UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-15308

In the Matter of

JOSEPH CONTORINIS,

Respondent.

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AND MEMORANDUM OF LAW IN SUPPORT THEREOF AGAINST RESPONDENT JOSEPH CONTORINIS

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OTHER AUTHORITIES

Pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice and the Court's Order Following Prehearing Conference entered May 31, 2013, the Division of Enforcement (the "Division") respectfully moves for summary disposition against Respondent Joseph Contorinis and for entry of an order barring him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in any offering of a penny stock, based on Respondent's conviction for securities fraud and conspiracy to commit securities fraud in United States v. Contorinis, 09-MAG-289 (S.D.N.Y.) and the related civil injunction entered against him in SEC v. Stephanou, et al., Civil Action No. 09-cv-01043 (RJS) (S.D.N.Y.).

PRELIMINARY STATEMENT

The issue in this case is simple—whether the Respondent, a convicted felon who generated millions of dollars of illegal profits and avoided losses through illegal insider trading, who was subsequently civilly enjoined from future such violations, and who continues to deny his wrongdoing despite his criminal conviction, is fit to be associated with securities industry related entities or to participate in penny stock offerings. The answer most certainly is no, and Respondent should therefore be barred from participating in those activities.

On October 6, 2010, Contorinis was criminally convicted of one count of conspiracy to commit securities fraud and seven substantive counts of securities fraud. He purchased or sold at least 3,100,540 shares of a publicly traded company on behalf of a hedge fund he co-managed based on material, nonpublic information, which allowed the fund to make approximately $7.3 million in unlawful profits and to avoid approximately $6.3 million in losses. Subsequently, on February 29, 2012, the district court presiding over the Commission's related civil action entered

a final judgment against Contorinis enjoining him from further violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder.

The Division's request for a permanent, industry-wide collateral bar and penny stock bar is appropriate where, as here, a respondent's conduct is as egregious, recurrent, and willful and knowing, and where the respondent refuses to recognize the wrongful nature of his conduct and fails to provide sincere assurances that he will not engage in future violations. Moreover, the fact that Contorinis lied during his criminal trial testimony, and continues to deny that he engaged in insider trading, conclusively demonstrates his dishonesty and untrustworthiness. Thus, the public interest requires that Contorinis be barred from the securities industry and from participating in penny stock offerings to prevent him from having any opportunity to commit future securities law violations.

PROCEDURAL BACKGROUND

On April 30, 2013, the Securities and Exchange Commission (the "Commission") instituted an Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940 (the "Advisers Act") to determine what, if any, remedial action against Contorinis is appropriate and in the public interest. The Order Instituting Administrative Proceedings was based on: (1) Contorinis's criminal conviction for one count of conspiracy to commit securities fraud and seven substantive counts of securities fraud; and (2) the final judgment entered against him in a related Commission civil action permanently enjoining Contorinis from further violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Division made documents available to Contorinis pursuant to Rule 230(a)(1) of the Commission's Rules of Practice and, on May 31,

2013, the parties participated in a prehearing conference with the Court. Contorinis filed his Answer ("Answer") on June 10, 2013.

STATEMENT OF UNDISPUTED FACTS

As a result of his criminal conviction for conspiracy to commit securities fraud and multiple substantive counts of the same, as described in more detail below, Contorinis currently is incarcerated at FCI Schuylkill in Minersville, Pennsylvania. (Answer ¶ 1.) Previously, from March 2004 through March 2008, Contorinis was an Executive Vice President and registered representative of Jefferies & Company, Inc. ("Jefferies"), a broker-dealer registered with the Commission from February 2004 through February 2008. (Id.) While employed at Jefferies, Contorinis was Co-Portfolio Manager of the Paragon Fund ("Paragon"), a hedge fund associated with and funded in part by Jefferies. (Id.) He directed trading in, and on behalf of, Paragon along with one other individual. (Id.) Accordingly, Contorinis was associated with an investment adviser and a broker-dealer. (Id.)

On February 4, 2009, the United States Attorney for the Southern District of New York filed a criminal complaint against Contorinis, charging him with conspiracy and securities fraud resulting from his trading in Albertson's, Inc. ("Albertson's") stock on behalf of Paragon based on material, nonpublic information. (Div. Ex. A, Complaint in United States v. Contorinis, 09-MAG-289 (S.D.N.Y.)). The next day, on February 5, 2009, the Commission filed a civil enforcement action against Contorinis based on the same set of facts, alleging that he violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. (Div. Ex. B, Complaint in SEC v. Stephanou, et al., Civil Action No. 09-cv-01043 (RJS) (S.D.N.Y.)). Contorinis vigorously denied that he engaged in insider trading. (Div. Ex. C, Contorinis's Answer in SEC v. Stephanou).

Later in the year, on November 5, 2009, Contorinis was indicted on one count of conspiracy to commit securities fraud and nine substantive counts of securities fraud. (Div. Ex. D, Indictment in United States v. Contorinis, Case No. 1:09-cr-01083-RJS (S.D.N.Y.)). Contorinis vigorously fought the criminal allegations of insider trading, refusing to admit his guilt and requiring the government to prove each element of their claims beyond a reasonable doubt.

Contorinis's criminal trial began on September 20, 2010 and ran until October 6, 2010. (Div. Ex. E at 1-2:9 and 1925:6-1927:13, Excerpts of Trial Transcripts in United States v. Contorinis). Over the course of eight-and-a-half days, attorneys for the government and Contorinis presented evidence and arguments to the jury. (Id. at 37 and 1844). Contorinis chose to testify in his defense, denying that he had traded on the basis of material nonpublic information. (See, e.g., id. at 1163:12-24; 1299:7-11; 1366:11-14; 1368:6-9; 1372:1-3; 1383:20-23; 1397:4-7).

On October 6, 2010, after one-and-a-half days of deliberations, the jury found Contorinis guilty of one count of conspiracy to commit securities fraud and seven substantive counts of securities fraud. (Div. Ex. E at 1925:6-1927:13). The jury found that:

1. Contorinis committed securities fraud in connection with the sale of 406,750 shares of Albertson's stock on December 22, 2005;

2. Contorinis committed securities fraud in connection with the sale of 311,600 shares of Albertson's stock on December 22, 2005;

3. Contorinis committed securities fraud in connection with the sale of 1,493,300 shares of Albertson's stock on December 22, 2005;

4. Contorinis committed securities fraud in connection with the purchase of 269,200 shares of Albertson's stock on January 11, 2006;

5. Contorinis committed securities fraud in connection with the purchase of 30,700 shares of Albertson's stock on January 11, 2006;

6. Contorinis committed securities fraud in connection with the purchase of 557,100 shares of Albertson's stock on January 11, 2006; and

7. Contorinis committed securities fraud in connection with the purchase of 318,000 shares of Albertson's stock on January 11, 2006.

(Div. Ex. F, Jury Verdict in United States v. Contorinis). All told, Contorinis's conspiracy to commit securities fraud resulted in, at the very least, his purchasing or selling 3,100,540 shares of securities based on material, nonpublic information. (Id.) As a direct result of Contorinis's illegal trading, Paragon made approximately $7.3 million in illegal profits and avoided approximately $6.3 million in losses. (Div. Ex. E at 861:3-12.)

On December 30, 2010, Contorinis appealed the criminal conviction. On August 17, 2012, the Court of Appeals for the Second Circuit affirmed the conviction, although it vacated the order of forfeiture and remanded the case for the district court's consideration of the appropriate forfeiture amount. (Answer ¶ 6; United States v. Contorinis, 692 F.3d 136 (2d Cir. 2012)).

Following Contorinis's criminal conviction, the Commission moved for summary judgment in its civil enforcement action on the ground, among others, of collateral estoppel. (Div. Ex. G, Brief in Support of Motion for Summary Judgment in SEC v. Stephanou). Rather than acknowledging the wrongful nature of his conduct – after having been criminally convicted of conspiracy to commit securities fraud and seven substantive counts of securities fraud – Contorinis chose instead to fight the Commission's claims. (Div. Ex. H, Contorinis Opp'n to Mot. for Summary Judgment in SEC v. Stephanou). Not surprisingly, the district court agreed with the Commission that Contorinis was collaterally estopped from challenging the jury's guilty verdict, and entered summary judgment against Contorinis. (Answer ¶ 2; SEC v. Stephanou, No. 09 Civ. 1043 (RJS), 2012 WL 512626, at *3 (Feb. 3, 2012 S.D.N.Y.)). Among other things, the

district court judgment permanently enjoined Contorinis from violating, directly or indirectly, Section 10(b) of the Exchange Act and Rule 10b-5. (Id. at *4). Based on his illegal insider trading, the Court also ordered Contorinis to disgorge profits of approximately $7.26 million and to pay prejudgment interest calculated at the IRS underpayment rate. (Id. at *7).

Still undeterred, Contorinis appealed the district court's final judgment. (Div. Ex. I, Appeal Brief in SEC v. Contorinis.) On March 12, 2013, Contorinis filed his brief in support of his appeal, arguing that the district court abused its discretion when it: (1) ordered that Contorinis disgorge $7.26 million; (2) ordered that Contorinis pay prejudgment interest in the amount of $2.485 million; and (3) permanently enjoined Contorinis from violating, directly or indirectly, Section 10(b) of the Exchange Act and Rule 10b-5. (Id.) The Commission filed its opposition brief on June 11, 2013. (Div. Ex. J, SEC Appeal Opposition Brief in SEC v. Contorinis.) Briefing has not yet been completed.

On April 30, 2013, the Commission instituted this Administrative Proceeding and, on June 10, 2013, Contorinis filed his Answer. Notwithstanding his criminal conviction and the final judgment entered against him in the civil enforcement action, Contorinis persists in denying "that he engaged in insider trading in ABS securities or otherwise . . . ." (Answer ¶¶ 3, 5.) Contorinis further "denies the allegations in the [Comission's] complaint in [its civil enforcement] action, including that he violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder." (Answer ¶ 2.) He also "avers that the jury verdict was in error and against the weight of the evidence presented at trial." (Answer ¶¶ 4-5.) At no time has Contorinis either acknowledged or recognized the wrongful nature of his actions, shown any contrition, or provided any assurance that he will not engage in future violations.

ARGUMENT

I. The Division's Motion for Summary Disposition Is Ripe and Appropriate.

Pursuant to Commission Rule of Practice 250, the Division's motion for summary disposition is ripe at this time because: (1) Respondent has answered; (2) the Division has made its investigative file available to Respondent; and (3) the Court granted leave to file such motions pursuant to its May 31, 2013 Order Following Prehearing Conference. Motions for summary disposition are particularly appropriate where, as here, they are based on a respondent's criminal conviction or the entry of an injunction based on securities fraud. See, e.g., Eric S. Butler, Release No. 65204, 2011 WL 3792730, at *5-6 (Aug. 26, 2011) (Opinion of the Commission) (affirming ALJ's grant of summary disposition based on respondent's criminal conviction for conspiracy to commit securities and wire fraud); Gary M. Kornman, Release No. 59403, 2009 WL 367635, at *12 (Feb. 13, 2009) (Opinion of the Commission) (affirming ALJ's grant of summary disposition based on criminal conviction) ("We have repeatedly upheld the use of summary disposition by a law judge in cases such as this one where the respondent has been enjoined or convicted of an offense listed in Exchange Act Section 15(b) and Advisers Act Section 203, the sole determination is the proper sanction, and no material fact is genuinely disputed."), pet. denied Kornman v. SEC, 592 F.3d 173 (D.C. Cir. 2010); Adam Harrington, Initial Decisions Release No. 484, 2013 WL 1655690, at *4-5 (April 17, 2013) (ALJ Foelak) (granting summary disposition against respondent based on his criminal conviction for securities fraud, wire fraud, mail fraud, and conspiracy to commit these offenses); Gregory Bartko, Esq., Initial Decisions Release No. 467, 2012 WL 3578907, at *2 (Aug. 21, 2012) (ALJ Elliot) ("The Commission has repeatedly upheld use of summary disposition in cases such as this, where the respondent has been enjoined or convicted and the sole determination concerns the appropriate

sanction. Under Commission precedent, the circumstances in which summary disposition in a 'follow-on' proceeding involving fraud is not appropriate 'will be rare'" (citations omitted)); Richard P. Callipari, Initial Decisions Release No. 237, 81 SEC Docket 633, 2003 WL 22250402, at *2 (Sept. 30, 2003) (ALJ Foelak) ("The Commission, however, considers summary disposition particularly appropriate in proceedings, such as this one, that are based on a respondent's conviction for fraud."); see also Adoption of Amendments to the Rules of Practice and Related Provisions, Release No. 52846, 86 SEC Docket 1931, 2005 WL 3199273, at *3 (Apr. 21, 2005) ("Motions for summary dispositions are often made in cases where a respondent has been criminally convicted or an injunction has been entered and the conviction or injunction provides the basis for an administrative order against the respondent.").

II. Contorinis Should Be Permanently Barred from the Securities Industry and From Participating in any Penny Stock Offering.

Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act provide, among other things, that "[t]he Commission, by order, shall . . . revoke the registration of any broker or dealer [or bar any person, at the time of the alleged misconduct, associated with an investment adviser, from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization] if it finds . . . that such . . . revocation [or bar] is in the public interest and that such [person] . . . " either: (1) "has been convicted . . . of any felony . . . which the Commission finds . . . involves the purchase or sale of any security . . ."; or (2) "is permanently . . . enjoined by order, judgment, or decree of any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security." Exchange Act §§ 15(b)(4); Advisers Act §§ 203(e)(2), 203(e)(4), 203(f). In addition, with respect to any person who at the time of the alleged misconduct was associated with a broker

dealer, Section 15(b)(6) of the Exchange Act also permits the Commission by order to "bar any such person from . . . participating in an offering of penny stock" if it finds that sanction is in the public interest and that such person has been similarly convicted or enjoined as provided above. Exchange Act § 15(b)(6).

Here, it cannot be disputed that Contorinis was both convicted of a felony involving the purchase or sale of a security and permanently enjoined from engaging in or continuing a conduct or practice in connection with the purchase or sale of a security. Moreover, there is no question that Contorinis was associated with both a broker-dealer and an investment adviser at the time of his misconduct. Therefore, the only remaining issue is what remedial sanctions should be imposed on him.

In determining what remedial actions are appropriate in the public interest, the Court should consider:

1. the egregiousness of the defendant's actions;
2. the isolated or recurrent nature of the infraction;
3. the degree of scienter involved;
4. the sincerity of the defendant's assurances against future violations;
5. the defendant's recognition of the wrongful nature of his conduct; and
6. the likelihood that the defendant's occupation will present opportunities for future violations.

Butler, 2011 WL 3792730, at *3 (citing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979)); Kornman, 2009 WL 367635, at *6 (same); Omar Ali Rizvi, Initial Decisions Release No. 479, 2013 WL 64626, at *6 (January 7, 2013) (Chief ALJ Murray) (same); Bartko, 2012 WL 3578907, at *5 (same); Seghers v. SEC, 548 F.3d 129, 134 (D.C. Cir. 2008) (quoting Steadman).

The facts and circumstances here compel this Court to find it appropriate and in the public interest to enter a permanent, industry-wide collateral bar against Contorinis and to bar him from participating in any offering of a penny stock. See, e.g., John W. Lawton, Release No. 3513, 2012 WL 6208750, at *10 (Dec. 13, 2012) (Opinion of the Commission) (finding a full industry-wide collateral bar appropriate against respondent even when the underlying conduct predated passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act); Rizvi, 2013 WL 64626, at *7 (granting summary disposition against respondent who was enjoined from future fraud and registration violations of the federal securities laws, and who was associated with a broker and an investment adviser, and barring him from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization and from participating in an offering of penny stock); Victor Teicher, Release No. 56744, 2007 WL 3254806 (Nov. 5, 2007) (Opinion of the Commission) (affirming ALJ's imposition of bar from association with any broker, dealer, investment company, investment adviser, or municipal securities dealer against respondent who was convicted of insider trading, and who was associated with an investment adviser); Bartko, 2012 WL 3578907, at *5-8 (granting summary disposition against respondent who was convicted of felonies involving the purchase or sale of securities, among other things, and who was associated with both a broker dealer and an investment adviser, and barring him from association with an investment adviser, broker, dealer, municipal securities dealer, and transfer agent).

A. Contorinis's Actions Were Egregious.

Contorinis's actions were, without doubt, egregious – well exceeding what is required to justify the permanent, industry-wide collateral bar and penny stock bar that the Division seeks here.

In Kornman, for instance, the Commission affirmed the Court's decision permanently barring respondent from associating with any broker, dealer, or investment adviser based on an admittedly false statement he made to the Commission during an investigation. 2009 WL 367635. In explaining how much the securities industry relies upon the integrity of its participants, the Commission stated: "[T]he importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business." Kornman, 2009 WL 367635, at *7. Although egregious in its own right, Kornman's conduct pales in comparison to Contorinis's.

Here, Contorinis's dishonest conduct related to securities transactions. And it related to his activities in the securities business. Contorinis was convicted of one count of conspiracy to commit securities fraud and seven substantive counts of securities fraud involving, at the very least, the purchase or sale of 3,100,540 shares of Albertson's securities. Contorinis's illegal trades resulted in his fund not only reaping $7.3 million in illegal profits, but also avoiding approximately $6.3 million in losses. (Div. Ex. E at 861:3-12.) Thus, Contorinis's unlawful activities resulted in significant harm to the market and to numerous unidentified market participants.

To make matters worse, once Contorinis's insider trading was exposed, he fought the government's criminal case and testified under oath in an effort to conceal his unlawful conduct.

The jury, by unanimously issuing a guilty verdict, refused to believe Contorinis, resoundingly rejecting his claims of innocence – a decision affirmed by the Court of Appeals. Nevertheless, Contorinis fought (and is still fighting) the Commission's civil enforcement action. And, obviously, he is fighting this Administrative Proceeding. All the while, he continues to deny his illegal conduct.

The egregiousness of Contorinis's conduct is more than sufficient to justify the relief the Division seeks here. John S. Brownson, Release No. 46161, 77 SEC Docket 3097, 2002 WL 1438186, at *2 (July 3, 2002) (Opinion of the Commission) ("Absent extraordinary mitigating circumstances, [an individual convicted of securities fraud] cannot be permitted to remain in the securities industry.") pet. denied, Brownson v. SEC, 66 Fed. Appx. 687 (9th Cir. 2003).

B. Contorinis's Infractions Were Recurrent, not Isolated.

Contorinis did not commit securities fraud in one, isolated instance. The jury convicted Contorinis of one count of conspiracy to commit securities fraud and seven substantive counts of securities fraud for his trading in December 2005 and January 2006. Thus, the recurring nature of Contorinis's wrongful conduct weighs in favor of the Division's requested relief.

C. Contorinis's Securities Fraud Violations Were Willful, Knowing, and With the Intent to Defraud.

At the end of the criminal trial, but before the jury's deliberations, Judge Sullivan specifically instructed the jury as follows:

> In order to meet its burden of proof with respect to Counts Two through Ten of the Indictment, the government must establish beyond a reasonable doubt, with respect to each specific count, the following elements of the crime of securities fraud: . . . that the defendant acted willfully, knowingly and with the intent to defraud.

(Div. Ex. E at 1865:6-17). The jury's guilty verdict, therefore, conclusively determined that Contorinis's insider trading activities were undertaken willfully, knowingly, and with the intent

to defraud. Contorinis is collaterally estopped from arguing anything to the contrary. See Butler, 2011 WL 3792730, at *3 n.23 ("[A] prior criminal conviction will work an estoppel in favor of the Government in a subsequent civil proceeding with respect to questions distinctly put in issue and directly determined in the criminal prosecution . . . In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." (citing United States v. Fabric Garment Co., 366 F.2d 530, 534 (2d Cir. 1966))); Bartko, 2012 WL 3578907, at *2 ("The findings and conclusions made in the underlying action are immune from attack in a follow-on administrative proceeding. The Commission does not permit a respondent to relitigate issues that were addressed in a previous proceeding against the respondent." (citations omitted)). Accordingly, the fact that Contorinis's conduct was determined by the jury to be willful, knowing, and with the intent to defraud weighs in favor of the Commission's requested relief.

D. Contorinis Has Provided No Assurances Against Future Violations.

Contorinis has not provided any, let alone sincere, assurances that he will refrain from engaging in any future securities fraud violations. Moreover, Contorinis would be hard-pressed to provide any sincere assurances against future violations given that, to this day, he still denies his insider trading. Contorinis's failure to provide any sincere assurances against future violations weighs in favor of the Division's requested relief here.

E. Contorinis Has Not Acknowledged, Let Alone Recognized, the Wrongful Nature of His Conduct.

Contorinis denies that he engaged in insider trading. He denies the allegations in the Commission's complaint in the civil enforcement action. And he avers that the jury verdict was in error and against the weight of the evidence at the criminal trial. The jury necessarily concluded that he lied during his sworn testimony at the criminal trial in a bid to escape

punishment for his crimes. It is difficult to imagine that there is anything else Contorinis could say that would more convincingly demonstrate his complete lack of acknowledgement or recognition of the wrongful nature of his conduct. Contorinis's refusal to acknowledge or recognize the wrongful nature of his conduct weighs in favor of the Division's requested relief.

F. Contorinis's Future Employment Within the Industry Will Present Opportunities for Future Violations.

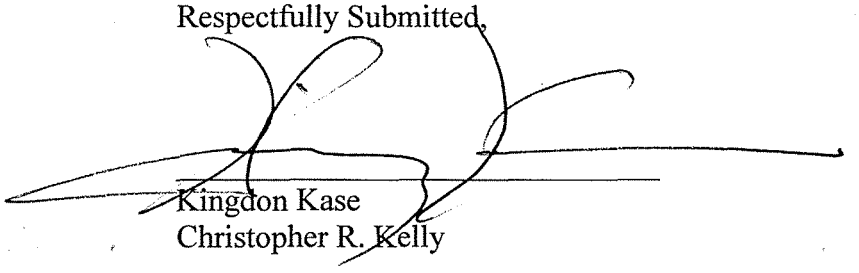
If Contorinis were allowed to remain in the securities industry, he would undoubtedly be presented with opportunities to commit future violations. The fact that Contorinis's prior criminal securities fraud activities were as egregious, recurrent, and willful and knowing as they were – coupled with his continued failure to acknowledge that he did anything wrong – compels the conclusion that Contorinis cannot be trusted as an industry participant to do the right thing. As in Kornman, Contorinis's conduct "indicates a lack of honesty and integrity, as well as a fundamental unfitness to transact business associated with a broker or dealer and to advise clients as a fiduciary." 2009 WL 367635, at *7. The fact that Contorinis's future employment within the industry will present him with opportunities to commit further violations weighs in favor of the Division's requested relief here.

CONCLUSION

For all the foregoing reasons, the Division of Enforcement respectfully requests that this Court enter an order barring Contorinis from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in any offering of a penny stock.

Dated: June 27, 2013

Respectfully Submitted,



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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-15308

In the Matter of

JOSEPH CONTORINIS,

Respondent.

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AND MEMORANDUM OF LAW IN SUPPORT THEREOF AGAINST RESPONDENT JOSEPH CONTORINIS

VOLUME I
EXHIBITS A - G

Approved: Reed M. Brodsky
REED M. BRODSKY
Assistant United States Attorney

Before: HONORABLE ANDREW J. PECK
United States Magistrate Judge
Southern District of New York

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UNITED STATES OF AMERICA : SEALED COMPLAINT

- v. - : Violation of 18 U.S.C. § 371; 15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5

JOSEPH CONTORINIS, :

Defendant. :

: COUNTY OF OFFENSE: NEW YORK

- - - - - - - - - - - - - - - - - X

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SOUTHERN DISTRICT OF NEW YORK, ss.:

DAVID MAKOL, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation ("FBI"), and charges as follows:

COUNT ONE
(Conspiracy)

1. From at least in or about August 2005 up to and including in or about January 2006, in the Southern District of New York and elsewhere, JOSEPH CONTORINIS, the defendant, and others known and unknown, unlawfully, willfully, and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit, securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

2. It was a part and object of the conspiracy that JOSEPH CONTORINIS, the defendant, and others known and unknown, unlawfully, willfully and knowingly, directly and indirectly, by the use of means and instrumentalities of interstate commerce, and of the mails, and of facilities of national securities exchanges, would and did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by: (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of

material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon the purchaser and seller, all in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

Overt Acts

3. In furtherance of the conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about January 20, 2006, a co-conspirator not named herein ("CC-1") placed a telephone call from New York, New York, to JOSEPH CONTORINIS, the defendant, on the same day that CONTORINIS traded in the securities of Albertson's Corporation ("Albertson's").

b. On or about January 20, 2006, CONTORINIS caused the purchase of approximately 500,000 shares of Albertson's common stock on the New York Stock Exchange ("NYSE").

(Title 18, United States Code, Section 371.)

COUNT TWO
(Securities Fraud)

4. On or about January 20, 2006, in the Southern District of New York and elsewhere, JOSEPH CONTORINIS, the defendant, unlawfully, willfully and knowingly, directly and indirectly, by the use of means and instrumentalities of interstate commerce, the mails and the facilities of national securities exchanges, in connection with the purchase and sale of securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which

operated and would operate as a fraud and deceit upon persons, to wit, CONTORINIS purchased approximately 500,000 shares of Albertson's common stock based on material, nonpublic information.

(Title 15, United States Code, Sections 78j(b) & 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5; and Title 18, United States Code, Section 2.)

The basis for my knowledge and the foregoing charges are, in part, as follows:

5. I have been a Special Agent with the Federal Bureau of Investigation for approximately six years. I am currently assigned to a squad responsible for investigating violations of the federal securities laws and related offenses. I have participated in investigations of these offenses, and I have made and participated in making arrests of individuals for participating in such offenses.

6. The information contained in this affidavit is based upon my personal knowledge, as well as information obtained during this investigation, directly or indirectly, from other sources and agents, including: (a) information provided by the United States Securities and Exchange Commission (the "SEC"); (b) telephone records; (c) trading records from banks and broker-dealers; (d) publicly available documents; and (e) my conversations with a co-conspirator not named herein ("CC-1") who has been arrested and is cooperating with law enforcement. Because this affidavit is prepared for limited purposes, I have not set forth each and every fact I have learned in connection with this investigation. Where conversations and events are referred to herein, they are related in substance and in part. Where figures and calculations are set forth herein, they are approximate.

Relevant Entities and Individuals

7. Based on my conversations with the SEC, publicly available information, and my conversation with JOSEPH CONTORINIS, the defendant, on or about January 26, 2009, I have learned that CONTORINIS was a portfolio manager of a hedge fund ("Contorinis' Hedge Fund") at an investment advisory firm from at least in or about 2005 through at least in or about 2006. I have further learned that, during the relevant period, the Contorinis' Hedge Fund had a brokerage account (the "Contorinis' Hedge Fund Account"). Based on my review of telephone records, I also know that CONTORINIS was the subscriber of a certain cellular

telephone number (the "Contorinis Cellular Telephone").

8. Based on my conversations with CC-1 and my review of information from the Central Registration Depository ("CRD"), which is a central licensing and registration system for the United States securities industry and its regulators, I have learned that CC-1 was employed during the relevant period in the investment banking department of the New York, New York office of an international bank (the "Investment Bank"). CC-1 has been charged by complaint with one count of conspiracy to commit securities fraud and two counts of securities fraud and has been cooperating with law enforcement in the hope of obtaining a cooperation agreement and leniency at sentencing. CC-1's information has proven to be reliable and accurate, and certain information has been corroborated by, among other things, telephone records and trading records. Based on my conversations with CC-1 and my review of telephone records, I know that CC-1 was the subscriber of a certain cellular telephone number ("CC-1's Cellular Telephone").

9. Based on my review of publicly available information, I have learned that Albertson's, a public company whose stock traded at all relevant times on the NYSE under the symbol "ABS," was a grocery company with headquarters in Boise, Idaho.

Confidentiality

10. Based on my training, experience, and conversations with CC-1, I know that CC-1 had a duty of confidentiality to the Investment Bank and the Investment Bank's clients not to disclose confidential information to others and that prohibited CC-1 from trading based on that confidential information. I also know that the Investment Bank distributed policies and procedures to CC-1 and its other employees that described CC-1's duty of confidentiality and the prohibitions on trading based on that confidential information.

Insider Trading in the Securities of Albertson's

11. Unless otherwise specifically stated, based on my review of public filings with the SEC and press releases, as well as my conversations with the SEC, I have learned the following:

a. In or about August 2005, a private equity firm (the "Firm") approached Albertson's regarding the Firm's interest in acquiring the company. The Investment Bank where CC-1 was employed at the time was the financial advisor to the Firm in connection with this potential acquisition of Albertson's. I also learned that, in or about September and October 2005,

Albertson's provided legal and financial information to potential buyers of the company, including the Firm.

b. On or about December 7, 2005, the Firm and another party informed Albertson's that they did not believe that the acquisition price would be more than the then-current market price of the stock.

c. On or about December 12, 2005, several members of a consortium (the "Consortium"), including the Firm, explored a potential acquisition of Albertson's. The Investment Bank was the financial advisor to the Firm in connection with the Consortium's potential acquisition of Albertson's.

d. On or about December 22, 2005, Albertson's rejected the Consortium's bid to acquire the company. On or about December 23, 2005, Albertson's and certain members of the Consortium publicly announced that they had terminated discussions about a potential acquisition of Albertson's.

e. During the weeks following December 23, 2005, there were new, private discussions between Albertson's and the Consortium about the potential acquisition of Albertson's. On or about January 9, 2006, the Consortium held a private meeting to revive discussions about an acquisition of Albertson's.

f. On or about January 23, 2006, Albertson's announced publicly that it was being acquired by the Consortium at an approximately 27 percent premium based on the company's closing share price on September 1, 2005.

12. Based on my conversations with CC-1, I know that CC-1 was assigned by the Investment Bank to work on the Firm's potential acquisition of Albertson's at the Investment Bank. Based on my review of a document provided to the SEC by a participant in the acquisition of Albertson's, I know that CC-1 was one of several individuals at the Investment Bank who was assigned to work on the Firm's potential acquisition of Albertson's and that a certain individual at the Investment Bank was the most senior employee assigned to work on the transaction (the "Executive Director"). In addition, based on my review of CC-1's telephone records, I have learned that, from on or about October 25, 2005 through on or about October 27, 2005, telephone calls from CC-1's Cellular Telephone were made from Boise, Idaho, which was the headquarters of Albertson's. The telephone records also show that, on or about December 7, 2005, CC-1's Cellular Telephone communicated with a telephone number associated with the Executive Director.

13. CC-1 informed me that he/she provided material, nonpublic information relating to the acquisition of Albertson's to JOSEPH CONTORINIS, the defendant, prior to the public announcement of the acquisition on or about January 23, 2006, and that CONTORINIS knew, among other things, that CC-1 was providing CONTORINIS with material, nonpublic information that CC-1 obtained from working on the transaction in violation of CC-1's duty of confidentiality.

14. Based on my review of telephone records and trading records relating to Contorinis' Hedge Fund Account, and my conversations with the SEC about these records, I know the following:

a. Following the private meeting between the Consortium and Albertson's regarding a potential acquisition, described in paragraph 11(e) above, from on or about January 9, 2006 through on or about January 17, 2006, there were approximately twenty-four phone calls between CC-1's Cellular Telephone and Contorinis' Cellular Telephone.

b. From on or about January 9, 2006 through on or about January 18, 2006, Contorinis' Hedge Fund Account purchased approximately 2,675,000 shares of Albertson's stock.

c. On or about January 18 and 19, 2006, there were approximately sixteen telephone calls between CC-1's Cellular Telephone and Contorinis' Cellular Telephone. Moreover, on those same days, Contorinis' Hedge Fund Account sold approximately 675,000 shares of its Albertson's stock, earning profits from the sales.

d. On or about January 20, 22, and 23, 2006, there were approximately ten telephone calls between CC-1's Cellular Telephone and Contorinis' Cellular Telephone.

e. On or about January 20, 2006, Contorinis' Hedge Fund Account purchased approximately 500,000 more shares of Albertson's stock.

f. On or about January 23, 2006, following the public announcement of the acquisition of Albertson's, Contorinis' Hedge Fund Account sold all of its approximately 2,500,000 remaining shares of Albertson's stock. As a result of these timely purchases and sales of Albertson's stock, Contorinis' Hedge Fund Account reaped profits of approximately $7,200,000.

WHEREFORE, deponent prays that an arrest warrant be issued for JOSEPH CONTORINIS, the defendant, and that he be imprisoned or bailed as the case may be.

DAVID MAKOL
SPECIAL AGENT
FEDERAL BUREAU OF INVESTIGATION

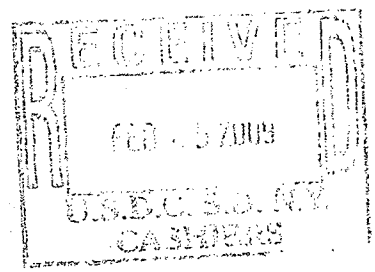
Sworn to before me this
4th day of February 2009

THE HONORABLE ANDREW J. PECK
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

09 CIV 01043

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. NICOS ACHILLEAS STEPHANOU, RAMESH CHAKRAPANI, ACHILLEAS STEPHANOU, GEORGE PAPARRIZOS, a/k/a GEORGIOS PAPARRIZOS, KONSTANTINOS PAPARRIZOS, MICHAEL G. KOULOUROUDIS, and JOSEPH CONTORINIS, Defendants.	:	Civil Action No. 09-cv-



COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission") alleges as follows:

SUMMARY

1. This case involves unlawful insider trading conducted from at least November 2005 through December 2006 by two mergers and acquisitions professionals -- Nicos Achilleas Stephanou ("Stephanou") at UBS Investment Bank ("UBS") and Ramesh Chakrapani ("Chakrapani") at Blackstone Advisory Services, L.P. ("Blackstone") -- a portfolio manager for a Jefferies Group, Inc. ("Jefferies") hedge fund, Joseph Contorinis ("Contorinis"); and at least four other individuals. By virtue of their employment at their financial advisory firms, Stephanou and Chakrapani were privy to highly confidential information concerning mergers and acquisitions. Notwithstanding

their agreements and duties to maintain the confidentiality of this information, they tipped other individuals and each other with nonpublic information about impending corporate acquisitions. The individuals they tipped then traded in the securities of the acquired companies based on this information and in advance of public disclosure of the acquisitions, tipped family members and/or traded in accounts in their family members' names, generating a combined total of over $8 million in illegal profits and losses avoided.

2. Specifically, this insider trading ring involved Stephanou and Chakrapani, who are friends and former colleagues from their prior employment at another financial advisory firm, and Stephanou's: friend and former colleague, Contorinis, a portfolio manager for the Jefferies Paragon Fund ("Paragon Fund"); father, Achilleas Stephanou ("A. Stephanou"); former classmate, George Paparrizos ("G. Paparrizos") and his father, Konstantinos Paparrizos ("K. Paparrizos"); and close family friend, Michael Koulouroudis ("Koulouroudis") (collectively, the "tippees").

3. Stephanou and all of the tippees engaged in unlawful insider trading ahead of the announcement of the acquisition of Albertson's Inc. ("ABS"). Cerberus Capital ("Cerberus"), one of the companies that eventually acquired ABS, retained UBS as its financial advisor in connection with the acquisition. Stephanou was a member of the team at UBS that advised Cerberus on the acquisition and, therefore, was privy to material nonpublic information about the acquisition of ABS prior to its public release.

4. Stephanou tipped G. Paparrizos, Koulouroudis and Contorinis with material nonpublic information regarding the ABS acquisition, all of whom traded on the basis of that information. Stephanou also either tipped his father, A. Stephanou, or in an

effort to evade detection, Stephanou traded ABS securities in his father's brokerage account. In addition, Stephanou either tipped K. Paparrizos or, in an effort to evade detection, G. Paparrizos traded ABS securities in his father's account. Further, Koulouroudis, who is authorized to exercise control over four family accounts, either tipped four family members with the material nonpublic information, who traded in the accounts, or traded in their accounts on their behalf on the basis of the material nonpublic information. By virtue of this trading in ABS securities, the tippees made total profits and avoided losses of approximately $7.7 million.

5. Stephanou, A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis also engaged in unlawful insider trading ahead of the announcement of the acquisition of ElkCorp ("ELK"). ELK hired UBS as its financial advisor in connection with the potential acquisition. Through working on the deal himself, through communications with other employees at UBS who advised ELK on the acquisition, and/or by virtue of his access to UBS' internal files, Stephanou had access to material nonpublic information about ELK's impending acquisition.

6. Stephanou tipped G. Paparrizos and Koulouroudis with material nonpublic information regarding the ELK acquisition, both of whom traded on the basis of that information. Stephanou also either tipped A. Stephanou and K. Paparrizos about the material nonpublic information about ELK or, in an effort to evade detection, Stephanou traded in A. Stephanou's account and/or G. Paparrizos traded in K. Paparrizos' account. Further, Koulouroudis either tipped four family members with the material nonpublic information or traded in their accounts on the basis of the material nonpublic information. By virtue of this trading in ELK securities, A. Stephanou, G. Paparrizos, K. Paparrizos,

and Koulouroudis and his family members made total profits of approximately $300,000.

7. In addition, Chakrapani, Stephanou, A. Stephanou and Koulouroudis engaged in unlawful insider trading ahead of the announcement of a potential acquisition of National Health Investors, Inc. ("NHI"). NHI retained Blackstone as its financial advisor in connection with the potential acquisition. Chakrapani was a member of the team at Blackstone that advised NHI on its potential acquisition and, therefore, was privy to material nonpublic information about the potential NHI acquisition.

8. Chakrapani tipped Stephanou with material nonpublic information regarding the potential NHI acquisition, who in turn tipped Koulouroudis with that information. Koulouroudis traded in NHI securities on the basis of that information. In addition, Stephanou also tipped A. Stephanou or, in an effort to conceal his own trading, Stephanou traded in A. Stephanou's account on the basis of that information. Moreover, Koulouroudis either tipped four family members with that information or traded in their accounts on the basis of that information. By virtue of this trading in NHI securities, A. Stephanou, Koulouroudis and his family members made total profits of approximately $17,000.

9. By knowingly or recklessly engaging in the conduct described in this Complaint, Defendants Stephanou, A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis violated, and unless restrained and enjoined will continue to violate, Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)] and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R. § 240.10b-5], thereunder. In addition, by knowingly or recklessly engaging in the conduct described in this Complaint, Defendants

Chakrapani and Contorinis violated, and unless restrained and enjoined will continue to violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R. § 240.10b-5], thereunder.

JURISDICTION AND VENUE

10. The Commission brings this action pursuant to Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)], and Sections 21(d) and 21A of the Exchange Act [15 U.S.C. §§ 78u(d) and 78u-1], to enjoin such transactions, acts, practices, and courses of business, and to obtain disgorgement, prejudgment interest, civil money penalties and such other and further relief as the Court may deem just and appropriate.

11. This Court has jurisdiction over this action pursuant to Sections 20(b) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b) and 77v(a)] and Sections 21(d), 21(e), 21A and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), 78u-1 and 78aa].

12. Venue in this district is proper under Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Certain of the transactions, acts, practices, and courses of business constituting the violations alleged herein occurred within the Southern District of New York and elsewhere, and were effected, directly or indirectly, by making use of the means or instruments or instrumentalities of transportation or communication in interstate commerce, or of the mails, or the facilities of a national securities exchange.

DEFENDANTS

13. Nicos Achilleas Stephanou, age 34, resides in London, England and is a citizen of Cyprus. Following his arrest on December 27, 2008, Stephanou has been incarcerated at the Metropolitan Correctional Center in New York, New York. Since

2002, Stephanou has been employed by UBS and associated with UBS Securities, LLC, a registered broker-dealer in the United States. Most recently, he was an Associate Director of Mergers and Acquisitions in UBS' London office. Stephanou worked in UBS' New York City office before transferring to its London office in July 2006. He has been a registered representative since August 26, 2002. Stephanou previously worked as an analyst in the New York City office of Credit Suisse First Boston from July 1998 through June 2000.

14. Ramesh Chakrapani, age 33, resides in London, England and is a citizen of the United States. Following his arrest on January 12, 2009, he has been temporarily residing in Cerritos, California. Since 2001, Chakrapani has been employed by Blackstone, a financial advisory services firm and registered broker-dealer in the United States. Chakrapani was most recently a Managing Director in the Corporate and Mergers and Acquisitions Advisory group in Blackstone's London office. Chakrapani worked in Blackstone's New York City office from in or about 2001 through in or about 2008, before transferring to its London office. Chakrapani has been a registered representative since April 1, 2001. Chakrapani was suspended from his employment at Blackstone on January 13, 2009, following his arrest. Chakrapani previously worked as an analyst at the New York City office of Credit Suisse First Boston from July 1997 through July 1999. A period of his employment at Credit Suisse First Boston overlapped with that of Stephanou, with whom he became friends.

15. Achilleas Stephanou, age 64, is Stephanou's father, a citizen of Cyprus, and currently resides in Nicosia, Cyprus. During the relevant time period, A. Stephanou maintained a brokerage account at Charles Schwab. The account documents for this

account indicate that: A. Stephanou and his "son" called Charles Schwab on or about January 19, 2005, to ask how to set-up a password and wire $85,000 into the account; account notifications were requested to be sent to Stephanou's e-mail address; and, in January 2007, Stephanou instructed Charles Schwab to wire approximately $29,000 from the brokerage account to an account in his name at a bank in Jersey, a Channel Island off the coast of Normandy. The header from the facsimile requesting the wire transfer indicated that the request was coming from UBS. Additionally, in December 2006, a check in the amount of $18,000 was issued to Stephanou from A. Stephanou's account at Charles Schwab, and deposited into a bank account located in the Isle of Man. In addition, from in or about May 2007 through in or about February 2008, internet protocol ("IP") addresses show that an individual accessed A. Stephanou's account using a computer at the London office of UBS where Stephanou worked during this period of time. Accordingly, Stephanou exercised control over A. Stephanou's account and may have executed trades for A. Stephanou, or traded in the account, himself, for his own benefit in an effort to conceal his trading.

16. George Paparrizos a/k/a Georgios Paparrizos, age 37, is a former classmate of Stephanou's from the University of California at Berkeley. G. Paparrizos currently resides in Foster City, California, is a citizen of the United States and is a senior product marketing manager at a technology company. During the relevant time period, G. Paparrizos maintained a brokerage account at E*Trade.

17. Konstantinos Paparrizos, age 77, is the father of G. Paparrizos and currently resides in Athens, Greece. K. Paparrizos is a citizen of Greece. During the relevant time period, K. Paparrizos maintained a brokerage account at TD Ameritrade.

During the relevant time period, the vast majority of the IP address log-ons to K. Paparrizos' account originated from Northern California, where G. Paparrizos resides, including at least one IP address log-on from G. Paparrizos' former place of employment. Accordingly, G. Paparrizos exercised control over K. Paparrizos' account and may have executed trades for K. Paparrizos, or traded in the account, himself, for his own benefit in an effort to conceal his trading.

18. Michael Koulouroudis, age 58, is a close family friend of Stephanou and currently resides in Brooklyn, New York. Koulouroudis maintains dual citizenship in the United States and Greece. According to brokerage account opening documents, Koulouroudis had trading authority over five related brokerage accounts at Charles Schwab in his name and the names of various family members (collectively referred to as the "Koulouroudis accounts"). These accounts were in the following names: (1) Michael Koulouroudis as Custodian for J. Koulouroudis; (2) Michael Koulouroudis as Custodian for N. Koulouroudis, subsequently Nicholas M. Koulouroudis and Michael G. Koulouroudis jointly; (3) Margarita Koulouroudis and Michael Koulouroudis jointly; (4) Michael Koulouroudis; and (5) George Michael Koulouroudis and Michael Koulouroudis jointly.

19. Joseph Contorinis, age 44, was a Managing Director at Jefferies & Company, Inc. from February 2004 through February 2008. Jefferies & Company, Inc. is the principal operating company of Jefferies and is a registered broker-dealer, headquartered in Los Angeles, California with offices throughout the United States. Upon information and belief, Contorinis worked in the Stamford, Connecticut office of Jefferies. Contorinis was a portfolio manager for, and directed trading in and on behalf

of, the Paragon Fund, which was, upon information and belief, created and funded by Jefferies. Contorinis currently resides in Fort Myers, Florida and is a citizen of the United States. Contorinis was a registered representative from February 10, 2004 through February 26, 2008, while at Jefferies, and was associated with an investment adviser while employed by Jefferies. He is not currently registered in any capacity with a broker-dealer. Prior to his employment at Jefferies, Contorinis was employed at UBS during a period of time that overlapped Stephanou's employment there and they became friends.

OTHER RELEVANT ENTITY

20. Jefferies Paragon Fund was, upon information and belief, a hedge fund created by Jefferies Group, Inc. and funded by outside investors and Jefferies. The Paragon Fund was managed by Jefferies Asset Management, LLC, a registered investment adviser. During the relevant time period, the Paragon Fund maintained a brokerage account at Morgan Stanley & Co., Inc. Upon information and belief, Contorinis was a portfolio manager for, and directed trading in and on behalf, and for the benefit, of the Paragon Fund. Upon information and belief, the Paragon Fund was closed in June 2007.

FACTS

I. Insider Trading Ahead of the ABS Acquisition

A. Stephanou Possessed Material Nonpublic Information about the ABS Acquisition

21. Prior to its acquisition, ABS, headquartered in Boise, Idaho, was a supermarket retailer, operating grocery stores across the western United States. ABS common stock was traded on the New York Stock Exchange under the ticker symbol,

"ABS." In the six months prior to its announcement on January 23, 2006, that it would be acquired, the daily trading volume in ABS stock averaged 6,056,162 shares and the daily stock price averaged $23.15 per share.

22. In early 2005, ABS retained Blackstone to assist it during its consideration of strategic alternatives. On July 14, 2005, ABS' board of directors instructed Blackstone to solicit preliminary indications of interest from potential acquirers.

23. In August 2005, Cerberus, a private equity firm, approached ABS and expressed its interest in exploring a potential acquisition of ABS. Cerberus hired UBS to serve as its financial advisor. UBS subsequently entered into negotiations with ABS on behalf of Cerberus.

24. UBS assigned Stephanou to work on the ABS acquisition. UBS also assigned another individual employed at UBS to the team advising Cerberus regarding the potential acquisition ("Executive Director").

25. From on or about October 25, 2005 through on or about October 27, 2005, Stephanou placed telephone calls on his mobile telephone from Boise, Idaho, which was the headquarters of ABS. On or about December 7, 2005, Stephanou also spoke by telephone with the Executive Director.

26. As part of his participation on the Cerberus deal team, Stephanou learned material nonpublic information about ABS' acquisition and negotiations surrounding it prior to the public announcement.

27. Upon information and belief, UBS agreed to maintain in confidence all information related to Cerberus' exploration of an acquisition of ABS. Because UBS owed a duty to maintain the confidentiality of information provided to it by its clients,

such as Cerberus, upon information and belief, in the policies and procedures UBS distributed to employees, UBS included policies and procedures mandating that each employee maintain in strict confidence information concerning its clients. In its Code of Business Conduct and Ethics, UBS notes that "UBS is committed to upholding client confidentiality and protecting client information," is "committed to the proper handling of inside information" and that it "does not use information for any purposes other than those for which this information has originally been given to [UBS]." In addition, upon information and belief, UBS' policies prohibited employees from using confidential information obtained during the course of employment when trading in their own account or someone else's account, or disclosing the information to others. Stephanou was aware that he owed a duty to maintain the confidentiality of information provided to him and UBS by the firm's clients, including Cerberus, and abstain from trading based on that information or disclosing that information to others.

B. Stephanou Tipped his Friends and Relative with Material Nonpublic Information Regarding the ABS Acquisition, Each of Whom Traded

28. After hiring UBS as its financial advisor, in late October 2005, Cerberus formed a consortium with Supervalu. Soon thereafter, the Cerberus-Supervalu consortium began an in-depth due diligence process into a possible acquisition of ABS and, on November 16, 2005, the consortium participated in a due diligence meeting.

29. On November 17, 2005, Stephanou called Koulouroudis at 6:42 p.m. for six minutes. The next day, November 18, 2005, the Koulouroudis accounts, A. Stephanou and the K. Paparrizos account began to purchase the following amounts of ABS stock:

Individual	Date	Number of Shares Purchased	Average Price
Koulouroudis	11/18/05	12,575	$24.69
Koulouroudis	11/21/05	1,000	$24.53
Koulouroudis	11/22/05	2,000	$24.60
A. Stephanou	11/22/05	10,000	$24.77
Koulouroudis	11/25/05	1,000	$24.06
Koulouroudis	11/28/05	200	$24.05
Koulouroudis	11/30/05	1,000	$23.99
A. Stephanou	11/30/05	5,000	$23.68
K. Paparrizos	12/2/05	300	$23.96

On December 2, 2005, at 1:26 p.m., G. Paparrizos called Stephanou for two minutes. The Koulouroudis accounts and A. Stephanou had never traded in ABS common stock before these dates.

30. On December 7, 2005, the Cerberus-Supervalu consortium informed ABS in writing that it did not believe that an acquisition of ABS at a price in excess of its then-current market price per share was feasible. This confidential letter contained negative information that was not publicly released. Due to his participation in the acquisition, Stephanou had access to the information contained in this letter.

31. That same day, on December 7, 2005, Stephanou made numerous telephone calls to Koulouroudis and G. Paparrizos. Specifically, Stephanou placed two telephone calls to G. Paparrizos starting at 2:14 p.m., each lasting one minute, and G. Paparrizos called Stephanou at 2:32 p.m. for one minute. Stephanou also called Koulouroudis for one minute at 3:10 p.m.

32. On the same day, the A. Stephanou account, the K. Paparrizos account and the Koulouroudis accounts sold their entire ABS positions:

Individual	Date	Number of Shares Sold	Average Price
A. Stephanou	12/7/05	5,000	$23.86
A. Stephanou	12/7/05	20,000 (sold short)	$23.96
K. Paparrizos	12/7/05	440	$23.50
Koulouroudis	12/7/05	17,775	$23.38

33. That same day, the A. Stephanou account covered 5,000 of the shares sold short.

34. Two days later, on December 9, 2005, Stephanou again had numerous telephonic communications with Koulouroudis and G. Paparrizos. Specifically, Stephanou called Koulouroudis at 9:35 a.m. for one minute, at 11:43 a.m. for one minute, and at 8:34 p.m., Stephanou spoke with Koulouroudis for three minutes. Stephanou also called G. Paparrizos at 10:41 a.m. for one minute, and G. Paparrizos called Stephanou at 11:09 a.m. for one minute. That same day, A. Stephanou, the K. Paparrizos account and the Koulouroudis accounts all purchased ABS common stock:

Individual	Date	Number of Shares Purchased	Average Price
Koulouroudis	12/9/05	39,585	$23.53
A. Stephanou	12/9/05	63,000	$23.57
K. Paparrizos	12/9/05	500	$23.44

35. The next business day, on December 12, 2005, CVS officially joined the Cerberus-Supervalu consortium; however, this information was not publicly announced. On the same day, G. Paparrizos and the K. Paparrizos account purchased ABS common stock. On December 19, 2005, Stephanou called Koulouroudis twice, once at 10:01 a.m. for four minutes and once at 3:24 p.m. for three minutes. The following day, December 20, 2005, the Koulouroudis accounts purchased ABS common stock. The details of the trades follow:

Individual	Date	Number of Shares Purchased	Average Price
G. Paparrizos	12/12/05	1,200	$23.69
K. Paparrizos	12/12/05	500	$23.68
Koulouroudis	12/20/05	7,500	$23.94

36. On December 22, 2005, ABS' board of directors considered and rejected the consortium's proposed acquisition. Stephanou had at least seven telephone conversations with Koulouroudis and G. Paparrizos on that same day. For example, Koulouroudis called Stephanou at 9:35 a.m. and spoke to him for two minutes. Stephanou then called Koulouroudis four times between 10:29 a.m. and 11:19 a.m.: at 10:29 a.m. for one minute, at 10:31 a.m. for one minute, at 10:32 a.m. for one minute, and at 11:19 a.m. for two minutes. Stephanou called Koulouroudis one last time on December 22 at 6:07 p.m. and they spoke for seven minutes. Stephanou subsequently had a four minute telephone call with G. Paparrizos at 10:27 p.m.

37. That same day, the A. Stephanou account, G. Paparrizos, the K. Paparrizos account, and the Koulouroudis accounts sold all of their ABS common stock:

Individual	Date	Number of Shares Sold	Average Price
A. Stephanou	12/22/05	33,650	$22.99
A. Stephanou	12/22/05	25,000 (sold short)	$22.97
G. Paparrizos	12/22/05	1,200	$22.42
K. Paparrizos	12/22/05	1,000	$22.33
Koulouroudis	12/22/05	47,085	$22.64

38. On December 22, 2005, ABS common stock closed at $23.28 per share.

39. The next day, on December 23, prior to the open of trading, the consortium and ABS issued press releases announcing the termination of discussions regarding the potential sale of ABS. That day, ABS common stock opened at $19.97 per share and the high was $20.85 per share. As a result of this news, ABS' stock price dropped approximately 12%, from the closing price of $23.28 on December 22, 2005, to

a closing price of $20.54 on December 23, 2005. Further, the volume increased approximately 17% from 29,932,700 shares on December 22, 2005, to 35,144,600 shares on December 23, 2005.

40. As a result of their activities, A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis avoided losses and earned actual profits in the following amounts:

Individual	Date	Approximate Losses Avoided	Approximate Profits
A. Stephanou	12/23/05	$132,000	$73,000
G. Paparrizos	12/23/05	$2,000	
K. Paparrizos	12/23/05	$2,000	
Koulouroudis	12/23/05	$99,000	

41. During the following few weeks, discussions between ABS and the consortium were revived, and the consortium worked on a revised proposal. On January 9, 2006, the consortium held a nonpublic kick-off meeting to discuss a renewed and revived acquisition. That same day, Stephanou called Contorinis at 12:51 p.m. and they talked for four minutes. Beginning on that same day and continuing to January 18, 2006, the Jefferies Paragon Fund whose trading, upon information and belief, was directed by Contorinis, purchased 2,675,000 shares of ABS stock at an average price of $22.18 per share, the total cost of which was $59 million.

42. The next day, on January 10, 2006, Stephanou called Koulouroudis at 9:37 p.m. and they spoke for six minutes. On January 11, the Koulouroudis accounts and A. Stephanou started to purchase ABS stock again:

Individual	Date	Number of Shares Purchased	Average Price
A. Stephanou	1/11/06	29,000	$21.83
Koulouroudis	1/11/06	39,805	$21.87

43. Two days later, on January 13, 2006, Stephanou called G. Paparrizos at

10:13 a.m. for two minutes. From January 13 through January 18, A. Stephanou, G. Paparrizos, the K. Paparrizos account, and the Koulouroudis accounts increased their ABS common stock positions:

Individual	Date	Number of Shares Purchased	Average Price
A. Stephanou	1/13/06	2,000	$22.84
G. Paparrizos	1/13/06	1,200	$22.55
K. Paparrizos	1/13/06	600	$22.65
Koulouroudis	1/13/06	3,000	$22.61
K. Paparrizos	1/17/06	600	$22.76
Koulouroudis	1/18/06	1,000	$22.89

44. On January 18 and 19, 2006, there were approximately sixteen telephone calls between Stephanou and Contorinis. On those same days, the Paragon Fund, whose trading, upon information and belief, was directed by Contorinis, sold approximately 675,000 shares of ABS stock at an average price of $23.76 per share. From January 9, 2006, continuing through January 17, 2006, Stephanou and Contorinis had approximately twenty-four telephone conversations.

45. On January 19, 2006, the Wall Street Journal published an article citing anonymous sources stating that a consortium of private-equity investors and Supervalu submitted a new bid to acquire ABS at slightly more than $26 per share.

46. On January 20, the Paragon Fund, whose trading, upon information and belief, was directed by Contorinis, purchased another approximately 500,000 shares of ABS stock at an average price of $24.11 per share. That same day, ABS issued a press release announcing that it had received a bid from a consortium that had previously submitted an offer for the company in December.

47. On Friday, January 20, 2006, ABS common stock closed at $24.11 per share.

48. From January 20 through January 23, 2006, Stephanou and Contorinis had approximately ten telephone conversations. In total, between January 9, 2006, and January 23, 2006, Stephanou and Contorinis had approximately fifty telephone conversations.

49. On Monday, January 23, 2006, prior to the opening of trading, ABS, Supervalu, and CVS each issued a press release officially announcing the acquisition of ABS by the consortium at $26.29 per share. That day, ABS common stock opened at $24.85 per share and reached a high of $25.42 per share. As a result of this announcement, ABS common stock closed at $25.42 per share, up 5.43% from the closing price of $24.11 per share on the preceding business day. Further, the volume increased approximately 321% from 10,836,800 shares on January 20, 2006, to 45,578,700 shares on January 23, 2006.

50. During the two days immediately following the announcement on January 23, the A. Stephanou account, G. Paparrizos, the K. Paparrizos account, the Koulouroudis accounts, and Contorinis, on behalf, and for the benefit, of the Paragon Fund, closed out of their ABS positions entirely:

Individual	Number of Shares Sold	Average Price	Approximate Actual Profits
G. Paparrizos	1,200	$25.16	$3,000
K. Paparrizos	1,200	$24.84	$3,000
Koulouroudis	43,805	$24.96	$132,000
A. Stephanou	32,000	$24.86	$95,000
Contorinis, on behalf, and for the benefit, of the Paragon Fund	2,500,000	$25.07	$7,200,000

51. As a result of all of their trading in ABS, the parties avoided losses and

earned the following approximate actual profits:

- A. Stephanou: $300,000
- G. Paparrizos: $5,000
- K. Paparrizos: $5,000
- The Koulouroudis accounts: $231,000
- Contorinis, on behalf, and for the benefit, of the Paragon Fund: $7,200,000

52. The confidential information Stephanou provided the tippees regarding the ABS acquisition was material. For the foregoing and other reasons, a reasonable investor would have viewed this information as being important to his or her investment decision and a significant alteration of the total mix of information made available to the public.

53. Stephanou knew or was reckless in not knowing that the information about the ABS acquisition that he learned in the course of his employment was material and nonpublic, and had been disclosed to him with the expectation that he owed a fiduciary duty or similar duty of trust and confidence. By tipping this material nonpublic information about ABS to A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis, who then traded on the basis of this information, Stephanou knowingly or recklessly breached this duty. Alternatively, Stephanou breached this duty by trading in the account of his father, A. Stephanou, on the basis of this material nonpublic information.

54. A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis knowingly or recklessly received from Stephanou material nonpublic information about the ABS acquisition and assumed the duty to maintain that information in confidence. Upon information and belief, A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis knew that Stephanou, by virtue of his employment at UBS, had access to material nonpublic information and that he was under a duty to keep that information

confidential. In addition, A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis knew that Stephanou had disclosed material nonpublic information in violation of Stephanou's duty to keep that information confidential. By trading on the information received by Stephanou, A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis breached the duty they inherited.

II. Insider Trading Ahead of the ELK Acquisition

A. Stephanou Possessed Material Nonpublic Information about the ELK Acquisition

55. ELK was a manufacturer of roofing and building products. Prior to its acquisition, ELK was headquartered in Texas and its common stock traded on the New York Stock Exchange under the ticker symbol, "ELK." In the six months prior to its announcement on November 6, 2006, that it was exploring strategic alternatives, the daily trading volume in ELK averaged 267,879 shares and the daily stock price averaged $27.15 per share.

56. On August 17, 2006, during a Board of Directors meeting in Dallas, Texas, ELK's board engaged UBS to act as its financial advisor during the process of ELK's review of its strategic alternatives.

57. Upon information and belief, UBS agreed to maintain in confidence all information related to ELK's review of its strategic alternatives. Stephanou was aware that he owed a duty to maintain the confidentiality of information provided to him and UBS by ELK and abstain from trading based on that information or to disclose that information to others.

58. UBS attended the August 17, 2006, meeting telephonically and two senior investment bankers at UBS, including the Managing Director under whom Stephanou

worked on the ABS acquisition ("Managing Director"), were assigned to work on the strategic exploration and any potential acquisition. Both individuals were colleagues of Stephanou's at UBS, and worked in the New York City office of UBS at the same time as Stephanou. Telephone records evidence that Stephanou and the Managing Director had telephone communications during the relevant time period.

59. Upon information and belief, Stephanou learned material nonpublic information about the acquisition of ELK: because he was assigned to advise ELK on the potential acquisition; through communications with other employees at UBS who advised ELK on the acquisition, including his two former colleagues from New York City; and/or by virtue of his access to UBS' internal files relating to ELK.

60. On September 21, 2006, individuals from UBS, including the Managing Director and another senior member of the deal team with whom Stephanou maintained telephone contact, attended a Board of Directors Meeting in which ELK's board instructed ELK's management and UBS to commence a nonpublic solicitation process of contacting potential acquirers.

B. Stephanou Tipped his Friends and Relative with Material Nonpublic Information Regarding the ELK Acquisition, Each of Whom Traded

61. On that same day, September 21, 2006, A. Stephanou began buying shares of ELK. Between September 21, 2006 and October 31, 2006, A. Stephanou purchased a total of 13,700 shares of ELK at an average price of $27.13 per share. On September 27, 2006, at 11:40 a.m., Stephanou called Koulouroudis for approximately three minutes; between 12:14 p.m. and 12:31 p.m., Koulouroudis called, or attempted to call, Stephanou four times. On that same day, the Koulouroudis accounts began buying shares of ELK. Between September 27 and November 3, 2006, the Koulouroudis accounts bought a total

of 9,515 shares of ELK at an average price of $26.23 per share. None of these tippees had ever traded in ELK common stock before these dates.

62. On Friday, November 3, 2006, ELK common stock closed at $25.18 per share.

63. On Monday, November 6, 2006, prior to the market open, ELK issued a press release announcing that it was exploring strategic alternatives and that it had hired UBS as a financial advisor to assist in this process. That day, ELK common stock opened at $30.89 per share and its high was $32.25. As a result of this announcement, the price of ELK stock increased 26% from the closing price on the preceding trading day to the closing price on the day of the press release, $31.71. Further, the volume increased approximately 885% from 282,500 shares on November 3, 2006, to 2,782,000 shares on November 6, 2006.

64. On November 6, 2006, A. Stephanou bought 6,300 additional shares of ELK for an average price of $31.67 per share, bringing the account's total position in ELK's common stock to 20,000 shares.

65. On November 6, 2006, at 9:59 a.m., Stephanou called Koulouroudis for approximately three minutes. The Koulouroudis accounts began buying that same day and, between November 6 and November 15, 2006, the Koulouroudis accounts bought 3,350 additional shares of ELK for an average price of $31.45, bringing the Koulouroudis accounts' total positions in ELK stock to 12,865 shares.

66. On November 13 and November 14, 2006, the K. Paparrizos account bought 2,000 shares of ELK common stock at an average price of $32.37.

67. On November 15, 2006, ELK common stock closed at $33.20 per share.

68. The next day, on November 16, 2006, ELK publicly announced that it had received a buyout offer of $35 per share in cash from Building Materials Corporation of America ("BMCA"). That day, ELK common stock opened at $35.30 per share and its high was $36.85. As a result of this announcement, ELK common stock closed at $35.96, up 8.31% from the closing price of $33.20 the previous day. Further the volume increased approximately 1197% from 171,900 shares on November 15, 2006, to 2,229,100 shares on November 16, 2006.

69. That same day, the K. Paparrizos account sold all 2,000 of his shares of ELK common stock for $36.49 per share, earning total actual profits of $8,240.

70. Two weeks later, on November 27, 2006, the K. Paparrizos account purchased 1,500 shares of ELK common stock at an average price of $35.75 per share and, on November 28, G. Paparrizos purchased 950 shares of ELK common stock at an average price of $35.55 per share.

71. On November 30, 2006, the A. Stephanou account sold all 20,000 of his shares of ELK stock at an average price of $36.02, earning total actual profits of $149,154.

72. On December 6, 2006, between 11:47 a.m. and 12:13 p.m., Koulouroudis called, or attempted to call, Stephanou three times. Between December 6 and December 13, 2006, the Koulouroudis accounts sold 3,230 of their shares of ELK stock for an average price of $36.14 per share, bringing their remaining position in ELK stock to 9,635 shares.

73. On December 18, 2006, prior to the market open, a press release was issued announcing that ELK had agreed to be acquired by The Carlyle Group for $38 per

share in cash -- which was $3 higher than the original offer. That day, ELK common stock opened at $38.48 per share and its high was $38.95. As a result of this announcement, ELK stock closed at $38.81, up 8.26% from the closing price of $35.85 on the preceding business day. Further, the volume increased approximately 748% from 243,600 shares on December 15, 2006, to 2,065,900 shares on December 18, 2006.

74. That same day, at 10:12 a.m., Koulouroudis called Stephanou for approximately two minutes. Also on that day, the Koulouroudis accounts sold 7,535 shares of ELK common stock for an average price of $38.50 per share. On January 3, 2007, the Koulouroudis accounts sold their remaining 2,100 shares of ELK common stock for an average price of $41.00 per share. In total, the Koulouroudis accounts earned actual profits of approximately $138,000 from trading in ELK common stock.

75. On December 18, Stephanou called G. Paparrizos at 12:37 p.m. and the two spoke for six minutes. That same day, the K. Paparrizos account sold his 1,500 shares of ELK common stock for an average price of $38.24 per share, and G. Paparrizos sold his 950 shares of ELK common stock for an average price of $38.60 per share, earning total actual profits of approximately $4,000 and $3,000, respectively.

76. In total, the A. Stephanou account, G. Paparrizos, the K. Paparrizos account, and the Koulouroudis accounts made actual profits of approximately $302,000 on the ELK acquisition.

77. The confidential information Stephanou provided the tippees regarding the ELK acquisition was material. For the foregoing and other reasons, a reasonable investor would have viewed this information as being important to his or her investment decision and a significant alteration of the total mix of information made available to the public.

78. Stephanou knew or was reckless in not knowing that the information about the ELK acquisition that he learned in the course of his employment was material and nonpublic, and had been disclosed to him with the expectation that he owed a fiduciary duty or similar duty of trust and confidence. By tipping this material nonpublic information about ELK to A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis, who then traded on the basis of this information, Stephanou knowingly or recklessly breached this duty. Alternatively, Stephanou breached this duty by trading in the account of his father, A. Stephanou, on the basis of this material nonpublic information.

79. A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis knowingly or recklessly received from Stephanou material nonpublic information about the ELK acquisition and assumed the duty to maintain that information in confidence. Upon information and belief, A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis knew or were reckless in not knowing that that Stephanou, by virtue of his employment at UBS, had access to material nonpublic information and that he was under a duty to keep that information confidential. In addition, A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis knew that Stephanou had disclosed material nonpublic information in violation of Stephanou's duty to keep that information confidential. By trading on the information Stephanou provided, A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis breached the duty they inherited.

III. Insider Trading Ahead of the NHI Acquisition

A. Chakrapani Possessed Material Nonpublic Information about the NHI Acquisition

80. NHI, based in Murfreesboro, Tennessee, is a real estate investment trust that specializes in the purchase and leaseback of healthcare real estate and in the making

of mortgage loans to healthcare operators. NHI's stock trades on the NYSE under the symbol "NHI." In the six months prior to its announcement on October 10, 2006 that it was considering strategic alternatives, the daily trading volume in NHI stock averaged 78,131 shares and the stock price averaged $25.98 per share.

81. On August 2, 2006, during a quarterly Board of Directors meeting, NHI's Chairman, CEO, and President advised NHI's board that he intended to present a proposal to the board, whereby he and a group of outside persons would acquire NHI. Following this board meeting, a Special Committee of NHI's board contacted counsel regarding representation of the Special Committee in connection with the proposed acquisition. The next day, on August 3, 2006, the Special Committee's counsel contacted Blackstone and requested that Blackstone make a presentation to the Special Committee about Blackstone's experience in providing financial advisory services for companies during insider-led going private transactions.

82. On August 11, 2006, Blackstone made its presentation to the Special Committee with Chakrapani, along with two other individuals, representing Blackstone.

83. Blackstone was retained on August 15, 2006, to provide investment advisory services to NHI's Special Committee. Chakrapani was a member of the team advising NHI on the acquisition.

84. Chakrapani was also present at two subsequent NHI board meetings on September 12, 2006, and October 6, 2006.

85. Upon information and belief, Blackstone agreed to maintain in confidence all information related to NHI's exploration of an acquisition. Further, the firm states on its website that one of its "core principles" is "protecting client confidentiality." Because

the financial advisory services firm owed a duty to maintain the confidentiality of information provided to it by its clients, such as NHI, the policies and procedures the financial advisory services firm distributed to employees included policies and procedures mandating that each employee maintain information concerning its clients in strict confidence. In addition, upon information and belief, Blackstone's policies prohibited employees from using confidential information obtained during the course of employment when trading in their own account, or someone else's account, or disclosing the information to others. Chakrapani was aware that he owed a duty to maintain the confidentiality of information provided to him and his financial advisory services firm by the firm's clients, including NHI, and to abstain from trading based on that information or disclosing that information to others.

B. Chakrapani Tipped Stephanou, who in Turn Tipped Others who Traded on the Basis of the Material Nonpublic Information about the NHI Acquisition

86. On October 2, 2006, at 10:38 a.m., Chakrapani had a forty-one minute telephone call with a U.K. mobile telephone number which, upon information and belief, was associated with Stephanou.

87. On that same day, A. Stephanou purchased 2,000 shares of NHI common stock at an average price of $28.23 per share. A. Stephanou purchased an additional 1,000 shares of NHI stock on the following day, October 3, for an average price of $28.34 per share. A. Stephanou had never traded in NHI common stock before this date.

88. On October 4, 2006, Stephanou called Chakrapani at 2:00 p.m. and the two spoke for seven minutes. Stephanou also called Koulouroudis at 2:28 p.m. and spoke for approximately two minutes.

89. That same day, A. Stephanou purchased an additional 5,000 shares of NHI common stock for an average price of $28.59 per share. In addition, Koulouroudis also purchased 2,619 shares of NHI stock for the Koulouroudis accounts for an average price of $28.59 per share. The Koulouroudis accounts had never traded in NHI common stock before this date.

90. On October 5, 2006, A. Stephanou made his final purchase of 1,000 NHI shares at an average price of $28.74 per share. In total, A. Stephanou purchased 9,000 shares of NHI stock from October 2 through October 5 for $256,467 and at an average price of $28.50.

91. On October 9, 2006, Stephanou and Chakrapani spoke on multiple occasions. At 7:20 p.m., Stephanou called Chakrapani for one minute and, at 8:01 p.m., Chakrapani called Stephanou for one minute. At 8:02 p.m., Stephanou called Chakrapani and the two spoke for sixteen minutes.

92. On October 9, 2006, NHI common stock closed at $29.05 per share.

93. On October 10, 2006, NHI publicly announced that its Board of Directors had formed a Special Committee of independent directors, and had retained Blackstone as its financial advisor to evaluate strategic alternatives to enhance stockholder value. NHI further announced that it had received a buyout offer from its CEO offering $30 per share in cash, but stated that the proposal was inadequate. On October 10, NHI common stock opened at $29.13 per share and reached a high of $30.15 per share. NHI common stock closed at $29.93 per share, up 3.03% from the closing price of $29.05 per share on the preceding business day. The volume increased approximately 373% from 36,400 shares on October 9, 2006, to 172,000 shares on October 10, 2006. On October 11, the

first trading day after the official press release, NHI opened at $29.93 per share and reached a high of $31.20 per share. The stock closed at $30.70 per share, up 2.57% from the closing price of $29.93 per share on October 10. The volume increased approximately 422% from 36,400 shares on October 9, 2006, to 189,900 shares on October 11, 2006.

94. On October 10, 2006, the A. Stephanou account sold all 9,000 of its NHI shares for an average price of $29.94 per share.

95. On October 10, 2006, Koulouroudis called Stephanou at 11:11 a.m. and the two spoke for approximately one minute. That same day, the Koulouroudis accounts sold 1,619 NHI shares for an average price of $29.87 per share and sold the remaining 1,000 shares the next day on October 11, 2006, for an average price of $30.25 per share.

96. As a result of their trading activities, A. Stephanou made total actual profits of approximately $13,000 and the Koulouroudis accounts made total actual profits of approximately $4,000. In total, A. Stephanou and the Koulouroudis accounts made actual profits of approximately $17,000 on the NHI transaction.

97. The confidential information regarding the NHI acquisition that Chakrapani provided to Stephanou, who then passed it to A. Stephanou and Koulourodis, was material. For the foregoing and other reasons, a reasonable investor would have viewed this information as being important to his or her investment decision and a significant alteration of the total mix of information made available to the public.

98. Chakrapani knew or was reckless in not knowing that the information about the NHI acquisition that he learned in the course of his employment was material and nonpublic, and had been disclosed to him with the expectation that he owed a

fiduciary duty or similar duty of trust and confidence. By tipping this material nonpublic information about NHI to Stephanou, who then tipped A. Stephanou or traded in his account, and Koulouroudis, who either traded in the Koulouroudis accounts or tipped his family members, who traded on the basis of this information, Chakrapani knowingly or recklessly breached this duty.

99. Stephanou knowingly or recklessly received from Chakrapani material nonpublic information about the NHI acquisition and assumed the duty to maintain that information in confidence. Upon information and belief, Stephanou knew or was reckless in not knowing that Chakrapani, by virtue of his employment at Blackstone, had access to material nonpublic information and that he was under a duty to keep that information confidential. Stephanou also knew or was reckless in not knowing that in giving this information to Stephanou, Chakrapani was breaching this duty.

100. In addition, when Stephanou tipped A. Stephanou, and Koulouroudis about the material nonpublic information regarding NHI, they knew or were reckless in not knowing that the information regarding the potential acquisition was confidential information that Stephanou received from someone who had a duty to keep that information confidential. In receiving this information, they, too, inherited a duty to keep it confidential. By tipping the information to others, or trading in A. Stephanou's account, Stephanou breached the duty he inherited to keep this information confidential. By trading on the information received from Stephanou, A. Stephanou breached the duty he inherited and Koulouroudis breached the duty he inherited, either by trading in the Koulouroudis accounts or by tipping his family members.

IV. Stephanou, Chakrapani, and the Tippees Breached Duties to Maintain the Information in Confidence

101. UBS assumed and owed a duty to maintain the confidentiality of information provided to it by its clients, Cerberus and ELK. Accordingly, in the course of his employment, Stephanou not only agreed to, but was required to, maintain in confidence information about ABS' and ELK's pending transactions and abstain from trading based on that information or disclosing that information to others.

102. Stephanou knew or was reckless in not knowing that the information about the ABS and ELK acquisitions that he learned in the course of his employment was material and nonpublic, and had been disclosed to him with the expectation that he owed a fiduciary duty or similar duty of trust and confidence. By misappropriating and giving this material nonpublic information about ABS and ELK to his tippees, who then traded on the basis of this information, or by trading in his father's account, Stephanou knowingly or recklessly breached this duty.

103. A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis, who knowingly or recklessly received from Stephanou confidential information about the ABS and ELK acquisitions, assumed the duty to maintain that information in confidence. Upon information and belief, each tippee knew that Stephanou, due to his employment and position at UBS, had access to material nonpublic information and that he was under a duty to keep that information confidential. In addition, each tippee knew that Stephanou had disclosed material nonpublic information in violation of Stephanou's duty to keep that information confidential. By trading, each tippee breached this duty.

104. Stephanou derived a direct or indirect personal benefit from disclosing the material nonpublic information to A. Stephanou, G. Paparrizos, K. Paparrizos,

Koulouroudis, and Contorinis, all of whom were friends, former colleagues or a relative.

105. Alternatively, Stephanou's investment bank and its employees became temporary insiders as a result of their participation on the ELK deal team. When Stephanou, as a temporary insider, disclosed material nonpublic information to A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis about the pending ELK acquisition, or traded in his father's account, he breached a duty of trust and confidence to ELK and its shareholders to keep such information confidential.

106. NHI hired Blackstone in connection with its efforts to explore strategic alternatives, including the possible sale of the company. Blackstone assigned Chakrapani to work on the NHI transaction and, as a result, Chakrapani obtained access to material nonpublic information solely for the purpose of assisting NHI. Accordingly, Chakrapani became a temporary insider and fiduciary of NHI and its shareholders. Chakrapani owed a duty to maintain the confidence of any nonpublic information about NHI's pending transaction that he learned in the course of providing services to NHI and abstain from trading based on that information or disclosing that information to others.

107. Chakrapani breached his duty to NHI by disclosing material nonpublic information about the NHI acquisition to Stephanou. Chakrapani knew or was reckless in not knowing that the information about the NHI acquisition that he learned in the course of his employment was material and nonpublic, and had been disclosed to him with the expectation that he owed a fiduciary duty or similar duty of trust and confidence. By misappropriating and giving this material nonpublic information about NHI to Stephanou, who in turn tipped the information to others, and may have traded on it in his father's account, Chakrapani knowingly or recklessly breached this duty.

108. Stephanou, who knowingly or recklessly received from Chakrapani confidential information about the NHI acquisition, assumed the duty to maintain that information in confidence. Stephanou knew that Chakrapani, due to his employment and position at Blackstone, had access to material nonpublic information and that he was under a duty to keep that information confidential. By tipping others with this information or trading in A. Stephanou's account, Stephanou breached this duty.

109. A. Stephanou and Koulouroudis, who knowingly or recklessly received from Stephanou confidential information about the NHI acquisition, assumed the duty to maintain that information in confidence. Upon information and belief, A. Stephanou and Koulouroudis knew or were reckless in not knowing that the information regarding the potential acquisition was confidential information that Stephanou received from someone who had a duty to keep that information confidential. By trading, A. Stephanou breached the duty he inherited. Kolouroudis breached the duty he inherited by either trading in the Koulouroudis accounts or by tipping his family.

110. Chakrapani derived a direct or indirect pecuniary benefit or a reputational benefit from disclosing the material nonpublic information to Stephanou. In addition, Stephanou derived a direct or indirect pecuniary benefit or a reputational benefit from disclosing the material nonpublic information to A. Stephanou and Koulouroudis.

FIRST CLAIM FOR RELIEF

Violations of Section 17(a) of the Securities Act

111. The Commission realleges and incorporates by reference each and every allegation in paragraphs 1 through 110, inclusive, as if they were fully set forth herein.

112. Defendants Stephanou, A. Stephanou, G. Paparrizos, K. Paparrizos, and

Koulouroudis, by engaging in the conduct described above, knowingly or recklessly, in connection with the offer or sale of securities, by the use of the means or instruments of transportation, or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) employed devices, schemes or artifices to defraud;

(b) obtained money or property by means of untrue statements of material facts, or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or

(c) engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

113. By engaging in the forgoing conduct, Defendants Stephanou, A. Stephanou, G. Paparrizos, K. Paparrizos, and Koulouroudis violated Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

SECOND CLAIM FOR RELIEF

Violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder

114. The Commission realleges and incorporates by reference each and every allegation in paragraphs 1 through 113, inclusive, as if they were fully set forth herein.

115. Defendants Stephanou, Chakrapani, A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis, by engaging in the conduct described above, knowingly or recklessly, in connection with the purchase or sale of securities, directly or indirectly, by use of the means or instrumentalities of interstate commerce, or the mails, or the facilities of a national securities exchange:

(a) employed devices, schemes or artifices to defraud;

(b) made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or

(c) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

116. By engaging in the foregoing conduct, Defendants Stephanou, Chakrapani, A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis violated Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R.§ 240.10b-5], thereunder.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court enter a Final Judgment:

I.

Permanently restraining and enjoining Defendants Stephanou, A. Stephanou, G. Paparrizos, K. Paparrizos and Koulouroudis from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], and Defendants Stephanou, Chakrapani, A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R.§ 240.10b-5], thereunder;

II.

Ordering Defendants Stephanou, Chakrapani, A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis to disgorge the unlawful trading profits and losses avoided that were derived from the activities set forth in this Complaint, together with prejudgment interest thereon;

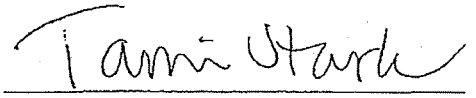
III.

Ordering Defendants Stephanou, Chakrapani, A. Stephanou, G. Paparrizos, K. Paparrizos, Koulouroudis, and Contorinis to pay a civil penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1], or in the alternative Section 21(d)(3) of the Exchange Act [15 U.S.C.§ 78u]; and

IV.

Granting such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,



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Facsimile: (215) 597-2740

Dated: February 5, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. NICOS ACHILEAS STEPHANOU et al., Defendant.	**Civil Action No. 09-1043 (RJS)** **ANSWER OF JOSEPH CONTORINIS**

Defendant Joseph Contorinis, by his attorneys, Paul, Weiss, Rifkind, Wharton & Garrison LLP, for his answer to the Complaint in this action dated February 5, 2009 ("Complaint"). Mr. Contorinis reserves the right to amend this pleading to the fullest extent consistent with the law. Mr Contorinis states upon knowledge as to his own conduct and upon information and belief as to the conduct of others, as follows:

1. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 1 of the Complaint.

2. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 2 of the Complaint.

3. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 3 of the Complaint.

4. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 4 of the Complaint.

5. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 5 of the Complaint.

6. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 6 of the Complaint.

7. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 7 of the Complaint.

8. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 8 of the Complaint.

9. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 9 of the Complaint.

10. States that paragraph 10 of the Complaint states a legal conclusion to which no response is required. To the extent any response is required, Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 10 of the Complaint.

11. States that paragraph 11 of the Complaint states a legal conclusion to which no response is required. To the extent any response is required, Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 11 of the Complaint.

12. States that paragraph 12 of the Complaint states a legal conclusion to which no response is required. To the extent any response is required, Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 12 of the Complaint.

13. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 13 of the Complaint.

14. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 14 of the Complaint.

15. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 15 of the Complaint.

16. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 16 of the Complaint.

17. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 17 of the Complaint.

18. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 18 of the Complaint.

19. Mr. Contorinis admits that he is age 44. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 19 of the Complaint.

20. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 20 of the Complaint.

21. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 21 of the Complaint.

22. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 22 of the Complaint.

23. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 23 of the Complaint.

24. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 24 of the Complaint.

25. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 25 of the Complaint.

26. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 26 of the Complaint.

27. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 27 of the Complaint.

28. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 28 of the Complaint.

29. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 29 of the Complaint.

30. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 30 of the Complaint.

31. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 31 of the Complaint.

32. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 32 of the Complaint.

33. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 33 of the Complaint.

34. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 34 of the Complaint.

35. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 35 of the Complaint.

36. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 36 of the Complaint.

37. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 37 of the Complaint.

38. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 38 of the Complaint.

39. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 39 of the Complaint.

40. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 40 of the Complaint.

41. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 41 of the Complaint.

42. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 42 of the Complaint.

43. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 43 of the Complaint.

44. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 44 of the Complaint.

45. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 45 of the Complaint.

46. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 46 of the Complaint.

47. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 47 of the Complaint.

48. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 48 of the Complaint.

49. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 49 of the Complaint.

50. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 50 of the Complaint.

51. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 51 of the Complaint.

52. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 52 of the Complaint.

53. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 53 of the Complaint.

54. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 54 of the Complaint.

55. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 55 of the Complaint.

56. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 56 of the Complaint.

57. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 57 of the Complaint.

58. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 58 of the Complaint.

59. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 59 of the Complaint.

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64. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 64 of the Complaint.

65. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 65 of the Complaint.

66. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 66 of the Complaint.

67. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 67 of the Complaint.

68. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 68 of the Complaint.

69. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 69 of the Complaint.

70. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 70 of the Complaint.

71. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 71 of the Complaint.

72. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 72 of the Complaint.

73. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 73 of the Complaint.

74. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 74 of the Complaint.

75. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 75 of the Complaint.

76. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 76 of the Complaint.

77. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 77 of the Complaint.

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79. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 79 of the Complaint.

80. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 80 of the Complaint.

81. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 81 of the Complaint.

82. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 82 of the Complaint.

83. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 83 of the Complaint.

84. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 84 of the Complaint.

85. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 85 of the Complaint.

86. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 86 of the Complaint.

87. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 87 of the Complaint.

88. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 88 of the Complaint.

89. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 89 of the Complaint.

90. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 90 of the Complaint.

91. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 91 of the Complaint.

92. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 92 of the Complaint.

93. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 93 of the Complaint.

94. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 94 of the Complaint.

95. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 95 of the Complaint.

96. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 96 of the Complaint.

97. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 97 of the Complaint.

98. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 98 of the Complaint.

99. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 99 of the Complaint,

100. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 100 of the Complaint.

101. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 101 of the Complaint.

102. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 102 of the Complaint.

103. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 103 of the Complaint.

104. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 104 of the Complaint.

105. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 105 of the Complaint.

106. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 106 of the Complaint.

107. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 107 of the Complaint.

108. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 108 of the Complaint.

109. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 109 of the Complaint.

110. Mr. Contorinis invokes his right against self-incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 110 of the Complaint.

111. Repeats the responses contained in paragraphs 1 through 110 inclusive, as if fully set forth herein, in response to the allegations contained in paragraph 111 of the Complaint.

112. Paragraph 112 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, Mr. Contorinis invokes his right against self- incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 112 of the Complaint.

113. Paragraph 113 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, Mr. Contorinis invokes his right against self- incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 113 of the Complaint.

114. Repeats the responses contained in paragraphs 1 through 113 inclusive, as if fully set forth herein, in response to the allegations contained in paragraph 114 of the Complaint.

115. Paragraph 115 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, Mr. Contorinis invokes

his right against self- incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 115 of the Complaint.

116. Paragraph 116 of the Complaint contains conclusions of law to which no response is required. To the extent an answer is required, Mr. Contorinis invokes his right against self- incrimination under the Fifth Amendment of the United States Constitution to the allegations contained in paragraph 116 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

117. The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

118. The claims alleged in the Complaint fail to plead fraud against Defendant with the particularity required by the Federal Rules of Civil Procedure. The lack of particularity makes it impossible for Defendant to determine at this time whether additional affirmative defenses may exist. Defendant reserves the right to assert additional affirmative defenses once the precise nature of the relevant circumstances or events are determined through discovery.

THIRD AFFIRMATIVE DEFENSE

119. The claims alleged in the Complaint are barred, in whole or in part, by the applicable statute of limitations.

FORTH AFFIRMATIVE DEFENSE

120. The claims alleged in the Complaint are barred because plaintiff misjoined parties to this action.

FIFTH AFFIRMATIVE DEFENSE

121. The claims alleged in the Complaint are barred by the doctrine of laches.

WHEREFORE, Defendant pray for relief as follows: (i) For judgment dismissing the complaint with prejudice; (ii) For costs of suit and reasonable attorneys' fees, as allowed by law; (iii) For such other and further relief as the Court deems just and proper.

Dated: July 13, 2009
New York, New York

Respectfully submitted,

By:_____

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(jjanghorbani@paulweiss.com)
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Attorneys for Defendant
Joseph Contoronis

JUDGE SULLIVAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA

-v.-

JOSEPH CONTORINIS,

Defendant.

- - - - - - - - - - - - - - - - - - - x

INDICTMENT

09CRIM1083

COUNT ONE

(Conspiracy to Commit Securities Fraud)

The Grand Jury charges:

Relevant Entities and Individuals

1. At all relevant times, JOSEPH CONTORINIS, the defendant, was an Executive Vice President of an investment bank and institutional securities firm with offices in New York, New York, and Stamford, Connecticut, and a co-Portfolio Manager of a hedge fund.

2. At all relevant times, UBS Investment Bank ("UBS") operated as an investment bank in New York, New York. Among other things, UBS advised public companies and private corporations on business-related transactions, including mergers and acquisitions.

3. At all relevant times, Nicos A. Stephanou, a coconspirator not named as a defendant herein, was employed as an investment banker at UBS.

4. At all relevant times, JOSEPH CONTORINIS, the defendant, was a close personal friend of Nicos A. Stephanou.

5. At certain times relevant to this Indictment, Albertson's Corporation ("Albertson's"), a public company whose stock traded on the New York Stock Exchange under the symbol "ABS," operated supermarkets, pharmacies, and drugstores.

UBS's Confidentiality Policies

6. At all relevant times, UBS established and distributed to its employees, including Nicos A. Stephanou, written policy statements regarding each employee's duties to maintain in strict confidence information concerning UBS's clients. At all relevant times, UBS's policies also prohibited employees from using confidential information obtained during the course of employment when trading in their own account, someone else's account, or disclosing the information to others.

7. At all relevant times, Nicos A. Stephanou owed a duty to UBS and its clients to maintain the confidentiality of information that Nicos A. Stephanou learned while working at UBS, not to trade based on that information, and not to disclose the information to others.

The Insider Trading Scheme

8. At all times relevant to this Indictment, UBS provided advice to clients in connection with potential and actual mergers and acquisition transactions. In the course of Nicos A. Stephanou's work at UBS, Stephanou had access to and learned material nonpublic information about merger and acquisition

transactions.

9. From at least in or about 2004 up to and including in or about June 2006, JOSEPH CONTORINIS, the defendant, Nicos A. Stephanou, and others known and unknown, participated in a scheme to defraud by executing securities trades based on material nonpublic information regarding mergers and acquisitions relating to UBS's clients ("UBS Inside Information"). Stephanou provided CONTORINIS, and others known and unknown, with UBS Inside Information in violation of (a) the fiduciary and other duties of trust and confidence that Stephanou owed to UBS and its clients, (b) the expectations of confidentiality of UBS's clients, and (c) UBS's written policies regarding the use and safekeeping of confidential and material nonpublic information.

10. Based on UBS Inside Information, JOSEPH CONTORINIS, the defendant, Nicos A. Stephanou, and others known and unknown, executed securities trades. As a result of the trading based on UBS Inside Information, CONTORINIS, Stephanou, and others known and unknown, together earned millions of dollars in unlawful profits. Stephanou provided UBS Inside Information to CONTORINIS because of their personal relationship and for a benefit.

11. At all times relevant to this Indictment, UBS represented a private equity firm (the "Firm") in connection with the acquisition of Albertson's Corporation by several companies, including the Firm (the "Albertson's Transaction"). On or about

January 23, 2006, Albertson's Corporation announced publicly that it was being acquired by several companies, including the Firm.

12. At certain times relevant to this Indictment, Nicos A. Stephanou provided JOSEPH CONTORINIS, the defendant, with UBS Inside Information relating to the Albertson's Transaction.

The Conspiracy

13. From at least in or about 2004 up to and including in or about June 2006, in the Southern District of New York and elsewhere, JOSEPH CONTORINIS, the defendant, Nicos A. Stephanou, and others known and unknown, unlawfully, willfully, and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit, securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.

Object of the Conspiracy

Securities Fraud

14. It was a part and an object of the conspiracy that JOSEPH CONTORINIS, the defendant, Nicos A. Stephanou, and others known and unknown, unlawfully, willfully and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails, and of facilities of national securities exchanges, would and did use and employ, in connection with the purchase and sale of securities, manipulative

and deceptive devices and contrivances in violation of Title 17, Code of Federal Regulations, Section 240.10b-5 by: (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon any person, all in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2.

Means and Methods of the Conspiracy

15. Among the means and methods by which JOSEPH CONTORINIS, the defendant, Nicos A. Stephanou, and their coconspirators would and did carry out the conspiracy were the following:

a. Stephanou misappropriated UBS Inside Information in violation of (a) the fiduciary and other duties of trust and confidence that Stephanou owed to UBS and its clients, (b) the expectations of confidentiality of UBS's clients, and (c) UBS's policies regarding the use and safekeeping of confidential and material, nonpublic information.

b. Stephanou, in breach of his duty of confidentiality to UBS and its clients, disclosed UBS Inside

Information to CONTORINIS, with the understanding that CONTORINIS would use the UBS Inside Information to purchase and sell securities, and thereby receive illegal profits or illegally avoid losses.

c. CONTORINIS, while in possession of UBS Inside Information that CONTORINIS knew had been misappropriated by Stephanou in breach of Stephanou's duty to keep the information confidential, purchased and sold securities based on that information and thereby received illegal profits or illegally avoided losses.

Overt Acts

16. In furtherance of the conspiracy and to effect the illegal object thereof, JOSEPH CONTORINIS, the defendant, Nicos A. Stephanou, and their coconspirators committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. On or about December 7, 2005, while in New York, New York, Stephanou provided CONTORINIS with UBS Inside Information by telephone.

b. On or about December 7, 2005, at approximately 11:28 a.m., Stephanou called CONTORINIS by telephone.

c. On or about December 7, 2005, at approximately 11:53 a.m., CONTORINIS caused the sale of approximately 350,000 shares of Albertson's securities.

d. On or about December 7, 2005, at approximately 11:53 a.m., CONTORINIS caused the sale of approximately 87,600 shares of Alberton's securities.

e. On or about December 7, 2005, at approximately 1:20 p.m., CONTORINIS caused the sale of approximately 322,000 shares of Albertson's securities.

f. On or about December 7, 2005, at approximately 1:49 p.m., CONTORINIS caused the sale of approximately 540,400 shares of Albertson's securities.

g. On or about December 21, 2005, at approximately 10:00 a.m., Stephanou called CONTORINIS by telephone.

h. On or about December 21, 2005, at approximately 8:46 p.m., CONTORINIS called Stephanou by telephone.

i. On or about December 22, 2005, while in New York, New York, Stephanou provided CONTORINIS with the UBS Inside Information by telephone.

j. On or about December 22, 2005, at approximately 12:57 a.m., Stephanou called CONTORINIS by telephone.

k. On or about December 22, 2005, at approximately 1:01 a.m., CONTORINIS called Stephanou by telephone.

l. On or about December 22, 2005, at approximately 1:29 a.m., CONTORINIS called Stephanou by telephone.

m. On or about December 22, 2005, at approximately 2:14 a.m., Stephanou called CONTORINIS by telephone.

n. On or about December 22, 2005, at approximately 2:20 a.m., Stephanou called CONTORINIS by telephone.

o. On or about December 22, 2005, at approximately 6:43 a.m., CONTORINIS called Stephanou by telephone.

p. On or about December 22, 2005, at approximately 7:02 a.m., CONTORINIS called Stephanou by telephone.

q. On or about December 22, 2005, at approximately 8:47 a.m., Stephanou called CONTORINIS by telephone.

r. On or about December 22, 2005, at approximately 9:32 a.m., CONTORINIS called Stephanou by telephone.

s. On or about December 22, 2005, at approximately 10:27 a.m., CONTORINIS called Stephanou by telephone.

t. On or about December 22, 2005, at approximately 10:31 a.m., CONTORINIS caused the sale of approximately 406,750 shares of Albertson's securities.

u. On or about December 22, 2005, at approximately 10:31 a.m., CONTORINIS caused the sale of approximately 311,600 shares of Albertson's securities.

v. On or about December 22, 2005, at approximately 10:36 a.m., CONTORINIS caused the sale of approximately 100,000 shares of Albertson's securities.

w. On or about December 22, 2005, at approximately 10:39 a.m., CONTORINIS caused the sale of approximately 200,000 shares of Albertson's securities.

x. On or about December 22, 2005, at approximately 10:42 a.m., CONTORINIS caused the sale of approximately 220,000 shares of Albertson's securities.

y. On or about December 22, 2005, at approximately 10:56 a.m., CONTORINIS caused the sale of approximately 1,493,300 shares of Albertson's securities.

z. On or about January 11, 2006, while in New York, New York, Stephanou provided CONTORINIS with UBS Inside Information by telephone.

aa. On or about January 11, 2006, at approximately 9:12 a.m., Stephanou called CONTORINIS by telephone.

bb. On or about January 11, 2006, at approximately 12:33 p.m., Stephanou called CONTORINIS by telephone.

cc. On or about January 11, 2006, at approximately 12:38 p.m., Stephanou called CONTORINIS by telephone.

dd. On or about January 11, 2006, at approximately 12:48 p.m., CONTORINIS called Stephanou by telephone.

ee. On or about January 11, 2006, at approximately 1:13 p.m., CONTORINIS caused the purchase of approximately 269,200 shares of Albertson's securities.

ff. On or about January 11, 2006, at approximately

1:13 p.m., CONTORINIS caused the purchase of approximately 30,700 shares of Albertson's securities.

gg. On or about January 11, 2006, at approximately 1:13 p.m., CONTORINIS caused the purchase of approximately 557,100 shares of Albertson's securities.

hh. On or about January 11, 2006, at approximately 1:59 p.m., CONTORINIS purchased approximately 318,000 shares of Albertson's securities.

(Title 18, United States Code, Section 371.)

COUNTS TWO THROUGH TEN

(Securities Fraud)

The Grand Jury further charges:

17. The allegations contained in paragraphs 1 through 12 and 15 are repeated and realleged as if fully set forth herein.

18. On or about the dates set forth below, in the Southern District of New York and elsewhere, JOSEPH CONTORINIS, the defendant, unlawfully, willfully and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, the mails and the facilities of national securities exchanges, in connection with the purchase and sale of securities, did use and employ manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of

material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon any person, to wit, CONTORINIS executed and caused others to execute the securities transactions listed below based on material, nonpublic information he obtained from Nicos A. Stephanou:

COUNT	DATE	SECURITY	TRANSACTION
TWO	December 7, 2005	Albertson's Corporation	sale of 350,000 shares of common stock
THREE	December 7, 2005	Albertson's Corporation	sale of 87,600 shares of common stock
FOUR	December 22, 2005	Albertson's Corporation	sale of 406,750 shares of common stock
FIVE	December 22, 2005	Albertson's Corporation	sale of 311,600 shares of common stock
SIX	December 22, 2005	Albertson's Corporation	sale of 1,493,300 shares of common stock
SEVEN	January 11, 2006	Albertson's Corporation	purchase of 269,200 shares of common stock
EIGHT	January 11, 2006	Albertson's Corporation	purchase of 30,700 shares of common stock
NINE	January 11, 2006	Albertson's Corporation	purchase of 557,100 shares of common stock
TEN	January 11, 2006	Albertson's Corporation	purchase of 318,000 shares of common stock

(Title 15, United States Code, Sections 78j(b) and 78ff;
Title 17, Code of Federal Regulations,
Sections 240.10b-5 and 240.10b5-2; and
Title 18, United States Code, Section 2.)

FORFEITURE ALLEGATION

19. As a result of committing one or more of the foregoing securities fraud offenses alleged in Counts One through Ten of this Indictment, JOSEPH CONTORINIS, the defendant, shall forfeit to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code Section 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the securities fraud offenses, including but not limited to the following:

Money Judgment

a. At least $7,200,000 in United States currency, in that such sum in aggregate is property which was derived from proceeds traceable to the commission of the securities fraud offenses listed in Counts One through Ten of the Indictment.

Substitute Assets Provision

20. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendant up to the value of the forfeitable property described above.

(Title 15, United States Code, Sections 78j(b) and 78ff;
Title 18, United States Code, Section 981(a)(1)(C);
Title 28, United States Code, Section 2461(c);
and Title 17, Code of Federal Regulations,
Sections 240.10b-5 and 240.10b5-2.)

FOREPERSON

PREET BHARARA
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

JOSEPH CONTORINIS,

Defendant.

INDICTMENT

09 Cr. ___

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2; and Title 18, United States Code, Sections 2 and 371.)

PREET BHARARA
United States Attorney.

A TRUE BILL

Foreperson.

11/5/09 Filed Indictment. Case Assigned to Judge Sullivan. S/ Mag. Judge Katz

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-15308

In the Matter of

JOSEPH CONTORINIS,

Respondent.

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AND MEMORANDUM OF LAW IN SUPPORT THEREOF AGAINST RESPONDENT JOSEPH CONTORINIS

VOLUME II
EXHIBITS H - J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. NICOS ACHILLEAS STEPHANOU, *et al.*, Defendants.

Civil Action No. 09-1043 (RJS)

ECF Case

DEFENDANT JOSEPH CONTORINIS'S MEMORANDUM OF LAW IN OPPOSITION TO THE SEC'S MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

Joseph Contorinis does not dispute that summary judgment as to liability can be entered against him based on the preclusive effect of the jury's verdict in the criminal case. Mr. Contorinis does, however, dispute that entry of summary judgment is appropriate on any other grounds. Mr. Contorinis also disputes that the SEC is entitled to the relief sought in its motion.

In addition to a term of incarceration that the Court itself described as "significant," Mr. Contorinis was ordered to pay to the government $12.65 million—a sum nearly five times his net worth. Yet the SEC—without disputing that the criminal forfeiture imposed by the Court vastly exceeds Mr. Contorinis's net worth—now seeks further financial punishment for the same conduct, and asks the Court to order Mr. Contorinis to pay another $31 million—including $7,260,604 in disgorgement, $2,485,205 in prejudgment interest, and $21,781,812 in civil monetary penalties. The further penalties sought by the SEC are neither warranted nor necessary on the facts of this case.

Background

The SEC filed this action on February 5, 2009, alleging that Mr. Contorinis traded in Albertsons stock based on inside information on behalf of the Jefferies Paragon Fund (the "Fund"). Mr. Contorinis was charged criminally in a complaint dated the day prior in connection with the same allegations, and was subsequently indicted on November 5, 2009 for one count of conspiracy to commit insider trading and nine substantive counts of insider trading.

On October 6, 2010, the jury in the criminal case returned a guilty verdict on eight of the ten counts, acquitting Mr. Contorinis with respect to trades made on December 7, 2005. This Court subsequently sentenced Mr. Contorinis to six years' imprisonment and ordered Mr. Contorinis to forfeit $12,650,438—an amount representing profits made by the Fund in

connection with its trades in Albertsons in January 2006, as well as losses avoided by the Fund in connection with its sales of Albertsons on December 22, 2005.

Mr. Contorinis filed a Notice of Appeal of his conviction and of the forfeiture order on December 30, 2010.[1] The SEC subsequently filed this motion for summary judgment based, "in large part," on the collateral estoppel effect of Mr. Contorinis's conviction.[2] (SEC Mem.[3] at 2.)

Argument

I. SUMMARY JUDGMENT ON LIABILITY BASED ON ANY GROUNDS OTHER THAN COLLATERAL ESTOPPEL IS NOT WARRANTED.

Where, as here, a defendant has been convicted of insider trading, the SEC is ordinarily entitled to summary judgment on the issue of liability relating to the same alleged conduct. *SEC* v. *Freeman*, 290 F. Supp. 2d 401, 405 (S.D.N.Y. 2003); *SEC* v. *McCaskey*, No. 98 Civ. 6153, 2001 WL 1029053, at *3 (S.D.N.Y. Sept. 6, 2001).[4] Accordingly, Mr. Contorinis

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1 Mr. Contorinis submitted his opening appeal brief on April 13, 2011 and the appeal is scheduled to be fully briefed by the end of July 2011.

2 The Court is respectfully referred to Mr. Contorinis's accompanying Responses in Opposition to Plaintiff's Rule 56.1 Statement of Undisputed Facts and Defendant's Counterstatement of Undisputed Facts for a more complete recitation of the facts relevant to this motion.

3 "SEC Mem." refers to the Memorandum of Law in Support of Plaintiff Securities and Exchange Commission's Motion for Summary Judgment against Defendant Joseph Contorinis, dated March 29, 2011.

4 As noted above, Mr. Contorinis has appealed his conviction and the order of forfeiture entered in connection with his sentencing. Because that appeal could, as a practical matter, moot the issue of fines and penalties (or at least the issue of Mr. Contorinis's ability to pay any further fine), we asked the SEC to join us in a request to stay this case until the appeal was decided. The SEC refused.

respectfully submits that if the Court is inclined to grant the SEC summary judgment on the issue of liability, the Court need not consider any of the other grounds raised by the SEC.[5]

To the extent that the Court is inclined to reach any of the SEC's other arguments, however, the Court should deny the motion for summary judgment because there are genuine issues of material fact.[6]

At the criminal trial, Mr. Contorinis introduced hundreds of newspaper articles, analyst reports, press releases, and other publicly-available information that demonstrates that any information Mr. Stephanou may have had about the Albertsons deal, and may have shared with Mr. Contorinis, was neither non-public nor material. (*See, e.g.*, Exhibit A to the accompanying declaration of Farrah R. Berse (the "Berse Decl.").) These publicly-available articles and reports are appropriate for consideration on this motion and create a genuine issue of material fact as to whether any information Mr. Stephanou may have passed to Mr. Contorinis was material, non-public information.[7]

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[5] If Mr. Contorinis is successful in overturning his conviction, he will move for relief from any judgment entered as a result of that conviction. *See* Fed. R. Civ. P. 60(b)(5) ("[T]he court may relieve a party . . . from a final judgment, order, or proceeding" where the judgment "is based on an earlier judgment that has been reversed or vacated.").

[6] Summary judgment is appropriate where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The evidence on each material element must be sufficient to entitle the movant to relief as a matter of law." *Armstrong* v. *Collins*, Nos. 01 Civ. 2437, 02 Civ. 2796, 02 Civ. 3620, 2010 WL 1141158, at *17 (S.D.N.Y. Mar. 24, 2010). All ambiguities and reasonable inferences must be drawn in the non-movant's favor. *Vt. Teddy Bear Co.* v. *1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004). The Court should not weigh the evidence in deciding summary judgment, but rather should determine only whether a genuine issue of material fact exists. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

[7] There are other genuine issues of material fact to consider. For example, prior to the opening of the market on January 23, 2006, Albertsons announced that it had reached an agreement, pursuant to which the consortium would purchase the company. The price of Albertsons stock opened only approximately 3% above the prior day's closing price. (*See* Berse Decl. Ex. J at 2056A.2.) Accordingly, issues of fact also remain as to whether or not the information Mr. Stephanou had about the closing of the deal was even material.

The SEC's assertion that Mr. Contorinis may not offer *any* evidence in his defense is incorrect. (*See* SEC Mem. at 11-12.) While some courts have prevented defendants who invoke their Fifth Amendment rights from filing personal affidavits, defendants are nevertheless permitted to introduce other evidence on their own behalf. *See, e.g.*, *United States* v. *Certain Real Prop. & Premises Known As: 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3d 78, 85 n.8 (2d Cir. 1995) ("[C]ircuit courts have reversed decisions in which a trial court has automatically entered judgment against the party that invoked the Fifth Amendment or has precluded that party from presenting any evidence whatsoever."); *SEC* v. *Graystone Nash, Inc.*, 25 F.3d 187, 191 (3d Cir. 1994) ("[A] complete bar to presenting any evidence, from any source, that would in all practical effect amount to the entry of an adverse judgment, would be an inappropriate sanction" for "a valid invocation of the [Fifth Amendment] privilege during discovery.").[8]

The cases that the SEC cites are entirely distinguishable. In *SEC* v. *Invest Better 2001*, No. 01 Civ. 11427, 2005 WL 2385452, at *2-3 (S.D.N.Y. May 4, 2005), the court precluded the defendants from introducing evidence concerning an accounting and asset list of dubious accuracy that the defendants provided to the SEC but refused to explain on Fifth Amendment grounds. As a result of the defendants' invocation of the Fifth Amendment, the SEC expended substantial resources to develop an accurate accounting and was otherwise prejudiced by the defendants' invocation of their rights. As that court explained, "when a party

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[8] Additionally, a defendant who has asserted his Fifth Amendment privilege may move the court to rescind his invocation of that right. *4003-4005 5th Ave.*, 55 F.3d at 84-85; *United States* v. *Snyder*, 233 F. Supp. 2d 293, 300 (D. Conn. 2002). Such a request should be granted where, as here, the defendant has not invoked the privilege to abuse the discovery process or gain an unfair strategic advantage, and the government has not suffered any prejudice. *4003-4005 5th Ave.*, 55 F.3d at 84-85; *Fid. Funding of Ca.* v. *Reinhold*, 190 F.R.D. 45, 52 (E.D.N.Y. 1997).

invokes the Fifth Amendment privilege in a civil case, courts may then preclude that party from introducing *evidence that was not previously available to his or her adversary due to the party's invocation of the privilege.*" *Id.* at *2 (emphasis added). Here, Mr. Contorinis offers publicly-available information—information which was equally available to the SEC and which was not withheld from the SEC due to Mr. Contorinis's invocation of his rights.

Similarly, in *4003-4005 5th Ave.*, the trial court precluded the defendant from waiving his invocation of the Fifth Amendment because the defendant had abused the privilege to "stonewall[] the Government's attempt to proceed with its action." 55 F.3d at 85-86. Mr. Contorinis's invocation of the Fifth Amendment privilege, on the other hand, has not led the SEC to incur unnecessary expenses or delayed the lawsuit in any way, nor has the SEC offered any evidence that it has suffered any prejudice as a result of Mr. Contorinis's invocation of his constitutional rights.

In addition, the Court should not draw an adverse inference against Mr. Contorinis for invoking his Fifth Amendment right. "[T]he drawing of an adverse inference against a litigant who invokes the Fifth Amendment is a harsh remedy that is normally employed to counter a defendant's desire to obstruct discovery or abuse the privilege against self-incrimination." *Sampson* v. *City of Schenectady*, 160 F. Supp. 2d 336, 351 (N.D.N.Y. 2001). Mr. Contorinis has not invoked his constitutional right to obstruct discovery, and would be unduly prejudiced should the Court draw an adverse inference. Accordingly, no such inference should be drawn. *In re Inflight Newspapers, Inc.*, 423 B.R. 6, 17 (E.D.N.Y. 2010) (finding that a court must determine that the party asserting the Fifth Amendment privilege is not unduly prejudiced before drawing an adverse inference). In any event, should the Court draw an adverse inference, the SEC's motion cannot succeed on that basis alone. *SEC* v. *Susman*, 684 F. Supp.

2d 378, 386 (S.D.N.Y. 2010) ("[A] motion for summary judgment cannot be granted on an adverse inference alone . . . ."); *Fid. Funding of Ca., Inc.* v. *Reinhold*, 79 F. Supp. 2d 110, 116 (E.D.N.Y. 1997) (noting that a motion for summary judgment "must stand or fall on the merits of the evidence adduced," not on an adverse inference drawn from an invocation of the Fifth Amendment privilege).

Finally, even if the Court were to deem all facts stated in the SEC's Requests for Admission (the "RFAs") to have been admitted, those facts do not establish that Mr. Contorinis committed insider trading. The RFAs generally asked Mr. Contorinis to admit facts relating to the time and length of telephone calls made between him and Mr. Stephanou, as well as about Mr. Contorinis's relationship with Mr. Stephanou and Mr. Contorinis's relationship to the Fund. The RFAs—even if all admitted—do not establish all of the elements of the SEC's claims. For example, the RFAs do not establish that Mr. Contorinis traded on the basis of material nonpublic information, that such information was provided by Mr. Stephanou in violation of a fiduciary duty, or other duty of confidentiality, or that Mr. Contorinis acted with the requisite scienter. Even if all taken as true, when combined with the publicly-available information about the Albertsons transaction, there are material issues of disputed fact which cannot be resolved on a motion for summary judgment.

For these reasons, summary judgment should not be granted on any of the SEC's alternative theories.

II. THE COURT SHOULD NOT ORDER THE DISGORGEMENT OF $7.2 MILLION.

The SEC is seeking disgorgement of the "profits that Contorinis obtained through his fraudulent conduct," which the SEC claims amount to $7,260,604. (SEC Mem. at 21-22.) The SEC is not, however, entitled to $7.2 million—or any sum—under a theory of disgorgement.

As even the SEC concedes, the $7.2 million of allegedly illegal profits were the result of trades "on behalf of, and for the benefit of, the Paragon Fund" (Facts, ¶ 30), not trades made on Mr. Contorinis's own behalf. Disgorgement—an equitable remedy—should not be used to require the payment of funds: (1) that Mr. Contorinis has already been ordered to forfeit; (2) that were never received or enjoyed by Mr. Contorinis; and (3) without deducting all of the Fund's costs in making its trades in Albertsons or calculating the value of the inside information. Under these circumstances, ordering the disgorgement of $7.2 million would be inappropriate.[9]

A. Mr. Contorinis Cannot Be Required to Disgorge Profits He Has Already Been Ordered to Forfeit.

Disgorgement is an equitable remedy designed to prevent unjust enrichment caused by the defendant's wrongdoing. *See, e.g.*, *SEC* v. *First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) ("disgorgement is a method of forcing a defendant to give up the amount by which he was unjustly enriched"); *SEC* v. *Patel*, 61 F.3d 137, 140 (2d Cir. 1995) ("disgorgement of profits merely deprives the [wrongdoers] of the gains of their wrongful conduct" (internal quotation marks omitted, alteration in original)); *Susman*, 684 F. Supp. 2d at 392 ("Disgorgement is a method of forcing a defendant to give up the amount by which he was unjustly enriched." (internal quotation marks omitted)). As the purpose of disgorgement is to prevent unjust enrichment, Mr. Contorinis cannot be ordered to disgorge profits he has already been ordered to forfeit.

As the Court is aware, Mr. Contorinis has already been ordered to forfeit $12.65 million, which includes the Fund's profits from trading in Albertsons in January 2006—*the very*

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[9] Many of the issues raised in the disgorgement section of this brief relate to issues raised by Mr. Contorinis's pending appeal of the forfeiture order. For example, that appeal raises issues of: (1) whether a defendant can be ordered to forfeit funds he never received or enjoyed; (2) whether the Fund's costs should be deducted from the amount to be paid; and (3) whether the value of the inside information must be taken into account.

same funds the SEC seeks here. As a result of the order requiring Mr. Contorinis to forfeit these funds, it would be impossible for an order of disgorgement to prevent any unjust enrichment because Mr. Contorinis has already been ordered to return those funds. *Cf. SEC* v. *Palmisano*, 135 F.3d 860, 863-64 (2d Cir. 1998) (modifying disgorgement order to the extent it did not take into account money already paid, or to be paid, under a restitution order entered in connection with a related criminal case);[10] *First Jersey Secs., Inc.*, 101 F.3d at 1475 ("It was well within the court's discretion to give defendants credit for the $5 million paid out to reimburse victims of their frauds and to require defendants to disgorge the rest of those profits."); *SEC* v. *Credit Bancorp, Ltd.*, 738 F. Supp. 2d 376, 391 (S.D.N.Y. 2010) (holding that amount of disgorgement could be offset by amounts paid in restitution pursuant to an order in a related criminal case); *SEC* v. *Opulentica, LLC*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007) (same); *United States* v. *Elliott*, 714 F. Supp. 380, 381-82 (N.D. Ill. 1989) (a defendant cannot be ordered to forfeit funds under the RICO statute that he has already been ordered to disgorge in connection with a related SEC matter).[11]

Elliot is particularly instructive. In *Elliot*, the defendant moved to strike certain sections of the indictment that sought forfeiture of funds that he had already paid in connection with a related suit brought by the SEC. The court noted that since the securities transactions alleged in the civil complaint were the same as the racketeering acts alleged in the indictment,

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[10] In its appeal brief in *Palmisano*, the SEC conceded that "Defendant is only required to give back the proceeds of his securities fraud once. Thus, to the extent he pays back the victims of his securities fraud as a result of the criminal restitution order, those payments should be credited towards the disgorgement award." *Id.* at 863 (quoting SEC Appellate Brief at 13 n.11).

[11] *See also SEC* v. *Risman*, 7 F. App'x 30, 31 (2d Cir. Mar. 23, 2001) (finding that where portions of the disgorgement fund remained after the defendant made full restitution to the victims—as ordered in connection with a related criminal case—such funds must be returned to the defendant).

and the alleged illegal profits had already been paid to the SEC, the defendant could not also be ordered to forfeit the same funds. *Id.* As the court explained, the purpose of the racketeering forfeiture statute was to "separat[e] the racketeer from his dishonest gains. . . . But the SEC has already separated [the defendant] from his dishonest gains." *Id.* at 382 (internal quotation marks omitted). As the *Elliot* court further explained, the "money [the defendant] paid to the SEC was not paid to a third party; it was paid to an agency of the United States." *Id.* Under such circumstances, requiring forfeiture of the same funds would exact a "double recovery." *Id.*

The same analysis applies here. Mr. Contorinis has already been ordered to pay the Fund's alleged illegal profits to the United States. The SEC is not entitled to receive the same funds. Such an order would exact "double recovery" and would be merely punitive in nature and therefore improper. *See, e.g.*, *SEC* v. *Cavanagh*, 445 F.3d 105, 116 n.25, 117 (2d Cir. 2006) (disgorgement "is remedial rather than punitive").[12]

B. Mr. Contorinis Should Not Be Ordered to Disgorge Profits He Did Not Receive or Enjoy.

Moreover, Mr. Contorinis should not be required to disgorge profits that he did not receive or enjoy. This is not a case where there is a question about how much of the proceeds of insider trading a defendant *retained*. Nor is it a case where a defendant purposefully diverted funds or took other steps so as to never actually "receive" them. Rather, the question here is how much of the alleged profits Mr. Contorinis ever *received at all*, and, thus, by how much *he personally* was unjustly enriched. The SEC has calculated that the *Fund's* profits from

[12] Should the Court enter an order of disgorgement, it should also take into account the $4 million lost by the Fund as a result of trading in Albertsons in December 2005. Accordingly, should the Court determine that an order of disgorgement is appropriate, the maximum amount permitted is $3.2 million. *See SEC* v. *McCaskey*, No. 98 Civ. 6153, 2002 WL 850001, at *10 (S.D.N.Y. Mar. 26, 2002) (declining to award the SEC disgorgement where the profits sought were "more than offset" by the losses incurred during the alleged scheme).

its trades in Albertsons stock in January 2006 were approximately $7.26 million. (Facts, ¶ 30.) Mr. Contorinis, however, only personally profited a small percentage of that amount. Ordering Mr. Contorinis to disgorge any amount above his own profits would be inconsistent with the very purpose of disgorgement, which is to ensure that a defendant is "deprive[d] . . . of the gains of [his] wrongful conduct." *Patel*, 61 F.3d at 139 (internal quotation marks omitted); *see also SEC* v. *Gaspar*, No. 83 Civ. 3037, 1985 WL 521, at *20 (S.D.N.Y. Apr. 16, 1985) (declining to order an insider trading defendant to disgorge the amounts by which his customers profited, where he played a "minor role . . . in [the] entire transaction" and had a "lower level of culpability").[13]

C. Costs Should Be Deducted from Any Order of Disgorgement.

Before Mr. Contorinis can be ordered to disgorge any profits, the Court should deduct his costs. *See, e.g.*, *McCaskey*, 2002 WL 850001, at *4 ("Courts in this Circuit consistently hold that a court may, in its discretion, deduct from the disgorgement amount any direct transaction costs, such as brokerage commissions, that plainly reduce the wrongdoer's actual profit."); *see also SEC* v. *Rosenfeld*, No. 97 Civ. 1467, 2001 WL 118612, at *2 (S.D.N.Y. Jan. 9, 2001) ("A court may in its discretion, deduct from the defendant's gross profits certain expenses incurred while garnering the illegal profits, including . . . transaction costs such as brokerage commissions."). This is necessary so that disgorgement remains "remedial rather than punitive." *McCaskey*, 2002 WL 850001, at *4 (internal quotation marks omitted); *see also Litton Indus., Inc.* v. *Lehman Bros. Kuhn Loeb, Inc.*, 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990)

[13] None of the cases to which the SEC has cited resulted in the defendant being ordered to disgorge monies that the defendant never possessed or had the ability to possess. *See, e.g.*, *First Jersey Secs., Inc.*, 101 F.3d at 1475-76 (affirming order of disgorgement where individual defendant who was sole, 100% owner of the firm was held jointly and severally liable for the full amount of disgorgement); *Patel*, 61 F.3d at 138-40 (affirming order of disgorgement against defendant who personally traded in stock based on inside information); *see also Suman*, 684 F. Supp. 2d at 382-84, 392 (ordering disgorgement where defendants personally traded in stock based on inside information).

("To require disgorgement of all fees and commissions without permitting a reduction for associate expenses and costs constitutes a penalty assessment and goes beyond the restitutionary purpose of the disgorgement doctrine. Therefore, transaction costs such as brokerage commissions incurred by [defendant] in executing trades in [the company's] securities should be deducted from any fees and commissions disgorged as profit."). As the court in *SEC* v. *Shah*, 92 Civ. 1952, 1992 WL 288285 (S.D.N.Y. July 28, 1993), explained:

> Allowing a deduction for reasonable brokers' commissions incurred in making insider trades is consistent with the view in the Second Circuit that disgorgement is not a penalty assessment, but merely a means of divesting a wrongdoer of ill-gotten gains. [Defendant] has already paid the commissions to his broker. Requiring him now to disgorge an amount equal to those commissions would penalize him by compelling him to pay the commissions twice.

Id. at *5.

The record establishes that the Fund incurred significant costs in making its trades, including commissions and upwards of 35% in hedging costs, generally. (Berse Decl. Ex. B.) These costs should be deducted from any order of disgorgement.[14]

D. The SEC Has Not Shown that the Full Amount Sought Was the Result of Misconduct.

The Court may not order disgorgement of the entirety of a defendant's profits, but only those profits that the SEC demonstrates have been earned as a result of misconduct. *Cf. SEC* v. *First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C.C. 1989) (in ascertaining whether disgorgement is appropriate, "the SEC generally must distinguish between legally and illegally obtained profits"); *SEC* v. *MacDonald*, 699 F.2d 47, 52-55 (1st Cir. 1983) (en banc) (rejecting

[14] The SEC's calculation of the Fund's profits appears to take commission costs—and only commission costs—into account. (*See* Declaration of John S. Rymas ¶¶ 23-24, Ex. B [Docket No. 145].) For the reasons explained above, *all* of the Fund's direct costs should be deducted from any order of disgorgement, not just commissions. Further, to the extent the SEC has *not* take all commission costs into account, those should likewise be deducted.

calculation of disgorgement where SEC made no effort to connect the amount of disgorgement to the fraudulent conduct); *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104-05 (2d Cir. 1972) (declining to order disgorgement of income the defendant subsequently earned on his initial illegal profits); *SEC* v. *Johnson*, No. 03 Civ. 177, 2006 WL 2053379, at *8 (S.D.N.Y. July 24, 2006) (ordering disgorgement of only those profits that defendant "clearly received in connection with his charged fraudulent activities"). Thus, "the court may exercise its equitable power only over property *causally related* to the wrongdoing." *First City Fin. Corp., Ltd.*, 890 F.2d at 1231 (emphasis added). The SEC bears the burden of demonstrating the required causal connection. *Id.* at 1231-32.

It has never been established that, absent any inside information, Mr. Contorinis would not have made the questioned trades at all. To the contrary, the record establishes that the Fund had been investing in Albertsons stock for over a year before Mr. Stephanou even came into possession of inside information, and that the Fund bought and sold Albertsons stock even in the absence of inside information. (Berse Decl. Ex. C.)

So, for example, on September 2, 2005, after the public announcement that Albertsons was exploring strategic alternatives, *but prior to Mr. Stephanou even being placed on the deal team*, the Fund invested over $17 million in Albertsons. (*Id.* at 2051A.1.) Furthermore, Michael Handler—the Fund's co-Portfolio Manager, whom the government has never claimed was a conspirator—explained, based entirely on publicly-available information, the reasons why each of the questioned trades was made. (Berse Decl. Ex. D at 1056:18-23, 1061:1-1062:10,

1096:1-7.) Mr. Contorinis should be ordered to disgorge, at most, the difference between the profits he would have made absent the alleged fraud and those actually made.[15]

For these reasons as well, Mr. Contorinis cannot be required to disgorge $7.2 million.[16]

III. THE COURT SHOULD NOT IMPOSE A FINE.

In addition to an injunction and substantial disgorgement, the SEC also requests that the Court impose a significant civil penalty on Mr. Contorinis, in the maximum allowable amount of three times the alleged profits, or a total of $21,781,812. The SEC's request is, we submit, overreaching and unnecessarily punitive. Where, as here, a defendant has already been ordered to pay a multiple of his net worth in a related proceeding, the Court should not impose any additional monetary penalty.

Section 21A of the Exchange Act vests the SEC with the ability to seek a civil monetary penalty against a person who has violated a provision of the Act. 15 U.S.C. § 78u-1(a)(1)(A). The amount of any such penalty "shall be determined by the court in light of the

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[15] The record further establishes that the Fund made trades inconsistent with Mr. Stephanou's inside information. For example, on January 18 and 19 (when Mr. Stephanou was in possession of inside information concerning the possibility of the deal closing) the Fund sold over 500,000 shares. (Berse Decl. Ex. C at 2051A.5-6.)

[16] After the Court takes into account the profits actually made by Mr. Contorinis, the Fund's costs, and the actual value of the inside information, if the Court is inclined to order Mr. Contorinis to disgorge any funds, prejudgment interest should not be awarded on that sum. An award of prejudgment interest is discretionary. *See, e.g., First Jersey Secs., Inc.*, 101 F.3d at 1476. "In deciding whether an award of prejudgment interest is warranted, a court should consider (i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *Id.* As discussed above, Mr. Contorinis did not receive, enjoy, or control the profits the SEC seeks, and he has already been ordered to forfeit such profits. Accordingly, considerations of fairness counsel in favor of declining to order prejudgment interest.

facts and circumstances, but shall not exceed three times the profit gained or loss avoided . . . ." *Id.* § 78u-1(a)(2).

Courts therefore have broad discretion to impose penalties less than the amount sought by the SEC, even where the statutory predicate is met. Indeed, a court may refuse to assess *any* civil penalties at all against a defendant. *See, e.g.*, *SEC* v. *Smath*, 277 F. Supp. 2d. 186, 188 (E.D.N.Y. 2003) (taking into consideration that the defendant "had no prior criminal history and now has a felony conviction on his record" and ordering the defendant to pay only $1.00 in nominal damages to the SEC because "enough is enough"); *Shah*, 1993 WL 288285, at *6 (finding penalty unwarranted based on "extensive criminal and regulatory penalties and discipline which [defendant] has already suffered" and which "sufficiently further the goal of deterrence"); *see also SEC* v. *Hickey*, No. C 94-03336 WHA, 2000 WL 236427, at *3 (N.D. Cal. Feb. 18, 2000) (exercising discretion not to impose civil monetary penalties).[17]

As part of this discretionary inquiry, courts consider several factors, none of which is dispositive, in assessing civil monetary penalties, including: (1) "the defendant's culpability;" (2) "the amount of profits gained;" (3) "the repetitive nature of the unlawful act;" and (4) "the deterrent effect of a penalty given the defendant's net worth." *Susman*, 684 F. Supp. 2d at 393 (internal quotations and citations omitted). Here, an assessment of these factors counsels against the imposition of a civil penalty upon Mr. Contorinis.

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[17] Similarly, a court may set a penalty well below the amount sought by the SEC or authorized by statute. *See, e.g.*, *SEC* v. *Robinson*, No. 00 Civ. 7452, 2002 WL 1552049, at *12 (S.D.N.Y. July 16, 2002) (recommending $100,000 penalty instead of $22.7 million authorized by statute); *SEC* v. *Falbo*, 14 F. Supp. 2d 508, 528-29 (S.D.N.Y. 1998) (declining to "impose the extreme penalty requested by the SEC" even where defendant attempted to conceal trades and passed information to others, but had no prior or subsequent history of insider trading, only traded illicitly in one company's securities, and was not employed in the securities industry).

Most significantly, consideration of Mr. Contorinis's financial condition and the deterrent effect of any additional monetary penalty points decisively against assessing a penalty here. *See, e.g.*, *Credit Bancorp, Ltd.*, 738 F. Supp. 2d at 391 ("[Defendant's] current and future financial situation precludes imposing a penalty."); *SEC* v. *Paul*, No. CV 04-6613 SVW SSX, 2005 WL 1774101, at *1 (C.D. Cal. July 20, 2005) (refusing to order any civil penalty and waiving payment of all but $100,000 of disgorgement and prejudgment interest totaling $411,482.72 based on defendant's financial condition); *SEC* v. *House Asset Mgmt.*, No. 02-2147, 2004 WL 2125773, at *3 (C.D. Ill. Aug. 20, 2004) (imposing $65,000 penalty, not $120,000 maximum penalty sought by SEC, because "[i]n light of the circumstances, especially Defendant's financial condition, [the maximum] amount seems too severe").

There is no way in which a civil penalty could have any deterrent effect on Mr. Contorinis. First, due to this Court's order of forfeiture, Mr. Contorinis now has a *negative* net worth of approximately $10 million. As noted in the Presentence Investigation report prepared by the Probation Office, as of November 19, 2010, Mr. Contorinis had a net worth of $2,638,965. Since that time, however, this Court has ordered Mr. Contorinis to forfeit $12.65 million, thereby resulting in Mr. Contorinis's negative net worth.[18] Having already been stripped of all his money (and then some), an additional monetary penalty simply cannot have a deterrent effect on Mr. Contorinis.

Moreover, Mr. Contorinis has no prospects of ever again earning a substantial income. Mr. Contorinis is currently incarcerated, serving a sentence of 72 months' imprisonment. He has no ability to earn an income during his incarceration. And, as discussed below with respect to the SEC's request for a permanent injunction, Mr. Contorinis has very few

[18] No criminal fine was imposed against Mr. Contorinis.

prospects for future income in the financial community. For this reason as well, any additional monetary penalty can have no deterrent effect on Mr. Contorinis.

Finally, regardless of Mr. Contorinis's financial situation, there is no indication whatsoever that he will commit any further crimes in the future. As the Court stated during Mr. Contorinis's sentencing, "[a]s to specific deterrence, *I don't think there is any chance that you are going to commit crimes in the future. . . . There is not much dispute about that.*" (Berse Decl. Ex. E at 56:18-21 (emphasis added).) Accordingly, there is no need for specific deterrence in Mr. Contorinis's case, in the form of a civil monetary penalty or otherwise.

Consideration of the other factors also weighs against the assessment of a civil monetary penalty against Mr. Contorinis. With regard to Mr. Contorinis's culpability, his alleged conduct lacks several of the more egregious characteristics of insider trading cases. For example, there was no payment to or sharing of proceeds with the tipper, Mr. Stephanou; there was no trading in personal accounts, let alone the use of secret accounts or accounts in the names of others; there were no efforts whatsoever to conceal the conduct at issue; and Mr. Contorinis—even by Mr. Stephanou's account—stopped trading on inside information years before he was caught. (Berse Decl. Ex. D at 487:5-15, 552:18-20, 887:20-22, 889:10-15.)

Nor was Mr. Contorinis's unlawful conduct repetitive in nature. Rather, the conduct upon which the SEC's complaint is based was an isolated event over the course of Mr. Contorinis's unblemished career of more than twenty years in the financial services industry. Indeed, Mr. Stephanou testified that he gave Mr. Contorinis inside information on stocks in which Mr. Contorinis never traded. (*Id.* at 552:12-25.)

Finally, as already discussed with respect to disgorgement, the amount of the civil penalty being sought here is in no way related to, and far exceeds, the amount of any profits that Mr. Contorinis received or enjoyed as a result of the conduct at issue.

In sum, Mr. Contorinis's criminal conviction, sentence, the order of forfeiture against him, and these proceedings have had a profoundly negative effect on Mr. Contorinis's life and career. With or without an injunction, he has been effectively barred from working in the financial services industry. With or without an order mandating disgorgement, the combined effect of his criminal conviction and sentence, along with the order of forfeiture, has substantially altered his financial situation and prospects for future earnings. To impose an additional, significant penalty upon Mr. Contorinis would be unnecessarily punitive. *See, e.g.*, *SEC* v. *Pardue*, 367 F. Supp. 2d 773, 777-78 (E.D. Pa. 2005) (imposing $25,000 penalty on defendant because court saw "no reason to pointlessly impose an order for monetary relief with dubious chances of execution and for no other purpose than further solidifying the financial ruination of the defendant and his innocent family"). Accordingly, no such penalty should be imposed.

IV. THE COURT SHOULD NOT PERMANENTLY ENJOIN MR. CONTORINIS FROM WORKING IN THE SECURITIES INDUSTRY.

Finally, the Court should not permanently enjoin Mr. Contorinis from working in the securities industry. A permanent injunction is "a drastic remedy" that is inappropriate under these circumstances. *SEC* v. *Dibella*, No. 3:04cv1342, 2008 WL 6965807, at *12 (D. Conn. Mar. 13, 2008); *see also SEC* v. *Unifund SAL*, 910 F.2d 1028, 1040 (2d Cir. 1990) (recognizing that a permanent injunction against future securities law violations has "grave consequences"). Such an injunction should only be issued where there is a "cognizable danger of recurrent violation"— which there is not in this case. *Dibella*, 2008 WL 6965807, at *12. In order to

make the "substantial showing" that Mr. Contorinis is likely to commit a future offense, it is insufficient for the SEC to rely on Mr. Contorinis's past violation, as it does here. *Id.*; *Unifund SAL*, 910 F.2d at 1040.

In determining whether to impose a permanent injunction, the Court should consider the following factors:

> the fact that the defendant has been found liable for illegal conduct; the degree of scienter involved; whether the infraction is an isolated occurrence; whether defendant continues to maintain that his past conduct was blameless; and whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.

SEC v. *Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998) (internal quotation marks omitted). An additional factor for the Court to weigh is the adverse effect that an injunction would have on the defendant. *Manor Nursing Ctrs.*, 458 F.2d at 1102.

While Mr. Contorinis was found guilty of violating securities laws and maintains his innocence, a permanent injunction is nevertheless unwarranted because the alleged illegal conduct was isolated and because Mr. Contorinis is unlikely to commit any other violations. Mr. Contorinis worked in the finance industry for twenty years without a single allegation of misconduct. He was not involved in systematic wrongdoing; to the contrary, Mr. Stephanou testified that, although he provided Mr. Contorinis inside information on four different companies, Mr. Contorinis only traded on two of them, while Mr. Stephanou and his friends traded on many others. (Berse Decl. Ex. D at 552:12-25.) Furthermore, the last piece of inside information Mr. Contorinis allegedly traded upon was in January 2006, which was two and a half years before his arrest and more than five years ago. As this Court noted at Mr. Contorinis's sentencing, there is very little chance of Mr. Contorinis repeating any wrongful conduct. (Berse Decl. Ex. E at 56:18-21.)

Not only is a permanent injunction inappropriate, but it is also unnecessary. The SEC can revoke Mr. Contorinis's license on the basis of his conviction, and has the discretion to reinstate his license thereafter. 15 U.S.C. § 78o(b)(4)(B). Mr. Contorinis is already barred by statute from registering with the stock exchanges for the ten years following his conviction. *Id.* § 78c(4)(B)(39)(F). There is therefore no need for a permanent injunction to protect the public. Additionally, Mr. Contorinis would suffer extreme harm should this Court issue an injunction, as it would prevent him from resuming any work in the securities industry. Mr. Contorinis has spent decades working in finance and it is his sole means of livelihood. Any benefit from an injunction is therefore far outweighed by the harm it would cause to Mr. Contorinis.

Conclusion

For the foregoing reasons, Mr. Contorinis respectfully submits that if the Court enters summary judgment in favor of the SEC, such order should be made on the basis of the preclusive effect of the criminal conviction, and that the Court deny the SEC's motion for disgorgement, civil penalties, and a permanent injunction.

Dated: May 10, 2011
New York, New York

Respectfully submitted,

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12-1723-cv

United States Court of Appeals
for the
Second Circuit

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

JOSEPH CONTORINIS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF AND SPECIAL APPENDIX OF
DEFENDANT-APPELLANT JOSEPH CONTORINIS

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STATUTES

Defendant-Appellant Joseph Contorinis appeals from a judgment (the "Judgment") entered on February 29, 2012 in the United States District Court for the Southern District of New York. (SPA-9-16.[1]) The Judgment was entered after the district court granted summary judgment for Plaintiff-Appellee, the United States Securities and Exchange Commission ("SEC"). (SPA-1-8.)

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 15 U.S.C. §§ 78u(d), 78u(e), 78u-1, and 78aa. The district court entered the Judgment on February 29, 2012. (SPA-9-16.) Mr. Contorinis filed a timely notice of appeal on April 24, 2012 (the "Civil Appeal"). (A-410-424.) The Court "so ordered" the parties' stipulation withdrawing the Civil Appeal pending resolution of an appeal in a parallel criminal case without prejudice and subject to reactivation on June 26, 2012, and "so ordered" the parties' stipulation extending the withdrawal of the Civil Appeal, again subject to reactivation, on September 21, 2012. [Docket Nos. 40 & 56.] Mr. Contorinis timely submitted a notice of reinstatement on December 11, 2012, and the Civil Appeal was reinstated by this Court on December 18, 2012. [Docket Nos. 58-59.] This Court has jurisdiction under 28 U.S.C. § 1291.

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[1] References to "SPA" are to the Special Appendix attached to this brief. References to "A" are to the Joint Appendix filed with this brief.

INTRODUCTION

This appeal principally involves a challenge to a district court order that requires Defendant-Appellant Joseph Contorinis to "disgorge" over $7.2 million in "profits" that he never acquired or controlled and to pay nearly $2.5 million in prejudgment interest on monies he never held (including monies held by the U.S. government as part of a bail package in a related criminal case). This disgorgement order was entered even though Mr. Contorinis's actual profits from the conduct in question were—according to a stipulation agreed to by the U.S. government—less than $430,000 (less than six percent of the amount ordered to be disgorged).

In an appeal of the related criminal case, this Court held that the district court erred in ordering Mr. Contorinis to forfeit amounts that he did not possess or control. The same reasoning applies here, in that an individual cannot be required to "disgorge" amounts that he did not gain, either directly or indirectly. To hold otherwise would ignore both the plain meaning and the purpose of disgorgement, which is based on the concept of illicit gain to the defendant. The district court's error was compounded in this case, when the court ordered Mr. Contorinis to pay millions of dollars of prejudgment interest on amounts that Mr. Contorinis never held, controlled, or enjoyed.

The district court also erred in entering a permanent injunction against future violations of the securities laws because the SEC did not meet its burden of establishing a reasonable likelihood that Mr. Contorinis will violate the securities laws in the future.

For the reasons discussed below, the district court's order of disgorgement (approximately $7.2 million, plus approximately $2.5 million in prejudgment interest) and the injunction should be vacated.

ISSUES PRESENTED

1. Whether the district court erred in ordering Mr. Contorinis to "disgorge" $7,260,604 based on profits earned not by himself, but by the fund by which he was employed as a co-Portfolio Manager, where those profits were never acquired, enjoyed, or controlled by Mr. Contorinis.

2. Whether the district court erred in ordering Mr. Contorinis to pay $2,485,205 in prejudgment interest where: (1) Mr. Contorinis never directly or indirectly acquired or controlled the original sum he was ordered to disgorge; and (2) the amount on which interest was calculated included $3 million of Mr. Contorinis's assets which was held as bail—even following Mr. Contorinis's remand—by the U.S. government in connection with a related criminal case, *United States* v. *Contorinis*, No. 09-cr-1083 (S.D.N.Y.) (Sullivan, J.) (the "Criminal Case").

3. Whether the district court erred in permanently enjoining Mr. Contorinis from violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

STATEMENT OF THE CASE

The SEC filed this action on February 5, 2009. (A-52-87.) In its Complaint, the SEC alleged that Mr. Contorinis violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder by trading on inside information in the stock of Albertsons, Inc. ("Albertsons"). The Complaint did not allege—and the SEC never sought to show—that Mr. Contorinis made these trades for his own benefit. Rather, the Complaint alleges that Mr. Contorinis made the trades on behalf of the Jefferies Paragon Fund (the "Fund"), (A-66-69), a fund for which Mr. Contorinis was a co-Portfolio Manager. (SPA-2; A-282-283.) Likewise, the SEC did not allege—and again never sought to show—that the profits from those trades were acquired, enjoyed, or controlled by Mr. Contorinis.

On November 5, 2009, Mr. Contorinis was indicted in a parallel criminal case based on allegations virtually identical to those alleged in the SEC's Complaint. (A-134-147.) On October 6, 2010, the jury in the Criminal Case returned guilty verdicts on one count of conspiracy to commit securities fraud and seven substantive counts of insider trading, while finding Mr. Contorinis not guilty of two counts of substantive insider trading. (A-157-158.) On December 17,

2010, Mr. Contorinis was sentenced to 72 months' imprisonment and was ordered to forfeit $12,650,438, an amount which included the approximately $7.2 million in profits earned by the Fund that Mr. Contorinis has been ordered to disgorge here. (SPA-6; A-149-155, 293, 342-345.)

On appeal of the Criminal Case, this Court affirmed the conviction, but vacated the order of forfeiture after holding that Mr. Contorinis could not, *as a matter of law*, be required to forfeit funds that he never received or controlled. *United States* v. *Contorinis*, 692 F.3d 136, 148 (2d Cir. 2012). On remand, the parties to the Criminal Case agreed that in light of this Court's order, the appropriate amount of forfeiture—representing Mr. Contorinis's personal profits as a result of the trades at issue here—was $427,875, approximately *one-twentieth* of the amount Mr. Contorinis has been ordered to disgorge in this case. The parties' proposed amended order of forfeiture reflecting this agreed-upon amount is still before the district court on remand.[2]

On March 29, 2011, the SEC filed a motion for summary judgment in this civil action based on the judgment in the Criminal Case. (A-31-34.) In a memorandum and order dated February 3, 2012, the district court granted the

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[2] On January 7, 2013, the district court ordered the parties to the Criminal Case to submit letters on the issue of whether the district court is authorized to impose a criminal fine following this Court's remand of the forfeiture order. *See United States* v. *Contorinis*, No. 09-cr-1083 (S.D.N.Y.) [Docket No. 108]. The district court has not yet ruled on this issue.

SEC's motion for summary judgment. *SEC* v. *Contorinis*, No. 09 Civ. 1043(RJS), 2012 WL 512626 (S.D.N.Y. Feb. 3, 2012) (Sullivan, J.). (SPA-1-8.) On February 29, 2012, the district court entered the Judgment: (1) permanently enjoining Mr. Contorinis from violating Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder; (2) ordering Mr. Contorinis to disgorge $7,260,604 (and to pay $2,485,205 in prejudgment interest on that amount); and (3) ordering Mr. Contorinis to pay a further civil penalty in the amount of $1,000,000. (SPA-9-11.) The amount of prejudgment interest was calculated using the full amount of the ordered disgorgement—including $3 million in assets unrelated to the "profits" earned that Mr. Contorinis had deposited to the clerk of the district court as part of a bail package in the Criminal Case, and which the government continued to hold following Mr. Contorinis's remand. The prejudgment interest was based on the IRS tax underpayment rate, compounded quarterly. (SPA-7; A-261, 281.)

On April 24, 2012, Mr. Contorinis timely filed a notice of appeal of the Judgment. (A-410-424.) The Civil Appeal was withdrawn without prejudice and subject to reactivation pursuant to Local Rule 42.1, pending disposition of the criminal appeal. It was reactivated on December 18, 2012. [Docket Nos. 40, 56, 58-59.]

STATEMENT OF FACTS

A. Joseph Contorinis and the Jefferies Paragon Fund

During the relevant time period, Mr. Contorinis was a co-Portfolio Manager for the Fund, a fund created and controlled by Jefferies & Company, Inc. ("Jefferies") and funded by outside investors and Jefferies. (SPA-2; A-284-285, 335, 349-350.) Jefferies is a financial services firm and a member of the New York Stock Exchange. (A-282-283, 355.) Mr. Contorinis's co-Portfolio Manager was Michael Handler. As co-Portfolio Managers, Messrs. Contorinis and Handler made the investment decisions for the Fund. (A-285, 335, 349-350, 391-393.) They did not control disbursements of money to the Fund's clients.

B. Nicos Stephanou

Nicos Stephanou, the only witness in the criminal trial who claimed to have knowledge of Mr. Contorinis's alleged insider trading, began working for UBS Investment Bank ("UBS") in its New York office in 2002. (A-284.) He eventually transferred to UBS's London office in April 2006, where he worked until he was arrested for insider trading in December 2008. (A-56-57, 284.) While at UBS, Mr. Stephanou stole inside information—conduct which he had begun much earlier in his career—concerning corporate acquisitions, including, among others, the acquisition of Albertsons, a supermarket chain. (A-62-75, 100, 108, 110, 328-329.) Mr. Stephanou admitted that he personally traded based on this

information, and claimed that he also passed this information to friends (including Mr. Contorinis) and a relative. (*Id.*)

C. The Albertsons Deal and the Fund's Albertsons Trades

Albertsons was a supermarket retailer, operating grocery stores across the western United States. (A-60, 285.) Albertsons common stock traded on the New York Stock Exchange. (*Id.*) Significantly, the Fund had been investing in Albertsons since September 2004—a year prior to any allegations of insider trading by Mr. Contorinis. (A-321.)

1. September – December 2005

In 2005, Albertsons engaged advisors to help it consider strategic alternatives. (A-285.) Specifically, on the morning of September 2, 2005, Albertsons publicly announced that it was exploring "strategic alternatives," including a possible sale of the company. (A-302.) As noted above, the Fund had already been trading in Albertsons stock for over a year when this announcement was made. (A-321.)

Immediately following the September 2 public announcement, the Fund purchased $17 million of Albertsons stock. (*Id.*) Importantly, Mr. Stephanou only learned that he would be a member of the UBS deal team advising Cerberus—and therefore acquired inside information about the stock—*after* the Fund made its $17 million investment in Albertsons. (A-132, 321.)

Over the course of the next several months, there was unusually extensive, highly-detailed media coverage of Albertsons, focusing on the possibility of the company being acquired and the status of the negotiations. (A-302-308.) Messrs. Contorinis and Handler, as co-Portfolio Managers of the Fund, followed this extensive news coverage, and made numerous trades in Albertsons stock on behalf of the Fund over the course of the next few months. (A-321-326, 391-393.)

Negotiations and due diligence for the Albertsons deal took place throughout November and December 2005. On or around December 22, 2005, however, Albertsons and the consortium that had been formed for the purpose of acquiring Albertsons issued press releases announcing the termination of negotiations. (A-268, 270, 288, 378.)

2. January 2006

In late December or early January 2006, discussions between Albertsons and the consortium resumed. (A-289-290.) On January 6, Mr. Contorinis attended a meeting organized by Bear Stearns for investors who followed Albertsons. (A-391.) At this meeting, investors and analysts discussed the possibility of an Albertsons deal, with many indicating that they still believed that a deal would be completed. (A-331, 391.)

On January 10, SuperValu, the largest member of the consortium, issued an earnings release. (A-304, 384-387, 391-392.) In connection with the earnings release, the CEO of SuperValu announced to analysts and investors that Supervalu "viewed the sale of Albertson's, and specifically the availability of certain of its premier properties, as an extraordinary opportunity for [SuperValu] to consider." (A-387, 392.) Investors saw this statement as a sign that a deal still might happen. (A-339.)

It had also been publicly reported that January 12 was the deadline for Albertsons shareholder proposals. (A-389, 392.) Messrs. Contorinis and Handler therefore wanted to get back into the stock before that deadline. Accordingly, on January 11 and 12, the Fund made additional purchases of Albertsons stock. (A-325.)

On January 13, *The New York Post* announced that the parties had renewed discussions about a potential purchase of Albertsons, and the Fund purchased more stock. (A-304-305, 381-382, 392.) On January 18 and 19, the Fund sold approximately 700,000 shares of Albertsons stock. (A-325-326.)

On January 19, *The Wall Street Journal* published an article stating that a consortium had submitted a new bid to acquire Albertsons. (A-272, 306.) On January 20, Albertsons issued a press release announcing that the bid had been

received. (A-274, 307.) That same day, and after the public announcement, the Fund purchased approximately 500,000 shares of Albertsons stock. (A-326.)

On January 23, the Albertsons deal was publicly announced. (A-276-279, 291, 307-308.) That day, the Fund closed out of its position in Albertsons. (A-291, 326.) The Fund made approximately $7.2 million in profits from its Albertsons trades in January 2006. (SPA-5.)

SUMMARY OF ARGUMENT

The order of disgorgement entered in this case should be vacated. The district court erred when it ordered Mr. Contorinis to disgorge profits made by the Fund, as opposed to the far more limited profits made by Mr. Contorinis himself. The purpose of disgorgement—like the purpose of forfeiture—is to deprive defendants of their ill-gotten gains. Ordering the disgorgement of profits that Mr. Contorinis never directly or indirectly received, enjoyed, or controlled is at odds with that purpose and improperly functions as a punitive, rather than an equitable, remedy. Because Mr. Contorinis never directly or indirectly "acquired" or "controlled" these funds, he cannot be ordered to disgorge them, just as this Court held that Mr. Contorinis could not be ordered to forfeit them.

The district court compounded its error by ordering Mr. Contorinis to pay prejudgment interest at a highly punitive rate, on sums that, as outlined above, he never acquired or controlled, including on $3 million of Mr. Contorinis's own

money which was turned over to the U.S. government years prior to the entry of the Judgment and which the government continued to hold following Mr. Contorinis's remand.

Finally, the district court abused its discretion when, in addition to imposing criminal penalties, a substantial amount of disgorgement (including millions of dollars of prejudgment interest), and a civil penalty of $1 million, it permanently enjoined Mr. Contorinis from future violations of the securities laws.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT ORDERED MR. CONTORINIS TO DISGORGE $7.26 MILLION.

The district court ordered Mr. Contorinis to disgorge approximately $7.26 million, an amount based on the total profits *made by the Fund* in January 2006 from the Fund's trades in Albertsons. That was error because the law does not require—and indeed prohibits—the disgorgement of funds that were never acquired or controlled by a defendant, his co-conspirators, or his tippees.[3]

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[3] The imposition of disgorgement is reviewed for abuse of discretion. *See, e.g.*, *SEC* v. *First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996). A "district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *SEC* v. *Milligan*, 436 F. App'x 1, 1 (2d Cir. 2011) (quoting *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008)).

A. Disgorgement Is an Equitable Remedy that Cannot Be Used to Require the Payment of Profits Never Received, Enjoyed, or Controlled by a Defendant.

Disgorgement is an equitable remedy designed to prevent a defendant's unjust enrichment. *See, e.g.*, *SEC* v. *First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) ("[D]isgorgement is a method of forcing a defendant to give up the amount by which *he* was unjustly enriched . . . ." (emphasis added)). The "paramount purpose of enforcing the prohibition against insider trading by ordering disgorgement is to make sure that wrongdoers will not profit from their wrongdoing." *SEC* v. *Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987); *accord First Jersey Sec.*, 101 F.3d at 1474 ("The primary purpose of disgorgement as a remedy for violation of the securities laws is *to deprive violators of their ill-gotten gains* . . . .") (emphasis added)).

As courts have therefore repeatedly held, disgorgement is an *equitable* remedy that is meant to "return[] the wrongdoer to the status quo before any wrongdoing had occurred." *SEC* v. *Lorin*, 869 F. Supp. 1117, 1122 (S.D.N.Y. 1994); *accord SEC* v. *Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) ("As an exercise of its equity powers, the court may order wrongdoers to disgorge their fraudulently obtained profits."); *SEC* v. *Yun*, 148 F. Supp. 2d 1287, 1290 (M.D. Fl. 2001) ("Courts often note that the primary purpose of disgorgement is the prevention of unjust enrichment—that is, that those who have violated the

securities laws are not allowed to gain by their illegal conduct."). For this reason, "it is well settled that the amount of disgorgement, as an equitable remedy, is determined by *the amount of profit realized by the defendant*." *SEC* v. *AbsoluteFuture.com*, 393 F.3d 94, 96 (2d Cir. 2004) (emphasis added); *accord Tome,* 833 F.2d at 1096 (disgorgement "is a method of forcing a defendant to give up the amount by which he was unjustly enriched" (quoting *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978))).

Simply put, disgorgement is meant to be remedial, not punitive. *See, e.g.*, *Cobalt Multifamily Investors I, LLC* v. *Arden*, No. 06 CV 6172, 2012 WL 3838834, at *5 (S.D.N.Y. Aug. 14, 2012) ("[D]isgorgement is remedial and not punitive."), *adopted by Cobalt Multifamily Investors I, LLC* v. *Arden*, No. 06 CV 6172(KMW)(MHD), 2012 WL 3835400 (S.D.N.Y. Sept. 4, 2012); *see also Official Comm. of Unsecured Creditors of WorldCom, Inc.* v. *SEC*, 467 F.3d 73, 81 (2d Cir. 2006) ("As the House Report on the Remedies Act noted, 'Disgorgement merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty . . . .'" (quoting H.R. Rep. No. 101-616 (1990))); *Yun*, 148 F. Supp. 2d at 1290 ("[B]ecause disgorgement is an equitable remedy, it does not serve to punish or fine the wrongdoer, but simply serves to prevent unjust enrichment.").

"[A]wards that exceed the defendant's gains are punitive and[, therefore,] beyond the court's equitable powers." *SEC* v. *Wyly*, 860 F. Supp. 2d 275, 277 (S.D.N.Y. 2012); *accord SEC* v. *Cavanagh*, 445 F.3d 105, 116, 117 n.25 (2d Cir. 2006) ("Because the [disgorgement] remedy is remedial rather than punitive, the court may not order disgorgement [by the wrongdoer] above ["the amount of money acquired through wrongdoing" plus interest]."); *SEC* v. *MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983) (en banc) ("The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment." (quoting *SEC* v. *Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978))). It necessarily follows that a defendant must have actually received the sums in question for the court to be able to exercise its equitable powers in ordering such sums to be disgorged. *See, e.g.*, *FTC* v. *Verity Int'l, Ltd.*, 443 F.3d 48, 68 (2d Cir. 2006) (ordering district court on remand to "consider how much of the sum was in fact *received by the defendants-appellants*," as opposed to withheld by a middleman, and could therefore "be the basis for a disgorgement remedy" (emphasis added)).

B. The Disgorgement Ordered in this Case Was Inconsistent with the Purpose of Disgorgement and the Relevant Case Law.

The disgorgement ordered in this case is inconsistent with the basic principles described above. As this Court has already held, Mr. Contorinis never

received, directly or indirectly, enjoyed, or controlled the amount he was ordered to disgorge. *United States* v. *Contorinis*, 692 F.3d 136, 148 (2d Cir. 2012) (finding the $7.26 million in profits earned by the Fund was "never possessed or controlled by [Mr. Contorinis] or others acting in concert with him"). Ordering Mr. Contorinis to disgorge amounts that neither he nor others acting in concert with him ever acquired, enjoyed, or controlled goes far beyond depriving him of ill-gotten gains. It does not just return Mr. Contorinis to the status quo, as disgorgement is meant to do. Instead, it requires Mr. Contorinis to pay monies he never received, enjoyed, or controlled and thus, functions as a punitive measure, directly at odds with the purpose of this equitable remedy.

Although decided in the context of criminal forfeiture and not disgorgement, *Contorinis* is instructive on the issue raised here. This is particularly so in light of the similar purposes of disgorgement and criminal forfeiture. *Compare id.* at 146 ("Criminal forfeiture focuses on the disgorgement by a defendant of his ill-gotten gains" (internal quotation marks omitted)), *with First Jersey Sec.*, 101 F.3d at 1474 ("The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains . . . .").

In *Contorinis*, this Court held that Mr. Contorinis could not be required to forfeit amounts that he did not "possess[] or control[]." 692 F.3d at

148.[4] In arriving at that conclusion, this Court specifically found that the funds "sought by the government here were 'acquired' by the Fund over which [Mr. Contorinis] lacks control," thereby making it "difficult to square the statute with the [district court's] forfeiture order." *Id.* at 146. As this Court explained:

> The extension of forfeiture to proceeds received by actors in concert with a defendant may be deemed to be based on the view that the proceeds of a crime jointly committed are within the possessory rights of each concerted actor, i.e. are "acquired" jointly by them and distributed according to a joint decision. *This view does not support an extension to a situation where the proceeds go directly to an innocent third party and are never possessed by the defendant. . . . The property must have, at some point, been under the defendant's control or the control of his co-conspirators in order to be considered "acquired" by him.*

Id. at 147 (emphasis added).

The district court justified its disgorgement order in part based on *SEC* v. *Warde*, 151 F.3d 42 (2d Cir. 1998), which was decided before this Court decided *Contorinis*. In *Warde*, the defendant argued that a portion of the profits the court sought to have him disgorge belonged to third parties, and that disgorgement of those amounts would "impermissibly operate as a penalty rather than a release of unjust gains." 151 F.3d at 49. But the so-called "third parties" included: (1) a trust, of which Warde was the *sole beneficiary*; and (2) Warde's

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[4] *See also Contorinis*, 692 F.3d at 146 ("[T]he calculation of a forfeiture amount in criminal cases is usually based on the defendant's actual gain."); *id.* at 147 ("[A] defendant may be ordered to forfeit all monies received *by him* as a result of the fraud." (internal quotation marks omitted and emphasis in original)).

wife, for whom Warde had opened the account in which the trades at issue were made—an account over which Warde "exercised complete control." *Id.* The *Warde* Court held that neither the trust nor the wife's account were "truly third parties" and it was therefore not improper to require Warde to disgorge their profits. *Id.*

In stark contrast to *Warde*, as this Court has already held, the Fund was in fact "an innocent third party" which Mr. Contorinis did not control.[5] *Contorinis*, 692 F.3d at 147. Mr. Contorinis was not the sole beneficiary of the Fund; indeed, he held only a tiny percentage of the Fund. And Mr. Contorinis did not "exercise complete control" over the Fund. Mr. Contorinis, in fact, had no control over the disbursement of assets in the Fund.

Even assuming the Fund was not "an innocent third party"—an assumption for which there is no support on this record—*Warde* does not foreclose the argument that Mr. Contorinis should not be required to disgorge the Fund's

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[5] Although the Fund was "an innocent third party," this did not preclude the SEC from naming the Fund or Jefferies as "relief" or "nominal" defendants and to seek disgorgement from them as well. *See, e.g.*, *SEC* v. *Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998) ("Federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds."). The SEC chose not to seek such relief in this case, although the SEC does seek such relief in other cases. *See, e.g.*, *Tome*, 833 F.2d at 1090; *Wyly*, 860 F. Supp. 2d at 279 & n.30, 283; *SEC* v. *China Energy Sav. Tech., Inc.*, 636 F. Supp. 2d 199 (E.D.N.Y. 2009).

profits. The *dicta* in *Warde* concerning whether a defendant can be ordered to disgorge a third party's profits relates to tippees:

> Moreover, even if the Brockhurst and Warde trust profits were fairly characterized as third party profits, Warde would nevertheless be liable to disgorge their profits. A tippee's gains are attributable to the tipper, regardless whether benefit accrues to the tipper. The value of the rule in preventing misuse of insider information would be virtually nullified if those in possession of such information, although prohibited from trading for their own accounts, were free to use the inside information on trades to benefit their families, friends, and business associates. *See SEC* v. *Clark*, 915 F.2d 439, 454 (9th Cir. 1990).[6]

Warde, 151 F.3d at 49-50.

There has never been any allegation by anyone that a tipper-tippee relationship existed between Mr. Contorinis and the Fund. Moreover, as demonstrated above, reading *Warde* more broadly—to permit an order that a defendant disgorge profits earned by innocent third parties—is wholly inconsistent with the remedial and equitable purpose of disgorgement and this Court's more recent holding in *Contorinis* with respect to forfeiture.

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[6] *Clark* was a case in which the defendant was ordered to disgorge the profits of his tippee. It, too, does not stand for the broad proposition that a defendant can be ordered to disgorge the profits of a wholly innocent third party. *SEC* v. *Grossman*, No. 87 Civ. 1031 (SWK), 1997 WL 231167 (S.D.N.Y. May 6, 1997), *vacated in part on other grounds*, 1999 WL 163992 (2d Cir. Mar. 18, 1999)—the other case cited by the district court—is also a case in which the defendant was ordered to disgorge profits of his tippees. It, too, does not stand for the broader proposition that a defendant can be ordered to disgorge profits that he (or his tippee) never received, controlled, or enjoyed.

II. THE DISTRICT COURT ERRED WHEN IT ORDERED MR. CONTORINIS TO PAY PREJUDGMENT INTEREST IN THE AMOUNT OF $2.485 MILLION.

The district court ordered prejudgment interest on the entire amount of disgorgement—$7.26 million—at the IRS underpayment rate, compounded quarterly. This resulted in an order of prejudgment interest in the amount of almost $2.5 million. That order was punitive under the circumstances present here, and therefore was in error.[7]

The rationale for imposing prejudgment interest at the IRS underpayment rate is that it "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." *First Jersey Sec.*, 101 F.3d at 1476. Indeed, the very purpose of prejudgment interest is to deprive a defendant of "years of interest-free use of their ill-gotten gains." *SEC* v. *Federated Alliance Grp.*, No. 93-CV-0895E(F), 1997 WL 374207, at *2 (W.D.N.Y. June 23, 1997); *accord SEC* v. *Kirch*, 263 F. Supp. 2d 1144, 1152 (N.D. Ill. 2003) (purpose of prejudgment interest is to prevent wrongdoer from gaining "an unwarranted profit from the use of the ill-gotten gains in the interim"). As set forth above, however, Mr. Contorinis did not receive, enjoy, or have the benefit of the vast majority of the

[7] The imposition of prejudgment interest is reviewed for abuse of discretion. *See, e.g.*, *First Jersey Sec.*, 101 F.3d at 1476.

$7.26 million he has been ordered to disgorge. Thus, Mr. Contorinis also was incapable of deriving the comparable benefit of an interest-free loan—or any other unwarranted profit—of that amount. Mr. Contorinis should not be ordered to pay prejudgment interest on the amounts that he did not acquire or control and which went, instead, to an innocent third party. *See SEC* v. *Aragon Capital Mgmt., LLC*, No. 07 Civ. 919 (FM), 2010 WL 517586, at *1 (S.D.N.Y. Jan. 29, 2010) (declining to award prejudgment interest prior to the date the relief defendants actually received the proceeds of the insider trading); *SEC* v. *Zafar*, No. 06-CV-1578, 2009 WL 129492, at *7 (E.D.N.Y. Jan. 20, 2009) (declining to award prejudgment interest on summary judgment to the extent the defendant appeared to have been restrained from using the profits of the scheme).

The punitive nature of the prejudgment interest award was compounded when the district court ordered that Mr. Contorinis should have to pay interest on $3 million of Mr. Contorinis's assets that the U.S. government has been holding since February 2009 as bail in connection with Mr. Contorinis's criminal case. The government continued to hold those assets following Mr. Contorinis's remand in October 2010. Mr. Contorinis did not have access to those funds for approximately three years prior to the entry of the Judgment. To the extent Mr. Contorinis was not enjoying those funds since at least that date, no prejudgment interest should be charged on that amount. *See, e.g.*, *First Jersey Sec.*, 101 F.3d at

1477 (affirming order awarding prejudgment interest and noting that the district court had declined to award prejudgment interest on $5 million that had been out of the defendants' control because it had been paid in settlement); *see also Zafar*, 2009 WL 129492, at *7 ("While it is proper to award prejudgment interest for the entire period during which the defendant had use of unlawful profits, the SEC has thus far failed to demonstrate that it is appropriate to do so when the defendant is already restrained from using those profits." (internal quotation marks and citation omitted)).

Finally, even if the Court were to determine that it was proper to order the payment of some prejudgment interest, ordering prejudgment interest at the IRS underpayment rate, compounded quarterly, was overly punitive in this case. Under the circumstances present here, where Mr. Contorinis made less than $430,000 personally as a result of the alleged misconduct, has already been subject to severe criminal penalties, including 72 months of incarceration, as well as an injunction, substantial orders of forfeiture and disgorgement, and a $1 million civil penalty, the award of nearly $2.5 million in prejudgment interest is not warranted.

III. THE DISTRICT COURT ERRED IN ENTERING A PERMANENT INJUNCTION.

In addition to substantial disgorgement, millions of dollars of prejudgment interest, and a significant civil penalty, not to mention criminal penalties that include 72 months' incarceration, the district court also permanently

enjoined Mr. Contorinis from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The district court abused its discretion in entering this injunction, given that the SEC did not—and cannot—establish that Mr. Contorinis is likely to commit additional securities law violations.[8]

Section 21(d)(1) of the Exchange Act enables the SEC to seek preliminary and permanent injunctions against a person who has committed any violation of the Exchange Act or the SEC rules thereunder. 15 U.S.C. § 78u(d)(1). To obtain injunctive relief, the SEC *must* demonstrate by a preponderance of the evidence that the defendant "is engaged or is about to engage in acts or practices constituting a violation." *Id.* In other words, unless the SEC is seeking an injunction to prevent an ongoing violation, the SEC must demonstrate a "likelihood or propensity to engage in future violations." *Commonwealth Chem. Sec.*, 574 F.2d at 99 (internal quotation marks omitted). In order to meet its burden, the SEC must "go beyond the mere facts of past violations and demonstrate a realistic likelihood of recurrence." *Id.* at 100. "It is [thus] well settled that the [SEC] cannot obtain relief without positive proof of a reasonable likelihood that past wrongdoing will recur." *SEC* v. *Bausch & Lomb Inc.*, 565 F.2d

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[8] The imposition of an injunction is reviewed for abuse of discretion. *See, e.g., First Jersey Sec.*, 101 F.3d at 1478.

8, 18 (2d Cir. 1977); *accord SEC* v. *Parklane Hosiery Co., Inc.*, 558 F.2d 1083, 1089 (2d Cir. 1977) ("The [SEC] cannot obtain injunctive relief where there is no reasonable likelihood of recurrence.").

Given this clear standard, courts in this Circuit and elsewhere do not hesitate to deny a request for injunctive relief where the SEC does not establish a reasonable likelihood of future violations. *See, e.g.*, *SEC* v. *Jadidian*, No. 08 Civ. 8079, 2011 WL 1327245, at *6 (S.D.N.Y. Mar. 31, 2011) (denying request for injunctive relief where "the SEC has not met its burden of demonstrating that Jadidian is likely to commit future securities violations"); *SEC* v. *Dibella*, No. 3:04cv1342, 2008 WL 6965807, at *12-14 (D. Conn. Mar. 13, 2008) (denying request for injunctive relief after considering the fact that the defendant was a first-time offender whose acts were "all committed in a relatively short time period, and all related to the one underlying fraud"); *SEC* v. *800America.com, Inc.*, No. 02 Civ. 9046, 2006 WL 3422670, at *11 (S.D.N.Y. Nov. 28, 2006) (denying request for injunctive relief where the SEC "failed to present sufficient evidence to indicate that Steeples is likely to violate the securities laws again"); *Yun*, 148 F. Supp. 2d at 1294-95 (denying request for injunctive relief); *SEC* v. *Brethen*, No. C-3-90-071, 1992 WL 420867, at *24 (S.D. Ohio Oct. 15, 1992) (denying request for injunctive relief where the defendant was "not likely to return to the corporate arena, either as a director or as an employee in an executive capacity, where he will

once again have the opportunity to engage in insider trading"); *SEC* v. *Ingoldsby*, Civ. A. No. 88-1001-MA, 1990 WL 120731, at *1-3 (D. Mass. May 15, 1990) (denying request for injunctive relief where the court found "that there is no reasonable likelihood of future securities law violations by the defendant"); *SEC* v. *Ingram*, 694 F. Supp. 1437, 1442 (C.D. Cal. 1988) (denying request for injunctive relief where the court concluded "that based upon the totality of circumstances there is no reasonable likelihood of future securities law violations").

Here, the district court never grappled with the question of whether Mr. Contorinis was likely to commit future securities violations. That alone should end the inquiry and the injunction should be vacated. But, in any event, had the district court considered the relevant question, the relief should still have been denied. There is no indication whatsoever that there is any likelihood, let alone a reasonable likelihood, that Mr. Contorinis will commit any securities violations in the future. Indeed, as the district court stated during Mr. Contorinis's sentencing in the Criminal Case, "*I don't think there is any chance that you are going to commit crimes in the future. . . . There is not much dispute about that.*" (A-343 (emphasis added); *see also* A-344 ("I also think it's worth noting that Mr. Contorinis has . . . led an otherwise law-abiding life; that the duration of this crime was months but it wasn't years. There is no indication, as is the case in other cases in this courthouse, where people have persistently over time repeatedly for years engaged

in a steady practice of insider trading. There is no evidence really of that in this case here. It was relatively isolated.").)

Because the SEC did not meet its burden of establishing that that there was a reasonable likelihood that Mr. Contorinis will commit further violations of the securities laws, the district court erred in imposing a permanent injunction.

CONCLUSION

For the foregoing reasons, the district court's order of disgorgement (approximately $7.2 million, plus approximately $2.5 million in prejudgment interest) and the injunction should be vacated.

Dated: March 12, 2013
New York, New York

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(b)

The undersigned counsel for Defendant-Appellant Joseph Contorinis certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). This brief contains 6,012 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count program in Microsoft Word.

By: s/ Roberto Finzi

Dated: March 12, 2013

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 09 Civ. 1043 (RJS)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

VERSUS

JOSEPH CONTORINIS,

Defendant.

MEMORANDUM AND ORDER
February 3, 2012

RICHARD J. SULLIVAN, District Judge:

Plaintiff Securities and Exchange Commission ("SEC") brings this action against Defendant Joseph Contorinis arising out of his alleged involvement in an insider trading scheme that generated more than $12 million in illegal profits and avoided losses, in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder. Plaintiff seeks injunctive relief, disgorgement of Defendant's gains, and imposition of a civil penalty. Before the Court is Plaintiff's motion for summary judgment. For the reasons that follow, Plaintiff's motion is granted.

I. BACKGROUND

A. Facts[1]

This action arises out of a series of trades in December 2005 and January 2006 made by a hedge fund, the Jefferies Paragon Fund ("Paragon Fund" or the "Fund"), in the stock of Albertsons, Inc. ("ABS"), a supermarket retailer that was the target of several acquisition attempts. (Pl.'s 56.1 ¶ 8.) Due to well-timed trades, the Paragon Fund realized profits of $7,260,604 and

[1] The following facts are taken from the pleadings, the parties' Local Rule 56.1 Statements, the affidavits submitted in connection with the instant motions, and the exhibits attached thereto. The facts are undisputed unless otherwise noted. Where only one party's 56.1 Statement is cited, the other party does not dispute the fact asserted, has offered no admissible evidence to refute that fact, or merely objects to inferences drawn from that fact.

avoided losses of $5,345,700.[2] (Decl. of Kingdon Kase, dated March 29, 2011, Doc. No. 146 ("Kase Decl."), Ex. 7 at 2.) Defendant was a co-Portfolio Manager of the Fund, and his compensation included a component that directly correlated with its profitability.[3] (Pl.'s 56.1 ¶ 3).

Nicos Achilleas Stephanou, a longtime friend of Defendant's, was employed at UBS Investment Bank ("UBS"), where he worked on mergers and acquisitions. (*Id.* ¶ 2.) Stephanou obtained knowledge of nonpublic information regarding efforts by the firm Cerberus, in consortium with several other companies, to acquire ABS. (*Id.*) This acquisition was publicly announced on January 23, 2006. (Id. ¶ 29.) Throughout this time period, Stephanou and Contorinis spoke on the phone dozens of times during which, the SEC asserts, Stephanou passed material nonpublic information regarding the acquisition to Defendant. (*Id.* ¶¶ 19-32).

On May 6, 2009, Stephanou pleaded guilty pursuant to a cooperation agreement with the government to six counts of conspiracy to commit securities fraud and one count of securities fraud in relation to tipping Defendant with privileged information regarding the ABS deal. (Kase Decl., Ex. 9.) In October 2010, Stephanou testified as a government witness at Defendant's parallel criminal trial held before this Court.

On October 6, 2010, the jury returned a verdict in which it found Defendant guilty of one count of conspiracy to commit securities fraud and seven counts of securities fraud. The substantive counts of which Defendant was convicted included three counts of selling more than 2.2 million shares of ABS stock on December 22, 2005 and four counts of purchasing more than 1.1 million shares on January 11, 2006.[4] (Kase Decl., Ex. 4.) On December 20, 2010, the Court sentenced Defendant to six years imprisonment. Defendant was also ordered to forfeit $12,650,438 in illegal profits and avoided losses. (56.1 ¶ 5.) Defendant appealed his conviction and the forfeiture order on December 30, 2010. (Opp'n at 2.) The appeal is currently pending.

B. Procedural History

Plaintiff initiated this action on February 5, 2009, alleging violations of the federal securities laws against Defendant, Stephanou, and six other individuals.[5] The matter was stayed pending resolution of the criminal action. On March 29, 2011, Plaintiff filed a motion for summary judgment against Defendant, asserting that Defendant is collaterally estopped from challenging facts established at his criminal

[2] Defendant partially disputes this assertion, arguing that the "profit calculation is not representative of the amount of money that the Fund made in connection with its trades in Albertsons." (Def.'s 56.1 ¶ 30.)

[3] The parties dispute the amount of control that Defendant had over trading ABS stock. Plaintiff claims that Defendant "alone, directed, authorized, and caused trades in ABS stock on behalf of, or for the benefit of the Paragon Fund." (Pl.'s 56.1 ¶ 7.) Defendant asserts that he "did not act alone in directing, authorizing or causing trades in ABS stock on behalf of, or for the benefit of the Fund; Michael Handler, the co-Portfolio Manager, also directed, authorized, and caused trades in ABS stock." (Def.'s 56.1 ¶ 7.)

[4] Defendant was found not guilty on two counts of securities fraud stemming from sales of about 430,000 shares of ABS stock on December 7, 2005. (Kase Decl., Ex. 4 at 11; Ex. 6 at 1.)

[5] Plaintiff entered into consent judgments with Defendants Stephanou, George Paparrizos, and Michael Koulouroudis. (*See* Doc. Nos. 83-84, 153.) Plaintiff voluntarily dismissed its claims against the other three Defendants. (*See* Doc. Nos. 89, 123.)

trial. The motion was fully submitted as of May 20, 2011.

II. STANDARD OF REVIEW

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The moving party bears the burden of proving that there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party has met its burden, the nonmoving party "must come forward with specific facts showing that there is a genuine issue for trial." *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (internal citations and quotation marks omitted). In ruling on a motion for summary judgment, the court must resolve any ambiguity in favor of the nonmoving party. *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir. 2004). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996). As a result, summary judgment will not issue where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

III. DISCUSSION

A. Collateral Estoppel

"Under the doctrine of collateral estoppel, 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *United States v. U.S. Currency in Amount of $119,984.00, More or Less*, 304 F.3d 165, 172 (2d Cir. 2002) (quoting *Schiro v. Farley*, 510 U.S. 222, 232 (1994)) (finding that claimants failed to overcome presumption of collateral estoppel based upon prior criminal proceedings); *accord State of New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 96 (2d Cir. 2000) (holding that construction contractors were collaterally estopped from challenging liability in state's antitrust action based on prior criminal convictions under RICO). "In order for collateral estoppel to apply, the court must determine that '(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.'" *Julius Nasso Concrete Corp.*, 202 F.3d at 96 (quoting *NLRB v. Thalbo Corp.*, 171 F. 3d 102, 109 (2d Cir. 1999)).

Courts in this district have consistently found that a defendant convicted of securities fraud in a criminal proceeding is collaterally estopped from relitigating the underlying facts in a subsequent civil proceeding. *See SEC v. Shehyn*, No. 04 Civ. 2003 (LAP), 2010 WL 3290977, at *3 (S.D.N.Y. Aug. 9, 2010) ("'It is well-settled that a criminal conviction, whether by a jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by judgment in the criminal case.'" (quoting *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978))); *SEC v. McCaskey*, No. 98 Civ. 6153 (SWK), 2001 WL 1029053, at *3 (S.D.N.Y. Sept. 6, 2001)

(granting summary judgment for the SEC because the defendant "was convicted by guilty plea on [criminal] securities-fraud charges related to the same activities at issue here. All questions of fact material to and underlying [the defendant's] criminal conviction . . . bind [the defendant] in this subsequent civil action.").

In the instant case, Defendant "does not dispute that summary judgment as to liability can be entered against him based on the preclusive effect of the jury's verdict in the criminal case." (Opp'n at 1.) This is so despite the fact that Defendant's appeal of his criminal conviction remains pending. *See Russell-Newman, Inc. v. The Robeworks, Inc.*, No. 00 Civ. 9797 (JFK), 2002 WL 1918325, at *1 n.1 (S.D.N.Y. Aug. 19, 2002) ("The law is clear that ordinarily the pendency of an appeal should not impact the collateral estoppel effect of an otherwise final and valid judgment.").[6]

Accordingly, Plaintiff's motion for summary judgment is granted as to liability.

B. Damages

Plaintiff seeks three forms of relief against Defendant: (i) a permanent injunction that would enjoin Defendant from violating section 10(b) of the Securities Act of 1934 and Rule 10b-5 promulgated thereunder; (ii) disgorgement of Defendant's gains along with pre-judgment interest; and (iii) the imposition of a civil penalty.

1. Injunctive Relief

The SEC has requested a final judgment "[p]ermanently retraining and enjoining . . . Contorinis from violating Section 10(b) of the Exchange Act, and Rule 10b-5, thereunder."[7] (Compl. ¶ I at 34.) As the Second Circuit has noted, "[i]njuntive relief is expressly authorized by Congress to proscribe future violations of federal securities laws." *SEC v. Cavanaugh*, 155 F.3d 129, 135 (2d Cir. 1998). To determine whether a permanent injunction is warranted, courts consider the following factors:

> the fact that defendant has been found liable for illegal conduct; the degree of scienter involved; whether the infraction is an "isolated occurrence;" whether defendant continues to maintain that his past conduct was blameless; and whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.

S.E.C. v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 100 (2d Cir. 1978).

Applying these factors to the instant case, the Court finds that a permanent injunction is warranted. Significantly, there can be no doubt that the jury found that Defendant acted knowingly in making illegal trades. (*See* Opp'n at 18.) Moreover,

[6] Plaintiff additionally argues that it is entitled to summary judgment against Defendant on grounds independent of collateral estoppel, including "Contorinis's own admissions, his preclusion from offering evidence in his defense, and the adverse inference that should be drawn against him." (Reply at 1.) The Court finds adjudication of such issues unnecessary at this time. As Defendant notes in his opposition papers, in the event that his conviction is vacated, he is free to move for relief from any civil judgment entered as a result of that conviction. (Opp'n at 3 n.5.)

[7] Defendant mischaracterizes the relief requested in his opposition papers, arguing that "the Court should not permanently enjoin Mr. Contorinis from working in the securities industry." (Opp'n at 17). While the SEC may seek such a broad prohibition later, it "is not the relief sought by the Commission in this civil action," and the Court need not address its appropriateness here. (Reply at 8.)

while Defendant's conviction arose out of trades in only one company, Defendant made multiple trades over the course of several weeks, and he profited substantially from his conduct. (Pl.'s 56.1 ¶¶ 19-32.) Finally, throughout this action, and in the parallel criminal action, Defendant has consistently maintained that his past conduct was blameless.

As a practical matter, one might question the benefit of enjoining conduct that is already prohibited by the federal securities laws. Nevertheless, in light of the fact that Defendant satisfies most of the factors identified above, and that defendants in other SEC enforcement actions have agreed to similar injunctions as a part of their consent judgments, the Court is persuaded that a permanent injunction is appropriate here. (*See* Doc. Nos. 83 (Paparrizos consent judgment), 84 (Stephanou consent judgment), 153 (Koulouroudis consent judgment); *SEC v. Cutillo, et al*, No. 09 Civ. 9208 (RJS), Doc. Nos. 48-50, 52-54.)

Accordingly, Plaintiff's request that the Court permanently enjoin Defendant from violating Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder is granted.

2. Disgorgement

Plaintiff also seeks disgorgement in the amount of $7,260,604, representing the total profits realized by the Fund in its ABS trades between December 30, 2005 and January 23, 2006, less $45,074 in commission costs. (Decl. of John Rymas, dated March 29, 2011, Doc. No. 145 ("Rymas Decl.") ¶¶ 23-24.) Plaintiff also seeks prejudgment interest at the "IRS underpayment rate."[8] (Pl.'s Mem. at 22.)

"In the exercise of its equity powers, a district court may order the disgorgement of profits acquired through securities fraud." *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995) (affirming lower court's disgorgement order in Section 10(b) case). "The district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2d Cir. 1996). In this regard, the Second Circuit has held:

> The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws. . . . The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.

Id. at 1474 (internal quotation marks omitted).

Defendant argues that disgorgement in this proceeding is not warranted, as, pursuant to a forfeiture order in the criminal proceeding, he has already been directed to surrender approximately $12.5 million. (*See* Kase Decl., Ex. 7.) However, Plaintiff has represented that "if Contorinis is unsuccessful in his appeal of his criminal

[8] In response to Plaintiff's request for prejudgment interest, Defendant argues only that he "did not have 'ill-gotten gains,' since he did not commit insider trading, and therefore no prejudgment interest is due." (Def.'s 56.1 ¶ 32.) As such, it appears that Defendant concedes that Plaintiff is entitled to prejudgment interest on whatever disgorgement amount that the Court orders.

conviction and is unable to obtain relief from the Forefeiture Order [entered in the criminal proceeding], any funds that he ultimately forfeits pursuant to that order should then be credited toward the disgorgement ordered against him in this matter." (Reply at 7.)

Defendant also argues that he should not be required to disgorge funds "that were never received or enjoyed by Mr. Contorinis," as he "only personally profited a small percentage" of the $7.26 million in illegal profits. (Opp'n at 7, 10.) In the criminal action, however, Defendant was convicted of engaging in insider trading that resulted in "profits of $7,304,738." (Kase Decl., Ex. 7 at 2.) Defendant was also found to be jointly and severally liable with Stephanou for $12,650,438. (Kase Decl., Ex. 5 at 6-7.) As discussed above, Defendant is collaterally estopped from relitigating the findings of the criminal court. *See Grossman*, 1997 WL 231167 at *3 (adopting a report and recommendation ordering disgorgement, in which the magistrate judge rejected the defendant's assertion that disgorgement was inappropriate because "he did not personally profit from the unlawful trading," since the defendant was "jointly and severally liable for the profits of [his] tippees." (internal citation omitted)). Further, Defendant's argument that he should not be required to disgorge the portion of illegal profits that were enjoyed by the Fund has been rejected by the Second Circuit. *See SEC v. Warde*, 151 F.3d 42, 49 (2d. Cir. 1998) ("The value of the rule in preventing misuse of insider information would be virtually nullified if those in possession of such information, although prohibited from trading in their own accounts, were free to use the inside information on trades to benefit their families, friends, and business associates.").

Finally, Defendant argues that before he "can be ordered to disgorge any profits, the Court should deduct his costs" above and beyond the $45,000 in trading commission fees already deducted from the total realized profits, including, most particularly, his "hedging costs." (Opp'n at 10.) However, Defendant makes no attempt whatsoever to define his hedging costs or even articulate the amount of such costs that he is seeking to have deducted. Instead, Defendant claims only that he is entitled to "upwards of 35% in hedging costs, generally." (Opp'n at 10-11.) In support of this claim, Defendant cites to a ten-page "trading blotter" with no explanation of how the Court is to ascertain or derive Defendant's hedging costs. (See Berse Decl., Ex. B.) But even if such costs were ascertainable, Defendant has put forward no authority for the proposition that these costs are properly exempt from disgorgement.

Accordingly, Plaintiff's request for disgorgement in the amount of $7,260,604 plus prejudgment interest is granted.

3. Civil Penalties

Finally, Plaintiff asks the Court to impose the maximum allowable civil penalty against Defendant, which amounts to treble damages, or $21,781,812.

Section 21A of the Exchange Act authorizes civil money penalties for insider trading, up to three times the profit gained or loss avoided of the illegal act. "Congress intended the penalty to serve as a deterrent mechanism because disgorgement alone 'merely restores a defendant to his original position without extracting a real penalty for his illegal behavior.'" *SEC v. Sekhri*, 2002 WL 31100823, at *18 (S.D.N.Y. July 22, 2002) (quoting H.R.Rep. No. 98-355, 98th Cong., 2d Sess., 7-9 (1984), reprinted in

1984 U.S.C.C.A.N. 2274, 2280-81).

In determining the appropriate civil penalty, courts look to "the defendant's culpability, the amount of profits gained, the repetitive nature of the unlawful act and the deterrent effect of a penalty given the defendant's net worth." *Sekhri*, 2002 WL 31100823, at *18. "Some courts have weighed other factors also such as whether the defendant is employed in the securities industry, *see, e.g., S.E.C. v. Falbo*, 14 F. Supp. 2d 508, 528-29 (S.D.N.Y. 1998); whether the defendant has a prior record of securities violations, *see id.* at 528-29; and other penalties that arise out of defendants' conduct." *SEC v. Svoboda*, 409 F. Supp. 2d 331, 347 (S.D.N.Y. 2006). Courts in this district "have not hesitated to impose penalties where the defendants executed multiple insider trades and their scheme evidenced a high degree of intent." *Id.* (citing cases).

Applying these factors to the instant case, the Court finds that a fine of $1,000,000 is appropriate to satisfy the objectives of the Exchange Act. As noted above, Defendant is fully culpable for his crimes, from which he profited substantially. The jury's verdict reflects that Defendant's trades in ABS occurred over a period of two months, revealing a high degree of intent and a willingness to repeatedly exploit misappropriated information. Accordingly, a fine of $1,000,000 is sufficiently substantial to promote the general and specific deterrence contemplated by the Exchange Act. Any civil penalty greater than that, however, would be unduly harsh in light of the severe criminal penalties that have already been imposed on Defendant.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment is granted. IT IS HEREBY ORDERED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security: (i) to employ any device, scheme, or artifice to defraud; (ii) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (iii) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED that Defendant shall disgorge his profits in the amount of $7,260,604 plus prejudgment interest to be calculated at the IRS underpayment rate.

IT IS FURTHER ORDERED that Defendant shall pay a civil penalty of $1,000,000. The Clerk of Court is respectfully directed to terminate the motion at Doc. No. 142 and to close this case.

SO ORDERED.

Dated: February 3, 2012
New York, New York

RICHARD J. SULLIVAN
United States District Judge

* * *

Plaintiff is represented by Kingdon Kase, Tami Scarola Stark, Catherine Eleni Pappas, and G. Jeffrey Boujoukos of the United States Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

Defendant is represented by Mark Floyd Pomerantz, Roberto Finzi, and Farrah Robyn Berse of Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, NY 10019.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

JOSEPH CONTORINIS,

Defendant.

No. 09 Civ. 1043 (RJS)
JUDGMENT

WHEREAS the Court granted Plaintiff Securities and Exchange Commission's ("Commission") motion for summary judgment by Memorandum and Order dated February 3, 2012;

WHEREAS by Order dated February 8, 2012, the Court directed Plaintiff to submit a proposed judgment and invited Defendant to submit any comments that he had regarding the proposed revised judgment;

WHEREAS the Court held a telephone conference regarding the proposed revised judgment on February 28, 2012, it is

ORDERED, ADJUDGED AND DECREED: That Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with Defendant, who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of

any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;

That Defendant is liable for disgorgement of $7,260,604, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $2,485,205, and a civil penalty in the amount of $1,000,000 pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1].[1] Defendant shall satisfy this obligation by paying $10,745,809 within 14 days after entry of this Order by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission. The payment shall be delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312, and shall be accompanied by a letter identifying Joseph Contorinis as a defendant in this action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Order. Defendant shall pay post-judgment interest

[1] As set forth in the Court's February 3, 2012 Memorandum and Order, this disgorgement amount may be offset by any amounts paid by Defendant pursuant to the criminal forfeiture order in the accompanying criminal case.

on any delinquent amounts pursuant to 28 U.S.C. § 1961. The Commission shall remit the funds paid pursuant to this paragraph to the United States Treasury;

That this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Order;

That this Order shall constitute the final judgment in this matter and supersedes the Clerk's Judgment of February 8, 2012, located at docket entry number 156.

SO ORDERED.

Dated: February 29, 2012
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

SPA-12

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

Ruby J. Krajick, Clerk of Court

by: _____

, Deputy Clerk

SPA-13

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

---X

-V-

NOTICE OF APPEAL

civ. ( )

---X

Notice is hereby given that _____ (party) hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the _____ (day) day of _____ (month), _____ (year).

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

---X

-V-

---X

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

Pursuant to Fed. R. App. P. 4(a)(5), ______________________ respectfully
(party)

requests leave to file the within notice of appeal out of time. ______________________
(party)

desires to appeal the judgment in this action entered on ______________ but failed to file a
(day)

notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

Date: ______________________ ( ) ________-______________
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

--X	
	AFFIRMATION OF SERVICE
-V-	
	civ. ( )
--X	

I, ______________________________, declare under penalty of perjury that I have

served a copy of the attached ____

____

upon ____

____

whose address is: ____

____

Date: ________________
New York, New York

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

FORM 4

FORM 2

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ( )

----------X

1. Notice is hereby given that _____ hereby appeals to
(party)
the United States Court of Appeals for the Second Circuit from the judgment entered on _____.
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time

_____ respectfully requests the court to grant an extension of time in
(party)
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, _____ states that
(party)
this Court's judgment was received on _____ and that this form was mailed to the
(date)
court on _____.
(date)

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the

12-1723-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

JOSEPH CONTORINIS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

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General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

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FOR THE SECOND CIRCUIT

12-1723-cv

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

JOSEPH CONTORINIS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

PRELIMINARY STATEMENT

This is an appeal by defendant Joseph Contorinis in a civil law enforcement action brought by the Securities and Exchange Commission. The Commission filed this action against Contorinis and six other individuals based on their involvement in an insider trading scheme that violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §240.10b-5, and generated millions of dollars of profits and avoided losses. Specifically, the Commission alleged that Nicos

Stephanou, who worked on mergers and acquisitions at a major investment bank, passed material nonpublic information regarding potential acquisitions of publicly traded companies to certain friends, including Contorinis. The Commission alleged that Contorinis, and other individuals to whom Stephanou tipped the information, traded in advance of announcements regarding the potential acquisitions while in possession of material nonpublic information. Contorinis used the information he received from Stephanou to make trades on behalf of a hedge fund for which he served as a portfolio manager and in which he had an ownership interest.

In a parallel criminal case brought by the United States Attorney's Office for the Southern District of New York ("USAO"), Stephanou and Contorinis were charged with securities fraud and conspiracy to commit securities fraud. In May 2009, Stephanou pleaded guilty to one count of securities fraud and six counts of conspiracy to commit securities fraud. These included one count of conspiracy to commit securities fraud based on Stephanou tipping Contorinis with material nonpublic information about the acquisition of a supermarket retailer. In December 2010, Stephanou was sentenced to a twenty-two month prison sentence and was ordered to forfeit $14 million.

Contorinis went to trial in the criminal case. On October 6, 2010, he was convicted of one count of conspiracy to commit securities fraud and seven counts

of securities fraud, in violation of Section 10(b) and Rule 10b-5. The counts on which Contorinis was convicted include all of his illegal trading that is the basis of the Commission allegations against him, as well as several trades that were not alleged against him in the Commission's complaint. On December 17, 2010, Contorinis was sentenced to six years imprisonment and ordered to forfeit approximately $12,650,438 in illegal profits and avoided losses. JA 46, ¶36. [1]

Contorinis appealed in his criminal case and, on August 17, 2012, this Court affirmed his conviction. This Court also determined, however, that Contorinis could not be ordered to pay criminal forfeiture in the amount ordered by the district court because that amount included "proceeds"— profits and avoided losses — that were not received by Contorinis, but retained by the hedge fund for which he served as a portfolio manager. This Court relied on the fact that the forfeiture statute's definition of "proceeds" subject to forfeiture extends only to "the amount of money *acquired* through the illegal activity," and on the Court's conclusion that a defendant "acquires" only money that the defendant possesses or controls. Since the fund, not Contorinis, ultimately retained possession and control of the bulk of the money derived from the illegal insider trading he conducted on behalf of the fund, Contorinis could not be ordered to forfeit the amount of retained money. *See United States v. Contorinis,* 692 F.3d 136, 145 (2d Cir. 2012) (interpreting the

[1] "JA__" refers to the page number in the Joint Appendix, and "SPA __ refers the page number in the Special Appendix attached to the brief of the appellant.

language of 18 U.S.C. §981(a)(2)(B)). This Court remanded the case to the district court for a redetermination of the amount of forfeiture Contorinis should pay. After remand, the parties agreed that Contorinis would forfeit $427,875 in profits that were received by him.

After Contorinis's conviction, and while the appeal of his conviction was pending, the Commission moved for summary judgment, based on the collateral estoppel effect of the conviction. On February 3, 2012, the district court granted summary judgment in favor of the Commission. In doing so, the court rejected Contorinis's argument that he could not be ordered to disgorge the profits of his insider trading that were retained by the hedge fund. The district court held that this Court's precedent establishes that an insider trader, Contorinis, may be held liable for the profits received by a third party, the fund. The district court ordered Contorinis to disgorge $7,260,604 in profits and pay $2,485,205 in prejudgment interest and a $1,000,000 civil penalty. It also enjoined Contorinis from violating Section 10(b) of the Exchange Act and Rule 10b-5. SPA 9-10.

In this appeal, Contorinis does not dispute that (as he conceded in the district court), he is collaterally estopped from contesting his liability for fraud. Nevertheless, he spends several pages in his brief making an impermissible attack on the factual findings underlying the jury's verdict in the criminal case.

Much of Contorinis's brief is devoted to his flawed argument that criminal forfeiture principles should be applied to the imposition of the remedial equitable remedies involved in this case. He argues that, since this Court construed the criminal forfeiture statute as restricting his liability for criminal forfeiture, the same result should follow in this civil case with respect to disgorgement of the illegal profits retained by the hedge fund and the award of prejudgment interest on those profits. But this case turns on equitable principles, not on the interpretation of the criminal forfeiture statute, and Contorinis's argument is inconsistent with well established precedent holding that an insider trading violator is civilly liable for the disgorgement of the profits obtained by third party recipients.

Contorinis also argues that the district court abused its discretion in enjoining him from future fraud violations because, he argues, there has been no showing that he is likely to commit such violations in the future. But the district court properly determined that most of the relevant factors used to determine whether a defendant is likely to commit future violations weighed in favor of enjoining Contorinis.

JURISDICTIONAL STATEMENT

The Commission concurs in the jurisdictional statement contained in the brief of the appellant.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court acted within its discretion in ordering Contorinis, a hedge fund portfolio manager, to disgorge $7,260,604 made by his hedge fund from his insider trading violations where it is well established that an insider trading violator is liable for the profits received by third parties from his insider trading, regardless of whether he shared in or benefited from the profits.

2. Whether the district court acted within its discretion in ordering Contorinis to pay $2,485,205 in prejudgment interest on the $7,260,604 in disgorgement where (a) it is well established that a violator may be ordered to pay prejudgment interest on the amount of profits made by a third-party recipient of the profits, regardless of whether the violator shared in these profits, and where (b) Contorinis directly benefited from the performance of the fund, both in terms of his compensation and his reputation as a securities portfolio manager.

3. Whether the district court acted within its discretion in ordering Contorinis to pay the full $2,485,205 in prejudgment interest when the government allegedly held approximately $3 million of Contorinis' assets as bail (a) where Contorinis failed to raise the bail issue before the district court; (b) where it was Contorinis himself who decided to use the money as bail; and (c) where he had the full benefit of the bail money because it allowed him to remain free from imprisonment.

4. Whether the district court acted within its discretion in enjoining Contorinis from future violations of Section 10(b) of the Exchange Act and Rule 10b-5, where the district court analyzed the relevant factors and determined that Contorinis (a) acted knowingly; (b) made multiple trades based on nonpublic material information over a period of several weeks; and (c) has consistently maintained that he is blameless for his actions — as he does in his appellate brief.

COUNTERSTATEMENT OF THE CASE

A. Facts

In September 2005, Stephanou, a longtime friend of Contorinis, informed Contorinis that the investment bank for which he worked, UBS Investment Bank ("UBS"), had been hired as the financial advisor to Cerberus, a private equity firm, in order to explore a potential acquisition of Albertson's Inc. ("ABS"), a large retail supermarket chain whose securities were traded on the New York Stock Exchange ("NYSE") under the ticker symbol "ABS." JA 5-6, ¶¶8-13.[2] That information was not publicly available at the time Stephanou revealed it to Contorinis, and Contorinis asked Stephanou to keep him apprised of any

[2] The district court determined that the facts are largely undisputed. SPA 1, n.1. In addition, in light of his criminal conviction, Contorinis concedes that he is collaterally estopped from contesting liability. Docket No. 147, at 1 (opposition to summary judgment). The facts in the following documents are the basis on which summary judgment was granted in this case: SPA 1-2 (February 3, 2012 Memorandum and Order of the district court); JA 35-47 (Commission's statement of undisputed facts); JA 52-94 (complaint); JA 134-46 (indictment in *United States v. Contorinis*); JA 165-78 (information in *United States v. Stephanou*).

developments. JA 6, ¶6. Contorinis was a Managing Director at the brokerage firm Jefferies & Company, Inc. ("Jefferies"). He was also a registered representative of Jefferies and associated with a Jefferies investment adviser. At the time Stephanou tipped Contorinis, and throughout the relevant period, Contorinis worked as a portfolio manager for a hedge fund established by Jefferies, the Paragon Fund (the "Fund"). JA 1-2, ¶¶1, 3. The Paragon Fund closed in June 2007. JA60, ¶20.

1. Contorinis acquired nonpublic information from Stephanou that Contorinis knew was provided to him in violation of a duty of confidentiality.

As part of his participation on the UBS team working with Cerberus on exploration of a possible acquisition of ABS (the "ABS transaction"), Stephanou learned material nonpublic information about the ABS transaction and the negotiations surrounding it prior to the public announcement of that information. JA 40,¶12. UBS had agreed with Cerberus, its client, to maintain in confidence all information related to the ABS transaction. JA 39, ¶11. Because UBS owed a duty to its client to maintain the confidentiality of client information provided by UBS to its employees, UBS maintained policies and procedures to ensure the proper handling of nonpublic client information and required that each employee maintain in strict confidence information concerning clients. *Id; see also* JA 190-97. Specifically, UBS policies prohibited employees from using confidential

information obtained during the course of their employment when trading in their own account or someone else's account, and from disclosing nonpublic information to others. JA 40, ¶11. And Stephanou was aware that he owed a duty to maintain the confidentiality of information provided to him and to UBS by the firm's clients, including Cerberus, and to abstain from trading based on that information or disclosing that information to others. *Id ;* JA 100.

Nevertheless, Stephanou informed Contorinis that, as a member of the ABS transaction "deal team," he was privy to nonpublic information about the transaction. JA 42, 121, 123. And, as described below, Stephanou subsequently tipped Contorinis material nonpublic information concerning the ABS transaction, and Contorinis, although he knew the source and confidential nature of the information (JA 121, 123), traded ABS securities while in possession of that information.

2. Contorinis traded while in possession of material nonpublic information.

Between October 2005 and December 2005, negotiations concerning the ABS transaction ran a tenuous course, and on several occasions it appeared that the deal would not be consummated. JA 41-42, ¶¶15-17, 19. During that time, Cerberus formed a consortium with Supervalu, Inc. ("Supervalu") and CVS Caremark Corporation ("CVS") (the "consortium") in an effort to complete the acquisition of ABS. JA 41-42, ¶¶14-17, 19. But prior to the opening of trading on

the NYSE on December 23, 2005, the consortium and ABS issued a press release announcing the termination of discussions regarding the potential sale of ABS. JA 41, ¶19. Based on that news, ABS stock price dropped 12% that day. *Id.*

During the following weeks, however, discussions between ABS and the consortium were revived. On January 9, 2006, the consortium held a nonpublic kick-off meeting to discuss a possible acquisition. JA 42, ¶21. Beginning that day and continuing until the acquisition of ABS was publicly announced on January 23, 2006, Stephanou and Contorinis had approximately 50 phone conversations during which Stephanou provided Contorinis with material nonpublic information concerning progress on the ABS transaction. JA 42 & 44, ¶¶21 & 28. During that period, Contorinis traded ABS securities on behalf of the Paragon Fund while in possession of the information he obtained from Stephanou.

Stephanou testified during Contorinis's criminal trial that, during calls he had with Contorinis between January 9 and January 23, 2006, he told Contorinis, among other things, that the ABS transaction had "gained a lot of traction" and that it looked like the transaction "was happening because the antitrust risk [which might have caused negotiation to fall through in December] would be eliminated." JA 42, ¶22; JA 117, 126. Stephanou also testified that he told Contorinis during those calls that there was "no other major transaction risk," that there would be a "small increase in the price offered" from a previous offer that had been made

during the December negotiations that fell through, and that the "transaction would be announced within a couple of weeks." JA 42-43, ¶22; JA 117. Stephanou further testified that, once he learned the date of the ABS transaction, he tipped that information to Contorinis "three or four days prior the announcement." *Id.* Contorinis therefore knew of the expected completion of the acquisition of ABS by the consortium prior to its becoming public. JA 42-43, ¶¶21, 22; JA 117.

On January 9, 2006, the same day the consortium met to revive the acquisition, Stephanou called Contorinis at 12:52 p.m., and they spoke for about four minutes. JA 43, ¶23. Beginning that day and continuing to January 18, 2006, Contorinis caused the purchase of 2,675,000 shares of ABS stock for the Paragon Fund at an average price of $22.18 per share and a total cost of $59,331,722, excluding commissions. *Id;* JA 259, ¶13; JA 266

On January 18 and 19, 2006, Stephanou and Contorinis spoke by phone approximately sixteen times. JA 43, ¶24. On those days, Contorinis caused the sale of approximately 700,000 shares of ABS stock for the Paragon Fund at an average price of $23.79 per share. *Id;* JA 259, ¶15, JA 266.

From January 20 through January 23, 2006, Stephanou and Contorinis had approximately ten phone conversations. JA 44, ¶28. On January 20, 2006, Contorinis caused the purchase of 500,000 shares of ABS shares for the Paragon Fund at an average price of $24.11 per share. JA 44, ¶26; JA 260, ¶17; JA 266.

3. When the acquisition of ABS was publicly disclosed, the stock price rose significantly, and Contorinis sold all the ABS shares held by the Paragon Fund.

On January 23, 2006, prior to the opening of trading, ABS, Supervalu, and CVS each issued a press release officially announcing the acquisition of ABS by the consortium at $26.29 per share. JA 44, ¶29. That day, ABS common stock opened at $24.85 per share and closed at a high of $25.42 per share, a 5.43% increase over the closing price of $24.11 at the end of trading on the preceding business day. *Id.*

On the day of the announcement, Contorinis, on behalf of the Paragon Fund, closed out the Fund's position entirely by selling 2,500,000 shares of ABS at an average price of $25.07. In total, the Paragon Fund realized profits of $7,260,604 on the 2,500,000 shares of ABS stock Contorinis purchased between January 9 and January 20, 2006. JA 43 & 45, ¶¶23 & 30; JA 266.

4. Contorinis was convicted in a parallel criminal action and has agreed to pay criminal forfeiture in the amount of approximately $427,875 as the result of his conviction.

In February 2009, Contorinis was indicted on one count of conspiracy to commit securities fraud and nine counts of securities fraud. JA 45, ¶33; JA 133-47. The indictment included factual allegations that mirrored those in the Commission's civil complaint. Both the indictment and the complaint alleged that Contorinis obtained illegal profits for the Paragon Fund by trading ABS stock in

January 2006, while in possession of material nonpublic information concerning the ABS transaction, in violation of Section 10(b) of the Exchange Act and Rule 10b-5. JA 45, ¶33; *compare* JA 133-47 *with* JA 52-87.

Following an eleven-day criminal trial, the jury returned a verdict on October 6, 2010 finding Contorinis guilty of one count of conspiracy to commit securities fraud and seven counts of securities fraud. JA 46, ¶34. Five of the counts on which Contorinis was convicted were based on the same illegal trading in ABS securities alleged in the Commission's complaint. *Id.* Evidence presented at Contorinis's trial established that his insider trading resulted in losses avoided of $5,345,700 and profits of $7,304,738. JA 46, ¶35. Contorinis was sentenced to a six-year term of imprisonment and ordered to pay criminal forfeiture in the amount of $12,650,438.

Contorinis appealed and, on August 17, 2012, this Court affirmed the conviction but vacated the forfeiture order and remanded the case to the district court for a redetermination of the proper amount of forfeiture. *United States v. Contorinis,* 692 F.3d 136 (2d Cir. 2012). This Court's decision to vacate the forfeiture order was based on an interpretation of the criminal forfeiture statute under which a district court can order the forfeiture of property that constitutes "proceeds" traceable to the violation, 18 U.S.C. §981(a)(1)(C), and under that statute, the proceeds to be forfeited must have been "acquired" by the defendant.

18 U.S.C. §981(a)(2)(B). This Court concluded that a defendant "acquires" only proceeds that it possesses or controls. This Court further determined that Contorinis could not be ordered to forfeit all the losses avoided and profits made by the Fund from his violative insider trading because Contorinis did not possess or control, and thus did not "acquire," the bulk of those "proceeds." 692 F.3d at 146.

But it was recognized that Contorinis did acquire substantial sums from his illegal trades because he had an ownership interest in the Fund and because most of his compensation was based on the performance of the Fund. JA 36, ¶3; JA 330. Accordingly, this Court's decision noted that "[t]o what extent [Contorinis's] interest in salaries, bonuses, dividends, or enhanced value of equity in the Fund can be said to be money 'acquired' by the defendant 'through the illegal transactions resulting in the forfeiture,' * * * we leave to the district court to decide on remand." 692 F.3d at 148 n.4. The parties subsequently agreed that the proper amount of forfeiture to be paid by Contorinis in satisfaction of the judgment in the criminal proceeding is $427,875. Br. 5.

B. Procedural history and the decision of the district court

The same day Contorinis was indicted, the Commission brought this civil action. Following Contorinis's criminal conviction, the Commission moved for summary judgment on the ground that Contorinis was liable as a matter of law

based on facts established at trial that he was collaterally estopped from challenging. In his opposition to summary judgment, Contorinis stated that he "[did] not dispute that summary judgment as to liability can be entered against him based on the preclusive effect of the jury's verdict in the criminal case." Docket No. 147, at 1. Accordingly, the district court granted summary judgment in favor of the Commission as to liability. SPA 4.

Contorinis did take issue with the remedies sought by the Commission, including an injunction against future fraud violations, disgorgement, prejudgment interest, and a civil penalty. Docket No. 147. The Commission sought disgorgement of $7,260,604, representing the total profits realized by the Paragon Fund from Contorinis's ABS trades between December 30, 2005 and January 23, 2006, less $45,074 in commissions. Contorinis argued, however, that he should not be required to disgorge funds "that were never received or enjoyed by [him]," as he "only personally profited from a small percentage" of the illegal profits made by the Fund. SPA 6 (quoting Docket No. 147, at 7 & 10). In response, the district court, citing *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998), noted that Contorinis's "argument that he should not be required to disgorge the portion of the illegal profits that were enjoyed by the Fund has been rejected by the Second Circuit." SPA 6.

As to prejudgment interest, the district court concluded that Contorinis had conceded that he is liable for interest on any amount of disgorgement he is ordered to pay based on a statement made by Contorinis in his Counterstatement of Undisputed Facts. SPA 5 (quoting Docket No. 149, at 11 ¶32).

The district court concluded that an order enjoining Contorinis from future violations of Section10(b) and Rule 10b-5 was warranted based on the factors used to determine when an injunction is necessary to prevent future violations of the federal securities laws. SPA 4 (Op. 4). Specifically, the court found that Contorinis acted knowingly in making illegal trades; that he made multiple trades over a course of several weeks; that he profited substantially from his conduct; and that, throughout this action and in the parallel criminal action, Contorinis had consistently maintained that he was blameless for past conduct. SPA 4-5.

STANDARD OF REVIEW

District court orders granting disgorgement, prejudgment interest, and injunctive relief are reviewed for an abuse of discretion. *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1475-76 (2d Cir. 1996) (disgorgement and prejudgment interest); *SEC v. Posner,* 16 F.3d 520, 522 (2d Cir. 1994) (disgorgement); *SEC v. Banner Fund International,* 211 F.3d 602, 616 (D.C. Cir. 2000) (injunction). This Court will find an abuse of discretion "only if [it has] 'a definite and firm conviction that the court below committed a clear error of

judgment in the conclusion that it reached upon a weighing of the relevant factors.'" *In re American Express Financial Advisors Securities Litigation,* 672 F.3d 113, 129 (2d Cir. 2011) (quoting *Silivanch v. Celebrity Cruises, Inc.,* 333 F.3d 355, 362 (2d Cir. 2003)).

SUMMARY OF THE ARGUMENT

1. Even after this Court affirmed his criminal conviction, Contorinis attacks the factual basis of the jury's verdict finding him liable for insider trading. Contorinis is collaterally estopped, however, from challenging his liability for insider trading, and his attempt to impugn the jury's verdict as to liability is not permissible.

2. The district court acted within its discretion in ordering Contorinis to disgorge the full $7.26 million in profits made by the Fund, whether or not the profits were received by Contorinis. When a person who has discretionary authority over brokerage accounts makes profitable trades on behalf of the owners of those accounts based on inside information, it is in substance the same as if he had traded for his own account and then given the profits to the account holders. The prohibition on insider trading would be virtually nullified if those in possession of inside information, although prohibited from trading for their own accounts, were free to use the inside information on trades to benefit their families, friends, or business associates. Accordingly, it is well settled that an insider

trading violator can be required to disgorge third-party profits from his trading, regardless of whether he received or benefited from those profits.

This Court's decision in the criminal case holding Contorinis not liable for criminal forfeiture is not applicable to the equitable disgorgement involved here. That holding was based on an interpretation of language that is in the criminal forfeiture statute but is not applicable here, and disgorgement and criminal forfeiture have fundamentally different purposes.

3. The district court correctly held that Contorinis conceded his liability for prejudgment interest by failing to properly controvert facts in the Commission's Local Rule 56.1 statement. Furthermore, it is within the discretion of the district court to order an insider trading violator to pay prejudgment interest on the profits from his trading, even where he did not receive a pecuniary benefit from the profits.

4. The district court acted within its discretion in enjoining Contorinis from future violations of Section 10(b) and Rule 10b-5. After reviewing the relevant factors, the court noted that Contorinis acted knowingly in making illegal trades, that he made multiple trades over the course of several weeks, and that he profited substantially from his conduct. Finally, the court emphasized that throughout this action, and in the parallel criminal action, Contorinis has consistently maintained that his past conduct was blameless. Even now, in his opening brief, he attempts to

challenge the factual basis of the jury's decision to convict him of insider trading. Such persistent refusals to admit any wrongdoing make it rather dubious that Contorinis is likely to avoid such violations of the securities laws in the future.

ARGUMENT

I. BECAUSE CONTORINIS IS COLLATERALLY ESTOPPED FROM CHALLENGING HIS LIABILITY FOR INSIDER TRADING, HIS ATTEMPT TO IMPUGN THE JURY'S VERDICT AS TO LIABILITY IS NOT PERMISSIBLE.

Contorinis does not directly argue against his liability for insider trading, but he devotes four pages of his statement of facts to attacking the jury's factual findings in three respects. Br. 7-10. These challenges are barred by the collateral estoppel effect of his criminal conviction (which this Court affirmed), and in any event lack merit.

First, Contorinis suggests that he did not commit insider trading because the Fund invested in ABS stock before the relevant time period. "Significantly," Contorinis asserts, "the Fund had been investing in [ABS] since September 2004 —a year prior to any allegations of insider trading by Mr. Contorinis." Br. 8. And "Mr. Stephanou only learned that he would be a member of the UBS deal team advising Cerberus — and therefore acquire inside information about the stock— *after* the Fund made its $17 million investment in [ABS]." Br. 8 (emphasis in original). What Contorinis does not mention, however, is that, after the Fund's investment in ABS dwindled to zero on December 8, 2005, it rose dramatically during the period when Stephanou was tipping inside information. It was over $75 million on December 20, 2005 and over $59 million on January 18, 2006. JA 323-25.

Second, Contorinis makes repeated references to his co-portfolio manager, Michael Handler, and suggests that he, together with Handler, who had not been tipped, jointly made the decision to invest in ABS stock based on public information. Br. 7, 9-10. He asserts that "[a]s co-Portfolio managers, Messrs. Contorinis and Handler made the investment decisions for the Fund" (Br. 7), and "as co-Portfolio Managers of the Fund followed * * * extensive news coverage, and made numerous trades in [ABS] stock on behalf of the Fund" during the relevant period. Br. 9. Handler testified, however, that it was Contorinis who was primarily responsible for Paragon Fund's trades in ABS stock. *United States v. Contorinis,* No. 11-3, Docket No. 41 at 21 (summarizing trial transcripts 1047, 1049, 1054-55); *see also* JA 335, at 1030; JA 336, at 1047; JA 337, at 1054-55. The only exceptions to this were trades executed on December 7, 2005 (*id.*), and the jury did not find Contorinis liable for those trades. JA 157.

Third, Contorinis also reasserts a major factual contention rejected by the jury in his criminal trial — that, even apart from his argument about Handler, his trades in ABS stock were not based on tips of nonpublic information from Stephanou, but on information available to the public through the news media. Contorinis states that during the relevant time period, "there was unusually extensive, highly-detailed media coverage of [ABS], focusing on the possibility of the company being acquired and the status of the negotiations." Br. 9. Contorinis

further notes that on January 10 "the CEO of SuperValu announced to analysts and investors that Supervalu viewed the sale of [ABS], and specifically the availability of certain of its premier properties, as an extraordinary opportunity for [Supervalu] to consider.'" Br. 10. In addition, Contorinis states that "[o]n January 13, *The New York Post* announced that the parties had renewed discussions about a potential purchase of [ABS]" and that "[o]n January 19, *The Wall Street Journal* published an article stating that a consortium had submitted a new bid to acquire [ABS]." Br. 10. He also states that "[i]t had also been publicly reported that January 12 was the deadline for [ABS's] shareholder proposals," and he states that "Contorinis and Handler therefore wanted to get back into the stock before the deadline." Br. 10.

Contrary to what Contorinis appears to argue, these bits and pieces of information about a stock from sources of varying reliability do not render immaterial or public the information from an inside source. As this Court stated when it affirmed Contorinis's criminal conviction:

> Insiders often have special access to information about a transaction. Rumors or press reports about the transaction may be circulating but are difficult to evaluate because their source may be unknown. A trier of fact may find that information obtained from a particular insider, even if it mirrors rumors or press reports, is sufficiently more reliable, and, therefore, is material and nonpublic, because the insider tip alters the mix by confirming the rumors or reports.

Contorinis, 692 F.3d at 144.

Indeed, Stephanou's tips gave Contorinis access, not simply to speculation about what might happen, but to knowledge of what was happening. Unlike other investors, Contorinis did not need to rely on conflicting news stories or hopeful statements by the CEO of one the companies that made up the consortium. From Stephanou, Contorinis knew negotiations had been revived before that fact became public. He knew how the negotiations were progressing and that the negotiations were likely to succeed, and he even knew the date the merger would be announced before any of this had become public.

II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ORDERING CONTORINIS TO PAY $7.26 MILLION IN DISGORGEMENT BECAUSE IT IS WELL ESTABLISHED THAT AN INSIDER TRADING VIOLATOR IS LIABLE FOR THE PROFITS FROM HIS TRADING.

"The decision to order disgorgement of ill-gotten gains * * * lie[s] within the discretion of the trial court, which 'must be given wide latitude in these matters.'" *SEC v. Lorin,* 76 F.3d 458, 462 (2d Cir. 1996) (quoting *SEC v. Patel,* 61 F.3d 137, 140 (2d Cir. 1995)). And where disgorgement calculations cannot be exact, "any risk of uncertainty ... should fall on the wrongdoer whose illegal conduct created that uncertainty." *SEC v. Patel,* 61 F.3d at 140; *see also SEC v. First City Financial Corp.,* 890 F.2d 1215, 1232 (D.C. Cir. 1989).

A. It is well settled that an insider trading violator can be required to disgorge third-party profits from his trading, regardless of whether he received or benefited from those profits.

Contrary to Contorinis's argument (Br. 12), the district court properly ordered Contorinis to disgorge approximately $7.26 million based on the profits obtained by the hedge fund from Contorinis's insider trading violations, whether or not he received or benefited from the profits. When a person who has discretionary authority over brokerage accounts, such as a hedge fund manager, trades on behalf of the owners of those accounts based on inside information, and the account holders receive the profits of the unlawful trading, it is in substance no different than if the manager had traded for his own account, receiving the profits and then given them to the account holders. *Cf. Dirks v. SEC,* 463 U.S. 646, 663-64 (1982). Courts require securities law violators to disgorge the resulting profits without regard to whether the violator keeps them because "[a]n order to disgorge establishes a personal liability, which the defendant must satisfy regardless of whether he retains the selfsame proceeds of his wrongdoing." *SEC v. Banner Fund Int'l,* 211 F.3d 602, 617 (D.C. Cir. 2000) (citing *SEC v. Shapiro,* 494 F.2d 1301, 1309 (2d Cir. 1974) (insider trading case where tipper did not get profits ordered to be disgorged)). The same result should follow here.

Indeed, in *SEC v. Warde,*151 F.3d 42 (2d Cir. 1998), this Court held an insider trading violator liable for disgorgement when the Court was faced with

very similar circumstances involving discretionary trading authority. In that case, Warde traded based on material nonpublic information on behalf of two trusts, of which he and his wife were beneficiaries. Like Contorinis in this case, Warde argued he was not liable for the profits he made on behalf of the trusts because the trusts were third parties. To this, the Court declared, in an alternative holding, that "[e]ven if the * * * Trust profits were fairly characterized as third party profits, Warde would nevertheless be liable to disgorge their profits." The Court explained:

> The value of the [prohibition on insider trading] in preventing misuse of insider information would be virtually nullified if those in possession of such information, although prohibited from trading on their own accounts, were free to use the inside information on trades to benefit their families, friends, and business associates.

SEC v. Warde, 151 F.3d at 49. Recognizing the similarity between the circumstances in *Warde* and the analogous situation involving a tipper and tippee, *Warde* cited *SEC v. Clark,* 915 F.2d 439, 454 (9th Cir. 1990), in which the Ninth Circuit— relying on precedent from this Circuit — held:

> It is well settled that a tipper can be required to disgorge his tippee's profits, *see, e.g., Elkind v. Liggett & Myers, Inc.,* 635 F.2d 156, 165 (2d Cir. 1980) ("Trades by tippees are attributed to the tipper.").

Id. (also citing *SEC v. Texas Gulf Sulphur Co.,* 446 F.2d 1301, 1308 (2d Cir. 1971) and *SEC v Tome,* 638 F. Supp. 596, 617 (S.D.N.Y. 1986) (Pollack, J.)).

Warde makes it clear that "[a] tippee's gains are attributable to the tipper, *regardless whether benefit accrues to the tipper*." 151 F.3d at 49 (emphasis added). This principle is widely recognized and firmly established. *See, e.g., Elkind v. Liggett & Myers, Inc.,* 635 F.2d at 165; *Texas Gulf Sulphur Co.,* 446 F.2d at 1308; *SEC v. Hirshberg,* 173 F.3d 846 (2d Cir. 1999) (unpublished opinion printed in Federal Reporter), *affirming in pertinent part, SEC v. Grossman,* 1997 WL 231167, at *3 (S.D.N.Y. May 6, 1997); *SEC v. Gowrish,* No. 09-05883, 2011 WL 2790482, at 7-8 (N.D. Cal. July 14, 2011), *aff'd,* No. 11-1695, 2013 WL 681053 (9th Cir. Feb. 26, 2013); *SEC v. Aragon Capital Management, LLC.,* 672 F. Supp. 2d 421, 445 (S.D.N.Y. 2009), *rev'd on other grounds, SEC v. Rosenthal,* 650 F.3d 156 (2d Cir. 2011); *SEC v. Drucker,* 528 F. Supp. 2d 450, 452-53 (S.D.N.Y.), *aff'd,* 346 F. App'x 663 (2d. Cir. 2009); *SEC v. Michel,* 521 F. Supp. 2d 795, 830-31 (N.D. Ill. 2007); *SEC v. Blackwell,* 477 F. Supp. 2d 891, 914 (S.D. Ohio 2007); *SEC v. Yun,* 148 F. Supp. 2d 1287, 1292 (M.D. Fla. 2001); *SEC v. Tome,* 638 F. Supp. 638, 639-40 (S.D.N.Y. 1986), *aff'd,* 833 F.2d 1086 (2d Cir. 1987); *Tome,* 638 F. Supp. at 617 n.40.[3]

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[3] *See also* Alan R. Bromberg, Lewis D. Lowenfels, and Michael J. Sullivan, 3 *Bromberg and Lowenfels on Securities Fraud* §6:340 (Thomson Reuters (Westlaw) 2013) ("A tipper may even be forced to disgorge the profits of subtippees."); Joseph Warren Bishop, *Law of Corporate Officers and Directors* §3:39 (Thomson Reuters (Westlaw) 2013) ("Existing precedent suggests that the insider could be liable for the full amount of each investor's losses, plus an amount equal to profits made by any persons whom he or she 'tipped.'"); *Cf. Bateman Eichler, Hill*

The Court in *Warde* understood that, "without such a remedy, insiders could easily evade their duty to refrain from trading on inside information" because "[e]ither the transaction so traded could be concluded by a relative or an acquaintance of the insider, or implied understanding could arise under which reciprocal tips between insiders in different corporations could be given." *SEC v. Texas Gulf Sulphur Co.,* 446 F.2d at 1308; *Accord Clark,* 915 F.2d at 454 (tipping may occur with the expectation of reciprocity); *Dirks.* 463 U.S. at 664 (regardless of what pecuniary monetary profit a tipper might or might not make, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo.*"); *Tome,* 638 F. Supp. at 639-40 (tipper may act in order "to foster goodwill between it and the financial analyst it tipped"); Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws,* 93 Harv. L. Rev. 322, 348 (1979) ("The theory * * * is that the insider, by giving the information out selectively, is in effect selling the information to its recipient for cash, reciprocal information, or other things of value for himself.") (quoted in *Dirks,* 463 U.S. at 663-64).

Richards, Inc. v. Berner, 472 U.S. 299, 313 (1985) ("A tippee trading on inside information will in many circumstances be guilty of fraud against individual shareholders, *a violation for which the tipper shares responsibility.*") (emphasis added); *Dirks v. SEC,* 463 U.S. 646, 663-64 (1983) (an insider does not necessarily need to obtain a pecuniary benefit to be liable for insider trading).

Indeed, "Congress explicitly endorsed such reasoning in * * * legislation which authorized civil penalties in insider trading cases." *SEC v. Yun,* 148 F. Supp. 2d at 1290 (citing and quoting *Texas Gulf Sulphur,* 446 F.2d at 1308, as set forth above). The House Report on the legislation stated:

> The public interest nature of Commission actions necessitates that the Commission's ability to obtain the full scope of equitable and other relief available in appropriate cases remain unimpaired. Thus, for example, if a tipper's communication resulted in profits to his direct tippee and to remote tippees as well, the Commission could obtain disgorgement from the tipper of the profits of both the direct and remote tippees.

H.R. Report 910, 100th Congress, 2d Session, 1988, 1988 U.S. Code Cong. and Admin. News 6043, 6057 n.16 (quoted in *SEC v. Yun,* 148 F. Supp. 2d at 1291).

Holding Contorinis liable for disgorgement of the Fund's profits has an even stronger foundation than holding a tipper liable for disgorgement of his tippee's profits. A tipper — *i.e.,* a person who communicates material, nonpublic information to another person who may reasonably be expected to use it to trade — often will not know the extent to which his tippee will trade and thus will not know the amount of the expected profits. Contorinis, however, was not a mere tipper. Contorinis himself effected the illegal trades on behalf of the Fund. And as a result, he had the certainty of knowing the amount of illegal profits he was generating. Thus, it is particularly appropriate to hold him liable for disgorging

those profits on the rationale that the results of his conduct were exactly the same as if he had directly obtained the profits by trading for himself and then turned them over to the Fund.

The need to require Contorinis to disgorge the Fund's profits is reinforced by the fact that he actually did personally obtain benefit, in several ways, from the profits attributable to his trading for the hedge fund. Contorinis had an ownership interest in the Fund, and most of his compensation (more than the $200,000 in salary he earned) was derived from incentive bonuses that were linked to the Fund's profits. JA 36, ¶3; JA 330, at 671-72. Both his returns from his interest in the Fund and his incentive bonuses increased proportionately with the Fund's increase in profits. *Id.* Those benefits thus were dependent on the full amount of the Fund's profits.

Moreover, it is crucial to recognize that, for another reason, his benefit was not limited to the $427,875 in profits and incentive bonuses he ultimately received. The measure of success of a securities portfolio manager, after all, is the amount of profit he creates for his clients. Even if the portfolio manager obtains only a portion (or none) of the profits generated for his clients' accounts, his reputation rises or falls based on his ability to generate profits. Thus, a portfolio manager who generates extraordinary returns through illegal insider trading reaps a potentially enormous reputational benefit for purposes of his future employment

and compensation. *E.g.*, *Dirks,* 463 U.S. at 664 (noting a possible gain to the tipper in terms of a "reputation benefit that will translate into future earnings."). It is the recognition of intangible benefits such as this that serves as a basis for this Court's rule requiring a tipper to disgorge the profits of his tippee, even where the tipper himself does not receive those profits. *See, e.g., Warde,* 151 F.3d at 49; *Clark,* 915 F.2d at 454; *Texas Gulf Sulfur Co.,* 446 F.2d at 1308; *Tome,* 638 F. Supp. at 639-40; *cf. Dirks,* 463 U.S. at 664.

B. This Court's holding concerning Contorinis's criminal forfeiture is not applicable to the equitable disgorgement involved here.

Contorinis errs in arguing that the civil disgorgement ordered in this case should be vacated in light of this Court's ruling in *United States v. Contorinis* that Contorinis could not be made to pay *criminal forfeiture* based on the Fund's profits from his illegal trading. That ruling does not apply here both because it was based on an interpretation of a criminal forfeiture statute that does not apply to equitable disgorgement and because criminal forfeiture and disgorgement in a civil action serve different purposes.

1. This Court's decision in the criminal case was based on an interpretation of language that is in the criminal forfeiture statute but that is not applicable here.

This Court's determination to restrict the scope of the criminal forfeiture against Contorinis rested on an interpretation of the particular terminology contained in the forfeiture statute — language that is not applicable to disgorgement. Under the forfeiture statute, 18 U.S.C. §981(a)(1)(C), a district court can order the forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to [the] violation." The term "proceeds," in turn, is defined as "the amount of money *acquired* through the illegal transactions resulting in the forfeiture." 18 U.S.C. §981(a)(2)(B) (emphasis added).[4] In the criminal appeal, this Court decided that Contorinis could not be ordered to forfeit the profits retained by the Fund because "the 'proceeds' sought by the government

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[4] 18 U.S.C. 981(a)(2)(B), providing the definition of proceeds applicable in *United States v. Contorinis,* states:

> In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

here were 'acquired' by the Fund over which [Contorinis] lacks control." 692 F.3d at 146. The decision turned on the Court's narrow construction of the term "acquired" in §981(a)(2(B), which the Court held means "possessed or controlled by [Contorinis] or others acting in concert with him * * *." *Id.* at 148

The limited applicability of the holding in *United States v. Contorinis* — even in other criminal cases — was demonstrated in this Court's later decision in *United States v. Torres,* 703 F.3d 194 (2d Cir. 2012). There, a defendant who fraudulently understated her income in order to receive subsidized housing benefits was convicted of the theft of government property and ordered to forfeit $11,724 to the United States and to pay the same amount in restitution to the New York Housing Authority. On appeal, the defendant relied on *Contorinis* to argue that she could not be required to pay forfeiture because the payments at issue went to the Housing Authority directly from HUD such that she did not obtain the funds. 703 F.3d at 201. The *Torres* court responded by emphasizing that the result in *Contorinis* was based on the definition of proceeds in §981(a)(2)(B), which required the violator to have "acquired" the property subject to forfeiture — a limitation that did not apply to the definitional provision at issue in *Torres.*[5] 702

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[5] The provision at issue in *Torres* was 18 U.S.C. §981(a)(2)(A), which defines proceeds as follows:

> In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means

F.3d at 201. Thus, based on the particular wording of the applicable criminal forfeiture provision, which did not use the word "acquired," the result in *Torres* was different from that in *Contorinis,* and the defendant in *Torres* was required to forfeit the money sought by the government. The Court's criminal forfeiture ruling in *Contorinis* has even less applicability to the equitable disgorgement order in this civil action, which is not subject to §981(a)(2)(B) or *any other* criminal forfeiture statute.

2. Contrary to Contorinis's contention, disgorgement and criminal forfeiture have fundamentally different purposes.

Aside from the inapplicability to this case of the criminal forfeiture statute at issue in *Contorinis,* the Court's ruling in that case is rooted in the purpose of criminal forfeiture — which is entirely distinct from the purpose of the disgorgement ordered in this civil action. Disgorgement is remedial. It is available under the court's equitable authority and is broadly applied so as to prevent a defendant's unjust enrichment. *See SEC v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1474-75 (2d Cir. 1996); *Zacharias v. SEC,* 569 F.3d 458, 471-72 (D.C. Cir. 2009). Criminal forfeiture, on the other hand, is a statutory remedy that "serves

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property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

no remedial purpose [and] is designed to punish the offender," *United States v. Contorinis,* 692 F.3d at 146, and, like other criminal statutes, is construed narrowly. *See Scheidler v. Nat'l Org. for Women, Inc.,* 537 U.S. 393, 408 (2003); *Staples v. United States,* 511 U.S. 600, 619 n.17 (1994).

This essential difference between the purposes of disgorgement and forfeiture explains courts' different conclusions about what may be disgorged and what may be forfeited. Given equitable disgorgement's focus on denying violators any unjust enrichment from their violations, courts have held that it is appropriate to order disgorgement that deprives the defendant, not only of any pecuniary interest he may have gained, but also the value of any reputational or other non-pecuniary benefit he may have received through his violation. *See, e.g., Warde,* 151 F.3d at 49; *Texas Gulf Sulfur Co.,* 446 F.2d at 1308; *Tome,* 638 F. Supp. at 639-40. Forfeiture, on the other hand, has been limited, as in Contorinis's criminal case, to the pecuniary profits of a violation over which a defendant retains control.

* * * *

In sum, this Court should reject Contorinis's attempt to extend the holding in the criminal appeal to this civil action because the holding in the criminal appeal was limited to the wording of the forfeiture statute that has no relevance to disgorgement and because forfeiture and disgorgement have very different purposes.

C. Contorinis's argument that he cannot be required to disgorge profits because the Fund was an innocent third party is based on a misinterpretation of this Court's decision in the criminal case and a misunderstanding of the nature of disgorgement.

Contorinis's argument that he may not be held liable for disgorgement of the Fund's profits because the Fund is "an innocent third party" (Br. 18) is based on a further misinterpretation of *Unites States v. Contorinis*. Indeed, in the paragraph of that decision on which Contorinis relies (for the proposition that a violator is not liable where the recipient of the profits is an innocent third party), the Court is distinguishing one scenario, where "the proceeds of a crime jointly committed are within the possessory rights of each concerted actor" such that the proceeds "are '*acquired*' jointly by them," from a second scenario, where "the proceeds go directly to an innocent third party and are never possessed by the defendant." 692 F.3d at 147 (emphasis added) (Br. 17). Being an "innocent third party" within the forfeiture context is significant *only* because an innocent third party cannot be said to have acted in concert with the violators such that the proceeds were *acquired* by them within the meaning of Section 981(a)(2)(B) of the forfeiture statute and thus can be subject to forfeiture. That analysis has no bearing on disgorgement, since the term "acquired" is inapplicable to disgorgement.

In arguing that a tipper's liability for disgorgement is in some way dependent on the culpability or innocence of the tippee, Contorinis fails to appreciate the nature and purpose of disgorgement. Disgorgement is an equitable

remedy that seeks to deprive the violator of his ill-gotten gains so that he is not unjustly enriched and is returned to the *status quo ante. Zacharias v. SEC,* 569 F.3d at 471. Disgorgement therefore focuses on the gains of the tipper, not on the status of the tippee. As Judge Pollack has noted, "[a] tipper's liability is independent, not derivative, of the tippee's." "[A] tipper, " therefore, "is liable for profits obtained (or losses avoided) from his tippee's trades, even if the tippee himself could not be held liable for those trades because he did not commit fraud within the meaning of Section 10(b) or Rule 10b-5, *i.e.*, if the tippee did not and should not have known that the information was conveyed in breach of the tipper's fiduciary duty, or because he was not joined as a defendant in the action." *Tome,* 638 F. Supp. at 617 n.40 (citing *Texas Gulf Sulfur*, 401 F.2d at 852-53). Accordingly, contrary to Contorinis's argument, several cases have held a tipper liable for a tippee's profits where the tippee was an innocent third party. *See e.g., SEC v. Clark,* 915 F.2d at 454; *Elkind v. Liggett & Meyers, Inc.,* 635 F.2d at 160-61; *Texas Gulf Sulphur,* 446 F.2d at 1308 (*see also Texas Gulf Sulfur,* 312 F. Supp. 77, 95 (S.D.N.Y. 1970); *SEC v. Michel,* 521 F. Supp.2d at 830-31; *Tome,* 638 F. Supp. at 617 & n.40. There is nothing inequitable about this. As the Supreme Court has held, a tipper's conduct is almost invariably more culpable than that of the tippee. *Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 317 (1985).

III. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ORDERING CONTORINIS TO PAY PREJUDGMENT INTEREST ON THE AMOUNT TO BE DISGORGED.

Contorinis argues that the district court erred in ordering him to pay prejudgment interest on the full $7.26 million he was ordered to disgorge. He claims that (1) he did not have the benefit of much of the $7.26 million and (2) the government has been holding $3 million of his assets since February 2009 as bail in connection with the criminal case against him. Br. 20-22. But Contorinis conceded his liability for prejudgment interest, and, in any event, a court may order a defendant to pay prejudgment interest on the full amount of the ill-gotten gains from his illegal securities trades. Contorinis, furthermore, did benefit from the Fund's profits and from the $3 million he paid in bail.

A. The district court correctly held that Contorinis conceded his liability for prejudgment interest by failing to properly controvert facts in the Commission's Local Rule 56.1 statement.

The district court concluded that Contorinis had conceded he is liable for prejudgment interest by failing to properly controvert the Commission's assertion as to prejudgment interest contained in its statement of undisputed material facts, filed pursuant to Local Civil Rule 56.1 of the United States District Court for the Southern District of New York. Under Rule 56.1, a party moving for summary judgment must submit a statement of the allegedly undisputed facts on which the moving party relies, together with citations to the admissible evidence in the record

supporting each fact. The facts in the moving party's statement must be "specifically controverted by a correspondingly numbered paragraph" in a statement filed by the opposing party. Rule 56.1. "If the opposing party then fails to controvert a fact so set forth in the moving party's Rule 56.1 statement, that fact will be deemed admitted." *Giannullo v. City of New York,* 322 F.3d 139, 140 (2d Cir. 2003); *see* Rule 56.1; *see also Feis v. United States,* 394 F. App'x 797, 799 (2d Cir. 2010) (declining to consider a claimed factual dispute where disputed fact not properly controverted); *American Atheist, Inc. v. Port Authority of New York and New Jersey,* __F. Supp.2d __, 2013 WL 1285321, *14 (S.D.N.Y. Mar. 28, 2013) (holding facts deemed to be admitted where not controverted).

In paragraph 32 of its Rule 56.1 statement, the Commission alleged that "[t]he prejudgment interest on Contorinis's ill-gotten gains is $2,485,205" (citing Declaration of John S. Rymus, ¶25 (JA 26)). In the corresponding paragraph in his counterstatement of undisputed facts, Contorinis responds, stating: "Disputed. Mr. Controinis did not have 'ill-gotten gains,' since he did not commit insider trading, and therefore no prejudgment interest is due." JA 292, ¶32. Since the sole basis of Contorinis's dispute of the Commission's statement of the amount of prejudgment interest due is his assertion that he is not liable for insider trading, Contorinis acknowledges that he is liable for prejudgment interest if, as it turned out, he is liable for insider trading. "As such," the district court correctly concluded, "it

appears that Defendant concedes that [the Commission] is entitled to prejudgment interest on whatever disgorgement amount that the Court orders." SPA 5, n.8 (Op. 5, n.8). While Contorinis contradicted this position in his Memorandum in Opposition to Summary Judgment (Docket No. 147 at 13, n.16), the court was not required to consider factual assertions made in his legal memorandum. *See Holtz v. Rockefeller & Co., Inc.,* 258 F.3d 62, 73 (2d Cir. 2001) ("A district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules."), *abrogated on other grounds, Gross v. FBL Fin. Servs.,* 129 S. Ct. 2343, 2350 (2009).

B. It is within the discretion of the district court to order an insider trading violator to pay prejudgment interest on the profits from his trading, even where he did not receive a pecuniary benefit from the profits.

Contorinis argues that the district court's order requiring him to pay prejudgment interest is not remedial, but instead punitive, because he did not benefit from much of the $7.26 million he has been ordered to disgorge. Br. 20-21. But the reasoning supporting the district court's order requiring Contorinis to disgorge profits that the Fund retained from the illegal trading he conducted on its behalf also supports the court's prejudgment interest award. *See surpa* Argument II-A. This is why this Court has long held that the fact that violating defendants do not make a profit for themselves "does not, standing alone, make it inequitable to

compel them to pay interest." *Roth v. Blyth, Eastman Dillon & Co., Inc.,* 637 F.2d 77, 87 (2d Cir. 1980).

Indeed, cases that are analogous to this one have repeatedly rejected the argument that a tipper should not be required to pay prejudgment interest on the profits received by his tippee. For example, in *Elkind v. Liggett & Myers, Inc.,* 472 F. Supp. 123, 134 (S.D.N.Y. 1978), *aff'd in relevant part,* 635 F.2d 156 (2d Cir. 1980), the tipper argued that its liability for disgorgement and prejudgment interest should be limited because the tipper did not benefit financially from the tippee's transactions. In rejecting this argument and imposing liability on the tipper for *both* disgorgement and prejudgment interest, the district court noted that the defendant "'acted in order to obtain other benefits [for itself],' *i.e.,* to foster goodwill between it and the financial analyst it tipped." *Tome,* 638 F. Supp. at 639 (quoting and describing the holding in *Elkind,* 472 F. Supp. at 134). On appeal in *Elkind,* the Second Circuit affirmed the district court's order of prejudgment interest against the tipper, noting that "[t]he district court acted well within its discretion in awarding prejudgment interest." *Elkind,* 635 F.2d at 169, 173 n.30; *see Tome,* 638 F. Supp. at 639-40 (describing and following *Elkind* in holding a tipper liable for disgorgement of its tippee's profits and prejudgment interest); *see also SEC v. Blackwell,* 477 F. Supp.2d at 917 (expressly rejecting the argument that a tipper who was liable for disgorgement of his tippee's profits should not also

be liable for prejudgment interest); *Aragon Capital Management, LLC,* 672 F. Supp.2d at 445 (same). Several cases have held tippers, who did not profit monetarily from the trades of their tippees, liable for both disgorgement and prejudgment interest. *See, e.g., Warde,* 151 F.3d at 49; *SEC v. Gowrish,* 2011 WL 2790482, at *8-9; *Aragon Capital Management,* 672 F. Supp.2d at 445; *SEC v. Drucker,* 528 F. Supp.2d at 453; *SEC v. Michel*, 521 F. Supp.2d at 831; *Blackwell,* 477 F. Supp.2d at 917; *Tome,* 638 F. Supp. at 640; *SEC v. Grossman,* 1997 WL 231167, at *12; *Elkind,* 472 F. Supp. at 129; *but see SEC v. Sargent*, 329 F.3d at 40 (affirming district court decision not to award prejudgment interest while recognizing a tipper is liable for a tippee's profits, regardless whether the tipper profits).

"The decision whether to grant prejudgment interest [is] confided to the district court's broad discretion." *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.,* 67 F.3d 1063, 1071-72 (2d Cir. 1995), *superseded on other grounds as stated in, Fleming Co. v. Department of Agriculture*, 322 F. Supp. 2d 744 (E.D. Tex. 2004). That discretion is exercised in light of the fact that in an enforcement action brought by a regulatory agency, the remedial purpose of the statute takes on special importance." *SEC v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1476 (2d Cir. 1996). The remedial purpose here, to prevent unjust enrichment, is served by awarding prejudgment interest. "[L]ike the remedy of disgorgement itself, an

award of prejudgment interest is intended to deprive the wrongdoer of profits he illegally obtained by violating the securities laws." *SEC v. Lorin,* 877 F. Supp. 192, 201 (S.D.N.Y. 1995), *vacated in part on other grounds,* 76 F.3d 458 (2d Cir. 1996); *see First Jersey Securities,* 101 F.3d at 1476; *SEC v. Aragon Capital,* 672 F. Supp. 2d at 445. "[T]he interest rate [imposed] is generally the IRS underpayment rate" because "[t]he rate reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." *First Jersey Securities,* 101 F.3d at 1476; *see SEC v. Drexel Burnham Lambert, Inc.,* 837 F. Supp. 587, 612 n.8 (S.D.N.Y. 1993), *aff'd sub nom. SEC v. Posner,* 16 F.3d. 520 (2d Cir. 1994) (approving use of the IRS underpayment rate in connection with disgorgement); *SEC v. Blackwell,* 477 F. Supp.2d at 917 (applying IRS rate to disgorgement).[6]

The remedial nature of prejudgment interest is reinforced by other factors present in this case. *See First Jersey Securities,* 101 F.3d at 1477 (prejudgment interest is awarded based on considerations of fairness including the remedial purpose of the statute, the goal of depriving a violator of his ill-gotten gains, and other considerations of fairness); *see also Tome,* 638 F. Supp. at 640 (where violator did not receive the profits, his personal wrongdoing is a consideration in

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[6] Contorinis appears to take issue with the application of the interest rate used by the IRS in cases of underpayment of taxes. Br. 22. However, Contorinis does not offer an alternative rate.

deciding to award prejudgment interest) (citing *Norte & Co. v. Huffines,* 416 F.2d 1189, 1191 (2d Cir. 1969)). In light of the intentional and knowing nature of his conduct, the benefit he sought to gain for himself, and his refusal to acknowledge the wrongfulness his actions, this Court should not hesitate to affirm the district court's decision to order Contorinis to pay prejudgment interest.

C. The amount of money on which Contorinis has been ordered to pay prejudgment interest should not be reduced by the $3 million Contorinis chose to pay as bail.

Contorinis asks that the amount on which he has been ordered to pay prejudgment interest be reduced by $3 million. Contorinis argues that "[t]he punitive nature of the prejudgment interest award was compounded when the district court ordered that [he] should have to pay interest on $3 million of [his] assets that the U.S. government has been holding since February 2009 as bail in connection with [his] criminal case." Br. 21.

This argument was not made by Contorinis in the district court. In fact, Contorinis's entire argument concerning prejudgment interest was confined to one footnote in his opposition to summary judgment (Docket N. 147, n.14), and there is no mention of the money held by the government as bail in that footnote or in his Counterstatement of Undisputed Facts. Docket No. 149, ¶32. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Bogle-Assegai v. Connecticut,* 470 F.3d 498, 504 (2d Cir.

2006) (quoting *Greene v. United States,* 13 F.3d 577, 586 (2d Cir. 1994)). While there are exceptions to this rule, they do not apply when the new arguments were "available to the [party] below" and it "proffer[s] no reason for [its] failure to raise the arguments below." *Allianz Insurance Co. v. Lerner,* 416 F.3d 109, 114 (2d Cir. 2005). Contorinis could easily have made this argument in the district court, and there is no reason for his having failed to do so.

Moreover, the amount of money on which Contorinis is ordered to pay prejudgment interest should not be reduced by the amount of money he chose to pay as bail. During the pendency of this litigation, there have been no restrictions placed on assets held by Contorinis. His decision to deposit $3 million as bail money was a decision made freely by him. And Contorinis obviously benefited from the deposited $3 million because it allowed him to remain free from prison. If Contorinis wanted the money, presumably he could have asked for it back and surrendered himself to federal prison authorities. In sum, Contorinis is not entitled to an exemption of this money from prejudgment interest because he had the full benefit of it. *See, e.g. SEC v. Whittmore,* 744 F. Supp.2d 1, 9 (D.D.C. 2010), *aff'd,* 659 F.3d 1 (D.C. Cir. 2011); *SEC v. Kenton Capital, Ltd.,* 69 F. Supp.2d 1, 16 (D.D.C. 1998).

Contorinis relies on *SEC v. Zafar,* 2009 WL 129492, at *7 (E.D.N.Y. Jan. 20, 2009) for the proposition that a defendant should not be required to pay

prejudgment interest on money the government has already restrained him from using. Br. 22. In *Zafar*, however, the funds in question were subject to a court order freezing assets which deprived the defendant of any use or benefit of the funds. In this case it is Contorinis, not the court, who decided to pay money as bail, and, unlike the defendant in *Zafar*, Contorinis continued to benefit from the money because it allowed him to remain free from prison. Accordingly, the amount of money on which Contorinis is ordered to pay prejudgment interest should not be reduced by the bail money.

IV. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ENJOINING CONTORINIS FROM FUTURE VIOLATIONS OF SECTION 10(b) AND RULE 10b-5.

The district court granted the Commission's request for an order enjoining Contorinis from violating Section 10(b) and Rule 10b–5 in the future. Contorinis contends that "[t]he district court abused its discretion in entering this injunction, given that the SEC did not — and cannot — establish that [he] is likely to commit additional securities law violations." The district court acted within its discretion. It examined the factors deemed relevant by this Court and decided Contorinis should be enjoined.

The district court's decision recognizes that "[i]njuntive relief is expressly authorized by Congress to proscribe future violations of federal securities laws." SPA 4 (Op. 4) (quoting *SEC v. Cavanagh,* 155 F.3d 129, 135 (2d

Cir.1998)). To determine whether a person is likely to commit future violations such that an injunction is warranted, courts consider a set of factors set forth by the district court in its decision:

> the fact that the defendant has been found liable for illegal conduct; the degree of scienter involved; whether the infraction is an "isolated occurrence;" whether defendant continues to maintain that his past conduct was blameless; and whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.

SPA 4 (Op. 4) (quoting *S.E.C. v. Commonwealth Chem. Sec., Inc.,* 574 F.2d 90, 100 (2d Cir.1978)).

Applying these factors to the instant case, the district court found that an injunction was warranted because Contorinis's conduct satisfies most of these factors. SPA 5 (Op. 5). "Significantly," the court wrote, "there can be no doubt that the jury found that Defendant acted knowingly in making illegal trades." SPA 4 (Op. 4). "Moreover," the court continued, "while Defendant's conviction arose out of trades in only one company, Defendant made multiple trades over the course of several weeks and profited substantially from his conduct." SPA 4-5 (Op. 4-5).

Finally, the court emphasized that "throughout this action, and in the parallel criminal action, Defendant has consistently maintained that his past conduct was blameless." SPA 5 (Op. 5). The district court's concern about Contorinis's refusal to acknowledge the wrongfulness of his action is reinforced by statements

Contorinis makes in his appellate brief, where he spends pages impugning the factual basis of the jury's decision to convict him of insider trading. SPA 7-10 (Op. 7-10). As described above in Argument I, Contorinis impermissibly proclaims his innocence by asserting that his trades in ABS stock were not based on nonpublic information, but on information available to the public through the news media.

"[P]ersistent refusals to admit any wrongdoing 'ma[k]e it rather dubious that [a defendant is] likely to avoid such violations of the securities laws in the future * * *.'" *Lorin,* 76 F.3d 458, 461 (2d Cir. 1996) (per curiam) (quoting *SEC v. Lorin*, 877 F. Supp. at 201); *see also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972)). And Contorinis's continued protestations of innocence raise particularly acute concerns because (a) he has been criminally convicted of his violations, (b) the conviction was reviewed and affirmed by this Court on appeal, and (c) he has conceded that he is collaterally estopped from attacking his conviction in this civil proceeding. *See, e.g., SEC v. Quinlan,* 373 F. App'x 581, 588 (6th Cir. 2010) (affirming permanent officer and director bar where future violations were reasonably likely in light of defendant's attempt to withdraw his guilty plea and to maintain his innocence after he entered it); *SEC v. Amerindo Investment Advisors, Inc.,* __F. Supp.2d __, 2013 WL 1385013, at *11 (S.D.N.Y. Mar. 11, 2013) (holding that a defendant was likely to commit future violations

because he continued to maintain his innocence after being found liable for fraud in both criminal and civil proceedings).

Contorinis notes that "the district court stated during Mr. Contorinis's sentencing in the criminal case, '*I don't think there is any chance that you are going to commit crimes in the future . . . There is not much dispute about that.*'" Br. 25 (emphasis added in appellant's brief). While the district judge said this when he sentenced Contorinis, the judge appears to have changed his mind after Contorinis later continued to maintain his innocence during the civil proceeding. Indeed, the district court did pointedly note Contorinis's continued protestations of innocence when it decided to enjoin him. SPA 4 (Op. 4). The court did not abuse its discretion when it concluded that Contorinis should be enjoined from committing future violations of Section 10(b) and Rule 10b-5.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Signed:	/s/ Allan A. Capute
Attorney for:	Securities and Exchange Commission
Dated:	June 11, 2013