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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15580

In the matter of:

ANTHONY CHIASSON,

Respondent-Petitioner.

Oral Argument Requested

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANTHONY CHIASSON'S PETITION TO REVIEW THE INITIAL DECISION

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Dated: June 30, 2014

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Rules

Petitioner Anthony Chiasson submits the following brief in support of his Petition to Review the Initial Decision issued by the assigned Administrative Law Judge ("ALJ") on April 18, 2014, in the above-captioned proceeding ("Initial Decision"). Mr. Chiasson further requests by separate motion accompanying this brief that the Commission hear oral argument in support of his Petition to Review the Initial Decision.

PRELIMINARY STATEMENT

The permanent industry bar recommended by ALJ Cameron Elliot in this proceeding is predicated on a criminal conviction that may soon be reversed. The ALJ issued his Initial Decision two business days before the Second Circuit heard oral argument in Mr. Chiasson's criminal appeal, in which the Circuit considered whether a remote tippee in an insider trading case must know that a tipper received a personal benefit in exchange for fraudulently providing material nonpublic information. During the argument, the Second Circuit sharply questioned the government's interpretation of the law governing insider trading, referred to its trial theory as "amorphous," and suggested that the government's proposed standard provided "precious little guidance" to those who interact with the financial markets. Moreover, in the aftermath of the oral argument, the legal community reacted in a manner that supports deferring the Initial Decision here: (1) the Division of Enforcement of the Securities and Exchange Commission (the "Division") sought a stay in its own related civil case against Michael Steinberg; (2) the United States Attorney's Office for the Southern District of New York ("USAO" or "government") requested a continued stay in the related *Steven A. Cohen* Administrative Proceeding; (3) Judge Naomi Reice Buchwald declared that the knowledge of personal benefit charge Mr. Chiasson sought at his criminal trial is "the law;" and (4) Judge Richard J. Sullivan, the trial judge in Mr. Chiasson's case, acknowledged the very real possibility that his decision to deny the requested

jury charge may be reversed in the coming months. Given these significant developments—which are different from the circumstances that existed at the time the ALJ issued his Initial Decision—the Commission should not accept the ALJ's recommendation because it is based on incomplete information.

Mr. Chiasson respectfully requests that the Commission refrain from summarily affirming the ALJ's Initial Decision. Finalizing the industry bar against Mr. Chiasson is against the public's interest in the efficient use of resources. Affirming the bar will cause both parties to unnecessarily expend time and resources in the event that Mr. Chiasson has to petition the SEC to vacate the bar. Additionally, acting before the outcome of the criminal appeal will substantially prejudice Mr. Chiasson because if he is returned to his pretrial or preindictment legal status, he will have a permanent bar on his record without a legal basis. This will unfairly tarnish his reputation and adversely affect his ability to work in the securities industry in the future. Finally, a decision to maintain the *status quo* merely through the pendency of the appeal will not prejudice the SEC or the public in any way. Accordingly, Mr. Chiasson petitions the Commission to reverse the ALJ's recommendation and remand with instructions to stay the Administrative Proceeding through the pendency of Mr. Chiasson's criminal appeal, or in the alternative, modify the Initial Decision such that the proposed bar is not entered until after the Second Circuit's decision in the criminal appeal.

STATEMENT OF RELEVANT FACTS

I. Mr. Chiasson's Parallel Criminal and Civil Cases

A. The Criminal Case

The USAO indicted Mr. Chiasson on January 12, 2012, for insider trading in the securities of Dell, Inc. and NVIDIA Corporation.[1] *See* Superseding Indictment, *United States v. Anthony Chiasson*, 12-cr-121 (RJS) ("Indictment"), attached as Exhibit A to the Declaration of Savannah Stevenson ("Stevenson Decl."). According to the Indictment, Mr. Chiasson—a remote tippee removed by four degrees of separation from the initial tippers—traded on material non-public information provided by two separate corporate insiders. The Indictment alleged that a Dell insider provided material non-public information to Sandeep Goyal, who passed that information to Jesse Tortora, who passed it to Sam Adondakis (an analyst employed by Mr. Chiasson's hedge fund), who relayed it to Mr. Chiasson. *See* Stevenson Decl. Ex. A, Indictment at ¶¶ 12, 17. The Indictment further alleged that a NVIDIA insider provided material non-public information to a person identified as "Individual 2," (cooperating witness Hyung Lim) who passed the information to Danny Kuo, who passed it to Adondakis, who relayed it to Mr. Chiasson. *See* Stevenson Decl. Ex. A, Indictment at ¶¶ 22, 24, 26.

The government's proof concerning Mr. Chiasson's knowledge of the personal benefit provided to the initial tippers was nonexistent. During trial, the government elicited testimony aimed at demonstrating that the tippers received personal benefits in exchange for the information they provided. However, the prosecution offered no evidence that Mr. Chiasson knew the tippers or knew anything about whether either one received any form of personal gain. *See* Brief for Defendant-Appellant in *United States v. Newman et al.*, 13-1837-cr (L)

[1] Within days of the indictment, the Division filed its civil complaint against Mr. Chiasson based on the same alleged insider trading activity. *See* Complaint, *SEC v. Adondakis et al.*, 12-cv-409 (HB), Docket No. 1.

("Appellant's Brief") at 7, attached as Exhibit B to the Stevenson Decl. The government even failed to prove that Adondakis—Mr. Chiasson's alleged sole source of information—knew whether the insider received a personal benefit. Adondakis testified that he did not know *what* the Dell tipper received in exchange for the information, and the remaining record is silent as to *whether* Adondakis knew that the tippers received a personal gain.

This failure of proof played a significant role in the proceedings. Based on the total lack of evidence concerning Mr. Chiasson's knowledge of personal benefit and the United States Supreme Court's decision in *Dirks v. SEC*, 463 U.S. 646 (1983), Mr. Chiasson sought a Rule 29 dismissal of all counts and, subsequently, a jury charge permitting a guilty verdict only if the jury determined Mr. Chiasson knew that the Dell and NVIDIA tippers revealed information in exchange for a personal benefit. *See* Stevenson Decl. Ex. B, Appellant's Brief at 17. Judge Sullivan denied both requests. Instead, the court instructed the jury that it must find that Mr. Chiasson knew the insiders breached of a duty of *confidence*—without reference to any knowledge requirement concerning personal gain. On December 17, 2012, the jury returned a guilty verdict.

On May 13, 2013, the court sentenced Mr. Chiasson to six and one half years in prison and denied bail pending appeal. Mr. Chiasson subsequently appealed his conviction, challenging, among other things, the district court's refusal to properly instruct the jury. Shortly after sentencing, Mr. Chiasson petitioned the Second Circuit for bail pending appeal. On June 21, 2013, the Second Circuit reversed the district court's denial, and granted bail. *See United States v. Chiasson,* No. 13-1837-cr (L), Docket Nos. 96, 97. In deciding that Mr. Chiasson should remain at liberty, the Second Circuit concluded that Mr. Chiasson's appeal raised a

substantial question of law or fact likely to result in reversal or an order for a new trial. *See United States v. Randell*, 761 F.2d 122, 123 (2d Cir. 1985).

B. The Division's Civil Case

Following the entry of the judgment in the criminal case, the Division moved by letter in its civil case for partial summary judgment and a permanent injunction based solely on the preclusive effect of Mr. Chiasson's criminal conviction. *See* Letter from Division Senior Counsel Daniel R. Marcus to Hon. Harold Baer, Jr., dated September 16, 2013 ("Division Letter"), attached as Exhibit C to the Stevenson Decl.[2] The Division's Letter stated that Mr. Chiasson "recognize[d] the collateral estoppel effect of [his conviction] and, *on this basis alone*, do[es] not oppose the motion." *Id.* at 2 (emphasis added). The Division Letter further stated that if Mr. Chiasson prevailed on appeal, the Division would not oppose his motion to vacate the partial judgment. *See id.*

On October 4, 2013, the district court in the civil case entered the consent judgment, permanently enjoining Mr. Chiasson from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *See SEC v. Adondakis* et *al.*, 12-cv-0409 (HB), Docket No. 92.

C. The Division's Administrative Proceeding

Two weeks after entry of the injunction in Mr. Chiasson's civil case, the Division filed an Order Instituting Administrative Proceedings ("OIP") against Mr. Chiasson predicated on the criminal conviction and resulting judgment in the civil case. On November 22, 2013, the Division moved for summary disposition and sought to bar Mr. Chiasson from the securities

[2] Even before the oral argument in Mr. Chiasson's criminal appeal, the Division agreed to defer the issues of disgorgement and civil penalty until after the criminal appeal is decided. *Id.* at 1, n.2

industry. Rather than moving for a stay of the Administrative Proceeding, Mr. Chiasson requested only that the ALJ delay decision at least to the end of the 210-day period set forth in the OIP so that the ALJ might have the benefit of the Second Circuit's view of the appeal, and so that Mr. Chiasson would not have to move to vacate any bar if the conviction were reversed.

On April 18, 2014, two business days before the appellate argument and approximately one month before the 210-day decision period expired, the ALJ rejected Mr. Chiasson's request, granted the Division's motion for summary disposition, and recommended that the Commission permanently bar Mr. Chiasson from the securities industry. *See In the Matter of Anthony Chiasson*, Initial Decision, Release No. 589 at 9, Administrative Proceeding No. 3-15580 ("Initial Decision"), attached as Exhibit D to the Stevenson Decl. The ALJ based his decision on SEC Rule of Practice 250, stating that "Rule 250 requires me to 'promptly grant or deny' a motion for summary disposition, and Chiasson has not shown good cause within the meaning of the rule to defer decision on the Motion."[3] Stevenson Decl. Ex. D, Initial Decision at 4. The Initial Decision is based entirely on the criminal conviction and the resulting civil injunction.

II. Mr. Chiasson's Appeal of His Criminal Conviction

On April 22, 2014, the Second Circuit heard the *Chiasson* oral argument. Specifically, Mr. Chiasson challenged Judge Sullivan's refusal to instruct the jury that, to convict, it had to find that Mr. Chiasson knew "that the tippers had fraudulently breached their fiduciary duties to

[3] It is curious that the ALJ did not wait the few extra days to have the benefit of all relevant information before determining that Mr. Chiasson should be permanently barred from the securities industry. The ALJ could have used the appellate argument as good cause to consider whether something short of imposing an immediate bar would have been appropriate given the circumstances, such as waiting for the Second Circuit's decision in an effort not to punish an individual based on underlying predicate that may no longer exist. Had the ALJ waited the two business days, Mr. Chiasson and the Commission might not have had to incur the time and expense associated with this appeal.

their employers by exchanging confidential information for personal gain."[4] Stevenson Decl. Ex. B, Appellant's Brief at 1.

Mr. Chiasson argued that knowledge of an insider's self-dealing is the element that distinguishes lawful from unlawful conduct in insider trading cases. Mr. Chiasson urged the Second Circuit to follow *Dirks v. SEC*, which held that—absent some personal gain—there has been no breach of fiduciary duty for which the insider is liable. *Dirks v. SEC,* 463 U.S. 646, 662 (1983). *Dirks* defined "breach" as the exchange of information for personal benefit. *Id.* at 662 ("Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders."). Thus, the Court concluded that a tippee must know of the insider's breach (*i.e.*, the information in exchange for the personal benefit) in order to be derivatively liable. *Id.* at 660.

Dirks teaches that liability only attaches when a tippee knows that the insider breached a duty to the company, which requires receiving a personal benefit for providing the information. Judge Hall honed in on this principle during the oral argument:

> JUDGE HALL: Doesn't Dirks tie the personal benefit to the breach?
>
> [COUNSEL FOR MR. CHIASSON]: Yes. Yes.
>
> JUDGE HALL: Not as a separate component. But you don't have a breach unless you have a personal benefit. Isn't --
>
> [COUNSEL FOR MR. CHIASSON]: That's exactly the point . . ..

Unofficial Transcript of Oral Argument ("Oral Argument Tr.") at 59, attached as Exhibit E to the Stevenson Decl.[5]

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[4] Mr. Chiasson is also appealing his sentence and forfeiture order based on the sentencing court's factual findings in calculating Mr. Chiasson's sentencing range and forfeiture amount. Mr. Chiasson's complete positions and arguments are set forth in his appellate brief, attached as Exhibit B to the Stevenson Decl.

[5] Upon request, Mr. Chiasson will provide the Commission with an audio recording of the oral argument.

As noted by the Division and defense counsel in a related case, "the panel's questions appeared to express skepticism as to the sufficiency of Judge Sullivan's jury instructions regarding downstream tippees." *See* May 8, 2014 Letter from B. Berke to the Hon. Harold Baer, Jr. (the "Steinberg Letter"), attached as Exhibit F to the Stevenson Decl. To that point, the panel repeatedly questioned the government about what it had to prove based on the jury charge. *See, e.g.*, Stevenson Decl. Ex. E, Oral Argument Tr. at 42-43, 45-47, 50. In response, the government argued that the tippee had to know the information was obtained in contravention of the policies of the public companies in question. This theory runs contrary to *Dirks*, and diverges from the views of the preceding four district court judges to reach the issue.[6] *Id.* at 45-47, 35-36.

Beyond the sufficiency of the jury instructions, the Second Circuit also expressed concern about the government's theory in the *Chiasson* prosecution in light of *Dirks*. Specifically, Judge Winter stated:

> JUDGE WINTER: . . . If you read [*Dirks*] . . . it uses the word "guiding principle," has to establish a guiding principle for people who have – who trade all the time.
>
> . . .
>
> [*Dirks*] wants to protect analysts. And, unless there's some kind of . . . benefit coming to a tipper, there's . . . nothing at all.

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[6] District court judges in the Second Circuit have historically charged the jury as Mr. Chiasson requested. *See State Teachers Ret. Bd. v. Fluor Corp.* 592 F. Supp. 592, 594 (S.D.N.Y. 1984) (Sweet, J.); *United States v. Santoro*, 647 F. Supp. 153 (E.D.N.Y. 1986) (McLaughlin, J.), rev'd on other grounds, *United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988); *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 497-98 (S.D.N.Y. 2011) (Holwell, J.);*United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012) (Rakoff, J.) (a tippee must know that the original tipper benefited from disclosing confidential information). After Judge Sullivan declined to give Mr. Chiasson's requested charge, but before the appellate argument, the Honorable Paul G. Gardephe, with no objection from the USAO, gave the knowledge of personal benefit charge in *United States v. Martoma*, citing Judge Rakoff's decision in *Whitman*. *See United States v. Martoma*, 12-cr-973 (S.D.N.Y.), February 4, 2014 Jury Charge, Docket No. 229 at 25 and n.4. To date, the only judge in the Southern District of New York not to give the knowledge of personal benefit charge in a classical insider trading case is Judge Sullivan.

Stevenson Decl. Ex. E, Oral Argument Tr. at 40-41. Judge Parker directed similar comments to the government relating to the potential lack of clarity created by the *Chiasson* case for those who work in the financial markets:

> JUDGE PARKER: [W]e sit in the financial capital of the world. And the amorphous theory that you have, that you've tried this case on, gives precious little guidance to all of these institutions, all of these hedge funds out there who are trying to come up with some bright line rules about what can and what cannot be done. And your theory leaves all of these institutions at the mercy of the government, whoever the government chooses to indict, you know, how big the fund is. . . . Isn't the whole community, the legal community and the financial community, served by having a rule that says the person you all want to send to jail has to know of the benefit?

Id. at 49.

Although the Panel reserved decision, the degree to which the judges scrutinized the government's proof and theory of liability was widely broadcasted within the financial and legal community.[7]

III. The Division's and USAO's Reactions to the Oral Argument

A. The Division's Decision to Stay Michael Steinberg's Civil Case

Three months after the jury found Mr. Chiasson guilty, the government indicted Michael Steinberg for insider trading. The USAO superseded Mr. Steinberg into the *Chiasson* case by alleging that the same corporate insiders divulged the same information, and passed it through the same tipping chain to Mr. Steinberg. Judge Sullivan also presided over the *Steinberg* trial. As in the *Chiasson* trial, Judge Sullivan—over the defense's objection—declined to instruct the jury that, to convict, it must find that Mr. Steinberg knew that the insider-tippers disclosed the

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[7] *See, e.g.*, Ben Protess and Matthew Goldstein, *Appeal Judges Hint at Doubts in Insider Case*, NEW YORK TIMES, Apr. 22, 2014, *available at* http://dealbook.nytimes.com/2014/04/22/appeals-court-raises-doubts-about-governments-insider-trading-case/; Walter Pavlo, *Chiasson/Newman Appeal Heard on Insider Trading Conviction*, FORBES, Apr. 23, 2014, *available at* http://www.forbes.com/sites/walterpavlo/2014/04/23/chiasson-newman-appeal-heard-on-insider-trading-conviction/; Patricia Hurtado, *2nd Cir. Mulls Insider Trading Jury Instructions*, BLOOMBERG BNA, May 2, 2014, *available at* http://www.bna.com/2nd-cir-mulls-n17179890134.

information for a personal benefit. On December 18, 2013, the jury found Mr. Steinberg guilty of insider trading.

Shortly after the indictment, the Division filed a parallel civil action against Mr. Steinberg. However, on May 8, 2014—approximately two weeks after the oral argument in the *Chiasson* appeal—the Division agreed to stay Mr. Steinberg's civil action until the Second Circuit renders its decision in *Chiasson*. In the joint stay application, the parties' observed that during the *Chiasson* oral argument, "the panel's questions appeared to express skepticism as to the sufficiency of Judge Sullivan's jury instructions regarding downstream tippees." Stevenson Decl. Ex. F, Steinberg Letter at 2. The parties concluded that if the Second Circuit reversed Mr. Chiasson's conviction, it would likely do so for Mr. Steinberg too; accordingly, to proceed with the Division's civil case "would be inefficient and unnecessarily burdensome to the Court and the parties...." *Id.* Based on this submission, the court granted the parties' request to stay the Division's civil action against Mr. Steinberg.

B. The USAO's Decision to Request an Extended Stay in the Division's Administrative Proceeding against Steven A. Cohen

On July 19, 2013, the Division instituted an Administrative Proceeding against Steven A. Cohen based on allegations of insider trading. Part of this proceeding related to the allegations against Mr. Steinberg because he worked as a portfolio manager at a hedge fund owned by Mr. Cohen. On August 8, 2013, the USAO moved to stay the *Cohen* Administrative Proceeding because of three related criminal cases, including the criminal case against Mr. Steinberg.

On May 28, 2014, based in part on the pendency of the *Chiasson* appeal, the USAO wrote to the SEC's Chief Administrative Law Judge to request she continue to stay the Administrative Proceeding. *See In the Matter of Steven A. Cohen*, Administrative Proceeding File No. 3-15382, Letter from AUSA John T. Zach to Hon. Brenda P. Murray, dated May 28,

2014 ("Cohen Letter"), attached as Exhibit G to the Stevenson Decl. Specifically, the USAO stated that it anticipated Mr. Steinberg would appeal his conviction based on the same legal issue currently before the Second Circuit in Mr. Chiasson's appeal. *Id.* at 2. Because Mr. Steinberg worked as a portfolio manager at a hedge fund owned by Mr. Cohen, Mr. Steinberg's appeal and the outcome of the *Chiasson* appeal might affect the *Cohen* Administrative Proceeding. The Chief Administrative Law Judge granted the USAO's request for a continued stay. *See In the Matter of Steven A. Cohen, Administrative Proceeding*, Order Continuing Stay, Release No. 1472 (May 29, 2014), File No. 3-15382, attached as Exhibit H to the Stevenson Decl.

IV. District Court Judges' Reactions to the Oral Argument

Subsequent to the appellate argument, at least two judges in the Southern District of New York publicly indicated their belief that the Circuit might reverse Mr. Chiasson's conviction. First, Judge Naomi Reice Buchwald stated that she intended to give the knowledge of personal benefit jury charge in the insider trading trial now pending before her. *See United States v. Rengan Rajaratnam*, 13-cr-211 (NRB), May 30, 2014 Argument Tr., attached as Exhibit I to the Stevenson Decl. During argument on pretrial motions, Judge Buchwald explicitly referred to the Second Circuit oral argument in Mr. Chiasson's appeal: "Look. The government has withdrawn its earlier opposition on the personal benefit aspect. They [government counsel] went to the Second Circuit argument. They heard it." *Id.* at 10:5-7. Further, during the defense's opening statement, when the government objected to the assertion that it had to prove that Rajaratnam knew that "the insider who disclosed the inside information did so in return for a personal benefit," Judge Buchwald overruled the objection and noted, "That's the law." *See* Christopher M. Matthews, *Rajaratnam Trial Turns to Brothers' Ties*, WALL STREET JOURNAL, June 18, 2014,

available at http://online.wsj.com/articles/prosecutors-say-rajaratnam-brothers-worked-together-to-corrupt-insiders-1403118920.

Even Judge Sullivan, who gave the original jury charge, explicitly recognized in the *Steinberg* case that the Second Circuit could reverse based on his jury charge. When Judge Sullivan denied Mr. Steinberg's Rule 29 motion to dismiss all charges—which was based in large part on the lack of evidence of Mr. Steinberg's knowledge of the tipper's personal benefit—the court acknowledged that "the Second Circuit may change course and require a new knowledge of benefit element."[8] *United States v. Steinberg*, 2014 U.S. Dist. LEXIS 70037, *24 (S.D.N.Y. 2014). In addition, he discussed the issue during Mr. Steinberg's sentencing when addressing bail pending appeal. Specifically, Judge Sullivan decided to grant Mr. Steinberg's request for bail pending appeal, stating that the Second Circuit's reversal of his decision to deny Mr. Chiasson bail pending appeal "indicated that this is a closer call than I thought." *United States v. Michael Steinberg*, 12-cr-121 (RJS), May 16, 2014 Sentencing Tr. at 53-54 ("Steinberg Tr."), attached as Exhibit J to Stevenson Decl. These obvious references to Mr. Chiasson's appeal, and the Second Circuit's reaction to the appeal, evidences Judge Sullivan's recognition that there is a real possibility of a reversal.

[8] To be clear, Mr. Chiasson does not agree with Judge Sullivan's assessment that the Second Circuit may "change course" and impose a "new" element. That element has existed since *Dirks* and has been applied multiple times in the district courts of the Second Circuit. *See infra* n.6 at page 8. Moreover, it has always been Mr. Chiasson's position that the United States Supreme Court requires knowledge of the personal benefit for tippee liability in a classical insider trading case.

ARGUMENT

The Commission has broad discretion in determining how it will handle Mr. Chiasson's petition. Indeed, declining to accept the ALJ's recommendation is well within the Commission's powers. Rule 411(a) of the SEC's Rules of Practice permits the Commission to "affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer [and] make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. § 201.411(a).

In addition, the Commission has directed the parties to address the question of whether the Initial Decision should be summarily affirmed pursuant to SEC Rule of Practice 411(e). According to Rule 411(e)(2), the "Commission will decline to grant summary affirmance [of an initial decision] upon a reasonable showing that ... the [ALJ's] decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review." 17 C.F.R. § 201.411(e)(2). An ALJ's decision to impose a permanent bar from practicing in the securities industry constitutes an "exercise of discretion" covered by Rule 411(e)(2). *See In the Matter of Christopher A. Lowry*, Release No. 45131 (Dec. 5, 2001), Administrative Proceeding No. 3-10390. Moreover, the Commission has stated that "[s]ummary affirmance is rare, given that generally we have an interest in articulating our views on important matters of public interest and the parties have a right to full consideration of those matters." *Id.* For the following reasons, and based on the facts set forth above, the Commission should not summarily affirm the Initial Decision. Instead, the Commission should reverse the decision and remand the matter with instructions to stay the Administrative Proceeding through the pendency of Mr. Chiasson's criminal appeal, or in the alternative, modify the Initial Decision such that the proposed bar is not entered until after the Second Circuit's decision in the criminal appeal.

Without the benefit of hearing the oral argument, the ALJ decided that there was no reason to wait to impose an industry bar against Mr. Chiasson. He based his decision on the existence of the criminal conviction and the corollary injunction issued against Mr. Chiasson. In reaching this decision, the ALJ stated that "Rule 250 requires me to 'promptly grant or deny' a motion for summary disposition, and Chiasson has not shown good cause within the meaning of the rule to defer decision on the Motion." Stevenson Decl. Ex. D, Initial Decision at 4. Assuming *arguendo* that good cause did not exist at the time the ALJ issued his Initial Decision, good cause certainly exists now.

First, the Second Circuit panel expressed "skepticism" about the government's position and Judge Sullivan's jury charge. *See* Stevenson Decl. Ex. F, Steinberg Letter at 2. At least two judges sharply questioned the government about the sufficiency of the jury instructions on an essential element of the offense, and generally questioned the propriety of government's theory of criminal liability. Judge Parker described the government's theory against Mr. Chiasson as "amorphous" and questioned how trading on inside information could be criminal without the tippee knowing that the tipper revealed the information for a personal benefit. *See* Stevenson Decl. Ex. E, Oral Argument Tr. at 49:6-13. In addition, Judge Winter questioned the government's reading of *Dirks* regarding the personal benefit element. *Id.* at 48. Judge Hall similarly indicated that the *Dirks* definition of breach—about which a tippee must know—requires the receipt of a benefit. *Id.* at 10, 59.

Second, the Division publicly recognized the potential for a reversal and the wisdom of preserving judicial resources when it made a joint request for a stay in its civil case against Mr. Steinberg. While Mr. Steinberg did not participate in the *Chiasson* appeal, he is directly impacted by it because his appellate issue is identical. Messrs. Chiasson and Steinberg were

charged with participating in the same conspiracy to commit insider trading. The inside information was identical, and travelled through the same conduits from the same sources. Importantly, their cases were tried by the same judge who refused to give the knowledge of personal benefit jury instruction in both cases. The criminal cases could have, in fact, been tried together, but for the government's decision to add Mr. Steinberg to the *Chiasson* indictment after the conclusion of Mr. Chiasson's trial. And yet the Division—based on its interpretation of the *Chiasson* appellate argument—concluded that staying, rather than proceeding with, the civil case was the more prudent approach. In making that request, the Division tacitly acknowledged that even though it could still seek summary judgment, it was not appropriate to do so given the fact that the underlying predicate for any relief (*i.e.*, the criminal conviction) might soon not exist.

Third, in the *Steven A. Cohen* case, the USAO voiced its apparent expectation that the Second Circuit may vacate Mr. Chiasson's conviction.[9] On May 28, 2014, the USAO sought to continue the stay in the *Cohen* Administrative Proceeding. In so doing, it cited the fact that the Second Circuit is poised to rule on the legal issue of whether a tippee must know of a personal benefit to the tipper. *See* Stevenson Decl. Ex. G, Cohen Letter at 2. The knowledge of personal benefit issue is relevant to the *Cohen* matter because the allegations against Mr. Cohen are linked to Mr. Steinberg's conduct in his capacity as an SAC Capital employee. Normally, Mr. Steinberg's conviction would enhance the Commission's Administrative Proceeding against Mr. Cohen. However, when it appeared that the *Steinberg* verdict might be in jeopardy due to the *Chiasson* appeal, the USAO sought to keep the *Cohen* stay in place, and the Commission agreed.

[9] While Mr. Chiasson is not privy to what specifically motivated the Division's and USAO's decisions, it is only logical that both sought to halt the proceedings so that they would not waste resources litigating something that may soon become moot, and because a successful *Chiasson* appeal would make the relief each sought unsupportable on the remaining record.

Id. at 3; *see also In the Matter of Steven A. Cohen*, Order Continuing Stay, Release No. 1472 (May 29, 2014), Administrative Proceeding No. 3-15382.

Fourth, Judge Buchwald has already adopted a position that the knowledge of personal benefit jury charge is appropriate in insider trading cases. In *United States v. Rajaratnam*, the court stated that the government, who previously opposed the charge, "went to the Second Circuit argument. They heard it." Stevenson Decl. Ex. I, *Rengan Rajaratnam* Tr. at 10:5-7. On June 18, she referred to this element of insider trading liability as "the law." *See* Christopher M. Matthews, *Rajaratnam Trial Turns to Brothers' Ties*, *supra* at 12. Her actions and statements evidence her belief that the Second Circuit will ultimately rule in Mr. Chiasson's favor.

Fifth, Judge Sullivan acknowledged that the Circuit might well reverse his order denying Mr. Steinberg's Rule 29 motion. *See Steinberg*, 2014 U.S. Dist. LEXIS 70037, *24 (S.D.N.Y. 2014). Likewise, he discussed the issue during Mr. Steinberg's sentencing when addressing bail pending appeal. Specifically, Judge Sullivan granted Mr. Steinberg's request for bail pending appeal, noting that the knowledge of personal benefit jury charge "is a closer call than I thought." Stevenson Decl. Ex. J, Steinberg Tr. at 53-54. Judge Sullivan's action and remarks clearly demonstrate that he recognizes the real possibility of a reversal.

Each of these reactions evidences the fact that the landscape of Mr. Chiasson's matter changed in the days following the ALJ's ill-timed Initial Decision. That decision, however, should not prevent the Commission from exercising its discretion and acknowledging that various government representatives and judges impacted by Mr. Chiasson's appeal all are acting, at least in an abundance of caution, as if reversal is a distinct possibility. In light of the foregoing, the underlying predicate for the bar should be given little weight until the appeal is decided.

Without the benefit of the *Chiasson* oral argument, the ALJ was unmoved by the fact of Mr. Chiasson's appeal. In reaching his decision, the ALJ relied on caselaw establishing that the mere existence of a pending criminal appeal is not grounds to defer a decision in an administrative proceeding. However, Mr. Chiasson does not base this petition on the mere fact that he appealed his criminal case; it is the merits of the criminal appeal as understood in light of the appellate judges' comments, and in conjunction with the reaction from district court judges, government attorneys, and other defense counsel, that cause Mr. Chiasson to petition the Commission here.

For the same reason, the cases on which the ALJ relies are inapposite. In the first two cases, *In the matter of Jose P. Zollino*, 89 SEC Docket 2598, 2601 n.4 (2007), and *In the Matter of Joseph P. Galluzzi*, 55 S.E.C. 1110, 1116 n.21 (2002), the petitioners could not substantiate the fact that their criminal convictions were on appeal. In the third case cited by the ALJ, *In the Matter of Ira William Scott*, 53 S.E.C. 862, 865 n.8 (1998), the petitioner had merely filed a "petition for post-conviction relief" and did not provide any facts concerning the nature of the appeal or its likelihood of success. Accordingly, these cases are unpersuasive.

In another case cited by the ALJ, *In the Matter of Charles Phillip Elliott*, 50 S.E.C. 1273, 1277 n.17 (1992), *aff'd*, 36 F.3d 86 (11th Cir. 1994), the petitioner was convicted of running a massive Ponzi scheme through several entities that he controlled. *Elliott*, 50 S.E.C. at 1275. The evidence at trial established that the petitioner had been warned by both his Chief Executive Officer and his outside accountants that his liabilities exceeded his assets by tens of millions of dollars, that his entities were losing approximately $100,000 per month, and that his investors were owed approximately $60 million. *Id.* Although the petitioner established that his criminal conviction was on appeal, there was no evidence in the record about the merits of the appeal, the

reaction of the judges during oral argument, or anything that would indicate whether his arguments moved the appellate panel. Certainly there were no related cases that were stayed on the basis of the appeal itself, nor did it appear that other courts made decisions based on the merits of the appeal. The 11th Circuit subsequently upheld Elliott's conviction. *See United States v. Elliott*, 62 F.3d 1304 (11th Cir. 1995) (affirming the conviction but vacating and remanding the associated restitution order for an error in calculation). Accordingly, the circumstances in *Elliott* are markedly different from the circumstances here.

In each case cited by the ALJ, the Commission stated that the fact that a criminal conviction is on appeal is not sufficient reason to stay the imposition of an industry bar if the bar would be in the public interest. However, the fact that the pendency of an appeal does not usually warrant a stay does not mean that it can never justify a stay. Here, it is not just the fact of Mr. Chiasson's appeal that warrants a stay, it is the indications from the Second Circuit—as reacted to by USAO, the Division, and two district court judges—that Mr. Chiasson's conviction may well be reversed. These circumstances are far more specific and meaningful than any raised in the cases cited by the ALJ, and accordingly, tip the scale in favor of reversing or modifying the ALJ's Initial Decision.

In addition, the public is best served by maintaining the *status quo* through the pendency of the appeal. Waiting for the Second Circuit to decide the appeal will preserve Mr. Chiasson's and the Division's limited resources. If the bar is finalized against Mr. Chiasson and he prevails in his criminal appeal, he will have to file a motion with the Commission to vacate the bar. This will require Mr. Chiasson and the Division to expend additional resources on this matter, and will require the Commission to spend valuable time entertaining further motion practice in circumstances where, if stayed, litigation may not be necessary.

Moreover, finalizing the Initial Decision before the criminal appeal is decided will severely prejudice Mr. Chiasson in the event his conviction is vacated. If the Second Circuit decides to restore Mr. Chiasson to a postindictment/pretrial posture, or even a pre-indictment posture, all "punishments" associated with the conviction, *i.e.*, forfeiture, fine, and imprisonment, will be vacated. Under those circumstances, it would be unjust for there to be any bar, even for the period of time required for Mr. Chiasson to move to vacate it, since the basis for the bar will no longer exist. Because there appears to be a real chance of reversal, Mr. Chiasson urges the Commission not to finalize the bar, but instead to take a wait-and-see approach to afford all parties maximum flexibility without unnecessarily harming one side or the other.

There is also well-founded concern that if Mr. Chiasson wins his appeal, the bar will linger on his record. In similar cases, when a conviction has been reversed and the Commission ultimately agrees that the previously-imposed bar should be lifted, it often takes months for the bar in fact to be lifted. *See, e.g., In the Matter of Nwaigwe*, Release No. 69967 (July 11, 2013), Administrative Proceeding No. 3-13481 (barred on December 11, 2009; conviction vacated on August 2, 2012; bar vacated nearly *one year later* on July 11, 2013); *In the Matter of Mahaffy*, Release No. 68462 (December 18, 2012), Administrative Proceeding No. 3-13481 (barred on September 20, 2010; conviction vacated on August 2, 2012; bar vacated *four months later* on December 18, 2012); *In the Matter of Goble*, Release No. 68651, 2013 SEC LEXIS 129 (January 14, 2013) (barred on October 5, 2011; injunction vacated on May 29, 2012 (during pendency of petition for review); administrative proceeding dismissed *seven months later* on January 14, 2013 (petition for review converted to motion to dismiss)). If Mr. Chiasson is barred for even a day based on a fatally flawed conviction, he will be irreparably harmed. His reputation should

not be made to suffer further damage if the Second Circuit concludes that Judge Sullivan committed reversible error.

Even when the bar is finally lifted, its original imposition often remains on the petitioner's record. This creates a lack of clarity and unfairly tarnishes that person's reputation and his ability to work in the securities industry. *See, e.g.,* FINRA BrokerCheck Report for Linus N. Nwaigwe (failing to indicate that his conviction and bar were both vacated), attached as Exhibit K to the Stevenson Decl. Again, if Mr. Chiasson's record is tarnished due to an improper jury instruction, he suffers prejudice that cannot be undone. This kind of damage can be easily avoided if the Commission simply defers decision on the bar until after the Second Circuit hands down a decision—and if Mr. Chiasson proves successful, the Commission should never impose the bar at all.

Finally, the Commission's decision to remand and stay or defer finalizing the Initial Decision will not prejudice the Division or the public in any way. Mr. Chiasson is not working in the securities industry now, nor is it realistic that he could attempt to reenter the industry in the near future given the conviction currently on his record and the notoriety of his case. Mr. Chiasson also presents no risk of recidivism, as evidenced by the trial court's findings at sentencing. *See United States v. Anthony Chiasson*, 12-cr-121 (RJS), May 13, 2013 Sentencing Tr. at 16:11-16, which excerpt is attached as Exhibit L to the Stevenson Decl.

To be clear, Mr. Chiasson is *not* arguing that the caselaw on which the ALJ relied is wrong, should be overturned or should be ignored. Rather, he argues the instant case goes far beyond the mere existence of a criminal appeal. Mr. Chiasson makes his request because of the relatively unusual positive reaction by the Second Circuit to his criminal appeal, as well as the legal community's reaction to it. This combination of factors counsels in favor of the

Commission exercising its discretion to maintain the *status quo* until the Circuit either affirms or reverses Mr. Chiasson's conviction.

CONCLUSION

For the reasons set forth above, Mr. Chiasson respectfully requests that the Commission not summarily affirm the ALJ's Initial Decision in this Administrative Proceeding. Instead, Mr. Chiasson requests that the Commission reverse the Initial Decision and remand with instructions to stay the Administrative Proceeding through the pendency of Mr. Chiasson's Second Circuit appeal, or in the alternative, modify the Initial Decision such that the proposed bar is not entered until after the Second Circuit's decision in Mr. Chiasson's appeal.

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Respectfully submitted,

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