UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15308

In the Matter of

JOSEPH CONTORINIS,

Respondent.

ORAL ARGUMENT REQUESTED

RESPONDENT JOSEPH CONTORINIS'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

Respondent Joseph Contorinis respectfully submits this memorandum of law in support of his motion for summary disposition under Rule of Practice 250 and requests that the Administrative Law Judge (the "ALJ") dismiss the Order Instituting Proceedings ("OIP"), in its entirety and with prejudice.

PRELIMINARY STATEMENT

The OIP should be dismissed in its entirety and with prejudice for two independent reasons.

First, these proceedings are time barred. 28 U.S.C. § 2462 requires that administrative actions for the purpose of seeking a penalty must be filed within five years of when the claim *first accrued*. These proceedings clearly seek a penalty: the OIP seeks to impose on Mr. Contorinis a lifetime bar, and seeks to do so without even a single allegation in the OIP to the effect that Mr. Contorinis is likely to pursue any wrongful conduct in the future. The relief sought—based entirely on his past conduct and not on any allegation as to the likelihood of the conduct being repeated in the future—cannot fairly be described as anything other than a penalty. Accordingly, under § 2462, these proceedings, to be timely, had to be commenced within five years of when the claim first accrued. Those five years expired no later than January 23, 2011—more than two years *before* the Securities and Exchange Commission (the "Commission") initiated these proceedings. Despite knowing of the alleged misconduct since 2009, at the latest, the Commission nonetheless sat on its hands and waited until 2013 to initiate these proceedings. That is improper, unfair, and contrary to the very purpose of statutes of limitations. For this reason alone, the OIP should be dismissed.

Second, imposing the relief sought by the Commission would violate Mr. Contorinis's rights under the Fifth and Sixth Amendments. The Commission is seeking to increase the penalty imposed on Mr. Contorinis as a result of his criminal conviction. Namely,

the Commission is seeking imposition of a lifetime bar. But in order for such a bar to be imposed, the Commission (pursuant to § 15(b) of the Exchange Act and § 203(f) of the Advisers Act) first needs to make a finding that the bar would be in the public interest. But no jury has ever made—or even been asked to make—that finding beyond a reasonable doubt. Therefore, imposing such a punishment—which is clearly beyond the maximum statutory penalty authorized by his conviction—would violate Mr. Contorinis's constitutional rights. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). For this reason as well, the OIP should be dismissed.

STATEMENT OF UNDISPUTED FACTS

The Jefferies Paragon Fund and Albertsons

Mr. Contorinis was a co-Portfolio Manager for the Jefferies Paragon Fund, LLC (the "Fund"), a fund created and controlled by Jefferies & Company, Inc. ("Jefferies") and funded by outside investors and Jefferies. (Ex. 1 at 3–4, 21, 23; Ex. 2 at 1011; Ex. 4 at 3.)[1] Mr. Contorinis and his co-Portfolio Manager, Michael Handler, made investment decisions for the Fund. (Ex. 1 at 3, 21, 23; Ex. 2 at 1009, 1028–29, 1036; Ex. 3 at 2–4.)

Albertsons, Inc. ("Albertsons") was a supermarket retailer that operated grocery stores across the western United States. (Ex. 4 at 4; Ex. 5 at ¶ 21.) Albertsons common stock traded on the New York Stock Exchange. (Ex. 4 at 4; Ex. 5 at ¶ 21.) The Fund's trades in Albertsons that were at issue in the related criminal and civil cases against Mr. Contorinis occurred between late 2005 and January 2006. (*See, e.g.*, Ex. 5 at ¶¶ 41, 44, 46, 50.) The Fund closed out its position in Albertsons on January 23, 2006.[2] (Ex. 4 at 10; Ex. 6.)

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[1] Citations in the form "Ex. __" are to exhibits attached to the accompanying Declaration of Farrah R. Berse.

[2] The facts underlying these proceedings will be explored in more detail in response to the Commission's motion for summary disposition, as appropriate.

The Criminal and Civil Cases

The Commission filed an action against Mr. Contorinis on February 5, 2009 (the "Civil Case"). (Ex. 5.) In its Complaint, the Commission alleged that Mr. Contorinis violated § 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder by trading on inside information—allegedly received from Mr. Contorinis's friend, who was a banker at UBS—in the stock of Albertsons. (*Id.*)

On November 5, 2009, Mr. Contorinis was indicted in a parallel criminal case based on allegations virtually identical to those alleged in the Commission's Complaint (the "Criminal Case"). (Ex. 7.) On October 6, 2010, the jury in the Criminal Case returned guilty verdicts on one count of conspiracy to commit securities fraud and seven substantive counts of insider trading, while finding Mr. Contorinis not guilty of two counts of substantive insider trading. At Mr. Contorinis's sentencing, the sentencing judge, the Honorable Richard J. Sullivan, stated:

> I don't think there is any chance that you are going to commit crimes in the future. . . . There is not much dispute about that. . . . [I]t's worth noting that Mr. Contorinis has . . . led an otherwise law-abiding life; that the duration of this crime was months but it wasn't years. There is no indication, as is the case in other cases in this courthouse, where people have persistently over time repeatedly for years engaged in a steady practice of insider trading. There is no evidence really of that in this case here. It was relatively isolated.

(Ex. 8 at 56, 58.) On December 17, 2010, the district court sentenced Mr. Contorinis to 72 months' imprisonment and ordered him to forfeit $12,650,438.[3] (Ex. 9.)

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[3] On appeal of the Criminal Case, the Court of Appeals for the Second Circuit affirmed the conviction, but vacated the order of forfeiture after holding that Mr. Contorinis could not, as a matter of law, be required to forfeit funds that he never received or controlled. *United States* v. *Contorinis*, 692 F.3d 136, 148 (2d Cir. 2012). On remand, the parties to the Criminal Case agreed that in light of the Second Circuit's order, the appropriate amount of forfeiture—representing Mr. Contorinis's personal profits as a result of the trades at issue—

On March 29, 2011, the Commission filed a motion for summary judgment in the Civil Case based on the collateral estoppel effect of the judgment entered in the Criminal Case. In a memorandum and order dated February 3, 2012, the district court granted the Commission's motion. *SEC* v. *Contorinis*, No. 09 Civ. 1043(RJS), 2012 WL 512626 (S.D.N.Y. Feb. 3, 2012). On February 29, 2012, the district court entered the Judgment: (1) permanently enjoining Mr. Contorinis from violating § 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder; (2) ordering Mr. Contorinis to disgorge $7,260,604 (and to pay $2,485,205 in prejudgment interest on that amount); and (3) ordering Mr. Contorinis to pay a further civil penalty in the amount of $1,000,000. (Ex. 11.) On April 24, 2012, Mr. Contorinis timely filed a notice of appeal of the Judgment, challenging the injunction and the order of disgorgement, including the order of prejudgment interest. The appeal will be fully briefed as of July 12, 2013.

On April 30, 2013, the Commission commenced these proceedings, seeking "remedial action" pursuant to § 15(b) of the Exchange Act and § 203(f) of the Advisers Act. (OIP at 2.)

ARGUMENT

I.

THESE PROCEEDINGS ARE TIME BARRED.

The conduct alleged in the criminal indictment, the civil complaint, and the OIP indisputably occurred on or before January 23, 2006. These proceedings are therefore time-barred under 28 U.S.C. § 2462, which requires the Commission to commence an action such as this within five years of when the claim *first* accrued—here, by no later than January 23, 2011.

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was $427,875. On June 25, 2013, the district court entered an order, reducing the forfeiture amount to $427,875 and imposing a fine of $2,000,000. (Ex. 10.)

A. **These Proceedings Are Subject to a Five Year Statute of Limitations Under 28 U.S.C. § 2462.**

28 U.S.C. § 2462 provides that any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, *shall not be entertained unless commenced within five years from the date when the claim first accrued*" (emphasis added). This statute of limitations "applies not only to judicial proceedings but also to administrative proceedings" in which the remedy sought is a civil fine, penalty, or forfeiture. *Johnson* v. *SEC*, 87 F.3d 484, 485 (D.C. Cir. 1996); *see also Proffitt* v. *FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) (applying § 2462 to FDIC removal proceeding). The relevant question in determining whether these proceedings are subject to § 2462's five-year statute of limitations is thus whether the Commission seeks to impose a "penalty" within the meaning of the statute. The answer to that question is yes.

As used in § 2462, the word "penalty" means a "form of punishment imposed by the government for unlawful or proscribed conduct, which *goes beyond remedying the damage caused to the harmed parties by the defendant's action.*" *Johnson*, 87 F.3d at 488 (emphasis added); *see also Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) ("[T]his case involves penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers."); *Meeker* v. *Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915) ("The words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury . . . ."); *Proffitt*, 200 F.3d at 860 (describing a penalty as a "sanction used to punish an individual for unlawful or proscribed conduct, going beyond compensation of the wronged party" (internal quotation marks omitted)). Indeed, a sanction is a penalty for purposes of § 2462 so long as it goes beyond compensating a wronged party, even if it also has a remedial purpose. *Proffitt*, 200

F.3d at 861. It is thus of no moment that §§ 15(b) and 203(f) require a finding that an associational bar is in the "public interest." Section 2462's "concern is not whether Congress legislated the sanction as part of a regulatory scheme to protect the public, but rather whether the sanction is itself a form of punishment of the individual for unlawful or proscribed conduct, going beyond compensation of the wronged party." *Johnson*, 87 F.3d at 491. Thus, even if a statute has the "dual effect" of "protecting the public" and "punishing [respondent] for his misconduct," it is still subject to § 2462's five year limitations period. *Proffitt*, 200 F.3d at 861.

The remedy sought here—a lifetime associational bar—is clearly a penalty for purposes of § 2462. The Commission "is not a defrauded victim seeking recompense." *Gabelli*, 133 S. Ct. at 1221. This remedy goes far "'beyond compensation of [any] wronged party,'" and is therefore a penalty. *Proffitt*, 200 F.3d at 861 (quoting *Johnson*, 87 F.3d at 488).

This conclusion is consistent with decisions by courts around the country which have repeatedly held that prohibiting an individual from working in a given industry on the basis of prior misconduct is a "penalty" within the meaning of § 2462. *See, e.g.*, *SEC* v. *Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012) (per curiam) (§ 2462 applies to follow-the-law injunction and director and officer bar); *Proffitt*, 200 F.3d at 860–62 (§ 2462 applies to removal as a bank director and prohibition from working in the banking industry for breach of fiduciary duty and fraud); *Johnson*, 87 F.3d 484 (§ 2462 applies to censure and six-month suspension from securities industry pursuant to § 15(b)); *see also United States* v. *Lovett*, 328 U.S. 303, 316 (1946) (finding that a lifetime bar from government service is punishment "of a most severe type"). Indeed, "there is substantial evidence that Congress and the courts have long considered the suspension or revocation of a professional license as a penalty." *Johnson*, 87 F.3d at 489 n.6. As courts have noted, the impact of an associational bar on a respondent's "ability to earn a

living" and "ability to pursue her vocation" "clearly resemble punishment in the ordinary sense of the word." *Id.* at 488–89; *see also Bartek*, 484 F. App'x at 956 (holding that follow-the-law injunction and director and officer bar are penalties because (i) they have "significant collateral consequences" and (ii) they "do not address the past harm" caused by defendant).

Even if an associational bar was not a penalty as a matter of law, it clearly is a penalty as applied in Mr. Contorinis's case. The OIP is devoid of any allegation that Mr. Contorinis is presently unfit to work in the securities industry or likely to commit insider trading—or any other wrongful act—in the future. There is not a single allegation in the OIP that would support an argument by the Commission that it is seeking to do anything other than impose a penalty here. *See, e.g.*, *Proffitt*, 200 F.3d at 862 (finding expulsion sanction to be a penalty within the meaning of § 2462 where proceeding focused on the plaintiff's past conduct, rather than his "present fitness or competency"). Indeed, that the Commission waited *more than seven years* from the date of the alleged wrongdoing to seek to bar Mr. Contorinis undercuts any possible argument that the Commission believes such a bar is a necessary remedy to protect the public, rather than a penalty. *Id.* at 861 ("That the expulsion sanction is punitive is further manifested by the fact that the FDIC did not act for more than six years after Proffitt's misdeeds. . . . If in fact Proffitt posed the threat to the public that the FDIC portrays, it presumably would have removed him sooner rather than later."). Because the Commission seeks a penalty through these proceedings, § 2462's five year statute of limitations applies.

B. The Five Year Statute of Limitations Began Running at the Time of the Alleged Wrongdoing and Thus Expired No Later than January 23, 2011.

It is black letter law that a claim "normally accrues when the factual and legal prerequisites for filing suit are in place." *3M Co.* v. *Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994); *see also Gabelli*, 133 S. Ct. at 1220 ("[T]he standard rule is that the claim accrues when

the plaintiff has a complete and present cause of action." (internal quotation marks omitted)). Under §§ 15(b) and 203(f), the factual and legal prerequisites for the Commission to pursue an associational bar were in place—and the Commission had "a complete and present cause of action," *Gabelli*, 133 S. Ct. at 1220—once Mr. Contorinis allegedly violated the securities laws. That was no later than January 23, 2006. Under § 2462, that is "the date when the claim *first accrued*," and which thus started the Commission's five year clock.

Sections 15(b) and 203(f) authorize the Commission to impose an associational bar—after making a finding that such a bar would be in the public interest—if the Commission also finds that (a) the respondent engaged in certain wrongful acts; (b) the respondent was convicted of certain crimes; or (c) an injunction was entered. The fact that a finding of (a), (b), or (c) is sufficient as a legal matter to impose an associational bar (assuming such a bar is in the public interest), does not change the analysis of when the claim *first* accrued—the date of the alleged misconduct.[4] Interpreting the statute of limitations to permit proceedings based on when a claim next accrued (here, when Mr. Contorinis was convicted in October 2010) or last accrued (when the injunction was entered in February 2012) would offend the very purpose of § 2462. As the Supreme Court just recently affirmed, the standard "first accrual" rule *must* be applied to § 2462 in order to protect the purpose of statutes of limitations:

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[4] In a similar context, the Ninth Circuit has held that although the three different events—misconduct, conviction or injunction—can independently justify the entry of a bar, the "event" to which the statute "attaches the legal consequence . . . is the misconduct . . . , regardless of whether the SEC chose to bring the proceeding on the basis of an injunction, a conviction or the underlying conduct." *Koch* v. *SEC*, 177 F.3d 784, 788 (9th Cir. 1999) (Kozinski, J.). As the Ninth Circuit explained, while the presence of an injunction or conviction makes it easier for the Commission to prove its case, the "underlying" conduct remains "the substance of the SEC's case." *Id.* The date of the underlying conduct is thus when the claim first accrued.

> This reading sets a fixed date when exposure to the specified Government enforcement efforts ends, advancing the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities. . . . We have deemed [statutes of limitations] vital to the welfare of society, and concluded that even wrongdoers are entitled to assume that their sins may be forgotten.

Gabelli, 133 S. Ct. at 1221 (citation and internal quotation marks omitted). As a result, in *Gabelli*, the Supreme Court rejected the Commission's position that the discovery rule should apply to § 2462. The Supreme Court concluded that to do otherwise "would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id.* at 1223.

That is exactly what the Commission is seeking to do here. Permitting the Commission to bring proceedings within five years of any of the three events that provide a legal basis for the imposition of a bar, regardless of when the claim *first* accrued, would have a similar effect to permitting the Commission to apply the discovery rule to § 2462. It would impermissibly expand the Commission's ability to commence proceedings at an *indeterminate date in the future*. Indeed, the Commission repeatedly takes the position that § 2462 does not apply—and therefore effectively that *no* statute of limitations applies—to suits seeking the very injunction that the Commission claims can trigger the five year statute of limitations under § 2462.[5] *See, e.g.*, Brief of the SEC, *SEC* v. *Quinlan*, 373 F. App'x 581 (6th Cir. 2010) (No. 08-2619), 2009 WL 1209317 ("Commission enforcement actions are not subject to a statute of limitations unless Congress has expressly provided otherwise. . . . This limitations period [in 28

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[5] The ten-year restriction on the use of a conviction in §§ 15(b) and 203(f) is not a statute of limitation and thus does not supersede § 2462. Rather, the provision merely "limits the [Commission's] *jurisdiction* . . . while section 2462 requires that any action . . . must be initiated no later than five years from the date the claim 'first accrue[s].'" *Proffitt*, 200 F.3d at 862 (emphasis in original).

U.S.C. § 2462] applies only to *penalties* sought by the SEC, not its request for injunctive relief." (citation and internal quotation marks omitted) (emphasis in original)); *see also SEC* v. *Kelly*, 663 F. Supp. 2d 276, 286 (S.D.N.Y 2009) (noting where the Commission was seeking a follow-the-law injunction that "[n]either the Securities Act nor the Exchange Act explicitly contains a limitations period" and "the SEC's contention that equitable remedies are exempted from section 2462's limitations period"). Allowing § 2462's five year limitations period to be trigged by the entering of an injunction—which, the Commission claims, can be sought at an indeterminate point in time after alleged misconduct—is flatly inconsistent with the very purpose of statutes of limitations.[6]

The injustice of allowing the Commission to commence proceedings more than five years after its claim first accrued is particularly acute here, where the Commission was aware of the alleged misconduct well within five years of when it occurred. The Commission filed a civil suit against Mr. Contorinis based on the exact same misconduct that is now the basis for these proceedings in February 2009. If the Commission believed that the misconduct alleged in that complaint justified the entry of an associational bar, the Commission could and should have sought such a bar at that time—or at any time in the subsequent two years. Indeed, the Commission even waited, inexplicably, for more than two years after Mr. Contorinis's October 2010 conviction to commence these proceedings. Had the Commission initiated proceedings in the months following the conviction, it *would have been within the five year statute of limitations.* Instead of commencing these proceedings in 2009 when it filed the Complaint or in 2010 following the conviction, however, the Commission sat on its hands, leaving Mr.

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[6] Indeed, courts have concluded that where, as here, the "progress of" a proceeding is "largely within the control of the government," a "limitations period that began to run only after" the

Contorinis exposed to the possibility of this action "not only for five years after [his alleged] misdeeds, but for an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223. That is precisely the uncertainty that statutes of limitations are designed to prevent.

Both the plain text and the purpose of statutes of limitations require that § 2462's five year clock began to run from the time that the claim first accrued, which is when the Fund closed out of its position in Albertsons in January 2006. As these proceedings were not commenced until April 2013, the claim is time barred and the OIP should be dismissed.[7]

II.

BARRING MR. CONTORINIS FROM THE INDUSTRY BASED ON THE FACT OF HIS CONVICTION, AND WITHOUT A JURY FINDING THAT SUCH A BAR IS IN THE PUBLIC INTEREST, WOULD VIOLATE MR. CONTORINIS'S FIFTH AND SIXTH AMENDMENT RIGHTS.

In order to bar Mr. Contorinis from the securities industry on the basis of his conviction, the Commission must also establish that such a bar would be "in the public interest." 15 U.S.C. § 78o(b)(6)(A); *id.* § 80b-3(f). Because this question is to be determined by the presiding ALJ, rather than by a jury, the imposition of a bar on the basis of Mr. Contorinis's conviction would violate Mr. Contorinis's Fifth and Sixth Amendment rights. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000).

The statutory maximum penalty for a crime—such as the insider trading charges for which Mr. Contorinis was convicted—is the maximum punishment which may be imposed

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conclusion of that proceeding "would thus amount in practice to little or no[]" limitations period at all. *United States* v. *Core Labs., Inc.*, 759 F.2d 480, 482–83 (5th Cir. 1985).

[7] We respectfully submit that *Markowski* v. *SEC*, No. 01-1181, 2002 WL 1932001 (D.C. Cir. Apr. 25, 2002) (per curiam)—the non-binding decision which held that § 2462's five year statute of limitations begins to run from the latest of the date of the alleged misconduct, conviction, or the entry of an injunction—was incorrectly decided. But, in any event, *Markowski* was decided before the Supreme Court re-affirmed in *Gabelli* the importance of

"*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis in original). "[T]he relevant 'statutory maximum'" does not include punishments that may be "impose[d] after finding additional facts," but rather is limited to those penalties that may be "impose[d] *without* any additional findings." *Id.* at 303–04 (emphasis in original). Mr. Contorinis's conviction does not alone authorize the Commission to bar Mr. Contorinis from the securities industry. Instead, under §§ 15(b) and 203(f), the ALJ is required to engage in additional fact finding and to make a determination that it is in the public interest to bar Mr. Contorinis. 15 U.S.C. § 78o(b)(6)(A); *id.* § 80b-3(f). Thus, a bar is a penalty in excess of an otherwise-applicable statutory maximum for *Apprendi* purposes.[8]

Because the punishment exceeds the statutory maximum, the requisite fact finding "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490; *see also Oregon* v. *Ice*, 555 U.S. 160, 163 (2009) ("[I]t is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense."). If a punishment is inflicted "that the jury's verdict alone does not allow," as here, *Apprendi* is violated. *Blakely*, 542 U.S. at 304.

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considering the purpose of statutes of limitations when determining when a claim first accrues under § 2462.

[8] An associational bar is the type of penalty subject to the rule of *Apprendi*, just like any other penalty exceeding the statutory maximum. In *Southern Union Co.* v. *United States*, 132 S. Ct. 2344 (2012), the Supreme Court held there was "no principled basis under *Apprendi*" to limit the doctrine to only certain punishments, such as imprisonment and the death penalty. *Id.* at 2350. Rather, "[i]n stating *Apprendi*'s rule," the Supreme Court has "never distinguished one form of punishment from another." *Id.* at 2351. In holding that *Apprendi* applies to criminal fines, the Court explained that "*Apprendi*'s core concern" applies to all "penalties inflicted by the sovereign for the commission of offenses." *Id.* at 2350; *see also State* v. *Harding*, No. 2012-CA-18, 2012 WL 4478453 (Ohio App. Ct. Sept. 28, 2012) (finding sex offender designation based on facts not allocated in a guilty plea violates *Apprendi* and its progeny).

Whether it is in the public interest to bar Mr. Contorinis from the securities industry is a question that was never posed to a jury, and never required to be proven beyond a reasonable doubt. "'If [Congress] makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how [Congress] labels it—must be found by a jury beyond a reasonable doubt.'" *United States* v. *Booker*, 543 U.S. 220, 231 (2005) (quoting *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002)); *see also Ring*, 536 U.S. at 602 ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." (quoting *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (emphasis in original)) (alteration in original)). Here, under §§ 15(b) and 203(f), Congress made the entry of an associational bar contingent on a finding that such a bar would be in the public interest. Therefore, that fact finding may not be entrusted to any decision-maker other than a jury.

Indeed, the public interest finding here is precisely the sort of non-jury fact-finding that violates *Apprendi*. The Commission uses the following factors in determining whether a bar is in the "public interest":

> (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations.

Franz, File No. 3-14960, 2013 WL 208970, at *3 (Jan. 18, 2013) (Elliot, A.L.J.) (citing *Steadman* v. *SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)).[9] All six of these factors concern the types of fact-finding that the Supreme Court has held violates *Apprendi* when conducted by the sentencing judge rather than a jury:

[9] Mr. Contorinis will address the applicability of the *Steadman* factors to the facts and circumstances of this case at a later stage of these proceedings.

- Egregiousness: In *Ring*, the Supreme Court held that the question of whether the offense was "especially heinous, cruel or depraved" must be determined by a jury when such determination increases the maximum penalty that may be imposed. 536 U.S. at 595.
- Recurrence: In *Southern Union*, the Supreme Court held that a determination that a violation is recurrent "is a determination that for each given day, the Government has proved that [the defendant] committed all of the acts constituting the offense," and therefore is fact-finding that must be submitted to a jury. 132 S. Ct. at 2356.
- Scienter: In *Apprendi*, the Supreme Court rejected the idea that, in addition to the scienter, or *mens rea*, found by the jury, a "second *mens rea* requirement" could be found by the judge. 530 U.S. at 493.
- Sincerity of Assurances, Recognition of Wrong, and Likelihood of Future Violations: These remaining *Steadman* factors are "facts concerning the offender," which are equally subject to *Apprendi*. *Cunningham* v. *California*, 549 U.S. 270, 291 n.14 (2007).

Finally, it makes no difference that the statutory scheme in operation here entrusts this non-jury fact-finding to an administrative agency as opposed to a sentencing judge. The rights recognized in *Apprendi* are "no mere procedural formality, but a fundamental reservation of power [to the jury] in our constitutional structure." *Blakely*, 542 U.S. at 306.[10] Congress may

[10] Indeed, as the Supreme Court has held in the context of the Seventh Amendment's jury guarantee: "Congress . . . lacks the power to strip parties . . . of their constitutional right to a trial by jury. . . . [T]o hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action . . . . The Constitution nowhere grants Congress such puissant authority. . . . [N]or

not deprive Mr. Contorinis of his constitutional rights by transferring the fact-finding, or the imposition of the punishment, to an administrative agency. It is simply implausible that the Sixth Amendment right to a jury could be effectively eviscerated by transferring the meting out of punishment to an administrative agency, where the same exact scheme would be unconstitutional if administered by an Article Three judge.

Accordingly, because barring Mr. Contorinis from the industry exceeds the statutory maximum penalty for the crimes of which he was convicted and is dependent on non-jury fact-finding, the entry of an associational bar would violate *Apprendi* and would therefore be unconstitutional. The OIP should thus be dismissed.

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can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51–52 (1989).

CONCLUSION

For the foregoing reasons, Mr. Contorinis respectfully requests that the OIP be dismissed, in its entirety and with prejudice.

Dated: New York, New York
June 28, 2013

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15308

In the Matter of JOSEPH CONTORINIS, Respondent.	**DECLARATION OF FARRAH R. BERSE**

FARRAH R. BERSE declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys for Respondent Joseph Contorinis in the above-captioned proceedings. I submit this declaration in support of Mr. Contorinis's Motion for Summary Disposition.

2. Attached as Exhibit 1 are true and correct copies of excerpts of the Confidential Private Placement Memorandum for the Jefferies Paragon Fund, LLC, dated September 2005.

3. Attached as Exhibit 2 are true and correct copies of excerpts from the September 28, 2010 trial testimony of Michael Handler in the action captioned *United States* v. *Contorinis*, No. 09 Cr. 1083 (RJS) (S.D.N.Y.) (the "Criminal Action").

4. Attached as Exhibit 3 is a true and correct copy of the Securities and Exchange Commission's Response to Defendant Joseph Contorinis's Counterstatement of Undisputed Facts, filed on May 20, 2011 in the action captioned *SEC* v. *Contorinis*, 09 Civ. 1043 (RJS) (S.D.N.Y.) (the "Civil Action").

5. Attached as Exhibit 4 is a true and correct copy of Joseph Contorinis's Responses in Opposition to Plaintiff's Rule 56.1 Statement of Undisputed Facts and Defendant's Counterstatement of Undisputed Facts, filed on May 10, 2011 in the Civil Action.

6. Attached as Exhibit 5 is a true and correct copy of the Complaint, filed on February 5, 2009 in the Civil Action.

7. Attached as Exhibit 6 is a true and correct copy of an excerpt of a chart showing the Jefferies Paragon Fund's trades in Albertsons, Inc. for the period September 16, 2004 through January 23, 2006. The chart was entered into evidence as Exhibit 2051A in the Criminal Action.

8. Attached as Exhibit 7 are true and correct copies of excerpts of the docket sheet in the Criminal Action.

9. Attached as Exhibit 8 is a true and correct copy of an excerpt of the transcript of Mr. Contorinis's December 17, 2010 sentencing hearing in the Criminal Action.

10. Attached as Exhibit 9 is a true and correct copy of the Judgment, filed on December 22, 2010 in the Criminal Action.

11. Attached as Exhibit 10 is a true and correct copy of an Order, filed on June 25, 2013 in the Criminal Action.

12. Attached as Exhibit 11 is a true and correct copy of the Judgment, filed on February 29, 2012 in the Civil Action.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at: New York, New York
June 25, 2013

Farrah R. Berse