UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2649/May 8, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16383

In the Matter of CHARLES L. HILL, JR.	ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION ON THE MERITS

The Securities and Exchange Commission initiated this proceeding under Section 21C of the Securities Exchange Act of 1934. A hearing is scheduled to begin on June 15, 2015, in Atlanta, Georgia.

Respondent Charles L. Hill, Jr., has moved for summary disposition, arguing that the Division of Enforcement's case is "based only on conclusory allegations, impermissible inferences, and conjecture."[1] Mot. at 2. For the reasons stated below, I DENY Mr. Hill's motion.

1. Background

In the Order Instituting Proceedings (OIP), the Division alleges that during May through July 2011, Mr. Hill "engaged in insider trading, in violation of Section 14(e) of the Exchange Act and Rule 14e-3 thereunder, in connection with" his purchase and sale of securities of Radiant Systems, Inc. OIP at 1-2. Specifically, the Division asserts that Radiant's Chief Operating Officer (COO) told his friend (referred to in the OIP as the "COO's friend") about Radiant's possible acquisition by NCR Corporation. *Id.* at 1. According to the allegations, the COO's friend passed this and later material, nonpublic information to Mr. Hill. *Id.* at 1, 4. The Division claims that Mr. Hill then opened new brokerage accounts and, over the ensuing five weeks, purchased over $2 million of Radiant stock. *Id.* at 2, 5.

[1] This Order addresses only Mr. Hill's motion for summary disposition on the merits. A separate order will address his motion for summary disposition on constitutional issues.

According the OIP, after a merger agreement between Radiant and NCR was publicly announced, the share price of Radiant's stock increased by over thirty percent. OIP at 6. Mr. Hill then sold his shares, realizing gains of about $744,000. *Id.*

2. Legal Principles

A. Exchange Act Section 14(e) and Rule 14e-3

In relevant part, Section 14(e) of the Exchange Act provides:

> It shall be unlawful for any person to . . . engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . . The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

15 U.S.C. § 78n(e). Based on the rulemaking authority in this provision, the Commission adopted Exchange Act Rule 14e-3(a). That Rule fleshes out what it means "to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer." *See* 17 C.F.R. § 240.14e-3(a). It says that for purposes of Section 14(e):

> If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice . . . for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:
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> > (1) The offering person,
> >
> > (2) The issuer of the securities sought or to be sought by such tender offer, or
> >
> > (3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer,
>
> to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time

> prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

17 C.F.R. § 240.14e-3(a).

The Rule prohibits "'trad[ing] on the basis of material nonpublic information concerning a pending tender offer that [the trader] knows or has reason to know has been acquired "directly or indirectly" from an insider of the offeror or issuer, or someone working on their behalf.'" *United States v. O'Hagan*, 521 U.S. 642, 669 (1997) (quoting *United States v. Chestman*, 947 F.2d 551, 557 (2d Cir. 1991) (en banc)). This prohibition applies "'*without regard to whether the trader owes a pre-existing fiduciary duty* to respect the confidentiality of the information.'" *Id.*

B. Summary disposition standard

Commission Rule of Practice 250 governs motions for summary disposition. *See* 17 C.F.R. § 201.250. An administrative law judge "may grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b). "The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323." 17 C.F.R. § 201.250(a). In order to successfully challenge a motion for summary disposition, a litigant "may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing." *Daniel Imperato*, Exchange Act Release No. 74596, 2015 SEC LEXIS 1377, at *23 (Mar. 27, 2015); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *21 n.24 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

Although Rule 56 of the Federal Rules of Civil Procedure does not apply in this proceeding, cases applying it are instructive. *See Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *22 n.26 (Feb. 4, 2008); *see also* Mot. at 12 n.16; Opp'n at 9 n.5. Under Rule 56, a genuine issue of material fact exists if the nonmoving party produces evidence that would allow a reasonable fact-finder to return a verdict in its favor. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). In considering Mr. Hill's motion, I cannot make credibility determinations, weigh evidence, or decide what inferences to draw. *See id.* at 255. Instead, I must view the evidence in the light most favorable to the Division, "indulg[ing] all reasonable inferences in its favor." *Miss. Pub. Emps.' Ret. Sys. v. Bos. Scientific Corp*., 649 F.3d 5, 28 (1st Cir. 2011); *see Anderson*, 477 U.S. at 255. As a result, I am bound to act with caution before granting a motion for summary disposition. *Anderson*, 477 U.S. at 255; *Greenberg v. FDA*, 803 F.2d 1213, 1216 (D.C. Cir. 1986); *see Jay T. Comeaux*, Securities Act of 1933 Release No. 9633, 2014 SEC LEXIS 3001, at *16 n.30 (Aug. 21, 2014).

3. Discussion

A. Undisputed facts

In light of Mr. Hill's Answer to the OIP, the following facts are not in dispute. Mr. Hill has been close friends with the COO's friend for twenty years. Answer at ¶ 25; OIP at ¶ 25. During May through July 2011, he and the COO's friend met in person and "frequently communicated" with each other by "telephone or text message." Answer at ¶ 25; OIP at ¶ 25. Mr. Hill knew of the friendship between Radiant's COO and the COO's friend and knew of the COO's position at Radiant. Answer at ¶ 26.

Before May 2011, Mr. Hill had never bought or sold any shares of Radiant. Answer at ¶ 29; OIP at ¶ 29. Between at least May 2007 and May 2011 Mr. Hill did not purchase any securities. Answer at ¶ 29; OIP at ¶ 29. Mr. Hill opened two brokerage accounts in May 2011. Answer at ¶ 30; OIP at ¶ 30. Between the date he opened the accounts and July 8, 2011, Mr. Hill purchased Radiant shares in the following amounts on the following dates:

4,500 shares	June 1, 2011
50,000 shares	June 3, 2011
13,000 shares	June 24, 2011
20,000 shares	July 1, 2011
4,100 shares	July 5, 2011
10,000 shares	July 8, 2011

Answer at ¶¶ 31-37; OIP at ¶¶ 31-37. In total, Mr. Hill bought 101,600 shares of Radiant for approximately $2.1 million. Answer at ¶ 4; OIP at ¶ 4. Mr. Hill sold all of his Radiant shares on July 12, 2011, realizing a gain of approximately $744,000. Answer at ¶¶ 5, 45.

B. Mr. Hill's position

With this background in mind, Mr. Hill argues that the Division has no evidence that either he or the COO's friend ever possessed material, nonpublic information about Radiant. Mot. at 9-11. Mr. Hill first notes that the COO's friend testified during the investigation in this matter that: (1) "[t]he COO never talks about business or his work" and never mentioned that Radiant might be bought by another company; (2) the COO did not tell the COO's friend that the COO had moved from Radiant to NCR; (3) "[t]he COO never mentioned anything about Radiant's stock price"; (4) the COO's friend first learned of the merger in August 2011, or later; and (5) the COO's friend did not overhear merger or acquisition discussions and did not see any documents suggesting that Radiant's share price might rise. *Id.* at 9-10.

Mr. Hill also notes that Radiant's COO testified that: (1) he was subject to Radiant's insider trading prohibitions; (2) he did not discuss personal investing with the COO's friend; (3) he could not remember discussing stocks with the COO's friend, mentioning Radiant's potential acquisition, or saying to the COO's friend that the COO expected Radiant's share price to rise; (4) he would not have told the COO's friend he was preparing for due diligence meetings; and (5) the COO's friend did not have access to the COO's computer or e-mails. Mot. at 10.

With respect to his own discussions with the COO's friend, Mr. Hill notes that the COO's friend testified that: (1) he and Mr. Hill did not discuss investing; (2) he did not know whether Mr. Hill had a brokerage account or followed Radiant's stock; (3) he does not remember discussing Radiant's business with Mr. Hill; (4) he did not discuss Radiant's COO or CEO with Mr. Hill; and (5) he does not think Mr. Hill ever asked him about Radiant's COO or CEO. Mot. at 11. Mr. Hill testified that he and the COO's friend did not discuss Radiant or its stock and that the COO's friend told him nothing that influenced him to buy Radiant's stock. *Id.*

Based on the foregoing, Mr. Hill argues the Division cannot show, as it must,[2] that he possessed material, nonpublic information about NCR's potential acquisition of Radiant. Mot. at 13. According to Mr. Hill, the Division's case is built on speculation that the COO's friend could have learned about Radiant's possible acquisition and the additional speculation that the COO's friend could have told Mr. Hill. *Id.* at 18.

Mr. Hill argues I can give no weight to the frequent discussions he had with the COO's friend between May and July 2011 because the pattern of discussions is consistent with their "usual pattern and practice." Mot. at 18. He also argues that because Mr. Hill and the COO's friend normally spoke almost daily, I can draw no inference from the fact that Mr. Hill purchased Radiant stock on some of the days he spoke with the COO's friend. *Id.*

Mr. Hill additionally argues that in light of the absence of any evidence about the substance of the COO's friend's discussion with the COO or Mr. Hill, the COO's and the COO's friend's denials of wrongdoing show that neither the COO's friend nor Mr. Hill had material, nonpublic information. Mot. at 18-19. He further asserts that a reasonable factfinder could not infer from his contacts with the COO's friend what the two discussed. *Id.* at 19-20. Mr. Hill supports this argument by asserting that he "has a plausible and credible explanation for why he made his Radiant purchases," namely his knowledge of Radiant and those who ran it combined with the sudden, unexpected availability of funds he experienced after a commercial real estate deal fell through. *Id.* at 20.

C. The Division's position

The Division responds that it may prove its case by circumstantial evidence and that precedent shows that a reasonable factfinder could infer liability in the circumstances presented here. Opp'n at 9-18. The Division points to evidence that during the May to July 2011 timeframe, Radiant was in discussions with NCR concerning the latter's acquisition of Radiant. *Id.* at 3, 6-7. Additionally, Radiant's COO had frequent discussions with the COO's friend, who in turn had frequent discussions with Mr. Hill. *Id.* at 4-5.

The Division further relies on the fact that Mr. Hill had never previously purchased Radiant stock and never reviewed its financial reports. Opp'n at 5. Additionally, it notes that Mr. Hill spoke to the COO's friend shortly before each of his five purchases of Radiant stock.

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[2] *See SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004); *SEC v. Adler*, 137 F.3d 1325, 1338 & n.35 (11th Cir. 1998).

Id. at 5-7. The Division notes evidence that Mr. Hill has testified that his annual income is around $350,000. *Id.* at 2. The $2.2 million price of the stock Mr. Hill purchased was thus more than five times Mr. Hill's annual income.

D. The Division has shown that material facts are in dispute

There is no doubt that the evidence on which Mr. Hill relies could support a determination that because he never possessed material, nonpublic information about Radiant, he is not liable. Indeed, after reviewing all the evidence and hearing testimony, it is entirely possible that Mr. Hill will prevail based on that evidence, my assessment of the credibility of the witnesses who testify, and the inferences I will draw from the evidence presented. At this juncture, however, it is not enough that the evidence could support an outcome in Mr. Hill's favor; in order to prevail at this juncture, Mr. Hill must show that the evidence could reasonably *only* support an outcome in his favor. *See Greenberg*, 803 F.2d at 1216 (holding that summary judgment is inappropriate if "reasonable persons might differ as to [the] significance" of "evidence presented on a dispositive issue [that] is subject to conflicting interpretations"); *see also E.Y. ex rel. Wallace v. United States*, 758 F.3d 861, 869 (7th Cir. 2014) (summary judgment not appropriate if two opposing inferences are reasonable).

As an initial matter, whether bringing an insider trading case under Section 10(b) or Section 14(e), the Division may rely on circumstantial evidence. *SEC v. Ginsburg*, 362 F.3d 1292, 1299 (11th Cir. 2004). Indeed, circumstantial evidence carries as much weight as direct evidence "as long as it reasonably establishes [a] fact rather than anything else." *Burrell v. Bd. of Trs. of Ga. Military Coll.*, 970 F.2d 785, 788 (11th Cir. 1992). Because the government rarely has a recording of discussions among those involved, *see SEC v. Sargent*, 229 F.3d 68, 74 (1st Cir. 2000), if direct evidence were required, few insider trading cases would ever proceed to trial, *see SEC v. Obus*, 693 F.3d 276, 290 (2d Cir. 2012).

Although Mr. Hill points to the innocent explanation he offered and the denials he and the other players also offered, Mot. at 18-20, *at this point* those denials and that explanation are limited by the reasonable inferences that I must draw in the Division's favor, *see Obus*, 693 F.3d at 290. Whether Mr. Hill's pattern of communication with the COO's friend during the relevant time period was consistent with their pattern of communication during other periods is thus beside the point for purposes of this Order because a reasonable factfinder could infer, based on all the evidence, that their frequent communications gave the COO's friend the opportunity to pass information to Mr. Hill. *See Ginsburg*, 362 F.3d at 1300-01; *SEC v. Adler*, 137 F.3d 1325, 1341-42 (11th Cir. 1998).

It is uncontested that Mr. Hill had not traded in any securities for at least four years before he purchased $2.1 million dollars in Radiant's stock. Answer at ¶ 29; OIP at ¶ 29. The amount Mr. Hill paid for Radiant's stock and the amount of his gain from the sale of that stock are both significantly more than his annual salary. When these facts are combined with evidence that (1) Radiant was involved in acquisition discussions during the same time Mr. Hill executed his trades; (2) the COO regularly spoke to the COO's friend; (3) the COO's friend frequently spoke to Mr. Hill; and (4) Mr. Hill's purchases coincided with discussions he had with the COO's friend, a reasonable factfinder *could* infer that Mr. Hill acquired material, nonpublic

information on which he based his decision to purchase Radiant stock. *See Ginsburg*, 362 F.3d at 1299-1300.[3] As the First Circuit has held, "opportunity in combination with circumstantial evidence of a well-timed and well-orchestrated sequence of events, culminating with successful stock trades," constitutes evidence from which a trier of fact *could* infer possession of inside information. *United States v. Larrabee*, 240 F.3d 18, 21 (1st Cir. 2001).

As the court explained in *Ginsburg*, "[t]he factfinder in an insider trading case need only infer the most likely source of" of a person's belief that a stock's price will rise or fall. 362 F.3d at 1299. And, "[t]he temporal proximity of a phone conversation between the trader and one with insider knowledge provides a reasonable basis for inferring that the basis of the trader's belief was the inside information." *Id.* That the evidence in this case adds a middleman does not change the equation, so long as the inferences involved are reasonable.[4] And the inference of possession may be stronger as trading profits increase or if the trades occur close in time to when the trader was potentially exposed to inside information. *Id.* Such is the case here, where there is evidence of trading after speaking to a possible source of information coupled with a sizable gain in a short period of time.

United States v. McDermott is also instructive. *See* 245 F.3d at 138-39. There was evidence in *McDermott* of "incessant telephone conversations" between an insider and "an amateur trader, [who] opened a trading account funded by monies given to her by" the insider. *Id.* at 138. There was also evidence, including coinciding phone calls and the timing of successful trades, from which one could infer that the amateur trader traded based on the insider's information. *Id.* The parallels between *McDermott* and this matter support an inference that Mr. Hill possessed material, nonpublic information. *See also SEC v. Musella*, 748 F. Supp. 1028, 1039 (S.D.N.Y. 1989) ("[T]he amounts involved and the financing of the trades suggest that [the tippee's] confidence that these investments would 'pan out' quickly was unusually high, and thus suggestive of insider trading."); *cf. SEC v. Kornman*, 391 F. Supp. 2d 477, 493 (N.D. Tex. 2005) ("allegations [of] extremely opportunistic timing of . . . purchases immediately after learning the confidential information . . . support an inference that [Kornman] had adequate scienter and provide strong circumstantial evidence of conscious behavior").

Mr. Hill places emphasis on the fact that whereas in many of the cases cited above, the tipper or insider was also charged with liability, neither the COO nor the COO's friend have been charged in connection with Mr. Hill's trades. Reply at 3-7, 10, 13-14. He also notes that there is no evidence that the COO's friend or anyone else close to him bought or sold Radiant stock. *Id.* at 5-6, 14. The fact there is no evidence that anyone else close to the COO's friend bought Radiant stock is a fact from which a reasonable factfinder could infer that the COO's friend did not have inside information and thus did not give such information to Mr. Hill. A

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[3] *See also United States v. McDermott*, 245 F.3d 133, 138-39 (2d Cir. 2001); *Sargent*, 229 F.3d at 74-75; *SEC v. Warde*, 151 F.3d 42, 47-48 (2d Cir. 1998); *Adler*, 137 F.3d at 1341-42; *SEC v. McGee*, 895 F. Supp. 2d 669, 683-84 (E.D. Pa. 2012).

[4] Of course, the fact that a reasonable trier of fact could draw those inferences does not mean that I will draw those inferences after considering the evidence presented at the hearing in this matter.

reasonable factfinder could, based on all the evidence, nonetheless reach the opposite inference. And while it is true that "close friendship alone is [in]sufficient evidence to support an inference of insider trading," *id.* at 5 (emphasis removed), the Division is relying on more than mere "close friendship." And whatever one might make of the Division's charging decisions, those decisions are not significant for purposes of ruling on Mr. Hill's motion for summary disposition.

For the foregoing reasons, the Division has shown that material facts are in dispute. As a result, I DENY Mr. Hill's motion for summary disposition.

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James E. Grimes
Administrative Law Judge