UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15308

In the Matter of

JOSEPH CONTORINIS,

Respondent.

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

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Respondent Joseph Contorinis respectfully submits this memorandum of law in opposition to the Division of Enforcement's ("Division's") Motion for Summary Disposition (the "Motion") and requests that the lifetime bar sought by the Division be denied.[1]

PRELIMINARY STATEMENT

Despite the Division's assertions to the contrary, this is not an easy case. A lifetime industry bar is "the most drastic remed[y]" available to the Commission. Accordingly, a permanent associational bar is not, as the Division suggests, appropriate merely because Mr. Contorinis was convicted of insider trading or because bars have been imposed in other cases. Rather, to prevail on this Motion, the Division must meet its burden of establishing that barring Mr. Contorinis for the rest of his life is "in the public interest." The Division has not met—and cannot meet—this burden.

The trades at issue in the underlying cases involved a single stock and took place on a few days over a period of a few weeks. Mr. Contorinis did not engage in efforts to conceal his conduct. He did not cause others to engage in any wrongdoing. He did not breach fiduciary duties, defraud investors or deprive them of their hard-earned savings, or divert investors' funds for his own use. Instead, these were isolated trades over a short time in Mr. Contorinis's otherwise unblemished twenty-year career in the financial services industry. Until the underlying charges were brought against Mr. Contorinis in early 2009, he had never been the subject of any disciplinary action of any kind: regulatory, civil, or criminal. Indeed, the district court judge who presided over Mr. Contorinis's two-week trial and heard Mr. Contorinis's

[1] Mr. Contorinis does not dispute that it is appropriate to resolve this proceeding by summary disposition. Although we discuss in this memorandum certain evidence presented during trial in the underlying criminal action, we present this information not to relitigate the underlying issues, but to demonstrate why no bar is necessary or warranted. However, if the ALJ believes that some bar should be imposed, we respectfully submit that a temporary bar—lasting no more than five years—would be appropriate.

testimony concluded: "*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.*"

Considering the relevant facts and circumstances present here, a lifetime associational bar is not in the public interest.

COUNTER-STATEMENT OF UNDISPUTED FACTS

The Jefferies Paragon Fund and Albertsons

In 2004, Mr. Contorinis and a friend and former colleague, Michael Handler, were hired by Jefferies Asset Management ("Jefferies") to be co-Portfolio Managers of the Jefferies Paragon Fund (the "Fund"), a fund created and controlled by Jefferies & Company, Inc. ("Jefferies") and funded by outside investors and Jefferies. (Berse Decl. I Ex. 1 at 3–4, 21, 23; *id.* Ex. 2 at 1009, 1011; *id.* Ex. 4 at 3.[2]) As co-Portfolio Managers, Mr. Contorinis and Mr. Handler made decisions about the Fund's investments. (*Id.* Ex. 2 at 1028–29; *id.* Ex. 3 at 2–4.) The Fund managed approximately $400 million in assets.

Albertsons, Inc. ("Albertsons") was a supermarket retailer that operated grocery stores across the western United States. (*Id.* Ex. 4 at 4; Division Ex. B at ¶ 21.) Albertsons common stock traded on the New York Stock Exchange. (Berse Decl. I Ex. 4 at 4; Division Ex. B at ¶ 21.) The Fund had been investing in Albertsons since September 2004—a year prior to any allegations of insider trading by Mr. Contorinis. (Berse Decl. II Ex. 1.)

All trading in Albertsons was done on behalf of the Fund. All of the Fund's trades were done publicly; indeed, the Fund reported its holdings in publicly-filed documents and

[2] Citations in the form "Berse Decl. I Ex. __" are to exhibits attached to the June 25, 2013 Declaration of Farrah R. Berse submitted in support of Mr. Contorinis's motion for summary disposition. Citations in the form "Berse Decl. II Ex. __" are to exhibits attached to the accompanying July 19, 2013 Declaration of Farrah R. Berse. Citations in the form "Division Ex. __" are to the exhibits attached to the Division's Motion.

in account statements sent to clients. Mr. Contorinis never traded Albertsons stock in any personal account, let alone any secret account in someone else's name. (*Id.* Ex. 2 at 1179–80.)

The Criminal Case

On January 26, 2009, Mr. Contorinis was informed that he was the subject of a federal criminal investigation. Mr. Contorinis agreed to be interviewed by federal agents, and he voluntarily surrendered several days later. On November 5, 2009, Mr. Contorinis was indicted based on allegations that he 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 (the "Criminal Case"). (Division Ex. D.) Mr. Contorinis exercised his right to present his defense to a jury. His trial took place from September 20 through October 6, 2010, when the jury returned guilty verdicts on one count of conspiracy to commit securities fraud and seven substantive counts of insider trading relating to trading that took place on two days: December 22, 2005, and January 11, 2006. The jury found Mr. Contorinis not guilty of two additional counts of substantive insider trading. (*Id.* Ex. F.)

Mr. Contorinis, knowing the verdict and the relief that the U.S. Attorney's Office would seek, appeared as required for a remand hearing the day following the verdict. He was remanded on October 7, 2010, and has been incarcerated without incident ever since, first at the Metropolitan Detention Center in Brooklyn, New York, and currently at FPC Schuylkill in Minersville, Pennsylvania.

At Mr. Contorinis's sentencing hearing on December 17, 2010, the Honorable

Richard J. Sullivan, who had presided over Mr. Contorinis's two-week trial and heard Mr. Contorinis's own testimony over the course of two days, stated:

> *I don't think there is really any dispute that prior to this you led a completely law-abiding life and an admirable life.* I don't think anyone really challenges that. You worked hard. You have lived a life that for the most part you can be proud of.
>
> * * *
>
> *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 . . . 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.*

(Berse Decl. II Ex. 3 at 54, 56, 58 (emphasis added).) The district court sentenced Mr. Contorinis to 72 months' imprisonment, to be followed by 24 months of supervised release, and ordered him to forfeit $12,650,438. (Berse Decl. I Ex. 9.)

On appeal of the Criminal Case, the Court of Appeals for the Second Circuit affirmed the conviction, but vacated the forfeiture order 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—was $427,875.[3] (Berse Decl. II Ex. 4.)

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[3] 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. (Berse Decl. 1 Ex. 10.) On July 1, 2013, in response to correspondence from the parties regarding the need for a sentencing hearing before a new fine could be imposed, the district court vacated the June 25, 2013 order and related amended judgment and ordered the parties to submit briefing on the question of the imposition of a fine. *United States* v. *Contorinis*, No. 09-cr-1083 (RJS), Dkt. No. 114 (S.D.N.Y. July 1, 2013). These briefs are due this month.

The Civil Case

The Securities and Exchange Commission (the "Commission") filed a parallel civil action against Mr. Contorinis on February 5, 2009 (the "Civil Case"). (Division Ex. B.) Its Complaint is based on allegations virtually identical to those alleged in the criminal indictment. (*Id.*) The Fund's trades in Albertsons that were at issue in the Civil Case against Mr. Contorinis occurred between January 9, 2006 and January 23, 2006—a period of only two weeks. (*See, e.g.*, *id.* at ¶¶ 41, 44, 46, 50; Berse Decl. I Ex. 4 at 9–10.) The Complaint did not allege—and the Commission (and the U.S. Attorney's Office in the Criminal Case) never sought to show—that Mr. Contorinis made these trades for his own benefit. Rather, the Complaint alleges that Mr. Contorinis made the trades on behalf of the Fund. (Division Ex. B at ¶¶ 19–20, 50–51.)

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. (*Id.* Ex. G.) Mr. Contorinis did "not dispute that summary judgment as to liability c[ould] be entered against him based on the preclusive effect of the jury's verdict in the criminal case." (Division Ex. H at 1.) In opposition to the Commission's motion, Mr. Contorinis merely asserted that entry of summary judgment was not appropriate on grounds other than collateral estoppel, and opposed the amount of disgorgement, and the imposition of a fine or permanent injunction. (*Id.*)

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. (Berse Decl. I 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 was fully briefed as of July 12, 2013, and oral argument is expected to take place during the last week of September 2013.

ARGUMENT

MR. CONTORINIS SHOULD NOT BE SUBJECTED TO THE DRASTIC REMEDY OF A LIFETIME ASSOCIATIONAL BAR.

A. The Standard for Imposing a Lifetime Associational Bar

A lifetime associational bar is the "most drastic remed[y]" available to the Commission. *Steadman* v. *SEC*, 603 F.2d 1126, 1137 (5th Cir. 1979). It is "the most potent weapon in the Commission's arsenal of flexible enforcement powers" because its "indefinite exclusion" works a severe "deprivation of livelihood." *Id.* at 1139 (internal quotation marks and citations omitted). Thus, when the Commission chooses to impose such a bar, "it has a greater burden to show with particularity the facts and policies that support these sanctions and why less severe action would not serve to protect investors." *Id.* at 1137.[4]

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[4] *See also Blinder, Robinson & Co., Inc.*, File No. 3-6380, 1990 WL 321585, at *20 (Apr. 27, 1990) (Murray, A.L.J.). In *Blinder*, ALJ Murray explained: "According to *Steadman*, a permanent exclusion is not justified in fact unless the Commission articulates compelling reasons for issuing such a sanction, and articulates why a lesser sanction would not sufficiently discourage others from engaging in the unlawful conduct it seeks to

avoid. Examples of situations which the *Steadman* court found might justify disbarment include where the facts indicate a reasonable likelihood that a particular violator cannot ever operate in compliance with the law, or might be so egregious that even if further violations of the law are unlikely, the nature of the conduct mandates permanent disbarment as a deterrent to others in the industry." *Id.* After considering this high standard, ALJ Murray imposed a bar with a right to reapply after two years and held that such a sanction, "rather than a permanent bar, . . . will serve as a deterrent by warning those who are considering securities violations that the Commission will not treat lightly actions which undermine the integrity of the marketplace and will give [respondent] an opportunity for rehabilitation and an opportunity to seek reinstatement in a time specified." *Id.* at *21.

This high standard is a necessary consequence of the statutes authorizing the imposition of associational bars. Under section 15(b) of the Exchange Act and section 203(f) of the Advisers Act, the Commission is authorized to impose an associational bar *only* after making a finding that such a bar would be "in the public interest." 15 U.S.C. § 78o(b)(6)(A); *id.* § 80b-3(f). In crafting the relevant statutes in this way, Congress made clear its view that the fact of a conviction or the entry of an injunction is not, on its own, enough to justify a bar. To justify a permanent bar, the Division must also establish facts beyond the mere fact of a respondent's past misconduct: "*To say that past misconduct gives rise to an inference of future misconduct is not enough.*" *Steadman*, 603 F.2d at 1140 (emphasis added). The facts and circumstances of each particular case must be examined and "the appropriate remedial action . . . cannot be determined precisely by comparison with the action taken in other cases." *Brownson*, File No. 3-10295, 2002 WL 1438186, at *2 n.10 (SEC July 3, 2002) (internal quotation marks omitted).

Instead of "follow[ing] any mechanistic formula in determining an appropriate sanction," *Kornman* v. *SEC*, 592 F.3d 173, 186 (D.C. Cir. 2010) (citing *PAZ Sec., Inc.* v. *SEC*, 566 F.3d 1172, 1775 (D.C. Cir. 2009)), in order to determine whether an associational bar is in the public interest and is thus the appropriate sanction, the Commission considers the *Steadman* factors:

(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 or her conduct; and

(6) the likelihood that the respondent's occupation will present opportunities for future violations.

Butler, File No. 3-13986, 2011 WL 3792730, at *3 (SEC Aug. 26, 2011) (citing *Steadman*, 603 F.2d at 1140).[5] These factors are to be considered "in light of the entire record, and no one factor is dispositive." *Pierce*, File No. 3-13927, 2011 WL 3159088, at *19 (July 27, 2011) (Elliot, A.L.J.).

As discussed below, a proper balancing of these factors does not justify permanently barring Mr. Contorinis from the securities industry.

B. A Lifetime Associational Bar Is Not Warranted.

Several of the *Steadman* factors strongly weigh against imposing a lifetime associational bar here.

1. Mr. Contorinis's Actions Were Not Egregious.

The actions at issue do not rise to the level that justifies the drastic remedy of a lifetime associational bar. *First*, as discussed in more detail below, this was a limited, isolated incident. The trades for which Mr. Contorinis was convicted involved a single stock, bought and sold on only two days, over less than three weeks. This was an anomalous episode that spanned a very short period in Mr. Contorinis's otherwise unblemished, twenty-year career.

Second, Mr. Contorinis did not engage in any deception or effort to conceal any of the relevant conduct—neither the underlying communications nor the trading itself. All trading in Albertsons was done on behalf of the Fund, and all of the Fund's trades were made publicly.

Indeed, the Fund reported its holdings in publicly-filed documents and in account statements sent to clients. Mr. Contorinis never traded in any personal accounts, let alone any secret accounts or

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[5] The sixth factor is sometimes characterized as "the likelihood of future violations." *Franz*, File No. 3-14960, 2013 WL 208970, at *3 (Jan. 18, 2013) (Elliot, A.L.J.); *see also Bartko*, File No. 3-14700, 2012 WL 3578907, at *5 (Aug. 21, 2012) (Elliot, A.L.J.).

accounts in anyone else's name—circumstances often present in insider trading cases. And, immediately upon being approached by the government, Mr. Contorinis voluntarily surrendered, and he made no efforts to interfere with the government's investigation or to obstruct justice.

Third, there are no allegations that Mr. Contorinis caused others to engage in any alleged wrongdoing. It has never even been alleged that Mr. Contorinis tipped the Fund or any of its investors. This, too, weighs against a finding of egregious conduct. *See Jantzen*, File No. 3-14880, 2012 WL 5422022, at *5 (Nov. 6, 2012) (Elliot, A.L.J.) (where the misconduct "did not involve any of [the respondent's] clients, the individuals he supervised, or any identifiable third party," the egregiousness factor "does not weigh in favor of imposing a severe sanction").

Fourth, while the trades at issue resulted in approximately $7.3 million in profits and $6.3 million in avoided losses for the Fund, these amounts must be considered in the proper context. At the time, the Fund had approximately $400 million in assets under management; thus, the profits and avoided losses at issue constituted a mere fraction of the Fund's overall assets. Moreover, the U.S. Attorney's Office has agreed that the amount of Mr. Contorinis's *personal* profits as a result of the trades at issue was nowhere near this amount, but rather $427,875. While this is not an insubstantial sum, it is a mere fraction—only about three percent—of the amounts referenced by the Division.[6] (*See* Div. Br. at 5, 11.)

Finally, the Division's suggestion that Mr. Contorinis's defense of this and other related proceedings somehow adds to the egregiousness of his actions, (Div. Br. at 11–12), is patently unfair. While a respondent's recognition of the wrongful nature of his or her conduct is

a separate factor to be considered, that is entirely distinct from a defendant's right to require the

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[6] Despite the fact that the amounts that the Division references in its brief have never been in Mr. Contorinis's possession or control, and although the Commission has the ability to name the Fund as a relief or nominal defendant in order to redeem these amounts directly from the Fund, the Commission has never sought to do so.

government to meet its burden of proof. It would go against the very core of our judicial system to base the imposition of such a significant penalty as a lifetime industry bar on a defendant's exercise of his right to present a defense.

Although "comparison with the action taken in other cases" is not determinative, *Brownson*, 2002 WL 1438186, at *2 n.10 (internal quotation marks omitted), the conduct in *Kornman* and the other cases cited by the Division, involve conduct that was far more egregious than the conduct at issue here. (*See* Div. Br. at 7–14.) The respondents in those cases:

- Breached fiduciary duties they owed to their clients and investors;[7]
- Made misrepresentations to their clients and investors, defrauding those individuals and often depriving them of significant sums of money;[8]

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[7] *See Steadman*, 603 F.3d at 1140 (respondent caused "flagrant and intentional breaches of his companies' contractual and fiduciary duties to see that the funds fulfilled their reporting obligations"); *Lawton*, File No. 3-14162, 2012 WL 6208750, at *10 (SEC Dec. 13, 2012) (citing repeated breaches of "fiduciary duty to the Paramount investors").

[8] *See Seghers* v. *SEC*, 548 F.3d 129, 131 (D.C. Cir. 2008) (respondent caused over-stated values to be reported to hedge fund investors and directly made a false report to investors regarding "positive developments" and "respectable returns"); *Lawton*, 2012 WL 6208750, at *1–2 (respondent misled prospective investors using fact sheets that fraudulently misstated the hedge fund's investment success and misled existing investors using account statements that fraudulently inflated returns on investment, thereby generating additional investments in the fund); *Butler*, 2011 WL 3792730, at *1–3 (respondent made hundreds of millions of dollars of "unauthorized purchases of securities for the accounts of [his] customers, and fraudulently concealed the nature of these purchases . . . including by falsifying the names of the products in emails to the customers . . . in order to earn higher commissions" (alterations and internal quotation marks omitted)); *Rizvi*, File No. 3-14984, 2013 WL 64626, at *7 (Jan. 7, 2013) (Murray, A.L.J.) ("Rizvi repeatedly misled potential investors by drafting offering circulars containing false information" and "supervised, actively sought out, and knowingly hired unregistered brokers to solicit potential investors in unregistered securities offerings"); *Bartko*, 2012 WL

35/8907, at *3 ("money was raised from investors . . . through the use of false claims"); *Brownson*, 2002 WL 1438186, at *1 (recommending stocks to customers in return for undisclosed payments from a stock promoter). The Division also cites *In the Matter of Adam Harrington*, File No. 3-15119, 2013 WL 1655690 (Apr. 17, 2013) (Foelak, A.L.J.). Harrington caused misrepresentations to be made to investors as part of a fraudulent scheme. *United States* v. *Mandell*, No. 1:09-cr-00662-PAC-3, Dkt. No. 173 at 6 (S.D.N.Y. Nov. 2, 2011) (noting there was "overwhelming evidence that defendants [Mandell and Harrington] had defrauded investors and enriched themselves at the investors' expense"); *see also, e.g.*, *id.* at 10 ("The oral statements were not innocent opinions, or predictions, or optimistic statements of future events. They were outright lies told to get investors' money so that Mandell and Harrington would continue their fraudulent scheme.").

- Diverted their investors' funds for their own use;[9] and/or
- Made false statements to government representatives investigating their cases, thus obstructing justice.[10]

None of those circumstances are present here.

Indeed, even in cases involving far more egregious conduct than at issue here, less than lifetime bars have been imposed. For example, over a period of at least five months, the respondent in *Gartz*, File No. 3-9060, 1997 WL 441913 (Aug. 6, 1997) (Murray, A.L.J.), a local branch manager for a major brokerage firm, "took advantage" of "unsophisticated investors" who trusted him "to control most or all the assets they had accumulated over a lifetime." *Id.* at *16. Gartz's actions were "exacerbated by the fact that he knew that most of the older investors needed to keep their assets safe because they needed to earn income to support them in retirement, and that the younger investors wanted income for their children." *Id.* Nevertheless, Gartz knowingly sold these customers illiquid, high risk, and otherwise unsuitable investments, often at higher than market prices, and while representing both sides of the transactions at issue. *See id.* at *4–15. Despite the egregiousness of Gartz's actions, the ALJ barred Gartz from associating with a broker-dealer with a right to reapply after two years, for admission in a non-supervisory, non-proprietary capacity. *Id.* at *17. None of the egregious characteristics of the conduct in *Gartz* are present here.

Mr. Contorinis's alleged conduct was not egregious and does not justify as severe a sanction as a lifetime associational bar.

[9] *See Bartko*, 2012 WL 3578907, at *4 (noting that the respondent's private equity fund never invested the over $700,000 received from investors, "nearly half of which Bartko personally received and spent").

[10] *See Lawton*, 2012 WL 6208750, at *3 (convicted of making a false statement in a federal government investigation); *Kornman*, File No. 3-12716, 2009 WL 367635, at *2 (SEC Feb. 13, 2009) (same); *Callipari*, File No. 3-11205, 2003 WL 22250402, at *4 (Sept. 30, 2003) (Foelak, A.L.J.) (same).

2. Mr. Contorinis's Actions Were Isolated and Not Recurrent.

A lifetime bar is not warranted where the alleged misconduct is isolated and not recurrent. *See, e.g.*, *Jantzen*, 2012 WL 5422022, at *6. This factor is often found to weigh in favor of a lifetime bar when the misconduct spans years, not, as here, a period of only months or weeks. In fact, less than a lifetime bar has been imposed where misconduct spanned a period as short as nine months, which significantly exceeds the time period at issue in Mr. Contorinis's case. *See, e.g.*, *Radano*, File No. 3-12084, 2008 WL 2574440, at *6, 8 (SEC June 30, 2008) (finding right to reapply after five years appropriate where misconduct spanned at least nine months); *see also Furman*, File No. 3-14532, 2012 WL 2339281 (June 20, 2012) (Elliot, A.L.J.), at *6 (finding two transactions over a period of nine months "to favor a temporary bar" from practicing or appearing before the Commission); *Lieberman*, File No. 3-12302, 2006 WL 1457991, at *1 (SEC May 26, 2006) (accepting an offer of settlement that included a right to reapply for association after three years, where alleged misconduct took place over a period of two-and-a-half years). Moreover, where, as here, a respondent's misconduct is "isolated" over the course of a multi-decade, otherwise untainted, career, this factor weighs against a lifetime bar. *See, e.g.*, *Jantzen*, 2012 WL 5422022, at *6 (finding that the "isolated nature of Jantzen's misconduct weighs in favor of imposing a more lenient sanction" where the Division "ha[d] not alleged that Jantzen engaged in any other acts of insider trading, nor does Jantzen have a record of any securities violations during his prior twenty years as a licensed securities professional").

Mr. Contorinis's conviction was based on trading in the stock of only one

company on only two days: December 22, 2005, and January 11, 2006. The alleged misconduct ended in January 2006, three years before Mr. Contorinis was approached by the government regarding any allegations of wrongdoing. This was an isolated incident in an otherwise unblemished career that—like the respondent in *Jantzen*—spanned over twenty years.

Significantly, the isolated nature of Mr. Contorinis's misconduct was recognized by the judge who presided over the Criminal Case. After hearing testimony for over two weeks, including two days of Mr. Contorinis's testimony, and receiving extensive submissions following the conviction concerning Mr. Contorinis's sentencing, Judge Sullivan observed as follows:

> I don't think there is really any dispute that prior to this you led a completely law-abiding life and an admirable life. I don't think anyone really challenges that. You worked hard. You have lived a life that for the most part you can be proud of. . . . I also think it's worth noting 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.*

(Berse Decl. II Ex. 3 at 54, 58 (emphasis added).)

The recurrence factor does not weigh in favor of imposing a lifetime associational bar on Mr. Contorinis. *See Mathis*, File No. 3-7153, 1990 WL 322821, at *12 (Aug. 3, 1990) (Murray, A.L.J.) ("Mitigating factors include the fact that . . . [respondent] has not been the subject of any other disciplinary action in the almost 20 years he has been active in the securities business [and that] the actions described in this decision appear to be a selfish aberration in a life of accomplishments achieved by hard work and abiding by the rules . . . ."). Rather, as in cases such as *Radano* and *Jantzen*, a five-year bar, at most, would be sufficient to satisfy the public interest requirement.

3. Mr. Contorinis Is Not Likely to Commit Future Violations.[11]

Permitting anyone to work in the securities industry presents the opportunity for violations to be committed. But that does not mean that they will be committed. Nor do an

[11] *See* above note 5.

individual's past violations necessarily demonstrate a "realistic likelihood of recurrence." *SEC* v. *Commonwealth Chem. Sec.*, 574 F.2d 90, 100 (2d Cir. 1978); *see also Steadman*, 603 F.2d at 1140 ("To say that past misconduct gives rise to an inference of future misconduct is not enough."). Yet here, the Division has offered only Mr. Contorinis's prior conduct and nothing more to support the contention that he cannot be trusted to continue working in the industry. (Div. Br. at 14.) In instances where, as here, the respondent has an otherwise spotless record, however, the public interest has been found to warrant less than a lifetime bar. *See, e.g.*, *Radano*, 2008 WL 2574440, at *8 (basing right to reapply after five years, in part, on respondent's "otherwise unblemished career in the securities industry" (internal quotation marks omitted)); *Rosenthal*, File No. 3-8642, 1998 WL 549558, at *3 (SEC Sept. 1, 1998) (basing right to reapply after three years, even after conviction, in part, on "no evidence of either prior or subsequent disciplinary history"); *Gartz*, 1997 WL 441913, at *17 (basing right to reapply after two years, in part, on recognition that "[p]rior to these transgressions, [the respondent] had not been the subject of any customer complaints or regulatory action during his twenty years in the securities industry in which he held a high profile position and had a large number of clients"); *Sloate*, File No. 3-8232, 1997 WL 126707, at *3 (SEC Mar. 7, 1997) (same as *Radano*); *Paul*, File No. 3-6271, 1985 WL 548579, at *2 (SEC Feb. 26, 1985) (permitting convicted respondent to reapply after two years, with conditions, based on respondent's "lengthy unblemished record in the securities business"); *see also Jantzen*, 2012 WL 5422022, at *6 ("While it is true that continued employment in the securities industry would provide Jantzen with the opportunity for future

violations, overall, a temporary associational bar will serve as a sufficient deterrent to any future misconduct.").

Indeed, based on factors such as Mr. Contorinis's otherwise unblemished record, in connection with sentencing Mr. Contorinis, Judge Sullivan concluded that Mr. Contorinis posed no risk of future violations: "As to specific deterrence, *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.*" (Berse Decl. II Ex. 3 at 56 (emphasis added).)[12]

Moreover, the significant punishment already imposed (or likely to be imposed) on Mr. Contorinis—72 months' incarceration, to be followed by 24 months of supervised release, $7.26 million of disgorgement plus $2.485 million of prejudgment interest, forfeiture in the amount of $427,875, a $1 million civil penalty, a permanent follow-the-law injunction, and a possible criminal penalty[13]—serves as more than a sufficient deterrent to any potential future violations. Mr. Contorinis's incarceration has already kept, and will continue to keep, Mr. Contorinis out of the securities industry for several years to come. And in light of the severe and stigmatizing criminal and civil penalties that have already been imposed on Mr. Contorinis, his ability to find employment again in the industry remains in serious doubt.

A lifetime bar is not necessary to prevent any future violations.

C. The Amount of Time that Has Passed Belies the Division's Claim that a Bar Is in the Public Interest.

In considering whether to impose a lifetime industry bar, it is also appropriate for the ALJ to consider the "age of the violation" at issue. *Harrington*, 2013 WL 1655690, at *4. Indeed, the staleness of the underlying conduct weighs strongly against any suggestion that Mr.

[12] While Judge Sullivan later imposed a permanent follow-the-law injunction, in ordering that injunction, Judge Sullivan never grappled with the key question of whether Mr. Contorinis was likely to commit future securities violations. *See Contorinis*, 2012 WL 512626, at *4. Mr. Contorinis has therefore appealed the injunction. The appeal was fully briefed as of July 12, 2013, and it is expected that oral argument will take place in September 2013.

[13] See above note 3.

Contorinis poses a present threat to the public that would warrant such a bar. *See Proffitt* v. *FDIC*, 200 F.3d 855, 862 (D.C. Cir. 2000) ("If in fact Proffitt posed the threat to the public that the FDIC portrays, it presumably would have removed him sooner rather than later."). Where, as here, several years have passed since the underlying conduct, less than a lifetime associational bar has been found to satisfy the public interest. *See Radano*, 2008 WL 2574440, at *8 (granting right to reapply after five years where conduct occurred approximately seven years earlier); *Rosenthal*, 1998 WL 549558, at *3 (imposing three-year bar on convicted respondent, in part, because the conduct underlying the conviction was twelve years old).

Here, *more than seven years* have passed since the conduct at issue ended in January 2006. The Commission filed its Complaint against Mr. Contorinis more than four years ago. The indictment was issued more than three years ago. Mr. Contorinis was convicted more than two years ago. And the permanent injunction was imposed against Mr. Contorinis more than a year ago. Yet the Division waited until April 30, 2013, to commence these proceedings. If a bar was truly in the public interest, the Division surely would have pursued this sanction sooner.

CONCLUSION

For the foregoing reasons, Mr. Contorinis respectfully requests that the relief sought by the Division in its Motion be denied.[14] Mr. Contorinis respectfully submits that no bar

[14] Mr. Contorinis respectfully submits that the collateral bar sought by the Commission is inappropriate. While

Mr. Contorinis acknowledges that the Commission recently held in *Lawton* that "collateral bars imposed pursuant to Section 925 of Dodd-Frank are not impermissibly retroactive as applied in follow-on proceedings addressing pre-Dodd-Frank conduct," 2012 WL 6208750, at *6–10, we respectfully submit that that case was wrongly decided and Mr. Contorinis expressly raises this issue to preserve it for appeal. Enactment of § 925 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, § 925, 124 Stat. 1376, 1850–51 (2010), for the first time gave the Commission the authority to impose: (a) an associational bar with respect to municipal advisors and NRSROs, *see, e.g.*, *Bartko*, 2012 WL 3578907, at *7; and (b) a collateral bar on a respondent who had not yet sought to associate with a particular branch of the securities industry, *see, e.g.*, *Teicher* v. *SEC*, 177 F.3d 1016, 1019–21 (D.C. Cir. 1999). Because Mr. Contorinis's conduct ended no later than January 2006 and therefore pre-dates Dodd-Frank, the collateral bar

is necessary or warranted. In the alternative, Mr. Contorinis respectfully submits that any bar should last no longer than five years, after which time Mr. Contorinis should have a right to reapply.[15]

Dated: New York, New York
July 19, 2013

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that the Division seeks would have an impermissible retroactive effect on Mr. Contorinis. *See Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

[15] On June 24, 2013, Mr. Contorinis wrote to the Division and raised several issues regarding the Division's

privilege log. On July 9, the Division replied to that letter. Yesterday, Mr. Contorinis wrote again to the Division to request additional information or documents to try to resolve some of the issues that remained outstanding. We received a response from the Division at approximately noon today and are reviewing the new information provided. While we are hopeful that the parties will be able to resolve any open issues with further discussion, given that some issues appear to still remain outstanding, we respectfully request that Your Honor defer ruling on this Motion for at least two weeks while the parties attempt to resolve the outstanding issues. If, at that time, the parties have not resolved the issues, we will notify Your Honor and file a motion, as necessary. In the meantime, Mr. Contorinis reserves the right to seek leave to supplement his opposition to this motion if the resolution of these issues results in the production of any additional relevant material.