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 DANIEL R. MARCUS

I, Daniel R. Marcus, pursuant to 28 U.S.C. § 1746, declare as follows:

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

2. I am employed as a Senior Counsel in the Division of Enforcement ("Division") at the New York Regional Office of the Securities and Exchange Commission ("Commission"). I make this declaration in support the Division's Motion for Summary Disposition against Respondent Anthony Chiasson.

3. Attached as exhibits to this Declaration are true and correct copies of the following documents:

Exhibit 1: the Superseding Indictment in *U.S. v. Todd Newman et al.*, S2 Cr 121 (RJS) (S.D.N.Y.) ("*U.S. v. Newman*"), filed on August 28, 2012.

Exhibit 2: certain excerpts from the trial transcript in the trial of Anthony Chiasson and Todd Newman in *U.S. v. Newman.*

Exhibit 3: Government Exhibit 448 admitted as evidence in *U.S. v. Newman.*

Exhibit 4: Government Exhibit 476 admitted as evidence in *U.S. v. Newman.*

Exhibit 5: Government Exhibit 477 admitted as evidence in *U.S. v. Newman.*

Exhibit 6: Government Exhibit 907 admitted as evidence in *U.S. v. Newman.*

Exhibit 7: Government Exhibit 927 admitted as evidence in *U.S. v. Newman.*

Exhibit 8: Government Exhibit 56 admitted as evidence in *U.S. v. Newman.*

Exhibit 9: Government Exhibit 73 admitted as evidence in *U.S. v. Newman.*

Exhibit 10: Government Exhibit 64 admitted as evidence in *U.S. v. Newman.*

Exhibit 11: the Amended Judgment in *U.S. v. Newman,* filed July 16, 2013.

Exhibit 12: the Complaint in *Securities and Exchange Commission v. Spyridon Adondakis et al.*, 12 Civ. 0409 (S.D.N.Y.) ("*SEC v. Adondakis*").

Exhibit 13: the Final Judgment against Anthony Chiasson, entered on October 4, 2013, in *SEC v. Adondakis.*

Exhibit 14: the Brief for the United States of America in *U.S. v. Chiasson*, 13-1837-cr (L), filed on November 14, 2013.

Exhibit 15: the Initial Decision in *In re Anthony Chiasson*, Initial Decision Rel. No. 589, A.P. File No. 3-15580 (Apr. 18, 2014).

Exhibit 16: the initial page of the respondent's motion to dismiss in *In the Matter of Evelyn Litwok*, AP File No. 3-14190, which was received by the Office of the Secretary on June 12, 2012.

Exhibit 17: the respondent's "Application to Vacate Order Making Findings and Imposing Remedial Sanctions" (without exhibits) in I*n the Matter of Jimmy Dale Swink, Jr.*, AP File No. 3-8129, which was received by the Office of the Secretary on July 20, 1995.

Exhibit 18: the respondent's "Motion to Vacate the Commission's Order of Debarment," in *In the Matter of Linus N. Nwaigwe*, AP File No. 3-13481, which was received by the Office of the Secretary on May 15, 2013.

Exhibit 19: the initial page of the respondent's "Additional Briefing on the Question of Whether the Commission Should Dismiss This Proceeding," in I*n the Matter of Richard Goble*, AP File No. 3-14390, which was received by the Office of the Secretary on December 5, 2012.

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

Executed on July 30, 2014
New York, New York

Daniel R. Marcus

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v.-	:	SUPERSEDING INDICTMENT
TODD NEWMAN, ANTHONY CHIASSON, and JON HORVATH,	:	S2 12 Cr. 121 (RJS)
Defendants.	:	

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 (MPD)
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.

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In The Matter Of:

UNITED STATES OF AMERICA, v

TODD NEWMAN,

November 27, 2012

SOUTHERN DISTRICT REPORTERS

500 PEARL STREET

NEW YORK, NY 10007

212 805-0330

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 12 Cr. 121 (RJS)

TODD NEWMAN,
ANTHONY CHIASSON,

Defendants.
----------x

New York, N.Y.
November 27, 2012
9:35 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
ANTONIA APPS
JOHN ZACH
RICHARD TARLOWE
Assistant United States Attorneys

SHEARMAN & STERLING
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BY: STEPHEN R. FISHBEIN
JOHN A. NATHANSON

STEPTOE & JOHNSON
Attorneys for Defendant Chiasson
BY: REID WEINGARTEN
ERIK KITCHEN
MICHELLE LEVIN
-and-
MORVILLO LLP
BY: GREGORY R. MORVILLO

(Trial resumed; jury not present)

THE COURT: Okay have a seat. The jury is here. Nothing we need to discuss before we start with Mr. Adondakis. Why don't we bring him in, just have him ready to go.

(Continued on next page)

(In open court; jury present)

THE COURT: All right, have a seat. Good morning, ladies and gentlemen. Hope you had a good night. Mr. Feith is not here today, so Mr. Skolnik, my other law clerk, will be filling in. He's secretly my favorite clerk. He only has less than two weeks before he leaves me and starts to make more money than I do. So anyway you're in for a treat with Mr. Skolnik. Let him know if you need anything. We are now going to continue with the trial. The government is going to call its next witness and that is --

MR. ZACH: Your Honor, the government calls Sam Adondakis.

SPYRIDON ADONDAKIS,
called as a witness by the Government,
having been duly sworn, testified as follows:

THE COURT: If you could state your name and spell your name first and last for the record.

THE WITNESS: It's first name Spyridon. I go by Sam. S-p-y-r-i-d-o-n, last name Adondakis, A-d-o-n-d-a-k-i-s.

THE COURT: Scoot up a little to the microphone, and speak slowly. From the little I heard you're a fast talker, so speak slowly and deliberately so the court reporter can pick it up. Mr. Zach, you may proceed.

DIRECT EXAMINATION

BY MR. ZACH:

Q. Mr. Adondakis, how old are you?
A. 41.
Q. Where were you born?
A. Salt Lake City, Utah.
Q. Where did you grow up?
A. Seattle, Washington.
Q. Where did you go to college?
A. University of Washington, Seattle.
Q. What did you major in?
A. Finance.
Q. What year did you graduate University of Washington?
A. 1993.
Q. What was your degree in?
A. Business.
Q. After graduation, where did you work?
A. My first job was at Prudential Securities as a stockbroker.
Q. Where was that located?
A. It was in Bellevue, Washington.
Q. And how long did you stay in that job for?
A. I was there about three and a half years.
Q. And after you finished up at Prudential Securities, where did you move on to?
A. It was at Safeco Mutual Funds for a short stint.
Q. When you say short, how long were you there?
A. About nine months.

about the companies in which the consultants actually worked, right?
A. Correct.
Q. Now, with respect to the Dell contact from Sandy, when you learned of that contact, what did you do with that information at Level Global?
A. I told Mr. Chiasson about the chain of command with respect to the contacts so that Sandy had worked for Jesse, Sandy had previously worked for Dell. And Sandy was talking to someone within Dell to get information and that Sandy had then moved to work for Fayad Abbasi, who was my roommate, who was at Neuberger Berman, and that the two of them had been willing to share information on Dell with me.
Q. And when you told Mr. Chiasson that you were able to obtain this inside information from Dell, how did he react?
MR. WEINGARTEN: Objection.
THE COURT: Overruled.
A. He seemed interested in determining whether or not we could use this information to trade Dell stock.
Q. Well, going forward did you begin to receive this Dell inside information from Mr. Tortora?
MR. WEINGARTEN: Objection.
A. I did.
THE COURT: Overruled.
A. I did.

Q. First, looking behind you, you see behind you it's Government Exhibit 90?
A. Yes.
Q. Do you recognize what that is?
A. I do.
Q. What is it?
A. This is a chart of Dell earnings announcements for the years 2007 to 2009.
Q. Let's look at Government Exhibit 403.
A. Okay.
Q. Do you recognize that?
A. Yes.
Q. Do you recognize that document?
A. I do.
Q. What is it?
A. This is an e-mail exchange between myself and Jesse Tortora.
MR. ZACH: Your Honor, the government offers 403.
MR. WEINGARTEN: No objection.
THE COURT: Government Exhibit 403 is received.
(Government's Exhibit 403 received in evidence)
MR. ZACH: Just blow up the top part of it.
Q. Looking at the bottom e-mail, who is it from?
A. Jesse Tortora.
Q. Who is it to?

A. It's to me.
Q. What's the date?
A. It's dated May 6, 2008.
Q. And what does Mr. Tortora say to you?
A. He says. Subject is hi. More checks on Intel/Dell if interested.
Q. What did you understand Mr. Tortora to mean by saying there were checks on Dell?
A. I understood him to mean that Sandy Goyal had obtained some information on Dell.
Q. So leading up to this time period had you been receiving information from Mr. Tortora from Mr. Goyal's source?
A. Prior to this, not really, no.
Q. Was this around the period when you began receiving that information?
A. It is.
Q. And how do you respond?
A. I said: Sure. You in the office?
Q. How typically would Mr. Tortora convey the information to you?
A. He would typically convey it whenever he received it.
Q. And what sort of medium would he use to convey it to you?
A. Primarily, over the phone. Sometimes, if we happen to be together, he would just tell me in person, and then other times he would e-mail.

Q. Now, after you received information from Mr. Tortora, what would you do with it?
A. I would initially try to determine whether there was an investment opportunity, and then I would convey it to Mr. Chiasson.
Q. When you say determine if it was an investment opportunity, what do you mean by that?
A. So in addition to the fact that we had the information, the most relevant part of it is whether or not we can use the information to make money. And so I would -- I had a model that I used for Dell and I would plug the numbers that I received from Mr. Tortora into my model, and then to the extent that it looked like there was an opportunity to make money in stock, based on this -- based on my model and based on the sentiment in the stock and other factors, I would then convey that to Mr. Chiasson.
Q. Now, looking at the date of this e-mail, which is May 6, 2008, and looking at the board behind you, where are we within Dell's quarter and quarterly announcements period?
A. This would be three days after the close of the quarter. I'm sorry. One day after the close of the quarter in 2008, the May quarter.
Q. I think May 2, 2008.
A. I'm sorry. It's four days.
Q. Do you have a recollection of what Level's position was in

A. This looks like an entry that talks about a trip, it looks like it's an Outlook calendar reference.
MR. ZACH: The government offers 462.
MR. WEINGARTEN: No objection.
THE COURT: Government Exhibit 462 is received.
(Government's Exhibit 462 received in evidence)
Q. Who went with you on this trip?
A. Mr. Chiasson and Mr. Brenner.
Q. Where did you guys leave from?
A. We left from the Hamptons.
Q. How did you travel out to California?
A. We used a private plane through the firm's NetJets account.
Q. While you were on the plane, did you discuss the Dell position?
A. We did.
Q. What did you guys talk about while you were on the plane traveling out to the west coast?
A. Just the position in general, the fact that gross margins would be an important part of whether or not the company would do well, and that there was additional information coming through the contacts from Sandy Goyal through the Dell insider.
Q. And what sort of additional information were you guys expecting from the Dell insider?
A. The final roll-up of numbers ahead of the quarterly earnings announcement.

Q. Why is it important to get such an update close to the actual announcement?
A. Because the -- those numbers are unlikely to change between whenever you would have gotten and the actual announcement. And so if you have the numbers ahead of the announcement you can adjust your position accordingly. In this case, we were short the stock, so we were hoping that there was no change to the numbers that had been coming in, which called for gross margin weakness.
Q. Now, where did you stay in California?
A. The four seasons in Palo Alto.
Q. This was all for business purposes, right?
A. Correct.
Q. Showing you Government Exhibit 464, what is 464?
A. This is an e-mail from Mr. Chiasson to myself and Mr. Brenner.
MR. ZACH: The government offers 464.
MR. WEINGARTEN: No objection.
THE COURT: Government's 464 is received.
(Government's Exhibit 464 received in evidence)
Q. What is this about?
A. Mr. Chiasson is asking if we want to meet downstairs at 7:15 in the morning.
Q. Do you recall what you were meeting for?
A. We were going to leave to go meet companies and so we just

got together to meet before we were going to leave for breakfast.
Q. Now, as the quarter announcement approached, did you continue to get information from Dell and other companies that you were interested in reviewing in connection with the Dell position?
A. Yes.
Q. Let's look at Government Exhibit 490.
Do you see that?
A. Yes.
Q. What is it?
A. This is an e-mail from Mr. Chiasson to Mr. Ganek, myself, and Mr. Brenner.
Q. When is it dated?
A. Dated August 20, 2008.
MR. ZACH: The government offers 490.
MR. WEINGARTEN: No objection.
THE COURT: Government's 490 is received.
(Government's Exhibit 490 received in evidence)
Q. Looking just at the top part of the e-mail, what is this?
A. So this is the e-mail sent from Mr. Chiasson, he talks about -- it says HPQ notes plugging Dell positively. What I think he means by that, Hewlett-Packard, it looks like, reported the night before. And typically when a company reports, sell side analysts will issue research notes. Those

notes, according to Mr. Chiasson, mention Dell positively.
Q. And how is that relevant to your position or the public's position in Dell?
A. It would have been contrary to our position because we had a short position. Everything positive for Dell would be negative for us.
Q. Why were you negative on Dell?
A. Because we had information that gross margins were going to be worse than expected.
Q. If Wall Street expectations are that a company is going to do very well and you're betting against that, how does that affect your position?
A. If the expectations are high and the company disappoints, that's positive for a short position.
Q. When you say it's positive, what does that mean?
A. It means that whoever is short the stock will make money because the stock will go lower.
Q. As the quarter approached, did Mr. Chiasson continue to ask you for updates on information from the Dell insider?
A. He did.
Q. Let's look at Government Exhibit 505.
Do you recognize this document?
A. Yes.
Q. What is it?
A. This is an e-mail exchange between myself and Mr. Chiasson.

A. It is.
Q. What do you understand Mr. Kuo to be saying when he says, I get a non-GAAP GM of 37.8 percent?
A. He had taken out that inventory charge and this is the number that he got for non-GAAP.
Q. Let's go to the top of the e-mail.
Who does Mr. Tortora forward that to?
A. To Todd Newman.
THE COURT: Why don't we take a break here. Let's stop here for an afternoon break. I'll see you in about ten minutes. Don't discuss the case, of course. But you can use the restroom, stretch your legs, get a cookie or something. Thanks.
All rise for the jury.
(Jury not present)
THE COURT: Anything we need to discuss?
You have ten minutes. See you in a bit.
(Recess)
THE COURT: Let's bring in the jury.
MR. NATHANSON: Your Honor, one brief matter.
The last exhibit that the government went over is Exhibit 805, and I believe the last question that was just asked was whether or not at the top of that e-mail that Mr. Tortora forwarded it to Mr. Newman. I don't think that's an appropriate question. Mr. Adondakis isn't on that portion

of the e-mail. It's really just a point for summation. Mr. Adondakis just said yes, it is and he sees that it is.
I mention it now because there are at least two other exhibits, 810 and 820, that have similar strings that at the top they get forwarded to Mr. Newman. This witness can't possibly add anything to those. He is not on those top communications.
I just ask that there be no questions about whether or not Mr. Tortora, after it was forwarded to Mr. Adondakis, then forwarded it to Mr. Newman.
THE COURT: But the exhibit is in evidence, so the jury can infer that it was forwarded.
MR. NATHANSON: Sure. There is no reason to ask this witness to show him that part of the e-mail and say, was this forwarded on to Mr. Newman? It's not something within the purview of his knowledge other than the fact that he is seeing an e-mail, which I understand is in evidence. It doesn't seem like an appropriate question to ask.
MR. ZACH: Your Honor, the documents are in evidence. The jury is having a lot of documents thrown at them. I am asking the question to point out that it was to Mr. Newman. There is so many documents coming in, there is nothing wrong with the witness reading from it. I don't intend to do it that much more.
THE COURT: It's in evidence. I think you can ask a

witness to read in from it. If you want to go into on cross if he knows nothing about what was actually done, I think you can. I don't think it's an improper thing with an exhibit that's in evidence.
Let's bring in the jury.
(Jury present)
THE COURT: We are going to resume the examination of Mr. Adondakis by Mr. Zach.
Go ahead, Mr. Zach.
MR. ZACH: Thank you, your Honor.
Q. Before we broke Mr. Adondakis, we had been looking at Government Exhibit 805 which had information from an accounting manager at Nvidia being passed along to a variety of people.
Do you recall that?
A. Yes.
Q. Now, what did you tell Mr. Chiasson about this inside information that you were getting from Nvidia?
A. I explained to him that a friend of Jesse Tortora would be getting information from Nvidia through a friend of his who he went to church with and that the contact was -- it would have an Nvidia contact, essentially.
Q. When you say Nvidia contact, did you express where that Nvidia contact worked?
A. I didn't specifically say at Nvidia, but based on contacts that we had at other companies, I assumed --

MR. WEINGARTEN: Respectfully object.
THE COURT: Hold on.
Did you express where that Nvidia contact worked, yes or no?
THE WITNESS: No.
THE COURT: Next question.
Q. Had you had a course of dealing in talking about sources of information with Mr. Chiasson that you referred to in a specific way?
A. Yes.
Q. What was the way that you referred to him?
A. When I would refer to contacts I would refer to them as those that worked at companies.
Q. When you said that a contact at a company, did that mean that that contact worked at the company?
A. That's correct.
Q. Now, turning to Government Exhibit 810, it's already in evidence, have you seen this document?
A. Yes.
Q. Let's look at the lower e-mail.
THE COURT: Hold on one second. Just take that down. I don't have that in. Maybe I just missed it. Does anybody else who is keeping score have it in? There has been a lot of documents. I don't suggest that I am infallible on this point.
MR. TARLOWE: Our records suggest that it was admitted

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message_date	sender_name	sender_im	recipient_name	recipient_im	content
08/12/2008 19:24:48	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	what u thinkng on amat?
08/12/2008 19:24:48	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	IM Administrator: All instant messages sent to and from this buddy name will be logged by our IMAuditor and will be subject to archival, monitoring, or review and/or disclosure to someone other than the recipient.
08/12/2008 19:24:48	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	IM Administrator: All instant messages sent to and from this buddy name will be logged by our IMAuditor and will be subject to archival, monitoring, or review and/or disclosure to someone other than the recipient.
08/12/2008 21:08:02	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	where this going
08/12/2008 21:08:11	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	new highs
08/12/2008 21:08:33	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	u think ?
08/12/2008 21:08:44	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	sounds sort of hedgy on q1
08/12/2008 21:09:02	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	they just changed the game on qtr order guide up
08/12/2008 21:09:14	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	every monkiey going to say bottom so buy group
08/12/2008 21:09:51	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	i was trying to hit u but u never responded to my im - my buddy there told me about big order from nanya and tsm
08/12/2008 21:10:03	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	inter
08/12/2008 21:10:04	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	so i dont think its industry
08/12/2008 21:10:06	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i am small
08/12/2008			Anthony		

21:10:09	jyuster910	jyuster910	Chiasson	chiassonlevel	its mkt share
08/12/2008 21:10:16	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	gonna take off
08/12/2008 21:10:16	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	fuck it
08/12/2008 21:10:42	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	but monkeys going to chase now --for the first time i actually am going to look for longs in this space
08/12/2008 21:11:12	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	hes saying 09 will grow - not much else will in tech
08/12/2008 21:11:26	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	that is true
08/12/2008 21:11:27	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	we should do work on form
08/12/2008 21:11:31	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	if anything more disappointments
08/12/2008 21:11:32	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	this seems inter to me
08/12/2008 21:11:36	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	asml
08/12/2008 21:11:40	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	will see big curr benefit
08/12/2008 21:11:42	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	prob true
08/12/2008 21:11:45	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	u like asml
08/12/2008 21:11:47	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	?
08/12/2008 21:11:50	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	doing work
08/12/2008 21:11:54	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i like they can see curr benefit
08/12/2008 21:12:00	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	all monkeys will look for $ beneficiaries
08/12/2008 21:12:01	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	agree--same with my chkp
08/12/2008 21:12:05	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	true
08/12/2008 21:12:16	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	my concern on asml is the order commentary last qtr
08/12/2008 21:15:31	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	arcuri bottom ticked dg

08/12/2008 21:15:37	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	how is nvda guid?
08/12/2008 21:19:59	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	better
08/12/2008 21:20:02	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	everyone short
08/12/2008 21:20:12	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	what was guid?
08/12/2008 21:20:12	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	semi night all good for J
08/12/2008 21:20:22	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	im only long mxim
08/12/2008 21:20:24	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	and onnn
08/12/2008 21:20:28	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	im too light
08/12/2008 21:20:33	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	u had the vibe
08/12/2008 21:20:40	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	i knew tech rally too
08/12/2008 21:20:49	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	and cant make a shekel
08/12/2008 21:21:00	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	This is a pain in the ass
08/12/2008 21:21:01	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	my shorts keep rallyng
08/12/2008 21:21:04	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Same
08/12/2008 21:21:13	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	every day its a new headache
08/12/2008 21:25:57	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	why is nvda ripping?
08/12/2008 21:26:00	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	didnt they lower?
08/12/2008 21:26:36	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	yes but come on J bird
08/12/2008 21:27:11	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	guide was was well below consensus - guides oct up slightly vs. +10% for street, gm was also about 100bps light , expectations were very low
08/12/2008 21:27:23	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	gm guide expectation was lower

08/12/2008 21:27:28	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i do think this top line guide was worse
08/12/2008 21:27:31	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	than people thot
08/12/2008 21:27:41	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	cud be another gm blow hre
08/12/2008 21:27:43	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	here
08/12/2008 21:28:27	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	wow so it was complete reset
08/12/2008 21:28:37	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	so eps will go to 80c --15x
08/12/2008 21:28:41	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	already after mkt
08/12/2008 21:28:49	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	so i cant see this really running here
08/12/2008 21:28:56	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	he is trying to pump on the call
08/12/2008 21:29:04	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Calling "px ing" stable
08/12/2008 21:29:06	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Also calling
08/12/2008 21:29:09	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	levers
08/12/2008 21:29:15	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	that he can use for the gm
08/12/2008 21:30:55	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	is this thing going to keep running?
08/12/2008 21:31:08	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	with model reset?
08/12/2008 21:34:28	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	u doing anything on rht?
08/12/2008 21:35:24	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	im at dell now
08/12/2008 21:35:25	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	any q?
08/12/2008 21:35:31	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	how biz
08/12/2008 21:35:34	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	slowdown?
08/12/2008 21:36:42	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	he wont comment
08/12/2008	jyuster910	jyuster910	Anthony	chiassonlevel	but hes pitching new

21:36:48			Chiasson		notebook
08/12/2008 21:36:50	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	launch
08/12/2008 21:36:52	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	saying high mgns
08/12/2008 21:37:00	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	and targeting commercial
08/12/2008 21:37:03	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	16-19hr
08/12/2008 21:37:06	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	battery life
08/12/2008 21:37:10	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	how it look
08/12/2008 21:37:52	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	slick design
08/12/2008 21:38:16	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	My checks on gm this qtr not so good
08/12/2008 21:38:19	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	I am waiting for final read
08/12/2008 21:38:29	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	As of now, dont see repeat of last qtr
08/12/2008 21:38:33	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	and sentiment much better
08/12/2008 21:39:04	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	how could u have checks on gm%?
08/12/2008 21:39:22	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Not your concern
08/12/2008 21:39:28	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	I just do
08/12/2008 21:39:38	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Just like i had chex on wdc pxing
08/12/2008 21:39:44	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	When you will smithe'd me
08/12/2008 21:39:58	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Fresh Prince style
08/12/2008 21:40:01	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	jazzy Jeff too
08/12/2008 21:40:22	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	St is 18.35
08/12/2008 21:40:26	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	just not sure it gets there
08/12/2008 21:40:31	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	need to keep doing work there

08/12/2008 21:40:50	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	ha
08/12/2008 21:40:58	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	I am on it
08/12/2008 21:41:00	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	i agree on oper mgns
08/12/2008 21:41:00	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	very focused
08/12/2008 21:41:04	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	stock going to 21
08/12/2008 21:41:05	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	next qtr seems high
08/12/2008 21:41:05	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	if no good
08/12/2008 21:41:11	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	but they dont give guid
08/12/2008 21:41:17	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	so its about this qtr
08/12/2008 21:41:34	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Y
08/12/2008 21:41:38	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Me think that true
08/12/2008 21:41:44	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Sentiment so bullish
08/12/2008 21:41:47	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	Inverse setup
08/12/2008 21:41:49	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	to last qtr
08/12/2008 21:43:23	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	agree on sentiment
08/12/2008 21:43:29	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	but not enuf
08/12/2008 21:43:32	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	we in rally mode
08/12/2008 21:43:42	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	we need # cuts
08/12/2008 21:43:58	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	if gm misses
08/12/2008 21:44:01	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	they cud miss
08/12/2008 21:44:02	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	eps
08/12/2008	Anthony	chiassonlevel	jyuster910	jyuster910	brother

21:44:04	Chiasson				
08/12/2008 21:44:10	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i dont think that much rev upside
08/12/2008 21:44:21	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	its all gm
08/12/2008 21:44:25	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	with this pup
08/12/2008 21:45:06	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	what about the opex cuts
08/12/2008 21:45:17	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	michaels got the reins
08/12/2008 21:45:39	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i cannot get that number
08/12/2008 21:46:08	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	working on it
08/12/2008 21:46:28	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	im looking at asml #s --this qtr seems ok -next qtr slightly high
08/12/2008 21:46:41	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	but then it looks like game on for AC
08/12/2008 21:47:04	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	and cheap--value for AC -- mid teens mult--not much in semicap land here
08/12/2008 21:47:14	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	lft strong print and guide here
		REDACTED			
08/12/2008 21:47:58	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	thx for reminder -it was like watching paint dry -- couldnt hold on
08/12/2008 21:48:12	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i thot it was ur top posn
08/12/2008 21:48:21	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i forgot the report was today
08/12/2008 21:48:22	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	ac been busy
08/12/2008 21:48:26	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	losing money
08/12/2008 21:48:36	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	90k a day will never be top
08/12/2008 21:48:37	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	takes a lot of work to be as bad as i am riight now
08/12/2008 21:48:52	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	u can blame it on your analysts

08/12/2008 21:48:55	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	im flying solo
08/12/2008 21:49:41	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	investors never want to see the analysts
08/12/2008 21:49:49	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	y-hear ya
08/12/2008 21:49:52	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	especially when results lousy
08/12/2008 21:50:08	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	tough yr
08/12/2008 21:50:23	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	pain in the ass
08/12/2008 21:50:28	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	and working on some strategic crap too
08/12/2008 21:50:32	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	so its all a pain in the ass
08/12/2008 21:50:40	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	whats your mkt view--no biases -b/w here and yr end
08/12/2008 21:50:55	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	just AC and JY speak--where u at for 2h mkt view
08/12/2008 21:51:13	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i think rally continues for a bit here
08/12/2008 21:51:17	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	we have a tough sept/oct
08/12/2008 21:51:23	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	and then close the year maybe back around here
08/12/2008 21:51:25	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	or a little higher
08/12/2008 21:51:35	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	post elex rally

08/12/2008 21:52:02	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	generally agree tho i am starting to think that sept oct sell wont be as bad as i thought

08/12/2008 21:52:05	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	doesnt ruin us
08/12/2008 21:52:15	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	i think mkt bottomed for yr
08/12/2008 21:52:20	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	it may have
08/12/2008 21:52:25	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	we prob retest in 1q tho
08/12/2008 21:52:27	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	if oil is done
08/12/2008 21:52:29	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	we ok
08/12/2008 21:52:30	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	but i only care about 2h
08/12/2008 21:52:41	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	mkt in range the next 2 yrs to me
08/12/2008 21:52:44	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	y
08/12/2008 21:52:46	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	miserable
08/12/2008 21:52:48	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	setup
08/12/2008 21:52:50	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	quite frankl
08/12/2008 21:52:51	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	y
08/12/2008 21:52:54	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	usa is low growth
08/12/2008 21:52:55	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	no breakout bull for AC til 2010 or 2011
08/12/2008 21:52:57	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	y
08/12/2008 21:52:59	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	settle in
08/12/2008 21:53:06	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	get the jy mgmt fee stream going
08/12/2008 21:53:09	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	keep expenses down
08/12/2008 21:53:19	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	build west coast jy compound
08/12/2008 21:53:22	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	funny u said that--we talking about that now--no reason to hire

08/12/2008 21:53:31	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	mkt is 75% macro
08/12/2008 21:53:32	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	no reason to
08/12/2008 21:53:38	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	need tight macro view
08/12/2008 21:53:41	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	and manage risk tightly
08/12/2008 21:53:44	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	i actually may be moving in with AC -moving on up east side
08/12/2008 21:53:47	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	then find 5-10 ideas
08/12/2008 21:54:00	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	i welcome all alpha generators to my hood
08/12/2008 21:54:04	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	keep out consensus thinkkers
08/12/2008 21:54:20	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	need to grow and everything in ny -wife pissed so we'll see
08/12/2008 21:54:20	Anthony Chiasson	chiassonlevel	jyuster910	jyuster910	I am away from my computer right now.
08/12/2008 21:55:10	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	anyway if we agree on mkt rally for a bit -need to have long bias -need to find key 2h movers
08/12/2008 21:57:17	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	big beat on topline by lft
08/12/2008 21:57:25	jyuster910	jyuster910	Anthony Chiasson	chiassonlevel	surprised only 1c eps

4

From: Jeremy Yuster <jyuster@missionglobalfund.com>
Sent: Monday, August 18, 2008 6:37 PM
To: Anthony Chiasson
Subject: RE: Economics: Frugal future showed up in the CPI data - United States - 3pp

In this scenario stock tanks

Jeremy Yuster
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-----Original Message-----
From: Anthony Chiasson [mailto:AC@levelglobal.com]
Sent: Monday, August 18, 2008 6:34 PM
To: Jeremy Yuster
Subject: Re: Economics: Frugal future showed up in the CPI data - United States - 3pp

Gm 17.4-17.7
No opex kiss

----- Original Message -----
From: Jeremy Yuster <jyuster@missionglobalfund.com>
To: Anthony Chiasson
Sent: Mon Aug 18 17:45:47 2008
Subject: RE: Economics: Frugal future showed up in the CPI data - United States - 3pp

Risk reward from a sentiment standpt and from upside vs downside on stock as I showed u is def favorable to be there into print --but besides your nyc posse taking profits create a scenario for me where stock craters?

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-----Original Message-----
From: Anthony Chiasson [mailto:AC@levelglobal.com]
Sent: Monday, August 18, 2008 5:44 PM
To: Jeremy Yuster
Subject: Re: Economics: Frugal future showed up in the CPI data - United States - 3pp

Where do you dell revs come in

----- Original Message -----
From: Jeremy Yuster <jyuster@missionglobalfund.com>
To: Anthony Chiasson
Sent: Mon Aug 18 17:37:31 2008
Subject: RE: Economics: Frugal future showed up in the CPI data - United States - 3pp

On your gm% for dell, don't u worry about dram, panel prices all coming down hard?

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From: Anthony Chiasson [mailto:AC@levelglobal.com]
Sent: Monday, August 18, 2008 5:29 PM
To: Jeremy Yuster
Subject: Re: Economics: Frugal future showed up in the CPI data - United States - 3pp

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2-3 cent beat here?

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To: Anthony Chiasson
Sent: Mon Aug 18 17:15:19 2008
Subject: FW: Economics: Frugal future showed up in the CPI data - United States - 3pp

Look at the comments below from the economist-hes talking pricing pressure in pc land

Jeremy Yuster

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From: ML-David Rosenberg [mailto:feedback@mlresearch.ml.com]
Sent: Monday, August 18, 2008 6:53 AM
To: Jeremy Yuster
Subject: Economics: Frugal future showed up in the CPI data - United States - 3pp

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The frugal future showed up in the CPI data

Link to full report including important disclosures*

http://research1.ml.com/C/?q=0Y5U9zBXCi3ltljEpgrEYA%3D%3D
<http://research1.ml.com/C/?q=0Y5U9zBXCi3ltljEpgrEYA%3D%3D>

Entering a period of mean reverting consumer spending

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To reply to David Rosenberg directly, click here [redacted]

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Click here <http://rsch1.ml.com/14016/24592/iq/iqmethod.pdf> for the iQmethodSM report

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Recipient: Jeremy Yuster

<http://research1.ml.com:8080/t/o.do?m=07c3a86ef8ad6842a8c6c72bc0494890&b=dc56f2704669151b7f09b2cd06707ca3>

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From: Jeremy Yuster <jyuster@missionglobalfund.com>
Sent: Monday, August 18, 2008 8:08 PM
To: Anthony Chiasson
Subject: RE: Economics: Frugal future showed up in the CPI data - United States - 3pp

What happens on adi tomorrow night if revs and gm% beat but they effectively lower seq growth on revs and next qtr absolute $$ stays same? Is that pos or they need to raise given pos previews?

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-----Original Message-----
From: Anthony Chiasson [mailto:AC@levelglobal.com]
Sent: Monday, August 18, 2008 8:09 PM
To: Jeremy Yuster
Subject: Re: Economics: Frugal future showed up in the CPI data - United States - 3pp

My view on gm more convicted than urs
U hitting me w. Inline gm

----- Original Message -----
From: Jeremy Yuster <jyuster@missionglobalfund.com>
To: Anthony Chiasson
Sent: Mon Aug 18 20:03:10 2008
Subject: RE: Economics: Frugal future showed up in the CPI data - United States - 3pp

I like u bringing out the college stats curriculum but I think closer to 10% given mike's public pos comments

Jeremy Yuster
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-----Original Message-----
From: Anthony Chiasson [mailto:AC@levelglobal.com]
Sent: Monday, August 18, 2008 8:04 PM
To: Jeremy Yuster
Subject: Re: Economics: Frugal future showed up in the CPI data - United States - 3pp

To get the down 15-20pct, need eps miss
I think 30pct chance if u run expected value Street sleep time on pricing

----- Original Message -----
From: Jeremy Yuster <jyuster@missionglobalfund.com>
To: Anthony Chiasson
Sent: Mon Aug 18 19:59:18 2008
Subject: RE: Economics: Frugal future showed up in the CPI data - United States - 3pp

Mike's comments on gaining share and recent pos view on 2h pc growth def has elevated expectations--but don't think hes stupid -not sure why he would say this if biz was light.

At same time I feel like given they don't give guid, im stuggling to understand if qtr is inline why it breaks given no guid down since they don't give guid

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-----Original Message-----
From: Anthony Chiasson [mailto:AC@levelglobal.com]
Sent: Monday, August 18, 2008 7:55 PM
To: Jeremy Yuster
Subject: Re: Economics: Frugal future showed up in the CPI data - United States - 3pp

28/20
I think ur risk reward right
I think the print is more questionable given chunky expecs and rightly so with mike on the tape each minute

----- Original Message -----
From: Jeremy Yuster <jyuster@missionglobalfund.com>
To: Anthony Chiasson
Sent: Mon Aug 18 17:39:22 2008
Subject: RE: Economics: Frugal future showed up in the CPI data - United States - 3pp

What do u see risk reward if u disagree with me?

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-----Original Message-----
From: Anthony Chiasson [mailto:AC@levelglobal.com]
Sent: Monday, August 18, 2008 5:42 PM
To: Jeremy Yuster
Subject: Re: Economics: Frugal future showed up in the CPI data - United States - 3pp

All ur nyc boys loving dell long time

----- Original Message -----
From: Jeremy Yuster <jyuster@missionglobalfund.com>
To: Anthony Chiasson
Sent: Mon Aug 18 17:37:06 2008
Subject: RE: Economics: Frugal future showed up in the CPI data - United States - 3pp

Dell is 15x eps for this fy --I see risk is $27 if u give it a best case 15x cal 09 eps --vs 12x which is $21.60 -but im not assuming any # cuts here so the downside case doesn't make sense bc if #s get cut, at 12x it prob goes lower than this

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jyuster@missionglobalfund.com
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-----Original Message-----
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Jeremy Yuster | Head of Research | Mission Global Advisers, LLC
460 Park Ave., 19th Fl | New York, NY 10022
w: 415-785-4430 | [redacted] | jyuster@missionglobalfund.com | [redacted]

Jeremy Yuster | Head of Research | Mission Global Advisers, LLC
460 Park Ave., 19th Fl | New York, NY 10022
w: 415-785-4430 | [redacted] | jyuster@missionglobalfund.com | [redacted]

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From: Anthony Chiasson
Sent: Tuesday, April 28, 2009 2:15 PM
To: David Ganek
Subject: NVDA

Sammy thinks we will get a firmer read shortly

I am going to give it a day or 2

Prelim call is Street is 34 / our check is 30 GM

GM in model goes 34 to 38 over balance of cal 09

So 30 this qtr will imply less leeverage given assumed ramp up dynamic

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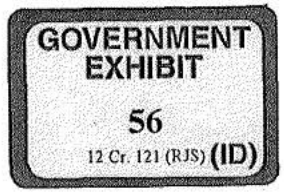
From: Michael Alessi
Sent: Monday, May 04, 2009 2:20 PM
To: David Ganek
Cc: Michael Alessi
Subject: * NVDA - AC shorting 500K for starters *

Not sure if you have spoken with AC/Sam.
Sam's latest check thinks GM's will be light when they report on Thursday.
Assuming we will pro-rate equally.

Michael W. Alessi
Level Global Investors
888 West 57th Street, 27th Floor
New York, NY 10019
Direct: (212) 287 5327
Trading Desk: (212) 287 5398
ma@levelglobal.com
[redacted]

Level Global
Profits From Trading Dell Inc.
05/12/2008 – 06/02/2008

Description	(Cost) / Proceeds
Profit from Common Stock:	$3,657,348.00
Profit from Options:	$1,058,120.00
Total Realized Profit from Stock and Options Trading:	$4,715,468.00

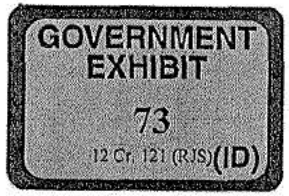


Level Global
Total Profits From Trading Dell Inc.
07/08/2008 – 09/16/2008

Description	(Cost) / Proceeds
Profit from Common Stock:	$43,697,797.51
Profit from Options:	$10,100,933.00
Total Realized Profit from Stock and Options Trading:	$53,798,730.51

Level Global
Profits From Trading NVIDIA Corporation
05/01/2009 – 05/13/2009

Description	(Cost) / Proceeds
Common Stock Short Selling in NVDA	$45,574,346.00
Common Stock Short Covering in NVDA	($35,288,016.15)
Total Realized Profit from Common Stock Trading:	$10,286,329.85



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AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case Sheet 1 (NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
V.
ANTHONY CHIASSON

Date of Original Judgment: 5/13/2013
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: S2 12 Cr. 121
USM Number: 66258-054
Reid Weingarten & Gregory Morvillo
Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☑ was found guilty on count(s) 1, 6-10 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 371	Conspiracy to Commit Securities Fraud	12/31/2009	1
15 U.S.C. 78j(b) & 78ff	Securities Fraud	5/12/2008	6
15 U.S.C. 78j(b) & 78ff	Securities Fraud	8/11/2008	7

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☑ Count(s) from prior indictments ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/15/2013
Date of Imposition of Judgment

Signature of Judge
Richard J. Sullivan U.S. District Judge
Name and Title of Judge

7/15/2013
Date

DEFENDANT: ANTHONY CHIASSON
CASE NUMBER: S2 12 Cr. 121

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. 78j(b) & 78ff	Securities Fraud	8/18/2008	8
15 U.S.C. 78j(b) & 78ff	Securities Fraud	8/20/2008	9
15 U.S.C. 78j(b) & 78ff	Securities Fraud	5/4/2009	10

DEFENDANT: ANTHONY CHIASSON
CASE NUMBER: S2 12 Cr. 121

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of :

78 months

☑ The court makes the following recommendations to the Bureau of Prisons:

That Defendant be committed to the camp at FCI Otisville, or such other facility that is as close to the New York metropolitan area as possible, so that he may be close to his friends and family, including his wife, 9-year-old son, and 1-year-old daughter.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☑ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANTHONY CHIASSON
CASE NUMBER: S2 12 Cr. 121

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

1 year

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment, or if such prior notification is not possible, then within five days after such change;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

DEFENDANT: ANTHONY CHIASSON
CASE NUMBER: S2 12 Cr. 121

ADDITIONAL SUPERVISED RELEASE TERMS

1) The Defendant shall provide the probation officer with access to any requested financial information.
2) The Defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.
3) The Defendant is to report to the nearest Probation Office within 24 of release from custody, or by the next business day if the Defendant is released on a weekend or holiday.
4) The Defendant shall be supervised in his district of residence.

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties (NOTE: Identify Changes with Asterisks (*))

DEFENDANT: ANTHONY CHIASSON
CASE NUMBER: S2 12 Cr. 121

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 600.00	$ 5,000,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
Sheet 6 — Schedule of Payments (NOTE: Identify Changes with Asterisks (*))

DEFENDANT: ANTHONY CHIASSON
CASE NUMBER: S2 12 Cr. 121

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Defendant shall pay the fine in full by August 13, 2013.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

*$1,382,217

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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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: 10/4/13

UNITED STATES DISTRICT JUDGE

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

SPYRIDON ADONDAKIS,
ANTHONY CHIASSON,
SANDEEP GOYAL,
JON HORVATH,
DANNY KUO,
TODD NEWMAN,
JESSE TORTORA,
DIAMONDBACK CAPITAL MANAGEMENT, LLC,
and
LEVEL GLOBAL INVESTORS, L.P.,

Defendants.

12-cv-0409 (HB)

ECF CASE

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: 10/4, 13

UNITED STATES DISTRICT JUDGE

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13-1837(L)

13-1917(CON)

To Be Argued By:
ANTONIA M. APPS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 13-1837(L), 13-1917(CON)

UNITED STATES OF AMERICA,

Appellee,

—v.—

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 THE UNITED STATES OF AMERICA

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ANTONIA M. APPS,
RICHARD C. TARLOWE,
MICAH W.J. SMITH,
BRENT S. WIBLE,
Assistant United States Attorneys, Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 13-1837(L), 13-1917(CON)

UNITED STATES OF AMERICA,

Appellee,

—v.—

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

Defendants,

TODD NEWMAN, ANTHONY CHIASSON,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Todd Newman and Anthony Chiasson appeal from judgments of conviction entered on May 9, 2013, and May 14, 2013, respectively, in the United States District Court for the Southern District of New York, following a six-week jury trial before the Honorable Richard J. Sullivan, United States District Judge.

Superseding Indictment S2 12 Cr. 121 (RJS) (the "Indictment") was filed on August 28, 2012, in twelve counts. Count One charged Newman, Chiasson, and a co-defendant with conspiracy to commit securities

fraud, in violation of Title 18, United States Code, Section 371. Each of Counts Two through Five charged Newman and each of Counts Six through Ten charged Chiasson with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2; and Title 18, United States Code, Section 2.[1]

Trial commenced on November 7, 2012, and ended on December 17, 2012, when the jury returned its verdict, finding Newman and Chiasson guilty on each of the counts in which they were charged.

On May 2, 2013, the District Court sentenced Newman to an aggregate term of 54 months' imprisonment, to be followed by an aggregate one-year term of supervised release, imposed a $500 mandatory special assessment, and ordered Newman to forfeit $737,724 and to pay a $1 million fine. On May 13, 2013, the Court sentenced Chiasson to an aggregate term of 78 months' imprisonment, to be followed by an aggregate one-year term of supervised release, imposed a $600 mandatory special assessment, and ordered Chiasson to pay a $5 million fine, deferring the determination of the forfeiture amount. On June 28, 2013, following further briefing by the parties, the Court ordered Chiasson to forfeit $1,382,217.

---

[1] The co-defendant in the conspiracy count, who pleaded guilty before trial, was charged with securities fraud in Counts Eleven and Twelve.

At the conclusion of his sentencing proceeding, Newman moved for bail pending appeal. By order dated May 8, 2013, the District Court denied Newman's motion. Chiasson also moved for bail pending appeal at his sentencing proceeding, which motion the Court denied for the reasons set forth in its May 8, 2013 order. Both Newman and Chiasson thereafter filed motions in this Court for bailing pending appeal. On June 21, 2013, this Court granted those motions. Newman and Chiasson thus remain free on bail pending appeal.

Statement of Facts

A. The Government's Case

The evidence at trial established that Newman, a portfolio manager at a hedge fund called Diamondback Capital Management, LLC ("Diamondback"), and Chiasson, a co-founder of a hedge fund called Level Global Investors, L.P. ("Level Global"), participated in an insider trading scheme along with a cohort of corrupt analysts at various hedge funds and investment firms who exchanged material, nonpublic information obtained from employees of publicly traded technology companies. The analysts provided the inside information they obtained to their portfolio managers—including Newman and Chiasson—who, in turn, used that information to trade in securities. The trial focused largely on tips from insiders at Dell, Inc. ("Dell") and NVIDIA Corporation ("NVIDIA"), who breached duties they owed to their employers by disclosing their companies' confidential earnings numbers before that information was publicly re-

leased. Based on this inside information, Newman and Chiasson executed trades in Dell and NVIDIA securities, earning approximately $4 million and $68 million, respectively, in illicit profits for their funds.[2]

The Government's proof included: (1) the testimony of cooperating witnesses Sandeep ("Sandy") Goyal and Hyung Lim, who received tips from insiders at Dell and NVIDIA and shared the tips with corrupt analysts; (2) the testimony of cooperating witnesses Jesse Tortora and Spyridon ("Sam") Adondakis, who worked as analysts for Newman and Chiasson, respectively, and passed illegal tips to them; (3) the testimony of Dell and NVIDIA representatives establishing that the information disclosed to the defendants was confidential and that insiders breached duties of confidentiality in divulging it; (4) e-mails and instant messages corroborating the analysts' testimony; (5) compliance manuals of the defendants' hedge funds, which banned trading on inside information; and (6) telephone and trading records showing trades executed shortly after the defendants received inside tips from their analysts.

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[2] Counts Two, Three, Four, and Six through Nine were based on trades in Dell securities shortly before Dell's May 2008 and August 2008 earnings announcements. Counts Five and Ten were based on trades in NVIDIA securities shortly before NVIDIA's May 2009 earnings announcement.

1. The Inside Tips Regarding Dell and Newman's and Chiasson's Trades on Those Tips

Between 2007 and May 2009, Rob Ray worked in Dell's investor relations department, where he had access to Dell's financial information as the company consolidated its earnings numbers from its various business units each quarter. (Tr. 2759, 2769; GX 1657).[3] For eight quarters in a row, Ray disclosed Dell's consolidated earnings numbers to Sandy Goyal, an analyst at Neuberger Berman, before the information was released to the public. (Tr. 2769, 2782, 2804, 2808, 2813; GX 39, 1704A, 1707). Ray provided multiple updates each quarter, often during the consolidation process (*i.e.*, between the close of the quarter and the earnings announcement). (Tr. 2769, 2781-82, 2793, 2804, 2808, 2813, 2820; GX 39, 1704A, 1707).[4]

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[3] "Tr." refers to the trial transcript; "GX" refers to a Government Exhibit introduced at trial; "DX" refers to a Defense Exhibit introduced at trial; "Newman Br." and "Chiasson Br." refer to the defendants' respective briefs on appeal; "A." refers to the appendix filed with those briefs; and "PSR" or "Presentence Report" refers to the Presentence Investigation Report prepared by the United States Probation Office (the "Probation Office") in connection with Chiasson's sentencing.

[4] This internal consolidation of financial results is often referred to as a "roll-up" of financial information.

Upon receiving this information from Ray, Goyal shared it with Tortora, an analyst who worked for Newman at Diamondback. (Tr. 136, 144). Tortora, in turn, provided the information to Newman and certain other analysts with whom he shared inside information, including Sam Adondakis of Level Global. Adondakis passed the tips along to Chiasson. (Tr. 159; GX 214). Both Newman and Chiasson traded on the inside information Ray provided about Dell's earnings in advance of Dell's earnings announcements in May, August, and November of 2008, and earned substantial profits in connection with two of those quarters. (GX 51, 56, 59, 64).

Ray was not Goyal's primary contact at Dell for legitimate communications; Shep Dunlap, another investor relations employee at Dell, had that role. (Tr. 1472-73, 1475, 1631; GX 736, 759). Goyal spoke to Dunlap during business hours. By contrast, Ray, who worked in a cubicle where his criminal conversations could be overheard, provided confidential, inside information to Goyal at night and on weekends. (GX 26, 27; Tr. 1631). After Ray left Dell's investor relations team in May 2009 and joined the company's corporate development department, where he had no legitimate reason to discuss Dell's performance with analysts, he continued to provide inside information to Goyal. (GX 27, 1657; Tr. 2867).

Ray provided precise information concerning key portions of Dell's earnings results, including Dell's revenues, margins, and operating expenses. (Tr. 150, 154). For example, in advance of Dell's May 28, 2008 earnings announcement, Ray disclosed that Dell

would report $15.8 billion in revenue and a gross margin between 18.5 and 18.6 percent. (*See* GX 600A (notes of a corrupt analyst documenting Ray's tip)). Ray provided similarly precise information before Dell announced its financial results in August and November of 2008. (*See* GX 214 (August 5, 2008 e-mail from Tortora to Newman reporting that "gm [gross margin] looking at 17.5%"), 257 (November 14, 2008 e-mail from Tortora to Newman relaying "rev[enues of] 15.150 [billion], om [operating margin of] 6.1%")).

The confidential financial information Ray disclosed to Goyal was also largely accurate. As Tortora explained, there were occasions when certain metrics were "slightly off," but "the most important thing" was that Ray's information "allowed [the coconspirators] to accurately predict or project whether earnings were going to be materially better or worse than market expectations, thus allowing for trading on the stock." (Tr. 156). For example, before Dell's May 2008 earnings announcement, as Dell was consolidating its financial information, Ray disclosed that Dell would report gross margins between 18.5 and 18.6 percent. (*See* GX 600A). At the time Ray disclosed this information, it matched Dell's internal numbers. (*See* GX 1712, 1712A at 2 (May 12, 2008 internal Dell report showing Generally Accepted Accounting Principles ("GAAP") and non-GAAP gross margins of 18.5 percent and 18.6 percent, respectively)).

As another example, in advance of Dell's August 2008 quarterly announcement, Ray told Goyal that Dell would report a gross margin number lower than

17.5 percent, well below market expectations; consistent with Ray's tip, Dell in fact reported GAAP and non-GAAP margins of 17.2 and 17.4 percent, respectively. (Tr. 249, 1769; GX 238A at 5, 586A). Although Ray's tip that Dell would report revenues of $16.2 billion was slightly below the actual number ($16.4 billion), this discrepancy was insignificant because the critical metric that quarter was the gross margin number. Because Dell reported gross margins substantially below the prevailing market expectation of 18.3 percent, the stock price fell by almost 14 percent —the largest decline in eight years. (GX 1842, 3003S).[5] Ray similarly provided accurate information the following quarter. (*See* GX 255 (indicating Ray

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[5] Newman mischaracterizes an instant message exchange between Tortora and Newman at the time of the announcement. He asserts that Tortora "'freaked'" when he saw Dell reported $16.4 billion in revenue. (Newman Br. 13 (quoting A. 2019)). The full text of the instant message shows that Tortora "freaked when [he] saw [the] 16.4 [billion revenue number] . . . *and stock go up.*" (A. 2019 (emphasis added)). At the time of the announcement, Newman held a large short position in Dell. Following the announcement, Dell's price initially rose (apparently in response to the higher than expected revenue number) before falling precipitously based on the margin information. When the stock price rose initially, Tortora was concerned that the market would not react as expected to the margin number. (Tr. 883).

told Goyal revenues would be $15.15 billion for the quarter ending in October 2008), 1807 (Dell reported revenues of $15.162 billion)).[6]

In tipping Goyal, Ray breached his duty of confidentiality to Dell. Ray was never authorized to disclose Dell's nonpublic financial information to outsiders. (Tr. 2807). Dell's policies strictly prohibited disclosure of Dell's confidential information, and Dell's unannounced consolidated earnings numbers counted among the company's most sensitive information. (Tr. 2766-68, 2780-81). Dell allowed only approximately 20 employees to access this information, including the Chief Executive Officer, the Chief Financial Officer, and certain members of the investor relations team who needed the information to prepare for the company's quarterly earnings announcements. (Tr. 2800-01, 2815-16). Members of the investor relations team—including Ray—received training on Dell's nondisclosure policies and how to answer questions from investors so as to avoid inadvertently dis-

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[6] Newman misinterprets a February 20, 2009 instant message in which Tortora told Adondakis that he had been "dead wrong" on Dell the prior quarter, suggesting Tortora meant Ray's information had been incorrect. (Newman Br. 14 n.9). Tortora, however, explained that the information was accurate, but that the stock market did not react as expected based on Dell's results; he further explained that his comment about being "dead wrong" referred to his prediction of how the market would react. (Tr. 921).

closing current quarter earnings data before its public release. (Tr. 2774-75, 2823-27, 2973).[7]

In addition to this training on Dell's nondisclosure policy, Ray was explicitly warned not to disclose Dell's financial results before the company announced its earnings in May and August of 2008—the very announcements underlying the substantive counts charging trades in Dell securities. For example, on May 12, 2008, Ray and other members of Dell's investor relations team received an e-mail that contained Dell's financial results for the quarter, scheduled to be announced later that month. (GX 1712, 1712A; Tr. 2186). In the e-mail, Lynn Tyson, who was then the head of Dell's investor relations team, warned that she would "hunt . . . down" anyone who "breath[ed] a peep" of the results. (GX 1712). Notwithstanding this warning, on May 11 and May 15, Ray had lengthy telephone conversations with Goyal during which he disclosed Dell's confidential earnings

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[7] Members of Dell's investor relations team were permitted to help analysts with models pertaining to Dell's historical financial information, but were prohibited from discussing current quarterly financial information. (Tr. 2926). Moreover, while Dell's investor relations group sought to target certain institutional investors as long-term investors in the company, Dell strictly prohibited the selective release of quarterly earnings information before its public announcement. (Tr. 2777-78, 2784, 2974).

numbers. (GX 31, 32, 33, 600A, 1712A at 2).[8] Both Chiasson and Newman traded on Ray's information in advance of Dell's May 2008 earnings announcement, reaping over $1 million and $4 million in profits, respectively. (GX 51, 56). Chiasson did so on May 12 and May 16, shortly after Adondakis passed the information to him (GX 34, 52), and Newman did so on May 16, upon receiving the information from Tortora (GX 33, 50).

Ray received similar warnings not to discuss Dell's financial information in advance of the August 2008 quarterly earnings announcement. On August 8 —a week after the quarter ended—Ray received an e-mail advising investor relations personnel to be "especially vigilant about not sharing current information." (GX 1730). Yet at 10:30 p.m. on August 14, only hours after receiving the latest roll-up of Dell's financial information, Ray had a lengthy telephone conversation with Goyal in which he disclosed the information. (GX 26, 1732). Goyal spoke to Tortora the next morning, before the market opened; thereafter, starting at 10:24 a.m., Newman began to increase his short position in Dell stock. (GX 2501; Tr. 1201-09).

Then, on August 20, Ray and other investor relations personnel received an e-mail stating, "[w]e are keeping a tight lid on this"—meaning Dell's earnings numbers—"due to our performance in the quarter."

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[8] The financial information contained in Government Exhibit 1712A was also available on a shared network drive to which Ray had access. (Tr. 2817, 2843).

(GX 1733). Nonetheless, at 9:29 p.m. on August 24, Ray had another lengthy telephone conversation with Goyal and disclosed confidential information to him. (GX 26). The next day, Goyal spoke to Tortora, who subsequently told both Newman and Adondakis that Dell would miss market expectations on gross margins. (GX 26, 42, 230, 231). After receiving this information, both Newman and Chiasson increased their short positions in Dell securities. (GX 2501-DA, 2501-LA). Newman's and Chiasson's trading on the Dell tips in advance of the August 28, 2008 earnings announcement resulted in approximately $3 million and $54 million, respectively, in illegal profits for their hedge funds. (GX 59, 64).

2. The Inside Tips Regarding NVIDIA and Newman's and Chiasson's Trades on Those Tips

Like Dell, NVIDIA limited employee access to its internal accounting database. Chris Choi, however, worked in NVIDIA's finance department and was involved in preparing the company's quarterly financial statements; he therefore had access to the company's earnings numbers before they were publicly announced. (GX 1858A; Tr. 3095-96). NVIDIA's policies prohibited disclosure of its "financial results" to outsiders, and Choi signed a confidentiality agreement when he began working at NVIDIA. (GX 1953; Tr. 3101, 3103). Moreover, Choi was not a member of the company's investor relations department, and was not authorized to speak to investors. (Tr. 3098-101, 3103). Choi nonetheless repeatedly shared

NVIDIA's nonpublic financial information with Hyung Lim, a friend he knew from church.

Over the course of more than two years, Choi tipped Lim on numerous occasions, providing multiple updates in advance of each quarterly earnings announcement. (Tr. 3097-98, 3101-03; GX 1952, 1959). The information Choi provided was both precise and accurate. For example, on February 9 and February 10, 2009—before NVIDIA announced its earnings for the quarter ending in January of that year—Choi told Lim that quarterly revenues would be $481 million, down 46.4 percent from the previous quarter, and that GAAP gross margins would be 29.4 percent. (*See* GX 806 (e-mail documenting the tip)). Consistent with Choi's tip, after the market closed on February 10, NVIDIA reported revenues of $481.1 million (a 46 percent decrease from the prior quarter) and a GAAP gross margin number of 29.4 percent. (GX 1976).[9] As another example, Choi told Lim that, for the quarter ending in April 2009, NVIDIA would report revenues of "around $668 million" and gross margins of 30 percent. (*See* GX 820 (e-mail reflecting Choi's tip)). Consistent with this tip, NVIDIA later reported revenues of $664.2 million and non-GAAP gross margins of 30.6 percent. (GX 1979A).

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[9] The information Choi provided as to the non-GAAP gross margin number was incorrect, although it appeared that the error was in calculating the non-GAAP gross margins based on (accurate) information Choi provided about an inventory charge. (Tr. 490, 997-98).

NVIDIA did not sanction such disclosures. Not only did the company prohibit employees like Choi from divulging nonpublic financial information to outsiders, but, as a corrupt analyst wrote in an e-mail to Tortora in February 2009, the head of NVIDIA's investor relations group "had a firm policy about not calling back even in the last month of [the] quarter." (GX 803; Tr. 493-94).

After receiving this inside information from Choi, Lim passed it on to his friend Danny Kuo, who worked as an analyst at an investment company in California. (Tr. 3039). Kuo, in turn, shared the information with his boss and other corrupt analysts, including Tortora and Adondakis. (GX 804, 818). Both Newman and Chiasson traded on the information ahead of NVIDIA's May 7, 2009 earnings announcement, earning over $73,000 and $10 million, respectively. (GX 71, 73).

3. The Benefits Ray and Choi Received for Disclosing Inside Information

Ray and Choi each disclosed inside information for personal benefit. In exchange for providing material, nonpublic information about Dell to Goyal, Ray received career advice and assistance from Goyal.[10] Af-

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[10] Goyal told Ray that he worked in the research department at Neuberger Berman, writing research reports that formed the basis of stock recommendations Goyal sent to the firm's portfolio managers. (Tr. 1424, 1643). While Goyal did not tell Ray that he was trading on the information or sharing it with an-

ter attending business school with Ray, Goyal worked at Dell before becoming a Wall Street analyst. (Tr. 1390). Ray wanted to follow in Goyal's path. (Tr. 1396-1403; *see* GX 700 (Ray stating, "I wanted to call and chat with you sometime and get some feedback about your experience so far when you have a little time. As you know, I am extremely interested in the equity research area and it will be great to get some perspective from you."), 705 (Ray thanking Goyal for career advice, attaching his résumé, and stating, "Since you have successfully made the transition from Dell to investment management, I would love to hear your feedback on my resume only if/when you have some time")). In September 2007, Ray told Goyal that he was "still desperately looking to break into the buy/sell side." (GX 708). Goyal immediately responded that he had "put in a good word" for Ray with a buy-side person with whom Goyal was having lunch at the time. (GX 708). Over the next two years, Goyal continued to advise Ray on a range of topics, from discussing an examination that is required in order to become a financial analyst to editing Ray's résumé and sending it to a Wall Street recruiter. (Tr. 1396-1403; GX 703, 705, 710, 715, 719, 719B, 720, 733).

At critical points in 2008, Ray and Goyal exchanged earnings numbers for career advice in the

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yone outside Neuberger, the timing of Goyal's inquiries, with repeated updates during Dell's consolidation process, made apparent that Goyal sought to profit from the information before it became public.

very same conversation. For example, on August 14, 2008, two weeks before Dell's earnings announcement, Ray received by e-mail the "final" internal consolidation of Dell's earnings numbers. (GX 1732). That evening, Goyal sent an e-mail to Ray containing an investment pitch for Ray to use in connection with job interviews. (GX 734; Tr. 1461). A few hours later, Ray and Goyal had a lengthy telephone conversation during which Ray tipped Goyal. (GX 39). The next day, Goyal contacted Tortora, who passed Dell's earnings information along to Newman and Adondakis. (Tr. 266-70, 1203-07). Both Newman and Chiasson subsequently traded on the information the day they received it.

Ray and Goyal were also friends. The men had known each other for years. (Tr. 1469-70). They knew each other's wives, talked about going on family vacations together, and spoke frequently on the telephone, late at night, often for lengthy periods of time. (Tr. 1469-70).

Choi provided NVIDIA's earnings numbers to his friend Lim in advance of each quarterly earnings announcement in 2009. (Tr. 3082-83). Lim described Choi as a "family friend"; they had attended the same church, had lunches together, and had participated in "occasional other church activities" since 2002. (Tr. 3032-33). Lim told Choi that he traded NVIDIA stock, and at times solicited Choi's view on whether trading in the stock would be profitable. (Tr. 3044, 3083). Lim sought NVIDIA's earnings information from Choi following a request for inside information from Lim's friend Kuo, who Lim knew wanted to exe-

cute trades based on the information. (Tr. 3033). Kuo gave Lim a total of $15,000 in cash and various valuable items in return for the information. (Tr. 3010, 3039, 3042).

4. Newman and Chiasson Knew the Dell and NVIDIA Tips Came from Insiders in Breach of a Duty of Confidentiality

a. Newman's Knowledge of the Breaches

Newman knew that the information Tortora gave him concerning Dell and NVIDIA came from company insiders who disclosed the information in breach of their duties to keep it confidential, and not for any legitimate corporate purpose. Tortora told Newman the Dell tips came from a Dell employee. (Tr. 160-61). Tortora gave Newman the Dell tips he received from Goyal "verbatim," including references to Dell's "roll-up" of its financial numbers. (Tr. 160). As discussed, those tips were specific, provided shortly before quarterly announcements, and materially different from market expectations. For example, on August 5, 2008, just four days after the quarter had closed, Tortora informed Newman that the "Q finished on fri, numbers still coming in," but that Goyal had reported, "gm looking at 17.5% vs street at 18.3%, however could go higher as things get rolled up." (GX 214; *see also* GX 287 (Newman writing to Tortora, "hey when u th[in]k sandy [Goyal] checks in," and Tortora responding, "most likely next week as close [of the quarter] today, but let me ask him today"), 296 (Tortora forwarding e-mail to Newman in which Goy-

al wrote to Tortora, "waiting for qtr to end or come closer so that numbers more firm")).

The timing and frequency of the Dell updates—coming multiple times between the close of the quarter and the earnings announcements—as well as the specificity of the information demonstrated that an insider disclosed the information in breach of duty and for an improper purpose. Only a company insider with access to earnings numbers as they were being consolidated for a quarterly announcement could provide such disclosures. Moreover, Newman was keenly interested in Goyal's tips, at times pestering Tortora to obtain updates from Goyal shortly before Dell's earnings announcement. (*See, e.g.*, GX 228 (e-mail dated August 25, 2008, from Newman to Tortora asking, "U think we get one more dell update before [the earnings report is released on] thurs?"), 287 (instant message dated May 1, 2009, in which Newman asked Tortora, "hey when u thk sandy checks in?")).

Moreover, Newman knew that Goyal communicated with this particular Dell contact at night and on the weekend, rather than during the work day. When Newman asked Tortora in late October 2008 to confirm whether Dell would be issuing a mid-quarter update, Tortora responded that he had "spoke[n] to [Goyal]," who was "putting in a call to [his] main contact," but that Goyal "usually wont hear back from him til evening as calls him outside of work." (GX 322; *see also* GX 197 (in an e-mail chain forwarded to Newman, Tortora asked Goyal for "anything new on dell," and Goyal responded that he was not able to reach his contact over the weekend), 242

(Tortora telling Newman that Goyal "spoke to his guy [at Dell] over weekend")).

That Newman authorized $175,000 in secret payments to Goyal through a sham consulting arrangement with Goyal's wife further demonstrated that Newman knew he was improperly obtaining material, nonpublic information regarding Dell. (GX 750-54, 775A, 776, 780A, 781A, 2269, 2270; Tr. 1353). Indeed, Newman agreed to award Goyal a $100,000 bonus at the end of 2008, explaining to Tortora that Goyal "helped us most." (GX 790). Newman would have had no reason to pay Goyal such a large sum if Goyal's contact at Dell had been authorized to disclose that information to investors.

As for NVIDIA, Newman received multiple updates on the company's earnings numbers shortly before three quarterly announcements in 2009. In the quarter before Newman made the illicit trade charged in Count Five, Tortora forwarded Newman an e-mail from Kuo containing NVIDIA's earnings numbers, including its revenue and gross margin data. (GX 805). In the e-mail, Kuo was explicit about the fact that the information was from "an accounting manager at NVDA," and that Kuo had received it "through a friend." (GX 805). The e-mail provided precise numbers and described an inventory charge, which information could have come only from a NVIDIA insider with access to the company's confidential financial data. The revenue and GAAP gross margin numbers proved to be accurate, as Tortora reminded Newman before Newman decided to trade on another tip the insider provided in advance of

NVIDIA's May 2009 earnings announcement. (*See* GX 809, 815; *see also* GX 806 (Tortora writing that Kuo's source had "nailed rev and gaap gm to the decimal")). The e-mails in which Kuo shared Choi's tips —all of which Tortora forwarded to Newman—also reflected the internal consolidation process that only an insider with access to the company's financial numbers could know. (*See, e.g.*, GX 819 ("April quarter GM tracking to 30% . . . He won't know about the amount of inventory reserve charge, if any, until the end of the quarter"), 820 (providing "NVDA checks over the weekend, after the close of quarter"), 838 ("NVDA checks—final read before the print")).

The pattern and timing of Newman's trades confirmed that Newman understood he had access to material, nonpublic information. Knowing that the information about Dell's earnings came from corporate insiders and was inconsistent with market expectations, Newman made large investments in Dell securities based on the inside information. Before Newman received the Dell tips in 2008, he rarely, if ever, held a position in Dell securities at the time of its quarterly earnings announcements. Throughout 2008, however, as Goyal provided accurate information in advance of Dell's quarterly announcements, Newman made increasingly large investments in Dell securities. (GX 50 (450,000 shares as of May 29, 2008), 58 (800,000 shares short as of August 28, 2008), 67 (1.6 million shares as of November 20, 2008), 2501). In advance of Dell's August 2008 earnings announcement, Newman took the largest short position he had ever taken in a single stock during his time at Diamondback. (Tr. 3551-55; GX 8529A).

Not only did Newman take large positions based on material, nonpublic information, but he also frequently traded within minutes of obtaining inside information on Dell and NVIDIA. For example, in advance of NVIDIA's May 2009 earnings announcement, Tortora forwarded to Newman Kuo's tip that gross margins would be 30 percent—significantly below the consensus expectation of 35 percent. (GX 818). Commenting that the gross margin number was "ugly," Newman asked whether Kuo was "good on gm." (GX 818). Tortora immediately confirmed that Kuo's source had "[n]ailed everything including gm last q." (GX 818). Two minutes later, Newman shorted NVIDIA's stock. (GX 2501). Newman similarly traded in Dell securities nearly immediately after receiving Dell tips in May and August of 2008. (GX 33, 50, 2501, 2501-DA).

b. Chiasson's Knowledge of the Breaches

Like Newman, Chiasson knew that his analyst, Adondakis, was providing him with nonpublic information that corporate insiders had improperly disclosed. Around May 2008, Adondakis learned that Tortora had access to an insider at Dell. (Tr. 1705, 1710). Tortora shared with Adondakis the inside information he got from his Dell source, and Adondakis passed the tips along to Chiasson, telling him that they came from a company insider. (Tr. 1708 (Adondakis testifying that he explained to Chiasson that Goyal used to work at Dell, obtained information from "someone within Dell," and provided the information to Tortora)).

Chiasson acted immediately upon receiving inside tips on Dell from Adondakis, demonstrating that he knew the tips were reliable. Upon receiving positive inside information on Dell in early May 2008, Chiasson closed out a short position in the stock and started to build a long position. (Tr. 1712-15; GX 53, 402). After receiving an update from Tortora on May 12, Adondakis called Chiasson to share the information. (GX 31). That same day, Chiasson discussed the pricing of Dell call options with a Level Global trader, and purchased 3,500 such options. (GX 406, 2501).[11] The following day, as Chiasson accumulated Dell securities, the trader informed Adondakis by e-mail that Chiasson "said he was waiting on one check from you on DELL ... before buying much more." (GX 411). Three days later, on May 16, Adondakis received another update from Tortora; within 20 minutes, Chiasson purchased 750,000 shares of Dell stock. (GX 34, 2501). Based on the inside Dell tips Chiasson received in May 2008, Level Global reaped over $4 million in illicit profits following Dell's May 29, 2008 quarterly earnings announcement. (GX 56).

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[11] A call option gives the holder the right to buy a certain number of shares at a specified price by a certain date. Consistent with the positive tip Adondakis received in advance of Dell's May 29, 2008 earnings announcement, Chiasson's purchase of such options allowed him to take advantage of an increase in Dell's stock price following the announcement.

In July and August of 2008, leading up to Dell's quarterly earnings announcement on August 28, Adondakis passed numerous tips on Dell to Chiasson. Recognizing the reliability of the information the Dell insider had provided the previous quarter, Chiasson initiated a short position immediately after learning in early July that Dell would likely miss market expectations on gross margins, and steadily built the position as the earnings announcement approached and he received additional updates from Adondakis confirming that gross margins would be below expectations. (Tr. 1736-42, 1749; GX 60, 319, 446, 584). On August 14, for example, Ray received by e-mail Dell's consolidated financial results for the quarter and shared the information with Goyal that evening; Goyal subsequently spoke to Tortora, who passed the information along to Adondakis on August 18. (GX 40, 1732). At the time, Adondakis was attending a conference in California with Chiasson and another Level Global employee. During the flight there, Adondakis had told Chiasson that he expected to receive through Goyal's contact the final "roll-up" of Dell's financial results before the company's quarterly announcement. (Tr. 1792). The very same day Adondakis received this tip, Chiasson instructed his trader to sell short additional Dell shares. (GX 469).

Then, a few days before the announcement, Chiasson sent an e-mail to Adondakis asking whether there had been "any chatter over the weekend" on Dell. (GX 505). On August 27, after receiving another update from Tortora, Adondakis convened a conference call with Chiasson and two other men, including David Ganek (Chiasson's co-founder of Level Global).

(Tr. 1804-05; GX 523). During this call, Adondakis shared the update Tortora had given him on gross margins and other financial data, and Ganek instructed a trader to increase the firm's short position in Dell. (Tr. 1804, 1807-08; GX 528, 2501).[12] Based on the inside tips on Dell, Level Global ultimately amassed a huge short position in advance of Dell's August 28, 2008 earnings announcement, earning nearly $54 million in illegal profits when it liquidated the position after the earnings announcement. (GX 62, 64). This was the second largest short position the firm had ever taken. (DX 39).

A series of e-mail and instant message exchanges between Chiasson and a friend at another hedge fund, Jeremy Yuster, demonstrated that Chiasson understood that only a Dell insider without authorization to disclose earnings information would have divulged Dell's gross margin numbers in advance of a quarterly announcement. After receiving a Dell update from Adondakis in August 2008 a few days after the quarter had ended, Chiasson reported to Yuster

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[12] Ganek was aware that Adondakis received nonpublic information from a Dell insider during the consolidation process. On August 8, 2008, Ganek asked a Level Global trader whether Adondakis had heard "from his dell contact." (GX 438). The trader responded, "initial check was neg earlier in the week, next one is later next week I believe (not sure of exact timing), then one more right before the q[uarter]." (GX 438).

that he had "checks on gm [gross margin for Dell] this qtr [quarter]" indicating that gross margins would not be good, and that Chiasson was waiting for the "final read." (GX 448). In response to Yuster's question as to how Chiasson could have "checks on gm%," Chiasson wrote, "Not your concern. I just do." (GX 448). Subsequently, on August 18, after Chiasson received the "final" update from Adondakis, Chiasson confirmed the numbers with Yuster: "Gm 17.4—17.7." (GX 476). When Yuster questioned whether that was possible, Chiasson responded, "My view on gm more convicted than [yours]." (GX 477).[13]

As for the NVIDIA tips, Adondakis told Chiasson that he got the information from a friend of Tortora's who, in turn, got it from a friend from church. (Tr. 1878).[14] As with Dell, Adondakis obtained and

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[13] The day after Dell's quarterly announcement, a Level Global employee wrote to Chiasson that "we had that [Dell trade] nailed on conviction." (GX 549). Chiasson responded that, as to Dell, they had "1 guy used for 2 qtrs [quarters]," that is, he explained that a single Dell insider had provided tips for two successive quarters. (GX 549). Chiasson told yet another Level Global employee that the trade had been based on Adondakis's tips. (*See* GX 542 (in response to congratulations on the trade, Chiasson wrote, "Hit sam. Had a good read")).

[14] Adondakis referred to the source as a "NVIDIA contact," which, based on Adondakis's course of dealings with Chiasson, meant a company insider. (Tr. 1879). In this regard, Adondakis obtained inside

provided to Chiasson multiple updates on NVIDIA's earnings shortly before the company's quarterly announcement in May 2009. (GX 45-47). In an e-mail exchange between Chiasson and Ganek in late April, Chiasson stated that Adondakis expected he would "get a firmer read shortly" with respect to the preliminary gross margin number Adondakis had received immediately before the end of the quarter. (GX 907). Adondakis received an updated "check" approximately one week later, indicating that NVIDIA's gross margins would not meet market expectations. (GX 927). Such tips could have come only from an insider.

Chiasson's conduct upon receiving the inside tips on NVIDIA from Adondakis showed that he knew the information was reliable. When Chiasson received a negative NVIDIA tip from Adondakis on April 27, 2009—ten days before the company announced its earnings—Chiasson held a long position in NVIDIA stock. (GX 920, 2501-LB). Chiasson immediately closed out the long position; after receiving an update on May 4, Chiasson caused Level Global to take a

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information about other technology companies either from friends of his who had friends at the companies or through expert-networking firms. (*See, e.g.*, GX 1618 (Chiasson, in an instant message, asking if Adondakis had established any "GOOD [] CONTAX" at a particular company through an expert networking firm, and Adondakis responding that he had "no mole in the organization yet"); Tr. 1678-91 (discussing contacts at Intel in 2007)).

large short position in NVIDIA stock. (GX 2501). The short trade resulted in over $10 million in illicit gains when NVIDIA announced its earnings data on May 7. (GX 73).

Chiasson's efforts to conceal the true bases for the Dell and NVIDIA trades from Level Global's official reports further demonstrated that Chiasson knew he had received inside information that had been improperly disclosed. Level Global had an internal reporting system in which employees were supposed to record the basis for trades in order to provide transparency to investors. More than a month after Chiasson began shorting Dell stock based on the confidential information he obtained from the Dell insider, Chiasson directed Adondakis to create a bogus research report that did not include any information about the Dell contact as the basis for the trades. (Tr. 1785). He similarly instructed Adondakis to create a sham report for the NVIDIA trade in 2009 that omitted reference to the inside source. (GX 928 (e-mail in which Chiasson told Adondakis to create a "Hi level trading template" for the NVIDIA trade)).

B. The Defense Case and the Verdict

Both defendants offered numerous documents during the cross-examination of Government witnesses. Additionally, Newman presented expert testimony concerning the size of the charged Dell and NVIDIA trades in comparison to the remainder of his portfolio. The defendants also called the case agent and questioned him about various consensually recorded telephone calls made at the direction of law en-

forcement officers, as well as prior statements by the cooperating witnesses. (Tr. 3447-585).

Through their cross-examination of Government witnesses, the defendants sought to establish that Dell's investor relations personnel "leaked" earnings data that was similar to the information Ray disclosed. The evidence, however, belied that claim. Tortora testified that Lynn Tyson—Dell's head of investor relations at the time—never gave him the kind of detailed information concerning revenue and gross margins that he received from Goyal. (Tr. 342). In stark contrast to the specific gross margin and revenue numbers Ray disclosed, other members of Dell's investor relations team were willing to provide only general sentiments about Dell's business, such as "sound[ing] fairly confident on [gross margin] and [operating margin]." (DX 952).[15] As Tortora ex-

[15] The defendants claim—incorrectly—that Defense Exhibit 952 (an e-mail from Tortora to Newman recounting the substance of a telephone call with a Dell representative) is an example of Dell commenting on "soon-to-be-released industry data that would show poor results for Dell." (Newman Br. 19; Chiasson Br. 15). In fact, what Tortora reported in this e-mail was that Dell stated industry data would show "poor calendar q4 results due to *sep to oct* demand drop off." (DX 952 (emphasis added)). As Tortora explained, at the time of this call—on December 15, 2008—Dell had already publicly released its earnings information for September and October on November 20, 2008. (Tr. 595-96). As a Dell representative testified at trial, Dell investor relations personnel were

plained, investor relations personnel and company management tended to comment only on the long-term view; unlike the tips regarding nonpublic financial data that Ray provided, this information could not be exploited to execute profitable trades around quarterly announcements. (Tr. 582-84).

The defendants attempted to demonstrate that Dell leaked current quarter earnings information by pointing to an April 2009 investor lunch with Lynn Tyson that Goyal attended. (*See* DX 994 (e-mail summarizing the discussion)). Newman distorts the record, however, by claiming that Tyson "*told* [the group of analysts] that Dell's normalized gross margin would be 18% for the *current quarter*." (Newman Br. 19 (emphasis added)). In fact, Goyal reported in the e-mail that Tyson "*implied* that *normalized* GM [gross margin] is near 18% levels." (DX 994 (emphasis added)). Goyal explained at trial that the comment was a conclusion he reached based on Tyson's comments and body language, and that the word "normalized" referred not to the current quarter, but to a longer-term outlook. (Tr. 1509, 1632).[16]

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trained to know what information was public or nonpublic, so they would not reveal nonpublic information before a quarterly announcement. (Tr. 2765, 2774).

[16] Newman also asserts that Dell leaked financial information by providing unit sales data to industry research services. (Newman Br. 20). This claim has no basis. These research services signed confidentiality agreements with Dell and released their reports to

The defendants' claim that Dell leaked its financial results in advance of earnings announcements was most powerfully undermined at trial by the fact that Dell's August 2008 announcement of its negative gross margin numbers shocked the market, resulting in a single-day decline in Dell's stock price of nearly 14 percent. (GX 1842, 3003S). Throughout August 2008, analysts expected that Dell would report a gross margin number of 18.3 percent. (GX 3003S). As of early August, however, Dell's internal numbers—which Ray disclosed to Goyal—showed that Dell would report gross margins substantially below expectations. (GX 214). If Dell in fact leaked its financial performance data, market expectations would have adjusted accordingly and, more importantly, the price of Dell's stock would not have dropped dramatically immediately following the announcement.[17]

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the entire market. (Tr. 2888-89). Moreover, Dell's unit sale numbers were not nearly as helpful indicators of stock price movements around quarterly earnings announcements as the information Ray provided. (Tr. 321).

[17] In their appeal briefs, the defendants also rely on a handful of e-mails from the October 2008 quarter that contain blatant hearsay. (Newman Br. 18 (third bullet point, citing DX 798), 19 (first, second, and fourth bullet points, citing DX 866, 900, 957); Chiasson Br. 15-16). One such e-mail stated, "[a]pparently DELL IR saying offline that they will miss Oct est[timates] 'by a country mile.'" (A. 2387; DX 798). The author of this e-mail did not testify, and

Contrary to the evidence adduced at trial, the defendants also sought to show that NVIDIA leaked to analysts information concerning its financial performance. They pointed to a report of a meeting Adondakis had with the head of NVIDIA's investor relations department on March 27, 2009, in which Adondakis commented that the department head "did not flinch" when asked about a sell-side analyst's predictions for NVIDIA's revenue. (A. 2419; Chiasson Br. 16). In that report, Adondakis recommended that Chiasson continue to build a long position in NVIDIA stock, believing (incorrectly) that gross margins would be "flattish." (A. 2421). When Adondakis received an inside tip from Kuo a month later indicat-

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there was no non-hearsay evidence that anyone on Dell's investor relations team actually made this statement. Another e-mail attributed a disclosure about Dell's earnings to Lynn Tyson, but, again, there was no non-hearsay evidence that she made any such disclosure. (DX 866). The District Court sustained the Government's objection that these exhibits were not admissible for their truth. (Tr. 474-75). Indeed, even Newman's counsel acknowledged that he was "not going to say [Investor Relations] actually did it," that is, leaked the information. (Tr. 475). Instead, the Court admitted the e-mails merely to show that Newman was told certain information came from investor relations. (Tr. 474-75). The defendants thus should not be permitted to use these documents for their truth on appeal.

ing worse than expected gross margins, however, Adondakis immediately told Chiasson to reverse course and short the stock, which Chiasson did, ultimately netting more than $10 million on the trade. (GX 73, 816, 900).

On December 17, 2012, the jury returned its verdict, rejecting these defenses and finding Newman and Chiasson guilty on each of the counts in which they were charged.

C. The Sentencings

On May 2, 2013, the District Court sentenced Newman principally to an aggregate term of 54 months' imprisonment. On May 13, 2013, the Court sentenced Chiasson principally to an aggregate term of 78 months' imprisonment.

ARGUMENT

POINT I

The Jury Instructions Were Correct

Newman and Chiasson challenge three aspects of the jury instructions. Both defendants contend that the District Court should have instructed the jury that the Government was required to prove the defendants knew an insider disclosed information for a personal benefit. (Newman Br. 30-40; Chiasson Br. 21-52). Additionally, Newman argues that there was no factual predicate for a conscious avoidance instruction (Newman Br. 42-45), and that the Court

erred in defining "nonpublic" information (Newman Br. 45-46). Each of these claims is unavailing.[18]

A. Applicable Law

This Court reviews jury instructions *de novo*. *United States* v. *Moran-Toala*, 726 F.3d 334, 344 (2d Cir. 2013). A defendant challenging a jury instruction must establish both that he requested a charge that "accurately represented the law in every respect" and

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[18] In a footnote, Newman states that "[t]he district court's refusal to give jury instructions as requested by the defense stands in marked contrast to its willingness to interject itself into witness examinations, which ultimately inured to the benefit of the government." (Newman Br. 42 n.23). This suggestion of bias is utterly lacking in basis, as demonstrated by the two examples upon which Newman relies. In an effort to blur the line between permissible immaterial statements and illegal tips, Newman's counsel asked Dell's corporate representative if the Chief Executive Officer could make "positive" comments before an earnings release; the Government objected to this vague question, and the Court properly sought to clarify it. (Tr. 2949). Subsequently, Newman's counsel incorrectly suggested to the jury, through his questioning of cooperating witness Hyung Lim, that the Government was required to prove that Lim knew Newman. In these circumstances, the Court's instruction clarifying the law of conspiracy was appropriate. (Tr. 3051-52). Newman's claim of unfairness is thus unfounded.

that the charge delivered was erroneous and caused him prejudice. *United States* v. *Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). In considering whether there has been error, the reviewing court should consider the charge as a whole to determine if the jury was accurately advised as to the applicable law. *See United States* v. *Mitchell*, 328 F.3d 77, 82 (2d Cir. 2003). Moreover, a district court has "discretion to determine what language to use in instructing the jury as long as it adequately states the law," *United States* v. *Alkins*, 925 F.2d 541, 550 (2d Cir. 1991), and a defendant "cannot dictate the precise language of the charge," *United States* v. *Han*, 230 F.3d 560, 565 (2d Cir. 2000). Thus, if "the substance of a defendant's request[ed instruction] is given by the court in its own language, the defendant has no cause to complain." *Id.* (internal quotations omitted).

An instructional error should be disregarded if the error is harmless. *See* Fed. R. Crim. P. 52(a) ("[a]ny error . . . which does not affect substantial rights shall be disregarded"); *United States* v. *Botti*, 711 F.3d 299, 308 (2d Cir. 2013). Such an error is harmless "if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States* v. *Botti*, 711 F.3d at 308 (internal citations and quotation marks omitted).

B. Discussion

1. The Instruction on the Defendants' Knowledge of the Insiders' Breaches Was Correct

Newman and Chiasson each argue that the District Court erred in instructing the jury that it need find only that the defendants knew insiders disclosed material, nonpublic information in violation of a duty of confidentiality. They contend that the Court should have instructed the jury that the Government was also required to prove that they knew the insiders did so for some personal benefit. (Newman Br. 30-42; Chiasson Br. 20-52). They are mistaken. Neither the Supreme Court nor this Court has ever required the Government to establish such knowledge on the part of a tippee. Moreover, because the securities fraud statute's *mens rea* provision does not expressly apply to the benefit requirement (which requirement does not appear in the statute itself), the Government was required to prove knowledge of enough facts to distinguish conduct that is likely culpable from conduct that is entirely innocent. Establishing that the defendants traded on material, nonpublic information they knew insiders had disclosed in violation of a duty of confidentiality satisfied this requirement.

In any event, any instructional error was harmless. Having found that the defendants knew insiders disclosed inside information in breach of a duty (and not for any legitimate corporate purpose), the jury further would have concluded that the defendants inferred from the circumstances that the insiders did so

in return for some benefit. The defendants' claim should therefore be rejected.

a. Relevant Facts

During the charge conference, Newman's and Chiasson's counsel urged the District Court to instruct the jury that, in order to convict, it must find that the defendants knew an insider disclosed inside information for a personal benefit. (Tr. 3594-605). The Court disagreed, finding that, in *SEC* v. *Obus*, 693 F.3d 276 (2d Cir. 2012), this Court had made clear that the Government need prove only that "the tip[p]ee knew or had reason to know that the tip[p]ee improperly obtained the information . . . through the tipper's breach." (Tr. 3604).

The District Court subsequently instructed the jury, in pertinent part, that in order to establish that the defendants were guilty of insider trading, the Government had to prove that (1) the tippers had a "fiduciary duty or other relationship of trust and confidence" with their employers such that they were "entrusted with material, nonpublic information with the reasonable expectation that they would keep it confidential and not use it for personal benefit" (Tr. 4029); (2) the tippers intentionally breached that duty by "disclosing material, nonpublic information for their own benefit" (Tr. 4030); (3) the tippers received a personal benefit from the tips (Tr. 4032-33); (4) the defendant tippees knew the inside information was disclosed by the insiders in breach of a duty of trust and confidence (Tr. 4033); and (5) the defendant tippees participated in the insider trading scheme

knowingly, willfully, and with specific intent to defraud (Tr. 4036). Specifically, the Court gave the following instructions on the tippers' intent and the personal benefit requirement:

> Now, if you find that Mr. Ray and Mr. Choi had a fiduciary or other relationship of trust and confidence with their employers, then you must next consider whether the government has proven beyond a reasonable doubt that they intentionally breached that duty of trust and confidence by disclosing material, nonpublic information for their own benefit.

(Tr. 4030).[19]

As to the defendant tippees, the District Court instructed the jury as follows:

> To meet its burden, the government must also prove beyond a reasonable doubt that the Defendant you are considering knew that the material nonpublic information had been disclosed by the insider in breach of a duty of trust and confidence. The mere receipt of material, nonpublic information by a Defendant, and even trading on that information, is not sufficient; he must have known that

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[19] The District Court defined "benefit" to include intangible benefits such as "maintaining a business contact" or "making a gift of confidential information to a trading relative or friend." (Tr. 4032-33).

> it was originally disclosed by the insider in violation of a duty of confidentiality.

(Tr. 4033). The Court further instructed the jury that the Government was required to prove that the defendants "participated in . . . the insider trading scheme . . . knowingly, willfully, and with intent to defraud," that is, that the defendants knew "of the fraudulent nature of the scheme and acted with the intent that it succeed." (Tr. 4036-37). In doing so, the Court cautioned that:

> It is not a willful deceptive device in contravention of the federal securities laws for a person to use his superior financial or expert analysis or his educated guesses or predictions or his past practice or experience to determine which securities to buy or sell. Nor is it a deceptive device in contravention of the federal securities laws for a person to buy or sell securities based on public information or on tips where he does not know that the information had been disclosed in violation of a duty of confidence, or where the information is obtained from permissible sources.

(Tr. 4036-37).

b. Discussion

i. Tippee Liability Does Not Require Knowledge of a Personal Benefit

The question on this appeal is not whether tippees are prohibited from trading on material, nonpublic information they receive from company insiders. Nothing in the District Court's instructions would have permitted a conviction on that theory. Rather, as the jury found, both defendants traded on material, nonpublic information the defendants knew insiders had disclosed in violation of a duty to keep the information confidential. The narrow question presented here is whether the Government had to prove the defendants knew the insiders had disclosed the information not only in breach of a duty, but also for a personal benefit. Neither the Supreme Court nor any Court of Appeals has ever required such proof.

The Supreme Court addressed tippee liability in insider trading cases—and established the requirement that an insider-tipper is guilty of insider trading only if he disclosed confidential information to an outsider for a personal benefit—in *Dirks* v. *SEC*, 463 U.S. 646 (1983). Dirks was a first-level tippee who received information from an insider suggesting that management was committing fraud. *Dirks* v. *SEC*, 463 U.S. at 649. The tipper had notified various regulatory agencies of the fraud, but they failed to act; accordingly, he urged Dirks to verify the fraud and disclose it publicly. *Id.* Dirks conducted an investigation, and unsuccessfully sought to persuade a newspaper

to publish the allegations. *Id.* Although Dirks did not trade in the company's stock, he discussed his findings with clients and investors, some of whom did so. *Id.*

In finding that Dirks was not liable for insider trading, the Supreme Court held that tippees assume an insider's duty to the company's shareholders to disclose or abstain from trading in the company's stock if the inside information "has been made available to them *improperly*." *Id.* at 660 (emphasis in original). In discussing the "improper" receipt of inside information, the Supreme Court did not adopt the position advocated by Newman and Chiasson, namely, that a tippee must know the tipper benefitted from the tip. Rather, notwithstanding its holding that a *tipper* must benefit from a disclosure in order to be liable for insider trading, *id.* at 662, the Supreme Court did not explicitly require that a *tippee* know about this benefit. Instead, the Court required only that the tippee know the tipper disclosed information in breach of a duty. *Id.* at 660. As the Court stated:

> [A] tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his or her 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.; *see also id.* at 661 n.19 (citing concurring opinion in *In re Investors Management Co.*, 44 S.E.C. 633, 650

(1971), that a tippee can be held liable only if he received information in breach of an insider's duty not to disclose it).[20]

Following *Dirks*, this Court has never required the Government to prove that a tippee knew an insider who disclosed confidential information acted for a personal benefit, and the Government is aware of no decision from any other Court of Appeals imposing such a requirement. To the contrary, in *SEC* v. *Warde*, 151 F.3d 42 (2d Cir. 1998), this Court stated that the Securities and Exchange Commission ("SEC"), in order to establish a tippee's liability, was required to prove that (1) an insider possessed material, nonpublic information; (2) the insider disclosed such information to a tippee; (3) the tippee traded stock while in possession of that information; (4) the tippee knew the insider violated a relationship of

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[20] *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985), upon which the defendants rely, is not to the contrary. (Newman Br. 33-34 n.16; Chiasson Br. 25-26). The issue in *Bateman* was whether the common-law *in pari delicto* defense bars a private damages action by tippees against tippers who induced the tippees to invest in securities by misrepresenting that they were disclosing material, nonpublic information. *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. at 301. The elements of tippee liability were not at issue in the case, and *Bateman* made no holding regarding tippee knowledge.

trust in disclosing the information; and (5) the insider benefitted by the disclosure, *id.* at 47.

Similarly, in *SEC* v. *Obus*, 693 F.3d 276, this Court did not require the SEC to prove that the tippees knew the insider had disclosed inside information for a personal benefit. In *Obus*, this Court considered whether the SEC had presented sufficient evidence to avoid summary judgment for the defendants (a tipper, an immediate tippee, and a successive tippee). In finding that it had done so and in rejecting the defendants' argument regarding the level of knowledge required on the tippee's part as to the tipper's breach, the Court summarized the elements of tipping liability as follows:

> [W]e hold that tipper liability requires that (1) the tipper had a duty to keep material non-public information confidential; (2) the tipper breached that duty by intentionally or recklessly relaying the information to a tippee who could use the information in connection with securities trading; and (3) the tipper received a personal benefit from the tip. Tippee liability requires that (1) the tipper breached a duty by tipping confidential information; (2) the 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); and (3) the tippee, while in knowing possession of the material non-public information,

> used the information by trading or by tipping for his own benefit.

Obus, 693 F.3d at 289.

Most recently, in *United States* v. *Jiau*,—F.3d—, 2013 WL 5735348 (2d Cir. Oct. 23, 2013), this Court stated that, to hold a tippee criminally liable for insider trading, the Government must prove the following elements:

> (1) the insider-tippers . . . were entrusted the duty to protect confidential information, which (2) they breached by disclosing to their tippee[ ], who (3) knew of their duty and (4) still used the information to trade a security or further tip the information for her benefit, and finally (5) the insider-tippers benefited in some way from their disclosure.

Id. at *3.

Indeed, *Jiau* is merely the most recent in a string of cases in which this Court has found that a tippee, in order to be criminally liable for insider trading, need know only that an insider-tipper disclosed information in breach of a duty of confidentiality. *See United States* v. *Libera*, 989 F.2d 596, 600 (2d Cir. 1993) (holding that requirements for tippee liability are "(i) a breach by the tipper of a duty owed to the owner of the nonpublic information; and (ii) the tippee's knowledge that the tipper had breached the duty"); *United States* v. *Mylett*, 97 F.3d 663, 668 (2d Cir. 1996) (explaining that tippee defendants must "subjectively believe that the [inside] information was ob-

tained in breach of a fiduciary duty"); *United States* v. *Falcone*, 257 F.3d 226, 234 (2d Cir. 2001) (same). As for the benefit received by the tipper, however, this Court has held that the Government need prove only that there was such a benefit, but not that the tippee knew of it.

That the Government does not have to prove a tippee-defendant's knowledge as to each of the elements of tipper liability is not unusual. Many statutes have elements as to which the Government need not prove the defendant's knowledge. *See, e.g.*, *United States* v. *Feola*, 420 U.S. 671, 684 (1975) (in prosecution for assaulting a federal officer, under 18 U.S.C. § 111, Government need not prove the defendant knew victim was a *federal* officer); *United States* v. *Griffith*, 284 F.3d 338, 350-51 (2d Cir. 2002) (holding that a prosecution under 18 U.S.C. § 2423 for transporting a minor in interstate commerce to engage in prostitution does not require proof of the defendant's knowledge of the victim's age); *United States* v. *Weintraub*, 273 F.3d 139, 147-51 (2d Cir. 2001) (holding that the scienter provision of criminal provision of the Clean Air Act, 42 U.S.C. § 7413(c)(1), required proof that the defendant knew asbestos was involved, but not the kind and quantity of asbestos that triggered the applicable regulation); *United States* v. *Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998) (in prosecution under 8 U.S.C. § 1327 for assisting alien excludable for certain reasons to enter United States, Government must show defendant knew alien was excludable but not knowledge of particular grounds of excludability); *United States* v. *LaPorta*, 46 F.3d 152, 158-59 (2d Cir. 1994) (in prosecution for destruction of government

property under 18 U.S.C. § 1361 Government need not prove defendant knew owner of property); *United States* v. *Falu*, 776 F.2d 46, 49-50 (2d Cir. 1985) (holding that predecessor statute to 21 U.S.C. § 860 did not require proof that a defendant knew he was distributing a controlled substance within 1,000 feet of a school); *United States* v. *Roglieri*, 700 F.2d 883, 885 (2d Cir. 1983) (knowledge that stolen item came from the mail is not required under 18 U.S.C. § 1708); *United States* v. *Baker*, 693 F.2d 183, 185 86 (D.C. Cir. 1982) (18 U.S.C. § 641 does not require proof of knowledge that stolen property belonged to the government); *United States* v. *Mingoia*, 424 F.2d 710, 713 (2d Cir. 1970) (knowledge that stolen goods were transported in interstate commerce is not required by 18 U.S.C. § 2314).

Where the reach of a statute's *mens rea* requirement is ambiguous,[21] this Court has "demand[ed] knowledge of enough facts to distinguish conduct that is likely culpable from conduct that is entirely innocent," that is, "knowledge only of facts that in a reasonable person would create an expectation that his conduct was likely subject to strict regulation." *United States* v. *Weintraub*, 273 F.3d at 147; *United States* v. *Sanders*, 211 F.3d 711, 723 (2d Cir. 2000) ("[I]t has become clear that knowledge may suffice for criminal culpability if 'extensive enough to attribute

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[21] Here, because the securities fraud statute does not explicitly address insider trading, let alone mention benefit, the statute supplies little guidance as to the reach of its *mens rea* provision.

to the knower a 'guilty mind,' or knowledge that he or she is performing a wrongful act.'" (quoting *United States* v. *Figueroa*, 165 F.3d at 115-16)). "The touchstone is the defendant's 'settled expectations' about the regulated conduct." *Weintraub*, 273 F.3d at 148 (citation omitted).

Trading securities based on information a defendant knows to be not only material and nonpublic, but also to have been disclosed by a company insider in violation of a duty to keep the information confidential is plainly wrongful conduct. No reasonable person would harbor a settled expectation that he is free to trade securities based on such information. Indeed, Level Global's compliance manual forbade employees from trading while in possession of any material, nonpublic information. (GX 1852 at LEVEL 000006667 (Level Global compliance manual stating that "[t]he Firm forbids any Employee to trade, either personally or on behalf of others, . . . while in possession of material non-public information" and that "Employees should assume that all information obtained in the course of their employment or association with the Firm is not public unless the information has been publicly disclosed by means of a press release, wire service, newspaper, proxy statement or prospectus or in a public filing made with a regulatory agency, or is otherwise available from public disclosure services")). And Diamondback's compliance manual defined material, nonpublic information to include information disclosed by a company insider in breach of a duty of confidentiality. (GX 2253 at F-3 (Diamondback compliance manual indicating that "material nonpublic information may include '*tips*'

you receive directly or indirectly from a third party where you know, or should know, that the third party is disclosing the information improperly, in breach of *his or her* duty of confidentiality to the owner or source of the information" and instructing employees to contact "Legal/Compliance" upon receiving such information (italics in original))). In these circumstances, there is no credible claim of surprise that trading on information knowingly obtained from an insider who had an obligation to keep it confidential was a wrongful act. *See In re Investors Management Co.*, 44 S.E.C. 633, at *11 n.2 (Comm'r Smith, concurring) (likening tippees to those who "knowingly receive stolen goods").[22]

In pressing a contrary conclusion, Newman and Chiasson emphasize that trading on material, nonpublic information from an insider is not, by itself, illegal. (*See, e.g.*, Newman Br. 30; Chiasson Br. 21, 27). Of course, the jury instructions here did not permit the jury to convict based on such proof alone. To

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[22] These circumstances are entirely unlike those in *Dirks*, given that Dirks knew the insider was a whistleblower who sought to expose a fraud. *Dirks*, 463 U.S. at 649. The circumstances here are also unlike other situations the *Dirks* Court recognized would not lead to tippee liability, such as where it is unclear whether the information was either material to the stock's price or nonpublic. *Id.* at 662. The earnings information at issue here plainly was both material and nonpublic when the insiders disclosed it shortly before quarterly announcements.

the contrary, the District Court instructed the jury that, in order to convict, it must find that an insider breached a duty of confidentiality by "disclosing material, nonpublic information for their own benefit," and that the defendants "knew that the material nonpublic information had been disclosed by the insider in breach of a duty of trust and confidence." (Tr. 4029-30, 4033).

In this regard, Chiasson argues that the SEC's adoption of "Regulation Fair Disclosure" ("Regulation FD") in 1999—which imposes on securities issuers an obligation to make prompt public disclosure of material, nonpublic information if the information is disclosed selectively by the issuer or someone acting on its behalf, *see* 17 C.F.R. § 243.100—somehow supports his claim that *Dirks* requires tippee knowledge of a benefit to the insider because people are not prohibited from trading on such selectively disclosed information. (Chiasson Br. 27-32). Regulation FD, adopted pursuant to Section 13(a) of the Exchange Act, addresses selective disclosures that were authorized by the issuer. It does not address unauthorized tips provided by insiders in violation of a duty of confidentiality to the company. *See* 17 C.F.R. § 243.100(a) (providing that where "an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities" to certain specified people, "the issuer shall make public disclosure of that information"); *id.* § 243.101(c) (defining "[p]erson acting on behalf of an issuer" and stating that "[a]n officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or

confidence to the issuer shall not be considered to be acting on behalf of the issuer").[23] Here, the jury found that Newman and Chiasson knew insiders disclosed information in violation of a duty of confidentiality. Regulation FD is therefore inapposite.[24]

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[23] Indeed, the adopting release explicitly stated that Regulation FD "does not affect any existing grounds for liability under Rule 10b-5," such as "liability for 'tipping' and insider trading." *Selective Disclosure and Insider Trading*, 65 Fed. Reg. 51716-01, at *51726 (Aug. 24, 2000).

[24] Chiasson further relies on documents released by the SEC in connection with Regulation FD's promulgation in 1999 to bolster his unsupported claim that the selective disclosure of earnings numbers in advance of a quarterly announcement is common. (Chiasson Br. 28). Of course, there was no proof at trial that such selective disclosures are common. In any event, the studies cited in the SEC's release were commentaries on market practices in the late 1990s. *See, e.g., Selective Disclosure and Insider Trading*, 64 Fed. Reg. 72590-01, at *72592 n.11 (Dec. 28, 1999) (citing a 1998 study in which 26 percent of responding companies indicated they engaged in some type of selective disclosure). Chiasson appears to assume that practices a decade later—in 2008 and 2009—had not changed and that Regulation FD has had little impact in curbing selective disclosures. Chiasson, however, points to no evidence to support this assumption. To the contrary, the trial evidence

Newman and Chiasson further suggest that the benefit received (or anticipated) by the tipper is the fact that marks the difference between conduct that is wrongful and conduct that is innocent. (*See, e.g.*, Newman Br. 35 n.17; Chiasson Br. 29). They thus contend the Government must prove a tippee's knowledge of the tipper's benefit, lest a defendant with an innocent mental state be convicted. For the reasons already given, this is incorrect.

In this regard, the defendants' reliance on *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994), and *Staples* v. *United States*, 511 U.S. 600, 615 (1994), is unavailing. (Neman Br. 34; Chiasson Br. 33). In *X-Citement Video, Inc.*, the Supreme Court interpreted a child pornography statute to require proof that the defendant knew the performers in a pornographic film were underage so as to ensure that the statute did not "sweep within [its] ambit . . . actors who had no idea that they were even dealing with sexually explicit material." *United States* v. *X-Citement Video, Inc.*, 513 U.S. at 69. In *Staples*, the Court held that a statute making it unlawful to possess a machinegun that is not properly registered required the Government to prove that the defendant knew the firearm was a machinegun (but not the gun's registration status), reasoning that, absent such proof, "the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in

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showed that Dell and NVIDIA do not sanction such selective disclosures. (*See, e.g.*, Tr. 2771-80).

their possession—makes their actions entirely innocent" given the "common experience that owning a gun is usually licit and blameless conduct." *Staples* v. *United States*, 511 U.S. at 602, 608, 614-15.

Here, by contrast, there is no risk that the securities fraud statute would impose criminal penalties on people who reasonably believed they were engaged in blameless conduct, because the Government had to prove the defendants knew an insider-tipper disclosed material, nonpublic information in breach of a duty of trust and confidence. Trading securities based on nonpublic information disclosed by an insider in violation of such a duty "is easily sufficient to trigger an expectation of regulation in a reasonable person and to distinguish in his or her mind innocent from wrongful conduct." *Weintraub*, 273 F.3d at 149.

For similar reasons, Newman's and Chiasson's claim that the Government must prove a tippee knew of the tipper's benefit because the securities fraud statute imposes criminal liability only on defendants who act "willfully," 15 U.S.C. § 78ff(a), has no merit. (Newman Br. 35; Chiasson Br. 24 n.10, 32). Contrary to their contentions, Section 78ff(a) "do[es] not require a showing that a defendant had awareness of the general unlawfulness of his conduct, but rather that he had an awareness of the general wrongfulness of his conduct." *United States* v. *Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010); *United States* v. *Dixon*, 536 F.2d 1388, 1395 (2d Cir. 1976) (Friendly, *J.*) (stating that a person can willfully violate the securities laws without knowing of their existence, and that "the prosecution need only establish a realization on the

defendant's part that he was doing a wrongful act" so long as the act is "wrongful under the securities laws" and "involves a significant risk of effecting the violation that has occurred" (citation and internal quotation marks omitted)); *United States* v. *Peltz*, 433 F.2d 48, 55-56 (2d Cir. 1970) (Friendly, *J.*) (same); *see also United States* v. *Tarallo*, 380 F.3d 1174, 1188 (9th Cir. 2004) ("Under our jurisprudence, then, 'willfully' as it is used in § 78ff(a) means intentionally undertaking an act that one knows to be wrongful; 'willfully' in this context does *not* require that the actor know specifically that the conduct was unlawful." (emphasis in original); cited favorably in *Kaiser*).[25]

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[25] In *United States* v. *Cassese*, 428 F.3d 92 (2d Cir. 2005), this Court stated that *Peltz* had held that "willfulness," as used in Section 78ff(a), means "a realization on the defendant's part that he was doing a wrongful act under the securities laws," *id.* at 98 (citation and internal quotation marks omitted). This characterization of *Peltz*'s holding was *dicta*, as the *Cassese* Court ruled that the Government had failed to prove that Cassese realized he was committing a wrongful act at all. This statement was also an inaccurate characterization of *Peltz*'s holding. As set forth in the text, and as this Court subsequently recognized in *Kaiser*, *Peltz* held that the willfulness requirement of Section 78ff(a) requires a showing that a defendant "had an awareness of the general wrongfulness of his conduct." *United States* v. *Kaiser*, 609 F.3d at 569; *United States* v. *Peltz*, 433 F.2d at 54-55 (holding that "[a] person can willfully violate an SEC rule even if he does not know if its existence" and

Establishing that Newman and Chiasson understood their conduct was wrongful (and thus willful) required no more than showing that they traded on material, nonpublic information they knew insiders had disclosed in violation of a duty of confidentiality. Not only did the District Court instruct the jury that it could convict only upon such a finding, but it also instructed the jury that, in order to convict, it must find that the defendants acted both "with intent to defraud" and "with a bad purpose to disobey and disregard the law." (Tr. 4036-37). No more was required.

Nor is there any traction in Newman's claim—echoed by Chiasson—that "nearly thirty years of precedent in the Southern District of New York" has required the Government to prove a tippee's knowledge of the tipper's benefit. (Newman Br. 36; Chiasson Br. 26-27). To characterize a small handful of district court decisions as "nearly thirty years of precedent" is a substantial overstatement. This is particularly so given that, since 1993, this Court has repeatedly discussed the requirements for tippee liability and, in each case, stated that the Government need prove that the tippee knew only that the tipper had disclosed material, nonpublic information in breach of a duty of confidentiality. *See United States* v. *Jiau*, 2013 WL 5735348, at *3; *Obus*, 693 F.3d 289;

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that the Government need only establish that the defendant realized he was doing a wrongful act, so long as the act was in fact wrongful under the securities laws and "involve[d] a significant risk of effecting the violation that has occurred").

United States v. *Falcone*, 257 F.3d at 234; *SEC* v. *Warde*, 151 F.3d at 47; *United States* v. *Mylett*, 97 F.3d at 668; *United States* v. *Libera*, 989 F.2d at 600.

Neither Newman nor Chiasson so much as acknowledges *Warde*.[26] And they largely ignore *Falcone*, *Libera* and *Mylett*, other than to assert in footnotes that, before *Obus*, this Court had never required proof of a personal benefit received by the tipper in a misappropriation case. (Newman Br. 38 n.20; Chiassion Br. 39 n.13).[27] This is incorrect. *See SEC* v. *Materia*, 745 F.2d 197, 203 (2d Cir. 1984) (pre-*Obus* misappropriation case stating that insider must obtain "his own advantage" from misappropriated information); *see also United States* v. *O'Hagan*, 521 U.S. 642, 653-54 (1997) (stating that a misappropriator defrauds the principal by pretending loyalty while

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[26] At the time the defendants filed their briefs on appeal, this Court had not yet decided *United States* v. *Jiau*, 2013 WL 5735348.

[27] Under the misappropriation theory, "persons who are not corporate insiders but to whom material non-public information has been entrusted in confidence" are guilty of insider trading if they "breach a fiduciary duty to the source of the information to gain personal profit in the securities market." *Obus*, 693 F.3d at 284. Under the classical theory of insider trading, by contrast, "a corporate insider is prohibited from trading shares of that corporation based on material non-public information in violation of the duty of trust and confidence insiders owe to shareholders." *Id.*

converting the principal's information "for personal gain" (citation and internal quotation marks omitted)).

In any event, that *Falcone*, *Mylett*, and *Libera* (and *Obus*, for that matter) were misappropriation cases does not undermine their force as precedent here. *Libera* cited *Dirks* as establishing the requirements for tippee liability, and did not interpret it to require that a tippee have knowledge of any benefit to the tipper. Indeed, this Court has explicitly recognized that, for purposes of tippee liability, there is no material difference between a classical insider-trading case and a misappropriation case. *See Obus*, 693 F.3d at 285-86 ("The Supreme Court's tipping liability doctrine was developed in a classical case, *Dirks*[], but the same analysis governs in a misappropriation case."). The defendants' attempt to distinguish these cases is particularly fruitless given that this Court has stated—in both civil and criminal classical insider trading cases—that the Government need prove that a tippee knew only that an insider-tipper disclosed material, nonpublic information in breach of a duty of trust and confidence. *Jiau*, 2013 WL 5735348, at *3; *Warde*, 151 F.3d at 47. Additionally, in claiming that a handful of district court cases support their position, the defendants ignore two district court cases that undermine their argument. *See SEC* v. *Thrasher*, 152 F. Supp. 2d 291, 304 (S.D.N.Y. 2001) ("The Plaintiff does not have to prove[] . . . that a remote tippee knew for certain how the initial breach of fiduciary duty occurred."); *SEC* v. *Musella*, 678 F. Supp. 1060 (S.D.N.Y. 1988) (granting summary judgment for the SEC, finding that there was

no issue of material fact regarding the defendants' scienter even though the defendants did not know who the insiders were).

Moreover, the reasoning of the district court decisions upon which the defendants rely is flawed. In the first of those decisions, *State Teachers Ret. Bd.* v. *Fluor Corp.*, 592 F. Supp. 592 (S.D.N.Y. 1984), the district court reasoned that *Dirks* required tippee knowledge "of each element [of tipper liability,] including the personal benefit," because, "[w]ere it otherwise, Dirks, in acknowledged possession of material inside information, would have been a tippee," *id.* at 594-95. This analysis was plainly incorrect. Dirks was not liable as a tippee because the insider-tipper was a whistleblower who did not receive any personal benefit. *See Dirks*, 463 U.S. at 666-67 (stating that the tipper did not violate any duty because he was "motivated by a desire to expose the fraud," and that there was thus "no derivative breach by Dirks"). Simply put, absent personal benefit to the insider-tipper, there is no tippee liability. The district courts in *United States* v. *Rajaratnam*, 802 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2011), and *United States* v. *Santoro*, 647 F. Supp. 153, 170 (E.D.N.Y. 1986), merely followed *Fluor* without any additional analysis, and are accordingly based on the same flawed reading of *Dirks*.

As for *United States* v. *Whitman*, No. 12 Cr. 125 (JSR), 2012 WL 5505080 (S.D.N.Y. Nov. 19, 2012), the cornerstone of the district court's analysis was that the purpose of the *Dirks* classical theory of insider trading is "to protect shareholders against self-

dealing by an insider who exploits for his own gain the duty of confidentiality he owes to his company and its shareholders." *United States* v. *Whitman*, 2012 WL 5505080, at *5. That purpose is satisfied by requiring the Government to prove, as it did here, that an insider benefitted from the tip. Indeed, requiring proof that a successive tippee knew the insider benefitted would thwart this purpose by allowing tippees who knew of the insider's breach of duty—but not the benefit—to escape liability.[28]

Insofar as they address this Court's precedents setting forth the elements of tippee liability, Newman and Chiasson emphasize *Obus* and seek to distinguish it. They first contend that *Obus* is not controlling because the parties in the case did not argue that the defendants (including a successive tippee) had to know the tipper received a benefit. (Newman Br. 37-38; Chiasson Br. 37-38). The level of knowledge required on the tippee's part as to the tipper's breach, however, was squarely presented in *Obus*, and this Court held that the SEC had to show only that the successive tippee "knew or had reason to know" that the inside information "was obtained through a breach of fiduciary duty." *Obus*, 693 F.3d at 288. In so holding, this Court recognized that a lesser standard

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[28] The district court in *Whitman* also sought to distinguish contrary authority such as *Obus* and *Falcone* on the ground that they were misappropriation cases. As discussed in the text, however, there is no material distinction between classical and misappropriation cases for purposes of tippee liability.

of knowledge is required on the part of a tippee as to the circumstances of the tipper's breach of duty than is required for the act of trading on inside information. *See id.* Given the issue in dispute in *Obus*, its description of the requirements for tipping liability—including its conclusion that a tippee need know only that the tipper breached a duty of confidentiality—governs here. *Cf. United States* v. *Goffer*, 721 F.3d 113, 124 (2d Cir. 2013) (citing *Obus* for the proposition that the Government must show a tippee either knew or should have known of the insider's breach of duty).

Newman further argues that *Obus* is not controlling because it was a civil case, and that criminal prosecutions for securities fraud require willfulness. (Newman Br. 38-39). As discussed above, however, the willfulness requirement of Section 78ff(a) requires only that a defendant "had an awareness of the general wrongfulness of his conduct." *Kaiser*, 609 F.3d at 569. This requirement was satisfied by the jury's finding that the defendants traded on material, nonpublic information they knew insiders had disclosed in breach of a duty of confidentiality.

In sum, the District Court properly instructed the jury that the Government was required to prove only that the defendants knew insiders had disclosed material, nonpublic information in breach of a duty of confidentiality, as this was all that was required to establish that the defendants knowingly engaged in wrongful conduct. This instruction was consistent with *Dirks* and this Court's precedent setting forth

the elements of tippee liability. Newman's and Chiasson's arguments to the contrary should be rejected.

ii. There Was No Due Process Violation

Relying on *State Teachers Ret. Bd.* v. *Fluor Corp.*, 592 F. Supp. 592, and the district court cases that followed it, both Newman and Chiasson further argue that the law was settled prior to *Obus* that a tippee is liable for insider trading only if he knew the insider-tipper acted for personal benefit, and contend that if *Obus* changed the law, its application here violates due process. (Newman Br. 39 n.21; Chiasson Br. 40). This claim is unavailing. For the reasons already given, the defendants had notice that by trading on information an insider had disclosed in violation of a duty of confidentiality, they were engaged in wrongful conduct. More importantly, as discussed above, *Obus* followed this Court's precedent in both classical and misappropriation cases establishing that the Government need prove only that the tippee knew an insider disclosed information in breach of a duty of confidentiality.

iii. Any Error Was Harmless

Even if this Court were to conclude that the Government was required to prove the defendants knew the Dell and NVIDIA insiders received some benefit for disclosing inside information, any instructional error here was harmless. Given the jury's conclusion that Newman and Chiasson knew the insiders had provided inside tips in violation of a duty of confidentiality and in light of the nature and timing of those

tips—disclosures of earnings information shortly before quarterly announcements—the jury's verdict would have been the same absent the error. *See, e.g.*, *Botti*, 711 F.3d at 308 (instructional error is harmless "if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error" (internal citations and quotation marks omitted)).

At best for the defendants, the jury should have been instructed—as Judge Rakoff instructed the jury in *Whitman*—that "it is not necessary" that the defendants "know . . . the specific benefit given or anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that the defendant[s] had a general understanding that the insider was improperly disclosing inside information for personal benefit." *Whitman*, 2012 WL 5505080, at *6. Moreover, Newman and Chiasson are incorrect in suggesting that, in order to establish knowledge of the insiders' benefits, the Government was required to prove that the defendants were explicitly told about those benefits. (Newman Br. 40; Chiasson Br. 44). Instead, the jury could find such knowledge by concluding that the defendants inferred from the circumstances that some benefit was provided to (or anticipated by) the insiders. *See United States* v. *Werner*, 160 F.2d 438, 441-42 (2d Cir. 1947) (Hand, *J.*) (holding that, to support a conviction for receipt of stolen goods, the evidence need establish only that the receiver "infer[red] the theft from the circumstances"); *United States* v. *Pabon-Cruz*, 255 F. Supp. 2d 200, 207-08 (S.D.N.Y. 2003) (Lynch, *J.*) (explaining that knowledge is established where the factfind-

er "conclude[s] that the defendant believed" a fact, and "the circumstances were such that the defendant's belief was well supported and turned out to be accurate").

As recounted above, both defendants knew they were receiving material, nonpublic information from insiders at Dell and NVIDIA. (Tr. 160-61, 1708, 1878; GX 805). These tips included highly material information concerning Dell's and NVIDIA's financial performance, shortly before the companies made quarterly earnings announcements. (*See, e.g.*, GX 214 (August 5, 2008 e-mail from Tortora to Newman explaining that Dell would report gross margins of approximately 17.5 percent), 806 (e-mail documenting Choi's February 2009 tip regarding NVIDIA's revenues and gross margins in advance of quarterly announcement)). Moreover, the insiders provided multiple updates in the weeks leading up to the earnings announcements, as the companies consolidated their earnings data. (*See, e.g.*, GX 214 (e-mail dated August 5, 2008, concerning Dell and stating, "Q finished on fri, numbers still coming in"), 296 (e-mail concerning Dell in which Goyal wrote, "waiting for qtr to end or come closer so that numbers more firm"), 438 (e-mail from Level Global trader explaining, as to Adondakis's source on Dell, "initial check was neg earlier in the week, next one is later next week I believe (not sure of exact timing), then one more right before the q")). Given the nature, specificity, and timing of these disclosures, the jury had ample basis for its conclusion that Newman and Chiasson knew the insiders had disclosed the information "in breach of a duty of trust and confidence." (*See* Tr. 4033).

Faced with this evidence, Newman and Chiasson contend that these tips could have been selective disclosures (*i.e.*, authorized leaks) carried out for purposes other than self-dealing. (Newman Br. 41; Chiasson Br. 46-47). The jury, however, rejected this selective-disclosure argument and found that the defendants knew the insiders disclosed the information in violation of a duty of confidentiality. It had good reason for doing so. The information provided by legitimate sources at Dell and NVIDIA was not specific and did not permit the defendants to trade around quarterly earnings announcements. The information these insiders provided, by contrast, allowed the defendants to execute highly profitable trades. And there was substantial evidence that the defendants knew their inside sources were not authorized to disclose the information:

- Newman knew Goyal obtained information from the Dell insider outside of business hours, at night and on the weekend. (*See, e.g.*, GX 322 (e-mail from Tortora to Newman stating that Goyal "usually wont hear back from [the Dell insider] til evening as calls him outside of work")). Newman also authorized substantial payments to Goyal for the tips, through a sham consulting arrangement with Goyal's wife. (GX 2269, 2270). Had Goyal obtained the tips through a Dell insider who was authorized to disclose the information to investors, there would have been no reason to pay Goyal so much for the information.

- Newman was told the NVIDIA source was an "accounting manager" at the company. (GX 805). Based on his extensive experience in the financial industry, Newman understood that such employees were not authorized to communicate with investors. *Cf. Obus*, 693 F.3d at 292-93 (stating that tippee was a "sophisticated financial analyst" who would know that nonpublic information about an acquisition would be material).[29]
- Chiasson told a friend at another investment firm that he had "checks on gm" concerning Dell shortly before the company's August 2008 quarterly announcement. (GX 448). In response to the friend's question as to how Chiasson could have "checks on gm%," Chiasson wrote, "Not your concern. I just do." (GX 448). Chiasson's response demonstrated that he understood the Dell in-

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[29] Newman also believed (incorrectly) that Goyal's contact was not a member of Dell's investor relations department, which undermines his claim that he could have thought Goyal's contact was legitimately communicating information about Dell's earnings. (GX 242 (distinguishing Goyal's communications with investor relations from Goyal's "check" with "his guy"), 322 (referring to the fact that Goyal had a friend in investor relations who was someone other than Goyal's "main contact")).

sider was not authorized to disclose such information.

- Chiasson sought to conceal the bases for his Dell and NVIDIA trades from Level Global's internal reporting system, directing Adondakis to create sham reports reflecting false reasons for the trades. (Tr. 1785; GX 928).

This evidence demonstrated that Newman and Chiasson were well aware that the Dell and NVIDIA insiders had provided inside information without authorization.

Based on its well-supported finding that Newman and Chiasson knew insiders at Dell and NVIDIA had disclosed material, nonpublic information in violation of a duty of confidentiality (and not for a legitimate corporate purpose), the jury further would have found that the defendants inferred from the circumstances that some benefit was provided to (or anticipated by) the insiders. *See United States* v. *Werner*, 160 F.2d at 441-42; *United States* v. *Pabon-Cruz*, 255 F. Supp. 2d at 207-08. Given how the Supreme Court and this Court have defined benefit—to include "a reputational benefit or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend," *Obus*, 693 F.3d at 285 (citation and internal quotation marks omitted); *see id.* at 292 (stating that, although the SEC had to prove the insider obtained some benefit, "[i]n light of the broad definition of personal benefit set forth in *Dirks*, this bar is not a high one")—the jury would have found that the defendants understood the insiders would

not have undertaken the highly risky step of disclosing earnings information shortly before a quarterly announcement unless they expected to receive something in return. Put differently, the jury would have concluded that the defendants knew insiders disclosed the information for some personal reason rather than for no reason at all. *Cf. Libera*, 989 F.2d at 600 (in a misappropriation case, stating that *tipper's* knowledge that he breached establishes his knowledge that the tippee will misuse the information because "it may be presumed that the tippee's interest in the information is, in contemporary jargon, not for nothing"). Alternatively, because the defendants' involvement in the offenses was so overwhelmingly suspicious, the jury would have found that if they did not know the insiders received (or expected to receive) some benefit in return for disclosing material, nonpublic information, it was only because the defendants deliberately avoided learning that fact. *See* Point I(B)(2), *infra*.[30]

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[30] For the same reasons that any instructional error was harmless, Newman and Chiasson are wrong that there was insufficient evidence to establish their knowledge of the insiders' benefits. (Newman Br. 40-42; Chiasson Br. 42-49). Accordingly, Newman's requests for a judgment of acquittal or a new trial and Chiasson's request for a remand with instructions to dismiss the Indictment should be rejected.

2. The District Court Properly Instructed the Jury on Conscious Avoidance

Newman next contends that there was an insufficient factual predicate to support a conscious avoidance instruction, arguing that there was no evidence he deliberately decided to avoid learning that information he received regarding Dell and NVIDIA was improperly obtained from company insiders. (Newman Br. 42-45). Newman is mistaken. His involvement in the criminal schemes was so suspicious that the jury could properly infer from his failure to question the circumstances of the tips that he purposefully contrived to avoid guilty knowledge.

a. Relevant Facts

Over the defendants' objections, the District Court instructed the jury on conscious avoidance as follows:

> [A] Defendant's knowledge may be established by proof that the Defendant you are considering deliberately closed his eyes to what otherwise would have been obvious to him. If you find beyond a reasonable doubt that the Defendant's ignorance was solely and entirely the result of a conscious purpose to avoid learning the truth, then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the Defendant was merely negligent, foolish or mistaken.
>
> If, for example, you find beyond a reasonable doubt that the Defendant you

> are considering was aware that there was a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, but deliberately and consciously avoided confirming this fact, then you may find that the defendant acted knowingly. However, if you find that the Defendant actually believed that the information he obtained was not disclosed in violation of a duty of trust and confidence, he may not be convicted. It is entirely up to you whether you find that the Defendant you are considering deliberately closed his eyes and any inferences to be drawn from the evidence on this issue.

(Tr. 4037-38).

b. Applicable Law

"A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States* v. *Cuti*, 720 F.3d 453, 463 (2d Cir. 2013) (citation and internal quotation marks omitted). A conscious avoidance instruction "is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the

defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain." *United States* v. *Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995).

"[T]he same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise an inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct." *United States* v. *Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (citation and internal quotation marks omitted); *see also United States* v. *Goffer*, 721 F.3d at 127 ("Red flags about the legitimacy of a transaction can be used to show both actual knowledge and conscious avoidance."). Thus, "the second prong [of the conscious avoidance test] may be established where[] a defendant's involvement in the criminal offense may have been *so overwhelmingly suspicious* that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *United States* v. *Svoboda*, 347 F.3d at 480 (citation and internal quotation marks omitted; emphasis in original); *United States* v. *Cuti*, 720 F.3d at 463; *United States* v. *Kozeny*, 667 F.3d 122, 133-34 (2d Cir. 2011).

Moreover, "[i]t is not uncommon for a finding of conscious avoidance to be supported primarily by circumstantial evidence," as "the very nature of conscious avoidance makes it unlikely that the record will contain directly incriminating statements." *United States* v. *Kozeny*, 667 F.3d at 134. Thus, "[a] conscious-avoidance instruction is appropriate when a

defendant claims to lack some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance." *United States* v. *Gabriel*, 125 F.3d 89, 98 (2d Cir. 1997) (citation and internal quotation marks omitted).

c. Discussion

Newman disputed at trial that he knowingly received material, nonpublic information that corporate insiders at Dell and NVIDIA had disclosed in violation of a duty of confidentiality. He argued that he believed the information was the product of legitimate research or had been properly released by the companies. He did so in opening statement (*see, e.g.*, Tr. 68 (stating that Newman "hired Jesse Tortora . . . to do honest legitimate research, and honest research is exactly what he thought he was getting"), in cross-examining certain Government witnesses (*see, e.g.*, Tr. 723-24 (suggesting that Dell's investor relations team prematurely leaked quarterly results)), and in summation (*see, e.g.*, Tr. 3766 ("[W]hen Newman sees specific numbers, he doesn't think that must come from an improper or illegal source."), 3767 (arguing that when Newman received specific numbers, he did not "assume . . . that is inside information, that is improper and that is from an unauthorized source at the company")). The first prerequisite for a conscious avoidance instruction—that the defendant assert "the lack of some specific aspect of knowledge required for conviction—was therefore satisfied here. *See United States* v. *Aina-Marshall*, 336 F.3d 167, 171 (2d Cir. 2003).

The second prerequisite for the instruction was also met. Contrary to Newman's claim, there was ample evidence from which a rational juror could have concluded that Newman was aware of a high probability that he received tips from Dell and NVIDIA insiders who disclosed the information in violation of a duty of trust and confidence, but deliberately avoided confirming that fact. The evidence from which the jury could have reached this conclusion included the following:

- Tortora told Newman that his source at Dell had access to the internal consolidation process (Tr. 160-61), and that the NVIDIA insider was an accounting manager at the company (GX 805);
- Newman received specific tips concerning Dell's and NVIDIA's revenues and gross margins before the information was publicly announced, which information Newman—a sophisticated hedge fund manager—knew was confidential;
- Newman received multiple, frequent tips of such information during Dell's and NVIDIA's consolidation processes leading up to multiple quarterly earnings announcements;
- Newman knew that Goyal communicated with his "contact" at Dell at night and on the weekend (GX 197, 242, 322); and
- Newman paid Goyal a substantial sum for the Dell tips.

In short, the information Tortora provided to Newman was so overwhelmingly suspicious that the jury could reasonably conclude that if Newman did not know he was receiving confidential information disclosed by insiders in breach of a duty of confidentiality, it was only because he purposely avoided confirming that fact. *See Goffer*, 721 F.3d at 124; *Cuti*, 720 F.3d at 463; *Kozeny*, 667 F.3d at 134; *Svoboda*, 347 F.3d at 480.

In pressing a contrary position, Newman relies on *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2071-72 (2011), to argue that the standard set forth in *Svoboda*, *Kozeny*, and *Cuti* was erroneous. (Newman Br. 44). Under this Court's controlling precedents, however, where a defendant's involvement in an offense was "so overwhelmingly suspicious," a jury is entitled to infer that any lack of actual knowledge on the defendant's part is attributable to the defendant's deliberate decision to avoid confirming a disputed fact. *Svoboda*, 347 F.3d at 480 (citation, internal quotation marks, and emphasis omitted); *Cuti*, 720 F.3d at 463; *Kozeny*, 667 F.3d at 133-34. The Supreme Court in *Global-Tech*—a civil patent case—did not purport to undermine these precedents or set forth a new standard for conscious avoidance. Indeed, this Court recently held that *Global-Tech* "did not alter the conscious avoidance standard." *Goffer*, 721 F.3d at 128.

In this regard, Newman contends there was no evidence that he deliberately avoided confirming any facts and ample evidence that he asked Tortora questions regarding the reliability and accuracy of the in-

formation Tortora provided. (Newman Br. 43). Obviously, Newman could ask certain questions to confirm the reliability and accuracy of the information and at the same time deliberately avoid asking others that would confirm that insiders were improperly disclosing confidential information. Indeed, the jury could reasonably infer that Newman asked some questions but not others as part of an effort to avoid such knowledge. The jury could thus properly find that by failing to question the overwhelmingly suspicious tips Tortora provided, Newman purposefully avoided confirming that the information came from insiders in breach of a duty.

Newman also argues that the circumstances here were not "overwhelmingly suspicious" because, among other reasons, he received much of the information from Tortora via his office e-mail account, which he contends "could be read by the compliance department and the SEC." (Newman Br. 44). Contrary to this claim, receiving multiple, specific updates from an insider in anticipation of a quarterly earnings announcement is highly suspicious. That Newman received the information via e-mail makes it no less suspicious, particularly given that Newman instructed Tortora not to be explicit in e-mails about the insiders' access to information and that Diamondback's compliance office conducted only limited reviews of e-mails. (Tr. 530, 1313-15). Newman's decision to use e-mail reflects his assessment of the probability that his illicit behavior would be detected, but in no way suggests that the circumstances were not highly suspicious.

3. The Instruction on Nonpublic Information Was Correct

Newman further contends that the District Court erred in its instruction defining "nonpublic" information. He argues that the Court failed to provide the jury with adequate guidance in determining whether the information he received regarding Dell and NVIDIA was "truly confidential." (Newman Br. 45-46). This claim is unavailing. The concepts contained in Newman's proposed instruction were adequately conveyed by the charge that was given, which reflected the defense theory. Moreover, the instruction Newman argues should have been given applies in misappropriation cases to aid the jury in finding whether allegedly misappropriated information was confidential and, as a result, a type of property. The Court's instruction on nonpublic information, by contrast, closely tracked the instruction approved in *United States* v. *Contorinis*, 692 F.3d 136, 142-44 (2d Cir. 2012). In any event, given the overwhelming evidence that Dell and NVIDIA took all appropriate steps to ensure the confidentiality of their earnings information, any error was harmless.

a. Relevant Facts

Before trial, the defendants jointly submitted requests to charge, including a proposed addition to the District Court's draft instruction defining "nonpublic" information. (A. 206-07). The defendants asked that the following language be added to the draft charge:

> [I]n considering whether corporate information is non-public, you must con-

> sider what steps the corporation has taken to maintain and protect confidentiality. The factors will vary, but may include written company policies, employee training, measures the employer has taken to guard the information's secrecy, the extent to which the information is known outside the employer's place of business and the ways in which other employees may access and use the information. Even if a corporation "considers" information to be confidential, if that corporation does not take affirmative steps to treat it as such, particularly when the corporation is alerted to the possibility that it is being disclosed or at risk of being disclosed, then the information is "available" to the public.

(A. 206-07).

Commenting that "the instruction I have covers this," the District Court declined to add the defendants' proposed language. (Tr. 3610). The Court, consistent with its draft instruction, subsequently defined "nonpublic" information for the jury as follows:

> Information is nonpublic if it is not available to the public through sources such as press releases, Securities and Exchange Commission filings, trade publications, analysts' reports, newspapers, magazines, television, radio, rumors word of mouth, websites, internet chat rooms, or online message boards. In

> assessing whether information is nonpublic, the keyword is "available." If information is available in the public media or in SEC filings, it is public. However, the fact that information has not appeared in the newspaper or other widely available public medium does not alone determine whether the information is nonpublic. Sometimes a corporation authorizes the release of information or is otherwise willing to make information available to securities analysts, prospective investors, or members of the press who ask for it even though it may never have appeared in any newspaper or other publication. Such information would be public. Accordingly, information is not necessarily nonpublic simply because there has been no formal announcement or because only a few people have been made aware of it. Whether information is nonpublic is an issue of fact for you to decide.

(Tr. 4031).

b. Discussion

Newman argues that because he contended at trial that Dell and NVIDIA regularly disclosed the kind of information he received through company insiders, the District Court erred in refusing to give his proposed instruction regarding the steps a company takes to maintain confidentiality. (Newman Br. 45).

The Court's charge, however, addressed such disclosures, instructing the jury that information released by a company to certain analysts or investors, even if not disseminated through a widely available public medium, is public information. (Tr. 4031 ("[T]he fact that information has not appeared in the newspaper or other widely available public medium does not alone determine whether the information is nonpublic. Sometimes a corporation authorizes the release of information or is otherwise willing to make information available to securities analysts, prospective investors, or members of the press who ask for it even though it may never have appeared in any newspaper or other publication. Such information would be public."). This instruction adequately represented the defense theory that Dell and NVIDIA leaked earnings information to analysts by making clear that if, in fact, those companies authorized the disclosure of certain information, such information was public and could properly be used in executing trades.

Moreover, the District Court's instruction on nonpublic information was materially indistinguishable from the instruction approved in *United States* v. *Contorinis*, 692 F.3d at 142-44. Because the instruction adequately defined "nonpublic" information, the Court did not err in declining to use the defendants' proposed language. *See, e.g.*, *United States* v. *Coplan*, 703 F.3d 46, 87 (2d Cir. 2012) ("Although a defendant is entitled to have the court charge the jury on any defense theory for which a foundation existed in the record, he is not necessarily entitled to have that instruction communicated to the jury in the language of his choice." (alteration, citation, and internal quota-

tion marks omitted)); *United States* v. *Wexler*, 522 F.3d 194, 205 (2d Cir. 2008) ("A defendant is not entitled to prescribe the exact language of a jury instruction, and the charge is sufficient if it adequately appr[ises] the jury of the crime and offense." (internal quotations omitted)).; *United States* v. *Alkins*, 925 F.2d at 550 ("A court has discretion to determine what language to use in instructing the jury as long as it adequately states the law.").

In arguing that the instruction was erroneous, Newman relies solely on *United States* v. *Mahaffy*, 693 F.3d 113 (2d Cir. 2012).[31] That reliance is misplaced. The defendants in *Mahaffy* were stockbrokers employed by various brokerage firms, who were charged with misappropriating those firms' confidential business information by disclosing information concerning pending orders for blocks of securities (which orders were broadcast over an internal communication system known as "squawk boxes") to traders at another firm; those traders then placed trades in the securities before the brokerage firms executed their customers' orders. *United States* v. *Mahaffy*, 693 F.3d at 119-20. In order to establish that the pending orders were a form of property that the defendants had stolen, the Government was required to prove that the orders were confidential. *Id.* at 118, 120 (citing *Carpenter* v. *United States*, 484 U.S. 19 (1987)).

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[31] Similarly, the defendants cited only *Mahaffy* in support of their proposed instruction. (A. 207).

Having vacated the convictions based on violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), this Court stated that the Supreme Court in *Carpenter* "require[d] proof that [] information was both considered and treated by an employer in a way that maintained the employer's exclusive right to the information" for the Government to establish a property right in information sufficient to support a misappropriation charge. *Mahaffy*, 693 F.3d at 135 n.14. In that context, this Court instructed district courts to provide guidance to juries in misappropriation cases "regarding how to evaluate whether employers treat information as confidential," and set forth a list of "pertinent factors" juries could be instructed to consider. *Id.*

Newman's proposed instruction closely tracked this discussion in *Mahaffy*. Because this discussion addressed how to evaluate whether information qualifies as property in misappropriation cases, the District Court did not err in declining to give Newman's requested instruction. This is particularly so given that this Court in *Contorinis* approved an instruction on nonpublic information materially indistinguishable from the instruction given here.

In any event, even if the District Court somehow erred in declining to give the requested instruction, any such error was harmless in light of the extensive evidence that both Dell and NVIDIA treated nonpublic earnings information as highly confidential prior to its announcement. As the Government proved at trial, (1) both Dell and NVIDIA restricted access to earnings information prior to its public release

(Tr. 2816, 3095-96); (2) both companies had policies prohibiting the disclosure of earnings information to outsiders, and both corporate insiders signed confidentiality agreements with their employers (GX 1659, 1957; Tr. 2758, 3098-101, 3103); and (3) Ray, as a member of Dell's investor relations team, received training on Dell's confidentiality policy and how to respond to investors' questions without disclosing confidential information (Tr. 2774-75, 2823-27). *Cf. Mahaffy* 693 F.3d at 121-122 (firms did not train brokers on the proper use of squawks, firms had no policy specifically addressing how employees should treat squawks, and squawks were broadcast throughout the firms' offices, including in areas where nonemployees were visiting). Given the ample evidence that Dell and NVIDIA took affirmative steps to maintain the confidentiality of their earnings information before its public release, any error in the Court's refusal to give the defendants' requested instruction was harmless.

POINT II

There Was Sufficient Evidence that the Dell and NVIDIA Insiders Breached a Duty for a Personal Benefit

Newman claims that the evidence at trial was insufficient to support the jury's verdict. (Newman Br. 47-52). Specifically, he argues that the Government failed to prove that the Dell and NVIDIA insiders—Rob Ray and Chris Choi, respectively—intentionally breached duties they owed their employers. (Newman Br. 47-48). He further contends

that there was insufficient evidence that either insider received a personal benefit. (Newman Br. 49-52). For the reasons set forth below, both claims are unavailing.

A. Applicable Law

A defendant challenging the sufficiency of the evidence bears a "heavy burden," *United States* v. *Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004), as the standard of review is "exceedingly deferential," *United States* v. *Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). Specifically, the Court "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States* v. *Chavez*, 549 F.3d 119, 124 (2d Cir. 2008) (citations, brackets, and internal quotation marks omitted). Moreover, a reviewing court must "consider the evidence in its totality, not in isolation." *United States* v. *Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). A conviction must therefore be affirmed if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).

B. Discussion

1. There Was Sufficient Evidence that the Insiders Intentionally Breached a Duty of Confidentiality

Newman's claim that the Government failed to prove Ray intentionally breached a duty to Dell has no force. (Newman Br. 47-48). In eight straight quarters, Ray disclosed Dell's financial data to Goyal before the information was publicly announced, providing multiple updates during the internal consolidation process. He provided precise information concerning Dell's revenues and gross margins, typically during telephone calls with Goyal at night or on the weekend. (*See, e.g.*, GX 26, 27, 214, 257, 600A; Tr. 1631). Ray did so even though he was never authorized to disclose Dell's nonpublic financial information to outsiders, Dell's policies strictly prohibited such disclosures, and Ray was specifically warned not to reveal Dell's financial results before the company announced its earnings in May and August of 2008. (Tr. 2766-68, 2780-81, 2807; GX 1712, 1730). Based on this evidence, the jury could properly conclude that, in providing tips to Goyal, Ray intentionally breached his duty of confidentiality to Dell.

Faced with this evidence, Newman contends that there was insufficient proof of an intentional breach because Goyal "affirmatively misled" Ray to believe that Goyal was not trading on the tips and was merely working on a model. (Newman Br. 47). Of course, Goyal's use of Ray's information in models that formed the basis of stock recommendations he made

to portfolio managers was improper. In any event, the jury was entitled to find that Ray knew perfectly well —regardless of what Goyal told him—that Goyal wanted Dell's current financial information in advance of quarterly earnings announcements in order to trade on the information. Such a conclusion was plainly warranted, given that Goyal repeatedly requested updates on Dell's financial data shortly before quarterly announcements, when such information was highly relevant to executing profitable trades.[32] As this Court has noted, "it may be presumed that the tippee's interest in the information is, in contemporary jargon, not for nothing." *Libera*, 989 F.2d at 600.

Newman further claims that the Government failed to prove an intentional breach on Ray's part because Dell did not prohibit investor relations personnel from assisting analysts with models and speaking to them at night. (Newman Br. 47). Newman fails to acknowledge, however, that Dell permitted its investor relations team to help analysts with models pertaining only to historical data and prohibited them from disclosing current quarter earnings numbers before their public release. (Tr. 2926). More-

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[32] In this regard, Newman emphasizes that Goyal did not tell Ray that he was sharing Ray's tips with analysts at other firms. This fact is irrelevant, as the Government was not required to prove that Ray knew the full extent of Goyal's intended use of the inside information in order to establish that Ray knowingly breached a duty to Dell.

over, the jury could properly rely on the fact that Ray spoke to Goyal almost exclusively at night and on weekends—while Goyal spoke to a different member of Dell's investor relations team during business hours—in concluding that Ray intentionally breached his duty to Dell.

Additionally, Newman argues that the purported evidence of leaks by Dell "undermined any inference that advance disclosure of quarterly results was such a serious infraction so as to imply a knowing breach." (Newman Br. 47). As set forth above, the evidence did not show that Dell leaked earnings numbers before they were publicly announced. Moreover, Ray received training on how to communicate with investors without disclosing confidential financial data, and was explicitly warned in advance of Dell's May and August 2008 announcements not to disclose current quarter information. (*See, e.g.*, GX 1712 (the head of Dell's investor relations warning that she would "hunt . . . down" anyone who "breath[ed] a peep" of the results)). The jury had ample basis for concluding that Ray intentionally breached a duty in disclosing nonpublic financial information—including revenue and gross margin data—shortly before its public announcement.

Newman's claim that there was insufficient evidence that Choi intentionally breached a duty to NVIDIA similarly lacks traction. (Newman Br. 48). Choi repeatedly disclosed nonpublic information concerning NVIDIA's financial results in advance of the company's quarterly earnings announcements. Before NVIDIA's quarterly announcements in February and

April of 2009, for example, Choi disclosed the company's revenues and gross margins. (*See* GX 806, 820). Choi did so even though NVIDIA prohibited such disclosures, Choi had signed a confidentiality agreement, and Choi was not authorized to speak to investors. (GX 1953; Tr. 3098-103). The jury was entitled to rely on this evidence and find that, in disclosing confidential financial information shortly before quarterly earnings announcements, Choi intentionally breached a duty he owed NVIDIA.

As to both Ray and Choi, Newman emphasizes that the Government has not charged either man, and claims that this fact shows there was insufficient proof of an intentional breach. (Newman Br. 47-48). Of course, the Government's charging decisions have no bearing on the sufficiency of the trial evidence demonstrating that Ray and Choi intentionally breached duties they owed their employers. Nor is there any basis for Newman's completely unfounded assertion that the Government considers both insiders to lack culpability. (Newman Br. 47-48 (asserting that the absence of charges against Ray is "a telling indication of the government's view of his culpability")). Indeed, based on extensive evidence of Ray's and Choi's wrongdoing, the Government argued at trial—and the jury found—that both men intentionally breached their duties of confidentiality. That finding should not be disturbed.

2. There Was Sufficient Evidence that the Insiders Received Personal Benefits

Contrary to Newman's contention, the evidence was sufficient to establish that Ray benefitted from his tips of inside information to Goyal. Not only were the two men friends, but Goyal provided Ray with career advice and assistance. While Goyal did not view Ray as a "close" friend (Tr. 1411), the men had known each other for years, having both attended business school and worked at Dell together (Tr. 1469-70). Moreover, they knew each other's wives, talked about going on vacation together, and spoke frequently, often for long periods of time, late at night while each of them was at home. (Tr. 1469-70). Additionally, Ray —who wanted to become a Wall Street analyst like Goyal—benefitted from the tips by receiving career advice and assistance from Goyal. (*See, e.g.*, GX 700 (Ray writing to Goyal, "As you know, I am extremely interested in the equity research area and it will be great to get some perspective from you.")). Goyal provided advice, reviewed Ray's résumé, sent Ray's résumé to a Wall Street recruiter, and "put in a good word" for Ray with a potential employer. (GX 703, 705, 708, 720, 725, 729, 729B, 720, 733; Tr. 1396-1403). On occasion, Goyal even provided career advice in the very same conversation during which Ray gave him inside information on Dell. (*See, e.g.*, Tr. 1461; GX 39, 734). Based on this evidence, the jury could properly conclude that Ray received personal benefits for providing inside information to Goyal.

In urging a contrary conclusion, Newman emphasizes Goyal's testimony that the men were not "close"

friends. (Newman Br. 50). The Government, however, was not required to prove a particularly intimate friendship in order to establish that Ray received a benefit. *See Obus*, 693 F.3d at 292 (stating that the SEC had to prove tipper derived some benefit from tip, but that, "[i]n light of the broad definition of personal benefit set forth in *Dirks*, this bar is not a high one"). The Government merely had to prove a friendship such that the tip resembled trading by Ray followed by a tip of the profits to Goyal. *See Warde*, 151 F.3d at 48-49. The jury could permissibly reach that conclusion based on Goyal's description of his relationship with Ray, including his testimony that the men discussed taking family vacations together.[33] In

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[33] In support of his argument that the relationship between Ray and Goyal did not support an inference that Ray benefitted from his tips to Goyal, Newman relies on *SEC* v. *Maxwell*, 341 F.Supp.2d 941 (S.D. Ohio 2004), and *SEC* v. *Anton*, No. 06-2274, 2009 WL 1109324 (E.D. Pa. Apr. 23, 2009). (Newman Br. 49). Neither case is comparable to this one. In *Maxwell*, the court found that a one-off tip from a corporate executive to his barber—in the absence of a close friendship, family relationship, or business association—provided an inadequate basis for finding any benefit to the tipper. *SEC* v. *Maxwell*, 341 F.Supp.2d at 947-48. And *Anton* involved a single tip from a corporate insider to a financial analyst who was not a friend and with whom the tipper "could not recall spending any social time." *SEC* v. *Anton*, 2009 WL 1109324, at *1 n.3. Assuming that these cases were correctly decided—and the Government does not

any event, the career advice Goyal provided Ray was an independent basis for the jury's conclusion that Ray benefitted from his tips to Goyal.

That Goyal began giving Ray career advice some time before Ray supplied Goyal with inside information on Dell was insignificant. (Newman Br. 50). In September 2007—shortly before Ray began disclosing Dell's consolidated earnings numbers to Goyal —Ray told Goyal he was "*desperately* looking to break into the buy/sell side." (GX 708 (emphasis added)). The jury could reasonably conclude that Goyal's advice and assistance to Ray during this period was materially different from any prior guidance Goyal had provided Ray, and that Goyal's assistance to Ray in this regard was a personal benefit.

Newman further contends that the career assistance Goyal provided Ray "amounted to routine and ultimately ineffective courtesies," and thus did not qualify as a benefit. (Newman Br. 50). The premise of this argument is incorrect. Goyal need not have succeeded in obtaining employment for Ray in order to have provided him with a benefit. The jury was entitled to find that Goyal's assistance to Ray—which included providing advice, reviewing Ray's résumé, sending it to a Wall Street recruiter, and recommend-

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concede that they were—Ray's relationship with Goyal did not resemble the relationships at issue in either case.

ing Ray to a potential employer—was a meaningful benefit. *Cf. Jiau*, 2013 WL 5735348, at *4 (holding that the Government proved benefit by showing insider-tipper joined tippee's investment club, which gave the insider opportunities to access inside information, even though the insider did not in fact receive tips through the club).

Nor is there any force to Newman's assertion that Goyal's career advice was not a benefit because "Goyal would have given the advice even without receiving the information." (Newman Br. 51). Even if true, this would not undermine the jury's verdict, as the jury nonetheless properly could have concluded that Ray provided inside information in return for Goyal's assistance. *Cf. United States* v. *Quinn*, 359 F.3d 666, 675 (4th Cir. 2004) (holding, in a bribery case, that "it does not matter whether the government official would have to change his or her conduct to satisfy the payor's expectations"). In any event, Newman's assertion is undermined by Goyal's testimony that he had more frequent and lengthier telephone calls with Ray than with other people (Tr. 1515), and that he had such lengthy and frequent calls with Ray because Diamondback was paying him for the information Ray provided (Tr. 1630).

Newman also argues that there was insufficient evidence that Ray received a benefit for the inside information he provided because Ray never explicitly "connected the career advice as a *quid pro quo*" to the tips. (Newman Br. 51). No such explicit agreement was required. *Cf. United States* v. *Garcia*, 992 F.2d 409, 414 (2d Cir. 1993) (holding, in a bribery case,

that a "*quid pro quo* [need not be stated] in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods" (citation and internal quotation marks omitted)). The jury could reasonably infer from the evidence—including the proof that Ray and Goyal swapped career advice for inside information in the same telephone call (GX 39, 734; Tr. 1461)—that the men had implicitly reached such an agreement.

The jury also had ample basis for finding that Choi disclosed inside information concerning NVIDIA to Lim in return for a personal benefit, namely, friendship. Lim described Choi as a "family friend" he had known for years, and the men attended church and socialized together. (Tr. 3032-33). Newman all but ignores this friendship, and insists there was insufficient proof of a benefit because Lim testified he never gave Choi "anything of value in exchange for information." (Newman Br. 51). The Government, however, was not required to show that Lim gave Choi cash or gifts for inside information. The jury was entitled to find that, in light of the friendship between Choi and Lim, Choi received a benefit by tipping Lim. *See Warde*, 151 F.3d at 48-49 (finding benefit to the tipper based on friendship between tipper and tippee, because tip resembled trading by tipper followed by a gift of profits to the recipient). Newman argues that the jury could not properly reach this conclusion, because Choi did not know Lim was trading NVIDIA stock and Lim did not trade the stock between April and July of 2009. (Newman Br. 51). He is mistaken. Lim told Choi that he traded NVIDIA stock, and he in fact traded the stock in March, April,

July, and August of 2009. (Tr. 3044, 3083; GX 3510-6 at 2-3). He also passed the information to another analyst, Kuo, in exchange for cash and gifts. (Tr. 3010, 3039, 3042). In any event, as discussed above, that Choi knew he was breaching a duty in disclosing information to Lim "suffice[d] to establish [Choi's] expectation that the breach w[ould] lead to some kind of a misuse of the information." *Libera*, 989 F.2d at 600. Thus, contrary to Newman's claims, Choi's tips resembled "trading by the insider himself followed by a gift of the profits to the recipient." *Dirks*, 463 U.S. at 664.

In sum, the evidence was sufficient to support the jury's conclusion that the Dell and NVIDIA insiders disclosed inside information in breach of a duty and for a benefit. Newman's challenges to the sufficiency of the evidence should therefore be rejected.

POINT III

There Was No Prejudicial Variance as to Count Two

Newman next contends that the proof at trial regarding inside tips he received in advance of Dell's May 2008 earnings announcement constituted a prejudicial variance from the allegations in Count Two of the Indictment. (Newman Br. 52-55). Newman raised no such complaint in the proceedings below, and his claim is therefore subject to review solely for plain error. Newman's claim would fail under any standard of review, because the evidence at trial did not prove facts materially different from those alleged in Count Two and because, even if there were a vari-

ance, Newman was on notice of it through the exhibits and witness statements provided to him in advance of trial.

A. Applicable Law

"A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *United States* v. *Salmonese*, 352 F.2d 608, 621 (2d Cir. 2003) (citation and internal quotation marks omitted). This Court "has consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *United States* v. *Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) (citation and internal quotation marks omitted).

"A defendant alleging variance must show 'substantial prejudice' to warrant reversal." *United States* v. *Rigas*, 490 F.3d 208, 226 (2d Cir. 2007) (quoting *United States* v. *McDermott*, 918 F.2d 319, 326 (2d Cir. 1990)). A variance is prejudicial only when it "infringes on the 'substantial rights' that indictments exist to protect—to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy." *United States* v. *Dupre*, 462 F.3d 131, 141 (2d Cir. 2006) (citation and internal quotation marks omitted); *see also United States* v. *Mucciante*, 21 F.3d 1228, 1236 (2d Cir. 1994) ("A variance is immaterial—and hence not prejudicial—where the allegation and proof substantially correspond, where the variance is not of a character that could have misled the defendant at the trial, and

where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the same offense." (citation and internal quotation marks omitted)).

B. Relevant Facts

The speaking allegations in the Indictment described an insider-trading scheme in which Jesse Tortora—an analyst at Diamondback—obtained inside information from employees of publicly traded technology companies both directly and through a network of corrupt analysts at other hedge funds. (A. 149-50). This information related to, among other things, the companies' earnings, revenues, and gross margins. (A. 150). The Indictment alleged that Tortora passed such inside information to Newman, who used it to execute securities trades. (A. 150).

The Indictment provided specific details about trades based on inside information in connection with two quarterly earnings announcements by Dell in 2008 and one such announcement by NVIDIA in 2009. (A. 153-55, 156-57). As to Dell's May 2008 earnings announcement (which is the subject of Count Two), the Indictment alleged that a Dell insider had disclosed "Inside Information concerning Dell's financial results for the quarter ended May 2, 2008," and that the "Inside Information indicated, among other things, that gross margins would be higher than market expectations." (A. 153). The Indictment further alleged that, based on this information, Newman bought 475,000 shares of Dell stock in advance of the earnings announcement. (A. 153, 163).

The evidence at trial established that, in advance of Dell's quarterly earnings announcement in May 2008, the Dell insider provided multiple updates on Dell's financial results to Goyal, which tips Goyal shared with Tortora. (*See* GX 26). Tortora, in turn, provided the information to Newman and other corrupt analysts. (GX 29, 30, 31, 32, 33, 34, 2604, 2607). The cooperating witnesses did not remember precisely which metrics the Dell insider had provided for the May 2008 quarter, but each of them recalled that the information led to the conclusion that Dell's earnings per share would beat market expectations. (Tr. 179, 1451, 2463).[34]

Documentary evidence provided to the defendants six weeks in advance of trial (in accordance with the District Court's order regarding the production of marked Government exhibits) showed that the defendants received information in advance of Dell's quarterly announcement that Dell's earnings would beat market expectations. One of the corrupt analysts spoke to Tortora regarding Dell on May 12, 2008, and took notes of the conversation. Those notes indicated that, as of May 12, Dell would report revenues of $15.8 billion (which was one percent greater than market expectations at the time), gross margins of

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[34] Goyal believed he had received information from Ray regarding revenues and margins (Tr. 1451); Tortora recalled that he had received Dell's revenue information and either its gross margins or operating margin (Tr. 179, 788); and Adondakis recalled receiving revenue information but not margins (Tr. 2464).

"18.5-18.6%" (which was slightly better than the current market expectations of 18.5 percent), and operating expenses of 13 percent. (GX 600A). A few days later, after another update from the Dell insider, Goyal and Tortora used the information he had provided to calculate an earnings per share ("EPS") number of 36 to 37 cents, which exceeded market expectations of 33 cents per share. (GX 187; Tr. 197).[35]

On May 16—the very same day Tortora confirmed that Dell's EPS would beat market expectations by three to four cents—Newman took a large long position in Dell stock. (GX 2501-DA). Only hours before Dell announced its earnings on May 29, following an additional update on Dell, Newman purchased additional shares. (GX 2501-DA).[36] While no documentary evidence records precisely what information Tortora conveyed to Newman on May 29, the information was

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[35] As Tortora explained, Goyal did not provide Dell's EPS number; Tortora calculated that number using other metrics Goyal had given him, such as revenues, gross margins, operating margins, and expenses. (Tr. 147, 198).

[36] Telephone records showed that (1) Ray and Goyal spoke on the evening of May 28, (2) Goyal called Tortora later that same evening, and (3) Tortora called Newman at 7:48 a.m. the next morning. (GX 25, 2606, 2607, 2610). Newman purchased the 220,000 additional shares between 9:32 a.m. and 12:48 p.m. that day. When Dell announced its earnings shortly after 4:00 p.m., Newman held a total of 450,000 shares. (GX 2501-DA).

obviously positive, given that Newman increased his Dell holdings after speaking to Tortora.

Dell ultimately reported revenues and operating margins that beat consensus projections, with the result that Dell's EPS number was 38 cents per share. (GX 1803; Tr. 834). Gross margins, however, were slightly below market expectations. (GX 1723; DX 8228). As Newman had correctly predicted based on the inside information he had received, Dell's stock price increased following the earnings announcement. (GX 1842 (showing stock price increase of five percent within one day of the announcement)).

C. Discussion

Contrary to Newman's claim, there was no variance at all here, let alone a prejudicial variance. While it may have been preferable for the Indictment to allege that Dell's financial results generally would beat expectations in May 2008 without highlighting gross margins, the allegation was not limited to margins. The Indictment alleged, among other things, that Newman received inside information regarding Dell's quarterly financial results in advance of the company's quarterly announcement in May 2008. (A. 153). As Newman himself acknowledges, the Indictment's allegation that the tips included gross margin numbers was merely illustrative of the information that was disclosed. (A. 153 (alleging that the "Inside Information indicated, among other things, that gross margins would be higher than market expectations"); Newman Br. 52 n.25 (conceding that the language of the Indictment was not limited to tips

concerning gross margins and "leaves room for other parameters")). Indeed, the thrust of the allegation was that Newman received inside information that Dell's financial results would exceed market expectations, leading him to purchase a large volume of Dell stock so that he could capitalize on the rise in stock price following the announcement of those results. The proof at trial was consistent with—and certainly not materially different from—these allegations.

The trial evidence established that, in May 2008, Goyal received multiple tips from a Dell insider concerning the company's financial results for the preceding quarter and shared that information with Tortora, who, in turn, passed it along to Newman. The tips included information regarding revenues and operating expenses, in addition to gross margins. (*See* GX 600A). Newman emphasizes that while the Indictment alleged a tip that gross margins would exceed expectations, gross margins were ultimately lower than analysts' projections. (Newman Br. 52). The inside tip Tortora received on May 12, 2008, however, showed that revenues, gross margins, and operating expenses all would beat market projections. (*See* GX 600A). That Dell's gross margin numbers were subsequently revised downward during the consolidation process does not establish a variance. (*See* GX 1712A (showing gross margins of 18.5 to 18.6 percent as of May 12, consistent with the tip)). The evidence established that Newman received inside tips regarding Dell's quarterly financial results—including its gross margins—in advance of the company's May 2008 earnings announcement, just as the Indictment alleged.

Even if the Indictment's allegation that the inside information regarding Dell's quarterly financial results included, "among other things, that gross margins would be higher than market expectations" could somehow be interpreted as different from the evidence presented at trial, Newman has fallen far short of demonstrating that any such variance resulted in substantial prejudice. (A. 153). This Court has held that "[a] variance is immaterial—and hence not prejudicial—where the allegation and proof substantially correspond, where the variance is not of a character that could have misled the defendant at the trial, and where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the same offense." *United States* v. *LaSpina*, 299 F.3d 165, 183 (2d Cir. 2002) (internal quotation marks omitted). Newman does not assert that the purported variance would impede his ability to avoid double jeopardy. Instead, he claims that he was surprised by what he contends was a shift in the Government's theory at trial. (Newman Br. 54).

Newman's claim of surprise has no traction. As discussed, the Indictment put him on notice that the Government intended to prove he received inside tips in advance of Dell's May 2008 quarterly announcement that the company's financial results would beat market expectations, leading him to take a substantial long position in Dell stock. Moreover, the Government produced marked exhibits to him six weeks before the trial began. Those exhibits included a record of the tip provided in mid-May indicating that Dell's revenues, gross margins, and operating expenses would all exceed market projections.

(GX 600A). The exhibits also included an e-mail between Tortora and Goyal—which was both quoted and discussed at length in the criminal complaint filed against the defendants—reflecting the Government's theory that the inside information Newman obtained was, on the whole, positive. (GX 187 (e-mail indicating that Dell's EPS would beat market expectations by several cents per share)). *See United States* v. *Dupre*, 426 F.3d at 141-42 (variance not prejudicial where there was no claim of surprise because Government had produced documents containing evidence presented at trial well in advance of trial).

Perhaps the most powerful proof that Newman was not in fact surprised by the theory the Government pursued at trial was his own counsel's comments in opening statement. At the outset of the trial, even though the Government had not mentioned the May 2008 tips in its opening statement, Newman's counsel twice described the Government's theory as being that Newman received inside information that month that Dell would report positive results in its quarterly announcement. (Tr. 87 (stating that Count Two alleged that "Newman bought 475,000 shares of Dell because he had been given inside information, according to the[Government], that Dell would report positive results a few weeks later on May 29"), 88 (describing "May 16" as "when the government says [Newman] got inside information telling him he knew that the company[, that is, Dell,] was going to report positively")). As these comments demonstrate, Newman well understood the Government's theory as to the May 2008 Dell tips and was

not surprised at trial when the Government did not limit its proof to tips regarding gross margins.

Newman further asserts that the claimed prejudice was "particularly severe" because the District Court did not allow him to "fully explor[e] the inconsistencies in the government's allegations." (Newman Br. 54-55). Specifically, he contends that the District Court improperly prevented him from (1) seeking to refresh the cooperating witnesses' recollections, using the Indictment, as to whether they had told the Government they received tips in May 2008 related to gross margins; and (2) questioning the case agent about the criminal complaint he signed, which stated that Tortora received gross margin information in advance of Dell's May 2008 earnings announcement. These complaints regarding restrictions on Newman's examination of certain witnesses have no bearing on his claim of prejudicial variance, given this Court's precedent that a variance is prejudicial only when it "infringes on the 'substantial rights' that indictments exist to protect—to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy." *Dupre*, 462 F.3d at 141 (citation and internal quotation marks omitted). The complaints have no merit in any event.

Although Newman claims that the District Court prohibited him from showing three cooperating witnesses the Indictment "to refresh their memories" as to whether they had previously told the Government that, in May 2008, they received inside information related to gross margins, this is not what happened at trial. Newman's counsel did not ask to show

Tortora the Indictment. Instead, after confirming with Tortora on cross-examination that Tortora did not recall which "financial performance line items" he had received that quarter, Newman proposed to read aloud to the jury a paragraph from the Indictment in order to put the testimony "in context." (Tr. 826-27). The Court did not abuse its discretion in precluding Newman's counsel from doing so and directing him instead to "[a]sk [the witness] questions." (Tr. 827). *See* Fed. R. Evid. 611(a); *cf. United States* v. *Polizzi*, 500 F.2d 856, 876 (9th Cir. 1974) ("The decision to read the indictment to the jury is within the sound discretion of the trial court.").

Moreover, Newman fails to acknowledge that the District Court allowed him to attempt to refresh Goyal's and Adondakis's recollections on this very point with the informations containing the charges to which each of them had pleaded guilty. (Tr. 1571-72, 2463-67, 3431-32). In any event, it would not have been an abuse of discretion for the Court to prevent Newman from attempting to refresh the cooperating witnesses' recollections with the Indictment (had he sought to do so), given that it was a legal document based on a composite of information obtained from various sources and that Newman could have sought to refresh their memories with their own prior statements, as documented by the Government. *See Berkovich* v. *Hicks*, 922 F.2d 1018, 1025 (2d Cir. 1991) ("A trial judge has broad discretion to organize or limit the use of evidence to refresh recollection." (citation and internal quotation marks omitted)).

Nor is there any force to Newman's claim that the District Court abused its discretion in preventing him from questioning the case agent about the allegation in the criminal complaint that Dell's gross margins would beat market expectations. As Newman's counsel explained at trial, he sought to ask the case agent whether Goyal and Tortora were the source of this information in order to impeach them with a prior inconsistent statement. (Tr. 3432-37). The Court correctly found that there was no inconsistency between the witnesses' testimony and any prior statements they had made, because they had each testified that they did not recall what type of financial information they had received concerning Dell in May 2008. (Tr. 3437; *see also* Tr. 178-79 (Tortora testifying that he did not remember "the specific details of the line items" he received on Dell in May 2008), 788-89 (Tortora testifying on cross-examination that he was not certain whether he had received gross margin information on Dell in May 2008), 1571 (Goyal testifying on cross-examination that he did not recall what information he had received on Dell in May 2008)).

In any event, even if Newman's counsel had identified a prior inconsistent statement, he could not offer extrinsic evidence of any such statement under Rule 613(b) of the Federal Rules of Evidence without giving either Tortora or Goyal "an opportunity to explain or deny the statement," Fed. R. Evid. 613(b), which he failed to do. In these circumstances, the District Court cannot be said to have abused its discretion. *See United States* v. *Strother*, 49 F.3d 869, 874-75 (2d Cir. 1995) ("We review a district court's

determination of whether statements are inconsistent with each other for an abuse of discretion.").

In sum, there was no variance here, prejudicial or otherwise. Newman's claim should therefore be rejected.

POINT IV

Chiasson's Sentence Was Reasonable

Chiasson challenges his sentence of 78 months' imprisonment as both procedurally and substantively unreasonable. (Chiasson Br. 53-70). He contends that his sentence was procedurally unreasonable because the District Court included in its calculation of gain the illicit profits generated not only by Chiasson's own trades on behalf of Level Global, but also the trades made by Level Global's other co-founder, David Ganek, who the Court found was a co-conspirator. Contrary to Chiasson's claim, that finding was not clearly erroneous, and the inclusion of Ganek's trades in the gain calculation was therefore proper. Moreover, Chiasson's further argument that his sentence was substantively unreasonable because the Court placed undue emphasis on gain and failed to account for unwarranted sentencing disparities also lacks merit. Chiasson's sentence—which was substantially below the applicable Guidelines range—was reasonable.

A. Relevant Facts

In advance of Chiasson's sentencing, the Probation Office prepared a Presentence Report. In calcu-

lating the applicable range under the United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines"), the Probation Office determined that Chiasson was responsible for unlawful trading gains of approximately $40 million. (PSR ¶¶ 32, 36, 41, 42, 51).[37] Accordingly, the Probation Office concluded that Chiasson's total offense level was 30, that he fell within Criminal History Category I, and that his Guidelines range was 97 to 121 months' imprisonment. (PSR ¶ 93). The Probation Office recommended a sentence of 97 months' imprisonment. (PSR at 28-29, Sentencing Recommendation).

In his sentencing submission, Chiasson challenged the Probation Office's Guidelines calculation, arguing that the trading gains should be limited to trades executed by Chiasson himself. (A. 2574-77). Chiasson further requested that the District Court grant a "substantial downward variance" from the Guidelines range. (A. 2578). Chiasson's submission included an extensive discussion of other insider-trading defendants and their sentences, arguing that a substantially below-Guidelines sentence was necessary to avoid

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[37] Although the actual trading gains realized by Level Global were in excess of $50 million, the Probation Office utilized the same "24-hour rule" that the District Court had applied at Newman's sentencing, and calculated insider trading gains based on the stock price 24 hours after the public announcement of the inside information, on the assumption that the information was fully embedded in the stock price by that time.

unwarranted sentencing disparities. (A. 2579-92). Chiasson also argued that such a sentence was warranted because of Chiasson's personal history and family circumstances; the Guidelines' emphasis on profits; and the aberrational nature of Chiasson's criminal conduct. (A. 2592-607).

In its sentencing submission, the Government advocated for a sentence within the Guidelines range of 97 to 121 months' imprisonment, noting the extraordinary scope of the conspiracy, Chiasson's role in it, and the enormous trading gains realized by Chiasson and his co-conspirators at Level Global. (A. 2777-93). With respect to the Guidelines calculation, the Government argued that the calculation of gains should include not only trades Chiasson executed himself, but also trades directed by co-conspirator David Ganek, who had co-founded Level Global with Chiasson. (A. 2796-97). On that point, the Government argued that to the extent Ganek had directed some of the trades at issue, he and Chiasson had been acting in concert with one another. (The District Court had previously made a finding at trial by a preponderance of the evidence that Ganek was also a member of the conspiracy, as discussed in Point V, *infra*.)

On May 13, 2013, the parties appeared before the District Court for sentencing. The Court first addressed the Guidelines calculation, noting that the principal dispute between the parties was whether to include trades at Level Global that were directed by Ganek. (A. 2880-81). Chiasson argued that he should be treated similarly as certain downstream tippees in an unrelated case, *United States* v. *Goffer*, 10 Cr. 56

(RJS), where the tippee defendants where held responsible for the profits resulting from their own trades and not those of co-conspirators. (A. 2881-83). The Government countered that the two cases were not factually analogous, as the tippee-defendants in *Goffer* worked at different firms and traded independently of one another; in contrast, the trades at Level Global, whether directed by Ganek or Chiasson, were all part of a single trade built up over time—namely, a short of Dell stock based on inside information Adondakis had obtained indirectly from inside Dell. (A. 2883-88). The Court agreed with the Government largely for the reasons set forth in its sentencing submission and found, consistent with the Presentence Report, that the gain attributable to Chiasson was more than $20 million, resulting in a Guidelines range of 97 to 121 months. (A. 2888).

The District Court next identified the different factors it was required to consider under Section 3553(a) of Title 18, United States Code, in determining an appropriate sentence, including the need to avoid unwarranted sentencing disparities among similarly situated defendants, and then heard from both parties. (A. 2888-91). Chiasson's counsel requested that the Court show leniency based on Chiasson's personal history and the sentences imposed on other insider trading defendants. (A. 2912-20). The Government reiterated its view of the seriousness of the offense. (A. 2920-21).

The District Court then discussed the application of the various Section 3553(a) factors. With respect to the circumstances of the offense, the Court comment-

ed that the criminal conduct took place over a "long period of time" and "wasn't just one error in judgment" because "[i]t was repeated over multiple months and even years." (A. 2927). The Court also noted that the incentives for Chiasson to commit the crime should have been greatly diminished since he was a wealthy individual earning more than $10 million a year. (A. 2927). The Court agreed that Chiasson was less culpable than certain other insider trading defendants, like Zvi Goffer, who received a sentence of 120 months' imprisonment. (A. 2930). At the same time, the Court remarked that Chiasson had engaged in efforts to conceal his criminal conduct and that the size of the illegal profits was extraordinary. (A. 2930-31). The Court explained that "the size of the bet matters and the size of the gains matter. I think that they should be discounted to some extent. I agree with [counsel for Chiasson], they shouldn't be the only thing that matters, but they do matter." (A. 2931). Balancing all the different factors, the Court concluded that a sentence of 78 months' imprisonment was warranted.

B. Applicable Law

1. Appellate Review of Sentences

Appellate review of a district court's sentence "encompasses two components: procedural review and substantive review." *United States* v. *Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc); *see generally United States* v. *Booker*, 543 U.S. 220 (2005); *United States* v. *Crosby*, 397 F.3d 103 (2d Cir. 2005). A district court "commits procedural error where it fails to

calculate the Guidelines range (unless the omission of the calculation is justified), makes a mistake in its Guidelines calculation, [] treats the Guidelines as mandatory[,] . . . does not consider the Section 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *United States* v. *Cavera*, 550 F.3d at 190 (internal citations omitted); *see also Gall* v. *United States*, 552 U.S. 38, 51 (2007).

If the Court determines that there was no procedural error, it "should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall* v. *United States*, 552 U.S. at 51. In applying that standard, the Court must "take into account the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion and bearing in mind the institutional advantages of district courts." *Cavera*, 550 F.3d at 190; *see also United States* v. *Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006). The Court has elaborated on the definition of substantive reasonableness and, in doing so, indicated that the substantive reasonableness standard "provide[s] a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States* v. *Rigas*, 583 F.3d 108, 123 (2d Cir. 2009); *see also Cavera*, 550 F.3d at 190 (stating that the Court will "set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions' " (emphasis

in original; quoting *United States* v. *Rigas*, 490 F.3d at 238)).

2. Consideration of Sentencing Disparities

When sentencing a defendant, a court "shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The "primary purpose of th[is] provision was to reduce unwarranted sentence disparities nationwide," although the statute does not limit the sentencing court from considering other types of disparities, including comparisons with co-defendants' sentences. *United States* v. *Wills*, 476 F.3d 103, 109 (2d Cir. 2007); *see United States* v. *Frias*, 521 F.3d 229, 236 (2d Cir. 2008).

This Court has repeatedly reaffirmed that sentencing disparities are not "unwarranted" where defendants are not "similarly situated." *United States* v. *Wills*, 476 F.3d at 109-10; *United States* v. *Fernandez*, 443 F.3d at 32 ("[A] sentencing difference is not a forbidden 'disparity' if it is justified by legitimate considerations, such as rewards for cooperation."(citation and internal quotation marks omitted)). Moreover, as this Court has explained, even where a sentencing judge acknowledges the existence of a disparity, such acknowledgment does not necessarily require the judge to "adjust a sentence downward from the advisory guidelines range in order for that sentence to be reasonable." *United States* v. *Florez*, 447 F.3d 145, 157-58 (2006) (citation and internal quotation marks omitted). That is, "if sentencing disparities . . . are

properly considered, the weight to be given such disparities, like the weight to be given any '3553(a) factor,' is a matter firmly committed to the discretion of the sentencing judge and is beyond our [appellate] review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *Id.* at 158 (quoting *Fernandez*, 443 F.3d at 32). This Court has further explained that "[a] reviewing court's concern about unwarranted disparities is at a minimum when a sentence is within the Guidelines range." *United States* v. *Irving*, 554 F.3d 64, 76 (2d Cir. 2009) (internal quotation marks omitted).

C. Discussion

1. Chiasson's Sentence Was Procedurally Reasonable

Chiasson contends that the District Court incorrectly calculated Chiasson's trading gains by including the gains from trades placed on behalf of Level Global by both Chiasson and Ganek. (Chiasson Br. 59-62). He argues that Ganek's trades should not have been included "[a]bsent evidence that Ganek joined a conspiracy with Chiasson." (Chiasson Br. 61). But that is precisely the finding the Court made at trial. Because that finding was not clearly erroneous, *see* Point V, *infra*, the Court's inclusion of Ganek's trades in the gain calculation was proper.

Under the Guidelines, gain in insider trading cases includes all gains that result 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, com-

ment. background (emphasis added). That was plainly the case here. The Dell trades made at Level Global in July and August 2008 by Chiasson and Ganek, the co-founders of the firm, were all part of a single position built up over time—a massive short in Dell stock based on the inside tip Adondakis had received about Dell's surprisingly weak margins for the quarter.

As set forth in greater detail in Point V, *infra*, in July and August 2008, Ganek received multiple updates about Dell's upcoming quarterly results based on inside tips. (*See, e.g.*, GX 459 (Adondakis informing Chiasson and Ganek that he would get "the DELL check mid-week"), 513 (e-mail from Chiasson to Ganek stating that while an analyst was predicting gross margins for Dell of 18 percent, "our call is 17.5ish"—a reference to the inside information Adondakis had received about Dell's disappointing margins and the basis for the firm's short position in Dell)). Ganek's communications with others at Level Global demonstrated that he understood the source of the information was an insider at Dell. (*See, e.g.*, GX 438 (instant message in which Ganek asked another co-conspirator at Level Global, "did sam here [sic] from his dell contact?"), 515 (Chiasson informing Ganek that a certain analyst believed Dell would miss margin expectations and specifically advising Ganek that although that analyst "has a few guys there [*i.e.*, at Dell]," they were "not sam's people")). Indeed, as a matter of common sense, it defies logic to believe that Ganek would permit his firm to take a $220 million short position—the second largest short in its history—based on an unknown source. (DX 39;

GX 64). As the District Court explained, the nature of the information and Ganek's awareness of "the series of incremental checks spaced out over several weeks, which is consistent with financial results being firmed up as the roll up process is taking place, as the reporting date approaches," provided ample evidence that he knew the source of the tips. (Tr. 3255).

Other evidence also supported the conclusion that Chiasson and Ganek acted in concert with one another. In August 2008, for example, after Adondakis prepared an analysis of how Dell's stock would react to the public announcement of the inside information he had received from Tortora, Adondakis printed the analysis and took it to a meeting with Chiasson and another senior Level Global employee with whom he discussed the analysis. (Tr. 1778). Adondakis then observed Chiasson and the other Level Global employee take the analysis into Ganek's office in a closed door meeting without Adondakis. (Tr. 1779). And the day before the earnings announcement, on August 27, 2008, Adondakis had a 40 minute call with Chiasson, Ganek and two other coconspirators at Level Global in which Adondakis informed the group he "ha[d] another Dell update" indicating gross margins were coming in below expectations. (Tr. 1805; GX 523). In light of the extensive evidence of Ganek's participation in the conspiracy with Chiasson, the District Court's finding that the gain attributable to Chiasson was more than $20 million was not clearly erroneous.

Chiasson also suggests that he should have been held accountable only for his own trades in light of

the District Court's approach to sentencing downstream tippees in *Goffer*. There, several downstream tippees—Emanuel Goffer, Michael Kimelman and Craig Drimal—received inside tips from the same source, but for Guidelines purposes, were held responsible only for their own trades. Chiasson's reliance on *Goffer* is unavailing.

First, while Chiasson relies on the District Court's approach in *Goffer* to argue that a downstream tippee can be held accountable only for his or her own trades, or for the trades of those tipped by the defendant, the language of the Guidelines is not so limited. The Guidelines provide that gain in insider trading cases includes the gain resulting from trades by (1) the defendant, (2) people the defendant tipped, *and* (3) persons acting in concert with the defendant. *See* U.S.S.G. § 2B1.4, comment. background.

Second, and in any event, Chiasson is not similarly situated to the *Goffer* tippees vis-à-vis Ganek. In *Goffer,* at the time of the trades in question, the downstream tippees worked at three different firms, received information from the same source (Goffer) but through different tipping chains, and traded independently of one another. The relationship among those tippees is most analogous to the relationship between Chiasson and Newman, not Chiasson and Ganek. Consistent with its approach in *Goffer*, the District Court did *not* include Newman's gains (or those of co-conspirators at other investment firms) in Chiasson's gain calculation.

Finally, Chiasson's claim that the District Court did not make sufficiently specific findings to permit

review for clear error by this Court is belied by the record. (Chiasson Br. 59). The Court stated that it largely agreed with the reasons set forth in the Government's sentencing submission, which described the evidence supporting the inclusion of Ganek's trades. On top of that, the Court had already explained at trial its finding that Ganek was a co-conspirator. (Tr. 3254-56; *see* Point V, *infra*). This record is easily sufficient for this Court to conclude that the District Court's finding was not clearly erroneous.

2. Chiasson's Sentence Was Substantively Reasonable

Chiasson further contends that his sentence was substantively unreasonable, claiming that the District Court placed undue emphasis on the amount of gain and failed adequately to take into account the need to avoid unwarranted sentencing disparities. (Chiasson Br. 62-70). At Chiasson's sentencing, the Court expressly recognized its statutory obligation to consider, among other factors, the need to avoid unwarranted sentencing disparities. The Court balanced each of those factors and concluded that a sentence of 78 months—substantially below the Guidelines range—was appropriate. In light of all the factors set forth in Section 3553(a), Chiasson's sentence was reasonable.

Chiasson's unlawful conduct spanned a period of nearly two years and encompassed multiple trades in various securities based on a number of different illegal tips. Chiasson repeatedly and deliberately traded

on inside information—information he knew had been disclosed by company insiders in intentional breach of their duties of confidentiality. Chiasson also understood the enormous scope of the conspiracy; in addition to the massive trades made at Level Global, the inside information was being exchanged with other firms that also were trading on the information. Further, Chiasson took steps to conceal the illicit sources of information on which his trades were based. Indeed, he took an internal system at Level Global that was designed to create transparency and turned it on its head, using it to create a bogus paper trail to justify his unlawful trades while concealing their true basis. Chiasson was a sophisticated market professional who plainly understood the illegality of his conduct; to make matters worse, Chiasson was one of three people designated by Level Global to answer employees' questions about the firm's compliance policies, including its insider trading policy. (GX 595).

The magnitude of Chiasson's unlawful trades and resulting profits was truly staggering. The $220 million short of Dell stock in August 2008—based on inside information about the company's quarterly financial results—was Level Global's second largest short position ever, and it led to profits in excess of $50 million. (DX 39; GX 64). The unlawful profits from that position were enormous and unprecedented.

As even Chiasson is forced to concede, the size of the gains is a relevant sentencing consideration. The enormous gain from Chiasson's criminal conduct is

certainly a reflection of the extent of his criminal conduct, the extent of his corruption of the capital markets, and the harm caused to others. Many of the harms caused by insider trading are magnified when the unlawful trades and resulting profits are as massive as they were here. *See Goffer,* 721 F.3d at 132 (insider trading gain of approximately $11 million "had major deleterious effects on the market"). For one, the greater the gain resulting from the unlawful trades, the greater the loss to other participants in the market. Further, as Congress has found, insider trading undermines the public's confidence in the integrity of the financial markets. *See* Insider Trading and Securities Fraud Enforcement Act of 1988, H.R. Rep. No. 100-910, at 7-8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6044 (stating that "[i]nsider trading damages the legitimacy of the capital market and diminishes the public's faith . . . . [T]he small investor will be—and has been—reluctant to invest in the market if he feels it is rigged against him"); *see also* Insider Trading Sanctions Act of 1984, H.R. Rep. No. 98-355, at 5 (1983), *reprinted in* 1984 U.S.C.C.A.N. 2274, 2278 (emphasizing that "[t]he abuse of informational advantages that other investors cannot hope to overcome through their own efforts is unfair and inconsistent with the investing public's legitimate expectation of honest and fair securities markets where all participants play by the same rules"). The resulting damage is particularly severe where, as here, a multi-billion-dollar hedge fund reaps profits of more than $50 million from a single insider trade.

Even apart from its relevance to the "nature and circumstances of the offense," however, gain is also

relevant to another Section 3553(a) factor that Chiasson overlooks, namely, the need to provide adequate deterrence. Because insider trading has the potential, as demonstrated by the facts of this case, to be an extraordinarily profitable crime, substantial sentences are necessary to counter the incentives to engage in such activity. *See Goffer,* 721 F.3d at 132 ("The district court's assertion that insider trading requires high sentences to alter th[e] calculus" that insider trading is "a game worth playing" given the potential for large profits "is a Congressionally-approved example of giving meaning to the 18 U.S.C. § 3553(a) factors").

Chiasson's contention that his sentence was substantively unreasonable rests largely on comparisons to sentences received by a handful of other insider trading defendants. Of course, the District Court expressly recognized that the need to avoid unwarranted sentencing disparities was one of a number of factors the sentencing court had to consider; the weight to be given that factor, however, was a matter committed to the discretion of the District Court. *United States* v. *Florez*, 447 F.3d at 157-58. In any event, the comparisons upon which Chiasson relies are inapt.

In comparing himself to other insider trading defendants, Chiasson highlights facts from those cases that are favorable to him, while ignoring important differences. Chiasson compares himself, for example, to Joseph Contorinis, a tippee who received a 72-month sentence. Chiasson correctly notes that Contorinis testified untruthfully at trial, but overlooks that Contorinis's criminal conduct was more limited

in duration and scope than Chiasson's, as Contorinis traded only a single stock, over a short period of time, based on tips from one source about a single transaction.

Chiasson focuses most, however, on the 66-month sentence imposed on Craig Drimal, a downstream tippee in *Goffer*. Chiasson points to certain aggravating factors present in that case, but does not account for the fact that Drimal accepted responsibility and pleaded guilty. (Had Chiasson done so, his Guidelines range would have been substantially reduced.) Further, Chiasson's gains were nearly four times the size of Drimal's, which this Court described as having "major deleterious effects on the market." *Goffer*, 721 F.3d at 132.

Chiasson fails to acknowledge that the key differentiating factor between Drimal and other downstream tippees in *Goffer* (who received substantially lower sentences than he did) was the size of their respective gains. Emanuel Goffer, for example, received a sentence of 36 months' imprisonment even though he shared virtually all of the aggravating factors Chiasson highlights for Drimal (and, unlike Drimal, went to trial); Emanuel Goffer's profits, however, were far smaller than Drimal's. Significantly, this Court affirmed Drimal's 66-month sentence, agreeing with the District Court's consideration of gain as an important sentencing factor. *See Goffer*, 721 F.3d at 132.

Finally, Chiasson argues that a sentence two years longer than that received by Newman was not justified. Chiasson's gain, however, exceeded New-

man's by a factor of ten. That Chiasson disagrees with the District Court's balancing of the different factors does not render his sentence unreasonable. As this Court has made clear, "[t]he weight to be afforded any given argument made pursuant to one of the § 3553 factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *United States* v. *Nektalov*, 461 F.3d 309, 319 (2d Cir. 2006) (quoting *Fernandez*, 443 F.3d at 32). Here, in light of all the Section 3553(a) factors, Chiasson's below-Guidelines sentence was reasonable.

POINT V

The Forfeiture Order Was Proper

Chiasson finally challenges two aspects of the forfeiture order imposed by the District Court, claiming that the Court committed clear error in finding that David Ganek was a co-conspirator and contending that he was entitled to a jury determination, beyond a reasonable doubt, as to the amount of forfeiture. (Chiasson Br. 70-79). Neither of Chiasson's arguments has merit.

A. Relevant Facts

The evidence at trial established that Ganek was aware that Sam Adondakis (Chiasson's analyst at Level Global) had a source who was a Dell insider, and that Ganek knew Adondakis received numerous updates on Dell's financial results leading up to the company's August 2008 earnings announcement. On

August 5, 2008, Adondakis received an initial inside tip concerning Dell's performance in the quarter that had just ended, and passed the information along to Chiasson. (GX 214; Tr. 1761). Three days later, Ganek sent an instant message to another trader at Level Global asking whether Adondakis had heard "from his dell contact." (GX 438). The trader responded, "initial check was neg earlier in the week, next one is later next week I believe (not sure of exact timing), then one more right before the q." (GX 438).

Around that same time, Adondakis used the inside information he had received to prepare an analysis of how the market would react to Dell's quarterly earnings report. (Tr. 1774-78). Adondakis discussed the document in a meeting with Chiasson and another senior Level Global employee; Chiasson and the other employee then took the document to Ganek's office. (Tr. 1778-79). Following this meeting, Level Global increased its short position in Dell. Subsequently, on August 15, Adondakis wrote an e-mail to Chiasson, Ganek, and others, explaining that he would "get the DELL check mid-week & the company reports the following Thurs." (GX 459).

On August 26, Chiasson wrote to Ganek that an analyst had predicted that Dell would report a gross margin of 18 percent, but—consistent with the tip Adondakis had received—stated, "[o]ur call is 17.5ish." (GX 513). Chiasson also informed Ganek that an analyst named Fortuna was predicting a gross margin "miss." (GX 513). In a series of instant messages later that same day, Chiasson told Ganek that "[For]tuna smells it" and that Fortuna "has a

few guys" at Dell, but that they "are not sam's people." (GX 515).

On August 27, the day before Dell's quarterly announcement, Adondakis had a lengthy telephone call with Chiasson, Ganek, and two other Level Global employees during which Adondakis informed the group that he had another Dell update indicating that the company's gross margins would be lower than expectations. (Tr. 1805; GX 523). While he was still on the call with Adondakis, Ganek instructed a trader to increase Level Global's short position in Dell.

The evidence also established that Ganek knew Adondakis had a source of inside information on NVIDIA, and that this insider provided a series of updates leading up to NVIDIA's May 7, 2009 earnings announcement. On April 27, 2009, Adondakis received an initial tip regarding NVIDIA's gross margins for the quarter (that the company would report 30 percent), and passed it along to Chiasson. (GX 813, 900). The very next day, Chiasson sent an e-mail to Ganek in which he explained that "Sammy [Adondakis] thinks we will get a firmer read shortly," and that "[p]relim call [on gross margins] is Street is 34/ our check is 30 GM." (GX 907). Adondakis got his next inside tip on NVIDIA on May 4. (GX 820). That same day, a Level Global trader wrote Ganek that Chiasson was shorting NVIDIA "500k for starters" based on "Sam's latest check" that "GM's will be light when [NVIDIA] report[s] on Thursday." (GX 927). That evening, Ganek and Chiasson had the following instant message exchange:

Ganek:	nvda?
Chiasson:	starting to do a little here . . . gm call remains bad and bad for this qtr and guide[.] [C]alls so far we are doing this aft suggest people not prepared for what is coming in print and guide versus our checks . . . .
Ganek:	have gotten anything incremental to last weeks call?
Chiasson:	yes this call today.

(GX 923).

At trial, the District Court admitted Ganek's statements in these various instant message and e-mail communications as co-conspirator statements, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, finding that the Government had established by a preponderance of the evidence that Ganek was a co-conspirator of Chiasson's. (Tr. 3257). The Court stated that, although Adondakis did not explicitly tell Ganek he had a source inside Dell, a preponderance of the evidence showed that "Ganek was aware of the source and the nature of th[e] information" Adondakis provided. (Tr. 3254). In this regard, the Court commented that Ganek knew Adondakis had a Dell contact, that Ganek "was aware that the Dell contact was providing Adondakis with a series of incremental checks . . . spaced out over several

weeks, which is consistent with financial results being firmed up as the roll up process is taking place," and that Ganek knew "Adondakis was providing Dell checks to Ganek during a black-out period for Dell." (Tr. 3255). As for NVIDIA, the Court emphasized that Ganek was aware Adondakis's information would become "firmer as the earnings report approached." (Tr. 3255). The Court further found that Ganek's authorization of "large trading positions" in Dell and NVIDIA shortly after receiving information from Adondakis was "circumstantial evidence of his knowledge." (Tr. 3255).

Consistent with these findings at trial, in determining the forfeiture amount, the Court stated that Ganek was an unindicted co-conspirator and ordered Chiasson to forfeit $1,382,217, a sum representing incentive and management fees received by both Chiasson and Ganek. (A. 3003).

B. Applicable Law

The forfeiture statute pertaining to securities fraud broadly provides for the forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to [the] violation." 18 U.S.C. § 981(a)(1)(C).[38] "[A] court may order a defendant to forfeit proceeds received by others who

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[38] Although Section 981 is a civil forfeiture provision, 28 U.S.C. § 2461 provides that criminal forfeiture is mandated where federal law provides for civil forfeiture but there is no parallel criminal forfeiture provision.

participated jointly in the crime, provided the actions generating those proceeds were reasonably foreseeable to the defendant." *Contorinis*, 692 F.3d at 147; *United States* v. *Fruchter*, 411 F.3d 377, 384 (2d Cir. 2005) ("So long as the sentencing court finds by a preponderance of the evidence that the criminal conduct through which the proceeds were made was foreseeable to the defendant, the proceeds should form part of the forfeiture judgment."); *see also United States* v. *Royer*, 549 F.3d 886, 904 (2d Cir. 2008) (affirming forfeiture amount which, like the gain amount found at sentencing, incorporated the fraudulent conduct of persons who acted in concert with the defendant).

The Government must prove the facts supporting forfeiture only by a preponderance of the evidence. *See United States* v. *Treacy*, 639 F.3d 32, 48 (2d Cir. 2011); *United States* v. *Gaskin*, 364 F.3d at 461. Moreover, "[t]he Court's determination [as to the proper forfeiture amount] may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B). "When a forfeiture award is challenged on appeal, this Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error." *United States* v. *Treacy*, 639 F.3d at 47. Under this standard, if the district court's factual findings are " 'plausible in light of the record viewed in its entirety,' " *United States* v. *Reilly*, 76 F.3d 1271, 1276 (2d Cir. 1996) (quoting *Anderson* v. *City of Bessemer*

City, 470 U.S. 564, 574 (1985)), then the district court's findings should be affirmed.

C. Discussion

1. The District Court's Factual Findings Were Not Clearly Erroneous

Chiasson contends that the District Court committed clear error in finding, by a preponderance of the evidence, that Ganek was a co-conspirator. (Chiasson Br. 72-74). This claim is unavailing. As the Court found at trial, a preponderance of the evidence showed that Ganek "was aware of the source and the nature of th[e] information" Adondakis provided regarding Dell and NVIDIA. (Tr. 3254).

As to Dell, e-mails and instant messages showed that Ganek knew Adondakis had a contact at Dell (GX 438 (Ganek writing, "did sam here [sic] from his dell contact?"), and that Adondakis was providing incremental updates as Dell consolidated its internal financial numbers before reporting them (GX 438 (trader writing to Ganek on August 8, 2008, that Adondakis's "initial check was neg earlier in the week, next one is later next week I believe (not sure of exact timing), then one more right before the q"), 459 (Adondakis writing to Ganek and others on August 15, 2008, that he would "get the DELL check mid-week & the company reports the following Thurs")). Based on information Adondakis provided, Ganek approved increasing Level Global's short position in Dell (which was the second largest short position Level Global had ever taken in any stock) in advance of Dell's August 2008 earnings announcement.

In light of the documentary evidence—and given that it is highly unlikely Ganek would have approved such a large short position without knowing the basis for the trade—the District Court had ample basis for its conclusion that Ganek knew Adondakis had inside information on Dell's financial results.

As to NVIDIA, documentary evidence established that Ganek knew Adondakis had received specific information regarding the gross margin number the company would report in its May 2009 earnings announcement and expected to "get a firmer read shortly." (GX 907). Ganek was also informed that Adondakis received an update on NVIDIA's gross margins only days before the announcement, and that Adondakis's source had stated that gross margins would be lower than market expectations. (GX 923, 927). The District Court was entitled to rely on this evidence to conclude that Ganek knew he was obtaining nonpublic information regarding the consolidation of NVIDIA's financial data leading up to the quarterly earnings announcement.

In pressing a contrary conclusion, Chiasson emphasizes that Adondakis testified "he did *not* reveal his inside sources to Ganek." (Chiasson Br. 72 (emphasis in original)). That Adondakis did not do so was hardly surprising, given that he reported to Chiasson and had little interaction with Ganek before the summer of 2008. (Tr. 1955). The documentary evidence, however, provided ample basis for the District Court to conclude that Ganek was aware of Adondakis's sources, either through Chiasson or other employees at Level Global.

Chiasson further argues that "even if Ganek knew that Adondakis got inside information," he nonetheless was not a co-conspirator because "[t]here 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." (Chiasson Br. 72). Given Ganek's knowledge that Adondakis had access to consolidated earnings numbers as Dell and NVIDIA prepared their quarterly reports, the District Court could properly conclude by a preponderance of the evidence that Ganek knew Adondakis's source was disclosing the information improperly, in violation of a duty of confidentiality. Moreover, as explained above, Ganek need not have known that the insiders disclosed the information for a personal benefit. In any event, the Court could properly infer that Ganek was aware an insider would disclose such information only in exchange for some benefit.

Chiasson also asserts that Ganek's trades in Dell and NIVIDIA were not "unusually large given [Level Global's] size," and contends that the District Court placed undue weight on the volume of those trades. (Chiasson Br. 73). Contrary to this claim, the Court properly considered the size of the trades, given that Level Global's Dell trade in August 2008 was the second largest short position the firm had ever taken (DX 39), and that the Dell and NVIDIA trades (involving positions of $220 and $45 million, respectively) were indisputably significant (GX 62, 73).

As a last ditch effort to attack the District Court's finding, Chiasson argues that the Court improperly

speculated that, after Adondakis presented to Chiasson and a Level Global trader an analysis of Dell based on his inside information, Chiasson, the trader, and Ganek discussed Adondakis's analysis (and his source) in a closed-door meeting. (Chiasson Br. 73; Tr. 3256-57). In light of the documentary evidence demonstrating Ganek's knowledge of Adondakis's source, the Court had ample basis to draw this inference. Nor is there any traction to Chiasson's claim that this meeting did not occur because Ganek "was not in the office" on the day Adondakis testified it occurred. (Chiasson Br. 73). Even if Adondakis were incorrect as to the date of the meeting, the Court did not clearly err in crediting Adondakis's testimony that it happened.

Because the District Court did not commit clear error in determining that Ganek was a co-conspirator, Chiasson's challenge to the forfeiture amount should be rejected.

2. The District Court Properly Determined Forfeiture by a Preponderance of the Evidence

Chiasson further argues that, even if the District Court's factual findings were correct, the forfeiture order should be vacated because "the operative facts had to be found by a jury beyond a reasonable doubt." (Chiasson Br. 74). Chiasson contends that his position finds support in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and "evolving Supreme Court case law." (Chiasson Br. 74). He is mistaken. The Supreme Court has expressly held that "the right to a jury ver-

dict on forfeitability does not fall within the Sixth Amendment's constitutional protection." *Libretti* v. *United States*, 516 U.S. 29, 49 (1995).

Following the Supreme Court's ruling in *United States* v. *Booker*, 543 U.S. 220, this Court rejected an earlier iteration of the argument Chiasson presses here. In *United States* v. *Fruchter*, 411 F.3d 377, this Court considered a claim that *Apprendi* and its progeny had "so undercut *Libretti* as to have overruled it sub silentio." *United States* v. *Fruchter*, 411 F.3d at 381. Acknowledging that "*Libretti* remains the law until the Supreme Court expressly overturns it," the Court nonetheless considered and rejected the defendant's claim on the merits. *Id.* at 381-82 (citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The Court held that the rule of *Apprendi* that reserves to juries the determination of any fact (other than the fact of a prior conviction) that increases a defendant's maximum sentence does not apply to criminal forfeiture, because such forfeiture is "*not* a determinate [sentencing] scheme" and is a "different animal from determinate sentencing" in that there is "no . . . previously specified range" that applies to forfeiture. *Fruchter*, 411 F.3d at 383 (emphasis in original). The Court thus squarely held in *Fruchter* that forfeiture need not be proven to a jury beyond a reasonable doubt.

In arguing that *Libretti* and *Fruchter* are no longer good law, Chiasson relies on the Supreme Court's recent decisions in *Southern Union Co.* v. *United States*, 132 S. Ct. 2344 (2012), and *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013). (Chiasson Br. 76-77).

Neither case purported to overrule *Libretti*. Accordingly, *Libretti* remains binding precedent. *See Fruchter*, 411 F.3d at 381-82. In any event, the reasoning of those cases does not undermine *Libretti*'s holding.

In *Southern Union*, which does not address forfeiture at all, the Supreme Court held that the *Apprendi* rule applies to criminal fines. The criminal statute at issue in the case, which prohibited storing liquid mercury without a permit, authorized a maximum fine of $50,000 for each day of violation. *Southern Union Co.* v. *United States*, 132 S. Ct. at 2349. The Court ruled that, in order for a district court to impose a fine greater than $50,000, the jury must make a finding as to the duration of the violation. In so holding, the Court recognized that there could be no "*Apprendi* violation where no maximum is prescribed." *Id.* at 2353. Thus, far from requiring jury determinations as to forfeiture, *Southern Union* acknowledges that *Apprendi* is not implicated where a statute—like the forfeiture statutes at issue here—does not set a maximum penalty. Indeed, two Courts of Appeals have rejected *Apprendi*-type challenges to criminal forfeiture based on *Southern Union*, relying on the very reason this Court identified in *Fruchter*. *See United States* v. *Day*, 700 F.3d 713, 732-33 (4th Cir. 2012) (Wilkinson, *J.*); *United States* v. *Phillips*, 704 F.3d 754, 770 (9th Cir. 2012) (Rakoff, *J.*).

Nor does *Alleyne*, which also does not address forfeiture, support Chiasson's argument. *Alleyne* held that "any fact that increases the mandatory minimum [sentence for a crime] is an 'element' that must be submitted to the jury." *Alleyne* v. *United States*,

133 S. Ct. at 2155. In so holding, the Court emphasized that "the essential Sixth Amendment inquiry is whether a fact is an element of the crime," and stated that "[w]hen a fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 2162. Applying this holding, the Court found that Section 924(c) of Title 18, United States Code, establishes an offense of using or carrying a firearm in relation to a crime of violence (which carries a mandatory minimum sentence of five years' imprisonment) and an aggravated offense of brandishing a firearm in relation to a crime of violence (which carries a mandatory minimum sentence of seven years' imprisonment). *Id.* Section 924(c) thus establishes multiple offenses with aggravating elements that trigger enhanced mandatory minimum penalties.

If Chiasson were correct that *Alleyne* applied to the forfeiture statute at issue here, that statute would create an infinite number of separate, aggravated offenses, with each additional dollar (or other quantum) of criminal proceeds subject to forfeiture representing an element of an aggravated offense. As this Court has recognized, however, forfeiture statutes are a "different animal" from determinate sentencing regimes—like the one established in Section 924(c)—that "authorize[ ] the imposition of a sentence within a specified range." *Fruchter*, 411 F.3d at 383. Indeed, rather than defining gradations of offenses, the forfeiture statute applicable here simply provides that all property representing proceeds of illegal activity is subject to forfeiture. *See* 18 U.S.C.

§ 981(a)(1)(C). It is thus unlike the statute at issue in *Alleyne*, because there are "no . . . previously specified range[s]." *Fruchter*, 411 F.3d at 383.

Moreover, and contrary to Chiasson's claim, Section 981(a)(1)(C) does not establish a mandatory minimum at all. Even if the statute could somehow be interpreted as designating the District Court's finding of fact as to the forfeiture amount as a mandatory minimum, however, that finding was authorized by the jury's verdict. This is because Chiasson's conviction authorized forfeiture of a specific sum, namely, any property constituting or derived from proceeds of his crimes. The District Court, in determining the extent of those proceeds, was merely giving definite shape to the forfeiture permitted by the jury's verdict. *Cf. United States* v. *Leahy*, 438 F.3d 328, 337-38 (3d Cir. 2006) (en banc) (relying on similar reasoning to reject *Apprendi*-type challenge to restitution; cited favorably in *United States* v. *Reifler*, 446 F.3d 65, 118-19 (2d Cir. 2006)). Chiasson is thus wrong in asserting that, because forfeiture is mandatory, the forfeiture statute creates "a statutory mandatory minimum penalty" not authorized by the verdict. (Chiasson Br. 76 (quoting 28 U.S.C. § 2461(c), which provides that district courts "shall order" forfeiture)).

In this regard, Chiasson's argument that the District Court's findings concerning forfeiture effectively created a statutory mandatory minimum penalty is inconsistent with this Court's ruling in *Fruchter*. If the Court's findings were understood as effectively establishing a mandatory minimum penalty, they should also be understood as establishing at the very

same time the maximum authorized forfeiture penalty. Taken to its logical conclusion, on this view, no amount of forfeiture is authorized until a sentencing court makes a factual finding as to the amount of proceeds of a crime. *Fruchter*, however, did not adopt the view that a trial court's factual findings are tantamount to the creation of a mandatory minimum/statutory maximum forfeiture penalty. Had it done so, the Court would have identified an *Apprendi*-type error. Instead, *Fruchter* correctly treated forfeiture as an open-ended punishment scheme without a statutory maximum (and thus implicitly without a mandatory minimum) that does not implicate the Sixth Amendment.[39]

In sum, the Supreme Court's recent Sixth Amendment jurisprudence—including *Southern Union* and *Alleyne*—does not require a jury determina-

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[39] Chiasson also contends that even if he had no right under the Sixth Amendment to a jury determination regarding forfeiture, the Fifth Amendment independently required the Government to prove the forfeiture amount beyond a reasonable doubt. (Chiasson Br. 78-79). He is mistaken. The Sixth Amendment's guarantee of the right to a jury trial, together with the Fifth Amendment's Due Process Clause, "require[] that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne*, 133 S. Ct. 2156. Because Chiasson did not have a right to a jury determination as to forfeiture, the Government was not required to prove the forfeiture amount beyond a reasonable doubt.

tion, beyond a reasonable doubt, as to forfeiture. In any event, *Libretti* remains controlling precedent. Accordingly, the District Court did not err in determining the forfeiture amount by a preponderance of the evidence.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: New York, New York
November 14, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief does not comply with the type-volume limitation of Rule 32(a)(7)(B), but is being submitted pursuant to this Court's Order dated November 14, 2013, permitting the Government to file a brief on appeal of up to 34,000 words. As measured by the word processing system used to prepare this brief, there are 31,342 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: BRENT S. WIBLE,
Assistant United States Attorney

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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]

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[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

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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

May 29,2012

Judge Carol Fox Foelak
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. St. N.E.
Washington, DC 20549

Re: File NO. 3-14190

The attached papers are copies of the Second Circuit Court decision dated April 30, 2012 (Ex. 1). A true copy was instantly sent to Cynthia Matthews of the SEC who has not filed for a dismissal. **I ask Your Honor to dismiss this administrative proceeding.**

As you will note, of the 4 criminal charges, 2 counts were reversed and 2 were vacated. The SEC instituted this proceeding because "Litwok was convicted of mail fraud and tax evasion arising from misconduct while associated with an investment advisor." This last statement is no longer accurate.

For the record, I declared myself to be not guilty at the beginning of the SEC investigation in 1998. Prior to the filing of the SEC claim, my attorney and I provided documents to SEC staff to make them aware of the "true" facts in this case. In spite of evidence verifying my version of the facts, the SEC filed a knowingly false claim on December 27, 2000. No less than 30 SEC staff were involved with this case over the last 12 years at a cost of roughly $10 million dollars.

It is my contention each of SEC staff had thorough knowledge of the documents and had either met or reviewed forensic accounting provided to them. Both sets of documents directly contradicted SEC witnesses, Dalia Eilat and Peter Testaverde, deposition testimony. The SEC knew prior to filing their claim, their evidence was false.

Throughout the 12 years, I repeatedly attempted to get the SEC to withdraw their complaint on the basis of perjured testimony by Dalia Eilat and Peter Testaverde. I pointed out the perjured testimony to Cynthia Matthews during the course of his depositions. And I told SEC staff Cynthia Matthews, David Markowitz and David Rosenberg they were suborning the perjury of Dalia Eilat and Peter Testaverde.

Being self -regulating and accountable to no one, the SEC continued this malicious case and continued to make false accusation about me in court papers for 12 years. Had they been accountable to anyone, they would have been obligated to follow the evidence which was the "money." By following the money it would have lead to an indictment and claims against both Eilat and Testaverde.

I sent in several formal complaints against SEC staff to their Office of the Inspector General and received no response.

The primary SEC allegation of "embezzlement" was a lie; the dollar amount was a lie; that Evelyn Litwok gave Dalia Eilat 1.3 million dollars was a SEC lie and putting in writing that Evelyn Litwok and Dalia Eilat were lovers was a lie. Creating a scenario of lesbian lovers was "discrimination" in 2000. Public sentiment on the Lesbian issue was far more negative 12 years ago. This "made up Lesbian lover relationship" showed only the length SEC staff would go to win at all costs.

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THE PERRONI LAW FIRM

A PROFESSIONAL ASSOCIATION

STEWART BUILDING

801 WEST THIRD STREET

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OF COUNSEL
PATRICK R. JAMES, P.A.

TELEPHONE
501/372-6555
FAX
501/372-6333

July 17, 1995

Jonathan G. Katz
United States Securities
and Exchange Commission
Washington, D.C. 20549

RE: In The Matter of Jimmy Dale Swink, Jr.

Dear Jonathan:

Please find enclosed for filing the original and seven (7) copies of an Application to Vacate Order Making Findings and Imposing Remedial Sanctions regarding the above matter.

Very truly yours,

Patrick R. James

PRJ/vs

cc: Certificate of Service

1katz.795

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 33399 / December 29, 1993

Administrative Proceeding
File No. 3-8129

IN THE MATTER OF
JIMMY DALE SWINK JR.

APPLICATION TO VACATE ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS

Comes the Respondent, Jim D. Swink, Jr., by and through his attorneys, The Perroni Law Firm, P.A., and for his Application states:

1. On December 29, 1993, the Commission entered an order against Respondent Jim D. Swink, Jr., barring him from association (the "Bar Order") based solely upon a conviction. A copy of the Bar Order is attached as Exhibit "A" and incorporated by reference.

2. The Bar Order specifically provided that the bar would be vacated upon Swink, Jr.'s application if the conviction was reversed or vacated on appeal.

3. On April 15, 1994, the Eighth Circuit Court of Appeals vacated the conviction of Jim Swink, Jr. Attached hereto as Exhibit "B" and incorporated by reference is the decision of the Eighth Circuit.

4. The prior conviction was for counts 1 and 16 of the

indictment. The Eighth Circuit dismissed count 16 with prejudice and remanded the district court for a new trial on Count 1.

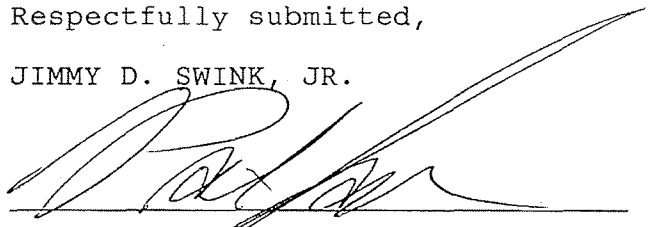
5. Thereafter, the United States District Court for the Eastern District of Arkansas, on July 15, 1994, Western Division, entered an Order dismissing Count 1. A copy of the Order is attached hereto as Exhibit "C" and incorporated by reference.

Therefore, pursuant to the terms of Bar Order, Swink moves this Commission to vacate the Bar Order in light of the reversal of his conviction, and dismissal of the remaining Count.

WHEREFORE, Jim D. Swink, Jr. prays that his Application to Vacate Order Making Findings and Imposing Remedial Sanctions and for all other just and proper relief.

Respectfully submitted,

JIMMY D. SWINK, JR.

By: 

PATRICK R. JAMES, Bar No. 82084
The Perroni Law Firm, P.A.
801 West Third Street
Little Rock, Arkansas 72201
Tel. (501) 372-6555
Fax. (501) 372-6333

CERTIFICATE OF SERVICE

I, Patrick R. James, hereby certify that a true and correct copy of the above and foregoing has been served on the Plaintiff by mailing a copy of same by first class United States mail, postage prepaid, to:

Phillip W. Offill, Jr.
United States Securities and Exchange Commission
Fort Worth District Office
19th Floor
801 Cherry Street
Fort Worth, Texas 76102

Jeffrey Hiller, Esq.
Securities and Exchange Commission
Divison of Enforcement, Stop: 4-8
450 5th Street, N.W.
Washington, D.C. 20549

Honorable Warren E. Blair
Chief Administrative Law Judge
Securities and Exchange Commission
450 5th Street, N.W., Stop: 7-7
Washington, D.C. 20549

T. Christopher Browne
District Administrator
Securities and Exchange Commission
Forth Worth District Office
801 Cherry, Ste. 1900
Fort Worth, TX 76102

Patrick R. James, P.A.

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Linus N. Nwaigwe
82 Lotus Oval south
Valley Stream, NY 11581
(516)-851-7013
nwaigwe1@verizon.net

May 7, 2013

By US PRIORITY MAIL

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F. Street, N. E.
Washington, D. C. 20549

Re: In the Matter of Linus N. Nwaigwe
Administrative Proceeding File No. 3-13481

Dear Ms. Murphy:

Enclosed is the original and three copies of a motion of Linus N. Nwaigwe to vacate the Commission's order of debarment dated September 20, 2010.

Very truly yours,

Linus N. Nwaigwe

Cc:
Jack Kaufman, Esq.
Senior Trial Counsel
Securities and Exchange Commission
3 World Financial Center
New York, New York 10281

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-13481

In the Matter of

DECLARATION IN SUPPORT OF MOTION TO VACATE ORDER OF DEBARMENT

LINUS N. NWAIGWE

Respondent.

I, Linus Nwaigwe, appearing pro se, declares under penalty of perjury:

1. I am the Respondent in the above –referenced matter. I make this declaration in support of my motion to vacate the Commission's order, dated September 20, 2010, that I be debarred from association with any broker, dealer or investment advisor.

2. The Commission's order of debarment was based solely on a criminal conviction, which the United States Court of Appeals for the Second Circuit vacated on August 2, 2012. The Second Circuits opinion is already in your possession.

3. The procedural history of the matter is as follows: Upon a jury verdict in United States District Court for the Eastern District of New York finding me guilty of conspiracy to commit securities fraud, administrative proceedings against me were authorized on May 21, 2009, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisors Act of 1940.

4. On December 11, 2009, an administrative law judge issued an initial decision by summary disposition based on the conviction. Upon review, the Commission ordered me disbarred on September 20, 2010.

5. I no longer stand convicted, because on August 2, 2012, the Second Circuit vacated my conviction. Thus, the basis for my debarment no longer exists.

WHEREFORE, for these reasons, the order of debarment should be vacated.

Dated: May 7, 2013

Linus N. Nwaigwe
Pro Se Respondent
[redacted]

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-14390

In the Matter of

RICHARD GOBLE

Respondent

RESPONDENT'S ADDITIONAL BRIEFING ON THE QUESTION OF WHETHER THE COMMISSION SHOULD DISMISS THIS PROCEEDING

Respondent RICHARD L. GOBLE ("GOBLE"), Pro se, hereby submits his response in support of the Securities and Exchange Commission dismissing this proceeding with prejudice since the underlining injunctions and bar have all been vacated and that the Middle District of Florida District Court has been ordered by the United States Court of Appeals for the Eleventh Circuit to consider any proposed Bar.[1]

The Commission is not able to consider the applications for review of the initial decision and must dismiss the initial decision given the fact that the injunction and bars on which they were was based are vacated and no longer in effect. The facts that Administrative Judge

[1] The SEC's attorney's specifically failed to request any bar of Mr. Goble to the Middle District of Florida after the Court of Appeals Order vacated all Bars and required that any future proposed Bars be specifically heard in the District Court.