM in the finance team for the PRA transaction after Olanipekun resigned in January 2002. There is no evidence that Kemp influenced Olanipekun's or Faraldo's recommendations about the composition of finance teams before April 2002.

Snell and LeCroy each testified that they never asked White to advocate for including JPM on the finance team for the Neighborhood Transformation Initiative (Tr. 471, 704). However, this evidence is not dispositive because LeCroy admitted that White communicated with the issuer.

On January 15, 2002, LeCroy sent an e-mail message to his supervisors, Hill and Smith (DX 71). LeCroy wrote: "Looks like Ron White may have us in as co-s[enio]r on the upcoming blight bond issue. Size estimated at 250MM. Details to follow." (DX 71). LeCroy obtained his information from Snell (Tr. 376, 392). I find as a fact that the "blight bond issue" discussed in LeCroy's January 15 e-mail is the same transaction as the Neighborhood Transformation Initiative described in RX 211.

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[37] The position of co-manager is a lesser position than that of co-senior manager (Tr. 19). Unlike the co-senior managers, a co-manager typically does not assist the senior manager or lead underwriter to structure the transaction. Rather, it merely places orders on behalf of its client base (Tr. 19).

Respondents argue that DX 71 is quite similar to DX 45, LeCroy's e-mail concerning the School District transaction. I reject this benign characterization of DX 71. DX 45 merely announced an outcome ("we will be a co[-manager]"). In contrast, DX 71 gave White credit for making the outcome a reality ("Ron White may have us in as a co-s[enio]r").[38]

Two-Part Philadelphia Gas Works
Revenue Bond Transaction

Between October 2001 and April 2002, JPM tried to persuade the Philadelphia Gas Works (PGW) to participate in a $175 million swap transaction (Tr. 532-33; RX 10, RX 11, RX 17, RX 28). During the same interval, JPM tried to persuade PGW to select it as the lead underwriter on upcoming bond transactions. Respondents told White that JPM was the only investment banking firm that had been willing to extend credit to PGW, and that JPM had testified on PGW's behalf in a rate proceeding (Tr. 294; RX 10). It was a sensitive matter for JPM's energy group that PGW had never reciprocated by selecting JPM to manage any of its bond offerings (Tr. 294; RX 10).

By April 2002, the prospects for JPM's swap proposal were bleak (Tr. 384; DX 74, DX 75; RX 41). However, PGW decided to issue some new debt, and it committed to giving JPM the role of lead underwriter (Tr. 452-53; DX 74, DX 75). Over the next two months, JPM attempted to revive its swap proposal (Tr. 387). As late as June 5, 2002, LeCroy encouraged White to communicate with Davis for that purpose (DX 76) ("[PGW] should still consider our swaption. That is the message that we are going to get Ron to take to Janice."). However, by June 14, 2002, JPM's swap proposal for PGW was dead (DX 58) ("Anthony . . . just left Janice. . . . PGW: staff does not want to do the swap and Janice doesn't want to force them.").

Respondents acknowledge that White worked with them on JPM's swap proposal (Tr. 379, 542, 550). However, they contend that White's communications with Davis were limited to the swap proposal and ended once Davis definitively ruled out the swap on June 14, 2002 (Resp. Prop. Find. ## 205-06; Resp. Br. 43-44). Respondents deny asking White to communicate with City officials about PGW bond transactions (Tr. 705).

The weight of the evidence does not support this claim. Respondents' October 12, 2001, memorandum to White complained that JPM had not been selected to manage any of PGW's

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[38] LeCroy recognized the inculpatory nature of his own e-mail and attempted to distance himself from DX 71 at the hearing. I find no record support for LeCroy's assertion that JPM was already aware of the information that White was transmitting (Tr. 376). I reject as incredible LeCroy's testimony that he does not know what a "blight bond" is (Tr. 392).

I admitted DX 71 against Snell over his objection (Tr. 377-78, 387-88). Thereafter, Snell's attorney elected not to question Snell about DX 71. Snell did not ask me to reconsider my bench ruling in his posthearing pleadings, despite having an opportunity to do so (Tr. 466-67, 640). Snell has waived any argument that DX 71 was improperly admitted against him.

bond transactions (RX 10). On April 14, 2002, following an early-morning meeting that Respondents had with White, LeCroy sent an e-mail message to JPM's swap desk staff (DX 75). LeCroy told them:

> PGW is apparently going to issue some new debt. According to Ron, they are not going to do the swap now. There is a good possibility that they will consider some type of synthetic with the new deal. Ron has a commitment that we will run that deal. I will get more information on what has changed their mind about the swaption.

LeCroy claimed that the grammatical antecedent of "that deal" was the proposed synthetic, and not the new debt (Tr. 379-80, 538; Resp. Br. at 40-42). This aspect of LeCroy's testimony was not persuasive. He erroneously placed his April 14 meeting with White after his April 14 meeting with Davis (Tr. 379-81). His explanation of the proposed synthetic was ambiguous. I interpret LeCroy's e-mail to mean that White had a commitment that JPM would run the new debt deal, i.e., the bond transaction.

Later on April 14, 2002, Respondents met with Davis. LeCroy then sent a late-night e-mail to the head of JPM's energy group, summarizing the day's events (DX 74): "We met with Janice and our consultant Ron White. Because they are not going to do the swap they committed to giving us the lead on the new money. This confirms what Barbara [Biskinner] has told you." Barbara Biskinner was employed by PGW's financial advisor (Tr. 537-42).

On June 20, 2002, LeCroy sent another e-mail to the head of JPM's energy group (Tr. 401-02; DX 59). The e-mail summarized a meeting Snell and LeCroy had with White the day before. Among other things, LeCroy and White discussed PGW at the June 19 meeting (DX 59) ("[White] received a call from Corey [Kemp] during our meeting. He told Corey he wanted to meet with him asap on these items.").

Several sources, including Davis, White, and PGW's financial advisor, assured JPM that it would be the lead underwriter on the proposed PGW bond transaction (Tr. 383, 452; DX 74). On August 21, 2002, Snell told LeCroy and other JPM colleagues: "I received a call from Ron White today . . . He. . . confirmed our mandate with PGW. The final touches are being made to the team" (Tr. 291; DX 60). However, when the transaction closed, JPM was not the lead underwriter.

The PGW bond transaction occurred in two parts (Tr. 293). PGW issued $125 million in revenue bonds on December 30, 2002, and another $186 million in revenue bonds on April 2, 2003 (DX 18). Goldman Sachs & Co. was the lead underwriter for both parts of the transaction, and its fees exceeded $1.2 million (DX 18, Tab 5 at 78081-82, 78090-91). JPM was co-senior manager for both parts of the transaction, and its fees were $152,359 (DX 18, Tab 2 at 77999). White's law firm was co-bond counsel on both parts of the transaction, and its fees were $62,500 for each part (a total of $125,000) (DX 18, Tab 1 at 77976).

When the head of JPM's energy group learned that JPM would not be the lead underwriter, he was upset (Tr. 294, 464-65). He accused Snell of "trading off" the lead

underwriter's position on the PGW revenue bond transaction for the prospect of a leading position on some future swap transaction (Tr. 453). Snell vehemently denied the accusation (Tr. 303-04). Hill directed LeCroy to investigate the matter, and LeCroy eventually concluded that there was no merit to the charge of "trading off" transactions (DX 62). As a part of his investigation, LeCroy spoke to several people, including Davis and White. White told LeCroy that "it was simply necessary to spread around the business" (DX 62).

Abandoned Workers' Compensation Transaction

The City was self-insured for workers' compensation matters (Tr. 153). Early in 2003, Davis began to explore how the City could liquidate its outstanding workers' compensation claims (Tr. 118-19, 207-08). Davis, Snell, and LeCroy agreed that it was a complex task and took quite some time merely to analyze the City's underlying workers' compensation liabilities (Tr. 118, 209-10, 304, 484). Only after the City had determined its liabilities did it turn to the question of how it might structure a transaction to cover them.

Four major investment banking firms offered proposals to address the City's workers' compensation claim problem, and each took a slightly different approach (Tr. 138, 174, 208-09). JPM recommended that the City obtain insurance, and pay the premiums by issuing bonds. JPM submitted its preliminary analyses to Davis on March 11 and April 23, 2003 (Tr. 656; RX 213), and a more detailed proposal on May 14, 2003 (Tr. 217; RX 144). A panel, which included Davis and Kemp, analyzed the different proposals with the help of the City's financial advisor. The panel ultimately decided to combine two of the proposals into one "hybrid" that would offer the greatest benefit for the City (Tr. 119, 174, 208, 218).

On July 15, 2003, Davis told Snell that she would recommend combining the best features of the presentations made by JPM and UBS/Paine Webber. She also informed Snell that JPM would "lead the deal" (Tr. 139, 306-08, 659; DX 66; RX 168). Snell anticipated that JPM would start to work on the matter in late September 2003 (DX 69).

The workers' compensation proposal was still on track during early October 2003 (DX 32; RX 198, RX 199, RX 199A). However, the transaction did not close. The City learned that it could not issue the bonds on a tax-exempt basis and it did not see value in issuing them on a taxable basis (Tr. 120, 208-09; DX 8 at 170-71).

Respondents never asked White to communicate with City officials about JPM's workers' compensation proposal (Tr. 486, 654, 705). Respondents introduced evidence of several intercepted telephone conversations. In brief, these intercepts demonstrate that White and Kemp had their own agenda for the workers' compensation transaction, and that their agenda differed significantly from what JPM and Davis had in mind.

On January 31, 2003, Kemp informed White that he would soon be meeting with Snell and LeCroy to discuss JPM's ideas for the workers' compensation transaction (RX 107 at 1-2). White then told Kemp to suggest—but not recommend—that JPM include Janney Montgomery Scott LLC (Janney) in its proposal (RX 107 at 3) ("[Y]ou could just say . . . if you pursuin' . . . this deal . . . it might be helpful . . . to hook up with . . . somebody . . . locally . . . 'Cause I know

Ron . . . has an interest in Janney . . . on this one.”).[39] Snell and White also discussed this matter (DX 8 at 168-70). Snell did as White desired. He met with Dennis Carlson (Carlson) of Janney and learned that Janney would indeed be interested in participating in JPM’s proposal (DX 8 at 168-69). Snell also told Kemp and White that JPM was willing to work with Janney (DX 8 at 170, DX 26 at 3-4).

On February 3, 2003, White gave Kemp more specific instructions (RX 110 at 1-2) (“Oh, now, on the workmen’s comp . . . try to find out if [Davis has] committed to anything on that . . . Because what I’d like to do is, I’d like to either pair Janney . . . with . . . [JPM] . . . or pair them with Paine Webber, you know, one of the big Wall Street firms.”).

On May 5, 2003, White reminded Kemp to keep the pressure on JPM (RX 144 at 1-2). Kemp told White that “Snell and those guys are coming in to present next on [May 14, 2003] . . . about this workers’ comp thing” (RX 144 at 1). White responded: “. . . I told them to do that with Janney . . . so you need to reinforce that for me” (RX 144 at 1). Kemp replied: “Okay” (RX 144 at 1). This conversation between White and Kemp occurred one month after the April 4, 2003, telephone call in which Snell informed White about the $50,000 payment.

By October 2003, however, White had changed his mind. On October 3, 2003, White spoke to Davis by telephone.[40] Among other things, they discussed the composition of the finance team for the workers’ compensation matter (DX 32 at 2-4):

White: I hear . . . you’re thinkin’ about moving the . . . workmen’s comp thing, right?
Davis: Right, we’re gonna move that. . . .
White: Well, this is what I wanted to do. When we first talked to [JPM] . . . about that . . . we told them to . . . do that . . . work with Janney . . . .
Davis: Ah. . . .
White: But this is what I’m thinking . . . I’ll take . . . Loop [Capital Markets LLC] and put them with [JPM].
Davis: Okay.

[39] Janney is a regional municipal securities firm with headquarters in Philadelphia and offices in the eastern United States. It is a subsidiary of Colonial Penn Life Insurance Company. Davis viewed Janney as having a “limited capacity,” and she stated, “We weren’t really impressed with them” (Tr. 143). White agreed with Davis’s assessment (RX 122 at 5) (“[W]e haven’t really been able to help [Janney] because . . . it doesn’t seem like they have . . . the strength or whatever it is that we’re lookin’ for”). The City had not transacted much investment banking business with Janney during the first two years of the Street administration (Tr. 143; DX 18, Tab 2 at 78001).

[40] Davis specifically remembered that White asked her to include JPM in the proposed workers’ compensation transaction (Tr. 118). However, she did not provide a date or a context for her discussion with White. I infer that Davis was referring to her October 3, 2003, telephone conversation with White (DX 32).

White: Instead of Janney. . . . So . . . that solves everything then, right?
Davis: Okay.
White: And . . . I'll just tell the Mayor that . . . we okay, then.
Davis: Okay, good deal.

Loop Capital Markets LLC (Loop) is a minority-owned underwriting firm from Chicago, Illinois (Tr. 142, 175). Its chief executive officer is James Reynolds (Reynolds) (Tr. 175). On October 7, 2003, White delivered the news to Reynolds (RX 199A at 1-2, RX 199 at 1-3) (emphasis added):

White: We took you off the water deal, right.
Reynolds: Okay.
White: And instead, what we're gonna do is, they're doin' this workman's compensation piece. . . . **[JPM] is basically presenting the deal.**
Reynolds: Okay.
White: Now, what we're telling [JPM] is that **they gotta do the deal with you.**
Reynolds: Okay.
White: **That it's gotta be a joint deal with you.** . . .Because this way, . . .I think you'll get a much bigger fee.
Reynolds: Oh, I will because . . . I'd get a share of the management fee plus we would split the designations.
White: Right, right, right . . .
Reynolds: Okay. Alright. . .
White: This is what I would do. First of all I would call Anthony Snell.
Reynolds: Alright.
White: Let him [know] that. . . you talked to me and Corey. You understand that you guys are going to be working together on this.
Reynolds: Okay.
White: So he can describe the deal to you plus you want a copy of his proposal.
Reynolds: Beautiful. I'll do that.
White: If—if you don't get the proposal from him, you call me back, I'll make sure you get it from the Treasurer's office.
Reynolds: Beautiful. Now Anthony Snell, is. . . he the [financial advisor]?
White: He's—no, he's [JPM].
Reynolds: Oh, beautiful. Okay.

The intercepted telephone conversations make it plain that JPM was "basically presenting the deal" and that White attempted to strong-arm JPM into "pairing up," first, with Janney, and then, with Loop ("they gotta do the deal with you").[41] The last recordings support an inference

[41] It was "not unheard of" that a consultant could represent two municipal securities firms in the same jurisdiction at the same time under former Rule G-38 (Tr. 241). However, it is unclear how an attorney could ethically function as a consultant for JPM at the same time and on the same transaction as he was acting as: (a) de facto City Treasurer; and (b) a consultant for JPM's competitors, Janney and Loop. Although the Division seeks cease-and-desist orders under the current version of MSRB Rule G-38, it does not explain how someone in White's position could

that Reynolds did not know anything about the workers' compensation matter before October 7, 2003. The FBI intercepts end shortly after October 7, 2003, the day that the Philadelphia Police Department discovered electronic listening devices in Mayor Street's office.

Philadelphia Municipal Authority
Lease Revenue Refunding Bonds

On December 16, 2003, PMA issued approximately $217 million in lease revenue refunding bonds (DX 18, Tab 5 at 78098-99; RX 233). PMA used the proceeds to refund bonds it had issued between 1991 and 1993 (RX 233 at cover page). JPM served as the lead underwriter for the transaction and received fees of $423,963 (Tr. 225-26; DX 18, Tab 5 at 78099). Commerce Capital Markets, Inc. (Commerce Capital Markets), acted as a co-senior manager and its fee was $71,528 (DX 18, Tab 2 at 77985).[42] White's law firm acted as underwriter's co-counsel and received a fee of $68,000 (DX 18, Tab 5 at 78098; RX 233 at cover page).

This was a complicated transaction with a tortured history. JPM had been working on a swap-based proposal to refund some outstanding PMA bonds even before Snell was assigned to cover Philadelphia (Tr. 525). Some of the underlying bonds were restricted from advance refunding and could not be currently refunded until August 2003 (RX 96, Executive Summary). Accordingly, the City decided to delay the transaction until the underlying bonds became callable (Tr. 122, 756-58; DX 58). Additional delay occurred because the transaction required approval from the Philadelphia City Council (Tr. 647-48). PMA counsel and the City's bond counsel had inadvertently omitted some required language from the authorizing legislation, and the matter had to be resubmitted to the City Council after it returned from its summer recess in mid-August 2003 (Tr. 647-48).

Snell submitted JPM's initial proposal for a breakeven swaption to Kemp on May 16, 2002, and he followed that with updated pricing information on June 3, 2002 (RX 54). LeCroy then advised his JPM colleagues that he wanted White to secure a verbal commitment from Davis on JPM's proposal (Tr. 414; DX 76). At the time, LeCroy believed that JPM did not have any competitors for the PMA transaction (DX 76).

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repeat White's conduct under today's regulatory scheme, i.e., how that person simultaneously could be an affiliate of JPM, an affiliate of Janney and Loop, and de facto City Treasurer without violating other MSRB Rules, such as Rule G-17.

[42] Commerce Capital Markets is the investment banking subsidiary of Commerce Bancorp, Inc., a bank with headquarters in Cherry Hill, New Jersey, and offices in several mid-Atlantic states. Commerce Bank/Pennsylvania, N.A., a depository institution, is also a subsidiary of Commerce Bancorp. Commerce Capital Markets and Commerce Bank/Pennsylvania both had offices at 2005 Market Street in Philadelphia (DX 25; RX 113; official notice). JPM knew that White had a long-term relationship with Commerce Capital Markets (Tr. 457-58, 487-88). White was also a member of the Board of Directors of Commerce Bank/Pennsylvania from June 2002 to October 2003 (DX 1 ¶¶ 1.a, 1.f).

In fact, Commerce Capital Markets, which lacked a capacity to do swap transactions, had already submitted its own bond-based proposal to PMA (Tr. 487-88, 556). On June 14, 2002, Davis informed Snell that JPM did have competition (DX 58). LeCroy advised his JPM colleagues of this fact and declared, "We are putting Ron [White] on this on Monday" (Tr. 408-10; DX 58). LeCroy also instructed Snell to provide an addendum to JPM's proposal (Tr. 409; DX 58). Snell submitted JPM's revised proposal to Kemp on June 18, 2002 (RX 62).

On June 19, 2002, LeCroy and Snell met with White to discuss the PMA proposal and other matters (Tr. 407-08; DX 59). LeCroy pushed White "pretty hard" to find out from City officials the current status of JPM's proposal (Tr. 404-05; DX 59). During the meeting, White received a telephone call from Kemp. In Snell's and LeCroy's presence, White told Kemp that they had to meet as soon as possible to discuss the PMA transaction (Tr. 407; DX 59). The record does not show what White said to Kemp in their subsequent meeting.

On July 24, 2002, Davis told Ross that PMA was JPM's deal (RX 67). However, on August 21, 2002, White provided conflicting information. He advised Snell that "the prevailing thought is to give the PMA trade to Commerce [Capital Markets]" because JPM already had mandates for the PCCA and PGW transactions (DX 60). White suggested to Respondents that JPM and Commerce Capital Markets work together on the PMA matter (DX 59).[43] LeCroy expressed his willingness to find a role for Commerce Capital Markets on the PMA transaction "if we have to," but he also advised White that White would have to "manage" Commerce Capital Markets' expectations (Tr. 406-07; DX 59).

Ultimately, JPM and Commerce Capital Markets agreed to share responsibility for the PMA transaction (DX 8 at 228-29, DX 59, DX 61). On October 18, 2002, the two firms submitted to Davis a joint proposal for a breakeven swaption (RX 86). On January 22, 2003, the two firms thanked Davis for selecting them to structure and execute the PMA transaction (DX 25). The two firms retained White's law firm to assist them in preparing the swaption documents (Tr. 577; RX 113). They also agreed to split White's fee of $150,000 (DX 63).

John B. Kelly (JB) is the managing director of Commerce Capital Markets (Tr. 195-96; DX 25; RX 113). Shortly after Snell and JB sent their "thank you" letter to Davis, JB expressed concerns to Kemp about JPM's swap. White and Kemp discussed the swap vs. bond issue on February 19, 2003. During the conversation, they spoke disparagingly of Snell and JPM (RX 118 at 11-14):

White:	. . . one of the things that JB said, he mentioned something about the [PMA] swap, right? And how [JPM] and them . . . the fees are so high because . . . a lot of times they don't watch out for the City's interests, right?
Kemp:	Um-hmm.

[43] The details of Commerce Capital Markets' proposal are not part of the record. JPM did not develop the idea of partnering with Commerce Capital Markets and ask White to make it happen. Rather, I infer that Commerce Capital Market's involvement with JPM was White's idea.

White:	. . . I'm not really interested in . . . how much money these guys make as much as I'm interested in . . . making sure that the City is getting the best deal . . .
Kemp:	Um-hmm.
White:	. . . Anthony Snell and them, they definitely coming in there for the money.
Kemp:	Yeah, definitely.
White:	And they don't really watch your back, that's something I done learned about them guys, man. You know what I mean?
Kemp:	Right.
White:	You know, they don't watch your back. They about getting fees and getting the most fees they can get . . . if there was a issue between whether to do a bond deal or a swap . . .
Kemp:	They gonna take swap.
White:	. . . they gonna take swap, even though . . . it may not be the best thing for you.
Kemp:	Well, JB did talk to me about this swap thing . . . it's probably gonna be more beneficial for . . . the City not to do the swap, to do the regular bond deal . . .
White:	Right. Right.
Kemp:	Right. . . . Because we gettin' so close to the call date.
White:	Right.
Kemp:	I had that discussion with JB last week . . . 'Cause the longer we wait, it doesn't make sense for us to do a swap.
White:	Right.

The next day, White telephoned Carlson of Janney. He told Carlson that the PMA swap "may turn into a bond deal" (RX 120 at 9). He promised Carlson that, if it did, "I'll probably get you as a co-senior [manager] or somethin' on that" (RX 120 at 9).

On February 26, 2003, Kemp advised White that the PMA transaction would be a bond deal, not a swap (Tr. 203-04; RX 125 at 3). He also informed White that Davis had instructed him to use Commerce Capital Markets and JPM and to add RBC Dain Rauscher as a co-senior manager (Tr. 203-04; RX 125 at 3).[44] White initially responded "[t]hat's fine," but soon realized that the switch from a swap transaction to a bond deal would "really wipe[] out" his projected $150,000 legal fee (RX 125 at 4). Kemp promised to ensure that White still received a substantial legal fee (RX 125 at 5).

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[44] This was consistent with Davis's policy (Tr. 202-03). Davis explained that, if a transaction came to her in one form and evolved into something else, she would stay with the team that she had identified initially. She had selected JPM and Commerce Capital Markets on or before January 22, 2003 (DX 25).

There is no evidence that White shared this information with Snell, LeCroy, or anyone else at JPM. Accordingly, JPM gamely pushed its swap proposal in March and early April 2003 (Tr. 632-33, 641-42, 645, 749, 768-70; RX 129, RX 130, RX 132, RX 226).

On April 11, 2003, Snell learned that the City's new financial advisor had recommended against the PMA swap and encouraged the City to pursue a bond deal (RX 136 at 2). Snell asked White to approach Kemp to reconsider the City's decision not to include the swap (DX 8 at 162; RX 136 at 2). Snell was hesitant during the conversation. He wanted the City to know that JPM appreciated being involved in the PMA transaction whether it was a bond deal or a swap (DX 8 at 164). White ultimately agreed to talk with Kemp, but he told Snell in clear terms that he would not push Kemp if Kemp thought the City would be better served by a bond deal (RX 136 at 2-3). There is no evidence that White followed through on his promise to speak with Kemp on behalf of JPM's swap.

On April 28, 2003, Kemp and White discussed the choice of investment banking firms for the minor roles in the PMA underwriting syndicate (RX 141 at 3-4) (emphasis added):

Kemp:	Alright. So then the PMA, **we** got [JPM], Commerce as co-senior and Dain Rauscher as co-senior . . .
White:	Right, now . . .
Kemp:	Then **you** got UBS [Paine Webber] . . . Because on the co-managers **you** got UBS. **You** wanted to put Paula Patrick . . .
White:	You mean Pat Poprik.
Kemp:	Pat Poprick, that's First American.
White:	Right.
Kemp:	And **you** wanted Loop on there?
White:	Right.
Kemp:	**You** wanted UBS, First American, and Loop.
White:	Yeah, I also, okay, Loop, um—also, I would like to have uh Janney. . . .
Kemp:	**You** wanted UBS, First American, Loop, and **you** want Janney.
White:	And Paine Webber. **Those are my four picks**.

This conversation occurred three weeks after Snell promised White the $50,000 payment and two months after Kemp told White that Davis had already decided that JPM would be staying on the PMA transaction.

On May 23, 2003, Snell offered to increase White's legal fees for the PMA transaction by $20,000 to make up for an expected $20,000 shortfall in JPM's 2003 charitable contribution to YLF (Tr. 316-17; DX 8 at 190, DX 31A at 2). White rebuffed Snell's suggestion and JPM never paid the additional $20,000 (DX 8 at 190, DX 31A at 2).

White twice told Kemp that JPM should split its management fee on the PMA transaction with Commerce Capital Markets (RX 141 at 3, RX 155 at 2-5).

On September 2, 2003, Kemp sent Davis his recommendations for the PMA underwriting syndicate (DX 23). The record is silent about developments in the transaction between

September 2 and December 16, 2003, the closing date. A preliminary official statement from early December 2003 discloses that the federal government was then investigating JPM and White's law firm, among others (RX 233 at 15-16). It also disclosed a possible investigation of the municipal underwriting business of Commerce Capital Markets (RX 233 at 16).

D. The Weight of the Evidence Shows that the Five Transactions as to Which White Communicated with Issuers Each Eventually Became "Municipal Securities Business" Subject to the Jurisdiction of the MSRB.

Non-securities-based swap agreements are not "securities" for purposes of the federal securities laws. See Section 2A of the Securities Act of 1933 and Section 3A of the Exchange Act, as added by Title III of the Commodity Futures Modernization Act of 2000 (CFMA), Pub. L. No. 106-554, 114 Stat. 2763 (2000). These statutory provisions also bar the Commission from asserting jurisdiction over any security-based swap agreements, except in situations involving fraud, manipulation, or insider trading.

The MSRB has no jurisdiction over derivatives in the municipal market. Its regulations apply only to municipal securities firms when those firms are engaging in municipal securities transactions. Swaps and swaptions are not "municipal securities business" within the jurisdiction of the MSRB. See former MSRB Rule G-38(a)(iv) and current MSRB Rule G-38(b)(v), incorporating by reference the definition of "municipal securities business" in MSRB Rule G-37(g)(vii)(A) and the definition of "primary offering" in MSRB Rule A-13(f).

Respondents acknowledge that JPM used White to obtain or retain various swap trades, but deny that White helped JPM to obtain or retain "municipal securities business." Snell and LeCroy do not contest that certain of these transactions ultimately closed as "bond deals," and therefore, "municipal securities business," but they insist that there should be no Rule G-38 liability if they consistently advocated for a swap and asked White to communicate with issuers to obtain swap agreements, but ended up with bond work despite their efforts and White's (Resp. Br. at 76-78).

The Division urges me to disregard this "swap defense" as a recent fabrication, which was conspicuously omitted from Snell's and LeCroy's Wells submissions (Div. Prop. Find. # 407; Div. Br. at 1). I reject this "recent fabrication" argument. In large measure, Respondents' Wells submissions responded to charges that the Division eventually decided not to bring, such as allegations of antifraud violations and MSRB Rule G-17 violations (DX 14, DX 15). Additionally, the Division did not identify all the relevant transactions until shortly before the administrative hearing. I agree with Respondents that the Division bears the burden of demonstrating that the MSRB and the Commission have subject matter jurisdiction over each of the relevant transactions. Cf. Barnes v. Levitt, 118 F.3d 404, 410 (5th Cir. 1997); Eagerton v. Valuations, Inc., 698 F.2d 1115, 1118 (11th Cir. 1983). In fact, the Commission would have to address the "swap vs. bond" issue on its own motion if Respondents had not done so. Cf. Citizens for the Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth., 917 F.2d 48, 53 (D.C. Cir. 1990), aff'd, 501 U.S. 252 (1991).

The Division also maintains that JPM's swap proposals "included" primary offerings of municipal bonds, and therefore were "municipal securities business" for that reason. It is unclear if the Division is asking the Commission to assert jurisdiction over such transactions in their entirety, or only over the bond aspect of these proposals. I agree with Respondents that, while an issuer might enter into a swap transaction or a swaption at the same time as it enters a bond offering, the contemporaneous nature of the two transactions does not make them a single financial instrument with a bond component. If a swap-based proposal merely contemplates that the issuer might offer refunding bonds at some point in the future, then the MSRB and the Commission would not exercise present jurisdiction over the transaction. Rather, they would assume jurisdiction only when and if the refunding bond offering becomes a reality. It is difficult to be more specific without reviewing the transactional documents, but the parties have not offered them as exhibits.

The PRA revenue bond transaction presents an easy case. LeCroy characterized it as a bond deal on January 15, 2002 (DX 71). It remained a bond deal until it closed on May 9, 2002 (DX 18, Tab 5 at 78071). The transaction was subject to MSRB jurisdiction at all times.

With respect to the two-part PGW revenue bond transaction, the record supports an inference that White communicated with Kemp about bonds, not just a swap proposal. The communication occurred on or after June 19, 2002 (DX 59). This was after PGW's staff and Davis had definitively ruled out JPM's swap proposal on June 14, 2002 (DX 58).[45] At that juncture, the proposed transaction became subject to MSRB jurisdiction.

JPM's workers' compensation proposal became a bond deal, and therefore, "municipal securities business" subject to the jurisdiction of the MSRB, no later than March 11, 2003. On that date, JPM prepared a preliminary analysis suggesting that the City finance various insurance alternatives (which JPM had been recommending) by selling bonds (RX 213 at JPMC 4002-04). The more detailed workers' compensation proposal that Snell forwarded to Davis on April 23, 2003, did the same thing (RX 213 at JPMC 4011-15). White discussed the workers' compensation transaction with Kemp on May 5, 2003, and with Davis on October 3, 2003 (DX 32, RX 144).

Finally, with respect to the PMA transaction, the record shows that Davis had ruled out JPM's swap proposal no later than February 26, 2003 (RX 125). JPM made several unsuccessful attempts to revive its swap proposal during March and early April 2003. White discussed the PMA transaction with Kemp on April 28 and May 23, 2003 (RX 141, RX 155). By then, the PMA transaction had firmly become a bond deal subject to MSRB jurisdiction.[46]

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[45] For that reason, it is unnecessary to consider whether JPM's rejected swap proposal was accompanied by a bond proposal (Div. Prop. Find. # 192; Div. Br. at 13 n.15; Resp. Br. at 76 n.59).

[46] For that reason, it is unnecessary to consider whether JPM's rejected swap proposals from May and June 2002 were accompanied by bond proposals (Div. Prop. Find. ## 315, 317-20, Div. Br. at 15-17, Div. Reply Br. at 8 n.12; Resp. Br. at 58-60).

E. The Weight of the Evidence Fails to Show that White Communicated about the Workers' Compensation and PMA Transactions "On Behalf Of" JPM.

LeCroy's e-mails leave little doubt that White advocated "on behalf of" JPM with respect to the PRA revenue bond transaction and the two-part PGW revenue bond transaction (DX 71 ("Looks like Ron White may have us in"), DX 75 ("Ron has a commitment that we will run that deal.")).

The evidence that White communicated "on behalf of" JPM is far weaker with respect to the workers' compensation and PMA transactions. In both instances, JPM became entangled in the City's policy of "pairing up" minority-owned underwriting firms (Loop) and regional underwriting firms (Janney and Commerce Capital Markets), on the one hand, with larger underwriting firms, on the other hand.

White and Davis Discuss "Pairing Up" JPM with
Minority-Owned and Regional Underwriters:
"We Make Them Share It."

On February 21, 2003, White spoke to Davis about the specifics of "pairing up" minority-owned and regional underwriting firms with larger underwriting firms (Tr. 141-45; RX 122 at 3-9) (emphasis added):

White:	. . . I just wanted to follow up with you to let you know that . . . when I was talkin' to the Mayor . . . what we wanted to try to do . . . with Janney.
Davis:	Um hmm.
White:	Because . . . we're a little uncomfortable with them kind of goin' at it by themselves.
Davis:	Right.
White:	But like, you know how we hooked up Commerce?
Davis:	Yeah.
White:	. . . tryin' to hook them up . . . gives us a chance . . . to take care of couple people at one time.
Davis:	Um hmm.
White:	. . . like on big deals where . . . let's say Paine Webber or [JPM] . . . take the leads, **we make them share it. Even though it's only one person really runnin' the books.**
Davis:	Um hmm.
White:	It's an opportunity for . . . the other people to get . . . kind of more involved monetarily, you know what I mean?
Davis:	Uh huh.
White:	**. . . and everybody . . . is happy because . . . if these guys are makin' say two million or . . . somethin' like that on these deals?**
Davis:	Yeah.
White:	**And they . . . gotta give up say . . . six or seven hundred . . . I don't see a lot of resistance from 'em, and they're kind of happy to do it.**

Davis:	Okay.
White:	You know? So . . . there's two people that . . . I'd like to . . . look at, one is Janney . . . So . . . we could hook them up with somebody. But . . . the other . . . person that . . . I really wanna try to help **this year** also is . . . Jim Reynolds.
Davis:	Okay. . . .
White:	Remember we said we was gonna try to get, let him lead a deal . . . But now . . . we could look at it . . . in two different ways. One is . . . to pair him up first.
Davis:	Um hmm. . . .
White:	So you know, we'll talk about it . . . so it's Loop . . . but Janney is a real priority right now.
Davis:	Okay.
White:	. . . I've already mentioned it to . . . Anthony [Snell] . . . and Ralph [Saggiamo of Paine Webber].
Davis:	Um hmm.
White:	. . . they were like a hundred percent . . . **whatever they can get . . . they fine with it.**
Davis:	Okay.
White:	. . . and it also gives us a chance to kind of deal with two people at one time. You know what I mean? Take care of two things at one time.
Davis:	**Okay, that works.**

White's reference to "this year" is unambiguous: 2003 was a mayoral election year in Philadelphia. I infer that the need for campaign contributions was at its peak.

White Communicated with Kemp and Davis
to Persuade JPM to "Pair Up" on the
Workers' Compensation Transaction

While it is "not unheard of" that a consultant might communicate with an issuer on behalf of more than one municipal securities firm in the same jurisdiction at the same time under former Rule G-38 (Tr. 241), this is not such a case. It is difficult to identify even one communication that White made "on behalf of" JPM with regard to the proposed workers' compensation transaction. In fact, White consistently worked to have JPM "pair up" with a regional underwriting firm and, later, with a minority-owned underwriting firm.

On January 31, 2003, White instructed Kemp to tell Snell that "Ron . . . has an interest in Janney . . . on this one" (RX 107 at 3). On February 3, 2003, White told Kemp he would like to pair Janney with either JPM or Paine Webber (RX 110 at 2). On April 4, 2003, White reiterated to Snell that he wanted JPM to put Janney on its workers' compensation proposal (DX 26 at 3-4). On May 5, 2003, White told Kemp to remind Snell that JPM should "pair up" with Janney (RX 144 at 1-2). On October 3, 2003, White told Davis that he had changed his mind. He was no longer interested in pairing Janney with JPM, but wanted instead to pair Loop with JPM (DX 32 at 2-4). Respondents' evidence was highly credible and, in fact, overwhelming.

For its part, the Division relies exclusively on Davis's testimony that she remembered White advocating for JPM on the workers' compensation transaction (Tr. 118). However, I have not given controlling weight to that testimony, because Davis did not provide a date or a context, and because Davis's testimony can be harmonized with Respondents' evidence. See supra n.40.

White Worked to Reduce JPM's Fees
on the PMA Transaction

It is likewise difficult to identify a single communication that White made "on behalf of" JPM with regard to the PMA transaction. In fact, White consistently worked to reduce JPM's fees on the PMA transaction. In August and September 2002, when JPM was still proposing a swap, White brokered a shotgun marriage between JPM and Commerce Capital Markets, a firm that lacked the capacity to handle swap transactions. White represented that JPM would be getting the lead on the PGW transaction, but that information turned out to be erroneous. On February 19, 2003, White spoke to Kemp in disparaging terms about how JPM's emphasis on swaps resulted in high costs for the City (RX 118 at 12). On February 20, 2003, when White learned that the PMA transaction might proceed as a bond issue rather than a swap transaction, White promised Janney a place in the underwriting syndicate (RX 120). On February 26, 2003, White learned from Kemp that Davis had rejected JPM's swap proposal (RX 125). However, he failed to share that information with JPM. On April 11, 2003, when Snell asked White to approach Kemp to reconsider JPM's swap proposal, White reluctantly agreed to do so, but not to "push" (RX 136 at 3). There is no evidence that White ever asked Kemp to reconsider. On April 28 and May 23, 2003, White told Kemp that JPM should split the management fee on the PMA transaction with Commerce Capital Markets (RX 141 at 3, RX 155 at 2-5).

For its part, the Division relies on two points. First, it urges me to invoke the doctrine of collateral estoppel to bar Snell and LeCroy from denying in this proceeding what they purportedly admitted during their change of plea hearings in the criminal case—namely, that White told Kemp to place JPM on the PMA transaction. I have previously discussed and rejected that argument. See supra pp. 22-26. Second, the Division asserts that White requested Davis to include JPM in the PMA transaction (Div. Prop. Find. # 314 (citing Tr. 122-23)).

Transcript pages 122-23 are not substantive evidence. See supra n.36. On these pages, the Division used the material from Davis's prior testimony to refresh Davis's recollection at the administrative hearing. However, after refreshing Davis's recollection, the Division never closed the loop by asking Davis the next necessary question: now that your recollection has been refreshed, do you recall White advocating for JPM on the PMA transaction? Instead, the Division only asked Davis whether she remembered the PMA transaction. She stated that she recalled it "just vaguely" (Tr. 122). I agree with Respondents that the refreshing document (here, the relevant passage from Davis's prior testimony) is not itself evidence in the administrative case, but only an aid to the giving of evidence in the administrative case. See Rush v. Ill. Cent. R.R. Co., 399 F.3d 705, 718 (6th Cir. 2005); Thompson v. United States, 342 F.2d 137, 140 (5th Cir. 1965); F.S. Johns & Co., 43 S.E.C. 124, 141-42 (1966), aff'd sub nom. Dlugash v. SEC, 373 F.2d 107 (2d Cir. 1967).

Analysis

Respondents' theory about the workers' compensation and PMA transactions is straightforward: when White was promoting the interests of Janney, Loop, and Commerce Capital Markets, JPM's competitors, he was necessarily working against JPM's financial interests (Resp. Prop. Find. ## 55, 65, 239, 251; Resp. Br. at 5, 17, 50). This is a provocative argument. It essentially urges the Commission to treat the City of Philadelphia's policy of "pairing up" municipal underwriters as a zero-sum game or a form of economic parasitism: a win-lose situation in which the smaller organism benefits only if the larger organism is harmed.[47]

I anticipated that the Division would address this issue during its rebuttal case or in its posthearing pleadings, by calling a witness from the City of Philadelphia who could explain the City's affirmative action program for municipal underwriters; or by developing LeCroy's testimony that municipal issuers "often" brought in local firms and that JPM was "glad" to work with them (Tr. 406); or by building a record based on White's comment to LeCroy in DX 62 ("it was simply necessary to spread around the business"). In the alternative, I expected the Division to argue that: (1) by entering the Philadelphia municipal market, JPM assumed the risk that this sort of outcome might happen to it from time to time; or (2) there is a symbiotic relationship between JPM and its fellow underwriting firms, and that, in underwriting syndicates, as in nature, not all symbiotic relationships are necessarily parasitic.[48] Instead, the Division elected to remain silent. As a result, the record is undeveloped on these and other possible counter-arguments. The weight of the evidence thus compels the conclusion that White did not advocate "on behalf of" JPM with respect to the workers' compensation or PMA transactions.

F. The Weight of the Evidence does not Show that White Undertook Any Communications "in exchange for, or with the understanding of receiving" Payment of $50,000 from Snell and LeCroy.

Under former Rule G-38, there must be an exchange for value or an understanding that such an exchange for value would occur in connection with a consultant's effort to obtain or retain municipal securities business (DX 79 at 11).

The contemporaneous evidence of what transpired between Respondents and White shows that they never reached an "understanding" that White would perform any services in exchange for the illicit $50,000 payment (DX 1 ¶¶ 104-05, DX 26). The matters admitted during the change of plea hearings and discussed during the April 4, 2003, telephone conversation between Snell and White establish three critical facts: (1) White was surprised to learn that the

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[47] JPM did not submit an amicus curiae brief endorsing Respondents' argument. See Rule 210(d) of the Commission's Rules of Practice.

[48] Mutualism is a type of symbiotic relationship between two species of organisms where both species benefit (e.g., Egyptian plover and Nile crocodile). It describes a win-win situation. Commensalism is a type of symbiotic relationship between two species of organisms where one species benefits and the other neither benefits nor is harmed (e.g., remora and shark).

$50,000 payment was coming; (2) Respondents demanded nothing in exchange; and (3) White offered nothing in exchange. No "understanding" was ever articulated and I conclude that none ever existed.

During the April 11, 2003, telephone conversation, Snell asked White to encourage Kemp to "take a second look" at the value in JPM's swap proposal for PMA. White asked: "So what do you want me to do? . . . So, I'm trying to figure out, Anthony, what it is that you're asking me to do" (RX 136 at 2). White would not have had to ask what Snell wanted from him if he and Respondents had already reached an "understanding" a week earlier that he was their Rule G-38 consultant. The futility of Snell's April 11 request can be measured by reference to the White-Kemp conversation of February 19, 2003, when both speakers disparaged JPM's emphasis on swaps (RX 118).

A review of White's conduct after April 4, 2003, shows no evidence that he engaged in any communications that assisted JPM with the two transactions then pending: workers' compensation and PMA.

Respondents analyze the issue by reference to contract law principles. The Division does not contend that contract law principles are irrelevant. Nor does it suggest an alternative. Because there was no "bargained-for exchange," there was no "understanding" within the meaning of former Rule G-38. See Restatement (Second) of Contracts § 71 (1981) ("(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promissee in exchange for that promise."). The illicit $50,000 payment was simply a transfer of funds without consideration—in other words, a gift from Snell and LeCroy to White.[49] Snell explained his thinking at the time of the fraudulent payment: "We'll try it. We'll reach out to [White] and see if that takes care of it" (Tr. 684). See Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr., 382 F.3d 1324, 1331 (Fed. Cir. 2004) (a gift is nothing more than the transfer of property without consideration); Liu v. T & H Machine, Inc., 191 F.3d 790, 797 (7th Cir. 1999) (a voluntary transfer of property to another made gratuitously and without consideration is a gift); Tcherepnin v. Franz, 457 F. Supp. 832, 837-38 (N.D. Ill. 1978) ("consideration constitutes an exchange for a promise or in reliance upon a promise").

Any communications that White may have had with issuers before he became aware of the illicit $50,000 payment cannot form the basis of a violation of former Rule G-38 by Snell or LeCroy. Under the Division's theory of the case, an understanding between Respondents and White did not arise until April 4, 2003, when White first learned that the $50,000 payment would

[49] Of course, it was a gift of JPM's money, without JPM's informed consent, which is why it was a criminal act. The superseding indictment charged White with extortion and attempted extortion where the grand jury believed that such charges were appropriate (DX 1 ¶¶ 129, 138, 143, 148, 165, and Counts 28 and 29). The superseding indictment did not charge White with extortion or attempted extortion for his dealings with Snell, LeCroy, and JPM, and I will not infer that it was such.

be coming. White had no expectation of receiving the $50,000 payment before April 4, 2003. Snell and LeCroy did not become "rogue brokers" until April 4, 2003.

The Division's theory that Respondents intended to compensate White for his past consulting services conflicts with the position of the United States Attorney in the underlying criminal case. The superseding indictment alleged that, prior to Snell's and LeCroy's scheme (which began in March 2003), JPM had decided not to enter into a consultant relationship with White and wished only to retain White's legal services for particular deals (DX 1 ¶ 108). Now, the Division argues that a surreptitious consultant relationship existed as early as December 2001. See supra n.21. Both propositions cannot be correct.

If there was a surreptitious, unwritten consultant arrangement before April 4, 2003, as the Division contends, then it must have been between JPM and White, not between Respondents and White. However, the OIP does not charge JPM with violating Rule G-38. For these reasons, Respondents cannot be held liable as violators of former Rule G-38 for any transactions that closed before April 4, 2003. This negates any potential liability arising out of the PRA revenue bond transaction (which closed on May 9, 2002) and the two-part PGW revenue bond transaction (which closed on December 30, 2002, and April 2, 2003).

The Division's theory that Respondents intended the illicit $50,000 payment to compensate White for his past consulting services also fails as a matter of contract law. See Currid v. Meeting House Rest., Inc., 869 A.2d 516, 521 (Pa. Super. Ct. 2005) (applying the common law maxim that "past consideration is no consideration"); Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. Sup. Ct. 1982) ("To be valid, . . . the purported consideration must not have been delivered before a promise is executed. . . ."); Roberts v. Browning, 610 F.2d 528, 533 (8th Cir. 1979) (citing the general principle of contract law that a contract must be supported by "present" rather than merely by "past" consideration); Murray v. Lichtman, 339 F.2d 749, 752 n.5 (D.C. Cir. 1964) ("past consideration is no consideration," citing 1 Williston Contracts § 142 (3d ed. 1957)); Plowman v. Indian Refining Co., 20 F. Supp. 1, 4-5 (E.D. Ill. 1937) ("Something which has been delivered before the promise is executed, and, therefore, made without reference to it, cannot properly be legal consideration . . . [A]ppreciation of past services . . . is not a sufficient consideration.").

G. The Weight of the Evidence Does Not Show that Snell and LeCroy Had a Personal Obligation to Comply with the Reporting and Disclosure Provisions of Former Rule G-38.

The Division contends that Snell and LeCroy assumed from JPM the responsibility for complying with former Rule G-38's reporting and disclosure requirements by virtue of their criminal conduct (Prehearing Conference of Oct. 31, 2006, at 17-19; Div. Prehear. Br. at 6-7; Div. Br. at 23, 26-27). Respondents urge me to hold that, if there was any reporting and disclosure obligation (which they deny), it would have rested with JPM (Respondents' Prehearing Brief at 4-5; Resp. Br. at 86-88).

The Division reasons that only Snell and LeCroy knew of the "consulting arrangement" whereby White received the illicit $50,000 payment. This theory commits the Division to the

proposition that Respondents' personal duty to file quarterly reports with MSRB and to make disclosure to issuers is limited to the period on and after April 4, 2003. I conclude that Snell and LeCroy did not have a personal duty to report and disclose before April 4, 2003, because they were not "rogue brokers" before that date. If any entity had a duty to report and disclose before that date, it must have been JPM's duty to do so.

I have previously determined that Respondents and White never reached any "understanding" with respect to the $50,000 payment. See supra pp. 46-48. Because there was no "consulting arrangement" between Respondents and White, even after April 4, 2003, I further conclude that Respondents never had a personal obligation to comply with the reporting and disclosure requirements of former Rule G-38. Assuming arguendo, that Snell, LeCroy, and White reached an agreement on or about April 4, 2003, there is no evidence that White communicated with issuers "on behalf of" JPM to obtain municipal securities business after that date. The only two transactions then pending were the workers' compensation proposal and the PMA proposal. The record does not show that White communicated with issuers to benefit JPM on these matters after April 4, 2003.

SUMMARY

Respondents' guilty pleas to felony wire fraud charges plainly require that they should be barred from associating with any broker, dealer, or municipal securities dealer.

With substantial assistance from the United States Attorney and the FBI, the Division has shown by the overwhelming weight of the evidence that all was not well with the issuance of municipal securities in Philadelphia, Pennsylvania, from 2001 through 2003. However, the Division has not shown that MSRB Rule G-38 is the right tool to address the problems it has identified. Because the record will not support any Rule G-38 liability by Snell or LeCroy, there is no basis for cease-and-desist orders or civil monetary penalties.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on March 7, 2007.

ORDER

Based on the findings and conclusions set forth above, and in my Order Granting Partial Summary Disposition to the Division of Enforcement, dated October 18, 2006:

IT IS ORDERED THAT, pursuant to Sections 15(b)(6)(A) and 15B(c)(4) of the Securities Exchange Act of 1934, Anthony C. Snell and Charles E. LeCroy are each barred from association with any broker, dealer, or municipal securities dealer;

IT IS FURTHER ORDERED THAT the charge that Anthony C. Snell and Charles E. LeCroy willfully violated Rule G-38 of the Municipal Securities Rulemaking Board is dismissed; and

IT IS FURTHER ORDERED THAT the charge that Anthony C. Snell and Charles E. LeCroy willfully violated Section 15B(c)(1) of the Securities Exchange Act of 1934 is dismissed.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. 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. 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 a 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 a motion to correct a manifest error of fact, or unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

James T. Kelly
Administrative Law Judge