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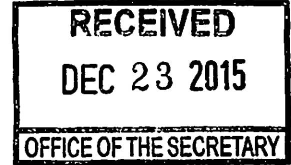

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 21, 2015

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 OPPOSITION TO DIVISION'S MOTION FOR SUMMARY DISPOSITION, CROSS-MOTION FOR SUMMARY DISPOSITION, AND SUPPORTING MEMORANDUM OF LAW

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CROSS-MOTION FOR SUMMARY DISPOSITION

Respondent Maher Kara does not contest that, as alleged in the Order Instituting Administrative Proceedings: (1) on July 11, 2011, he entered into a cooperation plea agreement and pleaded guilty to one count of conspiracy to commit securities fraud and one count of securities fraud and was sentenced on December 19, 2014, to three years' probation in *United States v. Kara*, No. CR 09-0417-EMC (N.D. Cal.); and (2) on August 21, 2015, he entered into a consent judgment permanently enjoining him from violations of the Securities Exchange Act of 1934 (the "Exchange Act") in *SEC v. Kara, et al.*, No. 09-cv-1880-EMC (N.D. Cal.).

The only matter for determination in this proceeding is, therefore, "[w]hat, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act." (Order Instituting Administrative Proceedings, at III.B.) Respondent agrees that this matter can be resolved without an evidentiary hearing and hereby moves for summary disposition. However, if the Court has any question about the testimony presented by Maher Kara as a government witness in two criminal trials, or the completeness and sincerity of Mr. Kara's recognition of the wrongful nature of his conduct and his assurances against future violations, Mr. Kara invites the Court to conduct a hearing in which it can direct any questions it may have to him.

Dated: December 21, 2015

Respectfully Submitted

By: George C. Harris /SW

George C. Harris
MORRISON & FOERSTER LLP

MEMORANDUM OF LAW

I. INTRODUCTION

In his guilty plea and consent judgment, and as a cooperating government witness in two trials, Respondent Maher Kara has fully acknowledged and accepted responsibility for his criminal conduct in providing material, non-public information to his brother Mounir ("Michael") Kara, who traded on that information and tipped others. Maher does not present a risk of future misconduct, and a permanent, industry-wide associational bar is not necessary or warranted to protect the public interest, for several reasons.

First, this is not a typical insider trading case. Maher's illegal conduct did not stem from greed or a desire for status, but from pressures created by his brother Michael's lifelong struggles with [redacted], his deceptions, and his pleas for help in the wake of their father's untimely death from [redacted]. As noted by the U.S. Attorney's Office in its Sentencing Memorandum, Maher "did not personally trade in securities and did not receive any of the proceeds of the scheme," and his "breaches of fiduciary duty were in large part the result of Michael Kara's persistence in seeking inside information." (Declaration of George C. Harris ("Harris Decl."), Ex. 1 at 7.) For most of the period at issue, Michael swore to Maher that he was not trading on that information. When Maher provided Michael information regarding the Biosite acquisition, expecting that Michael would trade, Maher immediately regretted doing so and pleaded with Michael not to trade. Maher sought and received no financial benefit from the insider trading, was unaware of the specific nature or extent of his brother's trading or the profits realized by that trading, and had no knowledge that his brother tipped others.

Second, Maher has demonstrated his true contrition and the sincerity of his assurances against future misconduct through what the U.S. Attorney's Office has described as "extraordinary" cooperation. (*Id.* at 6.) For the past nearly six years, since approaching the FBI

and the U.S. Attorney's Office through counsel to proffer cooperation, Maher has done everything in his power to atone for his offense. In a series of proffers beginning in early 2010, Maher provided the government a full confession of his conduct and complete cooperation. He persevered in that cooperation even when, to his surprise and anguish, it required him to provide grand jury and trial testimony against his brother-in-law Bassam Salman and Mr. Salman's wife's brother-in-law Karim Bayyouk. Salman and Bayyouk had not been indicted at the time Maher offered his cooperation, and their illegal trading on tips passed on by Michael was unknown to Maher. Maher's wife, Saswan ("Susie") Kara, Salman's sister, also met with the government at its request and testified at both trials.

Third, Maher's offense and prolonged cooperation have exacted a heavy toll on Maher and his family, which serves as a constant reminder of the wrongful nature of his conduct and a further assurance against any future misconduct. Maher's professional life and family relations are devastated. His career as a distinguished investment banker is over, and he has been unemployed since shortly after receiving an SEC Wells notice in October 2008. Maher has not spoken with his brother Michael for more than seven years. Having grown up in a culture in which family ties are of paramount importance, Maher, Susie, and their children have been completely ostracized and disowned by Susie's family as a result of Maher's cooperation and testimony at Susie's brother's trial. The public shame and the knowledge that he has disappointed so many people have been crushing to Maher.

As demonstrated below, the Division's claims for associational bars under Section 15(b)(6) of the Exchange Act, 15 U.S.C. § 78o(b)(6), which accrued no later than 2009 when the

SEC filed its district court complaint, are prohibited by 28 U.S.C. § 2462's five-year statute of limitations. The Court should therefore deny the Division's claims in their entirety.[1]

In the alternative, any associational bar should be limited to association with broker dealers, the only activity for which Maher was licensed at the time of his illegal conduct. All of that conduct occurred before the enactment of the 2010 Dodd-Frank Act, which amended Section 15(b)(6) to give the Commission authority to impose collateral bars. Under controlling D.C. Circuit precedent, that authority cannot be applied retroactively to impose a collateral bar based on conduct before passage of the Act. *See Koch v. SEC*, 793 F.3d 147, 157–58 (D.C. Cir. 2015).

If the Court reaches the merits of the Division's claims for associational bars, Maher Kara respectfully requests that any bar be subject to a right to reapply in no more than three years. Maher is a first-time offender who has led an otherwise exemplary and law-abiding life. His complete acceptance of responsibility and prolonged, extraordinary cooperation, at great personal cost, demonstrate his true character and the aberrant nature of his illegal conduct. He poses no risk of recidivism. As demonstrated below, a permanent associational bar is not necessary to protect the public interest.

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[1] The Division's claims should be denied for the additional reason that the SEC's appointment of the administrative law judge ("ALJ") was unconstitutional. As several courts have held, SEC ALJs are "inferior officers" subject to the requirements of the Appointment Clause. *See, e.g.*, *Ironridge Glob. IV, Ltd. v. SEC*, No. 1:15-CV-2512-LMM, 2015 WL 7273262, at *14 (N.D. Ga. Nov. 17, 2015); *Duka v. SEC*, No. 15 CIV. 357 RMB SN, 2015 WL 4940083, at *2 (S.D.N.Y. Aug. 12, 2015); *Hill v. SEC*, No. 1:15-CV-1801-LMM, 2015 WL 4307088, at *17 (N.D. Ga. June 8, 2015). As inferior officers, ALJs must be appointed by the President, courts, or department heads. *Duka*, 2015 WL 4940083, at *2. SEC ALJs, however, are not appointed by such parties. *Hill*, 2015 WL 4307088, at *3. Since the ALJ was not "appropriately appointed pursuant to Article II, [her] appointment [was] likely unconstitutional." *Duka*, 2015 WL 4940083, at *2.

II. ISSUES PRESENTED

1. Are the Division's claims for associational bars prohibited by 28 U.S.C. § 2462's five-year statute of limitations?

2. Would a collateral bar, including a bar on association with investment advisers, be an impermissibly retroactive application of the 2010 Dodd-Frank Act?

3. Are permanent associational bars necessary to protect the public interest?

III. BACKGROUND

A. Maher's Family History and Relationship with Michael

Maher's family history, including his relationship with his brother Michael and Michael's struggles with [redacted], is helpful in understanding the context in which Maher shared material non-public information with Michael.

Maher and his family immigrated to the United States from Beirut, Lebanon in 1976 when Maher was approximately five years old and Michael was approximately 15 years old. (*See* Joint Exhibit 2, Transcript of Testimony of Maher Kara in *United States v. Bayyouk*, No. CR-12-420 EMC (N.D. Cal. Aug. 27, 2013) ("Jt. Ex. 2") at 265:11–266:9.) At the time, Lebanon was in the midst of a civil war. (*Id.*) In the course of the war, Michael was separated from his family at the age of 14 and witnessed a number of atrocities over an extended period of time that scarred him psychologically. (*See* Joint Exhibit 5, Transcript of Testimony of Michael Kara in *United States v. Salman*, No. CR 11-625 EMC (N.D. Cal. Sept. 20, 23, and 24, 2013) ("Jt. Ex. 5") at 914:22–915:13; Joint Exhibit 4, Transcript of Testimony of Michael Kara in *United States v. Bayyouk*, No. CR 12-420 EMC (N.D. Cal. Aug. 27–28, 2013) ("Jt. Ex. 4") at 393:15–394:1.) After being fortunate enough to secure visas to the United States, Maher's family—including his parents, Michael, and his sister, Maya—relocated to San Francisco. (Jt. Ex. 2 at 265:11–266:9.)

Michael has struggled with [redacted] and [redacted], including [redacted] and [redacted], throughout Maher's life. (*See* Joint Exhibit 3, Transcript of Testimony of Maher Kara in *United States v. Salman*, No. CR 11-625 EMC (N.D. Cal. Sept. 17–18, 2013) ("Jt. Ex. 3") at 495:16–496:23, 497:19–499:3, 546:16–547:4; Jt. Ex. 2 at 355:25–357:11, 358:15–359:9; Jt. Ex. 4 at 394:14–395:7, 455:16–456:1, 483:16–485:20; Jt. Ex. 5 at 916:3–19, 1166:6–1168:5, 1197:2–23.) Michael's illness has led to [redacted], [redacted] and [redacted] behavior at times. (*Id.*) That behavior impacted Maher's family from the time Maher was young and got worse over time. (*See* Jt. Ex. 3 at 495:8–496:23.)

Maher's commitment to his family has led to attempts to mediate and handle demands placed on the family by Michael. For example, after graduating from U.C. Berkeley in 1993, Maher delayed for approximately six months his move to New York to take a position at Coopers & Lybrand in the tax consulting group, in order to help his family take care of Michael, who was then in intensive care, recovering from complications related to [redacted]. (*See* Jt. Ex. 3 at 366:1–22, 531:8–14; Jt. Ex. 2 at 267:8–22.)

Maher's decision to move to New York was in part to remove himself from "the stress that [his] brother had put on [their] family." (Jt. Ex. 3 at 366:23–367:9; *see also* Jt. Ex. 2 at 268:4–22.) Maher was "hurt[]" by Michael's sometimes erratic behavior, so moving to New York was an opportunity to "break free . . . and live [his] life independently without a lot of the stress that was coming along with" living in San Francisco near to his family. (*See* Jt. Ex. 2 at 357:6–11; Jt. Ex. 3 at 367:1–9.)

Maher worked at Coopers & Lybrand for three years until he went to business school at the University of Chicago. (*See* Jt. Ex. 2 at 269:2–8; Jt. Ex. 3 at 367:15–23.) After receiving his MBA in 1998, Maher began work as an investment banker at Salomon Smith Barney, which

became part of Citigroup in 1999. (*See* Jt. Ex. 2 at 269:16–23; Jt. Ex. 3 at 367:21–368:6.) After working initially as a generalist associate for a year, Maher worked in the San Francisco technology group. (*See* Jt. Ex. 3 at 368:12–369:4.) Maher then joined the healthcare group in mid-2002, where his focus was on biotechnology and pharmaceutical companies. (*See id.* at 369:5–9.) He was initially based in the Bay Area, but relocated to New York in 2003. (*See id.* at 369:10–17.) Maher remained at Citigroup until 2007. (*See id.* at 368:9–10; Jt. Ex. 2 at 269:24–270:3.)

As an investment banker at Citigroup, Maher worked for Citigroup Global Markets Inc. ("CGMI"), the registered broker dealer arm of Citigroup. (Declaration of Maher F. Kara ("Kara Decl.") ¶ 3.) He had series 7 and 63 licenses to be a registered representative associated with broker dealers. (*Id.*) Maher's work at CGMI did not overlap or have anything to do with Citigroup's investment adviser, Citigroup Asset Management, which was separated from CGMI by a strict ethical wall. (*Id.*)

As an adult, Maher's relationship with Michael was marked by periods when Maher would try to help Michael but then recede in frustration. (*See* Jt. Ex. 2 at 357:19–25.) On one occasion, for example, while working for Citigroup in the Bay Area in approximately 1999, Maher had to leave his office in the middle of the day to care for his brother after getting a call from the doorman of his apartment building telling him that Michael, who was intoxicated and/or under the influence of drugs, was asking to be let into Maher's apartment. (*See* Jt. Ex. 2 at 271:6–272:6; *see also* Jt. Ex. 3 at 370:5–371:1, 500:8–13, 527:13–528:1.) After that incident, Michael was diagnosed with [redacted]. (*See id.* at 527:24–528:1; Jt. Ex. 4 at 455:16–17.)

Maher's father was diagnosed with [redacted] in late 2003 and passed away in November 2004. (Jt. Ex. 5 at 933:4–10.) Maher, who had transferred to Citigroup's New York office by that time, traveled regularly to the Bay Area during his father's illness and continued to do so

after his passing to be with his family and support Michael as they all grieved the loss of their father.

Maher was introduced to Susie Salman through their families in 2002. (Jt. Ex. 3 at 360:4–9.) They were engaged in June 2003 and eventually married in July 2005, having delayed their wedding due to Maher's father's illness and eventual death. (*See id.* at 360:14–17; Jt. Ex. 2 at 300:25–302:1.) Prior to their marriage, Maher's and Susie's families spent time together and became close; in their Middle Eastern cultures, they "think of marriages or unions" as "not only the spouse/spouse relationship" but "as a family relationship." (Jt. Ex. 3 at 360:18–361:15; *see also* Jt. Ex. 2 at 304:24–305:10 ("In the Middle Eastern culture, the families have to really develop a good relationship.").) Bassam Salman is Susie's brother and Maher's brother-in-law. (Jt. Ex. 3 at 363:3–4.) Maher and Susie have two children: [redacted] who is eight years old, and [redacted] who is seven years old. (Kara Decl. ¶ 5.) Maher has been their primary caregiver during the past seven years, since losing his position as an investment banker, while Susie has worked full-time as a pediatrician. (*Id.*)

Since his loss of employment, Maher has also engaged in continuing education and volunteer work. Over a period of approximately three years, Maher studied and attended classes one or two nights a week at the University of California, Santa Cruz Extension, to obtain a certificate in biotechnology, which he completed in June 2012. (*Id.* ¶ 6.) Maher also spent over 300 hours volunteering at the Stanford University Cancer Center. (*Id.* ¶ 7.) As a volunteer "navigator," he worked directly with patients and their families to make sure cancer patients' needs were addressed. (*Id.*) Since sentencing, Maher has continued with community service work at Habitat for Humanity and continues to volunteer weekly even though he has completed his 100-hour court-ordered community service obligation. (*Id.*)

B. Maher's Participation in the Insider Trading Scheme

As Maher explained during the *Bayyouk* and *Salman* trials, and as set forth in the Joint Stipulation of Facts, his sharing of material nonpublic information with Michael evolved over time. (*See* Jt. Ex. 2 at 280:20–281:24; Jt. Ex. 3 at 385:17–388:11.) At first, Maher believed that Michael was maintaining the confidentiality of their conversations and not acting in any way on the information they discussed. Later, when Maher began to suspect that Michael was using confidential information from their conversations for trading purposes, Maher confronted his brother, who denied that he was trading. When Maher's suspicions continued despite Michael's assurances, Maher tried to avoid speaking to Michael. But eventually Maher capitulated and disclosed to Michael material nonpublic information, knowing that Michael would likely use it to trade, though Michael never directly disclosed his trading. (*See* Jt. Ex. 3 at 389:17–390:5.) Maher himself never traded on material nonpublic information, did not financially benefit from Michael's trading, was not aware of any of the specifics of Michael's trading or any of the profits from that trading, and was not aware that Michael had shared insider information with others. (*See* Jt. Ex. 3 at 470:19–25, 574:3–7, 588:18–20, 594:20–595:9; Harris Decl. Ex. 1 at 7.)

1. Maher Shares Material Nonpublic Information with Michael, Not Expecting That Michael Will Trade on the Information

Maher started sharing material nonpublic information with Michael when Maher started working in the healthcare group at Citigroup around the middle of 2002. (*See* Jt. Ex. 3 at 385:17–386:15.) Unlike Michael, Maher did not have a scientific background. As a vice president at Citigroup, Maher was required to have direct and substantive interactions with healthcare company executives to generate business and fees for Citigroup and to advance his professional career. (*Id.*) To gain a better understanding of the industry, Maher began to ask Michael questions about biotechnology and the science associated with certain pharmaceuticals

produced by Maher's clients. (*See id.*; Jt. Ex. 2 at 281:7–11; Jt. Ex. 3 at 386:3–10; Jt. Ex. 4 at 397:14–399:12.) At the time, Maher "gave [Michael] clear instructions that [the] information [he] was sharing with [Michael] was confidential." (Jt. Ex. 3 at 386:16–22.)

Toward the end of 2003, Maher's father was diagnosed with two different types of ████. (*See* Jt. Ex. 2 at 281:13–19.) This led Maher to share further confidential information with Michael when Maher and Michael began to discuss treatment and pharmaceutical options for their father. (*See id.* at 281:20–24; Jt. Ex. 3 at 386:23–387:15; Jt. Ex. 4 at 408:16–409:5.) During the course of those discussions, Maher shared information regarding companies, including Maher's Citigroup clients, that provided options that might help their father. (*See* Jt. Ex. 3 at 387:5–15, 390:9–391:15; Jt. Ex. 2 at 281:20–282:19; Jt. Ex. 5 at 933:18–935:23.)

Their father's illness and their discussions brought Maher and Michael closer together and allowed them to connect in ways they had not been able to connect in prior years. Maher was "naively unguarded" during these discussions with regard to sharing material nonpublic information about pharmaceuticals and the companies that manufactured and distributed them. (Jt. Ex. 2 at 282:20–283:3; Jt. Ex. 3 at 391:22–392:2.) Maher did not expect Michael to trade on the information he was sharing. (*See* Jt. Ex. 2 at 282:20–283:13.) Maher told Michael "that the information was confidential and . . . [Michael] shouldn't trade on it, and [Michael] told [Maher] he wouldn't." (*Id.* at 283:8–10; *see also* Jt. Ex. 3 at 392:3–6 ("I warned him initially, and then repeatedly told him that the information was confidential. And when I asked him, 'Are you trading?' he swore to me that he wasn't.").)

After their father passed away in November 2004, Maher became concerned about Michael's well-being. Michael was very close to their father and became "extremely depressed and was not himself and was actually suicidal" after their father passed away. (Jt. Ex. 2 at 284:4–7; *see also* Jt. Ex. 3 at 395:16–21, 396:21–397:13; Jt. Ex. 5 at 986:19–987:5,

1187:7–1188:4.) Around the time of their father's forty-day memorial service, for example, Michael expressed his desire to "be with [their] dad" as he put a loaded gun in his mouth. (*See* Jt. Ex. 2 at 284:9–21; Jt. Ex. 3 at 396:21–397:13.)

Maher made efforts to travel to the San Francisco Bay Area to be with his family and support Michael as they grieved the loss of their father. Maher intentionally stayed with Michael at his house to make sure Michael and Michael's family were okay. While staying with Michael, Maher would conduct Citigroup work, including participating in conference calls and receiving confidential materials. (*See* Jt. Ex. 2 at 301:7–9 ("I was in San Francisco and I was at [Michael's] house. And I was fielding numerous calls associated with this transaction. And I did those calls in his kitchen at his home."); Jt. Ex. 3 at 607:2–9.) After learning in the course of this case about Michael's trading during this period, Maher heard from family members that Michael had accessed Maher's confidential work materials and eavesdropped on his calls. (*See* Jt. Ex. 3 at 575:3–16 (Michael "was actually going into [Maher's] briefcase and sneaking a look at [his] documents"), 576:3–17 (Michael "was eavesdropping on [Maher's] telephone calls that [he was] having with colleagues or clients"), 498:21–24 ("much of the information that was used [by Michael] when [Maher] learned of the trading activities was taken from [him], without [his] knowledge and without [his] consent").)

As they spent time together in the wake of their father's death, Maher and Michael continued to grow closer, and Maher felt that Michael had become a "friend[]" and someone that he could "lean[] on" and "vent to . . . about [his] career and about issues going on in [his] group." (*See* Jt. Ex. 2 at 317:2–4.) Maher thus continued to discuss his work with Michael, assuming that Michael would not act on any confidential information that Maher conveyed to him. (*See, e.g.*, *id.* at 291:25–292:7, 292:19–21.)

For example, in January 2005, Maher disclosed confidential information to Michael about a possible transaction between two Citigroup clients, Protein Design Labs, Inc. ("PDLI") and ESP Pharma, Inc. Maher was in the Bay Area for a meeting with the CEO of PDLI to discuss the transaction. (*See id.* at 289:7–24.) Prior to the meeting, Maher asked Michael to recommend wines he could give to the CEO at the meeting to help win the business. (*See id.* at 291:11–17; Jt. Ex. 3 at 403:5–9.) When Michael asked what the meeting was for, Maher told him about the possible transaction and that it could benefit Maher's career if the transaction were consummated. (*See* Jt. Ex. 2 at 291:18–24, 294:24–295:13; Jt. Ex. 3 at 404:11–20.)

At the time, Maher "[felt] extremely comfortable in sharing [with Michael] updates about . . . projects for clients that [he] was working on." (Jt. Ex. 3 at 404:23–405:1.) In response to Michael's questions, Maher would thus share with Michael "great news" about possible transactions for clients he covered. (*See, e.g.*, Jt. Ex. 2 at 301:7–14 (discussing Endo Pharmaceuticals transaction); Jt. Ex. 3 at 421:9–422:2 (discussing Endo Pharmaceuticals transaction), 455:10–456:7 (discussing PDL Biopharma transaction).)

Maher also shared his frustrations at work with Michael. For example, in January 2006, Maher was taken off a possible transaction between Wockhardt Ltd. and Andrx Corporation. (*See* Jt. Ex. 2 at 315:19–23.) At the time, Maher was upset about this because he would not get credit for the fees generated by the transaction, which could affect his chance of receiving a promotion. (*See id.* at 315:24–316:13; Jt. Ex. 3 at 438:22–439:17.) Maher vented to his brother about being taken off the transaction and how it would be detrimental to his career and in doing so shared confidential information about the possible transaction. (*See* Jt. Ex. 2 at 316:14–317:10, 321:3–12; Jt. Ex. 3 at 440:2–20.) Maher "got so comfortable—naively comfortable and completely unguarded about [his] relationship with [Michael] that it felt like there[] [was] no

possible way [Michael] would do something." (Jt. Ex. 3 at 440:21–23.) Michael in effect was "like talking to a . . . sound[ing] board." (*Id.* at 440:24–25.)

Over time, however, Maher noted that Michael's questions became "much more targeted" and focused on the "business end" of companies. (*See* Jt. Ex. 2 at 330:2–7; Jt. Ex. 3 at 387:17–21.) This caused Maher to ask Michael "point blank" whether he was trading. (*See id.* at 387:22–23.) Maher told Michael "that the information was confidential and . . . he shouldn't trade on it." (Jt. Ex. 2 at 283:8–11.) Michael denied trading and reassured Maher by swearing on Michael's daughter's life. (*See id.* at 283:8–13; Jt. Ex. 3 at 387:22–24, 501:23–502:6.)

In addition to becoming "more targeted," Michael became "very persistent" and "nagging" in asking Maher questions, which created tension between them because Maher no longer wanted to answer Michael's questions or discuss his work with Michael. (*See* Jt. Ex. 2 at 330:2–9, 332:20–21.) Maher "tried to deflect" Michael's questions and even told his wife Susie not to take Michael's calls. (*See* Jt. Ex. 3 at 388:2–5.) Maher "stopped sharing information about new transactions [Maher] was working on because [he] was afraid of what [Michael] was doing." (Jt. Ex. 2 at 332:21–24.)

2. Maher Shares Material Nonpublic Information with Michael Expecting That Michael Will Trade on the Information

a. United Surgical Partners International

In the summer of 2006, Maher was at his brother's house watching a television show about leveraged buyouts. (*See* Jt. Ex. 2 at 329:2–16.) Michael was interested in what sort of entities conducted leveraged buyouts. (*See* Jt. Ex. 3 at 444:20–23.) At the time, one of Maher's colleagues at Citigroup was handling a possible leveraged buyout of United Surgical Partners International ("USPI") by a private equity firm that was USPI's largest shareholder. (*See* Jt.

Ex. 2 at 328:5–14.) Maher used USPI as an example to explain a leveraged buyout scenario to Michael. (*See id.* at 329:9–12; Jt. Ex. 3 at 444:24–445:6.)

A couple of months later, when Maher was back in the Bay Area, Michael brought up the topic of USPI again and told Maher that "he was doing some work and that [USPI] looked reasonably cheap to him." (Jt. Ex. 2 at 329:13–20; *see* Jt. Ex. 3 at 445:7–11.) Michael's comment about USPI looking "cheap" and his persistent questions about USPI led Maher to suspect that Michael was actually trading and specifically looking at USPI as an investment possibility. (*See* Jt. Ex. 2 at 330:9–12; Jt. Ex. 3 at 445:7–15.)

Maher gave in to Michael's persistence and provided inside information about USPI, expecting that Michael would trade on the information. To "get [Michael] off [his] back initially," Maher made what he acknowledges was "the wrong decision to encourage [Michael]" by giving him a research report that noted USPI as a potential leveraged buyout candidate and disclosing that a Citigroup colleague was working on a leveraged buyout involving USPI. (Jt. Ex. 2 at 330:9–20, 334:9–12; *see* Jt. Ex. 3 at 388:6–389:1, 448:3.) The research report was publicly available to Citigroup clients, but Maher's colleague's work on a leveraged buyout was material nonpublic information. (*See* Jt. Ex. 2 at 330:24–331:19; Jt. Ex. 3 at 445:18–446:3.)

Maher continued to appease Michael's relentless requests for updates on USPI. Maher would tell Michael that Maher's colleague "was still busy" to reassure Michael that the transaction was still pending. (Jt. Ex. 2 at 333:16–25.) Maher explained that "[t]he goal at that time was to give [himself] relief from [Michael], and [he] felt that the way to do it, was to give [information about USPI] to [Michael]." (Jt. Ex. 3 at 448:8–10.) Michael never disclosed to Maher that he was trading on USPI, but Maher "fully expected that he was going to trade." (*Id.* at 448:19–20.) Prior to USPI, Maher "had no knowledge [Michael] was trading" and "no intention of [Michael] having any gains." (*Id.* at 448:22–25.)

b. Biosite

In March 2007, Maher again shared material nonpublic information with Michael with the expectation and intention that Michael would act on the information. While in a taxi on his way to meet a colleague, Maher received an email from an assistant telling him to call his brother. (Jt. Ex. 2 at 337:16–20.) When Maher called, Michael said that he "was really ill" and conveyed with a sense of urgency that "he needed a favor," specifically "some information." (*See id.* at 337:19–338:4; Jt. Ex. 3 at 459:17–460:3; *see also* Jt. Ex. 2 at 361:14–362:8; Jt. Ex. 3 at 549:12–22.) Michael "sounded very troubled and a little bit distant on the phone." (Jt. Ex. 2 at 337:20–21.) Michael clarified that he did not need money, but "owe[d] somebody," and repeated, "Please, I need this. Please, I need this." (*Id.* at 338:1–4; Jt. Ex. 3 at 459:24–460:3.)

Given Michael's mental health history, the way he sounded and pleaded for information "set [Maher] off." (*See* Jt. Ex. 2 at 361:14–23; Jt. Ex. 3 at 549:7–9; *see also* Jt. Ex. 5 at 1305:3–10.) Maher "was panicking and wondering what [Michael] had gotten himself into." (Jt. Ex. 3 at 460:7–8; *see id.* at 549:7–22.) In that moment, Maher told Michael that a company called Biosite would likely be acquired as early as the next week. (*See id.* at 460:9–11; Jt. Ex. 2 at 338:5–13, 361:14–23.) Maher had learned this information from colleagues during a Citigroup officer luncheon earlier that week. (*See* Jt. Ex. 2 at 335:7–11; Jt. Ex. 3 at 457:5–10.) Maher acknowledges that the decision to provide Michael material nonpublic information about Biosite was "[t]errible judgment, and it was an issue of panic." (Jt. Ex. 3 at 463:19.) "I didn't know what my brother was involved in, when I offered him money[,] he said it wasn't about money and he didn't need money. I didn't know what he had done. And, he said he needed information. And, that's what I gave him." (*Id.* at 463:19–23; *see* Jt. Ex. 2 at 337:22–338:13.)

Maher immediately regretted providing this information to Michael. (*See* Jt. Ex. 2 at 339:2–9.) He called his brother back after getting out of the taxi and told Michael, "Please, what

I just did was wrong. It was illegal. Do not act on this. And do not give this information to anyone." (Jt. Ex. 3 at 461:2–8; *see* Jt. Ex. 2 at 339:2–9; Jt. Ex. 3 at 578:8–579:3; Jt. Ex. 5 at 1305:11–21 (Maher "begged [Michael] not to trade on [the Biosite information]").) Michael told Maher not to worry, but Maher expected Michael was going to trade on the information anyway. (*See* Jt. Ex. 2 at 339:10–13; Jt. Ex. 3 at 461:12–16; Jt. Ex. 5 at 1305:22–1306:1.) Maher's tipping of Michael regarding Biosite is a "nightmare that [he has] relived every day of [his] life [since]." (Jt. Ex. 3 at 463:13–15.)

C. Maher's Cooperation with the Government and Sentencing

When Maher was first contacted without notice by SEC staff by telephone on May 1, 2007, he did not provide truthful responses to some of the staff's questions. As Maher explained in his trial testimony, he made false statements because "[he] was terrified, scared"; Susie was nine months pregnant, and Maher was "afraid that [his] career would end," "afraid of going to jail," and "scared of the consequences on his family." (Jt. Ex. 2 at 346:24–347:7; Jt. Ex. 3 at 469:18–470:3.)

On April 21, 2009, a grand jury in the Northern District of California indicted Maher on one count of conspiracy to commit securities fraud and thirty-four counts of securities fraud. (*See* Joint Exhibit 1, Indictment filed Apr. 21, 2009 ("Jt. Ex. 1") ¶ 2.) Maher initially entered a plea of not guilty, given the breadth of the indictment and the initial "den[ial]" with which he struggled. (*See* Jt. Ex. 3 at 471:1–6.) However, by early 2010, Maher was prepared to plead guilty and sought to cooperate with the government and its investigation into the insider trading scheme.

Maher's attorneys first proffered to the government on March 4, 2010. (Harris Decl. ¶ 6; *see* Jt. Ex. 3 at 571:2–11.) Maher subsequently proffered to the government for the first time on April 21, 2010. (*See* Jt. Ex. 3 at 534:15–536:5.) Further proffers were delayed for almost a year

while attention was focused on resolving issues related to Michael's competency to plead guilty. (Harris Decl. ¶ 6.) Maher provided further proffers in the spring of 2011. (*Id.*) After the proffers were finally completed, on July 6, 2011, Maher entered a plea of guilty, pursuant to a cooperation plea agreement, to one count of conspiracy to commit securities fraud and one count of securities fraud. (*See* Joint Exhibit 6, Plea Agreement signed July 6, 2011 ("Jt. Ex. 6"); *see also* Jt. Ex. 3 at 356:16–357:10.)

Maher did not know, when he agreed to provide his full cooperation and truthful testimony, that the government investigation would lead to the indictment of Maher's brother-in-law, Bassam Salman, or that Maher would be required to testify against Salman. (*See* Jt. Ex. 3 at 590:1–5.) He nonetheless fulfilled his cooperation commitment and continued to meet with the government to provide assistance whenever requested. Maher's wife, Susie, also met with the government at the government's request. (Harris Decl. ¶ 8.) Maher testified before a grand jury on August 18, 2011. The government filed criminal charges against Salman on September 1, 2011, and against Bayyouk on May 29, 2012. Both Salman and Bayyouk pleaded not guilty.

Approximately a year later, beginning in May 2013, Maher began to meet with the government to prepare to testify at the *Bayyouk* and *Salman* trials. (Harris Decl. ¶ 7.) As he prepared to testify during several meetings leading up to the trials, Maher proactively identified additional information and documents that might be relevant to the government's continuing investigation and trial preparation, resulting in another proffer on May 31, 2013. (*Id.*) Susie also met with the government at its request. (*Id.* ¶ 8.) This was particularly difficult for her given that Sam Salman is her older brother and Bayyouk is Sam's wife's brother-in-law.

Maher testified as a key government witness at both trials. Susie was called by the government and testified at the *Bayyouk* trial. (*Id.*) She also provided information to the

government relevant to her prospective testimony at the *Salman* trial, in which she testified in response to a defense subpoena. (*Id.*)

Maher's cooperation directly contributed to securing the convictions of both Bayyouk and Salman. As described by the U.S. Attorney's Office in its Sentencing Memorandum:

> Maher Kara's cooperation was extraordinary. . . . He spent many hours in debriefings with the Office on multiple occasions. He both prepared to testify and testified before the grand jury. He identified and provided key documents and information to the government throughout the pendency of the investigation and prosecution. He participated in hours of witness prep in anticipation of testimony in the Salman and Bayyouk trials, and he testified as a government witness in both trials. His testimony was thoughtful and credible.

(Harris Decl. Ex. 1 at 6.)

On December 19, 2014, the United States District Court for the Northern District of California sentenced Maher to three years' probation, with a condition of three months' location monitoring. (Jt. Ex. 8; *see also* Harris Decl. Ex. 2, Transcript of Sentencing Hearing in *United States v. Kara*, No. CR 09-0417-EMC (N.D. Cal. Dec. 19, 2014) at 18–23.) In supporting a sentence of probation, the U.S. Attorney's Office noted in its Sentencing Memorandum that:

- Although he benefitted from disclosing inside information to his brother, Maher Kara did not receive any proceeds of the securities trading, and did not know the full scope of his brother's trading.

- With respect to Biosite, Maher Kara initially offered Michael Kara money rather than inside information, which would have avoided any unlawful conduct.

- Maher Kara's breaches of fiduciary duty appear in large part to have resulted from Michael Kara's persistence in seeking inside information.

- Maher Kara gained the least from the scheme and, in many respects, lost the most. He lost his job at Citigroup, lost his career in the financial industry, and lost many important family connections, as described in the PSR and letters to the Court.

(Harris Decl. Ex. 1 at 3.)

In imposing a probationary sentence, the court noted "the extraordinary cooperation of Mr. Kara, which required him to prolong his sentencing process and participate in . . . two trials, a number of proffers and the difficulty of circumstances of having to testify against relatives" and that Maher "did not engage in trades for personal gain and gained nothing from this in terms of any monetary enrichment." (Harris Decl. Ex. 2 at 19:21–25, 20:3–5.) The court also found that "it's unlikely that Mr. Kara would recommit any similar offense." (*Id.* at 18:8–10.)

Before and after his sentencing in the criminal case, Maher sought to resolve the SEC's district court enforcement action. In the fall of 2011, counsel for Maher and SEC staff reached an agreement in principle, but the staff then informed Maher's counsel that the SEC was not willing to proceed without resolution of claims against Michael, which was not possible at that time. (Harris Decl. ¶ 9.) When the SEC was willing to resume negotiations after Maher's sentencing in the criminal case, the parties sought to resolve the Division's anticipated claims for associational bars as well as the enforcement action. (*Id.*) The Division was, however, unwilling to accept anything other than a permanent, industry-wide bar. (*Id.*) Maher entered into a consent judgment in the enforcement action on July 2, 2015. (Joint Exhibit 8, Consent of Defendant Maher F. Kara to Entry of Final Judgment, signed July 2, 2015 ("Jt. Ex. 8").)

D. The Impact of Maher's Guilty Plea and Cooperation

Maher has not worked in the financial industry since he was terminated from Barclays PLC in October 2008 after receiving a Wells notice from the SEC. (Kara Decl. ¶ 4.) His career as an investment banker is over, and he has spent more than seven years without alternative professional opportunities. (*Id.*; Harris Decl. Ex. 1 at 3.) He has undertaken principal responsibility for the daily care of his two children while his wife, Susie, works full-time as a pediatrician. (Kara Decl. ¶ 5.)

This case has devastated not only Maher's career, professional reputation, and financial circumstances, but also his relationships with his family and his wife's family. Maher has not spoken to his brother, Michael, in more than seven years. (*See* Kara Decl. ¶ 9; Jt. Ex. 3 at 486:3–6.) And since Maher testified as a government witness at Salman's trial, Maher's wife's family has blamed both him and Susie for Salman's conviction. (Kara Decl. ¶ 8.) Susie's siblings no longer speak to her. (*Id.*) Salman has also encouraged the rest of Susie's family and extended family not to speak to Maher and Susie, which has resulted in some family members being actively hostile toward them and further deterioration of remaining family ties. (*Id.*) Coming from a Middle Eastern culture where family relationships are of utmost importance, this rift is particularly painful. (*Id.*) It affects not only Maher and Susie, but also their children, who will likely grow up not knowing their cousins and extended family. (*Id.*)

Maher understands that his own actions put him in this situation, and he takes responsibility for it. As he testified, "My family has suffered a lot. I have—it'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.)

IV. ARGUMENT

A. The Division's Claims for Associational Bars Are Prohibited by 28 U.S.C. § 2462.

Section 2462 of Title 28 provides a general five-year statute of limitations:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .

28 U.S.C. § 2462. Under controlling D.C. Circuit precedent, that limitations period applies to the Division's claims for associational bars, including its claims for collateral bars. Because

those claims accrued no later than 2009, when the SEC filed its enforcement action, they are barred by Section 2462.

In *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), the D.C. Circuit held that Section 2462 applied to claims for censure and suspension in an SEC administrative proceeding under Section 15(b) of the Exchange Act. *See also 3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (holding that Section 2462 applies to administrative as well as judicial proceedings). The court "conclude[d] that a 'penalty,' as the term is used in § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damages caused to the harmed parties by the defendant's action." *Johnson*, 87 F.3d at 488. It found that "the sanctions imposed by the SEC—censure and a six-month suspension—clearly resemble punishment in the ordinary sense of the word," and noted that "Congress and the courts have long considered the suspension or revocation of a professional license as a penalty." *Id.* & 488 n.6; *cf. In re Ruffalo*, 390 U.S. 544, 550 (1968) (holding in due process context that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer"). Because the administrative proceeding was commenced more than five years after the misconduct at issue, the D.C. Circuit vacated the Commission's order imposing sanctions.

In *Johnson*, the Commission reasoned

> that § 2462 should not apply because the "proceeding before us does not seek to impose a *civil penalty*, but rather to determine the appropriate *remedial action*. The intent of Johnson's suspension is to protect the public from future harm at her hands."

87 F.3d at 486 (citation omitted). The D.C. Circuit rejected that argument. It noted that "[i]t is clearly possible for a sanction to be 'remedial' in the sense that its purpose is to protect the public, yet not be 'remedial' because it imposes a punishment going beyond the harm inflicted by the defendant." *Id.* at 491 n.11, citing *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C.

Cir. 1977) ("From the point of view of the public and [the] enforcement agency, the action of the SEC is 'remedial.' To the broker removed from his profession the action partakes of 'punitive' impact."); *see also Proffitt v. FDIC*, 200 F.3d 855, 861 (D.C. Cir. 2000) (following *Johnson* and applying § 2462 to FDIC prohibition on further participation in banking industry: "Although the FDIC's expulsion of Proffitt from the banking industry had the dual effect of protecting the public from a dishonest banker and punishing Proffitt for his misconduct, its punitive purpose plainly goes 'beyond compensation of the wronged party.'") (citation omitted). The D.C. Circuit in *Johnson* held that "[u]nlike restitution or disgorgement, the sanctions here do not attempt to restore the stolen funds to their rightful owner. To the contrary, the sanctions in this case impose a punishment for Johnson's violation of a standard laid down in the Exchange Act and qualify therefore as a 'penalty' within the meaning of § 2462." 87 F.3d at 491–92.

Therefore, under controlling D.C. Circuit precedent, Section 2462's five-year statute of limitations applies to the Division's claims for associational bars here.[2] As in *Johnson*, the Division seeks practice bars, a remedy that "goes beyond remedying the damages caused to the

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[2] In *Timbervest, LLC*, Initial Decision Release No. 658, 2014 WL 4090371, at *59–61 (ALJ Aug. 20, 2014) ("*Timbervest I*"), the ALJ, applying *Johnson*, held that Section 2462 prohibited any associational bar because the violations at issue occurred more than five years prior to the commencement of the administrative proceeding. On appeal, the Commission held that Section 2462 did not prohibit imposition of an associational bar because that remedy is "equitable, not punitive," and seeks to "protect investors in the future from unfit professionals." *Timbervest, LLC*, Investment Advisers Act Release No. 4197, 2015 WL 5472520, at *15 (Sept. 17, 2015) ("*Timbervest II*"). The Commission did not attempt to explain how it could reconcile its analysis with the holding in *Johnson*, which specifically rejected that analysis. The Commission did acknowledge in a footnote that, though *Johnson* "states the controlling rule—*i.e.*, that a bar based 'solely in view of . . . past misconduct' could constitute a penalty for purposes of Section 2462," the Commission in district court actions has "generally taken the position that Section 2462 does not apply to equitable remedies," and "outside of the D.C. Circuit, the Commission maintains that *Johnson* was incorrectly decided." *Id.* at *15 n.71.

harmed parties by the defendant's action." *Id.* at 488. The only question is when the cause of action accrued and the five-year statute began to run.

"[T]he 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action.'" *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013) (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)); *see also Timbervest I*, at *59 ("the statute of limitations clock begins running at the time of accrual, that is, when the cause of action becomes enforceable"). In *Gabelli*, the Supreme Court rejected the discovery rule and held that the standard accrual rule applied under Section 2462 to an SEC enforcement action. 133 S. Ct. at 1220.

An associational bar can be imposed under Section 15(b)(6) of the Exchange Act when the Commission finds that it "is in the public interest" and the person to be barred "has committed any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection." 15 U.S.C. § 78o(b)(6)(A)(i). Section 4(D) includes willful violation of any provision of chapter 78.

Here, the SEC alleged securities fraud in violation of chapter 78 in its April 30, 2009 Complaint, more than six years before institution of this proceeding on September 10, 2015. (Declaration of E. Barrett Atwood, Ex. 1.) That Complaint alleged exactly the same conduct that the Division now relies on to seek associational bars. Indeed, in support of its summary disposition motion and request for permanent, industry-wide bars, the Division alleges no violations of law after 2007. The SEC's cause of action for associational bars thus accrued more than five years before this proceeding was commenced. That cause of action is therefore barred by Section 2462.[3]

[3] The Division may argue that this proceeding is distinguishable from that in *Johnson* because this is a "follow-on" rather than an "original" proceeding and is premised on Maher's conviction and consent judgment in the district court actions rather than on the underlying

(Footnote continues on next page.)

B. Imposition of a Collateral Bar, Including a Bar on Association with Investment Advisers, Would Be an Impermissibly Retroactive Application of the 2010 Dodd-Frank Act.

This proceeding was instituted pursuant to Section 15(b) of the Exchange Act, which concerns the "registration of brokers and dealers." 15 U.S.C. § 78o(b). As an investment banker at Citigroup, and throughout the time at issue in this proceeding, Maher worked for CGMI, the registered broker dealer arm of Citigroup, and held series 7 and 63 licenses to be a registered representative associated with broker dealers. (Kara Decl. ¶ 3.) He had no association with Citigroup's investment adviser, Citigroup Asset Management, which was separated from CGMI by a strict ethical wall, or with any investment adviser, municipal securities dealer, or transfer agent. (*Id.*) Nonetheless, the Division seeks a "collateral bar," permanently barring Maher "from associating with any investment adviser, broker, dealer, municipal securities dealer, or transfer agent." (Div. Mem. at 4.)

Prior to enactment of the 2010 Dodd-Frank Act, the Securities Exchange Act did not provide for collateral bars. "With respect to any person who [was] associated, who [was] seeking to become associated, or at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker dealer," the Commission's authority under Section 15(b)(6)(A) of the Exchange Act was limited to a suspension or bar from "being associated with a broker dealer." 15 U.S.C. § 78o(b)(6) (prior to 2010 Dodd-Frank Act amendment). The D.C. Circuit held in *Teicher v. SEC* that imposition of a collateral bar was "in

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(Footnote continued from previous page.)

violations of the Exchange Act. *Timbervest I* noted Commission decisions that might support this distinction and therefore phrased its holding as "because this is an original proceeding, the statute of limitations prohibits imposition of an associational bar." *Timbervest I*, 2014 WL 4090371, at *61. It also noted, however, that "nothing in *Johnson* suggests a principled distinction between an 'original' proceeding and a follow-on proceeding." *Id.* The Commission's decision in *Timbervest II* did not rely on that distinction.

excess of the Commission's powers" as provided by Congress. 177 F.3d 1016, 1021–22 (D.C. Cir. 1999); *see also id.* at 1017 ("the logic of the statutory structure convinces us that Congress withheld that power [to exclude persons from the investment adviser industry under Section 15(b)(6) based on association with a broker dealer]"; *id.* at 1020 ("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").

The 2010 Dodd-Frank Act expanded the Commission's powers and allowed collateral bars. Section 15(b)(6) was amended to allow, in the case of a person associated with or seeking to become associated with a broker dealer, a suspension or bar "from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization." 15 U.S.C. § 78o(b)(6)(A) (as amended by 2010 Dodd-Frank Act). Maher's misconduct all occurred no later than 2007, prior to the 2010 Dodd-Frank amendments. The issue, therefore, is whether Congress intended that the Commission's expanded powers should apply retroactively.

In its recent decision in *Koch v. SEC*, 793 F.3d 147 (D.C. Cir. 2015), the D.C. Circuit held that the Dodd-Frank expansion of the Commission's authority to include collateral bars does not apply retroactively. The petitioner, Koch, had been "properly charged as a primary violator under both the Exchange Act and the Advisers Act." *Id.* at 157. But the Commission, applying the collateral bar authority added in 2010 by Dodd-Frank, had also barred Koch from associating with municipal advisors and rating organizations, even though his misconduct took place in 2009. Applying *Landsgraf v. USI Film Products*, 511 U.S. 244 (1994), a leading Supreme Court case on retroactivity, the D.C. Circuit reasoned that "[b]ecause the Dodd-Frank Act does not expressly authorize retroactive application, we must determine whether applying it to Koch 'would impair rights [he] possessed when he acted, increase [his] liability for past

conduct, or impose new duties with respect to transactions already completed.'" *Koch*, 793 F.3d at 158 (quoting *Landsgraf*, 511 U.S. at 280). Finding that "[a]pplying the Act to Koch 'attache[d] new legal consequences' to his conduct by adding to the industries with which Koch may not associate," the court held that "applying Dodd-Frank's enhanced penalties to Koch is impermissibly retroactive." *Id.* (quoting *Landsgraf*, 511 U.S. at 270).[4]

The same is true here. Applying the sanctions authorized by the 2010 Dodd-Frank amendments to Maher's conduct in 2007 and before would "create new legal consequences for past conduct." *Id.* at 158. Just as the Exchange Act prior to the Dodd-Frank amendments provided no authority for a collateral bar on associating with municipal advisors or rating organizations, it also provided no authority for a collateral bar on associating with investment advisers or with anyone other than a broker dealer.

As held by the D.C. Circuit in *Teicher*, the Exchange Act, prior to the 2010 Dodd-Frank amendments, had no provision for collateral bars and did "not supply the Commission with authority to exclude persons from the investment adviser industry." 177 F.3d at 1017. While the Commission had authority under the Investment Advisers Act to bar association with investment advisers, that authority applied only to a "person associated or seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser." 15 U.S.C. § 80b-3(f) (prior to 2010 Dodd-Frank Act amendments). Unlike the petitioner in *Koch*, Maher had no association with an investment adviser and was not charged under the Advisers Act.

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[4] In *John W. Lawton*, Investment Advisers Act Release No. 3513, 2012 WL 6208750, at *7–10 (Dec. 13, 2012), decided before the D.C. Circuit decision in *Koch*, the Commission upheld a collateral bar in a case involving misconduct prior to the Dodd-Frank amendments, reasoning that collateral bars "address future risks and apply to future actions" rather than punish prior misconduct. That reasoning and holding are inconsistent with *Koch*.

Therefore, under controlling D.C. Circuit authority, this Court has no authority to bar Maher from associating with an investment adviser or with anyone other than a broker dealer.

C. A Permanent Bar Is Not Necessary to Protect the Public Interest.

Section 15(b)(6) of the Exchange Act authorizes a suspension or associational bar when it is "in the public interest." 15 U.S.C. § 78o(b)(6)(A). "[P]ermanent exclusion from the industry is 'without justification in fact' unless the Commission specifically articulates compelling reasons for such a sanction," such as "a reasonable likelihood that a particular violator cannot ever operate in compliance with the law." *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd*, 450 U.S. 933 (1981) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112–13 (1946)).

A "conclusive presumption of future wrongdoing on the basis of past misconduct" is inappropriate, and relevant factors should be considered as they apply to the particular circumstances of the respondent. *Id.* Those factors include

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Id. (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)); *accord Armstrong v. SEC*, 476 F. App'x 864, 865 (D.C. Cir. 2012); *Seghers v. SEC*, 548 F.3d 129, 131 (D.C. Cir. 2008). In determining whether to impose a collateral bar, the Commission should also consider "whether the misconduct is of the type that, by its nature, 'flows across' various securities professions and

poses a risk of harm to the investing public in any such profession." *In re Blinder*, 53 S.E.C. 250, 261 (1997).[5]

Consideration of these factors and the specific circumstances of Maher's case does not support a conclusion that a lifetime bar is necessary to protect the public interest. To the contrary, Maher's reluctant participation in the insider trading scheme in response to persistent pressures exerted by his mentally ill brother, his sincere and complete acceptance of responsibility, his extraordinary cooperation with the U.S. Attorney's Office, including his testimony in two trials against family members, and the toll that his offense and cooperation have exacted on him and his family, all support the conclusion that Maher does not pose a risk of future misconduct. (*See* Harris Decl. Ex. 2 at 18:8–10 (finding of district court that "it's unlikely that Mr. Kara would recommit any similar offense").)

1. The Nature of Maher's Offense Conduct

The first three *Steadman* factors (the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, and the degree of scienter involved) concern the nature of the offense conduct. Maher has fully acknowledged the wrongful, illegal nature of his conduct in his guilty plea, testimony as a government witness, and consent judgment in the SEC's enforcement action. However, the Division's characterization of that conduct—that Maher "acted egregiously, with a high degree of scienter, on multiple occasions" (Div. Mem. 21)—ignores the specific and unusual circumstances in which that conduct took place.

The Division characterizes Maher as sitting "atop a widespread trading ring that reaped millions of dollars in illegal profits." (Div. Mem. at 2.) But unlike most insider traders, Maher

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[5] The Commission held in *In re Blinder*, prior to the 2010 Dodd-Frank amendments, that Section 15(b)(6) of the Exchange Act authorized collateral bars. *Id.* at 255–61. That holding was overruled in *Teicher*, *supra*.

did not seek profit or status. The evidence presented by the government in two trials established that Maher engaged in no trading, sought and received no financial benefit, did not know any of the specifics of Michael's trading or the profits made in that trading, and had no knowledge that Michael was tipping others. (*See* Harris Decl. Ex. 1 at 3, 7; Jt. Ex. 3 at 470:19–25, 574:3–7, 588:18–20, 594:20–595:9; Harris Decl. Ex. 1 at 7.) As noted by the U.S. Attorney's Office, Maher's "breaches of fiduciary duty were in large part the result of Michael Kara's persistence in seeking inside information." (Harris Decl. Ex. 1 at 7.) Maher's misconduct was an aberration in an otherwise exemplary life. (*See* Jt. Ex. 3 at 480:1–483:17.)

Most of Maher's sharing of confidential information with Michael, until late 2006, was negligent and without intent or knowledge that Michael would trade on that information. It began when Maher sought Michael's help with questions about the biotechnology and science associated with pharmaceuticals produced by Maher's clients. (Jt. Ex. 3 at 386:3–15.) It continued as part of discussions concerning treatment and pharmaceutical options when their father was diagnosed with cancer. (Jt. Ex. 3 at 386:23–387:15.) After their father passed away and Michael became depressed and suicidal, Maher made efforts to travel to the Bay Area to support Michael and would conduct Citigroup work while staying at Michael's house. This presented opportunities for Michael to misappropriate confidential information from Maher's work documents and overheard telephone conversations. (*See* Jt. Ex. 2 at 301:7–9; Jt. Ex. 3 at 498:21–24, 575:3–16, 576:3–17, 607:2–9.)

Maher became "naively unguarded" and comfortable about sharing good news or frustrations about his work with Michael, including "sharing updates about . . . projects for clients that [Maher] was working on." (Jt. Ex. 2 at 282:23–24; Jt. Ex. 3 at 404:23–405:1.) For example, Maher's sharing of confidential information about Andrx—a primary focus of the SEC's enforcement action and the Division's brief here (*see* Div. Mem. at 7–8)—was part of

Maher's venting about being taken off a potential transaction involving Andrx and the impact that would have on his career, and was not a "tip" that Maher knew or expected Michael would trade on. (*See* Jt. Ex. 3 at 440:14–25; Jt. Ex. 2 at 316:18–317:10.)

Indeed, when Maher began to share confidential information, he "gave [Michael] clear instructions that [the] information [he] was sharing with [Michael] was confidential," and he believed that Michael was maintaining that confidentiality. (Jt. Ex. 3 at 386:16–22; Jt. Ex. 2 at 283:8–10.) Later, when Michael's questions became "more targeted" and focused on the "business end" of companies, Maher confronted Michael and asked if he was trading. (Jt. Ex. 3 at 387:17–24.) Michael "flat-out denied it, and he swore on his daughter's life that he wasn't trading." (*Id.* at 387:23–24; *see* Jt. Ex. 2 at 283:8–13.) When Michael became very persistent and nagging in his questions, Maher "tried to deflect it," "told [his] wife no longer to take [Michael's] calls," "[t]ried to avoid his phone calls, [and] wouldn't reply to his e-mails, because [he] just didn't want to talk to [Michael]." (Jt. Ex. 3 at 388:1–5.)

As Maher has fully acknowledged in his guilty plea and trial testimony, he did share material non-public information with Michael in two instances in which he expected that Michael would trade: USPI and Biosite. (*See supra*, III.B.2; Jt. Ex. 3 at 598:13–18.) With regard to USPI, Maher gave in to Michael's relentless requests for updates about Maher's colleague's work on a potential leveraged buyout. Michael never disclosed that he was trading, but Maher "fully expected that [Michael] was trading." (Jt. Ex. 3 at 389:20–21.) In the case of Biosite, the major source of trading profits to Michael and those he tipped, Maher gave in to Michael's repeated and desperate pleas for information, "panicking and wondering what [Michael] had gotten himself into." (*Id.* at 460:7–8; *see id.* at 549:7–22; Jt. Ex. 2 at 337:19–338:7; Jt. Ex. 5 at 1304:25–1305:10.) Maher immediately regretted providing that information, called Michael back, and admonished him not to use that information, though he expected that

Michael was going to trade on the information anyway. (*See id.* at 339:2–13; Jt. Ex. 3 at 461:2–16; Jt. Ex. 5 at 1305:11–1306:1.)

2. Maher's Recognition of His Wrongful Conduct and Extraordinary Cooperation

The fourth and fifth *Steadman* factors are "the sincerity of the defendant's assurances against future violations [and] the defendant's recognition of the wrongful nature of his conduct." 603 F.2d at 1140. Those factors weigh heavily against the need for a permanent bar.

Maher has fully and sincerely acknowledged his wrongful conduct in his cooperation plea agreement, in testimony in two trials, and at his criminal sentencing. (*See* Jt. Ex. 8, Ex. B; *see also, e.g.*, Jt. Ex. 3 at 494:14–495:5, 585:14–21 ("after the destruction of this family, after the pain I've caused people, after the embarrassment and after the humiliation that I've subjected my entire family to . . . I'm accepting full responsibility and I will take whatever punishment Judge Chen gives me"); Harris Decl. Ex. 2 at 17:5–24 (Maher's statement at sentencing).) A full reading of Maher's testimony in the *Salman* and *Bayyouk* trials leaves room for no other conclusion.

The sincerity of Maher's acceptance of responsibility and assurances against future violations is also demonstrated by the extensive and "extraordinary" cooperation that he provided to the U.S. Attorney's Office. (Harris Decl. Ex. 1 at 6.)[6] As noted by the U.S. Attorney's Office, Maher "spent many hours in debriefings with the [U.S. Attorney's] Office on multiple occasions," "identified and provided key documents and information to the government

[6] The Division asserts that "[i]t was not until the summer of 2011 . . . that Kara decided to acknowledge his wrongdoing and cooperate with the criminal authorities." (Div. Mem. at 21.) But in fact, Maher first offered his cooperation and began a series of proffers to the U.S. Attorney's Office in early 2010. (Harris Decl. ¶ 6.) That process and the completion of Maher's cooperation agreement were delayed while the U.S. Attorney's Office focused on issues related to Michael's mental competency to also plead guilty. (*Id.*)

throughout the pendency of the investigation and prosecution," and gave "thoughtful and credible" testimony before the grand jury and in two trials, both of which resulted in convictions. (Harris Decl. Ex. 1 at 6.)

Moreover, as discussed further below, Maher's cooperation came at great personal cost. When Maher offered his full cooperation, he had no knowledge that Michael had tipped Maher's brother-in-law, Bassam Salman, or that the government's investigation would result in the indictment of Salman and Salman's brother-in-law Karim Bayyouk. Maher nonetheless persevered in his cooperation, providing key testimony at the Salman and Bayyouk trials, as did his wife, Susie, Salman's sister.

Respondent agrees that the issues presented in this proceeding can be addressed with summary adjudication. However, if the Court has any question after reading Maher's trial testimony as to the completeness and sincerity of Maher's recognition of the wrongful nature of his conduct and assurances against future violations, Maher invites the Court to conduct a hearing in which the Court can take his testimony and direct any questions it may have to him.

3. The Impact of Maher's Misconduct, Guilty Plea, and Cooperation on His Career and Family Relations

The impact of Maher's misconduct, guilty plea, and cooperation on his career and family relations has been devastating and reinforces the conclusion that no further remedial measures are necessary to deter future misconduct.

The final *Steadman* factor is "the likelihood that the defendant's occupation will present opportunities for future violations." 603 F.2d at 1140. Maher's career as an investment banker ended more than seven years ago after he received a Wells notice from the SEC. (Jt. Ex. 2 at 369:5–370:5; Harris Decl. Ex. 1 at 3.) He has not worked in the securities industry since. Maher also has no continuing relationship with his brother Michael, the only person with whom

he shared insider information. They have not spoken in more than seven years. (Kara Decl. ¶ 9; *see* Jt. Ex. 3 at 486:3–6.)

Even more significantly, the destruction of Maher's relationship with his wife's family provides a constant reminder of his wrongful conduct and a strong deterrent to any future misconduct. Maher and Susie come from a Middle Eastern heritage in which family relations are paramount. The joining of their families was an essential element for their courtship and marriage. (*See* Jt. Ex. 3 at 360:22–361:15; Jt. Ex. 2 at 304:24–305:10.) Indeed, it was in that context that Michael Kara formed a relationship with Bassam Salman. As a result of Maher's cooperation with the government and testimony at the Salman trial, not only Maher but also Susie has been disowned by Susie's family. (Kara Decl. ¶ 8.)

4. General Deterrence and Comparison to Other Cases

A permanent industry-wide associational bar is also not necessary for general deterrence. A less than permanent bar, with a right to reapply, would not be inconsistent with the Commission's resolution of other comparable cases, including insider trading cases.

For example, in a recent case the Commission ordered an industry bar with the right to reapply after five years for Trent Martin, who, like Maher, held series 7 and 63 licenses. *See* Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, *Trent Martin*, Exchange Act Release No. 34-71369, 2014 WL 251306, at *2 (Jan. 23, 2014). Martin, a research analyst at a brokerage firm, misappropriated material nonpublic information about IBM's 2009 acquisition of SPSS Inc. from a friend who was working on the deal. *See id.* Martin illegally traded on that information in his own account and provided the confidential information to his roommate. *See id.* Martin's roommate used the information to trade illegally and tipped others who also traded. *See id.* at *1–2. The illegal trading from the scheme resulted in gains exceeding $1 million. *See id.* at *1. Martin pled guilty

in a related criminal action in September 2013 pursuant to a cooperation agreement. (*See* Harris Decl. Ex. 3 at 5, 29 (discussing Martin's agreement to cooperate with the government's investigation).) In December 2013, Martin consented to a judgment in the related enforcement action. (*See* Harris Decl. Ex. 4.)

In an administrative action brought by the Commission in January 2014, Martin received an industry bar pursuant to Section 15(b)(6) in connection with his participation in the insider trading scheme. *See Trent Martin*, 2014 WL 251306, at *3. However, despite initially fleeing the United States after learning about the SEC's investigation[7] and knowingly violating insider trading laws to enrich himself, Martin was given the right to apply for reentry to the appropriate self-regulatory organization after five years. *See id.*; *see also, e.g.*, *Jonathan Hollander*, Investment Advisers Act Release No. 3208, 2011 WL 1924109, at *2 (May 19, 2011) (industry bar with right to reapply after three years for insider trading defendant who traded on material nonpublic information and tipped others); *Steven E. Nothern*, Investment Advisers Act Release No. 2997, 2010 WL 883939, at *2 (March 11, 2010) (investment adviser bar with right to reapply after five years for tipper in insider trading case with profits of $3.1 million); *cf. SEC v. Miller*, 744 F. Supp. 2d 1325, 1339, 1348 (N.D. Ga. 2010) (five-year director and officer bar where defendant, who accepted no responsibility after being found guilty of securities fraud, had already been excluded from leadership positions for ten years).

As in *Martin* and the other cases noted above, an associational bar with a right to reapply after a specified period would adequately serve the public interest, including any interest in

[7] SEC Press Release, *SEC Charges Research Analyst with Trading and Tipping Ahead of IBM-SPSS Merger* (Dec. 26, 2012).

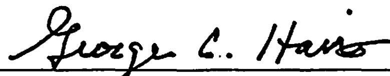
general deterrence, in this case.[8] Indeed, because Maher has been already effectively excluded from the securities industry for more than seven years, since receiving a Wells notice and throughout his lengthy cooperation with the U.S. Attorney's Office, a right to reapply in no more than three years would be appropriate.

CONCLUSION

For all of the reasons stated above, Maher Kara respectfully requests that the Court: (1) dismiss the Division's claims for associational bars in their entirety because they are prohibited by 28 U.S.C. § 2462's five-year statute of limitations; or (2) in the alternative, (a) apply controlling D.C. Circuit authority and 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 (b) 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: December 21, 2015

Respectfully submitted,



George C. Harris
MORRISON & FOERSTER LLP

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[8] The Division may argue that *Martin* and other cases resulting in non-permanent bars are not comparable because they involved settlements with the Commission. But analysis of the public interest, including deterrence, is the same in the settlement context. Moreover, Maher has sought diligently since his guilty plea to settle all matters with the SEC, offered complete cooperation with the SEC, entered into a consent judgment to resolve the district court enforcement action, and was willing to accept a non-permanent bar to settle the associational bar issue.

CERTIFICATE OF SERVICE

I, Noanoa L. Pan, hereby certify that on December 21, 2015, the foregoing **Respondent Maher F. Kara's Opposition to Division's Motion for Summary Disposition, Cross-Motion for Summary Disposition, and Supporting Memorandum of Law, Declaration of George C. Harris, and Declaration of Maher F. Kara** were filed with the Securities and Exchange Commission, as follows:

By fax and overnight mail (original and three copies)

Office of the Secretary
Attn: Brent Fields, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549-2557
Phone: 202-551-5400
Facsimile: 202-772-9324

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

By overnight mail

Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

By email-delivery (by agreement)

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