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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15580

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In the matter of:

ANTHONY CHIASSON,

Respondent.

ANTHONY CHIASSON'S MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

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Dated: December 13, 2013

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Respondent Anthony Chiasson submits the following response to the Securities and Exchange Commission ("SEC") Division of Enforcement's (the "Division") Motion for Summary Disposition.

PRELIMINARY STATEMENT

As the Court is aware from the parties' telephone conference on October 31, 2013, Anthony Chiasson, based solely on the preclusive effect of his conviction in a related criminal case, does not oppose the Division's motion for a collateral industry bar. Mr. Chiasson is appealing his conviction. He thus seeks to have this Court defer its decision on the Division's motion until the end of the 210-day determination period provided by the Order Instituting Proceedings in order to allow time for the Second Circuit to decide his appeal.[1] The Second Circuit has acknowledged that Mr. Chiasson's appellate issue is substantial, and indeed granted him bail pending appeal on that basis. A successful appeal would vacate the criminal conviction and invalidate the basis for the judgment in the civil case, thereby vitiating the factual predicates for any industry bar here. If that happens, the Division has agreed not to oppose Mr. Chiasson's request to lift any industry bar this Court may impose. Accordingly, by deferring its decision here, this Court may avoid additional litigation and thereby preserve the resources of the parties and the Court.

[1] To be clear, Mr. Chiasson is not seeking a stay of this proceeding; he is seeking to have the final determination deferred until after the appeal is decided. SEC Rule 360(a)(2) of the SEC's Rules of Practice and the Order Instituting Proceedings in this case provide the Court with 210 days to decide the present motion. Mr. Chiasson is simply requesting that the Court wait to decide the Division's motion until the end of the applicable determination period.

STATEMENT OF RELEVANT FACTS

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

As the Division sets forth in its Memorandum of Points and Law in Support of its Motion for Summary Disposition, Mr. Chiasson was indicted on January 12, 2012 for insider trading in the securities of Dell, Inc. and NVIDIA Corporation. Within days, the SEC filed its complaint against Mr. Chiasson based on the same alleged insider trading activity.[2]

Following Mr. Chiasson's criminal conviction on December 17, 2012, the SEC indicated its intent to move for summary judgment against Mr. Chiasson. The parties notified the civil court in a June 10, 2013 letter that they had reached a partial settlement in principal and would submit proposed judgments on consent for the court's approval. After good faith negotiations, however, the parties were unable to reach a final agreement. The SEC then moved via letter on September 16, 2013, for partial summary judgment solely on its request for a permanent injunction based on the preclusive effect of Mr. Chiasson's criminal conviction. *See* September 16, 2013 Letter from Daniel R. Marcus to The Honorable Harold Baer, Jr. ("SEC Letter"), attached as Exhibit A to the Declaration of Savannah Stevenson ("Stevenson Decl.").[3]

Importantly, the SEC Letter noted that Mr. Chiasson—solely because of the preclusive effect of his criminal conviction—did not oppose the SEC's motion for summary judgment. *See* Stevenson Decl., Ex. A, at 1-2 (noting that Mr. Chiasson "recognize[d] the collateral estoppel effect of [his conviction] and, *on this basis alone*, do[es] not oppose the motion.") (emphasis

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[2] Mr. Chiasson disputes the Division's characterization of his conduct and the evidence adduced at trial, but he acknowledges his criminal conviction and its preclusive effect in the related civil case and this proceeding.

[3] The SEC agreed to defer the issues of disgorgement and any civil penalty until after the appeal is decided. *Id.* at 1, n. 2. If Mr. Chiasson's appeal is successful, neither the parties nor the Court will need to address these issues.

added). The SEC, acknowledging the motion's limited basis, stated that if Mr. Chiasson prevails on appeal, "collateral estoppel would no longer apply [and Mr. Chiasson] could then move the Court to vacate the partial judgment." *Id.* at 2. The SEC also indicated that it "would not oppose such a motion."[4] *Id.*

On October 4, 2013, the civil court entered the consent judgment, permanently enjoining Mr. Chiasson from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *See SEC v. Adondakis*, No. 12-cv-409 (HB), Docket No. 92. Two weeks later, the Division filed an Order Instituting Proceedings against Mr. Chiasson predicated on the consent judgment. Now the Division seeks to have this Court impose a collateral industry bar.

II. Mr. Chiasson's Appeal

The Second Circuit recognized that Mr. Chiasson's appeal presents a substantial issue. Indeed, the Second Circuit granted Mr. Chiasson bail pending appeal for this very reason. Accordingly, some background on the appeal itself is warranted.

The appeal focuses on one primary question: whether a tippee in an insider trading case must *know* that the insider received a personal benefit for divulging confidential company information.[5] Mr. Chiasson's appeal stems from the trial court's refusal to instruct the jury that, to find him guilty of insider trading, it must find that he knew the relevant company insiders

[4] During the October 31, 2013 telephonic conference, the Court noted that it was unclear as to whether there were reasons other than the criminal conviction to impose a bar. There are not. The only predicate for the partial summary judgment award is the criminal conviction. Without it, there is no basis for summary judgment against Mr. Chiasson. If the criminal conviction and subsequent civil judgment are vacated, there will be no predicate to bar Mr. Chiasson from the industry.

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

breached their fiduciary duties by disclosing confidential information *in exchange for personal gain*. Instead, the trial court instructed the jury that it must find that Mr. Chiasson knew the insiders breached of a duty of *confidence*—without reference to any knowledge requirement concerning personal gain.[6]

On appeal, Mr. Chiasson argues that knowledge of an insider's self-dealing is the element that distinguishes lawful and unlawful conduct in insider trading cases. Mr. Chiasson's position is rooted in *SEC v. Dirks*, where the Supreme Court held that—absent some personal gain—there has been no breach of fiduciary duty for which the insider is liable. *SEC v. Dirks,* 463 U.S. 646, 662 (1983). *Dirks* further concludes that a tippee must know of the insider's breach in order to be derivatively liable. *Id.* at 660. This means that liability can only attach when a tippee knows that the insider received a personal benefit for providing information. Several district court decisions agree with Mr. Chiasson's position. *See United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012); *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 497-98 (S.D.N.Y. 2011); *State Teachers Ret. Bd. v. Fluor Corp.* 592 F. Supp. 592, 594 (S.D.N.Y. 1984).

Only three months before the *Chiasson* court refused to instruct the jury concerning knowledge of the tipper's gain, Judge Rakoff decided the same issue the other way. Judge Rakoff held that a tippee *must know* that the original tipper benefited from disclosing confidential information. *Whitman*, 904 F. Supp. 2d at 371 (S.D.N.Y. 2012). The tension between the *Whitman* and *Chiasson* cases means that a criminal insider trading defendant could be convicted in one courtroom in the Southern District of New York and acquitted in another. Citing the practical impact of these split decisions, Mr. Chiasson requested that the district court

[6] The trial court's instruction is also erroneous because criminal liability cannot be imposed based on a breach of a duty of confidence. The Supreme Court held in *Chiarella v. United States* that the tipper must breach a fiduciary duty in order to liable for insider trading. *Chiarella*, 445 U.S. 222, 232-33, 236 (1980).

grant him bail pending appeal. The court denied his request. Mr. Chiasson then sought bail pending appeal from the Second Circuit. The Circuit Court granted Mr. Chiasson's request, finding that the knowledge of personal benefit issue is substantial indeed. *United States v. Chiasson,* No. 13-1837, Docket Nos. 96, 97.

Mr. Chiasson filed his appellate brief on August 15, 2013. Three months later, the government filed its opposition. Once Mr. Chiasson files his reply brief on December 18, 2013, the appeal will be scheduled for oral argument and subsequently decided.

ARGUMENT

As noted above, Mr. Chiasson recognizes that the doctrine of collateral estoppel precludes him from contesting the charges in the SEC's case. For that reason alone, he did not oppose the SEC's motion for partial summary judgment in the civil case. And for the same reason here, Mr. Chiasson accepts the Division's recitation of the applicable legal standard and does not oppose its Motion for Summary Disposition.

However, because Mr. Chiasson's appeal is pending and a reversal would vitiate the predicate for the SEC's partial summary judgment in the civil case and any related sanction here, Mr. Chiasson respectfully urges this Court to wait until the end of the applicable determination period before deciding whether to impose any sanction. To that end, Rule 360(a)(2) and the Order Instituting Proceedings in this matter afford the Court 210 days to decide the Division's Motion for Summary Disposition. *See* Stevenson Decl., Ex. C; *see also* 17 C.F.R. § 360(a)(2) ("In the order instituting proceedings, the Commission will specify a time period . . . [of] either 120, 210 or 300 days from the date of service of the order."). If the Court defers its decision until the end of the 210-day period, the time may allow for the Second Circuit to decide Mr. Chiasson's appeal.

Allowing time for the Second Circuit to decide the appeal may ultimately preserve the time and resources of Mr. Chiasson, the Division, and this Court. If the Court imposes a bar and Mr. Chiasson wins his appeal, he will have to request that the Court lift any bar it imposes. This will require Mr. Chiasson and the Division to expend additional resources on this matter, and will require the Court to spend valuable time entertaining further motion practice in a matter where there is essentially no dispute.

In addition, the Court's deferral will not prejudice the Division or the public interest.[7] Were the Court to defer its decision, it would not impair the Division's ability to seek a bar or the Court's ability to impose one.[8] And the public interest is not jeopardized by deferring the imposition of sanctions because Mr. Chiasson is effectively barred already. He is not working in the securities industry now, nor is it realistic that he could attempt to reenter the industry in the near future.

Neither does Mr. Chiasson present any risk of recidivism. The Division mischaracterizes the facts by claiming that Mr. Chiasson has neither acknowledged his wrongdoing nor provided any assurances that he will refrain from future violations. Mr. Chiasson is appealing his conviction; however, he has acknowledged the reality of the jury verdict at every subsequent step in both the criminal and civil cases. Indeed, his consent to the permanent injunction in the civil case and the Division's present motion demonstrates his acceptance of the reality of his conviction, notwithstanding his belief that the trial court committed reversible error. Moreover, even the trial court found that Mr. Chiasson did not present a risk of recidivism. *See* Stevenson

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[7] *See* SEC Rule 360(a)(2) (the Commission will determine the applicable time period "with due regard for the public interest and the protection of investors").

[8] If his appeal is not decided within 210 days, Mr. Chiasson would willingly consent to an extension of the Court's time to render a decision until after the appeal is decided in order to avoid additional litigation.

Decl., Ex. D, *United States v. Newman, et al.*, 12-cr-121 (RJS), May 13, 2013 Sentencing Tr. at 16:11-16. Ultimately, this Court risks little by waiting to decide the Division's motion until after the end of the applicable 210-day determination period.

CONCLUSION

For the reasons above, Mr. Chiasson respectfully requests that the Court defer deciding the Division's Motion for Summary Disposition until the end of the 210-day determination period. If the Court enters a bar against Mr. Chiasson, he reserves his right to move the Court to lift the bar if his appeal is successful.

Dated: December 13, 2013

Respectfully submitted,

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