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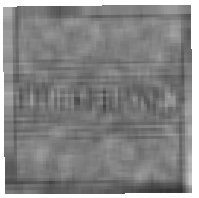

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January 4, 2017

By ECF

Assigned Judge
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *SEC v. Ronald N. Dennis*, No. 1:14-cv-01746-HB

Your Honor:

Our firm represents Mr. Ronald N. Dennis in the above-referenced matter. I submit this letter motion to respectfully request that the Court modify a previous judgment entered against Mr. Dennis in this case by reducing the monetary component of the judgment by $172,833.90. I have conferred with staff of the Securities and Exchange Commission ("SEC"), who have advised me that the SEC does not oppose this request and will file a letter confirming this position shortly.

On March 13, 2014, the SEC filed a complaint against Mr. Dennis, alleging that he unlawfully caused others to execute trades in Foundry Networks, Inc. and Dell, Inc. securities after receiving insider information. *See* Docket No. 2. Subsequently, on April 22, 2014, pursuant to an agreement between Mr. Dennis and the SEC to settle all claims, Judge Harold Baer entered a final judgment in these proceedings and ordered Mr. Dennis to pay $203,334.34 to the government. *See* Docket No. 11 at 4. Approximately five months after the judgment was entered, however, the Second Circuit issued its decision in *Newman*, a case against a remote tippee premised on the classical theory of insider trading. *See United States v. Newman, et al.*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015) (No. 15-137). The *Newman* court found that the Dell transactions at issue, which involved similar players as those in the purported Dell tipping chain in this case and partially formed the basis for the judgment against Mr. Dennis, did not amount to insider trading in violation of federal law. *Id.* The Supreme Court denied the government's petition for certiorari. *Id.*

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, this Court may modify the final judgment entered by Judge Baer, because the consent judgment was predicated on the same or similar facts and conduct that were found lawful in the subsequent *Newman* decision. Rule 60(b) permits the Court to relieve a party from a final judgment if "(5) the judgment . . . is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason . . . justifies relief." Fed. R. Civ. P. 60(b)(5)-(6).[1] Whether prospective application of a judgment is inequitable "depends upon a showing of changed circumstances," *i.e.*, "events which occurred subsequent to entrance of the order" and which make the continued application of the judgment unfair. *Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd.*, 74 F.R.D. 621, 623 (S.D.N.Y. 1977). "While a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 390 (1992). Indeed, the broad language under Rule 60(b)(6) – "any other reason that justifies relief" – provides this Court "broad discretion . . . to grant relief when appropriate to accomplish justice." *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986) (internal quotation marks and citations omitted).

It would be inequitable to apply the entire judgment prospectively given that the agreement between the parties forming the basis of the final judgment was entered into based on the incorrect assumption that the evidence supported that the Dell insider received an improper personal benefit. This misunderstanding was reasonable, since it occurred before the *Newman* decision. Therefore, the Court should modify the judgment.

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[1] Federal Rule of Civil Procedure 59(e) prescribes that "[a] motion to alter or amend a judgment must be filed no later than 28 days after entry of the judgment." However, this Court may construe a motion under Rule 59(e) as a motion for relief from judgment pursuant to Rule 60(b), *Ass'n for Retarded Citizens of Connecticut, Inc. v. Thorne*, 68 F.3d 547, 553 (2d Cir. 1995), which must only be made "within a reasonable time." Fed. R. Civ. P. 60(c)(1). This is particularly appropriate here, where the *Newman* decision was issued more than 28 days after entry of the final judgment, the parties are in agreement that a modification is warranted and fair, and such a change in controlling law is a valid basis for modifying the judgment under both Rules. *See Shapiro v. Kronfeld*, No. 00 CIV.6286 KRW, 2005 WL 183137, at *2 (S.D.N.Y. Jan. 27, 2005) ("The decision to construe Shapiro's motion under Rule 60(b) rather than Rule 59(e) is of little import, as the standards applied under either motion are, for the purposes relevant here, the same."); *Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372, 376 (S.D.N.Y. 2007) (under Rule 59(e), judgment modifications are justified when there is "an intervening *change in controlling law*, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.") (emphasis added).

Specifically, the Court should reduce the monetary component of the settlement by $172,833.90; that is, the judgment should be modified to only require Mr. Dennis to pay $30,500.44, and the permanent injunction and all other terms should remain unaffected. Because Mr. Dennis has already paid the first $101,667.17 installment pursuant to the judgment, the Court should order the SEC to reimburse Mr. Dennis $71,166.73. Mr. Dennis respectfully requests that the Court, by "so ordering" this letter, re-open the matter to partially vacate the April 22, 2014 judgment.

At the direction of the Clerk's Office, we will be submitting a courtesy copy of this letter as filed to that office, along with a request for judicial reassignment of this case in accordance with Division of Business Rule 17. I am available for a conference should the Court have any questions regarding this matter.

Respectfully submitted,

Lawrence Gerschwer

cc: Counsel for Plaintiff (via ECF)
Clerk of the Court (by hand)

Defendant Ronald N. Dennis ("Defendant") having made an application to partially vacate the judgment entered against him on April 22, 2014 (Dkt. No. 11), and Plaintiff Securities and Exchange Commission ("SEC") having no opposition to the application, and good cause appearing to grant the application,

IT IS ORDERED that the judgment entered against Defendant in this matter as document number 11 on the ECF docket be and hereby is partially modified such that (a) the Commission will return to Mr. Dennis $71,166.73 of the $101,667.17 that he has paid to the Commission pursuant to the judgment and (b) all other monetary sanctions against him pursuant to the judgment are vacated. All nonmonetary components of the judgment, including the permanent injunction against Mr. Dennis, shall remain in effect.

IT IS SO ORDERED:

U.S. DISTRICT JUDGE

1/31/17.

The purpose for which this case was re-assigned and re-opened having been completed, the Clerk is directed to close this case. So ordered.

1/31/17 /U.S.D.J.