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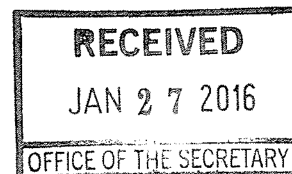

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
January 22, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16803

In the Matter of **MAHER F. KARA,** **Respondent.**	: : : : : : :	**Administrative Law Judge** **Carol Fox Foelak**

RESPONDENT MAHER F. KARA'S REPLY IN SUPPORT OF HIS CROSS-MOTION FOR SUMMARY DISPOSITION

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I. INTRODUCTION

In seeking a permanent, industry-wide bar, the Division has not met its burden to show "a reasonable likelihood that [Maher Kara] cannot ever operate in compliance with the law," such that a "permanent exclusion from the industry" is necessary to protect the public interest. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd*, 450 U.S. 933 (1981) (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 112–13 (1946)). Rather than realistically assessing the likelihood of future illegal conduct, the Division impermissibly asks the Court, in effect, to make a "conclusive presumption of future wrongdoing on the basis of past misconduct." *Id.*

A fair consideration of the relevant factors, considered in the light of the human dynamics and motivations underlying this case, demonstrates that there is no genuine risk that Maher Kara will reoffend. The unique circumstances in which Maher shared confidential information with his brother Michael, Maher's lack of financial or professional motives for doing so, the consequences this case has had for his family relations and career, and his true contrition, as demonstrated by his extraordinary cooperation with the U.S. Attorney's Office and testimony in two trials, all compel the conclusion that a permanent exclusion is not necessary to protect the public interest. Any bar imposed by the Court should, therefore, be non-permanent, subject to a specified right to reapply after a period of no more than three years.

As demonstrated in Respondent's opening memorandum, the Division's claim for an associational bar is also legally flawed for two reasons under controlling D.C. Circuit precedent: (1) it is untimely under 28 U.S.C. § 2462 because this proceeding was commenced more than five years after the claim accrued; and (2) the Commission has no authority to impose a collateral

bar for Maher's pre-Dodd-Frank conduct, given his lack of association with an investment adviser. The Division's opposing memorandum simply ignores that precedent.[1]

II. THE DIVISION'S CLAIM FOR ASSOCIATIONAL BARS IS PROHIBITED BY 28 U.S.C. § 2462

Respondent's opening memorandum showed that under controlling D.C. Circuit and Supreme Court precedent, the Division's claim for associational bars is prohibited by 28 U.S.C. § 2462. (Resp. Mem. at 20–22.) As this Court has recognized, pursuant to *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), associational bars are subject to Section 2462's five-year statute of limitations. *See David E. Zilkha*, Initial Decision Release No. 415, 2011 WL 1425710, at *15 (ALJ Apr. 13, 2011) (investment advisory bar is "subject to the five-year statute of limitations"); *Clarke T. Blizzard*, Initial Decision Release No. 229, 2003 WL 21362222, at *20 (ALJ June 13, 2003) ("the requested bar and civil penalty are barred by 28 U.S.C. § 2462, a statute of general applicability that provides a five-year statute of limitations").

Section 2462 provides that a proceeding "shall not be entertained unless commenced within five years from the date when the claim *first accrued*." 28 U.S.C. § 2462 (emphasis added). The Supreme Court has held that an SEC enforcement claim accrues for purposes of Section 2462 when a plaintiff "has a complete and present cause of action." *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013) (quotation marks and citation omitted); *see also Harding Advisory LLC*, Initial Decision Release No. 734, 2015 WL 137642, at *84 (ALJ Jan. 12, 2015) ("Under 28 U.S.C. § 2462, the limitations clock starts running at the time that the cause of action becomes enforceable."), *review granted*, 2015 WL 755825 (Feb. 23, 2015). The Division does not dispute that it had a complete and enforceable cause of action against Maher Kara under Section 15(b)(6)

[1] The Division also fails to address federal court precedent holding that the SEC's appointment of administrative law judges is likely unconstitutional. (*See* Respondent's Opening Memorandum ("Resp. Mem.") at 4 n.1.)

of the Exchange Act well outside of the five-year statute of limitations. The Division instituted this proceeding in 2015 but does not allege any violations of the securities laws after 2007. (*See* Resp. Mem. at 23.)

Nonetheless, relying on *In the Matter of Joseph Contorinis*, Investment Advisers Act Release No. 3824, 2014 WL 1665995 (Apr. 25, 2014), the Division argues that it should be allowed to bring a proceeding eight years after the conduct occurred because Section 15(b)(6) includes alternative grounds for accrual of a claim—entry of a criminal judgment or civil injunction—that did not occur until later. *See* 15 U.S.C. § 78o(b)(6)(A)(i)–(iii). Citing *In the Matter of Gregory Bartko*, Exchange Act Release No. 34-71666, 2014 WL 896758 (Mar. 7, 2014), *Contorinis* asserts that *Gabelli* does not address "established precedent" regarding the statute of limitations for follow-on proceedings. *Joseph Contorinis*, 2014 WL 1665995, at *3 & n.12. *Bartko*, in turn, cites *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000), and another Commission case relying on *Proffitt*. *Gregory Bartko*, 2014 WL 896758, at *10.

The Division's reliance on *Proffitt*, a D.C. Circuit decision prior to the Supreme Court decision in *Gabelli*, for an exception to the general rule enunciated in *Gabelli* is misplaced. In *Proffitt*, the statute at issue required the FDIC to satisfy each of three prongs (misconduct, effect, and culpability) to bring a claim. *Proffitt*, 200 F.3d at 862–63. The "effect" prong could be triggered when an "insured depository institution or business institution has suffered *or* probably will suffer financial loss or other damage"; or when "the interests of the depository institution's depositors have been *or* could be prejudiced." *Id.* at 863. The court reasoned that, given this language, if the "statute of limitations began running as to *all* effects as soon as the first effect occurred, the 'will probably suffer' violation would always trigger the statute's accrual." *Id.* at 864. The *Proffitt* court emphasized that the statute at issue "expressly authorizes the FDIC to take action 'whenever' it determines that the statutory prongs are satisfied." *Id.*

In contrast, Section 15(b)(6)(A) states that the Commission "shall" bar any such person if the Commission finds that a bar is in the public interest "and that such person—(i) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4)." 15 U.S.C. 78o(b)(6)(A)(i). Unlike the statute in *Proffitt,* Section 15(b)(6)(A) does not permit the Division to bring its Section 15(b)(6) claim "whenever" it would like. The Division's claim accrued when Maher Kara committed an act that satisfied Section 15(b)(6)(A)(i), which according to the SEC's allegations was more than five years before this proceeding was initiated. The Division's claim is therefore barred by Section 2462.

III. IMPOSITION OF A COLLATERAL BAR WOULD BE AN IMPERMISSIBLY RETROACTIVE APPLICATION OF THE 2010 DODD-FRANK ACT

As demonstrated in Respondent's opening memorandum, under controlling D.C. Circuit precedent, the Commission has no authority to impose a collateral bar based on Maher Kara's pre-Dodd-Frank conduct. (Resp. Mem. at 24–27.) Prior to the Dodd-Frank amendments, the Exchange Act provided authority only for a bar on association with broker-dealers and did "not supply the Commission with authority to exclude persons from the investment adviser industry." *Teicher v. SEC*, 177 F.3d 1016, 1017 (D.C. Cir. 1999). And the Investment Advisers Act only provided authority for a bar on association with an investment adviser in the case of a person associated with or seeking to become associated with an investment adviser. The Division proceeds here only under the Exchange Act and presents no evidence that Maher was associated with or is seeking to become associated with an investment adviser.[2] Applying the Dodd-Frank

[2] The Division states in a footnote that "Respondent fails to claim that he is not seeking to become an investment adviser," and implies that Maher Kara—by arguing that a collateral bar, including an investment adviser bar, is beyond the Commission's authority—is somehow seeking to become associated with an investment adviser within the meaning of Section 203(f) of the Advisers Act. (Div. Reply Mem. at 8 n.7.) This is incorrect. Maher is not seeking at this time to become associated with an investment adviser, and the Division has no basis to assert

(Footnote continues on next page.)

amendments to impose a bar on association with investment advisers, or anyone other than broker-dealers, would therefore "'attach[] new legal consequences' to [Maher's] conduct by adding to the industries with which [he] may not associate," and is therefore impermissibly retroactive. *Koch v. SEC*, 793 F.3d 147, 158 (D.C. Cir. 2015).

Attempting to avoid the holding in *Koch*, the Division erroneously contends that the impact of Dodd-Frank on this case is merely a "procedural change" that does not "alter[] substantive rights." (Div. Reply Mem. at 7.) But prior to Dodd-Frank, the Commission had *no* authority to impose an investment adviser bar on a person not associated with or seeking currently to become associated with an investment adviser. *See Teicher*, 177 F.3d at 1017 (Congress withheld from the Commission the power to "exclude persons from the investment adviser industry" based on association with a broker-dealer). Indeed, the D.C. Circuit in *Teicher* rejected the same argument that the Division makes here.

> The SEC objects that this forces it to do in two proceedings what it would be more convenient to do in one. First we note that as we read the statutes, they simply do not permit the Commission to impose sanctions in any specific branch until it can show the nexus matching that branch.

Id. at 1020.

The Division mischaracterizes *Koch* as holding that "the Commission already had the authority to impose each of the collateral bars sought here prior to the Act, which merely allowed for a more efficient procedure." (Div. Reply Mem. at 7.) In *Koch*, unlike here, the respondent "was properly charged as a primary violator under both the Exchange Act and the Advisers Act."

(Footnote continued from previous page.)

that he is. To the contrary, Maher was willing to settle with the Commission for a non-permanent collateral bar, including a bar on association with investment advisers, but the Division was unwilling to entertain anything other than a permanent bar. (*See* Harris Decl. at ¶ 9.)

793 F.3d at 157. *Koch* noted that prior to Dodd-Frank the Commission would nonetheless have had to initiate separate follow-on proceedings for "the separate industries in the securities market," rather than bringing one proceeding and seeking a collateral bar, and characterized that change as procedural rather than substantive. *Id.* at 157 n.3. But nothing in *Koch* suggests that the Commission had the authority prior to Dodd-Frank to impose a bar on association with an industry to which the respondent had no nexus.

Nor do the Commission opinions cited by the Division alter the conclusion that, under *Teicher* and *Koch*, the Commission has no authority to issue a collateral bar for pre-Dodd-Frank conduct without the required nexus. *John W. Lawton*, Investment Advisers Act Release No. 3513, 2012 WL 6208750 (Dec. 13, 2012), is a pre-*Koch* decision in which the Commission upheld a collateral bar in a case involving misconduct prior to the Dodd-Frank amendments on the basis that collateral bars "address future risks and apply to future actions" rather than punish prior misconduct. *Id* at *7–10. That reasoning was rejected by *Koch*, which held that applying "additional prohibitions," not available prior to Dodd-Frank, for pre-Dodd-Frank conduct is "impermissibly retroactive." 793 F.3d at 158.[3]

Feeley & Willcox Asset Management Corp., Investment Advisers Release No. 2143, 2003 WL 22680907 (July 10, 2003), a pre-Dodd-Frank case cited by the Division, demonstrates why the Dodd-Frank amendment at issue here is substantive, not just procedural. The Commission distinguished *Teicher* and upheld a broker-dealer bar in a case brought under the Advisers Act,

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[3] *Gregory Bartko*, 2014 WL 896758, another pre-*Koch* decision cited by the Division, followed *Lawton* and is also overruled by *Koch*. *Erick Laszlo Mathe*, Release No. 874, 2015 WL 5013727 (Aug. 25, 2015), also cited by the Division, was a default proceeding in which this Court excluded bars on association with municipal advisors or nationally recognized statistical rating organizations "in light of *Koch*" (*id.* at *3 n.3), but did not consider the retroactivity issue further.

only after finding that the respondent was also associated with a broker-dealer. As the Commission explained:

> In *Teicher*, Ross Frankel was associated with a broker-dealer, but not with an investment adviser, when he violated the antifraud provisions of the securities laws. The Commission, acting pursuant to Exchange Act Section 15(b)(6), barred Frankel from association with an investment adviser. The *Teicher* court found that the Commission exceeded its statutory authority, given that Frankel was not and never had been associated with an investment adviser. Here, in contrast, Feeley, was a "person associated with a broker or dealer" at the time of the charged violations.

Id. at *14.

Here, Maher Kara was associated only with a broker-dealer, not with an investment adviser. Under that circumstance, pre-Dodd-Frank, under *Teicher*, a collateral bar on association with an investment adviser would have exceeded the Commission's authority. Reversal of that result through application of the Dodd-Frank amendments would therefore be substantive and impermissibly retroactive under *Koch* when, as here, it is applied to pre-Dodd-Frank conduct.

IV. A PERMANENT BAR IS NOT NECESSARY TO PROTECT THE PUBLIC INTEREST

The Division has not met its burden to justify a "permanent exclusion from the industry" by showing "a reasonable likelihood that [Maher Kara] cannot ever operate in compliance with the law." *Steadman*, 603 F.2d at 1140.[4] Indeed, the federal district court judge who heard all of the evidence, including Maher's extensive testimony in two trials, concluded that "it's unlikely that Mr. Kara would recommit any similar offense." (Harris Decl. Ex. 2 at 18:8–10.) A fair

[4] The Division mischaracterizes Respondent's position as "advocat[ing] for a time-limited bar that specifically allows him to pursue association with an investment adviser now." (Div. Reply Mem. at 9.) Respondent argues rather that, as a matter of law, a bar must be limited to association with broker-dealers because the Commission lacks authority to impose a collateral bar for pre-Dodd-Frank conduct. As a separate matter, and whether or not the Court accepts that position, proper application of the *Steadman* factors supports only a time-limited bar, not a permanent bar.

consideration of the relevant factors, examined in light of the human dynamics and circumstances related to Maher's offense, should lead this Court to the same conclusion. There is no genuine risk that his illegal conduct will recur in the future.

The Division asserts repeatedly, in conclusory fashion, that Maher Kara's conduct was "egregious" and committed with a "high degree of scienter." It minimizes the unique circumstances surrounding that conduct, arguing that "family and job pressures will persist throughout any career [Maher] pursues," and asserts that "he is unfit for the securities industry." (Div. Reply Mem. at 10.) That conclusion does not comport with fairness or common sense.

A fair and objective evaluation of the circumstances and motivations of Maher Kara's illegal conduct does not support a risk of recurrence. It is undisputed that Maher sought and received no financial or professional gain, did not plan or execute any trading, and shared material non-public information only with his brother Michael. He did so initially under pressures related to their father's illness and death, with assurances that Michael would not trade on that information. The Division refers to Maher's "numerous disclosures of confidential information to his brother" (Div. Reply Mem. at 16), which Maher has fully acknowledged. But Maher had no knowledge that Michael was trading on that information, let alone tipping others, and other information was misappropriated by Michael rather than intentionally shared.[5] Maher became aware of the scope of his brother's trading and tipping only as a result of the evidence

[5] Citing Jt. Ex. 3 at 596:5–599:18, the Division responds to evidence of misappropriation by Michael by asserting that Maher testified that he "could have been the source for all of the nonpublic information Michael knew." (Div. Reply Mem. at 11 n.8.) Review of the cited testimony demonstrates, however, that it is based on Maher's realization, only after charges were filed, of the scope of Michael's trading coupled with information from family members that Michael had accessed Maher's confidential work materials and eavesdropped on his calls. (*See also* Jt. Ex. 3 at 575:3–16, 576:3–17, 498:21–24.)

produced by the U.S. Attorney's office and the SEC. He has not spoken with his brother since. (Kara Decl. ¶ 9.)

The Division argues that Maher "provided his brother Michael with material nonpublic information knowing that Michael would trade on it . . . not once but twice." (Div. Reply Mem. at 11.) Maher has fully acknowledged that he shared information regarding the USPI and Biosite transactions, with the expectation that Michael would trade. He did so, as the U.S. Attorney's office has noted, not for personal gain, but as a result of "Michael Kara's persistence in seeking inside information" (Harris Decl. Ex. 1 at 3), in the context of Michael's severe and suicidal depression after their father's death. On the second occasion (Biosite), Maher immediately admonished and pleaded with Michael not to trade on that information. (Jt. Ex. 3 at 461:2–8; *see* Jt. Ex. 2 at 339:2–9; Jt. Ex. 3 at 578:8–579:2; Jt. Ex. 5 at 1305:11–21.) Maher's tipping of Michael regarding Biosite is a "nightmare that [Maher has] relived every day of [his] life [since]." (Jt. Ex. 3 at 463:13–15.) There is no reason to believe that Maher will ever again engage in similar conduct.

The Division discounts the significance of Maher's recognition of his wrongful conduct and exemplary cooperation with the U.S. Attorney's office as "belated" because it did not occur until after criminal and civil charges had been pending. This argument fails to take account of the fact that the initial charges were for widespread trading about which Maher had no knowledge. The SEC's claims, which initially charged illegal trading in numerous securities (*see* Atwood Decl. Ex. 1), were later limited in an amended complaint to trading in two stocks (Biosite and Andrx). (Am. Compl., *SEC v. Kara*, No. CV-09-1980 MHP (N.D. Cal. Oct. 30, 2009), ECF No. 62 at 4.) More importantly, the nature of Maher's cooperation, as recognized by the U.S. Attorney's office, was "extraordinary." (Harris Decl. Ex. 1 at 6.) He provided "thoughtful and credible" testimony that led to two convictions, persevering in that cooperation

despite the resulting destruction of family relations. (*Id.*) It is the fulsome nature of Maher's cooperation, as endorsed by the U.S. Attorney's office, that provides a powerful basis to conclude that Maher will not engage in unlawful conduct in the future.

The Division argues, in effect, that Maher got the benefit of his cooperation at the time of criminal sentencing. It notes the statement in the U.S. Attorney's office's sentencing memorandum that Maher "'is likely to be barred from the securities industry as a result of the parallel SEC case,'" and contends that "this result was accepted by Respondent as a foregone conclusion." (Div. Reply Mem. at 14.) No one said or accepted, however, that a bar would be permanent. Moreover, without the compulsion of any bar, Maher has not been employed in the financial industry since 2008. Whatever this Court concludes, it is reasonable to conclude that his career as an investment banker is over. The issue here is whether a permanent bar on any association with the securities industry is necessary to protect the public. It is not. Whether "defendant's occupation will present opportunities for future violations" (*Steadman*, 603 F.2d at 1140), like other factors, weighs in favor of that conclusion.

The Division discounts the deterring effect of the devastating impact this case has had on Maher's family relations because it resulted from his "own willful misconduct." (Div. Reply Mem. at 13.) This misses the point. Maher has fully acknowledged his personal responsibility. As he said in his trial testimony: "My family has suffered a lot. . . . [I]t's been my fault. I've caused this pain. And I've hurt my wife, I've hurt my wife's family, I've hurt my own family, I've hurt my kids. I've hurt myself." (Jt. Ex. 3 at 590:15–20.) Maher's genuine sorrow at the impact of his misconduct on his family and his full acceptance of responsibility demonstrate "the sincerity of [his] assurance against future violations" and his "recognition of the wrongful nature of his conduct." *Steadman*, 603 F.2d at 1140. No one who heard Maher's heartfelt expressions of remorse in his trial testimony could genuinely believe that he is likely to reoffend.

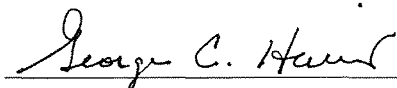
Based on the relevant factors and a fair assessment of the human dynamics underlying this case, the Court should conclude that a permanent bar is not necessary to protect the public interest. The Division does not dispute that, as demonstrated in Respondent's opening memorandum, a less than permanent bar with a right to reapply would be consistent with the Commission's resolution of other comparable cases, including insider trading cases. (*See* Resp. Mem. at 33–34.) The Division contends instead that those cases are irrelevant because they were "reached as the result of negotiations." (Div. Reply Mem. at 17.) But protection of the public interest was no less at issue in those cases. And, as in those cases, the public interest does not require a permanent bar here.

V. CONCLUSION

For all of the reasons stated above and in Respondent's opening memorandum, the Court should deny the Division's motion for summary disposition, grant Respondent's cross-motion for summary disposition, and: (1) dismiss the Division's claims for associational bars because they are prohibited by 28 U.S.C. § 2462's five-year statute of limitations; or (2) in the alternative, hold that any bar applies only to association with broker-dealers because the conduct at issue occurred prior to the 2010 Dodd-Frank amendments to the Exchange Act allowing collateral bars; and (3) because a permanent bar is not necessary to protect the public interest, make any bar subject to a right to reapply in no more than three years.

Dated: January 22, 2016

Respectfully submitted,



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sf-3612988

CERTIFICATE OF SERVICE

I, Noanoa L. Pan, hereby certify that on January 22, 2016, the foregoing

Respondent Maher F. Kara's Reply in Support of His Cross-Motion for Summary Disposition

were filed with the Securities and Exchange Commission, as follows:

By fax and overnight mail (original and three copies)

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and that a true and correct copy of the foregoing has been served on the following persons entitled

to notice:

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