HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15580

In the matter of:

ANTHONY CHIASSON,

Respondent-Petitioner.

DECLARATION OF SAVANNAH STEVENSON IN SUPPORT OF ANTHONY CHIASSON'S PETITION TO REVIEW THE INITIAL DECISION

I, Savannah Stevenson, Esq., declare as follows:

1. I am over 18 years of age and a member of the bar of the State of New York.

2. I am an associate with the law firm Morvillo LLP, located at 200 Liberty Street, New York, New York 10281, which represents respondent-petitioner ANTHONY CHIASSON in the above-captioned matter.

3. I submit this declaration and attached Exhibits A through L in support of Mr. Chiasson's Petition to Review the Initial Decision.

4. Attached as Exhibit A is a true and correct copy of the superseding indictment in the matter of *United States v. Anthony Chiasson et al.*, 12-cr-121 (RJS), filed on August 28, 2012 (the "Indictment").

5. Attached as Exhibit B is a true and correct copy of Anthony Chiasson's appellate brief in *United States v. Chiasson*, 13-1837-cr (L), Docket No. 136 (2d Cir.), filed on August 15, 2013 ("Appellant's Brief").

6. Attached as Exhibit C is a true and correct copy of the letter from Securities and Exchange Commission Division of Enforcement Senior Counsel Daniel R. Marcus to the Honorable Harold Baer, Jr., dated September 16, 2013 (the "Division Letter").

7. Attached as Exhibit D is a true and correct copy of the administrative law judge's initial decision from *In the Matter of Anthony Chiasson*, Release No. 589 (April 18, 2014), Administrative Proceeding File No. 3-15580 (the "Initial Decision").

8. Attached as Exhibit E is a true and correct copy of an unofficial transcript of the April 22, 2014 oral argument in *United States v. Chiasson*, 13-1837-cr (2d Cir.) ("Oral Argument Tr.").

9. Attached as Exhibit F is a true and correct copy of the letter from Barry H. Berke, Esq. to the Honorable Harold Baer, Jr., dated May 8, 2014 (the "Steinberg Letter").

10. Attached as Exhibit G is a true and correct copy of the letter from AUSA John T. Zach to the Honorable Brenda P. Murray, dated May 28, 2014 (the "Cohen Letter").

11. Attached as Exhibit H is a true and correct copy of the Order Continuing Stay dated May 29, 2014 from *In the Matter of Steven A. Cohen*, Release No. 1472, Administrative Proceeding File No. 3-15382.

12. Attached as Exhibit I is a true and correct copy of the transcript of the oral argument before the Honorable Naomi Reice Buchwald on May 30, 2014 in *United States v. Rangan Rajaratnam*, 13-cr-211 (NRB) ("Rengan Rajaratnam Tr.").

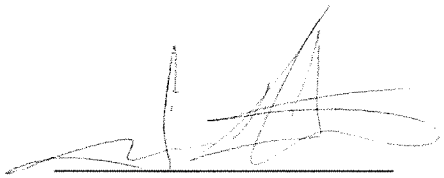
13. Attached as Exhibit J is a true and correct copy of the transcript of the May 16, 2014 sentencing proceeding before the Honorable Richard J. Sullivan in *United States v. Michael Steinberg*, 12-cr-121 (RJS) ("Steinberg Tr.").

14. Attached as Exhibit K is a true and correct copy of the BrokerCheck Report for Linus N. Nwaigwe dated June 20, 2014.

15. Attached as Exhibit L is a true and correct copy of the cover page and page 16 of the Sentencing Transcript from the May 13, 2013 sentencing proceeding in *United States v. Chiasson*, 12-cr-121 (RJS).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 30, 2014
New York, New York



Savannah Stevenson

4

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

UNITED STATES OF AMERICA :

-v.- : SUPERSEDING INDICTMENT

TODD NEWMAN, :
ANTHONY CHIASSON, and S2 12 Cr. 121 (RJS)
JON HORVATH, :

Defendants. :

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

COUNT ONE

(Conspiracy to Commit Securities Fraud)

The Grand Jury charges:

Relevant Entities and Individuals

1. At all times relevant to this Indictment, TODD NEWMAN, the defendant, was a portfolio manager at a hedge fund located in Stamford, Connecticut ("Hedge Fund A"). At all times relevant to this Indictment, Jesse Tortora ("Tortora"), a coconspirator not named as a defendant herein, was employed as an analyst at Hedge Fund A.

2. At all times relevant to this Indictment, ANTHONY CHIASSON, the defendant, was one of the founders of, and a portfolio manager at, a hedge fund located in New York, New York ("Hedge Fund B"). At all times relevant to this Indictment, Spyridon Adondakis, a/k/a "Sam Adondakis" ("Adondakis"), a coconspirator not named as a defendant herein, was employed as an analyst at Hedge Fund B.

3. At all times relevant to this Indictment, JON HORVATH, the defendant, was employed as an analyst at a hedge fund located in New York, New York ("Hedge Fund C").

4. At all times relevant to this Indictment, Dell, Inc. ("Dell"), a public company whose stock was traded on the Nasdaq Stock Market, produced personal computers and provided technology services around the world. Further, at all times relevant to this Indictment, Dell's policies prohibited the unauthorized disclosure of Dell's confidential information.

5. At all times relevant to this Indictment, NVIDIA Corporation ("NVIDIA"), a public company whose stock was traded on the Nasdaq Stock Market, produced, among other things, graphics processors. Further, at all times relevant to this Indictment, NVIDIA's policies prohibited the unauthorized disclosure of NVIDIA's confidential information.

The Insider Trading Scheme

6. From at least in or about late 2007 through in or about 2009, JON HORVATH, the defendant, along with Tortora, Adondakis, and others known and unknown, were analysts who worked at hedge funds and investment firms in New York, New York and elsewhere (the "Analyst Coconspirators"). The Analyst Coconspirators exchanged with each other material, nonpublic information ("Inside Information") obtained directly and indirectly from employees of certain publicly traded technology

companies ("Technology Companies"). The Analyst Coconspirators, in turn, provided the Inside Information they obtained from each other and from their own sources to the portfolio managers for whom they worked at their respective hedge funds and investment firms (the "Portfolio Manager Coconspirators"). The Portfolio Manager Coconspirators, including TODD NEWMAN and ANTHONY CHIASSON, the defendants, in turn, executed securities transactions based in whole or in part on the Inside Information the Analyst Coconspirators provided to them.

7. The Inside Information obtained by the Analyst Coconspirators, including JON HORVATH, the defendant, and passed to the Portfolio Manager Coconspirators, including TODD NEWMAN and ANTHONY CHIASSON, the defendants, and to others known and unknown, included information relating to the Technology Companies' earnings, revenues, gross margins, and other confidential and material financial information of the Technology Companies.

8. The Inside Information obtained by the Analyst Coconspirators, including JON HORVATH, the defendant, and passed to the Portfolio Manager Coconspirators, including TODD NEWMAN and ANTHONY CHIASSON, the defendants, and to others known and unknown was obtained in violation of: (i) fiduciary and other duties of trust and confidence owed by the employees of the Technology Companies to their employers; (ii) expectations of confidentiality held by the Technology Companies; (iii) written policies of the

Technology Companies regarding the use and safekeeping of confidential business information; and (iv) agreements between the Technology Companies and their employees to maintain information in confidence.

9. Specifically, in furtherance of the conspiracy, Tortora passed to TODD NEWMAN, the defendant, Inside Information pertaining to Technology Companies that Tortora had obtained from the Analyst Coconspirators and other sources. NEWMAN executed and caused others to execute transactions in the securities of certain Technology Companies based in whole or in part on the Inside Information, earning substantial sums in unlawful profits or illegally avoiding losses for the benefit of Hedge Fund A.

10. In furtherance of the conspiracy, Adondakis passed to ANTHONY CHIASSON, the defendant, Inside Information pertaining to Technology Companies that Adondakis had obtained from the Analyst Coconspirators and other sources. CHIASSON, either alone or together with one or more coconspirators at Hedge Fund B (the "Hedge Fund B Coconspirators"), executed and caused others to execute transactions in the securities of certain Technology Companies based in whole or in part on the Inside Information, earning substantial sums in unlawful profits or illegally avoiding losses for the benefit of Hedge Fund B.

11. In furtherance of the conspiracy, JON HORVATH, the defendant, passed the Inside Information he obtained from the

Analyst Coconspirators and other sources to the portfolio manager for whom he worked ("Portfolio Manager 1"), who in turn executed and caused others to execute transactions in the securities of certain Technology Companies based in whole or in part on the Inside Information, earning substantial sums in unlawful profits or illegally avoiding losses for the benefit of Hedge Fund C.

The Dell Inside Information

12. From in or about 2008 through in or about 2009, in advance of Dell's quarterly earnings announcements, Tortora provided Inside Information regarding Dell's financial condition, including Dell's gross margins (the "Dell Inside Information") to TODD NEWMAN and JON HORVATH, the defendants, and to Adondakis. Tortora obtained the Dell Inside Information from Sandeep Goyal, a/k/a "Sandy Goyal" ("Goyal"), a coconspirator not named as a defendant herein. Goyal, in turn, obtained the Dell Inside Information from an employee at Dell (the "Dell Insider").

13. At certain times, the Dell Insider worked in Dell's investor relations department, and had access to confidential financial information concerning Dell's quarterly earnings announcements before it was publicly announced. The disclosure by the Dell Insider of the Dell Inside Information in advance of Dell's public earnings announcements violated Dell's policies and the Dell Insider's duties of trust and confidence owed to Dell.

14. Hedge Fund A paid Goyal for information, including the Dell Inside Information, through a purported consulting arrangement with another individual ("Individual 1"). In 2008, Individual 1 received three payments of $18,750 pursuant to this purported consulting arrangement, and a separate $100,000 payment in or about January 2009. TODD NEWMAN, the defendant, approved this consulting arrangement and the payments to Individual 1 described herein.

May 29, 2008 Earnings Announcement

15. In advance of Dell's May 29, 2008 quarterly earnings announcement, the Dell Insider provided to Goyal, who, in turn, provided to Tortora, Inside Information concerning Dell's financial results for the quarter ended May 2, 2008. That Inside Information indicated, among other things, that gross margins would be higher than market expectations.

16. Tortora passed this Dell Inside Information to TODD NEWMAN, the defendant, in advance of Dell's May 29, 2008 quarterly earnings announcement. NEWMAN executed or caused to be executed transactions in securities of Dell based in whole or in part on the Dell Inside Information, resulting in an illegal profit for Hedge Fund A of approximately $1 million.

17. Tortora also provided the Dell Inside Information concerning Dell's May 29, 2008 quarterly earnings announcement to Adondakis. Adondakis, in turn, provided the Dell Inside

Information to ANTHONY CHIASSON, the defendant, in advance of Dell's May 29, 2008 earnings announcement. CHIASSON, either alone or together with one or more coconspirators at Hedge Fund B, executed or caused to be executed transactions in securities of Dell based in whole or in part on the Dell Inside Information, resulting in an illegal profit for Hedge Fund B of approximately $4 million.

August 28, 2008 Earnings Announcement

18. On multiple occasions in advance of Dell's August 28, 2008 quarterly earnings announcement, the Dell Insider provided to Goyal, who, in turn, provided to Tortora, Inside Information concerning Dell's financial results for the quarter ended August 1, 2008. That Inside Information indicated, among other things, that gross margins would be materially lower than market expectations.

19. Tortora passed this Dell Inside Information concerning Dell's August 28, 2008 earnings announcement to TODD NEWMAN, the defendant, who executed or caused to be executed transactions in securities of Dell based in whole or in part on the Dell Inside Information, resulting in an illegal profit for Hedge Fund A of approximately $2.8 million.

20. Tortora also provided the Dell Inside Information concerning Dell's August 28, 2008 quarterly earnings announcement to Adondakis. Adondakis, in turn, provided the Dell Inside

Information to ANTHONY CHIASSON, the defendant. CHIASSON, either alone or together with one or more coconspirators at Hedge Fund B, executed or caused to be executed transactions in securities of Dell based in whole or in part on the Dell Inside Information, resulting in an illegal profit for Hedge Fund B of approximately $53 million.

21. Tortora also provided the Dell Inside Information concerning Dell's August 28, 2008 quarterly earnings announcement to JON HORVATH, the defendant. HORVATH, in turn, provided the Dell Inside Information to Portfolio Manager 1. Portfolio Manager 1 executed or caused to be executed transactions in securities of Dell based in whole or in part on the Dell Inside Information, resulting in an illegal profit for Hedge Fund C of approximately $1 million.

The NVIDIA Inside Information

22. At all times relevant to this Indictment, Danny Kuo, an Analyst Coconspirator not named as a defendant herein, was employed as an analyst at a wealth management company headquartered in Pasadena, California ("Investment Firm D"). In or about 2009, Kuo obtained Inside Information regarding NVIDIA's financial results, including NVIDIA's revenues and gross margins (the "NVIDIA Inside Information"), in advance of NVIDIA's quarterly earnings announcements. Kuo obtained the NVIDIA Inside Information from a friend ("Individual 2") who in turn obtained

the NVIDIA Inside Information from an employee at NVIDIA (the "NVIDIA Insider"). Kuo paid Individual 2 cash and other items of value in exchange for the NVIDIA Inside Information. Kuo passed this NVIDIA Inside Information to the portfolio manager at Investment Firm D for whom he worked ("Portfolio Manager 2") as well as to Tortora, Adondakis, and JON HORVATH, the defendant.

23. At certain times, the NVIDIA Insider worked in NVIDIA's finance department, and had access to confidential financial information concerning NVIDIA's quarterly earnings announcements before the information was publicly announced. The disclosure by the NVIDIA Insider of the NVIDIA Inside Information in advance of NVIDIA's public earnings announcements violated NVIDIA's policies and the NVIDIA Insider's duties of trust and confidence owed to NVIDIA.

May 7, 2009 Earnings Announcement

24. In advance of NVIDIA's May 7, 2009 quarterly earnings announcement, the NVIDIA Insider provided to Individual 2, who in turn provided to Kuo, Inside Information concerning NVIDIA's financial results for the quarter ended April 26, 2009. That Inside Information indicated, among other things, that gross margins would be lower than market expectations. Kuo provided this NVIDIA Inside Information to Portfolio Manager 2 as well as to Tortora, Adondakis, and JON HORVATH, the defendant.

25. Tortora, in turn, provided the NVIDIA Inside

Information to TODD NEWMAN, the defendant. NEWMAN executed or caused to be executed transactions in securities of NVIDIA in advance of NVIDIA's May 7, 2009 quarterly earnings announcement based in whole or in part on the NVIDIA Inside Information, resulting in an illegal profit for Hedge Fund A of at least $48,000.

26. Adondakis, in turn, provided the NVIDIA Inside Information to ANTHONY CHIASSON, the defendant. CHIASSON executed or caused to be executed transactions in securities of NVIDIA in advance of NVIDIA's May 7, 2009 quarterly earnings announcement based in whole or in part on the NVIDIA Inside Information, resulting in an illegal profit for Hedge Fund B of approximately $10 million.

27. JON HORVATH, the defendant, in turn provided the NVIDIA Inside Information to Portfolio Manager 1. Portfolio Manager 1 executed or caused to be executed transactions in securities of NVIDIA in advance of NVIDIA's May 7, 2009 quarterly earnings announcement based in whole or in part on the NVIDIA Inside Information, resulting in an illegal profit for Hedge Fund C of over $400,000.

The Conspiracy

28. From in or about late 2007 through in or about 2009, in the Southern District of New York and elsewhere, TODD NEWMAN, ANTHONY CHIASSON, and JON HORVATH, the defendants, and

others known and unknown, willfully and knowingly did combine, conspire, confederate and agree together and with each other to commit an offense against the United States, to wit, securities fraud, in violation of Title 15, United States Code, Section 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

29. It was a part and an object of the conspiracy that TODD NEWMAN, ANTHONY CHIASSON, and JON HORVATH, the defendants, and others known and unknown, willfully and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, and of the mails, and of the 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

30. Among the means and methods by which TODD NEWMAN, ANTHONY CHIASSON, and JON HORVATH, the defendants, and others known and unknown, would and did carry out the conspiracy were the following:

a. The Analyst Coconspirators, including HORVATH, obtained Inside Information directly and indirectly from employees of public companies that had been disclosed by those employees in violation of fiduciary and other duties of trust and confidence that they owed to their employers.

b. The Analyst Coconspirators, including HORVATH, shared with each other Inside Information that they obtained directly or indirectly from public company employees.

c. The Analyst Coconspirators, including HORVATH, also provided the Inside Information they obtained directly or indirectly from public companies or from each other to their respective portfolio managers for the purpose of the portfolio managers' trading on that Inside Information. Thus, HORVATH provided the Inside Information that he obtained from both the Analyst Coconspirators and other sources to Portfolio Manager 1, Tortora provided the Inside Information that he obtained from both

the Analyst Coconspirators and other sources to NEWMAN, and Adondakis provided the Inside Information that he obtained from both the Analyst Coconspirators and other sources to CHIASSON.

d. NEWMAN executed and caused others to execute securities transactions for the benefit of Hedge Fund A in various Technology Companies based in whole or in part on the Inside Information provided by Tortora, knowing that the Inside Information had been disclosed by public company employees in violation of duties of trust and confidence owed to their employers.

e. CHIASSON, either alone or together with one or more coconspirators at Hedge Fund B, executed and caused others to execute securities transactions for the benefit of Hedge Fund B in various Technology Companies based in whole or in part on the Inside Information provided by Adondakis, knowing that the Inside Information had been disclosed by public company employees in violation of duties of trust and confidence owed to their employers.

Overt Acts

31. In furtherance of the conspiracy, and to effect the illegal object thereof, TODD NEWMAN, ANTHONY CHIASSON, and JON HORVATH, the defendants, and their coconspirators committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. On or about May 12, 2008, Adondakis called CHIASSON's office telephone line in New York, New York.

b. On or about May 16, 2008, Tortora and NEWMAN spoke by telephone.

c. On or about August 5, 2008, Tortora sent emails to NEWMAN, HORVATH, Kuo, and Adondakis containing certain of the Dell Inside Information.

d. On or about August 8, 2008, Adondakis discussed certain of the Dell Inside Information with CHIASSON in an office located in New York, New York.

e. On or about August 18, 2008, Tortora spoke with HORVATH by telephone.

f. On or about August 18, 2008, Tortora spoke to Kuo by telephone.

g. On or about August 25, 2008, HORVATH sent an email to Portfolio Manager 1 containing certain of the Dell Inside Information.

h. On or about August 27, 2008, CHIASSON participated in a telephone call routed through Hedge Fund B's office in New York, New York, with Adondakis and other coconspirators at Hedge Fund B in which certain of the Dell Inside Information was discussed.

i. On or about February 10, 2009, Kuo sent emails to Portfolio Manager 2, as well as to HORVATH, Tortora, and Adondakis containing Inside Information concerning NVIDIA.

j. On or about May 4, 2009, Kuo sent emails to Portfolio Manager 2, as well as to HORVATH, Tortora, and Adondakis containing Inside Information concerning NVIDIA.

k. On or about August 6, 2009, Kuo sent emails to Portfolio Manager 2, as well as to HORVATH, Tortora, and Adondakis, containing Inside Information concerning NVIDIA.

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

COUNTS TWO THROUGH FIVE

(Securities Fraud)

The Grand Jury further charges:

32. The allegations contained in paragraphs 1 through 27 and 30 through 31 are repeated and realleged as though fully set forth herein.

33. On or about the dates set forth below, in the Southern District of New York and elsewhere, TODD NEWMAN, the defendant, willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of 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, NEWMAN executed and caused others to execute the securities transactions listed below based in whole or in part on material, nonpublic information:

COUNT	DATE	SECURITY	TRANSACTION
TWO	May 16, 2008	Dell, Inc.	purchase of 475,000 shares of common stock
THREE	August 5, 2008	Dell, Inc.	short sale of 180,000 shares of common stock
FOUR	August 15, 2008	Dell, Inc.	short sale of 350,000 shares of common stock
FIVE	April 27, 2009	NVIDIA Corporation	short sale of 375,000 shares of common stock

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

COUNTS SIX THROUGH TEN

(Securities Fraud)

The Grand Jury further charges:

34. The allegations contained in paragraphs 1 through 27 and 30 through 31 are repeated and realleged as though fully set forth herein.

35. On or about the dates set forth below, in the Southern District of New York and elsewhere, ANTHONY CHIASSON, the defendant, willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of 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, CHIASSON executed and caused others to execute the securities transactions listed below based in whole or in part on material, nonpublic information:

COUNT	DATE	SECURITY	TRANSACTION
SIX	May 12, 2008	Dell, Inc.	purchase of 3,500 call option contracts
SEVEN	August 11, 2008	Dell, Inc.	short sale of 100,000 shares of common stock
EIGHT	August 18, 2008	Dell, Inc.	short sale of 700,000 shares of common stock
NINE	August 20, 2008	Dell, Inc.	purchase of 7,000 put option contracts
TEN	May 4, 2009	NVIDIA Corporation	short sale of 1,000,000 shares of common stock

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

COUNTS ELEVEN AND TWELVE

(Securities Fraud)

The Grand Jury further charges:

36. The allegations contained in paragraphs 1 through 27 and 30 through 31 are repeated and realleged as though fully set forth herein.

37. On or about the date set forth below, in the Southern District of New York and elsewhere, JON HORVATH, the defendant, willfully and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of 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, HORVATH provided material, nonpublic information to Portfolio Manager 1, who executed or caused others to execute the securities transactions listed below based in whole or in part on the information:

COUNT	DATE	SECURITY	TRANSACTION
ELEVEN	August 18, 2008	Dell, Inc.	short sale of at least 167,000 shares of common stock
TWELVE	May 5, 2009	NVIDIA Corporation	a swap transaction equivalent to a short sale of 160,000 shares of common stock

(Title 15, United States Code, Sections 78j(b) & 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

38. As a result of committing one or more of the foregoing securities fraud offenses alleged in Counts One through Twelve of this Indictment, TODD NEWMAN, ANTHONY CHIASSON, and JON HORVATH, the defendants, 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.

Substitute Assets Provision

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

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 defendants up to the value of the forfeitable property described above.

(Title 18, United States Code, Section 981; Title 28, United States Code, Section 2461; Title 18, United States Code, Sections 371 and 2; 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.)

FOREPERSON

Preet Bharara (KPO)
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. -

TODD NEWMAN,
ANTHONY CHIASSON, and
JON HORVATH,

Defendants.

SUPERSEDING
INDICTMENT

S2 12 Cr. 121 (RJS)

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

PREET BHARARA
United States Attorney.

A TRUE BILL

Foreperson.

8/28/12 Filed Superseding Indictment
ds
Judge Peck
USMJ

B

13-1837-cr(L)

13-1917-cr(con)

To Be Argued By:
MARK F. POMERANTZ

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JON HORVATH, DANNY KUO, HYUNG G. LIM, MICHAEL STEINBERG,

Defendants,

TODD NEWMAN, ANTHONY CHIASSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT ANTHONY CHIASSON

MARK F. POMERANTZ, ESQ.
MATTHEW J. CARHART, ESQ.
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

ALEXANDRA A.E. SHAPIRO, ESQ.
DANIEL J. O'NEILL, ESQ.
JEREMY LICHT, ESQ.
SHAPIRO, ARATO & ISSERLES LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

GREGORY R. MORVILLO, ESQ.
MORVILLO LLP
1 World Financial Center, 27th Floor
New York, New York 10281
(212) 796-6330

Attorneys for Defendant-Appellant Anthony Chiasson

August 15, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The government's zeal to combat insider trading went too far in this case, and swept in conduct that is not a crime under the law. Anthony Chiasson, a hedge fund manager, was convicted of insider trading based on the use of confidential business information "leaked" by corporate insiders. Chiasson played no role in inducing the insiders to disclose information. He was a remote tippee, removed from the insiders by four degrees of separation. Chiasson did not know who the insiders were or why they divulged information. Critically, he did not know that the tippers had fraudulently breached their fiduciary duties to their employers by exchanging confidential information for personal gain. According to the government's evidence, Chiasson knew only that his research analyst had sources of material nonpublic information coming from "insiders," and he traded on that information.

That is not a crime. There is no general duty to abstain from trading just because a tippee receives material nonpublic information coming from an insider. An insider violates the law only if he commits a fraudulent breach of fiduciary duty, which the Supreme Court has defined as providing confidential information for personal gain. A tippee's liability derives from the insider's liability: To be found guilty of securities fraud, a tippee must be "'a participant after the fact in the insider's breach of fiduciary duty.'" *Dirks* v. *SEC*, 463 U.S. 646, 659 (1983)

(quoting *Chiarella* v. *United States*, 445 U.S. 222, 230 n.12 (1980)). This means that, in order to commit a crime by trading on inside information, the tippee must *know* that the insider provided information for personal benefit.

Here, the government did not prove and the jury was not required to find that Chiasson knew anything about the tippers' exchange of confidential information for personal gain. Although the government argued that Chiasson knew that insiders had "improperly" breached duties of confidentiality to their employers, a breach of a confidentiality duty is not a fraudulent fiduciary breach that supports liability under *Dirks*. Absent knowledge that a tipper exchanged inside information for personal gain, Chiasson did not participate in conduct that violates Section 10(b) or Rule 10b-5.

If accepted, the government's "improper disclosure" theory would ride roughshod over *Dirks* and later cases, and lead to an unwarranted expansion of the federal securities laws. Pursuant to corporate confidentiality policies and the SEC's Regulation FD, many selective disclosures of material nonpublic information are "improper" in the broad sense that they violate some duty of confidentiality. Nonetheless, insiders commonly provide such information to analysts and investors; the financial community is awash in nonpublic information that insiders disclose selectively for a variety of reasons. Most trading on "leaks" and selective disclosures is beyond the scope of insider trading prohibitions, and is

legal. Indeed, thirty years ago, the Supreme Court recognized what the prosecution has since forgotten: "Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Dirks*, 463 U.S. at 658.

Trading on inside information becomes securities fraud only where the tippee *knows* that an insider provided the information for personal gain. That is what converts trading on a "leak" or a "tip" into a criminal violation of the federal securities laws. Here, the government offered no such proof and the jury was required to make no such finding. Chiasson's conviction should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. The judgment of conviction was entered on May 15, 2013. (A-2940-46).[1] Chiasson filed a notice of appeal on May 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether a remote tippee can be guilty of insider trading if he does not know that the corporate insider disclosed information in exchange for personal benefit—even though the Supreme Court held in *Dirks* v. *SEC* that an insider

[1] "A" refers to the Appendix filed jointly by all parties.

commits a fraudulent fiduciary breach only if he tips for personal benefit, and a tippee commits insider trading only if he knows that the tipper engaged in a fraudulent fiduciary breach.

2. Whether Chiasson is entitled to (a) acquittal on all charges because there was insufficient evidence that he knew that he was trading on material nonpublic information that had been disclosed by a corporate insider in exchange for personal benefit, or (b) a new trial because the jury was not instructed to find such knowledge.

3. Whether Chiasson's 78-month sentence should be vacated because the district court erred in holding Chiasson accountable for the trading gains of a supposed co-conspirator and because the court created unwarranted sentencing disparity by imposing a sentence on Chiasson far in excess of the sentences of other insider trading defendants found guilty of more culpable conduct.

4. Whether the forfeiture order should be vacated, both because the district court erroneously required Chiasson to forfeit fees collected by a supposed co-conspirator and because Chiasson was deprived of his constitutional rights under the Fifth and Sixth Amendments to have the forfeiture amount set by a jury based upon proof beyond a reasonable doubt.

STATEMENT OF THE CASE

Chiasson appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (Sullivan, J.), following a jury trial. The rulings at issue are unreported.[2]

Chiasson and co-defendant-appellant Todd Newman were charged in a superseding indictment with conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 (Count One). Chiasson also was charged with five substantive counts of securities fraud in violation of Section 10(b) of the Securities Exchange Act and SEC Rules 10b-5 and 10b5-2, based upon alleged insider trading in Dell stock (Counts Six through Nine) and NVIDIA stock (Count Ten). (A-148-68).

The indictment alleged that a group of financial analysts at various hedge funds and other institutional investors exchanged financial information they obtained, mostly indirectly, from company insiders, and that the analyst group passed this information to portfolio managers at their companies. Chiasson, one of those portfolio managers, was alleged to have traded on the information for the benefit of his hedge fund, Level Global. The charges against Chiasson were based entirely on information that his analyst, Sam Adondakis, provided to him. The government did not claim that Chiasson had any contact with any of the insiders or tippees other than Adondakis. (A-151-57).

[2] (A-1725-26; A-2924-34; A-2940-47).

The allegations focused on Dell and NVIDIA information that Adondakis received from the group of analysts. The indictment alleged that prior to Dell's May 29, 2008 earnings announcement, Adondakis relayed to Chiasson that Dell's gross margins would be higher than the market expected, and Chiasson caused Level Global to purchase call options on May 12, 2008. (A-153-54; A-164). The government also alleged that, ahead of Dell's August 28, 2008 earnings release, Adondakis gave Chiasson information that gross margins would be lower than expected; and that Chiasson caused Level Global to execute short sales of Dell stock on August 11 and 18, 2008 and to purchase Dell put options on August 20, 2008. (A-154-55; A-164). Finally, the indictment alleged that, in advance of NVIDIA's May 7, 2009 earnings announcement, Adondakis relayed information indicating that gross margins would be lower than market expectations and that Chiasson then caused Level Global to sell NVIDIA stock short on May 4, 2009. (A-157; A-164).

Trial commenced on November 7, 2012 and lasted approximately six weeks. On December 17, 2012, the jury returned a verdict of guilty on all counts. (A-1972-73).

On May 13, 2013, Judge Sullivan sentenced Chiasson to an aggregate term of 78 months' imprisonment, to be followed by a term of supervised release. He imposed a $5 million fine and ordered forfeiture in an amount not exceeding $2

million.[3] (A-2931-32). The judge denied Chiasson's application for bail pending appeal (A-2938), but this Court reversed that ruling on June 18, 2013. Chiasson is at liberty pending this appeal.

STATEMENT OF FACTS

Viewed in the light most favorable to the government, the trial evidence showed that Chiasson was a remote tippee who knew that Adondakis had received detailed information, leaked by insiders at Dell and NVIDIA, about quarterly revenue, gross margin, and other financial metrics ahead of quarterly earnings announcements. There was no evidence that Chiasson knew who the insiders were or that they had disclosed the information for personal benefit. The evidence also demonstrated that Adondakis and Level Global routinely received similar information from high-level executives at public companies who were not acting for personal benefit, and that these executives selectively disclosed the information in advance of quarterly earnings releases. Thus, the proof showed that Chiasson knew that company insiders frequently reveal material nonpublic information for a multitude of reasons, and was unaware that the information at issue was provided

[3] Judge Sullivan subsequently set the forfeiture amount at $1,382,217. (A-3002-04). In his forfeiture order, Judge Sullivan also mistakenly held, *sua sponte*, that his imposition of a $5 million fine was "plain error" under *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), and requested submissions on the remedy. (A-3004). But the judge had imposed the fine under 15 U.S.C. § 78ff, which authorizes fines up to $5 million, rather than under the statute applied in *Pfaff*. (*See* A-3005-06). After the parties pointed this out, the judge left the $5 million fine undisturbed. (A-3007).

corruptly. In other words, Chiasson lacked knowledge of the key fact—the alleged self-dealing of the insiders—that, if known, would have made his trading illegal.

A. The Proof At Trial

The prosecution's case focused principally on two different "tipping chains," one related to Dell and one to NVIDIA.[4]

1. The Dell Tipping Chain

The tips originated with Rob Ray, who worked in Dell's Investor Relations department. Ray did not testify at trial, and he was never charged with a crime or alleged to be a co-conspirator (*see* A-170; A-1631). Ray tipped cooperating witness Sandy Goyal, an analyst at Neuberger Berman (a large institutional investor). Goyal was a former Dell employee who met Ray in business school.

Goyal testified that beginning in late 2007, and for approximately two years, Ray gave him information about Dell's financial results after Dell "rolled up" the numbers but before it publicly released the results. (A-896). Ray provided "ranges" of numbers or comparisons to Wall Street expectations. (A-898). According to Goyal, Ray told him that Dell's margins could be in the "low 18's" (*i.e.*, 18 to 18.3%), or that margins and revenues could be higher or lower than market consensus estimates. (*Id.*). Goyal lied to Ray, claiming that he needed the

[4] The government charged that the conspiracy also involved information about several other companies, but did not discuss them in its summation; the core of the case was the Dell and NVIDIA tipping chains. (A-1774-93).

information to refine his financial model for Dell, and he never told Ray that anyone was trading on the information. (A-947). Goyal never offered Ray money, because he did not want Ray to "suspect[] something was wrong." (*Id.*). The government claimed that Ray shared information with Goyal because Goyal gave Ray "career advice." However, there was never an explicit *quid pro quo*. (A-922). Goyal testified that he gave Ray more career advice than he would have absent the passing of company information, but he would have given advice anyway. (A-923). Ray did not testify, and there was no evidence that Ray understood that he was exchanging inside information for career advice.

Goyal gave Ray's Dell information to Jesse Tortora, another cooperator and co-defendant Newman's analyst at Diamondback Capital. Tortora did not know the name of Goyal's source at Dell, the source's position or seniority, or that Goyal provided the source "career advice" in exchange for confidential information. (A-396-97; A-473; A-576). Tortora testified that Goyal told him only that the Dell insider "liked to talk stocks" and "trading ideas," and that Goyal sometimes gave information back to the insider. (A-498). Tortora testified that the confidential "earnings related metrics" he got from Goyal were specific and useful for trading, so he shared the information with both Newman and Tortora's "group of friends." (A-396-97).

Tortora's "group of friends" included Adondakis, Chiasson's analyst at Level Global. Tortora gave Adondakis the confidential Dell information even though Goyal specifically asked him not to share the information with Adondakis. (A-489-90). Adondakis testified that he passed the information to Chiasson, and Chiasson used it to make trading decisions. (A-1002). Thus, the Dell information passed from Ray to Goyal to Tortora to Adondakis to Chiasson. Chiasson was four levels removed from the original insider/tipper.

Adondakis, the sole conduit of inside information to Chiasson, knew precious little about the original tipper.[5] Adondakis did not know who the source was, where he worked within Dell,[6] or why he "leaked" information about Dell's financial results ahead of their public release. Adondakis was clueless about what, if anything, Ray received for providing Goyal with information. (A-1001; A-1190-91; A-1200). Adondakis simply knew that Goyal had a source of information at Dell, and that is what he told Chiasson. (A-1192).

---

[5] The government argued that Ray provided the information only after-hours and on a personal telephone (A-899; A-1777), which showed that Ray was disclosing information improperly. There was no evidence that Chiasson or even Adondakis knew these facts. Also, there was testimony that after-hours conversations were not unusual for investor relations personnel. (A-1435-36).

[6] Adondakis testified that he was told at one point that Ray worked in Dell's finance department, though he did not say that he relayed this to Chiasson. (A-1190). In fact, Ray never worked in Dell's finance department. Ray worked in Investor Relations at Dell during 2007-2009, where he had access to confidential information before Dell released its quarterly financial results. (A-1401).

2. The NVIDIA Tipping Chain

The NVIDIA tipping chain was similarly attenuated. Chris Choi, who worked in NVIDIA's finance unit and was privy to financial data before they were announced in the company's quarterly filings, was the original source. (A-1506). The government never prosecuted Choi or alleged that he was a co-conspirator. (A-170; A-1631). Choi did not testify. Hyung Lim, a cooperator, testified that he was Choi's church and family friend. (A-1511-12). Lim asked Choi "how the quarter [was] doing," and Choi responded by providing NVIDIA's quarterly financial information ahead of public filings. (A-1520-21). Lim never told Choi that he wanted the information to trade in NVIDIA stock, although Choi knew that Lim was a trader. (A-1514). Lim relayed the information to Danny Kuo, a personal friend and poker buddy. (A-1506-07). Kuo, an analyst at Whittier Trust, gave Lim small amounts of money, but neither gave money to Choi.[7] (A-1506; A-1520). Choi did not know that Lim relayed the information to Kuo or anyone else. (A-1521).

Kuo passed the NVIDIA information to the analyst "group of friends," including Adondakis. (A-1042). Adondakis provided it to Chiasson. (*E.g.*, A-

[7] There was no evidence that Adondakis ever knew of these payments, and therefore no conceivable basis on which Chiasson could have known about them. There also was considerable trial testimony relating to $175,000 in payments from Diamondback to Goyal through a consulting agreement with Goyal's wife. (A-490-96; A-900-03). Chiasson and Adondakis knew nothing of this arrangement. (A-785; A-1190-91).

1045). Thus, the NVIDIA tipping chain was Choi to Lim, Lim to Kuo, Kuo to his analyst friends (including Adondakis), and Adondakis to Chiasson.

Adondakis knew little about the NVIDIA insider. He knew that Kuo had a church friend with an NVIDIA contact who was an "accounting manager." (A-1138; A-1221). But Adondakis did not know who the ultimate or intermediate sources were, and never met or spoke with either. There was no evidence that Adondakis knew anything about the relationship between Kuo's "church friend" and the NVIDIA insider, or about any benefit that the insider may have received. Adondakis did not know Lim or Choi, and he knew nothing about their friendship. Chiasson knew only what Adondakis chose to share, and nothing about who leaked NVIDIA's information, or why or how it was leaked. Indeed, Adondakis testified that he did not specifically tell Chiasson that the source of the NVIDIA information even worked at NVIDIA. (A-1044).

3. The Information That Chiasson Received

Lacking evidence that Chiasson knew the insiders or their reasons for disclosing Dell and NVIDIA information, the prosecutors argued that Chiasson knew from the nature and timing of the information that it had been improperly disclosed. The prosecution argued that Chiasson was a "savvy" portfolio manager, who knew that companies did not disclose specific numbers about earnings before public filings. (A-1889). They also argued that the timing, frequency, and

accuracy of the updates showed that the critical information was "coming from someone at the company that should not be giving it out." (*Id.*).

The government attempted to depict a world in which corporate financial information is tightly controlled, and shared with investors and analysts only for proper corporate purposes pursuant to approved and established procedures. To prove that the two insiders breached their obligations to their employers by divulging information, the government called witnesses from Dell and NVIDIA. Robert Williams, Ray's supervisor at Dell, described Dell's internal processes for preparing quarterly financial reports, and detailed Ray's access to confidential information. He testified that Dell's policies and procedures, together with the SEC's Regulation FD,[8] required Ray to protect such information, and prohibited sharing the company's financial results with anyone prior to public announcement. (A-1403-08; A-1416-18). Michael Byron, a witness from NVIDIA, gave similar testimony regarding Choi. (A-1528).

The prosecution portrayed Ray's and Choi's breaches of their companies' confidentiality rules as sinister and manifestly improper. However, there was no evidence that Chiasson knew about these internal Dell and NVIDIA policies or

[8] Regulation FD provides that if an issuer or a defined set of persons acting on its behalf discloses material nonpublic information to certain individuals or entities, the issuer must simultaneously or promptly disclose the same information to the public at large. *See* 17 C.F.R. § 243.100(a). Regulation FD is not an insider trading rule, as discussed *infra* at 27-30, 46-48.

communications. On the contrary, the evidence showed that Chiasson knew that high-level executives at these two companies routinely disclosed similarly precise, accurate information to selected investors, including Chiasson's fund. Adondakis acknowledged that he was in regular contact with investor relations departments at various companies, including Dell and NVIDIA; that investor relations departments "from time to time" put out messages suggesting how the company is going to perform via off-line, private conversations in advance of quarterly filings; that NVIDIA was one of the more "talkative" companies in terms of informal communications from company insiders about likely financial performance; and that it was part of his job as an analyst to solicit this information and share it with Chiasson, who was managing fund portfolios. (A-1032; A-1118; A-1185; A-1222; A-1303-05).

The trial record was replete with examples of insiders "leaking" material nonpublic information to certain analysts and investors. These selective disclosures may have violated Dell's and NVIDIA's confidentiality policies or Regulation FD, but the government did not (and could not) argue that trading on this information was prohibited.

The following are some examples of the significant information that Dell and NVIDIA routinely "leaked" to selected investors, and that Adondakis routinely shared with Chiasson:

- Dell's head of Investor Relations ("IR"), Lynn Tyson, in a one-on-one call, informed Tortora that Dell would soon undertake a "multi-billion dollar" restructuring. Tyson explained that this information was not yet in the marketplace and would be formally announced at an upcoming "analyst day." (A-599-600; A-2379). Dell publicly announced the restructuring five days later. *See* http://www.infoworld.com/t/hardware/dell-eyes-3-billion-in-cost-savings-in-3-years-836.

- During the "quiet period" leading up to Dell's first quarter 2008 release, Dell's CFO told an analyst that Dell would achieve headcount reduction of about three times market expectations. (A-2380-81). This information proved accurate and critical to Dell's quarterly earnings. (A-2257-67; A-2440).

- Halfway through Dell's third quarter 2008, IR told an analyst "offline" that the company would miss quarterly estimates "by a country mile." (A-601-02; A-2387). Dell missed estimates by nearly $1 billion that quarter. (A-2253-56; A-2455).

- During the "quiet period" leading up to Dell's third quarter 2008 release, Tyson told an analyst that gross margin would be stable even if revenue missed expectations. (A-600-01; A-2388). Six days before the earnings release, Dell IR told an analyst that the company would report earnings of at least 30 cents per share. (A-2390; A-1175). Tortora forwarded both insights to his friends including Adondakis, who relayed the information to Chiasson. (A-2388-89; A-2391). Revenues missed widely but gross margin was stable, and the company reported earnings per share of 37 cents. (A-2253-56; A-2455).

- Halfway through Dell's fourth quarter 2008, Tyson told Tortora that soon-to-be-released industry data would show poor results for Dell and that it had strong, not yet reported, sales for Black Friday. (A-567-74; A-2392-94). Tortora forwarded this information to his friends, including Adondakis. (A-2394). When the industry data was released, it showed that Dell's PC shipments declined more than any other manufacturer listed. (A-2472-75).

- Two weeks before Dell's quarter end in April 2009, Tyson told a group of analysts at a lunch that Dell's normalized gross margin would be 18%. (A-482-83; A-920-21; A-2397). Goyal emailed this information to Tortora, and

it was also circulated to Adondakis and others. (A-2397; GX315). Dell later announced gross margin of 18.1%. (A-2403).

- Three weeks before Dell's quarter end in April 2010, Tortora learned from Dell IR that gross margin would be "in-line at best" with market expectations of 17.7%. (A-604-06; A-2399). This proved accurate when Dell reported on May 20, 2010. *See* http://www.dell.com/learn/us/en/uscorp1/investor-financial-reporting?c=us&l=en&s=corp&cs=uscorp1.

- Halfway through NVIDIA's quarter ending in April 2009, NVIDIA IR told a Diamondback consultant that "margins have been hit by collapse of workstation demand . . . higher mix to chipsets, [and] drop in [desktop] margins." (A-2417). This proved to be accurate. (A-2295-311).

- In late March 2009, two thirds of the way through NVIDIA's quarter ending April 2009, Mike Hara, head of IR, "did not flinch" when Adondakis asked about another analyst's precise revenue estimates for the current quarter. (A-2419; *see also* A-708-09; A-1120). Adondakis circulated this information internally at Level Global and to friends. (A-2419). In another report of the same meeting, Adondakis indicated that gross margin would be flat and revenue would track higher than the company's guidance (A-2421), both of which proved accurate. (A-2295-311; A-2423-33).

The government's own witnesses acknowledged that they obtained and passed along such information without believing that they were committing crimes. (A-566-68; A-595-606; A-641-42; A-709; A-749-50; A-753-55; A-920-21; A-1118-24; A-1185; A-1222-24; A-1276-78; A-1288-89; A-1300-01). Chiasson had no reason—without knowing more about Ray and Choi, the nature of their relationships with their immediate tippees, and why they tipped—to believe that their information, unlike other "leaks," was improperly provided for personal benefit.

B. The Jury Charge

Based on the Supreme Court's opinion in *Dirks*, the defendants moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. They argued that the evidence was insufficient to show that the Dell and NVIDIA insiders provided information in exchange for a personal benefit, and that there was no evidence that the defendants *knew* that the information had been exchanged for personal gain. Absent such knowledge, the defendants argued, they were not aware of or participants in the tippers' fraudulent breaches of fiduciary duties to Dell or NVIDIA, and they could not be convicted of insider trading. (A-1623-29). The defendants also asked the district court to instruct the jury that it must find that a defendant knew that an insider had disclosed information for personal gain in order to find that defendant guilty. (A-198; A-200-01; A-203; A-1626-27).

The district court reserved decision on the Rule 29 motions, remarking that the legal issues "are interesting ones and don't come up in every insider trading case." (A-1633).[9] In discussing the defendants' requested jury charge, the district court acknowledged that their position was "supportable certainly by the language of *Dirks*." (A-1723). But the judge ultimately decided that he was constrained to rule the other way by this Court's decision in *SEC* v. *Obus*, 693 F.3d 276 (2d Cir.

[9] The court never formally ruled on the Rule 29 motions until after sentencing, when it entered a conclusory order denying them. (A-2947).

2012). (A-1725-26). Accordingly, the district court did not instruct the jury that it had to find that Chiasson knew that the Dell and NVIDIA insiders had disclosed confidential information for personal benefit.

SUMMARY OF ARGUMENT

Under *Dirks* v. *SEC*, an insider/tipper who discloses material nonpublic information used to trade securities does not violate Section 10(b) and Rule 10b-5 unless he has engaged in self-dealing—disclosing the information to derive personal gain. It is the exchange of information for gain, and not simply the breach of a duty of confidentiality, that triggers the tipper's liability for securities fraud. A tippee who receives information from a corporate insider has no general duty to refrain from trading on that information, but can be liable derivatively as a "participant after the fact" in the tipper's fraud if he knows that the information was provided to him "improperly." In this context, as *Dirks* made clear, and as numerous courts have held, an "improper" disclosure means a disclosure for personal benefit. Accordingly, in a criminal case the tippee must know that the tipper was engaged in a disclosure of inside information for personal benefit. Unless the tippee knows that the tipper has exchanged information for personal gain, the tippee does not commit securities fraud, and does not act "willfully" under the Securities Exchange Act or generally under the criminal law. The court below therefore erred in ruling that a tippee's knowledge of personal benefit was

not required for fraud liability. Because the government failed to prove that Chiasson knew that the inside information upon which he traded came from insiders who had disclosed the information for personal gain, the evidence was insufficient to prove him guilty of the crimes charged, and he is entitled to an acquittal as a matter of law. At a minimum, a new trial should be ordered, because the trial court's jury instructions failed to tell the jury that it could convict only if Chiasson knew that the tippers had exchanged confidential information for personal gain.

The 78-month term of incarceration that the district court imposed was procedurally and substantively improper. Procedurally, the court below erred by holding Chiasson responsible for securities trades by Chiasson's business partner David Ganek. There was no evidentiary or legal basis for holding Chiasson responsible for Ganek's trades, and as a consequence the court sentenced Chiasson based on an improperly inflated calculation of the amount of his financial "gain." Substantively, Chiasson's sentence was unfair, and the product of a myopic focus on the amount of his purported "gain." The sentencing judge acknowledged that Chiasson was less culpable than his co-defendant, and less culpable than other insider trading defendants, but he imposed a prison term that was significantly longer, resulting in a grossly disparate and unreasonable sentence.

The forfeiture order entered against Chiasson also should be vacated. The amount of the forfeiture was improperly increased because Chiasson was ordered to forfeit gain that was realized by his business partner, without an evidentiary basis for finding that his business partner was a co-conspirator. Further, under recent Supreme Court decisions, the amount of the forfeiture should have been determined by a jury beyond a reasonable doubt, rather than a judge using a "preponderance of the evidence" standard.

Pursuant to Federal Rule of Appellate Procedure 28(i), Chiasson joins in the appellate arguments made by co-defendant Todd Newman, including specifically sections I, II, and III of his Argument.

ARGUMENT

I. CHIASSON'S CONVICTION SHOULD BE REVERSED

As a remote "tippee," Chiasson had no obligation to refrain from trading on inside information unless he knew that an insider disclosed the information for personal gain. The government did not prove that Chiasson had this knowledge, and the jury was not required to find that he did. Accordingly, this Court should direct an acquittal due to insufficient evidence, or at a minimum, grant Chiasson a new trial with a properly instructed jury.

A. To Be Guilty of Insider Trading, a Tippee Must Know That an Insider Provided Confidential Information for Personal Gain

1. *Dirks* and Subsequent Cases Require Tippee Knowledge

The starting point for analysis is settled law: A person who knowingly receives and trades on material nonpublic information from an insider *does not*, without more, commit securities fraud. The Supreme Court has clearly and repeatedly held that there is "no 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information.'" *United States* v. *O'Hagan*, 521 U.S. 642, 660 (1997) (quoting *Chiarella*, 445 U.S. at 233). *See also Dirks*, 463 U.S. at 654-59. A duty to refrain from trading, therefore, does not arise merely from the receipt of nonpublic information from an insider.

More is required, and the Supreme Court has specified what that "more" is. In *Dirks* v. *SEC*, the Court addressed tippee liability at length. The defendant, Raymond Dirks, was a securities analyst at a broker-dealer. Dirks received material nonpublic information from an insider at Equity Funding of America that its assets were vastly overstated. The insider tipped Dirks so that he could expose the fraud. Dirks relayed this information to clients and investors who sold their stock, thereby avoiding losses when the company's fraud became known and its stock price plummeted. The SEC sued Dirks, alleging that he had aided and abetted securities fraud by relaying confidential and material inside information to people who traded the stock.

The Supreme Court held that Dirks did not violate Section 10(b) and Rule 10b-5, and explicitly rejected the theory that a tippee must refrain from trading "whenever he receives inside information from an insider." 463 U.S. at 655. The Court emphasized that tippee liability derives from the tipper's liability, and turns on the purpose of the tipper's disclosure of inside information and the tippee's knowledge of the tipper's improper purpose.

The opinion first considered the duties of corporate insiders, or "tippers." Pointing to the SEC's decision in *In re Cady, Roberts & Co.,* 40 S.E.C. 907 (1961), the Court noted that a tipper's duty to disclose material information or to refrain from trading stemmed from the insider's fiduciary relationship to the issuer. Because Rule 10b-5 is an antifraud measure, the majority explained, "[n]ot 'all breaches of fiduciary duty in connection with a securities transaction' . . . come within the ambit of Rule 10b-5." 463 U.S. at 654 (quoting *Santa Fe Indus.* v. *Green*, 430 U.S. 462, 472 (1977)); *see also Chiarella*, 445 U.S. at 234-35 (emphasizing that Section 10(b) and Rule 10b-5 are "catchall" provisions, but "what [they] catch[ ] must be fraud"). The Court emphasized that the securities laws were intended, among other things, to eliminate the use of inside information for personal advantage. Therefore, the particular fiduciary breach that triggers *fraud* liability is the insider's use of corporate information for his own personal benefit:

> Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. . . . [T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure.

463 U.S. at 662.

The dissent in *Dirks* criticized the use of "personal benefit" as the litmus test for Rule 10b-5 liability, noting that there are other ways to breach duties owed to corporate shareholders. *Id.* at 673-74. But the majority understood the critical role in the securities market that analysts play through their ability to "ferret out and analyze information . . . by meeting with and questioning corporate officers and others who are insiders." *Id.* at 658 (internal quotation marks omitted). The Court observed that "[i]mposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Id.* Accordingly, the Court thought it "essential" that there be a "guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules." *Id.* at 664. The guiding principle the Court identified was the disclosure of inside information for personal gain: That is how the Court defined the *particular* fiduciary breach that amounts to securities fraud under Section 10(b) and Rule 10b-5.

Having defined the tipper's culpable breach of duty to stockholders as the disclosure of corporate information for personal gain, the *Dirks* Court then addressed tippee liability for insider trading. The Court noted that "the typical tippee" has no independent fiduciary duties to issuers or their shareholders, 463 U.S. at 655, and it rejected the notion that a tippee inherits a duty to disclose or abstain from trading "solely because a person knowingly receives material nonpublic information from an insider and trades on it." *Id.* at 658. Tippees can commit insider trading, the Court held, but only if they "*knowingly* participate with the fiduciary [*i.e.*, the insider] in such a breach," referring back to the insiders' "improper purpose of exploiting the information for their personal gain." *Id.* at 659 (emphasis added). That is, tippee liability exists "only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee *and the tippee knows or should know that there has been a breach.*" *Id.* at 660 (emphasis added).[10] *See also id.* at 661 n.20 (noting authorities indicating that tippees must have knowledge of the insider's breach).

[10] The Court's reference to the "knows or should know" standard came in the context of a civil enforcement proceeding. In a criminal case, the "should know" formulation has no place, because the government must prove that the defendant acted "willfully." 15 U.S.C. § 78ff(a). A "willful" violation requires the defendant actually to know that his conduct is illegal, which in turn requires proof that he was aware of the tipper's exchange of information for personal benefit. A "should know" standard equates to negligence, a mental state insufficient for a criminal violation, and insufficient generally to warrant criminal sanctions for serious felonies. *See United States* v. *Temple*, 447 F.3d 130, 137 (2d Cir. 2006) ("'Willful' repeatedly has been defined in the criminal context as intentional,

The SEC's finding that Dirks, as a tippee, violated Rule 10b-5 therefore could not stand. The *Dirks* insider provided information to expose a fraud, not benefit personally, and accordingly he had not fraudulently breached his fiduciary duties to shareholders within the meaning of Rule 10b-5. Dirks could not have been a "participant after the fact" in the insider's nonexistent breach, and therefore was not a culpable tippee.

Under *Dirks,* a culpable tippee must know of the insider's breach of duty to stockholders, and that breach must involve a disclosure of material corporate information for personal gain. It necessarily follows that a tippee cannot be convicted of insider trading unless he knows of the insider's self-dealing. Absent such knowledge, the tippee does not know that the tipper has committed a fraudulent breach of fiduciary duty as defined in *Dirks*. The Supreme Court itself confirmed this in *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985), explaining: "A tippee generally has a duty to disclose or to abstain from trading on material nonpublic information *only when he knows* or should know that his insider source 'has breached his fiduciary duty to the shareholders by disclosing the information'—*in other words, where the insider has sought to*

---

purposeful, and voluntary, as distinguished from accidental or negligent."). Although the trial court's draft jury instructions referred at various points to a "should have known" standard for scienter, the government acquiesced to a defense request to strike that language in favor of a requirement of knowing conduct. (A-1723; A-1902).

'*benefit, directly or indirectly, from his disclosure.*'" *Id.* at 311 n.21 (quoting *Dirks*, 463 U.S. at 660, 662) (emphasis added).

Since 1983, district courts applying *Dirks* have held repeatedly that insiders must disclose information for personal gain, *and tippees must know that the insiders acted for personal gain*, to violate Section 10(b) and Rule 10b-5:

- *State Teachers Ret. Bd.* v. *Fluor Corp.*, 592 F. Supp. 592 (S.D.N.Y. 1984). Judge Sweet read *Dirks* to require that a tippee know of the tipper's fiduciary breach, and held that this "necessitates tippee knowledge of *each element,* including the personal benefit, of the tipper's breach." *Id.* at 594.

- *United States* v. *Santoro*, 647 F. Supp. 153 (E.D.N.Y. 1986), *rev'd on other grounds*, *United States* v. *Davidoff*, 845 F.2d 1151 (2d Cir. 1988). Then-District Judge McLaughlin agreed that a tippee must know of the tipper's personal benefit, and that the jury had to have this explained "as an element of knowledge of the breach." But the court held that the indictment was not facially deficient for alleging simply knowledge of a breach, because "[a]n allegation that the tippee knew of the tipper's breach necessarily charges that the tippee knew that the tipper was acting for personal gain." *Id.* at 170-71.

- *Hernandez* v. *United States*, 450 F. Supp. 2d 1112 (C.D. Cal. 2006). "[U]nder the standard set forth in *Dirks,* an outsider who receives material nonpublic information (i.e., 'tippee') can be liable under § 10(b)/Rule 10(b)-5 if the tippee had knowledge of the insider-tipper's personal gain." *Id.* at 1118.

- *United States* v. *Rajaratnam*, 802 F. Supp. 2d 491 (S.D.N.Y. 2011). Citing *Fluor*, Judge Holwell reasoned that a tippee cannot be a knowing participant in the tipper's fiduciary breach unless the tippee knows that the tipper was divulging information for a personal benefit. *Id.* at 498-99.

- *United States* v. *Whitman*, 904 F. Supp. 2d 363 (S.D.N.Y. 2012). Judge Rakoff noted the *Dirks* requirement of personal benefit to the tipper, and reasoned that "if the only way to know whether the tipper is violating the law is to know whether the tipper is anticipating something in return for the unauthorized disclosure, then the tippee must have knowledge that such self-

> dealing occurred, for, without such a knowledge requirement, the tippee does not know if there has been an 'improper' disclosure of inside information." *Id.* at 371.

As Judge Rakoff has noted, *Dirks*' "knowledge of personal benefit" requirement may make it more difficult to prosecute "remote tippees." 904 F. Supp. 2d at 371-72. This is because remote tippees like Chiasson, who do not know what led the insider to disclose confidential information, are not parties to the insider's fraudulent exchange of information for personal gain. They are not, in the words of the *Dirks* Court, "participants after the fact" in the insider's self-dealing. *Cf. United States* v. *Snype*, 441 F.3d 119, 142 (2d Cir. 2006) (criminal liability as an accessory after the fact requires "the defendant's knowledge of the crime's commission").

In the years since *Dirks*, the SEC has acknowledged that *Dirks* "rejected the idea that a person is prohibited from trading whenever he knowingly receives material nonpublic information from an insider." Selective Disclosure and Insider Trading, Exchange Act Release No. 34-42259, 71 SEC Docket 732, 1999 WL 1217849, at *5 (Dec. 20, 1999). The SEC has further recognized that liability under Rule 10b-5 does not depend on whether inside information relates to anticipated corporate earnings, or whether the information is so precise and specific that it provides an unfair advantage to a tippee who trades on it. When it adopted Regulation FD, which makes it unlawful for issuers and certain issuer

personnel to make selective disclosures to investment professionals, the SEC noted that selective disclosures by insiders are common, and often "involve advance notice of the issuer's upcoming quarterly earnings or sales—figures which, when announced, have a predictable significant impact on the market price of the issuer's securities." Selective Disclosure and Insider Trading, Release Nos. 33-7787, 34-42259, IC-24209, 64 Fed. Reg. 72590-01, at 72,592-93 (Dec. 28, 1999). This, of course, is precisely the kind of information that underlay the criminal charges against Chiasson in this case. But the SEC enacted Regulation FD because the insider trading laws do not generally prohibit the disclosure of such information, or a tippee's trading on that information.

The adoption of Regulation FD is telling evidence that conduct such as Chiasson's does not violate Rule 10b-5. Recognizing that corporate insiders commonly "leak" material nonpublic information to analysts and investors, who thereby gain an unequal trading advantage, the SEC adopted Regulation FD to restrict issuers from making selective disclosure of confidential business information. But the Commission expressly elected not to "treat selective disclosure as a type of fraudulent conduct or revisit the insider trading issues addressed in Dirks." *Id.* at 72,594; *see* 17 C.F.R. § 243.102 ("No failure to make a public disclosure required solely by § 243.100 shall be deemed to be a violation of

Rule 10b-5 . . . ."). [11] Thus, Regulation FD did not purport to expand insider trading liability, or to impose trading restrictions on recipients of selective disclosures of material nonpublic information. In the post-Regulation FD environment, selective disclosures might be "improper," in which case insiders making these disclosures are violating legal duties as well as fiduciary duties of confidentiality. Yet analysts and investors can legally trade on selectively disclosed earnings and other issuer information. This trading becomes fraudulent only when the insider discloses information for personal gain and the tippee knows that to be so.

Tippee knowledge is critical, not just because *Dirks* said so but also because a contrary rule would make no sense, and would make a remote tippee's liability for securities fraud depend on facts entirely outside of his knowledge or control. An investor who receives material nonpublic information that comes from an issuer ordinarily can trade legally on that information. But if it turns out—entirely unbeknownst to him—that the disclosure was motivated by an insider's expectation of personal benefit, then he could be imprisoned for trading. Such a rule of law would be inconsistent with the "willfulness" standard of the Securities Exchange Act and with fundamental *mens rea* principles, *see infra* at 32-34, and

[10] *See also* Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590-01, at 72,598 (Regulation FD was "not intended to create duties under Section 10(b) of the Exchange Act or any other provision of the federal securities laws.").

would leave market participants with no ability to predict whether their trading would later be deemed illegal.

As the Supreme Court stated in *Dirks*, it is essential that there be "a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside trading rules." 463 U.S. at 664. *Dirks*, read correctly, provides just such a dividing principle: Those who disclose confidential issuer information cross the line into securities fraud if they disclose for personal benefit, and those who trade on material nonpublic information from insiders likewise commit fraud if they know that the tipper has violated a duty of confidentiality in order to obtain a personal benefit.

The government's position, by contrast, would impose liability on remote tippees whenever a tipper exchanged information for personal gain, whether or not the tippee knew this, provided that the tippee was aware that the tipper's disclosure violated some duty of confidentiality. As discussed, this is a misreading of *Dirks*. A mere breach of a duty of confidentiality is not enough to make a tipper liable for securities fraud, even if he knows that the recipient of the information will trade on it. If such a breach does not make the tipper guilty of fraud, then knowing of such a breach, without more, does not make the tippee guilty. Just as the tipper has to be engaging in self-dealing to commit fraud, the tippee has to know this to participate in the fraud. Further, as noted above, many selective disclosures of

material nonpublic information are "improper" in that they violate duties of confidentiality or Regulation FD, so the government's approach would provide no sensible dividing line or "guiding principle" to shape the conduct of market participants.

The trial record in this case illustrates this point. Senior officials and investor relations personnel at companies whose stock the defendants traded regularly "leaked" material nonpublic information to certain analysts and investors. Under Regulation FD, and issuer policies designed to ensure compliance with Regulation FD, these disclosures may have been "improper," because issuers are not supposed to disclose material nonpublic information unless it is broadly disseminated to the marketplace. Indeed, the government offered evidence in this case that Regulation FD generally requires insiders not to disclose confidential information. (A-1403-06; A-1408; A-2134; A-2150; A-2163).

Since selective disclosures are generally "improper," a rule of law that prohibits recipients from trading whenever they know that an insider has disclosed "improperly" sweeps far more broadly than current insider trading law requires. In practical terms, such a rule would be roughly equivalent to telling tippees that they must not trade on any material nonpublic information known to have been disclosed by an insider. But Rule 10b-5 plainly does not sweep this broadly, and the Supreme Court has thrice rejected the notion that tippees commit securities

fraud whenever they trade on material nonpublic information coming from an insider. *O'Hagan*, 521 U.S. at 661; *Dirks*, 463 U.S. at 654, 658-59; *Chiarella*, 445 U.S. at 233. Such trading may not be socially desirable, and it may erode "market integrity." But it is not against the law. It becomes illegal for tippees only when they learn that the insider has not simply breached a duty of confidentiality, but has traded information for personal gain.

2. Tippee Knowledge of the Insider's Self-Dealing Motive Is Also Required by the "Willfulness" Standard and Fundamental *Mens Rea* Principles

The *Dirks* rule requiring a tippee to know of the tipper's exchange of information for personal benefit is consistent with the particular requirements of the federal securities laws in criminal cases and with general principles of criminal law. Under the Securities Exchange Act, there is no criminal liability for insider trading unless the defendant acts "willfully." 15 U.S.C. § 78ff(a); *see O'Hagan,* 521 U.S. at 665 (Congress intended willfulness standard to provide a "sturdy safeguard[]" in insider trading cases). "Willfulness" requires "'a realization on the defendant's part that he was doing a wrongful act' under the securities laws." *United States* v. *Cassese,* 428 F.3d 92, 98 (2d Cir. 2005) (quoting *United States* v. *Peltz*, 433 F.2d 48, 55 (2d Cir. 1970)); *see also Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 57 n.9 (2007) ("[W]e have consistently held that a defendant cannot harbor such ["willful"] criminal intent unless he 'acted with knowledge that his conduct

was unlawful." (quoting *Bryan* v. *United States*, 524 U.S. 184, 193 (1998))). Thus, in insider trading cases, as this Court has recognized, there should be a particularly high *mens rea* standard: "Unlike securities fraud, insider trading does not necessarily involve deception, and it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful." *United States* v. *Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010).

A defendant does not act "willfully" if he is unaware of a fact that transforms otherwise lawful conduct into an illegal act. *E.g.*, *Safeco*, 551 U.S. at 57 n.9 ("[W]illful' or 'willfully' . . . in a criminal statute . . . limit[s] liability to knowing violations."). Even where criminal statutes do not explicitly require knowledge of unlawfulness, the Supreme Court requires proof that the defendant knew all the facts that "separate[e] legal innocence from wrongful conduct." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (requiring proof of defendants' awareness that performers in pornographic film were underage); *Staples* v. *United States*, 511 U.S. 600, 615 (1994) (requiring proof of knowledge that a semi-automatic had been converted into an illegal machine gun). Here, under *Dirks*, only the insider's intention to reap a personal gain transforms a "leak" of inside information into a fraudulent fiduciary breach that gives rise to a tippee's duty to refrain from trading. Even if the insider's disclosure violates a duty of confidentiality, or Regulation FD, such a violation is not fraudulent in and of itself,

and a tippee who knows of that violation is therefore not on notice that he may not trade. Put otherwise, a tippee who does not know the critical fact that bars his trading—the insider's self-dealing—does not act "willfully" under the Securities Exchange Act or generally as a matter of criminal law. *See, e.g., Whitman,* 904 F. Supp. 2d at 372.

3. The District Court's Reliance on *SEC* v. *Obus* Was Misplaced

At trial, both defendants argued that the government had to prove that the Dell and NVIDIA insiders exchanged material nonpublic information for personal gain, and that the defendants had to know this fact to be found guilty. The defense argued this position in support of their Rule 29 acquittal motions and in connection with the court's jury instructions. Judge Sullivan rejected the argument based on this Court's decision in *SEC* v. *Obus*, 693 F.3d 276 (2d Cir. 2012), which he read to hold that a tippee's knowledge of the tipper's exchange of information for personal benefit is not required to convict. (A-1723; A-1725-26; *see also* A-2804-05).

This was error, which resulted from an overly formalistic misreading of *Obus*. The judge incorrectly read *Obus* to require that the tipper breach a duty "by tipping confidential information," and that the tipper receive a personal benefit, but *not* that the tippee know of that personal benefit. Although the *Obus* opinion lists a tipper's "breach of a fiduciary duty of confidentiality owed to shareholders" and a

tipper's receipt of "personal benefit" as separate elements of tipper scienter, 693 F.3d at 286, this does not mean that the concepts are separable, either for tippers or tippees. *Dirks* made a tipper's "personal benefit" part and parcel of the fiduciary breach, not simply a separate, add-on concept: the opinion states unequivocally that, "[a]bsent some personal gain, there has been no breach of duty to stockholders." 463 U.S. at 662. The exchange of information for personal benefit is not separate from an insider's fiduciary breach; it *is* the fiduciary breach that triggers liability for securities fraud under Rule 10b-5. A breach of a duty of confidentiality is not fraudulent unless the tipper acts for personal gain, and that is how *Dirks* has been understood for the past 30 years. *See, e.g.*, *Rothberg* v. *Rosenbloom*, 771 F.2d 818, 826 (3d Cir. 1985) ("The test as to whether a disclosure by an insider amounts to a breach of fiduciary duty focuses on 'objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure.'" (quoting *Dirks*, 463 U.S. at 663)); *SEC* v. *Maxwell*, 341 F. Supp. 2d 941, 950 (S.D. Ohio 2004) (granting summary judgment because the tipper "did not derive a personal benefit from the disclosure of material, nonpublic information to [his barber] and, hence, did not breach a duty that he owed to Worthington shareholders"); *SEC* v. *Downe*, 92 Civ. 4092 (PKL), 1993 WL 22126, at *2 (S.D.N.Y. Jan. 26, 1993) ("A corporate insider breaches his fiduciary duty if he improperly discloses material, nonpublic information for

personal benefit." (citing *Dirks*, 463 U.S. at 662)); *Bianco* v. *Texas Instruments, Inc.*, 627 F. Supp. 154, 159 (N.D. Ill. 1985) (summarizing *Dirks*: "[A] tippee does not violate Rule 10b-5 unless the insider's 'tip' was a breach of fiduciary duty, generally determined by the personal benefit the insider derives from the tip.").

Dirks is controlling precedent; obviously, the *Obus* panel could not and did not intend to redefine what constitutes fraudulent insider trading as defined by the United States Supreme Court. On the contrary, *Obus* cites *Dirks* approvingly, particularly with respect to the requirement that "a tippee must have some level of knowledge that by trading on the information the tippee is a participant in the tipper's breach of fiduciary duty." 693 F.3d at 287. *Obus* actually expands on *Dirks* by requiring a tipper to act for his own benefit even in cases based on the "misappropriation theory" of insider trading.[12]

To be sure, *Obus* does not state explicitly that a tippee must know that a tipper is disclosing information for personal gain. It refers only to the requirement that a tippee "knew or had reason to know that the tippee improperly obtained the information (i.e., that the information was obtained through the tipper's breach)." 693 F.3d at 289. At another point, the opinion states that tippee liability turns on whether "a tippee knew or had reason to know that confidential information was

[12] *See supra* at 22-23. *Obus* was a misappropriation case, and the opinion states that it addresses "the scienter requirements for both tippers and tippees *under the misappropriation theory*." 693 F.3d at 286 (emphasis added).

initially obtained and transmitted improperly (and thus through deception)." *Id.* at 288. But, as discussed, and as numerous courts have held, the existence of a fiduciary breach by the tipper, and the essence of what is "improper" tipper conduct for insider trading purposes, is exchanging information for personal gain. Thus, for the tippee, knowing that information was "transmitted improperly" means knowing that the tipper exchanged the information for personal gain. Knowledge of the tipper's personal gain therefore is not, as Judge Sullivan said, the "addition of a totally new element" to tippee liability (A-2805). The requirement may have been "new" when *Dirks* was decided in 1983, but it has been part of the law for the last three decades.

In any event, *Obus* did not squarely address whether it is necessary for the tippee to know of the tipper's expectation of personal gain because the case did not turn on it. The question was whether the SEC's civil case against an alleged tipper and two tippees could withstand summary judgment under the misappropriation theory of insider trading. The SEC contended that Strickland, the tipper, told his friend Black about a forthcoming corporate acquisition involving a client of the tipper's employer. Black in turn relayed the information to his boss, Obus, who traded on the information. 693 F.3d at 279-80. The district court had granted summary judgment against the SEC, based on an internal investigation concluding that Strickland breached no fiduciary duty by providing information to Black, but

had simply "made a mistake." *Id.* at 283, 291. The *Obus* panel decided that the internal investigation was not conclusive, and that the facts would permit a jury to conclude that Strickland had breached a duty by tipping Black. *Id.* at 291.

With respect to whether Strickland's breach involved "personal benefit," the *Obus* panel noted that the district court had not reached this issue, but pointed to a statement in *Dirks* that "personal benefit" can "include making a gift of information to a friend." 693 F.3d at 291. Strickland and Black were college friends, permitting a jury to conclude that Strickland did receive a "benefit" from tipping Black. The opinion did not consider whether Black and Obus had been aware that Strickland's fiduciary breach involved personal benefit to him. Neither defendant appears to have argued this point; rather, they argued that there had been no "tip" and that they were unaware that Strickland had acted inappropriately. *See generally* Br. for Defs.-Appellees, *SEC* v. *Obus*, 10-4749 (2d Cir. June 28, 2011). It would have been futile to have argued specifically that they did not know Strickland had "tipped" for personal gain. There was evidence that both defendants were aware that Strickland and Black were close friends, and Obus even offered to find Strickland a job if he were fired on account of tipping Black, *see* 693 F.3d at 281. A jury that found Strickland to have committed a fiduciary breach, because he was intentionally providing his friend with confidential information upon which to trade, could have found that the breach involved

"personal benefit" under *Dirks'* expansive construction of that term, and that this was known to the tippees.

Obus did not change the law as to tippee scienter, and in particular did not dispense with the requirement that a tippee know that the tipper exchanged information for some personal benefit. *Whitman*, which was decided after *Obus* and discusses it, demonstrates this. There the court held that a tippee must have some knowledge of the tipper's self-dealing. 904 F. Supp. 2d at 371. This holding was based squarely on *Dirks* and its progeny. However, Judge Sullivan rejected *Whitman* as unpersuasive and refused to charge the jury that Chiasson needed to know about the tipper's exchange of information for personal gain. Judge Sullivan rejected *Whitman* because it supposedly "disregard[ed]" *Obus* (A-2806)—an odd criticism, as the *Whitman* opinion discusses *Obus,* and Judge Sullivan himself disregarded *Dirks*, which is the controlling case.[13] Judge Rakoff (who wrote *Whitman*) certainly did not regard his analysis as inconsistent with *Obus*, and he

[13] *Whitman* also distinguished a line of cases—*United States* v. *Falcone*, 257 F.3d 226 (2d Cir. 2001); *United States* v. *Mylett*, 97 F.3d 663 (2d Cir. 1996); *United States* v. *Libera*, 989 F.2d 596 (2d Cir. 1993)—that the government relied upon when it opposed bail pending appeal in this Court. Those "misappropriation" cases were not brought on a *Dirks* (or "classical") insider trading theory. But before *Obus*, this Court had never held that the tipper's personal gain was an element of insider trading based on misappropriation theory, and therefore had no occasion to address whether a tippee has to know of that personal gain. In "classical theory" cases such as this one, it has been clear since *Dirks* that the tipper must anticipate a personal gain and the tippee must know this in order for liability to attach. This Court need not decide here whether the same requirements exist in "misappropriation" cases.

cited *Obus* approvingly in his decision and in a later opinion. *SEC* v. *Conradt*, 12 Civ. 8676 (JSR), --- F. Supp. 2d ---, 2013 WL 2402989, at *6-7 (S.D.N.Y. June 4, 2013).

4. A More Expansive Reading of *Obus* Would Create Due Process, Fair Notice, and Vagueness Problems

If *Obus* altered the substantive law of insider trading in this Circuit, as the district court's decision would suggest, its application to Chiasson's conduct raises serious due process concerns.

First, the last trades at issue occurred in 2009. At that time, it was settled that there is no breach of fiduciary duty by a corporate insider who discloses material nonpublic information—and thus no derivative liability for tippees—unless the tipper acted for his personal benefit. Likewise, it was the law that the tippee had to know that the tipper acted for personal gain. *See Fluor*, 592 F. Supp. at 594-95; *Santoro*, 647 F. Supp. at 170. If *Obus* dispensed with this knowledge of personal benefit requirement, due process would bar its retroactive application to Chiasson. *See, e.g.*, *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (citations omitted)); *Casillas* v. *Scully*, 769 F.2d 60, 65 (2d Cir. 1985) ("[D]ue process prevent[s] the enlargement of a criminal statute through judicial interpretation from being applied retroactively . . . .").

Second, the district court's reading of *Obus* broadens the boundaries of insider trading liability and implicates constitutional vagueness concerns. It expands Section 10(b)/Rule 10b-5 beyond the "solid core" of plainly encompassed conduct. *See Skilling* v. *United States*, 130 S. Ct. 2896, 2930-31 (2010) (construing honest services mail fraud statute narrowly to avoid due process problem). Under current law, the Supreme Court has stated again and again that merely trading on material nonpublic information known to have come from an insider does not violate Rule 10b-5, and the SEC has acknowledged that Regulation FD does not make selective disclosures fraudulent. *See supra* at 28-29.

But under a broad reading of *Obus*, a tippee need not know that the tipper has exchanged information for personal benefit, and must only know that "confidential information was initially obtained and transmitted improperly." 693 F.3d at 288. The result from the tippee's perspective would be the potential criminalization of virtually all trading on selective disclosures. As explained, the trial record was replete with instances of selective disclosures. A recipient of such information would have no way of knowing—without knowledge of why the insider disclosed—whether he could trade or not. The result would essentially force analysts and investors to abstain from trading or risk potential prosecution, even in many cases where it would be legal to trade on the information. If this were to become the law, it would be a radical change that should be effected by

legislation. *See United States* v. *Bass*, 404 U.S. 336, 347-50 (1971) (due process requires that "legislatures and not courts . . . define criminal activity").

In short, the district court's construction of *Obus* would expand Section 10(b) and Rule 10b-5 to cover conduct that is not fraudulent, despite the plain language of these antifraud provisions and decades of Supreme Court precedent. This would violate the Supreme Court's teaching that due process requires courts to exercise "restraint" in interpreting criminal statutes "where the act underlying the conviction . . . is by itself innocuous." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-04 (2005). As the Supreme Court explained in *Chiarella*, "the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit." 445 U.S. at 234 (internal quotation marks omitted).

B. There Was Insufficient Evidence to Satisfy *Dirks*' Knowledge of Benefit Requirement

This Court reviews the sufficiency of the evidence *de novo,* and Chiasson's conviction cannot stand if "no rational trier of fact could have found [him] guilty beyond a reasonable doubt." *Cassese*, 428 F.3d at 98. If the law requires a tippee to know that the tipper has exchanged material nonpublic information for personal benefit, then Chiasson's conviction falls. The government offered no proof from which a rational juror could conclude that Chiasson knew that the Dell and

NVIDIA tippers were exchanging inside information for personal gain. This Court should therefore direct a judgment of acquittal.[14]

The vast majority of the evidence at trial focused on Dell and NVIDIA. The proof showed that the Dell insider, Ray, provided Goyal with confidential information about Dell's earnings in advance of their public release. The government argued that he did so because Goyal was giving him "career advice." However, as Newman explains in his brief to this Court, the proof of the alleged exchange of information for the benefit of "career advice" was wispy thin. (Newman Br. at 50-51). Ray himself did not testify, and Goyal denied that there had been an explicit *quid pro quo* of tips exchanged for career advice. *See supra* at 9. Goyal testified that he spent more time speaking to Ray about how to advance his career than he might have otherwise because Ray was giving him useful information. (A-951). However, the government never established that Ray was providing the confidential information in exchange for career advice.[15]

---

[14] If the district court erred by failing to require proof of Chiasson's knowledge that the insiders acted for personal benefit, then the conspiracy count falls along with the substantive counts. Conspiracy liability requires proof that "the defendant had the specific intent to violate the substantive statute[s]." *United States* v. *Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (internal quotation marks omitted). Therefore, the knowledge requirement is relevant "to a conspiracy charge to the same extent as it may be for conviction of the substantive offense." *United States* v. *Torres*, 604 F.3d 58, 65 (2d Cir. 2010) (internal quotation marks omitted).

[15] Prior to trial, the government provided defense counsel with letters indicating that Ray denied having ever disclosed material nonpublic information or intentionally breaching any duty to Dell. During an attorney proffer to the prosecutors, Ray's lawyer suggested that Ray, who was a "relatively junior IR

In any case, there was not a scintilla of evidence that Chiasson knew about the alleged corrupt exchange of confidential information for career advice. Indeed, the trial record established affirmatively that Chiasson could not have known about the alleged exchange because all of Chiasson's knowledge about the Dell insider came from Adondakis, who testified he knew nothing about any benefit to Ray. (A-1190-91). Adondakis knew only that Goyal's source was a Dell insider. (A-1001; A-1190-92; A-1200; A-1299). Since Adondakis did not know about any benefit conferred upon Ray, Chiasson could not and did not know about the career advice Ray supposedly received.

There was also no proof that Chiasson knew of any purported benefit to the NVIDIA insider. The government proved that the insider, Choi, provided confidential information to his friend Lim. The prosecutors argued that the Choi/Lim friendship established that Choi received a "benefit" from tipping Lim. (A-1895). Chiasson, however, did not know Choi or Lim, and knew nothing about their relationship. As with Dell, Chiasson's knowledge came from Adondakis, and there was no evidence that Adondakis knew anything about Choi, or why he shared information with Lim. Adondakis told Chiasson only that the information came

---

professional," had perhaps been "outmaneuver[ed]" by Sandy Goyal into providing Goyal with information, ostensibly to allow Goyal to check the accuracy of his Dell financial model. (A-146). Ray, through counsel, acknowledged that he had received some career advice from Goyal, but maintained that "these conversations were not connected to and did not influence the manner in which he performed his duties at Dell." (A-147).

from an NVIDIA "contact," without even stating that the "contact" worked at NVIDIA. (A-1044). Chiasson, therefore, did not know who the tipper was, or why the tipper disclosed information. He never learned that the tipper was exchanging information for the supposed benefit of enriching a personal friend.

Because the prosecution failed to prove Chiasson's knowledge, and because the law requires a tippee to know that the insider has engaged in self-dealing, Chiasson was entitled to an acquittal as a matter of law. It may be, as Judge Rakoff has opined, that "there is no reason to require that the tippee know the details of the benefit provided; it is sufficient if he understands that some benefit, however modest, is being provided in return for the information," *Whitman*, 904 F. Supp. 2d at 371. But here there was no evidence to suggest that Chiasson knew *anything* about personal benefit to the tippees. He was not only ignorant about the specific benefits that the insiders supposedly received; he was ignorant that they received any benefits at all in exchange for information.

In the trial court, the government never argued that Chiasson knew that the insiders were trading information for personal gain; Judge Sullivan ruled that such knowledge was not required, and so the government was relieved of its burden of proof on this issue. However, when it unsuccessfully opposed bail for Chiasson in this Court, and had to confront the prospect of an adverse ruling on the law, the government debuted a new theory with respect to knowledge of personal benefit:

The prosecutors claimed that, as a sophisticated investor, Chiasson "knew that corporate insiders are not authorized to disclose earnings information before it is publicly announced." Because the insiders could not have been making appropriate disclosures, the government claimed, they "must have done so for a personal benefit." (Appellee Opp'n to Appellants' Bail Motions ("Bail Opp'n"), at ¶ 46). The government's view, apparently, is that corporate insiders either disclose confidential information through appropriate channels or the disclosures are "improper," not made for a "legitimate purpose," and therefore are made for personal gain, as the defendants supposedly had to know.[16]

This new argument holds no water. It was never presented to the jury, so the jury's verdict provides the government with no comfort on this score.[17] In any case, the argument flies in the face of market reality. Insiders routinely provide nonpublic information to market participants for myriad reasons—to curry favor with large shareholders, to entice significant investors, to "condition" the market in

[16] The government attempted to bolster its argument by seeking to draw inferences of Chiasson's guilty mind from evidence that he did not divulge his sources to competitors and supposedly instructed Adondakis to create "bogus" and "sham" internal Level Global reports. (Bail Opp'n, at ¶¶ 20, 24). There is nothing nefarious about protecting sources from a competitor hedge fund, and the government mischaracterized the evidence regarding the internal reports. Chiasson told Adondakis to keep the internal reports "high level"—not to misrepresent the facts. (*See* A-2115).

[17] In this circumstance, there is no basis for drawing inferences in the government's favor, or viewing the facts in the light most favorable to the government. *Cf. Chiarella*, 445 U.S. at 236-37.

advance of unexpected earnings results, to bolster their credibility with certain analysts, to provide "comfort" about investment theses, and other reasons. *See, e.g.*, Stephen J. Choi, *Selective Disclosures in the Public Capital Markets*, 35 U.C. Davis L. Rev. 533, 543-48 (2002). These disclosures may be "improper" in that they violate corporate policy or Regulation FD, but they happen all the time and are not motivated by "personal gain."

Indeed, when the SEC proposed Regulation FD in 2000, it acted out of concern that selective disclosures of confidential information were commonplace, but very few of those disclosures were motivated by personal gain, and therefore they could *not* be predicates for insider trading actions under *Dirks*. Selective Disclosure and Insider Trading, 64 Fed. Reg. 72590-01, at 72,593. The SEC emphasized that selective disclosures "commonly" related to "upcoming quarterly earnings or sales figures"—precisely the kind of material nonpublic information involved in this case. The new rule was needed not because these disclosures were made for personal benefit, but because so many of them were *not* made for personal benefit. Regulation FD made many selective disclosures "improper," but that obviously did not mean that, as a matter of fact, they involved an exchange of information for personal gain.

Significantly, the trial record was chock full of disclosures, some or all of which were "improper" under company policy, Regulation FD, or both, that did

not involve an alleged exchange of information for personal benefit. *See supra* at 15-16. Chiasson, as a sophisticated investor who was aware of the many reasons company insiders "leak" material nonpublic information to select market participants, had no basis for knowing that the financial information coming from some insiders was tainted by self-dealing. The notion that Chiasson "must have known" or "had to know" that the information coming from Ray at Dell and Choi at NVIDIA had been exchanged for personal gain rests on surmise and speculation, not fact. *See United States* v. *D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise alone cannot stand."). Chiasson knew nothing about the tippers or why they provided information. He could not infer an exchange for personal gain simply because he received material nonpublic information from insiders. The SEC has acknowledged, and the trial record confirmed, that such "leaks" typically do not involve an exchange for personal gain. To prove Chiasson's knowledge, the government had to do more than simply establish his receipt of inside information. As the Supreme Court counseled in *Dirks*, "'[i]t is important in this type of case to focus on policing insiders and what they do . . . rather than on policing information *per se* and its possession.'" 463 U.S. at 662-63 (quoting *In re Investors Mgmt. Co.,* Exchange Act Release No. 9267, 1971 WL 120502, at *10 (July 29, 1971) (Smith, Comm'r, concurring in the result)).

* * *

Any fair reading of the trial record reflects that Chiasson did not know that the alleged "tippers" at Dell and NVIDIA were trading information for personal gain. If the law requires the government to prove such knowledge, then the evidence was insufficient and Chiasson's conviction cannot stand. The appropriate remedy is to reverse the judgment and remand the case with instructions to dismiss the indictment. *See, e.g.*, *United States* v. *Atehortva*, 17 F.3d 546, 552 (2d Cir. 1994).

C. At a Minimum, Chiasson Is Entitled to a New Trial With a Properly Instructed Jury

If the Court agrees with Chiasson's legal argument, he is entitled to a new trial even if there had been sufficient evidence because the court refused to instruct the jury that it had to find that Chiasson knew the tippers provided inside information for personal benefit. Jury instructions are subject to *de novo* review, and the Court of Appeals must find "'error if [it] conclude[s] that a charge either fails to adequately inform the jury of the law, or misleads the jury as to a correct legal standard.'" *United States* v. *Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (citation omitted). "An erroneous instruction, unless harmless, requires a new trial." *United States* v. *Hassan,* 578 F.3d 108, 129 (2d Cir. 2008) (internal quotation marks omitted). An error is harmless only if the government demonstrates that it is "clear beyond a reasonable doubt that a rational jury would

have found the defendant guilty absent the error." *Neder* v. *United States,* 527 U.S. 1, 18 (1999). For purposes of harmless error analysis, unlike sufficiency review, inferences are *not* drawn in favor of the government. *See United States* v. *Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008). Because the charge was legally flawed, and the error plainly was not harmless, Chiasson was denied a fair trial.

First, as explained, the defense requested an instruction requiring the jury to find that the defendants knew that the Dell and NVIDIA insiders disclosed the information for a personal benefit, but the district court refused to give it. *Supra* at 34. Instead, the court charged the jury that the government had to prove: (1) that the insiders had a "fiduciary or other relationship of trust and confidence" with their corporations; (2) that they "breached that duty of trust and confidence by disclosing material, nonpublic information"; (3) that they "personally benefited in some way" from the disclosure; (4) "that the defendant you are considering knew the information he obtained had been disclosed in breach of a duty"; and (5) that the defendant used the information to purchase a security. (A-1902; *see also* A-1903). Under these instructions, a defendant could be convicted merely if he knew that an insider had divulged information that was required to be kept confidential. Although the jury had to find that the tippers acted for personal gain, the defendants could be guilty under the court's instructions even if they did not know that fact. Further, the charge told the jury that the tipper could violate his fiduciary

duty simply by disclosing material nonpublic information; the personal benefit requirement was stated as a separate requirement as to the tippers (who of course were not on trial and who had not testified), but Chiasson as a tippee needed to know only that an insider had disclosed material that should have been kept confidential. For the reasons explained above, these instructions were legally erroneous, because they permitted the jury to convict Chiasson even if he lacked the knowledge required to be guilty of criminal insider trading. *Supra* at 21-49.

Second, the error was not remotely harmless because the evidence on whether Chiasson knew that the insiders acted for personal gain was not overwhelming. It was not even "underwhelming." It was nonexistent. *See supra* at 42-49. Had the court properly instructed the jury, Chiasson's closing argument would have focused on his lack of knowledge of the tippers' personal gain, and the jury could well (and should well) have acquitted him.

It is no answer to argue, as the government did in opposing Chiasson's bail pending appeal, that Chiasson was "sophisticated" and therefore knew that the tippers had provided information "for an improper purpose." (*See, e.g.*, Bail Opp'n ¶¶ 15-18, 20-21, 45 (contending Chiasson knew corporate insiders provided information "for an improper purpose," "without authorization" or without "legitimate" corporate purpose); *see also id.* ¶ 46 (claiming Chiasson "had every reason to know" when disclosures are unauthorized and therefore knew that

insiders "must have" disclosed the information "for a personal benefit")). On the contrary, a sophisticated investor like Chiasson would know that companies may have many reasons for leaking financial information to the "street." He would know that sometimes companies release information to temper expectations, so that there is no shock to the marketplace when final results are made public. The truly sophisticated investor also would know that companies like Dell target large institutional investors like Neuberger Berman. Thus, people along the tipping chain could have believed that Dell authorized the release of the information Goyal obtained. Finally, the sophisticated investor might have extensive experience with both Dell and NVIDIA, and know that they were companies that often made selective disclosures notwithstanding Regulation FD.

Indeed, given the abundance of evidence showing that Dell and NVIDIA routinely "leaked" confidential business information, a sophisticated investor would have assumed that the disclosures at issue were made for some purpose other than self-dealing.

In any case, Chiasson had the right to have these arguments considered by a properly instructed jury. The trial court's jury instructions deprived him of that right, and that error could not have been harmless. *See Neder*, 527 U.S. at 19 ("[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[the court] should not find the error

harmless.").

II. CHIASSON'S SENTENCE WAS PROCEDURALLY IMPROPER AND SUBSTANTIVELY UNREASONABLE

The district court imposed a 78-month prison sentence—what appears to be the longest sentence ever given to a remote tippee like Chiasson, and the *sixth* longest insider trading sentence in the Southern and Eastern Districts of New York over the last twenty years.[18] That sentence is far out of proportion to Chiasson's conduct, and the product of a clearly erroneous gain finding, a myopic focus on gain, and a blind eye to unwarranted sentencing disparity. This Court should vacate this unreasonable sentence.

A. The Sentencing Proceedings

The insider-trading guideline, United States Sentencing Guidelines Manual § 2B1.4, provides a base offense level of 8 for insider trading and an enhancement depending on "the gain resulting from the offense." This gain is not the pecuniary gain to the defendant, but the increase in the value of the securities realized through the defendant's trading. *See* U.S.S.G. § 2B1.4 cmt. background. Chiasson

[18] Counsel, through court records, government press releases, and published reports, identified 149 defendants sentenced for insider trading in the Southern and Eastern Districts from 1993 to the present. *See generally Inside Trades Draw Lengthier Sentences*, Wall St. J., (Oct. 13, 2011), http://online.wsj.com/article /SB10001424052970203914304576629053026510350.html (collecting sentencing data on sentences between 1993 and Oct. 13, 2011). Of those, only Sam Waksal, Amr Elgindy, Hafiz Naseem, Zvi Goffer, and Raj Rajaratnam received sentences longer than 78 months.

traded for the funds he managed, so he did not pocket the total increase in value. His personal gain from the trades at Level Global, which was a share of professional fees, was at most $335,469. (A-2773). The gain to the funds, which included losses avoided in addition to profits, was in the millions.

The key Guidelines dispute at sentencing was whether Chiasson's gain should be calculated from "all the trades done at Level Global, including the ones that were directed or in the fund that was controlled by [Level Global co-founder David] Ganek." (A-2882). Judge Sullivan had concluded at trial that Ganek was a co-conspirator, rejecting Chiasson's argument that the evidence did not show that Ganek knew that Adondakis's information came from insiders who breached duties of confidentiality. However, at sentencing the court did not treat that finding as a sufficient basis for saddling Chiasson with Ganek's trades. Rather, referencing a prior insider trading conspiracy case, the judge explained that aggregation of co-conspirator trades is reserved for defendants who are responsible for their co-conspirators' criminal actions:

> . . . Mr. Zvi Goffer was charged with the gains that were derived from all the people that he *tipped or coordinated.* And so, I mean, I guess *that's the question.* Why do you believe that Mr. Chiasson is more like Emanuel Goffer[19] than he is like Zvi Goffer?

[19] Emanuel Goffer was a co-conspirator and tippee of Zvi Goffer. Judge Sullivan considered only trades that Emanuel Goffer made personally when calculating his Guidelines range. He did the same for other Zvi Goffer tippees. (A-2881). But

(A-2881) (emphasis added).

The government argued in its sentencing memorandum that Chiasson was "analogous to Zvi Goffer" in that he "*arguably tipped* Ganek" and that Chiasson and Ganek "were jointly responsible for the trades at issue." (A-2797) (emphasis added); *see also* A-2883 (arguing that Chiasson either was the "tipper" or that he and Ganek "were simply making the decisions together"). That approach resulted in a gain of $40.3 million. Chiasson argued that there was no evidence that he tipped Ganek or that they "were doing this together." (A-2574-76). Chiasson argued that he should be responsible only for charged trades that he directed, an approach that yielded a gain of $3.7 million, and a corresponding guidelines range of 63 to 87 months. (A-2769).

The district court stated that it was "persuaded that the loss is greater than 20 million" "largely for the reasons stated by the government in their submission." (A-2888). That determination yielded a Guidelines range of 97 to 121 months. (*Id.*).

Chiasson argued that a sentence even remotely near that range would violate the principles of 18 U.S.C. § 3553(a) because it would reflect undue emphasis on trading gain and create unwarranted sentencing disparity. (A-2578-95); *see also*

---

he sentenced Zvi Goffer, the leader of the conspiracy, for trades that others made as well. (*Id.*).

18 U.S.C. § 3553(a)(6). Chiasson cited multiple similarly situated defendants who received sentences of 30 months or less after going to trial:

- Michael Kimmelman, a downstream tippee who did not contribute to the bribes his co-conspirators paid to maintain the flow of inside information. (A-2580-82).

- James Fleishman, a manager at "a totally corrupt" research firm that "was designed" to get company insiders to breach their duties. (A-2582-83).

- Rajat Gupta, a Goldman Sachs director who "stab[bed] Goldman Sachs in the back" by stealing the company's information and passing it to Raj Rajaratnam. (A-2583-85).

- Douglas Whitman, a hedge fund manager who sought out and procured inside information and committed perjury at trial. (A-2586-87).

Chiasson argued that these examples set the benchmark for his sentence because he was not more culpable than any of these defendants.

The 54-month sentence the court imposed on Newman underscored this point. Chiasson and Newman were similarly situated in many respects, beyond being charged in the same conspiracy. Both were hedge fund managers with young families, demonstrated commitments to their community, and no criminal history. However, Judge Sullivan found that Newman had authorized $175,000 in sham payments to Goyal's wife over a two-year period. (A-2746-47). Chiasson

knew nothing about these payments.[20] This distinction, Chiasson argued, warranted a sentence significantly below 54 months.

The district court did not disagree with Chiasson's assessment of his relative culpability, and even acknowledged that Chiasson was less culpable:

> I do agree that you are less involved, less culpable than some of the other defendants I have sentenced over the years. [Zvi] Goffer was a leader and an organizer. He was a corrupter. He was a person who ensnared people who might not otherwise have been involved. I don't think your involvement in this crime can be likened to that in any way, shape or form. Unlike Mr. Newman, you weren't paying tens of thousands of dollars to a source using surreptitious means to do it and fraudulent means to do it.

(A-2930).

Notwithstanding this conclusion, the court imposed a 78-month sentence. The court made no effort to reconcile this sentence with the sentences of the similarly situated defendants Chiasson cited, including Newman. Judge Sullivan did not even mention these sentences, even though they indicated precisely the kind of significant sentencing disparity referenced in § 3553(a)(6).

The court based the severity of the sentence almost entirely on "the amounts of money that are involved."[21] (A-2925). According to the court,

[20] As Newman points out in his appellate brief, the purpose of the Ruchi Goyal payments was a disputed issue at trial. Whether or not the court was correct to view the payments as an aggravating factor for Newman, Chiasson engaged in no similar conduct. Therefore, his offense conduct was, if anything, less culpable than Newman's.

> [The offense] was cheating to realize tremendous profits, tens of millions of dollars. That's a lot of money. Most people would go their whole lives without ever seeing anything close to that, even if they aggregate everything they ever made from the day they were born. So the money matters. The size of the bet matters and the size of the gains matter.

(A-2931).

Comparing Newman and Chiasson highlights the court's emphasis on "the size of the gains." The court in effect concluded that the trading gain attributed to Chiasson—which included the trades of *another person*, and which benefited hedge funds, and not Chiasson personally—warranted (1) eliminating any comparative leniency that might otherwise have resulted from Chiasson's less culpable conduct and (2) an additional two years in prison, *i.e.,* a 44% longer sentence.

B. Standard of Review

This Court reviews sentences for procedural and substantive reasonableness. A sentence is procedurally unreasonable if the court "makes a mistake in its Guidelines calculation" or "rests its sentence on a clearly erroneous finding of fact." *United States* v. *Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). A sentence is substantively unreasonable "if affirming it would . . . damage the

---

[21] The court also stated that Chiasson's trades spanned "multiple months and even years" and that Chiasson made "some attempt" to keep information about Adondakis's sources out of Level Global's databases. (A-2927; A-2930).

administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States* v. *Douglas*, 713 F.3d 694, 700 (2d Cir. 2013) (internal quotation marks omitted).

C. The District Court Erred in Calculating the Guidelines and Relied on Clearly Erroneous Facts

For Guidelines purposes, a defendant's gain derives from "trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information." U.S.S.G. § 2B1.4 cmt. background; *see United States* v. *Royer*, 549 F.3d 886, 891, 904 (2d Cir. 2008) (court properly aggregated trades by persons engaged with defendant in "joint endeavor" whom he tipped and instructed to trade). "[L]argely" agreeing with the "reasons stated by the government in their submission," the district court found that Chiasson was responsible for Ganek's trading and therefore more than $20 million in gain. (A-2888). That finding was clearly erroneous.

To begin with, the district court did not state its finding with precision, which makes it ripe for reversal. *See United States* v. *Archer*, 671 F.3d 149, 161 (2d Cir. 2011) ("[A] conclusion that factual findings are not clearly erroneous is more easily reached when the district court makes those findings explicitly and on the record."). Indeed, it is not clear how the district judge could have made such a finding at all. The court opined that aggregation of co-conspirator trades was reserved for persons "like Zvi Goffer" who tip or coordinate others (A-2881), yet

also determined that Chiasson's "involvement in this crime" could not be "likened" to Zvi Goffer's conduct "in any way, shape or form." (A-2930).

In any event, the evidence does not support the "reasons stated by the government in their submission," namely that Chiasson "arguably tipped Ganek" and that the two "were jointly responsible for the trades at issue." The district court mentioned "testimony that [Chiasson and Ganek] were on conference calls together with Mr. Adondakis." (A-2886). But there was only one such conference call, on August 27, 2008, and it was *Adondakis* who presented information on Dell, not *Chiasson*. (A-1026). Moreover, Adondakis testified specifically that he did not reveal his inside sources to Ganek on that call—or at any other point. (A-1331; *see also* A-1100; A-1115). Participation in a single conference call on August 27 is hardly evidence that Chiasson tipped Ganek or that they "jointly" decided to execute any illegal trades, let alone *all* the illegal trades at issue.

The evidence the government cited at the sentencing hearing fares no better. The government pointed to two communications between Ganek and Chiasson, both from August 26, 2008. (*See* A-2884 (citing GX 513 (A-2062); GX 515 (A-2063-68))). But one of those communications does not even mention Adondakis, and the other simply mentions "sam's people"—an ambiguous phrase that could refer to any of the dozens of people that Adondakis spoke to about Dell. This evidence provides no basis to infer that Chiasson tipped Ganek or was "jointly

responsible" with him for dozens of trades over a period of many months, as the government claimed. Absent evidence that Ganek joined a conspiracy with Chiasson, or that Chiasson told Ganek that Adondakis had illicit sources of information, Chiasson should not have been saddled with Ganek's profits.[22]

This clearly erroneous finding resulted in two procedural errors that should lead this Court to vacate Chiasson's sentence.

First, the district court calculated an incorrect Guidelines range. The court's Guidelines calculation required a finding that Chiasson's gain exceeded $20 million. The government offered no basis for finding that Chiasson's gains exceeded $20 million without Ganek's trades—the government could not even say "what the [gain] number would be if you took out Mr. Ganek's trades." (A-2884-85). Because the court's inclusion of Ganek's trades rested on clearly erroneous findings, its Guidelines determination cannot stand. *See, e.g.*, *Archer*, 671 F.3d at

[22] As an alternative theory, the government argued that "assuming *arguendo* that Ganek was not a coconspirator with Chiasson or that Chiasson did not discuss with Ganek the fact that the [sic] Adondakis had sources inside Dell and NVIDIA, Chiasson should still be held accountable for all of the trades under an aiding and abetting theory of liability." (A-2794; *see also* A-2887-88). The district court gave no indication that it accepted this theory (indeed the district's forfeiture order relied on a finding that Ganek and Chiasson were co-conspirators, *see infra* at 71. It also makes no sense. Aiding and abetting liability would require that Chiasson "knew of the proposed crime," that Chiasson either "acted, or failed to act in a way that the law required him to act, with the specific purpose of bringing about the underlying crime," and that "the underlying crime was committed by" Ganek. *United States* v. *Cruz*, 363 F.3d 187, 198 (2d Cir. 2004). If Ganek was not Chiasson's co-conspirator and Chiasson did not discuss Adondakis's sources with Ganek, then Ganek did not commit insider trading, and Chiasson obviously did not know that Ganek was doing so.

168 (vacating below Guidelines sentence where district court's clearly erroneous findings resulted in an incorrect Guidelines calculation).

Second, and apart from the error in calculating the Guidelines, the district court "err[ed] procedurally" because it "rest[ed] its sentence on a clearly erroneous finding of fact." *Cavera*, 550 F.3d at 190. The district court emphasized that "the size of the gains matter" and that the size of the gain was "tens of millions of dollars." (A-2931). The disparity between Chiasson's and Newman's sentences demonstrates that the court based its sentence virtually exclusively on the "tens of millions of dollars" in "gain." The court reached this dispositive figure on the basis of clearly erroneous findings that led it to count Ganek's trades. This was error apart from the judge's inflated Guidelines calculation. *See United States* v. *DeSilva*, 613 F.3d 352, 358 (2d Cir. 2010) (vacating sentence because district court committed procedural error in relying on a clearly erroneous finding).

D. A 78-Month Sentence for a Remote Tippee Is Substantively Unreasonable

Chiasson's 78-month sentence is also substantively unreasonable. That it is below the district court's Guidelines range (even assuming that range was right) does not render it just. "[T]he amount by which a sentence deviates from the applicable Guidelines range is not the measure of how 'reasonable' a sentence is. Reasonableness is determined instead by the district court's individualized application of the statutory sentencing factors." *United States* v. *Dorvee*, 616 F.3d

174, 184 (2d Cir. 2010). This rule is particularly apt here. From October 1, 2009 through March 31, 2013, courts imposed Guidelines sentences in only 12 of 83 insider trading cases, and none above the Guidelines.[23] This broad rejection of the Guidelines proves they do not measure reasonableness in cases like this and highlights the importance of individualized consideration of the § 3553(a) factors. *See United States* v. *Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006), *aff'd*, 301 F. App'x 93 (2d Cir. 2008) ("[W]here, as here, the calculations under the guidelines have so run amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences."). The district court's misapplication of the § 3553(a) factors—its disregard for sentencing disparity and its indefensible focus on gain—resulted in a sentence that is manifestly unreasonable.

---

[23] *See* United States Sentencing Commission, Preliminary Quarterly Data Report, 2nd Quarter Release at 13 tbl. 5 (2013), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_2nd.pdf; United States Sentencing Commission; 2012 Sourcebook of Federal Sentencing Statistics tbl. 28 (2012), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and Sourcebooks/2012/Table28.pdf; United States Sentencing Commission; 2011 Sourcebook of Federal Sentencing Statistics tbl. 28 (2011), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_ Sourcebooks/ 2011/Table28.pdf; United States Sentencing Commission, 2010 Sourcebook of Federal Sentencing Statistics tbl. 28 (2010), *available at* http://www.ussc.gov/Research_and_Statistics/ Annual _Reports_and_ Sourcebooks/2010/Table28.pdf.

Courts have imposed sentences of 70 months or more sparingly in insider trading cases, reserving them for the most egregious offenders. Counsel has identified only 10 such sentences (other than Chiasson's) since *United States* v. *Booker*, 543 U.S. 220 (2005). These cases involve persons who directly participated in a breach of a duty of confidentiality for personal gain, coupled with indisputable aggravating factors. Consider:

- Jeffrey Royer (72 months) was an FBI agent who for years leaked information about federal investigations to Amr Elgindy (135 months), who in turn distributed that information to a network of traders. Royer also lied to federal agents and Elgindy committed extortion. *See United States* v. *Royer*, 549 F.3d 886 (2d Cir. 2008).

- Hafiz Naseem (120 months) was a banker who repeatedly stole information from his co-workers and the bank's clients and relayed it to a co-conspirator abroad. *See United States* v. *Rahim*, 339 F. App'x 19 (2d Cir. 2009).

- Michael Guttenberg (78 months) engaged in two different conspiracies in which he breached his duty to UBS by relaying upcoming upgrades or downgrades of public company securities. He did so for personal gain, receiving hundreds of thousands of dollars in illicit payments. *See United States* v. *Guttenberg*, No. 07 Cr. 141, 2007 WL 4115810, at *1-*2 (S.D.N.Y. Nov. 14, 2007); *see also United States* v. *Guttenberg*, No. 07 CR 141 DAB (S.D.N.Y. Nov. 14, 2008) (judgment in a criminal case).

- Joseph Nacchio (70 months) was a public company CEO who had "unusual access and control over [company] information" whom a jury found guilty of 19 substantive counts and whom the court ordered to forfeit more than $44 million in proceeds from the offense. *See United States* v. *Nacchio*, No. 05 Cr 545, Tr. of Sentencing, Vol. 5, at 35:19-20 (D. Colo. June 24, 2010).

- Joseph Contorinis (72 months) received misappropriated information directly from the tipper and was found to have committed perjury at trial. *See United States* v. *Contorinis*, 692 F.3d 136 (2d Cir. 2012).

- Zvi Goffer (120 months) was the "leader[ ] of a fraudulent enterprise who recruited people and poisoned other traders" and paid for information stolen from a law firm. *United States* v. *Goffer*, --- F.3d ---, No. 11-3591-cr(L), 2013 WL 3285115, at *2, *12 (July 1, 2013) (internal quotation marks omitted).

- Raj Rajaratnam's (132 months) criminal activity spanned a decade, involved 19 public companies, more than 20 corrupt insiders, and interlocking conspiracies. *United States* v. *Rajaratnam*, No. 09 Cr. 1184, Tr. of Sentencing at 20-23 (S.D.N.Y. Oct. 13, 2011).

- Matthew Kluger (144 months) and Garret Bauer (108 months) engaged in a 17-year scheme in which they traded for personal gain based on information Kluger stole from law firms. *See United States* v. *Kluger*, --- F.3d ---, No. 12-2701, 2013 WL 3481505 (3d Cir. July 9, 2013).

Chiasson does not belong on this list. He did not participate directly in a breach of a duty for personal gain. He recruited no one to the conspiracy, and engaged in no aggravating conduct. His crime (if it was a crime) was receiving and trading on inside information. He did not even know that the information came from an insider who acted for personal benefit and thus committed fraud. For the district court to have placed Chiasson in the category of persons listed above "damage[s] the administration of justice because the sentence imposed [is] shockingly high." *Douglas*, 713 F.3d at 700 (internal quotation marks omitted).

Moreover, the court did not even acknowledge, let alone explain, why Chiasson deserved a sentence two-and-a-half times greater than the sentences of similarly situated defendants he cited and two years longer than the sentence Newman received. Coupled with the Court's explicit recognition of Chiasson's

lesser involvement and culpability than Newman and other insider trading defendants, the trial court's silence demonstrates a failure to give adequate weight to unwarranted disparity. *See Dorvee*, 616 F.3d at 184 (district court's "cursory explanation" evinced failure to observe principles of § 3553); *United States* v. *Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) ("[W]e may remand cases where a defendant credibly argues that the disparity in sentences has no stated or apparent explanation.").

No doubt the government will point to the gain attributed to Chiasson to justify his sentence. The question on appeal is whether that gain "can bear the weight assigned it under the totality of circumstances in the case." *Cavera*, 550 F.3d at 191. The answer is no.

First, gain cannot explain the vastly disparate sentence Chiasson received as compared to other defendants convicted at trial and responsible for multimillion-dollar gains. Gupta was responsible for more than $5 million in gain, yet received a 24-month sentence. *See United States* v. *Gupta*, 904 F. Supp. 2d 349, 353, 355 (S.D.N.Y. 2012). Newman was held responsible for $4 million and received a sentence two years shorter than Chiasson's. (*See* A-2699; A-2749). And both of these cases had aggravating factors absent from Chiasson's case: Gupta brazenly breached the trust owed to the company he served; Newman, according to the trial

court, employed surreptitious payments to procure access to inside information. Chiasson did neither.

Second, gain cannot serve as a proxy for meaningful consideration of sentencing disparity because it does not correlate to factors that courts traditionally rely on to distinguish defendants' culpability, such as offense conduct, motive, state of mind, role in the offense, or criminal history. This case is a prime example of how using gain as the sole comparator can lead to disparate results and a less culpable defendant—Chiasson—receiving a sentence many times longer than more morally culpable defendants convicted of the same crime. One who bribes a source for inside information is more culpable than the person who, without knowledge of the bribe, receives inside information. *See Royer*, 549 F.3d at 904 (district court was justified in granting passive recipient of information a more lenient sentence than a co-defendant who corruptly procured information from FBI sources). Yet the briber can easily gain less than the passive, unknowing recipient. Likewise, as between a recipient of information who knew that the tipper was breaking the law and a recipient who did not, surely the latter is less culpable. Resting a sentence on gain masks this difference, too. Gain may be relevant, but it should not be the overarching factor used to distinguish among defendants. *Cf. Cavera*, 550 F.3d at 192 ("[A] district court may find that even after giving weight to the large or small financial impact, there is a wide variety of culpability amongst

defendants and, as a result, impose different sentences based on the factors identified in § 3553(a)."); *United States* v. *Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) (Lynch, J.) (describing the amount of loss as a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence").

This Court's recent decision in *United States* v. *Goffer* illustrates how gain fails to capture meaningful distinctions in culpability between defendants. *Goffer* upheld the 66-month sentence that Judge Sullivan gave to Craig Drimal, an insider trading defendant who pled guilty to one conspiracy count and five substantive counts of securities fraud. *See* 2013 WL 3285115 at *1, *14. Drimal's gain was $11 million, but he was unquestionably more culpable than Chiasson: Drimal knew that he was receiving information from sources who broke the law (he was caught on a wiretap admitting that the lawyers who provided him with information could go to jail). *See id.* at *2. Drimal participated in bribing those sources for information. *See id.* Drimal used prepaid cell phones to avoid detection, *see id.* at *1, and then lied to authorities when questioned, *see United States* v. *Drimal*, No. 10 Cr. 56, Tr. of Sentencing (S.D.N.Y. Aug. 31, 2011) ("*Drimal* Sentencing Tr.") at 53. And Drimal traded on his own account, so gain in his case was *his* gain from *his* trades, not the gain of a fund derived from the trades of others. *See id.* at

32. Yet Chiasson received a longer sentence, because of Judge Sullivan's myopic focus on the gain number.[24]

Third, gain is not a good proxy for the harm the insider-trading prohibition seeks to address, which is the breach of fiduciary duty for personal profit. *See Gupta*, 904 F. Supp. 2d at 352 ("In the eye of the law, Gupta's crime was to breach his fiduciary duty of confidentiality to Goldman Sachs."); *see also United States* v. *Reich*, 661 F. Supp. 371, 373 (S.D.N.Y. 1987) ("[T]he essence of this crime was not the acquisition of dollars (or not in [the defendant's] case) but rather the destruction of trust in the integrity of the financial marketplace and in the specialized lawyers and professionals who are essential to the creation and management of the multimillion—and occasionally billion—dollar transactions. . . . To adjust sentences in crimes of this nature by the amount of profits taken (or available to be taken) would reduce the search for a just result to an accounting."). "Yet the Guidelines assess punishment almost exclusively on the basis of how

[24] The Court in *Goffer* noted the "magnitude of [Drimal's] insider trading" in affirming his sentence. But *Goffer* does not justify the district court's excessive focus on gain in this case. First, the *Goffer* court mentioned the "magnitude" of Drimal's trading in addressing Drimal's argument that his sentence "was substantively unreasonable in light of his community service and his commitment to his family," *id.* at *13, not an argument that gain overstated the seriousness of his offense. Second, in reviewing a sentence for substantive reasonableness, this Court considers whether a particular "factor, as explained by the district court, *can bear the weight assigned it under the totality of circumstances in the case*." *Cavera*, 550 F.3d at 191 (emphasis added). As a result of the aggravating factors described above, the district court had no occasion to give gain dispositive weight when sentencing Drimal. *See Drimal* Sentencing Tr. at 48-53.

much money [is] gained by trading on the information. At best, this is a very rough surrogate for the harm to" the company to which the duty was owed. *Gupta*, 904 F. Supp. 2d at 352. The Guidelines look to financial gain in insider trading cases not because it approximates the harm to victims, but because the "victims and their losses are *difficult if not impossible to identify*." U.S.S.G. § 2B1.4 cmt. background (emphasis added). But gain is not a good substitute for unquantifiable harm to victims. *Cf.* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1476-77 n.235 (2008) ("[T]he Guidelines' 'loss'-penalty tables appear to have been created out of whole cloth, without either statutory or empirical basis. The great weight the Guidelines attached to quantity had been devastatingly criticized, and nowhere explained." (citations omitted)).

Simply put, gain cannot bear the weight the district court placed on it in this case. The district court's undue emphasis on gain—especially in conjunction with its disregard for unwarranted sentencing disparity—led to a substantively unreasonable sentence that this Court should vacate.

III. THE DISTRICT COURT'S FORFEITURE ORDER WAS BASED ON A CLEARLY ERRONEOUS FACTUAL FINDING AND VIOLATED CHIASSON'S DUE PROCESS AND JURY TRIAL RIGHTS

The district court ordered Chiasson to forfeit $1,382,217, the amount of fees that the court determined Chiasson *and Ganek* to have earned from trades in Dell

and NVIDIA during the relevant period.[25] (A-3002-03). Chiasson had argued that he should not forfeit money Ganek received because there had been no jury finding that Ganek was a co-conspirator and because there had been no specific findings by the judge or the jury as to when Ganek joined the conspiracy or which of his trades rested on inside information. Accordingly, Chiasson argued that the forfeiture award should be limited to the fees he earned personally as a result of the charged trades that he executed, which amounted to $70,801. (A-2772). The court rejected that position based on its finding, by a preponderance of evidence, that Ganek was Chiasson's co-conspirator. (A-3003). Because the court clearly erred in making that finding, the forfeiture award cannot stand. But even if this Court determines that the Ganek finding was not clear error, it should still reverse the forfeiture award: under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, the district court's forfeiture order violated Chiasson's due process and jury trial rights because it increased his punishment based on facts not found beyond reasonable doubt and not proved to a jury.[26]

---

[25] Language in the court's forfeiture order suggests that the parties agreed that Chiasson received $1,180,498 in incentive fees. (*See* A-3002-03 ("[T]he parties agree that Defendant received incentive fees only in connection with the Nvidia trade in May 2009 and that those fees total $1,180,498.")). However, that figure represents the parties' agreement on the incentive fees earned by Chiasson *and* Ganek, not Chiasson alone.

[26] Chiasson preserved this issue for appeal but acknowledged below that the district court lacked authority to rule that the intervening Supreme Court decisions on which this argument is based superseded this Court's holding in

A. The Lower Court's Finding That Ganek Was a Co-Conspirator Was Clearly Erroneous

David Ganek was Chiasson's partner at Level Global, and he was never charged with a crime. The district court held Ganek to be a co-conspirator, finding that Ganek traded Dell and NVIDIA stock based on inside information from Adondakis, even though Adondakis testified that he did *not* reveal his inside sources to Ganek (A-1100; A-1115; A-1331). This finding, made over defense objection, lacked an evidentiary basis, and the district court therefore erred when it included proceeds from Ganek's trades in its forfeiture order as to Chiasson.

First, the court stated Ganek must have known that Adondakis obtained information improperly because Ganek supposedly knew that Adondakis got "incremental checks" that "firmed up" his information about Dell and NVIDIA as those companies' reporting dates approached. (A-1603). However, for the reasons addressed *supra* at 21-34, even if Ganek knew that Adondakis got inside information, this did not make Ganek a member of a criminal insider trading conspiracy. There was no evidentiary basis for finding that Ganek knew that Adondakis's sources disclosed information in violation of confidentiality duties, let alone in exchange for personal benefit.

United States v. *Fruchter*, 411 F.3d 377, 382-83 (2d Cir. 2005), that the *Apprendi* rule does not apply to forfeiture determinations. (A-2607; A-2999).

Second, the court relied on the size of Ganek's trades. But the evidence at trial established that Level Global's positions in Dell and NVIDIA were not unusually large given the fund's size. (*See generally* A-1342-43).

Third, the court inferred that there was "a discussion [] about Adondakis' source" during a closed door meeting between Chiasson, Ganek and Brenner, another Level Global employee. (A-1603). None of the attendees at the supposed meeting testified, so any conclusions about the discussion were necessarily based on speculation. Further, the evidence unequivocally showed that this meeting did not occur. Adondakis testified that he prepared a report containing inside information received from Tortora that Chiasson brought to Ganek in the supposed closed door meeting. The report was dated August 11, 2008 (A-2033), and Adondakis testified that he created it on that date. (A-1214). He said that he "physically handed [the report] to Mr. Chiasson and Mr. Brenner and they went into Mr. Ganek's office with it" on what he "believe[d] was the same day." (A-1214). Documentary evidence established that that testimony could not have been accurate, because Ganek was not in the office on Monday, August 11. (A-2488-91). The district court thus clearly erred in finding that Ganek was a co-conspirator based on speculative inferences that contradicted Adondakis's direct testimony and the documentary record. *See Trans-Orient Marine Corp.* v. *Star Trading & Marine, Inc.*, 925 F.2d 566, 571 (2d Cir. 1991) ("If a finding is directly

contrary to the only testimony presented, it is properly considered to be clearly erroneous.").

B. The Forfeiture Order Violates *Apprendi*

The forfeiture order should be vacated in any event for a different reason. Under evolving Supreme Court case law, the forfeiture process employed in this case was unconstitutional, because the operative facts had to be found by a jury beyond a reasonable doubt. Instead, the district judge made his own factual findings using what appears to have been a preponderance of the evidence standard.[27] Chiasson objected to this procedure in his sentencing submissions. (A-2607).

Apprendi was the landmark Supreme Court case requiring certain sentencing facts to be determined beyond a reasonable doubt by a jury. "Under *Apprendi* '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *S. Union Co.* v. *United States*, 132 S. Ct. 2344, 2350 (2012) (quoting *Apprendi*, 530 U.S. at 490). *Southern Union* extended the *Apprendi* rule to monetary penalties, and requires the factfinder to determine, beyond a reasonable doubt, the facts needed to support a maximum monetary fine

[27] The court's short forfeiture order as to Chiasson did not explicitly reference the preponderance standard. However, the district judge cited this Court's decision in *United States* v. *Gaskin,* 364 F.3d 438, 461 (2d Cir. 2004), (A-3003), which states that sentencing facts need be found only by a preponderance of evidence.

calculated based on the period of the violation. In so holding, the Supreme Court rejected the government's argument that *Apprendi* should be limited to facts that affect the length of incarceration. The Court explained:

> Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. . . . And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts. Sometimes, as here, the fact is the duration of a statutory violation; under other statutes it is the amount of the defendant's gain or the victim's loss, or some other factor. In all such cases, requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s animating principle: the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.

132 S. Ct. at 2350-51 (internal citations and quotation marks omitted).

It is well settled that criminal forfeiture is a form of punishment. *See, e.g.*, *Austin* v. *United States*, 509 U.S. 602, 622 (1993). Accordingly, under *Southern Union*, any facts, like the amount of the defendant's gain, that underlie the fixing of a maximum criminal forfeiture judgment must be proven to the jury beyond a reasonable doubt.

The Supreme Court's recent decision in *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013), reinforces *Apprendi*'s application to criminal forfeiture judgments. *Alleyne* overruled prior Supreme Court precedent limiting *Apprendi* to maximum statutory penalties, and held that mandatory minimum sentences are also subject to

Apprendi. *Id.* at 2163. The Court rejected the government's argument that *Apprendi* should apply only to those sentencing schemes that provide for a maximum sentence and not those that provide mandatory minimum sentences. It held that "[i]t is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal is exposed." *Id.* at 2160. Accordingly, a fact triggering a mandatory minimum "aggravates the [defendant's] punishment," and the *Apprendi* rule applies. *Id.* at 2158. In reaching this conclusion, the Court expressly overruled *Harris* v. *United States*, 536 U.S. 545 (2002), which had held otherwise. *Id.* at 2163.

In this case, the government employed a mandatory forfeiture requirement that functions as a mandatory minimum sentence within the meaning of *Alleyne*. The statute at issue, 28 U.S.C. § 2461(c), provides that the district court "shall order" a forfeiture penalty in addition to any sentence of imprisonment. This is not discretionary. It is a statutory mandatory minimum penalty. Accordingly, *Apprendi* applies to the forfeiture judgment at issue here.

To be sure, prior cases have held to the contrary. The Supreme Court held in *Libretti* v. *United States*, 516 U.S. 29, 49 (1995), that defendants do not have a Sixth Amendment right to a jury determination on forfeiture, and this Court held in *Fruchter*, 411 F.3d at 383, that forfeiture is not subject to the *Apprendi* rule. However, the recent decisions in *Southern Union* and *Alleyne*

invalidate these authorities, and indicate that *Apprendi* does indeed apply to criminal forfeiture sentences.

Fruchter held that the *Apprendi* rule does not apply to criminal forfeiture statutes because they do not have a "previously specified range" of punishments and thus lack a statutory maximum. 411 F.3d at 383. The Supreme Court rejected that rationale in *Southern Union*. The statute at issue in *Southern Union* did not specify a range or provide a definite statutory maximum—a fine of no more than $50,000 accrued every day that a violation occurred, no matter how long. The fine was indeterminate without reference to certain facts. The same is true of criminal forfeiture, for which the statute defines the maximum penalty in reference to any property that "constitutes, or is derived from proceeds traceable to [an offense]." 18 U.S.C. § 981(a)(1)(C). There is no meaningful distinction between a statute that sets a maximum fine in reference to specific facts and a statute that sets a maximum forfeiture in reference to specific facts; both prescribe maximum criminal punishments that are subject to *Apprendi*.

Furthermore, *Alleyne* precludes reliance on *Libretti*, which held that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. at 367-68. The Court in *Libretti*, decided pre-*Apprendi*, concluded that "a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed," citing *McMillan*

v. *Pennsylvania*, 477 U.S. 79, 93 (1986), in support of this proposition. 516 U.S. at 49. *McMillan* held that facts that increase a mandatory minimum sentence need not be proven to a jury beyond a reasonable doubt. *Alleyne* overruled that holding. *See* 133 S. Ct. at 2164, 2166 (Sotomayor, J., concurring) ("I join the opinion of the Court, which persuasively explains why *Harris* v. *United States* and *McMillan* v. *Pennsylvania* were wrongly decided. . . . With *Apprendi* now firmly rooted in our jurisprudence, the Court simply gives effect to what five Members of the Court recognized in *Harris*: *McMillan* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both." (internal quotation marks and brackets omitted)). Whatever remains of *Libretti* can no longer exclude forfeiture judgments from *Apprendi*'s reach

Even if this Court were to continue to follow *Libretti*, and to permit forfeiture orders to be fixed by judges rather than jurors, it should still reverse the forfeiture order here. *Libretti* concerned only the right to a jury determination on forfeiture under the Sixth Amendment, not the burden of proof the government must bear in a forfeiture proceeding. It thus does not control as to that issue, which implicates the due process protections of the Fifth Amendment. *See Alleyne*, 133 S. Ct. at 2156 ("The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, *in conjunction with the Due Process Clause*, requires that each element of a crime be proved to the jury

beyond a reasonable doubt." (emphasis added)). *Southern Union* and *Alleyne* make clear that the government must prove beyond a reasonable doubt any fact that increases the maximum forfeiture.[28]

The district court's forfeiture order relied on findings it apparently made on a preponderance standard. The finding that Ganek was Chiasson's co-conspirator alone increased the maximum forfeiture amount by more than $1 million. As discussed, the evidence supporting that finding was insufficient, *see supra* at 72-74, and certainly that finding could not be made "beyond a reasonable doubt." Accordingly, this Court should vacate the forfeiture order as to Chiasson.

[28] This Court in *United States* v. *Bellomo*, a case that predated *Apprendi*, held that a preponderance standard applies to criminal forfeiture proceeding because "[f]act-finding at sentencing is made by a preponderance of the evidence." 176 F.3d 580, 595 (2d Cir. 1999). *Apprendi* and its progeny have invalidated that rationale.

CONCLUSION

The judgment of conviction should be reversed and the case remanded with instructions to enter a judgment of acquittal. In the alternative, the judgment should be vacated and the case remanded for a new trial. If an acquittal or a new trial is not ordered, the sentence and forfeiture order should be vacated, and the case remanded for resentencing.

Dated: New York, New York
August 15, 2013

/s/ Mark F. Pomerantz
Mark F. Pomerantz
Matthew J. Carhart
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Alexandra A.E. Shapiro
Daniel J. O'Neill
Jeremy Licht
SHAPIRO, ARATO & ISSERLES LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Gregory Morvillo
MORVILLO LLP
One World Financial Center
27th Floor
New York, New York 10281
(212) 796-6330

Attorneys for Defendant-Appellant Anthony Chiasson

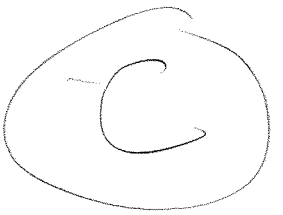
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Defendant-Appellant Anthony Chiasson certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7(C) that the foregoing brief contains 19,793 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2003.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font of Times New Roman.

Dated: August 15, 2013

/s/ Mark F. Pomerantz
Mark F. Pomerantz



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
3 WORLD FINANCIAL CENTER
ROOM 400
NEW YORK, NEW YORK 10281-1022

September 16, 2013

Via Facsimile: 212-805-7901

The Honorable Harold Baer, Jr.
United States District Judge
U.S. District Court for the Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: *SEC v. Adondakis et al.; 12 Civ. 0409 (HB)*

Dear Judge Baer:

The undersigned counsel represents Plaintiff Securities and Exchange Commission in the above-referenced action. We write, with the consent of counsel for defendants Anthony Chiasson and Todd Newman, to update the Court with respect to the status of the Commission's pending claims against Chiasson and Newman.

As you know, Chiasson and Newman each were convicted of conspiracy to commit securities fraud and multiple counts of substantive securities fraud in the parallel criminal case, U.S. v. Newman, S2-cr-121 (RJS), a case that involves the same conduct that is at issue in this civil action.[1] While the Commission had initially planned to move for summary judgment against Chiasson and Newman based on the doctrine of collateral estoppel and the preclusive effect of the guilty verdicts against them in the criminal case, on June 10, 2013, the parties informed the Court by letter that they had reached a partial settlement in principal and would submit proposed judgments on consent for the Court's approval in short order.

Despite good faith efforts on both sides, the parties have been unable to reach a consensual resolution of the matter. Accordingly, plaintiff is hereby moving for partial summary judgment against Chiasson and Newman. Specifically, the Commission is requesting, for the reasons set forth herein, that the Court permanently enjoin defendants Chiasson and Newman from violating Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Exchange Act Rule 10b-5.[2]

---

[1] Both Chiasson and Newman are appealing their convictions in the criminal case. They have filed their opening briefs and anticipate that the government will file its brief in November.

[2] The parties have agreed to defer the issue of whether or not Chiasson and Newman should also be liable for the disgorgement of ill-gotten gains and/or civil monetary penalties under Section 21A of the Exchange Act during the pendency of their appeals of their criminal convictions.

Counsel for each defendant has informed the undersigned that they recognize the collateral estoppel effect of the convictions in the criminal case and, on this basis alone, do not oppose the motion (the defendants, however, maintain their innocence in the criminal matter and do not concede the allegations in the Commission's complaint).

The parties agree that in the event a defendant's criminal conviction is overturned on appeal, collateral estoppel would no longer apply as to that defendant and that the defendant could then move the Court to vacate the partial judgment. The SEC would not oppose such a motion.

The Commission is Entitled to Partial Summary Judgment Against Defendants Newman and Chiasson

Rule 56(a) of the Federal Rules of Civil Procedure provides that a court "shall grant summary judgment 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). Once the moving party makes the required showing, the burden shifts to the nonmoving party who "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To defeat a summary judgment motion, the opposing party must come forward with specific facts showing that there is a genuine issue for trial. *Id.* at 587; *see also* Fed. R. Civ. P. 56(a). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 587.

As set forth below, based on the collateral estoppel effect of the defendant's criminal convictions, there is no genuine dispute with respect to the unlawful insider trading of Chiasson and Newman in Dell and Nvidia as alleged in the Commission's complaint. Accordingly, the Commission is entitled to partial summary judgment.

1. Chiasson and Newman Are Liable for Violations of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Section 17(a) of the Securities Act

The Commission's Complaint in this action asserts claims against Chiasson and Newman under Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Section 17(a) of the Securities Act. In the parallel criminal case, Chiasson and Newman were convicted of multiple violations of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 based on the same insider trading alleged in this action. Accordingly, the doctrine of collateral estoppel precludes them from disputing the facts that formed the basis of their criminal convictions.

Once an issue of law or fact necessary to a judgment has been decided, the doctrine of collateral estoppel precludes "relitigation of [that same issue] in a suit on a different cause of action involving a party to the first case." *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994). Where, as here, a motion for summary judgment is based on a defendant's prior criminal conviction, the facts underlying the conviction may be given preclusive effect. *See SEC v. Freeman*, 290 F. Supp. 2d 401, 404 (S.D.N.Y. 2003); *see also U.S. v. Podell*, 572 F.2d 31, 35 (2d

Cir. 1978) ("It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case.").[3] A defendant is estopped from relitigating issues that were decided as part of a prior criminal conviction, in part because "the Government bears a higher burden of proof in the criminal than in the civil context." *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 43 (2d Cir. 1986), *reh'g denied*, 479 U.S. 1048 (1987).

Chiasson was found guilty of five counts of securities fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. That conviction was based on the following trades executed on behalf of the Level Global hedge funds: (i) the May 12, 2008 purchase of 3,500 Dell call options; (ii) the August 11, 2008 short sale of 100,000 shares of Dell stock; (iii) the August 18, 2008 short sale of 700,000 shares of Dell stock; (iv) the August 20, 2008 purchase of 7,000 Dell put options; and (v) the May 4, 2009 short sale of 1,000,000 shares of Nvidia stock. As a result, summary judgment should be entered against him on Claims I and II in this action on the basis of those trades. In addition, because the elements of an insider trading claim under Section 17(a) of the Securities Act are identical to those of a claim under Section 10(b) of the Exchange Act (but apply only to sales of securities), *see, e.g., SEC v. Haligiannis,* 470 F.Supp.2d 373, 382 (S.D.N.Y. 2007), summary judgment should also be entered against him on Claim III in this action on the basis of: (i) the August 11, 2008 short sale of 100,000 shares of Dell stock; (ii) the August 18, 2008 short sale of 700,000 shares of Dell stock; and (iii) the May 4, 2009 short sale of 1,000,000 shares of Nvidia stock.

Similarly, Newman was found guilty of four counts of securities fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Newman's conviction was based on the following trades executed on behalf of the Diamondback hedge funds: (i) the May 16, 2008 purchase of 475,000 shares of Dell stock; (ii) the August 5, 2008 short sale of 180,000 shares of Dell stock; (iii) the August 15, 2008 short sale of 350,000 shares of Dell stock; and (iv) the April 27, 2009 short sale of 375,000 shares of common stock. As a result, summary judgment should be entered against him on Claims I and II in this action on the basis of those trades. In addition, because the elements of an insider trading claim under Section 17(a) of the Securities Act are identical to those of a claim under Section 10(b) of the Exchange Act (but apply only to sales of securities), *see, e.g., Haligiannis,* 470 F.Supp.2d at 382, summary judgment should also be entered against him on Claim III in this action on the basis of: (i) the August 5, 2008 short sale of 180,000 shares of Dell stock; (ii) the August 15, 2008 short sale of 350,000 shares of Dell stock; and (iii) the April 27, 2009 short sale of 375,000 shares of common stock.

---

[3] *See also, e.g., SEC v. Namer*, 2006 WL 1541378, at *1 (2d Cir. June 1, 2006) (concluding district court properly granted partial summary judgment after determining that defendant was collaterally estopped from relitigating the liability issues presented during the course of his criminal trial and conviction); *SEC v. Shehyn*, 2010 WL 3290977, at *4 (S.D.N.Y. Aug. 9, 2010) (defendant's admissions by guilty plea to mail and wire fraud charges establish requisite elements of securities fraud charges); *SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319, 326-27 (S.D.N.Y. 2007) (granting summary judgment in an SEC enforcement action based on collateral estoppel following defendant's guilty plea).

2. The Court Should Enter Permanent Antifraud Injunctions Against Chiasson and Newman

Because of their criminal convictions for violations of the antifraud provisions of the federal securities laws, the Court should permanently enjoin Chiasson and Newman from future violations of Section 10(b) of the Exchange Act. Section 21(d)(1) of the Exchange Act entitles the Commission to obtain permanent injunctive relief upon a showing that: (i) violations of the securities laws occurred; and (ii) there is a reasonable likelihood that violations will occur in the future.[4] *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99-100 (2d Cir. 1978). In considering whether there is a reasonable likelihood that a defendant will commit future violations, courts in this Circuit weigh various factors, including: (i) the fact that the defendant has been found liable for illegal conduct; (ii) the degree of scienter involved; (iii) the isolated or repeated nature of the violations; and (iv) the sincerity of the defendant's assurances against future violations. *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998).

Application of these factors to the facts here establish that Chiasson and Newman should be enjoined. Chiasson and Newman have both been found criminally liable for multiple violations of the antifraud provisions of the securities laws, and neither defendant has admitted any wrongdoing. *See SEC v. Lorin*, 877 F. Supp. 192, 201 (S.D.N.Y. 1995) (Baer, J.) (granting Commission injunctive relief where neither defendant "admitted any wrongdoing in relation to the allegations. This makes it rather dubious that they are likely to avoid such violations of the securities laws in the future."). Accordingly, a permanent injunction against Chiasson and Newman is necessary to protect the public interest.

For the reasons set forth above, the Commission respectfully requests that the Court grant the Commission's motion for partial summary judgment. We have enclosed a proposed judgment form for each defendant for the Court's convenience. Counsel for defendants Chiasson and Newman have informed the undersigned that, in light of the collateral estoppel effect of the guilty verdicts in the parallel criminal action, they do not oppose the entry of the enclosed proposed judgments.

We are available for a conference should the Court have any further questions.

Respectfully submitted,

Daniel R. Marcus
Senior Counsel

cc: All Counsel (by email)

---

[4] Unlike private litigants, the Commission need not show risk of irreparable injury, or the unavailability of remedies at law to obtain injunctive relief. *SEC v. Unifund SAL*, 910 F.2d 1028, 1036 (2d Cir. 1990).

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
-against-	:	**12-cv-0409 (HB)**
SPYRIDON ADONDAKIS,	:	
ANTHONY CHIASSON,	:	**ECF CASE**
SANDEEP GOYAL,	:	
JON HORVATH,	:	
DANNY KUO,	:	
TODD NEWMAN,	:	
JESSE TORTORA,	:	
DIAMONDBACK CAPITAL MANAGEMENT, LLC,	:	
and	:	
LEVEL GLOBAL INVESTORS, L.P.,	:	
Defendants.	:	

JUDGMENT AS TO DEFENDANT TODD NEWMAN

The Securities and Exchange Commission, having filed a Complaint and Defendant Todd Newman ("Defendant") having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; agreed not to oppose entry of this Judgment based solely on the collateral estoppel effect of his conviction in United States v. Todd Newman, S2-12-cr-121-RJS (S.D.N.Y.).

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment 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.

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

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

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant may be liable to pay disgorgement of ill-gotten gains, prejudgment interest thereon, and a civil penalty pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1]. The Court shall determine the amounts of the disgorgement and civil penalty, if any, upon motion of the Commission. Prejudgment interest shall be calculated based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). In connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: (a) the collateral estoppel effect of the Defendant's conviction will preclude him from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of this Judgment; and (c) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the Commission's motion for

disgorgement and/or a civil penalty, the parties may take discovery, limited to the issue of Defendant's financial condition,, including discovery from appropriate non-parties.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

V.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Judgment forthwith and without further notice.

Dated: _____, _____

_____
UNITED STATES DISTRICT JUDGE

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
-against-	:	**12-cv-0409 (HB)**
SPYRIDON ADONDAKIS,	:	
ANTHONY CHIASSON,	:	**ECF CASE**
SANDEEP GOYAL,	:	
JON HORVATH,	:	
DANNY KUO,	:	
TODD NEWMAN,	:	
JESSE TORTORA,	:	
DIAMONDBACK CAPITAL MANAGEMENT, LLC,	:	
and	:	
LEVEL GLOBAL INVESTORS, L.P.,	:	
Defendants.	:	

JUDGMENT AS TO DEFENDANT ANTHONY CHIASSON

The Securities and Exchange Commission, having filed a Complaint and Defendant Anthony Chiasson ("Defendant") having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; agreed not to oppose entry of this Judgment based solely on the collateral estoppel effect of his conviction in United States v. Anthony Chiasson, S2-12-cr-121-RJS (S.D.N.Y.).

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment 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.

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

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

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant may be liable to pay disgorgement of ill-gotten gains, prejudgment interest thereon, and a civil penalty pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1]. The Court shall determine the amounts of the disgorgement and civil penalty, if any, upon motion of the Commission. Prejudgment interest shall be calculated based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). In connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: (a) the collateral estoppel effect of the Defendant's conviction will preclude him from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of the Consent or this Judgment; and (c) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the Commission's motion for

disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

VI.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Judgment forthwith and without further notice.

Dated: _____, _____

_____
UNITED STATES DISTRICT JUDGE

INITIAL DECISION RELEASE NO. 589
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15580

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

In the Matter of	:	INITIAL DECISION
	:	April 18, 2014
ANTHONY CHIASSON	:	

APPEARANCES: Daniel R. Marcus, Valerie Szczepanik, and Matthew Watkins for the Division of Enforcement, Securities and Exchange Commission

Gregory Morvillo and Savannah Stevenson, Morvillo LLP, for Anthony Chiasson

BEFORE: Cameron Elliot, Administrative Law Judge

Summary

This Initial Decision grants the Division of Enforcement's (Division) Motion for Summary Disposition (Motion) and permanently bars Respondent Anthony Chiasson (Chiasson) from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization (collectively, collateral bar).

Procedural Background

On October 21, 2013, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP) against Chiasson, pursuant to Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that a federal district court enjoined Chiasson from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), and Exchange Act Rule 10b-5 (collectively, the antifraud provisions), in SEC v. Adondakis, 12-cv-409 (S.D.N.Y. Oct. 4, 2013) (Adondakis). OIP at 2. The OIP further alleges that Chiasson was convicted of securities fraud and conspiracy to commit securities fraud, sentenced to a seventy-eight month prison term followed by one year of supervised release, and ordered to pay a $5 million fine and $1,382,217 in criminal forfeiture, in United States v. Newman, 12-cr-121 (S.D.N.Y. July 16, 2013) (Newman). Id.

At a prehearing conference held on October 31, 2013, I deemed service of the OIP to have occurred on October 23, 2013. I also granted the parties leave to file motions for summary disposition pursuant to Commission Rule of Practice (Rule) 250 and waived the requirement for Chiasson to file an answer, provided that he file an opposition to the Division's Motion. See Anthony Chiasson, Admin. Proc. Rulings Release No. 1013, 2013 SEC LEXIS 3433 (Oct. 31, 2013); Tr. 4-5, 10-11.[1] In November 2013, the Division filed its Motion, with a Memorandum of Points and Authorities in Support of the Motion (Div. Mem.) and supporting exhibits (Div. Exs. 1 through 5); thereafter, Chiasson filed his Memorandum of Points and Authorities in Response to the Motion (Response), with supporting exhibits (Resp. Exs. A through D), and the Division filed its Reply Memorandum of Law in Further Support of the Motion (Reply), with supporting exhibits (Reply Exs. 1 through 4).[2]

Summary Disposition Standard

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by him, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323. 17 C.F.R. § 201.250(a).

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. See Gary M. Kornman, Exchange Act Release No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14262-63, pet. denied, 592 F.3d 173 (D.C. Cir. 2010); Jeffrey L. Gibson, Exchange Act Release No. 57266 (Feb. 4, 2008), 92 SEC Docket 2104, 2111-12 & nn.21-24 (collecting cases), pet. denied, 561 F.3d 548 (6th Cir. 2009). Under Commission precedent, the circumstances in which summary disposition in a follow-on proceeding involving fraud is not

[1] Citation ("Tr.") is to the prehearing conference transcript.

[2] In support of the Division's Motion, the Declaration of Matthew J. Watkins attached the following exhibits: the superseding indictment filed in Newman (Div. Ex. 1); the amended district-court judgment against Chiasson, filed in Newman (Div. Ex. 2); the civil complaint filed in Adondakis (Div. Ex. 3); the district-court judgment against Chiasson, filed in Adondakis (Div. Ex. 4); and Chiasson's answer to the civil complaint, filed in Adondakis (Div. Ex. 5). In support of Chiasson's Response, the Declaration of Savannah Stevenson attached the following exhibits: the Division's letter-motion for partial summary judgment, filed in Adondakis (Resp. Ex. A); Chiasson's opening brief in his appeal from his judgment of conviction in Newman, filed in the U.S. Court of Appeals for the Second Circuit (Second Circuit) (Resp. Ex. B); the OIP (Resp. Ex. C); and a one-page excerpt from Chiasson's sentencing transcript in Newman (Resp. Ex. D). In support of the Division's Reply, the Declaration of Matthew J. Watkins attached docket-sheet printouts (dated as of December 2013) of the following Second Circuit appeals: United States v. Newman (Chiasson), No. 13-1917 (Reply Ex. 1); United States v. Gupta, No. 12-4448 (Reply Ex. 2); United States v. Rajaratnam, No. 11-4416 (Reply Ex. 3); and United States v. Goffer (Goldfarb), No. 11-3591 (Reply Ex. 4).

appropriate "will be rare." John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), pet. denied, 66 F. App'x 687 (9th Cir. 2003).

The findings and conclusions in this Initial Decision are based on the record and on facts officially noticed pursuant to Rule 323.[3] See 17 C.F.R. § 201.323. The parties' filings and all documents and exhibits of record have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected.

Findings of Fact

A. Background

Chiasson was a founding partner at Level Global Investors, L.P. (Level Global), an unregistered investment adviser that managed hedge funds. Div. Ex. 5 at 2, 4-5. At Level Global, he served as the director of research and the sector head of the technology, media, and telecommunications sector, and he had authority to trade in certain accounts of the hedge funds managed by Level Global. Id. at 4.

B. Criminal Proceeding: Newman

In 2012, a federal grand jury charged Chiasson in a superseding indictment (the indictment) with one count of conspiracy to commit securities fraud and five counts of securities fraud, in violation of Exchange Act Section 10(b) and Rule 10b-5 thereunder, alleging: on five occasions between May 2008 and May 2009, and based on material, nonpublic information, Chiasson executed and caused others to execute securities trades in publicly traded technology companies for the benefit of a hedge fund (the insider-trading scheme).[4] See Div. Ex. 1. Following trial, the jury found Chiasson guilty of all counts. Min. Entry, Newman (S.D.N.Y. Dec. 17, 2012); Resp. Ex. B at 6. The district court sentenced Chiasson to a seventy-eight month prison term followed by one year of supervised release, and ordered him to pay a $5 million fine and $1,382,217 in criminal forfeiture. Min. Entry, Judgment, and Order, Newman (S.D.N.Y. May 13, May 14, and June 28, 2013, respectively), ECF Nos. 265, 280. In July 2013, the district court entered an amended judgment. Div. Ex. 2. Chiasson appealed to the U.S. Court of Appeals for the Second Circuit (Second Circuit), which is scheduled to hear argument on April 22, 2014. United States v. Newman, Nos. 13-1837(L), 13-1917(con) (2d Cir. entry dated Mar. 11, 2014).

[3] Pursuant to Rule 323, I take official notice of the proceedings, docket sheets, and records in Adondakis and Newman.

[4] Although the indictment does not refer to Level Global by name, there is no dispute that "Hedge Fund B" alleged in the indictment is Level Global. Compare Div. Ex. 1 at 1 with Div. Ex. 5 at 2, 4-5 and Resp. Ex. B at 5-6.

C. Civil Proceeding: Adondakis

In 2012, the Commission filed a civil complaint against Chiasson, alleging that he was involved in the insider-trading scheme, similar to the indictment's allegations. Div. Ex. 3. In September 2013, the Commission submitted a letter-motion to the district court, seeking entry of judgment enjoining Chiasson from future violations of the antifraud provisions. Resp. Ex. A. The letter represented that although the parties were unable to reach a consensual resolution and Chiasson would not concede the complaint's allegations, he did not oppose entry of the requested judgment due to the collateral-estoppel effect of his underlying criminal conviction. Id. In October 2013, the district court entered judgment against Chiasson, enjoining him from future violations of the antifraud provisions. Div. Ex. 4. Chiasson did not appeal. See Dkt. Sheet, Adondakis.

Conclusions of Law

Advisers Act Section 203(f) authorizes the Commission to impose a collateral bar as a sanction against Chiasson if: 1) he was convicted of any offense specified in Advisers Act Section 203(e)(2) within ten years of the commencement of this proceeding, or he was enjoined from any action, conduct, or practice specified in Advisers Act Section 203(e)(4); 2) at the time of the alleged misconduct, he was associated with an investment adviser; and 3) the sanction is in the public interest. 15 U.S.C. § 80b-3(f). Chiasson's conviction involves the purchase or sale of securities and arises out of the conduct of the business of an investment adviser, within the meaning of Advisers Act Section 203(e)(2); and he was enjoined from future violations of the antifraud provisions, i.e., "conduct . . . in connection with the purchase or sale of any security," within the meaning of Advisers Act Section 203(e)(4). 15 U.S.C. § 80b-3(e)(2)(A)-(B), (4). During the time of the alleged misconduct, he was associated with Level Global, an investment adviser. See Teicher v. SEC, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

Chiasson does not dispute that the statutory basis for a sanction has been satisfied. Indeed, he does not oppose the Division's Motion, given the preclusive effect of his conviction, but requests that I defer decision until the end, or "after the end," of the 210-day period to issue an Initial Decision, in order to allow time for the Second Circuit to decide his appeal. Response at 1, 7. However, 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. 17 C.F.R. § 201.250(b). The Commission has repeatedly held that the pendency of an appeal is not grounds to defer decision in an administrative proceeding. See Jose P. Zollino, Exchange Act Release No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2601 n.4; Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002); Ira William Scott, 53 S.E.C. 862, 865 n.8 (1998); Charles Phillip Elliott, 50 S.E.C. 1273, 1277 n.17 (1992), aff'd, 36 F.3d 86 (11th Cir. 1994). If the underlying criminal and civil judgments are vacated and a statutory basis for the bar is no longer present, the remedy is to petition the Commission for reconsideration of this action. See Jon Edelman, 52 S.E.C. 789, 790 (1996); Charles Phillip Elliott, 50 S.E.C. at 1277 n.17.

Accordingly, there is no genuine issue with regard to any material fact and summary disposition is appropriate. See 17 C.F.R. § 201.250(b). A sanction will be imposed if it is in the public interest.

Sanctions

The Division seeks a collateral bar against Chiasson.[5] Div. Mem. at 1, 8. The appropriateness of any remedial sanction in this proceeding is guided by the public interest factors set forth in Steadman v. SEC, namely: 1) the egregiousness of the respondent's actions; 2) the isolated or recurrent nature of the infraction; 3) the degree of scienter involved; 4) the sincerity of the respondent's assurances against future violations; 5) the respondent's recognition of the wrongful nature of his conduct; and 6) the likelihood that the respondent's occupation will present opportunities for future violations (Steadman factors). 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); see Gary M. Kornman, 95 SEC Docket at 14255. The Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. Gary M. Kornman, 95 SEC Docket at 14255. The Commission has also considered the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. See Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46; Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Industry bars have long been considered effective deterrence. See Guy P. Riordan, Exchange Act Release No. 61153 (Dec. 11, 2009), 97 SEC Docket 23445, 23478 & n.107 (collecting cases).

In Ross Mandell, the Commission directed that before imposing an industry-wide bar, an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities," and that the law judge's decision "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-8 (Mar. 7, 2014) (internal quotation marks omitted). After engaging in such an analysis, I have determined that it is appropriate and in the public interest to collaterally bar Chiasson from participation in the securities industry to the fullest extent possible.[6]

---

[5] Collateral bars are applicable here regardless of the date of Chiasson's misconduct. See John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61737.

[6] In a follow-on administrative proceeding after a criminal conviction based on a general guilty verdict, I may take into account all of the indictment's factual allegations in determining the appropriate sanction, without reference to whether such allegations were necessarily put in issue and determined in the criminal case. See Ross Mandell, 2014 SEC LEXIS 849, at *10 n.13. Thus, I need not engage in a particularized collateral-estoppel analysis, as might be required in other contexts. See, e.g., SEC v. Monarch Funding Corp., 192 F.3d 295, 307 (2d Cir. 1999) ("[E]stoppel does not apply to a finding that was not legally necessary to the final sentence."); SEC v. Bilzerian, 29 F.3d 689, 694 (D.C. Cir. 1994) ("Our review of the record indicates that Bilzerian's criminal convictions conclusively established all of the facts the [Commission] was required to prove with respect to the specified claims."); Demitrios Julius Shiva, 52 S.E.C. 1247,

A. Chiasson's Role in the Insider-Trading Scheme

Chiasson was a founding partner of, and a portfolio manager at, Level Global. Div. Ex. 1 at 1; Div. Ex. 5 at 2, 4-5. A Level Global analyst (the analyst) obtained material, nonpublic information that originated from employees at two technology companies, namely Dell, Inc. (Dell), and NVIDIA Corporation (NVIDIA). Div. Ex. 1 at 1-10. At all relevant times, Dell and NVIDIA were public companies with stock that traded on the NASDAQ Stock Market. Id. at 2. The inside information included information relating to Dell and NVIDIA's earnings, revenues, gross margins, and other confidential and material financial information, which was disclosed in advance of their quarterly earnings announcements. Id. at 3, 5-10. The analyst provided such inside information to Chiasson, who executed and caused others to execute the following securities transactions, in whole or in part, based on that information for the benefit of Level Global: 1) the May 12, 2008, purchase of 3,500 Dell call options; 2) the August 11, 2008, short sale of 100,000 shares of Dell stock; 3) the August 18, 2008, short sale of 700,000 shares of Dell stock; 4) the August 20, 2008, purchase of 7,000 Dell put options; and 5) the May 4, 2009, short sale of one million shares of NVIDIA stock. Id. at 3-10, 13, 16-18. These trades resulted in illegal profits for Level Global totaling approximately $67 million. Id. at 6-10, 16-18. Chiasson knew that the inside information upon which he traded had been disclosed by public company employees in violation of duties of trust and confidence owed to their employers. Id. at 13.

B. An Industry-Wide Bar Is in the Public Interest

1. The egregious and recurrent nature of Chiasson's misconduct

Chiasson's misconduct was egregious and recurrent in that he participated in an insider-trading scheme that reaped millions of dollars in illegal profits for Level Global, and he executed trades pursuant to that scheme on five occasions over the course of a two-year period. Div. Ex. 1 at 1-11, 16-18; see Peter Siris, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013) (finding the respondent's conduct egregious and recurrent where, inter alia, he was enjoined based on alleged conduct that included numerous instances of insider trading over the course of almost two years and that resulted in ill-gotten gains of over half-a-million dollars). As a result of his misconduct, he was convicted of securities fraud and conspiracy to commit securities fraud, and enjoined from violating the antifraud provisions. See Div. Exs. 2 and 4.

The Commission has "repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws." Peter Siris, 2013 SEC LEXIS 3924, at *23 (internal quotation marks omitted). Further, "in the absence of evidence to the contrary, it will be in the public interest to . . . suspend or bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions." Marshall E. Melton, 56 S.E.C. at 713. Chiasson's "repeated insider trading is exactly the type of egregious behavior that supports a collateral bar." Peter Siris, 2013 SEC LEXIS 3924, at *29. The egregious nature of his misconduct is underscored by

---

1249 (1997) ("factual issues that were actually litigated and necessary to the Court's decision to issue [an] injunction" may not be relitigated).

the imposition of a seventy-eight month prison term, $5 million fine, and over $1 million in criminal forfeiture. Div. Ex. 2.

Even if Chiasson did not actively seek out insider information, "he took unfair advantage of his role" as a portfolio manager at Level Global by trading on such information. Peter Siris, 2013 SEC LEXIS 3924, at *43. Moreover, "the degree of harm to investors the marketplace," measured by Level Global's illegal profits, is substantial. Marshall E. Melton, 56 S.E.C. at 698. Given his role in the insider-trading scheme over a two-year period, his violations cannot be categorized as isolated or merely technical. Cf. John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61739.

2. Scienter

In committing securities fraud, Chiasson acted with a high degree of scienter—intent to defraud, an element that the district court required the jury to find in order to convict Chiasson of securities fraud. Dec. 12, 2012, Trial Tr. 4024-25, 4036-39, Newman (filed Dec. 21, 2012), ECF. No. 219 (Trial Tr.); see United States v. Vilar, 729 F.3d 62, 88-89 (2d Cir. 2013) (scienter is an element of securities fraud under Exchange Act Section 10(b)); SEC v. Obus, 693 F.3d 276, 285-86, 288 (2d Cir. 2012) (scienter required for tippee insider-trading liability). Further, in committing conspiracy to commit securities fraud, Chiasson also acted with scienter. Trial Tr. 4047-56 (district court's instruction that to convict Chiasson of the conspiracy count, the jury had to find that he entered into an agreement or understanding to commit an unlawful criminal purpose, namely securities fraud by insider trading, and that he knowingly and willfully became a member of the conspiracy); see United States v. Feola, 420 U.S. 671, 686 (1975) (holding that to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the government must prove at least the degree of criminal intent necessary for the substantive offense).

3. Lack of assurances against future violations and recognition of the wrongful nature of his conduct

Although "[c]ourts have held the existence of a past violation, without more, is not a sufficient basis for imposing a bar[,] . . . 'the existence of a violation raises an inference that it will be repeated.'" Tzemach David Netzer Korem, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *23 n.50 (July 26, 2013) (quoting Geiger v. SEC, 363 F.3d 481, 489 (D.C. Cir. 2004)) (alteration in internal quotation omitted). Chiasson does little to rebut that inference. He does not dispute the statutory basis for this proceeding and claims to have "acknowledged the reality of the jury verdict." Response at 6. But he has made no assurances against future violations, and there is no indication that Chiasson recognizes the wrongful nature of his conduct. Rather, he refuses to admit to any conduct and maintains his innocence.[7] Tr. 8. Failure to make assurances against future violations and to recognize wrongdoing demonstrates the threat of future violations. See Christopher A. Lowry, 55 S.E.C. 1133, 1144 (2002).

[7] Although Chiasson is appealing his conviction and thus arguably maintaining a position in this proceeding consistent with that appeal, a pending appeal is not a mitigating factor. See Ross Mandell, 2014 SEC LEXIS 849, at *21 n.28.

4. Opportunities for future violations

Chiasson places emphasis on a remark by the district judge, made at his sentencing hearing, who said: "I think in your case I'm not too worried about you committing crimes in the future, but there is, nonetheless, a general deterrent purpose to a sentence." Resp. Ex. D (Sentencing Tr. at 16); see Response at 6-7. Admittedly, the last Steadman factor has sometimes been characterized simply as the "likelihood of future violations." Steven Altman, Exchange Act Release No. 63306 (Nov. 10, 2010), 99 SEC Docket 34405, 34435, pet. denied, 687 F.3d 44 (2d Cir. 2012); Chris G. Gunderson, Exchange Act Release No. 61234 (Dec. 23, 2009), 97 SEC Docket 24040, 24048. But the weight of authority supports its more specific characterization in this proceeding as the "likelihood that the [respondent]'s occupation will present opportunities for future violations." Steadman, 603 F.2d at 1140 (emphasis added); accord Tzemach David Netzer Korem, 2013 SEC LEXIS 2155, at *13; Johnny Clifton, Exchange Act Release No. 69982, 2013 SEC LEXIS 2022, at *53 (July 12, 2013); Alfred Clay Ludlum, Advisers Act Release No. 3628, 2013 SEC LEXIS 2024, at *16-17 (July 11, 2013).

Chiasson represents that he is "effectively barred already" from the securities industry, and that it is unrealistic that he could attempt to reenter the industry in the near future. Response at 6. Although he is not currently working in the securities industry, a collateral bar is a prospective remedy, and Chiasson has provided no assurance that he will never return to work in the securities industry. If Chiasson were to reenter the securities industry upon the expiration of his prison sentence, his occupation would present the opportunity for future violations, notwithstanding the district judge's remark or his current work status.

Nevertheless, even assuming arguendo that this factor weighs in Chiasson's favor, all the other Steadman factors weigh in favor of a collateral bar.

5. Other considerations

Allowing Chiasson to remain in the securities industry would pose too great a risk to investors and the public. As the Commission explained in John W. Lawton, securities professionals routinely gain access to sensitive financial and investment information and potentially market-moving information about securities, issuers, and potential transactions. 105 SEC Docket at 61740. As a result, they must "take on heightened responsibilities to safeguard that information and to avoid temptations to fraudulently misuse their access for inappropriate—but potentially lucrative or self-serving—ends." Id. Chiasson's conduct has shown that he is not fit to take on such heightened responsibilities in any capacity in the securities industry. See Robert Bruce Lohmann, 56 S.E.C. 573, 582-83 (2003) (upholding a permanent, collateral bar and noting that "[i]nsider trading constitutes clear defiance and betrayal of basic responsibilities of honesty and fairness to the investing public" (internal quotation marks omitted)). Lastly, a collateral bar will deter others from engaging in insider-trading schemes.

In conclusion, it is in the public interest to impose a permanent direct and collateral bar against Chiasson.

Order

It is ORDERED that, pursuant to Rule 250(b) of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement's Motion for Summary Disposition against Respondent Anthony Chiasson is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Anthony Chiasson is permanently BARRED from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360. See 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111. See 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occurs, the Initial Decision shall not become final as to that party.

Cameron Elliot
Administrative Law Judge

04-22-14 2nd Cir - Oral Argument

JUDGE WINTER: Okay.

JUDGE PARKER: The next case is United States versus Newman and Chiasson.

MARK POMERANTZ: May it please the Court, I'm Mark Pomerantz. I represent the appellant, Anthony Chiasson. I'd like to get right to the main legal issue that we've raised for the Court.

Anthony Chiasson is a remote tippee. He had no involvement with the insiders at Dell and NVIDIA. He received information fourth-hand. And, when it reached him, he knew simply that it came from inside those companies. He did not know that the insiders had disclosed the information in exchange for career advice, friendship, or indeed any other form of personal benefit.

The trial judge held, over objection, that proof of his knowledge was not required. When Judge Sullivan instructed the jury, he did tell the jury that the insiders had to receive or anticipate receiving some personal benefit. But he held that the defendants did not have to know about the receipt of the personal benefit. And so, the jury was not required to find that knowledge.

We believe this was error. Five district judges in this circuit--Judge Sweet in State Teachers against Fluor, then-District Judge McLaughlin in the Santoro case, Judge Holwell in Rajaratnam, Judge Rakoff in the Whitman case, and most recently Judge Gardephe in the Martoma case--have held that a tippee does have to know that insiders exchanged information for personal benefit, and that jurors have to be so instructed.

JUDGE PARKER: Can I correct it? In Martoma, the government went along with that charge.

MARK POMERANTZ: I believe, Your Honor, that, in Martoma, the government submitted a different charge, and Judge Gardephe went with the version of the charge that we believe was the correct version. But I--

JUDGE PARKER: Which is that the defendant had to know of the [UNINTEL].

MARK POMERANTZ: That the defendant had to know. To our knowledge, Your Honor, Judge Sullivan is the only judge to have held to the contrary. And that's because--

JUDGE HALL: Sorry, back to that point,

the reason that the defendant has to know that is because that's how--Dirks tells us that that's the only way to prove breach of duty?

MARK POMERANTZ: No, Dirks tells us that tippee liability is derivative. I'll retreat for a moment; I know that Your Honor is familiar with this, but, of course, there's no generalized duty to the marketplace. Chiasson is a stranger to those who are on the other side of his trades. He's a stranger to Dell and NVIDIA. He owes no duties of his own to refrain from trading.

And, indeed, the law is clear that the mere receipt of material nonpublic information, even material nonpublic information that comes to a person from an insider, doesn't give rise to any duty to abstain from trading.

Because liability for the tippee is derivative, it means there has to be a guilty tipper. If the tipper engages in a fraudulent fiduciary breach, of which the tippee has knowledge, the tippee, in effect, becomes an accessory after the fact in the tipper's fraudulent fiduciary breach.

And the relevance of personal benefit and the knowledge of personal benefit is that not

every breach of duty opens the door to insider trading liability. Dirks is quite clear on this. Dirks says--

JUDGE HALL: So your answer to my question is basically yes.

MARK POMERANTZ: Yes. Dirks says there has to be a fraudulent fiduciary breach. And Dirks goes on to define a fraudulent fiduciary breach in terms of the tipper's exchange of information for personal [UNINTEL].

And that, after all, was precisely the fraudulent fiduciary breach that the government was attempting to prove in this case. And it's precisely that fraudulent fiduciary breach that Judge Sullivan submitted to the jurors and said, "You have to find first that the tipper engaged in a fraudulent fiduciary breach." And he defined it correctly.

When he told the jury, "You have to find the tipper has engaged in a fraudulent fiduciary breach," he incorporated all of the ingredients of a fraudulent fiduciary breach identified by the Dirks court: the existence of a confidential relationship, a relationship of trust and confidence, the breach of a duty of

confidentiality, and the anticipation or the receipt of personal benefit.

So, that's what constitutes the fraudulent fiduciary breach that was alleged. But when it came to the tippee's knowledge of a fraudulent fiduciary breach, Judge Sullivan left a piece out of the equation. He left out of the equation the knowledge that the tipper was receiving some form of personal benefit. And that is what the Dirks court says takes a breach of confidentiality and transforms it into a fraudulent fiduciary breach.

JUDGE HALL: So, is that the only--excuse me; go ahead.

JUDGE PARKER: You had proved--help me recall this--that there were other disclosures of nonpublic information from Dell that was routine. What--flesh that out for me.

MARK POMERANTZ: Yeah. The record was replete, Your Honor, with the fact that Dell and NVIDIA were leaky companies, and that all kinds of material information reached the defendants, information that related to earnings, that related to margin.

JUDGE PARKER: So, how does this

information differ from the information that they got [UNINTEL]?

MARK POMERANTZ: Well, I think that was the point of the defense, Your Honor, is that there was no significant difference. And what it illustrates is that information--confidential information, material information--is the coin of the real in the securities business. And much information reaches portfolio managers like Mr. Chiasson, like Mr. Newman, without any indication that it has been exchanged for personal benefit.

So, the relevance of it was: you can't infer from simply the fact that information, indeed sensitive information, indeed confidential information--you cannot infer from the fact that it has reached a third party, a portfolio manager--you can't infer from that fact alone that some form of personal benefit to the insider was exchanged for that information.

And that's the touchstone here. It's the touchstone not only under Dirks and follow-on cases, Bateman Eichler, which we cite in the brief. It's not only the securities law. It's general principles of criminal law that support our argument.

Where you have a defendant like Chiasson, who is alleged to be a secondary actor, to be guilty of a crime because he was a participant in the insider's crime, then it's--I won't say [UNINTEL] book law, but I think well settled law that what the secondary actor has to know are all of the circumstances that make his participation participation in a crime.

And one of those circumstances was the exchange for personal benefit. If the insiders had not exchanged information for personal benefit, the government concedes there is no crime here. But the disjuncture, the oddity, is, although the government acknowledges that receipt of personal benefit, or the anticipation of personal benefit, has to be an ingredient of the tipper liability. That's what makes the tipper's conduct criminal.

And even though the government concedes that the tippee has to know of the fraudulent fiduciary breach, they say it's okay to leave that piece out of the equation. And we say it's not okay. It's not okay under Dirks; it's not okay under general principles of criminal law; and it's not okay under principles of willfulness

in cases like Excitement [VIDEA?] and Morissette that we cite in the brief. I see my bell is--

JUDGE PARKER: [ANSWER ME THIS?]--[UNINTEL] and Dirks, as I recall, were civil cases.

MARK POMERANTZ: Yes.

JUDGE PARKER: So, is the principle different with respect to civil cases as opposed to criminal prosecutions?

MARK POMERANTZ: We think that the arguments we're making apply equally in the civil context, with one caveat: there is the formulation in Dirks where the Dirks court speaks of the tippee's knowing or should-have-known of the tipper's fraudulent fiduciary breach. It may be that, in a civil case, a should-have-known is sufficient.

But for purposes of criminal liability--and this is, I think, undisputed here--Judge Sullivan charged the jury with the government's consent that the standard of knowledge was knowledge, not should-have-known. And what he listed was what the defendant has to know.

He did charge the jury that a defendant has to know of a simple breach of

confidentiality. But, when he made that charge, he's saying that a defendant has to know facts that don't constitute a fraud and don't constitute a crime.

JUDGE HALL: Is the only way to have a fraudulent breach of the duty that the tipper receives something of value?

MARK POMERANTZ: Well, that is certainly the breach and the definition of the breach that's identified in Dirks. And in--

JUDGE HALL: Yeah. Does Dirks give an example? Or is Dirks the [UNINTEL] the profits on that [UNINTEL]?

MARK POMERANTZ: Yeah. For purposes of this case, Your Honor, the answer doesn't matter, because that--it's the Dirks definition of a fraudulent fiduciary breach that was the fraudulent fiduciary breach that got tried in this case.

That's the fraudulent fiduciary breach that the government attempted to prove; that's why you've had all the evidence about career advice and friendship. That's the fraudulent fiduciary breach of the tipper that was given to the jury as an essential ingredient.

So, if--I can't conceive readily of a fraudulent fiduciary breach in the insider trading context by an insider that would qualify without the exchange of personal benefit that Dirks contemplates. But even if, theoretically, there's another flavor of fraudulent fiduciary breach that qualifies, that's not the one that was at issue in this case. At issue in this case was--

JUDGE HALL: So, what if the--

MARK POMERANTZ: Classic Dirks.

JUDGE HALL: What if the defendant, the tippee or the derivative tippee, thinks, "Boy, you know, I've found a well here. This--great information keeps flowing, and we get it periodically. This is too good to be true."

Does that approach knowledge of the source being--doing something that is a fraudulent breach of confidential duty? Or is he just talking in his sleep and his wife's passing it on to somebody?

MARK POMERANTZ: Well, we can certainly imagine cases where the circumstantial evidence is so compelling that the government can credibly argue that a defendant did know that the insider

must have exchanged this information for personal gain. But, two points.

One: this is not such a case, and that is where the relevance of the other information comes in. And second, even if it were such a case, that theory was just never given to the jury. We could never litigate the issue of whether Mr. Chiasson knew about personal benefit, because Judge Sullivan said, "It's not a defense; I'm not submitting it to the jury," so we couldn't try it; we couldn't sum up on it; we couldn't litigate the issue.

So, even if one could imagine a set of circumstances that kind of take this to the edge, that's not this case and it's not the basis on which the [UNINTEL].

JUDGE PARKER: Did the government try to prove that he knew about some sort of personal benefit?

MARK POMERANTZ: The government did not try and prove that Mr. Chiasson knew about personal benefit, because--well, A, there was no--whether they wanted to try or they didn't, there was no such proof. I mean, you know, the evidence just wasn't there.

I'm not suggesting that the government had proof of knowledge of personal benefit that it kept in its pockets. It didn't prove it. And Judge Sullivan didn't require the government to prove it. So, the issue, you know, dropped out of the case when the charge was given to the jury.

And it is an unfortunate circumstance, because we believe that the evidence was undisputed that Chiasson didn't know and couldn't have known. The government's main cooperator as Chiasson, Sam Adondakis, testified that he didn't know that the tippers, the insiders, were exchanging information for any form of personal benefit.

It was undisputed that all of the information that came to Chiasson came through Adondakis. So, if Adondakis didn't know, it's hard to understand how Chiasson would know. And it's impossible to understand the government's harmless error argument. But I'll leave that.

JUDGE HALL: Thank you, Mr. Pomerantz.

JUDGE PARKER: Thank you. Thank you, Mr. Pomerantz.

JUDGE HALL: You've reserved two minutes for rebuttal. Mr. Fishbein?

STEPHEN FISHBEIN: Thank you. May it please the Court, Stephen Fishbein. I represented Todd Newman at trial and on this appeal. The evidence at trial was insufficient, under the correct legal standard, to convict my client. And I'm going to address both knowledge of the benefit and also whether there was a breach or a benefit in the first place.

Starting with knowledge of benefit, there was no proof--Judge Parker, I think you asked the question--that Todd Newman knew of any benefit to any of the corporate insiders. And I should point out that we made clear at the beginning of this case what the correct legal standard was. We put it in our jury charge; we argued it to the judge.

The government knew full well, throughout this trial, that we would be pressing that issue. They knew full well that every District Court had required knowledge of benefit. The judge did not decide what the jury charge would be until the close of the government's case.

So, the government had every incentive to put on every piece of evidence it had to show

that Todd Newman knew about a benefit, and it came up with nothing. There was no direct evidence of that.

On appeal, they shift gears and they argue for what's in effect a double inference. They say that the circumstances suggest that the information was confidential and that it was not authorized to be disclosed. They then want to take a leap and say that, if you know that information came from the inside, and that it wasn't authorized, you must know about a benefit.

JUDGE PARKER: What was the government's theory about how you can tell the difference between nonpublic material information that you can trade on and nonpublic material information that you go to jail if you trade on? How did they offer that?

STEPHEN FISHBEIN: My interpretation was, "I know it when I see it." We did not think there was any bright line, and that was really our point. And I'd like to get into some detail on that.

You know, they say that the information that you can't trade on that came through Goyal and Tortora, you know, was quarterly information.

Well, the leaks, where there was no dispute that there wasn't any personal benefit, that was also quarterly information. It was accurate.

Let me give some specific examples. We proved leaks in this case. And, again, the premise here--it was agreed by everyone, the witnesses and everyone, that these leaks were not in exchange for personal benefit. And yet there were specific numbers: gross margin, 18 percent. Operating expense, 12 percent.

I'll give one ex--one of the leaks was an earnings-per-share number of $0.30 for the quarter. Now, Mr. Tortora, the government's star witness, said that, when he got this supposedly bad information from--on Dell, he never got earnings-per-share. He only got the ingredients for earnings-per-share. And yet we have an email that went to my client saying that a specific earnings-per-share number came out of Dell from an insider six days before the earnings release.

And what that shows is that, if you're a portfolio manager and you're receiving information that maybe you believe that not everybody has, and that it came from the inside, that is at least equally consistent with a leak

for which there is no personal benefit as there being a personal benefit.

And I think the law is very, very well established that, if facts are equally consistent with an innocent explanation and a guilty one, that does not support proof or an inference beyond a reasonable doubt.

And just to put a point on this, I would urge the Court to take a look at trial transcript page 688. It's Appendix 597. And there, again, the star witness, Justin Tortora, who was the conduit for this information, he said it was routine. It happened repeated times where he would be with management of a company, not only investor relations but management, executives, anybody, and he would--he said, "I got confidential information."

He even said, in his words, "It was information that I knew they shouldn't disclose." And he was asked a very direct question. "Did you give a personal benefit for that?" Answer: "No."

So, in light of the reality that was proved at this case, where inside confidential information comes out of a company not for personal benefit, but for other reasons, you

cannot infer beyond a reasonable doubt that it's only for personal benefit.

Now, I'm sure the government, as they did in their brief, they're going to say, "But Mr. Newman, you know, paid as a consultant one of the intermediaries, Mr. Goyal." That, of course, does not establish that the money was then transferred from Goyal to the insider. And, in fact, in this case, we proved that that was not the case.

JUDGE HALL: Does it only have to be money?

STEPHEN FISHBEIN: It does not only have to be money, no. The Supreme Court says, you know, a reputational benefit that will translate into future earnings. The government's theory with respect to Rob Ray was that it was career advice. But there was zero--zero--testimony that Mr. Tortora ever told Newman, or that Newman knew in any way, shape, or form, that Goyal was given career advice. And I'll come to the sufficiency of the benefit in a minute.

But I think the point that I want to make is that here we know for a fact that Goyal did not give any money to Rob Ray. In fact, he

didn't even tell Rob Ray that he was getting paid.

So, certainly the fact that Diamondback is employing consultants, which they did on a regular course--Goyal's consulting arrangement was set up before Rob Ray was in the picture, so there was nothing suspicious about it when it was originated. So, none of that supports this double inference the government is trying to make to the effect that you can infer a knowledge of a personal benefit.

Let me shift now to sufficiency of the breach to begin with. And let me start with the fact that neither insider here, neither Rob Ray nor Chris Choi, the insider at NVIDIA, has been charged criminally, civilly, or administratively. And, to my knowledge, in the recent spate of insider trading cases by the Southern District, this is the only one in which the insider was not charged with something.

And the reason for that is because, as Mr. Pomerantz said, it's derivative liability. Their whole theory is that the insiders are guilty of a terrible crime. And yet they haven't charged them. And I respectfully submit that the

reason they haven't done that is because, in fact, when you really drill down into the evidence, there is no sufficient evidence of breach or sufficient evidence of benefit.

Now, on breach, the government put in broad confidentiality policies with Dell and NVIDIA saying that all quarterly information is confidential. Now, we know that companies didn't abide by that, because we see all the evidence of leaks.

And in this Court's decision in the Mahaffy case, the Court made very clear that you don't only take into consideration the broad corporate policy, but also if the company took steps to actually keep the information confidential.

Now, here we have the benefit that Rob Ray's boss, the boss of the insider at Dell, testified. And he testified about what's allowed and what's not. And he specifically said that, in the case of modeling, discussions about analyst models, that company insiders are free to sort of give hints and help analysts with their models by saying, "Your model's too high; your model's too low." He said, "We talk about the quarter. We

talk about specific line items."

Now look at what Sandeep Goyal testified as to how he got this information from Dell. His testimony was very, very clear. He said, "I called up Rob Ray. I told him I was working on a model. And that's when I got the information. I didn't tell him I was trading. I just told him I needed help on a model to know whether I'm too high or too low."

So, if you compare what Sandeep Goyal said to Rob Ray, and they were compared against what Rob Ray's boss said was permissible--and this is transcript page 2926, which the government also cites. But I respectfully submit that those--that page and the next one fully support our position. Rob Ray said he was authorized to talk to an analyst about the models and whether the assumptions and their numbers were too high or too low.

I see I've run out of time, but I'll save the rest for rebuttal.

JUDGE HALL: Thank you, Mr. Fishbein. You've reserved two minutes. Ms. Apps?

ANTONIA APPS: May it please the Court, I represent the government on this appeal and I

represented the government below. The District Court properly instructed the jury that they had to find the defendants knew--

JUDGE PARKER: Well, before you get into that, I have something else to ask you. I looked at the--some of the docket sheets in the records and the indictments involving some of the players in this case. So, Adondakis was indicted before Judge Keenan. Tortora was indicted before Judge Pauley; Goyal, I believe, before Judge Forrest, and then Montoya before Judge Gardephe. And then, finally, we get to the men of the cases before--the defendants, who were before Judge Sullivan.

Can you--and I notice a pattern of when you indict individuals and when you supersede. Can you allay my concern that what the government did was move these indictments around until they got up before--they could get their main case before their preferred venue, which is Judge Sullivan?

ANTONIA APPS: Your Honor, it is not uncommon for the U.S. Attorney's office, when an individual cooperated or is going to plead guilty ahead of time, to put it in the wheel and wheel out, which is what we did with every cooperator

before the four defendants were charged in January of 2012.

At that time, again, it went into the wheel. And the judge that was drawn from the wheel was Judge Sullivan. And that is the judge who presided over the case. It is quite common for the office to, when they have cooperating witnesses, simply to put them in the wheel as they did in this case.

JUDGE PARKER: Then, once you got Judge Sullivan, you superseded with Mr. [STEIN?].

ANTONIA APPS: We did, Your Honor. That, I think, was a different situation. The analyst who was the main cooperator against the subsequent defendant, Mr. Steinberg, was an analyst who was part of the conspiracy and who was charged initially and wheeled out to Judge Sullivan.

There were a whole host of reasons as to why it made sense to supersede Mr. Steinberg into the existing case before Judge Sullivan, not the least of which was judicial efficiencies, in that Mr. Sullivan had--Judge Sullivan, I beg your pardon, had presided over not only a course of the pretrial, enormous amount of pretrial

litigation, but of course a six-week trial in which the issues were the same.

Mr. Steinberg was alleged to be part of the same conspiracy that was tried in front of Judge Sullivan. And many of the witnesses were the same. Jesse Tortora, a cooperating witness, testified in both trials, as did the corporate witnesses. It was a very similar--the evidence that the government put forward in both cases involved a lot of overlapping witnesses, a lot of overlapping testimony, and common issues of law and fact.

JUDGE WINTER: [UNINTEL PHRASE] were you trying the two both together--you're talking about efficiencies that are [UNINTEL] trial. Was there [UNINTEL] Steinberg was [UNINTEL] also. There's no [UNINTEL PHRASE]?

ANTONIA APPS: There was not enough time to try Steinberg with the two defendants Newman and Chiasson who were tried--

JUDGE WINTER: Where are the efficiencies then?

ANTONIA APPS: Your Honor, the same judge who has presided over the trial, and which involved--was a lengthy, complex trial for six

weeks, presided over the same issues and had--

JUDGE WINTER: I know [UNINTEL PHRASE] Second Circuit for almost all of [UNINTEL PHRASE] a lot of [UNINTEL PHRASE] issues that were [UNINTEL PHRASE] Rosenberg, where the government [UNINTEL PHRASE] criminal cases were related.

And at some point, the Southern District changed the rule there, which you [HAD?] [UNINTEL] a criminal case [WERE?] related, and thereby [UNINTEL] the judge, because [UNINTEL PHRASE] Rosenberg case. Now you're trying--you're doing the same thing, but superseding the indictment.

So, under the Rosenberg case, the finding was there was a witness in common, which would [UNINTEL] the case Judge [UNINTEL PHRASE] trial [UNINTEL] Rosenberg's. But your [APPROACH?] [UNINTEL PHRASE].

ANTONIA APPS: I respectfully disagree, Judge Winter. We did--I'm not familiar with the case that you mentioned, but there was not just one overlapping witness. There were numerous overlapping witnesses. This was the same case.

There were certain efficiencies that, to put it into--to supersede Mr. Steinberg into

the existing case, which, of course, the defendants had not at that time been sentenced, it is--the United States Attorney's Office occasionally does exactly this.

Of course, Judge Sullivan, who was presiding, indicated on the record that he had consulted with Chief Judge Preska about whether the supersede--it was appropriate to proceed on the superseder with Michael--the defendant Michael Steinberg, and ultimately ruled that it was appropriate under the local rules to do so.

JUDGE PARKER: And it was just coincidence that the judge--these cases [UNINTEL] sheer coincidence was the one judge on this list who had bought into the government's theory on knowledge of personal gain.

ANTONIA APPS: Your Honor, first of all, if I may--

JUDGE PARKER: [UNINTEL] all the other judges on the list had rejected it, and the government had given it up in the case before Judge Gardephe.

ANTONIA APPS: I'm not sure I understand, Judge Parker, what you mean by "list." But in fact there were other judges in

cases that the defendants routinely ignore: Judge Keenan in Thrasher.

There was a case ruling in [UNINTEL] where it's clear that the judges in those cases held that the government did not need to prove, for purposes of establishing tippee liability, that the defendant knows the circumstances of the initial--of the breach by the original tipper. And so, it is, respectfully, not true that Judge Sullivan is out there alone.

Also, just to address a question that Your Honor, Judge Parker, raised with respect to Martoma, of course, Martoma was a case where the defendant was the first-level tippee who gave their benefit to the tipper. And the fact that the government acquiesced in an instruction and thereby avoided an appellate issue should not be seen as in any way a signal that the government concedes its position.

And clearly, it makes sense for District Judges mindful of not having to retry cases that, when an issue is pending before the Circuit, to adopt a conservative jury instruction--

JUDGE PARKER: But the conservative

instruction was the opposite of what you were insisting in this case was required by the law.

ANTONIA APPS: But--

JUDGE PARKER: And so, I don't understand why anyone is doing a service, I mean to a jurist, where it looks like the government is taking completely inconsistent views on critical information, a critical point of law--and you can see how important it is because we're all concerned about it--for some--

ANTONIA APPS: Wait--

JUDGE PARKER: Very difficult to understand tactical benefit.

ANTONIA APPS: Your Honor, we--

JUDGE PARKER: Ms. Apps.

ANTONIA APPS: Sorry, Judge Parker. But we often take--accept a burden that is higher in a particular case when there's a pending issue for appeal.

For example, in this very case, the jury was instructed that they had to find that the information was a substantial factor as a basis for trading, notwithstanding that, on appeal in the Rajatnaram case, not decided at the time of the Newman trial, the government had

taken the position that it need only be a factor. And so, we often do that.

JUDGE PARKER: You can understand how we're--or at least I'm concerned that the government's position on these key points of law seems to be varying according to which judge you're talking to.

ANTONIA APPS: I respectfully disagree that that is the way it works, Your Honor. We selectively--we may select which issues to litigate in any particular case. Why would--it would make no sense to insist on a jury instruction in Martoma when the defendant is the one who paid the tipper. And that is--it is clearly established that there would be no reason to take that issue on appeal.

JUDGE PARKER: [UNINTEL PHRASE] on the point of law, you'll no doubt win on appeal.

ANTONIA APPS: Well, and--

JUDGE PARKER: Right?

ANTONIA APPS: But we often don't. We often are risk-averse in these situations. There's an enormous amount of resources that go into litigating a particular case.

There are sometimes--for some cases, we

select an issue to take up on appeal that we may not do so in another case, just as I indicated we accepted the higher burden on the known possession of information in this very case, notwithstanding in Rajatnaram, that preceded it, we had opted to challenge the lower burden.

If I may, Your Honor, though, at the end of the day, it does turn on what the answer to the fundamental underlying legal question is. And we think that the District Court properly instructed the jury that they had to find the defendants knew the information was disclosed in breach of a duty of trust and confidence.

And the evidence overwhelmingly supported that finding. The defendants were told they were receiving secret earnings numbers from company insiders before those numbers were released to the public, numbers which were at times accurate to the decimal point.

They received those numbers quarter after quarter after quarter. And they pressed their analysts to get the updates from the company insiders. They were told that the information originated from individuals, employees inside the company with access to the

internal rolled-up numbers. And, while Newman seeks to--

JUDGE PARKER: [UNINTEL] is this argument pointed in the direction that, if the charge were inaccurate, the error would be harmless?

ANTONIA APPS: Your Honor, we certainly make the harmless error analysis. And, in particular, on that point, Newman paid Goyal $175,000 for the information. There is absolutely an inference that he knew Goyal, who was getting the information from someone inside the company, understood that that employee was receiving some kind of benefit. Newman knew that the--Goyal's contact, [UNINTEL]--

JUDGE PARKER: How are we to--help me understand: if this information--if information concerning Dell's earnings is routinely leaked and can be traded on, how do we know--what's the principle--

ANTONIA APPS: I--

JUDGE PARKER: That criminalizes some information, some of this information, and makes virtually indistinguishable information innocuous?

ANTONIA APPS: I'm glad you brought that up, Judge Parker, because the arguments on the leaks are just plain wrong on the facts. And Tortora--to answer some of the questions, the--what the company--Tortora testified that Dell didn't leak the top-level earnings numbers.

You asked Mr. Pomerantz, I believe, "How did the information that the insiders like Rob Ray provided differ from the information that the companies disseminated to the public in an authorized fashion?" And they differed markedly.

Companies routinely talk about general business trends, long-term outlook. Sometimes they use numbers. But sophisticated market professionals like Chiasson and Newman know full well that that is not the same as receiving the revenue or gross margin number before it is released in that quarterly announcement.

And we went through in our briefs and we outlined why those claims that the defendants made were wrong. And, in fact, they, in some sense, an acknowledgement of their own weaknesses when they feel they need to cite information outside the record in order to support that claim.

JUDGE HALL: So, was the [UNINTEL]--

ANTONIA APPS: And it wasn't our--beg your pardon, Judge Hall.

JUDGE HALL: Is the argument that the nature of the information, as you've described it, the specificity and the granularity of it, somehow is proof that it was fraudulently leaked?

ANTONIA APPS: That is one of the factors and one of the elements in this particular case, because, in addition to those factors--and, by the way, it was quarter after quarter after quarter, inconsistent with any notion of accident or mistake by the original tipper. The defendants pressed for that information. They paid for the information.

JUDGE PARKER: Help me understand how that theory is at all [UNINTEL], because it seems to me that it turns most fundamentally on the sophistication and the experience of the tippee. So, if I've been in the business 15 minutes, there's a different criminal standard than if I've been in the business for 15 years, because I'm a relatively young analyst; I don't fully perceive the significance of this.

It may sound--you know, it may be a

little bit unusual, but it doesn't seem criminal to me because it's just like the information that's been flowing over the Autex or flowing over the Bloomberg or what have you all the time.

But then, if I've been in the business for 15-20 years, I'm a supervisor, I'm a--you know, I'm a managing director or an officer, there seems to be a different standard, a different criminal exposure.

I don't know how we can operate--I don't know how we can really go with a regime like that, because, at the end of the day, what--if you follow your position to its logical conclusion, at the end of the day, the person who's likely to be guilty is the person who the government decides to indict.

ANTONIA APPS: Your Honor, first of all, sophistication is clearly not a one-size-fits-all--it's not the only thing that matters. But courts have repeatedly recognized--

JDUGE 1: I was taking--I was teeing off on the answer you gave us.

ANTONIA APPS: It is but one factor. And courts have repeatedly recognized that the sophistication of the defendant is a factor to

take into account. It was taken into account in Obus. It was taken into account in Judge Winter's decision in [LIBERRA?]. It is a factor that's continually taken into account.

In this case, though, that was just one small factor. We didn't even--we barely even touched on sophistication in closing arguments. What we focused on were the facts, the facts of the payments, the fact that Newman was told it came from a company insider who was disclosing it at nights and on weekends, the fact that Chiasson directed his analysts to conceal the source of the information from official company reports.

And, by the way, you know, Mr. Fishbein talked about nights and weekends not being unusual. But if you look at the exhibits the government put into evidence of the calls, Government's Exhibits 26 and 27, for a two-year period, there are 68 calls between Ray and Goyal, and all save one was at night or on a weekend.

And just also there were a couple of matters that the--Judge Parker, that you brought up in--

JUDGE PARKER: Let me ask you this. Why is it, on the issue of whether the tippee's got

to know the personal benefit--explain why Judge Sullivan is right and all of his half-dozen colleagues are wrong.

ANTONIA APPS: Your Honor, as this Court--

JUDGE PARKER: Help me understand that.

ANTONIA APPS: Yes. Your Honor, at this--as this Court held in Obus, and it is consistent with Dirks; this Court held it in [LIBERRA?]; it has held it for decades: the elements of tippee liability are different from the elements of tipper liability.

And what the Court of Appeals in Obus held was, in order to establish tippee liability--and this stems back to [LIBERRA?]--that the tipper breached a fiduciary duty and that the tippee knew of the breach of the fiduciary duty. And that is exactly what the government proved in this case. And, were it otherwise, were there a contrary rule--

JUDGE PARKER: The SEC itself takes the position that Dirks requires knowledge of personal gain.

ANTONIA APPS: I don't believe the SEC has ever taken the position that downstream

tippee requires knowledge of a personal gain. And--but--Your Honor, by the way, since I think what you're alluding to is the defendant's argument about Reg FD, and the [UNINTEL], that's another point, to come back to the leaks.

It's clear that they had no faith--the defendants had no [FACE?] in the record, which was rejected by the jury, as to whether these companies leaked information, because they continually resort to references outside of the record, such as the Regulation FD and its enacting statutes.

But--and one more point on harmless error, Your Honor. With respect to NVIDIA, all you need to do is look at Government Exhibit 806, which is in the record 2109. Mr. Newman received an email the day before an earnings announcement for NVIDIA which said this information, information correct to the decimal point, was coming from an accounting manager at NVIDIA through a friend of mine. That right there is benefit under [JOW?].

JUDGE PARKER: What's the benefit?

ANTONIA APPS: Friendship is a benefit under [JOW?].

JUDGE PARKER: Friendship [UNINTEL]?

ANTONIA APPS: And so, that is count five for Newman and count 10 for Chiasson. And Chiasson--Sam Adondakis testified, at transcript 1878-79, that there was benefit--that the--excuse me, that the information came through a friend. Right there is benefit.

JUDGE PARKER: How does career advice--what's--explain--help me understand the government's career advice.

ANTONIA APPS: Career--the benefit that the government actually proved at trial, the career advice, was far higher than the benefit that was found sufficient in [JOW?].

In [JOW?], a tipper joined a--was recruited to join an investment opportunity, an investment club, and didn't in fact receive a single tip in that investment club. And the Court of Appeals held that the mere opportunity to receive a tip in the future--here we had far more, helping with the resume--

JUDGE PARKER: [UNINTEL] Ms. Apps, what you should do is stand closer to the microphone and keep your voice up. And that way, arguments--this is just hypothetical because you're doing a

fine job--because that way, your arguments go better. Is that career advice?

ANTONIA APPS: I'm not sure that that's good career advice, Your Honor. But, in this case--

JUDGE HALL: [UNINTEL PHRASE] now that he's [UNINTEL].

ANTONIA APPS: Apparently I was talking [UNINTEL]. But in this case, there was so much more. And it was assisting with resumes, putting good words in, sending across stock pitches, which would be used in investment [IN VIEW?], sending a resume to a recruiter. It is clear that it well passes the [JOW?]--

JUDGE PARKER: I'm sorry. I apologize for being facetious. But the underlying problem is that--and this may be, you know, our Court's problem and not yours. But the benefit standard is so soft. You get cases maybe like this one, where it just doesn't seem to amount to anything.

ANTONIA APPS: In which case, it makes no sense to impose--to have liability turn--of the downstream tippee turn on whether they received a benefit. And this point--this is a really important point, because--

JUDGE WINTER: [UNINTEL PHRASE] on this point, isn't it the case that the tipper who delivered the [UNINTEL PHRASE] always [UNINTEL] in the tipper's self-interest to do so? And that seems to be the government's [UNINTEL], the active self. In the [UNINTEL] case, the active self shows the tipper thought the tipper was getting some benefit.

ANTONIA APPS: That is not the government's position, and certainly not the facts of this case, where the defendants pressed for the information themselves and the tipper disclosed it three to five times a quarter for eight quarters in a row.

JUDGE WINTER: [UNINTEL PHRASE] the defendants [UNINTEL PHRASE] if they were actually [BRIBING?] to get it.

ANTONIA APPS: But they were bribing the first-level tippee to get it.

JUDGE WINTER: [UNINTEL PHRASE]

ANTONIA APPS: The--

JUDGE WINTER: Then, I mean, we're [UNINTEL] with Dirks. If you read the Dirks [AMENDMENT?] [UNINTEL PHRASE] it uses the word "guiding principle," has to establish a guiding

principle for people who have--who train all the time.

ANTONIA APPS: And with that--

JUDGE WINTER: [UNINTEL] nonpublic information. It wants to protect [UNINTEL]. And, unless there's some kind of [UNINTEL PHRASE] benefit coming to a tipper, there's nothing [UNINTEL] at all. The tipper will always find it in his or her self-interest to be doing what they're doing. It may be misguided, but they'll find it in there.

ANTONIA APPS: Your Honor, the guiding principle be that when--that the government should prove knowledge of a breach of trust. When you have a case like this one, when that's precisely what the government proved, because Newman paid for the information--you talk about bribing? Newman bribed the first-level tippee. The clear inference from that is that the original tipper was receiving some kind of benefit as well. And--

JUDGE HALL: Could you--

ANTONIA APPS: It's a really important point, too, members of the Court and Judge Winter, Mark Pomerantz opened his argument by

saying that there was no evidence that the tipper knew what information--what the benefit was, so the downstream tippees didn't know what the benefit was that the tipper received.

But as I understand the defendants, they're not even abdicating that the downstream tippee needs to know the kind of the benefit, whether it's chocolates or flowers, only that a benefit is received. And they make the same error in their briefs.

In the reply brief, at pages 24-25 for Chiasson's reply brief, it claims that Adondakis did not know whether the initial tipper benefit, and therefore Chiasson didn't know whether the initial tipper benefit--and again, I think that goes potentially to--

JUDGE WINTER: [UNINTEL PHRASE] going through your charge, the legal issues and putting aside the facts. What does the government, in the case of the derivative tippee, [UNINTEL PHRASE] case, [UNINTEL] misappropriation cases where theft [UNINTEL PHRASE] whether or not they knew about theft, they knew about it.

What does the government have to prove, beyond the fact that a derivative tippee, a

downstream tippee, let's say four levels down, has to believe that the information is nonpublic, in the sense that it's more accurate to the [UNINTEL], that the pricing [UNINTEL PHRASE] does not accurately reflect the information [UNINTEL] tippee has?

Second, go through [UNINTEL PHRASE] irrelevant that [UNINTEL PHRASE]. Third, that the numbers probably came from the company, and that the company had [UNINTEL PHRASE] policy regarding the information. Under the legal theory [UNINTEL PHRASE] prove more than that?

ANTONIA APPS: Well, Your Honor, the government has to prove knowledge of the breach. And here, of course, the [PERFORMERS?] were told that it came from inside the company.

JUDGE WINTER: [UNINTEL PHRASE] came from the company, the company had some confidentiality policy.

ANTONIA APPS: It depends on--I mean, that may or may not be sufficient in the circumstances. Here, of course, there was much more. But knowledge of the breach, I think, fairly understood, means knowledge of [FORWARD?].

JUDGE WINTER: [UNINTEL PHRASE] I

understand your [UNINTEL] there was much more here. I was talking about the legal instructions. [UNINTEL PHRASE] the instructions [UNINTEL] Judge Sullivan, the government's proof would be sufficient for proof of what I just said?

ANTONIA APPS: I'm not sure if we would agree that the "probably came from the company" is sufficient. It depends on the case. But I think it is critical to show that the defendants knew the information was sourced to the company and came directly from company insiders, which was true of every tip in this case, unlike the example--

JUDGE PARKER: [UNINTEL]

ANTONIA APPS: That Mr. Fishbein--sorry.

JUDGE PARKER: [UNINTEL] information is going to come from Dell. So, that's pretty self-evident.

ANTONIA APPS: Not necessarily. There--it's not necessarily true that it comes from Dell, and that there could come from--as an argument the defendants made was that this came from some kind of modeling or sell-side analyst.

But there was direct evidence that this information came from Dell of every tip that came

from the Dell insider. And for NVIDIA, the same is true. Unlike the example that Mr. Fishbein gave, where he talks about the $0.30, that wasn't sourced.

JUDGE WINTER: [UNINTEL PHRASE] in regard to [UNINTEL], I take it my description of what you--what these instructions required as proof [UNINTEL]?

ANTONIA APPS: Again, I think that we view it as a higher burden that we actually had from down--the District Court below.

JUDGE WINTER: [UNINTEL PHRASE]

ANTONIA APPS: Again, I think that, when you have to show that it comes--the defendants know that the downstream tippee--excuse me, the defendants know that the tipper breached a fiduciary duty of trust or duty of trust and confidence, I think you have to show more than it probably came from the company.

JUDGE WINTER: What do you [UNINTEL] that it came from the company? [UNINTEL PHRASE] it came from the company, or most probably came from the company confidentiality policy?

ANTONIA APPS: More than a confidentiality policy. They have to show--we

have to show that, in fact, it was adhered to. And the defendants argued, transcript 3815, that it wasn't enough to show that there was policy but there had to be a breach in fact.

And when companies--what--the argument they made to the jury, when the companies selectively disclose, there's no breach, and they didn't make--they weren't successful.

JUDGE WINTER: But on legal--I'm talking about legal instructions and you're talking about the proof.

ANTONIA APPS: I'm simply saying I think the burden is--that we actually had in the jury charge was slightly higher than as articulated by Your Honor. I don't think we need--we ultimate--at the end of the day, no Court in this Circuit--and, respectfully, Obus set forth the legal elements that we need to prove for tippee liability.

And so, those separate elements--and they specifically addressed the level of knowledge in order to be a participant after the fact, and held that we only need to know of the breach of duty, because that is synonymous with fraud, as was shown in this case. Just to this

point of--

JUDGE PARKER: So, why does the Supreme Court, in Dirks, give us a touchstone which says, "This is how you prove breach, actionable breach"?

ANTONIA APPS: For purposes of tipper liability, one must prove benefit. But, as the Seventh Circuit recognized in Evans, at page 324, despite the derivative nature of the liability, tipper and tippee liability differ. They have different elements. That is fundamental, that they have different elements. Every Court that has interpreted Dirks has found separate elements for tipper and tippee liability.

And Dirks itself failed to take the opportunity the defendants so wish they had of saying that knowledge by the tippee of benefit is required, notwithstanding Dirks addressed that you have to have benefit for tipper. It did not go additionally and say you have to have knowledge of the benefit. It said only knowledge of the breach of trust.

One point--this is very--the--I want to come back to the chocolates and flowers point, because, in the brief, at pages 24-25, in saying

that--

JUDGE WINTER: Doesn't Dirks say that the breach of trust involves getting a benefit?

ANTONIA APPS: For purposes of tipper liability, Your Honor. But, you know, the element--and O'Hagan talked about what it is. Although a misappropriation case, O'Hagan talked about the fact that the deception was in the--

JUDGE PARKER: Judge Winter's--

ANTONIA APPS: Sorry, Judge Winter. I didn't see.

JUDGE WINTER: I'm sorry. ANTONIA APPS:

ANTONIA APPS: I apologize. I couldn't see you talking there.

JUDGE WINTER: Oh, no, don't apologize. Talk about what you're talking about.

ANTONIA APPS: Did you have a question, Your Honor? I--

JUDGE WINTER: No. [UNINTEL]

ANTONIA APPS: Okay. To this point, they say that Adondakis didn't know whether there was a benefit received. But, in fact, the question in--at the appendix cite that they put in there, at 1190, was whether Adondakis knew what the tipper received, a fundamentally different

proposition, and not even one advanced--

JUDGE PARKER: [UNINTEL PHRASE] the government is resisting so much on the proposition that the person you're trying to convict has to know of the breach?

Because, you know, there--we 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. You know, it's a billion-dollar fund, so the gain was $50 million, it looks huge, and the jury will--eyes will [UNINTEL] over and so forth.

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?

ANTONIA APPS: Your Honor, the bright

line that the legal community currently has, and has had since the 1990s, is that the defendant, the downstream tippee, know of the breach of trust. That is the bright line that the country-- that New York has been operating under for decades, and it is the appropriate bright line in this case. To apply another--

JUDGE PARKER: So, [UNINTEL] the breach of trust?

ANTONIA APPS: For purposes of tipper liability--

JUDGE PARKER: [UNINTEL]

ANTONIA APPS: For purposes of tipper liability, the government must establish that--

JUDGE PARKER: What are the elements of breach of trust that the downstream tippee has to know?

ANTONIA APPS: That the--

JUDGE PARKER: And I agree it was charged you have to know there was a breach of trust.

ANTONIA APPS: That--

JUDGE PARKER: How does the government prove the breach of trust that the downstream tippee has to know?

ANTONIA APPS: That the disclosure of the information was unauthorized in contravention of the policies and the way they operate in principle, as written and in fact. And so, the argument that the defendants make on appeal, that they unsuccessfully made below, that a company like Dell leaks everywhere in selective disclosures, that goes to whether or not the company actually insists that the information is not disclosed.

It wasn't proved--the government proved that Dell didn't commit those kinds of disclosures, didn't disclose the topline earnings numbers. Yes, Dell talks to investors, all investors, about low-level information. But very different from the high-level information that was in fact disclosed in this case. And that is critical.

The defendants attempted to confuse the jury by saying that all this information was leaked, and it is--it was not. And we rebut each of those points in our briefs, Your Honor.

JUDGE PARKER: Now--

ANTONIA APPS: But fundamentally, the tips here were so--the defendants were told,

"This information came from company insiders." It was, again, information that was accurate to the decimal point.

And an example--just an example of the--to show that this information was not leaked, on the quarter in question that is part of the substantive, August of 2008, when Dell released its earnings numbers, the stock plummeted by 14 percent in a single day based on that information, showing that there wasn't a selective disclosure, as the defendants contend, of the information.

There was a couple of other points I wanted to address. I know I'm--I see that I'm out of time. But fundamentally, Your Honor, if I may just say that, you know, Obus set forth the elements of tippee liability, which differ from the elements of tipper liability.

JUDGE WINTER: [UNINTEL PHRASE]

ANTONIA APPS: It was, but it explicitly held that it applied to misappropriation and classical. And, by the way, Your Honor, the Courts have not--Obus was not alone in that, because Dirks, which was a classical case, has often been looked at as creating the elements for

tippee liability.

It only makes sense to harmonize that and have those elements of tippee liability be the same for classical and for misappropriation. Otherwise, we're left with a rule--to come back to Judge--

JUDGE WINTER: Well, that's fine. That's fine. It's just that, in misappropriation cases, the [UNINTEL PHRASE] of the information [UNINTEL] by the tipper.

ANTONIA APPS: I--

JUDGE WINTER: The tipper [UNINTEL PHRASE] the information. They're not [AN EMPLOYEE OR AGENT?] of the owner. And no one ever said in a misappropriation case that the tippee doesn't have to know of the misappropriation or the theft.

[UNINTEL PHRASE] there are cases that don't mention that because it's [UNINTEL PHRASE] the verdict. [UNINTEL PHRASE] was a case of the-- where the theft was mainly money, [UNINTEL] reported [UNINTEL] press. [UNINTEL PHRASE] There was no issue as to whether the defendant knew of the misappropriation.

ANTONIA APPS: Right. There certainly

was issues about the defendant's knowledge that were raised in Obus, of course, Your Honor. And fundamentally, to have a different rule for downstream tippee liability comes back to Judge Parker's question about a concern for having a bright-line rule, because you cannot achieve a bright-line rule if the downstream tippee liability rule is different for misappropriation versus classical cases.

Let's just take--if you posit slightly different facts here, if, instead of Ray intentionally breaching by disclosing the numbers to Goyal, if you'd posited that Goyal duped Ray, the--not even the defendants would claim they had a leg to stand on to argue that, as downstream tippees, they would be required to know of any benefit to the original tipper.

And so, that is--in order to have a uniform rule, as Obus recognized, explicitly saying it applies to classical and misappropriation--

JUDGE HALL: Thank you.

ANTONIA APPS: You should have a set of--oh, [UNINTEL]. Thank you.

JUDGE HALL: Thank you very much, Ms.

Apps.

ANTONIA APPS: Thank you, Your Honor.

JUDGE HALL: Mr. Pomerantz?

MARK POMERANTZ: First, I'd like to go back to what the District Court actually did require the government to prove here in terms of tippee knowledge. This is from the charge, at page 4033 of the transcript.

The defendant's knowledge was, as stated by the Court, "He must have known that it was originally disclosed by the insider in violation of the duty of confidentiality." That's what Judge Sullivan charged the jury. And the government's position is--

JUDGE PARKER: Is that all he charged them?

MARK POMERANTZ: Well, on the critical point of what a tippee has to know, the operative language is "a violation of the duty of confidentiality." So, the government's position is: it's okay; all you need is a knowledge by the defendant that there has been a breach of confidentiality.

And look at the slipperiness of this slope. The government concedes, because it has

to, because the Supreme Court has said it time and time again, it's okay, it's legal, to trade on material nonpublic information that comes from an issuer. Dirks, after all, traded on material nonpublic information that he knew had come from an issuer, Seacrest at Equity Funding.

The notion of nonpublic information is, I would submit--it's the same as confidential information. Indeed, the government proves information is nonpublic by showing the steps the company took to maintain confidentiality.

So, the government's posture is: it's okay to trade on material and confidential information known to come from an issuer, but you go to jail if you trade and you know there's been a breach of confidentiality. That is a distinction without a difference.

And, in any case, the bright line that Your Honor is quite right, people in this business, like Chiasson and Newman, are entitled to--the bright line is the line that was set by the Supreme Court in Dirks. In Dirks, the Court put it in language that is just unequivocal: "Whether disclosure is a breach of duty therefore depends in large part on the purpose of the

disclosure."

The test is whether the insider personally will benefit, directly or indirectly, from the disclosure. Absent some personal gain, there has been no breach of duty to stockholders.

So, that's the test. That's the test the Supreme Court has given us. And if that's the test for a fraudulent fiduciary breach by an insider, how can it be that a jury doesn't have to find knowledge of that aspect of a fraudulent fiduciary breach when you're considering tippee liability?

JUDGE PARKER: So, your position is that that quantum of knowledge is the only thing that meaningfully separates the ability to trade and the threat of jail if you do?

MARK POMERANTZ: Well, and it is a very--you know, the question whether personal benefit exists is a squishy one, and it's particularly squishy in this case when you get into concepts of career advice, friendship, and so on. But--but--you have to remember, however squishy the notion of personal benefit may be, it wasn't even given to the jury to consider here. The jury never even was told it had to find it.

So, you know, as a first point, the charge is insufficient. Then you get into the question of the sufficiency of the evidence. And I need to point out, of course, that, with respect to Mr. Chiasson, there's no evidence in the record, none, that he knew anybody was being paid, that he paid anyone.

And, when the government cites an exhibit to say, "Well, the knowledge of friendship was apparent," they're talking about the wrong link in the chain. There is no proof that the friendship between the NVIDIA insider and the first NVIDIA tippee was known to the defendants.

The document to which Ms. Apps refers is a friendship between the first-line tippee and the next tippee. And, of course, Mr. Chiasson is even further down the chain. So, it's even--

JUDGE HALL: Let me just take you back to my personal--I'm sorry, my first question, Mr. Pomerantz. And that is: is it Mr. Chiasson's view, the defendant's view in this case, that only demonstrating personal benefit is sufficient, the knowledge of personal benefit is sufficient to prove knowledge of fraudulent

breach?

MARK POMERANTZ: I think I would answer it this way: there are three components that the defendant has to know. One is the existence of a relationship of trust and confidence between the insider and the issuer. The second is a breach of the duty of confidence. And the third is personal benefit. You need all three. Those are the components of a fraudulent fiduciary breach, identified in Dirks but not only Dirks. And the notion that it--

JUDGE HALL: Doesn't Dirks tie the personal benefit to the breach?

MARK POMERANTZ: Yes. Yes.

JUDGE HALL: Not as a separate component. But you don't have a breach unless you have a personal benefit. Isn't--

MARK POMERANTZ: That's exactly the point. And that's where--

JUDGE HALL: [UNINTEL] is that exclusive? That's the question I'm trying to--is that the only way you can prove, the government can prove, fraudulent breach?

MARK POMERANTZ: In a classic insider trading case such as this one, I believe--and if

you take Dirks to mean what it said, and of course it was reiterated by the Supreme Court in later cases; it's never been retreated from--personal benefit is a defining aspect, a necessary aspect, of a fraudulent fiduciary breach.

Bearing in mind, of course, as the Court has emphasized, not every breach opens the door. This, although there is no statute, we're dealing here with a judge-made offense, this has to be fraudulent conduct.

So, the first question always has to be: where is the fraud? And the Supreme Court in Dirks said we can find the fraud if you have a relationship of trust and confidence and if you have an insider who betrays that relationship of trust and confidence for personal benefit.

And, again, I come back to the notion that, even if I'm wrong, and there are other forms of fiduciary breach that open the door to insider trading liability for tippees, the particular fraudulent fiduciary breach that the government attempted to prove here, and the one that was submitted to the jury when it--when the issue was, "Had the tippers done something

wrong?" and then we'll deal separately with the tippees.

But for tipper wrongdoing, for tipper criminality, the breach that the government alleged, the breach they say they proved, the breach that was submitted to the jury, is a fraudulent fiduciary breach contemplating personal benefit. It's just that a necessary component of that fiduciary breach, i.e. the contemplation of the receipt of benefit, drops out when you get to tippee knowledge.

And we're saying that's wrong. We're saying you can't--you know, it's like trying to have an egg sandwich but there's no eggs. You know, if the crime's tippee--you've consumed an egg sandwich, you can't say, "But we'll forget about whether the government has proved the existence of eggs." It just doesn't work.

It's an essential part of the fiduciary breach that there be personal benefit. That's the teaching of Dirks. And that wasn't here. And the--

JUDGE HALL: Thank you. Thank you, Mr. Pomerantz.

MARK POMERANTZ: Thank you, Your Honor.

JUDGE HALL: Mr. Fishbein?

STEPHEN FISHBEIN: Judge Hall, it's certainly our position that a fraudulent self-dealing by the insider is essential for the tipper's breach, and then the tippee has to know about it. And my point on sufficiency is that the government just didn't prove that.

And I take issue with the prosecutor saying that the leaks were somehow different than the charged information that my client was charged with. The leaks were very specific. Earnings per share of $0.30, contrary to what she said, that was attributed to an insider at Dell.

So, when Todd Newman gets the email, it's Dell Investor Relations saying 30-percent EPS. That's indistinguishable. Or, similarly, 18-percent gross margin, that was a specific leak from inside Dell. Everybody knew it was coming from inside Dell. It's a specific number, 18 percent. Same with 12-percent opex or missing revenues by a country mile.

And, in every one of those cases, the government concedes there was no personal benefit. There was no allegation of personal benefit.

So, from my client's perspective, you cannot go from, "It comes from the inside; it's specific," and then take the leap and say you must know about a personal benefit, especially when you look at the actual charge, the charge supposed tips. Jesse Tortora is constantly saying, "I guess," you know, "Maybe," "I think." It's always couched with uncertainty. And so, you put that all together, and, Judge Parker, to your point, it's just--it's not distinguishable.

Second, Ms. Apps said that my client paid a bribe. Nowhere in the trial record will you see that characterized as a bribe. That's a first time on appeal. The payment to Sandeep Goyal was a consulting payment.

It is undisputed that, when they hired Sandeep Goyal as a consultant, they hired numerous other consultants. He was hired to do legitimate work. That's what he said and that's what Jesse Tortora said. When he was hired and they--the amount of money--

JUDGE PARKER: Was there some visa problem there?

STEPHEN FISHBEIN: Yes, yes. Exactly. In other words, Goyal had a visa problem, and that's

why he said, "Pay my wife instead." But the undisputed evidence was, when they set that up, it was for Sandeep Goyal to do legitimate consulting for Tortora and for Diamondback.

So, to say now that it's a bribe, when they never argued that at trial, they never argued even in their appellate briefs that this consulting payment supports an inference of a benefit, a benefit to Rob Ray, when they know for a fact that none of the money that Sandeep Goyal got went to Rob Ray. Goyal said, "I did not transfer any of the money to Rob Ray. I didn't even tell him he was getting paid."

And if I could just illustrate it like this, it's a very common instruction in this courthouse. You see somebody walk into the courtroom, dripping wet; you can infer that it's raining. But if I prove for a fact at trial that there's somebody downstairs spraying people with hoses when they come into the courthouse, you wouldn't give that inference, because you know that it's not true.

And that's exactly what's going on here. We proved unequivocally that none of the money went to Rob Ray. He didn't get that kind of

benefit. And so, to infer it is just a specious inference. Thank you.

JUDGE PARKER: Thank you.

JUDGE HALL: Thank you.

JUDGE PARKER: Thank you all.

JUDGE HALL: Thanks, everyone. We will reserve decision.

Gotham Transcription states that the preceding transcript was created by one of its employees using standard electronic transcription equipment and is a true and accurate record of the audio on the provided media to the best of that employee's ability. The media from which we worked was provided to us. We can make no statement as to its authenticity.

Attested to by:

Sonya Ledanski Hyde

F

KRAMER LEVIN NAFTALIS & FRANKEL LLP

BARRY H. BERKE
PARTNER
PHONE 212-715-7560
FAX 212-715-7660
BBERKE@KRAMERLEVIN.COM

May 8, 2014

BY CM/ECF AND HAND DELIVERY

The Honorable Harold Baer, Jr.
United States District Judge
Southern District of New York
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *SEC v. Michael Steinberg*, No. 13 Civ. 2082 (HB)

Dear Judge Baer:

We represent defendant Michael Steinberg in the above-referenced action. For the reasons set forth below, we write to request that the Court (1) stay or otherwise extend the current summary judgment briefing schedule, pending the Second Circuit's disposition of the appeal in *United States v. Newman*, Nos. 13-1837-cr(L) & 13-1917-cr(con), and (2) remove the case from the Court's trial calendar. The Securities and Exchange Commission ("SEC"), by Daniel R. Marcus, Esq., joins in this request.

As Your Honor knows, on December 17, 2012, Todd Newman and Anthony Chiasson were convicted, after a joint jury trial before Judge Richard Sullivan, on charges that they traded securities of Dell Inc. ("Dell") and Nvidia Corporation ("Nvidia") while in possession of material nonpublic information obtained from Dell and Nvidia insiders. Three months later, the government charged Mr. Steinberg with trading on material nonpublic information obtained from the same company insiders. After trial in front of Judge Sullivan, a jury found Mr. Steinberg guilty on December 18, 2013. He is scheduled to be sentenced on May 16, 2014.

On April 22, 2014, the Second Circuit heard oral argument in the *Newman* case. The primary issue on appeal in *Newman* is whether Judge Sullivan erred by declining to instruct the jury that, to be found guilty of insider trading, remote or "downstream" tippees like Messrs. Newman and Chiasson (and Steinberg) must have knowledge that the information upon which they trade was disclosed by the tipper in exchange for a personal benefit. Acknowledging that issue to be one that presents a substantial question of law that could result in new trials or

judgments of acquittal for the defendants, the Second Circuit last year ordered Newman and Chiasson released on bail pending appeal. Order, *Newman* (June 21, 2013).[1] It later observed in another case that the issue remains open in our Circuit. *See United States v. Whitman*, --- F. App'x ---, No. 13-491, 2014 WL 628143, at *6 (2d Cir. Feb. 19, 2014).

When the *Newman* appeal was argued last month before Judges Peter Hall, Barrington Parker, and Ralph Winter, the panel's questions appeared to express skepticism as to the sufficiency of Judge Sullivan's jury instructions regarding downstream tippees.[2] Because of the factual similarities between the charges against Mr. Steinberg and Messrs. Newman and Chiasson, and because Judge Sullivan gave the same instruction now being appealed in *United States v. Newman* to the jury that convicted Mr. Steinberg, if the Second Circuit reverses or vacates the convictions of Messrs. Newman and Chiasson, it likely will grant the same relief to Mr. Steinberg after his conviction is entered and appealed. In that event, any estoppel that would otherwise operate collaterally in the SEC's favor in this case would no longer apply. *See* Fed. R. Civ. P. 60(b)(5) (authorizing court to relieve party from final judgment based on earlier judgment subsequently reversed or vacated). Accordingly, it would be inefficient and unnecessarily burdensome to the Court and the parties for the SEC to seek summary judgment or for the parties to proceed to trial in accordance with the current schedule.

For these reasons, the parties respectfully request that the Court remove the case from the August trial calendar and stay the dispositive motions deadline until 60 days after the Second Circuit issues its mandate in the *Newman* case. Should the Court wish to set a control date and schedule a status conference, the parties would propose Wednesday, October 22, 2014 — approximately six months from the date of the *Newman* oral argument.

The parties are available for a conference at the Court's convenience if Your Honor has any questions or would like more information.

Thank you for your consideration.

Respectfully submitted,

/s/ Barry H. Berke
Barry H. Berke

cc: Daniel R. Marcus (by CM/ECF)
Counsel to Plaintiff Securities and Exchange Commission

---

[1] A copy of the Second Circuit's order releasing Messrs. Newman and Chiasson is attached to this letter as Exhibit A.

[2] An unofficial transcription of the oral argument, prepared at the request of Kramer Levin, is attached as Exhibit B. Additionally, we will hand deliver to the Court an audio recording of the *Newman* argument obtained from the Second Circuit Clerk's Office.

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of June, two thousand and thirteen.

Before: Guido Calabresi,
José A. Cabranes,
Barrington D. Parker,
Circuit Judges.

United States of America,

Appellee,

v.

Todd Newman, Anthony Chiasson,

Defendants - Appellants.

ORDER
Docket Nos. 13-1837(L)
13-1917(Con)

Appellants Todd Newman and Anthony Chiasson filed motions for bail pending appeals pursuant to FRAP Rule 9(b). The Government opposes bail. Following argument of the motions on June 18, 2013 the panel ruled from the bench as follows:

IT IS ORDERED that bail pending appeal is granted on the terms previously set by the district court. The case is remanded to the district court for the purpose of adjusting the bail conditions as may be necessary during the pendency of the appeal. The mandate shall issue forthwith for these limited bail-related purposes.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

EXHIBIT B

United States v. Newman,

Nos. 13-1837-cr, 13-1917-cr

April 22, 2014 Oral Argument

Before the U.S. Court of Appeals for the Second Circuit

JUDGE WINTER: Okay.

JUDGE HALL: The next case is United States versus Newman and Chiasson.

MARK POMERANTZ: May it please the Court, I'm Mark Pomerantz. I represent the appellant, Anthony Chiasson. I'd like to get right to the main legal issue that we've raised for the Court.

Anthony Chiasson is a remote tippee. He had no involvement with the insiders at Dell and NVIDIA. He received information fourth-hand. And, when it reached him, he knew simply that it came from inside those companies. He did not know that the insiders had disclosed the information in exchange for career advice, friendship, or indeed any other form of personal benefit.

The trial judge held, over objection, that proof of his knowledge was not required. When Judge Sullivan instructed the jury, he did tell the jury that the insiders had to receive or anticipate receiving some personal benefit. But he held that the defendants did not have to know about the receipt of the personal benefit. And so, the jury was not required to find that

knowledge.

We believe this was error. Five district judges in this circuit--Judge Sweet in State Teachers against Fluor, then-District Judge McLaughlin in the Santoro case, Judge Holwell in Rajaratnam, Judge Rakoff in the Whitman case, and most recently Judge Gardephe in the Martoma case--have held that a tippee does have to know that insiders exchanged information for personal benefit, and that jurors have to be so instructed.

JUDGE PARKER: Am I correct that in Martoma, the government went along with that charge.

MARK POMERANTZ: I believe, Your Honor, that, in Martoma, the government submitted a different charge, and Judge Gardephe went with the version of the charge that we believe was the correct version. But I--

JUDGE PARKER: Which is that the defendant had to know of the--

MARK POMERANTZ: That the defendant had to know. To our knowledge, Your Honor, Judge Sullivan is the only judge to have held to the contrary. And that's because--

JUDGE HALL: Sorry, back to that point, the reason that the defendant has to know that is because that's how--Dirks tells us that that's the only way to prove breach of duty?

MARK POMERANTZ: No, Dirks tells us that tippee liability is derivative. I'll retreat for a moment; I know that Your Honor is familiar with this, but, of course, there's no generalized duty to the marketplace. Chiasson is a stranger to those who are on the other side of his trades. He's a stranger to Dell and NVIDIA. He owes no duties of his own to refrain from trading.

And, indeed, the law is clear that the mere receipt of material nonpublic information, even material nonpublic information that comes to a person from an insider, doesn't give rise to any duty to abstain from trading.

Because liability for the tippee is derivative, it means there has to be a guilty tipper. If the tipper engages in a fraudulent fiduciary breach, of which the tippee has knowledge, the tippee, in effect, becomes an accessory after the fact in the tipper's fraudulent fiduciary breach.

And the relevance of personal benefit

and the knowledge of personal benefit is that not every breach of duty opens the door to insider trading liability. Dirks is quite clear on this. Dirks says--

JUDGE HALL: So your answer to my question is basically yes.

MARK POMERANTZ: Yes. Dirks says there has to be a fraudulent fiduciary breach. And Dirks goes on to define a fraudulent fiduciary breach in terms of the tipper's exchange of information for personal knowledge.

And that, after all, was precisely the fraudulent fiduciary breach that the government was attempting to prove in this case. And it's precisely that fraudulent fiduciary breach that Judge Sullivan submitted to the jurors and said, "You have to find first that the tipper engaged in a fraudulent fiduciary breach." And he defined it correctly.

When he told the jury, "You have to find the tipper has engaged in a fraudulent fiduciary breach," he incorporated all of the ingredients of a fraudulent fiduciary breach identified by the Dirks court: the existence of a confidential relationship, a relationship of

trust and confidence, the breach of a duty of confidentiality, and the anticipation or the receipt of personal benefit.

So, that's what constitutes the fraudulent fiduciary breach that was alleged. But when it came to the tippee's knowledge of a fraudulent fiduciary breach, Judge Sullivan left a piece out of the equation. He left out of the equation the knowledge that the tipper was receiving some form of personal benefit. And that is what the Dirks court says takes a breach of confidentiality and transforms it into a fraudulent fiduciary breach.

JUDGE HALL: So, is that the only--excuse me; go ahead.

JUDGE PARKER: You had proved--help me recall this--that there were other disclosures of nonpublic information from Dell that was routine. What--flesh that out for me.

MARK POMERANTZ: Yeah. The record was replete, Your Honor, with the fact that Dell and NVIDIA were leaky companies, and that all kinds of material information reached the defendants, information that related to earnings, that related to margin.

JUDGE PARKER: So, how does this information differ from the information that they got indicted on?

MARK POMERANTZ: Well, I think that was the point of the defense, Your Honor, is that there was no significant difference. And what it illustrates is that information--confidential information, material information--is the coin of the real in the securities business. And much information reaches portfolio managers like Mr. Chiasson, like Mr. Newman, without any indication that it has been exchanged for personal benefit.

So, the relevance of it was: you can't infer from simply the fact that information, indeed sensitive information, indeed confidential information--you cannot infer from the fact that it has reached a third party, a portfolio manager--you can't infer from that fact alone that some form of personal benefit to the insider was exchanged for that information.

And that's the touchstone here. It's the touchstone not only under Dirks and follow-on cases, Bateman Eichler, which we cite in the brief. It's not only the securities law. It's general principles of criminal law that support

our argument.

Where you have a defendant like Chiasson, who is alleged to be a secondary actor, to be guilty of a crime because he was a participant in the insider's crime, then it's--I won't say hornbook law, but I think well settled law that what the secondary actor has to know are all of the circumstances that make his participation participation in a crime.

And one of those circumstances was the exchange for personal benefit. If the insiders had not exchanged information for personal benefit, the government concedes there is no crime here. But the disjuncture, the oddity, is, although the government acknowledges that receipt of personal benefit, or the anticipation of personal benefit, has to be an ingredient of the tipper liability. That's what makes the tipper's conduct criminal.

And even though the government concedes that the tippee has to know of the fraudulent fiduciary breach, they say it's okay to leave that piece out of the equation. And we say it's not okay. It's not okay under Dirks; it's not okay under general principles of criminal law;

and it's not okay under principles of willfulness in cases like X-citement Video and Morissette that we cite in the brief. I see my bell is--

JUDGE PARKER: Answer me this: Obus and Dirks, as I recall, were civil cases.

MARK POMERANTZ: Yes.

JUDGE PARKER: So, is the principle different with respect to civil cases as opposed to criminal prosecutions?

MARK POMERANTZ: We think that the arguments we're making apply equally in the civil context, with one caveat: there is the formulation in Dirks where the Dirks court speaks of the tippee's knowing or should-have-known of the tipper's fraudulent fiduciary breach. It may be that, in a civil case, a should-have-known is sufficient.

But for purposes of criminal liability--and this is, I think, undisputed here--Judge Sullivan charged the jury with the government's consent that the standard of knowledge was knowledge, not should-have-known. And what he listed was what the defendant has to know.

He did charge the jury that a defendant has to know of a simple breach of

Page 10

confidentiality. But, when he made that charge, he's saying that a defendant has to know facts that don't constitute a fraud and don't constitute a crime.

JUDGE HALL: Is the only way to have a fraudulent breach of the duty that the tipper receives something of value?

MARK POMERANTZ: Well, that is certainly the breach and the definition of the breach that's identified in Dirks. And in--

JUDGE HALL: Yeah. Does Dirks give an example? Or is Dirks the [UNINTEL] the profits on that?

MARK POMERANTZ: Yeah. For purposes of this case, Your Honor, the answer doesn't matter, because that--it's the Dirks definition of a fraudulent fiduciary breach that was the fraudulent fiduciary breach that got tried in this case.

That's the fraudulent fiduciary breach that the government attempted to prove; that's why you've had all the evidence about career advice and friendship. That's the fraudulent fiduciary breach of the tipper that was given to the jury as an essential ingredient.

Page 11

So, if--I can't conceive readily of a fraudulent fiduciary breach in the insider trading context by an insider that would qualify without the exchange of personal benefit that Dirks contemplates. But even if, theoretically, there's another flavor of fraudulent fiduciary breach that qualifies, that's not the one that was at issue in this case. At issue in this case was--

JUDGE HALL: So, what if the--

MARK POMERANTZ: Classic Dirks.

JUDGE HALL: What if the defendant, the tippee or the derivative tippee, thinks, "Boy, you know, I've found a well here. This--great information keeps flowing, and we get it periodically. This is too good to be true."

Does that approach knowledge of the source being--doing something that is a fraudulent breach of confidential duty? Or is he just talking in his sleep and his wife's passing it on to somebody?

MARK POMERANTZ: Well, we can certainly imagine cases where the circumstantial evidence is so compelling that the government can credibly argue that a defendant did know that the insider

Page 12

must have exchanged this information for personal gain. But, two points.

One: this is not such a case, and that is where the relevance of the other information comes in. And second, even if it were such a case, that theory was just never given to the jury. We could never litigate the issue of whether Mr. Chiasson knew about personal benefit, because Judge Sullivan said, "It's not a defense; I'm not submitting it to the jury," so we couldn't try it; we couldn't sum up on it; we couldn't litigate the issue.

So, even if one could imagine a set of circumstances that kind of take this to the edge, that's not this case and it's not the basis on which the basis on which the [UNINTEL].

JUDGE PARKER: Did the government try to prove that he knew about some sort of personal benefit?

MARK POMERANTZ: The government did not try and prove that Mr. Chiasson knew about personal benefit, because--well, A, there was no--whether they wanted to try or they didn't, there was no such proof. I mean, you know, the evidence just wasn't there.

Page 13

I'm not suggesting that the government had proof of knowledge of personal benefit that it kept in its pockets. It didn't prove it. And Judge Sullivan didn't require the government to prove it. So, the issue, you know, dropped out of the case when the charge was given to the jury.

And it is an unfortunate circumstance, because we believe that the evidence was undisputed that Chiasson didn't know and couldn't have known. The government's main cooperator as Chiasson, Sam Adondakis, testified that he didn't know that the tippers, the insiders, were exchanging information for any form of personal benefit.

It was undisputed that all of the information that came to Chiasson came through Adondakis. So, if Adondakis didn't know, it's hard to understand how Chiasson would know. And it's impossible to understand the government's harmless error argument. But I'll leave that.

JUDGE HALL: Thank you, Mr. Pomerantz.

JUDGE PARKER: Thank you. Thank you, Mr. Pomerantz.

JUDGE HALL: You've reserved two minutes for rebuttal. Mr. Fishbein?

Page 14

STEPHEN FISHBEIN: Thank you. May it please the Court, Stephen Fishbein. I represented Todd Newman at trial and on this appeal. The evidence at trial was insufficient, under the correct legal standard, to convict my client. And I'm going to address both knowledge of the benefit and also whether there was a breach or a benefit in the first place.

Starting with knowledge of benefit, there was no proof--Judge Parker, I think you asked the question--that Todd Newman knew of any benefit to any of the corporate insiders. And I should point out that we made clear at the beginning of this case what the correct legal standard was. We put it in our jury charge; we argued it to the judge.

The government knew full well, throughout this trial, that we would be pressing that issue. They knew full well that every District Court had required knowledge of benefit. The judge did not decide what the jury charge would be until the close of the government's case.

So, the government had every incentive to put on every piece of evidence it had to show

Page 15

that Todd Newman knew about a benefit, and it came up with nothing. There was no direct evidence of that.

On appeal, they shift gears and they argue for what's in effect a double inference. They say that the circumstances suggest that the information was confidential and that it was not authorized to be disclosed. They then want to take a leap and say that, if you know that information came from the inside, and that it wasn't authorized, you must know about a benefit.

JUDGE PARKER: What was the government's theory about how you can tell the difference between nonpublic material information that you can trade on and nonpublic material information that you go to jail if you trade on? How did they offer that?

STEPHEN FISHBEIN: My interpretation was, "I know it when I see it." We did not think there was any bright line, and that was really our point. And I'd like to get into some detail on that.

You know, they say that the information that you can't trade on that came through Goyal and Tortora, you know, was quarterly information.

Page 16

Well, the leaks, where there was no dispute that there wasn't any personal benefit, that was also quarterly information. It was accurate.

Let me give some specific examples. We proved leaks in this case. And, again, the premise here--it was agreed by everyone, the witnesses and everyone, that these leaks were not in exchange for personal benefit. And yet there were specific numbers: gross margin, 18 percent. Operating expense, 12 percent.

I'll give one ex--one of the leaks was an earnings-per-share number of $0.30 for the quarter. Now, Mr. Tortora, the government's star witness, said that, when he got this supposedly bad information from--on Dell, he never got earnings-per-share. He only got the ingredients for earnings-per-share. And yet we have an email that went to my client saying that a specific earnings-per-share number came out of Dell from an insider six days before the earnings release.

And what that shows is that, if you're a portfolio manager and you're receiving information that maybe you believe that not everybody has, and that it came from the inside, that is at least equally consistent with a leak

Page 17

for which there is no personal benefit as there being a personal benefit.

And I think the law is very, very well established that, if facts are equally consistent with an innocent explanation and a guilty one, that does not support proof or an inference beyond a reasonable doubt.

And just to put a point on this, I would urge the Court to take a look at trial transcript page 688. It's Appendix 597. And there, again, the star witness, Jesse Tortora, who was the conduit for this information, he said it was routine. It happened repeated times where he would be with management of a company, not only investor relations but management, executives, anybody, and he would--he said, "I got confidential information."

He even said, in his words, "It was information that I knew they shouldn't disclose." And he was asked a very direct question. "Did you give a personal benefit for that?" Answer: "No."

So, in light of the reality that was proved at this case, where inside confidential information comes out of a company not for personal benefit, but for other reasons, you

cannot infer beyond a reasonable doubt that it's only for personal benefit.

Now, I'm sure the government, as they did in their brief, they're going to say, "But Mr. Newman, you know, paid as a consultant one of the intermediaries, Mr. Goyal." That, of course, does not establish that the money was then transferred from Goyal to the insider. And, in fact, in this case, we proved that that was not the case.

JUDGE HALL: Does it only have to be money?

STEPHEN FISHBEIN: It does not only have to be money, no. The Supreme Court says, you know, a reputational benefit that will translate into future earnings. The government's theory with respect to Rob Ray was that it was career advice. But there was zero--zero--testimony that Mr. Tortora ever told Newman, or that Newman knew in any way, shape, or form, that Goyal was given career advice. And I'll come to the sufficiency of the benefit in a minute.

But I think the point that I want to make is that here we know for a fact that Goyal did not give any money to Rob Ray. In fact, he

didn't even tell Rob Ray that he was getting paid.

So, certainly the fact that Diamondback is employing consultants, which they did on a regular course--Goyal's consulting arrangement was set up before Rob Ray was in the picture, so there was nothing suspicious about it when it was originated. So, none of that supports this double inference the government is trying to make to the effect that you can infer a knowledge of a personal benefit.

Let me shift now to sufficiency of the breach to begin with. And let me start with the fact that neither insider here, neither Rob Ray nor Chris Choi, the insider at NVIDIA, has been charged criminally, civilly, or administratively. And, to my knowledge, in the recent spate of insider trading cases by the Southern District, this is the only one in which the insider was not charged with something.

And the reason for that is because, as Mr. Pomerantz said, it's derivative liability. Their whole theory is that the insiders are guilty of a terrible crime. And yet they haven't charged them. And I respectfully submit that the

reason they haven't done that is because, in fact, when you really drill down into the evidence, there is no sufficient evidence of breach or sufficient evidence of benefit.

Now, on breach, the government put in broad confidentiality policies with Dell and NVIDIA saying that all quarterly information is confidential. Now, we know that companies didn't abide by that, because we see all the evidence of leaks.

And in this Court's decision in the Mahaffy case, the Court made very clear that you don't only take into consideration the broad corporate policy, but also if the company took steps to actually keep the information confidential.

Now, here we have the benefit that Rob Ray's boss, the boss of the insider at Dell, testified. And he testified about what's allowed and what's not. And he specifically said that, in the case of modeling, discussions about analyst models, that company insiders are free to sort of give hints and help analysts with their models by saying, "Your model's too high; your model's too low." He said, "We talk about the quarter. We

talk about specific line items."

Now look at what Sandy Goyal testified as to how he got this information from Dell. His testimony was very, very clear. He said, "I called up Rob Ray. I told him I was working on a model. And that's when I got the information. I didn't tell him I was trading. I just told him I needed help on a model to know whether I'm too high or too low."

So, if you compare what Sandy Goyal said to Rob Ray, and they were compared against what Rob Ray's boss said was permissible--and this is transcript page 2926, which the government also cites. But I respectfully submit that those--that page and the next one fully support our position. Rob Williams said he was authorized to talk to an analyst about the models and whether the assumptions and their numbers were too high or too low.

I see I've run out of time, but I'll save the rest for rebuttal.

JUDGE HALL: Thank you, Mr. Fishbein. You've reserved two minutes. Ms. Apps?

ANTONIA APPS: May it please the Court, I represent the government on this appeal and I

Page 22

represented the government below. The District Court properly instructed the jury that they had to find the defendants knew--

JUDGE PARKER: Well, before you get into that, I have something else to ask you. I looked at the--some of the docket sheets in the records and the indictments involving some of the players in this case. So, Adondakis was indicted before Judge Keenan. Tortora was indicted before Judge Pauley; Goyal, I believe, before Judge Forrest, and then Martoma before Judge Gardephe. And then, finally, we get to the men of the cases before--the defendants, who were before Judge Sullivan.

Can you--and I notice a pattern of when you indict individuals and when you supersede. Can you allay my concern that what the government did was move these indictments around until they got up before--they could get their main case before their preferred venue, which is Judge Sullivan?

ANTONIA APPS: Your Honor, it is not uncommon for the U.S. Attorney's office, when an individual cooperator is going to plead guilty ahead of time, to put it in the wheel and wheel out, which is what we did with every cooperator

Page 23

before the four defendants were charged in January of 2012.

At that time, again, it went into the wheel. And the judge that was drawn from the wheel was Judge Sullivan. And that is the judge who presided over the case. It is quite common for the office to, when they have cooperating witnesses, simply to put them in the wheel as they did in this case.

JUDGE PARKER: Then, once you got Judge Sullivan, you superseded with Mr. Steinberg.

ANTONIA APPS: We did, Your Honor. That, I think, was a different situation. The analyst who was the main cooperator against the subsequent defendant, Mr. Steinberg, was an analyst who was part of the conspiracy and who was charged initially and wheeled out to Judge Sullivan.

There were a whole host of reasons as to why it made sense to supersede Mr. Steinberg into the existing case before Judge Sullivan, not the least of which was judicial efficiencies, in that Mr. Sullivan had--Judge Sullivan, I beg your pardon, had presided over not only a course of the pretrial, enormous amount of pretrial

Page 24

litigation, but of course a six-week trial in which the issues were the same.

Mr. Steinberg was alleged to be part of the same conspiracy that was tried in front of Judge Sullivan. And many of the witnesses were the same. Jesse Tortora, a cooperating witness, testified in both trials, as did the corporate witnesses. It was a very similar--the evidence that the government put forward in both cases involved a lot of overlapping witnesses, a lot of overlapping testimony, and common issues of law and fact.

JUDGE WINTER: Were you trying these people together? You're talking about efficiencies that are a benefit [UNINTEL] trial. Was there any attempt to try Steinberg with somebody else? There's no [UNINTEL PHRASE].

ANTONIA APPS: There was not enough time to try Steinberg with the two defendants Newman and Chiasson who were tried--

JUDGE WINTER: Where are the efficiencies then?

ANTONIA APPS: Your Honor, the same judge who has presided over the trial, and which involved--was a lengthy, complex trial for six

Page 25

weeks, presided over the same issues and had--

JUDGE WINTER: I'm not an expert. I've been connected with the Second Circuit for almost all of my professional life a lot of [UNINTEL PHRASE] there were issues that were United States against Rosenberg, where the government marked a criminal case as related.

And at some point, the Southern District changed the rule there, which you can mark a criminal case related, and thereby pick your judge. It caused a great deal of controversy in the Rosenberg case. Now you're trying--you're doing the same thing by superseding the indictments.

So, under the Rosenberg case, the finding was there was a witness in common, which in the prior case Judge Kaufman had trial [UNINTEL] the Rosenbergs. But you're just [UNINTEL] the rule, right?

ANTONIA APPS: I respectfully disagree, Judge Winter. We did--I'm not familiar with the case that you mentioned, but there was not just one overlapping witness. There were numerous overlapping witnesses. This was the same case.

There were certain efficiencies that,

Page 26

to put it into--to supersede Mr. Steinberg into the existing case, which, of course, the defendants had not at that time been sentenced, it is--the United States Attorney's Office occasionally does exactly this.

Of course, Judge Sullivan, who was presiding, indicated on the record that he had consulted with Chief Judge Preska about whether the supersede--it was appropriate to proceed on the superseder with Michael--the defendant Michael Steinberg, and ultimately ruled that it was appropriate under the local rules to do so.

JUDGE PARKER: And it was just coincidence that the judge--these cases [UNINTEL] sheer coincidence was the one judge on this list who had bought into the government's theory on knowledge of personal gain.

ANTONIA APPS: Your Honor, first of all, if I may--

JUDGE PARKER: --All the other judges on the list had rejected it, and the government had given it up in the case before Judge Gardephe.

ANTONIA APPS: I'm not sure I understand, Judge Parker, what you mean by "list." But in fact there were other judges in

Page 27

cases that the defendants routinely in large ignore: Judge Keenan in Thrasher.

There was a case in Musella where it's clear that the judges in those cases held that the government did not need to prove, for purposes of establishing tippee liability, that the defendant knows the circumstances of the initial--of the breach by the original tipper. And so, it is, respectfully, not true that Judge Sullivan is out there alone.

Also, just to address a question that Your Honor, Judge Parker, raised with respect to Martoma, of course, Martoma was a case where the defendant was the first-level tippee who gave their benefit to the tipper. And the fact that the government acquiesced in an instruction and thereby avoided an appellate issue should not be seen as in any way a signal that the government concedes its position.

And clearly, it makes sense for District Judges mindful of not having to retry cases that, when an issue is pending before the Circuit, to adopt a conservative jury instruction--

JUDGE PARKER: But the conservative

Page 28

instruction was the opposite of what you were insisting in this case was required by the law.

ANTONIA APPS: But--

JUDGE PARKER: And so, I don't understand why anyone is doing a service, I mean to a jurist, where it looks like the government is taking completely inconsistent views on critical information, a critical point of law--and you can see how important it is because we're all concerned about it--for some--

ANTONIA APPS: Wait--

JUDGE PARKER: Very difficult to understand tactical benefit.

ANTONIA APPS: Your Honor, we--

JUDGE PARKER: Ms. Apps.

ANTONIA APPS: Sorry, Judge Parker. But we often take--accept a burden that is higher in a particular case when there's a pending issue for appeal.

For example, in this very case, the jury was instructed that they had to find that the information was a substantial factor as a basis for trading, notwithstanding that, on appeal in the Rajatnaram case, not decided at the time of the Newman trial, the government had

Page 29

taken the position that it need only be a factor. And so, we often do that.

JUDGE PARKER: You can understand how we're--or at least I'm concerned that the government's position on these key points of law seems to be varying according to which judge you're talking to.

ANTONIA APPS: I respectfully disagree that that is the way it works, Your Honor. We selectively--we may select which issues to litigate in any particular case. Why would--it would make no sense to insist on a jury instruction in Martoma when the defendant is the one who paid the tipper. And that is--it is clearly established that there would be no reason to take that issue on appeal.

JUDGE PARKER: [UNINTEL PHRASE] on the point of law, you'll no doubt win on appeal.

ANTONIA APPS: Well, and--

JUDGE PARKER: Right?

ANTONIA APPS: But we often don't. We often are risk-averse in these situations. There's an enormous amount of resources that go into litigating a particular case.

There are sometimes--for some cases, we

Page 30

select an issue to take up on appeal that we may not do so in another case, just as I indicated we accepted the higher burden on the known possession of information in this very case, notwithstanding in Rajatnaram, that preceded it, we had opted to challenge the lower burden.

If I may, Your Honor, though, at the end of the day, it does turn on what the answer to the fundamental underlying legal question is. And we think that the District Court properly instructed the jury that they had to find the defendants knew the information was disclosed in breach of a duty of trust and confidence.

And the evidence overwhelmingly supported that finding. The defendants were told they were receiving secret earnings numbers from company insiders before those numbers were released to the public, numbers which were at times accurate to the decimal point.

They received those numbers quarter after quarter after quarter. And they pressed their analysts to get the updates from the company insiders. They were told that the information originated from individuals, employees inside the company with access to the

Page 31

internal rolled-up numbers. And, while Newman seeks to--

JUDGE PARKER: [UNINTEL] is this argument pointed in the direction that, if the charge were inaccurate, the error would be harmless?

ANTONIA APPS: Your Honor, we certainly make the harmless error analysis. And, in particular, on that point, Newman paid Goyal $175,000 for the information. There is absolutely an inference that he knew Goyal, who was getting the information from someone inside the company, understood that that employee was receiving some kind of benefit. Newman knew that the--Goyal's contact, [UNINTEL]--

JUDGE PARKER: How are we to--help me understand: if this information--if information concerning Dell's earnings is routinely leaked and can be traded on, how do we know--what's the principle--

ANTONIA APPS: I--

JUDGE PARKER: That criminalizes some information, some of this information, and makes virtually indistinguishable information innocuous?

Page 32

ANTONIA APPS: I'm glad you brought that up, Judge Parker, because the arguments on the leaks are just plain wrong on the facts. And Tortora--to answer some of the questions, the--what the company--Tortora testified that Dell didn't leak the top-level earnings numbers.

You asked Mr. Pomerantz, I believe, "How did the information that the insiders like Rob Ray provided differ from the information that the companies disseminated to the public in an authorized fashion?" And they differed markedly.

Companies routinely talk about general business trends, long-term outlook. Sometimes they use numbers. But sophisticated market professionals like Chiasson and Newman know full well that that is not the same as receiving the revenue or gross margin number before it is released in that quarterly announcement.

And we went through in our briefs and we outlined why those claims that the defendants made were wrong. And, in fact, they, in some sense, an acknowledgement of their own weaknesses when they feel they need to cite information outside the record in order to support that claim.

Page 33

JUDGE HALL: So, was the [UNINTEL]--

ANTONIA APPS: And it wasn't our--beg your pardon, Judge Hall.

JUDGE HALL: Is the argument that the nature of the information, as you've described it, the specificity and the granularity of it, somehow is proof that it was fraudulently leaked?

ANTONIA APPS: That is one of the factors and one of the elements in this particular case, because, in addition to those factors--and, by the way, it was quarter after quarter after quarter, inconsistent with any notion of accident or mistake by the original tipper. The defendants pressed for that information. They paid for the information.

JUDGE PARKER: Help me understand how that theory is at all [UNINTEL], because it seems to me that it turns most fundamentally on the sophistication and the experience of the tippee. So, if I've been in the business 15 minutes, there's a different criminal standard than if I've been in the business for 15 years, because I'm a relatively young analyst; I don't fully perceive the significance of this.

It may sound--you know, it may be a

Page 34

little bit unusual, but it doesn't seem criminal to me because it's just like the information that's been flowing over the Autex or flowing over the Bloomberg or what have you all the time.

But then, if I've been in the business for 15-20 years, I'm a supervisor, I'm a--you know, I'm a managing director or an officer, there seems to be a different standard, a different criminal exposure.

I don't know how we can operate--I don't know how we can really go with a regime like that, because, at the end of the day, what--if you follow your position to its logical conclusion, at the end of the day, the person who's likely to be guilty is the person who the government decides to indict.

ANTONIA APPS: Your Honor, first of all, sophistication is clearly not a one-size-fits-all--it's not the only thing that matters. But courts have repeatedly recognized--

JUDGE PARKER: I was taking--I was teeing off on the answer you gave us.

ANTONIA APPS: It is but one factor. And courts have repeatedly recognized that the sophistication of the defendant is a factor to

Page 35

take into account. It was taken into account in Obus. It was taken into account in Judge Winter's decision in Libera. It is a factor that's continually taken into account.

In this case, though, that was just one small factor. We didn't even--we barely even touched on sophistication in closing arguments. What we focused on were the facts, the facts of the payments, the fact that Newman was told it came from a company insider who was disclosing it at nights and on weekends, the fact that Chiasson directed his analysts to conceal the source of the information from official company reports.

And, by the way, you know, Mr. Fishbein talked about nights and weekends not being unusual. But if you look at the exhibits the government put into evidence of the calls, Government's Exhibits 26 and 27, for a two-year period, there are 68 calls between Ray and Goyal, and all save one was at night or on a weekend.

And just also there were a couple of matters that the--Judge Parker, that you brought up in--

JUDGE PARKER: Let me ask you this. Why is it, on the issue of whether the tippee's got

Page 36

to know the personal benefit--explain why Judge Sullivan is right and all of his half-dozen colleagues are wrong.

ANTONIA APPS: Your Honor, as this Court--

JUDGE PARKER: Help me understand that.

ANTONIA APPS: Yes. Your Honor, at this--as this Court held in Obus, and it is consistent with Dirks; this Court held it in Libera; it has held it for decades: the elements of tippee liability are different from the elements of tipper liability.

And what the Court of Appeals in Obus held was, in order to establish tippee liability--and this stems back to Libera--that the tipper breached a fiduciary duty and that the tippee knew of the breach of the fiduciary duty. And that is exactly what the government proved in this case. And, were it otherwise, were there a contrary rule--

JUDGE PARKER: The SEC itself takes the position that Dirks requires knowledge of personal gain.

ANTONIA APPS: I don't believe the SEC has ever taken the position that downstream

Page 37

tippee requires knowledge of a personal gain. And--but--Your Honor, by the way, since I think what you're alluding to is the defendant's argument about Reg FD, and the [UNINTEL], that's another point, to come back to the leaks.

It's clear that they had no faith--the defendants had no faith in the record, which was rejected by the jury, as to whether these companies leaked information, because they continually resort to references outside of the record, such as the Regulation FD and its enacting statutes.

But--and one more point on harmless error, Your Honor. With respect to NVIDIA, all you need to do is look at Government Exhibit 806, which is in the record 2109. Mr. Newman received an email the day before an earnings announcement for NVIDIA which said this information, information correct to the decimal point, was coming from an accounting manager at NVIDIA through a friend of mine. That right there is benefit under Jiau.

JUDGE PARKER: What's the benefit?

ANTONIA APPS: Friendship is a benefit under Jiau.

Page 38

JUDGE PARKER: Friendship is the benefit?
ANTONIA APPS: And so, that is count five for Newman and count 10 for Chiasson. And Chiasson--Sam Adondakis testified, at transcript 1878-79, that there was benefit--that the--excuse me, that the information came through a friend. Right there is benefit.
JUDGE PARKER: How does career advice--what's--explain--help me understand the government's career advice.
ANTONIA APPS: Career--the benefit that the government actually proved at trial, the career advice, was far higher than the benefit that was found sufficient in Jiau.
In Jiau, a tipper joined a--was recruited to join an investment opportunity, an investment club, and didn't in fact receive a single tip in that investment club. And the Court of Appeals held that the mere opportunity to receive a tip in the future--here we had far more, helping with the resume--
JUDGE PARKER: [UNINTEL] Ms. Apps, what you should do is stand closer to the microphone and keep your voice up. And that way, arguments--

Page 39

this is just hypothetical because you're doing a fine job--because that way, your arguments go better. Is that career advice?
ANTONIA APPS: I'm not sure that that's good career advice, Your Honor. But, in this case--
JUDGE HALL: Well, don't insult him now that he's giving you advice.
ANTONIA APPS: Apparently I was talking too loudly. But in this case, there was so much more. And it was assisting with resumes, putting good words in, sending across stock pitches, which would be used in investment interviews, sending a resume to a recruiter. It is clear that it well passes the Jiau--
JUDGE PARKER: I'm sorry. I apologize for being facetious. But the underlying problem is that--and this may be, you know, our Court's problem and not yours. But the benefit standard is so soft. You get cases maybe like this one, where it just doesn't seem to amount to anything.
ANTONIA APPS: In which case, it makes no sense to impose--to have liability turn--of the downstream tippee turn on whether they received a benefit. And this point--this is a

Page 40

really important point, because--
JUDGE WINTER: Excuse me, on this point, isn't it the case that the tipper who deliberately leaks information always find that it's in the tipper's self-interest to do so? And that seems to be the government's position, the act itself. That will be the next case, the act itself shows the tipper thought the tipper was getting some benefit.
ANTONIA APPS: That is not the government's position, and certainly not the facts of this case, where the defendants pressed for the information themselves and the tipper disclosed it three to five times a quarter for eight quarters in a row.
JUDGE WINTER: [UNINTEL PHRASE] the defendants might not have to press for it if they were actually bribing to get it.
ANTONIA APPS: But they were bribing the first-level tippee to get it.
JUDGE WINTER: [UNINTEL PHRASE]
ANTONIA APPS: The--
JUDGE WINTER: Then, I mean, we're [UNINTEL] Dirks. If you read the Dirks opinion fairly it uses the word "guiding principle," has

Page 41

to establish a guiding principle for people who have--who trade all the time.
ANTONIA APPS: And with that--
JUDGE WINTER: [UNINTEL] nonpublic information. It wants to protect analysts. And, unless there's some kind of concrete, demonstrable benefit coming to a tipper, there's no guiding principle at all. The tipper will always find it in his or her self-interest to be doing what they're doing. It may be misguided, but they'll find it in there.
ANTONIA APPS: Your Honor, the guiding principle be that when--that the government should prove knowledge of a breach of trust. When you have a case like this one, when that's precisely what the government proved, because Newman paid for the information--you talk about bribing? Newman bribed the first-level tippee. The clear inference from that is that the original tipper was receiving some kind of benefit as well. And--
JUDGE HALL: Could you--
ANTONIA APPS: It's a really important point, too, members of the Court and Judge Winter, Mark Pomerantz opened his argument by

Page 42

saying that there was no evidence that the tipper knew what information--what the benefit was, so the downstream tippees didn't know what the benefit was that the tipper received.

But as I understand the defendants, they're not even abdicating that the downstream tippee needs to know the kind of the benefit, whether it's chocolates or flowers, only that a benefit is received. And they make the same error in their briefs.

In the reply brief, at pages 24-25 for Chiasson's reply brief, it claims that Adondakis did not know whether the initial tipper benefit, and therefore Chiasson didn't know whether the initial tipper benefit--and again, I think that goes potentially to--

JUDGE WINTER: Can I ask a couple questions going through your charge, the legal issues and putting aside the facts--? What does the government, in the case of the derivative tippee, in a classical insider trading case--I'm not interested misappropriation cases where a theft [UNINTEL] crime. In the cases you cited there was no issue as to whether or not they knew about the theft, they knew about it.

Page 43

What does the government have to prove, beyond the fact that a derivative tippee, a downstream tippee, let's say four levels down, has to believe that the information is nonpublic, in the sense that it's more accurate to the [UNINTEL], that the pricing [UNINTEL] does not accurately reflect the information this [UNINTEL] tippee has?

Second, go through [UNINTEL] fact [UNINTEL] that [UNINTEL] material. Third, that the numbers probably came from the company, and that the company had a confidentiality policy regarding the information. Under the legal theory and instructions [UNINTEL] prove more than that?

ANTONIA APPS: Well, Your Honor, the government has to prove knowledge of the breach. And here, of course, the defendants were told that it came from inside the company.

JUDGE WINTER: Knowledge of the breach is that it most probably came from the company and the company had some confidentiality policy.

ANTONIA APPS: It depends on--I mean, that may or may not be sufficient in the circumstances. Here, of course, there was much more. But knowledge of the breach, I think,

Page 44

fairly understood, means knowledge of fraud.

JUDGE WINTER: [UNINTEL PHRASE] I understand you feel there was much more here. I was talking about the legal instructions. [UNINTEL PHRASE] the instructions [UNINTEL] delivered by Judge Sullivan, the government's proof would be sufficient for proof of what I just said?

ANTONIA APPS: I'm not sure if we would agree that the "probably came from the company" is sufficient. It depends on the case. But I think it is critical to show that the defendants knew the information was sourced to the company and came directly from company insiders, which was true of every tip in this case, unlike the example--

JUDGE PARKER: [UNINTEL]

ANTONIA APPS: That Mr. Fishbein--sorry.

JUDGE PARKER: [UNINTEL] information is going to come from Dell. So, that's pretty self-evident.

ANTONIA APPS: Not necessarily. There--it's not necessarily true that it comes from Dell, and that there could come from--as an argument the defendants made was that this came

Page 45

from some kind of modeling or sell-side analyst.

But there was direct evidence that this information came from Dell of every tip that came from the Dell insider. And for NVIDIA, the same is true. Unlike the example that Mr. Fishbein gave, where he talks about the $0.30, that wasn't sourced.

JUDGE WINTER: [UNINTEL PHRASE] in regard to [UNINTEL], I take it my description of what you--what these instructions required as proof is accurate?

ANTONIA APPS: Again, I think that we view it as a higher burden that we actually had from down--the District Court below.

JUDGE WINTER: How is that?

ANTONIA APPS: Again, I think that, when you have to show that it comes--the defendants know that the downstream tippee--excuse me, the defendants know that the tipper breached a fiduciary duty of trust or duty of trust and confidence, I think you have to show more than it probably came from the company.

JUDGE WINTER: What do you [UNINTEL] that it came from the company? That he believes it came from the company, or most probably came

Page 46

from the company, company had a confidentiality policy?

ANTONIA APPS: More than a confidentiality policy. They have to show--we have to show that, in fact, it was adhered to. And the defendants argued, transcript 3815, that it wasn't enough to show that there was policy but there had to be a breach in fact.

And when companies--what--the argument they made to the jury, when the companies selectively disclose, there's no breach, and they didn't make--they weren't successful.

JUDGE WINTER: But on legal--I'm talking about legal instructions and you're talking about the proof.

ANTONIA APPS: I'm simply saying I think the burden is--that we actually had in the jury charge was slightly higher than as articulated by Your Honor. I don't think we need--we ultimate--at the end of the day, no Court in this Circuit--and, respectfully, Obus set forth the legal elements that we need to prove for tippee liability.

And so, those separate elements--and they specifically addressed the level of

Page 47

knowledge in order to be a participant after the fact, and held that we only need to know of the breach of duty, because that is synonymous with fraud, as was shown in this case. Just to this point of--

JUDGE PARKER: So, why does the Supreme Court, in Dirks, give us a touchstone which says, "This is how you prove breach, actionable breach"?

ANTONIA APPS: For purposes of tipper liability, one must prove benefit. But, as the Seventh Circuit recognized in Evans, at page 324, despite the derivative nature of the liability, tipper and tippee liability differ. They have different elements. That is fundamental, that they have different elements. Every Court that has interpreted Dirks has found separate elements for tipper and tippee liability.

And Dirks itself failed to take the opportunity the defendants so wish they had of saying that knowledge by the tippee of benefit is required, notwithstanding Dirks addressed that you have to have benefit for tipper. It did not go additionally and say you have to have knowledge of the benefit. It said only knowledge

Page 48

of the breach of trust.

One point--this is very--the--I want to come back to the chocolates and flowers point, because, in the brief, at pages 24-25, in saying that--

JUDGE WINTER: Doesn't Dirks say that the breach of trust involves getting a benefit?

ANTONIA APPS: For purposes of tipper liability, Your Honor. But, you know, the element--and O'Hagan talked about what it is. Although a misappropriation case, O'Hagan talked about the fact that the deception was in the--

JUDGE PARKER: Judge Winter's--

ANTONIA APPS: Sorry, Judge Winter. I didn't see.

JUDGE WINTER: I'm sorry.

ANTONIA APPS: I apologize. I couldn't see you talking there.

JUDGE WINTER: Oh, no, don't apologize. Talk about what you're talking about.

ANTONIA APPS: Did you have a question, Your Honor? I--

JUDGE WINTER: No. [UNINTEL]

ANTONIA APPS: Okay. To this point, they say that Adondakis didn't know whether there was

Page 49

a benefit received. But, in fact, the question in--at the appendix cite that they put in there, at 1190, was whether Adondakis knew what the tipper received, a fundamentally different proposition, and not even one advanced--

JUDGE PARKER: [UNINTEL PHRASE] the government is resisting so much on the proposition that the person you're trying to convict has to know of the breach?

Because, you know, there--we 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. You know, it's a billion-dollar fund, so the gain was $50 million, it looks huge, and the jury will--eyes will [UNINTEL] over and so forth.

Isn't the whole community, the legal

Page 50

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?

ANTONIA APPS: Your Honor, the bright line that the legal community currently has, and has had since the 1990s, is that the defendant, the downstream tippee, know of the breach of trust. That is the bright line that the country-- that New York has been operating under for decades, and it is the appropriate bright line in this case. To apply another--

JUDGE HALL: So, what [UNINTEL] the breach of trust?

ANTONIA APPS: For purposes of tipper liability--

JUDGE HALL: [UNINTEL]

ANTONIA APPS: For purposes of tipper liability, the government must establish that--

JUDGE HALL: What are the elements of breach of trust that the downstream tippee has to know?

ANTONIA APPS: That the--

JUDGE HALL: And I will agree, it was charged-- you have to know there was a breach of trust.

Page 51

ANTONIA APPS: That--

JUDGE PARKER: How does the government prove the breach of trust that the downstream tippee has to know?

ANTONIA APPS: That the disclosure of the information was unauthorized in contravention of the policies and the way they operate in principle, as written and in fact. And so, the argument that the defendants make on appeal, that they unsuccessfully made below, that a company like Dell leaks everywhere in selective disclosures, that goes to whether or not the company actually insists that the information is not disclosed.

It wasn't proved--the government proved that Dell didn't commit those kinds of disclosures, didn't disclose the topline earnings numbers. Yes, Dell talks to investors, all investors, about low-level information. But very different from the high-level information that was in fact disclosed in this case. And that is critical.

The defendants attempted to confuse the jury by saying that all this information was leaked, and it is--it was not. And we rebut each

Page 52

of those points in our briefs, Your Honor.

JUDGE: Now--

ANTONIA APPS: But fundamentally, the tips here were so--the defendants were told, "This information came from company insiders." It was, again, information that was accurate to the decimal point.

And an example--just an example of the--to show that this information was not leaked, on the quarter in question that is part of the substantive, August of 2008, when Dell released its earnings numbers, the stock plummeted by 14 percent in a single day based on that information, showing that there wasn't a selective disclosure, as the defendants contend, of the information.

There was a couple of other points I wanted to address. I know I'm--I see that I'm out of time. But fundamentally, Your Honor, if I may just say that, you know, Obus set forth the elements of tippee liability, which differ from the elements of tipper liability.

JUDGE WINTER: Wasn't Obus a misappropriation case?

ANTONIA APPS: It was, but it explicitly

Page 53

held that it applied to misappropriation and classical. And, by the way, Your Honor, the Courts have not--Obus was not alone in that, because Dirks, which was a classical case, has often been looked at as creating the elements for tippee liability.

It only makes sense to harmonize that and have those elements of tippee liability be the same for classical and for misappropriation. Otherwise, we're left with a rule--to come back to Judge--

JUDGE WINTER: Well, that's fine. That's fine. Except that, in misappropriation cases, the crime [UNINTEL PHRASE] of the information [UNINTEL] by the tipper.

ANTONIA APPS: I--

JUDGE WINTER: The tipper is not the owner of the information. They're not an owner or agent of the owner. And no one ever said in a misappropriation case that the tippee doesn't have to know of the misappropriation or the theft.

There's no such holding. There are cases that don't mention that because it's obvious that it occurred. Libera. I wrote one of

Page 54

them. Libera was a case of the--where the defendant made money press [UNINTEL] advance copies of Business Week. [UNINTEL PHRASE] There was no issue as to whether the defendant knew of the misappropriation.

ANTONIA APPS: Right. There certainly was issues about the defendant's knowledge that were raised in Obus, of course, Your Honor. And fundamentally, to have a different rule for downstream tippee liability comes back to Judge Parker's question about a concern for having a bright-line rule, because you cannot achieve a bright-line rule if the downstream tippee liability rule is different for misappropriation versus classical cases.

Let's just take--if you posit slightly different facts here, if, instead of Ray intentionally breaching by disclosing the numbers to Goyal, if you'd posited that Goyal duped Ray, the--not even the defendants would claim they had a leg to stand on to argue that, as downstream tippees, they would be required to know of any benefit to the original tipper.

And so, that is--in order to have a uniform rule, as Obus recognized, explicitly

Page 55

saying it applies to classical and misappropriation--

JUDGE HALL: Thank you.

ANTONIA APPS: You should have a set of--oh, [UNINTEL]. Thank you.

JUDGE HALL: Thank you very much, Ms. Apps.

ANTONIA APPS: Thank you, Your Honor.

JUDGE HALL: Mr. Pomerantz?

MARK POMERANTZ: First, I'd like to go back to what the District Court actually did require the government to prove here in terms of tippee knowledge. This is from the charge, at page 4033 of the transcript.

The defendant's knowledge was, as stated by the Court, "He must have known that it was originally disclosed by the insider in violation of the duty of confidentiality." That's what Judge Sullivan charged the jury. And the government's position is--

JUDGE PARKER: Is that all he charged them?

MARK POMERANTZ: Well, on the critical point of what a tippee has to know, the operative language is "a violation of the duty of

Page 56

confidentiality." So, the government's position is: it's okay; all you need is a knowledge by the defendant that there has been a breach of confidentiality.

And look at the slipperiness of this slope. The government concedes, because it has to, because the Supreme Court has said it time and time again, it's okay, it's legal, to trade on material nonpublic information that comes from an issuer. Dirks, after all, traded on material nonpublic information that he knew had come from an issuer, Seacrist at Equity Funding.

The notion of nonpublic information is, I would submit--it's the same as confidential information. Indeed, the government proves information is nonpublic by showing the steps the company took to maintain confidentiality.

So, the government's posture is: it's okay to trade on material and confidential information known to come from an issuer, but you go to jail if you trade and you know there's been a breach of confidentiality. That is a distinction without a difference.

And, in any case, the bright line that Your Honor is quite right, people in this

Page 57

business, like Chiasson and Newman, are entitled to--the bright line is the line that was set by the Supreme Court in Dirks. In Dirks, the Court put it in language that is just unequivocal: "Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure."

The test is whether the insider personally will benefit, directly or indirectly, from the disclosure. Absent some personal gain, there has been no breach of duty to stockholders.

So, that's the test. That's the test the Supreme Court has given us. And if that's the test for a fraudulent fiduciary breach by an insider, how can it be that a jury doesn't have to find knowledge of that aspect of a fraudulent fiduciary breach when you're considering tippee liability?

JUDGE PARKER: So, your position is that that quantum of knowledge is the only thing that meaningfully separates the ability to trade and the threat of jail if you do?

MARK POMERANTZ: Well, and it is a very--you know, the question whether personal benefit exists is a squishy one, and it's particularly

Page 58

squishy in this case when you get into concepts of career advice, friendship, and so on. But--but--you have to remember, however squishy the notion of personal benefit may be, it wasn't even given to the jury to consider here. The jury never even was told it had to find it.

So, you know, as a first point, the charge is insufficient. Then you get into the question of the sufficiency of the evidence. And I need to point out, of course, that, with respect to Mr. Chiasson, there's no evidence in the record, none, that he knew anybody was being paid, that he paid anyone.

And, when the government cites an exhibit to say, "Well, the knowledge of friendship was apparent," they're talking about the wrong link in the chain. There is no proof that the friendship between the NVIDIA insider and the first NVIDIA tippee was known to the defendants.

The document to which Ms. Apps refers is a friendship between the first-line tippee and the next tippee. And, of course, Mr. Chiasson is even further down the chain. So, it's even--

JUDGE HALL: Let me just take you back

Page 59

to my personal--I'm sorry, my first question, Mr. Pomerantz. And that is: is it Mr. Chiasson's view, the defendant's view in this case, that only demonstrating personal benefit is sufficient, the knowledge of personal benefit is sufficient to prove knowledge of fraudulent breach?

MARK POMERANTZ: I think I would answer it this way: there are three components that the defendant has to know. One is the existence of a relationship of trust and confidence between the insider and the issuer. The second is a breach of the duty of confidence. And the third is personal benefit. You need all three. Those are the components of a fraudulent fiduciary breach, identified in Dirks but not only Dirks. And the notion that it--

JUDGE HALL: Doesn't Dirks tie the personal benefit to the breach?

MARK POMERANTZ: Yes. Yes.

JUDGE HALL: Not as a separate component. But you don't have a breach unless you have a personal benefit. Isn't--

MARK POMERANTZ: That's exactly the point. And that's where--

Page 60

JUDGE HALL: [UNINTEL] is that exclusive? That's the question I'm trying to--is that the only way you can prove, the government can prove, fraudulent breach?

MARK POMERANTZ: In a classic insider trading case such as this one, I believe--and if you take Dirks to mean what it said, and of course it was reiterated by the Supreme Court in later cases; it's never been retreated from--personal benefit is a defining aspect, a necessary aspect, of a fraudulent fiduciary breach.

Bearing in mind, of course, as the Court has emphasized, not every breach opens the door. This, although there is no statute, we're dealing here with a judge-made offense, this has to be fraudulent conduct.

So, the first question always has to be: where is the fraud? And the Supreme Court in Dirks said we can find the fraud if you have a relationship of trust and confidence and if you have an insider who betrays that relationship of trust and confidence for personal benefit.

And, again, I come back to the notion that, even if I'm wrong, and there are other

Page 61

forms of fiduciary breach that open the door to insider trading liability for tippees, the particular fraudulent fiduciary breach that the government attempted to prove here, and the one that was submitted to the jury when it--when the issue was, "Had the tippers done something wrong?" and then we'll deal separately with the tippees.

But for tipper wrongdoing, for tipper criminality, the breach that the government alleged, the breach they say they proved, the breach that was submitted to the jury, is a fraudulent fiduciary breach contemplating personal benefit. It's just that a necessary component of that fiduciary breach, i.e. the contemplation of the receipt of benefit, drops out when you get to tippee knowledge.

And we're saying that's wrong. We're saying you can't--you know, it's like trying to have an egg sandwich but there's no eggs. You know, if the crime's tippee--you've consumed an egg sandwich, you can't say, "But we'll forget about whether the government has proved the existence of eggs." It just doesn't work.

It's an essential part of the fiduciary

Page 62

breach that there be personal benefit. That's the teaching of Dirks. And that wasn't here. And the-

-

JUDGE HALL: Thank you. Thank you, Mr. Pomerantz.

MARK POMERANTZ: Thank you, Your Honor.

JUDGE HALL: Mr. Fishbein?

STEPHEN FISHBEIN: Judge Hall, it's certainly our position that a fraudulent self-dealing by the insider is essential for the tipper's breach, and then the tippee has to know about it. And my point on sufficiency is that the government just didn't prove that.

And I take issue with the prosecutor saying that the leaks were somehow different than the charged information that my client was charged with. The leaks were very specific. Earnings per share of $0.30, contrary to what she said, that was attributed to an insider at Dell.

So, when Todd Newman gets the email, it's Dell Investor Relations saying 30-percent EPS. That's indistinguishable. Or, similarly, 18-percent gross margin, that was a specific leak from inside Dell. Everybody knew it was coming from inside Dell. It's a specific number, 18

Page 63

percent. Same with 12-percent opex or missing revenues by a country mile.

And, in every one of those cases, the government concedes there was no personal benefit. There was no allegation of personal benefit.

So, from my client's perspective, you cannot go from, "It comes from the inside; it's specific," and then take the leap and say you must know about a personal benefit, especially when you look at the actual charge, the charge supposed tips. Jesse Tortora is constantly saying, "I guess," you know, "Maybe," "I think." It's always couched with uncertainty. And so, you put that all together, and, Judge Parker, to your point, it's just--it's not distinguishable.

Second, Ms. Apps said that my client paid a bribe. Nowhere in the trial record will you see that characterized as a bribe. That's a first time on appeal. The payment to Sandy Goyal was a consulting payment.

It is undisputed that, when they hired Sandy Goyal as a consultant, they hired numerous other consultants. He was hired to do legitimate work. That's what he said and that's what Jesse

Page 64

Tortora said. When he was hired and they--the amount of money--

JUDGE PARKER: Was there some visa problem there?

STEPHEN FISHBEIN: Yes, yes. Exactly. In other words, Goyal had a visa problem, and that's why he said, "Pay my wife instead." But the undisputed evidence was, when they set that up, it was for Sandy Goyal to do legitimate consulting for Tortora and for Diamondback.

So, to say now that it's a bribe, when they never argued that at trial, they never argued even in their appellate briefs that this consulting payment supports an inference of a benefit, a benefit to Rob Ray, when they know for a fact that none of the money that Sandy Goyal got went to Rob Ray. Goyal said, "I did not transfer any of the money to Rob Ray. I didn't even tell him he was getting paid."

And if I could just illustrate it like this, it's a very common instruction in this courthouse. You see somebody walk into the courtroom, dripping wet; you can infer that it's raining. But if I prove for a fact at trial that there's somebody downstairs spraying people with

Page 65

hoses when they come into the courthouse, you wouldn't give that inference, because you know that it's not true.

And that's exactly what's going on here. We proved unequivocally that none of the money went to Rob Ray. He didn't get that kind of benefit. And so, to infer it is just a specious inference. Thank you.

JUDGE PARKER: Thank you.

JUDGE HALL: Thank you.

JUDGE PARKER: Thank you all.

JUDGE HALL: Thanks, everyone. We will reserve decision.

Gotham Transcription states that the preceding transcript was created by one of its employees using standard electronic transcription equipment and is a true and accurate record of the audio on the provided media to the best of that employee's ability. The media from which we worked was provided to us. We can make no statement as to its authenticity.

Attested to by:

Sonya Ledanski Hyde

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

May 28, 2014

By Electronic Mail
Honorable Brenda P. Murray
Chief Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-2557

Re: *In the Matter of STEVEN A. COHEN*, Administrative Proceeding File No. 3-15382

Dear Judge Murray:

Pursuant to the Court's Orders dated August 8, 2013 and March 4, 2014, the United States Attorney's Office for the Southern District of New York (the "U.S. Attorney") writes to update the Court with respect to its continued request to stay the proceedings in the above-captioned matter based on ongoing criminal proceedings. The U.S. Attorney respectfully submits that the stay should continue in effect because certain of the criminal proceedings that originally warranted a stay of the administrative action remain ongoing.

In its original application for a stay of administrative proceedings, the U.S. Attorney identified three pending criminal prosecutions with facts that substantially overlapped with the allegations of the United States Securities and Exchange Commission in the Order Instituting Proceedings ("OIP"). The OIP alleges that respondent Steven A. Cohen, the founder of a group of affiliated hedge funds (collectively, the "SAC Hedge Fund" or "SAC"), failed to reasonably supervise two portfolio managers, Mathew Martoma and Michael Steinberg, who were alleged to have engaged in insider trading in violation of Title 15, United States Code, Section 78j(b) and Title 17, Code of Federal Regulations, Section 240.10b-5. At the time of the OIP, Martoma and Steinberg had been criminally charged with engaging in the insider trading activity upon which the failure to supervise allegations are premised. *See United States v. Martoma*, 12 Cr. 973 (PGG) and *United States v. Steinberg*, 12 Cr. 121 (RJS). Additionally, shortly after the OIP was filed, the U.S. Attorney brought criminal charges against the four corporate entities owned by Mr. Cohen that were responsible for managing the assets of the SAC Hedge Fund (collectively, the "SAC Hedge Fund Entities"). *See United States v. S.A.C. Capital Advisors, L.P., et al.*, 13 Cr. 541 (LTS). The criminal charges against the SAC Hedge Fund Entities were based in part on the alleged insider trading of Martoma and Steinberg, among several other employees.

On August 8, 2013, this Court issued an order granting a complete stay of proceedings "pending resolution of *Martoma*, *Steinberg*, and *S.A.C. Capital Advisors, L.P.*" (August 8, 2013 Order at 3). On November 29, 2013 and again on March 4, 2014, following updates as to the

status of the criminal prosecutions, the Court continued the stay based on the information provided by the U.S. Attorney.

At present, only one of the three matters referenced in the Court's prior order – the case against *S.A.C. Capital Advisors, L.P., et al.* – has been fully resolved. As the Court is aware, the four SAC Hedge Fund Entities pled guilty to insider trading charges on November 8, 2013. Subsequently, on April 10, 2014, the District Court accepted those guilty pleas and sentenced the SAC Hedge Fund Entities to, among other things, a five-year term of probation and a $900 million fine (in addition to the $284 million penalty previously imposed in connection with the civil forfeiture action). No appeal was taken.

The two other matters underlying the U.S. Attorney's request for a stay – the *Martoma* and *Steinberg* cases – remain ongoing. First, with respect to *Martoma*, the defendant was convicted after trial on February 6, 2014, but has yet to be sentenced. The sentencing hearing is presently scheduled for June 10, 2014.

Second, proceedings in the *Steinberg* case are also continuing. The defendant, who was convicted of all counts on December 18, 2013, and thereafter sentenced on May 16, 2014 to a 42-month term of imprisonment, has expressed his intention to appeal his judgment of conviction. Based on the litigation in the District Court, we expect that one of his primary arguments on appeal will be that the offense of insider trading requires a tippee to know that the insider who supplied material, non-public information did so in exchange for a benefit, and that there was insufficient proof to establish this element at trial. This precise legal issue – whether a tippee must know of the benefit (in addition to knowing of a breach of duty) – is a central question in a separate appeal brought by two of Steinberg's co-conspirators, Todd Newman and Anthony Chiasson.[1] That appeal, which has been fully briefed and was argued on April 22, 2014, is currently pending before the United States Court of Appeals for the Second Circuit. *See generally United States* v. *Todd Newman & Anthony Chiasson*, Docket Nos. 13-1837(L), 13-1917(con) (the "*Newman/Chiasson* Appeal").

On May 15, 2014, the District Court in the *Steinberg* case issued its decision denying the defendant's motion for a judgment of acquittal and rejecting his argument that the law requires proof of his knowledge of a benefit conferred upon the tipper. *See United States* v. *Steinberg*, No. 12 Cr. 121 (RJS), 2014 WL 2011685, at *9 (S.D.N.Y. May 15, 2014). In so doing, the District Court "acknowledge[d] the possibility that the Second Circuit may change course and require a new knowledge-of-benefit element" in insider trading cases, but "[u]ntil then, however, the Court must follow precedent as it is written," which does not require a "jury . . . [to] find any knowledge of the tippers' benefits beyond what [is] necessary to find knowledge of the tippers' breaches." *Id.* at *7-*8.

In view of these circumstances, and given the pendency of the sentencing in the *Martoma* case, the U.S. Attorney respectfully submits that the continued stay of the above-captioned

[1] Newman and Chiasson were portfolio managers at different hedge funds who obtained the same material, nonpublic information that Steinberg also received. Newman and Chiasson were convicted in a separate trial that took place in the Southern District of New York in November and December of 2012.

administrative proceeding remains necessary until at least the Second Circuit issues a decision in the *Newman/Chiasson* Appeal, which we expect to be forthcoming within the next several months.

Pursuant to the Court's August 8, 2013 Order, the U.S. Attorney will provide a further update as whether a stay remains warranted on or before August 26, 2014, or earlier should the *Newman/Chiasson* Appeal be decided before that time.

Respectfully submitted,

PREET BHARARA
United States Attorney
Southern District of New York

By: _____
Arlo Devlin-Brown
John T. Zach
Assistant United States Attorneys
(212) 637-2506/2410
arlo.devlin-brown@usdoj.gov
john.zach@usdoj.gov

cc: Sanjay Wadhwa
Amelia A. Cottrell
Preethi Krishnamurthy
Matthew Solomon
Daniel R. Marcus
Charles Riely
U.S. Securities and Exchange Commission

Martin Klotz
Michael S. Schachter
Alison R. Levine
Willkie Farr & Gallagher LLP
(counsel for respondent)

Daniel J. Kramer
Theodore V. Wells, Jr.
Mark F. Pomerantz
Michael E. Gertzman
Paul, Weiss, Rifkind, Wharton & Garrison LLP
(counsel for respondent)

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1472/May 29, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15382

In the Matter of	:	
	:	ORDER CONTINUING STAY
STEVEN A. COHEN	:	

On May 28, 2014, the United States Attorney for the Southern District of New York (U.S. Attorney) requested in an electronic communication that I continue the stay of this proceeding granted initially on August 8, 2013, and continued on March 4, 2014. Steven A. Cohen, Admin. Proc. Rulings Release No. 1277, 2014 SEC LEXIS 736; Admin. Proc. Rulings Release No. 785, 2013 SEC LEXIS 2303.

The U.S. Attorney represents that only one of the three matters that are the basis for the stay has been fully resolved. The two other matters – United States v. Martoma, No. 12 Cr. 973 (S.D.N.Y.) and United States v. Steinberg, No. 12 Cr. 121 (S.D.N.Y.) – remain ongoing. A sentencing hearing is scheduled in Martoma for June 10, 2014, and Steinberg has expressed his intention to appeal his conviction. See generally United States v. Newman , Docket Nos. 13-1837(L), 13-1917 (2d Cir.).

Ruling

Based on the information provided, I GRANT the request and CONTINUE the stay, pursuant to 17 C.F.R. § 201.210(c)(3), because the status of two of the three matters that are the basis of the stay is unchanged. The U.S. Attorney shall provide this Office with written notice as to whether a stay remains warranted on or before August 26, 2014, unless a defining event occurs earlier.

Brenda P. Murray
Chief Administrative Law Judge

E5UURAJC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

v. 13 CR 211(NRB)

RENGAN RAJARATNAM,

Defendant.

----------x

New York, N.Y.
May 30, 2014
11:20 a.m.

Before:

NAOMI REICE BUCHWALD

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: CHRISTOPHER D. FREY
RANDALL W. JACKSON
Assistant United States Attorneys

LANKLER SIFFERT & WOHL LLP
Attorneys for Defendant
BY: DANIEL M. GITNER
MICHAEL D. LONGYEAR

ALSO PRESENT
Sam Moon, Special Agent, FBI
Ruby Hernandez, Paralegal Specialist, United States Attorney's Office

THE DEPUTY CLERK: This is 13 Crim. 211, United States v. Rengan Rajaratnam.

Is the government present and ready to proceed?

MR. FREY: Yes.

Good morning, your Honor.

Christopher Frey and Randall Jackson for the government.

We are joined at counsel table by Special Agent Samuel Moon of the FBI.

THE DEPUTY CLERK: Is the defense present and ready to proceed?

MR. GITNER: Yes.

Good morning, your Honor.

Dan Gitner.

With me is Michael Longyear and my client Rengan Rajaratnam.

THE COURT: I think that the first part of business so that we don't forget to do it is to arraign Mr. Rajaratnam on the superseding indictment.

Mr. Gitner, have you received a copy of the superseding indictment and have you had an opportunity to review it with your client?

MR. GITNER: Yes, your Honor.

THE COURT: Do you waive its public reading?

MR. GITNER: Yes.

THE COURT: Mr. Rajaratnam, how do you plead to the superseding indictment, guilty or not guilty?

THE DEFENDANT: Not guilty, your Honor.

MR. GITNER: Thank you, Judge.

THE COURT: We, obviously, have a lot of motions on our plate this morning, and I am going to propose that we proceed to those motions in the following fashion. Let's start with the defendant's motions and attack them, essentially, one by one, almost always in order -- I think that there is one that changes that is out of order. I am just going to share with you my current views on the motion and then let the party who I propose to rule against have a chance to respond. Obviously, I am not interested in having that response be simply a recitation of whatever you wrote in your papers, which I have enjoyed reading.

But before we begin, in thinking about these motions, and probably maybe one in particular, I thought that it would be generally helpful for the Court to have an understanding of how the parties or what the parties' conception is of how much information the jury will be aware of concerning the conviction of Raj Rajaratnam, the defendant's brother. In other words, is that going to be essentially out there or are you going to try to totally hide it in the sense of having a jury that knows nothing about it in the first place and trying to encourage them not to learn about it? Is it going to come out in the

course of the cooperators who testified in the Raj trial testifying again here? I just don't know how you envision it, and it might be helpful for me to know.

MR. GITNER: I am happy to give you my conception, although this is not something that we have discussed with the government.

I don't think it is possible to keep it out of the case. I don't think it is possible, even if we tried, to be successful at it. Frankly, perhaps your Honor can see from my voir dire request, I think it is highly likely, despite the most severe charges your Honor could give, that jurors might Google the case. I think that the name Raj Rajaratnam is almost now synonymous, unfortunately, with this kind of case, so I think it is in the case.

And I think, frankly -- it is not my motion, but my response to their motion about the Brazil issue, assumes it is in the case because I have evidence, frankly, third party witnesses who can testify about my client's reaction to being indicted and it includes, obviously, knowledge of what had happened to his brother. So I would, frankly, be putting it into the case, assuming that your Honor allows me to, which I think, obviously, your Honor should. So I think it is impossible to keep it out of the case from the get-go.

THE COURT: You are certainly correct that that was the motion that I was thinking about this morning that inspired

the question because, obviously, if I permitted that evidence, it would have to be that Rengan Rajaratnam is either testifying or somehow getting in the fact that he returned to this country, despite knowing that his brother had been convicted of similar charges, had received a sentence of -- I think, it is 11 years --

MR. GITNER: 11 years.

THE COURT: -- and knew that there were individuals who had testified in the brother's trial who were named in this indictment, etc.

MR. GITNER: Exactly.

THE COURT: That was what sort of inspired the question.

MR. GITNER: That is exactly right. Frankly, I think even if that weren't in the case, it is going to come out. And it is a fiction to believe that the jurors either don't know or won't find out somehow.

THE COURT: They did find a jury in Watergate, so it is always possible to find a jury in any case that is sufficiently ignorant of the --

MR. GITNER: I suppose, but Watergate is pre-Google.

THE COURT: That's true.

MR. GITNER: Pre people having a culture of constantly finding information, getting information.

My view is, frankly, if a juror even emails to a

friend, I am on the Rajaratnam jury, Google could push news articles or push things to their email account. It will be almost impossible for jurors to avoid having outside influences.

Regardless, I think, even if it were possible, it is going to come out in the government's direct case. I may even bring it out. So I have no problem with it coming out. In fact, I want it out, particularly for this reason, in connection with the Brazil issue.

MR. JACKSON: Good morning, your Honor.

THE COURT: Good morning.

MR. JACKSON: I think it is the government's position, one, we don't necessarily agree that the Court couldn't properly instruct the jury to avoid it.

THE COURT: Let me say that I personally am of the view that the more you tell someone not to do something, the more they are inclined to do it.

And I don't have a final opinion on this, but I know what the recommended instruction is that comes from one of the judicial conference committees. And my view when I first read it -- it is always subject to change -- is that the instruction listed about a dozen or so do-not-dos. To me, it was partly going to have the effect of suggesting to jurors things that they had not even thought of and they might then do it.

I always, with some reference to the Internet,

certainly tell the jurors, not to seek information outside of what they hear in the courtroom. I certainly I can tell them, but I think that there is maybe even statistical evidence around that it doesn't quite work.

I would want to tell them, regardless, frankly, in broad outline, of the facts before them. I certainly want to discourage them from going out and learning a lot. It is one thing to know something as context; it is another thing to have them doing searches that will have them, in effect, re-trying the Raj case in their mind. I certainly don't want that.

MR. JACKSON: I think we are of a similar mind. I just recently concluded a similar trial before Judge Swain where there was a prominent conviction that was part of what people were generally aware of, but I think that the jurors did follow the court's instruction not to do further inquiry.

THE COURT: Well, they were exhausted after six months.

MR. JACKSON: Having said that, your Honor, it is, one, not the government's intention to elicit anything from any witness about Mr. Rajaratnam's conviction.

THE COURT: How are you going to get your cooperators' testimony in? Isn't someone going to ask them: Have you ever testified before?

MR. JACKSON: Yes, your Honor. I think that the fact that he was tried, we will likely go into -- let me just cut to

the end, your Honor, to say, if the defense views this as something that they want to go into on cross-examination, we don't oppose -- we defer to the judgment of the Court as to what is appropriate there, but we won't oppose their ability to cross-examine witnesses about it.

If they are stating that that is their intention, we may just operate under the assumption that they are going into that, but it is not the government's intention to elicit anything about the conviction or the sentence. If it is the defense's intention to do so, then I don't think we would oppose them putting that into the record. Having said that, we still think that even if that is a part of the case, our position on the motion that this relates to is unchanged.

THE COURT: We will get to that. I have a whole bunch of other questions on that.

I guess the conversation leads to the possibility of there being some stipulation about the other trial and that that might work to everyone's advantage. I am not dictating it, either as an order or literally dictating it, but it is something that you might think about.

The first in limine motion by the defendant seeks to have the Court order the government to proffer its evidence showing that the defendant knew that the inside information was disclosed in exchange for personal benefit, and for inspection of the grand jury minutes on this issue.

I would propose to deny that motion. I don't believe that the government is required to provide a preview of the specific evidence it will present at trial, and I think the government has satisfied its notice obligations by furnishing the defendant with the bill of particulars discovery material and trial exhibits well in advance of trial.

Moreover, because we are addressing these motions at an early stage, the fact is that the government's opposition brief highlights the evidence it believes establishes the defendant's knowledge.

And, finally, the defendant is not entitled to inspect the grand jury minutes because he has not demonstrated the requisite particularized need to overcome the presumption of grand jury secrecy..

Mr. Gitner.

MR. GITNER: I don't want to repeat what I put in my papers, so very briefly perhaps I can persuade your Honor.

My motion is really geared towards preventing the government from proceeding on a theory at odds with the law. They tried to do that with Counts 4 and 7. Frankly, that was what was going to happen in Counts 3 and 6 before the superseding indictment stopped them. That is what is going to happen in Counts 2 and 3 because, even though I heard your Honor state that they essentially previewed what they think the evidence is that satisfies the knowledge of the personal

benefit element, it, frankly, does not. If you look at the charge that Judge Holwell gave and the charge Judge Rakoff gave in Whitman and, again, I don't know how your Honor is going to come out on this --

THE COURT: Look. The government has withdrawn its earlier opposition on the personal benefit aspect. They went to the Second Circuit argument. They heard it.

MR. GITNER: I understand. My point was, I don't know how your Honor is going to come out in terms of the exact charge that your Honor gives.

THE COURT: You are quite right. I don't know yet.

MR. GITNER: Because Judge Holwell gave a different charge than Judge Rakoff gave, but if you look at either of those charges, the way the government is proposing to proceed is totally at odds with them. The government is proposing to proceed by proving knowledge of the personal benefit.

Let's just focus on what is now Counts 2 and 3, the Clearwire accounts, with evidence, solely, solely about other stocks -- AMD issue of a phone call -- I don't remember the exact date, I think it is August 15th -- and now they say another call was July 30th that has to do with totally different stock that is not charged in this case, months later.

And that is exactly what they said they would not do when your Honor was questioning the government about my duplicity motion. Your Honor said -- I don't have the exact

words, but essentially your Honor said -- I was saying they smushed these two things together. Your Honor said, why did you do that? Is the reason why you did that was because of this personal benefit issue and they said definitely not.

Now what they are proposing to do is bootstrap the AMD, the evidence about AMD to prove knowledge six months earlier about Clearwire. And there is zero evidence. There is not an email, an instant message, a piece of 3500 material, a phone call -- there is nothing that shows that Mr. Rajaratnam had any awareness of personal benefit given to Mr. Goel, so much so that while originally the indictment named him as a co-conspirator -- and we heard the government say how Mr. Goel knew Mr. Rajaratnam -- they had to pull back and claim he is no longer a co-conspirator -- there is nothing.

My argument is not -- it is geared towards preventing the government from going forward on a theory that is clearly at odds with this personal benefit issue, frankly, I think however your Honor ends up crafting the charge. So I would ask -- I know your Honor has not ruled -- but I am, essentially, asking your Honor to reconsider your thinking about this.

THE COURT: This is not a formal motion on reconsideration. I just thought that, given the number of motions, given how much effort has already, of course, gone into them, that it just made more sense to be candid about what

I was thinking because my hope is to resolve either all or most of the motions today, in court, and it facilitates that to let you know.

MR. GITNER: Thank you. I appreciate it and I understand it.

That is my motion. If the concern is, frankly, the government shouldn't have to preview its evidence to me, I understand that. Then my request is, essentially, so we don't have to waste time and go forward on a theory that is at odds with the law, the government preview it to your Honor in camera and your Honor decide if there is enough because it is, frankly, silly to go forward, in my view, if I am right that if all they have -- this is all that they said they have. They came out and said, we have enough. Here is what it is. If all they have was proof of knowledge of personal benefit on Clearwire is this evidence -- I can get into it, I don't think it is really evidence, but let's assume for the moment and give them the benefit of the doubt it is -- it is evidence that is clearly about AMD and another stock and it has nothing to do with Mr. Goel, the insider who gave the information about Clearwire.

MR. FREY: Your Honor, the argument the defense is effectively advancing is more traditionally styled in the form of a Rule 29 argument. The government has at this point advanced sufficient evidence from which a reasonable jury could

draw the inference that Mr. Rajaratnam had knowledge of the fact that the insider with respect to the information that was being provided as to Clearwire was receiving a personal benefit. The government expects that there will be multiple instances through the recordings in this case, at the very least, in which it will be clear that Mr. Rajaratnam understood that the way in which inside information was obtained from those who were in the positions provided was by providing a benefit of some kind, either actual or an anticipated -- the anticipation of the benefit which is also sufficient under this circuit's case law. It is a fair inference for the jury to draw from the totality of the evidence that he understood that.

There is no basis at this point in time for forcing the government to proffer evidence beyond that or for an out-of-the-box ruling that those charges shouldn't go to the jury. It really is the jury's province or if the Court felt at the close of the government's case that there was not sufficient evidence of that and it is not a reasonable inference that could be drawn, then that would be the time in which the charges could be taken from the jury.

THE COURT: I think the government correctly recites how trials normally proceed. We don't, as a general rule -- or any rule, I guess -- have judges have little mini trials in advance to see how strong they think the government's case is. The grand jury indicts. It is presumptively valid and we

proceed, and at the close of the government's case, it then gets tested.

MR. GITNER: I completely understand. And I understand that's how it usually works but, frankly, my view is, this is a unique situation, one in which the legal landscape changed drastically between indictment and today.

Even under the theory Mr. Frey just stated -- I can't quote him -- but essentially what he said was, the evidence will show that Mr. Rajaratnam knew that the general way to get inside information was to provide a value. That's not what I think your Honor is going to charge, if your Honor charges consistent with Judge Holwell, for example. The charge is going to be that Mr. Rajaratnam -- I don't want to say what is going to be -- but what Judge Holwell said was the government must show that Mr. Rajaratnam knew that the information was material, nonpublic information that that had been disclosed by the insider who directly or indirectly obtained some personal benefit from disclosure, not that Mr. Rengan Rajaratnam knew generally that, hey, if you pay somebody, maybe they will give you something that they are not supposed to give you. Everybody knows that. Everybody knows that bribery happens --

THE COURT: The reality is, now having been exposed to these motions, that there are a number of tapes involving the defendant directly that reflects or can be understood -- because I am not the factfinder -- as appreciating how this

conspiracy works and the issue, generally, of the receipt of the benefits in exchange for information. The jury may well be entitled, depending on how the evidence comes out, to make inferences.

MR. GITNER: My view, though, is that, that is not enough for the substantive counts. On the substantive counts, there has to be knowledge.

THE COURT: If you look at Judge Rakoff's charge, it is different.

MR. GITNER: True.

THE COURT: Figured that out.

It says that it is not necessary that Mr. Whitman know the specific benefit given or anticipated by the insider in return for disclosure of inside information, rather, it is sufficient that the defendant had a general understanding that the insider was improperly disclosing inside information.

So we will agree that Judge Holwell's charge is more specific. Judge Rakoff's is more lenient. I certainly have not made any decision about which of those I will either adopt or I will study some of the others as well.

I don't think you really have, literally, what would be a motion to dismiss the indictment for insufficiency at this stage. I don't think that we need to go forward. I think that certainly one of the benefits of having all of these motions early on is that it highlights issues. I appreciate that

because I would rather not inadvertently walk into sort of a minefield without knowing that I was walking into a minefield.

MR. GITNER: Judge, I won't belabor the point, other than also just to make sure that your Honor is aware that there is a third charge by Judge Gardephe that is also slightly different as well which I would urge the Court also to look at which actually names the specific insider, requires more specific knowledge. Obviously, I don't think I am going to convince your Honor so I am not going to -- other than to say I will continue to press the point at trial, of course.

THE COURT: Of course.

The second motion by the defendant is a motion to preclude the government from offering evidence concerning the defendant's efforts to cultivate a separate source of AMD inside information.

Again, the Court denies the motion. The defendant's attempt to cultivate Mr. Palacek as a source of inside information about AMD was conducted in furtherance of the conspiracy, as such, it is direct evidence of the conspiracy and the defendant's participation in it, as well as it can be understood as evidence that the defendant -- arguable evidence that he had knowledge of how insider trading schemes worked. The fact that Mr. Kumar may have disagreed with the defendant's actions does not diminish the relevance of this evidence to the conspiracy.

MR. GITNER: Judge, again, I don't want to repeat what I wrote -- it sounds like your Honor obviously read with care my motion -- other than to say, I think that what is the key part of my motion here, just for the record, this is not just a disagreement among alleged co-conspirators as to detail. This agreement, in the government's own theory as to what they call core conduct -- they have named these three people as the co-conspirators and so I think, frankly, borrowing from your Honor's first opinion in this, the government has charged an overarching conspiracy. They are stuck with that overarching conspiracy and they are the ones who said that Mr. Kumar did not agree -- and he testified to this in the first trial -- with what they say is core conduct to the overarching conspiracy. It is not part of the case and shouldn't come in.

THE COURT: I don't know if the government wants to say anything.

MR. JACKSON: No, your Honor, unless your Honor has any questions.

THE COURT: No. I considered and I have ruled.

The third motion is a motion to preclude the government from offering a portion of an August 15, 2008 conversation between the defendant and Raj Rajaratnam in which the defendant recounts a so-called joke that he made to Mr. Palacek about hiring Palacek's wife, to preclude the government from arguing that that is evidence that the

defendant was aware that either tipper received a personal benefit in exchange for providing inside information. They are requesting that the Court should instruct the jury that the so-called joke has no relevance to the personal benefit issue.

The Court again denies the motion. Although the defendant's comments do not prove that he knew the exact benefit that either insider made by disclosing inside information about Clearwire and AMD, the comments do indicate a general knowledge that furnishing insiders with some benefit was necessary in order to obtain material, nonpublic information.

This knowledge is further supported by the fact that when Mr. Palacek responded to the joke about Galleon hiring his wife by saying, "let me think about that," the defendant then told his brother that Palacek was "definitely, you know, thinking about playing ball." Thus, although the offer to hire Palacek's wife may have been said in a joking manner, there appears to be a serious intent behind it. Thus, the defendant's comments are relevant to the question of whether he knew that tippers who disclosed inside information did so in exchange for a personal benefit. And the government's use of those comments as evidence at trial doesn't constitute either a constructive amendment of the indictment or an unlawful variance.

MR. GITNER: It sounds like your Honor has ruled. I

don't know if you are inviting me --
THE COURT: Only if you have an argument that is sufficiently different from your papers that you think would change my mind. They are rulings, but I am giving each of you, depending on how they are coming out -- you are about to win one -- a chance to --
MR. GITNER: Can I pick which one I win?
THE COURT: No, but I think I appreciate which ones you would like to win.
MR. GITNER: Judge, on this one, I would like to say that my argument is not necessarily that jokes can never be evidence, but because the indictment found this to be a joke, the argument would be at odds with the indictment. I understand your Honor has ruled. I am not looking to engage in discussion, but I am looking forward to hearing which ones I win.
THE COURT: You don't have to wait very long.
The next motion is the motion to preclude the government from referencing the fact that the defendant previously worked at SAC Capital Advisors.
I grant that motion. The fact that the defendant was previously employed at SAC several years before the alleged insider trading occurred is not probative evidence of his guilt, and because SAC is well known for an insider trading scandal, the risk of prejudice is great.

The Court simply has no doubt that the government can introduce other evidence that does not carry this risk of prejudice to show what it seeks to show or asserts what it seeks to show through the defendant's employment at SAC, mainly his understanding of the securities market, his knowledge regarding the illegality of insider trading, his business qualifications and his motivation to make money.

MR. JACKSON: Thank you, your Honor. We appreciate the Court's consideration of our application.

I would just ask your Honor, just to be clear, your Honor's ruling doesn't prevent us from attempting to offer an exhibit that may have referenced SAC to the extent where it would be redacted and prevent reference to SAC in that exhibit or if a witness testifies and they are talking about something, to the extent that we are able to elicit it without actually referring to SAC or Steve Cohen -- I just want it to be clear that your Honor is not at this time ruling that that type of offer of evidence would be precluded.

THE COURT: Maybe Mr. Gitner knows what you are talking about. I am not sure that I understand the context. The point is that a reference to SAC carries with it just a huge prejudice component, and certainly in this context it is just not necessary. The defendant is a graduate of Stanford Business School. He has been in the industry for a long time. The notion of picking out the most toxic of his prior employers

is not acceptable.

MR. JACKSON: Absolutely, your Honor. We have no intent -- we are not at all contesting or asking your Honor to reexamine your ruling. I am just pointing out that there may be some documents that we would seek to offer -- we are still figuring this out -- but that have SAC on them and we may seek to redact SAC and make an offer of evidence that completely keeps SAC out of the case.

THE COURT: You show them to Mr. Gitner and if he agrees, that's great.

MR. JACKSON: Thank you.

MR. GITNER: On this issue, in the government's papers, the way they had intended originally at least to put this into evidence was through a deposition that Mr. Rajaratnam had given to the SEC many, many years ago. In talking to the government, I am not sure, but I think that they at least previously perhaps intended to offer the entirety of the deposition or other parts of it. Obviously, it was taken before he began working at Galleon. It has nothing to do with this case.

I am not sure if that's what Mr. Jackson is referring to, that he intends to put in other portions of his deposition that really have nothing to do with the case, that have to deal with a completely separate area. I don't know if that's what he is referring to as their intent. It is hundreds of pages of

deposition.

MR. JACKSON: Your Honor, I think we noted in our brief we thought that the deposition potentially was relevant to a number of issues at trial. At this time, I don't think we have to discuss that. I am going to discuss with Mr. Gitner more about what offers we might make --

THE COURT: Whenever you have a transcript, there is the rule of completeness.

MR. GITNER: Exactly.

MR. JACKSON: We understand the Court's ruling that there will be no SAC.

THE COURT: The fifth motion is a motion to preclude evidence concerning the alleged gain from the sale of shares of Clearwire and to strike the corresponding paragraphs from the indictment.

The Court denies the motion. The profits made on the Clearwire trades are an integral part of the story in this case and they help to establish the defendant's motive to engage in insider trading. Although the defendant may dispute the accuracy of the alleged profits and the attribution of these profits to his trading on inside information, those are arguments properly made to the jury at trial.

MR. GITNER: I understand. I just want to make a separate point. Just to give your Honor a sense of this case -- and I think maybe I didn't highlight enough in my

papers -- Mr. Rajaratnam sold, in other words, went flat, zero before the alleged inside information became public. So what they are alleging is that there is a gain totally as a function of the market, of other things. It has nothing to do with the inside information. He sold before the public announcement -- well before the before the public announcement.

Frankly, I understand your Honor is now saying the amount of the gain is an issue. If you look at the accounts that the government is saying is sort of at issue here, it is not that the amount of gain was in dispute; it is that whether there was a gain in dispute. In fact, I think the net net, there is a huge loss. And that is because everything is out before, before the information became public. So I understand what your Honor is ruling, but I want to make it clear to the Court --

THE COURT: If someone arguably trades on inside information, the crime is completed by virtue of the trade, regardless of whether the person profits or doesn't profit.

MR. GITNER: I agree.

But let's assume Person A gets inside information, buys a stock. The stock starts to go up, but the inside information is still confidential -- nobody has made a public announcement of insider information, the merger, let's say, is still a big secret.

Person A sells the stock before the merger occurs,

before the public announcement of it. The gain between Point X and Y has nothing to do with the inside information because it is still confidential. It is just a function of the market. It could have gone up. Could have gone down. It could have gone topsy-turvy. Could have done anything. So the amount of gain is totally irrelevant. That's my argument.

THE COURT: I am not sure I fully got that -- I mean not now, I mean before.

MR. JACKSON: Your Honor, I think what Mr. Gitner is again stating is that, essentially, he has a different understanding than the government's understanding of what the gain was in Clearwire. As your Honor stated, what the gain was is not determinative of whether or not the defendant participated in the conspiracy or engaged in the substantive crimes of trading that relate to this.

So from our view, everything that he is talking about is an appropriate subject of cross-examination of witnesses that put in that information. It is an appropriate argument before the jury for Mr. Gitner. It is certainly an appropriate basis for him, if he chooses to, to put on a defense witness who would establish a different calculation of the gain, but none of it is a basis for exclusion of the government's calculation of what the gain was, which was the only subject that was put before your Honor in the motion in limine.

THE COURT: I am just curious. Mr. Gitner would say,

as a matter of logic, there is no gain attributable to trading on inside information in that context. How does the government calculate the gain?

MR. JACKSON: Your Honor, we calculate it from the point when Mr. Rajaratnam or when Galleon made the purchase based on the insider information to the point at which those securities were sold. Whether they were sold before a public announcement is ultimately neither here nor there. Even in the recordings that were identified that your Honor has seen in part here, there were leaks of information subsequent to the point where the defendant and his co-conspirators began buying this stock before the ultimate public announcement and so they were able to reap the benefits of much of their insider trading on Clearwire before there was the ultimate public announcement because of the information getting out in different ways.

That's how we calculator it, your Honor. And we definitely understood that the defense has a different calculation, and we are prepared to cross-examine whatever witness they put on that comes to that calculation or to respond to their cross-examination of our witnesses if they elect not to put on any witness on that issue.

But I don't think that any of it, as your Honor is indicating, goes to the relevance of the gain. The relevance of the gain is clearly relevant under the established case law.

THE COURT: I assume, Mr. Jackson, you are referring

to the Wall Street Journal article?

MR. JACKSON: That's correct, your Honor.

THE COURT: I think I will leave the tentative ruling or transform it into a final ruling.

On the sixth motion, I need to proceed a little differently because I really have questions -- I am sorry -- rather than proceeding to the sixth motion, I want to move on to the defendant's motion to exclude other act evidence pursuant to 404(b), mainly the Akamai motion.

The multiple briefing on this gets a little confusing.

Focus with me, please, on the defendant's memorandum of law in opposition to the government's motion in limine, namely, page 9. There is the paragraph beginning "regardless, the evidence does not support the inference that Rengan's trades in Akamai was part of any conspiracy."

Are you with me?

MR. FREY: Yes, your Honor.

THE COURT: I would ask the government to respond to that, please.

MR. FREY: To respond to that --

THE COURT: In other words, if the portrayal by Mr. Gitner in this paragraph is that the basic reason that you shouldn't be allowed to introduce evidence about Akamai is that there isn't any evidence to support the argument that this defendant traded on inside information about Akamai; the

argument being made is, he sold it short before in an earlier quarter, and he sold it short here before there was the receipt of any inside information by his brother. So it would seem that if that were true, that would be a very good reason not to allow the evidence in.

MR. FREY: It may be true, your Honor. I don't know that that is necessarily a good reason not to allow the evidence in and here is why.

The defendant's actions after receiving the nonpublic information would have been informed by the nonpublic information that he received, at least in part, and that would be sufficient for any purposes of insider trading. If the defendant, because of market research that he is independently doing or a model that he has been working on informs him that that is the correct position to be taking with respect to the stock and then receives on X date nonpublic information --

THE COURT: Isn't the other problem here -- if I may interrupt for a minute -- that you actually don't have any hard evidence that he received any inside information? If I recall, the only basis for your suggesting that he received inside information from his brother on Akamai was that they were both in the office, I think it was July 25th. That can't quite be sufficient for a transmittal of inside information.

MR. FREY: Not in and of itself, your Honor, of course. That is but one fact, but the inference can be drawn

that the information was conveyed to Mr. Rajaratnam from his brother. They were in the office on the morning --

THE COURT: If we go on that theory, every time his brother received inside information at some point, by definition, since they work in the same place, this defendant received it. That is a little broad, don't you think?

MR. FREY: And I am not trying to make that argument, your Honor. That fact, I think, is significant, coupled with a number of additional facts and those being the following:

First, the defendant then in the days following the time period in which the government alleges that Raj Rajaratnam tipped his brother, he shorts the stock in small portions by instructing a trader at Galleon to do so. That is entirely consistent with the phone call between Danielle Chiesi and Raj Rajaratnam in which Danielle Chiesi passes the information to Raj that she has obtained from the Akamai insider saying how, over the next couple of days, effectively, she is going to slowly short it. Let's not do anything rash. We don't want to stir anything publicly. Let's slowly short it. And that is exactly what this defendant does within the days following the day that that was tipped.

THE COURT: I don't recall seeing in your papers the transcript of the Chiesi-Raj call, in fact, I had a question about whether there was a tape.

MR. FREY: There is a tape. To the extent it is not

referenced in our briefing, I can certainly provide it and hand it up to the Court to take a look at it. It is Government Exhibit 521 -- or what has been marked as 521.

THE COURT: Are you saying that after July 25th that this defendant shorted additional shares of Akamai?

MR. FREY: Yes.

THE COURT: OK.

MR. FREY: He did so, your Honor on the 25th, shortly after -- the government's theory is -- Raj Rajaratnam tipped him to that information. He does so again on the 28th. And he does so again on the 29th, the day before the negative earnings announcement by Akamai.

THE COURT: Do you happen to know offhand how many shares were involved in those shorts?

MR. FREY: I am not sure that I have the precise numbers, your Honor, but I believe they were in the range of 50,000, 75,000 -- there were quantities on each of those days of those approximate amounts.

THE COURT: And the amount that he had started his short position on the 23rd, do you know how the number of shares on the 23rd compares with the later short?

MR. FREY: That I know I do not have at my fingertips, although we could provide it to the Court.

If I may continue, your Honor, it is that fact -- and I can hand this transcript up for your Honor to look at --

where Danielle Chiesi and Raj Rajaratnam are discussing the fact that Akamai is going to have a negative earnings announcement that week and Raj Rajaratnam says, "We have a few more days, Friday, Monday and Tuesday."

And Danielle Chiesi says, "We just go slow." She continues, "Just keep shorting every day. We've got a lot of days. Nobody knows anything. Short. Short. Short. Nobody is going to know anything." And then, "Nobody will. And then, Wednesday we will see where the stock is."

I can hand this up to your Honor.

But the government's argument is that it is an inference to draw from this -- this is a call that occurs on July 24th.

THE COURT: Does that have an exhibit number?

MR. FREY: It is proposed Government Exhibit 521T.

I will just hand it up to the Court now, with the Court's permission.

May I continue?

THE COURT: Yes.

MR. FREY: It is a combination of a number of factors -- the defendant then calls -- it is a number of actions, that are consistent with the manner in which Danielle Chiesi and Raj Rajaratnam discuss using this nonpublic information.

It is also the fact that on the day of the negative

earnings announcement, shortly after the information is released publicly, there is both an instant message conversation and also a telephone conversation between this defendant and his brother where he -- first of all, I will take those separately.

In the instant message conversation, Raj Rajaratnam expresses how the Akamai numbers were awful.

And the defendant's response was thanks for the great call.

The government's argument is that the inference to draw from that is that he is thanking him, his brother.

THE COURT: That is in the report --

MR. GITNER: I have the instant message, and that is not what it says. It is Government Exhibit 1434. The thanks is after his discussion about Garmin, not Akamai.

MR. FREY: May I just comment on this?

THE COURT: Sure.

MR. FREY: I think one thing to notice is that it is an instant message conversation. To the extent that the Court is familiar with that, obviously, the responses don't necessarily immediately pair up. As one person is typing, there may be something else that appears on the screen, so it is not one for one.

But certainly, I would submit, the government should be able to argue that this is a fair inference to be drawn from

this IM. The defendant may argue another inference from this instant message. And the jury can accept or reject either of those, if any.

The suggestion here is that Akamai was awful, the reference to another stock, the first response from Mr. Rajaratnam to Akamai being awful and the sentence that follows is "such a great call, thanks."

And the government's inference is that this is with respect to the Akamai information.

There was also -- which your Honor, I think, was ready to go to next is that phone call that occurs very shortly after this instant message conversation. This instant message conversation occurred at approximately 4:45 and the call is moments later at 4:53, where the call begins with the defendant expressing his thanks to his brother and Raj Rajaratnam asking him how much Akamai he had and then the ensuing conversation about how long they should wait before they cover it and why it would be in their interests to do so.

So it is from that totality of facts that the government thinks it is a fair inference for the jury to draw that the defendant had this inside information from his brother, traded at least in part on that information illegally.

MR. GITNER: Could I respond, your Honor?

THE COURT: Yes.

MR. GITNER: Judge, to borrow a phrase, the totality

of the facts here, I think, actually show, without doubt, without doubt that the tip was not shared with Rengan. And there is a key fact that the government has left out that I will get into in a moment.

First, there is zero evidence of the information actually being shared. There is no IM chat. There is no email. No phone call. There will be no witness who says, Raj shared the tip.

The only evidence that Raj even told my client what his position was or what he was doing with that money is a 3:50 instant message, 10 minutes before the market closed, not enough to short -- that he was short Akamai -- doesn't say anything about confidential information, it just says, I am short Akamai or something like that. That is it.

The second fact is that it is a fact that Rengan started shorting -- I don't remember the amount, but I think, Judge, it is 200,000 shares -- I think it was a substantial amount, but I, frankly, don't remember -- before the tip was given to Raj. He started on July 23rd and he had engaged in the same pattern of shorting the previous quarter. This is something Rengan did.

The other thing that happens, your Honor, is that although he does continue to short in whatever other amounts, so do a lot of people at Galleon. And there are lots of legitimate reasons for that. One reason is, frankly, when you

short, you cannot just press a button and short, you have to go out and borrow stock and essentially sell it. There has to be enough borrowing in the market. It takes time. It is not easy. There are legitimate market reasons and legitimate strategic reasons why you might place positions over time.

Again, as Rengan is doing this, there is no evidence of the tip being shared. What the government is trying to argue as statistics, that because Raj got a tip and Rengan continued to trade consistently with the tip, there must have been a sharing. That is not enough. That is not enough.

What ends up happening, what the tip is, the tip is not as the government said, there is going to be a bad earnings announcement. That is not the tip. The tip is that the guidance will be bad.

This is a very important fact, and this is why I think it proves conclusively that this should not come in. The way Akamai works is, on July 30th -- this is the way it works every quarter and the way it worked every quarter for years -- at 4 o'clock it issues, essentially, a press release about its earning and at 4:30 it has a conference call where it issues guidance. So between 4 o'clock and 4:30, all sorts of things can happen. And the tip is that the guidance, what is going to be announced during the call at 4:30 -- the call begins at 4:30 -- the tip is that the guidance will come during the call.

And what does my client do before the guidance is

announced? So if you know the tip that guidance is going to be bad, and you have shorted, you are very happy. You are ready. You are sitting there saying, yea, my bets are going to pay off.

What does my client do? Their own exhibits show he covers the short before, before the guidance is announced. And what covering short means is that you take your short bet off the table. Rengan acts totally inconsistently with knowing the material, nonpublic information. Anybody who knows that the guidance is going to be bad and has a short bet on the table doesn't cover. You sit there and wait and you wave your flag in the air and say, this is going to be great. He covers. Totally, he acts inconsistent with the material, nonpublic information.

The legitimate market reason for why he covers is because between 4 o'clock when the press release and 4:30, new information has come into the market and the press release and new decisions are made. But if you know, if you know that the guidance is going to be bad, you wouldn't have made those new decisions.

In fact, in the instant message exchange -- unfortunately, I don't have it with me, it is a different one than this one -- what happens at the end, he says because the guidance is bad, the tip is true, Rengan says something like, what a disaster or this was a disaster because he had bet

wrong. He had done something inconsistent with the material, nonpublic information.

Given that inescapable fact, coupled with the notion that there is zero evidence that the confidential information was actually shared with him, coupled with the fact that this position -- I am not sure where it was, but he began before the tip came to Raj -- what I am going to call their statistical argument, it just totally falls apart. There is no reason to believe that the tip was shared other than, they are brothers and he traded. He shorted consistently with the tip for a period of time, but so did many other people. And it is not fair. It is not fair for this evidence to come in and for the government to urge these inferences in the face of that evidence and, apparently, in the face of a total lack of evidence of a tip being shared.

THE COURT: When you say he covered the short position, did he cover the whole thing?

MR. GITNER: I don't think there was time to cover the whole thing. I don't think that there was time. It is not like you can just press a button. It is not like selling or buying. But he covers -- I don't remember the amount, but I don't think that it was an insignificant amount that ends up getting covered. Even if he covers, let's say, half, why would you do that if you know that there's about to be a negative announcement? In fact, when that negative announcement comes,

the stock tanks, but Rengan is not able to take advantage of great bets because he covered too early.

Then when there is this discussion of the phone call that Mr. Frey talks about where afterwards he calls his brother and says something like thank you. And then his brother, frankly, listens and changes the subject and starts to talk about Akamai. It is pretty clear. The brother is saying, don't cover. His brother says, let the weasels cover. He had already covered. His brother is saying he is a weasel. His brother is telling him that he shouldn't have covered. Don't cover yet. Take more advantage. Let the weasels cover because there is a theory that, if you cover later, you make more money. He has already covered and later on or at some point, what a disaster. He acts totally inconsistent with material, nonpublic information.

MR. FREY: Your Honor, to the extent that Mr. Gitner wants to advance the theory that there is zero evidence that the tip was passed, there is no phone call in which Raj Rajaratnam passes the information to Rengan, but there have been insider trading cases for years in which there were no wiretaps. I don't think that that is what is required here. Certainly from the totality of the evidence, there is a fair inference for a jury to draw that the tip was in fact passed. What I hear Mr. Gitner advancing is really an argument as to the weight that it should be given or the inferences that

should be drawn by the jury, not whether it is relevant or not. It most certainly is relevant evidence.

THE COURT: It you really believe that, why didn't you indict him on this? I don't buy this, that you were afraid because you have a motion?

MR. FREY: Your Honor, I can represent that that is very much true. In planning to go to the grand jury to supersede, we gave a great deal of thought as to whether we should present this evidence to the grand jury and how that would be viewed, quite frankly, given that there were pending motions with respect to this issue.

THE COURT: That is often the way that pending motions are resolved in criminal cases is that the government supersedes and eliminates the basis for the motion -- at least that is my limited experience.

MR. FREY: After much deliberation, we elected not to proceed in that manner.

THE COURT: Could I get from you a fuller factual picture here. It was just handed up, the July 24th call, just handed up the instant message and there is apparently a second instant message. And I would like to have the trading records not only of the July trades, but the earlier quarter I am interested in seeing the amounts and, also, if you can find it for me, what the average trade in that stock was on a daily basis, how many shares typically changed hands. As of

yesterday it was about two and a half million.

MR. GITNER: You mean the liquidity?

THE COURT: In order words, to evaluate a specific purchase or sale or a short, I think it is helpful to put it in context. And the context really is, typically, how many shares in that stock are traded on an average day. If the average trade is -- three million shares are traded in an average day and someone decides to try to buy half a million, you might think, they knew something, right? But, obviously, if the proportion is totally different, that may be relevant as well, the other way.

MR. GITNER: I understand.

Judge, I would just note in brief response, it may be that the government charges certain cases certain ways, but I think your Honor put your finger on it, proffered 404(b) evidence. It has to go to knowledge and intent. And absent evidence that shows that Mr. Rajaratnam knew something an issue, personal benefit, that the information was confidential, that he was even confident that Raj had confidential information, it is not probative of anything. It is just meant to be prejudicial. It is not probative of anything because he acts inconsistent with having it.

MR. FREY: May I respond to that point, your Honor?

First of all, we are offering it as direct evidence. More appropriately, it is direct evidence of the conspiracy.

Whether it is direct or Rule 404(b) evidence with respect to knowledge, I do think that Mr. Rajaratnam's actions which the government would argue are wholly consistent with the advice or the plan that Danielle Chiesi and Raj Rajaratnam devised on that phone call on July 24th with respect to slowly shorting, it shows his knowledge of the information coming from Chiesi, of the fact that it is inside information. It shows the conspiratorial relationship between the parties, and that's important for a separate reason, that being that the chain here of information is exactly the same as one of the chains with respect to the AMD information -- it being that it is coming from Chiesi who has obtained it from a source to Raj and further passed on to Rengan. So I do think that this evidence presented could very well -- does very well speak to the knowledge on this defendant's part.

MR. GITNER: There are five or six others at Galleon alone who also short in this period. I can only imagine how many other people shorted in this period. Those five or six other people are also in the office. They are also potentially talking to Raj. The mere fact that he shorted after the tip without evidence of actual information exchanged is nothing more than them trying to essentially argue a statistical coincidence which is meaningless when you look at the fact that he started before and covered before -- he tried to cover before the negative announcement which was made -- I think that

the call starts at 4:30 or so, and I think that the negative announcement is at 4:42 or 4:43.

Judge, it is difficult with the trading records, we can try to find the other to present in a readable way, the other traders or managers who also shorted at Galleon.

Judge, there is one fact that I forgot.

The analyst at Galleon -- the way Galleon works, they had an analyst that essentially reported on stocks to the group, sometimes through an email group or to whoever wanted to listen. The analyst at Galleon -- I think her name was Kourakos -- who was reporting on Akamai, in the lead-up to July 30th, issues numerous emails and reports saying, it is going to be bad, you should short for whatever reason -- I don't remember the specifics, but essentially negative advice, you should short. That is a pretty good reason for somebody at Galleon to short, to follow the recommendation of the hedge fund's own analyst.

MR. FREY: Your Honor, I don't know that that conclusively proves, though, that the defendant didn't have inside information. It confirmed what the analyst was saying.

THE COURT: Yes, but there is an appropriate balancing here and that's what I have to figure out here. Even if I ultimately rule in Mr. Gitner's favor on this, it doesn't mean, for example, that you couldn't put in the evidence that Chiesi gave Raj a tip on the stock. I don't think it is necessarily

an all-or-nothing proposition, but I think a little bit more information would be very helpful.

Let's go back in order to the defendant's sixth motion -- this might be a good time to address the letter exchange between you.

I don't think that the government has been engaged in sandbagging. I accept the government's explanation in its May 27th letter at page 2 at the bottom that these recordings do not imply nor does the government otherwise intend to argue the defendant's involvement in such activity, namely, insider trading. And as the government has indicated in its motion papers, these recordings are offered as direct evidence of the existence of the conspiracy and to establish the nature of the relationship between the co-conspirators other than the defendant.

I think the government has made it clear that it is basically a representation that they will be held to, that they won't be introducing evidence of actual trading in the various stocks that are mentioned in the course of the transcripts. So I don't really think that there is a need for the defendant to research all of those other stocks.

I think that we should not really lose sight of the fact that, given this Court's management of this case, the amount of notice and the timing of that notice of 404(b), the exhibits are exceptionally early.

And I would suggest that the defense focus some efforts on limiting instructions to deal with the various references to other stocks in these various transcripts.

I'm sorry?

MR. GITNER: That's OK, Judge. I was waiting for your Honor.

THE COURT: Go ahead.

MR. GITNER: Thank you.

Judge, I want to focus just on tapes, for example, where my client is on. There are different kinds of tapes that are at issue here. And the government makes the point, and they are right, there are some tapes that my client is not on where they discuss all those stocks and there are some tapes that my client is on.

Let me focus on the second category for a moment. I will focus because the government has labeled what they call 509 -- so I think it is easier to focus on that because there has been back-and-forth about that in the letters.

This is the tape -- it is Exhibit C to our motion. It is the one that is about Cisco and EMC. What the government is doing here, they are offering a tape between Raj and Rengan where they are clearly not discussing any of the stocks charged -- Clearwire or AMD -- and instead they are discussing these other two random stocks, EMC and Cisco. And they are offering it as evidence of criminality. They are offering it

as evidence that Rengan and Raj had some sort of criminal relationship. They are offering it as evidence, they say -- I don't accept it -- that Rengan and Raj were trying, essentially, to cultivate corporate insiders for illegal and criminal reasons. And they are offering it as evidence that Rengan and Raj were engaged in insider trading. They are not offering trades, but they are offering it as evidence of insider trading in connection with other stocks at issue.

THE COURT: It is charged, a conspiracy here, conspiracy to commit insider trading -- this is not simply a conspiracy to commit insider trading in two stocks.

MR. GITNER: It is a conspiracy for insider trading that includes two schemes. The indictment is clear on this -- one Clearwire and one AMD. By the logic that it is not limited, they can introduce evidence of any stock, and there are thousands, if not tens of thousands of names at issue here. In the bill of particulars there is no mention of this stuff. It is not like they can just charge there is a general insider trading conspiracy and then offer evidence without giving me notice of any stock at issue. That's essentially the theory of -- that's what they are doing. And they are offering it, Judge -- their papers are clear -- as evidence of knowledge and intent. They are offering it as evidence of knowledge that Rengan understood that the way to corrupt a corporate insider was to give him some sort of gain. That's what they are

offering it as, in my view.

I understand, your Honor. It is classic 404(b) evidence. Frankly, the language that they use, they even cut and paste from their Akamai brief into this letter. It is exactly the same kind of language. It is iconic Rule 404(b) rubric that they use to support its admission.

THE COURT: The fact is that the 509 conversation does show both the business relationship between the defendant and his brother, and it reveals how the two of them sought to develop sources of information. That is evidence, direct evidence of the conspiracy.

MR. GITNER: Judge, it is not a tape that on its own, I think, is direct evidence of the conspiracy. Even the government admitted in connection with the Raj sentencing that it had not done the interviews or the work necessary to corroborate the inference that it is taking now. That was, I think in 2011, three or four years ago. There is no reason to believe that they have done it today. There is mention of, I think, five or six different individuals. There is no way to know who they are.

How are we going to know what this tape really means? Is Mr. Frey or Mr. Jackson going to stand up and be an expert witness and tell the jury? There is no evidence. There is no context with regard to what is happening with EMC or Cisco or any of the names -- Inder Singh, Nadeem, Nadeem's cousin,

someone named Leon. What does it mean? It is actually worse, in my view, that they are saying, we will just put the tape in and not offer other context or trades around it.

THE COURT: That is like suggesting that if two members of a drug conspiracy have a conversation about, another possible source of drugs is Joe Jones, that the government can't introduce that tape unless they go out and find out who Joe Jones really is and put in even more evidence.

Some of these tapes go more to relationships and are not necessarily revealing of actual trading on inside information, but do establish relationships, how the conspiracy works. And it seems to me that at least part of the focus of the defense ought to be on -- stock traders talk about stock, lawyers talk about law stuff, baseball players talk about baseball. That doesn't overemphasize the significance of this, most of which I think will go over the jury's head. To the extent that you are worried about a reference to a more common name, it could be another stock.

MR. GITNER: This tape, though, is not like a drug case where the tape is, hey, let's go find more drugs from John Jones or I am going to go buy a gun. A tape like that is pretty good direct evidence. This tape on its own doesn't speak to that, it doesn't say that, but that is what the government is going to say it says.

And my point is that there is no witness or evidence

to corroborate the government's interpretation of it. And so we are left, basically, having two lawyers, me and the government saying, here is how I would interpret it, you should interpret it too. But there is no evidence to support either interpretation because the government is not going to offer any of the context surrounding it.

So what I end up having to do to fight this is put in that context to show that that is not what they are talking about, and it is an incredible burden on us because we have to fight the interpretation given by the government. And, frankly, when the prosecutor stands up and gives an interpretation of the case, we both wear suits and he doesn't have a uniform but, frankly, we all know that the jury might be more likely to accept the government's view of what a piece of evidence is than mine. I then have to be the one to go do the work the government has avoided doing in all the years, even when it was pointed out to them by Raj's lawyers, that they had not done the work necessary to corroborate their interpretation.

I would also say, Judge, there is plenty of evidence outside of this case that explains the relationships in this case. I think that they marked 20 or so, maybe 30 tapes that do that. They are going to have people testify about the relationships and how this stuff supposedly works. This stuff is not needed at all to establish that kind of evidence -- at

least from the government's point of view.

I would also, Judge -- I don't want to argue a sandbagging point. I don't want this to fall into that but I do want to say this because it is important for me to make my record.

The government, I think, in their most recent letter said that this tape, they think, is incredibly important -- I don't know the words, but really super important to this case. When I asked them if they would redact it, they said that sounded eminently reasonable. I don't see how those two facts square. And it is not as if I just read them lines and page numbers. We had a more substantive discussion. And the government never promised me anything. They never said, yes, we will redact. They said, we have to think about it. We will get back to you on that. But they waited until their response -- May 22nd or whatever it was -- to do that.

Meanwhile, I am clearly of the view that this is something that the government thinks is reasonable to think could be redacted, and it is not noticed 404(b) evidence. I, frankly, don't see the difference between what the government argues about this and what the government argues about Akamai. I don't see the difference at all, other than the quantum of evidence which is not what Rule 404(b) is about.

THE COURT: The difference is that, in Akamai they are trying to argue that your client traded on inside information

that was passed to him by his brother; here, they are not suggesting that he did.

MR. GITNER: But they say core conduct in the case is cultivation of insiders. That's what the whole David Palacek thing is about.

THE COURT: But that is so important, though, on the issue of whether the defendant understands that the tipper receives a personal benefit. That's, obviously, the real relevance of a great deal of these tapes.

MR. GITNER: It goes to his knowledge. It is 404(b) evidence. That's my view too, but it should have been disclosed.

MR. FREY: Your Honor, just because it goes to the defendant's knowledge doesn't render it 404(b) evidence. It could be direct evidence that goes to the defendant's knowledge.

This is a conversation that I think your Honor correctly identifies where the defendant and his brother are discussing the development of sources. It is direct evidence of the conspiracy. Raj is instructing his brother as to how it is done. He makes comments such as Raj saying he will own Inder, don't worry. And he says to him, you know what you got to do, you got to work your Stanford.

And this call is approximately two weeks before the calls in which the defendant is reporting on how he is working

his Stanford connection, David Palacek -- they went to Stanford Business School together.

Together these tapes tell a compelling story of the defendant's knowledge of how this works, of the fact that a benefit has to be provided to the insider in order to get that information, and their concerted effort to advance the goals of the conspiracy, to trade on material, nonpublic information that they have obtained illegally.

This is not the same as Akamai. There are no trades here that we are trying to prove up at all. It is classic evidence of the relationship between the two conspirators and of the conspiracy itself.

MR. GITNER: The fact is, Judge, if there were trades in Cisco and those trades are inconsistent with some sort of scheme to engage in inside information and the government is just choosing to put in this slice of whatever the EMC, Cisco story is, and I am going to have to tell the whole story and put in the whole pie because they are just putting in a slice -- they are trying to put up someone named Inder Singh. Who is Inder Singh? I am going to have to show that. And by showing that, I am going to show that that is not what this tape is about.

MR. FREY: I think what this just highlights is that defense counsel will argue to the jury that there are inferences to be drawn from this. The government will argue

that there are inferences to be drawn from this. It doesn't make the evidence not relevant. On its face, the evidence is relevant to the charged conspiracy.

THE COURT: Yes.

MR. JACKSON: Sorry, your Honor. If I might, I just wanted to correct the record on one thing.

Mr. Gitner, we like Mr. Gitner a lot --

THE COURT: We all like Mr. Gitner.

MR. JACKSON: We all like him.

We had a number of friendly conversations in an attempt to make an official presentation to the Court. At no point did we say to him that any of these recordings were things that we were going to remove from the table. And I think the notion that we said that overall his suggestions were reasonable and we will evaluate them and get back to him, it doesn't make any sense that that's interpreted as some sort of concession on the part of the government. We said explicitly, after a lengthy phone call when we were writing down what he wanted us to consider, that we needed to evaluate all of those, and there was never any concession.

THE COURT: Let me say, having sort of dealt with discovery disputes for many years, very frequently, without having the transcript highlighted specifically with line, chapter and verse, there is no way to make a decision about what should be in and what should be out. I insist that

lawyers give me sort of advance warning because it is important to see it in context, to actually consider the sort of consequence of the accumulation of redactions.

So I don't personally find it surprising that the government, having not received, as I understand it, the chapter and verse, page and line, as it were, was in no position to respond on the telephone. I would not have felt comfortable in that context.

Let me just talk for a minute to Jake to see if we can give some overall rulings about these tapes instead of going through them one by one.

(Pause)

THE COURT: I think that we can just essentially cut through all the tapes in motion 6 in the following way. Basically, I think they are admissible as direct evidence of the conspiracy. I don't think that there's anything overly prejudicial by referencing other companies. I will say that with the caveat that there may be references to Akamai that may not come in if Akamai doesn't come in.

On the tapes, Government Exhibits 534 and 535, these are conversations between Chiesi and Kieran Taylor. They may be out if Akamai is out. The government has conceded that. It is also possible that the argument on that is not as binary as you think it is. It is not the same time frame at all. These are September conversations and the Akamai, at least they are

talking about sort of those trades that were in July.

MR. GITNER: Judge, particularly with the tapes that my client is not on and given what I understand to be the government's concessions that there is no evidence of Rengan participating in anything untoward with regard to those other stocks, I will ask for an appropriate limiting instruction about that.

THE COURT: I urge you to do so.

I don't think that there is really a necessity, unless someone else thinks so, to be more specific about the tapes.

MR. FREY: I think that's fine, your Honor.

THE COURT: So let's move on to motion 7.

Maybe next time use different colors -- do the Court of Appeals rules.

The next time the government gives me a long brief, don't forget to give me a table of contents.

MR. JACKSON: Absolutely, your Honor.

THE COURT: On the second one, you did. It was an added challenge, there being enough in this case.

So we have motion 7 which is to preclude a portion of an October 3, 2008 conversation between Raj Rajaratnam and Mr. Kumar because it is inadmissible hearsay.

This motion is also denied. The complained of portion is hearsay, but it is admissible as a statement by a co-conspirator, namely, Mr. Kumar, in furtherance of the

conspiracy.

The defendant is correct that embedded in Mr. Kumar's statement is a statement by Mr. Palacek that, when the defendant said that he knew about the AMD deal and knew that an executive was spilling everything to his girlfriend, we agree that that embedded statement does not fall within an exception to the hearsay rule, but we find that it is nonetheless admissible because of Raj's statement further down on the page which adopts it by reference. On line 38, Raj Rajaratnam says: "Yeah, he told me you said that and I said, Rengan, you are stupid to say that, you know, completely stupid. I mean, the girl is not my friend. It is Rengan's friend."

Because Raj's statement is admissible as a statement of a co-conspirator in furtherance of the conspiracy and could not be understood without reference to Mr. Kumar's statement, Mr. Kumar's statement is admissible.

MR. GITNER: Judge, I don't know if I am in a position to ask your Honor to reconsider.

THE COURT: Absolutely.

MR. GITNER: I think I understand your Honor's thinking but, just to be clear, I think your Honor understands this. I think I am right. I think your Honor agrees that there are essentially three levels of hearsay in the statement, and my complained of portion is the second, it is what Mr. Palacek said. Under Rule 805, I think there has to be an

exception to that.

I think what your Honor is saying is that, down the line -- I had to find it as your Honor was talking -- I am not sure I was able to hear everything that your Honor said, but line 38 Raj says: "He told me that he said that and I said Rengan, you're stupid to say that, you know, completely stupid. I mean, the girl is not my friend, it is Rengan's friend."

Is your Honor saying that by Raj saying that, he is repeating what Kumar said David said?

THE COURT: No. He is repeating what Rengan said to Palacek, therefore, it is a statement by a co-conspirator in furtherance of the conspiracy.

MR. GITNER: Because of what Raj said?

THE COURT: Yes.

MR. GITNER: Could I have just a moment to read that?

(Pause)

MR. GITNER: Judge, as I understand your ruling -- just to make sure that I understand it -- it is still the case that David's statement to Anil cannot come in for the truth. Whatever Raj may say, Raj says. But as I understand it, the first statement there is still no exception for it.

And I think, in the government's brief -- I think it is consistent, actually, with the government's brief. I am not sure that the government made this argument that your Honor's ruling is based upon. The government says that it is not

offering -- their defense to my motion is essentially that they are not even offering it for the truth of the matter asserted --

THE COURT: -- for the fact that it was said.

MR. GITNER: So my application would then be, I would ask for a limiting instruction that this -- I hope the government is essentially held to its representation and what its intent is, that David's statement is not coming in for the truth. The government said that it wouldn't offer it for the truth. That was their response to my motion.

THE COURT: Does the government want to respond?

MR. JACKSON: Your Honor, we would just say, I think in our brief we identified a number of reasons why the statement should be admitted, one of which was that this was a co-conspirator statement; another, which is that this was non-hearsay; and, also, that it wasn't necessarily offered for the truth.

I would just encourage your Honor to ask Mr. Gitner, if he thinks there is an appropriate limiting instruction, to draft it or propose it to us and we can evaluate whether we think it is appropriate. It is hard to understand exactly what he is proposing without looking at language in context, but I think the bottom line is that this is admissible.

THE COURT: If a co-conspirator -- discharged co-conspirator, obviously -- says to another co-conspirator

that a third co-conspirator said something to him and that something furthers the conspiracy, why is it not admissible?

MR. JACKSON: I think it is, your Honor.

MR. GITNER: Mr. Palacek is not a third co-conspirator. That has never been the claim ever, in any trial.

THE COURT: Agreed. He is not in --

MR. JACKSON: -- the chain.

THE COURT: He is not in the chain here because it is the defendant who says something to his brother which -- maybe put it the other way.

Mr. Kumar references a statement to a non-co-conspirator and that reference is for the fact that there was such a conversation and is confirmed by a co-conspirator confirming that a third alleged co-conspirator said the words; the statements of each of the alleged co-conspirators are in furtherance of the conspiracy.

Hearsay, the rules are designed to insure reliability of an out-of-court statement. The confirmation by Raj that this statement that is repeated by Mr. Kumar was made by the defendant would seem to provide the reliability that the rule is basically designed to get at.

MR. GITNER: I understand your Honor's first point about Raj's statement. I get that. And three co-conspirators you have, alleged, Rengan, Raj and Kumar.

My point is a little different, and sorry that I didn't make it clear, but I am coming to this for the first time today and I didn't anticipate -- I think this is different from what the government argued.
THE COURT: Thank you.
MR. GITNER: But that's our job.
My point is that it is different what Rengan allegedly told Raj than what Rengan may have told David, and that is an issue here. Whether if Rengan told Raj, I know about the deal --
THE COURT: That's --
MR. GITNER: All Raj said is that he told me that. I am not looking at what he said. "He told me he said that" and --
THE COURT: "He told me that he said that," that clearly refers to this defendant saying something to someone else and there's a context here, and the context is Mr. Palacek. And we also know from other tapes that there are conversations between this defendant and Mr. Palacek.
MR. GITNER: But no tapes at all that approach what Raj says Rengan said. There are not tapes like that.
And, two, what David said Rengan said, there is more than one part. If he knew the details of the deal --
THE COURT: One of the executives --
MR. GITNER: -- is talking to a girl or something. So

there is more than one part of it. And it is not clear from the tape what Raj is saying Rengan told Raj.

My point is that Raj's statement might come in, but it shouldn't come in, but David's statement to Anil should not.

THE COURT: I think I am going to rule against you on that.

So we just go to the government's motion. There is one that I am still holding in abeyance, the Akamai motion which is the first motion.

The second motion is not being contested. The analyst's motion, you said you didn't contest.

MR. GITNER: Not for that purpose.

THE COURT: So we get, in a sense, to the third motion and I think the only one in controversy or still in dispute is the issue of whether the defendant can introduce as consciousness of innocence evidence that, upon being indicted, he returned voluntarily from Brazil.

I would like the government to support for me the arguments that it makes at the second full paragraph on page 16 of its memorandum of law in support of its motion in limine.

MR. JACKSON: Well, your Honor, I think the fundamental question that is raised here is, how would this information be introduced. There are a number of ways, I guess, it could be introduced. It could be elicited, presumably, if there was a government witness who had

particular knowledge of it, they could elicit it. Presumably, they could call one of the agents, or the defendant could testify about it himself. I think that is probably the most likely way that it could be introduced, if we are actually getting towards information that speaks to the idea that the reason that he returned or that he had knowledge of the fact that what had transpired with his brother before he was coming back -- it is difficult to imagine how you would do that without having the defendant offer testimony on the subject.

In that situation, the cross-examination of the government, whether it is a government witness who this is being elicited from or it is the defendant who is testifying, is going to go to the factors that go against the conclusion that this is somehow probative of his consciousness of innocence, for lack of a better term. One of those factors is the fact that we can get extradition from a number of different countries.

THE COURT: Have you checked the extradition treaty with Brazil?

MR. JACKSON: I personally, your Honor, have not.

THE COURT: We did. And unless I am wrong, it is not an extraditable offense. If, as he says, it is true that he went to Brazil, established a residency there, had a business there and a lady friend, he didn't have to come back if you can't extradite him.

Listen. I am not an expert on extradition law, and I think that the reality is that this type of evidence normally comes in through expert witnesses, but we read the list of crimes and I don't see this falling within it. If that's accurate then, it is hard to say that this is not potentially rather powerful evidence.

Putting it in full context, if it is true that, as portrayed, he had some years before established a life in Brazil, if, as we all know -- and certainly knew what happened to his brother -- and if he couldn't be extradited, if that's so, it is not -- as I said, taking all of those factors in consideration, it is potentially rather powerful evidence that he came back.

MR. JACKSON: We understand that, your Honor. For us, the extradition is a complicated issues. There are a number of questions that would have to be answered in order to come to any sort of determinant --

THE COURT: You made a representation in this brief that such talk about other incentives to return, such as his desire almost certainly to avoid long-term detention in a Brazilian prison while awaiting extradition -- well, I don't know if that's the norm, that he would be imprisoned.

Secondly, after you get a provisional arrest warrant, if you could, you have to proceed within 60 days to actually get your extradition papers under this treaty. So I don't know

that that is true, since I don't even know that it is true that he could be extradited.

And, yes, I appreciate that leaving family and friends is hard. It is not something that I could personally do, but it was obviously something that he had already done. And he could not be confused about the risks of coming back. If in fact my reading of the extradition is correct, then he couldn't have been extradited.

So I am perfectly happy to receive some more information on this.

MR. JACKSON: Absolutely, your Honor.

I would just say briefly, we don't disagree with your Honor that the general proposition that we understand that there is an argument that could be made about this.

In terms of the facts, I will note that we did have a provisional arrest warrant in place with regard to him. And while the extent to which he is extraditable I think is complicated, that is a subject that generally ends up resulting in complicated and lengthy litigation. I have engaged in litigation in countries over the question of whether or not a person is extraditable that lasted, literally, for years. Sometimes it is a question --

THE COURT: Am I correct in believing that if he fought extradition for years and, let's say, he lost, that would not be information that you could introduce at trial,

correct?

MR. JACKSON: I think that's correct.

THE COURT: What is the risk?

I am not sure that it follows that for an extradition related to insider trading that a country is going to keep someone who has established residence in that country in custody during that time?

MR. JACKSON: Your Honor, we don't disagree with your Honor's general view on how -- these are arguments that could be made. This is really, I think, a minor point for our response in terms of, I guess, putting into context the host of things that could come up in a cross-examination on the subject, including the fact that he would have the potential to have loss of property. The defendant has had at different points, assets. There are a number of international financial organizations. We would have to explore what the potential loss to him would be from a situation where he stayed overseas and was failing to respond and had assets that could be lost.

So from our perspective, your Honor, these are just contexts that we think go into the determination, but we understand the Court's position.

MR. GITNER: Judge, the fact is that, essentially, immediately upon hearing of the indictment, he decided to return. And I will present several third party witnesses that will establish that fact and establish the fact that the reason

he decided to return essentially immediately is because of his consciousness of innocence, because he believes he is innocent. That is enough.

All of this stuff about what could have happened under Brazilian law or what might have happened, frankly, I agree with your Honor, but it is irrelevant. All that matters is what in his head. He knows he is in Brazil. He knows Brazil is like the Swiss bank for an extradition in lore.

THE COURT: That's where I should go?

MR. GITNER: Yes, that is where fugitives go. I am sure there is a whole Wikipedia page about it.

He has a business. He has a girlfriend. He has a life there. He has a visa -- Which is not easy to get in Brazil. He established residence there. He literally goes to the airport and misses a flight. He tried to come back earlier, but traffic prevented him from coming back earlier -- he misses the first flight and ends up coming back the next day, knowing that because he is coming back on a Sunday, he is going to have to spend a night in the MCC. He comes back immediately.

Frankly, there is no more powerful evidence of consciousness of innocence. This is exactly your Honor's decision in Grant, you could have jumped at the chance to stay in Brazil and fight. Mr. Jackson admitted that it could take years if not many, many years. And who knows what could have

happened? But he came back immediately, immediately. That's all that matters. Very powerful consciousness of innocence. It is right on all fours with the Biaggi case. It should come in.

THE COURT: As you can tell, my instinct, having done a little bit of extra research, is that this is admissible. And that, actually, having had not the identical, but had this issue presented to me once before, having denied it in the other case, I think that this is basically in the heartland of Biaggi, particularly if I am right that this is not extraditable.

I do think that Mr. Gitner's point which I was aware of, that he came back so quickly, is also part of the mix of facts because he could have, theoretically, played it both ways -- stayed there just long enough to transfer some more assets, do something, position himself and then come back later. But I think the fact that he came back quickly is relevant and admissible.

I think we are done.

MR. JACKSON: I think that is correct, your Honor.

I would just note on the last point, your Honor, to the extent that your Honor is admitting that evidence, we may submit to the Court some additional proffer of what we anticipate -- some of the types of topics that we anticipate we would put in, in response to that or we would seek to put in,

in response to that, including information about the defendant's interactions with the authorities leading up to his extradition that we think are probative of his not having a consciousness of innocence or that being the only explanation for his return.

THE COURT: Sorry. The government has one more motion which is the motion to permit evidence of the defendant's compensation at Galleon as proof of his motive to commit securities fraud.

I believe the government should only be allowed to introduce evidence of the defendant's compensation at Galleon for the time period during which he would have profited from the alleged unlawful trades in Clearwire and AMD.

The defendant doesn't object to the evidence of his 2008 compensation.

Thus, to the extent that the government's motion is limited to 2008, it is granted. But if they try to introduce evidence of his compensation beyond 2008, the government must demonstrate that such compensation was tied to the trades mentioned in the indictment. If the bonus comes in 2009 and it is tied back to 2008 trades that is OK. I understand the compensation package can work that way.

MR. JACKSON: So, your Honor, two things that we would argue on that.

One, we are certainly not going to seek to introduce

evidence of his compensation after the time period of the conspiracy. But I think we were seeking to introduce evidence of his Galleon compensation that predates the time period of the conspiracy and is probative of what the defendant was hoping to get.

And part of what is at play, in the defendant's initial run at Galleon, he made $800,000 in his last year there. And that was tied to his role there. Then he does a bunch of ventures -- which we will not get into during the course of trial, we are not getting into SEC, etc -- he comes back, and in 2007 and 2008 we have evidence of his compensation which we are still getting the complete picture of, but which your Honor knows is lower. And we think that the 2007 and the earlier, just before the last time that he leaves compensation, informs what was going on in his mind in terms of what his motives were.

THE COURT: There is only one motive for insider trading -- making money. It is not necessary to introduce evidence of seven-figure salaries and six-figure salaries that are not directly tied to these events. It is just too potentially prejudicial. There are very few jurors who are going to make that kind of money, and those are just numbers that, unless they are directly relevant, should not come in. And since we all know that there is a single motive, it is making money -- that's the only reason that people commit

securities fraud, ever -- even the ones who have more than they can know what to do with.

MR. GITNER: Judge, I would ask if your Honor is done, that we be able, with the government -- not ex parte -- in the robing room, discuss item 3C on the government's motion at page 18 with the table of contents.

THE COURT: I thought that there was no debate about that.

MR. GITNER: There isn't any debate, but I think that it has to do with management of the trial.

THE COURT: Sure.

MR. GITNER: That's all.

THE COURT: There is no need to have that on the record, is there?

MR. GITNER: No, not in my book.

MR. JACKSON: Your Honor, we had a couple of brief things that we wanted to make a record of and one question. We have four items.

The first question, your Honor, is it your anticipation that we sit on Fridays?

THE COURT: Yes. I sit from 9 to 2:15.

MR. JACKSON: Excellent, your Honor.

THE COURT: I will tell you that on Friday, June 20th, I have to participate in a conference call at 1 o'clock, so we will just end at 1 that day, not having everybody hang around

so that we might get another half hour of testimony.

MR. JACKSON: Thank you, your Honor.

We also wanted to just make two records related to the communications between parties.

One, I discussed this with Mr. Gitner. We don't need to detail anything here, but the government did extend a plea offer to Mr. Rajaratnam in advance of the trial which I am informed by Mr. Gitner, and he can confirm, that the defendant rejected. That is the one that we wanted to make a record of on that, your Honor.

Second, your Honor, the defendant had requested information regarding any Giglio in the government's possession related to non-testifying co-conspirators, so the government has endeavored to provide information regarding non-testifying co-conspirators including the plea -- I'm sorry -- post arrest statements that were made by Mr. Raj Rajaratnam and Ms. Chiesi to the defendant.

We have also provided some recorded phone calls made by Mr. Rajaratnam.

Moreover, we have given the defendant notice of the fact that Mr. Raj Rajaratnam and Ms. Chiesi were both convicted of securities fraud.

We have asked if there are other areas that the defense is particularly concerned about. So at this point we are not aware of any other areas that the defense will be

particularly concerned about, but we have received that notice and we have provided that, all in an abundance of caution. We don't believe that any of it constitutes Giglio, but that is our broadest attempt to respond to the defense request on that.

THE COURT: Mr. Gitner, just confirm that you received the plea offer?

MR. GITNER: Yes.

THE COURT: And reviewed it with your client?

MR. GITNER: Yes. Confirmed.

THE COURT: Let's talk about one other thing about trial length. My memory was that this was about two weeks?

MR. JACKSON: That is accurate, your Honor.

THE COURT: And, obviously, the Akamai issue may have an impact there.

MR. FREY: May I just ask your Honor for clarification. We will endeavor to put together that additional information about Akamai. When would the Court --

THE COURT: The sooner you get it to me, the sooner I can react to it.

MR. FREY: Absolutely, your Honor.

THE COURT: So if counsel want to come back.

(Discussion off the record)

o 0 o

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 12 CR 121 (RJS)

MICHAEL STEINBERG,

Defendant.

----------x

New York, N.Y.
May 16, 2014
11:30 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA,
United States Attorney for the
Southern District of New York
ANTONIA APPS
HARRY A. CHERNOFF
Assistant United States Attorney

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Defendant
BARRY H. BERKE
MEGAN RYAN
STEVEN SHANE SPARLING

ALSO PRESENT: KAITLIN PAULSON, Paralegal
JAMES HINKLE, FBI

(Case called)

THE COURT: We have a lot of people in the courtroom today, many friends and relatives. Many of you wrote letters to the Court, and I thank you for that.

This is a public courtroom, so everybody is welcome here; but I'm sure your presence means a great deal to Mr. Steinberg, so I thank you for taking the time to be here. Our system is an open one, so we do proceedings like this publicly and on the record in the open. I think that's the strength of the system, so thanks for being here.

I will do everything I can to make sure I explain what's happening, because I think it's important that everybody understands what's taking place. A lot of people will be affected by the sentence imposed today, not just Mr. Steinberg; so it's important that we do this carefully and deliberately, and so we'll do that.

Let me just remind everybody why we're here.

Mr. Steinberg was found guilty on December 18th of last year, after a monthlong trial. The jury returned a guilty verdict on all five counts of the indictment. Yesterday I ruled on the defense Rule 29 motion; I issued a separate order and opinion on that. I explained my reasoning, so we don't need to get into that today, but I just wanted to make the record clear.

Today we're here for sentencing. It's an important

day for Mr. Steinberg and his family; it's an important day for our system of justice, as well, because every case matters, and every case is an opportunity, I think, for us to live up to our values and to make sure that every case is an opportunity for us to act wisely and justly. So that's certainly what I'm endeavoring to do, and so we will take this one step at a time.

What I want to do first is go over with the parties what I've received in connection with sentencing, which is a fairly voluminous pile. And they, of course, will let me know if I'm missing anything.

So I have received, first of all, the presentence report prepared by the probation department. The presentence report is dated May 9th; it is 27 pages long, single-spaced.

I have also reviewed the sentencing submission made by Mr. Berke and his colleagues on behalf of Mr. Steinberg. It is a 64-page, double-spaced submission. It is characteristically thorough and thoughtful. It also includes a number of exhibits, the vast majority of which are letters from people close to Mr. Steinberg who know him best, who wrote letters attesting to his character, and provided me with a much fuller sense of the man, and that's very helpful. So I thank those who took the time to write. There are 68, I think, in total, some of them quite lengthy, so it's really hundreds of pages, and I've read them all and certainly have thought about them a great deal.

In addition to the letters, Mr. Berke also attached several articles relating to the trial and the charges in the trial. And I've reviewed those, as well.

I've also reviewed the government's sentencing submission, which is no less thorough. It's 37 pages, double-spaced. The government has also included exhibits attached to its submission, a two-volume set, mostly consisting of trial exhibits that were introduced at the trial and that are referenced in the submission. And I've reviewed those, as well.

I then have reviewed the May 14th reply letter, I guess I'll call it, of Mr. Berke and his colleagues. It is a nine-page single-spaced letter; it has one attachment. It mostly responds to some of the arguments that were put forth in the government's submission. So I've read that, as well.

I presided over the trial, so I'm certainly familiar with the facts as they were introduced at the trial. I have refreshed myself on some of it and some of the exhibits just so that I was sharp and familiar with what had taken place in the courtroom during the trial. But that's principally what I have in connection with sentencing.

Have I overlooked anything, Mr. Berke?

MR. BERKE: You have not, your Honor. Thank you.

THE COURT: Okay. Ms. Apps?

MS. APPS: Nothing, your Honor.

THE COURT: All right. Well, let's start then with the presentence report. And for those who maybe missed it the first time, the presentence report is a report prepared by the probation department. And it's quite a lengthy report. It sets forth a lot of factual detail about Mr. Steinberg, about the crimes that he was convicted of, and it's a very helpful acumen, helping the judge get a sense of the case and what might be an appropriate sentence. It also makes a sentencing recommendation, among other things.

So I have reviewed that. I want to make sure, Mr. Berke, you've seen a copy of it and reviewed it with your client?

MR. BERKE: We have, your Honor.

THE COURT: Do you have any objections to it?

MR. BERKE: No, your Honor. The elements are already considered in the report that we raised with probation directly.

THE COURT: Okay. That's what I thought.

Ms. Apps, you've reviewed the report?

MS. APPS: Yes, your Honor.

THE COURT: And do you have an objection with respect to the sentencing guidelines calculation on gain?

MS. APPS: Correct. We have no objection to the factual statements in the report, but we do object to the probation department's determination that it excluded trading

activity by Mr. Cohen, which we believe should be included as is reflected in the body of the probation department's report; although notwithstanding I informed probation after I received the first report that we did continue our objection as to their exclusion of that trading conduct. Towards the end of the report it indicates the government has no objections. I think there may have been some confusion by the probation department as to our position. But as has been made clear in the government's papers, we maintain that objection.

THE COURT: Okay. All right.

Well, we'll go to the guidelines, I guess, first.

I want to just explain to everybody here and Mr. Steinberg, most importantly, the different factors that I'm required to consider. Congress has told judges they have to consider certain things. And, frankly, even if I weren't required to, these are the kinds of things I would consider.

But these factors include, first of all, your own personal history, the facts and circumstances of your life. You're an individual, and a unique one, unlike anybody I've ever sentenced or ever met. And so it's important that the sentence be tailored to you as a person.

Now, I have to also consider the facts and circumstances of the crimes for which you were convicted. They are serious crimes, obviously. But it's not just the name of the crimes, it's the details. So I have to look carefully at

what the facts were, how long did this go on for, what were the details, who did what, because I have to make sure that the sentence imposed reflects the seriousness of the crime, and that it also promotes respect for the law, which is another important value, and ultimately that it provides a just punishment for the crime.

Another objective that I'm required to consider is the need to deter or discourage crimes like this from being committed in the future. And there's two types of deterrence: There's specific, which means hopefully the sentence imposed on the defendant will send a message to the defendant that they can't commit crimes like this in the future; and then there's general deterrence, which is the hope that by imposing a sentence on one person, the message will seep through to a larger population, and people will absorb it and take the message that this is conduct that can't be engaged in because the consequences are too severe. And the hope, of course, is that the message is received and absorbed and in the future there is less crime, fewer instances of this kind of activity.

Now, it's hard to predict with any kind of certainty what future effects will come from a sentencing. It's certainly hard to quantify. But Congress has said -- and I think most of us recognize there's something to that -- there's some intuitive relationship between a sentence and future conduct. And courts are told to take that seriously and to try

to make that a factor in imposing a sentence.

Other factors include the needs of a particular defendant while in custody. So some people have medical needs or mental health needs; many have substance abuse treatment needs. And courts have to be sensitive to that and make sure the time in which a person is incarcerated is not wasted time so that they can deal with issues that might be holding them back or derailing them in life, so that once someone finishes serving their sentence, they can be productive and live a happy and a healthy life. That's something judges should consider.

Another factor that judges have to consider is something that's referred to as the need to avoid unwarranted sentencing disparities, which is kind of a lawyerly statement. But the point is that there has to be some kind of rough justice, rough fairness in the sentences imposed across cases. It would be wrong if people who engaged in similar conduct under similar circumstances got wildly different sentences just by virtue of who the judge was or who the prosecutors were or who the defense lawyers were.

It's important that judges take a step back to make sure that there's rough equality in the sentences imposed, recognizing, of course, that no two defendants are exactly alike, and no two cases are exactly alike, but that people would lose respect for the law if the sentences were just high and low and random and apparently arbitrary. So those are

things that judges have to consider.

There's another factor that judges have to consider -- I'm sure you've discussed this with Mr. Berke; we've alluded to it a little bit already -- which is the United States Sentencing Guidelines. And certainly I know Mr. Berke and the lawyers here understand and are familiar with the guidelines. Mr. Steinberg is probably more familiar with it now by virtue of talking to his lawyers. And some of you may be less familiar with that.

The sentencing guidelines are a big book; it's about five or 600 pages long, and it's put out by a commission. It's a commission of judges and lawyers and experts in the field. And their task is to come up with a manual that can provide guidance to judges like me, who are tasked with imposing sentences on human beings, who have been found guilty of committing crimes.

And the way it works is that this book is divided up into chapters. And there is a separate chapter or subchapter for every crime or type of crime. And so in a case like this, one involving a fraud, particularly insider trading, the judge is directed to go to the chapter relating to insider trading. And the judge is asked to make certain findings of fact. And based on those findings, the judge is then to assign points. It's sort of mathematical. And the judge adds points and sometimes subtracts points, and comes up ultimately with a

number; and that number is referred to as the offense Level.

The judge then goes to a different chapter in the book that relates to criminal history. And it is simply and intuitively, generally speaking, people who have committed crimes before, who have gone to jail before, are going to be treated more harshly than people who have had no convictions or no prior involvement at all in the criminal justice system. And so the judge is directed to go to that chapter, make findings if there are any convictions; if so, what the sentences were, how long ago the crimes were committed. And on the basis of those findings, the judge then determines which of six criminal history category applies. Category I is the lowest, least serious; Category VI is the highest and the most serious.

And on the basis then of those two findings, the offense level on the one hand, and the criminal history category on the other, the judge goes to the back of this book where there's a grid, it's a two-dimensional grid that is pretty basic, and the judge is directed to go down this column, which is the offense level, and across these columns, which is the Criminal History Category. And where the categories land, that's the spot in the guidelines that the judge is to find as the range, according to the commission, that would be appropriate in the case.

Now, the judge is not required to follow this book;

they are advisory, they are not mandatory. There is a recognition that this book, although helpful, is just a book; it can't anticipate every fact and every circumstance. It's what Mr. Berke quoted back to me as a blunt instrument, and I think that's fair. But it's useful. And the goals of this manual are, in large part, the goals that I already talked about. It's to achieve some of those objectives at sentencing.

So we are going to talk about each of these. We'll spend a few minutes now talking about the guidelines and how they apply.

After that, I'll give Mr. Berke an opportunity to address any of the factors that I just mentioned; his submission covered many of them, but I'll certainly give him time to address and elaborate upon some of them.

I'll give Ms. Apps the same opportunity.

I'll maybe let them respond a little bit to each other to make sure nobody feels they haven't had a chance to say their piece.

And then, after that, Mr. Steinberg, I'll give you an opportunity to speak. You have a right to speak before I impose sentence. But you're not required to. But you'd certainly be welcome to. So I'll leave that up to you. And if you choose not to, that's fine; it wouldn't be held against you. But if you would like to speak, I'll give you a minute, okay, or more than a minute; I'll give you as much time as

you'd like.

Any questions so far?

No.

Well, if you do have questions, whisper in Mr. Berke's ear, and he'll let me know, because all of this should be understandable and accessible. And, as I said, this is an important day for you, so we are not going to rush it. We're going to take it very slow and careful, all right?

Great.

All right. So let's start with the sentencing guidelines.

The presentence report, on page, I think it's 8, sets out the view of the probation office. And there's no dispute that the base offense level, given the crime involved, is 8. And that's pursuant to Section 2B1.4 of the guidelines. And if this sounds technical, that's because it is; basically, it's sort of accounting.

There is a dispute as to what enhancement there should be for the amount of gain. According to the sentencing guidelines, there's a base offense level of 8, but then you get more points, depending on how much you gained from an insider trading offense. And the more money you gained, the higher the enhancement is going to be.

So Mr. Berke is of the view -- and the probation department agrees -- that the enhancement should be 16 levels,

because the amount of gain was limited to the roughly $1.8 million that Mr. Steinberg's portfolio received as a result of trades in Dell and in Nvidia stock, which were the subject of the indictment and the counts that the jury returned guilty verdicts on.

The government argues that it should be two points higher, it should be level 18, because in addition to the gains in the portfolio, the gains that were achieved by Mr. Cohen, who traded on the basis of information provided by Mr. Steinberg in certain Dell trades, should be attributed as gain. And this really turns on the language of the sentencing guidelines.

There's a commentary in the guidelines, it's Section 2B1.4, that says "gain" is defined as the "total increase in value realized through trading and securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information."

So I think we're really just talking about the last part of that sentence, to whom the defendant provided inside information. And the parties take very different views.

Mr. Berke is of the view that if Mr. Cohen can't be proven to have been a co-conspirator, in essence, who knowingly engaged in insider trading, and would meet all the elements for insider trading, then the gains associated with his trades shouldn't be attributed to Mr. Steinberg.

The government is of the view that all that is required is information be provided, not that all the elements of insider trading be proven.

And the standard, we should be clear, is not proof beyond a reasonable doubt here. At trial it was. Here, the standard is what's known as a preponderance of the evidence. And that simply means the greater weight of the evidence. If you have the scales of justice, and you took all the evidence and put it on there, if the evidence tipped in favor of a finding that the gain of Mr. Cohen's trades should be attributed, then it would be. I don't have to find beyond a reasonable doubt. But I think this is, in many ways, more a legal argument than a factual one.

So I've reviewed the parties' papers on this. I think I understand the arguments, but I'm happy to hear from you if you'd like to elaborate. If you want to rest on your papers, that's fine, too, Mr. Berke.

MR. BERKE: Your Honor, thank you.

We won't repeat --

THE COURT: It may be useful to use the lecturn. Let's try to do that, because I am worried people are having -- I assume you all can hear me okay, because I've got a microphone within an inch of my mouth. It's harder for lawyers who are standing, especially if they are really tall, like Mr. Berke, to get close to the mike.

All right, Mr. Berke. Go ahead.

MR. BERKE: Thank you, Judge.

Your Honor, I did want to respond to the question of the facts, because I do believe that even if you take the government's construction that "provided inside information" simply means provided inside information, and doesn't require any guilty knowledge or any knowledge at all by the recipient, I think it is clear that the guidelines very specifically say "provided inside information."

And that language, I think, means something, your Honor. I would submit they didn't say make a recommendation based on inside information, they didn't say other constructions that they could have said, the commission could have said. Instead, they said provided inside information. It has to be Mr. Steinberg who provided that inside information.

And what the government relies on factually is simply an email that reflects a call that Mr. Steinberg had with Mr. Cohen, as your Honor knows. And then the call, the only evidence that the government offers is Mr. Steinberg said, I spoke to Mr. Cohen, and he would like Mr. Plotkin and Mr. Horvath to compare notes. And then Mr. Steinberg offers -- appears on opposite sides of this one. And that's what the government is relying on.

So, your Honor, I would submit that even under the government's construction -- and I would submit this is an

unusual position for the government, as we look through the cases, whether it's Ganek, Mr. Ganek and the Chiasson case, whose trading was included, was alleged to be a co-conspirator, in virtually all of these cases the government seeks to include additional trading, they are alleging that someone is a co-conspirator. This is obviously very different circumstances; there's not a whole lot of law on the construction of this commentary, at least a lot of law that we can find, where the government is saying assuming -- in this case Mr. Cohen is a complete innocent -- that there's a basis to nevertheless include his trading.

And as we set forth in our papers, your Honor, as we were trying to understand the government's position, initially the government informed us that they agreed with our number of 1.8 million and change. We conveyed to the probation department we had an agreement on that. And then they obviously told us in probation they took a different view and wanted to include both Cohen and select, the select account which your Honor has read about. And now they agree that the select account should not be there.

From our perspective, your Honor, whether it's a legal matter or it's a matter of fact, the government has not established or shown at all that Mr. Steinberg provided inside information, as the commentary would require. And as your Honor certainly knows, the rule of lenity applies to the

guidelines, as well as statutes. And to the extent there's any ambiguity to what that means, I would submit that "inside information" has a definite meaning. And simply what the government offers, that one call that Mr. Steinberg spoke about Dell to Mr. Cohen, and then, as a result, had Mr. Plotkin and Mr. Horvath compare notes, that that is insufficient in order to increase Mr. Steinberg's sentencing guidelines by really a year, if the government's construction is adopted, as your Honor knows.

So, your Honor, we respectfully submit that probation has it right, that we have it right; and that in this instance, based on these facts, regardless of how one construes that provision, the Cohen trading losses avoided should not be included.

THE COURT: Thank you, Mr. Berke.

MR. BERKE: Thank you, Judge.

THE COURT: Ms. Apps, did you want to respond to that?

MS. APPS: Just briefly, your Honor.

With respect to the facts in this case, I think the government relies not just on the communication between Mr. Steinberg and Mr. Cohen as reflected in the email in Government Exhibit 634 on the morning of August 26, it's a series of events which we rely on which demonstrate, in our view, that the Cohen trading resulted from inside information that Mr. Steinberg provided him.

It starts with a chain of events where the day before Mr. Steinberg learns that Mr. Cohen is long in Dell, and then discusses with Horvath weighing the risk reward of communicating their view to Mr. Cohen. And then when Mr. Steinberg then reports to Mr. Horvath and Mr. Plotkin that he had talked to Mr. Cohen and they should compare notes, it is not, we submit, a point at which Mr. Steinberg would simply step out of the picture and let others take over. Of course, having worked for many years at SAC Capital, and working for ultimately Steve Cohen, the head of the firm, the purpose was to ensure that Mr. Cohen receives the view that Mr. Steinberg held, which was, in turn, based on inside information.

And finally, after the earnings announcement on August 28, 2008, Mr. Cohen sent an email to Mr. Steinberg and Mr. Horvath. It was actually sent to the distribution list Steinberg Group. And he said, "Nice job on Dell," reflecting that Mr. Cohen's trading in his own account was indeed based on the information which was inside information provided by Mr. Steinberg and his analyst, Mr. Horvath. So those are really the facts that we rely on, your Honor.

Mr. Berke pointed out that in the probation department's report we had initially included the select account trades. In an abundance of caution and to be conservative, we withdrew our request to include the select account trades. I will note it makes no difference to the

guidelines range if your Honor includes the trading in Mr. Cohen's portfolio, which was approximately 1.8 million in losses. The loss amount under the guidelines is 3.5 million, which is between the range set forth in the guidelines of 2.5 and seven million. To include the select account trading, which would only be an additional 1.7 million in losses, does not put Mr. Steinberg's trading -- excuse me, does not put the total loss amount in a different bracket.

THE COURT: All right. Thank you.

MR. BERKE: Your Honor, may I briefly respond?

THE COURT: You always get the last word, Berke.

MR. BERKE: No, your Honor, you do, as you know.

THE COURT: I guess that's true.

That's fine. I'm not looking to shut anybody out.

MR. BERKE: Thank you, Judge.

And I think, as I understood the government's position from their papers, is they were looking to this latter exchange as corroboration, and not the basis. And I assume that based on how the papers were written, because, again, the commentary said "Mr. Steinberg must provide."

And I believe that the information that ultimately -- even if you credit the government's version for purposes of sentencing, that the information that ultimately got to Mr. Cohen, according to their version, went through two different layers, and independent layers, Plotkin and Vaccarino, and then

to Cohen. And again, your Honor, the commentary doesn't say if someone trades based on inside information, they receive; it doesn't have any other number of constructions. It could have. It says "Mr. Steinberg provided." And I would submit in the rule of lenity, "provided" means Mr. Steinberg provides.

Beyond that, your Honor, I think the government is truly relying on speculation in support of their argument, because they rely on Mr. Plotkin as supposedly the conduit who provided the inside information. We know from the evidence presented or at least discussed at trial -- I think ultimately it wasn't presented -- that Mr. Plotkin, in the August 2008 Dell trade, was long 1.8 million shares, worth approximately $40 million; that he went the exact opposite direction and did not rely on all of the information provided. So when Mr. Cohen says, "Good job," he's just as well rewarding the side that was right as opposed to the side that was wrong, which was Mr. Plotkin. And he was wrong in a big way and cost the firm a lot of money.

But all this, your Honor, we are speculating what's going on here. And I would submit the question is does the evidence show that Mr. Steinberg provided inside information to Mr. Cohen. And I would submit that at most the government can say he provided was a statement about Dell that didn't lead Mr. Cohen to change his position, didn't lead Mr. Cohen to take a short position so he could make money on the information; it

simply caused Mr. Cohen to say compare notes.

Now, ultimately, in terms of the later facts that the government is apparently relying on, I would note we don't know what happened with Mr. Cohen and Mr. Vaccarino and the like. We have the SEC testimony of Mr. Vaccarino, which the government submitted, we referenced some that is included in the submission. We have a submission that the SAC submitted to the SEC in which Mr. Cohen represents to the SEC in those papers that the reason he reduced his position is because when he -- in this case, following Mr. Plotkin, he saw a reduction and, therefore, cleaned out his position. Whether that's right or not, we don't know. But what we do know, your Honor, is that the government has speculation.

But even on the basis of those facts, we would submit that would not satisfy, applying the rule of lenity, the requirement that Mr. Steinberg himself provided inside information, not a recommendation, inside information to Mr. Cohen. And we would ask, your Honor, here, based on those facts, that you not include the additional amounts and the recommendation of the probation department.

Thank you, Judge.

THE COURT: Okay. Thank you, Mr. Berke.

All right. I'm prepared to rule.

I guess I don't think that it boils down to speculation ultimately. It seems to me that the inferences to

be drawn from the evidence that was introduced, the chronology of communications, the chronology of the trades, does support an inference that the information was conveyed to Mr. Cohen, and was, in fact, the basis of his trading.

So because the standard here is by a preponderance of the evidence, I think that standard has been met, and I am going to include the two-level enhancement. I'm not sure at the end of the day it's going to really make much difference ultimately to my sentence, but the first process here is to do the guidelines and to just call balls and strikes as I see them. And so this one strikes me as one that has been demonstrated by a preponderance based on the fair inferences from the evidence that was introduced.

So with that then, there's an 18-level increase, which yields a total offense level of 26. Mr. Steinberg has no prior convictions or any involvement of any kind with the criminal justice system, so he is, of course, in Criminal History Category I. That results then in a guidelines range of 63 to 78 months, which is about five and-a-third to six and-a-half years.

When you get familiar with the guidelines, you learn to divide by 12 pretty well. But that's basically five and-a-third to six and-a-half years, which is sort of a very odd number, but that's the view of the commission that prepares this report based on their grid as to what would be the

appropriate sentence in light of the findings I've just made.

That's the guidelines.

As I said, the guidelines are not mandatory. And I think there's a recognition that no guidelines could ever replace the care and balancing of a human judge in deciding an appropriate sentence. So we'll talk now about the other factors that are every bit as important as the guidelines. And so, Mr. Berke, I'm happy to hear from you.

Can I ask you again to go to the lecturn.

MR. BERKE: Yes, of course, your Honor.

THE COURT: Thanks.

MR. BERKE: Thank you, your Honor.

Your Honor, as you know, I have represented Mr. Steinberg now for a number of years. And I've gotten to know Mr. Steinberg and his family at this point quite well. And on the unhappy day when I began turning towards thinking about the sentencing and these proceedings, I felt fairly confident that we would have a lot to say when discussing the history and characteristics of Mr. Steinberg in asking you to consider them, in addition to the offense conduct for which he was convicted.

And I have to confess, your Honor, after that, I began hearing from people who I may have met once or twice in court, or not at all, and began hearing about stories and anecdotes and more that Mr. Steinberg had done. I began hearing about

his deeds, his words, his support, his genuine acts of kindness that he gave to family, to friends, to strangers, and, in some respects, in a very organized way, and charitable and altruistic pursuits that he really has done all his adult life.

And I have to say, your Honor, that as much as I expected I'd have a lot to say, those expectations were surpassed by all that I learned about Mr. Steinberg that I didn't know, given how he has lived his life and how that may impact the factors beyond the offense conduct and the 3553(a) factors your Honor will, of course, consider. And I understand your Honor, and I know you've read the 65-plus letters very carefully, and I appreciate that. And I just wanted to, if I may, talk about some aspects of that for your Honor.

Of course, I know your Honor has read letters from Liz Steinberg, his wife, as well as many friends, who talked about the relationship between Mr. Steinberg and Liz and their children. And without question, I would submit that they reflect very positively on Mr. Steinberg's character and characteristics, they've obviously been very blessed with a lot of good things. But they've also, in their lives, had challenges. And you read in great detail -- and I won't go into those details -- how Mr. Steinberg responded and addressed those challenges they faced between health issues and issues with their children, and challenges that they continue to face; and that Mr. Steinberg is obviously a very key person that

their children, his son, relies on substantially, and you certainly read about how he meets those challenges. And I submit that those are relevant in considering his history and characteristics and some of the other factors, although obviously there are a lot of other factors, as well.

I know your Honor read the submissions by Mr. Steinberg's parents, Maurice and Sandy Steinberg. And, of course, they are his parents; they have a lot of good things to say. But I would submit even beyond just the good things, they tell stories and describe things about Mr. Steinberg that also show the support he's given them, his friends, and other family members, and also the respect he's afforded them. I was struck by the fact that to this day he speaks to his parents almost on a daily basis, which reflects how he honors them and how he carries himself with respect to his family.

His brother Daniel, of course, recounts, again, from a family perspective, how Michael has given him advice and helped him become a better person, and then did more tangible things where he was fortunately in a position to pay off his medical school loans, and which he did that, which obviously he was able to do that in part because of the success he has had in his job. But also I think it reflects other things he did beyond simply that financial contribution.

And, your Honor, I want to talk about beyond simply the family. There's a lot submitted about the immediate

family, the distant family, and all of the things that Mr. Steinberg has done and meant to him, which I do think does, I would submit, reflect on his character, which is, again, an undefined term, but I think obviously his characteristics are one of the things that I know your Honor will consider.

Beyond that though, I think Mr. Steinberg really is exceptional in terms of how he has lived his life in terms of an altruistic way, in terms of his giving in charitable pursuits. And I'll give the most obvious example, where Mr. Steinberg, starting when he was relatively young, 30, with others, had the idea of organizing the young professionals to see if they could maximize their skill set and get more involved in philanthropy and charitable causes by filling a gap where they saw smaller charities that were not able to get big institutions to give money, and try to not only identify the ones that could benefit the most from that, but do it in a hands-on way, I think they call it venture philanthropy hands-on giving. Mr. Steinberg committed himself all in. I think you certainly have the letter from Ms. Herman, the director of Natan, but also from many people who were able to talk about it either because they were involved in Natan or recipients of those grants. And I think you get a feel for the amount of time Mr. Steinberg actually contributed both in reviewing the grants, understanding what would be the best use of the money, but also involved with the organizations

themselves.

And as your Honor no doubt read, I think there are over 80 small charities that they helped, including some that stood out to me: Innovation Africa, where they help to bring Israeli technology to Africa, and over five years helped to bring, I believe the numbers were, electricity, food, and medical care to over 450,000 people. There are obviously a lot of other examples given where I think Mr. Steinberg gave of himself and was able to truly make a difference in the world in a way that if it should ever matter, I would submit today may be the day it matters.

Beyond that, I also think your Honor no doubt read how Mr. Steinberg 's involvement with Natan helped him to encourage not just his peers to get involved, but then as they got older, focused on younger professionals who may not be giving, may not be involved in such organizations, and to get them involved, and he did that, in addition to the children of his friends who as they began to have families.

And I would submit, your Honor, those sorts of acts really do stand out about who Mr. Steinberg is. And in balancing the offense conduct that your Honor is also required to consider, I hope your Honor will find that that does support a substantially lower sentence.

Beyond sort of the more higher profile acts of Mr. Steinberg, I also was struck by the smaller acts. One in

particular I mentioned is I thought it stood out that when Hurricane Sandy struck, and obviously affected so many people in our city, that Mr. Steinberg and his wife, Liz, that they opened their home to people who worked in their building who were affected by it. They cooked meals for them, offered them a place to rest, shower, and the like. And I thought that that also reflected their private acts of charity. And as your Honor knows, there's many more examples that are given in the letters and in his life, but I think that also reflects on his character.

The third piece I wanted to mention about the letters, your Honor, were really the anecdotes and stories that came from so many friends and acquaintances who talked about how Mr. Steinberg responded when they were in a time of need, of crisis, looking for help. Mr. Steinberg didn't only respond with words, but as the old saying goes, actions speak louder than words, he actually acted; he actually did something.

And, your Honor, I was struck and wanted to highlight the many examples where Mr. Steinberg was confronted with people in need, friends, but also situations where people didn't know him so well, and strangers who had reached out to Mr. Steinberg or he had reached out to them because he noticed they had some need.

His friend who was diagnosed with a terrible illness, Mr. Steinberg believed that he wasn't getting the proper

treatment, and did research himself, and then became involved with him and his family and doctors to get him the proper research. He credits Mr. Steinberg with actually saving his life.

The other friends with other illnesses, Mr. Steinberg responded again not just with words, but with deeds. And there was story, after story, after story that had an impression on me. And I was concerned I wouldn't have the words to sort of express it, but I know your Honor read them all yourself, and would ask that your Honor consider it.

And I recognize that it's difficult in considering all these factors, but I would submit, your Honor, that the long list of examples and evidence of how Mr. Steinberg has conducted his life outside of what your Honor is required to consider, based on the conviction here, does stand out. And I would ask your Honor to consider providing a sentence substantially below the guideline ranges based on those factors.

In considering how to quantify that and what that number may mean, I know your Honor has certainly given this a lot of thought.

I did want to focus on something that we talked about in our submission; and obviously our submissions are lengthy in discussing issues of culpability and relative culpability. But addressing the factor your Honor highlighted, the need to avoid

unwanted disparities, which, of course, the Supreme Court has also said in Gall, also involves making sure the sentences of defendants who are dissimilar or not similar. And to that, I wanted to address in particular what I think is the most direct and easy comparison.

The co-conspirator in this case, Mr. Newman, as your Honor knows, he had a guideline range that is actually the same as your Honor has now found for Mr. Steinberg. Your Honor sentenced him to nine months below the low-end of the guideline, 54 months. And we would submit, your Honor, that Mr. Steinberg's culpability, based on obviously the jury verdict and the government's allegations in this case, are substantially below that of Mr. Newman.

I think the most obvious example is what certainly the government spoke about in great length at his sentencing, and that is his role in paying the $175,000 to Mr. Boyle that the government alleged directly led to the breach by Mr. Ray and were covert payments. I think there are a lot of other distinctions that we draw out in our papers that I don't need to discuss here.

I would submit, your Honor, that based on the allegations and accepting obviously the verdict, that Mr. Steinberg is substantially less culpable than Mr. Newman. And we would ask that your Honor consider that in imposing a sentence sufficient, but not greater than necessary, to meet

the requirements of the guidelines.

And the other example we would give and reference in our papers, but would highlight today, is Mr. Whitman, who, as your Honor knows, was sentenced to 24 months. I would just say that Mr. Whitman was also someone -- he actually ran his own hedge fund. We think he was involved or alleged to be involved in two separate conspiracies. He was alleged to have directly provided the benefits in exchange for the inside information. And we would submit that based on the evidence publicly available, it would appear that he would have greater culpability than Mr. Steinberg based on the allegations in this case. And we would ask your Honor to consider that sentence, as well, recognizing that's a different conspiracy and a different set of facts.

And based on all this, your Honor, obviously we've submitted a lot more in our papers, if your Honor has any questions about any of the positions we've made or any of the submissions, we are available to discuss them.

Other than that, we would just ask your Honor obviously, based on all of the factors, to impose a sentence substantially below the advisory guideline range.

THE COURT: All right. Thank you, Mr. Berke.

MR. BERKE: Thank you, Judge.

THE COURT: Ms. Apps, I'm happy to hear from you.

MS. APPS: Thank you, your Honor.

As your Honor is aware, insider trading is a serious crime. And Michael Steinberg knowingly received and traded on material nonpublic information about Dell and Nvidia for multiple quarters in 2008 and 2009. He knew that his analyst obtained that inside information through a network of corrupt analysts at other hedge funds, and he pressed his analysts to get updates on that inside information. He made nearly two million in profits in his own portfolio, and passed the inside information to his boss, Steve Cohen.

As the jury found, based on your Honor's instructions, the evidence at trial overwhelmingly established that Mr. Steinberg knew of the fraudulent nature of the insider trading scheme he joined, and he acted with the intent that it succeed. He knowingly violated the law, and knew what he was doing was wrong.

If I may briefly address Mr. Berke's arguments on unwarranted sentencing disparities.

THE COURT: Sure.

MS. APPS: I won't focus on cases outside of this particular conspiracy, your Honor, because I know having appeared before your Honor at sentencings before, you are more familiar with the different cases, both with higher sentences and lower sentences, than anyone else I know. But if I may focus for a few moments on Mr. Newman.

As we argued earlier, I think the plain language of

the guidelines dictate the result that Mr. Cohen's trading should be included in the loss calculation and as your Honor found.

THE COURT: I've already found that, right.

MS. APPS: Of course.

I will note that that puts him in the same guidelines range as Mr. Newman. And in that regard, I think that the guidelines do not make a distinction between trades in an individual's portfolio account and those in the account of his boss for purposes of considering an individual's culpability.

But, of course, your Honor may consider, under Section 3553(a), whether or not the situations are comparable. And in that regard, I will note that Mr. Steinberg made 1.8 million in his portfolio, whereas Mr. Newman made four million in his portfolio. And the impact of that was partly to the profit that Mr. Newman made on the insider trades that were in his portfolio. The profit on that $4 million from Mr. Newman was far more direct, of course, than the profit from the trading in Mr. Cohen's account; indeed, in this case it was Mr. Cohen avoided losses and Mr. Steinberg made no profit from the trading in Cohen's account. And the Court, of course, may consider that for purposes of sentencing the defendant under Section 3553(a).

THE COURT: I think one of the distinctions that Mr. Berke focused on, not today, but certainly in his papers,

is that Mr. Newman was arranging for payments to be made to a source. And I think there's no such allegation with respect to Mr. Steinberg, so does that make Mr. Newman more culpable.

MS. APPS: Your Honor, we have conceded that Mr. Steinberg did not know of the payments that Mr. Newman made to Mr. Goyal. And there certainly is an argument that in that respect, Mr. Steinberg is less culpable than Newman. Of course, as we present it in our papers, that does not mean Mr. Steinberg was not fully aware of the illegal nature of this insider trading scheme, and participated and furthered that scheme --

THE COURT: Look, there are many people here who I think still believe that Mr. Steinberg is innocent, and I respect that. But the jury has spoken on that, so I'm sentencing on the basis of a guilty conviction and a finding that he was a member of the insider trading conspiracy and engaged in insider trading. So that's a given.

MS. APPS: Of course.

THE COURT: But there are still degrees of culpability within a conspiracy and a cross-conspiracy. So I think that was at least one of the points Mr. Berke was making, right.

MS. APPS: And I agreed that not having made those direct payments himself, in that respect, Steinberg is less culpable than Mr. Newman.

THE COURT: All right.

MS. APPS: Your Honor, I understand we'll get to forfeiture later, but we have a draft order for the Court's consideration.

THE COURT: Why don't we just spend a minute talking about forfeiture, because it always kind of breaks the flow when we take it up later.

The government is seeking forfeiture of approximately $365,000, which was the proceeds of the trades in Mr. Steinberg's portfolio.

Mr. Berke, I may have missed it, I don't think you addressed that, do you have any objection to that?

MR. BERKE: No, your Honor. Based on the conviction, we agree that's the proper --

THE COURT: You are not waiving any arguments on appeal, but in terms of the math, basically. So the forfeiture, 365,142.30, I think, right?

MS. APPS: Yes.

THE COURT: So you can hand that up. I'll look at it and I'll -- have you seen a copy, Mr. Berke?

MR. BERKE: I have, your Honor.

THE COURT: I think that will be part of any judgment.

Nothing else, Ms. Apps?

MS. APPS: I have nothing further at this time, your Honor.

THE COURT: Mr. Berke.

MR. BERKE: Nothing further, your Honor.

THE COURT: Mr. Steinberg, as I said, if you wish to speak, you can do that. If you want to sit, that's fine; frankly, it might be closer to the mike. If you prefer to stand, that's fine, too.

MR. BERKE: Your Honor, I just want to alert you, as your Honor may not be surprised to hear, we've advised Mr. Steinberg not to make a statement in light of the fact that there will be an appeal.

THE COURT: That's fine. Not unusual, and certainly nothing that would be held against you.

Okay. That's fine. Have a seat.

MR. BERKE: Thank you, Judge.

THE COURT: All right. Let me tell you the sentence I intend to impose and my reasons for it.

In our system, judges have to give reasons, and they have to do it publicly, which is, I think, a good thing. I think it's a strength in our system, because that way a defendant and his family and the public generally don't have to guess what the judge was thinking. They can know and understand. And even if they disagree, they can hopefully respect or have at least some respect for the judgment that came down.

Sentencing is the hardest job of any judge; every judge I know says that. And it's true. It's an awesome

responsibility to impose a sentence on another human being. It's a humbling experience. And it's a lonely part of the job, candidly, because Mr. Steinberg and his family and friends are united in their concern and their worry and in their hope. Others, I think, likewise have perspectives that are limited. I'm the only one who has to balance all these different factors, and that's something that I generally can't share; it has to be done by me based on my judgment. And there are times when that's a very daunting thing, it's a daunting task. But it is something that is the most important thing I do, and I think most judges feel that also.

So I'm going to explain to you sort of how I get to where I'm going, Mr. Steinberg. And I think it's important to walk through the process, even though the punchline gets sort of saved to the end, and it seems as though I'm trying to build suspense. It's not that, it's just that I want to give you a sense of my reasoning.

I was struck by a letter, the letter from your wife, Elizabeth, a really beautiful and moving letter; very heartfelt. But in it, she expressed some concern about whether her words could do justice to what she wanted to convey. And I think, frankly, her worries were unfounded, because I thought it was really a beautiful and eloquent letter, and gave a real sense of you as a man that, frankly, any husband would be proud to have from his wife.

But I understand her sentiment and her concerns, because I share the concerns in that I worry that my words today are not going to be sufficient to convey what I've considered and what I have thought about and what I have weighed. And so I guess that's the nature of human communication; there are limits to it. It doesn't always carry the freight we want it to, but it's the best we have. And so with that in mind, I'll proceed.

I read all the letters. They were very moving letters. They were very thoughtful letters. It's rare that I get that many, and that many letters of such a quality. People spent a lot of time thinking about what they were going to write. It didn't have the feel of a letter-writing campaign; it seemed like people really sat down and took the time to express themselves on a subject that they felt very strongly about.

I'm not going to comment on all or most of them. There are a couple that stood out, and I just think it's worth reading portions of them, because for one reason or another they struck me.

One of them was from Mark and Randy Berman, who may even be here, I don't know, but they wrote: "We hope you will invest the time to get a full understanding of who Michael Steinberg is as a person, father, and member of the community. We only wish you knew him personally."

And I thought, Well, that really does sum up what the hope I would think of a person writing a letter would be as to what the Court would do with that letter. And I can assure you, I certainly have invested the time, not just to read the letters -- I'll tell you, that took a long time; these are some very long letters and very detailed letters. They are not just a paragraph, He's a good guy, and sort of moves on. So I definitely invested that time.

But I think the harder part, the more time-consuming part is, frankly, investing the time to try to understand and appreciate the point of view of the letter writer, and to have empathy and understanding, put myself in their shoes, but also then to put myself in your shoes, Mr. Steinberg; because for understandable reasons, you haven't spoken here today, and you and I have never really directly spoken, I don't think, though I feel as though I know you in some ways, because we spent a month together in a courtroom, but there are limits to our communication. So these letters, in a sense, speak for you based on what you've meant to other people. And so I thank them for it. It's been very valuable.

There is a letter from your father which I thought had a comment that I thought was worth repeating. It said: "Michael cannot be defined by what you saw in court." And I think that's true. I know that going in. I know that a trial is not about providing a full picture of an entire person; it's

much more limited than that. The trial didn't define Mr. Steinberg; it couldn't have. There's so much more to this rich and really, really nuanced and complicated person.

One of the things that Dr. Steinberg said was: "Missing was the person known by his many friends and colleagues as an honorable, moral, and decent man." And I think perhaps that is true in a sense that really wasn't what the trial was about. The trial was much more limited; it was about whether the crimes charged were committed, whether the evidence -- and, frankly, it's more limited than that, whether the evidence demonstrated it beyond a reasonable doubt. That's all the jury was asked to do; that's all they really could do. They don't have the capacity to make a judgment about this man as a person or to offer a referendum on the quality of his life or who he is. They weren't exposed to most of who he is. They really were limited to the facts of the allegations and the proof that was presented at trial.

But sentencing is a little different. I have to go deeper than what the jury was focused on, because sentencing is a different task. So I certainly have endeavored to be careful about this.

Mr. Steinberg's mother wrote a beautiful letter, as well. And she described Michael as her precious son Michael. I suppose every mother says that about their son in some ways, but I do think that this is a special and a precious person. I

think that most defendants I sentence are special and precious in ways that defy what they have been charged with. But I think it's particularly true in this case.

I think Mr. Steinberg has lived a life that has, by and large, been not just good, it's been very good. He's been kind, he's been generous, he's been thoughtful. He's the kind of person that I would think any father or mother would be proud to have for a son. That comes across in the letters again and again.

Again, I don't want to read them and become repetitive, but Danielle Harris, who's a public defender in San Francisco, I think, wrote: "The world is a better place because of Michael Steinberg."

Lara Markenson said the same thing.

A lot of people used similar views and expressions to convey the sense of this person.

Ernie Dahlman credited Mr. Steinberg with literally saving his life. And that's a dramatic story and one that you don't read everyday.

But equally moving in some ways to me was a letter from Samantha and Eric Schmell -- I may be mispronouncing names -- who just talked about Mr. Steinberg being kind to the new kid on the first day of school. That's a small thing, I suppose, and it was a long time ago, but it gives a sense of character. And I think character is very important. It's

important in many ways more than just individual acts of charity or individual acts of generosity. I think most of the letters really speak about character, and it wasn't lost on me.

Barry Scherman wrote: "I have found Michael to be a person of noble character, someone to admire and emulate. I have the utmost respect and admiration for Michael Steinberg."

Heather Heller said a similar thing, very eloquently: "Michael Steinberg is a dedicated and loving father and husband, a wonderful and caring friend, and a generous, thoughtful, and philanthropic member of our community."

I believe that to be true. And I believe it to be important. So those things are not lost on me, and they are certainly weighed in the balance, and they count for a lot.

I will say that I was particularly pleased and, in some ways, touched with a letter from Andrew Heller, Ms. Heller's husband. He also spoke to the character of Mr. Steinberg very eloquently and thoughtfully.

But he said something else that sort of touched me. He said: "I can only imagine that sentencing someone is a tremendously difficult decision, and I appreciate that you have many considerations to balance. I hope that my letter will give you some additional information and perspective on the many good things Michael has done in his life so far, and the type of generous, thoughtful, and caring person I and many others know him to be."

Candidly, I was grateful for that bit of empathy from Mr. Heller, who tried to put himself in my shoes for a moment, because he's right, I have difficult decisions to make, but I also have many considerations to balance; and I guess that's my segue to some of the other considerations to balance.

If it were only this, if it were only what is the character of this man, then this would be easy, because I think this is a basically good man and a person who is loved and respected by many or most who know him in a way that is unusual. I wouldn't say it's unheard of; most of the people who come before me are good in a meaningful sense. I'm not naive, but I do think that most of the people that I sentence are people who are loved and missed and mourned when they are separated from their loved ones, and who are capable of great generosity and kindness.

But I do think that your life to this point takes you into a different category, and I think that has to be respected. But it has to be balanced, too. It has to be balanced against these other factors. And the letter writers, other than perhaps Mr. Heller, who focused on for a moment, at least acknowledged what I have to do, or not focused on that, and that's not a criticism, because they are focused on you, and they are focused on what is most immediate to them.

But I do have to consider the crime here. And as I said, there are some who sincerely believe that you did not

commit this crime; that the jury's verdict was erroneous. And I respect that. But that's why we have trials. And I think the jury's verdict was justified on the evidence. I issued a ruling on that. But I sentence now with the understanding, the assumption, that Mr. Steinberg is guilty of the crime that he was charged with, crimes that he was charged with.

They are serious crimes. No one died as a result of these crimes; there are more serious crimes. But they are not trivial crimes; they are crimes that go to the heart of what it is to live in an honest society, and to live in a market system where we have rules.

And one of the real objectives of sentencing is to promote respect for the law. And we have had these laws for a long time. And I think the understanding by everyone involved was that there are certain things you cannot do; there are certain types of information that can't be the basis for trades. And I think the evidence demonstrated that this was something that was honoring the breach, notwithstanding compliance manuals, notwithstanding training, notwithstanding full knowledge of the consequences of engaging in insider trading.

There was insider trading here in this conspiracy, not once or twice, this was consistent over a period of time, quarter to quarter to quarter, in multiple stocks, involving multiple trades. They didn't all make money, but in some ways

that was just sort of an accident of market expectations. But certainly the jury found -- and I think the evidence supports -- that there was a lot of trading going on. It wasn't an isolated thing. And that's something obviously that I have to consider. And it's something that has to be balanced.

There are a lot of people who criticize these guidelines. And I think it's fair to criticize these guidelines. They are not perfect. But to say they are not perfect is not to say they sort of go out the window. I think their endeavor is to avoid disparity, to equalize across cases, and to provide guidance based on measures of culpability.

The amount of gain is, in some ways, a clumsy way to measure culpability, but it's not an illogical one. There might be other more subtle things that could also be considered, but, for most people on the planet, $1.8 million of gain is a lifetime of accumulated wealth. It might be several generations of accumulated wealth. Even a hedge fund, it's no big deal, but it's a lot of money to most people. And the illegal procurement of those gains is something that has to be punished and has to be called out.

And so there are other factors I think are not in this guideline. The real criticism of the sentencing guidelines for insider trading is that it really focuses just on basically a base offense level and a gain amount. That's all there is.

And I think that is the fair criticism. There are other things that matter. But I think those other things in some ways are present here:

The number of trades. The guidelines make no distinction between someone who does one big trade on the spur-of-the-moment, exercising a momentary lapse in judgment, from someone who does systematic trades over a period of months and years. In this case, we have the latter.

The sophistication of the parties involved. Someone who sort of was young and not really familiar with the standards or understood how the rules were constructed and how they were played might be less culpable. But I think in this case Mr. Steinberg was very sophisticated, was in a leadership position, was someone who others looked to and respected. And so I think that counts against him in sort of weighing the culpability of this offense. Those are things I take into consideration, and they are things that can't be ignored.

Promoting respect for the law, as I said before, matters. And I think that's one of the chief harms of his crimes; it undermines people's respect for the law; it also, I think, undermines people's confidence in markets and confidence in systems that are essential to the prosperity of this country. This is a country where I think we should be proud of our free market system, and proud that we have access to wealth and access to investment to enable good ideas to be developed

so that we have a more prosperous society. I think that's a good thing. We are all proud of that. But things that undermine people's confidence in that system are at least potentially very harmful.

I guess that leads to the next point: Deterrence. As I said, there's specific deterrence and general deterrence.

Specific deterrence, I have to say, I don't think is really a factor here. I don't think Mr. Steinberg is ever going to commit another crime, so I'm not worried about that.

General deterrence is perhaps a different story. I do think others will follow this case and cases like it and perhaps derive lessons from it. That's important. That's not true of every case. I have to say the vast majority of cases where I sentence defendants, it's an empty courtroom; there might be one or two people, and no prospects for anybody else really learning much about the sentence.

This is a case and cases like it I think word gets out and people can learn from it. The lessons that are taught can be constructive ones. They can also be, I think, misunderstood, as well. But I do think that that's a relevant concern; it's not the driving concern, but it is a relevant concern and not an insignificant one.

And then with respect to sentencing disparity, look, it's hard sometimes to compare individuals, even in the same conspiracy, because each person is unique. I think a

distinction can be made between Mr. Newman and Mr. Steinberg, I think, in terms of culpability. I think Mr. Newman was more all in, was more of a driving force; the payments he made were reminders of the corrupt nature of this thing, whereas Mr. Steinberg's was a more passive involvement. I've seen no evidence to suggest that this was rampant, at least with respect to Mr. Steinberg's portfolio. Dell and Nvidia were the trades; they were not isolated; this happened quarter after quarter, not insignificant amounts of money, but certainly distinguishable from other cases that I've presided over where there was a much more aggressive seeking of inside information, basically putting bounties on sources, bounties on lawyers willing to breach their duties. I don't think this is that kind of a case, and it distinguishes Mr. Steinberg's culpability from some of the others that I've sentenced and have been sentenced in other cases.

Balancing all that is a hard thing. There's no magic in the guidelines. It may surprise you to know that I sentence below the guidelines at twice the national average, I just looked it up. And I don't feel bad about that. I usually, in cases like this, have sentenced at the low end, very low end of the range, or below the range, because I think there are other factors that are often not recognized in the guidelines, as I've mentioned.

In this case, I do intend to go below the guidelines,

and it's largely because of your character and the person I think you are. And it's not that you just sort of could throw money at things and buy yourself chips to throw on the good behavior column; it's not simply that you have no prior convictions, because, of course, you don't. I do think that the life you've led, the testimonials of people who know you best, says something about you that strikes me distinguishes you from most of the people I've sentenced. And you have to get credit for that. I think that a system that didn't consider that would be rigid and unjust. So I do consider those things.

But I also balance it against the other factors I talked about, including the fact that, look, I think the fact is that you didn't need to commit these crimes. You were comfortable. Not just comfortable, my goodness, in the history of mankind, there's very few who had all the blessings and material things that you had; but to throw the immaterial ones on top, family who loved you, and responsibilities to people who were depending on you, lots of reasons not to engage in this conduct. No need to engage in this to save a failing business or to stave off bankruptcy or anything like that. There were no financial pressures that drove to the commission of this crime. And I think that's something that I also meant to mention before.

But, on balance, look, I think I agree with the

letters I've received, I agree with most of what Mr. Berke said, I also agree with most of what Ms. Apps said; it's just, on balance, I think this is conduct that has to be punished, has to be punished in a serious way, but not in a way that's cruel or vindictive.

So with all that, I'll get to the punchline. I'm sorry I dragged this out.

It's my intention to impose a sentence of 42 months, which is three and-a-half years, not insignificant, but below the guidelines certainly, but I think reflective of the things I talked about. I think a sentence greater than that would be unnecessary to meet the objectives that I've talked about, and I think a sentence less than this would perhaps undermine some of those same objectives.

So 42 months, to be followed by a term of supervised release of three years, with terms and conditions that are set forth in the presentence report. Probation had asked for one year of supervised release. And if you're doing well, I'm happy to cut it short; I do that sometimes. But for now I'm going to say three years, which is what I typically do.

I am going to impose a fine. I think a fine of $2 million is appropriate. It's often the case I don't impose fines because people just don't have the money to pay a fine, but I think you have the ability to pay a fine. And I think it would be appropriate that you do so.

I am also going to order forfeiture, as I said, in the amount of $365,142.30, if I remember correctly. And I'll issue a separate order for that.

And then there's a special assessment of $500 that has to be imposed; that's mandatory $100 for each count of conviction.

So that's the sentence I intend to impose.

Mr. Berke, is there any legal impediment to my imposing that sentence?

MR. BERKE: Nothing that we haven't already raised, your Honor.

THE COURT: Okay.

Ms. Apps, is there any legal impediment to my imposing this sentence?

MS. APPS: No, your Honor.

THE COURT: Mr. Steinberg, let me ask you to stand.

Mr. Steinberg, having presided over your trial and accepted the guilty verdict from the jury on the five counts of the indictment, I now sentence you as follows:

I sentence you to a term of incarceration of 42 months to run concurrently on each of the counts. I also impose a term of supervised release of three years; it will include the following standard and mandatory special conditions. There are standard conditions 13 that apply in every case. I'm imposing those.

The mandatory conditions are that you shall not commit another federal, state, or local crime; you shall not possess a controlled substance of any kind; you shall not possess a firearm or destructive device of any kind.

I'm not too worried about most of these, candidly.

You will also cooperate in the collection of DNA as directed by your probation officer.

There are the following special conditions that I'm going to impose: First, that you shall provide the probation office with any requested financial information; second, you shall not incur new credit charges or open additional lines of credit without the approval of the probation officer. That's just to make sure that you're not doing anything that's going to put you at financial risk. I'm not too worried about that either.

I'm going to order that you report to the nearest probation office within 24 hours of your release from custody; so when you get home, celebrate, there will be a lot of people happy to see you. But the next day I want you to go to probation. You'll be supervised in this district, so it will probably be across the street by then, I'm not sure exactly, but I think it will be 500 Pearl Street.

As I said, I'm going to impose a fine of $2 million, as well as a special assessment of $500, which is due immediately. And then forfeiture in the amount of $365,142.30.

Okay. So have a seat. That's the sentence.

I should tell you -- I think you know already -- you have a right to appeal the sentence. And so if you wish to appeal, you need to file a notice of appeal within two weeks. Mr. Berke will help you with that, I'm sure.

All right. Mr. Berke, any recommendations you'd like me to make to the Bureau of Prisons?

MR. BERKE: Thank you, your Honor.

We would ask that you recommend that the sentence be served at the satellite camp at Otisville close to Mr. Steinberg's family.

THE COURT: I will make that recommendation. I'm not sure if anybody could hear you, but the request is that I make a recommendation to the Bureau of Prisons that he be designated to the Otisville facility, which is in -- it's not Westchester, I guess it's -- it might be Orange or Dutchess, I'm not sure. In any event, it's pretty close, so close enough to visit.

I can only make recommendations; I can't order it. But I certainly will make the recommendation in the strongest possible terms, okay?

MR. BERKE: Thank you, your Honor.

The other request we have, your Honor, is that your Honor grant bail pending appeal. The government has consented to that.

THE COURT: Look, I had denied a similar request to

Mr. Chiasson and Mr. Newman. And I denied it on the basis that I didn't think the standard had been met; seemed to me that the law was pretty clear, and so I denied it.

The Circuit reversed it, and I since, I think, indicated that this is a closer call than I thought. And I respect that. They are the Circuit; they get to make the final calls on this.

So in light of those changed circumstances, certainly I will grant the request, okay?

MR. BERKE: Thank you, your Honor.

THE COURT: I'll probably know what's going on. It may be that I might want to revisit this, depending on how the appeal in the Newman and Chiasson case goes. So if that comes down in the interim, I'd ask the parties to submit a joint letter indicating how that ruling would affect bail pending appeal, if at all. I'll probably learn about it at the same time you do, but we'll both keep our eyes out, okay?

MR. BERKE: Thank you, your Honor.

THE COURT: Anything else we should cover today?

MS. APPS: No, your Honor.

There are no open counts.

THE COURT: No other open counts.

Okay. Mr. Berke, anything else from your perspective?

MR. BERKE: No, your Honor.

The only thing I would say is to alert your Honor with

regard to the financial component of the sentence. We've had some conversations with the government, and we'll speak to them about hopefully reaching an agreement, as happened in the Chiasson case, in light of where we are with the sentencing.

THE COURT: Okay. The appeal.

MR. BERKE: The appeal, rather, yes.

Thank you, Judge.

THE COURT: All right. Mr. Steinberg, that may be a sentence of more than what you'd hoped for, maybe it's better, I don't know. As I said, I have to call them as I see them, and I try to do that.

I meant what I said. I think you're a decent man, a good man, a very good man. I read those letters. I just kept thinking, Boy, would people say such good and kind things about me so consistently. I don't know that they would. So you have much to be proud of.

And I do think, as your father said, this doesn't define you. The jury has spoken; and punishment follows from a verdict like that. But you're a young man, and this will pass. You've got a family, incredible family and support network behind you. You're very blessed in having that.

Obviously I think you will do everything you can to make sure that you're there for your kids and there for your family, even when you're separated from them, because that's a challenge, but it's one that I think you can manage.

And so my wish for you is a long and healthy and happy life; that you'll continue to do all the good things you were doing before, mindful of the harmfulness of this crime. And I think you have learned productive lessons from it, which no doubt you seem like that kind of person.

You and I have never really spoken, but I hope, even if you disagree with me, at least respect how I went about it, because I guess that's all I can ask for.

I feel the same way towards the rest of you here today. This is a sad day for everybody.

There may be newspaper stories and things tomorrow and the days after that will treat this like a morality play of some kind, and turn you and to some extent me into cartoon characters. But there's much more to it than this. It's much more complicated. And the process, I think, is capable of reflecting all of that. So don't doubt that there's much more to this, much more to you, and much more to this process than might be reported in the headlines. So good luck.

Let me thank the lawyers, who I thought did an exemplary job throughout this case through the trial and through sentencing. It's a pleasure to have such really capable lawyers who are thoughtful and respectful to each other and to the Court. So thanks for that.

All right. Good luck to everybody. Have a nice day.

* * *

BrokerCheck Report

LINUS NKEM NWAIGWE

CRD# 2613032

Report #13809-86349, data current as of Friday, June 20, 2014.

About BrokerCheck®

BrokerCheck offers information on all current-and many former-FINRA-registered securities brokers, and all current and former FINRA-registered securities firms. FINRA strongly encourages investors to use BrokerCheck to check the background of securities brokers and brokerage firms before deciding to conduct, or continue to conduct, business with them.

- **What is included in a BrokerCheck report?**
  BrokerCheck reports for individual brokers include information such as employment history, professional qualifications, disciplinary actions, criminal convictions, civil judgments and arbitration awards. BrokerCheck reports for brokerage firms include information on a firm's profile, history, and operations, as well as many of the same disclosure events mentioned above.
  Please note that the information contained in a BrokerCheck report may include pending actions or allegations that may be contested, unresolved or unproven. In the end, these actions or allegations may be resolved in favor of the broker or brokerage firm, or concluded through a negotiated settlement with no admission or finding of wrongdoing.
- **Where did this information come from?**
  The information contained in BrokerCheck comes from FINRA's Central Registration Depository, or CRD® and is a combination of:
  - information FINRA and/or the Securities and Exchange Commission (SEC) require brokers and brokerage firms to submit as part of the registration and licensing process, and
  - information that regulators report regarding disciplinary actions or allegations against firms or brokers.
- **How current is this information?**
  Generally, active brokerage firms and brokers are required to update their professional and disciplinary information in CRD within 30 days. Under most circumstances, information reported by brokerage firms, brokers and regulators is available in BrokerCheck the next business day.
- **What if I want to check the background of an investment adviser firm or investment adviser representative?**
  To check the background of an investment adviser firm or representative, you can search for the firm or individual in BrokerCheck. If your search is successful, click on the link provided to view the available licensing and registration information in the SEC's Investment Adviser Public Disclosure (IAPD) website at http://www.adviserinfo.sec.gov. In the alternative, you may search the IAPD website directly or contact your state securities regulator at http://www.finra.org/Investors/ToolsCalculators/BrokerCheck/P455414.
- **Are there other resources I can use to check the background of investment professionals?**
  FINRA recommends that you learn as much as possible about an investment professional before deciding to work with them. Your state securities regulator can help you research brokers and investment adviser representatives doing business in your state.

Thank you for using FINRA BrokerCheck.

Using this site/information means that you accept the FINRA BrokerCheck Terms and Conditions. A complete list of Terms and Conditions can be found at brokercheck.finra.org

For additional information about the contents of this report, please refer to the User Guidance or www.finra.org/brokercheck. It provides a glossary of terms and a list of frequently asked questions, as well as additional resources. For more information about FINRA, visit www.finra.org.

LINUS N. NWAIGWE

CRD# 2613032

This broker is not currently registered with FINRA.

Report Summary for this Broker

This report summary provides an overview of the broker's professional background and conduct. Additional information can be found in the detailed report.

Broker Qualifications

This broker is not currently registered with FINRA.

This broker has passed:

- 1 Principal/Supervisory Exam
- 1 General Industry/Product Exam
- 1 State Securities Law Exam

Registration History

This broker was previously registered with the following FINRA firm(s):

A.B. WATLEY DIRECT, INC.
CRD# 18663
NY, NY, NY
07/2002 - 09/2007

A.B. WATLEY, INC.
CRD# 797
NEW YORK, NY
10/2001 - 02/2004

ON-SITE TRADING, INC.
CRD# 30271
GREAT NECK, NY
12/1998 - 10/2001

Disclosure Events

All individuals registered to sell securities or provide investment advice are required to disclose customer complaints and arbitrations, regulatory actions, employment terminations, bankruptcy filings, and criminal or civil judicial proceedings.

Are there events disclosed about this broker? **Yes**

The following types of disclosures have been reported:

Type	Count
Regulatory Event	5
Criminal	1
Civil Event	1

Broker Qualifications

Registrations

This section provides the self-regulatory organizations (SROs) and U.S. states/territories the broker is currently registered and licensed with, the category of each license, and the date on which it became effective. This section also provides, for every brokerage firm with which the broker is currently employed, the address of each branch where the broker works.

This broker is not currently registered with FINRA.

Broker Qualifications

Industry Exams this Broker has Passed

This section includes all securities industry exams that the broker has passed. Under limited circumstances, a broker may attain a registration after receiving an exam waiver based on exams the broker has passed and/or qualifying work experience. Any exam waivers that the broker has received are not included below.

This individual has passed 1 principal/supervisory exam, 1 general industry/product exam, and 1 state securities law exam.

Principal/Supervisory Exams

Exam	Category	Date
General Securities Principal Examination	Series 24	05/03/1999

General Industry/Product Exams

Exam	Category	Date
General Securities Representative Examination	Series 7	07/07/1995

State Securities Law Exams

Exam	Category	Date
Uniform Securities Agent State Law Examination	Series 63	07/17/1995

Additional information about the above exams or other exams FINRA administers to brokers and other securities professionals can be found at www.finra.org/brokerqualifications/registeredrep/.

Registration and Employment History

Registration History

The broker previously was registered with the following FINRA firms:

Registration Dates	Firm Name	CRD#	Branch Location
07/2002 - 09/2007	A.B. WATLEY DIRECT, INC.	18663	NY, NY, NY
10/2001 - 02/2004	A.B. WATLEY, INC.	797	NEW YORK, NY
12/1998 - 10/2001	ON-SITE TRADING, INC.	30271	GREAT NECK, NY
07/1995 - 05/1998	CITICORP SECURITIES, INC.	7474	NEW YORK, NY

Employment History

Below is the broker's employment history for up to the last 10 years.

Please note that the broker is required to provide this information only while registered with FINRA and the information is not updated after the broker ceases to be registered. Therefore, an employment end date of "Present" may not reflect the broker's current employment status.

Employment Dates	Employer Name	Employer Location
09/2002 - Present	ABWALL, LLC	NEW YORK, NY
10/2001 - Present	AB WATLEY, INC.	NEW YORK, NY

Other Business Activities

This section includes information, if any, as provided by the broker regarding other business activities the broker is currently engaged in either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise. This section does not include non-investment related activity that is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.

No information reported.

Disclosure Events

What you should know about reported disclosure events:

1. All individuals registered to sell securities or provide investment advice are required to disclose customer complaints and arbitrations, regulatory actions, employment terminations, bankruptcy filings, and criminal or civil judicial proceedings.

2. **Certain thresholds must be met before an event is reported to CRD, for example:**
   - A law enforcement agency must file formal charges before a broker is required to disclose a particular criminal event.
   - A customer dispute must involve allegations that a broker engaged in activity that violates certain rules or conduct governing the industry and that the activity resulted in damages of at least $5,000.

3. **Disclosure events in BrokerCheck reports come from different sources:**
   - As mentioned at the beginning of this report, information contained in BrokerCheck comes from brokers, brokerage firms and regulators. When more than one of these sources reports information for the same disclosure event, all versions of the event will appear in the BrokerCheck report. The different versions will be separated by a solid line with the reporting source labeled.

4. **There are different statuses and dispositions for disclosure events:**
   - A disclosure event may have a status of *pending, on appeal,* or *final.*
     - A "pending" event involves allegations that have not been proven or formally adjudicated.
     - An event that is "on appeal" involves allegations that have been adjudicated but are currently being appealed.
     - A "final" event has been concluded and its resolution is not subject to change.
   - A final event generally has a disposition of *adjudicated, settled* or *otherwise resolved.*
     - An "adjudicated" matter includes a disposition by (1) a court of law in a criminal or civil matter, or (2) an administrative panel in an action brought by a regulator that is contested by the party charged with some alleged wrongdoing.
     - A "settled" matter generally involves an agreement by the parties to resolve the matter. Please note that brokers and brokerage firms may choose to settle customer disputes or regulatory matters for business or other reasons.
     - A "resolved" matter usually involves no payment to the customer and no finding of wrongdoing on the part of the individual broker. Such matters generally involve customer disputes.

For your convenience, below is a matrix of the number and status of disclosure events involving this broker. Further information regarding these events can be found in the subsequent pages of this report. You also may wish to contact the broker to obtain further information regarding these events.

	Pending	Final	On Appeal
Regulatory Event	0	5	0

Criminal	0	1	0
Civil Event	1	0	0

Disclosure Event Details

When evaluating this information, please keep in mind that a discloure event may be pending or involve allegations that are contested and have not been resolved or proven. The matter may, in the end, be withdrawn, dismissed, resolved in favor of the broker, or concluded through a negotiated settlement for certain business reasons (e.g., to maintain customer relationships or to limit the litigation costs associated with disputing the allegations) with no admission or finding of wrongdoing.

This report provides the information exactly as it was reported to CRD and therefore some of the specific data fields contained in the report may be blank if the information was not provided to CRD.

Regulatory - Final

This type of disclosure event may involves (1) a final, formal proceeding initiated by a regulatory authority (e.g., a state securities agency, self-regulatory organization, federal regulatory such as the Securities and Exchange Commission, foreign financial regulatory body) for a violation of investment-related rules or regulations; or (2) a revocation or suspension of a broker's authority to act as an attorney, accountant, or federal contractor.

Disclosure 1 of 5

Reporting Source:	Regulator
Regulatory Action Initiated By:	UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Sanction(s) Sought:	Other: N/A
Date Initiated:	05/21/2009
Docket/Case Number:	3-13481
Employing firm when activity occurred which led to the regulatory action:	A.B. WATLEY, INC.
Product Type:	Other: UNSPECIFIED TYPE OF SECURITIES
Allegations:	SEC ADMINISTRATIVE RELEASE 34-59957, IA RELEASE 40-2877, MAY 21, 2009: THE SECURITIES AND EXCHANGE COMMISSION ("COMMISSION") ANNOUNCED THE ISSUANCE OF AN ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(F) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING (ORDER) AGAINST LINUS N. NWAIGWE BASED UPON AN APRIL 22, 2009 GUILTY VERDICT ON ONE COUNT OF CONSPIRACY TO COMMIT SECURITIES FRAUD IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK IN CRIMINAL ACTION 05-CR-613 (JG).

Current Status:	Final
Resolution:	Decision
Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?	No
Resolution Date:	02/25/2010
Sanctions Ordered:	Bar (Permanent)
If the regulator is the SEC, CFTC, or an SRO, did the action result in a finding of a willful violation or failure to supervise?	No
(1) willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or to have been unable to comply with any provision of such Act, rule or regulation?	

(2) willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? or

(3) failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation by such person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any such Acts, or any of the rules of the Municipal Securities Rulemaking Board?

Sanction 1 of 1

Sanction Type:	Bar (Permanent)
Capacities Affected:	ANY CAPACITY
Duration:	N/A
Start Date:	02/25/2010
End Date:	

Regulator Statement	SEC INITIAL DECISION RELEASE 391, DECEMBER 11, 2009: THE SEC ISSUED AN INITIAL DECISION WHEREIN IT IS ORDERED THAT THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION IS GRANTED; AND IT IS FURTHER ORDERED THAT, PURSUANT TO SECTION 15(B)(6) OF THE SECURITIES EXCHANGE ACT OF 1934, LINUS N. NWAIGWE IS BARRED FROM ASSOCIATION WITH ANY BROKER OR DEALER. DECISION IS FINAL FEBRUARY 25, 2010.

Disclosure 2 of 5

Reporting Source:	Regulator
Regulatory Action Initiated By:	FINRA
Sanction(s) Sought:	Other: N/A
Date Initiated:	04/29/2009
Docket/Case Number:	2005001121401
Employing firm when activity occurred which led to the regulatory action:	A.B. WATLEY DIRECT, INC.
Product Type:	No Product
Allegations:	NASD RULES 2110 AND 3011: RESPONDENT LINUS NWAIGWE, ACTING ON BEHALF OF HIS MEMBER FIRM, FAILED TO ESTABLISH AND ENFORCE AN ADEQUATE ANTI-MONEY LAUNDERING PROGRAM, THEREBY FAILING TO DETECT AND INVESTIGATE RED FLAGS OF POSSIBLE SUSPICIOUS ACTIVITY IN ABW ACCOUNTS AND TIMELY REPORT SUCH ACTIVITY. ACTING ON BEHALF OF HIS MEMBER FIRM, NWAIGWE FAILED TO PERFORM THE REQUIRED INDEPENDENT AML TESTING AND PERFORMED AN INADEQUATE TEST IN ONE YEAR. ON BEHALF OF HIS FIRM, NWAIGWE DID NOT ESTABLISH AND IMPLEMENT POLICIES, PROCEDURES AND INTERNAL CONTROLS REASONABLY DESIGNED TO ACHIEVE COMPLIANCE WITH THE BANK SECRECY ACT AND THE IMPLEMENTING REGULATIONS THEREUNDER.
Current Status:	Final
Resolution:	Decision & Order of Offer of Settlement

Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?	No
Resolution Date:	04/08/2010
Sanctions Ordered:	Civil and Administrative Penalty(ies)/Fine(s) Suspension
If the regulator is the SEC, CFTC, or an SRO, did the action result in a finding of a willful violation or failure to supervise?	No
(1) willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or to have been unable to comply with any provision of such Act, rule or regulation?	

(2) willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? or

(3) failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation by such person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any such Acts, or any of the rules of the Municipal Securities Rulemaking Board?

Sanction 1 of 1

Sanction Type:	Suspension
Capacities Affected:	ANY PRINCIPAL CAPACITY
Duration:	NINE MONTHS
Start Date:	04/19/2010
End Date:	01/18/2011

Monetary Sanction 1 of 1

Monetary Related Sanction:	Civil and Administrative Penalty(ies)/Fine(s)
Total Amount:	$20,000.00
Portion Levied against individual:	$20,000.00
Payment Plan:	N/A
Is Payment Plan Current:	
Date Paid by individual:	
Was any portion of penalty waived?	No
Amount Waived:	
Regulator Statement	WITHOUT ADMITTING OR DENYING THE ALLEGATIONS, NWAIGWE CONSENTED TO THE DESCRIBED SANCTIONS AND TO THE ENTRY OF FINDINGS, THEREFORE HE IS FINED $20,000 AND SUSPENDED FROM ASSOCIATION WITH ANY FINRA MEMBER IN ANY PRINCIPAL CAPACITY FOR NINE MONTHS. THE FINE SHALL BE DUE AND PAYABLE IMMEDIATELY UPON REASSOCIATION WITH A MEMBER FIRM FOLLOWING THE NINE MONTH SUSPENSION, OR PRIOR TO ANY REAPPLICATION OR REQUEST FOR RELIEF FROM ANY STATUTORY DISQUALIFICATION RESULTING FROM THIS OR ANY OTHER EVENT OR PROCEEDING WHICHEVER IS EARLIER. THE SUSPENSION IS IN EFFECT FROM APRIL 19, 2010 THROUGH JANUARY 18, 2011.

Disclosure 3 of 5

Reporting Source:	Regulator
Regulatory Action Initiated By:	FINRA
Sanction(s) Sought:	
Other Sanction(s) Sought:	
Date Initiated:	08/28/2008
Docket/Case Number:	E102003025201
Employing firm when activity occurred which led to the regulatory action:	

Product Type:	No Product
Other Product Type(s):	
Allegations:	NWAIGWE FAILED TO PAY FINES AND/OR COSTS OF $20,000 IN FINRA CASE E102003025201
Current Status:	Final
Resolution:	Other
Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?	No
Resolution Date:	08/28/2008
Sanctions Ordered:	Revocation/Expulsion/Denial
Other Sanctions Ordered:	
Sanction Details:	IN ACCORDANCE WITH NASD RULE 8320, NWAIGWE'S FINRA REGISTRATION IS REVOKED FOR FAILURE TO PAY FINES AND/OR COSTS.

Disclosure 4 of 5

Reporting Source:	Regulator
Regulatory Action Initiated By:	ALABAMA SECURITIES COMMISSION
Sanction(s) Sought:	Cease and Desist
Date Initiated:	07/11/2006
Docket/Case Number:	CD-2006-0030
Employing firm when activity occurred which led to the regulatory action:	AB WATLEY DIRECT INC
Product Type:	Equity Listed (Common & Preferred Stock)
Allegations:	THE ALABAMA SECURITIES COMMISSION HAS IN ITS POSSESSION EVIDENCE WHICH INDICATES THAT A B WATLEY DIRECT, INC., LINUS NWAIGWE AND ROBERT MALIN ENGAGED IN THE OFFER AND/OR SALE OF UNREGISTERED SECURITIES TO AN ALABAMA RESIDENT, VIOLATING

	SECTION 8-6-3, OF THE CODE OF ALABAMA 1975. ON JULY 11, 2006, CEASE AND DESIST ORDER #CD-2006-0030 WAS ISSUED, WITH A NOTICE OF RIGHT TO A HEARING ATTACHED AND MADE A PART THEREOF, GIVING RESPONDENTS 28 DAYS FROM RECEIPT OF THE ORDER TO RESPOND OR PERFECT A RIGHT TO A HEARING.
Current Status:	Final
Limitation Details:	ON FEBRUARY 5, 2009, CD-2006-0030 WAS MADE A FINAL ORDDER OF THE COMMISSION DUE TO NO RESPONSE FROM RESPONDENTS.
Resolution:	ON FEBRUARY 5, 2009, CD-2006-0030 WAS MADE A FINAL ORDDER OF THE COMMISSION DUE TO NO RESPONSE FROM RESPONDENTS.
Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?	No
Resolution Date:	02/05/2009
Sanctions Ordered:	Other: ON FEBRUARY 5, 2009, CD-2006-0030 WAS MADE A FINAL ORDDER OF THE COMMISSION DUE TO NO RESPONSE FROM RESPONDENTS.
Regulator Statement	ON JULY 11, 2006, CEASE AND DESIST ORDER #CD-2006-0030 WAS ISSUED, WITH A NOTICE OF RIGHT TO A HEARING ATTACHED AND MADE A PART THEREOF, GIVING RESPONDENTS, A B WATLEY DIRECT, INC., LINUS NWAIGWE AND ROBERT MALIN, 28 DAYS FROM RECEIPT OF THE ORDER TO RESPOND OR PERFECT A RIGHT TO A HEARING.ON FEBRUARY 5, 2009, CD-2006-0030 WAS MADE A FINAL ORDDER OF THE COMMISSION DUE TO NO RESPONSE FROM RESPONDENTS.

Reporting Source:	Broker
Regulatory Action Initiated By:	ALABAMA SECURITIES COMMISSION
Sanction(s) Sought:	Cease and Desist
Other Sanction(s) Sought:	
Date Initiated:	07/11/2006
Docket/Case Number:	CD-2006-0030

Employing firm when activity occurred which led to the regulatory action:	ABWD
Product Type:	Equity Listed (Common & Preferred Stock)
Other Product Type(s):	
Allegations:	A CUSTOMER OF ABWD (WHOSE ACCOUNT HAD TRANSFERRED FROM ANOTHER BROKER DEALER ALSO OWNED BY ABWD'S PARENT) HAS COMPLAINED TO THE STATE OF ALABAMA THAT HE IS NOT BEING ALLOWED BY DIRECT TO TRADE EQUITIES IN HIS ACCOUNT. THIS CUSTOMER IS A RESIDENT OF ALABAMA WHO WAS ALLOWED TO TRADE EQUITIES AT DIRECT WHILE DIRECT HAD AN APPLICATION FOR REGISTRATION IN ALABAMA PENDING. WHEN IT WAS DETERMINED THAT DIRECT WOULD NOT PURSUE REGISTRATION IN THAT STATE, FURTHER TRADING IN THIS ACCOUNT WAS PROHIBITED BY DIRECT. FROM THIS, AROSE THE CUSTOMER COMPLAINT AND AN ORDER FROM THE STATE OF ALABAMA (DATED JULY 11, 2006) THAT A.B. WATLEY DIRECT, INC., LINUS NWAIGWE AND ROBERT MALIN CEASE AND DESIST FROM FURTHER OFFERS OR SALES OF ANY SECURITIES INTO, WITHIN, OR FROM THE STATE OF ALABAMA.
Current Status:	Pending
Broker Statement	A CUSTOMER OF ABWD (WHOSE ACCOUNT HAD TRANSFERRED FROM ANOTHER BROKER DEALER ALSO OWNED BY ABWD'S PARENT) HAS COMPLAINED TO THE STATE OF ALABAMA THAT HE IS NOT BEING ALLOWED BY DIRECT TO TRADE EQUITIES IN HIS ACCOUNT. THIS CUSTOMER IS A RESIDENT OF ALABAMA WHO WAS ALLOWED TO TRADE EQUITIES AT DIRECT WHILE DIRECT HAD AN APPLICATION FOR REGISTRATION IN ALABAMA PENDING. WHEN IT WAS DETERMINED THAT DIRECT WOULD NOT PURSUE REGISTRATION IN THAT STATE, FURTHER TRADING IN THIS ACCOUNT WAS PROHIBITED BY DIRECT. FROM THIS, AROSE THE CUSTOMER COMPLAINT AND AN ORDER FROM THE STATE OF ALABAMA (DATED JULY 11, 2006) THAT A.B. WATLEY DIRECT, INC., LINUS NWAIGWE AND ROBERT MALIN CEASE AND DESIST FROM FURTHER OFFERS OR SALES OF ANY SECURITIES INTO, WITHIN, OR FROM THE STATE OF ALABAMA. ON JULY 12, 2006 ABWD EFFECTIVELY WITHDREW IT PENDING APPLICATION FOR REGISTRATION WITH ALABAMA SECURITIES COMMISSION.

Disclosure 5 of 5

Reporting Source:	Regulator
Regulatory Action Initiated	NASD

FINRA

By:

Sanction(s) Sought:

Other Sanction(s) Sought:

Date Initiated: 03/15/2006

Docket/Case Number: E102003025201

Employing firm when activity occurred which led to the regulatory action: A.B. WATLEY DIRECT, INC.

Product Type: Mutual Fund(s)

Other Product Type(s):

Allegations: SECTION 17(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULES 17A-3 AND 17A-4 THEREUDER; NASD 2110, 3110, 3010(A), 3010(B): RESPONDENT, ACTING ON BEHALF OF THE FIRM FAILED TO MAINTAIN, PRESERVE AND PRODUCE RECORDS OF ORDER MEMORANDA AND FAILED TO MAINTAIN CORRESPONDENCE FROM PENSION AND MUTUAL FUND COMPANIES CONCERNING RESTRICTIONS, WARNINGS AND OTHER NOTIFICATIONS WITH RESPECT TO HIS MEMBER FIRM'S CUSTOMERS ABILITY TO TRADE IN MUTUAL FUNDS DUE TO THE CUSTOMERS' MAKET TIMING ACTIVITIES; HE FAILED TO IMPLEMENT, MAINTAIN AND ENFORCE AN EFFECTIVE SUPERVISORY SYSTEM THAT WOULD HAVE ENABLED THE FIRMS TO COMPLY WITH THE FEDERAL SECURITIES LAWS AND NASD'S CONDUCT RULES; FAILED TO FOLLOW HIS MEMBER FIRM'S OWN EXISTING PROCEDURES AND POLICIES THAT SHOULD HAVE ENABLED THE FIRMS TO INVESTIGATE AND DETERMINE WHETHER THEIR REPRESENTATIVES WERE COMPLYING WITH APPLICABLE SECURITIES LAWS AND REGULATIONS WITH RESPECT TO MUTUAL FUND TRANSACTIONS; RESPONDENT, ACTING ON BEHALF OF HIS MEMBER FIRM NEVER IMPLEMENTED ANY POLICIES OR PROCEDURES THAT ADDRESSED EITHER MUTUAL FUND MARKET TIMING OR MUTUAL FUND ORDER ENTRY PROCEDURES; FAILED TO ESTABLISH, MAINTAIN AND ENFORCE WRITTEN PROCEDURES REASONABLY DESIGNED TO ENABLE FIRM TO SUPERVISE ITS MUTUAL FUND BUSINESS INCLUDING THE DETECTION AND PREVENTION OF MARKET TIMING ABUSES AND LATE TRADING.

Current Status: Final

Resolution: Decision & Order of Offer of Settlement

Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?	No
Resolution Date:	07/11/2007
Sanctions Ordered:	Monetary/Fine $20,000.00 Suspension
Other Sanctions Ordered:	
Sanction Details:	WITHOUT ADMITTING OR DENYING THE ALLEGATIONS, NWAIGWE CONSENTED TO THE DESCRIBED SANCTIONS AND TO THE ENTRY OF FINDINGS; THEREFORE, HE IS FINED $20,000 AND SUSPENDED FROM ASSOCIATION WITH ANY NASD MEMBER IN A PRINCIPAL CAPACITY FOR SIX MONTHS. THE SUSPENSION IN A PRINICPAL CAPACITY IS IN EFFECT FROM SEPTEMBER 17, 2007 THROUGH MARCH 16, 2008.

Reporting Source:	Broker
Regulatory Action Initiated By:	NASD
Sanction(s) Sought:	Other
Other Sanction(s) Sought:	
Date Initiated:	03/22/2005
Docket/Case Number:	E102003025201
Employing firm when activity occurred which led to the regulatory action:	AB WATLEY, INC
Product Type:	No Product
Other Product Type(s):	N/A
Allegations:	THE NASD HAS NOTIFIED MR. NWAIGWE THAT IT IS CONDUCTING AN INVESTIGATION FOR ALLEGED VIOLATION OF NASD RULES AND HAS PROVIDED HIM WITH A WELLS NOTIFICATION. IN OR AROUND MARCH 15, 2006 THE NASD NOTIFIED MR. NWAIGWE IT HAS DETERMINED THAT HE VIOLATED NASD CONDUCT RULES 3010(B) AND 2110.

Current Status:	Final
Resolution:	Acceptance, Waiver & Consent(AWC)
Resolution Date:	07/11/2007
Sanctions Ordered:	Monetary/Fine $20,000.00 Suspension
Other Sanctions Ordered:	
Sanction Details:	FINE $20000 AND SUSPENDED IN A PRINCIPAL CAPACITY FOR A PERIOD SIX MONTHS

Criminal - Final Disposition

This type of disclosure event involves a criminal charge against the broker that has resulted in a conviction, acquittal, dismissal, or plea. The criminal matter may pertain to any felony or certain misdemeanor offenses, including bribery, perjury, forgery, counterfeiting, extortion, fraud, and wrongful taking of property.

Disclosure 1 of 1

Reporting Source:	Regulator
Formal Charges were brought in:	Federal Court
Name of Court:	UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
Location of Court:	BROOKLYN, NEW YORK
Docket/Case #:	05-CR-613
Charge Date:	03/21/2006
Charge(s) 1 of 2	
Formal Charge(s)/Description:	STATEMENTS OR ENTRIES GENERALLY
No of Counts:	1
Felony or Misdemeanor:	Felony
Plea for each charge:	NOT GUILTY
Disposition of charge:	Acquitted
Charge(s) 2 of 2	
Formal Charge(s)/Description:	CONSPIRACY TO COMMIT SECURITIES FRAUD
No of Counts:	1
Felony or Misdemeanor:	Felony
Plea for each charge:	NOT GUILTY
Disposition of charge:	5/17/07 CONVICTION OVERTURNED ON 8/2/12
Current Status:	Final
Status Date:	08/02/2012
Disposition Date:	08/02/2012
Sentence/Penalty:	IMPRISONED FOR ONE YEAR AND ONE DAY. THE COURT RECOMMENDS

	TO THE BUREAU OF PRISONS FOR INCARCERATION AT FCI OTISVILLE OR FAIRTON. DFT SHALL SURRENDER FOR SERVICE OF SENTENCE AT THE INSTITUTION DESIGNATED BY THE BUREAU OF PRISONS BEFORE 12PM ON 2/5/10. 3 YEARS SUPERVISED RELEASE. 6 MONTHS HOME DETENTION. 300 HOURS OF COMMUNITY SERVICE. SPECIAL ASSESSMENT OF $100.00.
Regulator Statement	ON MAY 17, 2007, NWAIGWE WAS CONVICTED BY JURY TRIAL OF CONSPIRACY TO COMMIT SECURITIES FRAUD. NWAIGWE WAS ACQUITTED OF THE FALSE STATEMENTS CHARGE. ON AUGUST 2, 2012, THE SECOND CIRCUIT COURT OF APPEALS OVERTURNED THE CONVICTION FOR CONSPIRACY TO COMMIT SECURITIES FRAUD, AFTER CONCLUDING THAT THE GOVERNMENT WITHHELD IMPORTANT TESTIMONY FROM THE DEFENDANTS AND THEIR LAWYERS. THE PROSECUTORS WITHHELD WITNESS DEPOSITIONS TAKEN BY THE SECURITIES AND EXCHANGE COMMISSION THAT COULD HAVE HELPED THE DEFENDANTS WITH THEIR CASE AND SHOULD HAVE BEEN DISCLOSED BY THE GOVERNMENT, THE APPEALS COURT CONCLUDED.

Reporting Source:	Broker
Organization Name (if charge(s) were brought against an organization over which broker exercised control):	A.B WATLEY, INC CHIEF COMPLIANCE OFFICER
Court Details:	US DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, SUPERSEDING INDICTMENT, CR. NO. 05-0613 (S-1) (ILG)
Charge Date:	03/21/2006
Charge Details:	TWO COUNTS - FELONY - FALSE STATEMENT TITLE 18, SECTIONS 1001(A)(1), 1001(A)(2) AND 3551 -PLEA- NOT GUILTY. ONE COUNT - FELONY - CONSPIRACY TO COMMIT SECURITIES FRAUD -PLEA- NOT GUILTY
Felony?	Yes
Current Status:	Final
Status Date:	05/17/2007
Disposition Details:	MAY 17, 2007 JUDGMENT OF ACQUITAL ENTERED - FOUND NOT GUILTY. THE CONSPRIRACY CHARGE WAS DEADLOCKED

Civil - Pending

This type of disclosure event involves a pending civil court action that seeks an injunction in connection with any investment-related activity or alleges a violation of any investment-related statute or regulation.

Disclosure 1 of 1

Reporting Source:	Regulator
Initiated By:	U.S. SECURITIES AND EXCHANGE COMMISSION
Relief Sought:	Injunction
Other Relief Sought:	PERMANENTLY ENJOINING NWAIGWE, HIS AGENTS, SERVANTS, EMPLOYEES, AND ATTORNEYS, AND ALL PERSONS IN ACTIVE CONCERT OR PARTICIPATION WITH HIM WHO RECEIVE ACTUAL NOTICE OF THE INJUNCTION BY PERSONAL SERVICE OR OTHERWISE, AND EACH OF THEM, FROM FUTURE VIOLATIONS OF SECTIONS 10(B) OF THE EXCHANGE ACT, 15 U.S.C. 78J(B), AND RULE 10B-5, 17 C.F.R. 240.10B-5, THEREUNDER AND FROM FUTURE VIOLATIONS OF SECTION 15(C) OF THE EXCHANGE ACT, 15 U.S.C. 78O(C). ORDERING NWAIGWE TO DISGORGE ALL ILLGOTTEN GAINS THEY RECEIVED AS A RESULT OF THE VIOLATIONS ALLEGED IN THIS COMPLAINT. ORDERING NWAIGWE TO PAY CIVIL MONEY PENALTIES PURSUANT TO SECTION 20(D) OF THE SECURITIES ACT, 15 U.S.C. 77T(D), AND SECTIONS 21(D) AND/OR 21A(A) OF THE EXCHANGE ACT, 15 U.S.C. 78U(D) AND 15 U.S.C. 78U-1.
Date Court Action Filed:	03/21/2006
Product Type:	Other
Other Product Types:	STOCKS
Court Details:	UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK CV-06-1274 (ILG) (E.D.N.Y.)
Employing firm when activity occurred which led to the action:	A.B. WATLEY, INC.
Allegations:	SEC LITIGATION RELEASE #19616 DATED MARCH 21, 2006; THE SECURITIES AND EXCHANGE COMMISSION FILED A CIVIL INJUNCTIVE ACTION IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK AGAINST A FORMER BROKER AND TEN FORMER DAY TRADERS AT A COMPANY (THE "COMPANY"), A NOW-DEFUNCT BROKER-DEALER, AND THEIR MANAGERS (COLLECTIVELY, "DEFENDANTS"). THE COMPLAINT ALLEGES THAT THE DEFENDANTS PARTICIPATED IN A FRAUDULENT SCHEME THAT USED SQUAWK BOXES TO OBTAIN THE CONFIDENTIAL INSTITUTIONAL CUSTOMER ORDER FLOW OF MAJOR BROKERAGES SO THE TRADERS COULD "TRADE AHEAD" OF

	THESE LARGE ORDERS. ("SQUAWK BOXES" ARE DEVICES THAT BROADCAST, WITHIN A SECURITIES FIRM, INSTITUTIONAL ORDERS TO BUY AND SELL LARGE BLOCKS OF SECURITIES.) THE SEC ALLEGED THAT LINUS NWAIGWE ("NWAIGWE") AIDED AND ABETTED VIOLATIONS OF 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 AND AIDED AND ABETTED VIOLATIONS OF SECTION 15(C) OF THE EXCHANGEACT, 15 U.S.C. 78O(C). NWAIGWE KNEW THAT HIS FIRM AND ITS OFFICERS AND/OR EMPLOYEES ENGAGED IN A FRAUDULENT TRADING AHEAD SCHEME INVOLVING THE FIRM'S DAY TRADERS TRADING AHEAD OF INSTITUTIONAL CUSTOMER ORDERS BASED ON INFORMATION REGARDING THESE ORDERS RECEIVED FROM THE BROKERS. NWAIGWE SUBSTANTIALLY ASSISTED THE FRAUDULENT ACTIVITY DESCRIBED ABOVE. FOR EXAMPLE, NWAIGWE CONCEALED THE TRADERS' AUDIO ACCESS TO SQUAWK BOXES FROM NASD AND OTHER REGULATORY AGENCIES. NWAIGWE KNEW THAT THE FIRM ENGAGED IN A FRAUDULENT TRADING AHEAD SCHEME INVOLVING ITS DAY TRADERS TRADING AHEAD OF INSTITUTIONAL CUSTOMER ORDERS BASED ON INFORMATION REGARDING THESE ORDERS RECEIVED FROM THE BROKERS. NWAIGWE ALSO SUBSTANTIALLY ASSISTED THE FRAUDULENT ACTIVITY DESCRIBED ABOVE. AMONG OTHER THINGS, THE DEFENDANTS ESTABLISHED, MANAGED, AND/OR SUPERVISED THE TRADING AHEAD CONDUCT, AND/OR PERSONALLY TRADED AHEAD OF INSTITUTIONAL ORDERS BROADCAST OVER SQUAWK BOXES.
Current Status:	Pending

Reporting Source:	Broker
Initiated By:	SEC
Relief Sought:	Injunction
Other Relief Sought:	PERMANENTLY ENJOINING FROM FUTURE VIOLATIONS OF SECTIONS 10(B) OF THE EXCHANGE ACT, 15 U.S.C; AND RULE 10B-5, 17 C.F.R. 240. 10B-5, DISGORGE ALL ILLGOTTEN GAINS RECEIVED AS A RESULT OF THE VIOLATIONS ALLEGED, AND CIVIL MONEY PENALTIES.
Date Court Action Filed:	03/21/2006
Date Notice/Process Served:	03/21/2006
Product Type:	Other
Other Product Types:	STOCK
Court Details:	US DISTRICT COURT FOR EASTERN DISTRICT OF NY CV-06--1274 (ILG)

Employing firm when activity occurred which led to the action:	AB WATLEY, INC
Allegations:	SEC ALLEGED FILED A CIVIL INJUNCTIVE ACTION IN THE US DISTRICT COURT FOR THE EASTERN DISTRICT OF NY AGAINST A FORMER BROKER AND SEVERAL DAY TRADERS. SEC ALLEGED THAT THE DEFENDENTS PARTICIPATED IN A FRAUDULENT SCHEME THAT USED "SQUAWK BOXES" TO OBTAIN CONFIDENTIAL ISTITUTIONAL CUSTOMER ORDER FLOW SO THAT THEY COULD TRADE AHEAD. MR. NWAIGWE WAS NOT A DAY TRADER BUT, RATHER, CHIEF COMPLIANCE OF THE B/D.
Current Status:	Pending

End of Report

This page is intentionally left blank.

d5dechis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, New York, N.Y.

v. 12 CR 121(RJS)

ANTHONY CHIASSON,

Defendant.

----------x

May 13, 2013
10:10 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: ANTONIA APPS
Assistant United States Attorney

MORVILLO, LLP
Attorneys for Defendant
BY: GREGORY R. MORVILLO

STEPTOE & JOHNSON, LLP
Attorneys for Defendant
BY: REID WEINGARTEN
PAUL WEISS RIFKIND WHARTON & GARRISON
Attorneys for Defendant on appeal
BY: MARK F. POMERANTZ

admirable qualities. So that's something that counts. It's not irrelevant to the process. Obviously the sentence imposed on you has to be tailored to you.

Other factors, of course, that have to be balanced against that are the facts and circumstances of these crimes. These are serious crimes, and these are crimes that have to carry with them some punishment. That punishment has to reflect the seriousness of the crime, has to provide a just punishment for the crime. It also has to promote respect for the law, which are all important things.

Another factor that's maybe related to the ones I just mentioned is the need to deter or discourage you and others from committing crimes in the future. I think in your case I'm not too worried about you committing crimes in the future, but there is, nonetheless, a general deterrent purpose to a sentence. And that's the notion that the sentence imposed on an individual will have an impact on others, will ripple across a society and affect the behavior of other people who might be considering whether or not they wish to engage in criminal conduct of this kind. And that's something courts have to take into account.

It's very difficult to assess with any kind of quantifiable certainty what the impact of a sentence on one person is going to be on others. But I think most of us recognize there's some intuitive plausibility to the notion of