UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

ROBERT O. CARR and KATHERINE M. HANRATTY,
Defendants.

No. 3:18-cv-1135 (SRU)

RULING AND ORDER

The Securities and Exchange Commission ("SEC") has filed a complaint alleging that Robert Carr ("Carr") and his romantic partner Katherine Hanratty ("Hanratty") engaged in insider trading of shares of Heartland Payment Systems ("Heartland") ahead of Heartland's December 15, 2015 announcement that it would be acquired by Global Payment, Inc. ("Global"). SEC's Compl. ¶ 1 (Doc. No. 1). On May 10, 2019, I approved Carr's partial settlement with the SEC and issued a permanent injunction enjoining Carr from violating section 10(b) of the Securities Exchange Act and ordered that he pay a civil penalty of $250,628. *See* Order (Doc. No. 45) at 1–5. The SEC now requests that I permanently bar Carr from serving as an officer and director of a public company. *See* SEC's Mot. for Perm. Officer and Director Bar (Doc. No. 49) at 1.

For the reasons that follow, the SEC's motion for a bar is **granted in part** and **denied in part**. The SEC's request for a permanent bar is **denied**. Based on the entire record, however, I conclude that a temporary bar of two years is warranted.

I. Standard of Review

Pursuant to Section 20(e) of the Securities Act, 15 U.S.C. § 77t(e), and Section 21(d)(2) of the Exchange Act, 15 U.S.C. § 78u(d)(2), "the Court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person" who has violated Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act from serving as an officer or director of a publicly held company "if the person's conduct demonstrates unfitness to serve . . . ." 15 U.S.C. § 78u(d)(2).[1] The Second Circuit has noted that the following factors are "useful" in determining whether a defendant "demonstrates substantial unfitness to serve as an officer or director" of a public company: "(1) the egregiousness of the underlying securities law violation; (2) the defendant's repeat offender status; (3) the defendant's role or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur." *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995) (internal quotation marks omitted); *see also SEC v. iShopNoMarkup.com, Inc*., 2012 WL 716928, at *3–6 (E.D.N.Y. Mar. 3, 2012). "[B]efore imposing a permanent bar, the court should consider whether a conditional bar (e.g., a bar limited to a particular industry) and/or a bar limited in time (e.g., a bar of five years) might be sufficient . . . . " *Patel*, 61 F.3d at 142. "[I]t is not essential for a lifetime ban that there be past violations." *Id.* However, "in the absence of such violations, [it is essential] that a district court articulate the factual basis for a finding of the likelihood of recurrence." *Id.*

Although the *Patel* factors "are useful in making the unfitness assessment," they "are the only factors that may be taken into account or even that it is necessary to apply all these factors

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[1] In the final judgment Carr neither admits nor denies that he violated Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act. *See* Judgment (Doc. No. 45) at 1. For the purposes of this motion, however, Carr is "precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint." *Id.* at 3.

in every case. A district court should be afforded substantial discretion in deciding whether to impose a bar to employment in a public company." *Id*. at 141.

II. Background

Unless otherwise indicated, the following facts are drawn from the factual summary section of the SEC's Complaint.[2] *See* SEC's Compl. ¶¶ 1–47.

Carr and Hanratty began a romantic relationship in 2011. They communicated frequently and Hanratty would often express concern to Carr about her financial insecurity. On October 15, 2015, the CEO of Global approached Carr, then the CEO of Hartland, to request a meeting to discuss Global's potential acquisition of Heartland. A few weeks later, on November 9, 2015, Carr and Global's CEO met in Atlanta to discuss the possibility of a merger. That morning, Hanratty emailed Carr stating: "Have a good meeting with Global!" Later that day, Carr emailed Hanratty stating that the meeting with the Global CEO was "good" and that Global's last offer price was $97.50 per share of Heartland stock, a premium to the then current trading price. Carr also stated that he believed the proposed acquisition of Heartland would close sometime in mid-December 2015. Hanratty relied in an email: "Wow quite an offer."

On November 10, 2015, Carr met with Heartland's Board of Directors to discuss the pricing and timing of the deal. That day, Hanratty emailed Carr hoping that the board meeting was "good." Carr responded via email that the meeting was "good" and Hanratty in turn responded via email that she was "[g]lad it went well." Carr agreed to meet with Global's CEO in Toronto on November 20, 2015 to continue the discussions.

[2] For the purposes of this motion, Carr has agreed to accept the allegations of the SEC's Complaint as true. *See* Def's Opp. (Doc. No. 52) at 22.

On November 15, 2015, Carr provided Hanratty with a $1 million check dated November 16, 2015 from his personal checking. Carr wrote "loan" in the memo section of the check. Two days later, on November 17, 2015, Hanratty emailed herself a to-do list that included "HPY," the stock ticker symbol for Heartland, and conducted internet searches on how to buy stock. That same day, Hanratty went to her local bank branch and deposited the $1 million check into her checking account. During that visit she asked the bank manager how to open a brokerage account. Later that day, Hanratty emailed Carr and stated that she had made arrangements to "purchase the HPY [Heartland] stock as soon as the out of state check clears." In her email she also informed Carr that "I am following your advice to the letter and keeping the amount you suggested in a saving [sic] account for now."[3]

On November 18, 2015, Hanratty wrote a $900,000 check to open a brokerage account with a local broker-dealer firm. In her opening paperwork, Hanratty stated that she did not own any securities prior to opening the account and that the source of her funds was a "gift." Hanratty also listed Carr as the beneficiary of the brokerage account upon her death and asked for his social security number to name him as a beneficiary. Hanratty told her broker that she felt obligated to purchase Heartland stock because she received the "gifted money" from the owner of the company. Hanratty purchased 8,500 shares of Heartland stock at $78.84 per share, and emailed Carr to inform him that she had become a Heartland shareholder. She also informed

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[3] The relevant portion of Hanratty's November 17, 2015 email to Carr reads:

> I went to the bank today and privately made the deposit (big gulp OMG) with the branch manager in her office. Arrangements are made to purchase the HPY stock as soon as the out of state check clears. I am following your advice to the letter and keeping the amount you suggested in a saving account for now. I have never felt so free from stress and worry (that stuff you don't believe in LOL) in my entire life. Saying thank you is not enough but I am not sure what else to say.

Doc. No. 27-7 at 1.

Carr that she had purchased the 8,500 shares and intended to obtain additional shares the next day.

Pursuant to her email, on November 19, 2015 Hanratty purchased an additional 2,500 shares at $78.88 per share. Finally, on November 23, 2015, she purchased an additional 393 shares for $79.49 per share. In total, between November 18, 2015 and November 23, 2015, Hanratty purchased 11,393 shares of Heartland stock for $899,852 for an average cost of $78.98 per share.

While Hanratty was acquiring Heartland stock, Carr continued to finalize the acquisition with Global. On November 19, 2015, Heartland and Global entered into a mutual confidentiality agreement to keep information confidential during Global's due diligence investigation. Two days later, on November 21, 2015, while on a trip for his 70th birthday, Carr announced to his children and their spouses that Global offered to buy Heartland and that he would not sell Heartland unless the offer had a "1" in the price, implying that he wanted at least $100 per share.

On November 23, 2015, Hanratty emailed Carr to express her gratitude and stated, "for the first time ever I feel a sense of relief knowing that I have some security." Referring to her brokerage account, Hanratty informed Carr that "I have done exactly what you recommended I do with it and made you the beneficiary of the account." Carr replied that he was glad that she was not as stressed anymore.

By December 10, 2015 multiple news outlets began reporting that Heartland and Global were negotiating a merger, causing Heartland's stock price to increase by $6.95 per share to close at $84.79 per share. Between December 12, 2015 and December 14, 2015, Hanratty repeatedly emailed Carr about his "crazy busy" preparations at Heartland. On December 13, Carr emailed Hanratty his draft quote to be used for the press release of the pending acquisition.

Just minutes later, she replied, "love it" and provided a suggestion for the draft quote. On December 15, 2015, Heartland and Global formally announced that Global would acquire Heartland in a cash-and-stock merger for $100 a share. After the public announcement, Heartland's stock price increased by $9.87 per share to a price of $94.97 per share.

Hanratty retained her Heartland stock until January 28, 2016, when she emailed her broker that she was planning to sell her stock after Carr decided to resign from Heartland. On April 11, 2016, Hanratty emailed Carr asking for his guidance on when she should sell the Heartland stock. The next day, Carr emailed Hanratty that he saw "no reason at all" why she should not sell that day as the stock price had risen to $101.37 per share. Hanratty then emailed Carr that she would sell her remaining Heartland stock. Accordingly, on April 12, 2016, Hanratty sold her 11,393 shares of Heartland at $101.066 per share, for a total profit of $250,628 compared to the initial prices at which she purchased the stock in November 2015.

The SEC filed its Complaint against Carr and Hanratty on July 10, 2018, alleging that the defendants engaged in insider trading in violation of Section 10(b) and Rule 10b–5 of the Securities and Exchanges Act. *See* SEC's Compl. ¶¶ 48–54. Hanratty settled her claim with the SEC on October 4, 2018 on a neither "admit[] [n]or den[y]" basis, where Hanratty agreed to disgorge $250,628 of her trading profits, pay a one-time civil penalty of $250,628, and pay prejudgment interest of $27,351.82. *See* Order (Doc. No 23) at 1–5.

On October 10, 2018, Carr moved to dismiss the Complaint arguing that the SEC failed to state a valid Section 10(b) claim because the Complaint lacked particularity concerning Carr's requisite scienter "at the moment of tipping." Def's Mem. in Supp. Mot. to Dismiss (Doc. No. 27-1) at 10. I denied Carr's motion on February 26, 2019, concluding that the SEC's Complaint

alleged with particularity that Carr acted with the requisite scienter at the time of the tip.[4] *See* Order (Doc. No. 36) at 1. Subsequently, on June 14, 2019, the SEC filed its motion for a permanent officer and director bar. *See* Doc. No. 49.

III. Discussion

To determine whether Carr is unfit to serve as an officer or director of a public company, I begin with the factors outlined by the Second Circuit in *Patel. See* 61 F.3d. at 141.

A. Egregiousness of the Underlying Violation

Under the first *Patel* factor, the SEC argues that Carr's conduct was egregious because he violated federal securities laws while serving as Heartland's CEO. *See* Mem. in Supp. Mot. for Perm. Officer and Director Bar ("SEC's Mot.") (Doc. No. 50) at 14. Specifically, the SEC contends that the "egregiousness" factor is met because of the totality of the circumstances surrounding Carr's insider trading. Carr "not only provided his girlfriend with material nonpublic information regarding that merger, but also the financial means with which to purchase stock in Heartland. After Hanratty purchased stock at his direction and made him the beneficiary of the trading account, Carr congratulated her."[5] SEC's Reply (Doc. No. 57) at 3.

In its motion, the SEC relies primarily on *SEC v. Bankosky*, 2012 WL 1849000, at *1 (S.D.N.Y. May 21, 2012), *aff'd*, 716 F.3d 45 (2013). In that case, the court considered insider trading "a flagrant, deliberate, and serious violation of the federal securities laws" and ordered a

[4] Specifically, I noted that "a strong inference arises that [Carr] had the requisite scienter at the time of the tip. The details that have been discussed about following your advice and providing social security number, and so forth, I think are just frosting on the cake . . . . I mean, frankly, it's a strong case of scienter." Mot. Hr'g Tr. (Doc. No. 43) at 8, 11.

[5] Carr argues in his Sur-Reply (doc. no. 61) that the SEC waived additional arguments regarding the *Patel* factors that were not initially raised in its underlying motion. The SEC's Reply, however, responds directly to Carr's assertions presented in his Opposition. *See, e.g.,* Def's Opp. at 12 ("Here, analysis of the foregoing [*Patel*] factors counsels strongly against the imposition of the permanent officer and director bar that the SEC's Motion requests.").

ten-year officer and director bar for a former business director of a pharmaceutical company who trading off inside information to make $63,000 in profits. *Id*. at *2. The SEC argues that Carr engaged in analogous conduct. "Carr committed insider trading by providing Hanratty with material nonpublic information and then providing her with a $1 million check. Within days at his direction, she purchased almost a million dollars of stock in his company and made him the beneficiary of the account." SEC's Mot. at 14.

In response, Carr argues that his conduct "pales in comparison when measured against other cases in which courts have imposed permanent or lengthy officer and director bars." Def's Opp. at 12. First, Carr notes that single insider trading violation is not a *per se* egregious offense. *See, e.g.*, *SEC v. Jacobs*, 2014 WL 12768507, at * 2–3 (N.D. Ohio Dec. 3, 2014) ("[I]nsider trading is an undeniably serious violation of securities laws . . . . However, the court finds that Defendants' violations fall short of being an egregious violation . . . . Here, Defendants committed one, isolated violation . . . . Thus, on balance, the Defendants' violation lacks the sort of aggravating factors that support a finding of egregiousness.").

Second, Carr distinguishes his conduct from the defendant's conduct in *Bankosky*. In that case the defendant's insider trading "continued for a period of two years and involved four different companies and at least thirteen different trades." *Bankosky*, 2012 WL 1849000, at *2. "[*Bankosky*] involved a pattern of insider trading that gave rise to a 10-year bar (less than the SEC's ask here)." Def's Opp. at 16. Despite that conduct, Carr notes that the court only imposed a 10-year officer and director bar, stating that the defendant's conduct "lacks certain other aspects that courts usually rely on when finding securities law violations to be egregious." *Bankosky*, 2012 WL 1849000, at *2. In this case, Carr argues that the SEC's Complaint

"concern[s] a single disclosure to a close romantic partner and a single trade from which [he] received no economic benefit." Def's Opp. at 12.

Here, the "egregiousness" factor weighs in favor of a bar. Although a single instance of insider trading is not a *per se* egregious violation, Carr obtained the insider information he disclosed to Hanratty through his position as the CEO of a publicly traded company. Unlike the defendants in *Jacobs*, who did not have "a fiduciary relationship to the company at issue," *Jacobs*, 2014 WL 12768507, at * 3, Carr breached his fiduciary duty to Heartland (his own company) by providing Hanratty information about Heartland's merger with Global. As noted by the SEC, Carr's relevant conduct includes not only his email to Hanratty informing her of the ensuing merger, but also his supply of funds to purchase her stock and his ongoing advice to Hanratty as she retained her Heartland stock. Therefore, the "egregiousness" factor weighs in favor of a bar.

B. Repeat Offender Status

The second factor listed in *Patel* is "the defendant's repeat offender status." 61 F.3d at 141 (internal quotations omitted). Here, the SEC does not allege that Carr is a repeat offender regarding insider trading. Instead it argues that Carr's lack of sound judgment has repeatedly led him into trouble with law enforcement.[6] *See* SEC's Reply at 11. Because there is no evidence that Carr is a repeat insider trading offender, the second factor weighs against a bar.

C. Carr's Role when he Engaged in Fraud

As noted above, the SEC contends that Carr used his position as the CEO and Chairman of Heartland to unjustly enrich himself at the expense of other Heartland shareholders. *Id.* at 6.

[6] I address those arguments in the "Likelihood of Future Misconduct" section below. *See infra* Section III F.

"Carr used his position as the CEO – a statutory officer whose role also required candor – of a public company to tip his girlfriend as to a merger that he was personally negotiating so that she can trade on the information using money he had given her." *Id.* at 3.

In response, Carr argues that he did not seek to leverage his position as the CEO for his own personal benefit. *See* Def's Opp. at 17. "At the time of the trades . . . [Carr] held approximately 300,000 shares of Heartland stock. If the merger discussions ripened, [he] stood to benefit without needing to resort to any improper trading." *Id.* Therefore, Carr contends that he never engaged in any purposeful conduct in order to use his position of power to unjustly enrich himself. *Id.*

Here, Carr's role as the CEO of Heartland weighs in favor of a bar. Although Carr may not have intended to harm other shareholders, his actions as CEO indicate a serious lack of sound judgment. As the CEO of Heartland, he had a fiduciary duty not to misuse inside information for personal gain to himself and others. Through his actions, Carr breached his fiduciary duty of confidentiality owed to Heartland's shareholders. *See* SEC's Compl. ¶ 46. ("By providing Hanratty the material, nonpublic information about the potential acquisition of Heartland and the funding to trade Heartland's stock, Carr violated [Heartland's] Code [of Ethics], which 'strictly' prohibited giving 'tips to others which allow them to trade securities and property using . . . insider information.'"). Therefore, I conclude that the third *Patel* factor weighs in favor of a bar.

D. <u>Degree of Scienter</u>

Next, the SEC argues that Carr acted with a high degree of scienter. The SEC argues that Carr kept Hanratty updated about the status of the merger and provided her with advice on how to maintain and sell her Heartland stock. "Carr did not merely accidently provide his girlfriend

with material nonpublic information, he repeatedly advised her to purchase securities of Heartland." SEC's Reply at 5.

Carr contends that although his conduct was "reckless," he did not engage in intentional misconduct. Def's Opp. at 17. He compares his conduct to a commuter rail passenger who discusses confidential information "knowingly within earshot of a passenger who is the commuter's friend and whom he also knows to be a day trader."[7] *SEC v. Obus*, 693 F.3d 276, 287 (2d Cir. 2012). "Carr's conduct falls at the lower, recklessness end of the scienter spectrum. Much like *Obus*'s commuter who discussed confidential information in front of his friend (a known day trader), [Carr] talked about nonpublic information with his girlfriend." Def's Opp. at 18.

In addition, Carr asserts that he lacked a high degree of scienter because Attorney Charles Kallenbach, the former General Counsel of Heartland, testified in a related civil action in New Jersey that he advised Carr that it was permissible to trade Heartland stock prior to the merger between Heartland and Global. *See* Def's Supp. Opp. (Doc. No. 69) at 2–3.

> Q: Is it fair to say you didn't have concerns about this transaction occurring on November 18 of 2015? . . .
>
> A: I thought it was appropriate to do at this time.
>
> Q: On November 18, 2015?
>
> A: November 18.
>
> Q: And you thought it was appropriate to do at this time on November 18, 2015, because at this point in time [Carr] did not have material nonpublic information with respect to a possible transaction between Global and Heartland? . . .

[7] In *Obus*, the Second Circuit opined that the distinction between mere negligence and recklessness regarding the disclosure of confidential information is not a bright line rule. *See* 693 F.3d. at 287. For example, a commuter who speaks too loudly on the phone and discloses confidential information to an eavesdropper walking by may only have committed negligent conduct. A commuter who loudly discusses confidential information knowing that a trader is nearby, however, may be guilty of more reckless conduct. *Id.*

> A: Yes, we had no written, nothing in writing that committed to any transaction or price.

Id. at. 2 (quoting Kallenbach Testimony Tr. 181:24–182:22, *Heartland Payment Systems, LLC v. Robert O. Carr*, *et al.*, No. 18-cv-09764).[8] Relying on Attorney Kallenbach's testimony, Carr asserts that "recklessness" is the highest level of scienter that the SEC can prove. *Id*. at 4.

That argument, however, does not address his conduct with Hanratty. He not only supplied her with the funds necessary to purchase the Heartland stock; he specifically advised her on how to purchase, maintain, and ultimately sell her stock.[9] He also contacted her during the Financial Industry Regulatory Authority's ("FINRA") investigation of Heartland stock purchases leading up to the merger.[10] In addition, Carr's conduct is a more culpable than the hypothetical "reckless" commuter in *Obus*. *See* 693 F.3d. at 287. Carr not only disclosed confidential information to a potential stock purchaser, he supplied that purchaser with funds and advice on how to acquire the stock.

Carr argues that because he owned approximately 300,000 shares of Heartland stock, he would not need to *sell* any shares of Heartland stock to benefit from Heartland's merger with Global. *See* Def's Opp. at 17 ("If the merger discussions ripened, [Carr] stood to benefit without needing to resort to any improper trading . . . . Again, [Carr] *sold* several thousand shares of Heartland stock to gift the money to [Hanratty] that was ultimately used to purchase her

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[8] It should be noted that Attorney Kallenbach's advice to Carr is not consistent with the materiality definition adopted by the Second Circuit. *See S.E.C. v. Mayhew,* 121 F.3d 44, 51,52 (2d Cir. 1997) (internal citations and quotations omitted) ("Information is material if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to invest . . . . [W]here information regarding a merger originates from an insider, the information, even if not detailed, takes on an added charge just because it is inside information. And a major factor in determining whether information was material is the importance attached to it by those who knew about it."). Here, Carr obtained material nonpublic information about the ensuing merger with Global even though the terms of the merger where not yet set forth in writing.

[9] Although Carr relies on his decisions with Attorney Kallenbach, it is unclear whether Carr ever disclosed to Attorney Kallenbach that his romantic partner was contemplating purchasing Heartland stock before Heartland's merger with Global. *See infra* Section III F; *see also* Kallenbach Testimony Tr. 46:3–47:9, Doc. No. 69-2 at 48–49.

[10] "We need to chat tonight – about FINRA. FINRA is researching stock purchases prior to Dec 15th. When is a good time to call you – it needs to be after 8pm." 4/20/16 Email from Carr to Hanratty (Doc. No. 51-19) at 1.

shares.”). What is important to note, however, is that Carr sold a portion of his Heartland shares to Hanratty before the merger to provide her with the $1 million needed to complete her acquisition of Heartland stock. *See id.* at 8. He then “provided Hanratty a check for $1 million and instructed her to use that money to open a brokerage account and purchase $900,000 worth of Heartland stock.” SEC’s Compl. ¶ 2. Presumably, had Carr not sold a portion of his Heartland stock, Hanratty would not have had the funds necessary to make her initial trade. Therefore, contrary to Carr’s assertions, he engaged in “purposeful conduct designed to use his position of power to unjustly enrich” Hanratty at the expense of other shareholders. Def’s Opp. at 17. Based on the facts alleged by the SEC, the scienter factor weighs in favor of a bar.

E. Economic Stake in the Violation

Regarding the “economic stake” factor, the SEC argues that Carr was personally benefitted by the trade because; (1) he was named the beneficiary of Hanratty’s brokerage account, (2) his initial gift to Hanratty grew by $250,000, and (3) most of Hanratty’s $250,000 profit was reinvested into Carr’s new company, Beyond. *See* SEC’s Reply at 6–7.

In response, Carr asserts that he received no direct profits from his conduct. *See* Def’s Opp. at 20–21.

> The SEC insinuates that [Carr] possessed a beneficial interest in the proceeds of [Hanratty’s] trades because she initially listed him as a beneficiary of her brokerage account. However, as the SEC’s own documents demonstrate, all parties understood this to be a temporary designation motivated by [Hanratty’s] family situation. *See* Bernstein Decl. Ex. 10 (11/18/2015 Hanratty Email to Carr) (“I am making you the beneficiary of this account *for now* because I don’t have anyone else. I plan on making a new will but for now I am afraid if something happened to me . . . the money . . . would be gone and there would be nothing for my nieces and nephews . . . .”

Id. at 13–14 n.16. (internal citation omitted).

Based on the allegations in the Complaint, the “economic stake” factor weighs in favor of a bar. Although Carr may not have directly benefited from his insider trading, he clearly enabled

his romantic partner to make over $250,000 in profits. Moreover, he effectively converted his initial $1 million out of pocket "gift" to Hanratty into $1.25 million. The SEC also alleges that some of those proceeds went into his new business venture, Beyond. To the extent Carr argues that Hanratty insisted that he be the beneficiary of her newly created brokerage account, that claim is contrary to other evidence presented in the record. *See, e.g.,* SEC's Compl. ¶ 31 ("I have done exactly what *you recommended* I do with [the brokerage account] and made *you the beneficiary* of the account.") (emphasis added). Thus, the fifth *Patel* factor weighs in favor of a bar.

F. Likelihood of Future Misconduct

Under the final *Patel* factor, the SEC contends that if a bar is not imposed there is a risk that Carr will engage in future misconduct. *See* SEC's Reply at 7. For that proposition, the SEC relies on Carr's lack of candor and sound judgment. "Carr has demonstrated his lack of candor and ethics in his communications with FINRA, his general counsel while at Heartland, and in the way he started his next company. Moreover, although this is the first insider trading case against Carr, it is not the first case concerning securities fraud." *Id.*

Specifically, the SEC notes that Carr was dishonest when FINRA asked if he had any conversations with Hanratty regarding her purchase of Heartland stock. *See* Ex. 20 to SEC's Mot. (Doc. No. 51-20) at 3. In a letter from Heartland's counsel to FINRA, counsel noted that Carr reported that he "did not discuss the HYP/GPN transaction with [Hanratty] prior to the December 15th Announcement and [did] not know if [Hanratty] had knowledge or awareness of the discussion between HYP and GPN, and, if so, how such knowledge or awareness was obtained." *Id.* In addition, when Carr asked Attorney Kallenbach if he could sell a portion of his Heartland stock prior to the company's merger with Global, Carr told him that he planned to

"sell enough shares personally to pay down the loans to my kids." Ex. 2 to SEC's Reply (Doc. No. 57-3) at 1. "[Carr] conveniently omitted in this disclosure that he used a third of the transaction to provide Hanratty with $1 million." SEC's Reply at 8.

The SEC also argues that Carr's litigation history suggests that he may engage in future misconduct. For example, the SEC notes that Carr is currently being sued by Heartland for breach of a non-competition clause in connection with his current company Beyond. *Id.* Additionally, in September 2018, Carr settled a second SEC action concerning Heartland's accounting practices from 2013 through 2015. *Id.* at 9. The SEC ordered Carr to cease and desist from any violations of Sections 17(a)(2) and to pay a civil monetary penalty of $120,000. *Id.*

Lastly, the SEC notes that Carr lacks any true remorse for his alleged conduct. In multiple emails with friends, Carr has referred to the two SEC cases pending against him as "bull shit." *See id.* at 11. "[W]riting this email around the same time he was settling the case is another showing of poor judgment. It is this kind of poor judgement that got Carr in trouble repeatedly with law enforcement agencies in the past." *Id.*

In opposition, Carr argues that "[t]he SEC's sole support for a risk of recidivism here is the fact that [Carr] has the opportunity to serve as an officer or director of a public company . . . . This opportunity alone does not introduce a risk of recidivism." Def's Opp. at 21. He further states that he "profoundly regrets that his actions (and failures to act) alleged in the SEC's Complaint fell short of those standards, and he has recommitted himself to those standards moving forward." *Id*. at 22.

Carr's untruthfulness with FINRA, Heartland's lawyers, and Attorney Kallenbach all indicate that he may engage in future misconduct.[11] Although he expresses remorse in his opposition and accompanying declaration (doc. no. 52-12), those assertions are directly contradicted by his private emails discussing his two pending SEC cases. Based on the evidence, the risk of recidivism factor weighs in favor of a bar.

G. Additional Factors

1. *Age*

Carr argues that because of his relatively advanced age of 74, "[a]n officer and director bar—even of a short duration—would effectively operate as a *de facto* permanent bar. Under these circumstances, an officer and director bar is unwarranted and unnecessary." Def's Opp. at 25. Carr cites *SEC v. Wallace*, 2017 WL 8230026, at *2 (C.D. Cal. May 8, 2017), where the court noted that the defendant's "past misconduct and his relative youth (age 35)" was relevant in implementing a permanent injunction against the defendant. *Id.* at *7. In contrast to *Wallace*, Carr notes that he is nearly 74 years-old and is nearing the end of his career. Def's Opp. at 25.

The SEC argues that Carr's age is not relevant to the analysis, "especially when [Carr] is simultaneously arguing that his continued involvement is integral to the success of [his current] company." SEC's Reply at 12.

I conclude that Carr's age does not weigh in favor or against a bar. Although he represents that he is "towards the end of his career," Carr's dishonesty has been exhibited throughout this case. Def's Opp. at 25; SEC's Reply at 11.

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[11] As noted above, Carr's actions with FINRA, Heartland, and Attorney Kallenbach also indicated that he acted with a high degree of scienter. *See supra*, Section III D.

2. *Collateral Consequences*

Carr also contends that an officer and director bar would have a detrimental effect on his charity, Give Back, which provides college scholarships and mentoring to low-income students. *See* Def's Opp. at 26. Carr states that Give Back is the beneficiary of his entire estate, which includes his majority ownership of Beyond. *Id.* "Were an officer and director bar imposed, the potential collateral impacts on Beyond would lessen the positive impact the foundation can have. Beyond is a closely held company and is deeply reliant on [Carr's] ability to secure financing and generate revenue." *Id.*

In response, the SEC argues that "Carr has left entirely unexplained the 'collateral consequence' of an officer and director bar as long as Beyond remains private." SEC's Reply at 12. I agree. It is unclear how an officer and officer bar will affect Carr's ability to finance or maintain Beyond, so long as Beyond is a private company. Even if he is barred from serving as an officer or director of a public company, Carr has not given any indication that Beyond may go public.

3. *Other Penalties*

Lastly, Carr notes that courts have considered other penalties besides an officer and director bar to deter future misconduct. *See* Def's Opp. at 26–27. Carr mainly relies on *SEC v. Stanard*, 2009 WL 196023, at *33. (S.D.N.Y. Jan. 27, 2009), where the court declined to impose a bar noting that "the injunctive relief already granted will provide a significant deterrent, greatly reducing the likelihood that Stanard, who has had an otherwise unblemished career, will engage in future securities violations as an officer or director." *Id.* Unlike the defendant in *Stanard* who had "no previous history of SEC violations," Carr is now involved in his second SEC proceeding. *Id.* at *32.

H. Imposition of a Temporary Bar

Applying the *Patel* factors to the evidence presented in the record, I impose a two-year temporary officer and director bar. As discussed above, five of the six *Patel* factors weigh in favor of a bar. Significantly, Carr engaged in insider trading while he was the Chairman and CEO of the public company at issue. Through his conduct, Carr breached the fiduciary duty he owed to Heartland's shareholders. Moreover, his subsequent actions indicate a lack of remorse or general understanding that his conduct was illegal and inappropriate.

In many of the cases cited by the SEC, however, the court has only imposed a temporary bar on the defendant. *See Bankosky*, 2012 WL 1849000, at *4 (ten-year ban), *SEC v. Levine*, 517 F. Supp. 2d 121, 146 (D.D.C. 2007) (ten-year ban), *SEC v. Selden*, 632 F. Supp. 2d 91 (D. Mass. 2009) (two-year ban). Considering Carr's age and the fact that he is not currently working at a public company, a temporary bar is an appropriate penalty to deter Carr from engaging in any future misconduct. To the extent the SEC's requests a permanent ban, the motion is **denied.**

IV. Conclusion

For the reasons stated above, I **grant in part** and **deny in part** the SEC's request for a bar (doc. no. 49) and impose a two-year temporary ban. The ban shall commence from the date of this decision.

So ordered.

Dated at Bridgeport, Connecticut, this 10th day of January 2020.

/s/ STEFAN R. UNDERHILL
Stefan R. Underhill
United States District Judge