UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16326

In the Matter of

Khaled A. Eldaher

Respondent.

POST-HEARING BRIEF OF THE DIVISION OF ENFORCEMENT

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I. INTRODUCTION

This case was brought by the Division of Enforcement ("Division") against Respondent Khaled A. Eldaher ("Respondent" or "Eldaher") because it is in the public interest to sanction Eldaher for "selling away" from his employing broker-dealer, ACAP Financial, Inc. ("ACAP").

As explained below, the evidence presented at the March 23, 2015 hearing establishes both that Eldaher sold away in violation of Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), and that sanctions should be imposed against him. Indeed, Eldaher had already admitted that "I sold away" while employed at ACAP, and that ACAP fired him for selling securities other than through ACAP. Moreover, the terms of the written agreement that Eldaher had with Efstratios "Elias" Argyropoulos ("Argyropoulos"), the principal of Prima Capital Group, Inc. ("Prima"), for Eldaher to receive compensation for referrals of investors interested in Facebook shares, are undisputed. (*See* Exhibit ("Ex.") 37 (email agreement).) This agreement, coupled with evidence that Eldaher did indeed refer investors to Argyropoulos and receive the agreed-upon fee, are sufficient to establish that Eldaher violated Section 15(a)(1).

The evidence further establishes that significant sanctions should be imposed. In particular, even though the Division need not establish that Eldaher acted with scienter in order to prove that he engaged in "selling away," ample evidence was introduced establishing that Eldaher was aware that selling away violated FINRA rules, was an "implicit" violation of his employer's rules, and that his conduct constituted "selling away." Tellingly, when asked whether he told his employing broker-dealer, ACAP about his referral arrangement with Prima, Eldaher testified, "They didn't ask and I didn't tell them." (Transcript ("Tr.") 11:24-12:5; *see also id.* 24:19-25:1.) The evidence also establishes that Eldaher concealed his selling away activities from ACAP by using a non-ACAP email address to communicate with Argyropoulos and with investors.

In addition to evidence showing that Eldaher knowingly engaged in illegal conduct and concealed that conduct from his employer, evidence was introduced establishing that Eldaher has a history of disputes with past employing broker-dealers going back to1999, and a deferred adjudication of guilt for theft by check resulting from writing a check for insufficient funds. Most of these disputes concerned Eldaher's failure to return funds advanced by his employer (including one in which the employer paid a monetary settlement to an Eldaher client who alleged churning of her account). The common thread of Eldaher's past conduct – relevant for determining the appropriate sanction in the public interest – is Eldaher's dishonesty in refusing to return funds which he was not entitled to keep. Moreover, Eldaher is still in the industry – he is associated with a Commission-registered investment advisor based in San Diego which, like ACAP, is located far away from Eldaher's residence in Austin, Texas, making supervision difficult.

As explained below, based on the evidence admitted at the hearing, a cease-and-desist order and order that Eldaher disgorge the $15,478 he received in referral fees should be imposed, and the remaining relief sought – a collateral bar and a $24,000 civil penalty– is in the public interest in order to protect investors.

II. STATEMENT OF FACTS[1]

A. Eldaher has Over Twenty Years of Experience as a Registered Representative

1. Eldaher was first licensed as a registered representative of a broker-dealer in 1992. (Tr. 7:20-7:22.) He passed the following licensing examinations: Series 24 in 1991 and Series 7 and 63 in 1993. (Tr. 7:20-8:7.)

2. From February 2011 to December 2013, Eldaher was associated with ACAP, a Commission registered broker-dealer, as a registered representative. (Tr. 8:11-8:15; Ex. 40 (Form U5) at 1 & 2.)

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[1] This Statement of Facts section serves as the requested proposed Findings of Fact.

B. Eldaher Sold Away from his Employing Broker

1. Eldaher Entered into an Agreement with Argyropoulos by which He Received Transaction-Based Compensation

3. In 2012, Eldaher referred investors who were interested in purchasing shares of Facebook to "somebody else outside of ACAP" – that is, Prima. (Tr. 10:9-10:13, 11:17-11:20.)

4. Argyropoulos was the founder, president and sole shareholder of Prima. (*In the Matter of Efstratios "Elias" D. Argyropoulos*, AP File No. 3-16382, Securities Exchange Act of 1934 release No. 74248 (Feb. 11, 2015) (Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions) at 2 ¶ III.1; Tr. 103:2-103:10 (taking official notice of the Order).)

5. Eldaher had had no prior business relationship with Prima. (Tr. 65:23-66:1.) Although Eldaher communicated with Argyropoulos, he claims he did not know the relationship between Prima and Argyropoulos, claiming it was "nonexistent as far as I know." (Tr. 14:16-14:24.) Eldaher did not know whether either Prima or Argyropoulos were registered or licensed and did not check. (Tr. 15:6-15:13.) Eldaher never met Argyropoulos in person; he only talked with him on the telephone. (Tr. 63:20-63:25.)

6. In fact, Eldaher knew or had reason to know that Argyropoulos had a relationship with Prima. On April 14, 2012, Argyropoulos sent an email to Eldaher regarding "Subject: Facebook 50/50%." (Ex. 37.) He signed the email with his name, followed by "Prima Capital Group, Inc.," a street address, cell and fax numbers and an email address of "prima@silcom.com." Additionally, the Form 1099 Eldaher received in his wife's name was issued by Prima. (Ex. 36.)

7. Argyropoulos' "Subject: Facebook 50/50%" email states: "This is an agreement between Khaled Eldaher and Elias Argyropoulos to split 50/50% points earned for placing Facebook in the Secondary market." (Ex. 37; Tr. 17:1-17:15.) It further states that Argyropoulos and Eldaher would work on a 50/50% basis on

other deals in the secondary market in the future. (Ex. 37.) Eldaher understood that for every referral, he would receive 5%. (Ex. 35 (Eldaher letter to Division attorney); Tr. 16:6-16:9.) Eldaher understood that his compensation would depend on how many shares were ultimately purchased by the person he referred. (Tr. 18:20-19:2.)

8. Eldaher in fact received $15,478 in fees pursuant to his agreement with Argyropoulos. (Ex. 36 (2012 Form 1099 from Prima); Tr. 19:3-20:1.) He referred twelve investors to Prima. (Ex. 38; Tr. 20:15-21-24.) He initially called these investors, rather than the investors calling him. (Tr. 86:7-86:1.) The total amount invested by these investors was more than $349,248.50. (Ex. 38 (investor list and amounts invested); Tr. 21:25-22:20, 101:14-101:15.)[2]

9. Eldaher admitted, in his investigative testimony, that "I sold away, and that is what it look[ed] like." (Tr. 11:12-11:13.)

10. Eldaher now claims that the fee he was paid was "a referral fee" as compensation for the referrals to Prima Capital, and denies that his referrals to Prima and Argyropoulos and the transaction based compensation he received for those referrals constituted "selling away." (*See* Tr. 11:21-11:23.)

11. In light of Eldaher's prior admission that he sold away, and the fact that Eldaher, not the Division, introduced the term "sold away" during his testimony, Eldaher's present claim that he now thinks that his selling away activities can be construed as "outside business activities versus selling away,"

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[2] The Division did not introduce evidence as to the amount invested by a twelfth investor, Tom Gouger, whose name is not on the list, but whom Eldaher admits invested. (*See* Tr. 21:7-21:16.) This accounts for the discrepancy between the $349,248.50 invested according to Ex. 38 and the $362,887.50 the Division alleged in the Order Instituting Proceedings was invested.

even though he admits he "didn't know the difference at the time" he previously testified, is not credible. (*See* Tr. at 12:13-13:24.)[3]

2. Eldaher Concealed His Selling Away Activity from ACAP

12. Eldaher admits that "it's implicit" that ACAP prohibited selling away. (Tr. 54:22-54:25.)

13. No one from ACAP supervised Eldaher's referrals to Prima. (Tr. 11:24-12:1.) Nor did ACAP know about the referrals because "They didn't ask and I [Eldaher] didn't tell them." (Tr. 12:2-12:5.)

14. In fact, Eldaher went to some trouble to conceal his selling away activities from ACAP. In particular, he used a non-ACAP email address in his communications with Argyropoulos and investors concerning the Facebook transactions, and instructed Argyropoulos to use that address in his communications. (Tr. 24:5-25:1; Exs. 4, 13, 37.) The fact that ACAP was based in Salt Lake City, Utah, and Eldaher was operating out of his residence in Austin, Texas, facilitated Eldaher's concealment of his selling away activities. (*See* Tr. 69:9-69:12.)

15. Eldaher was aware that ACAP minimally supervised him, further enabling him to conceal his selling away activities. In particular, ACAP merely conducted a financial audit to determine how much Eldaher owed the firm, and engaged in no other reviews or supervisory procedures. (Tr. 68:12-68:22.)

3. Eldaher Acted as an Intermediary between Argyropoulos and Investors

16. During the period Eldaher was selling away Facebook shares, he was aware that the IPO was oversubscribed, that the underwriter had decided to increase the number of shares offered, and that there was a very active secondary

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[3] Nor is it relevant to the legal question of whether his selling away activities in fact violated Section 15(a)(1), or to his state of mind during the period he was actually selling away.

market, but that there were "very, very limited ways of finding the shares." (Tr. 59:11-59:20.) He understood that these shares were "locked up" shares and not IPO shares, and that acquiring them would require significant funds to which Eldaher did not have access. (*See* Tr. 60:7-60:14.) Eldaher also knew that the shares had not yet been acquired by Argyropoulos. (Tr. 100:12-100:18.)

17. Nevertheless, as explained above, Eldaher did not check to determine whether Prima or Argyropoulos were licensed or perform any other due diligence as to their ability to acquire Facebook shares.

18. In fact, during the course of his selling away activities, Eldaher became aware that certain investors had not received their Facebook shares, as promised by Argyropoulos. (Tr. 23:3-24:4.) For example, from November 1, 2012 to May 2013, Eldaher was copied by Argyropoulos and investor Howard Tischler on a chain of several emails in which Tischler was complaining that he had not received delivery of the Facebook shares which he was offered in April 2012. (Exs. 2, 4, 9-11, 13; Tr. 23:3-24:4, 26:22-30:14, 32:18-34:11.) In the final, May 11 email, Tischler complains "You [Argyropoulos] have cost me substantial money by losing the ability to sell the stock and take the short-term tax loss." (Ex. 13 (email); Tr. 23:10-24:1.) Eldaher was also aware that other investors did not receive their Facebook shares. (Tr. 24:2-24:4.)

19. Argyropoulos in fact told Eldaher towards the end that he did not have the Facebook shares and that he had not obtained them from the source from which he was supposed to get them. (Tr. 100:5-100:11.)

20. In addition to referring investors to Argyropoulos, Eldaher acted as a go-between when Argyropoulos tried to substitute stock in another company for shares in Facebook. In particular, Eldaher discussed with Tischler and others exchanging the investor's promised Facebook shares for shares in Black Motor Corp., even though he did not "know exactly what it is," and any description of the

company he had was received solely from Argyropoulos. (Exs. 9 & 10 (emails); Tr. 27:22-30:14.0, 33:2-33:18.)

21. Investor Mary Weaver also complained to Eldaher when she received fewer shares than she had purchased, purportedly to cover the fee split between Argyropoulos and Eldaher. (Tr. 72:7-72:20.)

22. Eldaher kept his referral fee for the investments by Tischler and others, even though he knew several had not received their shares. (Tr. 34:22-35:1.) To the extent Tischler and others ultimately did receive Facebook shares, Eldaher did not provide them; they were provided by Prima in 2013, after Eldaher had received his fees in 2012. (Tr. 35:2-35:5, 76:21-77:8; Ex. 100 at E-0000063-68 (Prima Facebook Investor Status chart attached to letter to Division counsel by counsel for Prima and Argyropoulos.)[4]

4. ACAP Terminated Eldaher for "Selling Away"

23. ACAP terminated Eldaher because of his selling away activities. Specifically, ACAP commented in the Form U5 that "KHALED [ELDAHER] WAS PAID A FINDERS FEE FOR REFERRING PEOPLE TO SOMEONE SELLING SHARES OF FACEBOOK. HE DID NOT RUN THE BUSINESS THROUGH ACAP." (Ex. 40 (Form U5 at 5 ¶ 6 (capital letters original).) Eldaher was terminated in December 2013, about a month after ACAP learned in November 2013 that he was selling away. (*See* Tr. 52:19-53:9.)

24. Eldaher denied that his selling away activities were the reason for his termination, even after being confronted with ACAP's comment in his Form U5. First, before being confronted with the U5, Eldaher denied that he was terminated because he "sold away," claiming "That wasn't what was I [sic] told. I wasn't doing business with ACAP, and they didn't want to fund my registration fees." (Tr. 8:16-8:20.) After being confronted with ACAP's comment in the Form U5,

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[4] This chart includes additional Prima investors who were not referred by Eldaher.

Eldaher claimed that the above language "was added on after my U5. So this is amended as far as I know. . . ." (Tr. 9:13-9:18.) He then conceded, on further cross-examination, that he did, in fact, receive "a copy of the U5 that was amended." (Tr. 9:19-9:21.)

25. Eldaher was also reluctant to concede that he admitted in his investigative testimony, when asked why he was terminated by ACAP: "I sold away, and that is what it look[ed] like." (Tr. 11:12-11:13.)

26. Eldaher also disputed that Tischler had experienced substantial losses as of November 2013, arguing that if Tischler and others had kept their shares once they received them, their price today would be "substantially higher" than when they were purchased. (Tr. 25:9-25:19.)

27. Eldaher's attempts to deny that he was terminated for "selling away" in the face of his prior sworn admission and to explain away the language of his former employer in the Form U5 are deliberate attempts by Eldaher to evade responsibility for his illegal conduct and are not credible.

C. Eldaher Has a History of Dishonest Conduct

28. Eldaher admits that to pass his various licensing examinations, he had to learn the rules of the industry. (Tr. 8:8-8:10.)

29. Eldaher further admits that in 2012, when the events at issue occurred, he had been a broker for twenty years, that he was required to know the rules, that he knew them, and more specifically, that he knew that there was a FINRA rule that prohibited selling away. (Tr. 14:4-14:15.)

30. Eldaher has been employed at twelve different broker-dealers since 1992, including ACAP. (Ex. 41 (CRD Report).) He violated his employment contracts with at least two of those employers by not repaying monies they had advanced to him; he failed to reimburse a third employer when it paid a settlement to a client who claimed he had been churning her account; and he has been subject to an investigation by a fourth employer. He also received a deferred adjudication

of guilt for theft in 2000, and a fifth broker obtained a $7,000 judgment lien against him in 1999. Specifically:

a. When Eldaher left his employment with PHD Capital in February 2011, he owed that firm $18,024.71. (Ex. 41 at 2.) Prior to being shown the CRD Report at the hearing, Eldaher denied that he owed the firm money. (Tr. 35:12-36:21.)

b. Eldaher claimed not to recall whether PHD was the first firm he left owing money. (Tr. 37:5-35:7.) When refreshed that when he left Salomon Grey in 2005, he owed it money, Eldaher responded "Yes, and we worked out our difference with arbitration." (Tr. 37:8-37:11.) In fact, the difference was not "worked out" – Eldaher was *ordered* to pay Salomon Grey $14,141.05, the amount the firm claimed he owed. (Ex. 42 (CRD Report; Ex. 44 (LEXIS printout of *Salomon Grey Fin. Corp. v. Eldaher*, 2005 NASD Arb. LEXIS 2294 (Sept. 20, 2005); Tr. 37:12-37:16, 38:4-38:15.)

c. Eldaher's conduct was also subject to internal review beginning April 24, 2007, after he left a third broker, Barron Moore in 2006; he denies knowledge of this review, which resulted from an NASD examination. (Ex. 43 (CRD Report); Tr. 39:9-40:19.)

d. In 1999, while Eldaher was employed by First Financial Investment Securities (which later became Riverstone Wealth Management), a customer complained that Eldaher was churning her account. (Tr. 43:14-43:23.) The firm paid the customer $27,000, and sought reimbursement from Eldaher, who never paid. (Ex. 45 (CRD Report) at 1 & 3; Tr. 44:6-44:20, 94:14-94:19.)

e. In 1999, Eldaher had a dispute with broker Millinum.Com, which resulted in the firm obtaining a judgment lien for $7,000 against Eldaher. (Ex. 46 (BrokerCheck Report) at 13.) Eldaher claimed that the "day trading incident" at issue was created by a power outage causing the value in his account to drop; he admitted that as a result Millinum's funds were used to cover the position. (Tr. 45:22-47:8.) Eldaher failed to pay the judgment before the company ceased to exist. (Tr. 47:8-47:14.)

f. In 1999, Eldaher wrote a check when he had insufficient funds to cover it and was charged with the crime of theft by check. (Tr. 47:23-48:20.) The matter was resolved by a deferred adjudication of guilt on February 4, 2000 after Eldaher made restitution. (Ex. 46 (BrokerCheck Report) at 10.)

D. Eldaher is Currently Employed in the Securities Industry

31. Since September 2014, Eldaher has been employed by Managed Risk Portfolios ("MRP"), a Commission registered investment advisor based in San Diego, California. (Tr. 6:7-7:24.) Eldaher works from his home in Austin, Texas. (Tr. 7:2-7:6.) Eldaher meets with advisors and explains MRP's strategy, and asks them to invest with MRP. (Tr. 7:5-7:19.)

32. Eldaher testified that his position as Regional Relationship Manager for the Central Division of MRP does not require any securities licenses. (Tr. 50:20-50:22.) This is technically true because no self-regulatory licensing authority such as FINRA regulates investment advisers. However, Eldaher's duties are not merely clerical or ministerial and he does admit that he is presently associated with a Commission registered investment adviser. (Tr. 6:17-6:24.)

33. Although Eldaher does not presently have direct contact with investors, there is no assurance that he will not have investor contact in the future, other than his own assurances, which are not credible in light of his testimony

rationalizing his illegal conduct and past history of dishonesty in his prior employment and in engaging in theft by check. (*See* Tr. 97:2-97:16.)

E. Eldaher Refuses to Acknowledge Wrongdoing and Has Made No Reasonable Assurances that he Will Not Engage in Future Violations

34. Eldaher does not appreciate the wrongful nature of his conduct. As explained, he continues to deny he engaged in selling away. In an effort to disclaim culpability, he also deliberately defines selling away in an overbroad fashion as "To be involved in the selling process *all the way* and receiving *commissions* for it." (Tr. 91:13-91:14 [emphasis supplied].) Nor does he appreciate or care that he exposed the clients he referred to Prima to enormous financial risk. Nevertheless, Eldaher claims he understands that selling away is "wrong." (Tr. 96:5-96:10.) When asked by his counsel whether he will ever sell away again, Eldaher claims "Absolutely not," because "I don't want to go through this again." (Tr. 96:14-96:17.) This assurance is hollow, given that Eldaher does not concede he sold away in the first place, and his definition of selling away as being involved in "every step of the selling process" and receiving "commissions" specifically as compensation is meaninglessly overbroad. Tellingly, in describing his remorse, Eldaher testifies "I am beyond remorseful that I put *myself* through this process." (Tr. 96:10-96:11 [emphasis supplied].) He expresses no concern for the losses his clients could and may have experienced.

III. ARGUMENT

A. The Evidence Establishes that Eldaher Violated Section 15(a)(1)

Section 15(a) of the Exchange Act provides, in relevant part:

> It shall be unlawful for any broker or dealer which is . . . a natural person not associated with a broker or dealer. . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security. . . unless such broker or dealer is registered in accordance with subsection (b) of this section.

Section 3(a)(4)(A) generally defines a "broker" as follows:

> The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others.

Eldaher's liability under Section 15(a)(1) was established in two ways. First, and primarily, associated persons who "sell away" from their employing brokers violate Section 15(a)(1), because their employer's registration as a broker is irrelevant to their brokerage activities conducted outside that employing broker's knowledge or supervision. Second, because he received "transaction-based" compensation for his solicitation of Facebook investors on Prima's behalf and he satisfies other factors indicating he was a broker, Eldaher was acting as an unregistered broker. Under either analysis, Eldaher is liable for acting as an unregistered broker.

1. Eldaher Violated Section 15(a) by "Selling Away"

The Division has proven that Eldaher entered into an agreement with Argyropoulos, memorialized in an email from Argyropoulos to Eldaher's personal gmail account, which stated:

> This is an agreement between Khaled Eldaher and Elias Argyropoulos to split 50/50% points earned for placing Facebook in the Secondary market.
>
> For example at $48.50 Facebook is marked up 4 points. On 1,000 shares at $48.50 we make $4,000 or $2,000 each.
>
> We will work on a 50/50% basis on other deals in the secondary market in the future.
>
> Looking forward to working with you!

(Ex. 37.) Eldaher further admits, in a letter that he sent to the investigating Division attorney, that he referred "some investors that I thought would be interested in Facebook to Prima," and that for every referral who ended up investing, he received "a 5% referral fee," and that that fee "is evidenced in the 1099 from Prima." The Form 1099 shows that $15,478 in fees was paid by Prima to Tammy Eldaher, Eldaher's wife. (Ex. 36.) Twelve individuals referred by

Eldaher invested over $349,248.50 to purchase Facebook shares from Argyropoulos.

The evidence further showed that, although Eldaher was, in fact, associated with registered broker-dealer ACAP throughout 2012, the period at issue, ACAP was unaware of Eldaher's agreement with Argyropoulos and, according to the Form U-5 it filed with FINRA reporting its termination of Eldaher:

> KHALED [ELDAHER] WAS PAID A FINDERS FEE FOR REFERRING PEOPLE TO SOMEONE SELLING SHARES OF FACEBOOK. HE DID NOT RUN THE BUSINESS THROUGH ACAP.

(capital letters in original.) In testimony, when asked why he was terminated by ACAP, Eldaher admitted "I sold away."

When a person associated with a broker engages in the business of selling securities without the knowledge or supervision of the broker, that person is "selling away" from the broker, and is acting as an unregistered broker in violation of Section 15(a)(1) of the Exchange Act. *See SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990) (individual who made "private" bond deals which he negotiated out of his office at broker Dean Witter on his own behalf, was a broker-dealer and his failure to register as such violated Section 15(a)(1)); *SEC v. Integrity Fin. AZ, LLC*, 2012 Fed. Sec. L. Rep. (CCH) ¶ 96,715, 2012 U.S. Dist. LEXIS 6758 at *14 n.1 (D. Ohio, Jan. 20, 2012), *citing Roth v. SEC*, 22 F.3d 1108, 1109 (D.C. Cir. 1994 (unpublished opinion)) (holding registered representative liable for violations of Section 15 where he was unsupervised by the employing broker-dealer, from whom he hid his work selling unregistered securities); *SEC v. Homestead Properties, L.P.*, 2009 WL 5173685 at *5 (C.D. Cal. 2009) *citing Roth* (finding SEC had made a prima facie showing that a registered representative violated Section 15 where he was unsupervised by the employing broker-dealer, from whom he hid his work selling unregistered securities).

Eldaher's assertion that he was merely referring people to Argyropoulos for a fee, and not "selling" Facebook shares is unavailing. Individuals are not merely

required to register as brokers if they actually sell securities or, as Eldaher prefers, if they are involved in "every step of the selling process." Rather, the statute itself is broadly worded, and Eldaher's conduct falls well within its language. The evidence presented established that Eldaher "induce[d] or attempt[ed] to induce the purchase or sale of, a[] security." He was therefore required by Section 15(a)(1) to be registered as a broker, or to be associated with a registered broker-dealer.

2. Eldaher Was Acting as an Unregistered Broker When He Solicited Investors on Behalf of Prima

Even assuming Eldaher were not "selling away," the evidence established that Eldaher was "engaged in the business of effecting transactions in securities for the account of others" and therefore met the basic definition of a "broker." He was, of course, an associated person of ACAP, a registered broker-dealer, meaning he was engaged in the business of effecting securities transactions for the account of others. No further analysis should be necessary as to whether Eldaher was, in fact, a broker with respect to the Facebook shares. Nevertheless, assuming that it is necessary to further analyze whether Eldaher was truly acting as a "broker," the evidence establishes that he was.

A showing that an alleged broker is engaged in "a certain regularity of participation in securities transactions at key points in the chain of distribution" will establish that the person is acting as a broker. *See SEC v. Hansen*, 1984 Fed. Sec. L. Rep. (CCH) ¶ 91,426, 1984 U.S. Dist. LEXIS 17935 at *25 (S.D.N.Y. Apr. 6, 1984), *quoting Mass. Fin. Services, Inc. v. SIPC*, 411 F. Supp. 411, 415 (D. Mass. 1976); *see also In re Martin*, Initial Decision Rel. No. 751, 2015 SEC LEXIS 880 at *48-49 (Mar. 9, 2015). Among the factors relevant to a determination of whether an individual acted as a broker are whether the person: (1) is an employee of the issuer; (2) received commissions as opposed to a salary; (3) is selling, or previously sold, the securities of other issuers; (4) is involved in negotiations between the issuer and the investor; (5) makes valuations as to the merits of the investment or gives advice; and (6) is an active rather than a passive

finder of investors. *Hansen* at *25; *Martin* at *49. These factors have generally been adopted by courts as factors to consider in determining whether Section 15(a)(1) has been violated. *See, e.g., SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005); *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011) (most frequently cited factors are those identified in *Hansen*); *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

The *Hansen* factors are not designed to be exclusive, and some factors appear to be more indicative of broker activity than others. *Kramer*, 778 F. Supp. 2d at *1334; *Martin,* 2015 SEC LEXIS 880 at *49. *See also George*, 426 F.3d at *797 (that defendant was not employed by the issuer and ultimately suffered a net loss himself do not suffice to counter SEC's proof that he was regularly involved in communications with and recruitment of investors). In particular, "transaction-based compensation is the hallmark of a salesman." *Kramer*, 778 F. Supp. 2d at 1334; *Martin*, 2015 SEC LEXIS 880 at *49. Moreover, in this case, Eldaher referred to Prima twelve investors, who invested at least $349,248.50 in Facebook shares.

Here, the evidence established that Eldaher's conduct satisfied the second, third, fifth and sixth *Hansen* factors. In particular, with regard to the second factor, although his compensation may not have been termed a "commission," it was "transaction-related," or "transaction-based" because Eldaher received a percentage of the mark-up on Facebook shares that was dependent on the number of shares sold. *See George*, 426 F.3d at *793 (affirming finding of liability where defendant received "transaction-related compensation in the form of investors' money"); *SEC v. Parrish*, 2012 WL 43878114 (D. Colo. Sep. 25, 2012) (granting SEC default judgment, finding that defendant, who received "transaction-based" compensation, acted as unregistered broker). There is also no dispute that Eldaher, as an associated person of ACAP, previously sold securities of other issuers, satisfying the third *Hansen* factor.

By referring investors to Prima and Argyropoulos to purchase Facebook shares, Eldaher was making a valuation as to the merits of the Facebook investment or giving advice to invest in Facebook shares through Prima, satisfying the fifth factor. Similarly, by acting as a go-between between Tischler and other investors and Argyropoulos when Argyropoulos was attempting to persuade them to substitute Black Motor Corp. shares for Facebook shares, Eldaher was also making a valuation as to the merits of Black Motor Corp. stock or giving advice to invest in Black Motor Corp. shares, again satisfying the fifth factor. Finally, there is no question that Eldaher was an active, rather than a passive, finder of investors for Prima and Argyropoulos – the whole point of their agreement was for Eldaher to find Facebook investors for Prima, and be compensated for it.

3. Eldaher's "Selling Away" Was a Serious Violation

As the Commission explained in affirming a FINRA disciplinary action for "selling away":

> We have repeatedly held that selling away is a serious violation. "[FINRA] Conduct Rule 3040 [prohibiting "selling away"] is designed not only to protect investors from unsupervised sales, but also to protect securities firms from liability and loss resulting from such sales. Such misconduct deprives investors of a firm's oversight, due diligence, and supervision, protections investors have a right to expect." [citation omitted]

In re Siegel, 2008 SEC LEXIS 2459 at *36 (Oct. 2, 2008), *aff'd Siegel v. SEC*, 592 F.3d 147, 156 (D.C. Cir. 2010). Courts have similarly viewed "selling away" as a serious violation. *See U.S. v. Siddons*, 660 F.3d 699, 702 (3rd Cir. 2011) (describing criminal defendant's "selling away" activities, explaining that clients invested their modest life savings with the defendant, initially believing that they were investing in a bank-supported, conservative investment product); *McNabb v. SEC*, 298 F.3d 1126, 1133 (9th Cir. 2002) (affirming Commission sustaining NASD sanctions; explaining that by selling $690,000 worth of securities to various clients without notifying his employer, appellant placed that firm at "great risk

should any liability issues arise"; and that three of the unsupervised sales involved unsuitable recommendations, placing appellant's clients at risk).

Here, the evidence showed that Eldaher's "selling away" conduct resulted in investors collectively investing at least $349,248.50 in Facebook shares which Eldaher admits that Argyropoulos finally told him he did not have. In fact, investors complained to Eldaher that the Facebook shares were not being delivered by Prima. Eldaher did not provide any discernable assistance to these investors; instead, at the urging of Argyropoulos, he attempted to persuade several of them to accept shares in Black Motors Corp., a company he knew nothing about, in lieu of Facebook shares. He thus twice subjected investors to significant financial risk.

To the extent that Eldaher argues that he did not believe he was "selling away," his erroneous belief does not negate his liability. Scienter is not an element of a violation of Section 15(a). *SEC v. Randy*, 38 F. Supp. 2d 657, 667 (N.D. Ill. 1999); *SEC v. Alliance Leasing Corp.*, 2000 U.S. Dist. LEXIS 5227 at *23 (S.D. Cal. Mar. 20, 2000). Moreover, ignorance of the prohibition against selling away is no excuse. *In re Siegel*, 2008 SEC LEXIS 2459 at *41; *see also In re Gebhart*, 58 S.E.C. 1133, Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93 at *57-58 (Jan. 18, 2006) (violation of FINRA "selling away" rule does not require a finding that it was done knowingly or with any other degree of scienter; consequently, the appellants' belief they were in compliance is irrelevant).

In this case, however, Eldaher admits that he knew that "selling away" was a violation of FINRA rules, and an "implicit" violation of ACAP rules. His actions also evidence that he knew what he was doing was wrong. When asked whether he informed ACAP of his arrangement with Argyropoulos, he responded "They didn't ask and I didn't tell them." He used a non-ACAP email address to communicate with investors and instructed Argyropoulos to use that address. In short, he took full advantage of the light supervision by ACAP, which was located in Salt Lake City, far away from his home in Austin, Texas.

Moreover, it is clear from Eldaher's testimony that his definition of "selling away" is newly crafted. He admits that he "didn't know the difference at the time" he testified between what he now terms "outside business activities versus selling away." His actions show that he knew during the time he was selling away that he was engaged in illegal acts that had to be concealed from his employer.

B. The Relief Requested by the Division Should be Granted

The Division seeks four forms of relief in this case: a cease-and-desist order; disgorgement by Eldaher of his undisputed ill-gotten gains of $15,478; a collateral bar pursuant to Section 15(b)(6); and imposition of a $24,000 civil penalty.

1. Issuance of a Cease-and-Desist Order is Appropriate

Section 21C (a) of the Exchange Act authorizes that Eldaher be ordered to cease and desist from committing violations of the Exchange Act. *See* 15 U.S.C. U.S.C. § 78u-3(a). In *KPMG Peat Marwick*, the Commission determined that there must be "some" likelihood of future violations whenever a cease-and-desist order is issued. 54 S.E.C. 1135, 2001 SEC LEXIS 98 at *101 (Jan. 19, 2001). The Commission explained that:

> Though "some" risk is necessary, it need not be great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation. To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist.

Id. at *102-103. The Commission based this conclusion on the statutory language, which allows it to impose a cease-and-desist order on a person who "has violated" the securities laws, in contrast with the Commission's authority to seek injunctive relief in those instances when a person "is engaged or about to engage" in violative conduct. *Id.* at *103.

Along with the risk of future violations, the Commission considers "our traditional factors," including the factors listed in *Steadman v. SEC*, 603 F.2d 1126,

1140 (5th Cir. 1979), and, in addition, "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *Id.* at *116. This inquiry is a flexible one, and no one factor is dispositive. This inquiry is undertaken not to determine whether there is a "reasonable likelihood" of future violations, but to guide the Commission's discretion. *Id.*

As explained above, the evidence shows that Eldaher violated Section 15(a)(1) by "selling away" from his employer broker. This, by itself, is sufficient to warrant a cease-and-desist order, particularly in light of the Commission's expressed view that "selling away" is a serious violation. Nevertheless, other factors also establish the appropriateness of a cease-and-desist order. In particular, Eldaher, who had been associated with various brokers for twenty years, knowingly violated the law, as evidenced by his attempts to conceal his activities from his employer, as well as his admissions that he knew that "selling away" was a violation of FINRA rules and an "implicit" violation of ACAP rules. He has refused to acknowledge wrongdoing; any assurances that he will not violate the law again are thus unreliable. And he has a history of dishonest conduct during the course of his employment with other brokers; his attempts to rationalize his prior misbehavior further indicate the necessity of imposition of a cease-and-desist order.

2. Disgorgement is Appropriate

Section 21C(e) of the Exchange Act authorizes disgorgement in cease-and-desist proceedings, including reasonable interest.[5] *See* 15 U.S.C. § 78u-3(e).

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[5] Section 21B similarly authorizes disgorgement in any proceeding in which the Commission may impose a penalty. 15 U.S.C. § 78u-2(e). The Division seeks disgorgement under this section as well.

The goal of disgorgement is two-fold: "'to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable.'" *SEC v. Platforms Wireless*, 617 F.3d 1072, 1096 (9th Cir. 2010), *quoting SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). Therefore, "the amount of disgorgement should include all gains flowing from the illegal activities." *Id.*; *see also In re Koch,* Exchange Act Rel. No. 72179, 2014 SEC LEXIS 1684, at * 90 (May 16, 2014) (Comm. op.) (*citing SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006)).

When seeking disgorgement, the Division only needs to present evidence of a "reasonable approximation" of the ill-gotten gains. *See Platforms Wireless*, *Koch* and *JT Wallenbrock, supra.* Once the Division has made that showing, the burden shifts to the respondent "clearly to demonstrate that the disgorgement figure was not a reasonable approximation," and any "risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989); *see also Koch*, 2014 SEC LEXIS 1684, at *90-91 & n. 233; *In re Hatfield,* Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *3 (Dec. 5, 2014) (Comm. op.).

Here, the amount that Eldaher received pursuant to his agreement with Argyropoulos – $15,478 – is an obvious reasonable approximation of his ill-gotten gain from his "selling away" activities. He does not dispute that this is the amount he received as a result of his agreement with Argyropoulos.

3. Imposition of the Remaining Requested Sanctions of a Collateral Bar and Civil Penalty is in the Public Interest

The guiding principle in imposing the remaining requested sanctions of a bar and a civil penalty against a respondent is the public interest. *See, e.g., In re Bugarski*, Exchange Act Rel. No. 66842, 2012 SEC LEXIS 1267 at *10-11 (Apr. 20, 2012) (Comm. op.); *In re Doxey*, Initial Decision Rel. No. 598, 2014 SEC LEXIS 1668, at *58 (May 15, 2014). In determining whether a sanction is in the public interest, the Commission generally focuses on the factors identified in

Steadman: (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 that the respondent's occupation will present opportunities for future violations. *Steadman*, 603 F.2d at 1140; *see also In re Kornman*, Exchange Act Rel. No. 59403, 2009 SEC LEXIS 367, at *22 (Feb. 13, 2009) (applying *Steadman*); *Doxey*, 2014 SEC LEXIS 1668, at *58-59 (same).

In addition, the Commission considers whether sanctions will have a deterrent effect. *See In re Schield Mgmt. Co.*, 58 S.E.C. 1197, Exchange Act Rel. No. 53201, 2006 SEC LEXIS 195, at *35 (Jan. 31, 2006) (Comm. op.); *In re Bandimere*, Initial Decision Rel. No. 507, 2013 SEC LEXIS 3142, at *228-29 (Oct. 8, 2013).

"The appropriate sanction depends on the facts and circumstances of each case." *Schield Mgmt.*, 2006 SEC LEXIS, at * 35. Thus, the "inquiry into the appropriate sanction to protect the public interest is a flexible one and no one factor is dispositive." *Kornman*, 2009 SEC LEXIS 367, at *22; *see also In re Scammell*, Advisers Act Rel. No. 3961, 2014 SEC LEXIS 4193 at * 23 (Oct. 29, 2014) (Comm. op.).

When determining the scope of sanctions, the Commission "consistently [has] held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases." *In re Houston*, Exchange Act Rel. No. 71589, 2014 SEC LEXIS 614, at *33, n.60 (Feb. 20, 2014). Therefore, "the Commission is not obligated to make its sanctions uniform," and it is not necessary to compare the sanction under the specific facts and circumstances of a particular case "to those imposed in previous cases." *Kornman v. SEC*, 592 F.3d 173, 188 (D.D.C. 2010); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187

(1973) (holding that "[t]he employment of a sanction within the authority of an administrative agency is ... not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases").

In this case, the Division seeks imposition of a collateral bar and imposition of a civil penalty of $24,000 ($2,000 for each of the twelve investors Eldaher referred).

a) A Collateral Bar is Appropriate

Section 15(b)(6) authorizes imposition of a suspension or a bar from the securities industry if the respondent willfully violated the federal securities laws while associated with a broker or dealer, and the suspension or bar is in the public interest. *See Martin*, 2015 SEC LEXIS 880 at *63. The *Steadman* factors are considered to determine whether imposition of a suspension or bar is in the public interest. *Id.* Additionally, the need to deter others from similar misconduct is considered in imposing a suspension or bar. *See id.* at *69 (applying both the *Steadman* factors and considering the need to deter others).

In this case, a weighing of the *Steadman* factors indicates that a bar is appropriate.

First, Eldaher's "selling away" is a type of violation that the Commission itself has deemed to be serious. Second, Eldaher's violations were egregious and repeated in that he caused twelve investors collectively to invest over $349,248.50, and attempted to assist Argyropoulos in persuading several investors to allow substitution of Black Motor Corp. stock in lieu of their promised Facebook shares. Third, he acted with high scienter, in that he had been a broker for twenty years, knew selling away was illegal, specifically knew that FINRA rules prohibited it and ACAP rules at least "implicitly" prohibited it, and he concealed his illegal activity from his employing broker. Fourth, he has not acknowledged wrongdoing, instead arguing the even though he thought at the time he was "selling away," he now believes that he was simply engaging in outside business activities. Of

course, because he fails to acknowledge wrongdoing and now claims to understand that "selling away" has a much narrower meaning than it really does, his assurances that he won't sell away again are meaningless and unreliable.

The Division also seeks a collateral bar, prohibiting Eldaher from participating industry-wide. To determine the appropriateness of a collateral suspension or bar, the decision should "review each case on its own facts" to make findings regarding the respondent's fitness to participate in the industry in the barred capacities. *In re Mandell*, Exchange Act Rel. No. 71688, 2014 SEC LEXIS 849 at *7-8 (Mar. 7, 2014) (Comm. Op.) The facts of this case show that a collateral bar is necessary and appropriate to protect investors and markets. Although associated with a registered broker-dealer, Eldaher evaded that registrant's supervision, entering into a separate agreement with Argyropoulos for compensation for soliciting investments. He does not acknowledge that this conduct was wrongful or make reasonable assurances he will not engage in such misconduct in the future. He has also engaged in dishonest conduct while employed by several other brokers, and committed the crime of theft by check.

Finally, Eldaher is presently employed by a registered investment adviser marketing its strategy to other advisers and is soliciting them to invest with his employer. Because his functions are not merely clerical or ministerial, Eldaher meets the definition of "person associated with an investment adviser" under Section 202(a)(17) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(17), as he appears to admit.[6] Eldaher is therefore subject to regulation as an associated person of an adviser, just as he was subject to regulation as an associated person of a broker-dealer. And, as in the case of ACAP, Eldaher is

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[6] While, as he testified, his position does not require him to hold a securities license, that is because he may not have to pass any of the FINRA licensing exams to become associated with an adviser.

working far away from his supervising employer, who is based in San Diego, California.

Under these circumstances, it is in the public interest to bar Eldaher from associating with any registered investment professional, as it is likely he will evade their supervision just as he evaded supervision by ACAP, and it is reasonably likely he will engage in future dishonest or illegal conduct to the detriment of investors.

b) Imposition of a Civil Penalty is Appropriate

Section 21B(a) of the Exchange Act authorizes the Commission to seek penalties in administrative proceedings. See 15 U.S.C. § 78u-2(a). Penalties should be imposed when they serve the public interest, and are meant to deter future violators. *See, e.g., In re Raymond James Fin. Servs., Inc., et al.*, Initial Decision Rel. No. 296, 2005 SEC LEXIS 2368, at *197 (Sept. 15, 2005). In determining whether a penalty is in the public interest, the statute provides several factors to consider: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the resulting harm to other persons; (3) any unjust enrichment and prior restitution; (4) the respondent's prior regulatory record; (5) the need to deter the respondent and other persons; and (6) such other matters as justice may require. 15 U.S.C. § 78u-2(c). "'Not all factors may be relevant in a given case, and the factors need not all carry equal weight.'" *Bandimere*, 2013 SEC LEXIS 3142, at *249-50 (citations and quotations omitted).

As for the amount of the penalty, "a three-tier system establishes the maximum civil money penalty that may be imposed for each violation if found in the public interest." *Doxey*, 2014 SEC LEXIS 1668 at *67-68. This case does not involve allegations of fraud. Accordingly, imposition of a first tier penalty of a maximum of $7,500 per violation, or a second tier penalty of a maximum of $75,000 per violation if deliberate or reckless disregard of a regulatory requirement

is found, is appropriate. Section 21B(b), 15 U.S.C. § 78u-2(b), as adjusted for inflation by 17 C.F.R. § 201.1004 (2011), Subpart E, Table IV. To impose penalties, it must be determined how many violations occurred. *See Martin*, 2015 SEC LEXIS 880 at *78, *citing Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012). Eldaher received transaction-based compensation with regard to twelve investors, and could be assessed a maximum $90,000 first tier penalty, or a maximum $90,000 second tier penalty, if the facts warrant it.

While the statutory tier system sets forth the maximum penalty, it is up to the hearing officer to determine the amount of the penalty to be imposed within the tier. *See Martin,* 2015 SEC LEXIS 880 at *80, *citing In re Murray*, Advisers Act Rel. No. 2809, 2008 SEC LEXIS 2924 (Nov. 21, 2008). In making that assessment, courts have considered the following factors established in *SEC v. Lybrand*:

> (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), *aff'd on other grounds*, 425 F.3d 143 (2d Cir. 2005); *see also Bandimere*, 2013 SEC LEXIS 3142, at *251-52. Although these factors provide guidance, "each case has its own particular facts and circumstances which determine the appropriate penalty to be imposed." *Martin* at *80, *quoting SEC v. Opulentica*, LLC, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007).

Moreover, the size of a civil penalty is "not limited to the amount of profits derived from the violation." *Martin* 2015 SEC LEXIS 880, at *81, *citing In re Bloomfield*, Exchange Act Rel. No. 71632, 2014 SEC LEXIS 698, at *91 (Feb. 27, 2014) (Comm. op.). Thus, the civil penalty imposed against Eldaher may far exceed any personal gain he had, since civil penalties can be imposed "without

regard to defendants' pecuniary gain." *Id.* (finding that penalty for one respondent that was 27 times larger than his pecuniary gain was proper).

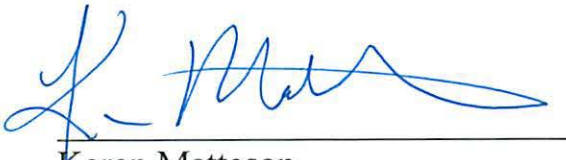
In this case, Eldaher could be found eligible to receive second tier penalties in light of his admissions that he knew selling away was a violation of FINRA rules and he thus arguably acted in deliberate or reckless disregard of a regulatory requirement. However, the Division instead seeks first tier penalties of $24,000 – $2000 per investor Eldaher referred to Argyropoulos in violation of Section 15(a)(1). This penalty appears to be sufficient to deter Argyropoulos and others from future violations in light of the other sanctions the Division seeks and Eldaher's apparent financial condition.

IV. CONCLUSION

The evidence presented at the hearing establishes that Eldaher "sold away" from his employer broker-dealer, ACAP, in violation of Section 15(a)(1) of the Exchange Act. The evidence further establishes that the relief requested by the Division is appropriate and in the public interest.

Date: April 23, 2015

Respectfully submitted,



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